NORTH CAROLINA COURT OF APPEALS REPORTS

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

ROY STEPHEN POSTELL v. B&D CONSTRUCTION CO. AND NON-INSURED CARRIER AND JAMES L. MOSLEY

No. 9010IC977

(Filed 7 January 1992)

1. **Master and Servant § 71 (NCI3d)— workers' compensation— average weekly wage—method of computation**

Pursuant to the "catch-all" provision of N.C.G.S. § 97-2(5), the Industrial Commission properly computed the average weekly wage of plaintiff, a carpenter who worked sporadically, by taking his total earnings for the year in which the injury occurred, excluding plaintiff's dates of temporary total disability, dividing by the total days of available work, and multiplying by seven.

Am Jur 2d, Workmen's Compensation §§ 368, 369, 378.

2. **Master and Servant § 48 (NCI3d)— workers' compensation— owner of house not co-general contractor**

The Industrial Commission properly concluded that defendant owner was not a joint or co-general contractor on the work site when plaintiff sustained an injury compensable under the Workers' Compensation Act, since the evidence tended to show that defendant was not engaged in construction prior to the project in question and had no expertise in that

field; one of the principals in defendant construction company introduced defendant to the company's subcontractor; the subcontractor hired plaintiff and set the amount of his pay; plaintiff set his own hours, provided his own tools, and was guided in his work by the blueprints and occasionally some instruction from the subcontractor; and plaintiff testified that he assumed that the principal had the authority to discharge him.

Am Jur 2d, Workmen's Compensation §§ 128, 129.

3. **Master and Servant § 50 (NCI3d) — workers' compensation — plaintiff as employee or independent contractor**

In an action to recover under the Workers' Compensation Act the Industrial Commission properly found that defendant owner was not an employer of plaintiff where the evidence tended to show that for two years prior to the accident in question plaintiff had earned a living as an independent carpenter; the hours worked by plaintiff were not set by defendant owner but by the general contractor on the job site; plaintiff testified that he brought and used his own tools to the job site; and plaintiff testified that he intended to leave the work site in question when the framework was done to work with his father on another project.

Am Jur 2d, Workmen's Compensation §§ 168-170.

4. **Master and Servant § 48 (NCI3d); Corporations § 115 (NCI4th) — failure of corporation president to obtain workers' compensation insurance — corporate veil pierced — president personally liable**

The Industrial Commission did not err in determining that defendant Rhyne was personally liable for defendant corporation's failure to obtain workers' compensation insurance, since the Commission pierced the corporate veil upon finding that defendant or his wife knew or should have known of the requirements of the Workers' Compensation Act; defendant Rhyne as president of defendant corporation also used the corporate structure to avoid personal liability for his failure to procure workers' compensation coverage for employees of his corporation; the personal monies of defendant were commingled with the assets of the corporation; there was no payment of dividends; the corporation was insolvent due to its liability to plaintiff; the dominant shareholders siphoned funds;

other officers or directors were nonfunctioning; and the corporation was undercapitalized in light of the scope of its operations and compensation paid to its employee/shareholders.

Am Jur 2d, Corporations §§ 43-46, 51.

APPEAL by plaintiff, Roy Stephen Postell, and defendant, B&D Construction Co., from Opinion and Award of the North Carolina Industrial Commission entered 4 May 1990.

Lore & McClearen, by R. Edwin McClearen and F. Scott Templeton, for plaintiff-appellant and plaintiff-appellee, Roy Stephen Postell.

Shelley Blum for defendant-appellant, B&D Construction Company.

Casey & Bishop, by Jeffrey L. Bishop, for defendant-appellee, James L. Mosley.

WYNN, Judge.

Facts

Plaintiff, Roy Stephen Postell ("Postell") was injured on May 19, 1988, when a sixteen penny nail penetrated his eye as he worked on the framing of a house. At the time of the accident, Postell worked for B&D Construction Corporation ("B&D"), a company owned by Bob and Doris Rhyne. Bob Rhyne ("Rhyne") on behalf of B&D, had contracted with James Mosley ("Mosley") to build the Mosley house on the work site.

Postell filed a claim against B&D on July 1, 1988, and against Mosley for the same injuries on August 17, 1988. Neither defendant had acquired workers' compensation insurance. In May of 1989, Deputy Commissioner Edward Garner, Jr., after conducting a hearing on this matter, held Bob Rhyne "personally and jointly and severally liable to the plaintiff along with B&D Corporation and Mr. James Mosley" for the injuries sustained by Postell. (The Deputy Commissioner made certain findings and conclusions with respect to Doris Rhyne but did not conclude that she was liable to the plaintiff.) The Deputy Commissioner further computed the plaintiff's rate of compensation at $135.94 per week based upon a determination that his average weekly wage was $203.91. From this award, all parties appealed to the Full Industrial Commission ("Com-

mission"): the defendants, on the determination of liability; and the plaintiff, on the limited issue of average weekly wage computation.

On appeal, the Commission released Mosley from liability, but upheld the finding of liability on the part of Rhyne, individually, and B&D. The Commission also upheld the computation of Postell's average weekly wage. From the ruling of the Commission, the parties appealed to this Court.

I.

Postell's Appeal

A. Computation of the Average Weekly Wage

The role of this Court in reviewing an appeal from the Industrial Commission is limited to a determination of (1) whether the findings of fact are supported by competent evidence, and (2) whether the conclusions of law are supported by the findings. *Barham v. Food World*, 300 N.C. 329, 331, 266 S.E.2d 676, 678 (1980).

[1] Postell first assigns error to the Commission's adoption of the Deputy Commissioner's computation of his average weekly wage. He contends that the Commission erred in determining his average weekly wage in that it was calculated using an incorrect method thus resulting in a lower wage than he earned actually.

The North Carolina Supreme Court in *Dereberry v. Pitt County Fire Marshall*, 318 N.C. 192, 347 S.E.2d 814 (1986), set forth certain considerations that must be taken into account when determining average weekly wage. The Court held that average weekly wage should be based upon the measure of the injured employee's earning capacity. *Id.* The Court also noted that the average weekly wage must be determined by calculating "the amount which the injured employee would be earning were it not for the injury." *Id.* at 197, 347 S.E.2d at 817.

Moreover, in *Joyner v. Oil Co.*, 266 N.C. 519, 146 S.E.2d 447 (1966), the Supreme Court addressed the issue of wage computation for a seasonal employee. There, the Court held that the work in question did not provide work in each of the 52 weeks of the year; some weeks the job was non-existent. "Fairness to the employer requires that we take into consideration both peak and slack periods." *Id.* at 522, 146 S.E.2d at 450.

To determine Postell's compensation rate in this case, the Deputy Commissioner relied upon the statutory methods of calculating average weekly wage set out in N.C. Gen. Stat. § 97-2(5) (1985). Within this statute, there are four different methods to calculate average weekly wage:

> [E]arnings of an injured employee in the employment in which he was working at the time of the injury during the period of 52 weeks immediately preceding the date of the injury, . . . divided by 52; but if the injured employee lost more than 7 consecutive calendar days at one or more times during such periods, the earnings for the remainder of such 52 weeks shall be divided by the number of weeks after the time so lost has been deducted.
>
> Where the employment prior to the injury extended over a period of less than 52 weeks, the method of dividing the earnings during that period by the number of weeks and parts thereof during which the employee earned wages shall be followed; provided results fair and just to both parties will be thereby obtained.
>
> Where, by reason of a shortness of time during which the employee has been in the employment of his employer or the casual nature or terms of his employment, it is impractical to compute the average weekly wages as above defined, regard shall be had to the average weekly amount which during the 52 weeks previous to the injury was being earned by a person of the same grade and character employed in the same class of employment in the same locality or community.
>
> But where for exceptional reasons the foregoing would be unfair, either to the employer or employee, such other method of computing the average weekly wages may be resorted to as will most nearly approximate the amount which the injured employee would be earning were it not for the injury.

Id.

Relying upon these statutory considerations, the Deputy Commissioner made the following pertinent findings of fact and conclusions of law:

Findings of Fact

> The plaintiff earned a total of $1,409.50 during a four-week period for his hourly services. These payments were made

directly by defendant, James Mosley, on his personal checking account on April 29, 1988 for 50 hours at $8.00 per hour; on May 6, 1988 for 50 hours at $9.00 per hour; on May 13, 1988 for 32 hours at $9.00 per hour and on May 20, 1988 for 33.5 hours at $9.00 per hour.

The plaintiff was not continuously employed or continuously engaged as an independent contractor during the 52-week period preceding his eye injury.

Conclusions of Law

The employment period prior to the plaintiff's injury was a period of less than 52 weeks, and the fair and equitable manner of computing his earnings yields an average weekly wage of $203.91. G.S. § 97-2(5).

The plaintiff's compensation rate for all relevant periods under the North Carolina Workers' Compensation Act is $135.94. G.S. § 97-29.

The Commission fully adopted these findings and conclusions of law. On appeal, upon applying the statutory methods for calculating average weekly wage as well as the considerations of the above stated case law, we note initially that the first method of computation is not applicable to the computation of wages for Postell because he worked less than 52 weeks on the job site.

The second method was not used to calculate Postell's average weekly wage for two reasons: the job itself was temporary in nature and would end upon completion of the framing, and basing an average weekly wage on a four week time period would result in an inequity for his employer. The record indicates that Postell worked sporadically in the carpentry business; as such, calculations under this method would be mere speculation of what he would have earned had he not been injured.

Under the third statutory method, to calculate Postell's average weekly wage would require comparing Postell's work with an employee of the "same grade and character . . . in the same locality or community" as required by § 97-2(5). There is competent evidence to support the Deputy Commissioner's finding that this was impractical because Postell's employment did not afford the same type of work throughout the year. To find a similarly skilled carpenter doing framing work on a house similar to Mosley's, 52 weeks

before Postell's injury, would work an impracticability in calculating average weekly wage for purposes of the statute.

Finally, N.C. Gen. Stat. § 97-2(5) includes a "catch-all" provision, to be used when warranted by "exceptional circumstances." The Commission upheld the computation of Postell's average weekly wage under this provision stating that, "[t]he Deputy Commissioner's finding as to plaintiff's average weekly wage, based on plaintiff's actual earning record during 1986, 1987 and 1988, appears to best reflect plaintiff's actual earnings." The Commission also held this was a "fair and equitable manner" of computation. We agree with the Commission that these findings are supported by competent evidence.

The Commission further agreed with the Deputy Commissioner that the findings supported the conclusion of law that Postell's average weekly wage was $203.91. This figure encompassed plaintiff's earnings, which totalled $7545.00 for 1988, excluding Postell's dates of temporary total disability (May 19, 1988-September 3, 1988; 15 weeks). Dividing $7545.00 by 259 days of available work, the amount Postell earned daily was approximately $29.13. This amount multiplied by 7 days is equivalent to $203.91.

Furthermore, we agree that this computation, found by the Deputy Commissioner and adopted by the Commission, supports the conclusion of law that Postell's average weekly wage was indeed $203.91. Therefore, the plaintiff's assignment of error is overruled.

B. Co-contractor Status

[2] Plaintiff next assigns error to the Commission's reversal of the Deputy Commissioner's determination that Mosley was a joint or co-general contractor on the work site within the meaning of the Workers' Compensation Act. Again, the role of this Court is to determine whether the findings of fact are supported by competent evidence and whether the conclusions of law are supported by the findings. *See generally, Barham*, 300 N.C. at 331, 266 S.E.2d at 678.

The Deputy Commissioner made the following pertinent findings of fact and conclusions of law:

Findings of Fact

In 1986 both defendant Mosley and Rhyne worked in the same building for Celenese Corporation and they began to discuss

with one another the prospect of defendant Mosley building a house at some point.

The land at Balmoral Circle was purchased by defendant Mosley.

Defendant Mosley and Rhyne never entered into a written contract for the construction of the house.

Rhyne and defendant Mosley were in joint control of the residential project at Balmoral Circle.

Rhyne and defendant Mosley were co-contractors and co-employers in the Balmoral Circle project.

Conclusions of Law

The defendant, James Mosley, was a co-general contractor and co-employer of the plaintiff, Steve Postell.

The last two findings of fact listed above were modified by the Commission to eliminate Mosley's name from the findings. The Commission deleted also the conclusion of law listed above.

The plaintiff contends that Mosley was not merely an owner of the house being built, which would indicate that he was exempt from liability, but that his conduct rose to a level sufficient to characterize him as a general contractor. The Commission disagreed and found that Mosley was not a co-general contractor. As such, the Commission concluded that Mosley was not bound by the provisions within the Act because, "[a]n owner cannot be a contractor within the meaning of § 97-19. The liable party is one who shall sublet a contract." Plaintiff asserts that this finding was "illogical and contrary to the philosophy of the North Carolina Workers' Compensation Act." We find this argument to be without merit.

N.C. Gen. Stat. § 97-19 (1985 & Supp. 1990) sets forth the controlling provision on this issue. It provides in pertinent part that:

> Any principal contractor, intermediate contractor, or subcontractor who shall sublet any contract for the performance of any work without requiring from such subcontractor or obtaining from the Industrial Commission a certificate, issued by the Industrial Commission, stating that such subcontractor has complied with G.S. 97-93 hereof, shall be liable, irrespective of whether such subcontractor has regularly in service less than four employees in the same business within this State, to the same extent as such subcontractor would be if he were

> subject to the provisions of this Article for the payment of compensation and other benefits under this Article on account of the injury or death of any employee of such subcontractor, any principal or partner of such subcontractor or any employee of such subcontractor due to an accident arising out of and in the course of the performance of the work covered by such subcontract.

Further, in *Greene v. Spivey*, our Supreme Court held,

> The manifest purpose of this statute, enacted as an amendment to the original Workmen's Compensation Act, is to protect employees of irresponsible and uninsured subcontractors by imposing ultimate liability on principal contractors, intermediate contractors, or subcontractors, who presumably being financially responsible, have it within their power, in choosing subcontractors, to pass upon their financial responsibility and insist upon appropriate compensation protection for their workers.

236 N.C. 435, 443, 73 S.E.2d 488, 494 (1952).

In the case at bar, there was evidence that Mosley was not previously engaged in construction work and had no expertise in that field. Rhyne introduced Mosley to B&D's subcontractor, McMickle; Mosley approved of McMickle and asked Rhyne to have him start right away.

Subsequently, McMickle hired Postell, set the amount of his pay and they began work. Postell set his own hours, provided his own tools and was guided in his work by the blueprints of the house and occasionally, some instruction from McMickle. Postell testified that he assumed that Rhyne had the authority to discharge him. These findings of fact were supported by competent evidence. Furthermore, the Commission's conclusion of law that Mosley was not a co-general contractor supports these findings. Accordingly, this assignment of error is overruled.

C. Employment Relationship

[3] Plaintiff's final assignment of error is that the Commission erred by finding that Mosley was not an employer of Postell. We disagree. The Commission's findings of fact and conclusions of law set out in the preceding section are also pertinent to this issue.

In order for Postell to maintain an action against Mosley for workers' compensation, he must be "in fact and in law, an employee

of the party from whom compensation is claimed." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 383, 364 S.E.2d 433, 437 (1988). Our Supreme Court has illuminated several factors that are indicative of an employee/employer relationship. They include whether the person employed:

> (a) is engaged in an independent business; (b) is to have independent use of his special skill, knowledge or training in the execution of the work; (c) is doing a specified piece of work at a fixed price . . . or upon a quantitative basis; (d) is not subject to discharge because he adopts one method of doing work rather than another; (e) is not in the regular employ of the other contracting party; (f) is free to use such assistants as he may think proper; (g) has full control over such assistants; and (h) selects his own time.

Doud v. K&G Janitorial Service, 69 N.C. App. 205, 211-212, 316 S.E.2d 664, 669, *disc. review denied*, 312 N.C. 492, 322 S.E.2d 554 (1984) (quoting *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944)).

Moreover, in *Youngblood*, the Court concluded that, "[n]o particular one of these factors is decisive in itself. Each is but a sign which must be considered with all the other indicia and circumstances to determine the true status of the parties." *Id.* at 385, 364 S.E.2d at 438.

After a careful review of the record of this case, we uphold the Commission's finding that Mosley was not an employer of Postell, and in so finding we note that the evidence supported the following:

1. Postell, since 1986 has earned a living as an independent carpenter.

2. Postell testified that he had to use his skill and training in order to "get the product the way he [the customer] wants it."

3. The hours worked by Postell were not set by Mosley but the general contractor on the job site.

4. Postell testified that he brought and used his own tools to the job site.

5. Postell did not work full time for Mosley and testified that he intended to leave the site when the frame work was done to work with his father on another project.

We conclude that competent evidence existed for the finding by the Commission that Mosley was not the employer of Postell. Accordingly, we overrule plaintiff's final assignment of error.

II.

Defendant's Appeal

[4] The defendant, Rhyne, assigns error to the Commission's determination that he is personally liable for the omission of B&D to obtain workers' compensation insurance. In order to impose personal liability on Rhyne, owner of one-half of B&D, the Commission concluded that it was necessary to "pierce the corporate veil" of B&D.

In *Glenn v. Wagner*, 313 N.C. 450, 329 S.E.2d 326 (1985), the Supreme Court reiterated that North Carolina recognizes the "instrumentality rule" as the basis for disregarding the corporate entity or "piercing the corporate veil." That rule, in the context of this case, would hold that where one exercises actual control over a corporation operating the latter as a mere instrumentality or tool, then that controlling individual is liable for the torts of the corporation thus controlled. "In such instances, the separate identities . . . may be disregarded." *Id.* at 454, 329 S.E.2d at 330 (citations omitted).

To "pierce the corporate veil" the Commission utilized the three part test for determining whether a corporation was being used as an instrument set out in *Glenn* and later restated in *Harrelson v. Soles*, 94 N.C. App. 557, 380 S.E.2d 528 (1989). The Court in *Harrelson* stated that liability may be imposed on an individual controlling a corporation as an "instrumentality" when he had:

> (1) Control, . . . complete domination, . . . of policy and business practice in respect to the transaction attacked so that the corporate entity . . . had at the time no separate mind, will or existence of its own; and
>
> (2) Such control must have been used . . . to perpetrate the violation of a statutory or other positive legal duty . . . in contravention of the plaintiff's legal rights; and
>
> (3) The aforesaid control and breach of duty must proximately cause the injury or unjust loss complained of.

Id. at 561, 380 S.E.2d at 531.

The Commission adopted the following findings of fact found by the Deputy Commissioner to support the conclusion that the three prong test set forth in *Glenn* and *Harrelson* has been met:

Findings of Fact

> Rhyne or Mrs. Rhyne, either personally or in their corporate capacity, either knew or should have known of the requirements of Chapter 97 of the North Carolina Workers' Compensation Act.
>
> The personal monies of Bob Rhyne were co-mingled with the assets of B&D Corporation through loans at times and he would reimburse himself whenever the company would generate some level of profit.
>
> [I]n the current pending workers' compensation case, it is apparent that Rhyne as president of B&D Corporation also used the corporate structure to avoid personal liability for his failure to procure the required North Carolina Workers' Compensation coverage for employees of his corporation.

Moreover, the Commission considered the following factors determinative in concluding that it was necessary to pierce the corporate veil: nonpayment of dividends; insolvency of the debtor corporation (due to its liability to plaintiff); siphoning of funds by the dominant shareholders; nonfunctioning of other officers or directors; and, inadequate capitalization in light of the scope of its operations and compensation paid to its employee/shareholders.

Based upon this evidence, the Commission adopted the first conclusion of law found by the Deputy Commissioner and added the second conclusion of law, both of which are set forth below:

Conclusions of Law

> B&D Corporation is a sham and grossly or "thinly incorporated." B&D Corporation has been saddled with disproportionate heavy debts for the personal gain of its sole shareholder, Bob Rhyne and it is not entitled to the immunity conferred by the corporate laws of this state.
>
> That Robert F. (Bob) Rhyne, through his domination of defendant B&D Construction Company, Inc., caused said corporation to neglect and fail to perform its statutory duty to the plaintiff to obtain workers' compensation insurance covering the subject injury, and thereby caused plaintiff to unjustly suffer the

inability to swiftly recover compensation benefit due him under the Act; and therefore, said Robert F. (Bob) Rhyne is personally liable as the alter ego of said defendant corporation.

We find that there was competent evidence for the Commission's finding that Rhyne exercised complete control over B&D and that the corporation was a "sham." Moreover, the record further supports the conclusion that Rhyne had a statutory duty under the Workers' Compensation Act to procure insurance, he should have known of the statutory duty, and his failure to do so was the proximate cause of Postell's injuries.

The purpose of the Act is to provide workers with protection from those who have it within their power to "insist upon appropriate compensation." *See Greene*, 236 N.C. at 443, 73 S.E.2d at 494. Rhyne, not only did not insist on appropriate compensation, he provided no compensation at all and confessed ignorance of the law when asked about the requirements of the Act. We find that the Commission's findings of fact are supported by competent evidence and its conclusions of law are supported by the findings. For these reasons, the defendant's assignment of error is overruled.

For the foregoing reasons, we agree with the findings of the Full Industrial Commission computing the plaintiff's average weekly wage at $203.91 and with the finding that Mosley was neither a co-general contractor nor an employer. With regard to the defendant, we uphold the finding that Rhyne is liable personally and that such liability is joint and several with that of B&D. Therefore, the Commission's decision is,

Affirmed.

Judges ARNOLD and JOHNSON concur.

RITE COLOR CHEMICAL COMPANY, INC. v. THE VELVET TEXTILE COMPANY, INC.

No. 9118SC254

(Filed 7 January 1992)

1. **Appeal and Error § 209 (NCI4th)— specific issues designated in notice of appeal—other issue not considered on appeal**

That portion of defendant's appeal which questioned the trial court's orders denying defendant's motions to amend its answer is dismissed, since defendant's notice of appeal designated only the trial court's order on unconscionability of the parties' contract, directed verdict, and the subsequent judgment; the court could not infer from this specific notice the intent to appeal from the orders denying defendant's motions to amend; and because defendant did not technically fail to comply with procedural requirements in the filing of its notice, the Court could not conclude that defendant's notice accomplished the "functional equivalent" of a proper notice.

Am Jur 2d, Appeal and Error § 319.

2. **Uniform Commercial Code § 7 (NCI3d)— sale of goods—contract allegedly unconscionable—procedural and substantive unconscionability required—finding of unconscionability precluded when one absent**

A finding that the terms of a contract for the sale of goods are not unreasonably favorable to one of the parties precludes a determination that the contract is unconscionable, since, to find unconscionability, there must be an absence of meaningful choice on the part of one of the parties (procedural unconscionability) together with contract terms which are unreasonably favorable to the other (substantive unconscionability). N.C.G.S. § 25-2-302.

Am Jur 2d, Sales §§ 233-238.

"Unconscionability" as ground for refusing enforcement of contract for sale of goods or agreement thereto. 18 ALR3d 1305.

APPEAL by defendant from orders entered 17 September 1990 and 18 September 1990 in GUILFORD County Superior Court by

Judge Thomas W. Seay, Jr. Heard in the Court of Appeals 5 December 1991.

Wyatt Early Harris Wheeler & Hauser, by William E. Wheeler, for plaintiff-appellee.

Turner, Rollins, Rollins & Clark, by Walter E. Clark, Jr., for defendant-appellant.

GREENE, Judge.

Defendant appeals from orders entered 17 September 1990 and 18 September 1990 determining that the parties' contract was not unconscionable and allowing the plaintiff's directed verdict motion.

The plaintiff is a North Carolina corporation which operates a chemical and dye plant in High Point, North Carolina. The defendant is a textile company located in Blackstone, Virginia. The defendant weaves, dyes, and finishes velvet. From 12 January 1989 through 13 March 1989, the defendant ordered and received various chemicals and dyes. Although the defendant used a substantial portion of these goods after delivery, the defendant never paid for them. The sum of the twelve unpaid invoices is $35,449.97.

On 2 August 1989, the plaintiff filed a complaint seeking recovery of $35,449.97. The defendant filed an answer admitting that the plaintiff had delivered the goods to the defendant, but asserting various defenses to the contract and counterclaims against the plaintiff, including unconscionability and unfair and deceptive trade practices. The plaintiff filed a reply to the defendant's counterclaims. On 30 July 1990, the plaintiff moved for summary judgment and scheduled the hearing for the 20 August 1990 session of superior court, three weeks before the case was scheduled for trial. On 17 August 1990, the defendant filed a motion for leave to amend its answer and counterclaim. At the summary judgment hearing, the trial court granted partial summary judgment as to three defenses and two counterclaims. The defendant voluntarily withdrew its motion for leave to amend. On 30 August 1990, eleven days before the scheduled beginning of the trial, the defendant filed another motion for leave to amend its answer and counterclaim to raise defenses and counterclaims of bribery, concealment, interference with an employment relationship, and fraud. On 10 September 1990, the trial court denied the defendant's motion.

On 13 September 1990, the trial court conducted a hearing to determine whether the parties' contract was unconscionable under N.C.G.S. § 25-2-302 (1986). The only basis for unconscionability alleged in the defendant's answer was the plaintiff's alleged overpricing of the goods. Both parties introduced evidence on the issue. The defendant, however, also put on evidence relating to the matters raised by the defendant's previously denied motion to amend which allegedly supported a determination of unconscionability. After the parties introduced their evidence, the trial court found the following facts: That the twelve unpaid invoices constituted the parties' contract; that before November, 1986, the defendant had ordered the same or similar chemicals and dyes from A.B. Chemicals and Dyes and had paid prices substantially similar to those charged by the plaintiff from November, 1986 through March, 1989; that between November, 1986 and 11 January 1989, the defendant had ordered the same or similar types of chemicals and dyes from the plaintiff on numerous occasions, had paid for those goods upon delivery, and had used them; that during this period, the plaintiff's prices were not substantially different from the prices it charged during the 12 January 1989 through 13 March 1989 period; that throughout these time periods, numerous suppliers offered the same or similar goods as those offered by the plaintiff but at lower prices than those charged by the plaintiff; that the defendant knew about these suppliers and their lower prices, but the defendant knowingly chose to purchase the chemicals and dyes offered by the plaintiff; that the plaintiff's prices were not unreasonably favorable to it; that the terms of the contract were not unreasonably favorable to it; and that the plaintiff's goods were not grossly and unreasonably overpriced. On these facts, the trial court determined that the contract was not unconscionable.

After the trial court had decided the issue of unconscionability, the only remaining issue to be tried was the defendant's counterclaim for unfair and deceptive trade practices. The only basis in the defendant's answer for this counterclaim was that the contract was unconscionable. The defendant again moved to amend its answer to allege additional facts to support its claim for unfair and deceptive trade practices. The trial court denied the motion, the plaintiff moved for a directed verdict, and the trial court entered directed verdict for the plaintiff on its claim for the contract price of the goods and on the defendant's counterclaim for unfair and deceptive trade practices. The defendant appealed.

[1] We note at the outset that although the defendant gave notice of appeal only as to the trial court's orders on the issues of unconscionability and unfair and deceptive trade practices, the defendant attempts to argue on this appeal that the trial court erred in denying its motions to amend, which denials were specifically reduced to written orders. Our appellate rules require that an entitled party may appeal from a judgment or order of a trial court "by filing notice of appeal with the clerk of superior court" and by serving copies of the notice upon all other parties in timely fashion. N.C.R. App. P. 3(a). Furthermore, our appellate rules require such party to "designate the judgment or order from which appeal is taken" in the notice of appeal. N.C.R. App. P. 3(d). This Court may not waive these jurisdictional requirements, and if a party does not comply with them, this Court must dismiss the appeal. *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 394 S.E.2d 683, *disc. rev. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990) (defendants gave notice of appeal in open court but did not file notice with clerk or serve copies upon all other parties). Despite these mandatory rules,

> we may liberally construe a notice of appeal in one of two ways to determine whether it provides jurisdiction over an apparently unspecified portion of a judgment. First, 'a mistake in designating the judgment, or in designating the part appealed from if only a part is designated, should not result in loss of the appeal as long as the intent to appeal from a specific judgment can be *fairly inferred* from the notice and the appellee is not misled by the mistake.' . . . Second, if a party technically fails to comply with procedural requirements in filing papers with the court, the court may determine that the party complied with the rule if the party accomplishes the '*functional equivalent*' of the requirement.

Von Ramm v. Von Ramm, 99 N.C. App. 153, 156, 392 S.E.2d 422, 424 (1990) (citations omitted) (emphases in text).

The defendant's notice of appeal, even when liberally construed, does not give this Court jurisdiction to review the trial court's orders denying the defendant's motions to amend. On its face, the defendant's notice of appeal designates only the order on unconscionability, the directed verdict, and the subsequent judgment. We may not "fairly infer" from this specific notice the intent to appeal from the orders denying the defendant's motions to amend.

Cf. Smith v. Independent Life Ins. Co., 43 N.C. App. 269, 274, 258 S.E.2d 864, 867 (1979) (where plaintiff specified order in notice of appeal, order granted both defendants' motions for dismissal for failure to state claim and summary judgment, and notice referred only to summary judgment, this Court could fairly infer intent to appeal from both portions of order). Furthermore, because the defendant did not technically fail to comply with procedural requirements in the filing of its notice, we may not conclude that the defendant's notice accomplishes the "functional equivalent" of a proper notice. *Cf. Torres v. Oakland Scavenger Co.*, 487 U.S. 312, 317, 101 L.Ed.2d 285, 291-92 (1988) (failure to designate appellant's name rendered notice improper). Accordingly, we dismiss that portion of the defendant's appeal which questions the trial court's orders denying the defendant's motions to amend its answer.

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[2] The issue is whether a finding that the terms of a contract are not unreasonably favorable to one of the parties precludes a determination that the contract is unconscionable.

As a general rule, our courts will not enforce unconscionable contracts. *Brenner v. Little Red School House, Ltd.*, 302 N.C. 207, 213, 274 S.E.2d 206, 210-11 (1981) (contract for non-refundable tuition payments not unconscionable); *Alpiser v. Eagle Pontiac-GMC-Isuzu*, 97 N.C. App. 610, 615, 389 S.E.2d 293, 296 (1990) (automobile lease not unconscionable); *Howell v. Landry*, 96 N.C. App. 516, 525, 386 S.E.2d 610, 615 (1989), *disc. rev. denied*, 326 N.C. 482, 392 S.E.2d 90 (1990) (courts will not enforce unconscionable premarital or postmarital agreements); Restatement (Second) of Contracts § 208 (1979). The General Assembly has codified this common law rule in the context of contracts for the sale of goods. Accordingly, if a trial court determines as a matter of law that a contract to sell goods or any clause of such contract was "unconscionable" at the time it was made, the trial court "may refuse to enforce the contract, or it may enforce the remainder of the contract without the unconscionable clause, or it may so limit the application of any unconscionable clause as to avoid any unconscionable result." N.C.G.S. § 25-2-302(1) (1986). As the official comment to this statute makes clear, the purpose behind N.C.G.S. § 25-2-302 is "to permit the courts to do openly what they have been doing for many years in a semi-covert way." 2 W. Hawkland, Uniform Commercial Code

Series § 2-302:01 (1984); *see also* 1 E. Farnsworth, Farnsworth on Contracts § 4.28 (1990). The comment provides the following:

> This section is intended to make it possible for the courts to police explicitly against the contracts or clauses which they find to be unconscionable. In the past such policing has been accomplished by adverse construction of language, by manipulation of the rules of offer and acceptance or by determinations that the clause is contrary to public policy or to the dominant purpose of the contract. This section is intended to allow the court to pass directly on the unconscionability of the contract or particular clause therein and to make a conclusion of law as to its unconscionability.

N.C.G.S. § 25-2-302 official cmt. 1 (Supp. 1991).

The term "unconscionability" is not defined by the statute, and the leading commentators agree that the term cannot be defined with precision. 2 R. Anderson, Anderson on the Uniform Commercial Code § 2-302:25 (3d ed. 1982); 1 E. Farnsworth, *supra*, § 4.28; 2 W. Hawkland, *supra*, § 2-302:02; J. White & R. Summers, Uniform Commercial Code § 4-3 (3d ed. 1988). Nevertheless, the official comment provides some guidance as to the term's meaning despite the comment's somewhat ambiguous language. It explains the term as follows:

> The basic test [of unconscionability] is whether, in the light of the general commercial background and the commercial needs of the particular trade or case, the clauses involved are so one-sided as to be unconscionable under the circumstances existing at the time of the making of the contract. . . . The principle is one of the prevention of oppression and unfair surprise . . . and not of disturbance of allocation of risks because of superior bargaining power.

N.C.G.S. § 25-2-302 official cmt. 1 (citation omitted). From this basic test and the cases involving this provision of the Uniform Commercial Code, commentators "have asserted that unconscionability involves procedural and substantive elements, and that these are useful classifications for analyzing the connotations of that term." 2 W. Hawkland, *supra*, § 2-302:02 (citing Ellinghaus, *In Defense of Unconscionability*, 78 Yale L.J. 756, 757 (1969) and Leff, *Unconscionability and the Code—The Emperor's New Clause*, 115

U. Pa. L. Rev. 485, 488 (1967)); *see also* 1 E. Farnsworth, *supra*, § 4.28; J. White & R. Summers, *supra*, § 4-3.

Procedural unconscionability involves "bargaining naughtiness" in the formation of the contract, J. White & R. Summers, *supra*, § 4-3, and is equated with the words "unfair surprise" from the official comment and with the phrase "lack of meaningful choice." 2 W. Hawkland, *supra*, § 2-302:03. The term encompasses "not only the employment of sharp practices and the use of fine print and convoluted language, but a lack of understanding and an inequality of bargaining power." 1 E. Farnsworth, *supra*, § 4.28. Substantive unconscionability, on the other hand, involves the harsh, oppressive, and "one-sided terms of a contract from which a party seeks relief . . . ." J. White & R. Summers, *supra*, § 4-3; 2 W. Hawkland, *supra*, § 2-302:02. Such terms are generally characterized as being "unreasonably favorable" to the other party to the contract. J. White & R. Summers, *supra*, § 4-3. An example of a potentially harsh, oppressive, and one-sided term is an excessive contract price. 2 R. Anderson, *supra*, § 2-302:73; 1 E. Farnsworth, *supra*, § 4.28; 2 W. Hawkland, *supra*, § 2-302:04; J. White & R. Summers, *supra*, § 4-5. Although there is some confusion among the commentators as to whether a court may determine a contract to be unconscionable on the basis of only one of the two elements described above, this Court has previously held that "[t]o find unconscionability there must be an absence of meaningful choice on part of one of the parties [procedural unconscionability] *together with* contract terms which are unreasonably favorable to the other [substantive unconscionability]." *Martin v. Sheffer*, 102 N.C. App. 802, 805, 403 S.E.2d 555, 557 (1991) (emphases added); *see* 2 R. Anderson, *supra*, § 2-302:73 (need excessive price and lack of meaningful choice); 1 E. Farnsworth, *supra*, § 4.28 (although most cases involve combination of varying degrees of both elements, unclear whether substantive unconscionability alone is sufficient); 2 W. Hawkland, *supra*, § 2-302:05 (need both elements for a determination, for example, excessive price and lack of meaningful choice); J. White & R. Summers, *supra*, § 4-7 (although most courts seem to take a "balancing approach" by requiring a "certain quantum" of both elements, excessive price alone should be sufficient basis for a determination).

Unconscionability is an affirmative defense, and the party asserting it bears the burden of establishing it. 2 R. Anderson, *supra*, § 2-302:12; J. White & R. Summers, *supra*, § 4-1. Likewise, because

it is an affirmative defense, courts are unwilling "to entertain damage suits based on unconscionability, just as a court of equity would have done before the Code." 1 E. Farnsworth, *supra*, § 4.28; J. White & R. Summers, *supra*, § 4-8. Furthermore, issues of unconscionability arising under N.C.G.S. § 25-2-302(1) are questions of law to be resolved by our trial courts. N.C.G.S. § 25-2-302 official cmt. 3 (Supp. 1991); *Billings v. Joseph Harris Co.*, 27 N.C. App. 689, 695, 220 S.E.2d 361, 366 (1975), *aff'd*, 290 N.C. 502, 226 S.E.2d 321 (1976); 2 R. Anderson, *supra*, § 2-302:13. The parties "shall be afforded a reasonable opportunity to present evidence as to . . . [the contract's] commercial setting, purpose and effect to aid the [trial] court in making the determination." N.C.G.S. § 25-2-302(2) (1986). Accordingly, when the trial court is faced with this issue, the trial court, not the jury, sits as the trier of fact and "is required to (1) find the facts on *all issues joined in the pleadings*; (2) declare the conclusions of law arising on the facts found; and (3) enter judgment accordingly." *Gilbert Eng'g Co. v. City of Asheville*, 74 N.C. App. 350, 364, 328 S.E.2d 849, 857, *disc. rev. denied*, 314 N.C. 329, 333 S.E.2d 485 (1985) (emphases added); *see also* N.C.G.S. § 25-2-302 official cmt. 3; 2 R. Anderson, *supra*, § 2-302:13. The trial court need not "recite in its order all evidentiary facts presented at hearing. The facts required to be found specially are those material and ultimate facts from which it can be determined whether the findings are supported by the evidence and whether they support the conclusions of law reached." *Quick v. Quick*, 305 N.C. 446, 451, 290 S.E.2d 653, 657 (1982).

The only basis raised by the defendant's original answer for a determination of unconscionability was that the plaintiff had grossly overpriced the chemicals and dyes sold to the defendant. At the hearing on unconscionability, the parties introduced evidence, not only on the overpricing issue, but also on the issues of bribery, conspiracy, interference, and fraud. "When issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C.G.S. § 1A-1, Rule 15(b) (1990); *Mangum v. Surles*, 281 N.C. 91, 98, 187 S.E.2d 697, 701-02 (1972). When there is no objection to evidence offered at trial on the specific ground that the evidence is outside the original pleadings, the parties are deemed to have impliedly consented to an amendment of the pleadings. *Roberts v. Memorial Park*, 281 N.C. 48, 58, 187 S.E.2d 721, 726-27 (1972). That a formal amendment to the pleadings

is not made is of no consequence, for the amendment is presumed to have been made. *Mangum*, 281 N.C. at 98, 187 S.E.2d at 702. Because the parties tried the issues of bribery, conspiracy, interference, and fraud at the hearing on unconscionability without objection, the law deemed the defendant's answer as having been properly amended to include these allegations as grounds for a determination of unconscionability.

After hearing the evidence submitted by both parties, the trial court found that the prices charged by the plaintiff "were not grossly and unreasonably overpriced," and that the terms of the parties' contract were not unreasonably favorable to the plaintiff. The trial court, however, did not make findings relating to bribery, conspiracy, interference, or fraud. The defendant argues that because these additional facts were raised by the defendant's amended answer on the issue of unconscionability, and because a trial court is required to make findings on all issues raised by the pleadings, the trial court's failure to do so requires reversal. *Gilbert*, 74 N.C. App. at 364, 328 S.E.2d at 857; *see also Coble v. Coble*, 300 N.C. 708, 714, 268 S.E.2d 185, 190 (1980) (appellate review frustrated when gap exists in required progression of trial court decision-making process). Assuming *arguendo* that the trial court was required to make these findings of fact, the alleged error did not prejudice the defendant. Because the defendant does not challenge the trial court's findings of fact as being unsupported by the evidence, its findings are conclusive on this appeal. *See Sharpe v. Park Newspapers of Lumberton, Inc.*, 317 N.C. 579, 582-83, 347 S.E.2d 25, 28 (1986) (where plaintiffs did not assign error to trial court's findings, they were conclusive). The trial court found that the contract prices were not grossly and unreasonably overpriced and that the terms of the contract were not unreasonably favorable to the plaintiff. In light of these findings establishing an absence of the substantive unconscionability element, a determination of unconscionability could not be made. *Martin*, 102 N.C. App. at 805, 403 S.E.2d at 557.

As the defendant conceded at the hearings prior to the trial court's entry of directed verdict, the alleged unconscionability of the contract was the sole basis for the defendant's counterclaim for unfair and deceptive trade practices. We assume without deciding that an unconscionable contract *may* provide the basis for an unfair and deceptive trade practice claim under N.C.G.S. § 75-1.1 (1988). *See Marshall v. Miller*, 302 N.C. 539, 548, 276 S.E.2d 397, 403

(1981) (practice unfair when it offends established public policy); *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346 (1975) (proof of fraud constitutes violation of N.C.G.S. § 75-1.1); *United Virginia Bank v. Air-Lift Assocs.*, 79 N.C. App. 315, 319, 339 S.E.2d 90, 93 (1986) (provisions of Chapter 25 do not preclude Chapter 75 claims). Accordingly, because the implied amendment discussed above only amended the defendant's answer with regard to the issue of unconscionability, and because the trial court found that the parties' contract was not unconscionable, the plaintiff was entitled to a directed verdict on its claim and on the defendant's counterclaim. *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990). The defendant's appeal of the trial court's orders denying its motions to amend is dismissed, and the trial court's orders are affirmed.

Dismissed in part and affirmed.

Judges PARKER and WYNN concur.

MICHAEL WAYNE ADAMS v. JOSEPH SCOTT LOVETTE

No. 9112SC187

(Filed 7 January 1992)

1. **Evidence and Witnesses § 2658 (NCI4th)— medical records—objection on grounds of relevance—privilege waived**

When plaintiff requested defendant's medical records, defendant impliedly waived his alleged privilege because he objected to the request, not on the ground of privilege, but on the ground of relevance. N.C.G.S. § 8-53.

Am Jur 2d, Trial § 426.

2. **Automobiles and Other Vehicles § 697 (NCI4th)— identity of driver—defendant's medical records excluded—no error**

In an action to recover for injuries sustained by plaintiff in an automobile accident, plaintiff was not entitled to a new trial based on the trial court's alleged abuse of discretion in finding that defendant's medical records contained no relevant information on who was driving for purposes of discovery,

since in light of the uncontroverted facts that neither party could remember who had been driving at the time of the accident, the plaintiff was found outside the driver's door, the defendant was found in the passenger's seat, the passenger's seat was separated from the driver's seat by a console, and the passenger's door was "jammed shut," plaintiff did not show that a different result would have likely occurred had the trial court not committed the alleged error. N.C.G.S. § 1A-1, Rule 26(b).

Am Jur 2d, Automobiles and Highway Traffic § 996.

Proof, in absence of direct testimony by survivors or eyewitnesses, of who, among occupants of motor vehicle, was driving it at time of accident. 32 ALR2d 988.

Judge WYNN dissenting.

APPEAL by plaintiff from order entered 23 February 1990 by *Judge E. Lynn Johnson* and order entered 2 November 1990 by *Judge Gregory A. Weeks* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 14 November 1991.

Rand, Finch & Gregory, P.A., by Thomas Henry Finch, Jr., for plaintiff-appellant.

Singleton, Murray, Craven & Inman, by Rudolph G. Singleton, Jr., for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from orders entered 23 February 1990 and 2 November 1990 denying his motion to compel the production of the defendant's medical records and denying his motion for a new trial.

In the early morning hours of 13 September 1986, as either the plaintiff or the defendant was driving the defendant's car southward on Graham Road in Cumberland County, North Carolina, the car crossed the center line, struck a driveway embankment, and came to a rest in a yard on the east side of the road. At approximately 1:30 a.m., someone discovered the defendant's wrecked car sitting upright in the yard. The driver's door was open, and the plaintiff was rolling slowly on the driveway about fifteen to twenty feet away from the open driver's door. The defendant was

found unconscious and sitting in the passenger's seat. An odor of alcohol was present in the car. A console separated the driver's and passenger's seats. The impact of the wreck damaged the right side of the defendant's car and "jammed shut" the passenger's door. It had to be opened with a five foot long pry bar. Both the plaintiff and the defendant were hospitalized with closed head injuries. Neither person could recall the events leading up to the accident, the accident itself, or which of them had been driving the car at the time of the accident. No one witnessed the accident.

On 6 September 1989, the plaintiff filed a complaint against the defendant alleging that the defendant's negligent driving on 13 September 1986 proximately caused the plaintiff's injuries. On 28 November 1989, the defendant filed an answer denying that he had been driving and alleging as an affirmative defense that if he had been driving, given that the plaintiff knew the defendant was intoxicated, the plaintiff was contributorially negligent for riding in the car with the defendant. On 5 December 1989, the plaintiff served on the defendant a request for production of all the defendant's medical records relating to the defendant's injuries. The defendant objected to the request on the grounds of relevance, prejudice, and burden, and the plaintiff filed a motion to compel the production of the medical records. The trial court ordered the defendant to provide it with the defendant's sealed medical records for an *in camera* review of them by the trial court. After the trial court reviewed the records, it denied the plaintiff's motion to compel finding "that there is nothing in said medical records providing relevant information as requested by Plaintiff . . . ." Following the correct procedure for *in camera* review of requested discovery materials when the request is denied, the trial court ordered the defendant's sealed medical records to "be retained in the file for the purpose of appellate review in the event of subsequent appeal." *See State v. Hardy*, 293 N.C. 105, 128, 235 S.E.2d 828, 842 (1977); *Mack v. Moore*, 91 N.C. App. 478, 483, 372 S.E.2d 314, 318 (1988), *disc. rev. denied*, 323 N.C. 704, 377 S.E.2d 225 (1989).

The case came on for trial at the 15 October 1990 civil session of the Cumberland County Superior Court. Before evidence was taken, the plaintiff made various motions in limine in which he requested, among other things, that the trial court prohibit the defendant from offering any evidence relating to the defendant's injuries, hospitalization, or consumption of alcohol before the acci-

dent. In response to this motion, the defendant offered his medical records subject to the deletion of a phrase in them which the defendant characterized as an "assumption" by a physician's assistant. The trial court granted the plaintiff's motion stating that it was bound by the previous discovery ruling on the medical records.

Both parties introduced evidence, and the trial court submitted the issues to the jury. On 26 October 1990, the jury returned a verdict finding that the plaintiff was not injured by the defendant's alleged negligence. The trial court entered a judgment accordingly, and the plaintiff made motions for judgment notwithstanding the verdict, for access to the defendant's medical records, and for a new trial. The trial court denied the plaintiff's motions, and the plaintiff appealed. The plaintiff then made a motion requesting that he be allowed to review the defendant's medical records for his appeal. The trial court denied this motion.

The issue is whether the trial court's alleged abuse of discretion in finding that the defendant's medical records contained no relevant information for purposes of discovery prejudiced the plaintiff requiring a new trial.

The plaintiff argues that because the trial court erred in finding that the defendant's medical records do not contain any relevant information for discovery purposes, he is entitled to a new trial.

North Carolina Gen. Stat. § 1A-1, Rule 34(a) (1990) provides in pertinent part that:

> [a]ny party may serve on any other party a request (i) to produce and permit the party making the request . . . to inspect and copy, any designated documents . . . or to inspect and copy, test, or sample any tangible things which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served . . . .

This rule "is not, strictly speaking, a discovery procedure. Its purpose is not to discover the existence of documents or other tangible things but to require the production of those known to exist and which can be designated." W. Shuford, North Carolina Civil Practice and Procedure § 34-3 (3d ed. 1988). The rule serves to eliminate "strategic surprise," to permit "the issues to be simplified," and

to expedite the trial. 8 C. Wright & A. Miller, Federal Practice and Procedure § 2202 (1970).

"Rule 34 requires that as a prerequisite of production, documents must be (1) 'designated,' (2) 'within the scope' of Rule 26(b), and (3) in the 'possession, custody, or control' of a party from whom they are sought. The party seeking production must show that these prerequisites are satisfied." *Willis v. Duke Power Co.*, 291 N.C. 19, 31, 229 S.E.2d 191, 199 (1976). The defendant apparently concedes, and we agree, that the plaintiff adequately designated the defendant's medical records in his request for production and that those records were in the defendant's possession, custody, or control. *See id.* at 34, 229 S.E.2d at 200 (designation); W. Shuford, *supra*, §§ 34-6, -7 (designation and possession, custody, or control); 8 C. Wright & A. Miller, *supra*, § 2210 (possession, custody, or control). The trial court concluded, however, and the defendant argues on this appeal, that the plaintiff did not show that the defendant's medical records fall within the scope of N.C.G.S. § 1A-1, Rule 26(b) (1990).

The scope of discovery as delineated by N.C.G.S. § 1A-1, Rule 26(b) is stated in pertinent part as follows:

> Unless otherwise limited by order of the court in accordance with these rules, . . . [p]arties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party . . . .

Accordingly, subject to other discovery limitations not applicable here, the scope of discovery under N.C.G.S. § 1A-1, Rule 26(b) is limited only by considerations of privilege and relevance. *Stone v. Martin*, 56 N.C. App. 473, 476, 289 S.E.2d 898, 900, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982); *see also* N.C.G.S. § 1A-1, Rule 26(b)(3) (1990) (trial preparation materials); N.C.G.S. § 1A-1, Rule 26(b)(4) (1990) (expert testimony); N.C.G.S. § 1A-1, Rule 26(c) (1990) (protective orders); N.C.G.S. § 1A-1, Rule 35(a) (1990) (physical or mental examinations); 8 C. Wright & A. Miller, *supra*, § 2007 (scope of discovery limitations). We address these considerations in that order.

Privilege

[1] When the plaintiff requested that the defendant produce his medical records, the defendant did not raise the issue of privilege; rather, he argued that his medical records were irrelevant, prejudicial, and burdensome. Likewise, during arguments on the plaintiff's motions in limine, the defendant stated that the physician-patient "privilege . . . has no application here." On appeal, however, he argues that his medical records are privileged under N.C.G.S. § 8-53 (1986), and therefore, because the trial court did not find that disclosure of these records was "necessary to a proper administration of justice," the trial court's order may not be disturbed. *See Sims v. Charlotte Liberty Mut. Ins. Co.*, 257 N.C. 32, 38-39, 125 S.E.2d 326, 331-32 (1962) (where trial court made no finding that admission of privileged hospital records was necessary to proper administration of justice, trial court did not err in excluding them); *McGinnis v. McGinnis*, 66 N.C. App. 676, 678, 311 S.E.2d 669, 671 (1984) (where trial court made no finding that admission of privileged information was necessary to proper administration of justice, trial court erred in admitting the information).

North Carolina Gen. Stat. § 8-53 provides in pertinent part as follows:

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

This qualified statutory privilege applies to requested disclosures whether they are made during discovery or at trial. W. Shuford, *supra*, § 26-7; *cf. In re Albemarle Mental Health Ctr.*, 42 N.C. App. 292, 299, 256 S.E.2d 818, 823, *disc. rev. denied*, 298 N.C. 297, 259 S.E.2d 298 (1979) (trial court may compel disclosure of privileged information prior to trial). "It is for the party objecting to discovery [of privileged information] to raise the objection in the first instance and he has the burden of establishing the existence of the privilege." 8 C. Wright & A. Miller, *supra*, § 2016. A patient may expressly or impliedly waive his physician-patient privilege

during discovery and at trial. *Id.; Cates v. Wilson*, 321 N.C. 1, 14, 361 S.E.2d 734, 742 (1987); *Sims*, 257 N.C. at 38, 125 S.E.2d at 331 (privilege belongs to patient); *cf. Crist v. Moffatt*, 326 N.C 326, 331, 389 S.E.2d 41, 44 (1990) (Supreme Court assumed *arguendo* that plaintiff had impliedly waived privilege during discovery). Although "[t]he facts and circumstances of a particular case determine whether a patient's conduct constitutes an implied waiver," *Crist*, 326 N.C. at 331, 389 S.E.2d at 44, a patient impliedly waives his privilege when he does not object to requested disclosures of the privileged information. *See id.; Spencer v. Spencer*, 70 N.C. App. 159, 165, 319 S.E.2d 636, 642 (1984) (failure to object at trial on grounds of privilege constitutes waiver of objection).

When the plaintiff requested the defendant's medical records, the defendant impliedly waived his alleged privilege because he objected to the request, not on the grounds of privilege, but on the grounds of relevance. Therefore, if such information is relevant for discovery purposes, such information falls within the scope of discovery under N.C.G.S. § 1A-1, Rule 26(b).

Relevance

[2] The test of relevancy under N.C.G.S. § 1A-1, Rule 26(b) differs from the more "stringent test" of relevancy under N.C.G.S. § 8C-1, Rule 401 (1988). *Willis*, 291 N.C. at 34, 229 S.E.2d at 200. Information is relevant for discovery purposes if it is "reasonably calculated to lead to the discovery of admissible evidence . . . ." N.C.G.S. § 1A-1, Rule 26(b)(1) (1990); *Willis*, 291 N.C. at 34, 229 S.E.2d at 200; *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 314, 248 S.E.2d 103, 106, *disc. rev. denied*, 295 N.C. 735, 249 S.E.2d 804 (1978). Although this test must be construed liberally, *Willis*, 291 N.C. at 34, 229 S.E.2d at 200, "the determination of relevance is within the . . . [trial] court's discretion," 4 J. Moore, J. Lucas, & G. Grotheer, Moore's Federal Practice ¶ 26.56[1] (2d ed. 1991), and as with other discovery orders, may be reversed on appeal only upon a showing of abuse of that discretion. *Midgett v. Crystal Dawn Corp.*, 58 N.C. App. 734, 737, 294 S.E.2d 386, 388 (1982). A trial court abuses its discretion when "its actions are manifestly unsupported by reason." *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985).

The plaintiff argues that the defendant's medical records contain relevant information concerning whether the defendant was driving the car at the time of the accident. At no time in the

course of this case, however, has the plaintiff been allowed to review the medical records. The plaintiff argues that he was put on notice during the hearing on his motions in limine that the medical records contain this type of information. At the hearing, the defendant offered his medical records subject to the deletion of an alleged "assumption" in them by a physician's assistant. Based upon the defendant's statements during the hearing, the plaintiff suggests that the alleged "assumption" was the following phrase: "patient was driving a car." In fact, the controversial phrase which appears twice in the defendant's medical records reads as follows: "He apparently ran off the road . . . ." Nothing else in the medical records suggests that the defendant was driving the car at the time of the accident. Assuming, without deciding, that the trial court abused its discretion in determining that this phrase was not "reasonably calculated" to lead to the discovery of admissible evidence, we hold that the alleged error did not prejudice the plaintiff. In light of the uncontroverted facts that neither party could remember who had been driving at the time of the accident, the plaintiff was found outside the driver's door, the defendant was found in the passenger's seat, the passenger's seat was separated from the driver's seat by a console, and the passenger's door was "jammed shut," the plaintiff has not shown that a different result would have likely occurred had the trial court not committed the alleged error. N.C.G.S. § 1A-1, Rule 61 (1990); *Warren v. City of Asheville*, 74 N.C. App. 402, 409, 328 S.E.2d 859, 864, *disc. rev. denied*, 314 N.C. 336, 333 S.E.2d 496 (1985) (appellant must show prejudice for new trial). Accordingly, the trial court's orders are

Affirmed.

Judge PARKER concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

I agree with the majority that the defendant impliedly waived his physician-patient privilege in this case. As such, the focal issue of this appeal is whether, in fact, the defendant's records contained any information "relevant to the subject matter involved in the pending action." N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (1990).

In *State v. Wingard*, 317 N.C. 590, 346 S.E.2d 638 (1986), our Supreme Court reiterated the test for relevancy by stating that "[e]vidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *Id.* at 597, 346 S.E.2d at 643. This Court in *Shellhorn v. Brad Ragan, Inc.*, 38 N.C. App. 310, 248 S.E.2d 103, *disc. review denied*, 295 N.C. 735, 249 S.E.2d 804 (1978), differentiated the relevancy test for discovery from the relevancy test for admissibility into evidence: "To be relevant for purposes of discovery," the Court stated, "the information need only be 'reasonably calculated' to lead to the discovery of admissible evidence." *Id.* at 314, 248 S.E.2d at 106. As such, this Court in *Shellhorn* concluded that "[a] determination that particular information is relevant for discovery is not conclusive of its admissibility as relevant evidence at trial." *Id.*

The majority concludes here that even if there is evidence in the medical records that would be reasonably calculated to lead to discovery, the plaintiff was not prejudiced because there was evidence to show that the plaintiff was the actual driver of the car. In short, the majority concludes that even if the evidence in the medical records is relevant, it is not material and is therefore not prejudicial to the plaintiff. For this proposition they cite, *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985), a case that is, in my opinion, distinguishable because the evidence in that case was *admitted* erroneously at trial and found not to have been prejudicial; whereas, in the case at hand, the evidence is sought for purposes of discovery. This puts an added qualification on the discovery of information before trial by requiring that nonprivileged information be not only relevant, but also material.

I do not believe such a materiality requirement exists under North Carolina law. Rule 26(b)(1) "demonstrates the broad and liberal scope of the discovery provisions contained in the rules. Questions of materiality do not come into play." W. Shuford, North Carolina Civil Practice and Procedure § 26-5 (3d ed. 1988 & Supp. 1990). Likewise, N.C. Gen. Stat. § 1A-1, Rule 34, which controls the production of documents and things, contains the same broad scope of discovery set out in Rule 26. "The original [Rule 34] had been limited to inspection of documents and things that were 'material to any matter involved in the action.' The amendment struck this language and substituted the words, 'relating to any of the matters within the scope of the examination permitted by Rule 26(b).' "

8 C. Wright & A. Miller, Federal Practice and Procedure § 2201 (1970). I disagree with the majority and, therefore, would conclude that relevant information that is not privileged is discoverable.

Moreover, even if we consider the information here under the standard set by the majority, there was evidence in the medical records that was both relevant and material. Clearly, the statement entered in the medical records by the physician assistant indicating that the defendant "apparently ran off the road" was not only relevant but material to the issue of who was driving the car at the time of the accident. Moreover, the medical records contain information on the identity of the physician assistant which would allow the plaintiff the opportunity to depose him for information that could lead to the discovery of admissible evidence. The medical records detail the nature of the injuries suffered by the defendant which could support the plaintiff's contention that the defendant was driving. To suggest that this information could not have produced a different result is, in my opinion, a speculation that could be well avoided by allowing the discovery of the information in the medical records.

CG&T CORPORATION v. BOARD OF ADJUSTMENT OF THE CITY OF WILMINGTON

No. 915SC528

(Filed 7 January 1992)

1. Municipal Corporations § 30.19 (NCI3d)— nonconforming use discontinued—intent of landowner irrelevant

Respondent board of adjustment properly informed petitioner that it would need to obtain a special use permit for oil refinery operations to resume on its property because the use of the property as an oil refinery had been discontinued for greater than 365 days, and there was no merit to petitioner's claim that, had respondent considered petitioner's intent surrounding the facility's operation, it would have reached a conclusion that the activity had been neither discontinued nor abandoned, since neither the term "abandon" nor "discontinue" was defined by the city code; the term "abandon" was found only in the catch line of the code provision and not the text; it was the function of respondent to interpret its

own city code; and petitioner's intent to resume operations was therefore irrelevant in determining whether the property's use as a refinery had been discontinued.

Am Jur 2d, Zoning and Planning §§ 214, 215, 219-221.

2. **Municipal Corporations § 30.19 (NCI3d)— discontinuance of nonconforming use—findings supported by substantial evidence**

Respondent's decision that petitioner had discontinued use of its property as an oil refinery and requiring petitioner to obtain a special use permit before resuming such use of its property was supported by competent, material, and substantial evidence, since the pleadings, testimony of witnesses, and other evidence as a whole supported respondent's conclusion that petitioner had discontinued use of the property as an oil refinery facility while maintaining the property as an oil storage terminal.

Am Jur 2d, Zoning and Planning §§ 217-219, 222.

3. **Municipal Corporations § 30.21 (NCI3d)— newly discovered evidence—proceedings not reopened—no denial of due process**

Petitioner was not denied due process of law by respondent board of adjustment's refusal to reopen a hearing on discontinuance of a nonconforming use to allow petitioner to present additional evidence which it contended was newly discovered.

Am Jur 2d, Zoning and Planning § 317.

APPEAL by petitioner from Order entered 28 February 1991 by *Judge Gary E. Trawick* in NEW HANOVER County Superior Court. Heard in the Court of Appeals in Wilmington on 17 October 1991.

Staton, Perkinson, Doster, Post, Silverman and Adcock, by Jonathan Silverman, for petitioner appellant.

City Attorney Thomas C. Pollard and Assistant City Attorney Robert W. Oast, Jr., for respondent appellee.

COZORT, Judge.

Petitioner owns an oil refining facility located in an area zoned for heavy manufacturing in Wilmington, North Carolina. Prior to May 1990, petitioner operated on a pre-existing nonconforming

use basis. On 2 May 1990, the city code officer informed petitioner it would need to obtain a special use permit for the operations to resume, because the use of the property as an oil refinery had been discontinued for greater than 365 consecutive days. The Wilmington Board of Adjustment and Superior Court of New Hanover County upheld the code officer's determination. We affirm.

Petitioner CG&T is a Utah corporation authorized to do business in North Carolina. Petitioner's authorized activities include the refining of crude oil and the selling of refined petroleum products. In 1986, CG&T acquired an 18-acre oil refining facility located on the Cape Fear River in Wilmington, North Carolina, for $18 million. This facility, located at 801 Surry Street, is in an area of Wilmington zoned Heavy Manufacturing, or "HM." Oil refining was a permitted use in the HM area until 1 August 1984, when the zoning ordinance was revised. Following the revisions, CG&T's predecessor, and later CG&T itself continued to lawfully operate the facility as a valid pre-existing nonconforming use under the Wilmington City Code.

On 2 May 1990, Wilmington's code enforcement officer determined that use of the property as an oil refinery had discontinued in excess of 365 consecutive days. Due to the discontinuance, CG&T would need to acquire a special use permit in order for CG&T to operate the oil refinery. CG&T disagreed with the code officer's order and appealed the finding to the Wilmington Board of Adjustment ("Board"). The Board conducted an evidentiary hearing on 19 June 1990. The evidence presented by the parties at the hearing tended to show: CG&T held valid permits required to operate an oil refinery in North Carolina which included an Air Quality Permit, a Water Quality Permit, and an Oil Refining Facility Permit. It was unnecessary for CG&T to file any reports required by various state and federal regulatory agencies after February 1988 because no process discharge was released. Other testimony at the hearing indicated no oil had been delivered to the property nor had any oil been refined or processed at the refinery site since CG&T took over the operation in 1986. The only sale of oil occurred in 1989, when CG&T sold 400,000 gallons of refined product stored on the site. Also in 1989, the crude oil which had been stored at the area since CG&T's acquisition of the property was transferred into one storage tank. CG&T did not operate its distillation tower in the year prior to the code officer's order because oil prices made the tower's operation cost ineffective.

Additional evidence demonstrated CG&T had no employees working at the site from March 1986 to July 1987 and again from November 1987 through February 1988. From July 1987 through November 1987, CG&T employed six workers at the property. During that time, some of the equipment on site was inspected, tested, maintained and repaired. During the period from February 1988 until April 1990, CG&T employed one individual, Robert Prevatte, at the location. Prevatte worked part time and had an irregular schedule. He usually worked alone and locked the plant gate and office door while at work. He stated twenty to twenty-five people would be needed to operate the oil refining facility at a minimum level; full operation would require a work force of approximately sixty.

The Wilmington City Code Enforcement Officer, Charles Holden, stated he visited the site on four separate occasions between July 1987 and April 1990. On each of the visits, Holden observed chained and locked gates and did not view anyone on the premises. The facility did not appear to be operating or open for business. A Wilmington resident who lives near the property testified that he observed the property at various times of the day for more than 500 times from March 1986 through April 1990. The resident indicated the facility appeared to be inoperative on each occasion. The State air quality inspector observed the property on annual inspection visits and on other occasions to investigate air quality complaints in the area from 1988 to 1990. He also noted the lack of activity at the oil refinery facility. Furthermore, the Wilmington City Directory stated that the property was vacant in 1987 and 1988.

Based on the above, and other evidence, the Board determined by a three to two vote that CG&T's nonconforming use of the refinery facility had *not* been discontinued. N.C. Gen. Stat. § 160A-388(e) (Cum. Supp. 1991), however, which establishes the procedure for the Board of Adjustment, reads: "The concurring vote of four-fifths of the members of the board shall be necessary to reverse any order, requirement, decision, or determination of any administrative official charged with the enforcement of an ordinance adopted pursuant to this Part . . . . " Therefore, the code officer's initial determination was affirmed pursuant to the statute in spite of the three to two vote against the code officer's finding. The superior court affirmed the Board of Adjustment's decision. Petitioner appeals.

Petitioner contends on appeal: (1) the superior court erred by affirming the Board of Adjustment's decision that CG&T had discontinued the nonconforming use of its oil refining facility within the meaning of Section 19-87 of the Wilmington City Code, and (2) the superior court erred in affirming the Board of Adjustment's order denying CG&T's motion to reopen the evidence. With respect to the first issue, petitioner raises three questions: (a) whether the Board and superior court should have considered CG&T's intent in deciding the discontinuance issue; (b) whether the Board's decision was supported by competent, material and substantial evidence; and (c) whether the Board's decision was arbitrary and capricious.

N.C. Gen. Stat. § 160A-388(e) (Cum. Supp. 1991) provides, "[e]very decision of the board shall be subject to review by the superior court by proceedings in the nature of certiorari." When a superior court reviews the decision of a Board of Adjustment on certiorari, the court sits as an appellate court. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 387 S.E.2d 665 (1990). The Administrative Procedure Act ("APA"), codified in Chapter 150B of the North Carolina General Statutes, does not apply to the decisions of town boards. Although the APA does not provide judicial review for cities and other local units of government, a similar standard of review is employed to review city council special zoning request decisions. *Jennewein v. City Council*, 62 N.C. App. 89, 302 S.E.2d 7, *disc. review denied*, 309 N.C. 461, 307 S.E.2d 365 (1983). The standard of review for town board decisions has been defined by the Supreme Court in *Coastal Ready-Mix v. Board of Com'rs*, 299 N.C. 620, 265 S.E.2d 379, *rehg denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). The superior court should determine the following: (1) whether the Board committed any errors in law; (2) whether the Board followed the procedures specified by law in both statute and ordinance; (3) whether the appropriate due process rights of the petitioner were protected, including the rights to offer evidence, cross-examine witnesses, and inspect documents; (4) whether the Board's decision was supported by competent, material and substantial evidence in the whole record; and (5) whether the Board's decision was arbitrary and capricious. *Id.* at 626, 265 S.E.2d at 383. Despite the APA's inapplicability to town board decisions, it is well recognized that "while the specific review provision of the North Carolina APA is not directly applicable, the principles that provision embodies are highly pertinent." *Id.* at 625, 265 S.E.2d at 382.

[1] In the case below, petitioner first argues both the Board and the superior court erred as a matter of law in interpreting and applying the term "discontinuance" as used in the Wilmington City Code. This Court has held:

> [I]f it is alleged that an agency's decision was based on an error of law then a *de novo* review is required. " 'When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review.' "

Brooks, Com'r. of Labor v. Rebarco, Inc., 91 N.C. App. 459, 463, 372 S.E.2d 342, 344 (1988) (citations omitted). Petitioner contends the Board should have examined CG&T's intent prior to concluding that CG&T had discontinued its operation of the oil refining facility. In support of this argument, petitioner refers us to Wilmington City Code Sec. 19-87, which provides:

> *Abandonment and discontinuance of nonconforming situations.*
>
> (a) When a nonconforming use is discontinued for a consecutive period of three hundred sixty-five (365) days, the property involved may thereafter be used only for conforming purposes, except for those structures qualifying under section 19-85(h).
>
> (b) For purposes of determining whether a right to continue a nonconforming situation is lost pursuant to this section, all of the buildings, activities, and operations maintained on a lot are generally to be considered as a whole. . . .
>
> If a nonconforming use is maintained in conjunction with a conforming use, discontinuance of a nonconforming use for three hundred sixty five (365) days shall terminate the right to maintain it thereafter.

The Board interpreted the above Code provisions and reached in part the following conclusions of law:

> 1. The Wilmington City Code, § 19-87(a), provides that a nonconforming use that has been discontinued for a period of 365 consecutive days may not be resumed; there is no requirement that a discontinuance of a nonconforming use under this section must be with the intent not to resume the use.

2. "Discontinue," as used in the Wilmington City Code § 19-87(a) is not synonymous with "abandon" and does not require an intention to abandon the nonconforming use.

* * * *

9. The use of the 801 Surry Street Properties as an oil storage facility does not affect the discontinuance of its use as an oil refinery facility.

* * * *

12. Therefore, the use of the 801 Surry Street Properties as an oil refinery has been discontinued for a period of 365 consecutive days and may not be resumed unless a Special Use Permit is obtained.

Petitioner CG&T challenges these conclusions by advancing a theory which equates the term "discontinue" with "abandon." Petitioner claims had the Board considered CG&T's *intent* surrounding the facility's operation, it would have reached a conclusion that the activity had been neither discontinued nor abandoned. We disagree with petitioner's interpretation of the zoning ordinance.

First, neither the term "abandon" nor "discontinue" is defined by the City Code. The dictionary meaning of "abandon" is "to cease to assert an interest, right or title to, with the intent of never again resuming or reasserting it." Webster's New International Dictionary (3d ed. 1976) at page 2. In contrast, the primary meaning of "discontinue" is "to break off; give up: terminate: end the operation or existence of: cease to use." *Id.* at page 646. The plain meaning of these words demonstrates that although intent is a necessary component of "abandon," intent need not be a factor in determining whether an activity has been discontinued.

Second, the term "abandon" is found only in the catch line of the Code provision and not in the text of Sec. 19-87. A general provision of the City Code, in Sec. 1-4 provides:

> The catchlines of the several sections of this Code printed in bold face type are intended as mere catchwords . . . and shall not be deemed to be titles of such sections, nor as any part of the section . . . .

As a rule of construction, the catch lines or titles do not control the interpretation of the Code. *Blowing Rock v. Gregorie*, 243 N.C.

364, 371, 90 S.E.2d 898, 903 (1956). The word "discontinue" is the term upon which the text of the ordinance focuses. The fact that the catch line is worded in the conjunctive rather than disjunctive does not establish the words "abandon" and "discontinue" as synonyms.

Finally, it is long recognized that one of the functions of a Board of Adjustment is to interpret local zoning ordinances. *Harden v. Raleigh*, 192 N.C. 395, 135 S.E. 151 (1926). Although we apply a *de novo* review to this issue, we still give some deference to the Board's interpretation of its own City Code. Furthermore, the case law supports the Board's conclusion. Petitioner offers various cases to support its argument that the Board erred as a matter of law by failing to consider CG&T's intent in arriving at its decision. Rather than analyzing each case individually, we deem it sufficient to note that these cases are readily distinguishable from the present case. None of the cases cited stands for the proposition that "discontinue" is synonymous with "abandon." Rather, those cases indicate that unless a term is modified or defined specifically within the ordinance in which it is referenced, then the term should be assigned its normal meaning. *See, e.g., Forsyth Co. v. Shelton*, 74 N.C. App. 674, 329 S.E.2d 730, *disc. review denied*, 314 N.C. 328, 333 S.E.2d 484 (1985); *Southern Equip. Co. v. Winstead*, 80 N.C. App. 526, 342 S.E.2d 524 (1986). Instead, the cases are more valuable as illustrations of the time honored maxim, "the law does not favor forfeitures and statutes authorizing them must be strictly construed." *Id.* at 528, 342 S.E.2d at 525. While acknowledging this rule, we note the following important policy:

> Non-conforming uses are not favored by the law. Most zoning schemes foresee elimination of non-conforming uses either by amortization, or attrition or other means. In accordance with this policy, zoning ordinances are strictly construed against indefinite continuation of non-conforming uses.

Appalachian Poster Advertising Co. v. Board of Adjustment, 52 N.C. App. 266, 274, 278 S.E.2d 321, 326 (1981) (citations omitted). Consequently, we find the Board of Adjustment's interpretation of "discontinue" within Sec. 19-87 of the City Code consistent with current law and rules of construction. We find petitioner CG&T's intent to resume operations irrelevant in determining whether the property's use as a refinery had been discontinued.

[2] Petitioner next contends the Board's decision was not supported by competent, material, and substantial evidence. As noted previously, one of the responsibilities of a reviewing court is "[i]nsuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record." *Coastal Ready-Mix*, 299 N.C. at 626, 265 S.E.2d at 383. Similar to review under the APA, the standard of judicial review in the present case is the "whole record" test as to this issue. The court reviewing an administrative decision must inspect all of the competent evidence which comprises the "whole record" to determine whether substantial evidence exists to support the administrative body's findings and conclusions. *Henderson v. North Carolina Dept. of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). Substantial evidence is that which a reasonable mind would regard as sufficiently supporting a specific result. *Walker v. North Carolina Dept. of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). When the Court of Appeals applies the whole record test and reasonable but conflicting views emerge from the evidence, the Court cannot substitute its judgment for the administrative body's decision. *General Motors Corp. v. Kinlaw*, 78 N.C. App. 521, 523, 338 S.E.2d 114, 117 (1985). The Court, however, must " 'take into account whatever in the record fairly detracts from the weight' of the evidence which supports the decision." *Id.* (quoting *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977)). The Court must ultimately decide whether the decision "has a rational basis in the evidence." *Id.*

Upon reviewing the entire record in the case at bar, we conclude the Board's decision was supported by competent, material and substantial evidence. The pleadings, testimony of witnesses, and other evidence as a whole support the Board's conclusion that petitioner had discontinued use of the property as an oil refinery facility, while maintaining the property as an oil storage terminal, a conforming use. In short, the record provides ample evidence that the oil refining activities at the site had ceased completely for over 365 days.

Petitioner next alleges the Board's decision was arbitrary and capricious. The "whole record" test is also applied when a court determines whether a board's decision is arbitrary and capricious. *Brooks*, 91 N.C. App. at 463, 372 S.E.2d at 347. Petitioner believes the "haphazard way in which the Board defined the legal issues"

demonstrates the arbitrariness of the Board's position. Specifically, petitioner disputes the Board's concept of "discontinue." Petitioner's argument is without merit. The duty of the Board is to give meaning to undefined terms within zoning ordinances so long as the interpretations are within the bounds of the law. Because we have already determined such an interpretation is consistent with legal principles, we find nothing arbitrary or capricious about the Board's decision.

[3] Lastly, petitioner argues the superior court erred in affirming the Board's order denying CG&T's motion to reopen the evidence. Following the Board's initial vote, but prior to the hearing on the question of reconsideration, petitioner moved to reopen proceedings to present additional evidence it contended was newly discovered. The Board declined to reopen the proceedings, and petitioner argues this denial amounted to a denial of due process of law. We cannot agree. Like a court, the Board has the discretion to deny motions as long as such denials do not constitute an abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975). Due diligence must be shown for a court to grant a motion to reopen proceedings for the purpose of introducing newly discovered evidence. *Harris v. Family Medical Center*, 38 N.C. App. 716, 248 S.E.2d 768 (1978). Here, petitioner did not demonstrate how the evidence sought to be introduced could not have been discovered with due diligence prior to the initial evidentiary hearing. Although the evidence may have been helpful to CG&T's case, petitioner cannot demonstrate how the denial of its motion inhibited CG&T's full and fair opportunity to present its case. The superior court's disposition of this issue is also affirmed.

For the reasons stated, the trial court's order is

Affirmed.

Judges ARNOLD and LEWIS concur.

IN THE MATTER OF BRANDON WILLIAM BLUEBIRD

No. 9119DC21

(Filed 7 January 1992)

1. **Parent and Child § 1.5 (NCI3d)— termination of parental rights—Indian child—federal and state provisions applicable—dual burden of proof**

In a proceeding for termination of parental rights involving an Indian child, a dual burden of proof is created in which the state provision, that grounds for termination must be supported by clear and convincing evidence, and federal provisions requiring evidence which justifies termination beyond a reasonable doubt, must be satisfied separately. To meet the federal requirement the trial court must conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child.

Am Jur 2d, Indians § 8.7; Parent and Child §§ 7, 34.

2. **Parent and Child § 1.6 (NCI3d)— termination of parental rights—neglect of child—sufficiency of evidence**

Evidence was sufficient to support the termination of respondent's parental rights on the ground of neglect where the evidence tended to show that respondent moved to Oklahoma in 1987 with her boyfriend and left her child with a friend; the child was eventually placed in foster care; respondent made no effort to inquire as to her son's welfare until mid-1988; she did not attempt to contact her son or DSS again until 1990; she failed to respond to the suggestions made by DSS as to how she could regain custody of her son; and she did not avail herself of the services available through the Cherokee Nation to remedy the problems which caused her son to be placed in the custody of DSS until the summer of 1990, six months after the petition to terminate parental rights had been filed. N.C.G.S. § 7A-289.32(2).

Am Jur 2d, Parent and Child § 35.

3. **Parent and Child § 1.6 (NCI3d)— termination of parental rights—child in foster care more than 18 months—sufficiency of evidence**

Evidence was sufficient to support the termination of respondent's parental rights on the ground that respondent

willfully left her child in foster care for more than 18 months without reasonable progress being made toward correcting those conditions which led to removal of the child where respondent's only effort was to attend a few parenting classes in the spring of 1990 after having left her child in mid-1987. N.C.G.S. § 7A-289.32(3).

Am Jur 2d, Parent and Child §§ 28, 35.

4. Parent and Child § 1.6 (NCI3d)— termination of parental rights—willful abandonment—sufficiency of evidence

Evidence was sufficient to support the termination of respondent's parental rights on the ground of willful abandonment where the evidence tended to show that respondent moved to Oklahoma in 1987 and made no efforts to contact DSS or her son, failed to respond to efforts of DSS and was uncooperative with the local social services agency in Oklahoma, moved several times after relocating to Oklahoma without informing anyone of her whereabouts, continued to be unemployed, and refused to end her relationship with a man who beat the child until late in 1989.

Am Jur 2d, Parent and Child §§ 34, 35.

5. Parent and Child § 1.6 (NCI3d)— termination of parental rights—evidence beyond a reasonable doubt

Evidence beyond a reasonable doubt supported the termination of respondent's parental rights and thus met the federal burden of proof under the Indian Child Welfare Act where it tended to show that respondent abandoned the child, neglected him and left him in foster care for more than 18 months; furthermore, a licensed psychologist testified as to the child's success in petitioner foster parents' home, the manner in which the foster parents had encouraged the child's Native American heritage by enrolling him in the local Native American daycare center, and the child's living arrangements, happiness, and security.

Am Jur 2d, Parent and Child §§ 34, 35.

6. Parent and Child § 1.5 (NCI3d)— termination of parental rights—indigent parent—appointment of counsel

The trial court's appointment of counsel sufficiently protected respondent's rights and complied with the statutory

provision where, at the first hearing to declare the child neglected or abused, the trial judge determined the respondent was not indigent and not entitled to court appointed counsel; after the petition to terminate parental rights was filed, but prior to its adjudication, the court appointed counsel to represent respondent; and this appointment occurred despite respondent's failure to request an attorney or to establish her eligibility for court appointed counsel.

Am Jur 2d, Parent and Child §§ 7, 34.

Right of indigent parent to appointed counsel in proceeding for involuntary termination of parental rights. 80 ALR3d 1141.

7. Parent and Child § 1.6 (NCI3d)— termination of parental rights—mistake in order—harmless error

Because the evidence strongly supported the trial court's order terminating parental rights, error by the trial court in its order terminating parental rights "pursuant to the authority of G.S. 7A-289.32(a)(b)(c)" was harmless, since it was obviously a typographical error or an error of draftsmanship, as subsections (a), (b), and (c) are nonexistent. The more efficient and prudent practice for trial courts is to delineate the specific grounds for termination in parental rights cases.

Am Jur 2d, Parent and Child §§ 7, 34.

APPEAL by respondent Donice Daniels from Order entered 18 October 1990 by *Judge William M. Neely* in RANDOLPH County District Court. Heard in the Court of Appeals 9 October 1991.

O'Briant, O'Briant, Bunch, Whatley & Robins, by Thomas D. Robins; and Randolph County Social Services, by Theresa A. Boucher, for petitioner appellee.

J. Howard Redding for respondent appellant.

COZORT, Judge.

On 29 November 1989, petitioners Alvin and Katherine Radford, the foster parents of the minor child, Brandon William Bluebird, filed a petition to terminate the parental rights of respondents Donice Daniels and William Leon Bluebird. Following a hearing, the trial judge concluded that grounds for termination were proven and the best interests of the child necessitated the termination

of respondents' parental rights. The trial judge concluded that petitioners satisfied the requirements set out in both N.C. Gen. Stat. § 7A-289 (1989) and 25 U.S.C. § 1901 *et seq.*, the Indian Child Welfare Act of 1978. Respondent Donice Daniels appeals. Because we find the evidence supports the decision to terminate the respondent's parental rights, we affirm.

The evidence presented at the termination hearing showed that Brandon William Bluebird was born on 18 September 1985. When he was twenty-three months old, Brandon was taken into custody by the Randolph County Department of Social Services ("DSS") and placed in foster care. This action was taken due to a social worker's discovery that respondent's live-in boyfriend, Leo Grass, had beaten Brandon until his back and legs were covered with black and blue bruises. A few days after Brandon was removed from her home, respondent contacted the DSS about the possibility of Brandon being returned to her if she moved in with a female friend. Such an arrangement was found to be satisfactory in a court hearing on 3 September 1987. On 21 September 1987, Judge Richard M. Toomes adjudged the child to be an abused child within the meaning of N.C. Gen. Stat. § 7A-517(1) (Cum. Supp. 1990) and a neglected child within § 7A-517(21) (Cum. Supp. 1990). The judge found that Mr. Grass physically abused Brandon, and respondent consented to a finding of neglect. Within one week of the adjudication, Ms. Daniels left North Carolina and moved to Oklahoma with Mr. Grass. Brandon remained with his mother's friend, Diane Chambers, until 13 November 1987, when she announced that she was also relocating to Oklahoma. The DSS placed Brandon in foster care with the petitioners, Alvin and Katherine Radford, on that date.

Subsequent to respondent's departure from North Carolina, the DSS learned from a letter sent by the Cherokee Nation that Brandon's putative father was a registered member of the Cherokee Nation of Oklahoma. Brandon was eligible for tribal membership and thus was subject to the Indian Child Welfare Act of 1978, which is codified at 25 U.S.C. § 1901 *et seq.* The Cherokee Nation declined jurisdiction or intervention in the case.

Ms. Janet McFadden, a foster care worker, was assigned by the DSS to periodically review Brandon's case. Ms. McFadden monitored Brandon's progress in the Radford home. She reported that Mr. and Mrs. Radford took a sincere interest in Brandon's heritage and began to become involved in several Native American

organizations. Ms. McFadden also stated Brandon appeared to be a happy child who felt comfortable living with the Radfords. After several attempts to make contact with Brandon's mother, Ms. McFadden learned that she was still living in Oklahoma with Mr. Grass. Finally, on 5 April 1988, respondent telephoned the DSS. This was her first attempt to inquire about Brandon since September 1987 when she moved to Oklahoma. Respondent conveyed her desire to recover custody of Brandon. Ms. McFadden informed respondent that Brandon could not be sent to live with her until the local Social Services agency approved her home for placement. Respondent wrote Brandon a letter in order to maintain contact. In August 1988, Ms. McFadden received a letter from the Jay County Department of Human Services in Oklahoma. The correspondence indicated that respondent had been uncooperative and difficult to contact. The letter also stated that respondent did not live in a satisfactory home and gave notice that placement with her had been denied. Ms. McFadden relayed this information to respondent in a letter dated September 1988.

Ms. McFadden attempted to contact William Leon Bluebird, Brandon's natural father. Eventually in 1989, Mr. Bluebird was located in Tahlequah, Oklahoma. The Cherokee Department of Human Services completed a home study of Mr. Bluebird and found his living situation to be an unacceptable placement alternative for Brandon.

In early 1989, the DSS contacted Carolyn Coronado, a licensed psychologist who is a Native American, for the purpose of completing an extensive psychological and environmental assessment of Brandon's living arrangement with the Radfords. Ms. Coronado observed Brandon and his foster parents on two separate occasions. One study occurred on 26 and 27 January 1989 and the other was conducted on 15 and 16 February 1990. Additionally, Ms. Coronado observed Brandon while he attended class at the Native American Day Care Center. Ms. Coronado testified that Brandon was developing normally and was receiving excellent care from petitioners. Ms. Coronado's overall assessment of Brandon's placement with the Radfords concluded the child was happy and secure.

Mr. and Mrs. Radford filed their petition to terminate parental rights on 29 November 1989. At the time of the termination hearing, Brandon Bluebird was four and one-half (4½) years old and had been living in the Radford home for two years and eight months.

The trial judge made specific findings of fact and concluded that grounds for termination existed and the termination of parental rights would further the best interests of the child. The trial judge thereupon terminated the parental rights of respondents Donice Daniels and William Leon Bluebird. William Leon Bluebird does not appeal.

[1] Respondent Donice Daniels first argues the evidence is insufficient to support the final order in this case. Under North Carolina law, petitioners are required to prove the existence of grounds for termination by clear, cogent, and convincing evidence. *In re White*, 81 N.C. App. 82, 85, 344 S.E.2d 36, 38, *cert. denied*, 318 N.C. 283, 347 S.E.2d 470 (1986). After the petitioners have met the burden of proof at the adjudicatory stage, the court's decision to terminate the parental rights is discretionary. *In re Parker*, 90 N.C. App. 423, 430, 368 S.E.2d 879, 884 (1988). A finding of any one of the separately enumerated grounds in N.C. Gen. Stat. § 7A-289.32 (1989) is sufficient to support termination of parental rights. *In re Williamson*, 91 N.C. App. 668, 680, 373 S.E.2d 317, 322-23 (1988); N.C. Gen. Stat. § 7A-289.31(a) (1989). If findings of fact based on clear, cogent, and convincing evidence support a conclusion that grounds for termination exist, the order terminating parental rights must be affirmed. *In re Ballard*, 63 N.C. App. 580, 586, 306 S.E.2d 150, 154 (1983), *rev'd on other grounds*, 311 N.C. 708, 319 S.E.2d 227 (1984).

Because of the minor child's status as a Native American, the termination proceeding is also subject to the provisions of the Indian Child Welfare Act. The Act provides:

> No termination of parental rights may be ordered in such proceeding in the absence of a determination, supported by evidence beyond a reasonable doubt, including testimony of qualified expert witnesses, that the continued custody of the child by the parent or Indian Custodian is likely to result in serious emotional or physical damage to the child.

25 U.S.C. § 1912(f). This provision does not require that the North Carolina statutory grounds to terminate parental rights be proved beyond a reasonable doubt. Rather, a dual burden of proof is created in which the state provisions and federal provisions must be satisfied separately. The state grounds for termination must be supported by clear and convincing evidence, while the federal law requires evidence which justifies termination beyond a reasonable doubt.

See In Re Interest of DSP, 157 Wis.2d 106, 458 N.W.2d 823 (Wis. App. 1990); *In re JRB*, 715 P.2d 1170 (Alas. 1986). To meet the federal requirement, the trial court must conclude beyond a reasonable doubt that continued custody by the parent is likely to result in serious emotional or physical damage to the child.

[2] The evidence in the present case supports the termination of parental rights under both the state and federal statutes. As noted above, only one statutory ground is needed to support a conclusion of termination. The evidence in the present case clearly and convincingly establishes three grounds for the termination of parental rights pursuant to N.C. Gen. Stat. § 7A-289.32(2), (3), and (8) (1989). First, the facts support a finding that respondent has neglected the child under subsection N.C. Gen. Stat. § 7A-289.32(2). We recognize that a prior adjudication of neglect, standing alone, is insufficient to support termination when the parents have been deprived of custody for a significant period of time before the proceeding. *In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984). In the present case, ample evidence exists independently from that used in the neglect hearing to support a finding of neglect. Respondent moved to Oklahoma in 1987 with her boyfriend and left her child with a friend. Eventually, the child was placed in foster care. Respondent made no effort to inquire as to her son's welfare until mid-1988. She did not attempt to contact her son or the DSS again until 1990. She failed to respond to the suggestions made by the DSS as to how she could regain custody of her son. She did not avail herself of the services available through the Cherokee Nation to remedy the problems which caused her son to be placed in the custody of the DSS until the summer of 1990, six months after the petition to terminate parental rights had been filed.

Similar treatment by a parent has been found to constitute grounds for termination of parental rights. For example, this Court has found that a respondent's lack of involvement with his children for a period of more than two years established a pattern of abandonment and neglect as defined in N.C. Gen. Stat. § 7A-289.32(2) (1989). *In re Graham*, 63 N.C. App. 146, 151, 303 S.E.2d 624, 627 (1983). The Court in *Graham* stated, "[o]ne communication in a two year period does not evidence the 'personal contact, love, and affection that inheres in the parental relationship.'" *Id.* at 151, 303 S.E.2d at 627 (quoting *In re Apa*, 59 N.C. App. 322, 324, 296 S.E.2d 811, 813 (1982)).

[3] The evidence in this case additionally justifies termination under N.C. Gen. Stat. § 7A-289.32(3) (1989), which allows for termination of parental rights when

> [t]he parent has willfully left the child in foster care for more than 18 months without showing to the satisfaction of the court that reasonable progress under the circumstances has been made within 18 months in correcting those conditions which led to the removal of the child or without showing positive response within 18 months to the diligent efforts of a county Department of Social Services, a child-caring institution or licensed child-placing agency to encourage the parent to strengthen the parental relationship to the child or to make and follow through with constructive planning for the future of the child.

Under this subsection, "willfulness" is "something less than willful abandonment." *In re Bishop*, 92 N.C. App. 662, 668, 375 S.E.2d 676, 680 (1989). In *Bishop*, despite efforts on the part of respondent to regain custody of the children, this Court found that the evidence supported a finding of willful abandonment. *Id.* at 668, 375 S.E.2d at 681. The fact that the parent makes some effort to regain custody does not preclude such a finding. *In re Tate*, 67 N.C. App. 89, 94, 312 S.E.2d 535, 539 (1984). Similarly in the present case, respondent made a few efforts by attending parenting classes in the spring of 1990. Despite respondent's attempts, we find respondent's leaving the child in foster care for greater than 18 months to be willful. Furthermore, her meager efforts did not effectuate any improvement in correcting the situation under the circumstances.

[4] Finally, as a third alternative, the evidence establishes grounds for termination of parental rights pursuant to N.C. Gen. Stat. § 7A-289.32(8) (1989). This provision allows for termination when "[t]he parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition." *Id.* "Abandonment" has been defined as:

> any wilful or intentional conduct on the part of the parent which evinces a settled purpose to forego all parental duties and relinquish all parental claims to the child. . . .
>
> * * * *
>
> Abandonment has also been defined as wilful neglect and refusal to perform the natural and legal obligations of parental

> care and support. It has been held that if a parent withholds his presence, his love, his care, the opportunity to display filial affection, and wilfully neglects to lend support and maintenance, such parent relinquishes all parental claims and abandons the child.

Pratt v. Bishop, 257 N.C. 486, 501, 126 S.E.2d 597, 608 (1962). This subsection's characterization of "willful" abandonment connotes more than the mere neglect implied in N.C. Gen. Stat. § 7A-289.32(3) (1989). "Willful" for the purposes of subsection (8) connotes purpose and deliberation. *In re Adoption of Searle*, 82 N.C. App. 273, 275, 346 S.E.2d 511, 514 (1986). We find the respondent's actions in this case to be purposeful and deliberate. The facts indicate respondent moved to Oklahoma and made no efforts to contact the DSS or her son. She failed to respond to the efforts of the DSS and was uncooperative with the local Social Services agency in Oklahoma. She moved several times after relocating to Oklahoma without informing anyone of her whereabouts, continued to be unemployed, and refused to end her relationship with Mr. Grass, who beat the child, until late 1989. This evidence is sufficient under subsection (8) of the statute to constitute grounds for termination of parental rights.

[5] Turning now to the applicable federal provision, we conclude that the evidence beyond a reasonable doubt supports the termination of respondent's parental rights. At the termination hearing, Ms. Coronado, a licensed psychologist, testified as to Brandon's success in the petitioners' home. She attested to the manner in which the Radfords had encouraged Brandon's Native American heritage by enrolling him in the local Native American day care center. She discussed Brandon's living arrangements and concluded he was happy and secure in the home. This testimony, coupled with the evidence reviewed above, is sufficient to support the trial judge's finding that removing Brandon from his foster home and returning him to respondent's custody would likely result in serious emotional damage to the child. The court also determined that removal from the only safe, stable, environment the minor child has known would inflict serious emotional injury. Our review of the evidence supports an identical conclusion. Consequently, the trial judge did not err in entering judgment terminating respondent's parental rights.

[6] Respondent additionally raises on appeal the issue of whether the trial court committed reversible error by basing its decision on facts found by the court prior to the appointment of counsel for respondent. North Carolina law requires the appointment of counsel for an indigent parent in termination of parental rights cases. N.C. Gen. Stat. § 7A-289.23 (1989). The Indian Child Welfare Act, pursuant to 25 U.S.C. § 1912, provides that a parent or Indian custodian shall have the right to counsel in any removal, placement or termination proceeding in any case in which the court determines indigency. At the first hearing on 3 September 1987 to adjudicate the minor child as being neglected or abused, the trial judge determined the respondent was not indigent and not entitled to court-appointed counsel. After the petition to terminate parental rights was filed, but prior to its adjudication, the court appointed counsel to represent respondent. This appointment occurred despite respondent's failure to request an attorney or to establish her eligibility for court appointed counsel. Respondent was therefore represented by counsel at the termination hearing. The trial court's consideration of the events which occurred while respondent was absent from our State is not error. We find that the trial court's appointment of counsel in this case sufficiently protected respondent's rights and complied with the statutory provisions.

[7] Finally, respondent argues the conclusions of law were not supported by the findings of fact. Respondent contends the trial judge committed reversible error by failing to state a conclusion of law which articulated the specific statutory grounds for termination. The trial court's Order in part stated, "Grounds exist to terminate the parental rights of the respondents, Donice Daniels and William Leon Bluebird to the minor child, Brandon Bluebird, pursuant to the authority of G.S. 7A-289.32(a)(b)(c)." This conclusion is obviously an error of draftsmanship or a typographical error, since subsections (a), (b) and (c) are nonexistent. The more efficient and prudent practice for trial courts is to delineate the specific grounds for termination in parental rights cases. Nonetheless, because the evidence strongly supports the trial court's conclusion, we find the error to be harmless. The termination of respondent's parental rights of the minor child, Brandon Bluebird, is therefore

Affirmed.

Judges ARNOLD and LEWIS concur.

ALAN RAY COX, PLAINTIFF v. HOZELOCK, LTD., A/K/A HOZELOCK-ASL AND AS HOZELOCK-ASL, LTD., DEFENDANT

No. 9121SC195

(Filed 7 January 1992)

Process § 14 (NCI3d)— foreign manufacturer—product injected into stream of commerce—exercise of personal jurisdiction by N.C. proper

The sole act of a manufacturer's intentional injection of its product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant.

Am Jur 2d, Process § 175.

Judge WELLS concurring.

APPEAL by defendant from order entered 26 December 1990 by *Judge James J. Booker* in FORSYTH County Superior Court. Heard in the Court of Appeals 2 December 1991.

Defendant is an English company engaged in the design, manufacture, distribution, maintenance and marketing of numerous products including a water pressure sprayer known and designated as "Polyspray" or "Polyspray2." Approximately 300,000 of these sprayers were manufactured per year during the period 1 January 1985 through 1 January 1988. Of these, approximately 32,100 were sold to two Pennsylvania distributors, Geiger Corporation and True Temper Corporation. Replacement parts for the Polyspray were also sold to Geiger and True Temper during this period.

Defendant was aware that Geiger was a wholesaler which bought goods from manufacturers and resold them to retail stores in the United States. Geiger sold approximately three dozen Polysprays per year since 1986 to Piedmont Garden Supply of Salisbury, North Carolina, which purchased such sprayers for resale in the ordinary course of trade. Plaintiff's employer, A New Leaf, purchased these sprayers from Piedmont Garden Supply as well as directly from Geiger.

On or about 4 February 1987, plaintiff, in his capacity as an employee of A New Leaf, was using a Polysprayer which was manufactured by defendant. He attempted to clear an obstruction

in the sprayer when it exploded in his face. Plaintiff's eye was damaged to such an extent that it had to be removed.

Plaintiff commenced this action on 2 February 1990 in Forsyth County Superior Court alleging breach of warranty and negligence. Defendant removed the action to the United States District Court for the Middle District of North Carolina on 28 February 1990. Defendant filed an answer and motion to dismiss, asserting lack of personal jurisdiction over defendant pursuant to Rule 12(b)(2), Federal Rules of Civil Procedure. The action was remanded to Forsyth County Superior Court which denied defendant's motion to dismiss for lack of personal jurisdiction. From that order defendant now appeals.

Charles O. Peed for plaintiff appellee.

Craige, Brawley, Liipfert & Ross, by William W. Walker, for defendant appellant.

WALKER, Judge.

In order to establish personal jurisdiction over a foreign defendant a two part test must be satisfied. First, there must be a North Carolina statute which permits the exercise of personal jurisdiction over defendant. In the instant case the trial court properly exerted jurisdiction over defendant under G.S. 1-75.4(4)b, and defendant conceded this point. The second part of the inquiry addresses whether the exercise of such personal jurisdiction over defendant is consistent with the well ingrained constitutional notions of due process and fairness. It is this question which we consider on appeal.

We begin by noting that the ability of our courts to exercise personal jurisdiction over a foreign defendant was articulated early on by the U. S. Supreme Court in *International Shoe Co. v. State of Washington*, 326 U.S. 310, 316, 90 L.Ed. 95, 102 (1945), where the Court held:

> [D]ue process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend "traditional notions of fair play and substantial justice."

More recently the Supreme Court's decision in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980),

is instructive as to when jurisdiction may lawfully be asserted. In *World-Wide*, plaintiffs were New York residents who purchased an automobile from a retailer in New York. Following an accident involving the automobile in Oklahoma, plaintiffs initiated suit against the New York retailer and New York distributor in Oklahoma state court. The Supreme Court held, however, that such an exercise of personal jurisdiction over the New York defendants was incompatible with the Due Process Clause of the Fourteenth Amendment in light of the fact that the sole connection with the forum state of Oklahoma was that the accident had occurred there. Though it was arguably foreseeable a product sold elsewhere could reach the forum state, the *World-Wide* Court noted that "foreseeability alone has never been a sufficient benchmark for personal jurisdiction under the Due Process Clause." *Id.* at 295, 62 L.Ed.2d at 500. The Court clarified this statement, however, by noting:

> This is not to say, of course, that foreseeability is wholly irrelevant. But the foreseeability that is critical to due process analysis is not the mere likelihood that a product will find its way into the forum State. Rather, it is that the defendant's conduct and connection with the forum State are such that he should reasonably anticipate being haled into court there.

Id. at 297, 62 L.Ed.2d at 501. As to when defendant's connection with the forum state would cross that threshold so that it would be consistent with the notions of due process and fairness to subject the defendant to the personal jurisdiction of the forum state, the Court stated:

> [I]f the sale of a product of a manufacturer or distributor . . . is not simply an isolated occurrence, but arises from the efforts of the manufacturer or distributor to serve, directly or indirectly, the market for its product in other States, it is not unreasonable to subject it to suit in one of those States if its allegedly defective merchandise has there been the source of injury to its owner or to others. The forum State does not exceed its powers under the Due Process Clause if it asserts personal jurisdiction over a corporation that delivers its products into the *stream of commerce* with the expectation that they will be purchased by consumers in the forum State.

Id. at 297-298, 62 L.Ed.2d at 501-502 (emphasis added).

This Court relied on the language of *World-Wide* in rendering our decision in *Bush v. BASF Wyandotte Corp.*, 64 N.C.App. 41,

306 S.E.2d 562 (1983). In *Bush*, a North Carolina plaintiff was injured while operating a washing machine for her employer. The machine had been manufactured by a Swedish corporation which sold several such machines to a distributor in New York. The New York distributor then sold the washing machine to plaintiff's employer. At no time did defendant corporation attempt to limit the area of distribution so as to exclude North Carolina. Upon an analysis of various state court and federal decisions, this Court held:

> [I]n light of the fact that defendant-appellees purposefully injected their product into the stream of commerce without any indication that it desired to limit the area of distribution of its product so as to exclude North Carolina, we hold that the courts of North Carolina may lawfully assert personal jurisdiction over defendant-appellees.

Id. at 51, 306 S.E.2d at 568.

We explicitly reaffirmed *Bush* in the more recent decision of *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C.App. 222, 401 S.E.2d 801 (1991). In that case, defendant was a Spanish corporation with its principal office in Spain. Defendant manufactured a gas heater which it then sold to an Illinois distributor and conferred upon that distributor the exclusive rights to distribution of its product in the United States. The Illinois distributor had a North Carolina company acting as distributor in North Carolina. The North Carolina distributor thereby sold the heater to a North Carolina retailer who then sold it to plaintiff. Plaintiffs sued after the heater allegedly started a fire in their home. This Court found that insofar as the defendant intentionally injected the product into the stream of commerce, *Bush* was the controlling authority and defendant had "subjected itself to the jurisdiction of the courts of this state." *Id.* at 229, 401 S.E.2d at 805.

We are struck by the factual similarities between *Bush*, *Warzynski*, and the case before us. Without question, this defendant purposefully and intentionally placed the product in the stream of interstate commerce. The findings of fact by the trial judge indicated defendant regularly sold its Polyspray and replacement parts to Geiger and True Temper. Further, defendant was fully aware that Geiger was a wholesaler which bought goods from manufacturers such as defendant and resold those goods in the United States. At no time did defendant attempt to limit its area

of distribution so as to exclude North Carolina. These facts therefore indicate defendant knew or reasonably should have known that, due to its relationship with Geiger, its products would be used in states other than Pennsylvania. Otherwise, defendant corporation would not have sold such products to a distributor but to someone with whom the product would remain for use, or would have taken steps to limit the distribution area of the product. Instead, defendant sought to expand its operations so as to reap profits in the U. S. marketplace. As such, defendant availed itself of the laws of these various states. Consistent with the notions of due process and fairness defendant could then reasonably expect to be subject to the jurisdictions of the courts in those states, so that the exercise of personal jurisdiction over the defendant by one of those states, North Carolina, did not violate the Due Process Clause.

Counsel for defendant stated at oral arguments that proper jurisdiction in this case would be in Pennsylvania, where defendant's goods were introduced into the U. S. marketplace. To recognize this view, however, plaintiffs in this state and elsewhere would be relegated to bringing their actions in Pennsylvania, even if the claim did not arise in Pennsylvania and plaintiffs had no other contacts with that state. Upholding this argument would effectively give defendant limited immunity insofar as the barriers facing plaintiffs, financial or otherwise, would be too great in many cases to warrant pursuing their claims by having to initiate suit in Pennsylvania. Consequently, Pennsylvania cannot be held to be the exclusive forum.

Defendant would have us rely on *Moss v. The City of Winston-Salem*, 254 N.C. 480, 119 S.E.2d 445 (1961), for the proposition that personal jurisdiction cannot be conferred on a foreign defendant solely on the basis the defendant intentionally placed goods in the stream of commerce. In that case, defendant Wood was an Illinois corporation which manufactured a lawn mower in Illinois and sold it to an unrelated distributor in Virginia. The distributor then sold the mower to a business in North Carolina which in turn sold it to the City of Winston-Salem. Plaintiff was injured by the mower while in the employ of the City. Although the facts indicated defendant Wood had intentionally placed the mower in the stream of interstate commerce, the North Carolina Supreme Court held that defendant Wood "has not had any contacts in the State of North Carolina that could make it amenable to process

from the courts of North Carolina for the purpose of a judgment in *personam.*" *Id.* at 484, 119 S.E.2d at 448.

We find *Moss* not to be dispositive to this case. The rationale and decision of *Moss* is largely premised on a prior case, *Putnam v. Triangle Publications, Inc.*, 245 N.C. 432, 96 S.E.2d 445 (1957). In *Putnam*, the North Carolina Supreme Court held personal jurisdiction could not be exercised over a foreign defendant who sold magazines to distributors within this state, but delivered and surrendered title to the magazines to carriers outside North Carolina. The court enunciated, however, that whether a foreign defendant can be made subject to personal jurisdiction of the forum state is a question of due process "which must be decided in accord with the decisions of the U. S. Supreme Court." *Id.* at 438, 96 S.E.2d at 450. Thus, it is crucial to note that when *Putnam* and *Moss* were decided, the U. S. Supreme Court had not yet rendered the *World-Wide* decision. The precedential value of both *Moss* and *Putnam*, by their own reasoning, must therefore yield to the rationale of *World-Wide*.

Further, we cannot agree that the impact of *World-Wide* has been significantly lessened due to the recent Supreme Court decision in *Asahi Metal Industry Co. v. Superior Court of California*, 480 U.S. 102, 94 L.Ed.2d 92 (1987). There plaintiff, a non-California resident, sought to maintain a cross-claim against a Japanese manufacturer in California state court. Finding California's own interests to be minimal and that an exercise of personal jurisdiction would pose an undue burden on defendant, the Supreme Court held California's exercise of jurisdiction over *Asahi* violated the Due Process Clause, was unreasonable and unfair. The Court was evenly split, however, as to the ramifications of *World-Wide* and whether intentionally placing a product in the stream of commerce, without more, provided a sufficient basis for jurisdiction over a foreign defendant.

Subsequently, we hold *World-Wide* still to be the controlling point of authority on this question of when a forum state may assert personal jurisdiction over a foreign defendant. "*Asahi* does not overrule previous cases that follow the stream of commerce theory, including *Bush v. BASF.*" *Warzynski v. Empire Comfort Systems, Inc.*, 102 N.C.App. 222, 229, 401 S.E.2d 801, 805 (1991). In conformity with the trend of North Carolina case law, we uphold the stream of commerce doctrine and find it consistent with the

federal Due Process Clause. We hold the sole act of a manufacturer's intentional injection of his product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant. Pursuant to the facts in this case, the North Carolina court may properly invoke personal jurisdiction over defendant.

Affirmed.

Judge LEWIS concurs.

Judge WELLS concurs with a separate opinion.

Judge WELLS concurring.

I concur with the result reached by the majority with this additional comment. The "stream of commerce" standard set out in *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 62 L.Ed.2d 490 (1980) establishes a two-step analysis: (1) whether a foreign defendant has placed or delivered its product into the *stream of commerce*, and (2) with the expectation that the product will be purchased by consumers in the forum state. The acts of the defendant in this case meet both requirements of this standard.

MILLER BUILDING CORPORATION, PLAINTIFF v. COASTLINE ASSOCIATES LIMITED PARTNERSHIP, DEWAYNE H. ANDERSON, WILLIAM G. BENTON, DAVID WEIL, WILLIAM T. BAIRD, FAISON S. KUESTER, JR., AND HISTORIC PRESERVATION 1988 LIMITED PARTNERSHIP, DEFENDANTS

No. 915SC280

(Filed 7 January 1992)

Arbitration and Award § 17 (NCI4th)— motion to compel arbitration—no unreasonable delay—right not waived

The trial court erred in denying defendant's motion to compel arbitration on the basis that defendant had delayed unreasonably in demanding arbitration since plaintiff's breach in filing the lawsuit in superior court started the time running for the determination of when defendant must demand arbitra-

tion, and defendant demanded arbitration approximately two months after plaintiff breached the contract by filing suit. Furthermore, defendants did not waive any right to arbitration by delaying the demand until after pursuing other motions and after plaintiff had incurred attorney fees which the court found were substantial, since plaintiff was not prejudiced by the order compelling arbitration and did not have to bear the expense of a lengthy trial, there was no indication that evidence was lost because of any delay in seeking arbitration, defendant did not take advantage of judicial discovery procedures not available in arbitration as no discovery was conducted, and funds expended by plaintiff were not the result of any delay in defendant's demand for arbitration.

Am Jur 2d, Arbitration and Award §§ 51, 52.

Delay in asserting contractual right to arbitration as precluding enforcement thereof. 25 ALR3d 1171.

APPEAL by defendants from Order entered 30 January 1991 by *Judge Napoleon B. Barefoot* in NEW HANOVER County Superior Court. Heard in Wilmington before the Court of Appeals on 16 October 1991.

Marshall, Williams & Gorham, by Lonnie B. Williams and John D. Martin, for plaintiff appellee.

Deborah L. Nowachek for defendant appellants.

COZORT, Judge.

In October 1987 plaintiff Miller Building Corporation (Miller) entered a written contract with defendant Coastline Associates Limited Partnership (Coastline) primarily for the construction of the Coastline Inn in Wilmington, North Carolina. The contract contained an arbitration provision and a provision that Coastline would be charged interest on all late monthly payments. After several late payments, in April 1988 Miller billed Coastline for interest due. Coastline did not pay the interest charge. Construction was completed in July 1989. Plaintiff continued to bill defendant for interest on late payments through February 1990, but defendant did not respond. After receiving no response to a written formal demand for payment, on 27 August 1990, Miller filed suit in New Hanover County Superior Court. By stipulation, the time for respon-

sive pleading was extended until 31 October 1990. On 30 October 1990 defendants filed a motion to stay judicial proceedings and compel arbitration, a motion to disqualify plaintiff's counsel, and an answer. The trial court denied defendants' motion to disqualify on 27 November 1990. On 28 January 1991, the trial court denied defendants' motion to stay the judicial proceedings and compel arbitration and entered an order two days later. Defendant appeals from the trial court's denial of the motion to compel arbitration. We reverse.

The sole issue on appeal is whether the trial court erred in denying the motion to compel arbitration on the basis that defendants had delayed unreasonably in demanding arbitration and had waived any right to arbitration.

In pertinent part the General Conditions of the Contract for Construction entered into by Miller and Coastline provide

> **4.5. ARBITRATION**
>
> **4.5.1 Controversies and Claims Subject to Arbitration.** Any controversy or Claim arising out of or related to the Contract, or the breach thereof, shall be settled by arbitration . . . .
>
> 4.5.4.2 A demand for arbitration shall be made . . . *within a reasonable time after the Claim has arisen,* and in no event shall it be made after the date when institution of legal or equitable proceedings based on such Claim would be barred by the applicable statute of limitations as determined pursuant to Paragraph 13.7. (Emphasis added)

The trial court made the following pertinent findings of fact and conclusions of law:

> 6. In its Answer, Coastline set up several defenses to payment of interest and for the first time moved for arbitration.
>
> * * * *
>
> 9. The General Conditions of the contract contained an agreement to arbitrate.
>
> 10. Because Coaastline [*sic*] failed to respond to the billings for interest and failed to request arbitration, the plaintiff employed counsel and filed suit in August 1990, two years and eight months after the first late payment in December

1987. The demand for arbitration under these circumstances was not made within a reasonable time.

11. Coastline waived any right it had to demand arbitration by its delays in seeking arbitration until after pursuing other motions and after plaintiff had incurred attorneys fees of $3,040.00, which the court finds were substantial.

From the foregoing findings of fact the court makes the following Conclusions of Law:

1. The demand for arbitration was not made in a reasonable time.

2. Coastline waived any right to arbitrate.

On appeal, defendants argue that the trial court erred in denying the motion to stay judicial proceedings and compel arbitration because defendants demanded arbitration within a reasonable time and Miller was not prejudiced by the delay in the demand. We agree.

In *Adams v. Nelsen*, 67 N.C. App. 284, 312 S.E.2d 896 (1984), *modified and aff'd*, 313 N.C. 442, 329 S.E.2d 322 (1985), plaintiff professional engineer entered a contract to perform professional design services in connection with a residence for defendants. The contract provided that demand for arbitration be made within the applicable statute of limitations. Plaintiff performed the work. Upon defendants' failure to pay, plaintiff filed suit in district court seeking to enforce a claim of lien. Defendants filed an answer and moved to dismiss the action pursuant to Rule 12(b)(6). The trial court granted the defendants' motion. On appeal, we found the trial court erred in dismissing the suit because there was no defect on the face of plaintiff's complaint and the trial court did not possess the authority to cancel plaintiff's claim of lien. We rejected defendants' argument that plaintiff's complaint was invalid since the parties had previously agreed to arbitrate all disputes. We did find, however, that both parties had waived the right to arbitration. The plaintiff indicated his intent to waive his right, we reasoned, by pursuing the action in court. We then concluded that defendants also waived the right to arbitrate based on the following reasoning:

> According to the contract's arbitration provision, to avoid waiver, it was necessary for a party to demand arbitration within the applicable statutory time limit. The statute of limitations governing contract disputes is three years. G.S. 1-52. *Defend-*

> *ants, therefore, to have invoked their right to arbitration should have demanded such within three years from the time plaintiff breached the contract's arbitration provision by instituting court action.* . . . Because of their own inaction, defendants are now barred from invoking their arbitration rights.

Id. at 288, 312 S.E.2d at 899 (citation omitted) (emphasis added). Finally, we noted that it was more practical and efficient for the trial judge to determine the waiver issue. *Id.*

On appeal, the North Carolina Supreme Court affirmed and modified our decision, determining that an arbitration clause does not prevent a party from pursuing a separate legal remedy in court; a 12(b)(6) motion does not oust the court of jurisdiction nor invoke the arbitration provision; and defendant could not demand arbitration after the running of the applicable statute of limitations. Although agreeing with our final resolution of the waiver issue, the Court concluded that we were mistaken that defendants' failure to demand arbitration within the statute of limitations period constituted a waiver. The Court reasoned that, since the contract contained a time limitation for demanding arbitration, the defendants' contractual right to demand arbitration was barred by the statute of limitations, and the question of whether defendants impliedly waived their right to arbitration was not an issue in the case. *Adams*, 313 N.C. at 448, 329 S.E.2d at 326.

Analyzing the case before us in light of *Adams*, we find that Coastline demanded arbitration within a reasonable time as required by the provisions of the contract. Coastline demanded arbitration on 30 October 1990, approximately two months after Miller breached the contract by filing suit in superior court. Miller stipulated to the extension of time to file responsive pleadings. According to *Adams*, the plaintiff's breach in filing the lawsuit in superior court starts the time running for the determination of when defendant must demand arbitration; this is true whether the time period at issue is the applicable statute of limitations as in *Adams* or within a reasonable time of the claim arising as in the case at bar. Since defendants promptly made demand for arbitration after plaintiff filed suit to enforce the disputed claim, we find that defendants did not delay unreasonably in making that demand.

We also agree with defendants that the trial court erred in finding that defendants waived the right to demand arbitration by delaying the demand for arbitration "until after pursuing other

motions and after plaintiff had incurred attorneys fees of $3,040.00, which the court finds were substantial." In *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 321 S.E.2d 872 (1984), the North Supreme Court addressed the issue of waiver:

> Because of the reluctance to find waiver, we hold that a party has impliedly waived its contractual right to arbitration if by its delay or by actions it takes which are inconsistent with arbitration, another party to the contract is prejudiced by the order compelling arbitration.
>
> A party may be prejudiced if, for example, it is forced to bear the expenses of a lengthy trial; evidence helpful to a party is lost because of delay in the seeking of arbitration[;] a party's opponent takes advantage of judicial discovery procedures not available in arbitration[;] or, by reason of delay, a party has taken steps in litigation to its detriment or expended significant amounts of money thereupon.

Id. at 229, 230, 321 S.E.2d at 876-77 (citations omitted).

Analyzing the case at bar in light of *Cyclone*, we find that Coastline did not waive the right to arbitration because Miller was not prejudiced by the order compelling arbitration. Miller did not have to bear the expenses of a lengthy trial. There is nothing in the record or Miller's brief to indicate that evidence was lost because of any delay in seeking arbitration. Coastline did not take advantage of judicial discovery procedures not available in arbitration since no discovery was conducted.

Miller argues that it was prejudiced by being forced to take steps in litigation and to expend significant amounts of money in filing suit and in defending the motion to disqualify its counsel. The trial court agreed. Defendants point out, and plaintiff does not dispute, that defendants made only two motions; one to disqualify plaintiff's counsel, and one to stay the judicial proceedings and compel arbitration. There is nothing in the record to contradict defendants' representation. In order to constitute prejudice, plaintiff would have had to expend funds because of defendants' delay in demanding arbitration. We find that the funds expended in defending the motion to disqualify were not due to the two-month period between plaintiff's breach and defendants' motion to compel arbitration. As defendants point out, plaintiff would have incurred such expenses whether the case was litigated or arbitrated. Similar-

ly, since plaintiff opted to pursue the claim in court, the funds expended in preparation for litigation were not connected in any fashion to the delay between Miller's filing and Coastline's response. We find that Coastline did not, through its actions, impliedly waive its contractual right to arbitrate and that an order compelling arbitration would not prejudice Miller.

For the reasons set forth above, the order of the trial court is reversed, and the cause is remanded for entry of an order compelling arbitration.

Reversed and remanded.

Judges ARNOLD and LEWIS concur.

RANDY WESTBROOK, PLAINTIFF v. ANDREW COBB, JR., DEFENDANT

No. 918SC174

(Filed 7 January 1992)

1. Negligence § 10.2 (NCI3d)— automobile accident—injury to plaintiff's back—injury not foreseeable

The chain of events resulting in plaintiff's injury was not reasonably foreseeable and within the contemplation of an ordinarily prudent individual, since defendant could not reasonably expect that as a result of his vehicle striking a utility pole with a transformer attached, with wires extending to the house across the street, that such wires would be pulled causing sparks which would then ignite a fire in the house; furthermore, a defendant could not reasonably expect that as a result of this house fire a resident of said house would arrive on the scene from a different location, would voluntarily proceed to enter the house while water was still being applied to it, and would injure his back in the process of retrieving personal property. Rather, plaintiff's intentional and purposeful entry into the house interrupted the causal chain of events between defendant's act and plaintiff's injury so that the occurrence was not one which naturally flowed from defendant's negligence.

Am Jur 2d, Negligence §§ 491, 492, 496, 497, 591, 592, 595, 620, 621, 625.

2. Negligence § 17 (NCI3d)— house fire—entry to retrieve possessions—rescue doctrine inapplicable

The rescue doctrine was not applicable in this case where plaintiff voluntarily and purposefully chose to leave a place of safety for the purpose of entering his house to extricate belongings after a fire had been extinguished but while water was still being administered.

Am Jur 2d, Fires § 44; Negligence §§ 689, 701-703.

Liability of one negligently causing fire for personal injuries sustained in attempt to control fire or to save life or property. 42 ALR2d 494.

APPEAL by plaintiff from judgment entered 1 November 1990 by *Judge Robert H. Hobgood* in LENOIR County Superior Court. Heard in the Court of Appeals 13 November 1991.

On the morning of 28 January 1985, defendant was driving an automobile in an easterly direction along R.P. 1757 near Grifton when he struck a utility pole across from the Westbrook house. Trooper J. R. Letchworth was called to investigate the accident. When he arrived he found defendant's car against a utility pole, which was partially broken and pushed over. A transformer was attached to the utility pole and wires ran across the road from it to service plaintiff's house. The utility pole was located off the paved portion of the highway.

At the time of the accident, Donald Johnson, Chief of the Grifton County Fire Department, lived down the road across an open field from plaintiff's house. His mother told him of the accident and approximately ten to fifteen minutes later he arrived at the scene. He was standing against defendant's car when he turned to discover the Westbrook home on fire. After ascertaining the house was empty, Johnson drove into Grifton to set off the fire alarm. Johnson got the fire truck, returned to the scene and began fighting the fire. During this time, plaintiff was at some stables approximately one and one-half miles from his home but his brother had alerted him to the fire. Almost simultaneously with the arrival of the fire truck, plaintiff arrived with his brother.

Plaintiff assisted in bringing the fire under control. With the fire seemingly under control, but water still being applied to the house, plaintiff and his brother entered the house to retrieve a

metal box with titles, deeds and birth certificates. While inside, plaintiff and his brother decided to attempt to retrieve additional items. Plaintiff was in the process of getting some clothes off a rack when he apparently injured himself. He believed the injury to be only a pulled muscle but when the condition did not improve, plaintiff's doctor referred him to an orthopaedic surgeon who eventually performed surgery on plaintiff's back for an acutely herniated disc.

After the fire was extinguished, Mr. Johnson conducted an investigation of the fire, during which time he discovered a gas line underneath the kitchen with an electric line across it. Evidence at trial tended to establish the blow to the utility pole and transformer caused a surge of electricity to run through the wires into the house. The electrical wires sparked, thereby igniting the gas line next to it and causing a blowtorch effect on the kitchen floor. While the evidence was conflicting as to the precise cause of the fire, all of the experts agreed that the fire was related in some way to the impact to the utility pole.

This case was tried before a jury. At the close of plaintiff's evidence, defendant moved for a directed verdict pursuant to Rule 50(a), N.C. Rules of Civil Procedure, which was granted. Plaintiff thereby appeals that judgment.

Duffus & Coleman, by Curtis C. Coleman, III, for plaintiff appellant.

Wallace, Morris, Barwick & Rochelle, P.A., by Thomas H. Morris, Martha B. Beam, and Elizabeth H. McCullough, for defendant appellee.

WALKER, Judge.

[1] Plaintiff sets forth five assignments of error in his brief. Of these we need only to consider the first assignment, which is whether the trial court erred in entering a directed verdict at the close of plaintiff's evidence in favor of the defendant on the grounds plaintiff did not establish the requisite elements of a negligence action. Specifically, we find plaintiff failed to prove the essential element of proximate cause, and the trial court did not err in directing a verdict for defendant.

A directed verdict should be granted only in those situations where the evidence, construed in the light most favorable to plain-

tiff, is insufficient to support a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). With regard to negligence actions, in *Oliver v. Royall*, 36 N.C.App. 239, 242, 243 S.E.2d 436, 439 (1978), this Court held:

> [P]laintiff, to overcome a motion for a directed verdict, is required to offer evidence sufficient to establish, beyond mere speculation or conjecture, every essential element of negligence. Upon his failure to do so, a motion for a directed verdict is properly granted. (citations omitted).

In order to sustain a claim of actionable negligence, plaintiff must prove (1) defendant owed a duty to plaintiff, (2) defendant failed to exercise proper care in the performance of that duty, and (3) the breach of that duty was the proximate cause of plaintiff's injury, which a person of ordinary prudence should have foreseen as probable under the conditions as they existed. *Pittman v. Frost*, 261 N.C. 349, 134 S.E.2d 687 (1964); *Burr v. Everhart*, 246 N.C. 327, 98 S.E.2d 327 (1957). Since the absence of any one of these elements will defeat a negligence action, we need only address the question of proximate cause. The North Carolina Supreme Court has stated:

> Proximate cause is a cause which in natural and continuous sequence, unbroken by any new and independent cause, produced the plaintiff's injuries, and without which the injuries would not have occurred, and one from which a person of ordinary prudence could have reasonably foreseen that such a result, or consequences of a generally injurious nature, was probable under all the facts as they existed. Foreseeability is thus a requisite of proximate cause, which is, in turn, a requisite for actionable negligence. (citations omitted).

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 233, 311 S.E.2d 559, 565 (1984). The test of foreseeability as an element of proximate cause does not require that defendant should have been able to foresee the injury in the precise form in which it occurred. Thus, where the defendant could have reasonably foreseen the consequences of his actions and his actions produced a result in continuous sequence, without which the injury would not have occurred, the defendant's actions will be deemed to have proximately caused the plaintiff's injury. *Nance v. Parks*, 266 N.C. 206, 146 S.E.2d 24 (1966).

A steadfast definition of "reasonable foreseeability" has not yet been promulgated, leaving the courts to analyze the facts and ascertain whether an ordinarily prudent man could have foreseen his actions would lead to this result.

> It is not required that the defendant foresee the precise injury, the particular consequences it produces, nor the exact manner in which it occurs. All that is required is that defendant "in the exercise of the reasonable care of an ordinarily prudent person, should have foreseen that some injury would result from [his] negligence, or that consequences of a generally injurious nature should have been expected . . . ." (citations omitted).

Partin v. Carolina Power and Light Company, 40 N.C.App. 630, 633, 253 S.E.2d 605, 609, *disc. review denied*, 297 N.C. 611, 257 S.E.2d 219 (1979). Foreseeability is not construed, however, to require the defendant to anticipate events which are merely possible. *Bolkhir v. N. C. State University*, 321 N.C. 706, 365 S.E.2d 898 (1988).

Here, we do not believe the chain of events resulting in plaintiff's injury to be reasonably foreseeable and within the contemplation of an ordinarily prudent individual. A defendant could not reasonably expect that as a result of his vehicle striking a utility pole with a transformer attached, with wires extending to the house across the street, that such wires would be pulled causing sparks which would then ignite a fire in the house. A defendant could not further reasonably expect that as a result of this house fire a resident of said house would arrive on the scene from a different location, would voluntarily proceed to enter the house while water was still being applied to it, and injure his back in the process of retrieving personal property. Although we are not prepared to promulgate a bright line test for the doctrine of foreseeability and application thereof, we are also not prepared to extend the concept to encompass the facts in this case.

Plaintiff argues it need not be shown that defendant could foresee what would happen, nor is it relevant that the eventual consequences, the fire and rescue, were improbable. Rather, all plaintiff needs to show is that defendant set in motion a chain of circumstances that led ultimately to plaintiff's injury. As the Supreme Court has noted, however, proximate cause is to be determined on the facts of each case upon mixed considerations of logic, common sense, justice, policy and precedent. "[I]t is 'inconceivable

that any defendant should be held liable to infinity for all the consequences which flow from his act,' some boundary must be set." *Sutton v. Duke*, 277 N.C. 94, 108, 176 S.E.2d 161, 169 (1970), *citing* Prosser, Law of Torts Sec. 50 (3d Ed. 1964) at p. 303. Consequently, we cannot find plaintiff's injury to have been the natural result of a continuous sequence of actions set into motion by defendant's initial act of striking the utility pole. In this case, plaintiff's intentional and purposeful entry into the house interrupted the causal chain of events between defendant's act and plaintiff's injury, so that the occurrence was not one which naturally flowed from defendant's negligence.

[2] Plaintiff also argues that his injury while attempting to rescue property falls within the realm of the "rescue doctrine." The rescue doctrine requires a tortfeasor to anticipate the possibility "some bystander will yield to the meritorious impulse to save life or even property from destruction, and attempt a rescue." *Britt v. Mangum*, 261 N.C. 250, 254, 134 S.E.2d 235, 238 (1964). Thus, where applicable, the doctrine stretches the foreseeability limitation to help bridge the proximate cause gap between defendant's act and plaintiff's injury. *Partin v. Carolina Power and Light Co.* at 634, 253 S.E.2d at 610. The question, then, is whether the rescue doctrine applies under these facts.

In *McNair v. Boyette*, 282 N.C. 230, 192 S.E.2d 457 (1972), the Court held the rescue doctrine did not apply where evidence indicated plaintiff came upon the scene of an automobile accident, investigated and found no one injured or in need of rescue. He then crossed the highway to get a flashlight for the purpose of directing traffic. When he stepped onto the highway he was hit by defendant's car. In holding the rescue doctrine to be inapplicable, the Court noted the plaintiff had reached, but then intentionally left, a place of safety. Under these facts, the Court concluded the defendant's negligence was not a proximate cause of plaintiff's injuries.

In this case, we too must conclude the rescue doctrine to be inapplicable. This doctrine was intended to encourage the rescue of others from peril and immediate danger by insulating the rescuer from contributory negligence claims, and by holding the tortfeasor liable for any injury to the rescuer on the grounds a rescue attempt is foreseeable. The underlying premise recognizes the need to bring an endangered person to safety. Here, however, plaintiff voluntarily

and purposefully chose to leave a place of safety for the purpose of entering the house to extricate belongings. We do not construe the rescue doctrine to encompass a rescue of property under all situations, especially in such a case where the danger to the property had passed, the fire was being brought under control, and plaintiff had already attained a level of safety. To hold otherwise would be to shield an injured plaintiff from the general principles of negligence, where plaintiff intentionally placed his or her own life at risk in order to retrieve property. Consequently, we decline to extend the rescue doctrine to the retrieving of personal property under the facts in this case.

Affirmed.

Judges WELLS and LEWIS concur.

PAUL DAVID MENARD, AN INFANT, BY AND THROUGH HIS GUARDIAN AD LITEM, PAUL F. MENARD, AND PAUL F. MENARD, INDIVIDUALLY, PLAINTIFFS v. RONALD EDWARD JOHNSON, JR., DEFENDANT, AND NEAL OWEN PARKS, DEFENDANT AND THIRD PARTY PLAINTIFF v. RONALD EDWARD JOHNSON, SR., THIRD PARTY DEFENDANT

No. 911SC78

(Filed 7 January 1992)

Torts § 5 (NCI3d)— settlement—codefendant's cross claim for contribution barred—defendant's right to file cross claim or counterclaim against same codefendant not barred

A defendant who settles with a plaintiff and invokes N.C.G.S. § 1B-4 to bar a cross claim for contribution from a codefendant does not extinguish his rights to pursue his own cross claim or counterclaim against the same codefendant for damages (personal and property) allegedly inflicted upon him by the codefendant.

Am Jur 2d, Contribution §§ 82, 113; Counterclaim, Recoupment, and Setoff § 39.

APPEAL by defendant, Ronald Edward Johnson, Jr., and third party defendant, Ronald Edward Johnson, Sr., from judgment entered

1 October 1990 by *Judge J. Herbert Small* in CURRITUCK County Superior Court. Heard in the Court of Appeals 5 November 1991.

On 31 March 1989 a pickup truck driven by Neal Parks (Parks) collided with a Volkswagen automobile driven by Ronald Edward Johnson, Jr. (Johnson Jr.). The plaintiff, Paul Menard (plaintiff), was a passenger in Johnson Jr.'s Volkswagen which Ronald Edward Johnson, Sr. (Johnson Sr.) owned.

On 15 May 1989 plaintiff filed this action against Johnson Jr. and Parks alleging that both defendants were negligent. On 27 July 1989 Parks filed an answer and cross claim for contribution against Johnson Jr. Parks also filed a third party complaint against Johnson Sr. seeking contribution. On 24 August 1989 Johnson Jr. filed an answer and cross claim against Parks. In his cross claim Johnson Jr. sought contribution and recovery for his own personal injuries. Johnson Sr. then filed an answer to the third party complaint and a counterclaim for property damage to his vehicle.

The trial court entered a consent judgment on 9 May 1990 which approved a settlement between the Johnsons' liability insurer, United Services Automobile Association (USAA) and the plaintiff. The settlement released the Johnsons from all liability in consideration of a $50,000 payment. Parks did not consent to the settlement and did not have notice of the settlement until after judgment was entered.

The Johnsons then filed supplemental pleadings and pled the settlement and consent judgment in bar of Parks' contribution claim pursuant to G.S. 1B-4. Parks also filed supplemental pleadings and alleged that the Johnsons irrevocably ratified USAA's settlement and that by invoking G.S. 1B-4 in bar of Park's claim the Johnsons had elected a remedy and judicially admitted that they were joint tort-feasors proximately causing the accident.

The Johnsons filed a motion for partial summary judgment against Parks' contribution claim. Parks filed a motion for partial summary judgment seeking dismissal of the Johnsons' claims. The trial court granted both motions.

D. Keith Teague, P.A., by D. Keith Teague, for defendant-appellant, Ronald Edward Johnson, Jr., and third party defendant-appellant, Ronald Edward Johnson, Sr.

Hornthal, Riley, Ellis & Maland, by L. P. Hornthal, Jr. and John D. Leidy, for defendant-appellee.

EAGLES, Judge.

The sole issue raised by this appeal is whether a defendant who settles with a plaintiff and invokes G.S. 1B-4 to bar a cross claim for contribution from a co-defendant also extinguishes his rights to pursue his own cross claim or counterclaim against the same co-defendant for damages (personal and property) allegedly inflicted upon him by the co-defendant. We hold that the defendant does not lose his right to cross claim or counterclaim.

Parks first argues that the Johnsons admitted their negligence was a proximate cause of the collision by "irrevocably ratifying USAA's settlement" with the plaintiff. Parks contends that because the Johnsons' "ratification" of the USAA settlement is an admission of negligence, the Johnsons have forfeited their cross claims for personal injury and property damage. To support his contention, Parks relies on: *Keith v. Glenn*, 262 N.C. 284, 136 S.E.2d 665 (1964); *Smithwick v. Crutchfield*, 87 N.C. App. 374, 361 S.E.2d 111 (1987); and *Johnson v. Alston*, 29 N.C. App. 415, 224 S.E.2d 293, *disc. rev. denied*, 290 N.C. 308, 225 S.E.2d 829 (1976).

A common fact scenario exists in each of the cases cited by Parks. The plaintiff and defendant were involved in an automobile accident. The plaintiff's carrier entered a settlement with the defendant. The plaintiff then filed suit against the defendant alleging that the defendant's negligence caused him damage, and the defendant counterclaimed. The plaintiff then pled his carrier's settlement in bar of the defendant's counterclaim. In each case the court held that plaintiff's plea of the defendant's release in bar of the counterclaim constituted a ratification of the settlement and barred the plaintiff's action.

The cases cited by Parks are each factually distinguishable from the instant case. In each case, the plaintiff's carrier entered a settlement with the defendant, and the plaintiff then sought to maintain an action to recover for his injuries against the same defendant. Here, however, the Johnsons are not seeking to recover from the party with whom their carrier settled. The Johnsons are seeking recovery from Parks. The Johnsons' carrier has not entered a settlement agreement with Parks. To the contrary, the only settlement here was between the Johnsons' carrier and the plaintiff. That settlement dealt solely with the plaintiff's injuries, and did not address the Johnsons' personal injury and property damage claims against Parks. Accordingly, we hold that there is

no settlement between USAA and Parks or between USAA and the plaintiff which the Johnsons could have ratified in bar of their claims against Parks.

However, Parks argues that even if we do not extend the ratification doctrine to encompass the present fact situation, the Johnsons have admitted their liability by electing to rely on the Uniform Contribution among Tort-Feasors Act (Uniform Act) to bar Parks' contribution claim. G.S. 1B-4 provides in pertinent part:

> When a release or a covenant not to sue or not to enforce judgment is given in good faith to one of two or more persons liable in tort for the same injury or the same wrongful death:
>
> * * *
>
> (2) It discharges the tort-feasor to whom it is given from all liability for contribution to any other tort-feasor.

Parks argues that by relying on G.S. 1B-4 to bar Parks' claim for contribution, the Johnsons admitted that they were "one of two or more persons liable in tort for the same injury." In short, Parks claims that the Johnsons admitted they were tort-feasors. We disagree.

The plain language of G.S. 1B-4 does not address cross claims or counterclaims for personal injury or property damage. The statute only addresses the statutory right to contribution. Statutes must be construed as written. *Burchette v. Davis Distributing Co.*, 243 N.C. 120, 125, 90 S.E.2d 232, 236 (1955). Where "the language of a statute is clear and unambiguous judicial construction is not necessary. Its plain and definite meaning controls." *Underwood v. Howland*, 274 N.C. 473, 479, 164 S.E.2d 2, 6 (1968) (citation omitted). Here, the statute clearly does not address personal injury or property damage claims. For this reason the assignment is overruled.

Furthermore, it is well settled that North Carolina public policy encourages prompt settlement of disputed claims. *See, e.g., North Carolina Baptist Hosp., Inc. v. Mitchell*, 323 N.C. 528, 533, 374 S.E.2d 844, 846 (1988). Indeed, the Uniform Act contemplates that settlements are to be encouraged, *Wheeler v. Denton*, 9 N.C. App. 167, 171, 175 S.E.2d 769, 772 (1970), and even provides an incentive for early settlement. The Uniform Act permits a tort-feasor to enter into a good faith settlement and release with an injured

party and relieve himself of further liability to remaining joint tort-feasors for contribution. G.S. 1B-4. The rule Parks proposes that this Court adopt by decision would remove this statutory incentive for early settlement. For example, a defendant who was sued in tort with another co-defendant and who sustained personal injury or property damage, would be discouraged from settling with the plaintiff and pleading the settlement in bar of his co-defendant's contribution claim. According to Parks' logic, which we have rejected here, if the defendant did raise the settlement in bar of contribution, he would lose his cause of action against the co-defendant. Parks' logic would also leave him with an unimpaired right to sue Johnson for property damage but would bar Johnson's claim. We reject such results and overrule the assignment of error.

Accordingly, we reverse the entry of partial summary judgment against the Johnsons and remand for trial.

Reversed and remanded.

Judges JOHNSON and ORR concur.

PEARLIE COGGINS DOZIER, PLAINTIFF v. ANNETTE CRANDALL, DEFENDANT

No. 913SC209

(Filed 7 January 1992)

Rules of Civil Procedure § 6 (NCI3d)— alias summons issued 92 days after original summons—action discontinued—no authority of court to extend time for filing

The trial court did not err in dismissing plaintiff's case on the ground that it did not have authority to extend the time for issuing the alias and pluries summons so that it would relate back to the original summons, since *the action was discontinued* when the alias and pluries summons was filed 92 days after issuance of the original summons; the action was deemed to have commenced on the date the alias summons was issued; and that date was more than three years from the date on which the cause of action arose. N.C.G.S. § 1A-1, Rule 4(c) and Rule 6(b).

Am Jur 2d, Limitation of Actions §§ 311, 312; Process § 119.

APPEAL by plaintiff from judgment entered 10 December 1990 by *Judge David D. Reid, Jr.* in PITT County Superior Court. Heard in the Court of Appeals 3 December 1991.

Plaintiff filed this action 15 March 1990 alleging she was injured in an automobile accident caused by the negligence of the defendant on 19 March 1987. A summons was issued 15 March 1990 and returned unserved on 27 March 1990. On 15 June 1990, an alias and pluries summons was issued (92 days after the issuance of the original summons) and returned unserved on 26 June 1990.

On 20 August 1990, defendant accepted service and filed an answer raising the three year statute of limitations as a defense. Also on 20 August 1990, defendant filed a motion for judgment on the pleadings asserting the statute of limitations as a bar to plaintiff's claim. That same day plaintiff filed a motion pursuant to Rule 6 of the North Carolina Rules of Civil Procedure requesting that the court extend the period for issuing the alias and pluries summons for three days due to excusable neglect.

On 12 December 1990, the trial court filed a judgment denying plaintiff's motion and granting defendant's motion on the grounds that plaintiff's claim is barred by the three year statute of limitations.

From this judgment, plaintiff appeals.

Evans & Lawrence, by Antonia Lawrence, for plaintiff-appellant.

Gaylord, Singleton, McNally, Strickland & Snyder, by Danny D. McNally, for defendant-appellee.

ORR, Judge.

The issue on appeal is whether the trial court erred in dismissing plaintiff's case on the ground that it did not have authority to extend the time for filing the alias and pluries summons. For the reasons set forth below, we affirm the judgment of the trial court.

Under Rule 4 of the North Carolina Rules of Civil Procedure, a summons must be served within 30 days of its issuance. N.C. Gen. Stat. § 1A-1, Rule 4(c) (1990). A summons not served within 30 days loses its vitality and becomes *functus officio*, and service obtained thereafter does not confer jurisdiction on the trial court

over the defendant. *Carolina Narrow Fabric Co. v. Alexandria Spinning Mills, Inc.*, 42 N.C. App. 722, 724, 257 S.E.2d 654, 655 (1979). However, although a summons not served within 30 days becomes dormant and unserveable, under Rule 4(c) it is not invalidated nor is the action discontinued. *Huggins v. Hallmark*, 84 N.C. App. 15, 18, 351 S.E.2d 779, 781 (1987).

> If the summons is not served within thirty days, Rule 4(d) permits the action to be continued, so as to relate back to the date of issue of the original summons, by an endorsement from the clerk or issuance of an alias or pluries summons within ninety days of the issuance of the last preceding summons. Any such alias or pluries summons, like the original summons, must be served within thirty days of issuance.

Lemons v. Old Hickory Council, Boy Scouts of America, Inc., 322 N.C. 271, 275, 367 S.E.2d 655, 657, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988).

Here, the alias summons was issued 92 days after the issuance of the preceding summons. The trial court found that the failure to issue the alias summons within 90 days was due to excusable neglect. The trial court, however, stated in its judgment:

> Nevertheless, plaintiff's motion to file (sic) alias summons is hereby denied for the reason that, as a matter of law, Rule 6(b) of the North Carolina Rules of Civil Procedure does not confer upon the Court the authority to permit an enlargement of time within which to issue an alias or pluries summons after the time specified in Rule 4(d) and Rule 4(e) such that the untimely issued alias or pluries summons would relate back to the previously issued summons. *The Court is of the opinion that it does not have discretion to prevent a discontinuance of this action under Rule 4(e).* . . . If permitted under Rules 6(b) and 4(e) the Court would exercise its discretion and allow the alias summons issued in the cause on June 15, 1990 to relate back to the previously issued summons on March 15, 1990. [Emphasis added.]

N.C. Gen. Stat. § 1A-1, Rule 6(b) (1990) provides:

> When by these rules . . . an act is required or allowed to be done at or within a specified time, the court for cause shown may at any time in its discretion with or without motion or notice order the period enlarged if request therefor is made

before the expiration of the period originally prescribed or as extended by a previous order. *Upon motion made after the expiration of the specified period, the judge may permit the act to be done where the failure to act was the result of excusable neglect.* Notwithstanding any other provisions of this rule, the parties may enter into binding stipulations without approval of the court enlarging the time, not to exceed in the aggregate 30 days, within which an act is required or allowed to be done under these rules, provided, however, that neither the court nor the parties may extend the time for taking any action under Rules 50(b), 52, 59(b), (d), (e), 60(b), except to the extent and under the conditions stated in them. [Emphasis added.]

Plaintiff relies on *Lemons* where the issue was "whether by adopting Rule 6(b), the General Assembly has given our trial courts authority to breathe new life and effectiveness into such a summons retroactively after it has become *functus officio*." 322 N.C. at 274, 367 S.E.2d at 657. The Court concluded that "the General Assembly has given our trial courts such authority by enacting Rule 6(b)" and held that a trial court has discretion to extend the time provided in Rule 4(c) for serving a summons upon a finding of excusable neglect. *Id.*

In *Lemons*, the plaintiff was allegedly injured on 15 May 1982 and on 21 March 1984 commenced an action against defendant which was terminated by voluntary dismissal on 6 February 1985. Then an action was commenced 6 February 1986, and a summons was issued that day but was not served. An alias summons was issued 2 May 1986 and served 5 June 1986, more than 30 days after its issuance. On 23 June 1986, defendant filed a motion to dismiss. On 10 September 1986, defendant was served with an alias summons issued that same day, more than 90 days after the issuance of the preceding summons such that the action did not relate back to the original summons. Thus, the plaintiff's action was barred by the statute of limitations. On 13 October 1986, plaintiff filed a motion for retroactive extension of time, *nunc pro tunc*, from 2 June 1986 to 6 June 1986 to serve the alias summons.

Lemons is distinguishable from the case *sub judice*, and we hold that it is not controlling here. *Lemons* holds that a trial court pursuant to Rule 6 may in its discretion and upon a finding of excusable neglect extend the time provided in Rule 4(c) for service

of summons. 322 N.C. at 274, 367 S.E.2d at 657. The failure to serve a summons within the required 30 days does not invalidate the summons, though it remains dormant and unserveable unless it is extended by endorsement or alias or pluries summons. *Huggins*, 84 N.C. App. at 15, 351 S.E.2d at 781; Rule 4(c). Thus, in *Lemons* the Court permitted extension of time to *serve* a dormant summons and thus revive it.

In contrast, here *the action* has been discontinued. Rule 4(e) specifically provides that where there is neither endorsement nor issuance of alias or pluries summons within 90 days after issuance of the last preceding summons, the action is *discontinued* as to any defendant not served within the time allowed and treated as if it had never been filed. *Johnson v. City of Raleigh*, 98 N.C. App. 147, 148-49, 389 S.E.2d 849, 851, *disc. review denied*, 327 N.C. 140, 394 S.E.2d 176 (1990). Under Rule 4(e), either an extension can be endorsed by the clerk or an alias or pluries summons can be issued after the 90 days has run, but "the action is deemed to have commenced, as to such a defendant, on the date of the endorsement or the issuance of the alias or pluries summons." *Lemons*, 322 N.C. at 275, 367 S.E.2d at 657. Thus, when plaintiff failed to have this action continued through endorsement or issuance of alias or pluries summons within 90 days, this action was discontinued.

While Rule 6 under the *Lemons* case gives the trial court discretion upon a showing of excusable neglect to permit *an act* to be done, we find no authority in the rule or in *Lemons* to overrule the express language of Rule 4(e) as to the effect of failing to have an endorsement or alias or pluries summons issued "within the time specified in Rule 4(d) . . . ." The time specified in Rule 4(d) is 90 days, and plaintiff regrettably did not comply with this specific time limit. The effect pursuant to Rule 4(e) is that the original action was discontinued, and any subsequent issuance of a summons in the case will result in the action being deemed to have commenced from that date.

Therefore, plaintiff's action is deemed to have commenced 15 June 1990, the date the alias summons was issued, more than three years from the date on which the cause of action arose. Thus plaintiff's action is barred by the statute of limitations, and we accordingly find that the trial court correctly granted defendant's motion for judgment on the pleadings.

Affirmed.

Judges JOHNSON and EAGLES concur.

RONALD WILLIAMS, P.A., PETITIONER v. RAMONA SANDS GARRISON, RESPONDENT

RONALD C. WILLIAMS, INDIVIDUALLY, PETITIONER v. RAMONA SANDS GARRISON, RESPONDENT

No. 9122SC94

(Filed 7 January 1992)

1. **Attorneys at Law § 56 (NCI4th)— alimony and child support— contingent fee contract based on amount of equitable distribution—contract void**

Where it is indisputable that a contingent fee contract for divorce based on the amount of an equitable distribution is void, and where the law of this state is clear that contingent fee contracts for alimony and child support are also void, a contingent fee contract for alimony and child support based on the amount of an equitable distribution is void as against public policy.

Am Jur 2d, Attorneys at Law § 257.

2. **Rules of Civil Procedure § 11 (NCI3d)— proceeding not grounded in fact or warranted by law—improper purpose—sanctions proper**

The trial court properly imposed Rule 11 sanctions against petitioner attorney for filing of a proceeding which was not well grounded in fact, was not warranted by existing law, and was interposed for an improper purpose where petitioner filed a petition for partition and sale of lakefront property belonging to respondent and her husband in violation of a standing Temporary Restraining Order postponing the sale of the property and effectively barring petitioner from taking any such action, and petitioner filed this petition four days after representing himself at a hearing for preliminary injunction on this issue, in full knowledge that the TRO was still in effect and a decision on the preliminary injunction pending.

Am Jur 2d, Costs § 30.

Attorney's liability under state law for opposing party's counsel fees. 56 ALR4th 486.

APPEAL by petitioner from order and sanctions entered 11 December 1990 in IREDELL County Superior Court by *Judge C. Preston Cornelius*. Heard in the Court of Appeals 6 November 1991.

Ronald C. Williams, pro se.

Charles M. Welling for Ramona Sands Garrison, respondent.

LEWIS, Judge.

Petitioner represented respondent in an action for equitable distribution, alimony and child support. The retainer letter reads in relevant part:

> It was a pleasure visiting with you. After studying your case, I believe that a fair and reasonable fee would be 15 percent of your share of the equitable distribution for all items except the items of cash. . . . On these items that 20 percent is reasonable. This fee would include a hearing for permanent child support and temporary and permanent alimony hearings and trial as well as equitable distribution. It will be necessary for you to pay out of pocket expenses such as court reporter fees for depositions, expert witness fees, appraisals, photocopies, long distance telephone costs, etc. as we go along. Cost does not include mileage for me.
>
> If this arrangement is satisfactory, would you please sign below. . . .

After Mr. Williams represented the respondent in these matters, as well as in an action by her former husband to partition jointly owned lake front property, Mr. Williams sought to assert a charging lien against the same property to protect his rights under the contract. Subsequent to a hearing for partition by sale pursuant to the lien, the trial court declared the contract void for violation of the public policy set forth in *Davis v. Taylor*, 81 N.C. App. 42, 344 S.E.2d 19 (1986) and *In Re Foreclosure of Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986). Petitioner was also sanctioned pursuant to Rule 11 of the North Carolina Rules of Civil Procedure

for court costs, attorney's fees and out of pocket expenses. Petitioner appeals.

[1] Mr. Williams argues that the contract should not be held void as against public policy because it did not provide for a fee to be paid out of alimony or child support. Mr. Williams further argues that his contract sets a contingent fee for equitable distribution and in effect, no charge for the other services, that a contingent fee contract for equitable distribution is valid pursuant to *In Re Foreclosure of Cooper*, at 29, 344 S.E.2d at 29, and that no public policy would be served by requiring him to charge an additional, hourly rate for the alimony and child support.

The contract does not expressly state that there is no charge for child support and alimony, but rather that the fee for representation for "permanent child support and temporary and permanent alimony hearings as well as for equitable distribution," is "15 percent of your share of the equitable distribution for all items except cash," and 20 percent for cash. Our reading of the contract indicates that the contract is a contingent fee contract for child support and alimony as well as for equitable distribution, to be calculated on the basis of the client's share of the equitable distribution assets.

Therefore, the question before us is whether the prohibition against contingent fee contracts for alimony and child support applies only where the fee is based on the amount of alimony or child support received. Appellants' reasoning is that the prohibition does not extend to those contracts in which the contingent fee is based on equitable distribution alone.

The law of this state is clear that a contingent fee contract for representation in a divorce proceeding is prohibited. *Thompson v. Thompson*, 313 N.C. 313, 314, 328 S.E.2d 288, 290 (1985). This is true even though such contingent fee cannot be based on the amount of money received in a divorce proceeding proper because no money is at issue. Such contracts are void regardless of how the contingent fee is calculated. The law of this state is clear that a contingent fee contract covering representation for alimony or child support subsequent to a divorce proceeding is likewise void. *Davis v. Taylor*, at 45, 344 S.E.2d at 21. Consequently, a contingent fee contract for either alimony or child support is void regardless of how such fee is to be calculated. Appellant relies on the holding of *In Re Cooper* in arguing that contingent fee

contracts based on the amount of an equitable distribution are valid. The holding of that court was stated in part as follows:

> We conclude that, although a contingent fee contract in a divorce, alimony or child support proceeding is void under *Thompson v. Thompson*, (citations omitted), a *separate* contingent fee contract in an equitable distribution may be fully enforceable.

Id. at 29 (emphasis added). Appellant's contract is not a "separate" contingent fee contract in an equitable distribution because it also includes representation for alimony and child support.

Where it is indisputable that a contingent fee contract for divorce based on the amount of an equitable distribution is void, and where the law of this state is clear that contingent fee contracts for alimony and child support are also void, we hold that a contingent fee contract for alimony and child support based on the amount of an equitable distribution is void as against public policy.

[2] Appellant also assigns as error the trial court's imposition of Rule 11 sanctions against him. Rule 11 of the North Carolina Rules of Civil Procedure states that:

> 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. . . .

In *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706, 714 (1989), the Supreme Court adopted the following standard for appellate review of the granting or denial of motions to impose mandatory sanctions under Rule 11(a):

> The trial court's decision to impose . . . sanctions under N.C.G.S. 1A-1, Rule 11(a) is reviewable de novo as a legal issue. In the de novo review, the appellate court will determine (1) whether the trial court's conclusions of law support its judgment or determination, (2) whether the trial court's conclusions of law are supported by its findings of fact and (3) whether the findings of fact are supported by the sufficiency of the evidence.

Id.

The record shows that Mr. Williams filed, on 30 April 1990, a petition for partition and sale of the lake front property in violation of a standing Temporary Restraining Order postponing the sale of the property and effectively barring Mr. Williams from taking any such action. Mr. Williams filed this petition four days after representing himself at a hearing for preliminary injunction on this issue, in full knowledge that the TRO was still in effect and a decision on the preliminary injunction pending. We therefore conclude that Mr. Williams' filing of Special Proceeding 90 SP 098 was not well grounded in fact and was not warranted by existing law, and that it was imposed for an improper purpose. The trial court's Rule 11 sanctions against petitioner are affirmed.

Affirmed.

Judges WELLS and WALKER concur.

STATE OF NORTH CAROLINA v. FELTON JACOBS, JR.

No. 9116SC65

(Filed 7 January 1992)

1. **Conspiracy § 44 (NCI4th)— sufficiency of evidence of one conspiracy—two convictions—one conviction vacated**

Evidence was sufficient to support only one conviction of defendant for conspiracy, though he was charged with conspiracy to commit larceny of a motor vehicle and conspiracy to commit burning of personal property, where the evidence tended to show that defendant and two others conspired to steal and burn an officer's car for revenge; the conspiracy lasted for a few hours at most; and all of the roadside meetings concerned where to burn the car.

Am Jur 2d, Conspiracy §§ 7-9.

2. **Larceny § 7.2 (NCI3d)— value of stolen property in excess of $400—failure to submit misdemeanor larceny—no error**

The trial court did not err in failing to submit the verdict of misdemeanor larceny to the jury where the only evidence of the value of the car at the time it was stolen was $3,500,

and all defendant's evidence of value related to the car before the owner restored it and made it driveable.

Am Jur 2d, Larceny §§ 45, 46, 174.

3. Larceny § 6 (NCI3d)— evidence of prior offense—admissibility to show motive

The trial court in a larceny and conspiracy case did not err in allowing the prosecutor to ask defendant if the owner of the stolen car had previously found marijuana in defendant's pants pockets and whether defendant was angry because on that earlier occasion the car owner had arrested him for possession of marijuana, since this evidence was admissible under N.C.G.S. § 8C-1, Rule 404(b) to show defendant's motive to steal and burn the vehicle.

Am Jur 2d, Larceny § 153.

APPEAL by defendant from judgment entered 18 May 1990 by *Judge Orlando F. Hudson* in HOKE County Superior Court. Heard in the Court of Appeals 9 October 1991.

The State's evidence presented at trial tended to show the following: In the summer of 1989, William Joseph Humphrey, a lieutenant with the Hoke County Sheriff's Department, owned a 1976 Chevrolet El Camino. The car was in his driveway when he left for work in the evening of 20 July 1989. When he returned on the morning of 21 July 1989 the car was missing. He heard a radio broadcast about a burned abandoned vehicle located on a dirt road a few miles from his home. He drove to this location and saw that the vehicle was his El Camino and that it was burned beyond repair.

The State also presented the testimony of a nineteen-year-old-woman, Neecie Locklear, who said that around 9 p.m. on 20 July 1989 she saw defendant driving a burgundy car down the road in front of her house. He was accompanied by two men whom she identified as Roosevelt "Bad Eye" Woods and Brian Moore. Defendant stopped the car, asked her if she wanted to be a lookout, and said that he was going to "go get that policeman's car." Locklear agreed to go if they would come back with the policeman's car. Twenty to thirty minutes later, the men returned. Defendant was driving Humphrey's car, and Woods was driving the burgundy car. Locklear got into the burgundy car and the group drove around,

stopping several times to discuss where to burn Humphrey's vehicle. Finally, they stopped on a dirt road. The three men then left in Humphrey's car, continuing down the dirt road until they were out of Locklear's sight. They walked back up the road a few minutes later and defendant was carrying a gas can. Locklear said she wanted to see the car. She and defendant walked down the road and saw the car was "blazed up." She testified that defendant said that the men poured gasoline on the car, lit a newspaper, and "threw it on it."

The Hoke County Grand Jury indicted defendant for felonious larceny of a motor vehicle, burning of personal property, conspiracy to commit larceny of a motor vehicle, and conspiracy to commit burning of personal property. Defendant was found not guilty of burning personal property and guilty of felonious larceny and both conspiracies. The trial court sentenced defendant to 16 years imprisonment. Defendant appeals.

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

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant-appellant.

EAGLES, Judge.

On appeal defendant contends that (1) both of defendant's conspiracy convictions must be vacated because there was insufficient evidence that he entered into agreements to do the unlawful acts; (2) one of defendant's conspiracy convictions must be vacated because there was insufficient evidence of two separate agreements; (3) defendant is entitled to a new trial in the larceny case because the trial court refused to submit the verdict of misdemeanor larceny to the jury; and (4) defendant is entitled to a new trial because the trial court erroneously allowed the prosecutor to impeach him with questions and evidence about his possession of marijuana. We agree in part and vacate defendant's conspiracy conviction in 89 CRS 3069. We find no error in the remainder of the trial court's judgment.

[1] Concerning his two convictions for conspiracy, defendant contends first, that both convictions must be vacated because there was insufficient evidence that he entered into any agreement to do the unlawful acts and second, that one conviction must be vacated

because there was insufficient evidence that there were two separate agreements. Here, the State presented sufficient evidence that defendant entered into an agreement to do an unlawful act but insufficient evidence to establish two separate agreements. This Court has said:

> It is well established that the gist of the crime of conspiracy is the agreement itself, not the commission of the substantive crime. It is also clear that where a series of agreements or acts constitutes a *single* conspiracy, a defendant cannot be subjected to multiple indictments consistently with the constitutional guarantee against double jeopardy. Defining the scope of a conspiracy or conspiracies remains a thorny problem for the courts. . . . However, under North Carolina law multiple overt acts arising from a single agreement do not permit prosecutions for multiple conspiracies. There is no simple test for determining whether single or multiple conspiracies are involved: the essential question is the nature of the agreement or agreements, but factors such as time intervals, participants, objectives, and number of meetings all must be considered.
>
> It is only proper that the State, having elected to charge separate conspiracies, must prove not only the existence of at least two agreements, but also that they were separate.

State v. Rozier, 69 N.C. App. 38, 52, 316 S.E.2d 893, 902 (citations omitted) (emphasis in original), *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984).

Here, Neecie Locklear testified that defendant drove up in a car with Woods and Moore and asked if Locklear would be a lookout while he (defendant) went and got the policeman's car. The men left and returned approximately 30 minutes later with Humphrey's car. The group drove around and the participants met several times to decide where to burn the automobile. Applying the factors set out in *Rozier*, the evidence shows that the conspiracy lasted for a few hours at most. Defendant, Moore and Woods were the only participants. The objective was to get revenge against Humphrey by stealing and burning his car. Finally, all of the roadside meetings concerned where to burn the car. After careful consideration of the record, we hold that the evidence establishes the existence of only one agreement and only one conspiracy.

[2] We find defendant's remaining arguments without merit. Defendant contends that the trial court erred by failing to submit the verdict of misdemeanor larceny to the jury. Defendant contends that here there was evidence tending to show the value of the car was $400 or less. We disagree.

> It is unquestioned that the trial judge must instruct the jury as to a lesser-included offense of the crime charged, when there is evidence from which the jury could find that the defendant committed the lesser offense. However, when all the evidence tends to show that the accused committed the crime with which he is charged and there is no evidence of guilt of a lesser-included offense, the court correctly refuses to charge on the unsupported lesser offense. "The *presence of such evidence* is the determinative factor."

State v. Redfern, 291 N.C. 319, 321, 230 S.E.2d 152, 153 (1976) (citations omitted) (emphasis in original).

Here, the only evidence of the value of the car at the time it was stolen was $3500. Humphrey testified that he purchased the car in early 1988 and that "it was in need of some restoration to make it driveable." He said that he worked on the car for several months and that in his opinion the fair market value of the car was $3500. Defendant's arguments all relate to the value of the car before the owner restored it and made it driveable. Accordingly, this assignment of error is overruled.

[3] Finally, defendant contends that the trial court erred by allowing the prosecutor to impeach him with questions and evidence about defendant's earlier possession of marijuana. The prosecutor asked defendant whether Lieutenant Humphrey had previously found marijuana in defendant's pants pocket and whether defendant was angry because on that earlier occasion Humphrey had arrested him for possession of marijuana. This evidence was admissible under G.S. 8C-1, Rule 404(b) to show defendant's motive to steal and burn the vehicle. Accordingly, we overrule this assignment of error.

Vacated as to 89-CRS-3069.

No error as to 89-CRS-3070 and 89-CRS-3071.

Chief Judge HEDRICK and Judge GREENE concur.

MARK R. COMAN, PLAINTIFF-APPELLANT v. THOMAS MANUFACTURING COMPANY, INC., DEFENDANT-APPELLEE

No. 9122SC204

(Filed 7 January 1992)

Evidence and Witnesses §§ 842, 1932 (NCI4th)— wrongful discharge—summaries from trip reports—additional information—inadmissible to show contents of reports

In an action for damages for wrongful discharge from plaintiff's at-will employment as a long distance truck driver where plaintiff alleged that he was discharged because he refused to violate federal law by driving in excess of federally mandated time periods, plaintiff's purported summaries of trip reports were not admissible to explain the contents of the trip reports where the summaries also contained additional information as to hourly times of departure and arrival of the drivers which was not shown on the trip reports but was based on speculation by plaintiff. Nor were the summaries admissible as summaries of voluminous writings under N.C.G.S. § 8C-1, Rule 1006 since they do not accurately represent the underlying documents.

Am Jur 2d, Evidence §§ 458, 470.

APPEAL by plaintiff from judgment entered 4 September 1990 by *Judge Joseph John* in DAVIDSON County Superior Court. Heard in the Court of Appeals 2 December 1991.

Larry L. Eubanks for plaintiff appellant.

Constangy, Brooks & Smith, by W. R. Loftis, Jr. and Robin E. Shea, for defendant appellee.

WALKER, Judge.

Plaintiff Mark R. Coman brought this action against defendant Thomas Manufacturing Company, Inc. seeking damages for wrongful discharge from his at-will employment. On 25 January 1988, at the initial hearing on this matter, the trial court dismissed the action upon defendant's Rule 12(b)(6) motion. The Supreme Court reversed the dismissal. *See Coman v. Thomas Manufacturing Co., Inc.*, 325 N.C. 172, 381 S.E.2d 445 (1989). The Court's decision recognized that a cause of action may lie against an employer for the

discharge of an "at-will" employee when the employee is discharged because he refuses to commit some act in violation of the law. Accordingly, the case was remanded for trial to determine whether plaintiff was actually discharged for his refusal to violate federal law. After trial, a jury decided defendant was not discharged "for a wrongful purpose or reason." Pursuant to the verdict, judgment was entered denying plaintiff any relief. Plaintiff appeals this judgment.

Evidence presented at trial indicates plaintiff began working for defendant as a part-time employee in 1978. From 1984 until his discharge in 1987, he was employed as a long-distance truck driver, hauling goods for defendant between Thomasville, North Carolina and such distant points as Michigan. The driving operations of defendant are governed by regulations of the United States Department of Transportation (DOT). These regulations provide that a driver cannot drive for a longer period than a 10 hour shift followed by a rest period of at least 8 hours. Plaintiff alleged defendant required plaintiff and other drivers to operate their vehicles for periods longer than the regulations allow. According to plaintiff, when he informed defendant he would not drive in excess of the DOT mandated time periods, he was discharged.

In support of his contention, plaintiff produced certain evidence in the form of documents. This evidence included: (1) a road atlas showing routes used by plaintiff and the other drivers; and (2) certain "trip reports" for the twelve weeks prior to plaintiff's discharge. These trip reports were the business records of Hertz-Penske who leased the long-distance trucks to defendant. Defendant's drivers were required to fill out a trip report for each round-trip journey they undertook. The information on these one page trip reports included the truck number, driver's name, dates of the trip, mileage of the trip, destination (including date arrived), date returned home, and route taken on the trip. However, these trip reports did *not* include the time (hour) of departure and arrival. From these trip reports, plaintiff prepared certain "summaries" (Exhibits L-1 through L-13). The trial court sustained defendant's objection to these summaries.

In preparing these summaries, plaintiff obtained certain information from the Hertz-Penske reports. In addition, the summaries also contained the "actual" *hourly* time of arrival and departure and the "legal" *hourly* time of arrival and departure. These times

were not included in the information from the Hertz-Penske trip reports, but rather were reconstructed from plaintiff's memory.

In *Ray D. Lowder, Inc. v. North Carolina State Highway Commission*, 26 N.C.App. 622, 217 S.E.2d 682, *cert. denied*, 288 N.C. 393, 218 S.E.2d 467 (1975), this Court was presented with a situation similar to the present controversy. In that case, plaintiff had been sent many damage reports over a long period of time. These reports related to injuries Lowder, Inc. had purportedly incurred in conducting its business. Plaintiff sought to introduce, as a business record, its own compilation of these damage reports. Our Court held the compilations inadmissible since they were: (1) not prepared in the regular course of business; (2) prepared for litigation; (3) not prepared contemporaneously with the events recorded in the damage reports; and (4) a product of the compiler's personal judgment, discretion and memory after a lapse of four years. *Id.* at 650-651, 217 S.E.2d at 699-700.

Plaintiff suggests that *Lowder* should not control this situation, but rather that the holding in *State v. Rhodes*, 202 N.C. 101, 161 S.E. 722 (1932), should control. In that case the Court held that parol evidence was admissible to explain the contents of a large number of documents. Thus, the person who makes the examination of the documents can properly testify as to the contents thereof, since the production of the documents and the privilege of cross-examination afford the opposing party ample protection. *Id.* at 104, 161 S.E. at 723. *Rhodes* does not address the situation presented in the present case, the accuracy of the summaries of the underlying materials.

Plaintiff also contends the summaries are admissible as summaries of voluminous writings under Rule 1006, N.C. Rules of Evidence. This rule provides:

> The contents of voluminous writings, recordings, or photographs which cannot conveniently be examined in court may be presented in the form of a chart, summary, or calculation. The originals, or duplicates, shall be made available for examination or copying, or both, by other parties at a reasonable time and place. The court may order that they be produced in court.

The official comment to Rule 1006 states that North Carolina Rule 1006 is identical to Rule 1006 of the Federal Rules of Evidence.

Under decisions of the federal courts, summaries are admissible if they are an *accurate* summarization of the underlying materials involved. *Davis & Cox v. Summa Corp.*, 751 F.2d 1507, 1516 (9th Cir. 1985); *Needham v. White Laboratories, Inc.*, 639 F.2d 394, 403 (7th Cir.), *cert. denied*, 454 U.S. 927, 70 L.Ed.2d 237 (1981); *White Industries, Inc. v. Cessna Aircraft Co.*, 611 F. Supp. 1049, 1070 (D.C.Mo. 1985). However, a "summary" is properly excluded from evidence if it does not fairly represent the underlying document. *Davis & Cox v. Summa Corp., supra; United States v. Drougas*, 748 F.2d 8 (1st Cir. 1984). In particular, a "summary" should be excluded if the basis for the summary is a party's unsupported speculation. *United States v. Sorrentino*, 726 F.2d 876 (1st Cir. 1984).

Here, plaintiff could have properly summarized the Hertz-Penske trip reports which provided a lot of information on the travels of defendant's long-distance truck drivers. However, since the summaries of these trip reports also contained additional information as to the hourly time of departure and arrival of the drivers, such information was based upon speculation by plaintiff and was not an accurate summarization of the underlying material. The trial court properly excluded the summaries, and in the trial of this case, we find

No error.

Judges WELLS and LEWIS concur.

ROSE'S STORES, INC., PLAINTIFF v. BRADLEY LUMBER COMPANY, INC., DEFENDANT

No. 909SC1343

(Filed 7 January 1992)

Venue § 7 (NCI3d)— action for sanctions and damages—transitory action—no removal as matter of right

The trial court properly denied defendant's motion to remove this action as a matter of right from Vance County, the county of plaintiff's principal place of business, to McDowell County, the situs of certain commercial property formerly leased by plaintiff and the county of defendant's principal place of

business, since the gravamen of plaintiff's action was not the title to or interest in the commercial property, though a determination of the validity of the lease assignment and of the propriety of the notice of default and termination to the landlord was necessary to a resolution of plaintiff's claims, but was instead plaintiff's right to Rule 11 sanctions, attorney fees under N.C.G.S. § 6-21.5, and damages for unfair and deceptive trade practices. N.C.G.S. § 1-76(1).

Am Jur 2d, Costs § 30; Monopolies, Restraints of Trade, and Unfair Trade Practices § 735; Venue § 82.

APPEAL by defendant from order entered on or about 10 September 1990 by *Judge Henry W. Hight, Jr.*, in VANCE County Superior Court. Heard in the Court of Appeals 24 September 1991.

Perry, Kittrell, Blackburn & Blackburn, by George T. Blackburn, II, and Charles F. Blackburn, for plaintiff-appellee.

Dameron and Burgin, by Anthony Lynch, for defendant-appellant.

PARKER, Judge.

The sole issue on appeal is the trial court's denial of defendant's motion to remove this action from Vance County to McDowell County as a matter of right pursuant to N.C.G.S. § 1-76(1). McDowell County is the situs of certain commercial property formerly leased by plaintiff Rose's Stores, Inc. ("Rose's"). Rose's assigned that lease to defendant Bradley Lumber Company, Inc. ("Bradley"). McDowell is also the county in which defendant, but not plaintiff, has its principal place of business.

N.C.G.S. § 1-76 creates special, mandatory venue rules for certain actions, requiring trial "in the county in which the subject of the action . . . is situated," where the action involves:

> Recovery of real property, or of an estate or interest therein, or for the determination in any form of such right or interest, and for injuries to real property.

N.C.G.S. § 1-76(1) (1983). Defendant contends that this venue provision governs plaintiff's action. Plaintiff argues that this action does not affect "an estate or interest" in the McDowell County property. In plaintiff's view proper venue lies in Vance County, the county

of its principal place of business. N.C.G.S. § 1-79(2). We hold that the trial court correctly denied defendant's motion to remove as a matter of right.

In deciding whether plaintiff's action would affect title to or an interest in land for purposes of N.C.G.S. § 1-76(1), we determine the nature and purpose of plaintiff's action solely from the allegations in its complaint. *Rose's Stores v. Tarrytown Center*, 270 N.C. 201, 203, 154 S.E.2d 320, 321 (1967); *Pierce v. Associated Rest and Nursing Care, Inc.*, 90 N.C. App. 210, 368 S.E.2d 41 (1988). If the outcome of an action—whether plaintiff does or does not prevail on the particular claims asserted in its complaint—would not affect an interest in land, the action is not removable as a local action under N.C.G.S. § 1-76(1). *Rose's Stores*, 270 N.C. at 205, 154 S.E.2d at 324; *see also Eames v. Armstrong*, 136 N.C. 392, 393-94, 48 S.E. 769, 770 (1904).

According to the allegations in plaintiff's complaint, defendant Bradley filed an action against plaintiff in McDowell County, alleging Rose's liability for (i) assigning its lease of the McDowell County property to Bradley by fraud or misrepresentation and (ii) violating the terms of the assignment by terminating the lease without Bradley's consent. Bradley took a voluntary dismissal of that action in 1990. The present action was filed by Rose's as the result of Bradley's previous action. The leasehold property in McDowell County is owned by National Community Centers, I ("NCCI"), which is not a party in the present action.

Plaintiff's complaint avers four causes of action: (i) in violation of Rule 11 of the North Carolina Rules of Civil Procedure, defendant instituted the 1988 action against plaintiff to coerce plaintiff into paying an increased rent to defendant under a lease not related to these civil actions; (ii) defendant's institution of litigation for the improper purpose of harassment makes plaintiff eligible for attorney's fees pursuant to N.C.G.S. § 6-21.5; (iii) defendant's conduct constitutes unfair and deceptive trade practices, rendering defendant subject to treble damages under N.C.G.S. § 75-1.1; and (iv) plaintiff is entitled to a declaratory judgment that its assignment of lease to defendant was valid and non-fraudulent and the notice of default and termination to NCCI was given with defendant's consent. The complaint contains five prayers for relief: (i) damages in excess of ten thousand dollars, (ii) costs, (iii) reasonable attorney's fees, (iv) trebling of any damage award and (v) a

declaratory judgment that plaintiff committed no tort in assigning the lease to defendant and that plaintiff breached no contract with defendant by sending written notice to NCCI of NCCI's default in not repairing the leased premises.

On the face of plaintiff's complaint, then, there is no allegation or prayer for enforcement of the parties' rights or interest in real property. The gravamen of plaintiff's action is not the title to or interest in the commercial property. Rather, plaintiff's complaint essentially challenges defendant's motives for filing its 1988 action against plaintiff and raises the issue of defendant's liability under N.C.G.S. § 1A-1, Rule 11, N.C.G.S. § 6-21.5 and N.C.G.S. § 75-1.1. A determination of the validity of the lease assignment and of the propriety of the notice of default and termination to the landlord is necessary to resolution of these alleged statutory violations and entitlements. As stated in *Rose's Stores*:

> "[A]n action is not necessarily local because it incidentally involves the title to land or a right or interest therein . . . . It is the principal object involved in the action which determines the question . . . ."

Rose's Stores, 270 N.C. at 206, 154 S.E.2d at 323 (citation omitted).

The allegations and prayers for relief in the case under review plainly distinguish this action from the cases argued by defendant on appeal. *Gurganus v. Hedgepeth*, 46 N.C. App. 831, 265 S.E.2d 922 (1980) (action involved termination of leasehold interest and, therefore, venue was governed by N.C.G.S. § 1-76(1)); *see also Sample v. Towe Motor Company, Inc.*, 23 N.C. App. 742, 209 S.E.2d 524 (1974). Under existing case law *in personam* actions, such as plaintiff's action for Rule 11 sanctions and damages under N.C.G.S. § 75-1.1, are transitory rather than local and, therefore, not subject to the special venue rule urged by defendant in this case. *McCrary Stone Service v. Lyalls*, 77 N.C. App. 796, 336 S.E.2d 103 (1985), *disc. rev. denied*, 315 N.C. 588, 341 S.E.2d 26 (1986); *Wise v. Isenhour*, 9 N.C. App. 237, 175 S.E.2d 772 (1970); *Mortgage Corp. v. Development Corp.*, 2 N.C. App. 138, 162 S.E.2d 623 (1968).

For these reasons, we affirm.

Affirmed.

Judges WELLS and WYNN concur.

STATE OF NORTH CAROLINA EX REL. WILLIAM W. COBEY, JR., SECRETARY DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES v. VIVIAN ANNE SIMPSON

No. 913SC166

(Filed 7 January 1992)

Waters and Watercourses § 7 (NCI3d)— violation of CAMA or DFA—restoration of coastal wetlands to predevelopment conditions—discretion of trial court

A trial court is not required to order the restoration of coastal wetlands (marshlands) to predevelopment condition once the court has determined that there has been unpermitted development activities pursuant to the Coastal Area Management Act and the Dredge and Fill Act, since pursuant to N.C.G.S. § 113A-126(a) the Coastal Resource Commission, upon a violation of the CAMA or DFA, may seek injunctive relief to restrain the violation and for such other or further relief in the premises as the court shall deem proper.

Am Jur 2d, Waters § 430.

APPEAL by the State from judgment signed 21 September 1990 by *Judge Howard E. Manning, Jr.* in CARTERET County Superior Court. Heard in the Court of Appeals on 13 November 1991.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General J. Allen Jernigan, for the State.

Bennett, McConkey, Thompson & Marquardt, by Thomas S. Bennett, for appellee.

LEWIS, Judge.

The issue in this case is whether a trial court must order the restoration of coastal wetlands (marshlands) to pre-development condition once the court has determined that there has been unpermitted development activities pursuant to the Coastal Area Management Act (CAMA), N.C.G.S. § 113A-100 *et seq.* (1983), and the Dredge and Fill Act (DFA). N.C.G.S. § 113-229 (1990).

Since 1945, the land now owned by defendant has had fill material deposited in the areas under consideration here. From 21 May 1984 through 17 September 1985, approximately 5,000 square

feet of coastal wetland on or adjacent to defendant's property was filled in without a state permit. An existing bulkhead was reconstructed and raised in height and a new retaining wall was constructed at a right angle to this bulkhead. The adjoining space was then filled with earthen materials. Defendant was served with a notice of violation of the CAMA and DFA by Natural Resources and Community Development (NRCD) personnel on 30 January 1986. This notice ordered her to cease the illegal filling and to restore the wetlands. The defendant was informed that a fine would be assessed for every day of noncompliance. After her refusal to comply, a follow-up notice of continuing violation was served.

On 11 June 1986, the NRCD instituted this action for a mandatory injunction to require removal of the retaining wall and the unpermitted fill materials and to restrain defendant from further violations. The State has not sought to collect the stated fines. On 24 September 1986, the court signed a preliminary prohibitory injunction, but denied a preliminary mandatory injunction. On interlocutory appeal, the Supreme Court ordered trial without a jury. *State ex rel. Rhodes v. Simpson*, 325 N.C. 514, 385 S.E.2d 329 (1989).

The trial court determined that the land in question was within an Area of Environmental Concern (AEC) designated by the Coastal Resource Commission (CRC). The court found defendant in violation of the CAMA and DFA for failing to obtain the required permit prior to developing an AEC. The trial court ordered defendant to remove one third of the length and one half of the height of the newly constructed retaining wall and to excavate the land fill which had been held intact by that part of the retaining wall to be removed. Defendant was permanently enjoined from further developing this land without the appropriate state permit. The court retained continued jurisdiction to ensure compliance with this order.

The State appeals the judgment and questions the trial court's authority to order any remedy short of full restoration of the wetlands. The State argues that once the trial court found the defendant in violation of the CAMA and the DFA that the court had no other option but to order full restoration. We do not agree. Our disagreement should not be interpreted to diminish the importance of the wetlands or the CRC's authority to promulgate rules to protect our natural resources from arbitrary destruction. We

consider controlling the specific language of the statute which grants unrestricted discretion to the trial court to order such remedy as it sees fit. As our reading does not comport with the State's argument, we affirm the trial court's judgment.

In *Adams v. North Carolina Dept. of Natural and Economic Resources*, 295 N.C. 683, 249 S.E.2d 402 (1978), our Supreme Court affirmed the CRC's "authority to prepare and adopt State guidelines for the coastal area." *Id.* at 702, 249 S.E.2d 413. The CRC promulgated the following guideline which the State now seeks to enforce via a judicial decree:

> Any violation involving development which is inconsistent with guidelines for development within AEC's (i.e., wetland fill, . . .) *must be corrected by restoring the project site to pre-development conditions* upon notice by the Commission or its delegate that restoration is necessary to recover lost resources, or to prevent further resource damage.

15A N.C. Admin. Code 7J.0410 (emphasis added). Though the CRC has the power to determine violations of the CAMA and DFA, it is not empowered to act upon these determinations without judicial intervention. The CAMA provides an appeal process by which disgruntled landowners may challenge the CRC's rulings. N.C.G.S. § 113-123 (1983). Further, the remedy which the CRC may pursue for violations of the guidelines requires judicial approval:

> Upon violation of any of the provisions of this Article or of any regulation, rule or order adopted under the authority of this Article the Secretary may, either before or after the institution of proceedings for the collection of any penalty imposed by this Article for such violation, institute a civil action in the General Court of Justice . . . for injunctive relief to restrain the violation and for *such other or further relief in the premises as said court shall deem proper.*

N.C.G.S. § 113A-126 (a) (1983) (emphasis added).

In essence, CAMA's enforcement provisions are in conflict with the CRC's guidelines. The agency is empowered to write a guideline which requires the restoration to pre-development condition, but is unable to compel this remedy in court. The legislature has created an ecological watchdog without the teeth necessary to protect its charge. CAMA's use of the phrase "such other relief as the court shall deem proper" clearly bestows virtually complete discretion

in the trial court to adjudicate the appropriate remedy for a CAMA violation. The agency may seek an injunction, but must convince the court that any further remedy is proper under the circumstances. As the courts have been the arbiters of last resort for centuries, the judicial discretion imbued here is an appropriate check upon what might otherwise be unlimited power in an unelected and potentially unresponsive governmental body.

The statute's specific grant of broad trial court discretion creates an abuse of discretion standard of appellate review. The expert and lay testimony as well as the judge's own assessment of the land from his on-site visit were considered. The trial court is in a better position than this Court to determine the credibility of the witnesses and the weight of the evidence so as to issue an appropriate remedy.

Upon review of the record we find no abuse of discretion and affirm. It is important to note that this ruling does not preclude the CRC's authority to assess civil penalties.

Affirmed.

Judges WELLS and WALKER concur.

MARK D. SEVERANCE, ADMINISTRATOR OF THE ESTATE OF KYLE DAVID SEVERANCE, PLAINTIFF-APPELLANT v. FORD MOTOR COMPANY, FORD MOTOR CREDIT COMPANY, AND DICK PARKER FORD, INC., DEFENDANT-APPELLEES

No. 913SC199

(Filed 7 January 1992)

1. **Appeal and Error § 556 (NCI4th)— judgment upheld on appeal—no authority of trial court to grant relief from judgment**

A trial court may not grant relief from its judgment which has been upheld on appeal.

Am Jur 2d, Appeal and Error § 353.

2. Rules of Civil Procedure § 60 (NCI3d)— relief from judgment— satisfaction of judgment not cancelled

Relief from a judgment does not cancel a satisfaction of that judgment so as to require vacation of a subsequent judgment based upon satisfaction of the prior judgment.

Am Jur 2d, Judgments § 766.

APPEAL by plaintiff from an order entered on 17 December 1990 by *Judge Herbert O. Phillips, III* in CRAVEN County Superior Court. Heard in the Court of Appeals on 2 December 1991.

Barker & Dunn, by Donald J. Dunn, for plaintiff-appellant.

Yates, McLamb & Weyher, by Derek M. Crump and Joseph W. Yates, III, for defendant-appellees Ford Motor Company and Ford Motor Credit Company.

Wheatly, Wheatly, Nobles & Weeks, by Stevenson L. Weeks, for defendant-appellee Dick Parker Ford, Inc.

LEWIS, Judge.

There are two issues in this case. First, may a trial court grant relief from its judgment which has been upheld on appeal. Second, does a relief from judgment also grant relief from a satisfaction of that judgment.

The action underlying this case is one for wrongful death. Plaintiff is the administrator of the estate of his deceased minor son. The deceased minor was killed when the Ford vehicle driven by his mother in which deceased was a passenger overturned on 21 March 1988. Plaintiff filed a wrongful death action against the driver (plaintiff's wife) on 26 May 1988 and a separate wrongful death action against Ford, Ford Motor Credit, and Dick Parker Ford on 15 August 1988. On 14 September 1988, a consent judgment (first judgment) was entered against the driver and plaintiff was paid $25,000.00 in satisfaction of this judgment by his own insurer. *Severance v. Severance*, (No. 88CVS852). Because plaintiff had satisfied the first judgment against a defendant which plaintiff alleged to be the sole cause of injury to plaintiff's intestate, this satisfaction released the other alleged tortfeasors, Ford, *et al*, from liability to plaintiff and summary judgment for the defendants was entered on 27 February 1989 (second judgment). Summary judg-

ment was upheld on appeal on 1 May 1990. *Severance v. Ford Motor Co.*, 98 N.C. App. 330, 390 S.E.2d 704 (1990).

On 19 May 1990, plaintiff moved for relief from judgment for the first judgment, which motion was granted by Judge Reid. To date, plaintiff has retained the monetary satisfaction of this judgment. Plaintiff then made a motion to amend to add this relief from the first judgment to the record on appeal and made a motion for rehearing. As plaintiff had not "challenged" the second judgment after relief from the first, this Court held that it was not the "proper court" for plaintiff's appeal and denied both motions on 18 June 1990. Subsequently, on 21 June 1990, plaintiff filed a motion for relief from the second judgment with the trial court. Relief was denied on 3 December 1990. Plaintiff appeals the denial of relief from the second judgment.

[1] Plaintiff essentially asks whether relief from judgment number one requires the vacating of a second judgment which was grounded upon the satisfaction of the first judgment for its holding. We address first the unasked but pivotal question of whether a lower court has the authority to alter a judgment once it has been affirmed. Under the circumstances posed, we answer all questions in the negative and concomitantly we affirm the trial court's denial of relief from the second judgment.

Once rendered, a judgment is not hermetically affixed to the parties. North Carolina Rule of Civil Procedure 60 (b) provides that "[o]n 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: . . . ." This rule provides relief from judicial determinations. However, contrary to plaintiff's argument, it does not, by its plain language or otherwise, provide relief from a completed execution on the same, such as a satisfaction.

Once a civil case has been upheld on appeal, both the trial and the appellate courts must proceed accordingly. "[A]fter an appeal the action becomes final and conclusive," *In re Griffin*, 98 N.C. 197, 199, 3 S.E. 515 (1887), such that a subsequent lower court cannot "alter, modify or remove the imposed penalty." *Id.* at 198, 3 S.E. at 515. Our Supreme Court has stated:

> In our judicial system the Superior Court is a court subordinate to the [appellate level courts]. Upon appeal our mandate is

> binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. 'Otherwise, litigation would never be ended, and the [appellate level courts] of the state would be shorn of authority over inferior tribunals.'

D & W, Inc. v. City of Charlotte, 268 N.C. 720, 722-23, 152 S.E.2d 199, 202 (1966) (citations omitted).

The certified appellate decision is sent to the trial court which must then "direct the execution thereof to proceed." N.C.G.S. § 1-298 (1983). There is no statutory authority to do otherwise. Though the action is remanded to the trial court for execution, this procedural step is merely for "clarity, continuity, and for the convenience of those who may examine the records thereafter—, but the efficacy of our mandate does not depend upon the entry of an order by the court below." *D & W, Inc.*, at 723-24, 152 S.E.2d 203. Any trial court action which varies, "disregard[s] the decree of this [appellate court], . . . [or] attempt[s] to postpone its enforcement [is] beyond [the trial court's] authority and [its] order to that effect is a nullity." *Id.* at 724, 152 S.E.2d 203.

In light of the above, it becomes clear that the affirming of the second judgment precluded the trial court from taking any action which would "alter, modify or remove the imposed penalty." *Griffin*. The trial court had no option but to deny plaintiff's motion for relief from judgment. We affirm.

[2] We decline to address in depth plaintiff's argument that relief from a judgment grants relief from a satisfaction and vacates a subsequent judgment which was based upon the satisfaction of the now vacated judgment. The judgment in *Severance v. Ford*, which was affirmed upon appeal, mandates the law of this case and cannot be altered or else this litigation will never end. Another panel of this Court has held that plaintiff obtained a satisfaction. The law of satisfaction is clear in North Carolina. *See*, N.C.G.S. § 1B-3(e) (1983). Though plaintiff may obtain an infinite number of judgments against joint tortfeasors for a single injury or wrongful death, he may obtain only one satisfaction. *Bowen v. Iowa Nat'l Mut. Ins. Co.*, 270 N.C. 486, 155 S.E.2d 238 (1967). Upon satisfaction of a judgment, the judicial process has run its course. In the interest of judicial economy, relief from a judgment does not cancel a satisfaction of judgment.

Affirmed.

Judges WELLS and WALKER concur.

ROBERT R. O'NEAL, PLAINTIFF-APPELLEE v. HENRY ARCHIE MURRAY, DEFENDANT AND THIRD-PARTY PLAINTIFF-APPELLANT v. THE KEY COMPANY, A NORTH CAROLINA CORPORATION, THIRD-PARTY DEFENDANT-APPELLEE

No. 9114DC128

(Filed 7 January 1992)

Rules of Civil Procedure §§ 37, 55 (NCI3d)— default judgment— failure to answer interrogatories—application of improper rule

The trial court erred in granting default judgment pursuant to N.C.G.S. § 1A-1, Rule 55(b) where the basis for plaintiff's pursuit of a default judgment was defendant's failure to respond to requested discovery, and Rule 37(d) was therefore the proper rule under which plaintiff should have sought relief.

Am Jur 2d, Depositions and Discovery §§ 391, 392; Judgments § 1165.

Judgment in favor of plaintiff in state court action for defendant's failure to obey request or order to answer interrogatories or other discovery questions. 30 ALR4th 9.

APPEAL by defendant from entry of default 26 October 1990 and judgment entered 1 November 1990 by *Judge Carolyn D. Johnson* in DURHAM County District Court. Heard in the Court of Appeals 12 November 1991.

Eugene C. Brooks, III for plaintiff appellee.

Newsom, Graham, Hedrick, Bryson & Kennon, by Emerson M. Thompson, III, for defendant and third-party plaintiff appellant.

Moore & Van Allen, by David E. Fox and Kevin M. Capalbo, for third-party defendant appellee.

WALKER, Judge.

Robert R. O'Neal (plaintiff) instituted this action against Henry Archie Murray (defendant) on 8 August 1989 alleging breach of

contract and damages in the amount of $31,970.85. Defendant filed an answer on 17 October 1989 denying plaintiff's allegations and asserted a third-party action against The Key Company (Key). Key answered the third-party complaint on 4 October 1990. On 26 October 1989, plaintiff served interrogatories on defendant through defendant's counsel, William J. Bair (Bair). At the time of hearing one year later, these interrogatories had remained unanswered.

On 2 October 1990, Bair moved for an order allowing his withdrawal from the case, setting forth defendant's failure to communicate with Bair and his failure to assist in the preparation of responses to the interrogatories. By order dated 4 October 1990, the court permitted Bair to withdraw from the case and gave defendant twenty days to secure alternate counsel. By letter dated 11 October 1990, Bair informed defendant that he would no longer be representing him, defendant had twenty days to secure alternative counsel, and the matter was set *for trial* on 26 October 1990. From the record, it appears this letter was the only notice defendant ever received disclosing the date the matter would be heard.

On 26 October 1990, plaintiff filed an affidavit and motion for entry of default. In his motion, he requested that the court strike defendant's answer and third-party complaint and enter default against defendant pursuant to Rule 55, N.C. Rules of Civil Procedure. Defendant was present in court on this date and moved for a continuance. This was denied and the trial court proceeded to strike defendant's answer and third-party complaint, enter default against defendant, and render judgment for plaintiff on his complaint. The judgment was not signed until 1 November 1990. Defendant appeals the entry of default and the judgment.

In the entry of default, the trial court found defendant (1) failed to secure alternate counsel by 24 October 1990, as per the court's 4 October 1990 order; (2) failed to respond to requested discovery; and (3) failed to cooperate with his attorney. The failure of a party to secure alternative counsel does not constitute adequate grounds for entry of default. A party has the right to appear *in propria persona* if he so chooses. *See Abernathy v. Burns*, 206 N.C. 370, 173 S.E. 899 (1934); *Cox v. Cox*, 92 N.C.App. 702, 376 S.E.2d 13 (1989). Therefore, the only apparent basis for the entry of default was defendant's failure to respond to requested discovery.

In this case, judgment by default was entered pursuant to plaintiff's motion under Rule 55(b), N.C. Rules of Civil Procedure. Defendant contends that the proper procedure was for plaintiff to file a motion pursuant to Rule 37(d), N.C. Rules of Civil Procedure, since defendant had filed an answer in the action and the reason for pursuing entry of default was defendant's failure to respond to interrogatories. Defendant further asserts that because plaintiff did not seek a default judgment under Rule 37(d), the judgment of the trial court should be reversed. We agree.

In relevant synopsis, Rule 37(d) provides, "If a party . . . fails . . . to serve answers or objections to interrogatories . . . after proper service of the interrogatories . . . the court in which the action is pending on motion may make such orders in regard to the failure as are just." Under this rule, where an answer to the complaint has been filed, a party may move the court to order the answer stricken and if granted, for entry of default judgment against the disobedient party. Rule 37(b)(2)c, N. C. Rules of Civil Procedure.

With the basis for plaintiff's pursuit of a default judgment being defendant's failure to respond to requested discovery, Rule 37(d) correctly applies to the present situation and plaintiff should have sought relief under this rule. Therefore, the trial court's grant of a default judgment pursuant to Rule 55(b) was improper.

As plaintiff failed to utilize the proper procedure for pursuing default, we decline to formally address defendant's remaining contentions. However, we note that even if Rule 55(b) had been the proper means for seeking a default judgment, plaintiff failed to give timely notice of his intent to seek a default judgment under Rule 55(b). *Stanaland v. Stanaland*, 89 N.C.App. 111, 365 S.E.2d 170 (1988); *Sawyer v. Cox*, 36 N.C.App. 300, 244 S.E.2d 173, *disc. review denied*, 295 N.C. 467, 246 S.E.2d 216 (1978).

The trial court's order of entry of default and judgment of default are reversed, and this case is remanded to the District Court of Durham County for entry of an order allowing defendant to respond to plaintiff's requested discovery.

Reversed and remanded.

Judges WELLS and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 7 JANUARY 1992

BARHAM v. BARHAM No. 9110DC663	Wake (87CVD5041)	Affirmed
BLEVINS v. BLEVINS No. 9123DC151	Ashe (89CVD244)	Affirmed
BRUINTON v. FIRST CITIZENS BANK & TRUST CO. No. 914SC793	Onslow (90CVS2517)	Affirmed
CHICAGO TITLE INS. CO. v. PELLA WINDOW & DOOR CO. No. 9124SC148	Watauga (90CVS521)	Reversed & Remanded
CHITTY v. ROTEN No. 9124SC108	Watauga (89CVS622)	Affirmed
CITY OF RALEIGH v. CARTER No. 9110SC213	Wake (89CVS02572)	Reversed & Remanded
CREECH v. MOSS No. 9111SC255	Johnston (90CVS1268)	Affirmed
NESBIT v. HOWARD No. 9022SC1313	Iredell (89CVS1225)	Reversed as to that portion of the order barring defendants from blocking plaintiffs' access to the newly constructed driveway on defendants' encumbered property; new trial on the sole issue of damages arising from plaintiffs' construction of the new driveway.
PITTMAN v. UNION CORRUGATING CO. No. 914SC185	Onslow (89CVS1658)	Affirmed

STATE v. CLARK No. 9115SC745	Chatham (90CRS2396) (90CRS2397) (90CRS3110)	No Error
STATE v. COOPER No. 911SC755	Pasquotank (90CRS3550)	No Error
STATE v. HYPOLITE No. 9113SC682	Brunswick (90CRS2563) (90CRS2564) (90CRS2565) (90CRS2048) (90CRS2049) (90CRS2050)	No Error
STATE v. LEWIS No. 918SC684	Wayne (90CRS9986)	No Error
STATE v. McCOY No. 9026SC1357	Mecklenburg (89CRS74938)	New Trial
STATE v. McELREATH No. 9028SC1317	Buncombe (90CRS5070)	No Error
STATE v. McGEE No. 9120SC631	Moore (90CRS5201) (90CRS5202) (90CRS7211)	No error in trial; remand for resentencing No Error No Error
STATE v. MILLER No. 9125SC759	Catawba (91CRS948)	No Error
STATE v. MOORE No. 912SC692	Beaufort (89CRS6663) (89CRS6664)	No Error
TENNECO OIL CO. v. WATERS OIL CO. No. 912SC252	Beaufort (89CVS110)	Affirmed

ANDREW J. WILSON AND WIFE, MARGARET WILSON, PLAINTIFFS v. CARL C. PEARCE AND WIFE, WANDA R. PEARCE, DEFENDANTS

No. 9114SC79

(Filed 21 January 1992)

1. **Adverse Possession § 45 (NCI4th)— next-door neighbors— adverse possession of plaintiff's fenced area—submission of issue to jury proper**

The trial court did not err in submitting the issue of adverse possession to the jury where both parties raised the issue in their pleadings and where the evidence tended to show that plaintiffs built their fence in 1957 on the property that defendants later purchased, and, throughout the more than 30 years prior to this action, plaintiffs' possession of the property in dispute was actual, open, hostile, exclusive and continuous.

Am Jur 2d, Adverse Possession § 321.

2. **Malicious Prosecution § 13 (NCI3d)— arrest for trespass in own yard—sufficiency of evidence of malicious prosecution**

The trial court did not err in submitting the issue of malicious prosecution to the jury where the evidence tended to show that defendant initiated a proceeding for criminal trespass against plaintiff; this charge was dismissed by the trial court; a reasonable person under the same circumstances as defendant would have known that the criminal trespass charge had no reasonable foundation in that plaintiff, at the time of his arrest, was mowing the grass on his side of his fence but on the property defendant claimed, plaintiff's fence had been on the property for more than 30 years at the time defendant took out the warrant, the fence and wall had been erected for at least the eight years defendant had lived next door to plaintiff, defendant never in those eight years sought a criminal trespass warrant against plaintiff, and defendant had never been on the property he claimed as his own; and defendant wife testified that defendants' intent in bringing the trespass charge against plaintiff was to assert their ownership claim to the property, not because they thought plaintiff was actually trespassing.

Am Jur 2d, Malicious Prosecution §§ 184-186.

3. Trespass § 2 (NCI3d)— next-door neighbors—threats—intentional infliction of emotional distress—sufficiency of evidence

Evidence was sufficient to be submitted to the jury on the issue of intentional infliction of emotional distress by defendant husband upon plaintiff husband where it tended to show that defendant raised his fist, made obscene gestures, cursed and threatened plaintiffs; defendant piled firewood against plaintiffs' fence in a pile taller than the fence which caused the fence to bulge and which attracted rats, even though defendants had no fireplace; defendants complained to the Durham City Housing Inspector about the condition of plaintiffs' yard and to the Durham Police Department about a "juvenile disturbance" at plaintiffs' home, both of which complaints were found to be groundless upon investigation; defendants threatened the grown children of plaintiffs and another neighbor who was helping plaintiff mow his lawn; and defendant was served a temporary restraining order to stop his alleged harassment of plaintiffs, but was found in contempt of the order.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4-7, 17, 36, 38, 40-42, 51, 55.

Modern status of intentional infliction of mental distress as independent tort; "outrage." 38 ALR4th 998.

4. Trespass § 2 (NCI3d)— intentional infliction of emotional distress—wife's claim dismissed—error

The trial court erred in dismissing plaintiff wife's claim for intentional infliction of emotional distress by defendant husband where the evidence tended to show that defendant threatened to kill plaintiff or her husband, threatened to have one of plaintiff's children arrested, and threatened plaintiff's husband in her presence, and though defendant was aware that plaintiff took substantial medication, defendant directed threats toward plaintiff, a senior citizen, both inside and outside her home.

Am Jur 2d, Fright, Shock and Mental Disturbance §§ 4-7, 17, 27, 28, 40, 42, 51.

Modern status of intentional infliction of mental distress as independent tort; "outrage." 38 ALR4th 998.

5. Malicious Prosecution § 13 (NCI3d); Trespass § 2 (NCI3d)—intentional infliction of emotional distress—malicious prosecution—sufficiency of evidence

In an action against defendant wife for malicious prosecution and intentional infliction of emotional distress, evidence was sufficient to be submitted to the jury where it tended to show that almost any time defendant husband verbally abused or threatened plaintiffs, defendant wife was either present or had told her husband that plaintiffs were outside; in this way she assisted her husband on several occasions to continue his direct threats and abuse against plaintiffs; on one occasion she brought her husband what appeared to the plaintiffs to be a gun so that defendant husband could use it to threaten plaintiff husband; defendant wife also drove surveyor type stakes into the ground on plaintiffs' property to assert her claim for the land enclosed by plaintiffs' fence; defendant testified that she and her husband "worked together" to have one of plaintiff's children arrested for trespass; and she conspired with her husband to have plaintiff husband arrested for criminal trespass.

Am Jur 2d, Fright, Shock and Mental Disturbance §§ 4-7, 17, 36, 38, 47, 51.

Modern status of intentional infliction of mental distress as independent tort; "outrage." 38 ALR4th 998.

6. Trespass § 10 (NCI3d)— intentional infliction of emotional distress—punitive damages—failure to submit to jury—error

In an action to recover for intentional infliction of emotional distress arising out of next-door neighbors' disagreement over the ownership of a strip of land, the trial court erred in refusing to submit the issue of punitive damages to the jury where there was sufficient evidence showing extreme and outrageous conduct by defendants toward plaintiffs as well as insult, indignity, malice, oppression, or bad motive.

Am Jur 2d, Damages §§ 747, 762-770; Malicious Prosecution § 187.

APPEAL by defendants and cross-appeal by plaintiffs from judgment entered 3 August 1990 by *Judge James A. Beaty* in DURHAM

County Superior Court. Heard in the Court of Appeals 5 November 1991.

In July and October 1989, plaintiffs filed a complaint and amended complaint against defendants alleging intentional infliction of emotional distress by both defendants against both plaintiffs and for malicious prosecution by both defendants against plaintiff Andrew J. Wilson. Plaintiffs sought compensatory and punitive damages. The issue of adverse possession was raised by defendants' counterclaims and plaintiffs' replies.

This case was tried before a jury beginning 30 July 1990. At the close of plaintiffs' evidence, the trial court granted defendant Wanda Pearce's motion for directed verdict and dismissed all claims against her. The trial court also granted directed verdict against plaintiff Margaret Wilson for her claim of intentional infliction of emotional distress against both defendants. The trial court also refused plaintiffs' request to submit the punitive damages issue to the jury.

The jury subsequently returned its verdict in favor of plaintiffs on the adverse possession issue, and awarded $65,000.00 to plaintiff Andrew J. Wilson for intentional infliction of emotional distress and $25,000.00 for malicious prosecution. On 3 August 1990, the trial court entered its judgment accordingly.

From the judgment of 3 August 1990, defendant Carl C. Pearce appeals and plaintiffs cross-appeal.

Arthur Vann for defendant-appellant Carl C. Pearce and defendants cross-appellees Carl C. and Wanda R. Pearce.

King, Walker, Lambe & Crabtree, by Daniel Snipes Johnson, for plaintiff-appellees and plaintiffs cross-appellants.

ORR, Judge.

Defendant argues three issues on appeal and plaintiffs argue three issues on cross-appeal. For the following reasons, we affirm the judgment in favor of plaintiffs on the issues of adverse possession and intentional infliction of emotional distress and malicious prosecution by defendant Carl C. Pearce against plaintiff Andrew J. Wilson. We reverse the judgment directing verdict and dismissing the claims of plaintiff Margaret Wilson for intentional infliction of emotional distress against both defendants and directing verdict

in defendant Wanda R. Pearce's favor on the issues of intentional infliction of emotional distress and malicious prosecution against plaintiff Andrew J. Wilson. Moreover, we hold that the issue of punitive damages should have been submitted to the jury.

This case arises from a property dispute. The evidence of record shows that plaintiffs moved into their home in 1955. Plaintiff Andrew Wilson (Mr. Wilson) was 73 years old at the time of trial and plaintiff Margaret Wilson (Mrs. Wilson) was 68. The Wilsons have three grown children, one of whom was still living at home during this dispute.

In 1957, plaintiffs built a fence enclosing their back yard. This fence encroached on the lot next door and crossed over another adjoining lot. This fence has stood continuously since 1957, and plaintiffs have maintained the property and improved the fence in the same location.

In 1980, defendants purchased the lot next door and in 1982, purchased the two lots adjoining plaintiffs' property. Plaintiffs' fence encroached upon a portion of the property purchased by defendants. The previous owner of the two lots defendants purchased in 1982 notified plaintiffs in January 1982 that he had sold those lots to defendants and requested that plaintiffs move their fence. Plaintiffs did not comply with this request.

In 1980, defendants allegedly began harassing plaintiffs over the location of the fence. Specific acts by defendants will be discussed below. Generally, defendants allegedly cursed and threatened plaintiffs, reported them to the City of Durham for untrue and alleged violations of city ordinances, threw items into plaintiffs' yard, made obscene gestures to plaintiffs and their children and generally disturbed their peace.

On 3 August 1989, the trial court issued a preliminary injunction against defendants enjoining defendants from engaging in such harassment toward plaintiffs. On 31 August 1989, defendants were found in contempt of court for violating the terms of the injunction, and defendant Carl Pearce (Mr. Pearce) was ordered to serve 48 hours in the Durham County Jail for willful contempt.

Defendant's Appeal

A.

[1] Defendant first argues that the trial court erred in submitting the issue of adverse possession to the jury. We find no error.

It is well settled law that the trial court must submit to the jury the issues raised by the pleadings and evidence to fairly adjudicate the case, and that the form and number of the issues submitted is within the sound discretion of the trial court. *McNeill v. Durham County ABC Bd.*, 87 N.C. App. 50, 359 S.E.2d 500 (1987), *aff'd in part, rev'd in part on other grounds*, 322 N.C. 425, 368 S.E.2d 619, *reh'g denied*, 322 N.C. 838, 371 S.E.2d 278 (1988). This Court will not find that the trial court abused its discretion so long as the trial court submits the issues comprehensively to resolve all factual controversies.

In the present case, defendants raised the issue of ownership of the property in question in their initial answer filed 17 July 1989. In a counterclaim dated 26 January 1990 and amended counterclaim dated 17 July 1990, defendants raised the issue of plaintiffs' claim to the property. Moreover, plaintiffs specifically raised the issue of adverse possession of the property in an affirmative defense dated 30 July 1990.

Where there is evidence that a party has acquired title to property under 20 years' adverse possession, this issue should be submitted to the jury. *McClure v. Crow*, 196 N.C. 657, 146 S.E. 713 (1929). Here, the evidence indicates that plaintiffs built their fence in 1957 on the property that defendants later purchased. Throughout the more than 30 years prior to this action, plaintiffs' possession of the property in dispute has been actual, open, hostile, exclusive and continuous. *See Campbell v. Mayberry*, 12 N.C. App. 469, 183 S.E.2d 867, *cert. denied*, 279 N.C. 726, 184 S.E.2d 883 (1971). There is ample evidence of adverse possession in the case *sub judice* as well as in the issues raised by the pleadings. Therefore, we find no error on this issue.

B.

[2] Defendant next argues that the trial court erred in submitting the malicious prosecution issue to the jury. We disagree.

In March 1988, Mr. Wilson was arrested for criminal trespass. Mr. and Mrs. Pearce testified at trial in the present case that they took out the warrant against Mr. Wilson to establish their ownership of the property in question. At the time Mr. Wilson was arrested, he was mowing the grass on his side of the fence but on the property that defendants claimed.

Defendant argues that because a magistrate must find probable cause prior to issuing a warrant for criminal trespass, there was probable cause in this case; therefore, there can be no malicious prosecution. Using this faulty rationale, there could never be a cause of action for malicious prosecution so long as a warrant had been issued for the underlying crime because a magistrate must have probable cause to issue any warrant.

In *Flippo v. Hayes*, 98 N.C. App. 115, 389 S.E.2d 613, *aff'd*, 327 N.C. 490, 397 S.E.2d 512 (1990), this Court reviewed the law on malicious prosecution.

> In proving a cause of action for malicious prosecution, the claimant must show that the defendant initiated the earlier proceeding maliciously and without probable cause and that the proceeding terminated in the claimant's favor. *Jones v. Gwynne*, 312 N.C. 393, 323 S.E.2d 9 (1984). Probable cause in malicious prosecution cases has been defined as "the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution." *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978) (quoting *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907)). The burden of proving want of probable cause is on the party pursuing the malicious prosecution claim. *Gray v. Gray*, 30 N.C. App. 205, 207, 226 S.E.2d 417, 419 (1976). Such proof is not established by proof that the proceeding was instituted maliciously. *Id.* at 208, 226 S.E.2d at 419 (citing *Tucker v. Davis*, 77 N.C. 330 (1877)). If the facts are admitted or established, the question of probable cause is for the court, but when the facts are in dispute the question is one of fact for the jury. *Pitts*, 296 N.C. at 87, 249 S.E.2d at 379.
>
> In this jurisdiction, want of probable cause may be found when an accuser swears out a criminal warrant but the conduct of the accused does not constitute a crime. *See Gray v. Bennett*, 250 N.C. 707, 110 S.E.2d 324 (1959); *Smith v. Deaver*, 49 N.C. 513 (1857).

Id. at 118-19, 389 S.E.2d at 615.

The test for determining probable cause in a malicious prosecution action is "whether a man of ordinary prudence and intelligence under the circumstances would have known that the charge had

no reasonable foundation." *Hitchcock v. Cullerton*, 82 N.C. App. 296, 298, 346 S.E.2d 215, 217 (1986). The element of malice required in these actions may be inferred from a lack of probable cause in the underlying action. *Raymond U v. Duke University*, 91 N.C. App. 171, 178, 371 S.E.2d 701, 706, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 590 (1988).

Applying these principles to the present case, there is no question that Mr. Pearce initiated the proceeding for criminal trespass against Mr. Wilson and that this charge was dismissed by the trial court. The only element remaining is whether Mr. Wilson has met his burden of establishing want of probable cause. We find that he has.

First, a reasonable person under the same circumstances as Mr. Pearce would have known that the criminal trespass charge had no reasonable foundation. Mr. Pearce knew that Mr. Wilson's fence had been on the property for more than 30 years at the time he took out the warrant. The fence and wall had been erected for at least the eight years Mr. Pearce had lived next door to Mr. Wilson, and Mr. Pearce never in those eight years sought a criminal trespass warrant against Mr. Wilson. Further, Mr. Pearce had never been on the property he claimed as his own.

Second, Mrs. Pearce testified that defendants' intent in bringing the trespass charge against Mr. Wilson was to assert their ownership claim to the property, not because they thought Mr. Wilson was actually trespassing. Finally, the jury found that Mr. Wilson had adverse possession of the property upon which he was allegedly trespassing on the date he was arrested for trespass. The jury also found enough evidence to support their verdict that Mr. Pearce instituted the action "with malice and without probable cause."

We therefore hold that the trial court did not abuse its discretion in submitting the issue of malicious prosecution to the jury.

C.

[3] Defendant finally argues that the trial court erred in submitting to the jury the issue of intentional infliction of emotional distress by Mr. Pearce upon Mr. Wilson. Again, we find no error.

Counsel for Mr. Pearce cites the case of *Johnson v. Ruark Obstetrics and Gynecology Associates, P.A.*, 327 N.C. 283, 395 S.E.2d

85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990), to support his argument that no emotional distress exists in the present case. *Johnson*, however, is a case dealing exclusively with *negligent* infliction of emotional distress, not *intentional* infliction of emotional distress as the case before us. Therefore, *Johnson* is not on point.

To establish a claim for intentional infliction of emotional distress, a party must show that "a defendant's conduct exceeds all bounds of decency tolerated by a society and the conduct causes mental distress of a very serious kind." *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 704, 365 S.E.2d 621, 625 (1988). Additionally, our Supreme Court has stated that

> [o]ne who by extreme and outrageous conduct intentionally or recklessly causes severe emotional distress to another is subject to liability for such emotional distress, and if bodily harm to the other results from it, for such bodily harm.

Id. at 705, 365 S.E.2d 621 (*citing, Dickens v. Puryear*, 302 N.C. 437, 447, 276 S.E.2d 325, 332 (1981), adopting the Restatement 2d of Torts § 46 definition of intentional infliction of emotional distress).

The evidence in the case before us is replete with examples of Mr. Pearce's (and Mrs. Pearce's) extreme and outrageous conduct. The evidence shows that the following acts occurred between 1980 and the time plaintiffs instituted this action.

On numerous occasions, Mr. Pearce would stand in his yard, raise his fists to the Wilsons if they were in their yard and make an obscene gesture. Mr. Pearce repeatedly cursed the Wilsons loud enough for several neighbors to hear. Mr. Pearce frequently stood in his window in full view of Mrs. Wilson and made obscene gestures with his "private parts" at her and then laughed at her reaction. At the time he was making these gestures, he "mouthed" obscene words.

Defendants have for several years piled firewood against the Wilsons' fence to the point that the firewood is taller than the fence and bulges the fence into the Wilsons' yard. The evidence shows that the Pearces do not own a fireplace and that rats inhabit the woodpile.

Mr. Pearce has on more than one occasion told both Mr. and Mrs. Wilson to "suck my dick" while rubbing his "private parts." In January 1987, Mr. Pearce accused Mr. Wilson of knocking over

some wood in his yard and began loudly cursing Mr. Wilson. Mr. Pearce then told Mrs. Pearce to "go get my gun." Mrs. Pearce went into the house and came back with what appeared to be a pistol covered by a towel. Mr. Wilson has also observed Mr. Pearce throwing broken glass into his yard.

The Pearces have also complained to the Durham City Housing Inspector about the condition of the Wilsons' yard. The official involved in that inspection refused to cite the Wilsons for any violations. While the inspector was present, Mr. Pearce came out of his house and began cursing Mr. Wilson in a loud voice. Also, in June 1988, the Pearces reported a "juvenile disturbance" at the Wilsons to the Durham Police Department. Upon investigation, the only juvenile police discovered at the Wilsons was their eleven day old grandchild.

On numerous occasions, Mr. Pearce cursed the Wilsons' grown children in the Wilsons' presence. On another occasion, after being informed by his wife that Mr. Wilson was working in his rosebed, Mr. Pearce yelled at Mr. Wilson "I'm gonna get me some god damn rocks and knock his god damned brains out." Mr. Pearce also fired a pistol from his yard into the Wilsons' yard in Mr. Wilson's presence. Mr. Pearce was allegedly firing at a stray dog. Since 1980, Mrs. Pearce has been photographing the Wilsons in their yard and on their property and keeping a file on the Wilsons for court purposes.

After the Wilsons filed their initial complaint in July 1989, Mr. and Mrs. Pearce continued to escalate their harassment of the Wilsons. Mr. Pearce was served with a temporary restraining order on 3 July 1989 to stop his alleged harassment of the Wilsons. However, after the restraining order, Mr. Pearce was found in willful contempt for the following acts. In August 1989, Mr. Pearce threatened to kill Mr. Wilson. Mr. Pearce also threatened another neighbor and attempted to have that neighbor arrested for criminal trespass because that neighbor was helping Mr. Wilson cut his lawn. Mr. Pearce "mowed his lawn" nine times in two weeks in August 1989 around 6:00 a.m. and parked his lawn mower as close as possible to the Wilsons' bedroom window for the purpose of disturbing the Wilsons' peace. On 14 August 1989, Mr. Pearce attempted to take out a warrant for arrest for the Wilsons' daughter, Andrea, but the magistrate refused to issue the warrant. Mrs. Pearce then filed a civil action against Andrea Wilson.

We hold that the above behaviors by the Pearces are extreme and outrageous conduct which intentionally or recklessly caused severe emotional distress to Mr. (and Mrs.) Wilson. Moreover, there was ample evidence of emotional distress and bodily harm to the Wilsons as a result of the Pearces' behavior.

The Pearces were aware that Mr. Wilson had a heart condition and takes medication for such. Mr. Wilson also has angina which arises from stress and stress-related incidents. On at least one occasion, Mr. Wilson sought medical attention from his cardiologist, Dr. Miller, for chest and arm pain from being upset and tense over a confrontation with Mr. Pearce. Dr. Miller testified in his deposition that on several occasions Mr. Wilson mentioned problems with his neighbors as the source of his stress-related angina.

Annette Wilson, the Wilson's daughter, testified that Mr. Wilson has had increased episodes of angina since Mr. Pearce began harassing them. Ms. Wilson also testified that her father is upset a great deal of the time, has lost weight and "feels afraid and has pains all over when these things happen." Moreover, when Mr. Wilson was arrested for trespass, he had to take three nitroglycerine pills for chest pain and began shaking uncontrollably.

Mr. Pearce's counsel argues in his brief that because Mr. Wilson served in the Marines as a young man, then he certainly has heard worse cursing than what Mr. Pearce said to Mr. Wilson. Counsel further argues that if Mr. Pearce is guilty of intentional infliction of emotional distress then the Marines should be also. We find this argument preposterous. Moreover, counsel's argument that the Wilsons could have just "walked away" from Mr. Pearce instead of taking the verbal abuse and degradation is ludicrous. No one in a civilized society should be expected to take the kind of harassment the evidence shows the Pearces have forced upon the Wilsons over the course of at least eight years. The fact that the Wilsons suffered so long may be attributed to their patience as well as their possible fear of reprisal from the Pearces.

For the above reasons, we hold that the trial court did not err in submitting the issue of adverse possession, malicious prosecution and intentional infliction of emotional distress by Mr. Pearce upon Mr. Wilson to the jury.

Plaintiffs' Cross-Appeal

A.

[4] Mrs. Wilson first argues that the trial court erred in granting directed verdict in the Pearces' favor dismissing claims for intentional infliction of emotional distress by Mr. Pearce. We agree.

Under N.C. Gen. Stat. § 1A-1, Rule 50, a motion for directed verdict "tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Hill v. Winn-Dixie Charlotte, Inc.*, 100 N.C. App. 518, 520, 397 S.E.2d 347, 349 (1990) (citation omitted). The reviewing court must consider the evidence in the light most favorable to the nonmoving party. *Id.* at 520, 397 S.E.2d at 349. A motion should be "granted only if the evidence is insufficient, as a matter of law, to support a verdict for the nonmoving party." *Id.*, 397 S.E.2d 349.

The elements for intentional infliction of emotional distress are stated in section C. above. We note that foreseeability of injury or physical injury are not requirements for this tort, *Dickens*, 302 N.C. at 448-52, 276 S.E.2d at 332-35; however, these factors go to the outrageousness of a defendant's conduct. *West*, 321 N.C. at 705, 365 S.E.2d at 625.

In addition to the behaviors previously described in section C., Mr. Pearce stated to Mrs. Wilson, "I'll kill one of you if this happens again." Mr. Pearce frequently threatened Mrs. Wilson with arresting one of the Wilson children. Mr. Pearce also frequently threatened Mr. Wilson in the presence of Mrs. Wilson.

Mr. Pearce was aware that Mrs. Wilson took substantial medication. Moreover, Mr. Pearce directed threats toward Mrs. Wilson, a senior citizen, both inside and outside her home.

Dr. Miller testified in his deposition that he has treated Mrs. Wilson for chronic obstructive lung disease and hypertension for a number of years. Both conditions, according to Dr. Miller, can be aggravated by stress and that "emotional upsets . . . could cause symptoms . . . such as angina or wheezing . . . and shortness of breath."

Based upon the above evidence and viewing it in the light most favorable to Mrs. Wilson, we hold that the trial court erred in granting a directed verdict in Mr. Pearce's favor on this issue. There is ample evidence to take this issue to the jury.

B.

[5] Mr. and Mrs. Wilson next argue that the trial court erred in dismissing their claims under Rule 50 of the N.C. Rules of Civil Procedure against Mrs. Pearce for malicious prosecution of Mr. Wilson and intentional infliction of emotional distress of Mr. and Mrs. Wilson. We agree.

Mr. and Mrs. Wilson maintain that Mrs. Pearce is liable for the above torts based upon "civil conspiracy" incurred by entering into a conspiracy with Mr. Pearce to terrorize and falsely prosecute the Wilsons.

It is well-settled law that although there is no action for "civil conspiracy":

> A claim for damages resulting from a conspiracy exists where there is an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way, and, as a result of acts done in furtherance of, and pursuant to, the agreement, damage occurs to the plaintiff. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981); *Burton v. Dixon*, 259 N.C. 473, 131 S.E.2d 27 (1963). In such a case, all of the conspirators are liable, jointly and severally, for the act of any one of them done in furtherance of the agreement. *Burton, supra.*

Fox v. Wilson, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987).

Our Supreme Court has stated that "[a]lthough civil liability for conspiracy may be established by circumstantial evidence, the evidence of the agreement must be sufficient to create more than a suspicion or conjecture in order to justify submission of the issue to a jury." *Dickens*, 302 N.C. at 456, 276 S.E.2d at 337. Viewing the evidence in the light most favorable to Mr. and Mrs. Wilson as we are required to do under Rule 50 of the N.C. Rules of Civil Procedure, we hold that the evidence is sufficient to go to the jury on the Wilsons' claims for intentional infliction of emotional distress against Mrs. Pearce.

The evidence indicates that almost any time Mr. Pearce verbally abused or threatened the Wilsons, Mrs. Pearce was either present or had told her husband that the Wilsons were outside. In this way, she assisted her husband on several occasions to continue his direct threats and abuse against the Wilsons. Further, on one

occasion she brought her husband what appeared to the Wilsons to be a gun so that Mr. Pearce could use it to threaten Mr. Wilson. Mrs. Pearce also drove surveyor-type stakes into the ground on the Wilsons' property to assert her claim for the land enclosed by the Wilsons' fence. Finally, Mrs. Pearce testified that she and her husband "worked together" to have Jay Wilson (the Wilsons' son) arrested for trespass (although he was on the Wilsons' property).

The evidence also tends to show that Mrs. Pearce conspired with her husband to have Mr. Wilson arrested for criminal trespass, which supports Mr. Wilson's claim against Mrs. Pearce for malicious prosecution. Mrs. Pearce testified regarding this issue as follows:

> Q And the two of you discussed with the Magistrate the fact that you felt you owned this property?
>
> A Right.
>
> Q And did you talk to the Magistrate yourself?
>
> A Carl did, I was with him.
>
> Q But you heard what Mr. Pearce told the Magistrate?
>
> A Oh, yes.
>
> Q And you approved of his decision?
>
> A Right.
>
> Q In fact, the two of you planned to go there together?
>
> A Right.
>
> Q And the two of you had agreed that your purpose in doing this was to try to assert a claim to part of that land?
>
> A Right.
>
> Q And you agreed that the way to do this was to have Mr. Wilson arrested?
>
> A Right.

We find that the above is sufficient evidence of Mrs. Pearce's alleged malicious prosecution to go to the jury and therefore hold that the trial court erred in directing verdict under Rule 50 in Mrs. Pearce's favor.

C.

[6] Mr. and Mrs. Wilson argue that the trial court erred in refusing to submit the issue of punitive damages to the jury. We agree.

In *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232 (1989), this Court stated:

> Punitive damages are awarded in addition to compensatory damages for the purpose of punishing the wrongdoer and deterring others from committing similar acts. *Hornby v. Penn. Nat'l Mut. Casualty Ins. Co.*, 77 N.C. App. 475, 335 S.E.2d 335, *disc. review denied*, 316 N.C. 193, 341 S.E.2d 570 (1986). Punitive damages are recoverable in tort actions only where there are aggravating factors surrounding the commission of the tort such as actual malice, oppression, gross and wilful wrong, insult, indignity, or a reckless or wanton disregard of plaintiff's rights. *Burns v. Forsyth Co. Hospital Authority*, 81 N.C. App. 556, 344 S.E.2d 839 (1986). [Punitive] damages are not recoverable as a matter of right, but only in the discretion of the jury when the evidence warrants. *Hunt v. Hunt*, 86 N.C. App. 323, 357 S.E.2d 444, *affirmed*, 321 N.C. 294, 362 S.E.2d 161 (1987).

Id. at 438, 378 S.E.2d at 236. Further, when there is evidence of extreme and outrageous behavior by a defendant as in a case of intentional infliction of emotional distress, the question of punitive damages is appropriate for the jury. *Id.*, 378 S.E.2d 232. In order to be "outrageous behavior," the evidence must establish some "insult, indignity, malice, oppression or bad motive." *Rogers v. T.J.X. Companies, Inc.*, 329 N.C. 226, 230, 404 S.E.2d 664, 666 (1991). Whether the evidence of outrageous conduct is sufficient to carry the issue of punitive damages to the jury is a question of law for the court. *Id.* at 231, 404 S.E.2d at 667. However, where the pleadings and evidence support a claim for punitive damages, the trial court should submit the issue to the jury to determine whether or not punitive damages in any amount should be awarded, and if so, the amount of the award. *Patrick v. Williams*, 102 N.C. App. 355, 368, 402 S.E.2d 452, 459 (1991). It is then within the jury's discretion to decide these issues. *Id.*

Applying the above principles to the present case, we find that there is sufficient evidence showing extreme and outrageous conduct by Mr. and Mrs. Pearce toward the Wilsons, as well as

"insult, indignity, malice, oppression or bad motive." We need not review the numerous incidents we have stated throughout this opinion which support our finding. Therefore, we hold that the trial court erred in not submitting the issue of punitive damages to the jury.

In conclusion, we hold that the trial court did not err in submitting to the jury the issues of adverse possession, malicious prosecution by Mr. Pearce and intentional infliction of emotional distress by Mr. Pearce upon Mr. Wilson. We further hold that the trial court erred in granting directed verdict in Mrs. Pearce's favor against Mr. and Mrs. Wilson and in directing verdict dismissing Mrs. Wilson's claims. The trial court also erred in not submitting the issue of punitive damages to the jury. For the above reasons, we affirm in part, reverse in part and remand for trial on the remaining issues.

Affirmed in part; reversed in part and remanded.

Judges JOHNSON and EAGLES concur.

STATE OF NORTH CAROLINA v. KEITH NORMAN SUDDRETH, DEFENDANT/APPELLANT

No. 9026SC1145

(Filed 21 January 1992)

1. Constitutional Law § 359 (NCI4th); Evidence and Witnesses § 1782 (NCI4th)— defendant required to model mask before jury—no error

In a prosecution of defendant for rape, burglary, assault with a deadly weapon inflicting serious injury, first degree sexual offense, and kidnapping, the trial court did not err in allowing an in-court demonstration requiring defendant to model a mask in the presence of the jury, since the demonstration was conducted to aid the jury in determining whether the victim could see the color of defendant's eyes, and the fact that the mask used in court was not the exact mask worn by the perpetrator did not preclude its use.

Am Jur 2d, Criminal Law §§ 945, 946.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury. 3 ALR4th 374.

2. Evidence and Witnesses § 701 (NCI4th)— defendant required to model mask—limiting instruction—no error

The trial court did not commit prejudicial error in giving a limiting instruction about an in-court demonstration requiring defendant to model a hood similar to the one worn by the victim's attacker, where the instruction specifically indicated the hood was not the one used by the attacker, was for illustrative purposes only, and should not be given undue emphasis by the jury.

Am Jur 2d, Criminal Law §§ 945, 946; Trial §§ 1213, 1283.

3. Evidence and Witnesses § 1898 (NCI4th)— arrest report and photo of defendant—admissibility for identification purposes

The trial court did not err in admitting into evidence an arrest report and photo of defendant for identification purposes where the victim testified that she thought defendant was her attacker except that the attacker had blue eyes and defendant's eyes were brown, and the State's purpose in displaying the photo and report was to show that defendant had worn blue contact lenses in the past.

Am Jur 2d, Evidence §§ 322, 784, 791, 792.5.

Admissibility, and prejudicial effect of admission, of "mug shot," "rogues' gallery" photograph, or photograph taken in prison, of defendant in criminal trial. 30 ALR3d 908.

4. Evidence and Witnesses § 1475 (NCI4th)— photograph of weapons—admissibility

In a prosecution for rape, burglary, assault with a deadly weapon, first degree sexual offense and kidnapping where the victim testified that her attacker thrust something which felt like a gun against her head, cut off her clothes with a knife, traced her body with a long thin knife, and beat her with something which felt like a club, the trial court did not err in admitting into evidence a photograph of weapons found during a search of defendant's car and residence, since the photograph was relevant to show the possibility of weapons

which were used or could have been used in the attack, and the probative value of the photograph outweighed any prejudice which might have existed.

Am Jur 2d, Evidence § 793.

5. Evidence and Witnesses § 2201 (NCI4th)— not improper identification

Testimony by a hair analysis expert that a hair found at the crime scene "is quite likely to have originated from [defendant]," coupled with the expert's statistical probability opinion, did not constitute an improper positive identification of defendant where the expert's statement does not rule out the possibility that the hair originated from a source other than defendant; the statistical illustration did not eliminate the possibility of other sources; the expert refuted a suggestion by defense counsel that he was equating the characteristics of head hair to the uniqueness of fingerprints; and the trial court instructed the jury that comparative microscopy of hair is not accepted as reliable for positively identifying individuals and is not conclusive.

Am Jur 2d, Expert and Opinion Evidence §§ 278, 301.

Admissibility and weight, in criminal case, of expert or scientific evidence respecting characteristics and identification of human hair. 23 ALR4th 1199.

6. Evidence and Witnesses § 2200 (NCI4th)— eyewitness identification—factors affecting reliability—expert witness's testimony properly excluded

The trial court did not err in excluding the testimony of an expert witness concerning the factors affecting the reliability of eyewitness identification where the court found that the evidence was not case specific, did not have sufficient probative value, would confuse the jury, and would not assist the jury in understanding the evidence or determining the facts in the case.

Am Jur 2d, Expert Opinion Evidence §§ 369-371.

Admissibility, at criminal prosecution, of expert testimony on reliability of eyewitness testimony. 46 ALR4th 1047.

Judge ORR concurring in part and dissenting in part.

STATE v. SUDDRETH

[105 N.C. App. 122 (1992)]

APPEAL by defendant from Judgment entered 6 June 1990 by *Judge Samuel A. Wilson, III*, in MECKLENBURG County Superior Court. Heard in the Court of Appeals 29 August 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Sylvia Thibaut, for the State.

Cheshire, Parker, Hughes & Manning, by Joseph Blount Cheshire, V, and Richard Noel Gusler, for defendant appellant.

COZORT, Judge.

Defendant Keith Norman Suddreth was found guilty of first-degree rape, second-degree burglary, assault with a deadly weapon inflicting serious injury, first-degree sexual offense, and first-degree kidnapping. He was sentenced to two life prison sentences and a 14-year sentence, all to run consecutively. On appeal, defendant raises several issues which question rulings made during trial. We conclude defendant received a fair trial free from prejudicial error.

The State's evidence at trial tended to show that on 16 July 1989, the victim arrived home from working the second shift at Presbyterian Hospital in Charlotte, North Carolina. As she was walking down the hall in her darkened apartment, someone jumped her from behind and threw her to the floor. The victim felt her assailant touch the back of her head with an object she thought was a gun. The attacker beat her, handcuffed her, and led her into the bedroom where he tied her to the bedposts. He then raped her. While raping her, the defendant called the victim "Baby." At one point, the victim got a "good look" at the attacker when the light was switched on momentarily. He was dressed entirely in black and was wearing an executioner's hood which had slits cut for the eyes and mouth. The victim could see the assailant's eyes and could tell they were blue. After terrorizing the victim for approximately two hours, the assailant left. The next morning the victim's neighbor discovered her after hearing pounding on the wall.

Officer Kenneth Grier of the Mecklenburg County Police Department testified that when he arrived at the crime scene, he asked the victim if she knew her attacker. The victim initially responded, "no," and then later stated, "I think I know who he is," but gave no name. At the hospital, the victim told the treating physician she was unsure about the race of the assailant. On the morning

of 17 July 1989, the victim talked with Ruth Story, a Mecklenburg County Police Investigator. The victim told Ms. Story it was the defendant who had raped and assaulted her.

The victim testified she knew the defendant because he also worked at Presbyterian Hospital. The victim and defendant established a friendly relationship during which they had had lunch, gone to a movie, attended a flower show and drank coffee at her house. She said the defendant's nickname for her was "Baby." She told the court the defendant wanted to establish a more serious relationship, but she was interested only in being friends. The defendant acted upset after the victim related her intent to maintain only a platonic relationship with him. One night in March, 1989, she discovered him peering in her window. She allowed him to come in the house to use her typewriter. He told her he wanted to have sex with her; she told him to leave. A month later, defendant again appeared uninvited at the victim's home. She talked briefly to him through the door, and he left. Later that night defendant telephoned her, and the victim told him she did not want to see him again.

The victim testified she recognized her attacker's voice as that of the defendant. On direct examination, she recalled some of the words which were exchanged before he pushed her into the bedroom.

> A. I said, "Keith, I'm sorry for what I did." He said, "Now, I will have to kill you." He said, "Why didn't you want me?"
>
> * * *
>
> A. [The assailant said,] "I wasn't good enough for you, right?" I shook my head no, saying no. He hit me. "I wasn't good enough for you right? Agree with me."

In addition, the victim told paramedics she did not want to be taken to Presbyterian Hospital because she was afraid. She did not give the paramedics the defendant's name because she did not want other employees of the hospital talking about her.

The victim did not positively identify the defendant as being her attacker until the day before trial. She testified she was confused because she was sure defendant was her assailant, except for the color of his eyes. Her attacker's eyes were blue, while the defendant's eyes were brown. She said, "the eyes bothered

me." Testimony by the defendant's stepmother and other evidence offered by the State revealed the defendant had previously worn blue contact lenses. The victim made an in-court identification of the defendant.

The defendant's evidence included alibi testimony by six witnesses, all relatives of defendant, who testified the defendant was with them in Lenoir, North Carolina, until approximately 11:00 p.m. on 16 July 1991.

[1] Defendant first contends the trial court committed reversible error in allowing an in-court demonstration requiring the defendant to model a mask in the presence of the jury, in admitting the mask into evidence, and in reciting an improper limiting instruction. We find no reversible error. During the trial, the court ordered the defendant to don a black executioner's mask while standing before the jury. The mask was similar to the one worn by the attacker and had been purchased by the State. The demonstration was performed to help the jury verify the victim's perception of her attacker and her identification of the defendant. Defendant contends this demonstration was unfairly prejudicial. We disagree.

It is well settled that an in-court demonstration requiring a defendant to don apparel is not a Fifth Amendment violation. *See Holt v. United States*, 218 U.S. 245, 252-53, 54 L.Ed. 1021, 1030 (1910); *Schmerber v. California*, 384 U.S. 757, 763-64, 16 L.Ed.2d 908, 915-16 (1966). The main issue is whether the procedure is too prejudicial to the defendant to be permitted. The leading case dealing with this issue in North Carolina is *State v. Perry*, 291 N.C. 284, 230 S.E.2d 141 (1976). In *Perry*, the trial court ordered the defendant to put on an orange stocking mask found at the scene of the crime and to stand in front of the jury. The orange stocking mask had runs in it which allowed the victim to see part of the robber's face. In court, the victim identified the defendant as being the robber. The Court held this demonstration was not prejudicial to the defendant since it aided the jury in verifying the victim's identification. The Court stated:

> The whole purpose of the experiment was not to identify the defendant as the perpetrator of the crimes charged, but to enable the jury to determine the correctness of his contention that the wearing of this mask by the perpetrator of the of-

> fenses made it impossible for [the victim] to see his features clearly enough to enable her to identify him thereafter.

Perry, 291 N.C. at 291-92, 230 S.E.2d at 145.

In support of its holding, the *Perry* case cited *United States v. Roberts*, 481 F.2d 892 (5th Cir. 1973), in which the defendant was instructed to model the mask used by the robber to allow the witness the opportunity to compare the similarity of the defendant's appearance while wearing the mask to the robber's appearance. The court stated, "[t]he Supreme Court has long held that the Fifth Amendment privilege against self-incrimination offers no protection against the compulsion to don an item of apparel worn by the person committing the offense in order to facilitate identification." *Roberts*, 481 F.2d at 894.

As in *Perry*, we find no unfair prejudice because the demonstration was conducted to aid the jury in determining whether or not the victim could see the color of the defendant's eyes. Furthermore, the fact that the mask was not the exact mask worn by the perpetrator does not preclude its use. The Court in *Perry* cited *United States v. Turner*, 472 F.2d 958 (4th Cir. 1973), in which the trial court required the defendant to wear a wig and sunglasses "similar" to ones worn by the robber in order to aid in identifying the perpetrator. We find the demonstration in the case below and the mask's admission into evidence to be no prejudicial error.

[2] Defendant additionally questions the correctness of the limiting instruction given prior to the demonstration. Rather than instructing the jury as defendant requested, the trial court instructed the jury as follows:

> Ladies and gentlemen, a demonstration is going to take place in just a moment, and I want to instruct you at this time that you should not place undue emphasis on this testimonial identification. This demonstration is for illustrative purposes only. The hood that is going to be placed on the Defendant's head is not the hood that was worn by the alleged assailant on the night of the alleged assault. It is for you, and you only, to determine what weight, if any, must be given to this demonstration.

Defendant argues the words "testimonial identification" contradict the statement "for illustrative purposes only." Despite the char-

acterization of the demonstration as a "testimonial identification," the instruction specifically indicated the hood was not the one used by the attacker, was for illustrative purposes only, and undue emphasis should not be placed on the demonstration. This instruction served to guard against any misunderstanding by the jury. Even assuming the instruction was error, defendant has failed to demonstrate how a different result would have been achieved at trial. N.C. Gen. Stat. § 15A-1443(a) (1983). We therefore cannot say such an error was prejudicial.

[3] Defendant next argues the trial court committed prejudicial error by admitting into evidence an arrest report and photo for identification purposes. In the case below, the State introduced a picture of defendant attached to a prior arrest report for an unrelated trespassing misdemeanor as evidence of the assailant's identity. The State's purpose in displaying the photo and report was to show the defendant had worn blue contact lenses in the past, and therefore could have worn the colored lenses on the night of the attack. Again, we find no prejudicial error.

All relevant evidence is generally admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1988). Relevant evidence is "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. Gen. Stat. § 8C-1, Rule 401 (1988). Rule 404(b) states:

> 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.

The probative value of such evidence must substantially outweigh any danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (1988). North Carolina courts have been liberal in allowing evidence to be admitted pursuant to Rule 404(b). *State v. Cotton*, 318 N.C. 663-66, 351 S.E.2d 277, 279 (1987). Rule 404(b) is a "general rule of *inclusion* of relevant evidence of other crimes, wrongs or acts by a defendant . . . ." *State v. Coffey*, 326 N.C. 268, 278-79, 389 S.E.2d 48, 54 (1990) (emphasis in original). In a criminal case, the identity of the perpetrator of the crime is always a material fact. *State v. Johnson*, 317 N.C. 417, 425, 347 S.E.2d 7, 12 (1986).

Therefore, " '[w]here . . . such evidence reasonably tends to prove a material fact in issue in the crime charged, it will not be rejected merely because it incidentally proves the defendant guilty of another crime,' but only if the sole logical relevancy of that evidence is to suggest defendant's predisposition to commit the type of offense with which he is presently charged." *State v. Jeter*, 326 N.C. 457, 458, 389 S.E.2d 805, 807 (1990) (quoting *State v. Johnson*, 317 N.C. at 425, 347 S.E.2d at 12).

In *State v. Carson*, 80 N.C. App. 620, 343 S.E.2d 275 (1986), this Court held testimony regarding defendant's arrest on an unrelated charge admissible "for the limited purpose of explaining [the witness's] initial identification of the defendant." *Id.* at 625, 343 S.E.2d at 278. The witness had observed the defendant and then recognized him on a television news broadcast regarding an arrest on an unrelated charge. The admission of the evidence was not "so prejudicial as to require a new trial." *Id.* Similarly, in the case below, the evidence was relevant in order to prove the perpetrator's identity. The victim testified she thought defendant was her attacker except for the eyes. The photo and arrest report indicated defendant's having had blue eyes at one time. This identification issue made the evidence of vital importance. Furthermore, this evidence was not overly prejudicial. The probative value of the evidence in this case was something other than to show merely the defendant had the propensity or disposition to commit an offense of the nature of the crime charged. Since under the circumstances the probative value of the evidence outweighed any prejudice to the defendant, the trial court properly admitted the picture and report.

[4] Additionally, the trial court gave the jury a limiting instruction which established the evidence as being considered for identification purposes only and notified the jury that the misdemeanor charge had in fact been dismissed. The instructions provided:

> Ladies and gentlemen, this evidence that's just received, it's received only, and is to be considered by you, only for such bearings as it may have, if any, on the identity of the Defendant. This was an arrest for a minor misdemeanor, the charges of which were later dismissed. This evidence is not to be considered by you as any evidence of criminal character.

This instruction adequately removed any potential prejudicial effect the evidence may have had.

Defendant next argues the trial court erred in admitting into evidence a photograph of certain items found during a search of defendant's car and residence. When police officers searched defendant's automobile as part of their investigation, they found two sheath knives, a slapjack and a police baton. The weapons were checked for blood using a luminaire light; no traces of blood were found. At trial, the State introduced into evidence a picture of the weapons. Defendant argues the photograph was irrelevant, and even if relevant, the picture was unfairly prejudicial. We disagree.

Photographs are usually competent to explain or illustrate anything that is competent for a witness to describe in words. *State v. Holden*, 321 N.C. 125, 140, 362 S.E.2d 513, 524 (1987), *cert. denied, Holden v. California*, 486 U.S. 1061, 100 L.Ed.2d 935 (1988). In her direct examination, the victim testified her attacker thrust something which felt like a gun against her head, cut off her clothes with a knife, traced her body with a long thin knife, and beat her with something which felt like a club. The photograph of the items found in defendant's vehicle was relevant to show the possibility of weapons which were used or could have been used in the attack. The probative value of the photograph additionally outweighed any prejudice if such prejudice can be said to have existed.

[5] Defendant next argues the trial court erred in admitting into evidence the testimony of a hair analysis expert. Defendant disputes the expert's use of statistical analysis in explaining his comparison of a hair sample taken from a paper towel at the crime scene with a hair sample from the defendant. A criminalist from the Charlotte Mecklenburg Crime Lab, Elinus Whitlock, III, testified the unknown hair from the paper towel was consistent with the hair sample from defendant. Mr. Whitlock gave the following testimony on direct examination:

> In this case, I found that the unknown hair from the paper towel is consistent with the hair standard from Keith Suddreth.
>
> Q. What do you mean by "consistent with"?
>
> A. I mean he exhibited all the same macroscopic and microscopic characteristics, and it is quite likely to have originated from Keith Suddreth.
>
> * * *

Q. How likely is it to have originated from Keith Suddreth?

A. . . .

Based on my experiences with hairs that I have examined, the characteristics I have seen in this hair it is certainly better than one out of a hundred, and my estimation is close to one out of a thousand. Meaning, if you pick an individual at random off the street, there is only one out of a thousand chance that the unknown hair would match or would also be consistent with that person's hair.

Defendant contends the hair expert's testimony, "it is quite likely to have originated from Keith Suddreth," coupled with the statistical probability opinion, constituted a positive identification of defendant as the attacker. Defendant contends the testimony was error, citing our decision in *State v. Faircloth*, 99 N.C. App. 685, 394 S.E.2d 198 (1990). We find *Faircloth* distinguishable from the case below and hold the trial court committed no error.

Our courts have liberally permitted the introduction of expert testimony as to hair analysis when relevant to aid in establishing the identity of the perpetrator. *See, e.g., State v. McNicholas*, 322 N.C. 548, 369 S.E.2d 569 (1988); *State v. Hannah*, 312 N.C. 286, 322 S.E.2d 148 (1984). While hair analysis evidence is admissible in criminal cases under a broad scope of relevancy, "[u]nlike fingerprint evidence, however, comparative microscopy of hair is not accepted as reliable for positively identifying individuals. Rather, it serves to exclude classes of individuals from consideration and is conclusive, if at all, only to negative identity." *State v. Stallings*, 77 N.C. App. 189, 191, 334 S.E.2d 485, 486 (1985) (citations omitted), *disc. review denied*, 315 N.C. 596, 341 S.E.2d 36 (1986).

In *Faircloth* the expert testified that " 'it would be improbable that these hairs would have originated from another individual' " and further stated that it would have been "impossible" for someone other than the defendant to have been in contact with the crime area and the victim's person. *Faircloth*, 99 N.C. App. at 692, 394 S.E.2d at 202. The Court found the statements to be "effectively, a positive identification of defendant derived from the hair evidence." *Id.* We do not find, however, that the testimony in the present case rises to the level of becoming a positive identification of the defendant. The expert's statement, "it is quite likely to have been from Keith Suddreth," does not rule out the

possibility the hair originated from a source other than the defendant. The statistical illustration also did not eliminate the possibility of other sources and was based on the expert's experience and expertise in the hair microscopy field. Furthermore, the witness refuted a suggestion by defense counsel that the expert was equating the characteristics of head hair to the uniqueness of fingerprints:

> Q. Well, you are not saying that the characteristics of head hair are so unique that they are like a fingerprint, are you?
>
> A. Oh, no. I cannot say that this hair came from a subject to the exclusion of all other individuals . . .
>
> Q. Right. Right.
>
> A. . . . because it is possible that the hair came from another individual.

Finally, the trial court instructed the jury, "comparative microscopy of hair is not accepted as reliable for positively identifying individuals and is not conclusive." We are of the opinion that the expert did not venture beyond his area of expertise, the testimony did not constitute a positive identification, and the trial court's instructions prevented the jury from reaching a decision based solely on the hair analysis testimony. We conclude the trial court committed no error.

[6] Next, defendant challenges the trial court's decision to exclude the testimony of an expert witness concerning the factors affecting the reliability of eyewitness identification. Defendant called Dr. Gary Long, a social psychology professor from the University of North Carolina, to testify in the area of eyewitness identification. The trial court refused to allow the witness's testimony, finding the evidence was not case specific, did not have sufficient probative value, would confuse the jury and would not assist the jury in understanding the evidence or determining the facts in the case. We agree.

"This court has held that the admission of expert testimony regarding memory factors is within the trial court's discretion, and the appellate court will not intervene where the trial court properly appraises probative and prejudicial value of the evidence under Rule 403 of the Rules of Evidence." *State v. Cotton*, 99 N.C. App. 615, 621, 394 S.E.2d 456, 459 (citing *State v. Knox*,

78 N.C. App. 493, 495-96, 337 S.E.2d 154, 156 (1985)). The standard for admitting such testimony was spelled out in *Knox*:

> Expert testimony is properly admissible when it "can assist the jury to draw certain inferences from facts because the expert is better qualified." The test for admissibility is whether the jury can receive "appreciable help" from the expert witness. Applying this test requires balancing the probative value of the testimony against its potential for prejudice, confusion, or undue delay. *See* N.C. Gen. Stat. 8C-1, Rule 403. Even relevant evidence may be excluded if its probative value is outweighed by the danger that it will confuse or mislead the jury. The court "is afforded wide latitude of discretion when making a determination about the admissibility of expert testimony."

Knox, 78 N.C. App. at 495, 337 S.E.2d at 156 (citations omitted). In the *Knox* case, as in the case below, Dr. Long was the proffered expert witness. The Court refused to permit Dr. Long to testify because his testimony was not case specific; "he testified generally about memory variables affecting the accuracy of eyewitness identification." *Id.* With respect to the present case, although the evidence held some probative value, the trial court did not find the evidence to be indispensable. Dr. Long did not interview the victim, did not visit the scene of the crime, and did not observe the victim testify. The only basis for Dr. Long's testimony was his review of the transcript of the victim's testimony. We find it proper to defer to the trial court's discretion. We conclude the court committed no error.

Next, defendant disputes the trial court's denial of his motion to dismiss for insufficiency of the evidence. The standard for ruling on a motion to dismiss is "whether there is substantial evidence (1) of each essential element of the offense charged and (2) that defendant is the perpetrator of the offense." *State v. Lynch*, 327 N.C. 210, 215, 393 S.E.2d 811, 814 (1990). Substantial evidence consists of "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). The test for sufficiency of the evidence is the same regardless of whether the evidence is circumstantial or direct. *State v. Earnhardt*, 307 N.C. 62, 68, 296 S.E.2d 649, 653 (1982). We find the evidence in the case below was sufficient for a jury to reasonably infer the defendant's guilt

from the circumstances shown. We conclude the trial court did not err in denying defendant's motion to dismiss the charges.

Defendant's remaining assignments of error deal with jury instructions. A review of the jury instructions given by the trial judge discloses no prejudicial error.

No error.

Judge LEWIS concurs.

Judge ORR concurs in part and dissents in part.

Judge ORR concurring in part and dissenting in part.

With the exception of the issue pertaining to the testimony of the hair analysis expert, I concur in the majority opinion. With respect to the issue pertaining to the hair analysis expert's testimony, I respectfully dissent. In my view, *State v. Faircloth*, 99 N.C. App. 685, 394 S.E.2d 198 (1990), is not distinguishable from the case *sub judice*.

This Court in *Faircloth* found that the expert's testimony that "it would be improbable that these hairs would have originated from another individual" was "effectively, a positive identification of defendant." *Id.* at 692, 394 S.E.2d at 202. The expert testified below that "it is quite likely to have originated from Keith Suddreth," and in response to a question as to how likely it is to have originated from Keith Suddreth, he stated that it is "certainly better than one out of a hundred, and my estimation is close to one out of a thousand." I would hold that here, as in *Faircloth*, the expert's testimony was an impermissible positive identification of defendant. The hair comparison analysis was an important link in establishing the identity of defendant as the perpetrator where there was only the victim's opinion that the masked assailant was the defendant and there were alibi witnesses for the defendant. I would therefore hold that this testimony is inadmissible and that defendant is entitled to a new trial.

STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION; LACY H. THORNBURG, ATTORNEY GENERAL; CAROLINA POWER & LIGHT COMPANY; DUKE POWER COMPANY; NANTAHALA POWER AND LIGHT COMPANY; NORTH CAROLINA CUSTOMERS ASSOCIATION, INC.; CAROLINA INDUSTRIAL GROUP FOR FAIR UTILITY RATES (CIGFUR-II); CONSERVATION COUNCIL OF NORTH CAROLINA; NORTH CAROLINA FAIR SHARE; NORTH CAROLINA CONSUMERS COUNCIL; NORTH CAROLINA SOLAR ENERGY ASSOCIATION; WESTERN NORTH CAROLINA ALLIANCE; SIERRA CLUB; JOCASSEE WATERSHED COALITION; ULTRASYSTEMS DEVELOPMENT CORPORATION; BLUE RIDGE ENVIRONMENTAL DEFENSE LEAGUE, INC.; AND DAVID SPRINGER, APPELLEES v. NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, APPELLANT

No. 9010UC1166

(Filed 21 January 1992)

1. **Energy § 21 (NCI4th)— least cost integrated resource plans— "unqualified approval" not given by Utilities Commission**

There was no merit to NCEMC's contention that the Utilities Commission erred in granting its "unqualified approval" of least cost integrated resource plans submitted by Duke Power and CP&L, since the Commission found as fact only that the plans submitted were "reasonable for the purposes of [the] proceeding" before it; that is, the plans were reasonable for analyzing the long-range needs for expansion of facilities for the generation of electricity in North Carolina; and the Commission made it expressly clear that the LCIRP proceedings were not meant to serve as a substitute for certification proceedings pursuant to N.C.G.S. §§ 62-110 or 62-110.1(a).

Am Jur 2d, Public Utilities §§ 236, 270.

2. **Energy § 21 (NCI4th)— least cost integrated resource planning proceeding—consideration of testimony deferred—issues properly before FERC**

NCEMC was not prejudiced by virtue of the Utilities Commission's decision finding Duke's and CP&L's LCIRPs reasonable, though the Commission deferred consideration of the testimony of two of NCEMC's witnesses, the substance of which NCEMC contended tended to show that the plans filed by Duke and CP&L were not least cost, since the same issues presented by the witnesses' testimony in this case were before the Federal Energy Regulatory Commission in a pro-

ceeding which was already underway; the testimony raised issues which were more appropriately directed to the attention of FERC, which has the exclusive authority to regulate interstate wholesale electric power transactions; and the Commission expressly left the witnesses' testimony open for consideration.

Am Jur 2d, Public Utilities § 303.

3. **Energy § 21 (NCI4th)— least cost integrated resource planning proceeding—no forum for mandatory orders to utility companies**

The newly-designed least cost integrated resource planning proceeding was not intended to provide an occasion for the issuance of mandatory orders requiring substantive changes in a given utility's operations. N.C.G.S. § 62-110.1(c).

Am Jur 2d, Public Utilities § 270.

4. **Electricity § 3 (NCI3d)— method of operations—effect on fairness of wholesale rates—order requiring change of method—FERC appropriate forum**

The issuance of an order requiring CP&L to provide NCEMC with its real-time system demand signal would have some impact upon the fairness of the wholesale rates at which NCEMC's member cooperatives are sold electricity, and such issue is therefore more appropriately addressed to FERC.

Am Jur 2d, Public Utilities § 303.

APPEAL by the North Carolina Electric Membership Corporation from order entered 17 May 1990 by the North Carolina Utilities Commission.

Thomas J. Bolch, Brand & Leckie, by Wallace E. Brand and Donrita Y. Cottrell, and Milton Grossman, of Counsel, for appellant, North Carolina Electric Membership Corporation.

H. Ray Starling, Jr., for appellee, Carolina Power & Light.

Steve C. Griffith, Jr., William Larry Porter, Karol G. Page, and Kennedy, Covington, Lobdell & Hickman, by Myles E. Standish, for appellee, Duke Power Company.

Gisele L. Rankin, for appellee, Public Staff—North Carolina Utilities Commission.

WYNN, Judge.

In 1975, the North Carolina General Assembly enacted G.S. 62-110.1(c) (1989), which directed the North Carolina Utilities Commission (the "Commission") to "develop, publicize, and keep current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina, including its estimate of the probable future growth of the use of electricity, the probable needed generating reserves, the extent, size, mix and general location of generating plants and arrangements for pooling power . . . ." 1975 N.C. Sess. Laws ch. 780, § 1. In the course of making this analysis and developing a plan, the Commission must confer and consult with the public utilities in North Carolina, conduct public hearings, and ultimately submit a report of its analysis and plan to the Governor and to appropriate committees of the General Assembly.

The parties are in general agreement that prior to 1987, the Commission's and the utilities' general practice was to focus strictly on "supply-side" considerations in analyzing the long-range needs for electricity in North Carolina. Supply-side considerations relate to *increasing the supply* of power available to a given utility, either by building new electricity generating units or by purchasing power from other utilities. In June 1987, however, the General Assembly enacted legislation amending N.C. Gen. Stat. 62-2 (The Public Utilities Act's "Declaration of Policy") by adding a new subsection (3a). *See* 1987 N.C. Sess. Laws, ch. 354, § 1. The policy of the State of North Carolina follows:

> To assure that resources necessary to meet future growth through the provision of adequate, reliable utility service include use of the entire spectrum of demand-side options, including but not limited to conservation, load management and efficiency programs, as additional sources of energy supply and/or energy demand reductions. To that end, to require energy planning and fixing of rates in a manner to result in the least cost mix of generation and demand-reduction measures which is achievable, including consideration of appropriate rewards to utilities for efficiency and conservation which decrease utility bills.

N.C. Gen. Stat. § 62-2(3a) (1989).

The parties are also in general agreement that the practical effect of adding subsection (3a) to G.S. 62-2 was to codify both the Commission's and the utilities' growing tendency to take "demand-side" considerations into account when complying with the directives of section 62-110.1(c). Demand-side considerations focus on the consumer's need for electricity, as well as ways to reduce that need. In response to the newly-enacted section 62-2(3a) and following several months of meetings and discussions, the Commission issued an Order on 8 December 1988 adopting Commission Rules R8-56 through R8-61 which set forth the process by which the Commission would comply with the new mandate. This process is known as "least cost integrated resource planning."

Also on 8 December 1988, the Commission issued an Order stating the following: "Integrated resource planning is a strategy which considers conservation, load management and other demand-side programs along with new generating plants, cogeneration and other supply-side options in providing cost-effective, high quality electric service." The Order required the utility companies subject to its Rules to file their least-cost integrated resource plans ("LCIRPs") with the Commission, and scheduled hearings in six different cities to analyze and investigate each utility's plan. Each plan filed was required to contain energy and peak load forecasts for at least fifteen years; an integrated resource plan giving due consideration to existing and new generating facilities, alternative energy resources, conservation and load management programs, purchased power, and transmission and distribution facilities; and a short-term action plan. Appellees Duke Power Company ("Duke") and Carolina Power and Light ("CP&L") were among the electric utility companies which filed LCIRPs with the Commission.

Pursuant to the Commission's invitation to all interested parties, the North Carolina Electric Membership Corporation ("NCEMC") petitioned to intervene and be heard during the hearings. NCEMC is comprised of twenty-seven electric distribution cooperatives which provide retail electric service to many areas of North Carolina. It also co-owns the Catawba Nuclear Station with Duke Power Company and the Saluda River Electric Cooperative. In its motion, NCEMC alleged that the "[i]dentification and utilization of least cost resource planning [was] critical to [its] successful operation." By Order dated 25 September 1989, NCEMC was allowed to intervene. Thereafter, NCEMC filed the testimony of three witnesses for the Commission's consideration.

On 12 December 1989, appellees Duke and CP&L filed separate motions to strike the testimony of each of the witnesses proffered by NCEMC. After considering the motions, the Commission decided to defer its consideration of two of the three witnesses' testimony until a later time. Thereafter, the matter came on for hearing on 9 January 1990. Following the hearing, the Commission issued an Order on 17 May 1990, stating the following finding of fact: "7. The Least Cost Integrated Resource Plans (LCIRP) filed by CP&L, Duke, and North Carolina Power are reasonable for the purposes of this proceeding. The Commission recognizes that LCIRP is an evolving, dynamic process, and that new information and new understanding of resource planning principles will be developed in the near future. The LCIRPs filed herein are at an early stage in their evolution, and these plans should be recognized as a good faith attempt to achieve an appropriate generation mix at least cost consistent with reliable service." NCEMC now appeals the Commission's 17 May 1990 final order.

I.

In its first assignment of error, NCEMC contends that the Commission erred in granting its "unqualified approval" of the LCRIPs submitted by Duke and CP&L. In this regard, NCEMC asserts that since the Commission deferred consideration of the testimony of two of NCEMC's witnesses, the substance of which NCEMC contends tended to show that the plans filed by Duke and CP&L were not least-cost, the better course of action for the Commission would have been to either reserve its judgment or, at most, lend its "conditional approval" of the Duke and CP&L plans.

Although NCEMC assigns error only to the Commission's entry of an "unconditional" final order and not to its decision to defer consideration of the testimony, it nonetheless would be helpful to an understanding of NCEMC's position to set forth the substance of those witnesses' testimony.

At the hearing, NCEMC presented to the Commission deposition-like testimony elicited from Dr. Richard Bower, an economist and former member of the New York Public Service Commission, and Anis Sherali, a power supply engineer.

Dr. Bower's testimony focused on one important aspect of CP&L's supply-side plan: CP&L's announced intention to purchase 400 MW of generating capacity from Duke between 1992 and 1997,

under a contract referred to as the "Schedule J" transaction. Bower analyzed the economics of the Schedule J transaction and concluded that it did not make good economical sense. It was his testimony that CP&L could meet its generation needs more economically if it were to facilitate a program whereby NCEMC could transfer excess power being generated through NCEMC's Catawba Nuclear Station entitlement to CP&L. The rationale underlying Bower's testimony is that seventeen of NCEMC's member cooperatives are located in areas controlled by CP&L, and those cooperatives receive their power requirements from NCEMC, which in turn receives its power supply through wholesale contracts with CP&L; CP&L, therefore, could meet its increased need for generating capacity more economically through a transfer of NCEMC's excess power from Catawba to the CP&L area. CP&L has refused to agree to such a transfer. In sum, the Bower testimony was proffered to indicate that the CP&L and Duke plans were not "least-cost."

Sherali's testimony was similar to that elicited from Bower; however, Sherali used a different method of analysis. Sherali testified that even if NCEMC were not allowed to transfer generating capacity from Catawba, the Schedule J transaction nonetheless would impose unnecessary costs upon CP&L ratepayers.

[1] For the reasons which follow, we are of the opinion that the Commission correctly handled these proceedings. First, the Commission did not, as NCEMC contends, grant "unqualified approval" of the Duke and CP&L LCIRPs; rather, the Commission found as fact in its 17 May 1990 order *only* that the Duke and CP&L plans were "reasonable for the purposes of [the] proceeding" before it. That is to say, the plans submitted by Duke and CP&L were reasonable for the purpose of "analy[zing] . . . the long-range needs for expansion of facilities for the generation of electricity in North Carolina . . . ." *See* N.C. Gen. Stat. § 62-110.1(c). Moreover, in response to concerns expressed in a motion filed by the Utilities Commission Public Staff that the Commission's 17 May 1990 order might be construed as "adopting" Duke's, CP&L's and other companies' LCIRPs, the Commission expressly reiterated that the 17 May 1990 order merely found the power companies' LCIRPs reasonable for the purposes outlined in G.S. 62-110.1(c); the Commission also *expressly* made it clear that the LCIRP proceedings were not meant to serve as a substitute for certification proceedings pursuant to G.S. 62-110 or 62-110.1(a).

[2] Second, in its pre-hearing order deferring consideration of Bower's and Sherali's testimony, the Commission stated that it would consider the testimony after the Federal Energy Regulatory Commission ("FERC") had reached a decision in a case in which the testimony of both Bower and Sherali was used. In addition to their assertions that the Schedule J transaction did not promote a least-cost objective, Bower and Sherali also contended that the Schedule J transaction would tend to suppress competition between CP&L and NCEMC's member cooperatives, and that CP&L had entered into the transaction in bad faith and in violation of federal antitrust laws. Duke and CP&L based their motions to strike Bower's and Sherali's testimony on the ground that the same issues presented by their testimony in the instant case were before FERC in a proceeding which was already underway. We agree with the appellees that the testimony of Bower and Sherali raises issues which are more appropriately directed to the attention of the Federal Energy Regulatory Commission. The Federal Power Act, 16 U.S.C. §§ 791a to 828c, authorizes FERC to regulate interstate wholesale electric power transactions. More importantly, FERC's authority over these transactions is exclusive and is not shared with state regulatory agencies. *Nantahala Power & Light Co. v. Thornburg*, 476 U.S. 953, 90 L.Ed.2d 943 (1986). Under 16 U.S.C. § 824d, a utility may not enter into a wholesale power transaction unless FERC has approved the rates and found them to be just and reasonable. As such, Duke and CP&L have submitted the Schedule J transaction for the FERC's approval. Since one of the factors which FERC considers in determining what is just and reasonable is whether the proposed transaction will have anti-competitive effects or will violate antitrust laws, *Federal Power Comm'n v. Conway Corp.*, 426 U.S. 271, 48 L.Ed.2d 626 (1976); *Gulf States Utilities Co. v. Federal Power Comm'n*, 411 U.S. 747, 36 L.Ed.2d 635, *reh'g denied*, 412 U.S. 944, 37 L.Ed.2d 405 (1973), and since NCEMC was allowed to intervene and submit the Bower and Sherali testimony in the proceedings for FERC's approval of the Schedule J transaction, NCEMC's concerns about the Schedule J transaction are being addressed adequately and appropriately in the proceedings which are currently before FERC. Moreover, since the Commission has expressly left the Bower and Sherali testimony open for consideration, we must conclude that NCEMC has suffered no prejudice by virtue of the Commission's decision finding Duke's and CP&L's LCIRPs reasonable.

II.

NCEMC next contends that the Commission erred in refusing to order CP&L to supply NCEMC with CP&L's "real-time" demand signal. A "real-time system signal" is an electronic signal which, when used with the proper equipment, provides a continuous indication of the total demand on a given utility's system. Although it is unclear from the record, it is presumably those service areas in which NCEMC's member cooperatives are located, but which are controlled by CP&L, to which NCEMC wishes the signal to be sent. According to NCEMC, it is the real-time system demand signal which allows utilities like CP&L to implement one of the most effective demand-side management techniques: shutting down or curtailing certain categories of use (e.g. domestic hot water heaters) during periods of peak demand. NCEMC asserts that, in order for such a program to operate efficiently, a utility must have accurate information from moment to moment regarding the level of demand on its system, and that the real-time system demand signal provides this information. NCEMC argues that since CP&L refuses to provide NCEMC with its signal, NCEMC is forced to speculate as to the precise time and length of the periods of peak demand on CP&L's system and that, as a result, voluntary participation on the part of NCEMC's member cooperatives' retail customers in programs designed to disrupt service during peak periods of demand is discouraged because the cooperatives inevitably disrupt the service for periods which are longer than necessary. It is NCEMC's position that in declining to order CP&L to make its signal available to NCEMC, the Commission "was heedless of its statutory mandate to promote 'the least-cost mix of generation and demand-reduction measures which is achievable . . . .'" We disagree.

[3] Although the issue of CP&L's providing its real-time system demand signal to NCEMC arguably bears some relevance to the effectiveness of CP&L's LCIRP, this Court is of the opinion that the newly-designed least-cost integrated resource planning proceeding was not intended to provide an occasion for the issuance of mandatory orders requiring substantive changes in a given utility's operations.

General Statutes section 62-110.1(c) makes it clear that the only purpose of a least-cost planning proceeding is to assist the Utilities Commission in "develop[ing], publiciz[ing], and keep[ing]

current an analysis of the long-range needs for expansion of facilities for the generation of electricity in North Carolina." Nowhere is it suggested in section 62-110.1(c) that the purpose of the proceeding is to issue directives which fundamentally alter a given utility's operations. Rather, we believe that the least-cost planning proceeding should bear a much closer resemblance to a legislative hearing, wherein a legislative committee gathers facts and opinions so that informed decisions may be made at a later time. Indeed, the very language of section 62-110.1(c), which requires the Commission to consider the analysis which results from the least-cost proceeding when acting upon a petition for the construction of a facility for the generation of electricity, appears to support this inference. In the instant case, however, no such petition was before the Commission and, therefore, the Commission was neither required nor even authorized, in the context of the proceedings in question, to issue the order which NCEMC sought.

If an intervenor desires the Commission to issue a mandatory order which will require a utility to take or to refrain from taking some specific substantive action, it may file a complaint pursuant to G.S. 62-73, which provides in relevant part as follows:

> Complaints may be made by the Commission on its own motion or by any person having an interest . . . by petition or complaint in writing setting forth any act or thing done or omitted to be done by any public utility . . . in violation of any provision of law or of any order or rule of the Commission, or that any rate, service, classification, rule, regulation or practice is unjust and unreasonable.

N.C. Gen. Stat. § 62-73 (1989). By mentioning this alternative method of bringing concerns before the Commission, however, we do not mean to suggest that the issue of the real-time system demand signal is appropriately addressed to the Utilities Commission. We only mention section 62-73 to emphasize the point that the least-cost planning proceeding is not the appropriate occasion for the issuance of mandatory orders.

[4] In the instant case, the Utilities Commission correctly recognized that the issue should be raised before FERC. As previously mentioned, exclusive jurisdiction over interstate wholesale electric power transactions is conferred upon FERC. NCEMC does not dispute FERC's authority to regulate the wholesale power transactions between it and CP&L. We shall, therefore, proceed under

the assumption that NCEMC concedes this point. If the Commission were to order CP&L to provide its real-time system demand signal to NCEMC, issues which were within the exclusive province of FERC would be affected.

In this regard, CP&L contends, and NCEMC does not dispute, that an order requiring CP&L to provide its real-time system demand signal to NCEMC would implicate, at least to some extent, the wholesale rate at which CP&L sells NCEMC's member cooperatives electric energy. CP&L contends that this is because providing NCEMC with its real-time system demand signal would change "a fundamental assumption" upon which the wholesale rate tariffs (which CP&L charges NCEMC's member cooperatives) are based: that NCEMC and its member cooperatives would not have access to the real-time demand signal.

According to CP&L, the monthly bills which it charges against NCEMC's member cooperatives in the CP&L area include both an energy component and a demand component. The energy component is based on a cooperative's total electric usage, as measured in kilowatthours, for the month, while the demand component is based primarily on the cooperative's demand, as measured in kilowatts (kW), during a one-hour period when CP&L's system demand reaches its peak for the month. CP&L further contends, and NCEMC does not dispute, that if NCEMC's cooperatives have access to CP&L's real-time system demand signal, then, by carefully observing fluctuations in system demand, the cooperatives could determine with considerable accuracy when the system reaches its monthly peak. With this information in hand, the cooperative could reduce its own demand during the period of peak demand, either by implementing a wide-scale demand reduction program such as that mentioned previously, or by purchasing a generator for use during the period of peak demand. In this way, CP&L argues, NCEMC's member cooperatives can create artificially low indications of their peak-hour demand, and thereby reduce the demand component of their monthly bills.

While CP&L does not dispute that reducing peak-hour demand is a good idea, it does dispute that the manner in which this could be accomplished, were it to provide NCEMC with the real-time system signal, is fair. It is CP&L's position that, since its plants and facilities are constructed on the basis of its need for power over a broader period of time than the one-hour period of peak

demand, the reduction of a cooperative's load for only one hour would have little or no effect on the cost of CP&L's system. As such, CP&L argues that, if it is ordered to supply NCEMC with the signal without a corresponding adjustment to the rate at which NCEMC and its member cooperatives are charged, the costs involved in meeting the expenses of expansion will be shifted to either CP&L's retail customers or to CP&L's shareholders.

Regardless of the merits of CP&L's argument, it is obvious that the issuance of an order requiring CP&L to provide NCEMC with its real-time system demand signal would have *some* impact upon the fairness of the wholesale rates at which NCEMC's member cooperatives are sold electricity. For this reason, we are of the opinion that such an issue more appropriately is addressed to FERC. Accordingly, we conclude that the Utilities Commission properly refused to order CP&L to provide NCEMC with its real-time system demand signal. NCEMC's assignment of error on this point, therefore, is overruled.

III.

In its final assignment of error, NCEMC contends that the Commission exceeded its statutory authority when, in its 17 May 1990 order, it announced its intention to require NCEMC "to participate in all future least-cost integrated resource planning proceedings" once a rulemaking proceeding for that purpose could be held. Unless and until the Commission actually institutes a rulemaking proceeding which results in such a requirement, we can discern no justiciable issue or genuine controversy between the parties. As such, the issue is not ripe for our determination and we decline to address it.

IV.

For the reasons discussed above, the order of the Utilities Commission is,

Affirmed.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. EDDIE LEE VINES

No. 9012SC1170

(Filed 21 January 1992)

1. Evidence and Witnesses § 1767 (NCI4th)— experimental evidence—admission no error

The trial court in a murder prosecution did not err in admitting evidence of an experiment conducted by officers investigating the murder where the evidence tended to show that the two and one-half year old victim died from burns and complications stemming therefrom; the burns allegedly happened when the child climbed into a tub of hot water; the investigating officers ran only hot water in the tub, just as defendant testified he did; the officers took a reading of the water temperature with a standard kitchen thermometer; the temperature was found to be approximately 145°F; this temperature was corroborated by the temperature setting on the water heater located in the house; and 145°F is the normal setting for tap water.

Am Jur 2d, Experiments and Tests §§ 820, 821, 825.

2. Criminal Law § 720 (NCI4th)— curative instructions—failure to restate following sustained objection—no error

The better practice is to issue curative instructions immediately following a sustained objection; however, there is no prejudicial error in the trial court's failure to reissue general curative instructions upon defendant's request.

Am Jur 2d, Trial § 1218.

3. Criminal Law § 553 (NCI4th)— failure to grant mistrial—no error

The trial court did not err in failing to grant a mistrial on the ground the State elicited testimony previously determined inadmissible by the trial court, since the court took reasonable precautions to remove any prejudice to defendant by retiring to chambers to contemplate granting a mistrial, discussing the possibility of a mistrial with counsel, issuing curative instructions that the jury not consider the disputed testimony, and polling the jury to determine if they could

disregard the testimony and continue their duties in a fair and impartial manner.

Am Jur 2d, Trial §§ 1218, 1708, 1710, 1746.

4. **Criminal Law § 685 (NCI4th)— jury instruction substantially similar to request—no error**

The trial court's instruction on the burden of proving that the victim's death was an accident was a correct statement of law and substantially conformed to the pattern instruction requested by defendant; therefore, the trial court committed no error in failing to submit the instruction requested by defendant.

Am Jur 2d, Trial § 1098.

5. **Criminal Law § 441 (NCI4th)— improper jury argument—integrity of witness and defense counsel challenged—new trial not required**

The prosecutor's jury argument which suggested that the testimony of defendant's expert medical witness was motivated by pay was grossly improper because it attacked the integrity of the witness and defense counsel, and such impropriety would justify a correction *ex mero motu*; however, in the light of the strong and convincing case against defendant, the prosecutor's improper comments did not require a new trial.

Am Jur 2d, Trial § 695.

6. **Homicide § 21.7 (NCI3d)— second degree murder—sufficiency of evidence of malice**

Evidence tending to show that defendant deliberately and forcefully placed his infant stepdaughter in a tub of scalding hot water, hot enough to cause fatal burns in as little as ten seconds, was sufficient to show the malice required to support a verdict of second degree murder.

Am Jur 2d, Homicide § 438.

APPEAL by defendant from judgment entered 21 May 1990 in CUMBERLAND County Superior Court by *Judge B. Craig Ellis*. Heard in the Court of Appeals 4 November 1991.

Defendant was indicted and convicted of murder in the second degree for the death of his stepdaughter, Chaketha Vines. Chaketha

was two and one-half years old and died after suffering first and second degree burns over her lower extremities, buttocks, abdomen and hands.

The evidence presented by the State at trial tended to show the following facts and circumstances. Defendant, his wife and Chaketha had recently moved into a new residence. On the evening of 15 August 1988 defendant and Chaketha were at home alone. Defendant was caring for Chaketha while her mother was at work.

Defendant made several statements concerning the events of 15 August. These statements, taken at different times after 15 August, were inconsistent and contradictory. Generally, defendant stated that Chaketha climbed into the bathroom tub which he had filled with hot water. In one account of the events, defendant stated he told Chaketha to "get on her nightgown" and prepare for bed. Defendant stated he went to check on Chaketha when she had not returned. Defendant found Chaketha in the tub. Defendant contended Chaketha had climbed into the tub despite being only thirty-one inches tall and quite small for her age.

Defendant stated in another account that the child already had on her nightgown, was "fake crying" and had soiled her nightgown in an effort to delay going to bed. Defendant sent Chaketha to "potty" after she soiled her nightgown and thus she was unsupervised in the bathroom. Defendant then went to check on Chaketha and found her in the tub. In a third account, defendant stated he found the child in the tub while the tub was still being filled with hot water. Defendant estimated Chaketha could have been in the tub up to ten minutes before he found her.

Defendant consistently admitted running only hot water into the tub. Defendant later stated he was drawing the hot bath for himself. Defendant stated he became alarmed upon finding Chaketha in the tub. Defendant took her out of the tub because her skin was red. Chaketha's skin was "peeling" away and "falling off" as she was removed from the tub. Defendant immediately ran cold water on the child's burns. Defendant did not call a doctor or ambulance for Chaketha but instead phoned her mother at work to inform her of Chaketha's condition. Chaketha eventually was taken to Cape Fear Valley Medical Center that evening.

Upon her arrival, Chaketha was treated by Dr. Michael Bauerschmidt, the emergency department physician. Defendant told

Dr. Bauerschmidt that the child had climbed into the tub and burned herself. Dr. Bauerschmidt noted the child suffered no burns above the upper chest or back with the exception of the forearms and hands. There were also no burns observed around the child's toes or across the upper groin. Dr. Bauerschmidt tested the child's reflexes which he found to be consistent with a normally developed child.

Chaketha was transferred to the burn center at North Carolina Memorial Hospital in Chapel Hill due to the extensive nature of her burns. She was treated by Dr. Hugh Peterson, director of the burn center. Dr. Peterson noted the same burn pattern found by Dr. Bauerschmidt and additionally observed the burn line on Chaketha was higher in the front than it was in the back. Chaketha underwent extensive, painful surgery in order to treat her burns. These efforts were unsuccessful and Chaketha eventually died of severe complications.

At trial Drs. Bauerschmidt and Peterson testified that in their opinions based upon the injuries observed, the burns Chaketha suffered could not have been inflicted accidentally. There were no splash marks or uneven burns on Chaketha which would be consistent with defendant's statements that Chaketha accidentally got into the tub. They also testified the burns could not be attributed to normal daily activity. Further, both doctors pointed out that portions of the child's feet were not burned. This fact would indicate something covered Chaketha's feet while she was in the tub. The even burn marks and a noticeable unburned fold on Chaketha's abdomen suggested the child was restrained and immersed in the hot water.

Drs. Bauerschmidt and Peterson, as well as doctors for the defendant, testified it would have taken between two and four seconds to inflict the burns suffered by Chaketha. One doctor testified it could take as long as ten seconds. Dr. Peterson testified that a "discovered" child, referring to defendant's account of the incident, probably could not have been extracted from the water quickly enough to prevent greater burning than was present. Both doctors that treated Chaketha found she reacted normally to pain associated with treating burn wounds.

The State presented testimony from investigating officers who checked the temperature setting on the Vines' water heater and took the water's temperature in the tub using only hot water. A reading of the water temperature in the tub with a thermometer

showed the temperature was approximately 145 or 146 degrees Fahrenheit. This reading was corroborated by the temperature setting of 145 degrees Fahrenheit found on the water heater.

Defendant's evidence tended to establish the following facts and circumstances. Defendant had never drawn water for a bath in the new residence until the evening of 15 August even though the family had lived there for almost a week. It was necessary in the Vines' old residence to run only hot water in order to have suitable water for bathing. Chaketha had previously climbed into a bath unsupervised. Family members testified defendant and Chaketha had a loving relationship and there had never been any abuse of the child.

Expert witnesses for defendant testified that Chaketha suffered from a rare condition known as congenital insensitivity to pain. This condition, as its name implies, prevents one from feeling pain as a normal person. The condition allowed Chaketha to climb into the tub and remain in water long enough to be burned severely. Defendant's experts testified that a proper diagnosis of this condition was entirely dependent upon observational or historical evidence and was to a large degree a matter of conjecture and judgment. Defendant's experts did not observe the child while she was alive. Defendant did not testify at trial.

Defendant was found guilty of second degree murder and sentenced to twenty years imprisonment, in excess of the presumptive term of fifteen years. The trial court found two aggravating and three mitigating factors and determined the aggravating factors outweighed the mitigating factors to support a sentence in excess of the presumptive. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane R. Garvey, for the State.

James R. Parish for defendant-appellant.

WELLS, Judge.

We note at the outset that defendant fails to discuss his fourth, six, seventh, eighth, tenth, twelfth and seventeenth assignments of error. These assignments are therefore deemed abandoned. N.C.R. App. P., Rule 28. In his remaining assignments, defendant contends the trial court erred in admitting evidence of an experiment without a sufficient showing of similar circumstances, failing to give curative

instructions as requested by defendant and denying defendant's motion for a mistrial.

Defendant further assigns as error the trial court's failing to instruct on the burden of proof of accident as requested by defendant and to sustain defendant's objections to the State's improper arguments to the jury. Finally, defendant assigns as error the trial court's submitting the possible verdict of second degree murder and imposing a sentence greater than the presumptive on finding the crime was heinous, atrocious or cruel when not supported by the evidence. We find no error.

[1] Defendant first assigns as error the trial court's admitting evidence of the experiment conducted by officers investigating the death of Chaketha Vines. Specifically, defendant contends the conditions of the experiment were not similar to the conditions as they existed on 15 August 1988. Defendant further contends the thermometer used in the experiment to test the temperature of the water they ran into the tub was not shown to be accurate; therefore, the evidence should have been excluded. We disagree.

The law is well settled in this jurisdiction that experimental or demonstrative evidence is admissible when performed under circumstances substantially similar to those existing at the time of the original transaction. The conditions need not be identical, but a reasonable or substantial similarity is sufficient. *State v. Mayhand*, 298 N.C. 418, 259 S.E.2d 231 (1979). The [trial court] is commonly afforded broad discretion in determining whether the conditions and circumstances of an experiment are sufficiently similar to those sought to be duplicated to render the results admissible. *State v. Bondurant*, 309 N.C. 674, 309 S.E.2d 170 (1983). The court's rulings thereon will not be interfered with on appeal unless an abuse of discretion is clearly shown. *State v. Jones*, 287 N.C. 84, 214 S.E.2d 24 (1975).

There is no showing, clear or otherwise, by defendant of an abuse of discretion regarding the introduction of this evidence. The investigating officers ran only hot water in the tub just as defendant testified he did. The officers took a reading of the water temperature with a standard kitchen thermometer. The temperature was found to be approximately 145 or 146 degrees Fahrenheit. This temperature was corroborated by the temperature setting on the water heater located in the Vines' residence. Further, it was testified without objection that 145 degrees Fahrenheit is the

normal setting for tap water. The trial court did not abuse its discretion in admitting this evidence; therefore, this assignment of error is overruled.

[2] Defendant next assigns as error the trial court's failure to give curative instructions as requested by defendant. Defendant objected to certain aspects of testimony of Drs. Bauerschmidt and Peterson while on direct examination for the State. Defendant then requested the trial court issue curative instructions following the court's sustaining of defendant's objections. This request was denied by the trial court and defendant contends this allowed the jury to wrongly consider evidence prejudicial to defendant's case. We disagree.

We note the trial court issued general instructions to the jury at the outset of the trial. Among these were instructions regarding the consideration to be given evidence to which an objection had been raised and sustained. These instructions were, in pertinent part:

> When the [c]ourt sustains an objection to a question, the jurors must disregard the question and the answer, if one has been given, and draw no inference from the question or speculate as to what the witness would have said if permitted to answer the question.

These instructions are sufficient to cure any prejudicial effect suffered by defendant regarding evidence to which an objection was raised and sustained. Our Supreme Court stated in *State v. Franks*, 300 N.C. 1, 265 S.E.2d 177 (1980), that it was not prejudicial error when a trial court issued curative instructions at the outset of a trial and failed to reissue them following a motion to strike. However, the Court noted it was the better practice to give instructions to disregard testimony immediately after a motion to strike. In the present case, defendant made no motion to strike but simply requested that the trial court reissue its curative instructions. We agree that the better practice would be to issue curative instructions immediately following a sustained objection. However, we find no prejudicial error in the trial court's failure to reissue these instructions upon defendant's request. Therefore, this assignment of error is overruled.

[3] Defendant next assigns as error the trial court's failure to grant a mistrial on the grounds the State elicited testimony previously determined inadmissible by the trial court. Defendant moved

for a mistrial following the State's attempt to question a nurse about the Vines' behavior while at the North Carolina Burn Center. The trial court had previously admonished the State from asking any questions about the Vines' behavior. Further, the State was directed not to ask any opinion of the witness comparing the Vines' behavior with other parents' behavior whose children had been burn center patients. We find no error.

N.C. Gen. Stat. § 15A-1061 states, in part, a defendant's motion for mistrial must be granted "if there occurs during the trial an error or legal defect in the proceedings, or conduct inside or outside the courtroom, resulting in substantial and irreparable prejudice to the defendant's case." The decision as to whether prejudice has occurred is addressed to the discretion of the trial judge and is not reviewable absent a showing of gross abuse of discretion. *State v. Rogers*, 52 N.C. App. 676, 279 S.E.2d 881 (1981).

In the present case, it is clear the trial court did not abuse its discretion in denying defendant's motion for a mistrial. Rather, the trial court took reasonable precautions to remove any prejudice to defendant. The trial judge retired to chambers to contemplate granting a mistrial. He discussed the possibility of a mistrial with counsel. Further, the trial court issued curative instructions that the jury not consider the disputed testimony. Finally, the trial court polled the jury to determine if they could disregard the testimony and continue their duties in a fair and impartial manner. Each juror indicated in the affirmative by a show of hands. These actions by the trial court do not show any abuse of discretion; therefore, this assignment of error is overruled.

[4] Defendant next assigns as error the trial court's failure to instruct the jury on the burden of proving Chaketha's death was an accident as requested by defendant. Defendant contends the instruction given by the trial court somehow conveys the notion that defendant's assertion of accidental death is a burden of proof upon defendant, which may be overcome by the State. However, the State contends the disputed instruction is a proper statement of law. Further, the State notes in its brief that defendant admitted at the charge conference there was no substantive difference between the instructions requested and the one given. We agree and find no error.

It is well established that if a request is made for a specific instruction which is correct in law and supported by the evidence,

the trial judge must give the instruction. *State v. Townsend*, 99 N.C. App. 534, 393 S.E.2d 551 (1990), *citing State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976). It is equally well established, however, that the trial court is not required to give a requested instruction in the exact language of the request, so long as the instruction is given in substance. *Id.* The instruction given by the trial court, N.C.P.I.-Crim. 307.10, is a correct statement of law and substantially conforms to the pattern instruction requested by defendant, N.C.P.I.-Crim. 206.35. Therefore, the trial court committed no error in failing to submit the instruction requested by defendant and this assignment of error is overruled.

Defendant's next four assignments of error concern alleged improper arguments to the jury by the State. These assignments, argued together in defendant's brief, will be treated together in this opinion. Defendant first contends the trial court committed reversible error when it overruled defendant's objection to the State's misstatement of law on the issue of malice. In three other assignments, defendant contends the State's closing argument was grossly improper and prejudicial to him. We note defendant failed to object at trial to all but two of the incidents of alleged improper arguments. Therefore, we will first address the incidents to which defendant objected. We will then address the question of whether the trial court should have corrected the other alleged improper arguments *ex mero motu*.

As to defendant's contention regarding the State's misstatement of law, we note the trial court, while overruling defendant's objection, instructed the jury to disregard the prosecutor's misstatement. The trial court further instructed the jury to rely upon it for instructions of law. These are steps the trial court would have taken if the objection had been sustained. Therefore, any error by the trial court in overruling defendant's objection was not prejudicial to defendant and this assignment of error is overruled.

Defendant contends the State's injection of personal opinion into closing arguments was grossly improper and prejudicial. It is well settled that the control of the arguments of counsel must be left largely to the sound discretion of the trial judge with wide latitude given counsel to argue all the law and the facts presented by the evidence and all reasonable inferences. *State v. McCall*, 289 N.C. 512, 223 S.E.2d 303 (1976). However, counsel may not employ his argument as a device to place before the jury incompe-

tent and prejudicial matters by expressing his own knowledge, beliefs and opinions not supported by the evidence. *State v. Allen*, 323 N.C. 208, 372 S.E.2d 855 (1988).

It should be noted that the trial court sustained defendant's objection in the one instance in which an objection was raised on the grounds of injecting personal opinion. Further, the trial court issued curative instructions for the jury not to consider an improper argument. When a trial court sustains a defendant's objection [to the State's improper argument] and instructs the jury not to consider it, the jury is presumed to have heeded the instruction and any prejudice is removed. *State v. Gregory*, 37 N.C. App. 693, 247 S.E.2d 19 (1978). Therefore, this assignment of error is also overruled.

[5] Defendant's remaining assignments on the issue of improper arguments are based on portions of the State's argument in which defendant contends that the prosecutrix argued that defendant contrived a defense and procured false testimony. Defendant failed to object at trial to any of these disputed portions of the State's closing argument. Therefore, the question before this Court is whether the trial court should have corrected the alleged improper argument *ex mero motu*. *See State v. Kirkley*, 308 N.C. 196, 302 S.E.2d 144 (1983). In a case where the defendant fails to object to the State's closing argument, the standard of review is one of gross impropriety. *State v. Craig and State v. Anthony*, 308 N.C. 446, 302 S.E.2d 740 (1983).

The prosecutrix began her "evaluation" of defendant's evidence with the testimony of Dr. Leshner, one of defendant's expert witnesses, in this fashion: "And here comes Dr. Leshner. You're right, I'm going to talk about him. You can get a doctor to say just about anything these days." In elaboration upon this theme, the prosecutrix went on to imply or suggest that Dr. Leshner's testimony was motivated by "pay." Such argument not only attacked the integrity of Dr. Leshner but also that of defense counsel. We vigorously disapprove of this improper argument and deem it to have been of such gross impropriety as to justify an *ex mero motu* correction. In the light of the strong and convincing case against defendant, especially the medical evidence presented by the State, we cannot say that the prosecutrix's improper comments are sufficiently prejudicial as to require a new trial. *See State v. Kirkley, supra* and *State v. Craig and Anthony, supra.*

[6] Defendant next assigns error to the trial court's submitting second degree murder as a possible verdict, contending that due to the absence of evidence of malice, such a verdict was not supported by the evidence. Defendant contends that at most the State's evidence would show his culpable negligence, which in turn would support at most a verdict of involuntary manslaughter. We disagree.

While a person may not be convicted of second degree murder in the absence of some intentional act sufficient to show malice, which act proximately causes death, the element of malice may be found in the nature of the intentional act leading to death. *State v. Wilkerson*, 295 N.C. 559, 247 S.E.2d 905 (1978). Any act evidencing "wickedness of disposition, hardness of heart, cruelty, recklessness of consequence, and a mind regardless of social duty and deliberately bent on mischief . . ." is sufficient to supply the element of malice necessary for second degree murder. *Id.*, *quoting* from Justice Sharp's dissent in *State v. Wrenn*, 279 N.C. 676, 185 S.E.2d 129 (1971). The evidence in this case tending to show that defendant deliberately and forcefully placed his infant daughter in a tub of scalding hot water, hot enough to cause fatal burns in as little as ten seconds, clearly meets the *Wilkerson* test. This assignment is therefore overruled.

In his final assignment of error, defendant contends that the trial court erred in imposing a sentence greater than the presumptive because the trial court's finding of the factor in aggravation that the crime was heinous, atrocious or cruel was not supported by the evidence. We need not dwell upon the heinous, atrocious and cruel aspect of defendant's crime to reject this argument summarily. This assignment is overruled.

For the reasons stated, we find no prejudicial error in defendant's trial.

No error.

Judges LEWIS and WALKER concur.

ROBERT D. HINSHAW, PLAINTIFF v. MELVIN WRIGHT, JR.; CARL F. PARRISH; T. LAWSON NEWTON, DEFENDANTS

No. 9021SC1304

(Filed 21 January 1992)

1. **Contracts § 106 (NCI4th)— law partners—withdrawal agreement—partnership agreement superceded**

The trial court did not err in concluding that the terms and conditions of the parties' 1986 agreement superceded and controlled the withdrawal provisions in their 1983 partnership agreement, since the subject matter of the later agreement dealt comprehensively with payments upon termination for capital and receivables and detailed the amount of money plaintiff received without reference to the 1983 partnership agreement; the 1986 contract was complete on its face and included a merger clause; all the parties were attorneys who presumably understood basic contract law and the effect of merger clauses; and plaintiff testified that he was involved in negotiating the 1986 agreement.

Am Jur 2d, Contracts §§ 397, 513, 520, 542; Partnership §§ 103, 105-108.

2. **Evidence and Witnesses § 2024.1 (NCI4th)— testimony to explain ambiguous contract provision—testimony not excluded by parol evidence rule**

In an action to determine the rights and liabilities of the parties pursuant to a withdrawal agreement executed in 1986 which superceded their partnership agreement of 1983, the trial court did not err in allowing defendants to testify about plaintiff's representations concerning a fee for work performed by plaintiff while still part of the firm, since such evidence did not allow defendants to assert a parol warranty of collectibility, but instead served to explain a paragraph of the 1986 agreement regarding receivables.

Am Jur 2d, Contracts § 403.

3. **Appeal and Error § 513 (NCI4th)— correct result—incorrect reasoning—judgment stands**

Even though the trial court erred in holding that former law firm partners who had withdrawn from the parties' part-

nership assigned their claims and interest in law firm assets and receivables to defendants rather than waived those interests, the trial court's judgment nevertheless stands, since the correct result was reached.

Am Jur 2d, Appeal and Error § 727.

4. **Fiduciaries § 2 (NCI3d)— failure to make timely delivery of insurance policies—breach of fiduciary duty**

Evidence was sufficient to support the trial court's determination that plaintiff was responsible for procuring life insurance and retirement benefits for a law firm, and that he breached his fiduciary duty to defendants by failing to deliver the insurance policies to defendants within the twenty-day rescission period as defendants requested.

Am Jur 2d, Partnership §§ 420, 623, 624.

5. **Fiduciaries § 2 (NCI3d)— breach of fiduciary duty—jurisdiction of state court**

The Superior Court of Forsyth County had subject matter jurisdiction over defendants' claim against plaintiff for breach of fiduciary relationship because plaintiff's conduct fell outside the purview of ERISA and did not relate to ERISA in that plaintiff's breach of fiduciary duty arose not out of any administrative responsibility to an insurance plan but rather out of his fiduciary duty to inform his fellow partners that he had received the insurance policy prior to the expiration of the twenty-day rescission period.

Am Jur 2d, Pensions and Retirement Funds § 1197.

6. **Partnership § 4 (NCI3d)— debt of partnership—pro rata share assigned to each partner—error**

The trial court erred in assigning to each defendant a pro rata share of the debt owed to plaintiff pursuant to the parties' agreement for plaintiff's withdrawal from the law firm. N.C.G.S. § 59-45.

Am Jur 2d, Partnership § 520.

APPEAL by plaintiff from judgment entered 21 September 1990 in FORSYTH County Superior Court by *Judge Dexter Brooks.* Heard in the Court of Appeals 14 October 1991.

Clyde C. Randolph, Jr., attorney for plaintiff-appellant.

David F. Tamer, attorney for defendants-appellees.

WYNN, Judge.

Plaintiff and defendants formed a law firm on 1 May 1983 and drew up an agreement which governed various aspects of the partnership. One of the responsibilities plaintiff assumed was the maintenance of life insurance policies for firm members.

On 31 August 1986, plaintiff withdrew from the firm and entered into a second agreement with the remaining partners. This 1986 agreement contained a merger clause and provided that defendants would pay plaintiff a lump sum of $10,000, and payments of $511.67 per month until they paid a total of $40,700 for his interest in the firm. Paragraph five of the agreement called for plaintiff to remit to the firm any fees he received which had been earned by the firm for his services prior to 1 September 1986. Plaintiff and the firm manager reviewed his work in progress and accounts receivable prior to plaintiff's withdrawal.

Defendants made the $10,000 lump-sum payment, as well as ten monthly payments. Defendants ceased making payments after plaintiff failed to remit $6,909 due the firm for work performed in *La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 350 S.E.2d 889 (1986), *cert. denied*, 319 N.C. 459, 354 S.E.2d 888 (1987), and from another client, Mr. Wallace Vanhoy.

Following the cessation of payments by defendants, plaintiff filed an action seeking a declaratory judgment of the rights and liabilities of the parties under the 1983 law firm partnership agreement and the 1986 withdrawal agreement. Defendants filed a counterclaim, alleging that plaintiff breached his fiduciary duty to defendants by failing to notify them when life insurance policies which defendants wished to cancel were delivered to plaintiff. Defendants also sought to have the unremitted funds setoff against any money still owed to plaintiff. The trial judge entered judgment as follows: (1) plaintiff recovered from defendants the sum of $15,350 under the 1986 withdrawal agreement; (2) defendants were allowed an offset against plaintiff's recovery in the amount of $6,909 received by plaintiff from the *La Notte* case and $2,900 received by plaintiff from Wallace Vanhoy; and (3) defendants recovered $4,828 from plaintiff under their breach of fiduciary duty claim,

with $2,174 to defendant Wright, $2,174 to defendant Parrish, and $480 to defendant Newton. From this judgment, plaintiff appealed.

I.

[1] Plaintiff first assigns error to the trial court's determination that the 31 August 1986 agreement supercedes and controls provisions contained in the 1 May 1983 partnership agreement. Plaintiff contends that, as a matter of law, the making of the second contract dealing with the same subject matter does not abrogate or discharge the first contract and, that the 1986 agreement does not purport to alter or modify the terms of the 1983 agreement. We disagree.

The North Carolina Supreme Court, in *Wittaker General Medical Corp. v. Daniel*, 324 N.C. 523, 379 S.E.2d 824, *reh'g denied*, 325 N.C. 231, 381 S.E.2d 792, *reh'g denied*, 325 N.C. 277, 384 S.E.2d 531 (1989), discussed the methods employed in determining whether a second contract supercedes the first. In *Daniel*, plaintiff employer sought damages for its employee's breach of a covenant not to compete. The employee, a salesperson, signed a covenant not to compete and, subsequently, entered a second contract that altered the method of her compensation and her territory but did not contain a non-competition agreement. The *Daniel* Court stated the following concerning novation:

> A novation occurs when the parties to a contract substitute a new agreement for the old one. The intent of the parties governs in determining whether there is a novation. If the parties do not say whether a new contract is being made, the courts will look to the words of the contracts, and the surrounding circumstances, if the words do not make it clear, to determine whether the second contract supersedes the first. If the second contract deals with the subject matter of the first so comprehensively as to be complete within itself or if the two contracts are so inconsistent that the two cannot stand together a novation occurs.

Id. at 526, 399 S.E.2d at 827. The Court upheld the jury's decision to enforce both contracts consistently, stating that the jury could have found that this was the intent of the parties.

Additionally, the presence of a merger clause in a second contract may cause a novation in a second contract. In *Zinn v. Walker*, 87 N.C. App. 325, 361 S.E.2d 314 (1987), *disc. review denied*, 321 N.C. 747, 366 S.E.2d 871 (1988), this Court noted that "[m]erger

clauses create a rebuttable presumption that the writing represents the final agreement between the parties. Generally, in order to effectively rebut the presumption, the claimant must establish the existence of fraud, bad faith, unconscionability, negligent omission or mistake in fact." *Id.* at 333, 361 S.E.2d at 318. The one exception to this general rule applies when giving effect to the merger clause would frustrate the parties' true intentions. *Id.*

In the case at bar, the 1983 Partnership Agreement contained the following relevant provisions on withdrawal:

> Section 4.2. *Payments to Terminate a Partner.* Upon the termination of a Partner's interest in the firm, the firm shall pay to the Partner, or to the Partner's successor-in-interest, the following sums:
>
> (a) *Payment for Capital.* The amount of the terminated Partner's capital account as of the date of termination, payable without interest within ninety (90) days after the date of termination. This payment is intended to be for the terminated Partner's interest in Partnership Property under Section 736(b)(1) of the Internal Revenue Code. In determining the amount of the capital account, fixed assets shall be valued as agreed upon by the terminated Partner in the firm, or in the absence of such an agreement at appraised value as determined by two qualified appraisers . . . .
>
> (b) *Payment for Receivables and Work in Process.* An amount equal to 50.0% of the average of the terminated Partner's taxable income from the firm during each of the last three (3) complete fiscal years of the firm, during which he was a Partner, payable in sixty (60) equal monthly installments, without interest, beginning ninety (90) days after the date of his termination. This payment is intended to be an income payment under Section 736(a) of the Internal Revenue Code.

The 1986 Withdrawal Agreement contained the following provisions concerning payments upon termination:

> 3. For and in consideration of such transfer [of Hinshaw's partnership interest], the Firm agrees to pay to Hinshaw the sum of Forty Thousand Seven Hundred Dollars ($40,700.00) as follows:

(a) Ten Thousand Dollars ($10,000.00) in cash or certified funds on or before September 2, 1986,

(b) Five Hundred and Eleven Dollars and Sixty-Seven Cents ($511.67) per month, beginning November 1, 1986 and continuing on the first day of each month thereafter until the sum is paid. No interest shall accrue on said sum.

. . . .

5. Hinshaw agrees to assign to the firm all of his right, title and interest in and to all monies, debts, accounts and work in process (billed and unbilled) due or hereafter to become due the partnership as a result of the services rendered by Hinshaw through and including August 31, 1986. The firm is authorized to take all appropriate action in order to collect said amounts and Hinshaw hereby authorizes the firm to use his name in doing so if such is reasonably necessary.

The 1986 agreement also contained a merger clause, and plaintiff did not rebut the novation presumption under this Court's decision in *Zinn*. Thus, the determinative issue is whether the trial court's finding that the 1986 agreement superceded the 1983 agreement frustrates the intention of the parties as required by the decisions in *Daniel* and *Zinn*. In our opinion, the subject matter of the latter agreement deals comprehensively with payments upon termination for capital and receivables, detailing the amount of money plaintiff received without reference to the 1983 Partnership Agreement. The 1986 contract also is complete, on its face, and includes a merger clause. We further note that all of the parties are attorneys who presumably possess an understanding of basic contract law and the effect of merger clauses, and plaintiff testified that he was involved in negotiating the 1986 agreement. After examining the relevant provisions of the two agreements and the evidence presented at trial, we find that the trial court did not err in concluding that the terms and conditions of the 1986 agreement supercede and control the withdrawal provisions in the 1983 agreement.

II.

[2] Plaintiff next assigns error to the trial court's admission into evidence of the testimony of defendants Wright, Parrish, and Newton about plaintiff's representations concerning the $6,909.00 fee in

the *La Notte* case. Plaintiff contends that this evidence amounts to an inadmissible parol warranty of collectibility. We disagree.

The parol evidence rule is not a rule of evidence but of substantive law. H. Brandis, *North Carolina Evidence* § 251 (3d ed. 1988). The traditional statement of the rule is that when a writing is integrated, all prior and contemporaneous negotiations or agreements are merged into the writing. *Cantrell v. Woodhill Enterprises, Inc.*, 273 N.C. 490, 160 S.E.2d 476 (1968). A writing is integrated if it supercedes all other agreements related to the transaction. H. Brandis, *supra*, at § 252. One exception to the parol evidence rule allows for evidence which explains ambiguous terms in the contract. *Mozingo v. North Carolina Nat'l Bank*, 31 N.C. App. 157, 229 S.E.2d 57 (1976), *disc. review denied*, 291 N.C. 711, 232 S.E.2d 204 (1977).

In the case at bar, the 1986 Withdrawal Agreement was integrated because, as we found in the previous section of this opinion, it superceded the provisions of the previous agreement on withdrawal. Thus, parol evidence is admissible only if it serves to explain an ambiguous term in the 1986 agreement. Plaintiff argues that the trial court allowed defendants to assert a parol warranty of collectibility. *See Clifford v. Riverbend Plantation, Inc.*, 312 N.C. 460, 323 S.E.2d 23 (1984) (holding that absent fraud in the inducement, warranties cannot be asserted by parol); *Dellinger v. Lamb*, 79 N.C. App. 404, 339 S.E.2d 480, *disc. review denied*, 317 N.C. 702, 347 S.E.2d 39 (1986) (same). We disagree with plaintiff's contention. The trial court allowed defendants' testimony concerning the *La Notte* fee to explain paragraph five of the 1986 agreement regarding receivables. As such, this evidence did not violate the parol evidence rule and was admitted properly.

III.

[3] Plaintiff also contends that the trial court erred in finding that former law firm partners Charles J. Alexander, II, and Gary B. Tash, when they withdrew from the firm, assigned their claims and interest in law firm assets and receivables to defendants. Plaintiff argues that there was no valid assignment because Tash and Alexander waived their rights to the *La Notte* receivables in their agreement with defendants.

An assignment is a formal transfer of property or property rights from one to another, *Payne v. Buffalo Reinsurance Co.*, 69

N.C. App. 551, 317 S.E.2d 408 (1984), whereas a waiver is the intentional relinquishment of a known right, *Adder v. Holman & Moody, Inc.*, 288 N.C. 484, 219 S.E.2d 190 (1975). In the instant case, the specific language of the withdrawal agreement between Alexander and Tash and the firm indicated a waiver, not an assignment. The trial court incorrectly termed the waiver as an assignment; but, by waiving their interest in the fees, the remaining firm members were entitled to their shares of the waived fee as if there had been an assignment of the interest. Because the correct result was reached in this case, the trial court's judgment stands with regard to the waiver of the *La Notte* fees. *See In re Will of Pendergrass*, 251 N.C. 737, 112 S.E.2d 562 (1960) (A judgment below will stand even though it is based on faulty reasoning if the correct result was reached.); *Payne*, 69 N.C. App. 551, 317 S.E.2d 408 (same). Plaintiff's assignment of error is overruled.

IV.

[4] Additionally, the plaintiff assigns error to the trial court's determination that plaintiff was responsible for procuring life insurance and retirement benefits for the law firm and that he breached his fiduciary duty to defendants. Plaintiff allegedly breached his duty by failing to deliver the insurance policies to defendants within the twenty-day rescission period as defendants requested.

If there is any competent evidence in the record to support the trial court's finding of fact, this Court must sustain the finding on appeal even if there is evidence that would support a contrary finding. *Williams v. Pilot Life Ins. Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). Plaintiff challenges the trial court's finding that plaintiff knew defendants wanted to rescind the policy but waited to deliver the policies until after the twenty-day rescission period had run. After reviewing the record, we find there was competent evidence to support the trial court's finding of fact. Mr. Wright testified that the partners asked Mr. Hinshaw if he had received the insurance policies. Mr. Hinshaw stated that he had not received them. The partners then told him that when the policies came in, they wanted the opportunity to send them back or rescind them within the twenty-day rescission period. This testimony alone is sufficient to support the trial court's finding. We, therefore, overrule plaintiff's assignment of error on this point.

V.

[5] Plaintiff further contends that the Superior Court of Forsyth County did not have subject matter jurisdiction over the defendants' breach of fiduciary duty claim. Plaintiff argues, for the first time on appeal, that because his alleged breach relates to the acquisition of life insurance, defendants' cause of action is preempted by the Employee Retirement Income Security Act of 1974 (ERISA), 29 U.S.C. §§ 1001-1461 (1985 & Cum. Supp. 1990). We disagree.

ERISA, with certain exceptions not applicable to the instant case, preempts "any and all state law insofar as they may now or hereafter relate to any employee benefit plan." *Id.* § 1144(a). This preemption includes state decisional law and state statutes. *Id.* § 1144(c); *see Overcash v. Blue Cross & Blue Shield*, 94 N.C. App. 602, 381 S.E.2d 330 (1989). The Court of Appeals for the Fourth Circuit found that ERISA does not preempt a state law claim if the claim does not result in conflicting employer obligations, variable standards of recovery, affect whether benefits are paid, or directly affect the administration of the plan. *Pizlo v. Bethlehem Steel Corp.*, 884 F.2d 116, 120 (4th Cir. 1989). The Second Circuit devised a similar test for ERISA preemption and held that if a statute "does not affect the structure, the administration, or the type of benefits provided by an ERISA plan, the mere fact that the statute has some economic impact on the plan does not require that the statute be invalidated." *Rebaldo v. Cuomo*, 749 F.2d 133, 139 (2d Cir. 1984), *cert. denied*, 472 U.S. 1008, 86 L.Ed.2d 718 (1985).

A claim for breach of fiduciary duty may be preempted by ERISA if the fiduciary is within the section 1002 definition:

> [A] person is a fiduciary with respect to a plan to the extent (i) he exercises any discretionary authority or discretionary control respecting management of such plan or exercises any authority or control respecting management or disposition of its assets, (ii) he renders investment advice for a fee or other compensation, direct or indirect, with respect to any moneys or other property of such plan, or has any authority or responsibility to do so, or (iii) he has any discretionary authority or discretionary responsibility in the administration of such plan.

29 U.S.C. § 1002(21)(A). Courts, in determining whether a person or an entity is a fiduciary, examine the function performed rather than the title held. *Anderson v. Ciba-Geigy Corp.*, 759 F.2d 1518,

1522 (11th Cir.), *reh'g denied*, 767 F.2d 938, *cert. denied*, 474 U.S. 995, 88 L.Ed.2d 360 (1985). As one court stressed, "ERISA permits employers to wear 'two hats,' and that they assume fiduciary status 'only when and to the extent' that they function in their capacity as plan administrators, not when they conduct business that is not regulated by ERISA." *Amato v. Western Union Intern'l, Inc.*, 773 F.2d 1402, 1416-17 (2d Cir. 1985), *cert. dismissed*, 474 U.S. 1113, 89 L.Ed.2d 288 (1986).

In the case at bar, we find that plaintiff's breach of fiduciary duty occurred while conducting firm business. Plaintiff's breach of fiduciary duty arose not out of any administrative responsibility to an insurance plan, but rather out of his fiduciary duty to inform his fellow partners that he had received the insurance policy prior to the expiration of the twenty-day rescission period. Because plaintiff's conduct falls outside the purview of ERISA and, therefore, does not relate to ERISA, the Superior Court of Forsyth County had subject matter jurisdiction over defendants' claim against plaintiff for breach of fiduciary relationship. Plaintiff's contentions on this point are overruled.

VI.

[6] Additionally, plaintiff contends that the trial court erred in assigning to each defendant a pro rata share of the debt owed to plaintiff. We agree.

Under N.C.G.S. § 59-45 (1989), "[a]ll partners are jointly and severally liable for the acts and obligations of the partnership." In the case at bar, the trial court allocated to each defendant a share proportional to his ownership in the firm. We find that the trial court erred by allocating a pro rata share and modify its judgment such that defendants are jointly and severally liable for the debt owed to plaintiff.

We have examined plaintiff's remaining assignments of error and find them to be without merit. The judgment of the trial court is affirmed in part and modified in part.

Affirmed in part and modified in part.

Judges WELLS and PARKER concur.

THE PINNACLE GROUP, INC., MOVANT v. JAMES E. SHRADER AND MARGARET J. SHRADER, RESPONDENTS

No. 9126SC92

(Filed 21 January 1992)

1. Arbitration and Award § 30 (NCI4th)— refusal of arbitrators to compel production of tapes—testimony heard—no basis for overturning award

Arbitrators did not engage in misconduct so egregious as to deny respondents a fair hearing on their claim of unauthorized trading on their securities account, though the arbitrators refused to compel the production of original audio tapes of conversations between plaintiff's broker and respondent for expert analysis and the parties disagreed about the content of those conversations, since, in addition to the tapes, both sides presented oral and documentary evidence about the conversations and trades in question, and, while a complete omission of critical evidence by the arbitrator would justify vacating the result, the award should not be overturned if the evidence in question was heard in one form or another.

Am Jur 2d, Arbitration and Award §§ 91, 108, 118.5.

Discovery in aid of arbitration proceedings. 98 ALR2d 1247.

2. Arbitration and Award § 54 (NCI4th)— arbitration award—award of attorney fees—New York law applicable—reasonableness of fees—award proper

The parties' agreement upon which arbitration was based provided that New York law should govern, and New York law would uphold the arbitrators' award of attorney fees in this action, since the costs were expressly provided for in the parties' arbitration agreement, and the arbitrators were free to award attorney fees in an amount representing the reasonable value of the legal services actually rendered.

Am Jur 2d, Arbitration and Award § 139.

APPEAL by respondents from order and judgment entered 21 September 1990 and order and judgment entered 16 November 1990 by *Judge Samuel A. Wilson, III* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 6 November 1991.

James E. and Margaret Shrader (respondents) had a securities account with movant, The Pinnacle Group, Inc. (Pinnacle), in which they primarily purchased and sold index options, a type of derivative security traded on the Chicago Board Options Exchange. During the time in controversy, October 1987, respondents dealt exclusively with Lee Folger, a broker in the employ of Pinnacle. Many of the conversations between Folger and respondents were taped during October 1987 and Pinnacle kept these audio recordings as part of its business records. As a result of the stock market crash in October 1987, respondents sustained losses which left a negative or debit balance in their securities account with Pinnacle.

Respondents contended their losses were due to Folger's failure to execute transactions on their behalf and from making unauthorized trades. Respondents submitted a claim to be arbitrated by the National Association of Securities Dealers, Inc. ("NASD") and agreed to submit this dispute to arbitration. Pinnacle answered and filed a counterclaim in the NASD arbitration proceeding, seeking to recover from respondents the debit balance of $131,981, plus interest and attorneys' fees pursuant to the Margin Agreement executed by respondents upon opening their Pinnacle account.

The parties proceeded to arbitration through the American Arbitration Association and presented their claims to a panel of three arbitrators who held hearings on 27-28 June 1990. On 6 August 1990, the arbitrators entered an award dismissing respondents' claims against all parties and holding them jointly and severally liable to Pinnacle for $138,000, inclusive of interest, and for attorneys' fees in the amount of $20,000. Pinnacle then moved to confirm the arbitration award and respondents moved to vacate the award. The trial court granted Pinnacle's motion to confirm the award and denied respondents' motion to vacate the award and entered judgment in favor of Pinnacle in the amount of $158,000, plus interest at the legal rate from the date of the arbitration award on 6 August 1990. Thereafter, Pinnacle moved for an additional award of attorneys' fees in the amount of $9,941 which was allowed by the court in an order dated 16 November 1990.

Smith Helms Mulliss & Moore, by Peter J. Covington and Bradley R. Kutrow, for movant appellee.

Wyrick, Robbins, Yates & Ponton, by Samuel T. Wyrick, III, Nelson G. Harris, and John F. Wible, for respondent appellants.

WALKER, Judge.

Respondents bring forth three questions for this Court's review. First, they contend the arbitrators committed error when they (1) failed to compel production of certain audio tapes for expert analysis; (2) failed to compel answers to interrogatories; and (3) rushed the arbitration hearings to conclusion, thereby excluding certain material evidence.

[1] Respondents' first assignment of error is the arbitrators' refusal to compel the production of the original audio tapes of the October 1987 conversations between Shrader and Folger for expert analysis. They contend that expert analysis of the original tapes would have disclosed the original tapes had been tampered with. In December 1989, respondents requested voluntary production of the tapes so that an expert could analyze them. Pinnacle provided a copy of a composite tape allegedly made from the original taped conversations which were on different tapes. Thereafter, respondents requested an order compelling production of the original tapes at the office of their expert. Pinnacle objected to the requested production on the grounds that copies of the taped conversations had been provided, that the original tapes contained confidential conversations with other customers which were material evidence in other proceedings, and that production was unneccesary since respondents could cross-examine Folger.

The arbitrator specially selected to consider the matter denied respondents' request by order dated 2 March 1990, and instead, required Pinnacle and Folger to produce affidavits establishing the chain of custody of the tapes by a person authorized to verify that the tapes had not been altered or tampered with. The order further provided that Pinnacle and Folger "should stand ready to produce immediately the originals of the tapes at the hearing conducted in this matter, if production is so ordered by the arbitrators. Such order may be induced if further evidence is supplied that indicates tampering of the tapes has taken place." These affidavits were submitted by Pinnacle's attorney and Folger. Respondents renewed their request for production of the tapes at the hearing on the matter. The arbitrators again denied the request, but gave respondents leave to present additional evidence.

Since this dispute arises from a contract to buy and sell securities in interstate commerce, and the parties having agreed to arbitrate, the case is governed by the Federal Arbitration Act. *See Burke*

County Public Schools Board of Education v. Shaver Partnership, 303 N.C. 408, 279 S.E.2d 816 (1981). Arbitration awards may only be vacated on one of the grounds specified in 9 U.S.C. Sec. 10(a) (1970):

> (1) Where the award was procured by corruption, fraud, or undue means.
>
> (2) Where there was evident partiality or corruption in the arbitrators . . . .
>
> (3) Where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced.
>
> (4) Where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

Also, the award may be vacated where the arbitrators acted in manifest disregard of the law to such an extent as to deny a party a fair hearing when the record is viewed as a whole. *See Atlantic Shores Resort Joint Adventure v. Martin*, 731 F.Supp. 1279 (D.S.C. 1990); *Checkrite of San Jose, Inc. v. Checkrite, Ltd.*, 640 F.Supp. 234 (D.Colo. 1986). Thus, as a general rule an arbitration award is presumed valid and the party seeking to vacate it must shoulder the burden of proving the grounds for attacking its validity. *See G. L. Wilson Building Co. v. Thorneburg Hosiery Co., Inc.*, 85 N.C.App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987); *Turner v. Nixon Properties, Inc.*, 80 N.C.App. 208, 341 S.E.2d 42, *disc. review denied*, 317 N.C. 714, 347 S.E.2d 457 (1986); *Thomas v. Howard*, 51 N.C.App. 350, 276 S.E.2d 743 (1981). Only *clear* evidence will justify vacating an award. *National Bulk Carriers, Inc. v. Princess Management Co., Ltd.*, 597 F.2d 819, 825 (2d Cir. 1979).

A moving party's burden is not carried simply by showing that evidence was not received. The appellants must show that the arbitrators' failure to receive evidence rose to the level of misconduct and thus deprived them of a fair hearing. *Fairchild & Co., Inc. v. Richmond, Fredericksburg & Potomac Railroad Co.*, 516 F.Supp. 1305, 1314 (D.D.C. 1981). Every failure to receive evidence does not constitute misconduct requiring vacation of an arbitrator's award. *Id.* In keeping with the policy of limited review of arbitra-

tion awards, courts have recognized that arbitrators have broad discretion to establish procedures for the conduct of the arbitration and to govern pre-hearing discovery. *Lashco, Inc. v. Erickson*, 700 F.Supp. 960, 963 (N.D.Ill. 1988).

A court is not free to review the merits of the dispute and cannot substitute its judgment for that of the arbitrators. *Checkrite of San Jose, Inc. v. Checkrite, Ltd.*, 640 F.Supp. 234, 236 (D.Colo. 1986). Arbitration is not governed by the rules of evidence, and matters relating to discovery are left to the discretion of the arbitrators. *See* NASD Code of Arbitration Procedure Sec. 34. However, even in arbitration parties are entitled to present evidence which is material to the determination of the dispute and must be given a reasonable opportunity to present their respective arguments. *Wildwoods of Lake Johnson Associates v. L. P. Cox Co.*, 88 N.C.App. 88, 362 S.E.2d 615 (1987), *disc. review denied*, 322 N.C. 838, 371 S.E.2d 285 (1988).

In the case before us, the record reveals that in addition to the tapes, both sides presented oral and documentary evidence about the conversations and trades that were the basis for respondents' claim of unauthorized trading. This dispute centers around the conflicting versions of the conversations between Shrader and Folger. Both parties to the disputed conversations testified about their recollection of the conversations. Some of the conversations were taped, others were not. Mr. Shrader testified extensively as to what he contended was inaccurate about the tape transcripts. While a complete omission of critical evidence by the arbitrator would justify vacating the result, the award should not be overturned if the evidence in question was heard in one form or another. *L. R. Foy Construction Co., Inc. v. Spearfish School District*, 341 N.W.2d 383, 385-86 (S.D. 1983). Having heard the testimony and evidence on the substance of what was contained in the tapes, we cannot say as a matter of law that the arbitrators engaged in misconduct so egregious as to deny respondents a fair hearing.

Respondents' remaining assignments of error relating to the arbitrators' failure to compel answers to interrogatories and rushing the hearing to conclusion are also without merit. Documents were produced for respondents and both Folger and Charles Chirchirillo (Director of Operations for Pinnacle) testified and were subject to cross-examination. Portions of their testimony was directed to the questions contained in respondent's interrogatories. According-

ly, we find there has been no showing by respondents that other material evidence sought through the interrogatories was excluded from the arbitrators' consideration.

Likewise, with regard to the hearings being "rushed," it is noted that this hearing covered two days and a careful review of the record does not support respondents' assertion that the proceedings were rushed. To the contrary, near the conclusion of the hearing in response to a question from the chairman of the panel asking if the parties had an equal opportunity to be heard, counsel for the respondents answered in the affirmative. No other request (or objection) was made to present additional evidence.

[2] Respondents next contend the arbitrators were without authority to award attorneys' fees of $20,000 in this case since under North Carolina law attorneys' fees on debts may only be awarded by a trial court pursuant to G.S. 6-21.2. *G. L. Wilson Building Co. v. Thorneburg Hosiery Co., Inc.*, 85 N.C.App. 684, 355 S.E.2d 815, *disc. review denied*, 320 N.C. 798, 361 S.E.2d 75 (1987). In the award, the arbitrators determined the respondents should pay to Pinnacle the sum of $20,000 representing attorneys' fees and then stated, "awarded pursuant to North Carolina law." In closing summations both parties urged the arbitrators not only for an award in their favor, but also for attorneys' fees. Questions from the arbitrators and responses by counsel centered around the provisions in North Carolina law regarding the award of attorneys' fees. This could be an explanation of why the arbitrators stated attorneys' fees were awarded pursuant to North Carolina law. However, this erroneous reference to North Carolina law does not require vacating the arbitrators' award. The agreement upon which the arbitration is based stated that the law of New York governs the parties to the contract and any disputes between the parties should be resolved through arbitration. This contract further provided that Pinnacle could recover reasonable costs and expense of collection of the debit balance, including attorneys' fees.

An arbitration agreement may validly provide for arbitration in accordance with the laws of another state. 6 C.J.S. *Arbitration* Sec. 16 (1975). The parties may agree that a certain jurisdiction's substantive law will govern their contract. *Tanglewood Land Co., Inc. v. Byrd*, 299 N.C. 260, 261 S.E.2d 655 (1980). Our Court recognizes that a party's entitlement to attorneys' fees *is* a question of substan-

tive law. *Tolarem Fibers, Inc. v. Tandy Corp.*, 92 N.C.App. 713, 375 S.E.2d 673, *disc. review denied*, 324 N.C. 436, 379 S.E.2d 249 (1989).

All that must be decided is whether New York law would uphold the arbitrators' award of attorneys' fees in the present action. New York law provides that attorneys' fees can be recovered in an arbitration proceeding only where such costs are expressly provided for in the arbitration agreement. *See Grossman v. Laurance Handprints—N.J., Inc.*, 90 A.D.2d 95, 455 N.Y.S.2d 852 (1982); *In re Koenigsberg*, 51 A.D.2d 929, 381 N.Y.S.2d 248 (1976).

In the present case, the award of $20,000 in attorneys' fees on the outstanding balance of the debt of $138,000 was slightly less than 15% of this amount. Unlike North Carolina which limits recovery of attorneys' fees to 15% of the outstanding debt (G.S. 6-21.2), New York has no universal statutory limit on the recovery of attorneys' fees. The legislature there has provided limits on recovery in two specific instances, neither of which is applicable in the present case. *See* N.Y. Pers. Prop. Law Sec. 302(7) (a retail installment contract for the purchase of an automobile may provide for the payment of attorneys' fees not exceeding 15% of the amount due and payable); N.Y. Pers. Prop. Law Sec. 413(5) (a retail installment credit card agreement may provide for the imposition of attorneys' fees not to exceed 20% of the amount due and payable under the contract). Otherwise, in New York the award of attorneys' fees must be based upon the reasonable value of the legal services actually rendered. *Marine Midland Bank v. Roberts*, 102 Misc.2d 903, 424 N.Y.S.2d 671 (1980); *Mead v. First Trust & Deposit Co.*, 60 A.D.2d 71, 400 N.Y.S.2d 936 (1977). Since the agreement provided for attorneys' fees, the arbitrators were free to award attorneys' fees in an amount representing the reasonable value of the legal services actually rendered.

As stated earlier, appellate review of an arbitration award is severely limited and we are not free to substitute our judgment for that of the arbitrators. Accordingly, we cannot say that the award of $20,000 in attorneys' fees to Pinnacle for costs incurred during arbitration constituted an abuse of discretion which warrants vacating the award.

Respondents' final assignment of error is that the trial court's award of an additional $9,941 in attorneys' fees was excessive as a matter of law under G.S. 6-21.2. Respondents assert this amount,

when totaled with the arbitrators' award of $20,000, was in excess of the statutory amount that North Carolina allows a party to recover based upon the outstanding balance of a debt. These attorneys' fees were incurred by Pinnacle as a result of respondents challenging the award in Superior Court by filing an application to vacate the arbitration award. After denying respondents' application to vacate, the court determined Pinnacle's request for attorneys' fees in the amount of $9,941 was reasonable and allowable under the law of New York. It was for the trial court to make this determination and we find no error in its award of the additional attorneys' fees incurred by Pinnacle.

Affirmed.

Judges WELLS and LEWIS concur.

STATE OF NORTH CAROLINA v. BILL TATE, DEFENDANT

No. 9121SC863

(Filed 21 January 1992)

1. Narcotics § 4.3 (NCI3d)— manufacturing marijuana— constructive possession—sufficiency of evidence

Evidence of constructive possession was sufficient to be submitted to the jury in a prosecution for manufacturing marijuana where it tended to show that defendant admitted to officers upon questioning that he was the owner of the premises on which a single marijuana plant and drying marijuana were found; he had lived there for twenty years; there was no evidence that anyone else owned the property; defendant exercised control over the premises by denying officers permission to search inside the house and by ordering officers off the premises; and the evidence of a single, well-worn path leading directly from defendant's house in which several persons resided to the premises on which three marijuana patches were discovered, it serving as the only access to the marijuana, together with the other incriminating circumstance of defendant's possession of marijuana found at his residence, supported

an inference of defendant's constructive possession of the marijuana patches.

Am Jur 2d, Drugs, Narcotics and Poisons §§ 21, 47.

2. Criminal Law § 1186 (NCI4th)— maximum sentence—fifteen-year-old prior conviction

The trial court did not err in imposing the maximum term of imprisonment for the offense based on defendant's one prior conviction which was more than fifteen years old, since the prior conviction was for the same offense for which defendant was currently being sentenced. N.C.G.S. § 15A-1340.4(a)(1)(o).

Am Jur 2d, Drugs, Narcotics, and Poisons § 48; Habitual Criminals and Subsequent Offenders §§ 6, 14.

APPEAL by defendant from judgment entered 12 June 1991 in FORSYTH County Superior Court by *Judge William Z. Wood, Jr.* Heard in the Court of Appeals 9 December 1991.

Attorney General Lacy H. Thornburg, by Associate Attorney General Evelyn B. Terry, for the State.

Paul C. Shepard for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 12 June 1991, which judgment was based on a jury verdict convicting defendant of one count of manufacturing marijuana, N.C.G.S. § 90-95(a)(1) (1990).

The State's evidence tended to establish the following: On 28 June 1990, Detective Tom Evans (Detective Evans) of the Forsyth County Sheriff's Department, while a passenger in a State Bureau of Investigation (SBI) aircraft, observed marijuana growing in a wooded area off the runway of Smith-Reynolds Airport. From the aircraft, Detective Evans could readily identify a path running from the marijuana to defendant's house. There were about five other houses in the vicinity. A ground search of the area revealed that the marijuana was accessible only by the path leading from defendant's home. The path was worn and clearly traveled and began shortly past defendant's house. The brush in the wooded area surrounding the marijuana was so dense and thick that one

could not walk through it without the aid of a farm implement, bulldozer, or the path provided.

About 25 yards down the path from defendant's house, a ground crew of law enforcement officers discovered the marijuana that had been seen from the SBI aircraft. There were three different patches of marijuana connected by the path. Officers counted a total of 125 plants. The plants had been cultivated, were well-maintained, and were all over four feet tall. Defendant acknowledged to the officers that he owned and lived in the house by the path and had lived there for more than twenty years, but denied knowing anything about the marijuana. Defendant told officers that he did not even know what a marijuana plant looked like. Sergeant Marc Fetter (Sergeant Fetter) of the Forsyth County Sheriff's Department, a member of the ground crew which investigated the marijuana patches, testified that while he was speaking with defendant at defendant's residence regarding the marijuana patches which had been discovered, he noticed a single marijuana plant about three feet tall growing in a planter in a flower garden in defendant's front yard. The plant was approximately 20 to 25 feet from the residence and could be seen from the residence. Sergeant Fetter testified that after he walked over to the planter and pulled the marijuana plant, defendant "got concerned and walked away," "became extremely defensive," and, with a raised voice, told officers that he wanted them off of his property. Sergeant Fetter also testified that defendant stated that he was a gardener and planted gardens.

After discovering the single marijuana plant in the garden, officers walked around and discovered two piles of marijuana drying out beside a plastic bag near a pond in defendant's front yard. Sergeant Fetter testified that defendant remained extremely defensive upon this second discovery of marijuana by the police officers. The officers checked the house closest to defendant's residence and found it to be abandoned. They were unable to locate any paths leading from that location to the marijuana. The officers did not determine who owned the land on which the marijuana patches were located. The State's evidence established that defendant was living in the house with his wife and at least one son. Sergeant Fetter testified that at the time he spoke with defendant there were several other people at the residence, including "at least two other black males," one of whom appeared to be a guest of defendant who was on the premises preparing for a cookout.

Defendant presented no evidence.

The issues presented are whether I) the State presented substantial evidence of defendant's manufacturing marijuana in order to survive defendant's motion to dismiss; and II) the trial court erred by finding as an aggravating factor for the purpose of sentencing defendant's 15-year-old conviction for a criminal offense punishable by more than 60 days' confinement, specifically, a 1973 conviction for manufacturing marijuana.

I

[1] Defendant contends that the evidence presented by the State is insufficient to permit the jury to find him guilty of growing or cultivating marijuana. Specifically, defendant argues that there was no evidence linking defendant to the marijuana patches found behind his house, nor any evidence establishing that he had constructive possession of the marijuana patches or of the marijuana found in defendant's yard.

North Carolina Gen. Stat. § 90-95(a)(1) (1990) provides that it is unlawful for any person "to manufacture, sell or deliver, or possess with intent to manufacture, sell or deliver, a controlled substance." Quantity is not an element of this offense. *State v. Hyatt*, 98 N.C. App. 214, 216, 390 S.E.2d 355, 357 (1990). " 'Manufacture' means the production, preparation, propagation, compounding, conversion, or processing of a controlled substance by any means. . . ." N.C.G.S. § 90-87(15) (1990). Marijuana is classified as a Schedule VI controlled substance. N.C.G.S. § 90-94 (1990). "In those cases where production, propagation, conversion, or processing of a controlled substance are involved, the intent of the defendant, either to distribute or consume personally, [is] irrelevant and does not form an element of the offense." *State v. Muncy*, 79 N.C. App. 356, 363, 339 S.E.2d 466, 471, *disc. rev. denied*, 316 N.C. 736, 345 S.E.2d 396 (1986) (quoting *State v. Childers*, 41 N.C. App. 729, 732, 255 S.E.2d 654, 656-57, *cert. denied*, 298 N.C. 302, 259 S.E.2d 916 (1979)).

In order to survive a defendant's motion to dismiss in a prosecution for manufacturing marijuana, the burden is on the State to offer substantial evidence that defendant was engaged in one or more of the manufacturing activities delineated in N.C.G.S. § 90-87(15), discussed *supra*. *See State v. Smith*, 300 N.C. 71, 78,

265 S.E.2d 164, 169 (1980) (trial judge must decide whether there is substantial evidence, i.e., such relevant evidence as a reasonable mind might accept as adequate to support a conclusion, of each element of the offense charged). In the instant case, the evidence adduced from police officers with regard to the discovery of the marijuana patches in the woods behind defendant's house, in the garden in defendant's yard, and beside defendant's pond, taken in the light most favorable to the State, supports a reasonable inference that *someone* was in the process of producing marijuana. The question is whether defendant was that person. Because the evidence does not indicate that defendant was in actual physical possession of any of the marijuana discovered, the doctrine of constructive possession must be applied. *See State v. Brown*, 310 N.C. 563, 568, 313 S.E.2d 585, 588 (1984); *State v. Owen*, 51 N.C. App. 429, 431, 276 S.E.2d 478, 479 (1981), *cert. denied*, 305 N.C. 154, 289 S.E.2d 382 (1982). Constructive possession exists when a person lacking actual physical possession nevertheless has the intent and capability to maintain control and dominion over the substance. *Brown*, 310 N.C. at 568, 313 S.E.2d at 588.

In North Carolina, an inference of constructive possession arises against an owner or lessee who occupies the premises where contraband is found, regardless of whether the owner or lessee has exclusive or nonexclusive control of the premises. "Such ownership is strong evidence of control and 'gives rise to an inference of knowledge and possession . . . .'" *State v. Thorpe*, 326 N.C. 451, 455, 390 S.E.2d 311, 314 (1990) (quoting *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972)); *State v. Davis*, 325 N.C. 693, 697-98, 386 S.E.2d 187, 190-91 (1989) (evidence of defendant's ownership of mobile home in which controlled substances were found supports inference of constructive possession); *see also Mobley v. State*, 380 S.E.2d 290, 292 (Ga. App. 1989) (there is a rebuttable presumption of possession against the owner or lessee of premises on which controlled substances are found). However, the State is not *required* to establish that a defendant owned or leased the premises on which contraband is found in order to prove control of such premises by defendant. *State v. Leonard*, 87 N.C. App. 448, 456, 361 S.E.2d 397, 402 (1987), *disc. rev. denied*, 321 N.C. 746, 366 S.E.2d 867 (1988). Where there is no evidence of ownership, defendant's exclusive control of the premises on which controlled substances are found supports an inference of defendant's constructive possession of the controlled substances. *Harvey*, 281 N.C. at

12, 187 S.E.2d at 714. Furthermore, where there is no evidence of ownership or of exclusive possession of the premises on which controlled substances are found, constructive possession may be inferred if the defendant has nonexclusive possession of the premises and there are accompanying incriminating circumstances. *State v. McLaurin*, 320 N.C. 143, 146, 357 S.E.2d 636, 638 (1987).

Marijuana On Defendant's Property

In the instant case, the evidence at trial established that defendant admitted to officers upon questioning that he was the owner of the premises on which the single marijuana plant and drying marijuana were found, and that he had lived there for twenty years. There was no evidence that anyone else owned the property. Moreover, defendant exercised control of the premises by denying officers permission to search inside the house and by ordering officers off the premises. *See Leonard*, 87 N.C. App. at 456, 361 S.E.2d at 402. Such evidence of defendant's ownership and control of premises on which marijuana is discovered in plain view in the front yard raises an inference that defendant had constructive possession of the marijuana. Because quantity is not an element of the offense of manufacturing marijuana, the evidence of defendant's constructive possession of a live marijuana plant and drying marijuana stalks is substantial evidence of defendant's manufacturing marijuana and is therefore sufficient to take the case to the jury. *See State v. Wiggins*, 33 N.C. App. 291, 235 S.E.2d 265, *cert. denied*, 293 N.C. 592, 241 S.E.2d 513 (1977) (defendant's constructive possession of marijuana growing in potted plant in front yard and of stripped marijuana stalks in back yard was substantial evidence of defendant's manufacturing marijuana). Accordingly, the trial court correctly denied defendant's motion to dismiss.

Marijuana Patches Behind Defendant's Property

Although the State presented evidence of defendant's ownership of the premises on which the single marijuana plant and drying marijuana stalks were found, the State failed to establish who owned the land behind defendant's house on which the marijuana patches were found. However, the evidence of the single, well-worn path leading directly from defendant's house in which several persons resided to the premises on which the marijuana patches were discovered, it serving as the only access to the marijuana, establishes, at a minimum, defendant's nonexclusive possession of such premises. *See, e.g., State v. Spencer*, 281 N.C. 121, 187 S.E.2d 779 (1972);

State v. Beaver, 317 N.C. 643, 346 S.E.2d 476 (1986). This nonexclusive possession of the premises on which the marijuana patches were discovered, when combined with the "other incriminating circumstance" of defendant's possession of marijuana found at his residence, supports an inference of defendant's constructive possession of the marijuana patches. *See State v. Jenkins*, 74 N.C. App. 295, 328 S.E.2d 460 (1985) (marijuana found in five-gallon buckets in defendant's yard properly considered in determining whether defendant had constructive possession of marijuana in fields surrounding defendant's house); *Spencer*, 281 N.C. at 129-30, 187 S.E.2d at 784-85 (marijuana seeds found in defendant's bedroom constituted one of the other incriminating circumstances which linked defendant to marijuana in field behind defendant's residence). This constructive possession of the marijuana patches is simply additional evidence supporting submission of this case to the jury.

II

[2] Defendant assigns as error the court's imposition of the maximum term of imprisonment for the offense based on defendant's one prior conviction, which was more than fifteen years old. He contends that a single conviction dating back more than fifteen years is not a sufficiently aggravating factor to justify the maximum sentence. We disagree.

North Carolina Gen. Stat. § 15A-1340.4(a)(1)(o) (1988) does not limit the age of the prior convictions that may be considered by the sentencing court as aggravating factors. *State v. Riggs*, 100 N.C. App. 149, 155, 394 S.E.2d 670, 674 (1990), *disc. rev. denied*, 328 N.C. 96, 402 S.E.2d 425 (1991). In *Riggs*, this Court upheld the trial court's finding of aggravating factors based on the defendant's unrelated convictions from twenty years in the past. Moreover, the balance struck in weighing any aggravating and mitigating factors found is a matter within the sound discretion of the trial court and will not be disturbed on appeal unless the court's ruling is manifestly unsupported by reason or so arbitrary that it could not have been the result of a reasoned decision. *State v. Parks*, 324 N.C. 94, 98, 376 S.E.2d 4, 7 (1989).

The one prior conviction on which the court based its finding of an aggravating factor here was defendant's conviction in 1973 for manufacturing marijuana. Given the facts of this case and the fact that defendant's prior conviction was for the same offense for which defendant was currently being sentenced, we cannot

conclude that the sentence imposed is manifestly unsupported by reason or constitutes an abuse of discretion. Accordingly, the trial court did not err in its imposition of the maximum term of imprisonment of five years.

No error.

Judges WELLS and PARKER concur.

STATE OF NORTH CAROLINA v. CLARENCE LEONARD MARTIN

No. 9018SC1255

(Filed 21 January 1992)

1. **Constitutional Law § 247 (NCI4th)— access to evidence in prosecutor's files denied—no error**

There was no merit to defendant's contention that the trial court erred in reversing its ruling ordering the State to turn over for inspection to defendant all items belonging to defendant in possession of the State or the FBI, since the prosecutor had an open file policy and gave the defense access to all materials in the State's possession; some of defendant's business records were seized by federal authorities pursuant to a federal grand jury subpoena; the federal court found that defendant had not shown a particularized need for the records as required by Federal Rule of Criminal Procedure 6; the superior court ruled that the defense had had ample time to specify which documents it needed; and the superior court adopted the findings of the federal court that defendant had failed to specify which documents it needed. N.C.G.S. § 15A-1443.

Am Jur 2d, Depositions and Discovery § 430.

Right of accused in state courts to inspection or disclosure of evidence in possession of prosecution. 7 ALR3d 8.

2. **Jury § 7.14 (NCI3d)— peremptory challenges—no racial discrimination shown**

The State showed neutral reasons for the exercise of peremptory challenges, and the trial court correctly concluded that circumstances indicating insidious and purposeful racial

discrimination were absent where the prosecution used peremptory challenges to dismiss two black jurors on the basis of recommendations by the chief investigator, who was black; the investigator made such recommendations because one juror had never held a professional position and the second juror had an unstable work history and demeanor and body language which the investigator did not like; defendant excused two black jurors; the jury as finally empanelled included three blacks; and the defendant and all the victims were black.

Am Jur 2d, Jury § 235.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

3. Evidence and Witnesses § 322 (NCI4th)— evidence of prior offense—admissibility to show knowledge

In a prosecution of defendant for obtaining property by false pretenses where defendant allegedly solicited various people to invest in a bogus car dealership network, the trial court did not err in admitting testimony concerning certain of defendant's checks being returned for insufficient funds since the evidence was relevant to show defendant's knowledge regarding the financial condition of the car dealership and his inability to meet the promises he made to investors regarding the guaranteed return on investment; moreover, defendant was not prejudiced by evidence of his purchase of automobiles using a bad check where the trial court instructed the jury to disregard the question and answer about the bad check.

Am Jur 2d, Evidence § 323.

4. False Pretense § 3 (NCI3d)— evidence of intent—exclusion error

In a prosecution of defendant for obtaining property by false pretenses where defendant allegedly solicited various people to invest in a bogus car dealership network, the trial court erred in excluding the testimony of defendant's attorney that he had advised defendant that a security agreement between the dealership network and a third corporation was void, since that evidence was relevant as to those indictments alleging that defendant pledged the inventory of the dealership network as collateral, and the evidence was relevant to show defendant's intent.

Am Jur 2d, False Pretenses § 72.

5. False Pretense § 3 (NCI3d)— intent to repay no defense— evidence properly excluded

Since intent to repay is no defense to a charge of obtaining property by false pretenses, the trial court did not err in precluding defendant from arguing intent to repay to the jury.

Am Jur 2d, False Pretenses § 72.

6. Criminal Law § 424 (NCI4th)— failure of spouse to testify— argument not prejudicial error

While the State's comment on defendant's wife's failure to take the stand violated the letter of N.C.G.S. § 8-57(a) and was error, the admission of this argument did not rise to the level of reversible error where the prosecutor recounted that defendant's employees had failed to testify, including defendant's wife, and this argument emphasized the wife's status as an employee of the company and not her status as defendant's spouse.

Am Jur 2d, Trial § 597.

Propriety and prejudicial effect of prosecutor's argument commenting on failure of defendant's spouse to testify. 26 ALR4th 9.

7. Criminal Law § 444 (NCI4th)— jury argument—belief that evidence sufficient

The prosecutor's jury argument, "And I didn't do that . . . because I felt that there was sufficient evidence before the jury," was not improper.

Am Jur 2d, Trial § 554.

8. Criminal Law § 373 (NCI4th)— court's suggestion to prosecutor—no opinion on evidence

The trial court did not express an opinion on the evidence when defendant objected to the State's introduction of bank records on the ground that the witness lacked personal knowledge of the documents and checks, and the court stated, "Would you indicate the inquiry of the witness' familiarity with the system itself. And his position, please."

Am Jur 2d, Trial § 280.

APPEAL by defendant from judgment entered 27 April 1990 by *Judge Melzer A. Morgan, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 23 September 1991.

The State's evidence presented at trial tended to show the following: During December 1987 through July 1988, defendant solicited various people to invest in a floor plan financing arrangement called the High Interest Investment Program for World Car Corporation (WCC). Defendant sent out a written invitation that provided:

> World Cars [sic] Corporation signs an auto share agreement with you for your investment of between one thousand to one hundred thousand. Your money will be used to purchase cars for lease and rental fleets.
>
> World Cars will rent or lease these units to our thousands of customers through our Dealership Network in Greensboro, Charlotte, Winston-Salem, Raleigh, Durham, and surrounding areas within North Carolina. World Cars currently has a [backlog] of customers waiting for our automobiles.

The letter promised no risk of loss and interest payments of 5 percent monthly or 60 percent annually. The letter also said that the investment was secured by the automobiles and that "[y]our investment is protected by a State of North Carolina UCC lien filing showing your name as a participating owner of the Cars in our fleet."

Through these representations, defendant induced the following persons to invest the sums listed: Prince Earl and Ruth Smith, $25,000; P.E. Smith, $10,000; Viola Morris, $2,000; Quincy H. Holt, $1,000; Thomas E. Brewington, $10,000; and Theodore and Gladys Plowden, $2,000. In fact, no network of World Car Corporation dealers existed; Martin did not have the means to pay the promised interest payments, the vehicles which were to be pledged to secure the investments did not belong to Martin or were not available to secure the interests of the investors, and Martin filed no documents to make the investors secured parties under the Uniform Commercial Code. None of the investors received the promised interest payments and none had status as secured investors as Martin had promised.

Defendant was indicted on six counts of embezzlement and six counts of obtaining property by false pretenses. On 27 April

1990 defendant was convicted on all counts with the court allowing defendant's motion to arrest judgment on the embezzlement charges. He was sentenced to a term of 20 years active time with a 26-year suspended sentence commencing at the expiration of the active term. Defendant appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patsy Smith Morgan, for the State.

Assistant Public Defender Frederick G. Lind for defendant-appellant.

EAGLES, Judge.

Defendant contends that the trial court erred by (1) ruling that the State was not required to turn over to the defense items that belonged to defendant that were in the possession of the State, the F.B.I. or any other state or federal agency; (2) denying defendant's motion to dismiss the jury panel for an alleged violation of *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986); (3) admitting evidence concerning checks returned for insufficient funds; (4) excluding the testimony of T.O. Stokes; (5) granting the State's motion in limine regarding defendant's closing argument and overruling defendant's objections to the State's closing argument; (6) giving advice to the prosecutor in the presence of the jury; and (7) denying defendant's motion to dismiss due to the insufficiency of the evidence. We agree in part and grant defendant a new trial in 88 CRS 68627, 68628, 68630 and 89 CRS 20528. We find no prejudicial error in 88 CRS 20527 and 89 CRS 20529.

[1] Defendant first contends that the trial court erred in "reversing its ruling ordering the state to turn over for inspection to the defendant all items belonging to the defendant in possession of the State, the F.B.I. agent, or any other federal or state agency assisting the state." We find this argument without merit. The record indicates that the prosecutor had an open file policy and gave the defense access to all materials in the State's possession. Some of the defendant's own business records had been seized by federal authorities pursuant to a federal grand jury subpoena and were subject to Federal Rule of Criminal Procedure 6(e), which governs disclosure of grand jury proceedings. The federal court found that defendant had not shown a particularized need for the records as required by Rule 6. Here, the superior court ruled that

the defense had had ample time to specify which documents it needed. The superior court also adopted the findings of the federal court that defendant had failed to specify which documents it needed. There is no indication in the record that defendant attempted to appeal from the federal court's ruling. On the record before us, we cannot conclude that defendant was prejudiced by the denial of access to these records. G.S. 15A-1443. Accordingly, this assignment of error is overruled.

[2] Defendant next contends that the trial court erred by denying defendant's motion to dismiss the jury panel for an alleged violation of the rules announced in *Batson v. Kentucky*, 476 U.S. 79, 106 S.Ct. 1712, 90 L.Ed.2d 69 (1986). Here, the prosecution used peremptory challenges to dismiss two black jurors. The trial court ruled that defendant had established a prima facie case of discrimination in the selection of the jury and required the prosecutor to disclose the reasons for excusing these jurors. The chief investigator in the case, who was black, testified that he recommended that the State dismiss one juror because he had never held a professional position. He testified that he recommended that the State dismiss the second juror because he had a somewhat unstable work history. He also testified that he recommended the removal of this juror because he did not like his demeanor and body language. We note also that the defendant excused two black jurors and that the jury as finally impaneled included three blacks. In this case, the defendant was black and all of the victims were black. On this record we conclude that the State showed neutral reasons for exercise of the peremptory challenges and the trial court correctly concluded that circumstances indicating insidious and purposeful racial discrimination were absent. Accordingly, this assignment of error is overruled.

[3] Defendant also contends that the trial court erred in admitting testimony concerning certain of his checks being returned for insufficient funds and defendant's purchase of automobiles using a bad check. We find defendant's arguments unpersuasive. First, the testimony regarding the return of checks for insufficient funds is relevant to show defendant's knowledge regarding the financial condition of WCC and his inability to meet the promises he made to investors regarding the guaranteed return on investment. Additionally, as to defendant's purchase of automobiles with bad checks, the trial court instructed the jury to disregard the question and answer about the bad check. Defendant has failed to show any

prejudice as required under G.S. 15A-1443. Accordingly, this assignment of error is overruled.

[4] Defendant next argues that the trial court erred by excluding the testimony of defendant's attorney, T. O. Stokes, regarding a security agreement between WCC and Vaillencourt Corporation. This evidence was relevant as to those indictments which allege that defendant pledged the inventory of World Car Corporation as collateral (88 CRS 68627, 88 CRS 68628, 88 CRS 68630, 89 CRS 20528). The defense made an offer of proof that attorney Stokes had advised the defendant that the security agreement between Vaillencourt and defendant was null and void and ineffective to create a valid security interest in the vehicles. We agree with defendant that this evidence was relevant to show defendant's intent. "When intention is considered relevant it may . . . like other facts, be proved by circumstantial evidence." 1 H. Brandis, North Carolina Evidence § 83 (1988). We disagree with the State's contention at trial that this testimony was irrelevant and "would only become relevant if in fact the defendant took the stand and said that he relied upon the advice of his counsel, and if he says that, then it would be relevant to corroborate him." We note that "admissibility is governed by the general rules applicable to substantive evidence, and the 'corroboration' label neither adds to nor detracts from its competency." 1 H. Brandis, North Carolina Evidence § 49 (1988). We hold that the exclusion of this testimony constitutes prejudicial error and accordingly grant defendant a new trial in 88 CRS 68627, 88 CRS 68628, 88 CRS 68630, and 89 CRS 20528.

We are not persuaded by defendant's arguments that the trial court erred in excluding Stokes' testimony that defendant attempted to improve the financial condition of WCC. Because we fail to see the relevance of this testimony, we overrule this assignment of error.

[5] Next, we address defendant's contentions regarding the closing arguments. First, defendant contends that the trial court erred in precluding him from arguing that he intended to repay the victims. This contention is without merit in that this Court has said that intent to repay is no defense to a charge of obtaining property by false pretenses. *State v. Tesenair*, 35 N.C. App. 531, 241 S.E.2d 877 (1978).

[6] Defendant also contends that the trial court erred in allowing the State to comment on defendant's wife's failure to take the

stand. We agree that the court erred in allowing the comment; however, the comment did not constitute prejudicial error. Defense counsel argued:

> All we can say, put one employee up to say there never was a fleet. And you notice that hasn't been contradicted in any way. There's never been any other employee take the stand. Mrs. Martin didn't take the stand.
>
> MR. HAYES: Objection, Your Honor.
>
> THE COURT: Sustained.
>
> MR. PANOSH: Your Honor, I said Mrs. Martin.
>
> THE COURT: You may comment upon Mrs. Martin not testifying.
>
> MR. PANOSH: No other employee of that corporation, including Mrs. Martin, took the stand and testified that there was a rental fleet, because there was none.

G.S. 8-57(a) provides in part: "The spouse of the defendant shall be a competent witness for the defendant in all criminal actions, but the failure of the defendant to call such spouse as a witness shall not be used against him." Defendant relies on *State v. McCall*, 289 N.C. 570, 223 S.E.2d 334 (1976) and *State v. Thompson*, 290 N.C. 431, 226 S.E.2d 487 (1976), to argue that the admission of this testimony constitutes prejudicial error. *McCall* and *Thompson* are distinguishable from the instant case. In *McCall* the prosecutor cross-examined the defendant about his wife's failure to testify and emphasized that point in closing argument. In *Thompson*, 290 N.C. at 446, 226 S.E.2d at 496, the solicitor argued: "Have you heard from his wife? I can't use a man's wife against him, but he can use his wife for himself. Wouldn't she be a good person to tell you when he came in and how he got in the house? Have you heard from her?" Here, the prosecutor recounted that defendant's employees had failed to testify, including Mrs. Martin, who was identified as the assistant manager of the company. The argument emphasized Mrs. Martin's status as an employee of WCC and not her status as defendant's spouse. While we agree that the admission of this argument violates the letter of G.S. 8-57(a) and was error, we hold that its admission does not rise to the level of reversible error. Accordingly, this assignment of error is overruled.

[7] Next defendant contends that the trial court erred by overruling defendant's objection to the following comment in the prosecutor's closing argument: "And I didn't do that, ladies and gentlemen of the jury, because I felt that there was sufficient evidence before this jury." In *State v. Black*, 308 N.C. 736, 744, 303 S.E.2d 804, 808 (1983), the Supreme Court said: "We see nothing improper in a prosecutor stating in his opening remarks to the jury that the State *will*, or he *thinks* it will, carry [its] burden." In our view, the prosecutor's comment here was of a similar character, and we overrule this assignment of error.

[8] Defendant also argues that the trial court erred by giving advice to the prosecutor in the presence of the jury and "convey[ing] to the jury the opinion that the judge was favoring the prosecution." While the prosecutor was attempting to lay a foundation for the introduction of bank records, the defendant objected based on the witness' purported lack of personal knowledge of the documents or the checks. The trial court said, "Would you indicate the inquiry of the witness' familiarity with the system itself. And his position, please." This Court has noted:

> Under G.S. 15A-1222, the judge "may not express during any stage of the trial, any opinion in the presence of the jury on any question of fact to be decided by the jury." It is the right and duty, however, of the trial judge to control examination and cross-examination of witnesses. The trial judge may also ask a witness questions for the purpose of clarifying testimony.

State v. Alverson, 91 N.C. App. 577, 579, 372 S.E.2d 729, 730 (1988) (citations omitted). As in *Alverson*, we find here that the trial judge's comments did not express an opinion about the defendant's guilt and were permissible.

Finally, defendant contends that the trial court erred by denying his motion to dismiss due to the insufficiency of the evidence. We note that because defendant offered evidence, he is precluded from arguing the trial court's denial of that motion as grounds for appeal under the Rules of Appellate Procedure. "If a defendant makes [a motion to dismiss the action] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case of nonsuit made at the close of the State's evidence is waived. Such a waiver precludes the defendant from

urging the denial of such motion as a ground for appeal." N.C.R. App. P. 10(b)(3).

For the reasons stated, we find no prejudicial error in 89 CRS 20527 and 89 CRS 20529 and grant defendant a new trial in 88 CRS 68627, 88 CRS 68628, 88 CRS 68630 and 89 CRS 20528, those cases in which the State alleges that the vehicles pledged by defendant to secure the investments were subject to a prior valid security interest held by Vaillencourt Corporation.

No error as to 89 CRS 20527 and 89 CRS 20529.

New trial as to 88 CRS 68627, 88 CRS 68628, 88 CRS 68630 and 89 CRS 20528.

Chief Judge HEDRICK and Judge GREENE concur.

FRANK HOUSE, GUARDIAN AD LITEM FOR ADDIE MOYE, AND CAROLYN F. JAMES, GUARDIAN AD LITEM FOR AGNES FULLILOVE, ET AL. v. HILLHAVEN, INC.; DAVID T. FLAHERTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; AND I. O. WILKERSON, JR., IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF FACILITY SERVICES OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 903SC1286

(Filed 21 January 1992)

Costs § 37 (NCI4th)— plaintiffs not prevailing party—plaintiffs not entitled to attorney fees

Plaintiffs were not entitled to attorney fees under N.C.G.S. § 6-19.1 in their class action lawsuit seeking declaratory and injunctive relief, alleging defendants' failure to provide adequate nursing care and to enforce patients' rights pursuant to state and federal law, where the parties settled the lawsuit but plaintiffs did not succeed on any significant issue which brought about the results they were seeking, and plaintiffs were thus not the prevailing party.

Am Jur 2d, Costs §§ 11, 14, 15.

APPEAL by plaintiffs from order entered 8 June 1990 by *Judge David Reid* in PITT County Superior Court. Heard in the Court of Appeals 28 August 1991.

On 8 April 1986, plaintiffs filed a class action lawsuit seeking declaratory and injunctive relief, alleging defendants' failure to provide adequate nursing care and to enforce patients' rights pursuant to state and federal law at University Nursing Center (Hillhaven) in Greenville, North Carolina. The parties entered a final settlement agreement on 16 March 1989. Plaintiffs filed a motion for attorney's fees and costs on 1 November 1989. The trial judge denied the motion on 8 June 1990, finding that plaintiffs were not the prevailing party and had not met their burden of proof. From this order, plaintiffs filed timely notice of appeal.

Attorney General Lacy H. Thornburg, by Meg Scott Phipps, Assistant Attorney General, for the State.

Carolina Legal Assistance, by Christine O'Connor Heinberg and Pamlico Sound Legal Services, by Jack Hansel, for plaintiffs-appellants.

JOHNSON, Judge.

Plaintiffs alleged in their amended complaint that defendants repeatedly failed to enforce the provisions of the Nursing Home Patients Bill of Rights, G.S. § 131E-117 (1988 and Cum. Supp. 1990), and state licensing rules and regulations, N.C. Admin. Code tit. 10 (May 1991), which are intended to insure quality of care and protect the dignity of patients. Defendants, the Department of Human Resources (DHR), the Division of Facility Services (DFS), David T. Flaherty, and I.O. Wilkerson, Jr. (hereafter also referred to as state defendants), are responsible for enforcement of the plaintiffs' rights under the previously mentioned statutes. This appeal, however, deals only with the issue of awarding attorney's fees. The relevant facts pertaining to this issue are set out below.

Plaintiffs' prayer for relief requested that the court (1) certify the action as a class action; (2) enter a declaratory judgment stating that defendants Flaherty and Wilkerson violated their duties under former G.S. § 131E-126 (now G.S. § 131E-129) by failing to impose administrative penalties against the nursing home when violations of G.S. § 131E-117, creating a substantial risk of death or harm, were found; (3) enter a declaratory judgment stating that the failure

of the defendant-owner to provide, and the failure of defendants Flaherty and Wilkerson to require it to provide care, conditions and treatment in accordance with federal Medicaid and Medicare standards violate the rights of plaintiffs who are Medicare or Medicaid recipients under 42 C.F.R. §§ 405.1101-1137, 442.200-202, 442.250-254, and 442.300-346; (4) enter preliminary and permanent injunctions requiring the defendant-owner to comply with all state and federally mandated statutes for the treatment, conditions and care of the nursing home residents and ordering it to comply with the conditions of its contractual arrangements with the Department of Human Resources relating to patient care; (5) enter preliminary and permanent injunctions requiring defendants to properly monitor conditions, treatment and care at the nursing home and to enforce all state and federally mandated standards governing the care, conditions and treatment of residents of the nursing home; (6) enter an order appointing a receiver to administer and operate the nursing home until further order of the court; (7) enter an order requiring defendant-owner of the nursing home to submit to the court for its approval and to counsel for the plaintiffs, a plan for the fulfillment of their responsibilities under the injunction requested in paragraph four above; (8) enter an order requiring defendants Flaherty and Wilkerson to submit to the court for its approval and to counsel for plaintiffs, a plan for the fulfillment of their responsibilities under the injunction requested in paragraph five above; (9) enter an order granting plaintiffs their costs; and (10) grant plaintiffs all other just and equitable relief. No preliminary or permanent injunctions were granted, and no declaratory judgments or any other orders prayed for were entered.

On 3 June 1987, plaintiffs filed a motion for partial summary judgment against state defendants and renewed the motion based on the amended complaint in 1988. Because the judge found that genuine issues of material fact existed as to whether state defendants had adequately discharged their duties, the motion was denied.

Plaintiffs also filed a motion for a preliminary injunction against defendant Hillhaven in June, 1987, requiring it to suspend admissions to the facility, provide care to patients at the facility in accordance with requirements of the law, and provide its staff with independent training in order to provide better care. This request was denied on 9 July 1987, based upon a finding that state defendants had inspected the facility on 11 June 1987 and had found the facility in substantial compliance with licensing regula-

tions. The court did find, however, that independent training was needed. Hillhaven agreed to arrange such training, and no injunction was granted.

State defendants filed a motion to dismiss for mootness on 3 August 1987, based on the implementation of the new Administrative Penalty Act, G.S. § 131E-129, effective 1 October 1987. The court granted the motion to dismiss as to the plaintiffs' prayer for relief in paragraph two of the complaint where plaintiffs asked for a declaratory judgment regarding state defendants' failure to impose administrative penalties in situations which endangered the health, safety or welfare of patients.

On 19 August 1988, state defendants filed a motion in limine to limit the evidence presented at trial to events occurring on or after 1 October 1987 and to the new statute which became effective on that date. The court granted the motion, stating that no evidence regarding defendants' failure to impose administrative penalties prior to 1 October 1987 could be admitted. The court reserved ruling on whether plaintiffs could introduce evidence as to events occurring prior to 1 October 1987 for other purposes.

Affidavits presented by state defendants show that they had been working on guidelines for the implementation of the statute since its enactment in July, 1987. An affidavit from Darius Wells, dated 7 April 1988, stated that on 5 February 1988, Wells sent to his staff a memorandum providing guidelines for implementation of the new law. In the memorandum, Wells stated that with experience, the penalty amounts will be more refined and specific.

Settlement negotiations were encouraged by the presiding judge, and a settlement conference was held on 18 March 1988 in Greenville, North Carolina. Following the conference, counsel for state defendants wrote plaintiffs' counsel, stating that settlement negotiations were possible. Defendants' counsel then submitted the guidelines, which Wells had been preparing for his staff, to plaintiffs' counsel.

On 13 October 1988, the parties entered an initial settlement agreement. On 16 March 1989, the parties entered a final settlement agreement as to all claims. The State did not admit or concede any of plaintiffs' allegations. On 1 November 1989, plaintiffs filed a motion for attorney's fees and costs. The trial judge denied the

motion on the basis that plaintiffs were not the prevailing party and had not met their burden of proof.

Plaintiffs contend that they are entitled to an award of attorney's fees and costs pursuant to G.S. § 6-19.1. We disagree based upon the premise that plaintiffs are not the prevailing party.

North Carolina General Statute § 6-19.1 (1988) provides:

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

First, it is imperative to note that G.S. § 6-19.1 is not applicable, and cannot be used by plaintiffs to recover attorney's fees unless plaintiffs are found to be the prevailing party. In our research, we find no North Carolina cases directly on point, and counsel for the parties have directed us to none. We do, however, find federal cases on point, and although not binding on this Court, we find them instructive.

A prevailing party is defined as "one in whose favor the decision or verdict is rendered and judgment entered; . . . the one in whose favor the verdict compels a judgment, or who in the end secures the most points." 67A C.J.S. *Parties* § 6 (1979). Parties may be considered prevailing when they vindicate rights through a consent judgment or without formally obtaining relief. *See Maher v. Gagne*, 448 U.S. 122, 65 L.Ed.2d 653 (1980). We believe, however, that the mere fact that plaintiffs obtained a settlement does not automatically transform them into prevailing parties for purposes of an award of attorney's fees.

In *Nadeau v. Helgemoe*, 581 F.2d 275 (1st Cir. 1978), the "merits test" was used by the court to determine who was the prevailing party entitled to attorney's fees under 42 U.S.C. § 1988. Under the merits test, persons may be considered prevailing parties for the purposes of attorney's fees if they succeeded on any significant issue in the litigation which achieves some of the benefit the parties sought in bringing the suit. *Nadeau*, 581 F.2d at 278-79. Therefore, in the case *sub judice*, we will examine the benefits sought by the plaintiffs in the complaint versus those actually obtained by settlement, and thereby attain the status of prevailing party.

The evidence in the case at bar shows that plaintiffs did not succeed on any significant issue in the litigation. Plaintiffs sought injunctive and declaratory relief: neither was granted. They sought a declaratory judgment against state defendants, declaring that defendants had violated their duties under G.S. §§ 131E-129 and 131E-126. The motion for partial summary judgment on this issue was denied on 22 June 1988.

Plaintiffs sought preliminary and permanent injunctions against Hillhaven, requiring compliance with state and federal standards and compliance with its contract with state defendants regarding care. The motion for the preliminary injunction was denied on 9 July 1987, based on the fact that the nursing home was in substantial compliance with laws and regulations governing the licensing of the nursing home. The court did find that staff training, which the defendant Hillhaven agreed to, was necessary, but no preliminary or permanent injunction was entered.

Plaintiffs sought preliminary and permanent injunctions against state defendants, requiring proper monitoring of the conditions at the nursing home and the enforcement of all federal and state licensure standards. They sought an order requiring state defendants to comply with any injunction so entered. They also requested that the court appoint a receiver to operate the nursing home. None of those requests were granted.

Furthermore, plaintiffs did not prevail on their motions for summary judgment, jury trial, or preliminary injunction. Plaintiffs also did not prevail on defendants' motion to dismiss for mootness or on defendants' motion in limine. Plaintiffs failed to achieve any significant success on the injunctive and declaratory portions of this case.

In addition, on 29 February 1988, plaintiffs' counsel wrote a letter to defendant Hillhaven's counsel, stating that "[a]ny settlement agreement would have to incorporate such an injunction [to comply with all state and federal standards] in a Consent Order so that Plaintiffs would be able to use the contempt power of the Court to enforce the responsibilities of Hillhaven[.]" This threshold requirement demanded by the plaintiffs was not included in the settlement agreement. Applying the merits test to the aforementioned facts, we find plaintiffs' contention that they are the prevailing party and therefore entitled to attorney's fees meritless.

Moreover, although G.S. § 131E-129 was made effective 1 October 1987 and benefited plaintiffs, the statute did not occur as the result of this litigation. As a result of the new statute's enactment, however, defendants did draft guidelines and a table of penalties for use by the staff of the Licensure Section of the DFS in implementing the new law. Prior to the enactment of the new law, the staff was utilizing the sanctions proposal form and the procedure for implementing a plan of correction. An in-service training session which covered the new law was held 30 May 1988—2 June 1988 for the licensure staff and the certification staff in the DFS. The evidence tends to show that the Licensure Section had been working on the new law since its enactment and that this litigation was not the catalyst which prompted state defendants to action. In settling the lawsuit, plaintiffs merely accepted what state defendants were already doing to implement G.S. § 131E-129.

This Court, applying the merits test by weighing the benefits sought by plaintiffs against the recovery obtained, concludes that plaintiffs have not succeeded on any significant issue which brought about the results plaintiffs were seeking. Accordingly, we affirm the trial court's decision that plaintiffs are not the prevailing party; thus, they are not entitled to attorney's fees.

Affirmed.

Judges EAGLES and PARKER concur.

DONALD CARROLL WILLIAMS, PLAINTIFF v. KUPPENHEIMER MANUFACTURING COMPANY, INC., A CORPORATION, D/B/A KUPPENHEIMER MEN'S CLOTHIERS, DEFENDANT

No. 9126SC236

(Filed 21 January 1992)

Malicious Prosecution § 13 (NCI3d)— sufficiency of evidence

Evidence was sufficient to be submitted to the jury in an action for malicious prosecution where it tended to show that the prior criminal trial for embezzlement terminated in favor of plaintiff; except for the efforts of defendant in providing police with all the documents used in the prosecution, it is unlikely that there would have been a criminal prosecution of plaintiff; the issue of probable cause was one for the jury where the grand jury's return of a bill of indictment and plaintiff's waiver of the preliminary hearing tended to show probable cause but the court's dismissal of the criminal charge against plaintiff at the close of the State's evidence tended to show absence of probable cause; and the trial court gave the instruction on malice tendered by defendant and correctly defined both actual and legal malice.

Am Jur 2d, Malicious Prosecution §§ 24, 36, 51, 52, 139, 191, 194.

APPEAL by defendant from judgment entered 28 November 1990 by *Judge John M. Gardner* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 4 December 1991.

Plaintiff brought this action to recover damages for malicious prosecution. Donald Carroll Williams (plaintiff) was employed as a store manager by Kuppenheimer Manufacturing Company, Inc. (defendant). In December of 1987, Ms. Carol Ayliffe (Ayliffe), defendant's Loss Prevention Manager, made a routine visit to the store where plaintiff was employed. Upon reviewing daily sales reports and supporting documents for void and return transactions for this store in October, November, and December, she noted a number of suspicious void sales. For this period there were eleven "void" cash sales where the sale had been voided the same day the goods had been purchased as if the cash register operator had merely made a mistake, making it appear the goods never left the store. A void voucher was usually prepared by the salesman

who rang up the sale on the cash register. That salesman would then take the void voucher to the manager or assistant manager who would place his or her initials on the void voucher indicating approval. Plaintiff had initialed all these questionable void transactions. Later, Ayliffe reviewed alteration tickets with the sales receipts attached and found three of the tickets showed work performed on garments purchased pursuant to transactions that were voided (as if the goods had never been sold).

In February 1988, Ayliffe and her supervisor confronted plaintiff with this evidence. Plaintiff denied any wrongdoing but resigned from defendant's employ. From the review of the sales receipts, Ayliffe determined defendant was embezzling money from the store.

Soon after plaintiff's resignation, Ayliffe contacted the Charlotte Police Department regarding the suspicious activity. Ayliffe turned over the evidence which she had compiled against plaintiff. This evidence included the eleven void transactions, the three suspicious tickets for alterations, and the names and addresses of the three individuals who had the alterations performed. According to testimony of law enforcement officials, they relied on the evidence compiled by Ayliffe. In the course of their investigation, law enforcement officials reviewed the materials provided by Ayliffe and the only witnesses that Detective Job, the investigator for the Police Department, contacted were the three people she talked to by telephone whose names had been furnished by Ayliffe as being persons who had alterations performed on garments purchased that had been voided.

Law enforcement officials presented this evidence to a magistrate who authorized a warrant to issue for the plaintiff's arrest for embezzlement. Subsequent to his arrest, plaintiff waived his right to a probable cause hearing. Later a grand jury returned a true bill of indictment against him. Throughout this process, plaintiff continually denied any wrongdoing. There was no evidence of any shortage in the cash register at defendant's store while plaintiff was manager. On 17 October 1988, after the presentation of the State's evidence, the trial court dismissed the embezzlement charges.

Plaintiff subsequently brought the present civil action for malicious prosecution against defendant. After trial, the court submitted issues to the jury which were answered as follows:

(1) Did the defendant Kuppenheimer institute the prosecution of the plaintiff on charges of embezzlement with malice and without probable cause?

ANSWER: Yes

(2) What amount of damages is the plaintiff entitled to recover from the defendant?

ANSWER: $22,500

Judgment was entered on this verdict and defendant appeals the trial court's denial of its motions for a directed verdict, for judgment notwithstanding the verdict, and for new trial.

Lacy W. Blue for plaintiff appellee.

Parker, Poe, Adams & Bernstein, by David N. Allen and Ronald L. Cornell, Jr., for defendant appellant.

WALKER, Judge.

Defendant first asserts that its motion for a directed verdict should have been allowed since plaintiff failed as a matter of law to establish the necessary elements of malicious prosecution. Upon defendant's motion for directed verdict, the plaintiff's evidence must be considered in the light most favorable to plaintiff, thereby giving him the benefit of every reasonable inference to be drawn. A directed verdict is not proper unless it appears as a matter of law that a recovery cannot be had by plaintiff upon any view of the facts. *Shillington v. K-Mart Corp.*, 102 N.C.App. 187, 402 S.E.2d 155 (1991). The evidence was sufficient to carry the present case to the jury and the trial court properly overruled defendant's motion.

In order to recover in an action for malicious prosecution, plaintiff must establish that defendant: (1) instituted, procured or participated in the criminal proceeding against plaintiff; (2) without probable cause; (3) with malice; and (4) the prior proceeding terminated in favor of plaintiff. *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966). We find it necessary to discuss only the first three elements as it is apparent the prior criminal proceeding terminated in favor of plaintiff.

Under the first element, defendant contends it did not institute, procure or participate in the prior criminal proceeding, rather it merely provided assistance and information to the prose-

cuting authorities. The act of giving honest assistance and information to prosecuting authorities does not render one liable for malicious prosecution. *Shillington v. K-Mart Corp., supra; Harris v. Barham,* 35 N.C.App. 13, 239 S.E.2d 717 (1978). However, in the present case, the jury could find defendant's actions went further than merely providing assistance and information. Defendant brought all the documents used in the prosecution to the police. As discussed earlier, these documents included the eleven suspicious void sales, the three suspicious alteration tickets, and the names and addresses of witnesses to be contacted. From the record it appears the only additional investigation undertaken by the authorities was to contact the three individuals who had suspicious alterations performed. Law enforcement officials never interviewed other customers, store employees or plaintiff prior to the time of his arrest. Except for the efforts of defendant, it is unlikely there would have been a criminal prosecution of plaintiff. Under these circumstances, the trial court was correct in determining this was a factual matter for the jury.

Defendant next contends there *was* probable cause to bring the prior criminal proceeding. Defendant makes several arguments in support of this contention: (A) the grand jury indictment establishes the existence of probable cause to bring the prior action; (B) plaintiff's waiver of the probable cause hearing establishes probable cause; and (C) the evidence in the case was insufficient to establish a lack of probable cause as a matter of law. Probable cause is defined as

> the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution. The existence or nonexistence of probable cause is a mixed question of law and fact. If the facts are admitted or established it is a question of law for the court. Conversely, when the facts are in dispute the question of probable cause is one of fact for the jury.

Pitts v. Village Inn Pizza, Inc., 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978) (citations omitted). While our Supreme Court has said that both a grand jury indictment and a waiver of a preliminary hearing in a criminal action establish a *prima facie* showing of probable cause, nevertheless, such a finding or waiver is not conclusive in a subsequent malicious prosecution action, and the question of probable cause is still an issue for the jury. *Jones v. Gwynee,*

312 N.C. 393, 323 S.E.2d 9 (1984); *Pitts v. Village Inn Pizza, Inc., supra; Newton v. McGowan*, 256 N.C. 421, 124 S.E.2d 142 (1962).

In contending for a new trial, defendant asserts the trial court erred in instructing the jury on the element of probable cause. The Court gave the following instruction:

> [T]he plaintiff must prove that the prosecution was without probable cause. The question presented here is not one of guilt or innocence of the plaintiff. You are not here to determine the guilt or innocence of the plaintiff on the charge of embezzlement. Rather it is a question of probable cause.
>
> Probable cause for instituting a criminal proceeding exists when there are reasonable grounds for suspicion supported by circumstances sufficiently strong in themselves to warrant a man of ordinary prudence to believe that the party committed the act of which the complaint is made.
>
> The defendant is not required to know all the facts necessary to insure a conviction but it is required that there are known to him sufficient grounds to suspect that the person he charges was guilty of the act complained of.
>
> In determining the issue of probable cause you should also consider the facts and circumstances that were apparent to Kuppenheimer at the time the original proceeding was instituted.

Here some of the evidence tended to show *prima facie* the existence of probable cause, i.e. the grand jury returning a bill of indictment and Williams' waiver of the preliminary hearing. Some of the evidence also tended to show *prima facie* the absence of probable cause, i.e. the court's dismissal of the criminal charge against Williams at the close of the State's evidence. These were clearly matters for the jury to resolve and the trial court in its instructions properly placed the burden of proof on the plaintiff to show the lack of probable cause.

Under the third element of malicious prosecution, defendant contends plaintiff failed to prove the prosecution was instituted maliciously. Here the trial court gave the instruction tendered by defendant and correctly defined both actual and legal malice. Actual malice is more difficult to substantiate and is defined as "ill-will, spite, or desire for revenge, or under circumstances of insult,

rudeness or oppression, or in a manner evidencing a reckless and wanton disregard of [plaintiff's] rights." *Williams v. Boylan-Pearce, Inc.*, 69 N.C.App. 315, 319, 317 S.E.2d 17, 20 (1984), *aff'd per curiam*, 313 N.C. 321, 327 S.E.2d 870 (1985). However, a showing of actual malice is only required if plaintiff is seeking punitive damages. *Mitchem v. National Weaving Co.*, 210 N.C. 732, 188 S.E. 329 (1936). In the present action, punitive damages were not awarded, so plaintiff was not required to demonstrate defendant acted with actual malice.

Legal malice suffices to support an award of compensatory damages for malicious prosecution. *Mitchem v. National Weaving Co., supra.* It is well settled that legal malice may be inferred from a lack of probable cause. *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966); *Shillington v. K-Mart Corp.*, 102 N.C.App. 187, 402 S.E.2d 155 (1991). We hold the trial court properly concluded there was sufficient evidence of each element of malicious prosecution to allow the case to go to the jury, and correctly instructed the jury accordingly. N.C.P.I., Civ. 801.00. In the trial below, we find

No error.

Judges WELLS and LEWIS concur.

PATRICIA BALLANCE v. BENNY D. RINEHART, INDIVIDUALLY AND BENNY D. RINEHART, D/B/A RINEHART APPRAISALS

No. 911SC831

(Filed 21 January 1992)

Negligence § 2 (NCI3d)— real estate appraisal—no duty of reasonable care owed to prospective purchaser

A licensed real estate appraiser who performs an appraisal of real property at the request of a client does not owe a prospective purchaser of such property who relies on the appraisal a duty to use reasonable care in the preparation of the appraisal, since real estate appraisers have no control over the distribution of their reports once rendered and therefore cannot limit their potential liability, and a real estate appraiser performs an appraisal pursuant to a contract with an individual

client, often a lending institution or homeowner, and thus does not benefit if the homeowner later decides to distribute the appraisal to a prospective purchaser of his home.

Am Jur 2d, Brokers §§ 101, 108; Negligence §§ 126, 127; Vendor and Purchaser § 297.5.

Liability to real estate purchaser for negligent appraisal of property's value. 21 ALR4th 867.

APPEAL by plaintiff from order entered 2 July 1991 in PASQUOTANK County Superior Court by *Judge Herbert Small.* Heard in the Court of Appeals 9 December 1991.

D. Keith Teague, P.A., by Joseph H. Forbes, Jr., for plaintiff-appellant.

W. T. Culpepper, III for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from an order entered 11 June 1991, dismissing plaintiff's complaint for failure to state a claim upon which relief can be granted, N.C.G.S. § 1A-1, Rule 12(b)(6) (1990).

Plaintiff instituted this action on 11 February 1991 seeking damages for economic loss allegedly caused by defendant's negligent performance of a real estate appraisal. In her complaint, plaintiff alleges that she purchased a house owned by Jack and Annie Horton after relying on a real estate appraisal prepared by defendant in which defendant stated that the house was in good condition. Plaintiff further alleges that soon after the purchase, she discovered that the house had serious structural defects and that defendant breached his duty of ordinary care by failing to discover the defects. Plaintiff alleges that defendant knew or should have known at the time that he rendered the appraisal report that, although the appraisal report was prepared for Peoples Bank and Trust Company (Peoples Bank), other persons, particularly potential home buyers, would rely on the report as verification of the condition and value of the property. On 15 February 1991, defendant moved to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Plaintiff filed an amended complaint on 16 May 1991, which added to plaintiff's original complaint the allegations that the appraisal report was also prepared for Jack Horton and that "defendant knew or should have known

that [owner] Jack Horton could potentially show the appraisal to potential buyers of the home." On 11 June 1991, the trial court entered an order in open court granting defendant's motion and dismissing plaintiff's complaint.

The dispositive issue is whether a licensed real estate appraiser who performs an appraisal of real property at the request of a client owes a prospective purchaser of such property who relies on the appraisal a duty to use reasonable care in the preparation of the appraisal.

A claim should be dismissed under N.C.G.S. § 1A-1, Rule 12(b)(6) (1990), where "it appears that the plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim." *Garvin v. City of Fayetteville*, 102 N.C. App. 121, 123, 401 S.E.2d 133, 134 (1991). "[T]his will occur when there is a want of law to support a claim of the sort made, an absence of facts sufficient to make a good claim, or the disclosure of some fact which will necessarily defeat the [plaintiff's] claim." *Id.* at 123, 401 S.E.2d at 135. The complaint must be liberally construed in analyzing its sufficiency under this rule. *Dixon v. Stuart*, 85 N.C. App. 338, 340, 354 S.E.2d 757, 758 (1987).

Plaintiff argues that the trial court's dismissal of her claim is improper since this Court has previously recognized the right of a home buyer, in the absence of contractual privity with the appraiser, to recover damages for economic loss proximately caused by negligence in the performance of a real estate appraisal. Plaintiff cites in support thereof *Alva v. Cloninger*, 51 N.C. App. 602, 277 S.E.2d 535 (1981), where this Court reversed a directed verdict for defendant real estate appraiser on plaintiff home buyer's claim for negligent misrepresentation. Like plaintiff in the instant case, the plaintiff in *Alva* alleged that he had suffered economic loss by relying on defendant's appraisal which indicated that the home purchased by plaintiff was in good condition when in fact the house contained serious defects. In reversing the directed verdict for the defendant, we held that "there was evidence from which a jury could have concluded that defendant [appraiser] should have reasonably foreseen and expected that plaintiffs would rely on the appraisal report" performed by defendant. *Alva*, 51 N.C. App. at 610-11, 277 S.E.2d at 540.

The facts in *Alva*, however, are quite different from those in the instant case. Specifically, although the defendant in *Alva* prepared the appraisal report at the request of NCNB Mortgage Corporation (NCNB), the following additional facts formed the basis of our holding: NCNB was the lending institution from whom plaintiff was in the process of obtaining the purchase money for the house; plaintiff was listed by name as the borrower on defendant's work order; plaintiff himself paid the appraisal fee; and defendant had transacted enough similar business with the lending institution that he should have been aware of the importance of his appraisals to borrowers for whom the appraisals were indirectly performed. Plaintiff in the instant case alleges simply, without specifying the original purpose for which the appraisal at issue was performed, that defendant provided the appraisal, as requested, to his clients, and that plaintiff ultimately saw it and relied on it.

Defendant contends that the present case is controlled not by *Alva* but by *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 322 N.C. 200, 367 S.E.2d 609 (1988). In *Raritan*, Intercontinental Metals Corporation (IMC) retained the defendants, a firm of certified public accountants and individual partners working for the firm, to provide an audit report on IMC's financial status. The plaintiffs, Raritan River Steel Company (Raritan) and Sidbec-Dosco, extended credit to IMC on the basis of what they contended was an incorrect overstatement of IMC's net worth contained in the audit report prepared by the defendants. The plaintiffs sought to hold the defendants liable for losses resulting from the extension of credit to IMC.

In assessing the scope of an accountant's liability for negligent misrepresentation to persons other than the client for whom the financial audit was prepared, our Supreme Court adopted the approach set forth in the Restatement (Second) of Torts § 552 (1977) (§552), which provides:

> *Information Negligently Supplied for the Guidance of Others.*
>
> (1) One who, in the course of his business, profession or employment, or in any other transaction in which he has a pecuniary interest, supplies false information for the guidance of others in their business transactions, is subject to liability for pecuniary loss caused to them by their justifiable reliance upon the information, if he fails to exercise reasonable care or competence in obtaining or communicating the information.

(2) . . . [T]he liability stated in Subsection (1) is limited to loss suffered

(a) by the person or one of a limited group of persons for whose benefit and guidance he intends to supply the information or knows that the recipient intends to supply it; and

(b) through reliance upon it in a transaction that he intends the information to influence or knows that the recipient so intends or in a substantially similar transaction.

Restatement (Second) of Torts § 552 (1977). The *Raritan* Court rejected as too expansive the position adopted by some courts which extends liability to all persons whom the accountant should reasonably foresee might obtain and rely on the financial information. In doing so, the Court emphasized the policy reasons which justify establishing a narrower class of plaintiffs to whom an accountant owes a duty of care, such as the lack of control by accountants over the distribution of their reports and the fact that accountants do not benefit if their clients decide to use the report for purposes other than those communicated to the accountant. *See Raritan*, 322 N.C. at 212-13, 367 S.E.2d at 616. After applying §552, the Court held that Sidbec-Dosco had stated a legally sufficient claim against the defendants for negligent misrepresentation by alleging that at the time that the defendants prepared the audited financial statements for IMC, they knew: (1) the statements would be used by IMC to represent its financial condition to creditors who would extend credit on the basis of them; and (2) Sidbec-Dosco and other creditors would rely on those statements. *Id.* at 216, 367 S.E.2d at 618.

For the following reasons, we find *Raritan* instructive in assessing the liability of a real estate appraiser for negligent misrepresentation to prospective purchasers of the appraised property with whom the appraiser is not in contractual privity. Like an accountant, real estate appraisers have no control over the distribution of their reports once rendered and therefore cannot limit their potential liability. Moreover, like an accountant, a real estate appraiser performs an appraisal pursuant to a contract with an individual client, often a lending institution or a homeowner. For example, in the case of a homeowner who requests an appraisal in connection with a refinancing transaction, the real estate appraiser does not benefit if the homeowner later decides to distribute

the appraisal to a prospective purchaser of his home. As the *Raritan* Court noted with regard to accountants:

> [A client's distribution of the audit opinion to others] merely exposes [the accountant's] work to many whom he may have no idea would scrutinize his efforts. We believe that in fairness accountants should not be liable in circumstances where they are unaware of the use to which their opinions will be put. Instead, their liability should be commensurate with those persons or classes of persons whom they *know* will rely on their work.

Raritan, 322 N.C. at 213, 367 S.E.2d at 616 (emphasis added). For these reasons, we conclude that §552, which limits the class of persons to whom certain suppliers of information may be held liable for negligent misrepresentation, is the appropriate standard under which to assess a real estate appraiser's liability.

Applying this standard to the instant case, we conclude that plaintiff has failed to sufficiently allege that she is a person for whose benefit and guidance defendant *intended* to supply the appraisal report, or that defendant *knew* that the recipients of the report, Peoples Bank and Jack Horton, intended to supply it to plaintiff. In fact, plaintiff's complaint is devoid of any alleged purpose for which Peoples Bank and Jack Horton requested the appraisal in question. Defendant could have supplied the appraisal in question as part of a refinancing transaction between Peoples Bank and Jack Horton, with no intention that a third party would later see and rely on the report. In addition, as previously discussed, the instant case is distinguishable from *Alva* in light of the fact that the plaintiff in *Alva*, although not in actual contractual privity with defendant appraiser, was so closely connected to the rendering of the appraisal report that the defendant appraiser could be deemed to have known that NCNB intended to supply it to plaintiff. In such a case, the §552 standard is satisfied. Here, nothing in her complaint indicates that plaintiff played any part, directly or indirectly, in procuring the appraisal at issue. Comment h to §552 makes it clear that liability does not extend to situations where the maker "merely knows of the ever-present possibility of repetition to anyone, and the possibility of action in reliance upon it, on the part of anyone to whom it may be repeated." Restatement (Second) of Torts § 552, comment h. Accordingly, plaintiff's complaint fails to state a claim under §552 of the Restatement

(Second) of Torts, and therefore was properly dismissed by the trial court.

Affirmed.

Judges WELLS and PARKER concur.

JOHN RICHARD MOTHERSHED, ADMINISTRATOR OF THE ESTATE OF NETTIE MOTHERSHED TORRENCE, PLAINTIFF v. FRANK L. SCHRIMSHER, ADMINISTRATOR OF THE ESTATE OF RUPERT FRITZ TORRENCE, DEFENDANT

No. 9126SC68

(Filed 21 January 1992)

Descent and Distribution § 36 (NCI4th)— slayer statute—slayer excluded from victim's estate—no provision for victim to participate in slayer's estate

The N. C. Slayer Statute, N.C.G.S. § 31A-4, deems the slayer to have predeceased his victim only for purposes of excluding the slayer from his victim's estate, and it does not establish the order of death between the slayer and the victim for purposes of distributing both the victim's and the slayer's estates.

Am Jur 2d, Descent and Distribution §§ 101, 105, 109.

APPEAL by plaintiff from an order denying leave to amend the complaint entered 15 November 1990 and from an order granting summary judgment entered on 16 November 1990 by *Judge Chase B. Saunders* in MECKLENBURG County Superior Court. Heard in the Court of Appeals on 4 November 1991.

Edwin H. Ferguson, Jr. for plaintiff-appellant.

John A. Mraz for defendant-appellee.

LEWIS, Judge.

At issue in this case is the effect of the North Carolina Slayer Statute's clause which deems the slayer to have died "immediately prior" to the victim's death. The question is whether the Statute establishes the order of death between the slayer and the victim

for purposes of distributing both the victim and the slayer's estate or whether the Statute merely ignores the slayer's actual date of death for purposes of distributing the victim's estate.

Nettie and Rupert Torrence were mother and son. Prior to their deaths, each was the primary heir of the other. Mrs. Torrence was a widow with Rupert her only surviving child. Rupert Torrence never married and has no known children. On 27 January 1989, Mr. Torrence shot his mother and himself but the bodies were not found until 30 January 1989. Though the death certificates for each indicate both died on 30 January 1989, the order of death is unknown. Both died intestate. Plaintiff was named the administrator of Nettie Torrence's estate, while defendant was named the administrator of Rupert Torrence's estate. Plaintiff filed a wrongful death action against defendant on 7 August 1989. It was amended by consent to include a second cause of action for a declaratory judgment that Rupert Torrence was a slayer and requested that plaintiff's intestate be declared her son's sole heir.

On 18 October 1990, Rupert Torrence was adjudicated a slayer under the Statute. Defendant then filed a motion for summary judgment as to the remainder of plaintiff's second cause of action: i.e., whether plaintiff's intestate was her son's sole heir. Later, plaintiff filed a motion to amend the complaint to add a third cause of action seeking equitable relief. Summary judgment was granted in defendant's favor and the motion to amend was denied. Plaintiff appeals both rulings.

The peculiarity in the case at bar lies in the bizarre facts; a murder-suicide, which seems to have terminated the rights of a mother and son to partake in the other's intestate estate despite the fact that prior to their respective deaths each was the primary heir of the other. Mr. Torrence's right to inherit as his mother's heir was terminated by virtue of the North Carolina Slayer Statute (Statute), N.C.G.S. § 31A-3 through § 31A-12. His statutory disinheritance is undisputed. At issue is Mrs. Torrence's right to inherit from her son's estate. Because the coroner's report indicates that the Torrences' order of death is uncertain, plaintiff urges this Court to read the clause in the Statute which deems the slayer to have predeceased the victim as establishing the order of death between the slayer and the victim for purposes of distributing the slayer's estate. As this would extend the Statute beyond its present boundaries, we decline to do so.

The Slayer Statute was enacted to " 'take care of every situation in which the slayer may receive *any* benefit of *any* kind as a result of the decedent's death.' " *Quick v. United Ben. Life Ins. Co.*, 287 N.C. 47, 56, 213 S.E.2d 563, 568-69 (1975) (emphasis added). The Statute bars an *intentional killer* from gaining any benefit from the victim's estate. *Id.* An involuntary killer may be barred from his victim's estate by resort to the common law principle that a person may not profit by his wrongful acts. *Id.* Common law remedies are not supplanted by the Slayer Statute, but, are applied only where the Statute does not apply. *Id.* "The statute makes no attempt artificially to alter the date of death of the decedent, but [the Statute] provides instead that the actual date of death of the slayer is to be disregarded." *Porth v. Porth*, 3 N.C. App. 485, 496, 165 S.E.2d 508, 516 (1969). The roll is called at the victim's actual date of death and the slayer is not permitted to be counted among the heirs. *Id.*

Plaintiff assigns as error the trial court's summary judgment ruling that Nettie Torrence was not her son's sole heir and the denial of the motion to amend. Each side argues over the significance of the summary judgment ruling. Plaintiff argues that the ruling precludes Mrs. Torrence's estate from ever proving that she was her son's heir. The defendant argues that the ruling merely prevents plaintiff's intestate from automatically becoming an heir as a "matter of law" upon Rupert Torrence's adjudication as a slayer without having to prove her right of inheritance.

Defendant's motion for summary judgment asked the court to determine whether the Slayer Statute deemed Rupert Torrence to have predeceased his mother for all purposes or merely for the purpose of distributing his victim-mother's estate. Defendant's motion also asked whether Nettie Torrence was an heir "as a matter of law." The trial court's ruling (first ruling) stated that the slayer is deemed to have predeceased his victim only for the purpose of distributing the victim's estate. The confusion lies not in this first ruling, but in the court's second ruling which stated that Mrs. Torrence is not her son's "heir at law." We believe that the court intended to hold, in the second ruling, that Mrs. Torrence did not *automatically* become her son's heir "as a matter of law" by virtue of the Slayer Statute's fiction which deemed Rupert Torrence to have predeceased his victim-mother.

The second ruling, as written, asks and answers a question which was not before the court: the descent and distribution of Rupert Torrence's estate. The second ruling summarily precludes Mrs. Torrence's administrator from proving that Mrs. Torrence survived her son and as such was his sole heir. Summary judgment may be granted where there are no issues of material fact. N.C.G.S. § 1A-1, Rule 56 of the N.C. Rules of Civil Procedure. "The burden of establishing that there is no material factual issue to litigate and [that] summary judgment is appropriate is always upon the movant." *Lynch v. Newson*, 96 N.C. App. 53, 55, 384 S.E.2d 284, 286 (1989), *disc. rev. denied*, 326 N.C. 48, 389 S.E.2d 90 (1990) (citation omitted). Survivorship is a crucial issue in this case. The material facts which Rupert Torrence's estate had to disprove so as to obtain summary judgment in its favor was that Mrs. Torrence predeceased her son. Summary judgment on the survivorship issue is not properly granted in the case at bar because the limited facts presented do not carry the movant's burden of showing that no issues of material fact exist. Here, where the sole evidence on record reveals that the order of death between the parties is uncertain, survivorship is a disputed material fact which should be decided by a jury. Hence, the trial court's second ruling proclaiming Mrs. Torrence "not an heir at law" was improper because it answered a question which was not asked and because summary judgment as to her right to inherit could not have been properly granted under the facts of this case.

Summary judgment on the first ruling regarding the Slayer Statute's effect was properly granted. The Statute deems the slayer to have predeceased his victim only for purposes of excluding the slayer from his victim's estate. This is evident by both the Statute's plain language and by statutory construction. The Statute provides that:

> The slayer shall be deemed to have died immediately prior to the death of the decedent and the following rules shall apply:
>
> 1) The slayer shall not acquire any property or receive any benefit from the estate of the decedent by testate or intestate succession or by common law or statutory right as surviving spouse of the decedent.
>
> 2) Where the decedent dies intestate as to property which would have passed to the slayer by intestate succession, such

> property shall pass to others next in succession in accordance with the applicable provision of the Intestate Succession Act.

N.C.G.S. § 31A-4 (1984). The Statute's plain language clearly bars the slayer from participating in the victim's estate. Nowhere does the Statute authorize the victim to participate in the slayer's estate. That may or may not occur. The Statute does not indulge the fiction that the slayer's date of death is other than the actual date of death, but merely establishes a presumption to exclude the slayer. *Porth v. Porth*, 3 N.C. App. 485, 496, 165 S.E.2d 508, 516 (1969). Had the Statute been enacted for the dual purpose of adjudicating slayer status and for altering the intestate succession of both the slayer and victim, it would have so stated.

Our reading of the Slayer Statute does not work an injustice in the case at bar. Plaintiff argues that the coroner's report indicates that the order of death is uncertain and survivorship will, therefore, be difficult to prove. Survivorship is often difficult to prove but the Slayer Statute was not enacted to ease this burden. The Statute is one of exclusion, not of inclusion. When applicable, it acts to exclude a slayer from participation in the victim's estate. It does not act to include the victim in the slayer's estate due to the slayer's crime. This would contradict the Statute's stated purpose. The plaintiff at bar is not without recourse. As summary judgment did not adjudicate survivorship, Mrs. Torrence's estate still has the opportunity to prove that she survived Rupert Torrence and as such was his sole heir. If it is unable to do so then the intestate succession laws apply. Whether or not Mrs. Torrence is found to have survived her son, her estate may seek such recompense as the law allows pursuant to a wrongful death action against Rupert Torrence's estate. We cannot, under the record before us, rule that only Rupert Torrence's maternal heirs could inherit to the exclusion of his paternal heirs.

Though the plaintiff's second assignment of error was not argued, we will consider it. The complaint had already been amended once by consent to add a second cause of action. Here, leave of court was required to amend because the time for responsive pleading had run. We find no abuse of discretion.

Affirmed as to the trial court's denial of the motion to amend.

Affirmed as to the trial court's ruling that Rupert Torrence is a slayer as a matter of law.

The court's second ruling that Mrs. Torrence is not her son's heir at law is vacated.

Judges WELLS and WALKER concur.

STATE OF NORTH CAROLINA v. WILLIE LEE BECKHAM

No. 9126SC134

(Filed 21 January 1992)

1. **Evidence and Witnesses § 1237 (NCI4th)— incriminating statement—absence of warnings—prejudicial error**

The trial court erred in denying defendant's motion to suppress his statement to the arresting officers that he had lived at a house where cocaine and drug paraphernalia were found for approximately one month, since the statement was obtained as the result of a custodial interrogation which occurred prior to defendant's being advised of his *Miranda* rights, and defendant's convictions for possession of cocaine and maintaining a place to keep a controlled substance could not stand absent evidence that defendant was in control of the premises, constructively possessed the cocaine, or maintained the house in which to keep a controlled substance.

Am Jur 2d, Evidence §§ 545, 555-557.

Comment Note—Necessity of informing suspect of rights under privilege against self-incrimination, prior to police interrogation. 10 ALR3d 1054.

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

Evidence was sufficient to be submitted to the jury in a prosecution for possession of drug paraphernalia where it tended to show that, when police officers entered the kitchen of a house, they found defendant seated at a small table holding a spoon in his hand which was covered with a white powder residue; found on the table where defendant was seated were

a "crack" pipe, a box cutter containing a razor blade, a box of plastic baggies, and a quantity of plastic bag corners; and on a mantel directly above the table where defendant sat, officers found a box of baking soda, a pair of scissors, and a mirror covered with a white powder residue.

Am Jur 2d, Drugs, Narcotics, and Poisons §§ 21, 47.

APPEAL by defendant from *Fulton (Shirley L.), Judge.* Judgment entered 7 August 1990 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 6 January 1992.

Defendant was charged in proper bills of indictment with possession of drug paraphernalia in violation of G.S. 90-113.22, maintaining a place to keep a controlled substance in violation of G.S. 90-108(a)(7) and possession with intent to sell or deliver a controlled substance in violation of G.S. 90-95(a)(1).

The evidence presented at trial tends to show the following: Officers Robert C. Wallace and Douglas W. Lambert, vice officers with the Mecklenburg County Police Department, received information from a confidential informant that a "Danny" Beckham was selling cocaine on South Halsey Street in Charlotte, North Carolina. On 4 April 1990, the officers took the informant to a house at 203 South Halsey Street, searched him for contraband and money, gave him $20.00 in Mecklenburg County funds, and instructed him to go inside the house and purchase $20.00 worth of cocaine. The officers watched the informant go inside the house where he stayed for approximately two to three minutes. Upon his return, the informant handed the officers a small plastic bag containing a white powder which later field tested positive for cocaine. The officers then searched the informant finding no money or other drugs on his person.

Based upon information received as a result of the "controlled buy" conducted on 4 April 1990, the officers obtained and executed a search warrant for the house at 203 South Halsey Street on 5 April 1990. Upon arrival at the residence, the officers found four men seated on the front porch. The officers approached the house, identified themselves as police officers and announced that they had a search warrant for the premises. The four men seated on the porch were searched and their names and addresses were obtained. One of the men, George Austin of 206 South Halsey

Street, was detained after officers discovered twenty-three plastic baggies containing a white powdery substance on his person.

The police officers then announced themselves at the door of the residence and went inside. Upon entering the house, the officers found no one inside except defendant who was found in the kitchen seated at a small table holding in his hand a spoon which was covered with a white powdery residue. A "crack" pipe, a box cutter containing a razor blade, a box of plastic baggies, plastic baggie corners, and a medicine bottle in the name of "Rollins Hunter" containing a white powder, which later field tested negative for cocaine, were found on the kitchen table where defendant was seated. A box of baking soda, a pair of scissors and a mirror covered with white powder were found on a mantel above the kitchen table.

The officers then pushed defendant to the floor and handcuffed him. The search warrant was read to him and a copy of the warrant was given to him. After handcuffing defendant, Officer Lambert asked him two questions: (1) "Where is Danny Beckham?" and (2) "Do you live here?" Defendant responded that Danny Beckham was not there and that he had lived at 203 South Halsey Street for approximately one month.

A search of the house revealed a small plastic baggie containing a white powder substance later determined to be cocaine hidden beneath the carpet in the living room near the front door.

The jury found defendant guilty of all the charges against him, and the offenses were consolidated for judgment. From a judgment imposing a prison sentence of five years, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General William B. Ray, for the State.

Assistant Public Defender Kathleen Arundell for defendant, appellant.

HEDRICK, Chief Judge.

[1] The critical question raised by this appeal is whether the trial court erred in denying defendant's motion to suppress his statement to police officers that he had lived at the house at 203 South Halsey Street for approximately one month. Defendant argues the statement was obtained as the result of a custodial interroga-

tion which occurred prior to defendant being advised of his constitutional rights as set out in *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). We agree.

In *State v. Marshall*, 94 N.C. App. 20, 380 S.E.2d 360, *appeal dismissed, disc. review denied*, 325 N.C. 275, 384 S.E.2d 526 (1989), this Court held that it was error for the trial court to admit into evidence defendant's statement that he lived in the house where a search for drugs was taking place prior to defendant being read his *Miranda* rights. *Id.* at 32, 380 S.E.2d at 367. This Court stated that a custodial interrogation had taken place since "[t]he occupants were not free to leave and the question was likely to produce an incriminating response." *Id.* at 33, 380 S.E.2d at 368.

In *Marshall*, however, this Court found that the error was harmless beyond a reasonable doubt because there was other evidence admitted tending to show that defendant was a resident of the premises searched. *Id.* In the present case, there is no other evidence tending to show that defendant was a resident of the premises in question, and the error here is clearly prejudicial.

Our determination that the court erred in denying defendant's motion to suppress his statement resolves the question of whether the court erred in denying defendant's motion to dismiss the charges of possession of the cocaine found hidden under the living room carpet and maintaining a place to keep a controlled substance. As noted above, there is no evidence that defendant was in control of the premises, or constructively possessed the cocaine, or that he maintained a place to keep a controlled substance. Thus, the trial judge erred in denying defendant's motion to dismiss the charges of possession of the cocaine and maintaining a place to keep a controlled substance, and the judgment with respect to these charges will be reversed.

[2] Defendant's contention that the court erred in not dismissing the charge of possession of drug paraphernalia is without merit. The evidence presented tends to show that when the police officers entered the kitchen of the house they found defendant seated at a small table, holding a spoon in his hand which was covered with a white powder residue. Found on the table where defendant was seated were a "crack" pipe, a box cutter containing a razor blade, a box of plastic baggies, and a quantity of plastic baggie corners. On a mantel directly above the table where defendant was seated, a box of baking soda, a pair of scissors and a mirror covered

with a white powder residue were found. This evidence is clearly sufficient to show that defendant actually possessed items of drug paraphernalia, and the trial court correctly denied defendant's motion to dismiss with respect to this charge.

As to defendant's contention that the trial court erred in denying his motion to suppress the evidence obtained as a result of the search, assuming *arguendo*, that defendant has standing to raise the question of the validity of the search warrant, we hold the search warrant was based on sufficient facts to support a finding of probable cause under the totality of the circumstances.

The result is: With respect to the charges of possession with intent to sell or deliver cocaine, case number 90-25771 and maintaining a place to keep a controlled substance, case number 90-25772, the judgment will be reversed; with respect to the charge of possession of drug paraphernalia, we find no error in the trial and the cause will be remanded for resentencing in case number 90-25773.

Reversed in part; remanded in part for resentencing.

Judges WELLS and JOHNSON concur.

L. C. COBB, JR. v. JACKIE LYNN REITTER

No. 914SC803

(Filed 21 January 1992)

Automobiles and Other Vehicles §§ 502, 637 (NCI4th)— collision between motorcycle and car—car pulling in front of motorcycle—speeding motorcycle—issues of negligence and contributory negligence for jury

In an action to recover for injuries sustained when plaintiff's motorcycle collided with defendant's car, the trial court erred in directing verdict for defendant where there was evidence from which a reasonable mind could conclude that defendant pulled in front of plaintiff at an intersection and that defendant's conduct was a proximate cause of plaintiff's injuries; moreover, the trial court was required to submit the

issue of whether plaintiff was speeding, and hence the issue of plaintiff's contributory negligence, to the jury.

Am Jur 2d, Automobiles and Highway Traffic §§ 422, 798, 816, 817.

APPEAL by plaintiff from judgment entered 18 April 1991 by *Judge Franklin R. Brown* in ONSLOW County Superior Court. Heard in the Court of Appeals 9 December 1991.

Popkin and Associates, by Samuel S. Popkin, for plaintiff-appellant.

Hamilton, Bailey, Way & Brothers, by Glenn E. Bailey and John E. Way, Jr., for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from a judgment entered 18 April 1991, which judgment directed a verdict against plaintiff at the close of all the evidence and dismissed with prejudice plaintiff's action against defendant.

Plaintiff instituted this negligence action to recover for injuries sustained when the motorcycle he was driving collided with defendant's automobile. In her answer, defendant denies any negligence on her part and alleges that, even if she was negligent, the contributory negligence of plaintiff was the proximate cause of plaintiff's injuries.

The evidence tends to establish that on 16 December 1989 at approximately 12:55 p.m., plaintiff was operating his motorcycle on southbound U.S. Highway 17 in Jacksonville, N.C., a road with three lanes of travel and a posted speed limit of 50 miles per hour. The weather was clear. As plaintiff approached the intersection of 17 South and Canady Road, the front of plaintiff's motorcycle collided with the extreme left rear of defendant's red 1986 Mercury automobile. Defendant testified that, when the accident occurred, she was crossing 17 South in order to reach the median so that she could turn left onto 17 North. The visibility to the left from the stop sign at the Canady Road intersection is a distance of approximately 475 feet, which is a straight stretch of road. Defendant testified that she stopped at the stop sign and after looking left, right, then left again, proceeded across 17 South. When the impact occurred, the majority of defendant's car was in the inside

turning lane, with just a few inches of the rear extending into the middle lane. Plaintiff testified that he did not see defendant until immediately before impact. He also testified that he was traveling at a speed of 48 miles per hour just prior to the accident. Defendant testified that, in her opinion, plaintiff was going at least 70 miles per hour prior to impact. Defendant presented the testimony of Michael Trapp (Trapp), a companion of plaintiff who was riding another motorcycle along with plaintiff at the time the accident occurred. Trapp testified that he was going 65 miles per hour just prior to the accident, and that plaintiff was pulling away from him.

At the close of all the evidence, defendant moved for a directed verdict on the grounds that no evidence existed of defendant's negligence and that the evidence showed contributory negligence on the part of the plaintiff. The court granted the motion without specifying on which ground, and entered judgment for defendant.

We must affirm the ruling of the trial court if the directed verdict was proper for either of the two grounds argued by the defendant in the trial court. *See Feibus & Co. v. Godley Constr. Co.*, 301 N.C. 294, 301, 271 S.E.2d 385, 390 (1980), *reh'g denied*, 301 N.C. 727, 274 S.E.2d 228 (1981) (appellate court can properly affirm directed verdict only on a ground stated in defendant's motion at trial). Accordingly, the issues are whether I) the plaintiff presented substantial evidence that defendant's negligence was a proximate cause of his injuries; and II) the only reasonable inference to be drawn from the evidence is that plaintiff's contributory negligence was the proximate cause of his own injuries.

I

On appeal from a directed verdict for the defendant in a negligence action which was granted on the ground that plaintiff presented insufficient evidence of defendant's negligence, the reviewing court is confronted with the identical task as the trial court, that is, to determine whether there is substantial evidence that defendant's negligence was the proximate cause of plaintiff's injuries. *See Harshbarger v. Murphy*, 90 N.C. App. 393, 395, 368 S.E.2d 450, 451 (1988). "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). If there is such relevant evidence as a reasonable mind might

accept as adequate to support the elements of negligence, the trial court must deny defendant's motion and allow the case to go to the jury. *See Hines v. Arnold*, 103 N.C. App. 31, 34, 404 S.E.2d 179, 181-82 (1991). "In deciding the motion, the trial court must treat [plaintiff's] evidence as true, considering the evidence in the light most favorable to [plaintiff] and resolving all inconsistencies, contradictions and conflicts for [plaintiff], giving [plaintiff] the benefit of all reasonable inferences drawn from the evidence." *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990).

In the instant case, plaintiff's evidence consisted of plaintiff's testimony and the testimony of the defendant. Plaintiff testified that when the accident occurred he was traveling south on Highway 17 at a speed below the posted speed, that he had just rounded a curve, that he had the right-of-way, and that, immediately before impact near the intersection of Highway 17 and Canady Road, defendant was crossing plaintiff's path of traffic or path of sight. Defendant testified that, when she first saw plaintiff approaching on his motorcycle, the front half of her car was in the inner lane of travel on Highway 17 and the back half was in the middle lane. The actual impact occurred before defendant's car had reached the median on Highway 17. A reasonable mind could find this evidence, when taken in the light most favorable to plaintiff, adequate to support the conclusion that defendant pulled in front of plaintiff at the intersection of Canady Road and Highway 17 and that defendant's conduct was a proximate cause of plaintiff's injuries. Accordingly, if the trial court directed a verdict for defendant on the ground that plaintiff failed to present substantial evidence of defendant's negligence, its ruling was erroneous.

II

A directed verdict for defendant on the ground that plaintiff was contributorially negligent is proper only if the evidence establishes the contributory negligence of the plaintiff as a matter of law. *Williams v. Odell*, 90 N.C. App. 699, 701, 370 S.E.2d 62, 64, *disc. rev. denied*, 323 N.C. 370, 373 S.E.2d 557 (1988). In determining whether plaintiff is contributorially negligent as a matter of law, "the question is whether the evidence establishes plaintiff's negligence so clearly that no other reasonable inference or conclusion may be drawn therefrom." *Screaming Eagle Air, Ltd. v. Airport Comm. of Forsyth County*, 97 N.C. App. 30, 37, 387 S.E.2d

197, 201, *disc. rev. denied*, 326 N.C. 598, 393 S.E.2d 882 (1990). A directed verdict based on plaintiff's contributory negligence is not proper "when other reasonable inferences may be drawn or when there are material conflicts in the evidence." *Stancil v. Blackmon*, 8 N.C. App. 499, 502, 174 S.E.2d 880, 882 (1970).

In the instant case, defendant argues that the evidence of plaintiff's speeding supports defendant's contention that plaintiff was contributorially negligent as a matter of law. Although there is evidence that the plaintiff was exceeding the posted speed limit at the time of the accident, plaintiff himself testified that he was going only 48 miles per hour in a 50 mile per hour zone immediately prior to impact. Taking the evidence in the light most favorable to plaintiff and resolving all inconsistencies in his favor, as it must do, the trial court would be required to submit the issue of whether plaintiff was speeding, and hence the issue of plaintiff's contributory negligence, to the jury. Here, "the evidence of plaintiff's contributory negligence, while strong, is not so overpowering as to preclude all reasonable inferences to the contrary." *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). Accordingly, if the trial court granted defendant's motion for a directed verdict at the close of the evidence based on plaintiff's contributory negligence as a matter of law, it was error.

Because neither ground offered by defendant at trial supports the trial court's granting of defendant's motion for a directed verdict, plaintiff is entitled to a new trial.

Reversed and remanded.

Judges WELLS and PARKER concur.

LARRY LYNCH, PETITIONER v. PPG INDUSTRIES AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS

No. 9127SC49

(Filed 21 January 1992)

Master and Servant § 108.1 (NCI3d)— unemployment compensation—conviction for possession of cocaine with intent to sell or deliver—disqualifying misconduct

Respondent properly concluded that petitioner was not entitled to receive unemployment insurance benefits where petitioner was discharged following his conviction for possession of cocaine with intent to sell or deliver, and the fact that that particular offense was omitted from N.C.G.S. § 96-14(2), the statute defining misconduct, was not determinative, since that statute did not set out an exclusive list of examples of disqualifying misconduct.

Am Jur 2d, Unemployment Compensation §§ 52, 52.5, 57.

APPEAL by petitioner from judgment entered 5 October 1990 by *Judge John Mull Gardner* in CLEVELAND County Superior Court. Heard in the Court of Appeals 15 October 1991.

Corry, Cerwin & Coleman, Attorneys, by Todd R. Cerwin, for petitioner-appellant.

Golding, Meekins, Holden, Cosper & Stiles, by Lawrence M. Baker and Henry C. Byrum, Jr., for respondent-appellee PPG Industries.

Chief Counsel T.S. Whitaker and Deputy Chief Counsel V. Henry Gransee, Jr., for respondent-appellee Employment Security Commission of North Carolina.

PARKER, Judge.

Petitioner Larry Lynch appeals from a judgment affirming the decision of the Employment Security Commission ("ESC") that he is not entitled to receive unemployment insurance benefits. Petitioner was discharged from employment with PPG Industries following his conviction for possession of cocaine with intent to sell or deliver, in violation of N.C.G.S. § 90-95(a)(1). The ESC accepted the appeal referee's findings of fact that petitioner "never con-

sumed illegal drugs while at work" and "never reported to work while impaired by illegal drugs." The ESC concluded as a matter of law, however, that petitioner's drug conviction was misconduct within the meaning of N.C.G.S. § 96-14(2), disqualifying him from drawing unemployment benefits. On petitioner's appeal, the trial court upheld the ESC's decision. We affirm.

> An individual shall be disqualified for benefits:
>
> . . . .
>
> (2) . . . [where] it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee, or in carelessness or negligence of such degree or recurrence as to manifest equal culpability, wrongful intent or evil design, or to show an intentional and substantial disregard of the employer's interests or of the employee's duties and obligations to his employer.

N.C.G.S. § 96-14(2) (1990).

A new second paragraph was added to N.C.G.S. § 96-14(2) by Session Laws 1989, chapter 707, section 5, with an effective date of 1 August 1989. That paragraph was in force when petitioner was convicted on 6 September 1989, after which PPG Industries terminated his employment. The new paragraph provides:

> "Discharge for misconduct with the work" as used in this section is defined to include but not be limited to separation initiated by an employer for reporting to work significantly impaired by alcohol or illegal drugs; consuming alcohol or illegal drugs on employer's premises; conviction by a court of competent jurisdiction for manufacturing, selling, or distribution of a controlled substance punishable under G.S. 90-95(a)(1) or G.S. 90-95(a)(2) while in the employ of said employer.

N.C.G.S. § 96-14(2) (1990).

On appeal petitioner argues that because this recent, special statutory definition of misconduct expressly enumerates all drug crimes included in N.C.G.S. §§ 90-95(a)(1) and (a)(2) except for possession with intent to sell or deliver, his conviction for possession with intent to sell or deliver is not a ground for disqualification from unemployment benefits under N.C.G.S. § 96-14(2). We disagree.

Petitioner misinterprets this special definitional paragraph to set out an exhaustive, exclusive list of examples of disqualifying misconduct. The statutory language, "include but not be limited to," clearly indicates, however, that the legislature did not intend an exclusive list. Thus, the paragraph added to N.C.G.S. § 96-14(2) in 1989 only illustrates and illuminates the more general language in the preceding paragraph of N.C.G.S. § 96-14(2). Under this provision the employer has the burden of showing the employee's disqualification from unemployment benefits on the basis of misconduct. *McGaha v. Nancy's Styling Salon*, 90 N.C. App. 214, 218, 368 S.E.2d 49, 52, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 110 (1988).

Even under the general construction of "misconduct" for purposes of N.C.G.S. § 96-14(2), PPG Industries met its burden in this case by showing that petitioner by his conviction of a drug crime had failed to meet the "standards of behavior" that PPG Industries had "the right to expect" of its employees. An employee's misconduct need not occur at the workplace or in connection with employment tasks to violate expectable behavioral norms. *In re Collins v. B&G Pie Co.*, 59 N.C. App. 341, 296 S.E.2d 809 (1982), *disc. rev. denied*, 307 N.C. 469, 299 S.E.2d 221 (1983). Nothing in the listed examples of misconduct in the paragraph added to N.C.G.S. § 96-14(2) in 1989 suggests that employees violate social norms only when they manufacture, sell or deliver controlled substances and not when they are convicted of other crimes, *e.g.*, homicide, sexual offenses or possession of a controlled substance with the intent to sell or deliver.

By enacting the new provision in N.C.G.S. § 96-14(2), the legislature was manifestly addressing the serious drug problem in the work force. Sound reasons exist for legislating that conduct related to substance abuse is misconduct giving rise to discharge. A drug-dealing employee may so conduct himself that (i) fellow employees are tempted to engage in the use of drugs; (ii) use of drugs may affect work performance and quality; and (iii) the

employer's good will and business interests could thereby be threatened. An employer is not, however, required to prove actual harm to its interests in order to meet its burden of showing employee misconduct. *In re Gregory v. N.C. Dept. of Revenue*, 93 N.C. App. 785, 379 S.E.2d 51 (1989).

A specific ground for disqualifying an employee from unemployment benefits in N.C.G.S. § 96-14, "when applicable," prevails over the general policy in N.C.G.S. § 96-2 of providing benefits to workers who are "unemployed through no fault of their own." *In re Scaringelli*, 39 N.C. App. 648, 650-51, 251 S.E.2d 728, 730 (1979). Under the circumstances in this case, petitioner's loss of employment was based on intentional misconduct in substantial disregard of his employer's interests. Accordingly, we affirm the judgment of the superior court upholding ESC's conclusion that petitioner is disqualified from unemployment benefits.

Affirmed.

Judges WELLS and WYNN concur.

R. W. BROCKWELL, PLAINTIFF v. LAKE GASTON SALES AND SERVICE, DEFENDANT

No. 919DC61

(Filed 21 January 1992)

Bailment § 4 (NCI4th)— boat repairs—disclaimer of liability by bailee—disclaimer void

Where defendant bailee took plaintiff bailor's boat, its contents, equipment and attachments into its sole possession in order to perform repairs on the boat in the regular course of its business, it was against public policy for defendant to attempt to exculpate itself from the duty of ordinary care it owed to plaintiff, and its liability disclaimer in its repair order was void and unenforceable as a matter of law.

Am Jur 2d, Bailments §§ 24, 140, 142-144; Boats and Boating §§ 86, 88.

Liability of operator of marina or boatyard for loss of or injury to pleasure boat left for storage or repair. 44 ALR3d 1332.

APPEAL by defendant from *Allen (Claude W., Jr.), Judge.* Judgment entered 29 August 1990 in District Court, WARREN County. Heard in the Court of Appeals 6 January 1992.

In this civil action plaintiff, bailor, seeks to recover damages in the amount of $4,321.00 from defendant, bailee, allegedly resulting from defendant's negligence.

The following facts are not controverted: On or about 27 March 1989, plaintiff took his 1987 model 200 Johnson motor and boat to defendant's place of business to be repaired. At the time of delivery to defendant, plaintiff's boat contained many items and articles of personal property including fishing gear, navigation equipment and electronic equipment.

Defendant told plaintiff that before his boat could be repaired, it would be necessary for him to sign a repair order which contained the following disclaimer:

> It is understood and agreed that [defendant] assumes no responsibility whatsoever for loss or damage by theft, fire, vandalism, water or weather related damages, nor for any items of personal property left with the unit placed with [defendant] for repair, storage or sale.

The repair order was duly executed by plaintiff and indicates that he paid defendant $706.13 for the work performed on the boat.

Approximately ten (10) days after plaintiff delivered his boat to defendant, defendant called plaintiff to inform him that his boat was repaired and that "a hole was in his boat where the radio was." Plaintiff immediately went to defendant's place of business and upon inspecting his boat found the following items of personal property were missing:

AM/FM radio X-3 lowrance chart	$ 400.00
P H Monitor	$ 49.00
3 boxes plastic worms, waits, and hooks	$ 175.00
3 tackle boxes	$ 75.00
1 set of tools	$ 125.00
11 rods and reels	$ 600.00
Baits and boxes of extra baits and gauges	$1,000.00

The judge, after a trial without a jury, made findings of fact and the following conclusions of law:

1. That the actions between the parties herein created a bailment for the mutual benefit of both plaintiff as bailor and defendant as bailee.

2. That the defendant, bailee, in this matter failed to use ordinary care to protect the property of plaintiff entrusted to him. That this lack of ordinary care constitutes negligence on the part of the defendant.

3. That such negligence on the part of defendant was a proximate cause of the loss of plaintiff's personal property that was in the boat compartments and/or attached to the boat.

4. That plaintiff was damaged by the negligence of the defendant.

From a judgment ordering that plaintiff have and recover of defendant $2,424.00 and costs, defendant appealed.

Townsend and Bloom, by H. Lee Townsend, III, for plaintiff, appellee.

Clayton and Clayton, P.A., by Theaoseus T. Clayton, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

The sole question raised by this appeal is whether the trial court erred by failing to find that defendant's bailment liability to plaintiff had been expressly relieved by contract. Defendant contends the trial court erred in denying its motion for summary judgment and "directed verdict." (A motion to dismiss pursuant to N.C.R. Civ. P. 41(b) is the proper motion where the trial is before the judge without a jury.) Essentially, defendant argues the "liability disclaimer" signed by the plaintiff, bailor, is an insurmountable bar to plaintiff's claim for relief. We disagree.

As a general rule, in an ordinary mutual benefit bailment, where there is no great disparity of bargaining power, the bailee may relieve himself from the liability imposed on him by the common law so long as the provisions of the contract do not run counter to the public interest. *Insurance Assoc. v. Parker*, 234 N.C. 20, 65 S.E.2d 341 (1951). Where the public has no interest in the subject

matter of the contract and the contract involves only private concerns of the parties, a liability disclaimer will be enforced. *Id.*

However, some contractual provisions which attempt to avoid liability for a party's negligence which are contrary to law and against public policy are void and unenforceable. *Hall v. Refining Co.*, 242 N.C. 707, 89 S.E.2d 396 (1955); *Insurance Assoc. v. Parker, supra.*

> Many courts hold that where the bailee makes it his business to act as bailee for hire, on a uniform and not an individual basis, it is against the public interest to permit him to exculpate himself from his own negligence. And the decided trend of modern decisions is against the validity of such exculpatory clauses or provisions in behalf of proprietors of parking lots, garages, parcel check rooms, and warehouses, who undertake to protect themselves against their own negligence by posting signs or printing limitations on the receipts or identification tokens delivered to the bailor-owner at the time of bailment.

Insurance Assoc. v. Parker, at 23-24, 65 S.E.2d at 344.

In the present case, defendant, bailee, attempted to exculpate itself from liability for its own negligence where it "was [its] business to act as a bailee for hire on a uniform . . . basis." Defendant, bailee, took plaintiff's boat, its contents, equipment and attachments into its sole possession in order to perform repairs on the boat in the regular course of its business, and we hold it was against public policy for defendant, bailee, to attempt to exculpate itself from the duty of ordinary care it owed to plaintiff, bailor. We therefore hold the liability disclaimer in the present case is void and unenforceable as a matter of law, and the judgment for plaintiff will be affirmed.

Affirmed.

Judges WELLS and JOHNSON concur.

DUAYNE A. HOOLAPA, PLAINTIFF v. ROBBIN L. HOOLAPA (BAGGS), DEFENDANT

No. 914DC194

(Filed 21 January 1992)

Rules of Civil Procedure § 60.2 (NCI3d)— equitable distribution provision—motion for relief denied

The trial court did not err in denying plaintiff's Rule 60(b) motion to set aside an equitable distribution provision in a divorce judgment granting defendant 38% of plaintiff's military retirement income on the ground of "mistake" under subsection (1) or for "any other reason justifying relief" under subsection (6) where plaintiff's motion was filed later than the one-year limit placed on subsection (1); the court's award of a 38% interest in the retirement benefits to defendant was not conditioned on any finding that the benefits were vested marital property; any mistake as to defendant's rights to plaintiff's retirement benefits was conditioned on an oral agreement of the parties as represented by plaintiff in his complaint and in open court; and plaintiff's attorney drafted the judgment.

Am Jur 2d, Divorce and Separation §§ 470, 909, 949.

APPEAL by plaintiff from an order entered by *Judge Kenneth W. Turner* on 30 November 1990 in ONSLOW County District Court. Heard in the Court of Appeals 4 December 1991.

Plaintiff sued for divorce on 23 November 1988 seeking an adjudication as to custody, child support and equitable distribution. Judge Kenneth Turner heard the matter on 13 January 1989 at a term of Onslow County District Court for uncontested matters without a reporter. Judgment was entered granting the relief requested by the plaintiff in his complaint. On 7 August 1990 plaintiff filed a motion under Rule 60 to set aside a portion of the 13 January 1989 judgment. A hearing on this issue took place on 30 November 1990. Subsequent to the hearing this motion was denied. Plaintiff appeals from the order denying this motion.

Lana Starnes Warlick for plaintiff-appellant.

Gaylor, Edwards, Vatcher & Bell, by Hiram C. Bell, Jr., for defendant-appellee.

LEWIS, Judge.

Parties were married 2 July 1972 and lived together as husband and wife until 1 June 1987, at which time they separated. Three children were born to the marriage. The plaintiff filed for divorce on 23 November 1988 alleging that parties were in agreement on all issues including equitable distribution. The complaint alleges that "because the plaintiff is an active duty member of the Armed Forces of the United States of America and because the plaintiff had fifteen (15) years of active duty service during the coveture (sic) of the parties, the defendant is entitled to a portion of the plaintiff's military retirement income." This allegation was adopted word for word in the trial court's order.

The issue of whether plaintiff's interest in his retirement income was vested and therefore marital property, or not vested and therefore separate property, was never raised. The divorce action came before the court on 13 January 1989. Plaintiff was represented by counsel; defendant was not. The court inquired of both parties as to whether or not they understood and were in agreement with the terms set forth in the judgment, to which each party responded in the affirmative. The court also inquired of the plaintiff as to whether he specifically agreed to the division of 38 per cent of his retirement benefit to the defendant, to which he responded in the affirmative. As a result of the testimony presented to the court, the judge granted the relief requested by the plaintiff and entered the judgment.

Subsequent to a Rule 60 hearing, Judge Turner's order states that plaintiff's attorney drafted the judgment adopted on 13 January 1989, specifically alleging that "the parties had agreed" to all provisions. Judge Turner found as a finding of fact that plaintiff's motion was not filed within a reasonable time as he waited nineteen months after entry of the judgment before moving the court to set aside the judgment, and that the plaintiff failed to timely note his appeal and therefore waived his right to appeal for relief from the judgment. Motion to amend the judgment was therefore denied.

Appellant's brief contends that his Rule 60 motion falls under Rule 60(b), which reads as follows:

> (b) 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:

(1) Mistake, inadvertence, surprise, or excusable neglect;

(2) Newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial. . . ;

(3) Fraud . . ., misrepresentation, or other misconduct of an adverse party;

(4) The judgment is void;

(5) The judgment has been satisfied, released, or discharged . . . ; or

(6) Any other reason justifying relief from the operation of the judgment.

The motion shall be made within a reasonable time, and for reasons (1), (2) and (3) not more than one year after the judgment, order, or proceeding was entered or taken.

N.C.G.S. § 1A-1, Rule 60(b) (1990). As plaintiff's motion was filed nineteen months after Judge Turner's original order, it was filed later than the one year limit placed on 60(b)(1), (2) and (3). With respect to Rule 60(b)(4), a judgment is "void" only where the court that renders it did not have "jurisdiction over the parties and the subject matter and [did not have] authority to render the judgment entered." *In re Brown*, 23 N.C. App. 109, 110, 208 S.E.2d 282, 283 (1974). Here, the trial court clearly had both personal and subject matter jurisdiction. *Id.* The order cannot then be "void" pursuant to Rule 60(b)(4).

Plaintiff argues that the trial court erred in presuming that plaintiff's retirement benefits were marital property. Even if such were the case, plaintiff's Rule 60 motion would fall under 60(b)(1) and thus be barred by the one year limit. However, the court's awarding of a 38 per cent interest of the retirement benefits to the defendant is not expressly conditioned on any finding that the rights are vested marital property. Rather, the trial court's award was conditioned on an oral agreement of the parties as represented by the plaintiff in his complaint and in open court. The record is clear that any mistake as to defendant's rights to plaintiff's retirement benefits was that of the plaintiff who personally consented to the division of these benefits in court and whose attorney drafted the judgment. There is certainly a strong inference that a man of plaintiff's responsible position in the United States Marine Corps with fifteen years service would know whether or

not his retirement benefits were vested. A motion to correct such a mistake also falls under Rule 60(b)(1), as either "[m]istake, inadvertence, surprise, or excusable neglect," and as such is barred by the one year time limit.

Furthermore, while plaintiff's motion may fall under the catch-all wording of 60(b)(6) ("[a]ny other reason justifying relief"), request for such relief "is addressed to the sound discretion of the trial court and appellate review is limited to determining whether the court abused its discretion." *Sink v. Easter*, 288 N.C. 183, 198, 217 S.E.2d 532, 541 (1975). The trial judge erred neither in law nor in his findings of fact. We conclude that the trial judge acted entirely within the bounds of his discretion in denying the motion. The order of the court is therefore:

Affirmed.

Judges WELLS and WALKER concur.

STATE OF NORTH CAROLINA v. FRANK W. PETERSILIE

No. 9124SC313

(Filed 21 January 1992)

Courts § 56 (NCI4th)— misdemeanors—original trial in superior court—no jurisdiction

The superior court did not have subject matter jurisdiction over a prosecution for publishing unsigned campaign material in connection with an election in violation of N.C.G.S. § 163-274(7), since a violation of that statute is a misdemeanor; defendant's arrest sprang from indictments issued by the grand jury and not from warrants issued by a magistrate or clerk, so that the indictments originated in the superior court; there was no indication in the record that a presentment preceded the indictments; the record affirmatively showed that defendant's prosecution was initiated in superior court upon those indictments; and the district courts of North Carolina have exclusive original jurisdiction of misdemeanor cases.

Am Jur 2d, Courts § 13.

APPEAL by defendant from judgment entered 19 October 1990 by *Judge Charles C. Lamm* in WATAUGA County Superior Court. Heard in the Court of Appeals 13 January 1992.

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

Chester E. Whittle, Jr. for defendant-appellant.

JOHNSON, Judge.

Defendant was convicted in superior court of publishing unsigned campaign material in connection with an election, in violation of G.S. § 163-274(7) (1991). On appeal defendant challenges the constitutionality of the statute under both the state and federal constitutions and also alleges other errors in the admission of certain testimony. The record on appeal before us includes copies of two indictments handed down by the grand jury and dated 19 February 1990, an arrest warrant dated 19 February 1990, the docket sheet, the jury verdict forms and the judgment. Defendant was tried before a jury in superior court and convicted on all counts.

Although neither party raises the issue, we find that initially we must decide whether the superior court which tried this case had subject matter jurisdiction over the action. Because we find that the superior court did not have jurisdiction, we vacate the judgment and remand the case.

A violation of G.S. § 163-274(7) constitutes a misdemeanor offense. The district courts of North Carolina have exclusive original jurisdiction for the trial of criminal misdemeanor offenses. G.S. § 7A-272. The superior courts of North Carolina have exclusive original jurisdiction over all criminal actions not assigned to the district court division except that the superior courts have jurisdiction to try a misdemeanor offense where (1) it is a lesser included offense of a felony properly before the court by indictment or information, (2) the charge is initiated by presentment, (3) the misdemeanor is properly consolidated for trial with a felony, (4) a plea of guilty or nolo contendere is tendered in lieu of a felony charge, or (5) a misdemeanor conviction is appealed for trial *de novo*, to accept a guilty plea to a lesser included or related charge. G.S. § 7A-271(a)(1)-(5). The superior court may also try misdemeanors under its derivative jurisdiction. This arises from the appeal of a conviction in district court. G.S. § 7A-271(b); *State v. Guffey*,

283 N.C. 94, 194 S.E.2d 827 (1973). *See also State v. Wall*, 271 N.C. 675, 157 S.E.2d 363 (1967) (jurisdiction of district and superior courts).

As explained in *State v. Felmet*, 302 N.C. 173, 273 S.E.2d 708 (1981):

> When the record shows a lack of jurisdiction in the lower court, the appropriate action on the part of the appellate court is to arrest judgment or vacate any order entered without authority. When the record is silent and the appellate court is unable to determine whether the court below had jurisdiction, the appeal should be dismissed (citations omitted).

Id. at 176, 273 S.E.2d at 711.

Thus, we must determine if the record before us "shows a lack of jurisdiction in the lower court" so that we must vacate the judgment below or whether it is simply "silent" on the question of jurisdiction such that we should dismiss this appeal.

In *Felmet*, defendant was convicted in superior court of a misdemeanor. The record on appeal indicated that defendant was tried upon a warrant issued by a deputy clerk of court charging the defendant with misdemeanor trespass. The record, however, lacked any indication that defendant was ever tried in district court, thus there was no evidence of the superior court's derivative jurisdiction. The *Felmet* Court held that the record before it was "silent" and although it allowed defendant to amend the record to show derivative jurisdiction, it did not fault the Court of Appeals for having dismissed the appeal because the record failed to show the basis for jurisdiction in the trial court. The *Felmet* Court cited three cases to illustrate the situation where the record is "silent" as to jurisdiction. *See State v. Hunter*, 245 N.C. 607, 96 S.E.2d 840 (1957); *State v. Banks*, 241 N.C. 572, 86 S.E.2d 76 (1955); *State v. Patterson*, 222 N.C. 179, 22 S.E.2d 267 (1942). In all three cases, defendants appealed from convictions in superior court on misdemeanor charges which originated with warrants issued by a clerk. The records before the appellate court, however, failed to show that the defendants had been convicted in district court and had appealed to the superior court, thus there was no showing in the record that the superior court had derivative jurisdiction.

In contrast to the "silent record" situation, where the record on appeal shows a lack of jurisdiction in the superior court, the

judgment appealed from must be vacated or arrested. *Felmet*, 302 N.C. 173, 273 S.E.2d 708. A record reflects a lack of jurisdiction when it shows: that the defendant was convicted in superior court of a crime for which he was not charged, *State v. Hardy*, 298 N.C. 191, 257 S.E.2d 426 (1979); the defendant was convicted of a crime for which the record affirmatively shows that no conviction occurred in district court, *Guffey*, 283 N.C. 94, 194 S.E.2d 827; or where there is no trial in district court and the trial in superior court originates upon a warrant and no indictment, *State v. Evans*, 262 N.C. 492, 137 S.E.2d 811 (1964).

We find that the case *sub judice* is one in which the record reflects a lack of jurisdiction in the court in which defendant was tried. The record indicates that defendant's arrest sprang from indictments issued by the grand jury and not from warrants issued by a magistrate or clerk, thus the indictments originated in the superior court. The indictments were for offenses classified as misdemeanors. There is no indication in the record that a presentment preceded the indictments. G.S. § 7A-271(a)(2). The record affirmatively shows that the defendant's prosecution was initiated in superior court upon those indictments.

On the record before us we find that the superior court had neither exclusive original jurisdiction of the misdemeanors under G.S. § 7A-271(a)(1)-(5), nor derivative jurisdiction under G.S. § 7A-271(b). This judgment must be vacated.

Vacated.

Chief Judge HEDRICK and Judge WELLS concur.

STATE OF NORTH CAROLINA v. RANDY L. EVANS

No. 9114SC230

(Filed 21 January 1992)

Constitutional Law § 186 (NCI4th)— assault on law officer with car—no double jeopardy

In a prosecution of defendant for assault on a law enforcement officer with a deadly weapon, an automobile, the trial

court did not err in denying defendant's motion to dismiss on the ground of double jeopardy where defendant was involved in a high speed chase giving rise to several misdemeanor traffic convictions; and the assault charge was based on defendant's conduct, occurring after he was pursued and stopped by officers, in accelerating his vehicle rapidly both forward and backward in an effort to strike the officer.

Am Jur 2d, Criminal Law §§ 266-268, 277, 279.

APPEAL by defendant from *Hudson (Orlando F.), Judge*. Judgment entered 5 October 1990 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 January 1992.

Defendant was charged in a proper bill of indictment with the Class I felony of assaulting a law enforcement officer with a deadly weapon to wit an automobile in violation of G.S. 14-34.2. The evidence at trial tends to show the following:

On 2 August 1988, defendant was involved in a high speed chase with law enforcement officers which began in Orange County and continued into Durham County. Officers Edwards and Gordon executed a "running road block" which brought defendant's car to a halt on the Falls Lake Bridge in Durham County. After defendant had stopped his car and while the officers were attempting to apprehend him, defendant attempted to run over Trooper Edwards.

Before trial, defendant made a motion to dismiss the assault charge on the grounds that this charge placed him in double jeopardy for the misdemeanor traffic offenses for which he was convicted in Orange County as a result of the high speed chase. The trial judge denied defendant's motion, and the jury subsequently found defendant guilty of assaulting a law enforcement officer with a deadly weapon. From a judgment imposing a prison sentence of three years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

Berman and Shangler, by Dean A. Shangler, for defendant, appellant.

HEDRICK, Chief Judge.

The two assignments of error brought forward and argued on appeal present the question of whether the State was barred on double jeopardy grounds from prosecuting defendant for assault with a deadly weapon in violation of G.S. 14-34.2.

The Fifth Amendment to the United States Constitution provides ". . . nor shall any person be subject to the same offense to be twice put in jeopardy of life or limb . . . ." The Supreme Court has consistently held that the "Double Jeopardy" clause in the Fifth Amendment prohibits successive prosecutions for the same criminal act or transaction after conviction. *Grady v. Corbin*, 495 U.S. ---, 109 L.Ed.2d 548 (1990); *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306 (1932).

In *Blockburger v. United States, supra*, the Court held there is no violation of the Fifth Amendment prohibition against double jeopardy if each of the offenses for which the defendant is prosecuted as statutorily defined requires proof of a fact that the other does not.

The Court announced an additional standard for determining whether a double jeopardy violation had occurred in *Grady v. Corbin*, 495 U.S. ---, 109 L.Ed.2d 548 (1990). In that case, the Court held that a second prosecution would be barred if the State sought to establish an essential element of the second offense by proving conduct for which the defendant was convicted in the first prosecution.

Defendant concedes in his brief the charge of "assault on a law enforcement officer . . . as statutorily defined requires proof of a fact the traffic offenses previously tried do not . . .", and therefore, "*Blockburger* . . . does not bar the successive prosecution for assault." Defendant contends, however, his successive prosecution for assault was barred on double jeopardy grounds pursuant to *Grady* because the assault on a law enforcement officer arose out of the same course of conduct for which he had been previously charged and convicted in Orange County. We disagree.

In the present case, defendant was charged with assaulting a law enforcement officer with a deadly weapon in violation of G.S. 14-34.2 which provides in pertinent part:

Any person who commits an assault with a firearm or any other deadly weapon upon any:

(1) Law enforcement officer;

. . . in the performance of his duties shall be guilty of a Class I felony.

Defendant's conduct giving rise to this charge is that after being pursued and stopped by police officers, defendant ignored their order to get out of the car; and instead, accelerated the vehicle rapidly both forwards and backwards in an effort to strike Trooper Edwards. This evidence alone was sufficient to show that defendant had committed the offense charged in the second prosecution. Furthermore, none of defendant's conduct in the first prosecution was necessary to prove the elements of assault with a deadly weapon on a law enforcement officer in the second prosecution.

Therefore, we hold the trial court did not err in denying defendant's motion to dismiss on the grounds of double jeopardy.

Defendant received a fair trial free from prejudicial error.

No error.

Judges WELLS and JOHNSON concur.

RICHARD JACK TOPPER v. BONNIE EVERHART TOPPER

No. 9121DC90

(Filed 21 January 1992)

Appeal and Error § 447 (NCI4th)— issues raised for first time on appeal—appeal dismissed

Defendant's appeal from summary judgment for plaintiff on a claim for equitable distribution is dismissed where defendant attempted to raise for the first time on appeal issues of fraud and the statute of limitations.

Am Jur 2d, Appeal and Error § 545.

APPEAL by defendant from judgment entered 28 August 1988 in FORSYTH County District Court by *Judge Margaret L. Sharpe.* Heard in the Court of Appeals 6 November 1991.

In January 1990, plaintiff brought this action for absolute divorce. Defendant answered admitting the grounds for divorce, asked for a divorce, and asserted a claim for equitable distribution of the parties' marital estate.

Plaintiff filed a reply in which he asserted as a bar to defendant's equitable distribution claim that the parties had entered into a separation agreement and property settlement.

After a consent order severing the issues, the trial court entered a judgment granting plaintiff an absolute divorce. Plaintiff then duly moved the court for summary judgment in his favor on the claim for equitable distribution. From the trial court's judgment granting that motion, defendant has appealed.

Davis & Harwell, P.A., by Joslin Davis and Robin J. Stinson, for plaintiff-appellee.

Greeson, Grace and Gatto, P.A., by Joseph J. Gatto and Lisa S. Costner; and David F. Tamer; for defendant-appellant.

WELLS, Judge.

The forecast of evidence before the trial court shows that on 10 March 1986, plaintiff and defendant entered into a separation agreement and property settlement. In that document the parties agreed to a division and distribution of their property, releasing and discharging each other from all claims, rights, and duties arising out of their marriage except as set forth in the agreement. The document contains, *inter alia*, three paragraphs pertinent to defendant's appeal as follows:

SECTION FIVE: CONCLUSION

ARTICLE I.

VOLUNTARY EXECUTION: Each of the parties hereto acknowledge that the provisions of this Agreement and their legal effect have been reviewed by the parties, and each party acknowledges that the Agreement is fair and equitable, that it is being entered into voluntarily, and that it was not the result of any duress or undue influence.

ARTICLE II.

ENTIRE AGREEMENT: The parties acknowledge that this Agreement contains the entire undertaking of the parties, that there are no representations, warranties, covenants or undertakings other than those expressly set forth in this Agreement.

ARTICLE III.

EQUITABLE DISTRIBUTION: Husband and Wife both acknowledge and agree that the property settlement herein contained constitutes an equitable distribution of all marital property and the parties hereby waive any further rights to an equitable distribution of property pursuant to NCGS § 50-20 et seq. This Agreement is made pursuant to the provisions of NCGS § 50-20(d) and shall be binding on both Husband and Wife.

. . .

Defendant's counterclaim asserted a statutory claim for equitable distribution, but made no mention of the separation agreement and property settlement. In one of her arguments to this Court, defendant attempts a poorly focused attack on the trial court's summary judgment for plaintiff, implying that defendant was never allowed to show the trial court that the separation agreement and property settlement was procured by plaintiff's fraud in plaintiff's "evaluation" of the marital assets, because plaintiff argued to the trial court that such a claim was barred by the statute of limitations. Defendant has not provided this Court with a transcript of the arguments presented to the trial court. Plaintiff's motion for summary judgment does not mention fraud or lack of fraud or the application of any statute of limitations to any such possible claim nor does the judgment of the trial court. This argument therefore does not present any question properly presented for our review and we therefore reject it summarily.

Defendant then attempts to argue in her brief that the agreement was obtained by fraud. The record before us does not reflect that any such issue or question was ever properly raised in the court below; it cannot be raised for the first time here. *Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C. App. 270, 319 S.E.2d 661 (1984).

Our law favors settlements of property disputes between divorcing persons. *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987). "A valid separation agreement that waives rights to equitable distribution will be honored by the courts and will be binding on the parties." *Id.* (Citations omitted). The agreement in this case was lengthy, thorough, well-drafted, and contained language which makes it abundantly clear that defendant, who was represented by counsel, entered into the agreement voluntarily, willingly, and with full understanding of its implications pertaining to her entitlement to marital property.

For the reasons stated, the judgment below from which defendant has attempted to appeal must be and is

Affirmed.

Judges LEWIS and WALKER concur.

ALESIA BASS, PLAINTIFF v. GEORGE GOSS, DEFENDANT

No. 9114SC279

(Filed 21 January 1992)

Costs § 30 (NCI4th)— personal injury claim arbitrated—award of attorney fees—discretion of court

Where an arbitrator entered an award and judgment in favor of plaintiff in a personal injury action, damages were awarded, this was confirmed by the court, and plaintiff subsequently filed a motion for costs, including attorney fees pursuant to N.C.G.S. § 6-21.1, it was within the judge's discretion whether and in what amount to award attorney fees.

Am Jur 2d, Arbitration and Award § 139; Costs §§ 72, 78, 79.

APPEAL by plaintiff from *Brannon (Anthony M.), Judge*. Order entered 13 December 1990 in Superior Court, DURHAM County. Heard in the Court of Appeals 8 January 1992.

This is a civil action wherein plaintiff seeks damages for personal injuries allegedly resulting from defendant's negligent con-

duct. The case was referred to arbitration and was heard 5 October 1990, before Attorney Thomas Fowler. An award and judgment was entered in favor of plaintiff on the issue of liability, and damages of $2,559.00 were awarded which was confirmed by the court on 6 November 1990. Subsequently, plaintiff filed a "Motion for Costs," including attorney's fees, pursuant to G.S. 6-21.1. The motion was heard by Judge Brannon who entered the following order on 13 December 1990:

> IT APPEARING TO THE COURT from a review of the file in this matter and Affidavits presented by the parties that the request for attorney's fees by the Plaintiff is denied pending remand to the Arbitrator for a further determination of costs per the Award.
>
> IT IS NOW, THEREFORE, ORDERED, ADJUDGED AND DECREED that the Plaintiff's Motion for attorney's fees be and the same is hereby denied and that the matter of attorney's fees and costs be remanded to the Arbitrator, Mr. Thomas C. Fowler, for a determination of costs of this action, if any, including attorney's fees, and to whom they are taxed.

Plaintiff gave timely notice of appeal to Judge Brannon's order on 14 January 1991.

Robert T. Perry for plaintiff, appellant.

Reynolds, Bryant, Patterson & Covington, P.A., by Joseph B. Chambliss, Jr., for defendant, appellee.

HEDRICK, Chief Judge.

G.S. 6-21.1 provides in pertinent part:

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

Judge Brannon's order denying plaintiff's motion for attorney's fees "pending remand to the Arbitrator for a further determination" was error. G.S. 6-21.1 requires the judge upon motion made to award attorney's fees as a part of the costs.

The action of the arbitrator after the case was remanded by order dated 13 December 1990 was a nullity inasmuch as plaintiff had given timely notice of appeal to this Court prior to the arbitrator's ruling on 8 February 1991.

While Judge Brannon's order entered 13 December 1990 is not clear as to whether plaintiff's motion for attorney's fees was denied or merely denied pending remand to the arbitrator, the appeal raises the question of whether the judge should award attorney's fees in this type of case as part of the costs. We hold the judge has discretion whether to and in what amount to award attorney's fees in this type of case.

Insofar as Judge Brannon's order denied the motion, it is reversed, and the cause is remanded to the Superior Court for entry of an order in accordance with G.S. 6-21.1.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

CLARA M. GOINS, WIDOW AND SOLE SURVIVING WHOLE DEPENDENT OF DAVID GOINS, DECEASED EMPLOYEE, PLAINTIFF v. SANFORD FURNITURE COMPANY, EMPLOYER; LIBERTY MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9110IC212

(Filed 21 January 1992)

Master and Servant § 95.1 (NCI3d)— appeal not timely—dismissed

Appeal from an opinion and award of the Industrial Commission is dismissed where notice of appeal was not timely filed. N.C.G.S. § 97-86.

Am Jur 2d, Workmen's Compensation § 622.

APPEAL by plaintiff from the Opinion and Award of the North Carolina Industrial Commission filed 4 December 1990. Heard in the Court of Appeals 3 December 1991.

J. Douglas Moretz, P.A., by J. Douglas Moretz and Beverly D. Basden, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Susan K. Burkhart, for defendant-appellees.

EAGLES, Judge.

The appellants have failed to timely give notice of appeal. "The procedure for appeal from the full Commission shall be as provided in the North Carolina Rules of Appellate Procedure. N.C. Gen. Stat. 97-86." *Fisher v. E. I. Du Pont De Nemours*, 54 N.C. App. 176, 177, 282 S.E.2d 543 (1981). G.S. 97-86 provides that "either party to the dispute may, within 30 days from the date of [the Commission's award] or within 30 days after receipt of notice to be sent by registered mail or certified mail of such award, but not thereafter, appeal" to this Court. The record before us here does not indicate whether notice of the award was mailed. We are bound by the record. *Fisher*, 54 N.C. App. at 177 n. 1, 282 S.E.2d at 543 n. 1. Accordingly, the appellant was required to file notice within thirty days from the date of the award. The full Commission filed its opinion and award on 4 December 1990. The statutorily allotted thirty days expired on 3 January 1991. However, the appellants filed notice of appeal on 4 January 1991, after expiration of the thirty day filing period. The appellants failed to timely perfect their appeal. *See Fisher v. E. I. Du Pont De Nemours*, 54 N.C. App. 176, 282 S.E.2d 543 (1981). *In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (one panel of this Court is bound by a prior decision of another panel of this Court addressing the same issue, although in a different case, unless the prior decision has been overturned by a higher court). Because the appellants failed to timely perfect their appeal by giving notice within thirty days of the order, we lack subject matter jurisdiction to resolve this controversy. The appeal must be dismissed.

In any event, after carefully examining the issues raised by the appellant and the arguments proffered in the appellate briefs, we find this appeal to be meritless. Accordingly, we dismiss.

Dismissed.

Judges JOHNSON and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 21 JANUARY 1992

ACUNA v. DUPLIN-SAMPSON MENTAL HEALTH CLINIC No. 9110IC257	Ind. Comm. (701141)	Reversed & Remanded
AVERY v. GRADY WHITE BOATS No. 9110IC107	Ind. Comm. (IC926582)	Affirmed
HENDRIX v. THARPE No. 9123DC737	Wilkes (90CVD870)	Affirmed
McGILL v. FRENCH No. 9116SC110	Robeson (88CVS1478)	New Trial
MERCER v. HARGETT No. 914SC796	Onslow (89CVS2813)	Affirmed
STATE v. BUTLER No. 9125SC798	Burke (90CRS239)	No Error
STATE v. HENDERSON No. 9026SC1322	Mecklenburg (89CRS79361)	No Error
STATE v. LIPSCOMB No. 9118SC838	Guilford (90CRS20107) (90CRS16268) (90CRS20105) (90CRS20109)	No Error
STATE v. RUFFIN No. 912SC866	Beaufort (90CRS5981) (90CRS5982)	No Error
STATE v. SMITH No. 9111SC700	Harnett (90CRS5665)	No Error
STATE v. STALLINGS No. 918SC799	Wayne (90CRS3048)	No Error

LUCYNA M. SONEK v. MOJMIR J. SONEK

No. 9123DC122

(Filed 4 February 1992)

1. **Divorce and Separation § 139 (NCI4th)— equitable distribution—salaried doctor—goodwill**

The trial court erred in an equitable distribution action by finding that defendant's medical practice at the time of the separation had goodwill to be included as a marital asset where defendant at the time of the separation was a salaried employee of the medical association. A salaried employee who maintains no ownership interest in the particular place of employment does not possess goodwill.

Am Jur 2d, Divorce and Separation § 899.

Divorce and separation; goodwill in medical or dental practice as property subject to distribution on dissolution of marriage. 76 ALR4th 1025.

2. **Divorce and Separation § 165 (NCI4th)— equitable distribution—distributive award**

The trial court's distributive award to plaintiff in an equitable distribution action was not erroneous. No North Carolina court has held that distributive awards are authorized only when a distribution in kind is impractical, and the only apparent limit to the trial judge's discretion concerns distributive awards payable for more than six years after the marriage ceases. Furthermore, the trial court found as fact that a complete distribution in kind was not practical and that a distributive award was necessary to achieve equity between the parties.

Am Jur 2d, Divorce and Separation §§ 930, 931.

3. **Evidence and Witnesses § 2488 (NCI4th)— equitable distribution—physician—expert witness fee**

The trial court did not err in finding that a physician testified as an expert witness rather than as a fact witness where the main purpose for his testimony was to establish the extent of plaintiff's future disability due to rheumatoid arthritis. Furthermore, the trial court did not abuse its discretion in awarding $200 per hour to the doctor where he was

subpoenaed as a witness, expended approximately three and one-half hours of his time to testify at trial, and claimed that his normal fee for expert testimony was $500 per hour.

Am Jur 2d, Divorce and Separation § 942.

4. **Appeal and Error § 364 (NCI4th)— child support—attorney fees—order not included in record—not considered**

The Court of Appeals did not reach the merits of defendant's contention that the trial court erred by awarding plaintiff attorney fees in a child support action where a copy of the child support order was not included in the record on appeal.

Am Jur 2d, Appeal and Error § 547.

Judge GREENE concurring in the result.

APPEAL by defendant from judgment entered 29 September 1990, and order entered 28 September 1990 in WILKES County District Court by *Judge Michael E. Helms*. Heard in the Court of Appeals 7 November 1991.

McElwee, McElwee & Warden, by William H. McElwee, III, for plaintiff-appellee.

Elliot & Pishko, P.A., by David C. Pishko, for defendant-appellant.

WYNN, Judge.

The plaintiff and defendant were married on 18 June 1972, in Chicago, Illinois. Two children were born of the marriage. On 5 June 1990, the parties obtained a judgment of absolute divorce.

The defendant, husband, is a medical doctor, specializing in obstetrics and gynecology. Defendant set up his own medical practice in Mocksville, North Carolina, in November 1984. Thereafter, in April 1986, defendant became a salaried employee of Brushy Mountain Ob-Gyn Associates, P.A. ("Brushy Mountain"), located in Wilkesboro, North Carolina, and owned solely by Charles F. Whicker who employed defendant pursuant to a written Employment Agreement.

At the time defendant and plaintiff separated, defendant was an employee of Brushy Mountain and held no ownership interest in the association. Five days after the separation, defendant ended

his employment with Brushy Mountain and subsequently opened his own practice in Wilkesboro, North Carolina.

Plaintiff filed an action for equitable distribution of marital property, child custody, child support, and alimony on 23 November 1988. From the equitable distribution judgment and the child support order, defendant appealed.

I.

[1] The appellant contends that the trial court committed error in finding that his medical practice at the time of the separation had goodwill to be included as a marital asset. He argues that a salaried employee of a professional association who has no ownership interest in the association cannot have personal goodwill for equitable distribution purposes. We agree.

The question of whether a salaried employee with no ownership interest in the respective business may have personal goodwill is a matter of first impression for our courts. A similar issue has been addressed, however, by the Washington Supreme Court in the case of *In re Marriage of Hall*, 103 Wash. 2d 236, 692 P.2d 175 (1984), wherein the Court considered the division of marital property of two physicians. The husband in *Hall* owned his own practice, and the wife worked as a salaried employee at a medical school. In rejecting the husband's contention that the wife's practice had professional goodwill, the Court reasoned as follows:

> Once goodwill is distinguished from earning capacity, the error becomes apparent in the argument that a practicing professional and a salaried professional, with equal earning capacities and educations, both have goodwill. Both have earning capacities, and, yet, only the practicing professional has a business or practice to which the goodwill can attach. The practicing professional brings an earning capacity to the practice comprised of skill and education. The goodwill, comprised of such things as location, referrals, associations, reputation, trade name and office organization, can directly supplement this earning capacity. When the practicing professional dies, retires or moves, he takes his skill and education with him, but the goodwill factors must be transferred or otherwise left behind. The goodwill may exist even though it is not marketable.
>
> The salaried professional also brings an earning capacity comprised of skill and education to the position. However,

> when the salaried professional leaves a position, he takes everything with him to the new position. There is nothing that increased his earning capacity in the old salaried position that cannot be taken to the new position.

Id. at 241-42, 692 P.2d at 178 (citation omitted).

The Washington Supreme Court's decision in *Hall* is consistent with the concept of goodwill as developed by the courts of this State. Our Supreme Court has defined goodwill in the following manner: "Goodwill exists as property merely as an incident to other property rights, and is not susceptible of being owned and disposed of separately from the property right to which it is incident." *Maola Ice Cream of North Carolina, Inc. v. Maola Milk and Ice Cream Co.*, 238 N.C. 317, 321, 77 S.E.2d 910, 914 (1953). *See Faust v. Rohr*, 166 N.C. 187, 81 S.E. 1096 (1914). In *Poore v. Poore*, 75 N.C. App. 414, 331 S.E.2d 266, *disc. review denied*, 314 N.C. 543, 335 S.E.2d 316 (1985), this Court delineated the factors relevant in determining goodwill as "the age, health, and professional reputation of the practitioner, the nature of the practice, the length of time the practice has been in existence, its past profits, its comparative professional success, and the value of its other assets." *Id.* at 421, 331 S.E.2d at 271.

In the case at bar, appellant had no ownership interest in Brushy Mountain on the date of the separation. The decisions in *Poore* and *Maola* demonstrate that there is no goodwill in this situation. The factors discussed in *Poore*, such as the past profits of the practice and the value of its assets, are obviously inapplicable to a non-owner salaried employee since they presume the existence of an ownership interest. Additionally, under the *Maola* Court's definition, goodwill does not exist in the absence of a property right. We, therefore, find that a salaried employee who maintains no ownership interest in the particular place of employment does not possess goodwill.

The trial court, in the instant case, concluded that defendant's medical practice had goodwill with a value of $31,419.92 on 25 June 1988, the date of separation. It awarded the goodwill to defendant. The court also stated that "[i]f the defendant's medical practice had not had goodwill on June 25, 1988, or if this goodwill had a value less than that determined, then the Court would have distributed the marital property with a greater percentage of it being distributed to the plaintiff." Because the trial judge made

his percentage award based on the presence of the $31,419.92 goodwill, we remand this case to the trial court.

While we recognize an inequity may result from our holding here today and note that Judge Greene has suggested in his concurring opinion that such inequity may be cured by classifying the increased value, if any, of defendant's medical license as marital property, this issue was not raised by either of the parties on appeal. We, therefore, are without jurisdiction to address this issue. N.C.R. App. P. 10 (This Court's scope of review "is confined to a consideration of those assignments of error set out in the record on appeal."). Moreover, we note that one spouse's contribution to "help educate or develop the career potential of the other spouse" is currently a distributional factor that allows a trial judge to order an unequal division of marital property. N.C. Gen. Stat. § 50-20(c)(7) (1991). In the present case, the trial judge, in fashioning the original order, allowed himself sufficient latitude for curing any potential inequities resulting from our reversal of his goodwill determination. The trial judge, on remand, should eliminate the value of the goodwill and assign the proper percentage due to each spouse.

II.

Appellant also assigns error to the trial court's valuation of the goodwill of defendant's medical practice at $31,419.92 and the trial court's award to plaintiff of seventy-five percent of the marital property. We need not address these issues since we have decided that defendant possessed no goodwill. Furthermore, because the trial judge on remand must reassess the percentage award to plaintiff, we need not decide whether it was error to award seventy-five percent of the marital property to plaintiff.

III.

[2] Appellant also contends that the trial court committed reversible error by making a distributive award to plaintiff without allocating to her as many items of property as was practical. He argues that section 50-20(e) authorizes distributive awards only if a division in kind is impractical. We disagree.

The statute governing distributive awards provides, in pertinent part,

> In any action in which the court determines that an equitable distribution of all or portions of the marital property in kind would be impractical, the court in lieu of such distribution shall provide for a distributive award in order to achieve equity between the parties. The court may provide for a distributive award to facilitate, effectuate or supplement a distribution of marital property.

N.C. Gen. Stat. § 50-20(e) (1991). In *Harris v. Harris*, 84 N.C. App. 353, 352 S.E.2d 869 (1987), this Court stated the directive under section 50-20(e) as an alternative test: "G.S. 50-20(e) directs the court to make a distributive award 'in order to achieve equity between the parties' in those cases where a distribution in kind would be impractical, and *otherwise* permits a distributive award in order 'to facilitate, effectuate or supplement a distribution of marital property.' " *Id.* at 362, 352 S.E.2d at 875 (emphasis added). No North Carolina court has held that distributive awards are authorized only when a distribution in kind is impractical. The only apparent limit to the trial judge's discretion concerns distributive awards payable for more than six years after the marriage ceases. *See Lawing v. Lawing*, 81 N.C. App. 159, 344 S.E.2d 100 (1986). Furthermore, the trial court found as fact that a complete distribution in kind was not practical and that a distributive award was necessary to achieve equity between the parties. Based on the foregoing, we find that the trial court's distributive award to plaintiff was not erroneous.

IV.

[3] Appellant further assigns error to the trial court's award of an expert witness fee to Dr. Christopher Wise. Appellant contends that Dr. Wise testified as a fact witness rather than as an expert, and that there was no basis in the record to support the trial court's finding that $200 per hour was reasonable. We disagree.

In *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989), our Supreme Court discussed the distinction between a physician testifying as a fact witness and an expert witness: "Although, by general definition, all doctors may be considered experts in that they possess a specialized knowledge of medicine beyond that of the layman, not every role of a doctor as a witness in a legal controversy is in the capacity of an 'expert' witness." *Id.* at 167-68, 381 S.E.2d at 715. At issue in *Turner* was defendant's alleged failure to identify a physician as an expert witness. The Court

concluded that the doctor was an ordinary fact witness because the focus of his deposition was his treatment and personal observations of plaintiff's medical condition rather than his opinion concerning the standard of plaintiff's care. *Id.* at 167, 381 S.E.2d at 715.

In the instant case, while it is true that Dr. Wise testified about his treatment of Mrs. Sonek's disease, he also gave his opinion as to the prognosis for her rheumatoid arthritis. Dr. Wise described, at length, the characteristics and treatment of rheumatoid arthritis. The main purpose for his testimony was to establish the extent of Mrs. Sonek's future disability. Accordingly, we find that the trial court did not err in determining that Dr. Wise testified as an expert witness.

Appellant further contends that there is no basis in the record to support the trial court's finding that $200 per hour was a reasonable fee for Dr. Wise's testimony. We disagree with appellant's contention. Dr. Wise was subpoenaed as a witness and expended approximately three and one-half hours of his time to testify at trial. Although Dr. Wise claimed his normal fee for expert testimony was $500 per hour, the court awarded only $200 per hour. We, therefore, hold that the trial court did not abuse its discretion in awarding $200 per hour to Dr. Wise. *See* N.C. Gen. Stat. § 7A-314 (1989).

V.

[4] Finally, the appellant argues that the trial court committed error by awarding the plaintiff attorney's fees in the child support action. In as much as appellant failed to include a copy of the child support order in the record on appeal, we are unable to reach the merits of this issue.

The judgment of the trial court is,

Affirmed in part, reversed in part, and remanded.

Judge PARKER concurs.

Judge GREENE concurs in the result with separate concurring opinion.

Judge GREENE concurring in the result.

I agree with the majority that under current North Carolina law, goodwill exists only in the presence of an ownership interest in a business. *See Maola Ice Cream Co. v. Maola Milk & Ice Cream Co.*, 238 N.C. 317, 321, 77 S.E.2d 910, 914 (1953); *McLean v. McLean*, 323 N.C. 543, 558, 374 S.E.2d 376, 385 (1988) (professional association engaged in law practice); *Locklear v. Locklear*, 92 N.C. App. 299, 301-02, 374 S.E.2d 406, 407 (1988), *disc. rev. allowed*, 324 N.C. 336, 378 S.E.2d 794 (1989) (closely held corporation engaged in trucking); *Draughon v. Draughon*, 82 N.C. App. 738, 741, 347 S.E.2d 871, 873 (1986), *disc. rev. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987) (sole proprietorship engaged in landscaping); *Poore v. Poore*, 75 N.C. App. 414, 420, 331 S.E.2d 266, 271, *disc. rev. denied*, 314 N.C. 543, 335 S.E.2d 316 (1985) (solely-owned professional association engaged in dental practice); *Weaver v. Weaver*, 72 N.C. App. 409, 414, 324 S.E.2d 915, 919 (1985) (partnership engaged in accounting). Accordingly, because the defendant-employee did not have an ownership interest in his place of employment, I agree that the defendant has no goodwill. As the following facts reveal, however, our holding will lead to an inequitable result if we fail to recognize as marital property the increase in value, if any, to the defendant-employee's medical license due to marital contributions, if any. I disagree with the majority that this issue has not been raised by either of the parties to this appeal. Defendant specifically argues in his brief that "the value [of his medical license] that accrued during his employment . . . should . . . be recognized as his separate property." In any event, to the extent that Rule 10 has been violated, in order to "prevent manifest injustice" and to "expedite decision in the public interest," I would suspend the rule, pursuant to Appellate Rule 2, and answer the question raised. *See State v. Petty*, 100 N.C. App. 465, 397 S.E.2d 337 (1990) (Court of Appeals "in its discretion" decided appeal filed in violation of Appellate Rule 10).

The following facts as found by the trial court are undisputed: At the time of the trial court's order, the plaintiff was 35 years old and the defendant was 38 years old. The plaintiff was just over 17 years of age and still in high school when she married the defendant. After their marriage, they moved to Ottawa, Canada where the plaintiff finished high school. The plaintiff continued her studies at the University of Ottawa and received a bachelor's degree and a master's degree in psychology. The defendant also graduated from the University of Ottawa where he received a

bachelor's degree, a medical doctorate degree, and later received his medical license. Throughout their marriage, the plaintiff was the primary, if not the sole, caretaker of the parties' home and children. Her efforts enabled the defendant "to complete his education and advance his professional career with minimal interference from family obligations." Furthermore, the plaintiff was always willing "to sacrifice to whatever extent was necessary in order to assure that the defendant would complete his education and have a successful medical career."

In 1974, the plaintiff developed rheumatoid arthritis. Realizing that her disease might prohibit the plaintiff from working, the parties "concentrated on developing the defendant's career in order that they might derive a comfortable standard of living from his medical practice." At the time of the trial court's order, the plaintiff suffered from "severe chronic active rheumatoid arthritis." The disease has totally and permanently disabled the plaintiff. She cannot work. At the time of the trial court's order, the plaintiff had custody of the parties' children despite her condition.

Because professional and business licenses are personal to their holders, are difficult to value, cannot be sold, and represent enhanced earning capacity, the vast majority of courts which have addressed the issue have held that such licenses are not property for purposes of equitable distribution. L. Golden, Equitable Distribution of Property § 6.19 (1983). Despite these concerns, however, our courts have recognized that professional and business licenses are property rights. *North Carolina State Bar v. DuMont*, 52 N.C. App. 1, 15, 277 S.E.2d 827, 836 (1981), *modified and aff'd*, 304 N.C. 627, 286 S.E.2d 89 (1982) (law license); *Parker v. Stewart*, 29 N.C. App. 747, 748, 225 S.E.2d 632, 633 (1976) (license to engage in occupation is property right). As the New York Court of Appeals has explained, "[a] professional license is a valuable property right, reflected in the money, effort and lost opportunity for employment expended in its acquisition, and also in the enhanced earning capacity it affords its holder . . . ." *O'Brien v. O'Brien*, 489 N.E.2d 712, 717 (N.Y. 1985) (medical license). Likewise, our General Assembly has recognized that such licenses are in fact property for purposes of the equitable distribution statute. N.C.G.S. § 50-20(b)(2) (1987 & Supp. 1991).

In North Carolina, "[a]ll professional licenses and business licenses which would terminate on transfer shall be considered

separate property." *Id.* However, the increases in value to separate property which are attributable to contributions of the marital estate are marital property. *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 465, 409 S.E.2d 749, 751 (1991). Accordingly, the value of the defendant-employee's medical license at the date of marriage, if acquired before marriage, or when acquired, if acquired after marriage, is his separate property, and any increase in value to his medical license as of the date of separation which is attributable to marital contributions is properly deemed to have been acquired by the marital estate and is therefore marital property.[1] The trial court should make the factual determinations concerning values with the help of expert testimony. *See Poore*, 75 N.C. App. at 421, 331 S.E.2d at 271; *see also Jones v. Jones*, 543 N.Y.S.2d 1016, 1019-20 (Sup. Ct. 1989) (valuing the medical license of a salaried employee by calculating the differential between the physician-employee's salary and that of average college graduate of employee's age and racial group without medical license, by projecting that differential out to age 65, and then by reducing that figure to present value). This rule applies, however, only when the spouse is an employee. When the spouse possesses an ownership interest in a business in which he or she uses his or her license, our courts may not classify, value, and distribute both the increased value of the professional license and the value of the goodwill. This is so because whether the classification and valuation is of an owner's goodwill or of a non-owner's professional license, each essentially represents a value based on enhanced earning capacity. It would be inconsistent with principles of fairness to allow distribution of both. *See* B. Turner, Equitable Distribution of Property § 6.19A, at 183 (Cum. Supp. 1991).

I realize that valuing such licenses may be difficult, but that problem has not deterred our courts from recognizing that such licenses are property nor has it deterred the General Assembly from identifying and classifying such property as separate. Likewise, difficulties in valuing a medical license cannot support the failure to recognize the marital aspects, if any, of any increases in value of such property. *See O'Brien*, 489 N.E.2d at 718. Furthermore,

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1. Measuring the increase in value of a professional license is very similar to the valuation required where a party acquires an interest in a business before marriage. In such cases, the value of the party's business interest at the date of marriage is his or her separate property and any increase in value of the business interest due to marital contributions is marital property.

the trial court is presently required to value and consider professional licenses in ordering the distribution of marital property. N.C.G.S. § 50-20(c)(1) (1987 & Supp. 1991); *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990). Finally, the failure to recognize this potential source of marital property would elevate form over substance in that the spouse of a sole medical practitioner would be entitled to share in the enhanced earning capacity (goodwill) of his or her spouse while the spouse of an employee would not be entitled to share in the enhanced earning capacity of the employee-spouse. Such a position runs counter to the fundamental goal of equitable distribution which is to fairly distribute property acquired during marriage by seeking "to effect upon divorce those sharing principles that motivate most couples during marriage." Sharp, *Equitable Distribution of Property in North Carolina: A Preliminary Analysis*, 61 N.C. L. Rev. 247 (1983).

Other jurisdictions remedy the potentially unfair consequences of cases like this one through recognition of "reimbursement alimony," *In re Marriage of Francis*, 442 N.W.2d 59, 64 (Iowa 1989) (alimony designed to compensate spouse for economic sacrifices directly enhancing other spouse's future earning capacity and does not end until full compensation achieved), and quasi-contractual actions, *Pyeatte v. Pyeatte*, 661 P.2d 196, 207 (Ariz. Ct. App. 1982) (court allowed restitution measure of recovery limited to contributions for "living expenses and direct educational expenses"). I. Ellman, P. Kurtz & K. Bartlett, Family Law ch. 3, at 330-49 (2d ed. 1991). In North Carolina, these potential solutions are arguably impermissible. *See* N.C.G.S. § 50-16.2 (1987) (fault ground required for alimony); *Britt v. Britt*, 320 N.C. 573, 577, 359 S.E.2d 467, 469 (1987), *overruled on other grounds*, 323 N.C. 559, 374 S.E.2d 385 (1988) (for unjust enrichment claim the "benefit must not be gratuitous"); *Suggs v. Norris*, 88 N.C. App. 539, 544, 364 S.E.2d 159, 163, *cert. denied*, 322 N.C. 486, 370 S.E.2d 236 (1988) (services rendered between spouses presumed gratuitous). In the absence of either our recognition of the increase in value of an employee-spouse's medical license due to marital contributions as marital property or a valid premarital or separation agreement dealing with the employee-spouse's enhanced earning capacity, a remedy for the contributing spouse currently available in North Carolina is to treat the employee-spouse's enhanced earning capacity as a distributional factor. N.C.G.S. § 50-20(c)(7) (1987 & Supp. 1991) (direct or indirect contribution to help educate or develop career

potential); *Geer v. Geer*, 84 N.C. App. 471, 478, 353 S.E.2d 427, 431 (1987) (career enhancing contributions); *Harris v. Harris*, 84 N.C. App. 353, 358-59, 352 S.E.2d 869, 873 (1987) (earning potential). When the marital estate is large, the trial court's discretion in its award based upon this distributional factor may very well lead to the equitable result intended by our equitable distribution statute. When the marital estate is small, however, treating as a distributional factor what *should* be distributed in the first place achieves nothing. Therefore, when the trial court determines that the increase in value of an employee-spouse's professional license is marital property, the trial court should distribute that increase. In such cases, however, the trial court should not also consider the increased value as a distributional factor.[2]

Accordingly, I agree that on remand the trial court should "eliminate the value of the goodwill and assign the proper percentage due to each spouse." However, in keeping with that general mandate, the trial court shall allow the parties to present new evidence which may be necessary for the trial court to identify, value, and distribute the increase in value, if any, of defendant-employee's medical license due to marital contributions, if any.

MULBERRY-FAIRPLAINS WATER ASSOCIATION, INC. v. TOWN OF NORTH WILKESBORO

No. 9123SC38

(Filed 4 February 1992)

1. Municipal Corporations § 5.2 (NCI3d) — contract to sell water — proprietary function — binding

The trial court correctly granted partial summary judgment for plaintiff in an action in which plaintiff water company alleged that defendant had breached a price provision in a contract under which defendant sold water to plaintiff. Although defendant contended that the setting of water rates is a governmental function and that this contract is unenforceable because

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2. Likewise, when the trial court determines that goodwill is marital property, the trial court should distribute the value of the goodwill but should not also consider the owner-spouse's enhanced earning capacity as a distributional factor.

it deprives subsequent town boards of the necessary discretion to perform that function for the remainder of the contract's forty year term, a municipal corporation is statutorily authorized to enter into contracts for the supply of water not exceeding forty years and the setting of rates and charges for water services furnished by a municipality to its customers is a proprietary function, subject only to limitations upon such action by statute or contractual obligation assumed in such actions. N.C.G.S. § 160A-322.

Am Jur 2d, Waterworks and Water Companies § 4.

2. **Municipal Corporations § 22 (NCI3d)— water contract—rate change—breach of contract**

The trial court did not err by concluding that the effect of a new water rate was a breach of contract where defendant municipality had contracted to supply water to plaintiff; the contract requires that the rate defendant charges to plaintiff has to be increased or decreased in the same proportionate amount as for customers inside the city limits; the new rate increased the cost of water for plaintiff while it decreased the cost for the majority of residents located within city limits.

Am Jur 2d, Waterworks and Water Companies §§ 3, 13.

3. **Municipal Corporations § 22 (NCI3d)— water contract—modification**

The trial court erred by deciding as a matter of law that a contract under which defendant sold water to plaintiff had not been modified and that defendant was entitled to summary judgment where the parties, for at least 15 years before this action, had established a continuous course of performance whereby defendant sold and plaintiff purchased water in excess of the contract maximum at the contract price; defendant supplied plaintiff with the amount of water plaintiff needed to supply its customers during that time without objection; defendant's first and only attempt to enforce the contract provision in question was after plaintiff filed this action; and defendant's general assertion that it furnished excess water solely on a month by month basis with no assurance of further supply and that this was not a modification of the contract was insufficient to meet the burden required of the party moving for summary judgment.

Am Jur 2d, Waterworks and Water Companies § 14.

4. Estoppel § 15 (NCI4th)— water contract—modification—estoppel to deny

Defendant was estopped from denying a modification to a contract under which it furnished water to plaintiff where plaintiff relied on defendant's conduct for many years; plaintiff was and is the only supplier of water to its customers; numerous additional customers, commercial and individual, were added to plaintiff's service area during those years; defendant was aware of the addition of customers and the increased demand for water by plaintiff which resulted therefrom; defendant acquiesced in those additions and furnished the amount of water necessary to supply them; and defendant benefited from its conduct by accepting payment at the contract rate for the water furnished in excess of the contract maximum.

Am Jur 2d, Estoppel and Waiver §§ 35, 76, 77, 128.

APPEALS by plaintiff and defendant from order entered 28 August 1990 in WILKES County Superior Court by *Judge W. Douglas Albright* granting plaintiff's motion for partial summary judgment and granting, in part, defendant's motion for summary judgment. Heard in the Court of Appeals 10 October 1991.

Plaintiff is a North Carolina non-profit corporation engaged in the sale and distribution of potable water in Wilkes County to 2100 members and serves a population of approximately 12,000 individuals. Since 1964, defendant has continuously sold water to plaintiff pursuant to written water contracts, the most recent contract being dated August 1974 and amended in January 1975.

The August 1974 written agreement provides that defendant will furnish plaintiff's water needs up to a maximum of 15,000,000 gallons per month. That agreement contains a price provision pertinent to this appeal which applies to the method by which defendant can increase or decrease the rate charged for the water it supplies to plaintiff under the contract in excess of the initial 1,500,000 gallons per month. Pursuant to this provision, if defendant increases or decreases the water rate charged to plaintiff, then the rate charged defendant's customers inside the city limits must be increased or decreased in the same proportionate amount. In December 1989, defendant's Town Board of Commissioners passed a resolution adopting a new "flat rate" of $.77 per thousand gallons for water sold to plaintiff. The rate was to become effective 1 January 1990.

Prior to the resolution, plaintiff had been paying a rate of $.347 per thousand for all gallons over 1,500,000. Thus, the new rate effectively doubled the plaintiff's cost of purchased water, while decreasing the rate charged defendant's customers inside the city limits.

In response to the resolution, plaintiff notified defendant that it considered the new rate to be in breach of their contract and requested that defendant negotiate a lower rate in accordance with the contract. Defendant refused to reconsider or modify the resolution.

Defendant sent plaintiff a January water bill in the amount of $22,952.93, which was calculated according to the new rate. Plaintiff submitted payment of $10,111.19, which was based on the rate effective prior to the resolution. Defendant returned the payment to plaintiff and simultaneously notified plaintiff that its account was delinquent. Subsequently, by written notice, defendant informed plaintiff that their water supply would be cut off if the January bill plus interest in the amount of $2,295.29 was not paid in full within five days of receipt of that notice.

Plaintiff filed this cause of action, alleging that the new rate constituted a breach of the contract. Plaintiff also alleged that the contract had been modified via the parties' course of conduct over the preceding fifteen years.

The alleged modification concerned a provision in the contract which provided that defendant was only obligated to supply plaintiff with a maximum of 15,000,000 gallons of water per month. Plaintiff alleged that defendant had continuously supplied water in excess of 15,000,000 gallons each month at the contract price for the preceding fifteen years and that plaintiff had detrimentally relied on this course of performance. Plaintiff alleged that the contract provision had been modified by this conduct and therefore defendant could not now attempt to restrict the quantity by relying on that provision, nor charge a price inconsistent with the contract rate.

Defendant answered alleging that the water rates to users within the town which were "similarly situated to plaintiff" had been increased in the same proportionate amount as had plaintiff's rates. Thus, the contract had not been breached. In further defense to plaintiff's claims, defendant alleged the contract in question pur-

ported to extend for forty years and was void because it placed an impermissible restriction on the Town Board's discretion. Finally, defendant denied that the quantity term of the contract had been modified and counterclaimed against plaintiff for the sums due for water furnished by defendant in January and February of 1990 and for any water furnished subsequent thereto.

Plaintiff obtained a temporary restraining order to prevent defendant from "cutting off, terminating, or decreasing" the quantity of water being supplied to plaintiff. Subsequently, a consent order was entered which, in effect, continued the provisions of the temporary restraining order while this action was pending. Among other things, the consent order dictated the method by which plaintiff would pay for the water received from defendant and obligated defendant to provide a maximum of 33,500,000 gallons of water per month.

Plaintiff filed a motion for partial summary judgment regarding the breach of contract issue and contended that a genuine issue of material fact existed as to whether the 15,000,000 gallon per month term had been modified. Defendant also filed a motion for summary judgment.

In the final judgment, the trial court granted summary judgment in favor of plaintiff as to the breach of contract claim. The court held as a matter of law that the new rate violated the price provision in the contract. Thus, plaintiff was entitled to the water supplied under the contract since January 1990 at the pre-resolution October 1989 rate. Defendant appealed from this part of the judgment. Further, the trial court granted summary judgment in favor of defendant on the issue of modification of the quantity term and the counterclaim. The court ordered that defendant was obligated to supply 15,000,000 gallons per month at the contract rate and that any water furnished in excess of that amount was not governed by the contract. The price of such excess water supplied to plaintiff would be defendant's flat rate in effect at the time the water was supplied. Plaintiff appealed from this part of the judgment. The court also entered judgment against plaintiff in the amount of $51,428.94 plus additional compensation, consistent with the judgment, for water furnished to plaintiff in excess of 15,000,000 gallons from 20 August 1990 through the date of judgment. We will address each appeal independently.

Brewer & Brewer, by Gregory J. Brewer, for plaintiff.

E. James Moore for defendant.

WELLS, Judge.

I.

[1] The sole issue presented by defendant's appeal is whether the trial court erred in granting plaintiff's motion for partial summary judgment.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show [1] that there is no genuine issue as to any material fact and [2] that any party is entitled to judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). Appellate review of summary judgment cases focuses on "whether the trial court's conclusions as to these questions of law were correct ones." *Ellis v. Williams*, 319 N.C. 413, 355 S.E.2d 479 (1987).

A party moving for summary judgment must show that there is no triable issue of fact before the court. The movant may meet this burden by (1) proving an essential element of the opposing party's claim is nonexistent, or (2) showing through discovery that the opposing party cannot produce evidence to support an essential element of his or her claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979) (*citing Zimmerman v. Hogg & Allen*, 286 N.C. 24, 209 S.E.2d 795 (1974)). Applying the above law to the facts of this case, in order to meet this burden, plaintiff would have to (1) show that a forecast of defendant's evidence indicates it will be unable to prove that the contract is unenforceable or (2) prove that an essential element of defendant's defense is nonexistent.

Defendant attempts to argue that the setting of water rates is a governmental function instead of a proprietary one. Defendant contends the contract in question is invalid and unenforceable because, for the remainder of the forty year term, it deprives subsequent town boards of the discretion necessary to perform the governmental function of setting water rates and thereby violates public policy. Therefore, defendant argues that the contract in question is not binding on the town. We find defendant's argument to be without merit.

In North Carolina, the law on this issue has been settled. First, we note that a municipal corporation is statutorily authorized to enter into contracts for the supply of water *not exceeding* forty years. N.C. Gen. Stat. § 160A-322 (1987). (Emphasis added). Further a municipality is authorized to establish and revise rates for water and sewer services. N.C. Gen. Stat. § 160A-314(a) (1987 & Supp. 1991). The setting of rates and charges for water services furnished by a municipality to its customers is a proprietary function, subject only to limitations imposed upon such action by statute or *contractual obligation assumed* in such actions. *Town of Spring Hope v. Bissette*, 305 N.C. 248, 287 S.E.2d 851 (1982), *aff'g*, 53 N.C. App. 210, 280 S.E.2d 490 (1981). (Emphasis added). *See also Aviation, Inc. v. Airport Authority*, 288 N.C. 98, 215 S.E.2d 552 (1975); *Pulliam v. City of Greensboro*, 103 N.C. App. 748, 407 S.E.2d 567, *disc. review denied*, 330 N.C. 197, 412 S.E.2d 59 (1991). Thus, defendant was performing a proprietary function when it entered into the contract with plaintiff and agreed to the price provision contained therein. Defendant is bound by that contractual provision for the duration of the contract. For the foregoing reasons, we affirm the trial court's decision regarding this issue.

[2] Defendant's next argument, in essence, appears to be that the trial court erred in concluding that the effect of the new rate was in breach of the contract. Again, we find no merit to this argument. After a thorough review of the lengthy record in this case, we find the trial court properly determined that there was no genuine issue of material fact with regard to whether the new rate constituted a breach of the contract and that plaintiff was entitled to judgment as a matter of law on this issue. The contract provision in question is clear. When the language of a contract is plain and unambiguous, construction of the language is a matter of law for the court. *Mountain Fed. Land Bank v. First Union Nat. Bank*, 98 N.C. App. 195, 390 S.E.2d 679, *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990). The contract requires that the rate defendant charges plaintiff has to be increased or decreased in the same proportionate amount as it is for those customers who live inside the city limits. Based on the information supplied to the court, the court properly determined that the $.77 rate effected a disproportionate rate change. The new rate increased the cost of water for plaintiff while it decreased the cost for the majority of residents located within the city limits. This was an

obvious breach of the price provision in the contract. Thus, we affirm the decision of the trial court.

In conclusion, based on the foregoing reasons, we hold the trial court properly granted plaintiff's motion for partial summary judgment.

II.

[3] The sole issue presented by plaintiff's appeal is whether the trial court erred in granting, in part, defendant's motion for summary judgment.

Plaintiff's forecast of evidence with regard to the issue of modification tended to show the following facts and circumstances. In its complaint, verified by the President of the Association, plaintiff alleged that since the execution of the last water contract in 1974, defendant had continuously supplied water to plaintiff in amounts in excess of the original 15,000,000 gallons per month limitation. Plaintiff also alleged that it had been induced to rely on such supply because since the execution of the contract, population and businesses in its supply area had expanded considerably "largely due to said continuous provision of water." In opposition to defendant's motion for summary judgment, plaintiff submitted a forecast of evidence which showed that water in excess of 15,000,000 gallons per month had been furnished plaintiff at the contract rate on a regular basis since 1975.

Defendant's forecast of evidence with regard to the issue of modification was as follows: In its answer, verified by the town manager, defendant admitted to supplying water in excess of the 15,000,000 gallon contractual maximum. Defendant stated that the furnishing of such excess water was solely on a month-by-month basis with no assurance that it would continue to do so. Defendant submitted other documents to show how the rate increase in question had been calculated. These documents reflected that the town based the increase, in part, on plaintiff's average monthly consumption of 28,011,410 gallons. Additional documents submitted by defendant showed that annual consumption for plaintiff was 244,081,125 gallons in 1986; 320,956,219 gallons in 1987; and 330,295,196 galllons in 1988.

We first point out that the sale of water, under the facts and circumstances of this case, constitutes a sale of goods under Article 2 of the Uniform Commercial Code (hereinafter the "Code").

See Zepp v. Mayor & Council of Athens, 180 Ga. App. 72, 348 S.E.2d 673 (1986). The Code defines "goods" as "all things . . . which are movable at the time of identification to the contract for sale other than the money in which the price is to be paid, investment securities (Article 8) and things in action." N.C. Gen. Stat. § 25-2-105 (1986). The definition of goods is based on the concept of movability. Official Comment 1, U.C.C. § 25-2-105. "Whatever can be measured by a flow meter has 'movability' as that term is used in connection with the definition of goods." 1 Anderson, *Uniform Commercial Code*, § 2-105:19 (3d ed. 1981). The sale of water is movable in this context. This is evidenced by the fact that defendant charges plaintiff for the water it supplies by the number of gallons plaintiff consumes per month. Water is also identifiable as a movable at the time of identification to the contract. *Zepp, supra.* Thus, we conclude that the contract involved in this case is governed by the provisions of the Code.

Plaintiff contended that the quantity term of the 1974 contract had been modified as evidenced by the parties' course of performance over the fifteen years preceding this action. Additionally, plaintiff argued that since it had detrimentally relied on defendant's conduct, defendant should be estopped to deny that the original agreement had been changed.

We note at the outset that unlike common law, a modification under Article 2 needs no new consideration to be binding. N.C. Gen. Stat. § 25-2-209(1). However, in order for the modification to be enforceable, the statute of frauds found in N.C. Gen. Stat. § 25-2-201 must be complied with if the contract, as modified, falls within its provisions. N.C. Gen. Stat. § 25-2-209(3). The alleged modification in this case would ordinarily fall within the provision of N.C. Gen. Stat. § 25-2-201(1) since it involves the sale of goods for a price of $500.00 or more. Thus, the defense of the statute of frauds would apply in this case. However, this defense must be affirmatively pled. N.C. Gen. Stat. § 1A-1, Rule 8(c) (1990). Failure to plead an affirmative defense constitutes a waiver of that defense. *Smith v. Hudson*, 48 N.C. App. 347, 269 S.E.2d 172 (1980). Since the defendant in the case at bar did not plead the statute of frauds in defense to plaintiff's modification claim, he has waived the right to assert it. *Bone Int'l, Inc. v. Johnson*, 74 N.C. App. 703, 329 S.E.2d 714 (1985).

Modification of a sales contract may be established by a course of conduct. Under the Code, course of performance[1] is relevant to show a modification of any term inconsistent with the parties' course of performance. N.C. Gen. Stat. § 25-2-208(3). This provision is in accord with pre-Code law wherein it is established that:

> The provisions of a written contract may be modified or waived by a subsequent parol agreement, or by conduct which naturally and justly leads the other party to believe the provisions of the contract are modified or waived. . . .

Son-Shine Grading v. ADC Construction Co., 68 N.C. App. 417, 315 S.E.2d 346, *disc. review denied*, 312 N.C. 85, 321 S.E.2d 900 (1984). (Citation omitted).

Based on the record before us, we find there was a sufficient forecast of evidence before the court to establish beyond dispute that the parties, for at least the *fifteen years* immediately preceding this action, had established a continuous course of performance whereby defendant sold and plaintiff purchased water in excess of the contract maximum at the contract price. Furthermore, it appears that defendant supplied plaintiff with the amount of water plaintiff needed to supply its customers during that time *without objection*. The record indicates that defendant's first and only attempt to enforce the contract provision in question was *after* plaintiff filed this action. Defendant, as the party moving for summary judgment, failed to meet its burden of proving an essential element of plaintiff's claim was nonexistent or of showing through discovery that plaintiff could not produce evidence to support an essential element of its modification claim. *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 251 S.E.2d 419 (1979). Defendant's general assertion that "the furnishing of such excess water on the part of defendant in the past was solely on a month by month basis with no assurance of further supply of such excess water and does not work as a modification of the contract between the parties" was insufficient to meet this burden. Accordingly, we hold that it was error for the trial court to decide, as a matter of law, that the contract

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1. Although course of performance is not specifically defined in § 25-2-208, Official Comment 2 to § 25-1-205 states "[c]ourse of dealing under subsection (1) is restricted, literally to a sequence of conduct between the parties *previous* to the agreement. However, the provisions of the Act on course of performance make it clear that a sequence of conduct *after or under* the agreement may have equivalent meaning. (Section 2-208.)" (Emphasis added).

had not been modified and that defendant was entitled to summary judgment on this issue.

[4] Unless displaced by the particular provisions of the Code, the principles of law and equity, including estoppel, shall supplement its provisions. N.C. Gen. Stat. § 25-1-103 (1986). The doctrine of equitable estoppel is recognized in North Carolina. *Smith v. Smith*, 265 N.C. 18, 143 S.E.2d 300 (1965). In *Godley v. County of Pitt*, 306 N.C. 357, 293 S.E.2d 167 (1982), the Court stated:

> In its broadest and simplest sense, the doctrine of estoppel is a means of preventing a party from asserting a legal claim or defense which is contrary to or inconsistent with his prior actions or conduct. The underlying theme of estoppel is that it is unfair and unjust to permit one to pursue an advantage or right which has not been promoted or enforced prior to the institution of some lawsuit; in particular, the rule is grounded on the premise that it offends every principle of equity or morality to permit a party to enjoy benefits of a transaction and at the same time deny its terms or qualifications. (Citations omitted.)

Due to the facts and circumstances of this case, we are of the opinion that the application of the doctrine of equitable estoppel is particularly appropriate. The forecast of evidence was sufficient to show plaintiff relied on defendant's conduct for many years. Plaintiff was and is the only supplier of water to its customers. The record indicates that numerous additional customers, both individual and commercial, were added to plaintiff's service area during these fifteen years. Furthermore, the record shows that defendant was aware of the addition of customers and the increased demand for water by plaintiff which resulted therefrom. Defendant acquiesced in these additions and furnished the amount of water necessary to supply them. Defendant has also benefitted from its conduct by accepting payment, at the contract rate, for the water furnished in excess of the contract maximum. Under these circumstances, we find that it would grossly offend the principles of equity to allow defendant to now deny that such modification took place in order to enforce the quantity provision in a manner inconsistent with its conduct for the preceding fifteen years.

In conclusion, we hold that the water purchase contract at issue has been modified. Pursuant to this modification, defendant is contractually bound to furnish water to plaintiff in excess of

the 15,000,000 gallon per month limitation. Defendant is obligated to supply water to plaintiff in an amount up to and including the maximum amount furnished to plaintiff, in any given month, prior to the institution of this action. Defendant is to furnish said water at the same contract rate charged for the gallons supplied in excess of the initial 1,500,000 gallons. Defendant is entitled to charge whatever rate it may set for any water furnished plaintiff in excess of the amount determined to be the modification amount. This obligation will remain in effect until the termination, expiration and/or modification of the current contract between the parties. On remand, we order that judgment be amended in favor of plaintiff in a manner not inconsistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judges PARKER and WYNN concur.

SUSAN DALE SPRY, PLAINTIFF v. WINSTON-SALEM/FORSYTH COUNTY BOARD OF EDUCATION, DEFENDANT

No. 9021SC1247

(Filed 4 February 1992)

1. **Schools § 13.1 (NCI3d)— probationary teacher—failure to renew contract—no right to appeal—right to sue**

A probationary teacher had no statutory right to appeal a board of education's decision not to renew her contract but could sue in the appropriate court for alleged violations of N.C.G.S. § 115C-325(m)(2).

Am Jur 2d, Schools § 161.

2. **Schools § 13.1 (NCI3d)— probationary teacher—failure to renew contract—action not for arbitrary, capricious or personal reasons**

Plaintiff probationary teacher's evidence was insufficient to support a jury finding that defendant board of education failed to renew her contract for arbitrary, capricious or personal reasons in violation of N.C.G.S. § 115C-325(m)(2) where she presented evidence relating to ill will and malice by members of her support team who had informed her that her perform-

ance was unacceptable; board of education members testified that they based their decision on the information presented at the hearing by the school superintendent and the plaintiff; the board properly inquired into the reasons its agents, the principal and superintendent, recommended that plaintiff's contract not be renewed; and an investigation by an assistant superintendent removed any taint that may have existed in the support team's evaluation of plaintiff.

Am Jur 2d, Schools § 161.

Judge JOHNSON dissenting.

APPEAL by defendant from judgment entered 7 March 1990 by *Judge James J. Booker* in FORSYTH County Superior Court. Heard in the Court of Appeals 27 August 1991.

The Winston-Salem/Forsyth County Board of Education hired plaintiff as a probationary teacher on 14 August 1987 and assigned her to teach cooperative occupational training and mathematics at North Forsyth High School (North Forsyth). Because plaintiff was a first-year teacher, the Board assigned to plaintiff a support team consisting of Benjamin Warren, the principal of North Forsyth; Elizabeth Lucas, a fellow teacher at North Forsyth; and Patricia Schreiber, the vocational director for the school system. Mr. Warren later assigned Judy Cowden, an assistant principal at North Forsyth, to take his place on the support team. The Board assigned Ms. Lucas to be plaintiff's mentor.

During the 1987-88 school year the support team worked with plaintiff and evaluated her teaching performance. The team met with plaintiff on several occasions and informed her that her performance was unacceptable. On 4 December 1987 plaintiff complained to the principal at North Forsyth that she had personality conflicts with Judy Cowden and the other members of her support team. Plaintiff said that Ms. Cowden was rude to her throughout the year and refused to speak to her. Plaintiff asked Mr. Warren to observe her teaching.

In March 1988 Mr. Warren visited plaintiff's class after plaintiff contacted the Forsyth County Association of Classroom Teachers. After Mr. Warren's visit plaintiff learned that Mr. Warren was scheduled to have surgery and might be out of work for the rest of the year. She wrote him a letter dated 20 March 1988 outlin-

ing her concerns and asking him to appoint a new support team for her. She said that Ms. Lucas, her mentor, had refused to give her a computer that was bought specifically for her students and had intentionally hidden a printer that plaintiff was supposed to have received at the beginning of the school year. Plaintiff also outlined her disagreements with the conclusions of the teachers who had evaluated her teaching performance. Mr. Warren did not respond to plaintiff's letter; however, he did visit her class again. On 15 April 1988, Mr. Warren, through Ms. Cowden, recommended that the Board not renew plaintiff's contract. Because plaintiff disagreed with the recommendation, the superintendent's office conducted an investigation. Based on the result of the investigation, the superintendent recommended that the Board not renew plaintiff's contract. After a hearing at its 16 May 1988 meeting the Board unanimously voted in public session not to renew plaintiff's contract.

Plaintiff filed an action against the defendant Winston-Salem/Forsyth County Board of Education alleging that the Board should have renewed her contract for employment as a probationary teacher for a second year. The jury found that the Board failed to renew plaintiff's contract for arbitrary, capricious, or personal reasons and awarded plaintiff $304,910 in actual damages and $150,000 in punitive damages. Defendant appeals.

Kennedy, Kennedy, Kennedy & Kennedy, by Harvey L. Kennedy, Harold L. Kennedy, III, and Annie Brown Kennedy, for plaintiff-appellee.

Womble, Carlyle, Sandridge & Rice, by Anthony H. Brett, for defendant-appellant.

Tharrington, Smith & Hargrove, by George T. Rogister, Jr., Allison B. Schafer, Ann L. Majestic and Jonathan A. Blumberg, for North Carolina School Boards Association, amicus curiae.

EAGLES, Judge.

In this appeal defendant contends that the trial court erred by (1) denying the Board's motions for summary judgment, directed verdict, and judgment notwithstanding the verdict; (2) instructing the jury regarding the standard for establishing a violation of G.S. 115C-325(m)(2); (3) admitting evidence and instructing the jury concerning actual damages for mental, emotional, and physical harm

resulting from the nonrenewal of plaintiff's contract; (4) admitting evidence and instructing the jury concerning damages to plaintiff's reputation; (5) admitting evidence concerning the school system's financial worth and instructing the jury that it could award punitive damages; (6) admitting testimony concerning plaintiff addressing the Board at a public rather than executive session; (7) admitting irrelevant prejudicial evidence; and (8) denying the Board's motion for a mistrial based on improper closing arguments made by plaintiff's counsel. We hold that defendant was entitled to a directed verdict and reverse the judgment of the trial court.

In 1981 the General Assembly enacted G.S. 115C-305 which provides:

> Appeals 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).

This Court has said that the General Assembly's decision to enact this section "indicates an intention to extend the right of appeal in public school personnel decisions far beyond the confines of the former law." *Warren v. Buncombe County Board of Education*, 80 N.C. App. 656, 658, 343 S.E.2d 225, 226 (1986).

Here, plaintiff initially brought a petition for review of the Board's decision under G.S. 115C-45(c) and 115C-305. Plaintiff then filed an amended complaint seeking a jury trial. "In North Carolina, our courts have held that *when the Legislature has provided an effective administrative remedy by statute, then that remedy is exclusive.* In addition, our courts have held that not only is the administrative remedy exclusive but also a party must pursue it and exhaust it before resorting to the courts." *Church v. Madison County Board of Education*, 31 N.C. App. 641, 645, 230 S.E.2d 769, 771 (1976) (citations omitted) (emphasis added), *disc. review denied and appeal dismissed*, 292 N.C. 264, 233 S.E.2d 391 (1977). But for other recent decisions of this Court, plaintiff would have a right to appeal the Board's decision to the Superior Court under G.S. 115C-305 and that remedy would be the exclusive procedural avenue for determining whether the Board's decision was for arbitrary, capricious, political, or personal reasons. As the Supreme Court has noted, the whole record test set out in G.S. 150B-51 applies to 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). While review under G.S. 115C-305 would constitute the exclusive remedy for determining whether the Board's decision violated G.S. 115C-325(m)(2), nothing would preclude plaintiff from bringing other claims, for example under 42 U.S.C. 1983, based on the same conduct. *See Crump v. Board of Education*, 93 N.C. App. 168, 378 S.E.2d 32, *review on additional issues denied*, 324 N.C. 543, 380 S.E.2d 770 (1989), *decision affirmed as modified*, 326 N.C. 603, 392 S.E.2d 579 (1990).

[1] However, in prior cases concerning the nonrenewal of probationary teachers' contracts, this Court said that "[n]o statutory right of appeal exists. G.S. 115C-325(n). Probationary teachers who contend non-renewal was for a prohibited reason therefore must sue in the appropriate court. *Sigmon v. Poe*, 528 F.2d 311 (4th Cir. 1975) (per curiam)." *Abell v. Nash County Board of Education*, 71 N.C. App. 48, 49, 321 S.E.2d 502, 504 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985). In addition, by entertaining appeals involving questions of summary judgment and directed verdict, this Court has implied that a teacher has a right to a trial on the question of whether the Board's actions were in violation of G.S. 115C-325(m)(2). *Abell v. Nash County Board of Education*, 71 N.C. App. 48, 321 S.E.2d 502 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985) and *Abell v. Nash County Board of Education*, 89 N.C. App. 262, 365 S.E.2d 706 (1988). The Supreme Court has said: "Where a panel of the Court of Appeals has decided the same issue, albeit in a different case, a subsequent panel of the same court is bound by that precedent, unless it has been overturned by a higher court." *In the Matter of Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989). Accordingly, we are bound by the prior decisions of this Court which hold that no statutory right to appeal exists and that a probationary teacher can sue for alleged violations of G.S. 115C-325(m)(2).

[2] Having prefaced our decision with these comments, we hold that on this record the trial court erred in denying defendant's motions for a directed verdict and judgment notwithstanding the verdict.

"A motion for a directed verdict raises the question as to whether there is sufficient evidence to go to the jury. . . . The plaintiff's evidence must be taken as true and be considered in the light most favorable to him and a directed verdict may be granted only if, as a matter of law, the evidence is insufficient

to justify a verdict for the plaintiff." W. Shuford, N.C. Civil Practice and Procedure § 50-5 (1988). Here, the evidence was insufficient as a matter of law to support a verdict in plaintiff's favor.

Plaintiff alleges that the Board failed to renew her contract in violation of G.S. 115C-325(m)(2) which provides as follows:

> The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons.

This Court has said that G.S. 115C-325(m)(2) imposes "a duty on boards of education to determine the substantive bases for recommendations of non-renewal and to assure that non-renewal is not for a prohibited reason." *Abell v. Nash County Board of Education*, 71 N.C. App. 48, 52, 321 S.E.2d 502, 506 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985).

Plaintiff contends that the Board's decision not to renew her contract was for arbitrary, capricious or personal reasons. At trial she presented evidence relating to "ill-will, spite and malice from the members of her support team." However, even taking this evidence as true, as a matter of law plaintiff failed to establish that the Board's decision not to renew her teaching contract was arbitrary, capricious, discriminatory, or for personal or political reasons.

Plaintiff testified at trial that she did not know any of the Board members before they considered her contract on 16 May 1988 and had no reason to believe that any of the members were biased against her. In making its decision, the Board considered a packet of information composed of: (1) a memo from the school superintendent recommending that the Board not renew plaintiff's contract; (2) the superintendent's exhibits which included materials prepared by plaintiff's principal and support team; and (3) plaintiff's exhibits, which included letters of recommendation, her letter to Principal Benjamin Warren outlining her concerns about her support team, and several evaluation forms. At the hearing, the Board also heard plaintiff, her attorney, and a local teachers' organization representative speak on plaintiff's behalf before it made its decision. The Board members testified that they based their decision

on the information presented at the hearing by the superintendent and the plaintiff.

Plaintiff correctly asserts that

> [b]y statute and under traditional common-law principles . . . the superintendent and principal are agents of the board. The board cannot escape responsibility for its actions, based on the recommendations of its agents, by simply refusing to inquire into their agents' reasons. The board, if it acts on recommendations made on improper grounds, must accept responsibility therefor. This does not mean that the board must make exhaustive inquiries or formal findings of fact, only that the administrative record, be it the personnel file, board minutes or recommendation memoranda, should disclose the basis for the board's action.

Abell v. Nash County Board of Education, 71 N.C. App. 48, 53, 321 S.E.2d 502, 506-07 (1984), *disc. review denied*, 313 N.C. 506, 329 S.E.2d 389 (1985). Even assuming plaintiff's allegations regarding the support team are true, this is not a case where the Board failed to inquire into the reasons of its agents. The assistant superintendent, who had interviewed all of the school personnel who had evaluated plaintiff's teaching, addressed the Board members and answered their questions regarding the investigation. The Board also heard from the plaintiff, her attorney, and a member of a teacher's organization who spoke on plaintiff's behalf. The Board had the opportunity to resolve any conflicts in the evidence. We think that this level of inquiry was sufficient to meet the requirements of *Abell* and G.S. 115C-325(m)(2).

Additionally, the inquiry by the superintendent's office was sufficient to remove any taint that may have existed in the support team's evaluation. In her brief plaintiff contends that the superintendent's office "covered up the misconduct" of the support team. However, there is absolutely no evidence to support this contention. Plaintiff alleges that the assistant superintendent who conducted the investigation was "good friends" with two members of the support team, Schreiber and Cowden, but there is no indication that evidence to support this characterization appears in the record. Plaintiff also alleges that the assistant superintendent was biased because she "talked to all of the Defendant's witnesses" and "none of Plaintiff's witnesses." The record indicates that the assistant superintendent met with plaintiff, her attorney, and the classroom

teacher's representative and discussed plaintiff's allegations regarding the support team. The assistant superintendent then interviewed all of the members of the support team, the principal at North Forsyth, and the program specialist in vocational education who observed plaintiff's teaching. Plaintiff gave the assistant superintendent a list of her students and employers involved in the occupational training program to interview as part of the investigation. The assistant superintendent declined to interview these people "[b]ecause the issue was [plaintiff's] classroom teaching as observed by professionals" and the opinions of these employers and students were not "germane." We agree that the opinions of these witnesses were irrelevant and fail to see how the assistant superintendent's actions constitute a "cover up" or show bias on the part of the superintendent.

Accordingly, the judgment of the trial court is reversed.

Reversed.

Judge PARKER concurs.

Judge JOHNSON dissents.

Judge JOHNSON dissenting.

I respectfully dissent because I believe that plaintiff's evidence is sufficient as a matter of law to go to the jury and to support its verdict on the issue of whether the Board violated G.S. § 15C-325(m)(2) in refusing to renew her contract. The record indicates that following the public meeting of the school board, during which all parties were present and allowed to speak, the board met in executive session. Plaintiff and her attorney were excluded from this executive session, but Dr. Epstein, the assistant superintendent and the individual who conducted the investigation of plaintiff's complaints and recommended non-renewal, was present. She answered board members' further questions concerning the investigation, the circumstances surrounding the hiring of plaintiff and other matters relating to the case, all outside the presence of plaintiff and her attorney. I believe this is fundamentally unfair and is evidence of arbitrary and capricious behavior on the part of the school board. I vote to affirm the trial court's denial of defendant's motion for directed verdict and judgment notwithstanding the verdict.

Notwithstanding the above, and recognizing that the question of damages is not before us given the majority decision, I would vote to reverse and remand on the issue of damages.

OCEAN HILL JOINT VENTURE v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES, AN AGENCY OF THE STATE OF NORTH CAROLINA AND WILLIAM W. COBEY, JR., SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 911SC240

(Filed 4 February 1992)

Limitation of Actions § 4 (NCI3d)— civil penalties assessed by administrative agency—one-year statute of limitation—accrual

The Department's civil penalty assessment pursuant to N.C.G.S. § 113A-64(a) (the Sedimentation Pollution Control Act) two years and seven months after the date of the last violation was barred by N.C.G.S. § 1-54(2). Civil penalty assessments by the Department under N.C.G.S. § 113A-64(a) clearly fall within the purview of actions or proceedings which are subject to the statute of limitations of N.C.G.S. § 1-54(2). A cause of action accrues under N.C.G.S. § 113A-64(a) the last date a violation occurs, and the statute of limitations prescribed by N.C.G.S. § 1-54(2) is inoperative as long as a violation under N.C.G.S. § 113A-64(a) continues.

Am Jur 2d, Forfeitures and Penalties § 95.

APPEAL by petitioner from judgment entered 31 January 1991 by *Judge Thomas S. Watts* in CURRITUCK County Superior Court. Heard in the Court of Appeals 4 December 1991.

While preparing land for development on the Currituck County Outer Banks in 1987, petitioner, Ocean Hill Joint Venture (Ocean Hill), by and through its engineers and contractors, violated the Sedimentation Pollution Control Act of 1973 (SPCA). The violation arose when Ocean Hill failed to file and secure approval of an erosion and sedimentation control plan prior to undertaking develop-

ment activities. Ocean Hill also failed to secure devices which would retain sediment on the site during the course of development.

Pursuant to 15 N.C. Admin. Code 4C.0003, respondent, Department of Environment, Health and Natural Resources (Department), assessed civil penalties against Ocean Hill on 10 January 1990 for its violations of the SPCA. The penalties assessed were in the amount of one hundred dollars per day for the eighty-seven day period of 25 February 1987 to 22 May 1987 for a total penalty of $8,700. By way of response, Ocean Hill filed a petition for a contested case hearing with the Office of Administrative Hearings on 13 March 1990 pursuant to G.S. 150B-23 and 15 N.C. Admin. Code 4C.0008.

On 18 May 1990 Ocean Hill filed a motion for summary judgment in the administrative proceeding, asserting the civil penalty assessment on 10 January 1990 was barred by the one year statute of limitations under G.S. 1-54(2). Following the response of the Department, the Administrative Law Judge entered an order dated 1 June 1990 denying Ocean Hill's motion for summary judgment. The Administrative Law Judge recommended a Consent Order and Final Decision which was entered into by the parties and adopted by the Secretary as the final agency decision on 22 October 1990. In this Consent Order and Final Decision, the parties agreed the sum of $6,090 would be a fair settlement of the amount in controversy should it be determined the civil penalties were assessed in a timely fashion. This final agency decision also expressly reserved the right of Ocean Hill to seek judicial review on the sole issue of the applicability of the one year statute of limitations pursuant to G.S. 1-54(2). Further, the parties agreed that if no timely appeal was taken, or if the denial of summary judgment was affirmed on judicial review, Ocean Hill would pay the Department the sum agreed upon.

Subsequently, Ocean Hill filed a petition for judicial review of the agency decision in Superior Court on 13 November 1990 alleging the one year statute of limitations within G.S. 1-54(2) barred such decision and civil penalty assessment. By judgment dated and filed 31 January 1991 the court affirmed the consent order and final decision, concluding the one year statute of limitations contained in G.S. 1-54(2) did not apply and did not bar the civil penalty assessment.

Hornthal, Riley, Ellis & Maland, by M. H. Hood Ellis, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel F. McLawhorn and Assistant Attorney General Kathryn Jones Cooper, for respondent appellees.

WALKER, Judge.

Ocean Hill presents primarily two questions on appeal. The first addresses whether G.S. 1-54(2) applies to administrative actions taken pursuant to G.S. 113A-64(a). If we answer affirmatively, then we must determine whether G.S. 1-54(2) bars the Department's assessment of a civil penalty more than one year after the date of the last violation of the SPCA.

Both parties admit the civil penalty is assessed pursuant to G.S. 113A-64(a), which does not contain a statute of limitations for the imposition of civil penalties. The Department contends G.S. 1-54(2) does not begin to run at the time a civil penalty can first be assessed pursuant to G.S. 113A-64(a) but only when the collection action, which must be initiated after a civil penalty has been assessed but unpaid, may be filed. G.S. 1-54 provides for a statute of limitations:

> Within one year an action or proceeding—
>
> . . . .
>
> (2) Upon a statute, for a penalty or forfeiture, where the action is given to the State alone, or in whole or in part to the party aggrieved, or to a common informer, except where the statute imposing it prescribes a different limitation.

The first issue, then, is whether an administrative agency's assessment of civil penalties pursuant to a statute constitutes an "action or proceeding" within the meaning of G.S. 1-54, so as to be subject to the one year limitation.

We believe civil penalty assessments by the Department under the SPCA clearly fall within the purview of "actions or proceedings" which are subject to the statute of limitations of G.S. 1-54(2). Article IV, Sec. 3 of the N.C. Constitution provides in part:

> The General Assembly may vest in administrative agencies established pursuant to law such judicial powers as may be reasonably necessary.

Consequently, G.S. 113A-64(a) has been expressly held to be a valid delegation of judicial power. *In the Matter of Appeal From the Civil Penalty Assessed for Violations of the SPCA*, 92 N.C.App. 1, 373 S.E.2d 572 (1988), *reversed on other grounds*, 324 N.C. 373, 379 S.E.2d 30 (1989). In that case, the Court noted that "discretionary judicial authority may be granted to an agency when reasonably necessary to accomplish the agency's purposes." *Id.* at 379, 379 S.E.2d at 34. The Legislature may also properly confer on an administrative agency the power to assess a monetary penalty. *Id.* at 380, 379 S.E.2d at 34.

In *Holley v. Coggin Pontiac*, 43 N.C.App. 229, 259 S.E.2d 1, *disc. review denied*, 298 N.C. 806, 261 S.E.2d 919 (1979), this Court asked the question, "[W]hen, if ever, is the one-year statute of limitations for penalties to apply?"

> The answer is that the one-year rule applies when a penalty is provided "upon a . . . statute," G.S. 1-54(2), and since penal statutes are to be construed strictly . . . we take this to mean that the "penalty" must be spelled out and not implied. (Citation omitted.)

Id. at 241-242, 259 S.E.2d at 9. The Court concluded, therefore, that G.S. 75-15.2 was a "civil penalty" which was given to the State through the Attorney General's utilization of it. No statute of limitations was prescribed within G.S. 75-15.2 so consequently, it was subject to the one-year statute of limitations of G.S. 1-54(2). *Id.*

We acknowledge the general rule that "a statute of limitations should not be applied to cases not clearly within its provisions." *Carolina Beach Fishing Pier, Inc. v. Town of Carolina Beach*, 274 N.C. 362, 372, 163 S.E.2d 363, 370 (1968). G.S. 113A-64(a), like G.S. 75-15.2 in *Holley*, confers upon the State, through the Department and the Attorney General, the right to assess and collect such civil penalties. G.S. 113A-64(a) authorizes the Secretary of the Department of Environment, Health, and Natural Resources to refer cases to the Attorney General for collection of unpaid civil penalties assessed under this statute. Insofar as the language of G.S. 1-54(2) does not distinguish between the "State" and an "administrative agency" we are not prepared to make any differentiation whereby

administrative agencies would be excluded from the statute of limitations contained within this section. Instead, as no other statute of limitations is provided for in the Act, G.S. 1-54(2) would be enforceable against the Department, as agent of the State.

Having established G.S. 1-54(2) applies to civil penalty assessments pursuant to G.S. 113A-64(a), we must determine whether the statute of limitations of G.S. 1-54(2) works to bar the Department's assessment of civil penalties more than one year after the date of the last violation. Generally, a statute of limitations begins to run when a cause of action accrues. The SPCA, however, makes no reference to any time limitation for the assessment of civil penalties. G.S. 113A-64(a)(1) provides "[n]o penalty shall be assessed until the person alleged to be in violation has been notified of the violation. Each day of a continuing violation shall constitute a separate violation." The problem before us, then, is to ascertain when a right to bring the action or proceeding of assessment is deemed to arise under G.S. 113A-64(a).

The Supreme Court has held that where the Commissioner of Revenue makes civil penalty assessments the cause of action arises on the last date of the violative act giving rise to the penalty assessment. In *Colonial Pipeline Co. v. Clayton, Commr. of Revenue*, 275 N.C. 215, 166 S.E.2d 671 (1969) the facts indicated the plaintiff filed its required use tax reports and made payments for the months of October 1962 through May 1963, the last payment being made on 12 June 1963. The Commissioner of Revenue sought to assess penalties for this period on 16 November 1966. The relevant statute of limitations was set forth in G.S. 105-241.1(e) for a period of three years. The Court held the statute of limitations began to run on the date the underlying violation occurred, and penalties could be assessed. Insofar as the assessment was not until 16 November 1966, more than three years from the last date of the violative act, the attempted assessment was barred.

Similarly, in *Standard Fertilizer Company, Inc. v. Gill, Commr. of Revenue*, 225 N.C. 426, 35 S.E.2d 275 (1945), plaintiff failed to pay any tax to defendant on materials used in the construction of a sprinkler system. The system was completed in 1937 but the defendant did not assess the tax or penalties until 1942. The Court, noting a three year statute of limitations was applicable, held the 1942 assessment to be barred by this limitations period.

In ascertaining when a cause of action accrues under G.S. 113A-64(a) there is no express provision by the Legislature and we conclude the applicable time is the last date the violation occurred. In *McMahon v. United States*, 342 U.S. 25, 96 L.Ed 26 (1951), the Supreme Court observed the relevant statute (the Clarification Act) was devoid of any evidence that Congress intended the cause of action to arise at any time other than the occurrence of the violative act. Consequently, the limitations period was held to run from the time of the injury.

In accord with North Carolina's position is the case *United States v. Core Laboratories*, 759 F.2d 480 (5th Cir. 1985). There, the U.S. Commerce Department sought to assess a civil penalty against the defendant for violations of the Export Administration Act. The statute provided that an action to enforce a penalty must be brought within five years from the date when the claim first accrued. The last violations allegedly took place on 1 August 1978 and the administrative proceeding on these charges was initiated on 19 November 1979. Civil penalties were imposed on 14 March 1983 and Core refused to pay. On 24 January 1984 a civil collection action was instituted to enforce the penalties. Core asserted that the five-year statute of limitation began to run in 1978 and the action was barred. The Court rejected the argument and held the claim accrued on the last date the underlying violation occurred.

The Department contends the First Circuit Court of Appeals considered similar facts but correctly rejected the *Core* holding in *United States v. Meyer*, 808 F.2d 912 (1st Cir. 1987), where the Court held the statute of limitations did not begin to run until the date of the final agency decision (the date the civil penalties would be assessed). This holding, however, is contingent upon the initial assessment having been made in a timely manner. In *Meyer*, the civil penalties were assessed within the requisite time period, whereas in the case at bar the civil penalties were not assessed until well beyond the one year prescribed by G.S. 1-54(2).

In support of our position we further note that in ascertaining when a cause of action first accrues, it is necessary to consider the general purpose of the statute "with due regard to those practical ends which are to be served by any limitation of the time within which an action must be brought." *Reading Co. v. Koons*, 271 U.S. 58, 62, 70 L.Ed. 835, 837 (1926). The Department contends the Act anticipates no penalty will be assessed until the violation

has been remedied. Further, the Department takes the position that the Secretary cannot assess a civil penalty consistent with the statutory directives if the violation is continuing and/or resulting environmental damage remains uncorrected. While we are not prepared to address other situations, clearly where as here the problem had been remedied and the violation ended as of 22 May 1987, the Department would not be forced to make multiple assessments. As long as a violation under G.S. 113A-64(a) continues, the statute of limitations prescribed by G.S. 1-54(2) is inoperative.

The Department also urges a construction whereby it would not be subject to any limitation within which to assess civil penalties. We cannot agree with such an interpretation which would subject a party indefinitely to the possibility of a civil penalty assessment. A party is entitled to some security from stale claims, and it is this protection which a statute of limitations purports to provide. *Shearin v. Lloyd*, 246 N.C. 363, 98 S.E.2d 508 (1957).

Under the facts of this case, we hold the one year statute of limitations period of G.S. 1-54(2) begins to run on the date of the last occurring violation of G.S. 113A-64(a). Having determined a violation occurred, the Department had the right to make an assessment on 22 May 1987. The Department's civil penalty assessment pursuant to G.S. 113A-64(a) two years and seven months after the date of the last occurring violation, however, was barred by G.S. 1-54(2).

Therefore we reverse the judgment of the Superior Court and remand with directions that this case be remanded to the Office of Administrative Hearings for entry of an order dismissing the assessment.

Reversed and remanded.

Judges WELLS and LEWIS concur.

KENNETH F. MIZELL, PLAINTIFF v. GREENSBORO JAYCEES-GREENSBORO JUNIOR CHAMBER OF COMMERCE, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF v. CONEX PARTNERSHIP, A NORTH CAROLINA GENERAL PARTNERSHIP CONSISTING OF JACOB H. FROELICH, JR., J. HYATT HAMMOND, GEORGE W. LYLES, JR., AND ROBINSON O. EVERETT, THIRD-PARTY DEFENDANT

No. 9118SC242

(Filed 4 February 1992)

1. **Deeds § 59 (NCI4th)— first refusal—rule against perpetuities—void**

A right of first refusal was void and a conveyance to the third party defendant pursuant to that right was a repudiation of a purchase contract with plaintiff where the right of first refusal violated the rule against perpetuities because its reservation of right for 25 years extended beyond 21 years in gross.

Am Jur 2d, Perpetuities and Restraints on Alienation §§ 65, 85.

Pre-emption rights to realty as violation of rule against perpetuities or rule concerning restraints on alienation. 40 ALR3d 920.

2. **Specific Performance § 2 (NCI3d)— offer to purchase property—void right of first refusal exercised—earnest money returned—specific performance not waived**

Plaintiff did not waive his right to specific performance where he made an offer to purchase property and his tender of earnest money was accepted; the third party defendant exercised its right of first refusal; plaintiff accepted the return of his earnest money; and the right of first refusal was held to be in violation of the rule against perpetuities. Plaintiff did everything in his power to keep the contract alive, making it abundantly clear that he would remain ready to complete the contract. On remand, the trial court should order the third party to convey the property to plaintiff and plaintiff to pay the purchase price to the third party.

Am Jur 2d, Specific Performance §§ 97, 98.

3. Vendor and Purchaser § 10 (NCI3d)— right of first refusal void—purchased with knowledge of lis pendens—carrying costs denied

A third party defendant which purchased property pursuant to a void right of first refusal and which was ordered to convey the property to plaintiff was denied its claim for carrying costs because it admitted knowledge of the *lis pendens* filed by plaintiff.

Am Jur 2d, Lis Pendens §§ 10, 11, 21, 40.

APPEAL by plaintiff from a judgment entered 27 December 1990 by *Judge Samuel T. Currin* in GUILFORD County Superior Court. Heard in the Court of Appeals 4 December 1991.

Carruthers & Roth, P.A., by Richard L. Vanore and Barbara L. Curry, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and Gregory A. Stakias, for defendant and third-party plaintiff.

Hugh C. Bennett, Jr. for third-party defendant Conex Partnership.

LEWIS, Judge.

The facts are undisputed. On 1 October 1980, Southern Life Insurance Company conveyed land located at 332 South Greene Street (headquarters) in Greensboro, North Carolina to the defendants, the Jaycees and Junior Chamber of Commerce (Jaycees). The deed contained the following reservation of a right to Southern Life:

> If at any time prior to *the 25th anniversary of this conveyance* to the Grantee [Jaycees], the Grantee should receive a bona fide written offer from a third party to purchase the property herein conveyed, which offer Grantee desires to accept, the grantee shall first give to Grantor, [Southern Life], or its successor in title [Conex] to the remaining property adjoining the property herein conveyed, thirty (30) days' written notice of such offer. . . .

(Emphasis added). Conex Partnership became the successor-in-interest to Southern Life's right of first refusal in the headquarters.

On 13 February 1989, plaintiff, Kenneth Mizell, as a "third party" made an offer to purchase the headquarters for $220,000.00 subject to the right of first refusal in Conex. There is no evidence in the record or the briefs of Mr. Mizell or the Jaycees as to the exact words in this offer. However, Conex's brief excerpts the reference to the right of first refusal as follows: "This Contract is subject to the terms of that certain right of first refusal contained in the deed to Seller . . . which right of first refusal is now held by the adjacent property owner, Conex Partnership, as Successor-in-Title to Southern Life Insurance Company." The Jaycees entered into a written contract for the sale of the headquarters and accepted Mr. Mizell's tender of $10,000.00 earnest money.

Also on 13 February 1989, Conex received thirty days written notice of Mr. Mizell's offer. By letter dated 15 March 1989, Conex notified the Jaycees of its exercise of the right of first refusal and set 14 April as the closing date. Conex paid the Jaycees $10,000.00 in earnest money and executed a sales contract which provided the same terms and conditions as those contained in Mr. Mizell's contract. On 16 March 1989, the Jaycees notified Mr. Mizell that Conex had exercised its right of first refusal and returned his $10,000.00 earnest money deposit. Mr. Mizell notified the Jaycees that he would remain ready to purchase the headquarters if the deal with Conex was not consummated. The closing did not occur as scheduled. In exchange for the Jaycees' agreement to extend the closing date to 28 April 1989, Conex, by letter dated 14 April 1989, agreed to reimburse the Jaycees for their carrying costs. Closing was again delayed and did not occur until 30 May 1989.

On 26 May 1989, Mr. Mizell filed a breach of contract action against the Jaycees and requested specific performance. Mr. Mizell also filed notice of *lis pendens*. In oral argument before this Court, Conex admitted to knowledge of the *lis pendens* filing prior to closing. The Jaycees filed a third-party complaint against Conex. As the facts were not in dispute, all parties requested summary judgment. The trial court granted summary judgment in favor of Conex. Plaintiff appeals.

[1] Plaintiff's argument is two-fold; first, the right of first refusal retained by Southern Life violates the rule against perpetuities and is therefore void as a matter of law and second, Conex's right of first refusal expired when closing was not held within 30 days.

As we rule in plaintiff's favor based upon his first argument, we do not address the second.

Sometimes called a "right of first refusal," "[a] preemptive right 'requires that, before the property conveyed may be sold to another party, it must first be offered to the conveyor. . . .'" *Smith v. Mitchell*, 301 N.C. 58, 61, 269 S.E.2d 608, 610 (1980) (citation omitted). "Preemptive provisions may be contained in leases, (citation omitted), in contracts, (citation omitted), or . . . in restrictive covenants contained in deeds or *recorded in chains of title.*" *Id.* at 61, 269 S.E.2d at 611 (emphasis added). To be valid, preemptive provisions must be reasonable as to both duration and as to price. *Id.* at 66, 269 S.E.2d at 613. In *Smith*, our Supreme Court limited the "duration of the right [of first refusal] to a period within the rule against perpetuities. . . ." *Id.* The time limitation in the rule against perpetuities, i.e., a life in being plus 21 years, is shortened to 21 years "in gross" when no life in being is to be considered. *Rodin v. Merritt*, 48 N.C. App. 64, 67, 268 S.E.2d 539, 541 (1980), *disc. rev. denied*, 301 N.C. 402, 274 S.E.2d 226 (1980). The *Smith* Court determined that a price is reasonable if it somehow links "the price to the fair market value of the land, or to the price the seller is willing to take from third parties." *Smith*, at 66, 269 S.E.2d at 613.

In *Coxe v. Wyatt*, 83 N.C. App. 131, 349 S.E.2d 75 (1986), *disc. rev. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987), a vendor sold a tract of land (first tract) to purchaser and gave him a right of first refusal in a second tract. Vendor accepted an offer to purchase the second tract from defendant Wyatt which stated: "[t]his offer is subject to the right of first refusal, if effective, in favor of [purchaser] as found in Book. . . ." *Id.* at 132, 349 S.E.2d at 76. Vendor notified purchaser of Wyatt's offer and purchaser in turn notified vendor of its intent to exercise its right of first refusal to purchase the second tract.

Upon notification of purchaser's intent to exercise its right, Wyatt claimed that the right of first refusal was invalid and that vendor was contractually obligated to convey the property to Wyatt. When purchaser threatened suit, vendor filed a declaratory judgment action to determine the parties' legal rights in this property. Because purchaser's right of first refusal did not mention a time limit, the *Coxe* Court held that it violated the rule against perpetuities. Despite Wyatt's reference to the right of first refusal

"if effective," the Court found this language "insignificant because that right [was] *void as a matter of law.*" *Coxe*, 83 N.C. App. at 134, 349 S.E.2d at 78. Vendor's acceptance of Wyatt's signed written offer "created a valid and enforceable contract." *Id.* Despite purchaser's claims to the contrary, the *Coxe* Court found that vendor's letter notifying purchaser of Wyatt's offer did not constitute an "unconditional offer" to purchase independent of its right of first refusal. *Id.*

The case at bar takes *Coxe* one step further in time: the property in question changed hands prior to an adjudication of the parties' rights. Upon acceptance of the offer and the earnest money deposit, the Jaycees entered into a written contract with Mr. Mizell to purchase the headquarters. Like *Coxe*, a binding contract was formed at this point. The Jaycees only rightful means to avoid this Contract was to transfer the headquarters to Conex pursuant to a valid right of first refusal. Transfer pursuant to an invalid right of first refusal would be a repudiation and as such, the Jaycees would be liable to Mr. Mizell. The right of first refusal here, as in *Coxe*, violates the rule against perpetuities because Southern Life's reservation of right for 25 years extends beyond 21 years in gross. As such, this reservation of right is void and the Jaycees' conveyance pursuant to this right is, therefore, a repudiation of the Contract with Mr. Mizell. As in *Coxe*, Mr. Mizell's offer's reference to the right of first refusal is insignificant, as the right was void as a matter of law. Hence, Mr. Mizell has the superior claim to purchase the headquarters.

[2] The singular difference between *Coxe* and the case at bar is that Mr. Mizell voluntarily accepted the return of his earnest money without first stating his claim that the right of first refusal was void. Our review of the *Coxe* briefs and record does not reveal any mention of a preclosing exchange of funds. This difference leaves the unanswered question: did the voluntary acceptance of the return of his earnest money deposit cause Mr. Mizell to waive his claim to assert an otherwise valid and binding contract with the Jaycees?

Earnest money is "[a] sum of money paid by a buyer at the time of entering a contract to indicate the intention and ability of the buyer to carry out the contract." Black's Law Dictionary 456 (5th ed. 1979). Our Supreme Court defined earnest money as "part payment of the purchase price of the property." *Davis v.*

Martin, 146 N.C. 281, 282, 59 S.E. 700 (1907). "It is a term taken from the civil law, and was more generally used in connection with the sales of personalty to 'bind the bargain.' " *Id.* Earnest money is not the consideration upon which the contract of sale is predicated. The only consideration necessary is the contract price. *Crotts v. Thomas*, 226 N.C. 385, 387, 38 S.E.2d 158, 160 (1946). Hence, the tender and acceptance of earnest money is neither the foundation nor an essential element of a contract to purchase land. Its tender is merely a tangible symbol of good faith.

Defendant argues that the converse of tender, the voluntary acceptance of the return of the earnest money, caused Mr. Mizell to waive his right to assert the contract. We disagree. Plaintiff asserts the contract and seeks specific performance. Specific performance is used to compel a party to meet his contractual obligations; it is not used to rewrite a contract or to create new contractual duties. 12 N.C. Index 3d, *Specific Performance* § 1 (1978); *See, McLean v. Keith*, 236 N.C. 59, 72 S.E.2d 44 (1952). In order to seek specific performance, plaintiff must show a valid contract and his offer to perform. *Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 604, 194 S.E.2d 133, 146 (1973) (citations omitted). Plaintiff's offer to perform does not have to be shown where defendant refused to honor or repudiates the contract. *See, Peaseley v. Virginia Iron, Coal & Coke Co.*, 282 N.C. 585, 604, 194 S.E.2d 133, 146 (1973) (citation omitted).

Waiver of the right to seek specific performance of a contract requires: 1) abandonment of the contract, 2) acquiescence in breach of the contract, or 3) conduct inconsistent with specific performance. 81 C.J.S. *Specific Performance* § 25 (1977). The right to seek specific performance is waived for "[l]ong delay, accompanied by acts inconsistent with the purpose of seeking specific performance." 12 N.C. Index 3d, *Specific Performance* § 2 (1978); *Ritter v. Chandler*, 214 N.C. 703, 200 S.E. 398 (1939). "As long as plaintiff is able, ready, and willing to perform the conditions of the contract remaining to be performed, he will not be barred from relief by specific performance where his failure fully to perform is excused." 81 C.J.S. *Specific Performance* § 111 (1977).

Mr. Mizell did not waive his right to specific performance. We do not find that acceptance of the return of earnest money was conduct inconsistent with specific performance. Mr. Mizell did everything in his power to keep the contract alive. He made it

abundantly clear to the Jaycees that he would remain ready to complete the contract if the deal fell through with Conex. In oral arguments, all conceded that Mr. Mizell made known his intention to remain "able, ready, and willing to perform" the contract. Hence, Mr. Mizell is entitled to specific performance despite his accepting the return of his earnest money. It appears from the record that in doing so, Mr. Mizell acted in good faith, without delay, and thus the return of his earnest money did not waive his right to specific performance of the contract with the Jaycees.

We note that "[w]here the court orders specific performance of a contract to convey land which has been conveyed by the vendor to, and paid for by, a third person, the judgment should not declare the third person's deed void and direct payment of the purchase money to the vendor but should require a conveyance by the third person and entitle him to the purchase money." 12 N.C. Index 3d, *Specific Performance* § 1; *See, Lawing v. Jaynes*, 20 N.C. App. 528, 202 S.E.2d 334, (1974), *modified on other grounds*, 285 N.C. 418, 206 S.E.2d 162 (1974). On remand, the trial court should order Conex to convey the headquarters to Mr. Mizell in accord with *Lawing* and Mr. Mizell is ordered to pay the purchase price of $220,000.00 to Conex.

[3] Conex argues that it should be awarded its costs of carrying the property in question. "Where a third party buys from [vendor] with *actual* notice or knowledge of the suit, and its nature and purpose, and the specific property to be affected, he takes title burdened with the same obligations as his grantors." *Lawing*, at 538, 202 S.E.2d at 341. As Conex admitted to knowledge of the *lis pendens* filed by Mr. Mizell prior to closing on the headquarters, the claim for carrying costs is denied.

Reversed and remanded.

Judges WELLS and ORR concur.

FASIH A. SHAIKH AND WIFE, MEHBOOB J. SHAIKH, PLAINTIFFS v. WALTER BRODIE BURWELL, JR., DEFENDANT

No. 9110SC169

(Filed 4 February 1992)

1. **Mortgages and Deeds of Trust § 33.1 (NCI3d)— foreclosure on junior lien—agreement with trustee to discharge senior lien—no surplus**

Summary judgment should have been granted for defendant trustee, rather than for plaintiffs, in an action in which plaintiffs sought funds from a foreclosure on a junior lien which were allegedly surplus to the satisfaction of the junior lien. The purchasers and defendant trustee had agreed that the purchase price would include a sum to be paid in discharge of the senior lien so that clear title would pass to the purchasers. A trustee may only sell the interest conveyed to him, and a trustee foreclosing upon a junior deed of trust must sell subject to all prior liens, absent special circumstances, which were present here.

Am Jur 2d, Mortgages §§ 796, 930, 931.

2. **Mortgages and Deeds of Trust § 36 (NCI3d)— foreclosure—acceptance of benefit—right to attack waived**

The trial court erred in granting summary judgment for plaintiffs in an action to recover allegedly surplus funds from the foreclosure of a junior lien where plaintiffs had requested a "notice of satisfaction" from the senior lienholder and had objected when defendant trustee filed a motion to set aside the foreclosure sale. When the mortgagor has received the benefit of the surplus derived from a foreclosure sale, the mortgagor waives the right to attack the foreclosure.

Am Jur 2d, Mortgages §§ 3, 930.

APPEAL by defendant from judgment entered 3 December 1990 by *Judge Henry V. Barnette, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 13 November 1991.

Walter Brodie Burwell, Jr. (defendant) appeals the granting of summary judgment in favor of Fasih A. Shaikh and Mehboob J. Shaikh (plaintiffs) in a suit arising out of the foreclosure and sale of plaintiffs' property under a deed of trust.

On 15 May 1985, plaintiffs purchased property located in Cary, North Carolina (Cary property) from Mr. and Mrs. Rury Lyles (Lyles). In order to fund this purchase, plaintiffs arranged financing with both the Lyles and Mortgage Corporation of the South (Mortgage Corporation). The Mortgage Corporation obtained a first deed of trust on the Cary property and the Lyles obtained a deed of trust on other property owned by plaintiffs. Defendant was the trustee named in the Lyles' deed of trust. Mortgage Corporation assigned the first deed of trust to BancBoston Mortgage Corporation (BancBoston). The Lyles and plaintiffs later substituted the Cary property for the existing property in the Lyles' deed of trust, thereby giving the Lyles a lien on the Cary property junior to BancBoston's first deed of trust.

Plaintiffs defaulted on their obligation to the Lyles, and defendant was instructed to foreclose upon the junior deed of trust. Plaintiffs were notified that the Lyles were pursuing foreclosure and the Clerk authorized defendant to proceed. Defendant published a notice of sale which stated the Cary property would be sold subject to any and all superior liens.

Prior to conducting the foreclosure sale, the Lyles told defendant they desired to buy the Cary property free and clear of all liens. Upon inquiry, defendant learned that the BancBoston note was also in default. Accordingly, defendant advised the Lyles that in order to purchase the property free and clear of all liens, the Lyles should make a bid at the sale which would include the amount owing on the BancBoston note plus the costs of foreclosure.

At the sale, defendant announced that the Cary property was being sold free of all liens. The Lyles bid $162,000 for the property and were the only bidders. Of this amount, $65,117.29 was used to pay the Lyles' note secured by the junior deed of trust, $87,889.71 was used to pay BancBoston's note secured by the senior deed of trust, the balance was used to pay commissions and costs, and all liens were satisfied.

After the sale was confirmed, plaintiffs filed the present action seeking to recover the $87,889.71 paid to BancBoston, alleging that these funds were "surplus" from the foreclosure sale. After filing this action, plaintiffs' attorney contacted BancBoston and requested a "notice of satisfaction" since all parties agreed the $87,889.71 debt had been discharged. BancBoston notified plaintiffs that the debt had been paid in full.

Both parties filed motions for summary judgment. On 3 December 1990, the Superior Court denied defendant's motion and granted plaintiffs' summary judgment. The judgment ordered defendant to pay plaintiffs $87,889.71, plus prejudgment interest. Defendant appeals this judgment.

Yeargan, Thompson & Mitchiner, by W. Hugh Thompson, for plaintiff appellees.

Bailey & Dixon, by Gary S. Parsons, Dorothy V. Kibler, and Rodney B. Davis, for defendant appellant.

WALKER, Judge.

On appeal, defendant contends the trial court erred in denying his motion for summary judgment and in granting plaintiffs' motion for summary judgment. Defendant asserts his motion for summary judgment should have been allowed for two reasons. First, the agreement between defendant and the Lyles allowed defendant to use the proceeds from the sale to discharge the senior Banc-Boston lien. Second, plaintiffs by their actions ratified the use of the proceeds to pay off the senior lien and therefore cannot maintain an action against defendant for $87,889.71 as being "surplus." We find merit in these contentions.

[1] In North Carolina, absent special circumstances, a trustee foreclosing upon a junior deed of trust must sell subject to all prior liens. *Staunton Military Academy, Inc. v. Dockery*, 244 N.C. 427, 94 S.E.2d 354 (1956); *Brett v. Davenport*, 151 N.C. 56, 65 S.E. 611 (1909). The proceeds, after payment of costs of sale and the debt secured by the junior deed of trust, must be applied to any other outstanding junior liens and any surplus remaining thereafter is to be paid to the mortgagor as owner of the equity of redemption. *Id.; Bobbitt v. Stanton*, 120 N.C. 253, 26 S.E. 817 (1897).

The justification for this rule is apparent. A trustee may only sell the interest conveyed to him. *Brett v. Davenport, supra.* If the trustee is only foreclosing on the junior deed of trust, the senior lien continues with the property and the trustee must sell subject to the senior lien. *Staunton Military Academy, Inc. v. Dockery, supra.* Therefore, the purchaser at the foreclosure sale of a junior lien purchases the property subject to senior liens. *Bobbitt v. Stanton, supra.* However, in *Brett* and *Staunton Military*

Academy, the Court recognized there may be a different result if "special circumstances" exist.

In *Merchants Bank & Trust Co. v. Watson*, 187 N.C. 107, 121 S.E. 181 (1924), a trustee foreclosed on a deed of trust which was junior to the City of Winston-Salem's tax assessment. Merchants Bank, the purchaser at the sale, paid a price which it intended would cover the City's senior lien. However, Merchants Bank failed to advise the trustee that the purchase price was to be applied to the discharge of prior liens. Instead of using the money to pay off the tax lien, the trustee paid the money to the mortgagor's estate since he thought the money constituted surplus. Merchant's Bank brought suit against the trustee, claiming the money paid to the mortgagor's estate should have been used to pay off the senior lien. The trial court found that Merchant's Bank, and not the trustee, was obligated to pay the senior lien. The Supreme Court upheld the trial court's decision but remarked:

> If he [Merchants Bank's agent] at the time of the sale had had an understanding and agreement, and it was so announced at the sale by [the] trustee that the highest bidder was to get a clear title, free from encumbrances, and he bid . . . with that understanding and agreement with the [trustee], then there would be no doubt that . . . the trustee would have to pay off the liens, including the [senior lien].

Id. at 111, 121 S.E. at 183.

The Supreme Court of Virginia has had the opportunity to pass upon a question very similar to that presented in the present case. In *Kaplin v. Ruffin*, 213 Va. 551, 193 S.E.2d 689 (1973), the trustee foreclosed upon a second deed of trust. Pursuant to an agreement between the trustee and the purchaser, the proceeds from the sale were used to discharge the senior deed of trust so that the purchaser would receive the property free of all prior liens. After the sale, a junior lienholder filed suit, asserting that it was entitled to the proceeds from the sale above the amount required to pay off the second deed of trust. In denying the junior lienholder relief, the Court held that where the terms of the agreement were fully disclosed at the sale, a trustee could, at his own risk, agree to sell the property free of all senior liens. However, the risk which the trustee takes does not concern his liability to the junior lienholder. Therefore, in *Merchant's Bank* and *Kaplin* the Courts indicate they would approve an agreement between

the trustee and the purchaser at foreclosure, whereby the trustee would pay off senior liens from the proceeds of the sale.

In this case, defendant and the Lyles agreed that the purchase price would include the sum of $87,889.71 to be paid to BancBoston in order to discharge its senior lien and thus pass title free and clear to the purchaser. The Lyles then bid $162,000 for the property and after paying both liens and the cost of sale, there were no surplus funds available for plaintiffs. A trustee has substantial discretion in discharging his responsibilities which include attempting to satisfy the debt while obtaining the highest price for the property and protecting the mortgagor's rights and equity. *Sprouse v. North River Insurance Co.*, 81 N.C.App. 311, 323, 344 S.E.2d 555, 563-564, *disc. review denied*, 318 N.C. 284, 348 S.E.2d 344 (1986). So long as the trustee does not violate the fiduciary responsibilities of his office, and does not give an unfair advantage to any party, his exercise of discretion is not reviewable by the courts. *Id.*

In the present case, in determining whether defendant abused his discretion as trustee, we must look at all of the circumstances of this foreclosure. *First*, defendant notified plaintiffs of the foreclosure sale under the junior deed of trust. *Second*, the note secured by the first deed of trust in favor of BancBoston was also in default and this was ascertained by defendant prior to the foreclosure sale. *Third*, defendant and the Lyles had an agreement that the purchase price would include the amount necessary to discharge the senior BancBoston lien. *Fourth*, the only evidence in the record shows the purchase price of $162,000 exceeded the fair market value of the property at the time of foreclosure. *Fifth*, there has been no showing by plaintiffs that they or anyone else would have upset this bid if given the opportunity. *Sixth*, all of plaintiffs' obligations were satisfied from the proceeds of the sale and neither the junior lienholder nor the senior lienholder had any right of deficiency against plaintiffs. We believe the foregoing bring this case within the "special circumstances" referred to in *Brett* and *Staunton Military Academy* and that the defendant therefore did not abuse his discretion. The procedures used by defendant should not invalidate this sale or permit plaintiffs to realize a "windfall" since no surplus existed.

[2] Defendant further contends plaintiffs accepted the benefits of defendant's acts and thereby ratified his payment of BancBoston's

lien. When plaintiffs learned that some of the proceeds of the sale had been used to satisfy their indebtedness to BancBoston, they verified this and requested BancBoston to execute a "notice of satisfaction" so that payment of plaintiffs' debt could be recorded. Further, when defendant filed a motion to set aside the foreclosure sale to the Lyles, plaintiffs objected. When the mortgagor has received the benefit of the surplus derived from a foreclosure sale, the mortgagor waives the right to attack the foreclosure. *Flake v. High Point Perpetual Building and Loan Association*, 204 N.C. 650, 169 S.E.2d 223 (1933); *Leonard v. Pell*, 56 N.C.App. 405, 289 S.E.2d 140 (1982). This Court has previously held that when a mortgagor endorses the surplus check and uses the proceeds to satisfy other debts, the mortgagor has ratified the sale. *Leonard v. Pell, supra.* Once ratified, the mortgagor may not sue the trustee for wrongfully conducting the sale. *Id.*

We agree with defendant that plaintiffs' actions indicate their approval of defendant's application of the proceeds to satisfy their BancBoston debt. Since defendant did not abuse his discretion and plaintiffs ratified the sale, plaintiffs cannot maintain this action against the trustee to recover surplus sale proceeds. Accordingly, summary judgment was improperly granted for plaintiffs. On the basis of the materials presented to the trial court and in the record before us, there is no genuine issue as to any material fact and defendant's motion for summary judgment should have been granted. For the foregoing reasons, the trial court erred in granting summary judgment for the plaintiffs and the case is remanded for action consistent with this opinion.

Reversed and remanded.

Judges WELLS and LEWIS concur.

DALE G. VANDERVOORT, PLAINTIFF v. CAMERON McKENZIE AND WIFE, CARMEN ANNA McKENZIE; GATEWAY MOUNTAIN PROPERTY OWNERS ASSOCIATION, AN UNINCORPORATED ASSOCIATION; BETTY GILLIAM; ESTATE OF JAMES EMORY VESS; JOHNSON, PRICE & SPRINKLE, ESCROW; CHERYL KIRKLAND; AND DORIS HARRISON, DEFENDANTS

No. 9129SC115

(Filed 4 February 1992)

1. **Courts § 84 (NCI4th)— summary judgment denied—motion by defendants added thereafter**

Additional defendants who were added to the action after the trial court denied the original defendants' motion for summary judgment were not bound by the trial court's earlier ruling and were entitled to a ruling on their summary judgment motion.

Am Jur 2d, Summary Judgment § 12.

2. **Easements § 32 (NCI4th)— prescriptive easement—permissive use**

Plaintiff's forecast of evidence was insufficient to establish a prescriptive easement in a roadway because his evidence showed that his use of the roadway was permissive rather than adverse where plaintiff's action in approaching the owner of the servient estate about maintenance of the roadway and placement of a gate across the roadway amounted to his asking the owner for permission; plaintiff admitted in his deposition that he told the owner of the servient estate that he was going to maintain the roadway for both plaintiff's benefit as well as the owner's benefit; and plaintiff made sure that members of the family of the owner of the land on which the gate was placed had keys to the lock on the gate.

Am Jur 2d, Easements and Licenses §§ 51, 54.

3. **Courts § 84 (NCI4th)— summary judgment denied—ruling on second motion by another judge inappropriate**

It was error for a superior court judge to determine one defendant's second motion for summary judgment where another superior court judge had denied a prior motion for summary judgment on identical issues by this same defendant even though

materials presented to the court on the second motion were different from those at the hearing on the first motion.

Am Jur 2d, Courts §§ 128, 130; Summary Judgment § 12.

APPEAL by plaintiff from order entered 2 October 1990 by *Judge James J. Booker* in MCDOWELL County Superior Court. Heard in the Court of Appeals 6 November 1991.

On 5 June 1987 plaintiff filed this action against Cameron McKenzie and Gateway Mountain Property Owners Association to establish "an easement of right of way by prescription" over defendants' land. Defendants filed an answer and moved for summary judgment. On 25 April 1988 Judge Bruce Briggs denied defendants' motion for summary judgment. Defendants then made a motion to dismiss for failure to join necessary parties. On 8 September 1988 the trial court ordered the plaintiff to file an amended complaint to bring in the additional necessary parties. Plaintiff filed an amended complaint on 5 October 1988 naming as additional defendants Carmen Anna McKenzie; Betty S. Gilliam; Emory Vess; Johnson, Price & Sprinkle, P.A.; Cheryl Kirkland; and Doris Harrison.

On 21 March 1989, the Clerk of the Superior Court of McDowell County entered default judgment against defendants Gilliam, Vess, and Gateway Mountain Property Owners Association. The trial court granted defendant estate of Vess' motion to allow answer but denied the motions of Gateway Mountain Property Owners Association and Betty S. Gilliam. Gateway Mountain Property Owners Association and Betty S. Gilliam appealed the entry of default to this Court. A reading of these opinions indicates that we dismissed these appeals in *Vandervoort v. McKenzie*, 98 N.C. App. 157, 391 S.E.2d 225 (1990) (unpublished opinions). Judge James J. Booker granted defendants' motion for summary judgment by an order entered on 2 October 1990. Plaintiff appeals from this order.

Carnes & Franklin, P.A., by Everette C. Carnes, for the plaintiff-appellant.

Robert E. Dungan, P.C., by Robert E. Dungan and Michael E. Smith, for the defendant-appellees.

EAGLES, Judge.

On appeal plaintiff contends that the trial court erred in granting defendants' motion for summary judgment "when a prior motion

on identical legal issues had been denied by another superior court judge." We agree in part and reverse the trial court's entry of summary judgment as to defendant Cameron McKenzie. We affirm the trial court's order as to the remaining defendants—Estate of Emory Vess; Doris Harrison; Johnson, Price & Sprinkle, P.A.; Cheryl Kirkland; and Carmen Anna McKenzie.

[1] This Court has said that "a motion for summary judgment denied by one superior court judge may not be allowed by another superior court judge on identical legal issues." *American Travel Corp. v. Central Carolina Bank & Trust Co.*, 57 N.C. App. 437, 440, 291 S.E.2d 892, 894, *disc. review denied*, 306 N.C. 555, 294 S.E.2d 369 (1982). Here, on 25 April 1988 the trial court denied a motion for summary judgment on behalf of defendant Cameron McKenzie and defendant Gateway Mountain Property Owners Association. Plaintiff then filed an amended complaint naming additional defendants. Rule 56(b) provides: "A party against whom a claim . . . is asserted . . . may, at any time, move with or without supporting affidavits for a summary judgment in his favor as to all or any part thereof." These additional defendants were not before the trial court when the first motion for summary judgment was denied on 25 April 1988. Accordingly, they were entitled to a ruling on summary judgment and cannot be prejudiced by the trial court's earlier ruling against defendant Cameron McKenzie and defendant Gateway Mountain Property Owners Association.

"Ordinarily 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." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). Here, before the second motion for summary judgment the parties provided the court with additional evidence, not available to the court on the first motion, that established defendants' right to judgment as a matter of law.

[2] To establish a prescriptive easement, the plaintiff must show the following:

> (1) that the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for at least twenty years; and

(4) that there is substantial identity of the easement claimed throughout the twenty-year period.

P. Hetrick & J. McLaughlin, Webster's Real Estate Law in North Carolina § 318 (1988). In his complaint plaintiff alleged that his use of the easement was adverse to the owners of the servient estates. However, plaintiff's deposition, taken after the denial of defendants' first motion for summary judgment, reveals that plaintiff's use of the roadway was permissive. Plaintiff testified as follows:

Q. Did you ever talk to Mr. Miller about using the road in access?

A. I didn't—didn't talk to him about using it. I just told him I was going to keep it maintained for his benefit and mine, and I did.

Q. What did he respond to that?

A. He said, "That's fine." He's using the road too. He had just cut timber on it before I bought it, and he'd been using it.

Q. When did Mr. Miller first give you permission to use the road?

A. I didn't get permission from Mr. Miller to use the road.

Q. What you just said, you told him and he said it would be fine.

A. I told him I was going to keep the road maintained, and he said, "That's fine with me."

Q. Did you tell him you were going to use the road?

A. Why would I be maintaining it? Of course I'm going to maintain the road to use it.

Q. What did he say when you told him you were going to use it?

A. "That's fine."

Q. He said, "That's fine."

A. Right.

Later in his deposition, plaintiff testified:

A. I told [one of the members of the White family] I wanted to put a gate up on that road. After I had gotten that road maintained real well, I wanted to put a gate up, and I had to put it on their property, and would that be any problem for him, and he said no. I put the gate up, and I sent them

keys. On several occasions, people would shoot the lock off. I'd put new locks on, and then I'd send them keys again. Every time I changed the lock, we sent them a set of keys.

Q. Could you show on a map where the gate was?

A. Sure. Well, I could—I can take you out there on the property and show you. If you had the right kind of map, I could show you. I put it just up above where the road turned off to go to Noey Vess's property, because I couldn't block Noey Vess from getting to his property on that road.

Q. When you told the Whites that you were going to put a gate at that location, why did you say you were going to put the gate up?

A. Because I had gotten the road in such good shape that you could take a car all the way to the top of that mountain, and a lot of people were starting to use it, and going there, and I thought that we needed to have some protection.

Q. So how did the White that you spoke with respond to that?

A. "That's fine." I said, "I'll send you keys." He said, "That's great."

It is true that evidence of repairing or maintaining a roadway is evidence of intention to claim and use the land as one's own. See, e.g., *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981). However, in his deposition plaintiff admitted that he told the owner of the servient estate that he was going to keep the road maintained for both plaintiff's benefit as well as the owner's benefit. He also made sure that the Whites had keys to the gate that blocked the road. For a use to be adverse, it "must be with the intent to hold to the exclusion of others." P. Hetrick & J. McLaughlin, Webster's Real Estate Law in North Carolina § 319 (1988). Plaintiff clearly admitted that he did not intend to hold the easement to the exclusion of others. Also plaintiff's action in approaching the owner of the servient estate about the maintenance of the roadway and building the gate amounts to his asking the owner for permission. "Entitlement to an easement by prescription is restricted because a landowner's 'merely neighborly act' of allowing someone to pass over his property may ultimately operate to deprive the owner of his land. For this reason, mere use alone is presumed to be permissive, and, unless that presumption is rebutted, the

use will not ripen into a prescriptive easement." *Johnson v. Stanley*, 96 N.C. App. 72, 74, 384 S.E.2d 577, 579 (1989) (citation omitted). Here, plaintiff has not presented sufficient evidence to overcome the presumption that his use was permissive and the trial court appropriately granted the additional defendants' motion for summary judgment.

[3] As to defendant Cameron McKenzie, we hold that the trial court erred in granting summary judgment in his favor because we are bound by this Court's holding in *Carr v. Great Lakes Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *disc. review denied*, 302 N.C. 217, 276 S.E.2d 914 (1981). In *Carr* this Court held that it was error for a superior court judge to determine defendant's second motion for summary judgment where another superior court judge had denied defendant's first motion, even though the materials presented at the second motion differed from those at the hearing on the first motion.

For the reasons stated, the order of the superior court is affirmed in part and reversed in part.

Affirmed in part; reversed in part.

Judges JOHNSON and ORR concur.

PHILLIP C. WIGGINS, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT

No. 918SC52

(Filed 4 February 1992)

State § 12 (NCI3d)— dismissal of Caswell Center employee—no just cause

Respondent did not have just cause to terminate petitioner's employment as a health care technician at the Caswell Center where petitioner became upset when a charge nurse informed him that the bathing procedure for the Caswell Center residents had been changed; petitioner became angry and argued with the charge nurse while questioning her about the reason for the change; when the charge nurse became upset and began

to cry, petitioner apologized and controlled his behavior; petitioner did not refuse to bathe his patients on the day in question; there was no indication that the incident caused a serious disruption of the normal operations of his work unit which affected the residents and employees of the unit; and defendant's questioning of the change in procedure did not rise to the level of insubordination.

Am Jur 2d, Civil Service § 63.

APPEAL by respondent from order entered 31 October 1990 in LENOIR County Superior Court by *Judge Robert H. Hobgood.* Heard in the Court of Appeals 15 October 1991.

Petitioner was employed as a developmental health care technician at the Caswell Center in Kinston, North Carolina. At the time this action arose, he had been employed at the Center for 11 years. Petitioner worked in the Dewey unit which is a geriatric unit with 18 residents aged 50 to 90 years old. The residents are moderately to severely retarded and most have been institutionalized for a long time.

In April 1985, petitioner was having delusions—hearing and seeing things that were not real. On 22 April 1985, petitioner was placed on mandatory medical leave. He was committed to Cherry Mental Hospital due to his behavior. Petitioner was diagnosed as having a permanent schizophrenic disorder which can be controlled by medication. The administrator of petitioner's unit first became aware of petitioner's illness at this time.

Petitioner returned to work in May 1985. He continued to work from May through October without incident. In late October, petitioner began to exhibit behavior similar to his behavior during the preceding April. Once again, he was placed on mandatory medical leave for two weeks. In November, his mandatory medical leave was extended. The administrator contacted a nurse from the County Mental Health Clinic who had counseled petitioner after his mandatory leave in April. At this time, the administrator learned petitioner required continuing treatment. Consequently, the administrator made petitioner's opportunity to return to work contingent upon his cooperating with a treatment plan. Petitioner agreed and returned to work in December 1985.

On 15 February 1986, petitioner was involved in an incident which resulted in his dismissal. Upon arriving at work, the unit

charge nurse informed petitioner that the bathing procedure for the residents had been changed without notice. Starting that day, the technicians would have to bathe all patients by 7:00 p.m. The change in procedure upset the petitioner. Prior to the change, there was no set time limit; technicians had to bathe the residents prior to the end of their shift at 11:00 p.m. Many residents had numerous bowel accidents during the shift. Consequently, the technicians preferred to bathe the residents as late in their shifts as possible in order to avoid having to bathe the residents several times during their shift. Petitioner requested the charge nurse to explain why the change was made so he would understand and could explain it to the technicians whom he supervised. The charge nurse said the change was made to assure the bathing was done. Petitioner then became angry and continued to question the charge nurse who became upset and began to cry. Petitioner also tried, albeit unsuccessfully, to contact the nurse coordinator with regard to the bathing procedure change. When petitioner saw that the charge nurse had begun to cry, he apologized and controlled his behavior. This, and the April incident, were the only times the charge nurse had had a problem with petitioner during his 3 years of employment at the Dewey unit.

As a result of this incident, the administrator suspended petitioner pending an investigation of his alleged insubordinate behavior. On 26 February 1986, petitioner was dismissed for reasons of personal misconduct.

Petitioner followed proper administrative procedure to obtain review of his dismissal. After a hearing, the Administrative Law Judge (hereinafter "ALJ") submitted a recommended decision to the State Personnel Commission (hereinafter "Commission") in which she concluded petitioner should be reinstated by the Commission. She also concluded the Commission should order the petitioner to be examined by a psychiatrist to determine his ability to resume employment, and arrange for determination of petitioner's disability eligibility if it was determined he was incapable of returning to work. Furthermore, she recommended respondent be ordered to investigate the reasonable accommodations which would allow petitioner to satisfactorily perform his job for as long as possible.

The Commission adopted the findings of fact as found by the ALJ but refused to adopt her recommended decision. Instead, the Commission concluded respondent had just cause to dismiss peti-

tioner and respondent's decision to terminate petitioner's employment was not based on an impermissible consideration of his illness.

Petitioner filed a petition for judicial review with the Superior Court of Lenoir County. The trial court reversed the decision of the Commission. In pertinent part, the trial court held that the findings of fact did not support the Commission's conclusion that respondent had just cause to terminate petitioner's employment. Further, the trial judge adopted the recommended decision of the ALJ in that he incorporated the same conditions for petitioner's reinstatement as were specified by the ALJ. Respondent appeals from that order.

Paul L. Jones for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David M. Parker, for respondent-appellant.

WELLS, Judge.

As his first assignment of error, respondent contends the trial court erred in concluding the findings of fact did not support the Commission's conclusion that petitioner was dismissed for just cause. We find no merit to this assignment.

A reviewing court may modify or reverse the agency's decision if the substantial rights of the petitioner may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

(4) Affected by other error of law;

(5) Unsupported by substantial evidence. . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1991). In the petition for judicial review, petitioner alleged, among other things, that respondent had "failed to provide sufficient evidence to overcome its burden of proof to support petitioner's dismissal." Petitioner further contended the Commission erred in concluding respondent had just cause to terminate his employment. If it is alleged on appeal that the agency's findings, conclusions, or decisions are unsupported by substantial evidence or that they are arbitrary or capricious, then the proper standard of review is the whole record test. *Brooks, Com'r of Labor*

v. Rebarco, Inc., 91 N.C. App. 459, 372 S.E.2d 342 (1988). Our review of a final agency decision is limited to the question of whether the trial court failed to properly apply the review standard set forth in N.C. Gen. Stat. § 150B-51 (1991). *In re Kozy*, 91 N.C. App. 342, 371 S.E.2d 778 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). Thus, the question on appeal is whether the trial court properly applied the whole record test in this case.

The Commission adopted the findings of fact contained in the recommended decision of the ALJ. If, at the superior court level, the party appealing to this Court did not object to the findings of fact adopted by the Commission, those findings are binding on the superior court and binding for purposes of our review. *Walker v. N.C. Dept. of Human Resources*, 100 N.C. App. 498, 397 S.E.2d 350 (1990), *cert. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). The respondent did not note any objection or exception to those findings at the superior court level. Therefore, the findings of fact, as found by the ALJ and adopted by the Commission, were binding on the trial court and constitute the whole record. *Id.* Thus, the trial court had to determine whether those findings reflected substantial evidence to support the Commission's conclusion that respondent had just cause to terminate petitioner's employment.

A permanent employee, subject to the State Personnel Act, can only be discharged for just cause. N.C. Gen. Stat. § 126-35(a) (1991). The statute does not define "just cause" but the words are to be given their ordinary meaning. *Reed v. Byrd*, 41 N.C. App. 625, 255 S.E.2d 606 (1979). Petitioner was dismissed for "personal conduct including insubordination, conduct unbecoming to a state employee, failure to maintain a satisfactory and harmonious relationship with employees, and serious disruption of the normal operations of [his] work unit, affecting both the residents and employees of the unit." We find the facts adopted by the Commission do not reflect substantial evidence to support the Commission's conclusion that "petitioner's behavior constituted personal conduct and in fact was just cause for his dismissal."

Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion and is more than a scintilla or a permissible inference. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). (Citations omitted). The findings indicate that petitioner was not insubordinate. He did not refuse to bathe his patients and in fact did bathe his

patients on the day in question. Furthermore, there was no indication the incident caused a serious disruption of the normal operations of his work unit which affected both the residents and employees of the unit. The findings reflect petitioner was not abusive. He did nothing to harm the residents. His questioning the change in procedure did not rise to the level of insubordination. Further, every other staff member also questioned the change. Although petitioner's anger did not fit the circumstance and he briefly argued with the charge nurse, he subsequently apologized for upsetting her. The argument between petitioner and the charge nurse lasted about 5 minutes and the entire incident only lasted for approximately one hour. Based on the findings in the record before us, we conclude that the trial court properly concluded the findings did not adequately support the Commission's conclusion that respondent had just cause to dismiss petitioner.

We have carefully reviewed respondent's other two assignments of error and find them to be without merit.

Affirmed.

Judges PARKER and WYNN concur.

JACKIE C. RUTLEDGE, PLAINTIFF EMPLOYEE v. STROH COMPANIES, DEFENDANT EMPLOYER AND STANDARD FIRE INSURANCE COMPANY, CARRIER; DEFENDANT(S)

No. 9110IC298

(Filed 4 February 1992)

Master and Servant § 91 (NCI3d)— workers' compensation—time for filing claim—wage earning capability

The Industrial Commission erred in a workers' compensation action by dismissing plaintiff's claim, filed on 7 April 1988, as barred by the statute of limitations in N.C.G.S. § 97-58(c). Although plaintiff's respiratory difficulties began in 1977 and his doctor notified defendant in 1982 that plaintiff was allergic to chemical contaminants when he worked in the canning line, plaintiff was not forced to stop work of any kind because of hyperreactive airways disease until he became seriously

ill in January and February 1988. Since plaintiff was still capable of earning the wages he had received in the past, albeit in a different environment, plaintiff was not incapable of earning the wages he had received at the time of the onset of his illness and therefore the running of the statute of limitations was not triggered.

Am Jur 2d, Workmen's Compensation §§ 482, 486, 487, 491.

APPEAL by plaintiff from the North Carolina Industrial Commission. Opinion and Award entered 9 January 1991. Heard in the Court of Appeals 13 January 1992.

This is a civil action wherein plaintiff is seeking benefits pursuant to the Worker's Compensation Act. The facts are summarized as follows: Plaintiff was employed for fourteen years at the Stroh Container Division of Stroh Brewery in Winston-Salem, North Carolina. Plaintiff's duties included rebuilding and repairing machinery with noxious chemical solvents which gave off strong fumes. Evidence shows that beginning in 1977, plaintiff was admitted to the emergency room at Forsyth Memorial Hospital on several occasions for respiratory difficulties. Plaintiff sought treatment from his family doctor, who referred him to Dr. William McCall, Jr., a specialist in internal medicine and allergen immunology.

On 1 September 1982, Dr. McCall wrote Jerry Hodges, an assistant industrial relations manager, regarding plaintiff's condition. The letter explained that McCall saw plaintiff on 26 August 1982 for a recurrence of his previous acute bronchospasm secondary to chemical exposures on the job. The letter advised that plaintiff was allergic to chemical contaminants when he worked in the canning line and was exposed to lacquer sprays and varnish. McCall indicated that plaintiff could not safely work in that area and recommended that he be kept out of that area.

Defendant Stroh responded by providing plaintiff a work area away from the canning line; however, absenteeism and employee shortages caused defendant to return plaintiff to the canning line. As a result, plaintiff's respiratory difficulties recurred from time to time, requiring further emergency room treatment and/or hospitalization. Plaintiff's breathing problems substantially worsened during January and February 1988.

On 7 April 1988, plaintiff filed a Form 18 seeking worker's compensation benefits alleging permanent and total disability as a result of an occupational disease. Thereafter, plaintiff was fired by defendant on 25 April 1988. The termination letter indicates plaintiff's "high sensitivity to chemicals" as the reason for his termination.

On 12 July 1989, Dr. McCall stated that plaintiff suffers from "hyperreactive airways disease," a condition in which the airway, or bronchial tube, is extremely sensitive to the environment. McCall explained that plaintiff was at an increased risk of developing an allergy or hypersensitivity compared with the general public because of his exposure to chemicals in the workplace. Furthermore, McCall expressed his opinion that plaintiff's history of chemical exposure at defendant's brewery was a significant factor contributing to his hyperreactive airways disease and the symptomatology that he had experienced since 1977.

Plaintiff's claim was heard before Deputy Commissioner Tamara R. Nance who entered an Opinion and Award denying plaintiff's claim based on the following conclusions of law:

> 1. Plaintiff did not and does not suffer from an occupational disease within the meaning of the Workers' Compensation Act. G.S. 97-53(13). Plaintiff's employment with defendant-employer did not place him at an increased risk of developing hyperreactive airways disease, nor was his employment a significant contributing factor to the development of the breathing problems he experienced while he was employed with defendant-employer. Plaintiff did not have unusual levels of airway reactivity and there is no documentation that he was actually allergic to anything at the Container Plant.
>
> 2. Assuming, *arguendo*, that plaintiff did suffer from an occupational disease within the meaning of the Workers' Compensation Act, plaintiff's claim for benefits is barred by G.S. 97-58(c), because he failed to file his claim within two years of disability when at the time of disability he had been advised by competent medical authority of the nature of and work-related cause of his disease. *Dowdy v. Fieldcrest Mills*, 308 N.C. 701 (1983).

Plaintiff appealed the decision of the Deputy Commissioner to the Full Commission.

On appeal the Full Commission made findings of fact and conclusions of law only with respect to whether plaintiff's claim was time-barred by the statute of limitations, and entered an order dismissing plaintiff's claim pursuant to G.S. 97-58. Plaintiff appealed.

Lore & McClearen, by R. Edwin McClearen, for plaintiff, appellant.

Womble Carlyle Sandridge & Rice, by Clayton M. Custer, for defendants, appellees.

HEDRICK, Chief Judge.

Plaintiff's sole assignment of error is the Industrial Commission erred in denying plaintiff's claim on the grounds that it was barred by the statute of limitations in G.S. 97-58(c). Plaintiff argues he filed his claim within two years of receiving notice of the nature and work-related cause of the disease. Furthermore, plaintiff contends that even if he had been put on notice of his disease more than two years prior to filing his claim, the additional requirement of "disability" had not been met at that time, and therefore, the statute of limitations has not run.

G.S. 97-58 provides in pertinent part:

> (b) . . . The time of notice of an occupational disease shall run from the date that the employee has been advised by competent medical authority that he has the same.
>
> (c) The right to compensation for occupational disease shall be barred unless a claim be filed with the Industrial Commission within two years after death, disability, or disablement as the case may be . . . .

In interpreting this statute, this Court found that two conditions must be met in order to start the two-year statute of limitations running against a claimant: (1) The employee must have suffered an occupational disease which renders the employee incapable of earning, at any job, the wages the employee was receiving at the time of the incapacity, and (2) the employee has been informed by competent medical authority of the nature and work-related cause of the disease. *Underwood v. Cone Mills*, 78 N.C. App. 155, 336 S.E.2d 634, *disc. review denied*, 316 N.C. 202 (1985).

In *Underwood*, plaintiff began experiencing breathing problems which gradually worsened over the course of several years. Plaintiff

saw a doctor in 1980, who informed plaintiff that he had chronic bronchitis, respiratory infection and allergies, and these conditions were possibly aggravated by plaintiff's exposure to cotton dust at work. Plaintiff was given a job in a different area where dust was less prevalent, but again experienced difficulties and was diagnosed as having chronic obstructive pulmonary disease in March 1981. The Industrial Commission awarded lifetime benefits, and defendant appealed on the grounds the claim was time-barred by G.S. 97-58. This Court applied the two part test set out above, and found plaintiff did not become disabled until he was forced to stop work of any kind because of his occupational disease, and since he was able to earn the wages he had always received until that date, the arguments about when plaintiff was first informed of the nature and work-related cause of his disease became irrelevant. *Id.*, 336 S.E.2d 364.

Similarly, in the present case, plaintiff was not forced to stop work of any kind because of "hyperreactive airways disease," until he became seriously ill in January and February 1988. Since plaintiff was still capable of earning the wages he had received in the past, albeit in a different environment such as when Stroh transferred him off the canning line, plaintiff was not incapable of earning the wages he had received at the time of the onset of his illness, and therefore the running of the statute of limitations was not triggered. As in *Underwood*, we need not address the question of the date on which plaintiff was informed by competent medical authority of the nature and work-related cause of his disease.

The Industrial Commission clearly dismissed plaintiff's claim on jurisdictional grounds and did not reach the merits of plaintiff's claim. The question of whether plaintiff suffers from an occupational disease is still before the Commission. Our decision today, reversing the ruling of the Commission with respect to jurisdiction means that the Commission must rule on plaintiff's claim on the merits, and for that purpose, the cause will be remanded to the Industrial Commission.

Reversed and remanded.

Judges WELLS and JOHNSON concur.

RAYMOND B. PAYNTER AND DAUPHINE P. PAYNTER v. ROBERT MAGGIOLO, SYLVIA MAGGIOLO AND THE VILLAGE BANK, INC.

No. 919SC235

(Filed 4 February 1992)

Mortgages and Deeds of Trust § 32.1 (NCI3d)— second purchase money deed of trust—first deed of trust foreclosed—action on purchase money note prohibited

The anti-deficiency statute prohibits the holder of a second purchase money deed of trust from bringing an *in personam* action on the purchase money note after the security for the note has been "destroyed" by foreclosure of the first deed of trust. N.C.G.S. § 45-21.38.

Am Jur 2d, Mortgages §§ 918, 920.

APPEAL by defendant from order entered 20 October 1990 in VANCE County Superior Court by *Judge Henry W. Hight, Jr.* Heard in the Court of Appeals 3 December 1991.

D. Randall Cloninger and Jack H. Hughes, Jr., for plaintiff-appellee.

Roberti, Wittenberg, Holtkamp & Lauffer by Samuel Roberti and Christa A. McGill for defendant-appellant Sylvia (Maggiolo) Trembley and Browne and Flebotte by Daniel R. Flebotte for defendant-appellant Robert Maggiolo.

WYNN, Judge.

In November 1985, Robert Maggiolo and his then wife, Sylvia Maggiolo, ("the Maggiolos") contracted to buy property located in Warren County, North Carolina, from Raymond Paynter and his wife, Dauphine Paynter, ("the Paynters") for $230,000. To partially finance the purchase, the Maggiolos borrowed $145,000 from Village Bank secured by a first deed of trust on the subject property. However, pursuant to the Offer to Purchase, the Maggiolos, after paying the Paynters $1,000 in earnest money and $114,000 at closing, signed a promissory note to the Paynters for the $115,000 balance of the purchase price secured by a second deed of trust on the subject property. (The $30,000 difference in the loan amount and the amount tendered at closing to the sellers apparently was retained by the Maggiolos without explanation. It also should be

noted that Sylvia Maggiolo as a licensed real estate broker received a commission of $6,900 from the sale.)

In 1986, Robert and Sylvia Maggiolo maritally separated. In August of that year, the Maggiolos defaulted on the note and the second deed of trust to the Paynters. In 1988, the Maggiolos divorced; and, in that same year, they defaulted on the note and the first deed of trust to Village Bank.

Village Bank thereafter instituted foreclosure proceedings and pursuant thereto the bank purchased the property at a foreclosure sale. The sale was confirmed on 2 January 1989. Following this sale, Robert Maggiolo, after again obtaining financing from Village Bank, repurchased the property from the bank on 9 January 1989.

In April 1989, the Paynters, unable to collect on the note and second deed of trust and having not participated in the foreclosure proceeding, brought a separate action against the Maggiolos alleging six claims: breach of contract, promissory estoppel, legal malpractice, default and acceleration of the balance due on the promissory note, fraud and collusion. Later, the plaintiffs amended their complaint to include claims for unjust enrichment, misrepresentation and fraud. The Maggiolos filed responsive pleadings and counterclaims for false representation alleging that environmental waste had been found on the property.

Thereafter, the Paynters made a timely motion for partial summary judgment on the claim of default and acceleration on the balance due on the promissory note. From the 20 October 1990 order granting partial summary judgment in favor of the plaintiffs, the defendants, Sylvia Trembley (Maggiolo) and Robert Maggiolo, appeal.

We note initially that although neither party addresses the interlocutory nature of this appeal, this Court may address such issues *ex proprio motu*. *See Bailey v. Gooding*, 301 N.C. 205, 211, 270 S.E.2d 431, 435 (1980). Therefore, as we find that the order granting summary judgment affects a substantial right of the parties, we will consider the substance of this appeal. N.C. Gen. Stat. § 1-277 and 7A-27(d) (1983). *See J&B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 9, 362 S.E.2d 812, 817 (1987).

The issue on this appeal is whether North Carolina's anti-deficiency statute prohibits the holder of a second purchase money

deed of trust from bringing an *in personam* action on the note for the debt even though the security has been "destroyed" by foreclosure of the first deed of trust.

The anti-deficiency statute, set forth at N.C. Gen. Stat. § 45-21.38 (1984) provides as follows:

> In all sales of real property by mortgagees and/or trustees under powers of sale contained in any mortgage or deed of trust executed after February 6, 1933, or where judgment or decree is given for the foreclosure of any mortgage executed after February 6, 1933, to secure to the seller the payment of the balance of the purchase price of real property, the mortgagee or trustee or holder of the notes secured by such mortgage or deed of trust shall not be entitled to a deficiency judgment on account of such mortgage, deed of trust or obligation secured by the same. . . .

Id.

Plaintiffs contend that the foreclosure sale of the Warren County property by the holder of the first deed of trust, Village Bank, effectively destroyed the underlying security to their note. As such, they argue that they should be allowed to sue the Maggiolos personally on the note given to them. For this proposition, the plaintiffs rely upon this Court's decision in *Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E.2d 560 (1984), which allowed an *in personam* action by the holder of a second purchase money deed of trust when the security for the debt had been exhausted by foreclosure of a first purchase money mortgage or deed of trust. In so holding the *Blanton* Court stated that its decision was a reaffirmation of the Supreme Court's decision in *Brown v. Kirkpatrick*, 217 N.C. 486, 8 S.E.2d 601 (1940).

The reasoning of *Brown* was rejected expressly by our Supreme Court in *Barnaby v. Boardman*, 313 N.C. 565, 330 S.E.2d 600 (1985). There, the Court spoke to the propriety of *in personam* suits on the note, holding that "[o]ur anti-deficiency statute 'bars any suit on the note whether before or after foreclosure.' " *Id.* at 571, 330 S.E.2d at 603 (quoting Note, 15 Wake Forest L. Rev. 822, 830 (1979)). The Court further stated that "the creditor is limited 'to the property conveyed when the note and the mortgage or deed of trust are executed to the seller of the real estate and the securing instruments state that they are for the purpose of securing the

balance of the purchase price.' " *Id.* at 571, 330 S.E.2d at 604 (quoting *Realty Co. v. Trust Co.*, 296 N.C. 366, 250 S.E.2d 271 (1979)). This being the current state of the law, plaintiff's reliance on the rationale of *Brown* and its progeny, is misplaced.

Moreover, in a case quite similar to the one at hand, this Court in *Sink v. Egerton*, 76 N.C. App. 526, 333 S.E.2d 520 (1985), concluded that a seller, who is the holder of a subordinate purchase money deed of trust and whose security has been eroded by foreclosure of a senior deed of trust, cannot bring an *in personam* action for the debt. The defendant in *Sink* purchased property and paid the seller with $23,545.00 borrowed from a bank and secured with a first deed of trust. The $10,000 balance of the purchase price was borrowed from the seller and secured with a subordinate deed of trust. The defendant defaulted on both loans and the bank foreclosed on the note and the property. The Court concluded that the seller could not sue on the subordinate note, holding that the "legislative intent behind N.C. Gen. Stat. § 45-21.38 is to limit recovery by purchase money mortgagees to the property conveyed." *Id.* at 528, 333 S.E.2d at 521.

Likewise, in the instant case, the plaintiffs cannot bring an action on the subordinated note. We hold that, as a matter of law, the trial court erred in granting partial summary judgment in favor of the plaintiffs.

Reversed.

Judges PARKER and GREENE concur.

RUTH B. WALLACE, PLAINTIFF v. JOHN R. HASERICK, M.D., AND PREVO DRUGS, INC., DEFENDANTS

No. 9119SC150

(Filed 4 February 1992)

Pleadings § 10.1 (NCI3d); Negligence § 10.3 (NCI3d)— medical negligence—negligence of another—not an affirmative defense

The trial court did not err by allowing defendants to inject into a medical negligence action an affirmative defense that

had not been raised in the pleadings where plaintiff suffered from a skin condition for which defendant Haserick prescribed Oxsoralen lotion and ultraviolet light; plaintiff attempted to have the prescription filled at Revco, which did not have the medication in stock; the Revco pharmacist called the pharmacist at defendant Prevo, which carried the medication, and transmitted the prescription over the telephone; the Revco pharmacist told the Prevo pharmacist that the prescription read "1 percent Oxsoralen lotion"; the prescription in fact read ".1 percent Oxsoralen lotion"; the prescription was never physically transported to Prevo; and plaintiff suffered a severe sunburn following her first treatment. The statements of defendants' counsel about the Revco pharmacist misreading the prescription do not raise a question of insulating negligence, but address the cause-in-fact element of plaintiff's prima facie case of negligence, and defendants were not required to plead them as an affirmative defense under N.C.G.S. § 1A-1, Rule 8(c).

Am Jur 2d, Physicians, Surgeons, and Other Healers § 326; Pleading §§ 127, 128, 152, 153.

APPEAL by plaintiff from judgment entered 26 September 1990 by *Judge Howard R. Greeson, Jr.*, in RANDOLPH County Superior Court. Heard in the Court of Appeals 12 November 1991.

This appeal arises from a medical malpractice action. Plaintiff suffered from vitiligo, a skin condition characterized by the destruction of the cells that produce melanin. As a result, plaintiff had developed white spots on her hands, feet and various parts of her trunk. During an office visit, her dermatologist, Dr. John R. Haserick, suggested that plaintiff undergo a treatment which involved applying a photosensitizer to the affected areas of the skin and exposing the skin to ultraviolet light. Dr. Haserick wrote a prescription for Oxsoralen lotion and told plaintiff to have it filled before her first treatment. He also instructed plaintiff to apply the lotion to the affected areas 45 to 60 minutes before her exposure to the ultraviolet light at his office. This treatment was scheduled for 4 September 1985.

Plaintiff took the prescription to Revco Drug Store in Asheboro and was told that the store did not have this medication in stock but that it could be ordered. On 3 September 1985 she returned to Revco and discovered that the prescription still had not been

filled. The Revco pharmacist then called the pharmacist at Prevo Drugs, another drug store in Asheboro, to inquire if Prevo stocked Oxsoralen lotion. When the Prevo pharmacist said that Prevo carried the medication, the Revco pharmacist transmitted the prescription over the telephone. She told the pharmacist at Prevo that the prescription read "1 percent Oxsoralen lotion." In fact Dr. Haserick had written the prescription for ".1 percent Oxsoralen lotion." The prescription itself was never physically transported from Revco Drug Store to Prevo Drugs.

Plaintiff picked up the one percent Oxsoralen lotion at Prevo Drugs. On 4 September 1985 she applied the lotion to most of her body instead of just on the areas affected by the vitiligo as Dr. Haserick had instructed. A nurse at Dr. Haserick's office treated plaintiff with the ultraviolet light. In the early morning of 6 September 1985 plaintiff began to develop blisters on her body and exhibited all the symptoms of severe sunburn. She was admitted to Moore Memorial Hospital on the evening of 6 September 1985 having suffered burns over 25 percent of her body.

Plaintiff filed a negligence action against Dr. Haserick and Prevo Drugs seeking to recover for personal injuries. She alleged, among other things, that Dr. Haserick was negligent in writing a prescription for diluted Oxsoralen lotion as .1 percent instead of 0.1 percent and in writing a prescription that allowed the pharmacy to dispense the medication directly to her. The jury returned a verdict in favor of both defendants, finding that plaintiff was not injured by the negligence of either Dr. Haserick or Prevo Drugs. Plaintiff appeals.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for the plaintiff-appellant.

Young, Moore, Henderson & Alvis, P.A., by Joseph W. Williford and Brian E. Clemmons, for the defendant-appellee John R. Haserick.

Petree Stockton & Robinson, by G. Gray Wilson and Urs R. Gsteiger, for the defendant-appellee Prevo Drugs, Inc.

EAGLES, Judge.

The sole issue raised on appeal is whether the trial court improperly allowed the defendants to inject into the case an affirmative defense that had not been raised in the pleadings. We hold that the trial court did not err.

Plaintiff contends that the trial court erred when it allowed counsel for defendants Prevo Drugs and Haserick to argue that the Revco pharmacist "misread" the prescription when Revco was not a party to the action and neither defendant alleged in the pleadings that Revco was in any way negligent. Plaintiff contends that "the arguments raise the issue of insulating negligence of Revco." We disagree.

In discussing insulating negligence, the Supreme Court has said:

> "An efficient intervening cause is a new proximate cause which breaks the connection with the original cause and becomes itself solely responsible for the result in question. It must be an independent force, entirely superseding the original action and rendering its effect in the causation remote."
>
> . . . .
>
> "The test by which the negligent conduct of one is to be insulated as a matter of law by the independent negligent act of another, is reasonable unforeseeability on the part of the original actor of the subsequent intervening act and resultant injury."

Hairston v. Alexander Tank & Equipment Co., 310 N.C. 227, 236-37, 311 S.E.2d 559, 566-67 (1984) (quoting *Harton v. Forest City Telephone Co.*, 141 N.C. 455, 462, 54 S.E. 299, 301-02 (1906) and *Riddle v. Artis*, 243 N.C. 668, 671, 91 S.E.2d 894, 896-97 (1956)). The statements of defendants' counsel about the Revco pharmacist misreading the prescription do not raise a question of insulating negligence. Defendants here do not concede that Dr. Haserick was negligent or argue that Revco committed a second unforeseeable negligent act in "misreading" the prescription. They contend, and the jury agreed, that Dr. Haserick was not negligent. Additionally, as to Revco, any negligence on the part of Prevo occurred *after* the acts of Revco. Accordingly, the actions of Revco could not constitute a *subsequent* intervening act. At trial both defendants contended that they were not negligent and that their actions were not the actual cause of plaintiff's injuries. The statements regarding the Revco pharmacist misreading the prescription address the cause-in-fact element of plaintiff's prima facie case of negligence against defendants Haserick and Prevo Drugs.

Because defendants' statements regarding the Revco pharmacist related to plaintiff's prima facie negligence claim, defendants were

not required to plead them as an affirmative defense under Rule of Civil Procedure 8(c).

> Generally, a defense which contests one of the material allegations of the complaint is not an affirmative defense since it involves an element of the plaintiff's prima facie case. Any other defense, especially if it introduces new matter in attempt to avoid the plaintiff's claim regardless of the truth or falsity of the allegations in the complaint, must be considered an affirmative defense.

W. Shuford, North Carolina Civil Practice and Procedure § 8-7 (1988). Accordingly, this assignment of error is overruled.

Because we hold that the trial court did not err in entering judgment for the defendants, we need not reach defendant Haserick's cross-assignment of error. For the reasons stated, we find no error.

No error.

Judges JOHNSON and ORR concur.

TERESA BELLOW MILLIKEN, PLAINTIFF v. JAMES HORTON MILLIKEN, DEFENDANT

No. 9118DC96

(Filed 4 February 1992)

1. Divorce and Separation § 377 (NCI4th)— visitation—custodial party required to move closer to other parent—error

The trial court erred in a child custody action by requiring plaintiff, the custodial parent, to move to a location within 90 miles of defendant to make it easier for defendant to be more involved with the children. There was no basis in the facts found in the order to support the conclusion that it would be in the best interest of the children to require them to move from their home, neighborhood and schools to another place.

Am Jur 2d, Divorce and Separation §§ 999-1001.

2. Appeal and Error § 342 (NCI4th)— cross-assignment of error— no notice of appeal—no appellant's brief

A cross-assignment of error to a portion of a child custody order requiring defendant to pay a portion of plaintiff's counsel fees was not before the Court of Appeals where defendant did not give notice of appeal and did not file an appellant's brief.

Am Jur 2d, Appeal and Error §§ 316, 686.

APPEAL by plaintiff from an order entered 17 September 1990 by *Judge William L. Daisy* in GUILFORD County District Court. Heard in the Court of Appeals 6 November 1991.

Kathleen E. Nix for plaintiff-appellant.

Michael R. Ramos for defendant-appellee.

WELLS, Judge.

This appeal follows the latest in a series of court orders dealing with the custody of the two minor children of the parties' marriage.

Prior to their separation and divorce, the parties resided in Sunset Beach, North Carolina. The parties separated on 26 January 1988, and pursuant to a separation agreement incorporated into their divorce judgment, plaintiff was awarded primary custody of the children. The agreement provided that the children could visit defendant at his home on every other weekend and during certain holiday and vacation periods.

In August 1988, plaintiff moved to Jamestown, North Carolina, where she resided at the time this order, now on appeal, was entered. Disputes arose between the parties over visitation and child/parent relationships, such that plaintiff moved the court for changes in defendant's visitation privileges, and defendant countered with a motion to award him primary custody.

In the order now on appeal, the trial court found that plaintiff lived in her own home in Jamestown, adjacent to the home of her parents; that plaintiff was employed in a High Point bank and helped support her children; that the oldest child, Justin (age 9), had attended public school in Jamestown since the fall of 1988 and was doing well in school; and that the youngest child, Megan (age 6), was enrolled in the first grade of public school in Jamestown.

The trial court also made these additional pertinent findings of fact:

> 25. Defendant was unable to exercise his visitation privileges with the minor child Megan Milliken from June of 1989 until July of 1989; and, defendant was unable to exercise his visitation privileges with the minor child Justin Milliken from July of 1989 until January of 1990.
>
> 26. The relationship between the defendant and the minor child Justin Milliken which was disrupted in the summer of 1989 has substantially improved since visitation for the defendant with the said child resumed in January of this year; and, since January 1990, the said child's visits with the defendant have occurred regularly and without any significant problems.
>
> 27. The defendant has continued to have the minor child Megan Milliken for visitation throughout all of these proceedings.
>
> 28. The defendant has remarried and his current wife resides with him in Shallotte; and, plaintiff is engaged to be married, and she and her fiance plan to continue to reside [in] Jamestown.
>
> 29. The best interest of the minor children requires that their primary custody remain with the plaintiff and that maximum visitation with the children be provided to defendant, with the defendant having weekends which include any school holidays, such that any time there is a holiday from school on the weekend, the defendant's regularly scheduled every other weekend visit should be switched to the weekend with the holiday from school; and, that defendant should have other visitation as hereinafter ordered for holidays and summer vacation.
>
> 30. The best interest of the minor children concerned herein requires that the plaintiff and children move to a location within 90 miles of Shallotte, North Carolina on or before August 15, 1991 so that they will live closer to defendant, which will make it easier for defendant to be more involved with the children.

. . .

[1] The trial court concluded that the best interest of the children required plaintiff to move to a location within 90 miles of Shallotte on or before 15 August 1991, and entered, *inter alia*, an order

to that effect. It is from the order requiring plaintiff and her children to move that plaintiff has appealed.

As in all custody cases, it is the statutorily mandated best interest and welfare of the child or children involved which must guide and direct our courts. We discern no basis in the facts found in the order before us which supports the conclusion that it would be in the best interest of these children to require them to move from their home, neighborhood and schools to another place. Accordingly, that part of the trial court's order requiring plaintiff and her children to move from Jamestown is reversed. In all other respects, the order is affirmed.

[2] Defendant has cross-assigned error to that portion of the trial court's order requiring defendant to pay a portion of plaintiff's counsel fees. However, defendant did not give notice of appeal from the judgment and has not filed an appellant's brief and that question is therefore not before us. *Dail Plumbing, Inc. v. Roger Baker & Assoc.*, 78 N.C. App. 664, 338 S.E.2d 135, *cert. denied*, 316 N.C. 731, 345 S.E.2d 398 (1986).

Reversed in part; affirmed in part.

Judges LEWIS and WALKER concur.

ALICE BELL SEBRELL AND HUSBAND, J. EMMETT SEBRELL, DANIEL L. BELL, JR. AND WIFE, MARY ANN BELL, ELIZABETH McLIN BELL, UNMARRIED, SUSAN JUNE PEOPLES TRAGESER AND HUSBAND, PAUL JOSEPH TRAGESER, JR., SIEWERS ANNE TROGDON AND HUSBAND, WILLIAM JOSEPH TROGDON v. ALLIE W. CARTER AND WIFE, MONTINE C. CARTER

No. 9115SC239

(Filed 4 February 1992)

1. Adverse Possession § 8 (NCI4th)— mistaken belief of title— instruction on "conscious doubt"

The trial court did not err in instructing the jury that the intent to claim title element of adverse possession is met if defendants took possession under a mistaken belief as to the true boundary between their property and plaintiffs' prop-

erty and that this element is not met if the defendants had "conscious doubt" concerning the state of title.

Am Jur 2d, Adverse Possession §§ 1, 9, 57, 322.

Adverse possession involving ignorance or mistake as to boundaries—modern views. 80 ALR2d 1171.

2. Adverse Possession § 8 (NCI4th)— possession not adverse—sufficiency of evidence

The evidence was sufficient to support the jury's verdict finding that defendants did not acquire title by adverse possession to the 167 acres in dispute where both defendants testified that they were informed at a bank of the possibility that they did not have record title to this land, and one defendant testified that "if [the property] belonged to somebody we wanted to know and if we could buy it from them we would buy it from them."

Am Jur 2d, Adverse Possession § 318.

APPEAL by defendants from judgment entered 2 November 1990 by *Judge Marvin Gray* in CHATHAM County Superior Court. Heard in the Court of Appeals 4 December 1991.

Plaintiffs filed an action to quiet title to 203 acres in Chatham County on 13 April 1989. Defendants asserted adverse possession to 167 acres by survey. The jury decided in favor of the plaintiffs. Defendants appeal.

Holleman and Stam, by Paul Stam, Jr., for plaintiffs-appellees.

Wishart, Norris, Henninger & Pittman, P.A., by Robert J. Wishart, June K. Allison and Elizabeth Leonard McKay, for defendants-appellants.

LEWIS, Judge.

[1] Defendant-appellants assign error to the trial court's instruction to the jury that defendants' possession of the property in question must have been with an intent to claim title to the land occupied to support a finding of adverse possession. The judge instructed the jury in part as follows:

First, there must have been an actual possession of the 167 acres. Second, the possession must have been hostile to the

> true owner exclusive by the defendants. Third, the possession must have been own [sic] and notorious and must have been under known and visible lines and boundaries. Fourth, the possession must have been continuous and uninterrupted for 20 years. And fifth, the possession must have been with an intent to claim title to the land occupied.
>
> . . . [As for the fifth element], the possession must have been with an intent to claim title to the land occupied. A conscious intention to claim title to the land of the true owner is necessary to make out adverse possession. If the defendants acted under a mistake as to [the] true boundary between their property and that of the plaintiffs,' then possession under mistake may satisfy this element if all other elements of their claim have been satisfied. But if they consciously [doubted] that title and for a portion of the period did not intend to claim title then their possession is not adverse.

Defendants objected to the trial court's description of the fifth element of adverse possession. Defendants argue that the trial court's description of the fifth element of adverse possession was changed in 1985 by the Supreme Court in *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985). The Court stated in *Walls* that:

> When a landowner, acting under a mistake as to the true boundary between his property and that of another, takes possession of the land believing it to be his own and claims title thereto, his possession and claim of title is adverse. If such adverse possession meets all other requirements and continues for the requisite statutory period, the claimant acquires title by adverse possession even though the claim of title is founded on a mistake.

Id. at 249, 337 S.E.2d at 562. *Walls* states that this fifth condition of adverse possession is met either when the possessor takes possession knowing that the title belongs to another, or takes possession based on the mistaken belief that title belongs to him. *Id.* In the case at bar, the judge instructed the jury as such and added that the fifth condition would not be satisfied if the plaintiff had "conscious doubt" concerning the state of the title. In *Walls*, the Supreme Court wrote that:

> Where an occupant of land is in doubt as to the location of the true line it is reasonable to inquire as to his state of

> mind in occupying the land in dispute, and if, having such doubt, he intends to hold the disputed area only if that area is included in the land described in his deed, then it is reasonable to say that the requisite hostility is lacking; but if the occupation of the disputed area is under a mistaken belief that it is included in the description in his deed—a state of mind sometimes described as pure mistake to distinguish it from the cases of conscious doubt—then his possession is adverse.

Id. at 246, 337 S.E.2d at 560. The trial court's instruction, therefore, adequately distinguished "conscious doubt" from the state of mind necessary to satisfy the fifth condition for adverse possession. We therefore overrule this assignment of error.

[2] The defendants' second assignment of error is that the trial court erred in denying defendants' motion for a new trial on the ground of insufficiency of the evidence to justify the verdict. The standard of appellate review for denial of a Rule 59 motion to set aside the verdict of a jury is abuse of discretion. *Thomas v. Dixson*, 88 N.C. App. 337, 363 S.E.2d 209 (1988). As stated above, the presence of conscious doubt undermines the state of mind necessary to establish that the occupation was "hostile." *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985). Both defendants testified that they were informed at a bank of the possibility they might not have record title to the land in dispute. Defendant Montine Carter testified that "if [the property] belonged to somebody we wanted to know and if we could buy it from them we would buy it from them." We conclude that the trial court was correct in denying a motion to set aside the verdict for insufficiency of the evidence.

The judgment of the trial court is therefore

Affirmed.

Judges WELLS and WALKER concur.

MARILYN R. ROSEN (SUGALSKI), PLAINTIFF v. HENRY N. ROSEN, DEFENDANT

No. 918DC63

(Filed 4 February 1992)

Divorce and Separation § 449 (NCI4th)— separation agreement—obligation to assist in children's college expenses—unenforceability

A provision in a separation agreement that defendant husband "obligates himself to assist the said children in the obtaining of educational training beyond high school" and extending "past the 18th birthday of said children" was unenforceable because there was no mutuality of agreement between plaintiff wife and defendant husband as to a specific amount or percentage of college expenses for which defendant was obligated.

Am Jur 2d, Divorce and Separation §§ 828, 1037, 1046.

Responsibility of noncustodial divorced parent to pay for, or contribute to, costs of child's college education. 99 ALR3d 322.

APPEAL by plaintiff from order entered 14 June 1990 in WAYNE County District Court by *Judge Arnold O. Jones*. Heard in the Court of Appeals 4 November 1991.

Plaintiff and defendant were divorced in October 1983. Prior to their divorce, the parties entered into a separation agreement, and by this action, plaintiff sought to have a provision in that agreement specifically enforced. After the pleadings were joined, plaintiff sought summary judgment, which was denied. Following a trial on the merits, the trial court entered judgment adverse to plaintiff. From this judgment, plaintiff has appealed.

Law Offices of Roland C. Braswell, by Roland C. Braswell, for plaintiff-appellant.

Barnes, Braswell, Haithcock & Warren, P.A., by S. Reed Warren and B. Geoffrey Hulse, for defendant-appellee.

WELLS, Judge.

Procedurally, we first note that plaintiff has assigned error to the trial court's denial of her motion for summary judgment. In *Harris v. Walden*, 314 N.C. 284, 333 S.E.2d 254 (1985), our Supreme

Court held "that the denial of a motion for summary judgment is not reviewable during an appeal from a final judgment rendered in a trial on the merits." There having been such a trial and final judgment in this case, this question is not before us.

Substantially, this appeal presents the question of the enforceability of the following provision in the parties' separation agreement:

> 8. EXTENSION OF PERIOD OF CHILD SUPPORT DURING COLLEGE. Husband hereby obligates himself to assist the said children in the obtaining of educational training beyond high school. Said assistance shall extend past the 18th birthday of said children. Said assistance shall be limited to those expenses reasonably incurred in the obtaining of an undergraduate college degree or the completion of a course in a specific vocation.

At or about the time this action was filed, Marnie, the oldest child of the Rosen's marriage, began preparing for her college career. Plaintiff contacted defendant to discuss the financing of Marnie's college education. Plaintiff testified that defendant was uncooperative with her efforts to determine the amount of support their child could expect from him. On one occasion, defendant told his college-bound daughter she would receive no assistance from him for her education and that he "[didn't] really give a damn what [she did] with [her] life."

Plaintiff further testified that eventually she received financial assistance from defendant for Marnie's college expenses. Evidence introduced at trial shows that expenses for the child's first three years of college amounted to approximately $34,156.00. Defendant contributed approximately $3,000.00 from his own funds and $5,000.00 from a trust fund created by the children's grandfather. The purpose of this fund was to aid in educating the Rosen's children.

Defendant's testimony at trial concerned the origins of the provision in question and his understanding of the responsibilities imposed upon him by the provision. Defendant testified that, following conversations with plaintiff, he instructed his attorney at the time to include a provision in the agreement relating to his children's college education. Defendant testified he wanted to obligate himself to help pay for the children's college education and that he wanted this commitment to extend beyond the 18th birthday of each child.

Defendant specifically instructed his attorney not to include any language relating to a certain percentage or sum of assistance he would be contractually bound to provide. Rather, defendant stated he wanted to leave this provision open so that he could determine the amount of assistance to provide based on his financial situation and his relationship with his daughters. Defendant admitted he believed the provision entitled him to give assistance at his discretion and that he was not obligated to pay any amount except "what I want to contribute."

The principles of law applicable to the contract provision at issue before us in this case are aptly summed up as follows:

> One of the essential elements of every contract is mutual[ity] of agreement. There must be neither doubt nor difference between the parties. They must assent to the same thing in the same sense, and their minds must meet as to *all* the terms. If *any* portion of the proposed terms is not settled, there is no agreement. . . . A contract, and by implication[,] a provision, leaving material portions open for future agreement is nugatory and void for indefiniteness. . . . Consequently, any contract provision . . . failing to specify either directly or by implication a material term is invalid as a matter of law.

MCB Ltd. v. McGowan, 86 N.C. App. 607, 359 S.E.2d 50 (1987) (Emphasis in original). *See also Mountain Fed. Land Bank v. First Union Nat. Bank*, 98 N.C. App. 195, 390 S.E.2d 679, *disc. review denied*, 327 N.C. 141, 394 S.E.2d 178 (1990) (Construing a provision in a bank letter of credit).

It being clear from the record before us that there was no mutuality of agreement between plaintiff and defendant relating to a specific amount or percentage for which defendant was responsible by his "obligation" to provide for his children's educational training beyond high school, the trial court correctly found and concluded that this provision could not be enforced, and therefore the judgment below denying plaintiff's claim for "specific performance" must be and is

Affirmed.

Judges LEWIS and WALKER concur.

STATE OF NORTH CAROLINA v. JEFFREY CHARLES LAWSON

No. 9130SC303

(Filed 4 February 1992)

Larceny § 8 (NCI3d)— sufficient evidence of felonious larceny— submission of misdemeanor larceny—defendant not prejudiced

The evidence was sufficient for the jury to find that defendant aided and abetted in felonious breaking or entering of a mobile home and felonious larceny of a stereo therefrom by driving the actual perpetrator to and from the crime scene, and since misdemeanor larceny is a lesser included offense of felonious larceny, the trial court did not err to defendant's prejudice in submitting to the jury the possible verdict of aiding and abetting misdemeanor larceny.

Am Jur 2d, Larceny §§ 13, 44, 80, 81, 146, 155, 174.

APPEAL by defendant from *Washington (Edward K.), Judge.* Judgment entered 9 October 1990 in Superior Court, HAYWOOD County. Heard in the Court of Appeals 13 January 1992.

Defendant was charged in a proper bill of indictment with felonious breaking or entering in violation of G.S. 14-54(a) and felonious larceny in violation of G.S. 14-72(b)(2).

The jury found defendant guilty of "aiding or abetting" the commission of misdemeanor larceny. From a judgment imposing a prison sentence of two years, suspended to supervised probation for four years, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Archie W. Anders, for the State.

Holt, Bonfoey, Brown & Queen, by Frank G. Queen, for defendant, appellant.

HEDRICK, Chief Judge.

On appeal, defendant contends the court erred in denying his motion to dismiss the charge of "aiding or abetting misdemeanor larceny." This assignment of error raises the question of the sufficiency of the evidence to be submitted to the jury as to the charges of felonious breaking or entering and felonious larceny.

The evidence tends to show the following: On 17 July 1990, Eddie Miller returned home from work to discover that the door to his mobile home had been kicked in, the wires to his stereo speakers ripped out, and his stereo lying in the yard. Deputy Sheriff Henson investigated the break-in and found that entry had been made through the front door of the trailer. Glass had been broken out of the storm door and was scattered across the living room floor. Deputy Sheriff Henson also discovered "spin" marks made by a car's tires approximately fifty feet from the trailer next to the driveway.

Between 2:00 and 3:00 p.m. on the afternoon of 17 July 1990, two of Mr. Miller's neighbors saw a "little brown car turned sideways in [Mr. Miller's] driveway, part of it in the ditch sitting there spinning." Defendant was seen sitting in the driver's seat of that car, and Gregory Kirkpatrick was seen coming from Mr. Miller's mobile home carrying a stereo which he dropped when two of the witnesses got out of a truck at a neighbor's house. Kirkpatrick then got into the car with defendant who immediately drove away.

From the foregoing evidence, the jury could find that (1) defendant and Gregory Kirkpatrick came to Mr. Miller's mobile home; (2) Kirkpatrick broke into the front door of the trailer and took Miller's stereo, carrying it to the automobile where defendant waited; (3) Kirkpatrick dropped the stereo in the yard when he realized he had been seen and got into the automobile with defendant; and (4) defendant drove away. From this evidence, the jury could infer that defendant and Kirkpatrick planned to break into Miller's mobile home and steal his stereo. The jury could also find that defendant aided or abetted Kirkpatrick by bringing him to Miller's trailer to steal the stereo, by hauling the stolen stereo away and by assisting in the escape.

We hold the evidence is sufficient for the jury to find that defendant aided and abetted Gregory Kirkpatrick in breaking or entering the premises of Eddie Miller with the intent to commit larceny therein, and the evidence is sufficient to support a finding by the jury that defendant aided and abetted in the felonious larceny of the stereo after breaking or entering. Furthermore, since misdemeanor larceny is a lesser-included offense of felonious larceny, *State v. Tolley*, 30 N.C. App. 213, 226 S.E.2d 672, *disc. review denied*, 291 N.C. 178, 229 S.E.2d 691 (1976), the trial court did not err to defendant's prejudice in submitting to the jury the pos-

sible verdict of aiding or abetting misdemeanor larceny. *State v. Chase*, 231 N.C. 589, 58 S.E.2d 364 (1950); *Tolley, supra.*

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WELLS and JOHNSON concur.

JOHN A. JARRELL, JR., PLAINTIFF v. TOWN OF TOPSAIL BEACH

No. 9114SC292

(Filed 4 February 1992)

Venue § 4 (NCI3d)— action against municipality—venue—Handicapped Persons Act

The trial court correctly denied defendant's motion for a change of venue as a matter of right where plaintiff brought an action under the Handicapped Persons Protection Act and defendant moved for a change of venue under N.C.G.S. § 1-77. While the proper venue for an action against a municipality ordinarily would be the county where the cause of action arose, the language of N.C.G.S. § 168A-11(a) allows plaintiff as a handicapped individual the option of bringing suit in either the county where the alleged discriminatory practice occurred or the county where he resides.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 855, 856, 858.

APPEAL by defendant from order entered 16 January 1991 by *Judge Anthony M. Brannon* in DURHAM County Superior Court. Heard in the Court of Appeals 8 January 1992.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for plaintiff appellee.

Burrows & Hall, by Richard L. Burrows, for defendant appellant.

WALKER, Judge.

The Town of Topsail Beach (defendant), located in Pender County, has an ordinance in effect which prohibits vehicles from being driven on the Town's beaches during certain periods of the year. This ordinance adversely affects John A. Jarrell, Jr. (plaintiff) since he is a paraplegic who cannot readily gain access to the beach without the use of his Honda all terrain vehicle (ATV). Pursuant to the Handicapped Persons Protection Act, G.S. 168A-1, *et seq.*, plaintiff requested that defendant accommodate his handicap by allowing him to drive his ATV on the beach. Defendant refused this request and plaintiff ultimately instituted the present action in Durham County alleging the ordinance violated the Handicapped Persons Protection Act. The trial court issued a restraining order directing defendant to stop enforcing the ordinance as it related to plaintiff.

On 20 August 1990, defendant filed a motion for change of venue as a matter of right pursuant to G.S. 1-77(2) and requested the case be moved to Pender County. It appeals the denial of this motion.

Since this action arises out of defendant's enforcement of a municipal ordinance, defendant asserts its motion for change of venue under G.S. 1-77 should have been granted. In pertinent part this statute provides:

> Actions for the following causes must be tried in the county where the cause, or some part thereof, arose, subject to the power of the court to change the place of trial, in the cases provided by law:
>
> . . . .
>
> (2) Against a public officer or person especially appointed to execute his duties, for an act done by him by virtue of his office; or against a person who by his command or in his aid does anything touching the duties of such officer.

Past decisions of our Supreme Court recognize that since a municipality may only act through its officers and agents, an action against a municipality is an action against "a public officer" within the meaning of G.S. 1-77. *Coats v. Sampson County Memorial Hospital, Inc.*, 264 N.C. 332, 141 S.E.2d 490 (1965); *Godfrey v. Tidewater*

Power Co., 224 N.C. 657, 32 S.E.2d 27 (1944); *Jones v. The Town of Statesville*, 97 N.C. 86, 2 S.E. 346 (1887). Ordinarily then, the proper venue for an action against a municipality would be the county where the cause of action arose and if an action is instituted in some other county, the municipality has the right to have the action removed to the proper county. *Godfrey v. Tidewater Power Co., supra.*

In the present case plaintiff brought his action under the Handicapped Persons Protection Act. In relevant part this statute provides:

> A handicapped person aggrieved by a discriminatory practice prohibited by G.S. 168A-5 through 168A-8, or a person aggrieved by conduct prohibited by G.S. 168A-10, may bring a civil action to enforce rights granted or protected by this Chapter against any person described in G.S. 168A-5 through 168A-8 or in G.S. 168A-10 who is alleged to have committed such practices or engaged in such conduct. The action shall be commenced in superior court in the county where the alleged discriminatory practice or prohibited conduct occurred *or where the plaintiff or defendant resides.* Such action shall be tried to the court without a jury.

G.S. 168A-11(a) (emphasis supplied). The language of this section allows plaintiff, as a handicapped individual, the option of bringing suit in either Pender County (where the alleged discriminatory practice occurred) or in Durham County (where plaintiff resides). Since plaintiff has the right to bring this action in Durham County, the trial court correctly denied defendant's motion for change of venue as a matter of right pursuant to G.S. 1-77(2) and 1-83(1), and the order of the Superior Court is

Affirmed.

Judges ARNOLD and PARKER concur.

PEGGY L. HILL, PLAINTIFF-APPELLEE v. HENRY S. HILL, DEFENDANT-APPELLANT

No. 9126DC6

(Filed 18 February 1992)

1. **Divorce and Separation § 289 (NCI4th)— foreign alimony award—modification for changed circumstances**

A district court which had jurisdiction over both parties had authority to modify a South Carolina alimony order upon a showing of changed circumstances.

Am Jur 2d, Divorce and Separation § 1139.

2. **Divorce and Separation § 291 (NCI4th)— alimony—increase for changed circumstances**

The trial court did not err in increasing a permanent alimony award to plaintiff based on a substantial change in circumstances where the court found that, after the original alimony award was entered, plaintiff was forced to file bankruptcy and to sell personal belongings to pay her bills, and that her actual needs and expenses have increased substantially while her income has increased only minimally.

Am Jur 2d, Divorce and Separation §§ 715, 716.

3. **Divorce and Separation § 288 (NCI4th)— permanent alimony award—no retroactive modification**

A permanent alimony award may not be modified retroactively absent a showing of a sudden emergency. Therefore, the trial court erred in making an increase in alimony retroactive from the date the motion for modification was first scheduled to be heard.

Am Jur 2d, Divorce and Separation § 734.

Judge COZORT concurs in part and dissents in part.

APPEAL from an order by *Judge Resa L. Harris* entered 24 July 1990 in MECKLENBURG County District Court. Heard in the Court of Appeals 8 October 1991.

James, McElroy & Diehl, by William K. Diehl, Jr., for plaintiff-appellee.

William E. Lamb, Jr. for defendant-appellant.

LEWIS, Judge.

The issue before this Court is whether the trial court erred when it retroactively increased a permanent alimony award and ordered payment of prejudgment interest on this amount.

Plaintiff and defendant were married 14 September 1951 and separated 1 May 1983. On 4 August 1983, the parties entered into a court approved order in South Carolina where the issues of alimony, child custody, and distribution of marital assets were settled. The defendant-appellant was granted an absolute divorce in Mecklenburg County, North Carolina on 20 May 1985. Plaintiff-appellee registered the South Carolina support order in Mecklenburg County on 18 December 1985. On 21 December 1987, the plaintiff filed a motion in Mecklenburg District Court requesting modification of the 1983 support order and judgment for alimony arrearages. The motions were scheduled to be heard on 9 February 1988, but were not actually heard until 28 September 1988. The judgment, entered 24 July 1990, denied defendant's motion for rehearing and retroactively increased plaintiff's prior alimony award from $900.00 to $1,500.00 per month. The trial court indicated that the continuances from the original hearing of this matter in February 1988 were without the fault of either party. Defendant appeals.

First, defendant alleges that the trial court erred by increasing the alimony award where plaintiff did not show any changed circumstances and where the court's findings of fact were not supported by the evidence. Defendant also claims as error the court's retroactive increase in the alimony award and its grant of prejudgment interest on the retroactively increased amount.

[1] As a preliminary matter, we address North Carolina's authority to modify the South Carolina support order. Modification of foreign alimony orders, to the extent possible under the law of the granting jurisdiction, is permitted in North Carolina where the trial court 1) obtains personal jurisdiction over both parties and 2) finds changed circumstances. N.C.G.S. § 50-16.9(c) (1987). South Carolina law permits the modification of alimony upon petition and a showing of changed circumstances. S.C. Code Ann. § 20-3-170 (Law Co-op 1976). Hence, the Mecklenburg District Court, which had jurisdiction over both parties, had the authority to modify the South Carolina support order upon a showing of changed circumstances. N.C.G.S. § 50-16.9(c) (1987).

In addition we note that once a foreign support order is registered pursuant to the Uniform Reciprocal Enforcement of Support Act, Chapter 52A, "the foreign support order may be enforced in the same manner as a support order issued by a court of this state. N.C.G.S. § 52A-30(a) (1984)." *Allsup v. Allsup*, 323 N.C. 603, 606, 374 S.E.2d 237, 239 (1988). Therefore, the Mecklenburg District Court had the authority to both modify and enforce the South Carolina support order at issue in this case.

A party seeking modification of alimony must show a "substantial" change of circumstances such that "the present award is either inadequate or unduly burdensome." N.C.G.S. § 50-16.9(a) (1987). *Britt v. Britt*, 49 N.C. App. 463, 470, 271 S.E.2d 921, 926 (1980). A substantial change is determined by a comparison of the facts at the time of the original order with the facts at the time modification is requested. *Broughton v. Broughton*, 58 N.C. App. 778, 294 S.E.2d 772, 775 (1982), *disc. rev. denied*, 307 N.C. 269, 299 S.E.2d 214 (1982). The facts to be considered are set out in N.C.G.S. § 50-16.5 (1987): the estates, earnings, earning capacity, condition, accustomed standard of living of the parties, and other facts of the particular case. *Rowe v. Rowe*, 305 N.C. 177, 287 S.E.2d 840 (1982), *appeal after remand*, 74 N.C. App. 54, 327 S.E.2d 624 (1985), *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 489 (1985). Findings of fact must be "sufficiently specific to indicate proper consideration of each of the factors established by N.C.G.S. § 50-16.5(a) (1987). . . ." *Spencer v. Spencer*, 70 N.C. App. 159, 170, 319 S.E.2d 636, 645 (1984).

[2] Defendant's first assignment of error challenges the basis for the increase in alimony. The trial court compared the facts as they existed at the time of the 1983 support order and as they existed in 1987. The court made the following findings:

> At the time of the 1983 support order:
>
> 1) Defendant had a gross income of $3,975.00 per month with reasonable expense of $3,000.00 per month; retirement benefits, a credit union savings account, a 1979 car, an interest in a boat. He was in good health, had worked regularly, and had a good potential for earnings.
>
> 2) Plaintiff was an unemployed housewife who had reared five children. She had no earned income and no training to earn an income comparable to husband's income; her reasonable

monthly expenses were $1,000.00 per month; she had a 1982 car and some personal effects.

3) They held a tenancy in common in a West Virginia home and lot valued at $100,000.00

4) After the support order was entered, plaintiff moved to West Virginia and filed personal bankruptcy.

At the time of the present hearing:

1) The plaintiff is a 59 year old woman whose lack of marketable skills and serious medical problems prevent her from earning a substantial income. She was and remains substantially dependent upon defendant for support. She does not own any real estate or intangible assets and earns $400.00 per month as a night janitor. Her reasonable living expenses, since 1983, have ranged from $2,000.00 to $2,600.00 per month. Plaintiff's present need is $2,750.00 per month. Since the 1983 support order, she has been unable to enjoy a standard of living comparable to that of her married life. She has been forced to sell some of her personal property to pay her bills.

2) Defendant is a 63 year old man in good health. He was and remains the supporting spouse. His income has substantially increased since the 1983 support order, from $57,593.00 to $64,300.00. He remarried in 1985. His holdings include a furnished home, three lots, boat dock, boat with motor and two cars. Defendant has an income of $5,907.00 per month with actual reasonable expenses of $2,000.00 per month.

3) Since the 1983 support order was entered, his expenses have decreased, while his income has increased. The plaintiff's needs and expenses have increased substantially, while her income has increased minimally. Defendant's earning capacity and health is significantly better than the plaintiff's. Defendant is able to pay an increased amount of alimony to plaintiff.

4) Since the 1983 support order, conditions and circumstances have substantially changed regarding plaintiff's welfare, need for support, ability to support herself, and defendant's ability to pay.

5) Plaintiff is in need of and defendant is able to pay $1,500.00 per month. This amount is reasonable.

In a non-jury trial, as here, the court's findings of fact are binding on appeal if they are supported by competent evidence, even if there is evidence which would support a contrary finding. *Beall v. Beall*, 290 N.C. 669, 228 S.E.2d 407 (1976). We have carefully reviewed the record in this case and find that there is sufficient competent evidence to support the court's findings of fact. A substantial change in circumstances is apparent in these facts. After the 1983 support order was entered, plaintiff was forced to file bankruptcy and to sell personal belongings to pay her bills. Her actual needs and expenses increased substantially, while her income increased only minimally. These are the financial changes of circumstances contemplated by N.C.G.S. § 50-16.9 (1987). The findings are sufficiently specific to indicate proper consideration of each statutory factor.

We note further that modification of an alimony award is in the discretion of the trial judge and will not be overturned absent an abuse of discretion. *Self v. Self*, 37 N.C. App. 199, 245 S.E.2d 541, (1978), *disc. rev. denied*, 295 N.C. 648, 248 S.E.2d 253 (1978). We find no abuse of discretion. The court's findings of fact on the statutory factors are sufficiently specific to justify an alimony modification, prospectively. Therefore, defendant's assignment of error as to the sufficiency of evidence is denied.

[3] Defendant's last two assignments of error challenge the trial court's order making the alimony increase retroactive with interest from the date when the case was first scheduled to be heard. As we agree that the alimony increase should not have been retroactive, we need not discuss the issue of prejudgment interest.

There is no statute nor is there case law in North Carolina which "directly hold[s] that an alimony decree can be retroactively modified. . . ." *Vincent v. Vincent*, 38 N.C. App. 580, 583, 248 S.E.2d 410, 412 (1978).

> [T]here is a pronounced conflict in the several states as to whether a court may cancel or *modify* installments that are past due. What has been called the "majority rule" is that a court has no power to change installments which have already become due. This so-called majority view is based on the ground that installments of alimony or support become vested when they become due. It often is said that statutes authorizing the modification of decrees for alimony or support are not to be given retrospective effect.

2 R. E. Lee, *North Carolina Family Law* § 152 at 241-42 (4th ed. 1980) (emphasis added). In accord with this "majority rule," this Court has held, by analogy to retroactive modification of child support orders, that there is no retroactive modification of alimony judgments absent a showing of "sudden emergency." *Vincent v. Vincent*, 38 N.C. App. 580, 583, 248 S.E.2d 410, 412 (1978).

The case at bar deals with the retroactive modification of a *permanent alimony award.* We note that there is case law dealing with temporary support awards which may permit retroactive alteration. In *Sikes v. Sikes*, 330 N.C. 595, 411 S.E.2d 588 (January 10, 1992), our Supreme Court held that an interim child support order could be modified because no final determination of the proper amount had been made. The Court indicated that the statute which prevents modification of past due child support payments, N.C.G.S. § 50-13.10(a) (1987), does not apply until a final order is entered. Pursuant to this reasoning, "[n]o showing of an emergency situation or a change in circumstances as required by *Fuchs* or *Ellenburger* was necessary." *Id.* at 599, 411 S.E.2d at 590.

Sikes is distinguishable from *Vincent* and the case at bar in that the former deals with temporary orders issued prior to a full hearing and a final determination of the proper amount whereas this case deals with a permanent support award. In *Sikes*, it was the "final determination" element of the equation upon which our Supreme Court focused when it held that the statutory prohibition against retroactive child support modifications did not apply. Though no similar statutory prohibition on retroactive alimony modification exists, case law prohibits such action. *See, Vincent.* As child support and alimony have similar purposes and functions, we apply the *Sikes* reasoning. Mrs. Hill was awarded permanent alimony of $900.00 per month. As a final judicial determination, it is subject to the prohibition against retroactive modification. Hence, the retroactive award in the case at bar must be reversed. We do not address the question of whether temporary alimony may be retroactively modified. *See, Haywood v. Haywood*, 95 N.C. App. 426, 382 S.E.2d 798 (1989), *disc. rev. denied*, 325 N.C. 706, 388 S.E.2d 454 (1989).

Fairness and the stability of judgments also dictate this result. The possibility of retroactive modification of a permanent alimony award creates an atmosphere of uncertainty. It is important that all parties to a suit be able to reasonably rely upon the finality of judicial rulings. Though support orders remain subject to modifica-

tion, there is nothing in these statutes which gives the supporting party notice or warning that he or she may be subject to an "unanticipated" debt by a court's retroactive award. Even though the filing of a petition for increased support alerts the supporting spouse to the potential for increased payments, the filing does not give notice as to the exact amount the court will augment the present award. In the interest of fairness, retroactive modification should not be permitted unless a compelling interest exists such as a sudden emergency.

In addition, we note a recent pronouncement from this Court; "*nunc pro tunc* orders are allowed only when 'a judgment has been actually rendered, or decree signed, but not entered on the record, in consequence of accident or mistake or the neglect of the clerk . . . provided [that] the fact of its rendition is satisfactorily established and no intervening rights are prejudiced.' " *Long v. Long*, 102 N.C. App. 18, 22, 401 S.E.2d 401, 403 (1991). *Nunc pro tunc* is defined as "now for then." Black's Law Dictionary, 965 (5th ed. 1978). It signifies "a thing is done now, which shall have the same legal force and effect as if done at a time when it ought to have been done." *Id.* Therefore, like any other court order, an alimony order cannot be ordered (*nunc pro tunc*) to take effect on a date prior to the date actually entered, unless it was decreed or signed and not entered due to mistake and provided that no prejudice has arisen.

In the case at bar, the record does not reflect that any court action was taken until 24 July 1990. Therefore, the alimony modification in question cannot be effective until 24 July 1990. To hold otherwise creates the potential for an onerous result. If a retroactive modification, back to the original date calendared for hearing or back to the filing date, applies to alimony increases, it must apply also to alimony decreases. Under this scenario, a dependent spouse would, by parallel logic, be required to pay the supporting spouse the difference between the old and new determinations of support. For an individual previously determined to be in need of support, this could be a devastating result. For the reasons stated above, we reverse the retroactive order of alimony and direct the increase to begin from the date decreed.

This case should not be construed to affect plaintiff's claim for arrearages.

The order increasing the alimony award to $1,500.00 per month is affirmed. The order making this alimony increase retroactive and awarding prejudgment interest is reversed.

Affirmed in part and reversed in part.

Judge ARNOLD concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT concurring in part and dissenting in part.

I dissent with that portion of the majority opinion which holds that the trial court erred in making the alimony increase retroactive with interest from the date when the case was first scheduled to be heard. I concur with the remainder of the majority opinion.

In finding no basis to support a retroactive alimony increase, the majority relies heavily on *Vincent v. Vincent*, 38 N.C. App. 580, 248 S.E.2d 410 (1978). The majority has extracted from the *Vincent* opinion the doctrine that there can be no retroactive modification of alimony judgments absent a showing of "sudden emergency." While that language does appear in the *Vincent* opinion, I believe the *Vincent* holding was a slight misstatement of the case upon which the *Vincent* holding was based.

The precise holding in *Vincent* upon which the majority here relies is:

> There are no North Carolina cases which directly hold that an alimony decree can be retroactively modified, although in *Fuchs v. Fuchs*, 260 N.C. 635, 133 S.E.2d 487 (1963), the court indicated that a retroactive increase in child support *might be permitted in a sudden emergency.* In the case *sub judice*, there was no showing of any sudden emergency requiring a retroactive reduction in alimony. Therefore the 1972 judgment could not be modified retroactively . . . .

Id. at 583, 248 S.E.2d at 412 (emphasis supplied).

I do not read the *Fuchs v. Fuchs* case from the Supreme Court, relied upon by the *Vincent* court for the "sudden emergency" doctrine, to require a sudden emergency to support a retroactive increase. The *Fuchs* case involved a request for a retroactive in-

crease in child support. In finding no evidence to support a retroactive increase, the Supreme Court stated the following:

> Furthermore, the order making the increased allowance retroactive to and including February 1963, *without evidence of some emergency situation that required the expenditure of sums in excess of the amounts paid by the plaintiff for the support of his minor children,* is neither warranted in law nor equity.

Fuchs v. Fuchs, 260 N.C. 635, 641, 133 S.E.2d 487, 492 (1963) (emphasis added).

I believe the *Vincent* court was correct in applying the standard for a retroactive increase in child support to alimony cases. However, I believe the *Vincent* court misstated the rule enunciated in the *Fuchs* case by requiring that the party seeking a retroactive increase must show the existence of a "*sudden* emergency." I do not believe the above quoted language from *Fuchs* requires a *sudden* emergency. Rather, it requires only an emergency situation which requires the expenditure of sums in excess of the amounts previously determined to be necessary. I believe the plaintiff's evidence in this case demonstrates an emergency situation which requires the expenditure of sums in excess of the amount previously determined to be sufficient for alimony. As the majority opinion properly finds from the evidence, "plaintiff was forced to file bankruptcy and to sell personal belongings to pay her bills. Her actual needs and expenses increased substantially, while her income increased only minimally." (Majority slip opinion, page 5.) I believe this evidence qualifies as the showing of an emergency situation as contemplated by the Supreme Court in the *Fuchs* opinion.

I thus vote to affirm the trial court's order making the increase in alimony retroactive to February of 1988, the day upon which plaintiff's motion for an increase in alimony was first calendared. While I agree with the majority's concern that there should be some finality and stability in alimony judgments, I do not believe permitting a retroactive increase of this nature would be either unfair or create an atmosphere of unnecessary uncertainty.

The plaintiff filed her motion for an increase in alimony in December of 1987. It was first calendared to be heard in February of 1988. The defendant cannot argue that he has not been on notice of the plaintiff's situation and her need for increased amounts of

alimony. The defendant was served with the plaintiff's motion in December of 1987. I find nothing unfair about making the increase in alimony retroactive to February of 1988 when the plaintiff's motion for an increase was first scheduled to be heard. I would not approve of making an increase in alimony retroactive to a point earlier than the filing of plaintiff's motion in this case. However, based on the facts as found by the trial court herein, and my reading of the *Fuchs* case from the Supreme Court, I believe the trial court was correct in making the increase in alimony retroactive to February of 1988. I also believe the trial court was correct in allowing interest on those unpaid increases in alimony. I dissent from the majority portion holding to the contrary.

STATE OF NORTH CAROLINA v. JERRY DAVID REEDER

No. 9119SC339

(Filed 18 February 1992)

1. **Rape and Allied Offenses §§ 5, 19 (NCI3d)— first degree sexual offense—taking indecent liberties—evidence sufficient**

The trial court did not err by denying defendant's motions to dismiss charges of first degree sexual offense and taking indecent liberties where the evidence, taken in the light most favorable to the State, was sufficient to raise inferences that defendant committed each element of the offenses charged.

Am Jur 2d, Infants §§ 16, 17.5.

2. **Evidence and Witnesses § 345 (NCI4th)— first degree sexual offense and indecent liberties—prior offenses admissible**

The trial court did not err in a prosecution for first degree sexual offense and taking indecent liberties by admitting into evidence defendant's statement concerning a prior incident of taking indecent liberties where the court admitted the evidence under N.C.G.S. § 8C-1, Rule 404(b) and *State v. Gainey*, 32 N.C. App. 682, which held that evidence of a prior sexual offense was relevant to show defendant's unnatural lust, intent or state of mind.

Am Jur 2d, Evidence §§ 321, 324.

3. **Evidence and Witnesses § 2337 (NCI4th)— sexual offense and indecent liberties—testimony of psychologists—credibility of the children—proper foundation**

The trial court in a prosecution for first degree sexual offense and taking indecent liberties properly admitted the testimony of two examining psychologists, despite defendant's contention that the witnesses gave testimony as to the credibility of the children without having laid a proper foundation, where the testimony of both examining psychologists established a sufficient foundation to permit the trial court to allow their opinions to be admitted.

Am Jur 2d, Expert and Opinion Evidence §§ 168, 169, 180; Rape §§ 100, 101.

4. **Constitutional Law § 366 (NCI4th)— first degree sexual offenses and indecent liberties—sentences within statutory limitations—not cruel or unusual**

Defendant's sentences for first degree sexual offense and indecent liberties were within the prescribed statutory limitations for the offenses charged and therefore were constitutionally valid in the absence of extraordinary circumstances, which defendant failed to show.

Am Jur 2d, Criminal Law §§ 625, 626; Infants §§ 16, 17.5; Rape §§ 114, 115.

5. **Evidence and Witnesses § 1958 (NCI4th)— first degree sexual offense and indecent liberties—physician's report—improperly admitted**

The trial court erred in a prosecution for first degree sexual offense and indecent liberties by admitting a medical report as an exception to N.C.G.S. § 8C-1, Rule 803(6) where the document contained matters which were immaterial and irrelevant and statements which amounted to hearsay upon hearsay.

Am Jur 2d, Expert and Opinion Evidence §§ 235, 255.

APPEAL by defendant from *Walker (Russell G., Jr.), Judge.* Judgment entered 6 December 1990 in Superior Court, RANDOLPH County. Heard in the Court of Appeals 15 January 1992.

Defendant was charged in proper bills of indictment in 89 CrS 143 with first degree sexual offense and taking indecent liberties with a three year old male child, and with the same offenses against a four year old male child, in 90 CrS 63-64, in violation of G.S. 14-27.4 and 14-202.1. The following evidence was presented at trial:

The three-year old child, who was four years old at the time of trial, testified he had attended pre-school at First Assembly Church in Asheboro, North Carolina and remembered defendant being there. The child further testified that on one occasion while he was using the bathroom at First Assembly, defendant touched the child's penis and defendant put his penis into the child's mouth. The child told his mother and Detective Jackie Whalley about what had happened to him.

The child's mother testified that on the morning of 8 May 1989, she dropped her child off at school and saw defendant, who was working as a custodian at the school, pat her son on the head saying, "There's my little buddy . . . ." On the following evening, 9 May 1989, she asked her son about defendant and the child responded "hims got a big penis" and explained that he had seen it in the bathroom. She said the child told her he had touched defendant's penis because defendant told him to and that defendant had touched his penis that day.

Detective Jackie Whalley, an officer with the Randolph County Sheriff's Department, testified that on 10 May 1989, the mother reported the incident, and on 12 May 1989, she interviewed the child. The child told her defendant was a big friend, and he and defendant went to the bathroom together at school. She testified the child said defendant had put his penis in the child's mouth.

Dr. Doug Jackson, a counseling psychologist who conducted four separate interviews with the child, testified the child told him defendant was a bad man who had put his penis into the child's mouth. Dr. Jackson stated the child demonstrated what had happened to him using anatomically correct dolls. He also stated the child acted aggressively toward the adult male doll pretending to shoot and cut it. Based upon the child's conduct during these interviews, Dr. Jackson concluded that he had been sexually abused.

The four-year old child, who was six at the time of trial, testified he had attended pre-school at First Assembly and knew defendant.

He said that while he was using the bathroom, defendant touched his behind with his penis. The child told his father about the incident some time later when he saw defendant on television and also spoke with Detective Whalley and "another woman" about what had happened.

The child's father testified his son had attended First Assembly pre-school during the 1988-89 school year and had participated in the "after school program" at First Assembly from August 1989 until February 1990. On 24 February 1990, his son was watching a television news broadcast and upon seeing a picture of defendant, the child became very upset and said, "that was Mr. Reeder." The child told him defendant had molested him. When the father inquired further, the child told him defendant had come up behind him while he was using the bathroom and stuck his "pee-pee" into the child's bottom and it hurt real bad. The child told his father he tried to scream, but defendant put his hand over his mouth and told him he would kill him if he told anyone.

The father testified his son said defendant had been doing this to him for a long time and would sometimes grab him by the arm while he was on the playground and take him to the bathroom. The father further testified that his child's story helped explain his behavior over the past year. He stated the child had often come home from school complaining of pain around his bottom. On or about 4 November 1988, the child told him his bottom and "pee-pee" were hurting, and upon examination, the father noticed the area appeared red.

Detective Jackie Whalley interviewed the four-year old child on 25 February and 20 March 1990. She testified the child told her defendant came into the bathroom stall where he was using the bathroom and put his "pee-pee" into his behind and it hurt. The child also said defendant had told him he would kill him if he told anyone.

Dr. Sandra Mills, a clinical psychologist recommended by Detective Whalley, interviewed the child on five separate occasions. Dr. Mills testified the child took a white male anatomically-correct doll and a black boy doll and demonstrated the white male doll putting its penis in the black boy doll's bottom and said defendant did this to him in the bathroom. She further testified the child became very angry with the white male doll, throwing it on the floor and saying "I'm smacking Mr. Reeder and I'm going to kick him.

I'm going to jump on his head. . . . He's not going to touch me anywhere else." From these interviews with the four-year old child, Dr. Mills concluded that he had been sexually abused.

Detective Thomas L. McIver of the Asheboro Police Department testified that he conducted an investigation involving defendant in June, 1986. During the course of that investigation, Detective McIver questioned defendant concerning an incident in which defendant had allegedly taken indecent liberties with two girls who were seven and eight years old. Defendant was advised of his constitutional rights and gave a written statement to Detective McIver in which he described numerous occasions where he had exposed himself to the girls and allowed them to touch his penis to the point of erection. He also admitted having touched the girls' vaginas.

The jury found defendant guilty as charged, and the court entered judgments sentencing defendant to two terms of life imprisonment for the first degree sexual offenses and two ten year terms of imprisonment for the charges of taking indecent liberties with the two children. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Clarence J. Delforge, III, for the State.

Assistant Appellate Defender Mark D. Montgomery for defendant, appellant.

HEDRICK, Chief Judge.

[1] Based upon Assignment of Error No. 10, defendant contends the trial court erred in denying his motion to dismiss the charges of first degree sexual offense and taking indecent liberties with the two children. Defendant simply argues the testimony of the children involved is "unreliable" with respect to the charges of first degree sexual offense, and with respect to the charges of taking indecent liberties, "[t]he trial court did not define for the jury the acts for which it could convict defendant of taking indecent liberties with [the two children]."

G.S. 14-27.4 in pertinent part provides:

(a) A person is guilty of a sexual offense in the first degree if the person engages in a sexual act:

(1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim;

A "sexual act" is defined in G.S. 14-27.1(4) as ". . . cunnilingus, fellatio, analingus, or anal intercourse . . . ."

G.S. 14-202.1 provides in pertinent part:

(a) A person is guilty of taking indecent liberties with children if, being 16 years of age or more and at least five years older than the child in question, he either:

(1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire; or

(2) Willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body of any child of either sex under the age of 16 years.

While defendant argues in his brief the trial court erred in its instructions to the jury, Assignment of Error No. 10 raises only the question of the sufficiency of the evidence to require submission of the charges to the jury. Suffice it to say, when the evidence is taken in the light most favorable to the State, it is sufficient to raise inferences that defendant committed each element of the offenses charged, and we hold the court did not err in denying defendant's motions to dismiss.

[2] Defendant next contends the trial court erred in admitting into evidence defendant's statement to Detective McIver concerning a prior incident of taking indecent liberties with two young girls. He argues this statement was inadmissible under Rules 404(b) and 403 of the North Carolina Rules of Evidence. We cannot agree.

Rule 404(b) states:

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.

In the case at bar, the trial judge conducted a *voir dire* hearing to determine whether defendant's statement was admissible. In his argument to the court on *voir dire*, the prosecutor stated that the evidence of the prior incident was relevant to show "defendant's unnatural lust, his intent, [and] state of mind." In support of his argument, the prosecutor cited the case of *State v. Gainey*, 32 N.C. App. 682, 233 S.E.2d 671, *disc. review denied*, 292 N.C. 732, 235 S.E.2d 786 (1977). In *Gainey*, this Court held that evidence of defendant's commission of a prior sexual offense was clearly relevant to show defendant's unnatural lust, intent or state of mind. *Id.* The record discloses that in ruling defendant's statement was admissible, the trial judge said:

> . . . I will find that the evidence that the State seeks to offer is relevant to the issues in this case, but it is not on balance unduly prejudicial and will admit it under the authority of Rule 404(b) and the language . . . in *State v. Gainey*, being particularly appropriate and applicable to this situation.

Under these circumstances, we find the trial judge properly admitted into evidence defendant's statement to Detective McIver concerning a prior incident of taking indecent liberties with children. Defendant's contention is meritless.

[3] Defendant also contends "[t]he introduction of opinion evidence was reversible error." He argues the testimony of the two examining psychologists, Dr. Sandra Mills and Dr. Doug Jackson, should not have been allowed since they gave expert testimony as to the credibility of the children without having laid a proper foundation for their opinions.

Rule 702 of the North Carolina Rules of Evidence governs the admission of expert testimony and provides:

> If 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.

This Court has often applied Rule 702 to allow experts to testify to the symptoms and characteristics of sexually abused children. *See State v. Murphy*, 100 N.C. App. 33, 394 S.E.2d 300 (1990); *State v. Bailey*, 89 N.C. App. 212, 365 S.E.2d 651 (1988). Furthermore, "where the expert's testimony relates to a diagnosis derived

from the expert's examination of the [child] witness in the course of treatment, it is not objectionable because it supports the credibility of the witness or . . . states an opinion that abuse has occurred." *State v. Speller*, 102 N.C. App. 697, 701, 404 S.E.2d 15, 17 (1991).

In the present case, Dr. Mills testified that she is a clinical psychologist in private practice in Greensboro, N.C., and that she treats and evaluates sexually abused children in the normal course of her practice. She stated that the four-year old child's parents had contacted her seeking evaluation and treatment for their son. In response to the parents' request, Dr. Mills conducted five interview sessions with the four-year old child over a two month period. Her testimony at trial consisted of her observations of the child's behavior, as well as her recollections of statements the child had made to her during the course of these interviews. Dr. Mills further testified that based upon these observations and her professional experience, it was her opinion that the four-year old child had been sexually abused.

Similarly, Dr. Jackson testified that he is a counseling psychologist practicing in Asheboro and Greensboro, N.C. He stated that the three-year old child's mother first brought him in for evaluation and treatment in August, 1989. Dr. Jackson conducted four interviews with the child, and his testimony described the child's behavior during these interviews. Dr. Jackson testified that he had observed behavorial characteristics in the child consistent with those of sexually abused children.

We find the testimony of both examining psychologists established a sufficient foundation to permit the trial court to allow their expert opinions to be admitted into evidence. This contention is without merit.

[4] By Assignment of Error No. 13, defendant claims the sentence imposed by the trial court denied him "his state and federal constitutional rights to be free from cruel or unusual punishments."

We note that the sentence imposed by the trial judge in this case was within the prescribed statutory limitations for the offenses charged and is therefore constitutionally valid in the absence of extraordinary circumstances. *State v. Pruitt*, 94 N.C. App. 261, 380 S.E.2d 383, *disc. review denied*, 325 N.C. 435, 348 S.E.2d 545 (1989). In his brief, defendant recognizes the facial validity of these

statutes and fails to show the existence of any extraordinary circumstances in this case. This assignment of error is thus overruled.

[5] Finally, defendant contends the court erred in allowing into evidence, over his objection, State's Exhibit 2, "[a] written report allegedly completed by Dr. Martha Sharpless on April 9, 1990 . . ." concerning her examination and evaluation of the four-year old child. The medical report in question appears in the record as follows:

> NAME: [the four-year old child]
>
> DATE OF EVALUATION: April 9, 1990
>
> Seen briefly for pictures and for re-examination. On his last examination he had a lot of reflex spasm and it was hard for me to examine him or obtain pictures. Today he shows on picture, he shows a definite wedge-shaped scar at 1 o'clock. He has no history of constipation or pinworms or any other problems. This could be definitely post-sodomy. The scar is fairly striking. He does not have a reflex relaxation. Rectal exam is negative, sent for serology and AIDS testing. The child today says, again he tells me, "Mr. Reeder messed with my bottom but I cannot remember what he did."
>
> Martha Sharpless, M. D./s
> Medical Director
>
> copy/Randolph County Sheriff Dept.

Attached to the medical report is an affidavit which appears in the record as follows:

> I, Nancy Collins, do solemnly swear:
>
> 1. That I am the custodian of Medical Records of Developmental Associates.
>
> 2. That attached hereto are the medical records sought by the attached subpoena. These are the records of the examination and treatment of Steven Douglas Hinton at Developmental Associates on April 9, 1990.
>
> 3. That the attached records are true and correct copies of the above-described records.
>
> 4. That the attached records were made and kept in the regular course of business at Developmental Associates. The contents

thereof were recorded at or near the time of occurrence of the events observed. The records were made by persons having personal knowledge of the matters contained therein.

This 5 day of December, 1990.

Nancy S. Collins/s
Director

In his brief, defendant states, "This report was hearsay. The [S]tate did not comply with the procedural requirements of Rule 803 in authenticating the document, and it should not have been admitted for this reason." Rule 803 of the North Carolina Rules of Evidence provides in pertinent part:

> The following are not excluded by the hearsay rule, even though the declarant is available as a witness:
>
> (6) Records of Regularly Conducted Activity—A memorandum, report, record, or data compilation . . . of acts, events, conditions, opinions, or diagnoses, made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method of or circumstances or preparation indicate lack of trustworthiness. The term "business" as used in this paragraph includes business, institution, association, profession, occupation, and calling of every kind, whether or not conducted for profit.

In *Sims v. Insurance Co.*, 257 N.C. 32, 125 S.E.2d 326 (1962), the Supreme Court applied the business records exception for hospital records and set forth the following requirements for their introduction:

> In instances where hospital records are legally admissible in evidence, proper foundation must, of course, be laid for their introduction. The hospital librarian or custodian of the record or other qualified witness must testify to the identity and authenticity of the record and the mode of its preparation, and show that the entries were made at or near to the time of the act, condition or event recorded, that they were made by persons having knowledge of the data set forth, and that

> they were made *ante litem motam. The court should exclude from the jury consideration of matters in the record which are immaterial and irrelevant to the inquiry, and entries which amount to hearsay on hearsay.*

Id. at 35, 125 S.E.2d 326 at 329 (emphasis added).

In the present case, assuming *arguendo* that the medical report in question was properly authenticated as a medical record "kept in the course of a regularly conducted business activity" and admissible as a business record within the purview of Rule 803(6), we must consider whether the report was otherwise "legally admissible" as provided in *Sims*. The report under consideration declares that the subject child told the declarant, Dr. Sharpless, "Mr. Reeder messed with my bottom but I cannot remember what he did." While this statement might have been admissible as corroborative testimony at trial, it is clearly inadmissible within the meaning of the business records exception to the hearsay rule because it is an "entr[y] which amount[s] to hearsay on hearsay." The State argues the statement should be admissible under the exception to the hearsay rule set out in Rule 803(4)—"Statements for Purposes of Medical Diagnosis or Treatment." The State's contention, however, is untenable since the report discloses that the exam was not made for the purpose of diagnosis or treatment, but solely for the purpose of determining whether the child had been sexually abused.

The relevance of the statements in the report that ". . . he shows a wedge-shaped scar at 1 o'clock. He has no history of constipation or pinworms or any other problems. This could be definitely post-sodomy" is seriously questionable since the doctor's exam occurred more than a year after the incident giving rise to the charge. The physician's statement was at most equivocal and was based in part on a history of the child's condition related to her by his parents. These statements, even if relevant, have no probative value and are clearly prejudicial. See N.C.R. Evid. 403. The statement in the report indicating that the child was "sent for serology and AIDS testing" is irrelevant and served only to unduly and unfairly prejudice defendant in the eyes of the jury as to the four-year old child, 90 CrS 63-64.

Therefore, we hold the trial judge erred to the defendant's prejudice in allowing the medical report made by Dr. Sharpless on 9 April 1990 to be admitted into evidence as an exception to

the hearsay rule pursuant to Rule 803(6) when the document contained "matters which were immaterial and irrelevant" and statements which "amounted to hearsay upon hearsay," and for this error, defendant must be given a new trial with respect to the charges against him involving the four-year old child. For this reason, we need not address defendant's remaining assignment of error argued on appeal which relates only to the four-year old child.

With respect to the charges against him concerning the three-year old child, defendant received a fair trial free from prejudicial error.

No error in 89 CRS 143; New trial in 90 CRS 63-64.

Judges WELLS and JOHNSON concur.

TRIPLE E ASSOCIATES, A NORTH CAROLINA PARTNERSHIP, C. L. MARTIN, ANNIE BELL M. LOWERY, BESSIE M. HARTIS, JOE R. MARTIN, DOROTHY ANNE M. GRANT, ALLIE ROSE M. HARRELL, JULIA M. WAITE, JASON THOMAS MARTIN, LAWRENCE NORMAN, MARTHA ALICE B. OWNBY, MILTON R. MARTIN, BETTY M. FOWLER, BRENDA KAYE McDONALD, MARY KATHERINE B. TICE, MACK THOMAS BOYTE, MARY ANN M. MELVIN, ALLAN F. MacLEAN, III, CHERI MacLEAN GERRARD, SYLVIA STEVENSON SMITH, PETITIONERS v. THE TOWN OF MATTHEWS, NORTH CAROLINA; SHAWN LEMMOND, MAYOR OF THE TOWN OF MATTHEWS AND MEMBER OF THE BOARD OF COMMISSIONERS OF THE TOWN OF MATTHEWS; TED KIKER, M. DAVID BLAND, R. LEE MYERS, ALEX J. SABO, BILL BRAWLEY, AND KATHY ABERNETHY, MEMBERS OF THE BOARD OF COMMISSIONERS OF THE TOWN OF MATTHEWS, RESPONDENTS

No. 9126SC139

(Filed 18 February 1992)

Municipal Corporations § 30.6 (NCI3d)— day care facility—special use permit denied—evidence of entitlement

Petitioners had sufficient competent and material evidence before the Town Board to establish their entitlement to a special use permit for a day care facility where the ordinance required as a prerequisite for approval of a special use permit that the proposed use be consistent with the most recent plan, that the proposed use be compatible with the general

characteristics of the area, and that the proposed use not create or seriously worsen the congestion on area thoroughfares beyond designated levels of service. The trial court noted in its findings that petitioners had produced competent, material and substantial evidence under the requirements of *Humble Oil & Refining Company v. Board of Aldermen of the Town of Chapel Hill*, 284 N.C. 458; the Town Board must then have before it competent, material and substantial evidence to the contrary in order to deny the permit.

Am Jur 2d, Zoning and Planning §§ 284-288.

APPEAL by petitioners and respondents from judgment entered 1 November 1990 by *Judge Raymond A. Warren* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 12 November 1991.

Triple E Associates (petitioners) are a group of landowners in the Town of Matthews who wished to construct and maintain a day care facility on their property consisting of a 3.89 acre tract of land. This property is located within an R-15 residential zone which includes single family housing. The property fronts to the east on Sardis Road and to the south on N.C. Highway 51, both of which are major thoroughfares. The northern portion of the property is adjacent to the City of Charlotte's five million gallon water storage tank, and the Cross & Crown Lutheran Church adjoins the property to the west. Respondents are the Mayor and Board of Commissioners of the Town of Matthews.

On 22 May 1989, petitioners filed a petition for a special use permit with the Town of Matthews ("Town"), and sought to withdraw a previously filed rezoning petition. At the time, Section 3319.1 of the Zoning Ordinance of the Town of Matthews ("the ordinance") allowed day care facilities to be established in any R-15 residential district by special use permit provided certain conditions were satisfied.

On 12 June 1989, the Board of Commissioners ("Town Board"), on its own motion, set a hearing to consider repealing the special use permit provisions from the ordinance. Subsequent to the hearing on 10 July 1989, the Town Board voted to repeal the special use permit provisions under the ordinance. Petitioners' requested public hearing on the special use permit application was denied and the petition was returned to petitioners with the filing fee.

Pursuant to a Petition for Writs of Certiorari and Mandamus, however, an order was issued by the Superior Court directing the Town Board to conduct a public hearing on the special use permit petition pursuant to the terms and provisions of the ordinance as it existed on 22 May 1989.

A hearing on the special use permit application was held on 18 January 1990 and continued on 24-26 January 1990, when it finally concluded with the Town Board referring the matter to the Planning Commission for a recommendation. At that time Section 3319.3 of the ordinance provided, as a prerequisite to approval of the special use permit, that evidence presented at the hearing must establish:

.1 That the proposed use will be consistent with the most recent plan, for the area, when one exists.

.2 That the proposed use will be compatible with the general characteristics of the area and with respect to the location of the structure; the location, design and screening of parking and service areas; the location, size and character of signs; and the streetscape.

.3 That the proposed use will not create or seriously worsen the congestion on area thoroughfares beyond the stable flow condition (level of service "C"), or beyond level of service "B" on area residential (non-thoroughfare) streets.

On 20 March 1990, the Planning Commission made findings under the ordinance that: (1) the proposed use was consistent with the most recent plan for the area; (2) the proposed use was compatible with the general characteristics of the area; and (3) the traffic generated by the proposed use would create or permanently worsen the congestion on area thoroughfares beyond the level of service "C." The Planning Commission thereby recommended the Town Board deny the special use permit. On 29 May 1990, the Town Board voted to deny the special use permit, finding that none of the three criteria required by the ordinance had been established.

The trial court in its 1 November 1990 order affirmed the Town Board's denial of the special use permit but made the following conclusions: (1) the proposed use was consistent with the recent plan for the area; (2) the evidence established the day care center would not worsen traffic congestion; and (3) the use was not com-

patible with the general characteristics of the area. The court affirmed the Town Board's decision to deny the special use permit.

Perry, Patrick, Farmer & Michaux, P.A., by Roy H. Michaux, Jr., and Bailey Patrick, Jr., for petitioner appellants-appellees.

Town Attorney Charles R. Buckley, III for respondent appellees-appellants.

WALKER, Judge.

Petitioners' primary issue on appeal is whether the Town Board based its findings under Section 3319.3 of the ordinance on competent, material and substantial evidence. We hold that the Town Board did not with respect to Sections 3319.3.1 and 3319.3.2 and therefore reverse. We remand this case to the Town Board for further evidentiary hearings under Section 3319.3.3 consistent with this opinion.

Respondents contend the court erred by striking certain of the Town Board's findings as not being supported by competent material and substantial evidence. Under the Town's ordinance, Section 3319.1 provides:

> The following uses may be established by a special use permit in residential districts subject to the standards in Section 1626 and all other appropriate provisions of this ordinance.
>
> .1 Day care centers and pre-schools, subject to Section 3119.

Obviously, the Town in adopting this ordinance contemplated the operation of day care facilities in residential districts. Indeed, a rational interpretation of the inclusion of such language in the ordinance would suggest a day care center is an acceptable establishment in a residential district, subject to the requisite conditions necessary for obtaining a special use permit being satisfied. Additionally, under Section 1626.5 of the ordinance, "[d]ay care centers . . . are permitted by right as an accessory to churches or synagogues subject to the dimensional standards established in 3119." The day care center's compatibility with the general characteristics of the area then becomes apparent, since churches and synagogues are permitted in single family residential districts.

Our Supreme Court noted "[t]he inclusion of [a] particular use in [an] ordinance as one which is permitted under certain conditions, is equivalent to a legislative finding that the prescribed use is

one which is in harmony with the other uses permitted in the district." *Woodhouse v. Board of Commissioners of the Town of Nags Head*, 299 N.C. 211, 216, 261 S.E.2d 882, 886 (1980). This Court agreed and concluded a "designation in the Code of an adult bookstore as a 'special use' was the equivalent of a legislative finding that it was compatible with other uses permitted in a Raleigh business district." *Harts Book Stores, Inc. v. City of Raleigh*, 53 N.C.App. 753, 758, 281 S.E.2d 761, 764 (1981). Thus, the ordinance itself specifically addresses the establishment of day care centers in a residential district by allowing such centers as of right if affiliated with a church or synagogue. We believe this to be clearly indicative of a legislative finding that day care centers are compatible with other uses within the residential district.

Despite the foregoing, we do not hold a day care center must conclusively be found to be compatible with other uses and the general characteristics of the district addressing its use. Here, the petitioners' site plan satisfied all minimum technical requirements of the ordinance. Petitioners also stated they could comply with the conditions recommended by the Planning Commission for issuance of the special use permit. Pursuant to Section 3307 of the ordinance, the Town Board would not necessarily be limited in its deliberations to only those conditions recommended by the Planning Commission. "*[T]he board of county commissioners* may issue special use permits . . . in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified . . . in the zoning ordinance." *In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970) (emphasis in original).

The North Carolina Supreme Court set forth in *Woodhouse* at 219, 261 S.E.2d at 888, the test the applicant for a special use permit must satisfy. This test provides that:

> [O]nce an applicant . . . shows that the proposed use is permitted under the ordinance and presents testimony and evidence which shows that the application meets the requirements for a special exception, the burden of establishing that such use would violate the health, safety and welfare of the community falls upon those who oppose the issuance of a special exception.

Furthermore:

> When an applicant has produced competent, material, and substantial evidence tending to establish the existence of the

> facts and conditions which the ordinance requires for the issuance of a special use permit, *prima facie* he is entitled to it. A denial of the permit should be based upon findings contra which are supported by competent, material, and substantial evidence appearing in the record.

Humble Oil & Refining Company v. Board of Aldermen of the Town of Chapel Hill, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

The trial court, in its Findings of Fact noted that petitioners had produced competent, material and substantial evidence tending to prove their entitlement to the permit under the requirements of *Humble*. The Town Board must then have before it competent, material and substantial evidence to the contrary in order to deny the permit. We agree with the trial court's Conclusion of Law No. 12 that there was insufficient evidence of a competent, material and substantial nature to rebut petitioners' showing of compliance with Section 3319.3.1, i.e. the proposed use was consistent with the recent plan for the area.

The record indicates that in the Town Board's analysis of Sections 3319.3.1 and 3319.3.2, each contained findings dealing with traffic matters. Thus, it is evident the Town Board considered how traffic would be affected under Sections 3319.3.1, .2 and .3 when it denied the permit. Since traffic issues are dealt with in Section 3319.3.3, as the trial court correctly noted, we hold these findings not to be relevant considerations under Sections 3319.3.1 and 3319.3.2. The Town Board may not create new requirements not outlined in the ordinance to deny the permit. *Woodhouse* at 218-219, 261 S.E.2d at 887. Since the relevant section of the land use plan does not address traffic, it is an improper consideration under 3319.3.1. Section 3319.3.2 does refer to "the streetscape" but the record is devoid of any evidence defining "streetscape" or linking it with traffic related issues.

With regard to Section 3319.3.2, the trial court concluded the Town Board's Findings A, B and C supported Finding E. While the trial court concluded these findings were supported by the evidence, it also stated in part in Conclusion of Law No. 9:

> The Town appears to take the position that the proposed use is incompatible *because* it is a day care center. Petitioners correctly describe this as being contrary to *Woodhouse* and *Hart's* [sic] *Book Stores*. The ordinance itself makes a legislative

> determination that day care centers *are* compatible under *certain conditions*. (Emphasis in original).

As the trial court observed, the ordinance decrees that day care centers are compatible under certain conditions. Findings A, B and C do not establish incompatibility, however they may be addressed by the Town Board under Section 3307 by attaching "reasonable and appropriate conditions" to the special use permit. When traffic considerations are excluded under 3319.3.1 and 3319.3.2, petitioners have otherwise established their ability to comply with the requisite conditions under these sections of the ordinance.

The trial court's Conclusion of Law No. 12 stated there was insufficient evidence of a competent, material and substantial nature to rebut petitioners' *prima facie* right to the permit under Section 3319.3.3. However, recognizing that traffic issues are properly included under Section 3319.3.3 and are important considerations in determining whether a special use permit should issue, we must look to see if the court's conclusion here is supported by adequate findings of fact. The trial court correctly concluded petitioners established a *prima facie* right to the permit under Section 3319.3, but then concluded there was "insufficient evidence of a competent, material and substantial nature to rebut petitioners' showing of compliance" with this section.

Petitioners' third exception thereby challenges the Town Board's finding the day care center would cause traffic conditions to worsen on area thoroughfares beyond the level "C" specified by Section 3319.3.3 of the ordinance. At the hearing, petitioners offered evidence which tended to show that with the improvements made to the intersection of Sardis Road and N.C. Highway 51, the day care center would not create or seriously worsen the congestion on these thoroughfares beyond the level of service "C." The Planning Board found the proposed use would worsen traffic and the Town Board agreed, finding the Town's evidence sufficient to rebut petitioners' case. The trial court, however, found the opponents' evidence was not competent and material to rebut the petitioners' claim that traffic congestion would not worsen. We agree with the court that the portion of the opponents' evidence which projected traffic conditions into the future (year 2000) should have been rejected as speculative. However, we are not prepared to say that all of the Town's evidence regarding the level of service by 1992 was

not competent and material so as to be insufficient to rebut petitioners' showing of compliance with Sec. 3319.3.3.

A special use permit should not be denied unless supported by competent, substantial evidence in the record. *In re Application of Goforth Properties, Inc.*, 76 N.C.App. 231, 233, 332 S.E.2d 503, 504, *disc. review denied*, 315 N.C. 183, 337 S.E.2d 857 (1985). Clearly, the implementation of the whole record test does not allow this Court or the Superior Court to substitute its judgment for the Town Board "as between two reasonably conflicting views." *Ghidorzi Construction, Inc. v. Town of Chapel Hill*, 80 N.C.App. 438, 440, 342 S.E.2d 545, 547, *disc. review denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). On the other hand, "the commissioners cannot deny applicants a permit in their unguided discretion or . . . refuse it solely because, in their view, [it] would 'adversely affect the public interest.' " *In re Application of Ellis*, 277 N.C. 419, 425, 178 S.E.2d 77, 81 (1970). In reviewing a decision an administrative board is responsible for:

> (3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,
>
> (4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and
>
> (5) Insuring that decisions are not arbitrary and capricious.

Coastal Ready-Mix Concrete Co. Inc. v. Board of Commissioners of the Town of Nags Head, 299 N.C. 620, 626, 265 S.E.2d 379, 383 *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980).

From our review of the record, we conclude the petitioners had sufficient competent and material evidence before the Town Board to establish their entitlement to the special use permit under Sections 3319.3.1 and 3319.3.2 of the ordinance. Consequently, we affirm the trial court with regard to its findings and conclusions under Section 3319.3.1 and reverse the court as to its findings and conclusions concerning Section 3319.3.2. We reverse the trial court with regard to Section 3319.3.3 because Conclusion of Law No. 12 is not supported by adequate findings of fact and remand for further proceedings.

It appears from the record, although not referenced in the ordinance, the Town Board's findings or the court's judgment that the "level of service 'C' " standard specified in the ordinance is a defined engineering term which is calculated according to specific standards called for under the Transportation Research Board Special Report 209, Highway Capacity Manual. If so, the standard prescribed in the most recent manual would be used upon remand.

With respect to the reversal of the trial court's ruling on Section 3319.3.3, we remand to the Mecklenburg County Superior Court for further remand to the Town Board with instructions to conduct a *de novo* evidentiary hearing under this Section and to make specific findings of fact as of the date on which the proposed use is scheduled to be put into effect.

Affirmed in part; reversed in part; and remanded for further proceedings consistent with this opinion.

Judges WELLS and LEWIS concur.

EARL BUMGARNER AND WIFE, EULA BUMGARNER v. HOBART RENEAU AND WIFE, REVA RENEAU, FORMERLY REVA ARNOLD

No. 9130SC116

(Filed 18 February 1992)

1. **Dedication § 12 (NCI4th)— clause in deed—reservation of road for public use—offer of dedication**

A clause in a deed "excepting and reserving" from the conveyance an existing road to "the general public" constituted an express offer of dedication of the road to the general public.

Am Jur 2d, Dedication §§ 5, 8, 28.

2. **Dedication § 13 (NCI4th)— implied acceptance of dedication—public use and governmental control**

Acceptance of an offer of dedication of a road is implied in North Carolina when the road is used by the general public coupled with control of the road by public authorities for a period of twenty years or more. North Carolina does not recognize an implied acceptance when the general public mere-

ly uses a road for an indefinite number of years without concomitant governmental control of the road.

Am Jur 2d, Dedication §§ 41, 45, 51-55.

Judge WYNN dissenting.

APPEAL by plaintiffs from judgment entered 28 August 1990 in JACKSON County Superior Court by *Judge J. Marlene Hyatt.* Heard in the Court of Appeals 7 November 1991.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, for plaintiff-appellants.

Russell & Dickson, by Russell L. McLean, III, and Long, Parker, Hunt, Payne & Warren, P.A., by Robert B. Long, Jr., for defendant-appellees.

GREENE, Judge.

Plaintiffs appeal from a judgment entered 28 August 1990, which judgment was based on a jury verdict finding that plaintiffs had failed to establish a prescriptive easement over defendants' property.

Plaintiffs instituted this action seeking to permanently enjoin defendants from interfering with plaintiffs' use of a paved road leading from plaintiffs' property across defendants' property to U.S. Highway 441 in Jackson County. In their initial complaint, plaintiffs make the following pertinent allegations: that they have used the road without interruption and without permission for 32 years, and that such use has been open and notorious; that defendants' deed to an eight-acre tract of land excepts and reserves the road to the general public; and that defendants erected metal posts along the road, "significantly reducing and limiting the easement area from its previous width [of 12 feet] to a dangerously narrow corridor . . ." which became impassable to fire trucks, ambulances, and plaintiffs' farm equipment. Plaintiffs' prayer for relief requested, among other things, a mandatory injunction requiring defendants to remove all obstructions placed on the road and a permanent injunction restraining and enjoining defendants from interfering with plaintiffs' right-of-way. Although the record does not indicate the trial court's ruling on the request for the injunctions, it appears that at some point after the filing of the complaint the posts were removed. Plaintiffs filed an amended complaint in which they added

to their initial prayer for relief a request that judgment be entered (1) declaring the right-of-way a public road, and (2) granting plaintiffs a prescriptive easement over the right-of-way.

At trial, the evidence established that plaintiffs' predecessor in title, William Rogers, prior to selling the property to plaintiffs, reached an agreement with nearby landowners for a right-of-way which would provide a means of ingress and egress from his property to Highway 441. A portion of the road, which was built in 1949, passes through what is now defendants' property. Defendants' predecessor in title, Howard Reagan, who in 1949 owned the eight-acre tract on which the road is now located, testified that he gave William Rogers permission to build the road and that the road was 12 feet wide. Howard Reagan conveyed the property to the Jordans in 1955. In 1960, the Jordans conveyed the property to the Halls. The Jordan-Hall deed includes the following clause:

> Excepting and reserving from this conveyance unto . . . the general public, the existing roadway as same is now located together with the right to maintain same; said roadway to be used as a means of ingress, egress and regress to the property above described and other properties belonging to members of the general public, and said right of way to be and remain perpetually open for the aforesaid purposes but in the event said right of way shall ever cease to be used for road purposes, then and in that event same shall revert to and become the property of the owner of the adjoining lands over which same passes.

Finally in 1964, the Halls conveyed the property to defendant Reva Arnold (now Reneau) and her husband at the time, Lester Arnold. The Hall-Arnold deed contains, word for word, the above-referenced clause.

The evidence established that, between 1949 and 1989, plaintiffs and others used the road as a means of accessing their property. In 1989, defendants erected the posts along the road for the purpose of curtailing construction vehicles which were using the road to reach a nearby subdivision. The width between the posts ranged from approximately 10 feet at some points to nearly 12 feet at others. After erecting the posts, defendants constructed a by-pass road for use by plaintiffs for plaintiffs' farm equipment. There is conflicting evidence as to the adequacy of the by-pass road.

During the direct examination of defendant Reva Reneau, plaintiffs attempted to introduce into evidence a copy of the deed to defendants' property. The trial court sustained defendants' objection to the introduction of the deed, and submitted to the jury only the issue of whether plaintiffs had established a prescriptive right-of-way. The jury found that plaintiffs had failed to establish such a right-of-way.

The issues are whether I) a clause in a deed "excepting and reserving" from the conveyance an existing road to "the general public" constitutes an offer of dedication to the general public; and II) an offer of dedication is properly accepted when the general public uses the road for an indefinite period of time and for the purpose for which it was offered for dedication.

Plaintiffs contend that they are entitled to a new trial because the trial judge refused to allow them to introduce into evidence defendants' deed. They contend that the deed is relevant to the issue of whether the disputed road is a public road. Plaintiffs do not contend in this Court that the deed is relevant to the issue of whether plaintiffs had established a right to use the road by prescription.

I

[1] Plaintiffs argue that the "exception and reservation" clause in defendants' deed creates a right-of-way for use by the general public by express reservation, or alternatively, by dedication. " '[A] reservation is a clause in a deed whereby the grantor reserves something arising out of the thing granted not then in esse, or some new thing created or reserved, issuing or coming out of the thing granted and not a part of the thing itself. . . .' " *River Birch Assoc. v. City of Raleigh*, 326 N.C. 100, 108, 388 S.E.2d 538, 542 (1990) (quoting *Central Bank & Trust Co. v. Wyatt*, 189 N.C. 107, 109, 126 S.E. 93, 94 (1925)). Dedication is "the intentional appropriation or donation of land, or of an easement or interest therein, by its owner for some proper public use." 23 Am Jur 2d Dedication § 1 (1983). An offer of dedication of land to the use of the public may be either by express language, reservation, or by conduct of the owner manifesting an intent to set aside land for the public, *Milliken v. Denney*, 141 N.C. 224, 227, 53 S.E. 867, 868 (1906); *Town of Sparta v. Hamm*, 97 N.C. App. 82, 85, 387 S.E.2d 173, 175, *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990), as well

as by the recording of a plat denoting lots and streets. *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 367, 90 S.E.2d 898, 901 (1956).

In the instant case, defendants' grantors expressly "reserved and excepted" for use by the general public a road which was already in existence and in use at the time of the grant. Because, as previously stated, a reservation contemplates a withholding by the grantor from the conveyance some interest which is not then in existence, technically, the clause in defendants' deed is not a reservation. *See* 6 George W. Thompson, Thompson on Real Property § 3090 (1962). However, "terms such as 'dedication' and 'reservation' [are often used] without regard to their technical meaning," and courts should give effect to the obvious intent of the parties. *River Birch*, 326 N.C. at 108, 388 S.E.2d at 543; *Reynolds v. B.V. Hedrick Gravel & Sand Co.*, 263 N.C. 609, 613, 139 S.E.2d 888, 891 (1965); *see also* 23 Am Jur 2d Dedication § 28 (1983) (failure to use the word "dedicate" does not preclude clause in deed from operating as an express dedication if character of conveyance is that of a dedication). Here, it appears without dispute that the intent of the parties, as evidenced by defendants' deed, was to dedicate the road for use by the public as a means of ingress to and egress from the surrounding properties. Accordingly, we conclude that the clause in defendants' deed constitutes an express offer of dedication of the road to the general public.

II

[2] A dedication of a road to the general public is a revocable offer until it is accepted on the part of the public in "some recognized legal manner" and by a proper public authority. *Wright v. Town of Lake Waccamaw*, 200 N.C. 616, 617, 158 S.E. 99, 100 (1931); *Oliver v. Ernul*, 277 N.C. 591, 598, 178 S.E.2d 393, 396 (1971). A "proper public authority" is a governing body having jurisdiction over the location of the dedicated property, such as a municipality, an incorporated town, a county, or any public body having the power to exercise eminent domain over the dedicated property. *See* 23 Am Jur 2d Dedication § 45 (1983). Acceptance in "some recognized legal manner" includes both express and implied acceptance. *Id.* at § 51. Express acceptance may take the form of, *inter alia*, a formal ratification, resolution, or order by proper officials, the adoption of an ordinance, a town council's vote of approval, or the signing of a written instrument by proper

authorities. *Id.* Acceptance of an offer of dedication is implied in North Carolina when the dedicated property is used by the general public coupled with control of the road by public authorities for a period of twenty years or more. *See Owens v. Elliot*, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962).

Plaintiffs argue that acceptance of a dedication can also be implied through an application of the doctrine of "public user," whereby an implied dedication results when an owner offers to dedicate property and the public subsequently uses the property for the purpose for which it was dedicated. *See* 23 Am Jur 2d Dedication § 54 (1983). We disagree. In North Carolina, the use by the public of dedicated property must be coupled with control of the property by the proper public authority for at least twenty years. In other words, North Carolina does not recognize "public user" as a legal manner of acceptance of an offer of dedication. *Oliver*, 277 N.C. at 598, 178 S.E.2d at 396 (acceptance of an offer of dedication cannot be established by permissive use); *see also Emanuelson v. Gibbs*, 49 N.C. App. 417, 420, 271 S.E.2d 557, 559 (1980) (rejecting "public user" doctrine as a method of establishing a public road). We are aware that some jurisdictions recognize an implied acceptance when the general public merely uses a street for an indefinite number of years, without concomitant governmental control of the street. *See* 2 George W. Thompson, Thompson on Real Property § 372 (1980); *cf.* 41 N.C. L. Rev. 875, 879-80 (1963) (suggesting that public use of a road constitutes an implied acceptance in dedication cases where there has been no attempt to impose liability on the public for maintenance). However, as previously stated, this is not the rule in North Carolina.

The deed offered by plaintiffs was relevant to prove the offer of dedication and should have been admitted for this purpose. However, it was not relevant on the issue of acceptance because the deed contained no information revealing either an express or an implied acceptance of the offer of dedication by a proper public authority. Plaintiffs offered no evidence of a legally recognized acceptance. Therefore, because dedication of a public road cannot be established without evidence of a proper acceptance, the failure of the trial court to admit the deed into evidence did not affect any substantial right of plaintiffs. *See* N.C.G.S. § 1A-1, Rule 61 (1990) (trial court's error must "amount[ ] to denial of a substantial right" in order for judgment to be disturbed on appeal).

No error.

Judge PARKER concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

In *Town of Blowing Rock v. Gregorie*, 243 N.C. 364, 90 S.E.2d 898 (1956), Justice Parker writing for our Supreme Court stated that "it is well understood that a dedication is never complete until acceptance." *Id.* at 368, 90 S.E.2d at 901. North Carolina has recognized three modes of acceptance of an offer of dedication: (1) by formal or express acts of public authorities; (2) by implication by acts of public authorities; or (3) by implication from user by the public for the purpose for which the property was dedicated.

I take issue with the majority's conclusion that North Carolina does not recognize "public user" as a legal manner of acceptance of an offer of dedication. In *Draper v. Conner & Walters Co.*, 187 N.C. 18, 121 S.E. 29 (1924), our Supreme Court found that mere permissive use by the public will not show a dedication to the public when an owner of land constructs a road for his own convenience. *Id.* at 20, 121 S.E. at 30. The Court also stated, however, that user by the public is a valid mode of acceptance of an offer of dedication when intent to dedicate is not at issue:

> "[T]he right to a public way cannot be acquired by adverse user, and by that alone, for any period short of twenty years. It is also established that if there is a dedication by the owner, completed by acceptance on the part of the public, or by persons in a position to act for them, the right at once arises, and the time of user is no longer material. The dedication may be either in express terms or it may be implied from conduct on the part of the owner; and, while an intent to dedicate on the part of the owner is usually required, it is also held that the conduct of the owner may, under certain circumstances, work a dedication of a right of way on his part, though an actual intent to dedicate may not exist. These principles are very generally recognized and have been applied with us in numerous and well considered decisions."

Id. at 21, 121 S.E. at 31 (quoting *Tise v. Whitaker-Harvey Co.*, 146 N.C. 374, 375, 59 S.E. 1012, 1013 (1907)). *See Milliken v. Denny*,

141 N.C. 224, 53 S.E. 867 (1906); *Boyden v. Achenbach*, 79 N.C. 539 (1878).

Admittedly, it appears that the "public user" mode of acceptance recently has been disregarded in our Courts' analysis of dedication cases. *See, e.g., Owens v. Elliott*, 258 N.C. 314, 128 S.E.2d 583 (1962). In *Emanuelson v. Gibbs*, 49 N.C. App. 417, 271 S.E.2d 557 (1980), this Court explained the confusion concerning "public user":

> Confusion in the law of acceptance of dedication by a public authority has resulted from consolidation of all cases dealing with dedication regardless of the goals of the litigants. In the early law of dedication in North Carolina where a private citizen sought to prevent a subdivision developer from blocking access to a street by withdrawing the offer of dedication of the street pursuant to G.S. 136-96, he could prove dedication to the public use through the theory of public user—that is, by showing an offer of dedication and an acceptance of the offer by the public in that the street was traveled by the general public. However, if the litigant sought to impose a duty of maintenance of a street upon a public authority, more than mere use by the public was required to prove dedication. The courts sought to protect public authorities from unreasonable burdens of maintenance by requiring some act signaling acceptance of the duty by the authority.

Id. at 420, 271 S.E.2d at 559. *See Town of Blowing Rock*, 243 N.C. at 368, 90 S.E.2d at 901 ("This acceptance may be shown not only by formal action on the part of the authorities having charge of the matter, but under certain circumstances, by user as of right on the part of the public . . . ."); Note, *Dedication—Acceptance of Streets in Subdivision—Public User*, 41 N.C. L. Rev. 875, 878-80 (1963) (Public user is a valid mode of acceptance except when a party attempts to use public user to impose a duty of public maintenance.).

Because I believe that "public user" is a valid mode of acceptance as an offer of dedication, I conclude that it was prejudicial error for the trial court to have excluded the deed during the trial of this case.

STATE OF NORTH CAROLINA v. TIMMY BRAYBOY

No. 914SC145

(Filed 18 February 1992)

1. **Rape and Allied Offenses § 5 (NCI3d)— attempted rape— insufficient evidence of intent**

The State's evidence was insufficient to show that defendant intended to engage in forcible, nonconsensual intercourse with the victim and was thus insufficient to support defendant's conviction of attempted second degree rape where it tended to show that, following a codefendant's shooting of the victim's companion, defendant grabbed the victim, forced her to the ground, pinned her arms behind her, and then straddled her, and the codefendant told defendant, "Go on and do what you want to do with her."

Am Jur 2d, Rape §§ 25, 26, 88.

2. **Kidnapping § 1.2 (NCI3d)— restraint to facilitate felonious assault—sufficiency of evidence**

The State's evidence was sufficient to support defendant's conviction of kidnapping the victim for the purpose of facilitating a felonious assault upon her companion where it tended to show that immediately after the codefendant shot the victim's companion, defendant restrained the victim upon her attempt to investigate the purpose of the shooting by forcing her to the ground, pinning her arms behind her, and getting on top of her; defendant told the victim that the shot was fired to kill a snake; and the codefendant walked to where defendant held the victim on the ground and said, "Go on and do what you want to do with her." The jury could infer from this evidence that defendant told the victim that the codefendant had shot a snake to conceal the assault upon her companion, that defendant forced the victim to the ground to prevent her from interfering with the assault or aiding her companion once he had been assaulted, and that defendant knew of the codefendant's intent to shoot the victim's companion.

Am Jur 2d, Abduction and Kidnapping §§ 13, 20, 21, 32.

APPEAL by defendant from judgment entered 29 August 1990 in SAMPSON County Superior Court by *Judge James R. Strickland.* Heard in the Court of Appeals 6 January 1992.

Defendant and his co-defendant were indicted for attempted first degree rape, second degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. The State's evidence presented at trial tends to establish the following facts and circumstances.

Defendant is a twenty-nine-year-old house painter and resident of Sampson County. Co-defendant (hereinafter Jones) is a resident of Sampson County and defendant's uncle. Defendant and Jones spent a good deal of time fishing at a creek located in rural Sampson County. While fishing, defendant and Jones struck a casual acquaintance with defendant's distant relative (hereinafter Kauchak) and his girlfriend (hereinafter Ms. Koehler). Kauchak and Ms. Koehler were visiting in Sampson County from Indiana and fished with defendant and Jones several times at this creek during the week of their visit.

On the evening of 10 May 1990 at approximately 9:00 p.m., defendant and Jones called upon Kauchak and Ms. Koehler to invite them to go fishing. They were informed that Kauchak was asleep at that time. Defendant and Jones left and came back later to again invite the couple to go fishing. After some delay, Kauchak and Ms. Koehler agreed. They then drove their car to the creek to meet defendant and Jones. Defendant and Jones were fishing when the couple arrived at the creek. The couple sat in the car while Kauchak finished a cigarette. Defendant came up to the car and told the couple to join him and Jones in fishing.

Kauchak got out of the car and walked towards Jones' truck to see if any fish had been caught. Ms. Koehler remained by the car and engaged in conversation with defendant. As Kauchak neared the truck, Jones fired a shot from a .22 calibre rifle wounding Kauchak. Kauchak testified that Jones had the gun aimed at him as soon as he reached the side of the truck where Jones was standing. Kauchak also testified that Jones shot him almost instantly upon reaching the side of the truck and that he was within two to three feet from Jones when he was shot.

The statements concerning the events following the shooting are varied and contradictory. Ms. Koehler stated that she asked

defendant, "What's that?" immediately following the gunshot and that he replied, "That's just [Jones] over there killing a snake." Ms. Koehler then turned to walk towards the vicinity of the gunshot when defendant grabbed her from behind, put his hand over her mouth and pinned her to the ground. Ms. Koehler began to scream and struggle. Defendant kept saying, "Shut up or I'm going to kill you" and raised his fist as if he were going to hit her. Ms. Koehler stated she then asked if Jones had killed Kauchak and an unidentified male voice responded, "No." Jones then walked up to where Ms. Koehler and defendant were on the ground and told defendant, "Go on and do what you want to do with her." Ms. Koehler testified that at no time did defendant attempt to touch her "privates." Other statements admitted at trial indicated that Ms. Koehler was not injured in any way by defendant and never complained of being sexually assaulted.

Defendant testified that while the parties stood in the dark at the creek he heard a splash and, using his flashlight, caught sight of a water moccasin in the water. Defendant then "hollered" for Jones to get his rifle to shoot the snake. Immediately following the shot, Jones said, "Timmy, Timmy, I shot [Kauchak] . . . the gun went off." Ms. Koehler then started "screaming and hollering" and defendant reached over her shoulder to calm her down. Defendant then stated Ms. Koehler slapped at him and slid down in the mud. Defendant testified that he and Jones aided Kauchak and Ms. Koehler by helping them back to their car and insisting that Kauchak seek medical treatment.

Kauchak testified that after he was shot and fell to the ground, he heard Ms. Koehler start to scream. Jones then walked in the direction of defendant and Ms. Koehler, stepping on Kauchak's head or neck in the process. Kauchak got up and made his way towards defendant and Ms. Koehler and saw that defendant was on top of her and had her pinned to the ground. Kauchak wrestled the rifle away from Jones and attempted to shoot Jones with it. Jones then replied, "There's no bullets in it, it won't do you no good, boy." Kauchak took a knife out of his pants and threatened to kill defendant and Jones. Kauchak then chased the two men around his car and tried to follow them as they fled into a nearby field. Kauchak and Ms. Koehler got in their car, drove away and then sought medical attention for Kauchak's gunshot wound.

Defendant and Jones were tried together under the theory of acting in concert for the crimes of attempted first degree rape, second degree kidnapping and assault with a deadly weapon with intent to kill inflicting serious injury. Defendant made motions to dismiss the charges against him for insufficiency of the evidence at the close of the State's evidence and at the close of all the evidence, which were denied. Jones was convicted of assault with a deadly weapon with intent to kill inflicting serious injury for the shooting of Kauchak. Defendant was convicted of attempted second degree rape and second degree kidnapping and was acquitted on the charge of assault. Defendant was given a combined sentence of thirty years imprisonment for these crimes upon the finding of an aggravating factor of prior convictions. This sentence is in excess of the presumptive terms of twelve years for attempted second degree rape and nine years for second degree kidnapping. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

Philip E. Williams for defendant-appellant.

WELLS, Judge.

Defendant presents five assignments of error to this Court on appeal. He does not address his fourth and fifth assignments in his brief and they are therefore deemed abandoned. N.C.R. App. P., Rule 28. In his remaining assignments, defendant contends the trial court erred in denying his motions to dismiss for insufficiency of the evidence, refusing defendant's motion for a mistrial and allowing impeachment of a defense witness with his own prior inconsistent statement.

Defendant first assigns error to the trial court's denial of his motions to dismiss for insufficiency of the evidence. Defendant contends in his brief that the evidence relating to the charges of attempted first degree rape and second degree kidnapping to facilitate the felony of assault with a deadly weapon with intent to kill inflicting serious injury is insufficient to withstand a motion to dismiss.

Upon a motion to dismiss by a defendant, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included

therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion. *State v. Smith*, 300 N.C. 71, 265 S.E.2d 164 (1980). The evidence is considered in the light most favorable to the State, "and the State is entitled to every reasonable intendment and every reasonable inference to be drawn therefrom." *State v. Bright*, 301 N.C. 243, 271 S.E.2d 368 (1980), *quoting State v. McKinney*, 288 N.C. 113, 215 S.E.2d 578 (1975). However, if the evidence "is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion for [dismissal] should be allowed." *Id.*, *quoting State v. Cutler*, 271 N.C. 379, 156 S.E.2d 679 (1967).

[1] In the present case, defendant contends that the evidence, taken in a light most favorable to the State, does not support the conclusion that he committed the crime of attempted rape. We agree. The two elements of the crime of attempt are (1) there must be the intent to commit a specific crime and (2) an overt act which in the ordinary and likely course of events would result in the commission of the crime. *State v. Rushing*, 61 N.C. App. 62, 300 S.E.2d 445 (1983). An attempt is an act done with the *specific intent* to commit a crime. *Id.* (Emphasis in original). In the context of attempted rape, the State must have presented evidence sufficient to establish that (1) defendant forced Ms. Koehler to the ground with the intent to engage in forcible, nonconsensual intercourse with her and (2) in the ordinary and likely course of events, defendant's assaultive act would result in the commission of a rape.

It is clear that the evidence pertaining to defendant's acts does not support the conclusion that he intended to rape Ms. Koehler. There is no evidence that defendant forced himself upon her in a sexual manner or indicated that it was his intent to engage in forcible, nonconsensual intercouse with her. The evidence merely shows that defendant grabbed Ms. Koehler, forced her to the ground, pinned her arms behind her back and then straddled her following Jones' shooting Kauchak. The only evidence which could give any indication that defendant might have intended to commit some sexual act upon Ms. Koehler is Jones' statement, "Go on and do what you want to do with her." This evidence allows one only to speculate exactly what defendant may have intended to "do"

with Ms. Koehler. Therefore, the trial court erred in denying defendant's motion to dismiss as to this charge.

[2] Defendant also contests the charge and conviction of kidnapping Ms. Koehler for the purpose of facilitating the felony assault upon Kauchak. He contends, as with the charge of attempted rape, that there was insufficient evidence presented at trial for this charge to survive his motion to dismiss. We disagree.

N.C. Gen. Stat. § 14-39, in pertinent part, 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: . . .
>
> (2) Facilitating the commission of any felony. . . .

The terms "restrain" and "remove" have been defined for the purposes of this statute. The term "restrain" connotes restriction by force, threat or fraud with or without confinement. *State v. Moore*, 77 N.C. App. 553, 335 S.E.2d 535 (1985), *citing State v. Fulcher*, 294 N.C. 503, 243 S.E.2d 338 (1978). Restraint does not have to last for an appreciable period of time and removal does not require movement for a substantial distance. *Id.* Restraint or removal of the victim for any of the purposes specified in the statute is sufficient to constitute kidnapping. Thus, no asportation is required where there is the requisite restraint. *Id.*

When an indictment alleges an intent to commit a particular felony, the State must prove the particular felonious intent alleged. *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982). In order to withstand the defendant's motion to dismiss, the State [is], therefore, required to introduce substantial evidence tending to show that defendant had the intent [to commit the particular felony] at the time he [confined, restrained or removed the victim]. *State v. Alston*, 310 N.C. 399, 312 S.E.2d 470 (1984). Intent, or the absence of it, may be inferred from the circumstances surrounding the event and must be determined by the jury. *Id.*, *citing State v. Accor and State v. Moore*, 277 N.C. 65, 175 S.E.2d 583 (1970). It is not necessary that the felony which was facilitated by the kidnapping be committed against the victim of the kidnapping. The kidnapping statute clearly requires only that the kidnapping facilitate the commission of any felony. *Moore, supra.*

In the present case, the State has shown substantial evidence that would support the inference that defendant restrained Ms. Koehler with the intent of facilitating the assault upon Kauchak. The State has sufficiently shown that defendant restrained Ms. Koehler by forcing her to the ground, pinning her arms behind her back and getting on top of her. Defendant's act of restraint occurred immediately after the shot was fired but prior to any investigation as to why it was fired. Defendant informed Ms. Koehler that the shot was fired to kill a snake but restrained her upon her attempt to investigate the purpose of the shooting. Further, Jones immediately walked to where defendant held Ms. Koehler on the ground and said, "Go on and do what you want to do with her."

A jury could infer that defendant told Ms. Koehler that Jones had shot a snake to conceal the assault committed upon Kauchak and that defendant forced her to the ground to prevent her from interfering with the assault or aiding Kauchak once he had been assaulted. Further, a jury could infer that Jones' action immediately following his shooting Kauchak was intended to confirm to defendant that the assault had been accomplished. This would support an inference that defendant knew of Jones' intent to shoot Kauchak. Therefore, we find no error in the trial court's denial of defendant's motion to dismiss as to the charge of kidnapping to facilitate the felony assault upon Kauchak and overrule this assignment of error as to this charge.

Defendant combines his remaining assignments of error into one argument in his brief. He contends the trial court erred in denying defendant's request for a mistrial on the ground that the State attempted to elicit an admission of prior bad acts by defendant. Defendant also contends that the trial court erred by allowing the State to impeach a particular witness with his own prior inconsistent statements. Upon our review of the arguments presented in defendant's brief and the record before us, we deem these assignments of error to be totally without merit and overrule them.

For the reasons stated, defendant's conviction of attempted second degree rape is reversed and this case is remanded for resentencing based on the conviction of second degree kidnapping.

As to No. 90 CRS 3500,

Reversed.

As to No. 90 CRS 3501,

No error in the trial; remanded for resentencing.

Chief Judge HEDRICK and Judge JOHNSON concur.

STATE OF NORTH CAROLINA v. DAVID LEE BYERS

No. 9116SC424

(Filed 18 February 1992)

1. Automobiles and Other Vehicles § 789 (NCI4th)— felony death by vehicle—not lesser offense of involuntary manslaughter

Felony death by vehicle is not a lesser included offense of involuntary manslaughter, and the trial court did not err in failing to charge the jury on felony death by vehicle in a prosecution in which the trial court submitted second degree murder and involuntary manslaughter as possible verdicts.

Am Jur 2d, Automobiles and Highway Traffic §§ 324, 328-330, 338, 339.

2. Evidence and Witnesses § 621 (NCI4th); Automobiles and Other Vehicles § 813 (NCI4th)— hospital blood test—waiver of right to challenge—admissibility under "other competent evidence" exception

Defendant waived his right to challenge the admissibility of blood tests performed at a hospital by failing to make a motion to suppress the blood test results prior to trial. N.C.G.S. § 15A-975. Furthermore, testimony concerning the results of blood tests may be admitted into evidence under the "other competent evidence" exception in N.C.G.S. § 20-139.1 even though the tests were not performed in accordance with N.C.G.S. §§ 20-16.2 and 20-139.1.

Am Jur 2d, Automobiles and Highway Traffic § 377.

3. Evidence and Witnesses § 174 (NCI4th); Homicide § 15.2 (NCI3d)— second degree murder—automobile collision—license revoked—driving without permission—evidence of malice

In a prosecution for second degree murder arising from a collision while defendant was driving under the influence

of alcohol, evidence that defendant knew his license was revoked when the accident occurred indicated that defendant acted with "a mind regardless of social duty" and with "recklessness of consequences" and was thus admissible to show malice. Evidence that defendant did not have permission to use the car he was driving and displayed fictitious tags on the car indicated a mind "bent on mischief" and was also admissible to show malice.

Am Jur 2d, Automobiles and Highway Traffic § 383.

4. **Evidence and Witnesses § 339 (NCI4th)— second degree murder—automobile collision while impaired—pending driving while impaired charge—admissibility to show malice**

In a prosecution for second degree murder arising out of an automobile collision while defendant was driving under the influence of alcohol, evidence that a charge of driving while impaired was pending against defendant at the time of the collision was not offered to show defendant's propensity to drive while impaired but was properly admitted under Rule of Evidence 404(b) to show malice.

Am Jur 2d, Automobiles and Highway Traffic §§ 383, 384; Evidence § 331; Homicide § 438.

5. **Evidence and Witnesses § 1354 (NCI4th)— officer's notes of questions and answers—admissibility—defendant's signature not required**

The trial court did not err in admitting an officer's notes recording verbatim the questions he had asked defendant and defendant's answers to those questions and in permitting the officer to read his notes to the jury even though the notes were not signed by defendant or otherwise admitted by defendant to be correct.

Am Jur 2d, Evidence § 533.

APPEAL by defendant from *Britt (Joe Freeman), Judge*. Judgment entered 17 October 1990 in Superior Court, ROBESON County. Heard in the Court of Appeals 10 February 1992.

Defendant was charged in proper bills of indictment with murder in violation of G.S. 14-17. The jury found defendant guilty of two counts of involuntary manslaughter.

The evidence presented at trial tends to show the following: On 11 March 1990, Mary Davis and Rosalind Batchelor were traveling east on Rural Paved Road 1318 in Red Springs, North Carolina. Defendant was traveling west on Road 1318, when he collided head on with the automobile driven by Mrs. Davis.

Andrew Jacobs came upon the accident. He first went to the car driven by Mrs. Davis and found she was unconscious and had no pulse. He checked Mrs. Batchelor and found her seriously injured and unable to speak. He then went to defendant's car and found him pinned in the driver's seat. Jacobs smelled alcohol in defendant's car. Jacobs went from car to car assisting the victims until help arrived. Trooper Keith Hinnant arrived at the scene along with emergency crews. He found both women motionless and smelled a strong odor of alcohol coming from defendant's car. After determining that both Mrs. Davis and Mrs. Batchelor were dead, emergency technicians attended to defendant. Defendant suffered facial cuts and bruises and had a noticeable odor of alcohol on his breath.

Defendant was taken for treatment to Southeastern General Hospital. Approximately two hours after the accident, pursuant to a physician's order, a phlebotomy specialist at Southeastern General withdrew blood from defendant. This blood was later analyzed by a medical technologist and revealed .239 grams of alcohol per 100 milliliters of blood.

After conducting an investigation at the scene, Trooper Hinnant proceeded to the emergency room where he saw defendant. Defendant told him Mrs. Davis had crossed over into his lane and hit him head on. On 15 March 1990, as defendant was being released from the hospital, Trooper Hinnant approached him again. After first being advised of his *Miranda* rights, defendant agreed to answer Trooper Hinnant's questions about the accident. Defendant said he had been drinking the afternoon and evening before the collision, that he had slept three or four hours, and when he awoke on the morning of the collision he had one more beer and started driving.

From judgments imposing two consecutive sentences of ten years in prison, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

Public Defender Angus B. Thompson, II, by Assistant Public Defender Omar Saleem, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends "[t]he trial court erred in refusing to charge the jury on felony death by vehicle." Our decision is controlled by *State v. Williams*, 90 N.C. App. 614, 369 S.E.2d 832, *disc. review denied*, 323 N.C. 369, 373 S.E.2d 555 (1988), where we held that felony death by vehicle, G.S. 20-141.4(a1), was *not* a lesser included offense of involuntary manslaughter.

In the present case, the trial court submitted three possible verdicts to the jury—second degree murder, involuntary manslaughter and misdemeanor death by vehicle. Since felony death by motor vehicle is not a lesser included offense of involuntary manslaughter, and since the trial court did submit involuntary manslaughter, the court did not err in not submitting felony death by motor vehicle as a possible verdict. This assignment of error is meritless.

[2] Defendant next assigns error to the trial court's admission of testimony concerning the results of the blood test. Defendant argues the results of the test were not admissible because the test was not performed in accordance with G.S. 20-16.2 and G.S. 20-139.1. The record, however, indicates defendant failed to challenge the admissibility of the results of the blood test by a proper motion to suppress pursuant to G.S. 15A-974 and 15A-975.

G.S. 15A-974 provides that "[u]pon timely motion," the trial court must suppress evidence if "[i]t is obtained as a result of a substantial violation" of the Criminal Procedure Act. G.S. 15A-975 sets forth the procedural requirements for making a motion to suppress evidence pursuant to G.S. 15A-974:

> (a) In superior court, the defendant may move to suppress evidence only prior to trial unless the defendant did not have reasonable opportunity to make the motion before trial or unless a motion to suppress is allowed during trial under subsection (b) or (c).
>
> (b) 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 . . . of its intention to use the evidence
>
> . . . .
>
> (c) If, after a pretrial determination and denial of the motion, the judge is satisfied, upon a showing by the defendant,

> that additional pertinent facts have been discovered by the defendant which he could not have discovered with reasonable diligence before the determination of the motion, he may permit the defendant to renew the motion before trial . . . .

A defendant's failure to comply with the requirements of the statute acts as a waiver of his right to suppress evidence in violation of statutory or constitutional law. *State v. Holloway*, 311 N.C. 573, 319 S.E.2d 261 (1984).

In the present case, defendant failed to make a motion to suppress the results of the blood test prior to trial, and there is nothing in the record to indicate the existence of other circumstances which would allow defendant to make the motion during trial. Thus, defendant's failure to move to suppress the results of the blood test prior to trial acts as a waiver of his right to suppress such evidence. Furthermore, the Supreme Court, in *State v. Drdak*, 330 N.C. 587, 411 S.E.2d 604 (1992), held that testimony concerning the results of blood tests may be admitted into evidence even though the tests were not performed in accordance with G.S. 20-16.2 and G.S. 20-139.1 under the "other competent evidence" exception contained in G.S. 20-139.1. Defendant's assignment of error is meritless.

By Assignments of Error Numbers 3, 4, and 5 argued on appeal, defendant challenges the trial court's rulings as to the admissibility of certain evidence tending to show: (1) defendant did not have permission to use the car he was driving at the time of the collision, (2) defendant's drivers' license was revoked when the accident occurred and (3) defendant had been charged with driving while impaired in November, 1989, which charge was pending at the time of the accident on March 11, 1990. Defendant claims this evidence was "completely irrelevant, prejudicial and inadmissible." We disagree.

"Relevant evidence means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. Rule 403 of the North Carolina Rules of Evidence provides in pertinent part: "Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." Whether to exclude evidence under Rule 403 is a matter left to the sound

discretion of the trial court. *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987).

"Ordinarily, evidence tending to support the theory of the case being tried is admissible." *State v. Coffey*, 326 N.C. 268, 280, 389 S.E.2d 48, 55 (1990). In the present case, defendant was charged with second degree murder. The Supreme Court has held that "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' . . . is sufficient to supply the malice necessary for second degree murder." *State v. Snyder*, 311 N.C. 391, 394, 317 S.E.2d 394, 396 (1984), *quoting State v. Wilkerson*, 295 N.C. 559, 581, 247 S.E.2d 905, 917 (1978).

[3] We find the evidence presented at trial tending to show defendant knew his license was revoked and proceeded to drive regardless of this knowledge indicates defendant acted with "a mind regardless of social duty" and with "recklessness of consequences." We further find the evidence tending to show defendant took the car without permission and displayed fictitious tags in order to drive indicates a mind "bent on mischief." Therefore, we hold the trial court did not abuse its discretion in admitting this evidence for the purpose of showing malice.

[4] Furthermore, we hold the trial court did not err in admitting evidence that defendant had a pending charge for driving while impaired at the time of the accident in order to show malice. Defendant contends this evidence was more prejudicial than probative and was violative of Rules 403 and 404(b) of the North Carolina Rules of Evidence. He argues this evidence was offered only to show defendant's propensity to drive impaired and cautionary instructions to the jury did not cure the prejudicial effect. We cannot agree.

Rule 404(b) provides:

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

This rule clearly suggests 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." *Coffey* at 278, 389 S.E.2d at 54. In order for the State to prove malice, it may present evidence of the defendant's acts which indicate criminal intent and other evidence which shows the defendant's mental state. *State v. Foust*, 258 N.C. 453, 128 S.E.2d 889 (1963).

In the present case, the evidence of defendant's pending driving while impaired charge is evidence of malice to support a second degree murder charge. The trial court properly admitted such evidence pursuant to Rule 404(b) since the evidence was not submitted to show defendant's propensity to commit the crime, but to show the requisite mental state for a conviction of second degree murder. Defendant's Assignments of Error Numbers 3, 4 and 5 are overruled.

[5] In his final assignment of error argued on appeal, defendant contends "[t]he trial court erred in admitting State's Exhibit Number [12] into evidence concerning statements made by defendant when the statements were not signed or acknowledged by defendant."

The record indicates defendant was approached by Trooper Hinnant as he was checking out of the hospital. After reading him the *Miranda* warnings, Trooper Hinnant asked defendant if he would answer some questions about the accident. At that time, defendant signed a waiver of rights form and agreed to answer Trooper Hinnant's questions. At trial, the State introduced Trooper Hinnant's notes recording the questions he had asked defendant and his answers to those questions as State's Exhibit 12. Trooper Hinnant testified that the exhibit was a verbatim record of the questions he posed to defendant and the answers he had given, and the trial judge allowed Trooper Hinnant to read his notes to the jury.

In his brief, defendant argues these notes should not have been admitted into evidence because they "were not signed or otherwise admitted by defendant to be correct." Defendant relies on *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967), for the proposition that the notes could not be admitted unless defendant signed them to acknowledge their accuracy. In *Walker*, the Supreme Court held that a written statement which was an interpretive narration of defendant's confession and was signed by defendant before being read to him was inadmissible. *Walker, supra.* The Court stated, however,

> There is a sharp difference between reading from a transcript which, according to sworn testimony, records the exact words used by an accused, and reading a memorandum that purports to be an interpretive narration of what the officer understood to be the purport of statements made by the accused.

Id. at 141, 152 S.E.2d at 138.

In the present case, Trooper Hinnant testified that his notes were a verbatim record of the questions and answers between he and defendant. We liken the present case to the facts in *State v. Cole*, 293 N.C. 328, 327 S.E.2d 814 (1977), in which the Supreme Court upheld the admissibility of defendant's unsigned written statement. As in *Cole*, the statement in question was taken down in longhand in defendant's own words by an officer and was not merely the officer's impression of the import of defendant's statements. Under these circumstances, we hold the trial court did not err in allowing Trooper Hinnant to read his notes to the jury. Defendant's assignment of error is without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Judges WELLS and JOHNSON concur.

NORTHSIDE STATION ASSOCIATES PARTNERSHIP v. CAROLYN MADDRY

No. 9110DC86

(Filed 18 February 1992)

Landlord and Tenant § 11 (NCI3d)— transfer of leasehold interest— partial assignment—privity of estate

The trial court erred by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs filed an action seeking past-due rent and damages related to defendant's occupation of a rental space; plaintiffs alleged that defendant entered into an agreement entitled "Sublease Agreement" with the original tenants for the space, the Hryniuks; and the court found in its order dismissing the action that the Agreement is a sublease and concluded that no privity

of contract exists between plaintiffs and defendant. North Carolina courts have adopted the traditional "bright line" test for determining whether a conveyance by a tenant of leased premises is an assignment or a sublease: a conveyance is an assignment if the tenant conveys its entire interest in the premises without retaining any reversionary interest in the term itself, while a sublease is a conveyance in which the tenant retains a reversion in some portion of the original lease, however short. Here, Stanley Hryniuk conveyed to Maddry his entire interest in the premises without retaining any reversionary interest in the term itself and the transfer is an assignment, though a partial one because Margaret Hryniuk did not convey her interest in the leased premises. Privity of estate exists between plaintiff Northside and defendant Maddry, allowing Northside to assert a direct claim against Maddry on the original lease covenants that run with the land.

Am Jur 2d, Landlord and Tenant §§ 452, 463.

Judge WYNN concurring.

APPEAL by plaintiff from order entered 24 October 1990 in WAKE County District Court by *Judge Fred M. Morelock.* Heard in the Court of Appeals 5 November 1991.

Merriman, Nicholls & Crampton, P.A., by R. Daniel Brady, for plaintiff-appellant.

Brady, Schilawski, Earls and Ingram, by John Randolph Ingram II, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order entered 24 October 1990 dismissing plaintiff's claim against defendant on the ground that it fails to state a claim upon which relief can be granted, N.C.G.S. § 1A-1, Rule 12(b)(6) (1990).

Plaintiff Northside Station Associates Limited Partnership (Northside) instituted this action against defendant Carolyn Maddry (Maddry) seeking past-due rent and damages related to Maddry's occupation of a rental space at a shopping center in Cary, North Carolina, of which Northside is landlord. Northside alleges that Maddry entered into an agreement entitled "Sublease Agreement" (the Agreement) with the original tenants of the space, Stanley

and Margaret Hryniuk d/b/a The Video Shoppe, and with the consent of Northside. Under the terms of the original Lease Agreement between the Hryniuks and Northside, which is attached to Northside's complaint as an exhibit, a tenant who remains in possession of the premises after the expiration of the lease and without execution of a new lease shall be deemed a tenant from month to month at a rental equal to the rental amount provided in the lease plus fifty percent of such amount.

Northside alleges that Maddry agreed to lease the rental space as "Subtenant" in accordance with the terms of the Agreement, which is also attached to Northside's complaint as an exhibit. The Agreement contains the following pertinent provisions: 1) that Subtenant agrees to lease the space "upon the terms and conditions set forth in the original Lease Agreement, dated September 1, 1987, between Landlord [Northside] and Tenant [The Video Shoppe]"; 2) that the "Sublease Agreement and underlying lease will expire at 11:59 p.m., Friday, June 30, 1989"; 3) that Subtenant agrees to pay to tenant monthly rent in escalating amounts (all of which were less than the rent of $1296.25 per month specified in the original Lease Agreement); 4) that Subtenant will pay directly to Landlord Northside charges for water and sewer; and 5) that "Tenant, Subtenant, and Landlord agree not to divulge or discuss to any Tenant, customer or any individual, the amount of rent payments between the Tenant and Subtenant." The Agreement ends with the following "Signatures of Agreement": Landlord Northside Station, by Edward C. Reeves; Tenant The Video Shoppe, by Stanley J. Hryniuk; and Subtenant The Floral Emporium, by Carolyn Maddry. Margaret Hryniuk did not sign the Agreement.

Northside alleges that it leased the space at issue to Maddry beginning on 1 February 1989 and that Northside's performance under the Agreement was rendered in a satisfactory manner. Northside further alleges that, upon expiration of the Agreement on 30 June 1989, Northside proposed a new lease to Maddry to begin on 1 July 1989, that Maddry never signed the new lease, and that, despite demands made by Northside, Maddry has refused to pay the amounts due Northside for rent and has refused to execute a new lease. Northside alleges that, under the terms of the original Lease Agreement, Maddry, by virtue of her failure to execute a new lease and her continued occupation of the premises, is deemed a tenant from month to month at a rental amount equal to the amount specified in the original Lease Agreement plus 50

percent of that amount, and that Northside is entitled to interest on the rental due and to attorney's fees.

Maddry moved to dismiss Northside's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) (1990), which motion was granted. The trial court in its order found that the Agreement is a sublease and concluded that no privity of contract exists between Northside and Maddry and that, therefore, Maddry's motion to dismiss should be allowed.

Northside seeks reversal of the trial court's order and advances in this Court the following arguments: 1) that the Agreement is an assignment and not a sublease since the tenant reserved no portion of the original lease term and that, therefore, Northside has a direct action against Maddry; 2) that Maddry is liable to Northside under N.C.G.S. § 42-4 (1984), which provides that any person who occupies land of another with permission, without any express agreement for rent, is liable to the landlord for a reasonable compensation for such occupation; 3) that because Maddry agreed to lease the rental space under the terms and conditions of the original Lease Agreement, that Northside is a third party beneficiary of the Agreement, without respect to the issue of privity; 4) that Maddry is liable to Northside as a tenant at will or a tenant at sufferance; and 5) that Maddry is liable to Northside because she agreed that Northside is entitled to receive her rental payments.

Of Northside's contentions, we address only the question of whether the claim is supported on the assignment theory, because Northside's alternative theories are not adequately alleged in its complaint. The inadequacy of the allegations results from Northside's failure to assert in its complaint the substantive elements of the law on which Northside bases these additional claims. *Sutton v. Duke*, 277 N.C. 94, 105, 176 S.E.2d 161, 167 (1970). For example, Northside's complaint does not properly assert a third party beneficiary theory of recovery because the complaint does not allege that the conveyance to Maddry was for the direct benefit of Northside. *See United Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317, *disc. rev. denied*, 300 N.C. 374, 267 S.E.2d 685 (1980). Northside's remaining allegations are similarly deficient. Its complaint, liberally construed, gives notice only of Northside's assignment theory.

The dispositive issue is whether an agreement in which a co-tenant transfers his one-half undivided interest in leased premises for the balance of the original lease term, reserving no part thereof unto himself, is a sublease or an assignment.

We dispose at the outset of Maddry's contention that Northside's "repeated allegations" in its complaint that the Agreement is a sublease precludes Northside from arguing on appeal that the Agreement is an assignment. Northside makes no allegation in its complaint that the Agreement is either an assignment or a sublease—it simply refers to the Agreement by its title, "Sublease Agreement," and to the parties in the same manner as they are denominated in the Agreement.

With regard to the substantive issue of whether the Agreement is an assignment or a sublease, Maddry argues that other factors, in particular the intent of the parties, should be considered in determining whether the Agreement is an assignment or a sublease. Maddry suggests that the Agreement itself reveals that the parties intended a sublease in light of the fact that the Agreement is entitled "Sublease Agreement" and in it Maddry is referred to as "Subtenant." We are aware that some jurisdictions have held that the intent of the parties, as gathered from the document of transfer, is the determining factor in distinguishing an assignment from a sublease. *See, e.g., Jaber v. Miller*, 239 S.W.2d 760 (Ark. 1951); 2 Richard R. Powell, Powell on Real Property § 248[2][a] (1991). However, North Carolina and the majority of jurisdictions do not recognize this "intent of the parties" test. Instead, our courts have adopted the traditional "bright line" test for determining whether a conveyance by a tenant of leased premises is an assignment or a sublease. Under this test, a conveyance is an assignment if the tenant conveys his "entire interest in the premises, without retaining any reversionary interest in the term itself." Patrick K. Hetrick & James B. McLaughlin, Jr., Webster's Real Estate Law in North Carolina § 241 (3d ed. 1988) (hereinafter *Hetrick*). A sublease, on the other hand, is a conveyance in which the tenant retains a reversion in some portion of the original lease term, however short. *Id.; see also Neal v. Craig Brown, Inc.*, 86 N.C. App. 157, 162, 356 S.E.2d 912, 915, *disc. rev. denied*, 320 N.C. 794, 361 S.E.2d 80 (1987) (citing with approval the distinction between sublease and assignment set forth in *Hetrick, supra*); *J.D. Cornell Millinery Co. v. Little-Long Co.*, 197 N.C. 168, 170, 148 S.E. 26, 27 (1929) ("The reservation by the lessee . . . of some

portion of the term [is] the chief distinction between a sublease and an assignment."); *accord* 3A George W. Thompson, Thompson on Real Property § 1210 (1981) (hereinafter *Thompson*) (a transfer is not a subletting unless the transferor retains a reversionary interest). If the conveyance is an assignment, "privity of estate" is created between the original lessor and the assignee with regard to lease covenants that run with the land, and the original lessor has a right of action directly against the assignee. *Hetrick* at § 241. The original lessor has no such right against a sublessee. *Id.*

Northside's complaint and accompanying exhibits reveal that Stanley Hryniuk, as co-tenant with Margaret Hryniuk in a lease with Northside which was to expire at 11:59 p.m. on 30 June 1989, transferred all of his interest in the leased premises to Maddry in an agreement which was to expire at 11:59 p.m. on 30 June 1989. In other words, Stanley Hryniuk as a co-tenant conveyed to Maddry *his* entire interest in the premises, without retaining any reversionary interest in the term itself. Where only one co-tenant of leased premises transfers his interest in the premises, and the transfer is for the balance of the term of the original lease, it is an assignment, though a partial one. Restatement (Second) of Property § 15.1 cmt. i (1977); *accord Thompson* at § 1219; *cf. Cornell Millinery*, 197 N.C. at 170, 148 S.E. at 27 (distinction between assignment and sublease depends solely on quantity of lessee's interest and not upon the extent of the premises transferred). Thus, the fact that Margaret Hryniuk did not convey her interest in the leased premises is not material to the issue of whether Stanley Hryniuk's transfer is a sublease or an assignment. Her failure to convey her interest to Maddry may, however, be material to the question of the degree of Maddry's liability to Northside. *See Thompson* at § 1219 (partial assignee liable to landlord for rent only in proportion to his interest in the premises).

For the foregoing reasons, we hold that the Agreement is a partial assignment. Therefore, privity of estate exists between Northside and Maddry, allowing Northside to assert a direct claim against Maddry on the original lease covenants that run with the land. Because payment of rent is a lease covenant that runs with the land, *see Hetrick* at § 251, the trial court's granting of Maddry's motion to dismiss was error.

Reversed and remanded.

Judge PARKER concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring.

I agree with the majority to the extent of concluding that the complaint of the plaintiff in this action *alleges* that there was an assignment of the leased premises to the defendant. As such, it states a claim upon which relief can be granted, and the dismissal of this cause of action under Rule 12(b)(6) was error. Accordingly, I would not make a determination as to whether in fact this agreement was an assignment, but rather, would remand to the trial court for trial of plaintiff's alleged cause of action.

STATE OF NORTH CAROLINA v. ROBERT STANLEY JOHNSON

No. 9027SC1281

(Filed 18 February 1992)

1. Rape and Allied Offenses § 5 (NCI3d)— sexual offense against children—fellatio—sufficient evidence of touching of mouths

The State's evidence was sufficient to support defendant's conviction of two first degree sexual offenses against two five-year-old girls where each girl testified that defendant inserted his penis into her mouth, notwithstanding each girl testified that defendant's penis did not touch her lips, since the jury could disbelieve the girls' testimony that defendant's penis did not touch their lips or could infer that some other touching of the mouths of the girls had occurred.

Am Jur 2d, Infants § 16; Sodomy §§ 45, 49.

2. Rape and Allied Offenses § 6.1 (NCI3d)— sexual offense—attempt instruction not required

The trial court in a prosecution for first degree sexual offense did not err in refusing to instruct the jury as to the lesser offense of attempted first degree sexual offense where defendant maintained that none of the alleged activity occurred at all and the State's evidence showed a completed offense.

Am Jur 2d, Infants §§ 16, 17.5; Sodomy §§ 34, 37, 38, 95.

3. Evidence and Witnesses § 2332 (NCI4th)— expert testimony— child's symptoms of sexual abuse

The trial court properly permitted a psychologist to state her opinion that a child exhibited symptoms consistent with child sexual abuse. The witness was not required to state the underlying facts or data where defendant made only a general objection to her testimony. N.C.G.S. § 8C-1, Rule 705.

Am Jur 2d, Infants §§ 16, 17.5.

APPEAL by defendant from judgment and commitment entered 19 July 1990 by *Judge Robert W. Kirby* in GASTON County Superior Court. Heard in the Court of Appeals 24 September 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

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

LEWIS, Judge.

In September of 1989, one of the complaining witnesses told her mother that she and her friend had been sexually abused by her uncle, the defendant. At the time, both girls were five years old. Defendant was indicted 10 July 1990 on two counts of first degree sexual offense and eight counts of taking indecent liberties with a minor. Defendant was convicted by a jury of all charges on 19 July 1990, and sentenced to two life sentences and twenty-four years, to run concurrently. Defendant appeals.

The alleged criminal acts occurred between 1 June 1989 and 22 September 1989. At trial, both girls testified that defendant had exposed his private parts to them, and had asked both to touch him and to touch each other. The girls testified that defendant touched each girl's private parts. Each girl testified that defendant inserted his penis into her mouth, and each witnessed defendant do the same to the other girl. Each girl testified that defendant's penis did not touch her lips. At trial, Madelyn Tison, a psychologist, was qualified as an expert and was permitted to testify concerning the nature of child sexual abuse and her assessment of one of the girls as an abused child.

[1] Defendant first assigns as error the trial court's denial of defendant's motion to dismiss the charges of first degree sexual

offense. Defendant was charged with and convicted of first degree sexual offense. A person is guilty of this crime if he

> engages in a sexual act:
>
> (1) With a victim who is a child under the age of 13 years and the defendant is at least 12 years old and is at least four years older than the victim.

N.C.G.S. § 14-27.4 (1986). Under the facts of this case, subsection (1) is clearly met. Both girls were five when the crimes allegedly occurred and the defendant was approximately forty-three.

While subsection (1) applies under the facts here, the defendant asserts that the conviction is in error because there was no "sexual act," proof of which is a necessary component for the State to obtain a conviction under N.C.G.S. § 14-27.4. Sexual act is defined by statute as:

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

N.C.G.S. § 14-27.1(4) (1986). Under this definition, then, there are two types of sexual acts: one which requires penetration by "any object" into two specifically named bodily orifices, and one which the North Carolina courts have interpreted to require a touching. Fellatio is of the latter type and defined as "contact between the mouth of one party and the sex organs of another." *State v. Goodson*, 313 N.C. 318, 327 S.E.2d 868 (1985) (*quoting People v. Dimitris*, 115 Mich. App. 228, 234, 320 N.W. 2d 226, 228 (1981)); *See also State v. Bailey*, 80 N.C. App. 678, 343 S.E.2d 434, *rev. impr. allowed*, 318 N.C. 652, 350 S.E.2d 94 (1986). Defendant contends that neither of these types of sexual acts occurred, thus his convictions for first degree sexual offense were in error. We disagree.

Defendant contends no penetration occurred here, as defendant inserted his penis into the children's mouths, not their genital or anal openings. The trial court, in fact, did not instruct the jury as to the penetration aspect of "sexual act." Further, both girls testified at trial that defendant's penis entered their mouths but did not touch their lips.

However, the record makes clear that the attorneys for both the State and the defendant confined their questioning of the children to whether or not defendant's penis touched the girls' lips. There was no questioning and therefore no testimony as to whether any other part of the children's mouths was touched. The case law clearly holds that fellatio is any touching of the male sexual organ by the lips, tongue, or mouth of another person. *See State v. Hewett*, 93 N.C. App. 1, 12, 376 S.E.2d 467, 474 (1989); *Bailey*, 80 N.C. App. at 682, 343 S.E.2d at 437 (1986). This is, in fact, precisely how the trial court instructed the jury as to what constitutes a sexual act under a first degree sexual offense.

It is within the jury's province to assess the credibility of each witness, and to assign weight to all parts of the testimony believed. *Williford v. Jackson*, 29 N.C. App. 128, 223 S.E.2d 528 (1976). The jury in this case, after being instructed that it "may believe all, part or none of what a witness has said, . . ." apparently either did not believe the testimony of the girls when they stated that defendant's penis did not touch their lips, or believed that some other touching of their mouths occurred. Because the trial court did not instruct the jury as to the "penetration" aspect of "sexual act," the jury could not find that defendant had penetrated the victims. The jury did, however, find that a sexual act occurred, as is manifest by its two convictions of defendant for first degree sexual offense. Therefore, it appears to this Court that the jury believed that defendant inserted his penis in the children's mouths, and that in so doing, his penis touched some part of their mouths.

We hold that a finding of guilty of first degree sexual offense, which requires a finding by the jury that there was a touching, flows logically from the evidence adduced at trial. First, there was ample evidence to support a finding that defendant inserted his penis in the children's mouths. Both girls testified as to that fact, and both testified that they witnessed defendant do the same to the other girl. Secondly, it is logical to infer that when the penis of an adult male is placed in the mouth of a five year old child, a touching of some part of that child's mouth, however slight, will occur. In light of the evidence and this logical inference, the girls' testimony, which was limited only to whether their *lips* were touched by defendant's sexual organ, does not preclude a finding by the jury that some other part of the girls' mouths was touched.

We distinguish this case from *State v. Murphy*, 100 N.C. App. 33, 394 S.E.2d 300 (1990). In that case, the conviction of the defendant for first degree sexual offense was overturned for insufficient evidence. In *Murphy*, the victim testified that "she 'had [her] teeth gritted' when the defendant began forcing her to engage in fellatio. . . ." *Id.* at 38, 394 S.E.2d at 303. In this case, however, the testimony of both witnesses was clear that defendant inserted his penis into their open mouths. Given all the evidence, this Court finds no error in the jury's either finding or inferring that a touching occurred.

Finally, we note that it would be an absurdity under the facts of this case to overturn defendant's convictions for first degree sexual offense. All the evidence points to an unwarranted and unwelcomed invasion by the defendant's penis into the mouths of these little children. The jury in fact found that such activity occurred.

The legislature could not intend for acts so revolting as these to go without severe punishment. The defendant would have us interpret N.C.G.S. § 14-27.4 to allow defendants to insert their sexual organs into *any* bodily orifice (other than the genital or anal openings) without violating any law other than perhaps indecent liberties. We believe it is the intent of the legislature to punish as a first degree sexual offense the acts which occurred in this case, and we overrule defendant's assignment of error.

[2] Defendant next assigns as error the trial court's refusing to instruct the jury as to the lesser offense of attempted first degree sexual offense. During the trial, there was no contention either by defendant or by the State that an attempt occurred. It was the defendant's position throughout the trial that none of the alleged activity occurred at all, and it was the State's position that the defendant's acts constituted a first degree sexual offense. The evidence supports the State's contention. Finally, because defendant maintained he committed no offense, he expressly waived an attempt instruction at the charge conference. Defendant cannot now allege error as to that fact. N.C.R. App. P. 10(b)(2) (1991). We overrule this assignment of error.

[3] Defendant also assigns as error the trial court's allowing witness Madelyn Tison to give her opinion that one child displayed symptoms consistent with child sexual abuse. Defendant first argues that the prosecution failed to build a proper factual foundation for submission of opinion testimony by an expert witness. We note

that Rule 705 of the North Carolina Rules of Evidence states that, "[t]he expert may testify in terms of opinion or inference and give his reasons therefor without prior disclosure of the underlying facts or data, unless an adverse party requests otherwise. . . ." N.C.G.S. § 8C-1, Rule 705 (1988).

Our review of the record reveals that while the defendant made a general objection to this testimony, he did not specifically request disclosure of the underlying facts or data pursuant to Rule 705. A general objection to the expert's opinion will not suffice to preserve a specific objection or request regarding the testimony of the expert. *See State v. Catoe*, 78 N.C. App. 167, 336 S.E.2d 691 (1985); *State v. Hamilton*, 77 N.C. App. 506, 335 S.E.2d 506 (1985), *disc. rev. denied*, 315 N.C. 593, 341 S.E.2d 33 (1986).

Defendant further argues that the expert witness relied on the premise that there is a "syndrome" of child sexual abuse and that such testimony has never been declared admissible in the courts of North Carolina. Our review of the record indicates that the expert witness neither relied on such diagnosis in giving her opinion nor made reference to the existence of such a syndrome. Rather, the witness affirmatively answered a question as to whether the child's symptoms were consistent with the reactions of children who are found to be sexually molested.

The North Carolina Supreme Court in *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987) allowed a psychologist who was an expert witness "to testify concerning the symptoms and characteristics of sexually abused children and to state [her] opinion[ ] that the symptoms exhibited by the victim were consistent with sexual or physical abuse." *Id.* at 31-32, 357 S.E.2d at 366. Furthermore, in *State v. Love*, 100 N.C. App. 226, 395 S.E.2d 429 (1990), *disc. rev. denied*, 328 N.C. 95, 402 S.E.2d 423 (1991), this Court held that, "Allowing experts to testify as to the symptoms and characteristics of sexually abused children and to state their opinions that the symptoms exhibited by the victim were consistent with sexual or physical abuse is proper." *Id.* at 233, 395 S.E.2d at 433.

It is clear under North Carolina law that an expert witness may testify as to whether the symptoms exhibited by a child are consistent with those of sexual abuse. We find no reason to address the issue of whether testimony based on indication of a child abuse "syndrome" is admissible. We conclude that the expert's testimony was properly admitted.

No error.

Judges ARNOLD and COZORT concur.

BILL M. TAYLOR AND WIFE, LINDA B. TAYLOR, PLAINTIFFS-APPELLEES v. ALFRED S. KENTON, CALVIN M. CHAPPELL, SR. AND WIFE, MARY S. CHAPPELL, CALVIN M. CHAPPELL, JR. AND WIFE, KIMBERLY M. CHAPPELL, DEFENDANTS-APPELLANTS

No. 911SC144

(Filed 18 February 1992)

1. **Deeds § 85 (NCI4th)— subdivision restrictive covenants—residential structures—use of lot for driveway**

The trial court correctly granted summary judgment for plaintiffs in an action for injunctive relief to prevent defendants from constructing a driveway across a lot in a residential subdivision to land outside the subdivision in violation of the subdivision's restrictive covenants. Defendants' proposed use would undermine a plain and obvious purpose of the subdivision which was to provide lot owners with a residential neighborhood in which they would have some assurance that the homes would conform to the standards set out in the covenants. Defendants' reliance on *North Carolina National Bank v. Morris*, 45 N.C. App. 281, is misplaced because defendants' granting of the right of way here is inconsistent with the parties' intentions in creating and agreeing to the covenants.

Am Jur 2d, Covenants, Conditions, and Restrictions § 232.

2. **Trial § 3.1 (NCI3d)— action to enforce restrictive covenants—continuance denied—no abuse of discretion**

There was no abuse of discretion in an action to enforce subdivision restrictive covenants where defendants asked for the continuance so that they could depose the developer of the subdivision regarding inconsistencies in prior statements and actions, but testimony concerning the developer's desire for a self-contained residential subdivision and his conduct in granting and offering rights of way is irrelevant to whether

building a driveway over a lot violates the restrictive covenants to which the lots are subject.

Am Jur 2d, Continuance § 9.

3. Deeds § 79 (NCI4th)— subdivision—restrictive covenants—standing to enforce

The trial court did not err by denying defendants' motion to dismiss based on plaintiffs' alleged lack of standing where plaintiffs had brought an action to challenge the construction of a driveway and defendants contended the developer was the only person with standing to challenge the violation of these restrictive covenants. The agreement does not specifically say that the lot owners may enforce the restrictive covenants but does provide that the covenants are to run with the land and shall be binding on all parties and all persons claiming under them. The Court of Appeals was not persuaded that plaintiffs, who own lots in the subdivision, were not entitled to enforce the restrictive covenants.

Am Jur 2d, Covenants, Conditions and Restrictions §§ 293-297.

Comment Note—Who may enforce restrictive covenant or agreement as to use of real property. 51 ALR3d 556.

4. Appeal and Error § 425 (NCI4th)— citations of authority—not included—assignment of error abandoned

Defendants abandoned an assignment of error by failing to cite authority in support of their argument. N.C. R. App. P. 28(b)(5).

Am Jur 2d, Appeal and Error §§ 658, 700.

APPEAL by defendants from order entered 8 October 1990 by *Judge Thomas S. Watts* in PASQUOTANK County Superior Court. Heard in the Court of Appeals 12 November 1991.

Plaintiffs filed suit for injunctive relief to prevent defendants from constructing a driveway across a lot in a residential subdivision in violation of the subdivision's restrictive covenants. Plaintiffs own a residence on lots 18 and 19 in the Country Club Forest subdivision in Pasquotank County north of Elizabeth City. Defendant Alfred S. Kenton owns a residence on lot 20, and defendants Calvin M. Chappell, Sr. and Mary S. Chappell own a residence

on lots 16 and 17. In 1989 Defendants Calvin M. Chappell, Jr. and Kimberly M. Chappell (Chappells Jr.) purchased a 4.8 acre parcel of land located adjacent to and behind lot 20.

On 2 November 1989 Mr. Kenton and his wife conveyed an easement across lot 20 to the Chappells Jr. to give them access to Country Club Drive, a road in the Country Club Forest subdivision. The conveyance was made "upon the express condition that the easement conveyed herein be utilized as a private easement for the benefit of [the Chappells Jr.], their heirs and assigns," and the deed of easement restricted the use of the easement to use as an "access to a single family private residence to be constructed on said property." The Chappells Jr. began construction of the driveway in June 1990. On 25 June 1990 plaintiffs obtained a temporary restraining order halting construction, and on 3 July 1990 the trial court issued a preliminary injunction. On 8 October 1990 Judge Watts granted plaintiffs' motion for summary judgment permanently enjoining defendants from building a driveway across a portion of lot 20 to the tract of land outside the subdivision owned by the Chappells Jr. Defendants appeal.

Trimpi & Nash, by Thomas P. Nash, IV and John G. Trimpi, for plaintiff-appellees.

Brown, Kirby & Bunch, by Mark C. Kirby and Christopher P. Edwards, for defendant-appellants.

EAGLES, Judge.

On appeal defendants contend that the trial court erred by (1) granting summary judgment for the plaintiffs and denying defendants' motion for summary judgment; (2) allowing the temporary restraining order and preliminary injunction; (3) denying defendants' motion for a continuance; and (4) denying defendants' motion to dismiss. We find defendants' arguments unpersuasive and affirm the order of the trial court.

[1] Defendants first argue that the trial court erred by granting summary judgment for the plaintiffs and denying defendants' motion for summary judgment. We disagree. Summary judgment is properly granted when there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102, *disc. review denied*, 303 N.C. 710 (1981).

The Supreme Court has said that "[i]n construing restrictive covenants, the fundamental rule is that the intention of the parties governs, and that their intention must be gathered from study and consideration of *all* the covenants contained in the instrument or instruments creating the restrictions." *Long v. Branham*, 271 N.C. 264, 268, 156 S.E.2d 235, 238 (1967) (emphasis in original). The Court also said:

> "In general, it may be said that if the granting of the right of way seems to be inconsistent with the intention of the parties in creating or agreeing to the restriction and with the result sought to be accomplished thereby, the courts incline to hold such a grant to be a violation of the restriction, while if the granting of the right of way does not interfere with the carrying out of intention of the parties and the purpose of the restrictions, it will not be held to be a violation.

Id. at 269, 156 S.E.2d at 239 (1967) (quoting Annotation, Grant of right of way over restricted property as a violation of restriction, 39 A.L.R. 1083 (1925)).

Here, there is evidence that the parties did not expect or intend to allow the use of the lots in Country Club Forest for access to residences on unrestricted tracts of land outside the subdivision. The developers filed a declaration that contained numerous covenants regarding the type of residential structures that may be built, their height, placement on the lot, minimum square footage, the size of any garage, and types of acceptable fencing. The covenants also restrict the use of the property for operating businesses and keeping animals. In our view defendants' proposed use would undermine a plain and obvious purpose of the subdivision which was to provide lot owners with a residential neighborhood in which they would have some assurance that the homes would conform to the standards set out in the covenants.

Defendants contend that the developer's decision to reserve "plugs" of land in two cul-de-sacs is evidence that the parties contemplated access to areas outside the subdivision through Country Club Forest. Here, the developer sold one plug to plaintiffs, whose land adjoined the plug, and the other plug to property owners who owned land adjacent to the subdivision. We agree with plaintiffs that this evidence tends to buttress their contention that none of the residential lots was intended for use as an access to areas outside the subdivision. If anything, the evidence would tend to

show that the plugs, not the residential lots, were for access to the subdivision from outside.

Additionally, we find defendants' reliance on *North Carolina National Bank v. Morris*, 45 N.C. App. 281, 262 S.E.2d 674 (1980), misplaced. Defendants contend that this case is "strikingly similar" to *Morris*, where this Court held that defendants' reservation of a driveway easement along the boundary of a lot would not violate restrictive covenants. *Morris* is distinguishable because in that case there was evidence that the parties anticipated the driveway easement. In *Morris*, the two tracts of land in question were part of a common larger tract. One tract conveyed was already subdivided and the deed for the second tract provided for its subdivision into three residential lots. The deed for this second tract provided that Home Place (a street) would serve the three lots. This Court concluded that "[s]ince all boundaries of the tract did not face on Home Place it is reasonable to expect easements would be necessary for access to the lots established." This Court also noted that "[c]onsidering the fact that a lake lies between Home Place and the lot to be served by the driveway, making direct access impractical, if not impossible, it is likewise reasonable to expect location of the driveway over adjoining property." *Id.* at 285-86, 262 S.E.2d at 677. Here, because defendants' granting of the right of way is inconsistent with the parties' intentions in creating and agreeing to the covenants, we hold that the trial court correctly granted summary judgment for the plaintiffs.

Defendants also argue that the trial court erred in allowing a temporary restraining order and preliminary injunction because plaintiffs failed to demonstrate a reasonable likelihood of success on the merits. Because we hold that plaintiffs are entitled to summary judgment, we find it unnecessary to address this assignment of error.

[2] Defendants next contend that the trial court erred in denying defendants' motion for a continuance. Defendants asked for the continuance so that they could depose the developer of the subdivision regarding inconsistencies in "both [his] prior statements and prior actions." In an affidavit submitted by plaintiffs, the developer said he "intended to establish a relatively small, self-contained residential subdivision to keep noise and traffic at a minimum." The record indicates that the developer granted the Russells a right of way "for ingress and egress from Caddy Lane to a private

residence to be constructed on the adjoining tract of land" over a plug of land the developer had reserved on another cul-de-sac in the subdivision. The record also indicates that the developer had offered the Chappells a similar right of way. A motion to continue is addressed to the sound discretion of the trial court. *Shankle v. Shankle*, 289 N.C. 473, 223 S.E.2d 380 (1976). Here, we find no abuse of discretion. In our view this testimony concerning the developer's desire for a "self-contained residential subdivision" and his conduct in granting the Russells a right of way and offering to grant the Chappells a right of way is irrelevant to whether building a driveway over a lot violates the restrictive covenants to which the lots are subject. "In construing a deed, it is the duty of the court to ascertain the intent of the grantor *as embodied in the entire instrument*, and every part of the deed must be given effect if this can be done by responsible interpretation." *North Carolina National Bank v. Morris*, 45 N.C. App. 281, 283-84, 262 S.E.2d 674, 676 (1980) (emphasis added). Accordingly, this assignment of error is overruled.

[3] Finally, defendants contend that the trial court erred in denying their motion to dismiss based on plaintiffs' lack of standing to challenge the proposed construction. Defendants concede that generally grantees in a subdivision are beneficiaries of any and all restrictive covenants imposed upon the subdivision so as to give them standing to challenge alleged violations of the restrictive covenants. However, defendants contend that here the developer was the only person with standing to challenge the violation of the restrictive covenants because paragraph 4 of the covenants provides:

> No lot shall be re-subdivided, nor shall any lot be used or converted into a public street or public right of way of any nature whatsoever, without the prior written consent of the said Carl W. Johnson and wife, Jackie S. Johnson, their heirs and legal representatives and assigns.

Defendants contend that "[t]he Johnsons established their own rule of standing in Paragraph 4 of the Covenants" and that "[t]he Johnsons have actively exercised their ability to oversee development in the subdivision in the past."

The Supreme Court has said:

> "Sometimes restrictive covenants expressly provide that they may be enforceable by any owner of property in the tract.

> Where such is the case, the right of an owner to enforce the same is, of course, clear. Similarly, where the agreement declares that the covenant runs with the land for the benefit of other lots or other owners, it may be so enforced."

Lamica v. Gerdes, 270 N.C. 85, 90, 153 S.E.2d 814, 818 (1967) (quoting 20 Am. Jur. 2d § 292). Here, the agreement does not specifically say that the lot owners may enforce the restrictive covenants. However, the agreement does provide: "The foregoing covenants are to run with the land and shall be binding on all parties and all persons claiming under them." The Supreme Court has said that the right to sue and enforce restrictive covenants against any other lot owner taking with record notice "rests upon the principle that a negative easement of this sort is a property right amounting to an interest in land." *Craven County v. First Citizens Bank and Trust*, 237 N.C. 502, 513, 75 S.E.2d 620, 628 (1953). We are not persuaded by defendants' argument that plaintiffs, who own lots in the subdivision, are not entitled to enforce the restrictive covenants.

[4] Additionally, we note that Rule of Appellate Procedure 28(b)(5) states that "[t]he body of the argument shall contain citations of the authorities upon which the appellant relies." Since defendants have failed to cite authority in support of their argument, they have abandoned this assignment of error. See *Byrne v. Bordeaux*, 85 N.C. App. 262, 354 S.E.2d 277 (1987).

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

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. KEVIN NOAH MATHIS

No. 9122SC325

(Filed 18 February 1992)

Homicide § 30.2 (NCI3d) — homicide — instruction on voluntary manslaughter — no plain error

There was no plain error in a second degree murder prosecution in which the court instructed the jury on voluntary

manslaughter where defendant's wife died after being hit by a vehicle; the facts indicated that defendant's wife was yelling at him when he got into a truck to drive off and that she was leaning on the driver's side rear view mirror and reaching into the truck in an attempt to turn off the ignition and stop the truck; defendant found it necessary to push his wife away from the truck in order to leave; and the jury could find from those facts that the victim's provoking conduct and defendant's action were of such close proximity in time that defendant's mind and disposition did not cool. Insofar as there was evidence before the court to support a conviction of voluntary manslaughter, it was proper to submit that issue to the jury. Furthermore, there was not a reasonable likelihood that, had the charge of voluntary manslaughter not been submitted, defendant would have been convicted only of involuntary manslaughter or else acquitted entirely.

Am Jur 2d, Homicide §§ 529, 532.

APPEAL by defendant from a judgment entered 9 November 1990 by *Judge Lester P. Martin* in IREDELL County Superior Court. Heard in the Court of Appeals 14 January 1992.

Defendant and Renea Mathis were married, had three young children, and made their home in Statesville, North Carolina. On 23 October 1989 at approximately 12:00 p.m. defendant and his wife argued loudly in their front yard. The State's evidence showed that during the course of their argument Mrs. Mathis went inside the house for a few minutes and then called defendant telling him there was a phone call. Defendant went into the house and when he returned the arguing continued. Defendant proceeded to get into his truck which was parked in the driveway. His wife told him to get out of the truck, that she wanted to talk to him, and apparently tried to open the truck door or otherwise reach into the truck in an attempt to stop him. Profanity was exchanged between the parties.

Since defendant's truck was blocked in the driveway by a trailer and a car, defendant drove the truck across a side yard and over the curb. He testified that as he drove off the curb he felt the back of the truck lift up and looked back to see his wife lying in the street. When she did not respond he called 911 and was there when the rescue vehicle arrived. There was also

some testimony that defendant intentionally hit his wife as she was carrying a bag of trash toward the street and then backed up over her as she was lying in the street. A neighbor who lived across the street testified she went to the scene and one of the children told her that his parents were arguing and defendant tried to leave in the truck when something on the truck hit his mother causing her to trip and the wheel went over her head.

An autopsy revealed Renea Mathis died as a result of severe brain injuries caused by a large force such as being hit by a vehicle. Defendant was subsequently charged with second-degree murder. At trial, the court instructed the jury as to second-degree murder, voluntary manslaughter, involuntary manslaughter, and not guilty. Defendant was convicted of voluntary manslaughter and sentenced to the maximum term of twenty years. He appeals on the ground the court erred in submitting a charge of voluntary manslaughter to the jury when the evidence did not support such a verdict.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Francis W. Crawley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Teresa A. McHugh, for defendant appellant.

WALKER, Judge.

Although defendant objects to the submission of the charge of voluntary manslaughter to the jury, alleging it to be unsupported by the evidence, he did not object to the instruction when it was given. In North Carolina, the general rule in this regard is that one must object to the instruction when it is given and before the jury retires in order for the alleged error to be considered on appellate review. Failure to call the court's attention to the alleged error, so that the court may have an opportunity to correct it, constitutes a waiver of such objection. *Donavant v. Hudspeth*, 318 N.C. 1, 347 S.E.2d 797 (1986); *Chastain v. Wall*, 78 N.C.App. 350, 337 S.E.2d 150 (1985), *disc. review denied*, 316 N.C. 375, 342 S.E.2d 891 (1986). Defendant argues, however, that insofar as this instruction and subsequent conviction were not supported by the evidence, his right to due process has been violated and the instruction on the lesser charge constituted plain error requiring reversal of the manslaughter conviction. We disagree.

In *State v. Odom*, 307 N.C. 655, 660, 300 S.E.2d 375, 378 (1983), our Supreme Court found that application of the plain error rule, where it warrants reversal of a criminal conviction, occurs:

> [W]here, after reviewing the entire record, it can be said the claimed error is a "*fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done," or "where [the error] is grave error which amounts to a denial of a fundamental right of the accused," or the error has " 'resulted in a miscarriage of justice or in the denial to appellant of a fair trial' " or where the error is such as to "seriously affect the fairness, integrity or public reputation of judicial proceedings" or where it can be fairly said "the instructional mistake had a probable impact on the jury's finding that the defendant was guilty." (Emphasis in original).

We cannot hold that the court's instruction on the lesser offense of voluntary manslaughter rises to this level of error so as to require reversal.

Unquestionably, it is reversible error for the trial court to submit a charge of a lesser-included offense where there is no evidence to support a conviction on that charge. *State v. Strickland*, 307 N.C. 274, 298 S.E.2d 645 (1983), *overruled in part on other grounds*, *State v. Johnson*, 317 N.C. 193, 344 S.E.2d 775 (1986). However, if the effect of a lesser-included charge is " 'to cause a verdict for the lesser offense to be found . . . than *should* have been rendered' . . . a defendant has no cause for complaint." *State v. Ray*, 299 N.C. 151, 163, 261 S.E.2d 789, 797 (1980). (Emphasis in original). Thus, a defendant is prejudiced and entitled to relief on appeal only when " 'there is a reasonable possibility that, had the error in question not been committed, a different result [favorable to defendant] would have been reached at the trial.' " *Id.* at 163-164, 261 S.E.2d at 797. The questions before us, then, are (1) whether there was sufficient evidence to support a conviction of voluntary manslaughter, so that the court's submission of the issue was proper, and (2) if the charge was erroneously submitted, whether there is a reasonable possibility that defendant would have been acquitted or convicted of involuntary manslaughter had the charge on voluntary manslaughter not been given.

As the trial court correctly instructed, voluntary manslaughter is the unlawful killing of a human being without malice. *State*

v. Wynn, 278 N.C. 513, 180 S.E.2d 135 (1971). A killing is without malice if the defendant acts in the heat of passion upon adequate provocation so that the defendant's state of mind overcomes his ability to reason and to control his actions. *State v. Montague*, 298 N.C. 752, 259 S.E.2d 899 (1979); *State v. Best*, 79 N.C.App. 734, 340 S.E.2d 524 (1986). The act of provocation must be such, however, that it "would naturally and reasonably arouse the passions of an ordinary man beyond his power of control." *State v. McLawhorn*, 270 N.C. 622, 628, 155 S.E.2d 198, 203 (1967).

Defendant argues no evidence was presented to support a conviction of voluntary manslaughter since mere words and a verbal argument in the front yard, no matter how abusive, are not sufficient provocation. *State v. Montague* at 757, 259 S.E.2d at 903. However, the theory of voluntary manslaughter is supported where the victim used words and threatening behavior toward defendant, thereby causing him to feel anger, rage, or furious resentment which rendered his mind incapable of cool reflection. *State v. Haight*, 66 N.C.App. 104, 108, 310 S.E.2d 795, 797 (1984). The facts indicated that when defendant got into the truck to drive off his wife was yelling at him, leaning on the driver's side rear view mirror and reaching into the truck in an attempt to turn off the ignition and stop the truck. Defendant found it necessary to push his wife away from the truck in order to leave. Under these facts, we believe that the victim's yelling and threatening behavior would have a natural tendency to arouse the passions of an ordinary person. From these facts the jury could find the victim's provoking conduct and defendant's action were of such close proximity in time that defendant's mind and disposition did not cool. A reasonable person could conclude defendant's state of mind at the time was so violent as to overcome reason so that he could not think to the extent necessary to form a deliberate purpose and control his actions. Insofar as there was evidence before the court to support a conviction of voluntary manslaughter, it was proper to submit that issue to the jury.

Assuming *arguendo* there was not sufficient evidence to support a conviction for voluntary manslaughter, we do not believe a reasonable possibility existed that defendant would have been acquitted or convicted of the lesser crime of involuntary manslaughter had the charge not been submitted. Hence, the error would be harmless and nonprejudicial. In *State v. Quick*, 150 N.C. 820, 64 S.E. 168 (1909), the defendant was charged with second-degree

murder and convicted of voluntary manslaughter. Defendant appealed contending there was no evidence to support the charge of voluntary manslaughter. The Court found there was evidence to support the lesser charge, but noted:

> Suppose the court erroneously submitted to the jury a view of the case not supported by evidence, whereby the jury were permitted, if they saw fit, to convict of manslaughter instead of murder, what right has the defendant to complain? It is an error prejudicial to the State, and not to him. His plea of self-defense had been fully and fairly presented to the jury and rejected by them as untrue. What, then, was the duty of the jury, if there was no evidence of manslaughter? Clearly, under the law, they should have convicted the defendant of murder in the second degree.

Id. at 824, 64 S.E. at 170.

Similarly, in *State v. Summitt*, 301 N.C. 591, 273 S.E.2d 425, *cert. denied*, 451 U.S. 970, 68 L.Ed.2d 349 (1981), the Court, over defendant's objection to the lesser included offenses, charged the jury on first-degree rape, second-degree rape, assault with intent to commit rape, and assault on a female. The jury returned a verdict of guilty of second-degree rape and defendant argued there was no evidence to support a conviction of this offense. The Court agreed but did not believe it so prejudicial as to warrant a new trial, noting that when the jury rejected defendant's defense all evidence pointed to first-degree rape and the submission of the lesser included offense was favorable to defendant. *Id.* at 600, 273 S.E.2d at 430.

In the case before us defendant contends the death of his wife was an accident and he did not intentionally run her down with his truck. The court properly instructed the jury that the burden was on the State to prove the victim's death was not accidental. The fact the jury returned a conviction of voluntary manslaughter as opposed to an acquittal, however, indicates they did not subscribe to defendant's theory, and his claim of an accident was rejected. Having discarded this contention, some of the evidence showed defendant intentionally killed his wife with a deadly weapon, supporting a conviction of the greater crime of second-degree murder. There was not a reasonable likelihood, then, that had the charge of voluntary manslaughter not been submitted, defendant would have been convicted only of involuntary manslaughter or else ac-

quitted entirely. Further, we agree with the State that defendant's conviction of voluntary manslaughter was not a compromise verdict because there was evidence to support this lesser included offense.

If the court fails to charge on a lesser offense of which there is evidence, the defendant gains a new trial. Here there was evidence to support a verdict of voluntary manslaughter and additionally defendant did not object to the court's submission of voluntary manslaughter as a possible verdict.

No error.

Judges ARNOLD and PARKER concur.

ORVILLE L. LILLY, JR. v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 9119SC120

(Filed 18 February 1992)

Social Security and Public Welfare § 1 (NCI3d)— food stamp household—adult child without children—separate purchase of meals

An adult child who lives at home with his parents and siblings, and who has no minor child of his own, will not be excluded from the computation of the family's food stamp household even if the adult child purchases and prepares meals separately from the others in the home. 7 U.S.C. § 2012(i).

Am Jur 2d, Welfare Laws §§ 26, 27, 27.6.

APPEAL by petitioner from judgment entered 14 December 1990 in ROWAN County Superior Court by *Judge Thomas W. Seay, Jr.* Heard in the Court of Appeals 7 November 1991.

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

Lacy H. Thornburg, Attorney General, by Marilyn A. Bair, Associate Attorney General, for the State.

GREENE, Judge.

Petitioner appeals from a judgment entered 14 December 1990, affirming respondent's certification of petitioner's household as an eight-person food stamp household.

The procedural history of this case is as follows: on 20 June 1990, petitioner Orville Lilly, pursuant to N.C.G.S. § 108A-52 (1988), applied for food stamps at the Rowan County Department of Social Services (DSS) office, stating on the application that he had an eight-person household consisting of himself, his wife, and six children. One of the six children listed was petitioner's 20-year-old son Dennis Lilly. Dennis has no children of his own. On 5 July 1990, counsel for petitioner notified the county DSS that petitioner wanted his household to be considered a seven-person household, separate from Dennis, on the ground that petitioner purchases and prepares the family's food separately from Dennis. On 13 July 1990, the county DSS denied petitioner's request to be certified as a seven-person household, and instead approved petitioner's application for an eight-person household and for a food stamp allotment of $103.00 for the month of June 1990. It denied petitioner any food stamp allotment for July because the household income, including that of Dennis, who is assistant manager at the Sky City department store in Salisbury, exceeded the gross income limit for an eight-person household.

Petitioner appealed the county DSS decision to the Department of Human Resources (DHR) pursuant to N.C.G.S. § 108A-79(a) (1988). A hearing officer held an administrative hearing on 14 August 1990, pursuant to N.C.G.S. § 108A-79(i) (1988). The evidence at the hearing established that if petitioner's household was certified as a seven-person household, which would exclude Dennis and consequently Dennis' income from the computation of petitioner's food stamp allotment, then in all likelihood petitioner's household would qualify for food stamps. On 10 September 1990, the hearing officer, pursuant to N.C.G.S. § 108A-79(j) (1988), issued a proposal for decision affirming the certification of petitioner's household as an eight-person household. Petitioner presented no oral or written arguments in opposition to the proposal for decision. On 20 September 1990, the designated official of the DHR issued a final decision affirming petitioner's certification as an eight-person food stamp household.

Petitioner, pursuant to N.C.G.S. § 108A-79(k) (1988), filed a petition for judicial review of the final decision in Rowan County

Superior Court on 8 October 1990. After hearing, the superior court entered judgment on 14 December 1990, affirming the final decision of the DHR. Petitioner appeals.

The issue presented is whether an adult child who lives at home with his parents and siblings, and who has no minor child of his own, may be excluded from the computation of the family's food stamp household if the adult child purchases and prepares meals separately from the others in the home.

In 1981, Congress amended the statutory definition of "household" in the federal Food Stamp Act, 7 U.S.C. §§ 2011 *et seq.* (1988), to provide that "parents and children who live together shall be treated as a group of individuals who customarily purchase and prepare meals together for home consumption even if they do not do so . . . ." 7 U.S.C. § 2012(i) (1988). Congress provided an exception to this irrebuttable presumption, *see Robinson v. Block*, 869 F.2d 202, 211-12 (3d Cir. 1989), only when one of the parents was elderly or disabled. 7 U.S.C. § 2012(i) (1988). In a 1986 opinion, the United States Supreme Court discussed the policy supporting "the statutory definition of the term 'household'. . . [which] generally treats parents [and] children . . . who live together as a single household . . . ," whether or not they actually purchase and prepare meals separately. *Lyng v. Castillo*, 477 U.S. 635, 636, 91 L. Ed. 2d 527, 531 (1986). The Court noted that "Congress could reasonably determine that close relatives sharing a home—almost by definition—tend to purchase and prepare meals together . . . ." *Id.* at 642, 91 L. Ed. 2d at 535. Moreover, "the cost-ineffectiveness of case-by-case verification" to ensure that close relatives living together actually purchase and prepare meals separately, coupled with the potential for mistake and fraud in obtaining additional food stamp benefits, "unquestionably warrants the use of general definitions in this area." *Id.* at 641, 91 L. Ed. 2d at 534-35.

In 1987, Congress established another exception to the general rule that parents and children living together are to be treated as a single food stamp household:

> (i) 'Household' means . . . (3) a parent of minor children and that parent's children (notwithstanding the presence in the home of any other persons, including parents and siblings of the parent with minor children) who customarily purchase food

> and prepare meals for home consumption separate from other persons . . . .

7 U.S.C. § 2012(i)(3) (1988). Petitioner argues that the addition of clause (3), above, to the definition of "household" allows his household to qualify as a seven-person household because his adult son Dennis purchases and prepares meals separately from the rest of the family. Specifically, petitioner argues that Congress intended the phrase "and that parent's children" to refer to the parent's minor *and* adult children, and the phrase "(notwithstanding the presence in the home of any other persons . . .)" to include the adult children of the parent with minor children. Construing the statute in this manner, petitioner argues that his son Dennis, as an adult child living with petitioner but not customarily purchasing and preparing meals with the rest of the family, is not to be included as a member of petitioner's food stamp household since petitioner also has minor children living in the home. Respondent, on the other hand, contends that clause (3) in the definition of food stamp "household" excepts from the parent/child single household presumption children who are living with their parents, but who have and are caring for minor children of their own, and who purchase and prepare their meals separately from the others in the home.

We reject petitioner's strained construction of clause (3), and conclude that respondent's interpretation is consistent with the plain meaning of the statute. However, even if we were to find ambiguous the portion of the statute at issue, both the legislative history of clause (3) and the regulations promulgated by the agency charged with the administration of the Food Stamp Act reveal the true meaning of the statute. *See Peele v. Finch*, 284 N.C. 375, 382, 200 S.E.2d 635, 640 (1973) (court must apply statute in such a manner as to give effect to the legislative intent, which may be determined by statute's legislative history); *Walls & Marshall Fuel Co. v. North Carolina Dep't of Revenue*, 95 N.C. App. 151, 155-56, 381 S.E.2d 815, 818 (1989) ("the construction adopted by those who execute and administer the statute is evidence of what it means"); *see also Wilson v. Lyng*, 856 F.2d 630, 634 (1988) (where a statutory term can support either of two meanings, deference is owed to the interpretation of the agency charged with administering the statute).

The legislative history indicates, contrary to petitioner's argument, that Congress did not intend to allow adult children with

no children of their own, who live at home with their parents, to be excluded from the computation of the food stamp household:

> The Senate amendment allows *three generations* living together to form two separate households if the parents with minor children purchase and prepare meals separately from the *grandparents*.

H.R. Conf. Rep. No. 100-174, 100th Cong., 1st Sess. (1987), *reprinted in* 2 1987 U.S.C.C.A.N. 441, 482 (emphases added). This report demonstrates Congress' intent to except from the presumption that parents and children who live together purchase and prepare meals together only those children who are living at home with their parents and are themselves parents of minor children, and are purchasing and preparing meals for themselves and their minor children separately from the others in the home. Dennis does not fall into this category, specifically because Dennis is not a parent of minor children; only two generations live in petitioner's home—petitioner and his wife, and their children.

Furthermore, pursuant to 7 U.S.C. § 2013(c) (1988), the Secretary of Agriculture promulgated federal regulation 7 C.F.R. § 273.1(a) (1991), which provides in pertinent part the following interpretation of the Food Stamp Act's definition of "household":

> (a) Household definition—. . . (c) Parent(s) living with their natural, adopted, or stepchild(ren) and such child(ren) living with such parent(s), unless at least one parent is elderly or disabled . . . . If the natural, adopted, or stepchild is a parent of minor children and he/she and the children are living with his/her parent(s), the parent of the minor children, together with such children, may be granted separate household status
>
> . . . .

7 C.F.R. 273.1(a)(2)(c) (1991). As indicated, section (c) of this regulation interprets the statutory exception to the parent/child single household presumption as granting separate household status, in the context of the instant case, only to a child who (1) lives at home with his or her parents, (2) has a minor child or children of her own, and (3) purchases and prepares meals for herself and her children separately from the others in the home.

Petitioner raises for the first time in his brief the contention that clause (3) in the definition of "household," as we have interpreted it, violates the Equal Protection Clauses of both the North

Carolina and the United States Constitutions. Petitioner failed to raise this constitutional issue at the state agency hearings, or to include this issue in his petition for judicial review, or to argue this issue before the superior court, or to make this issue the basis of any assignment of error. Accordingly, we are precluded from addressing this issue. *See State v. Parks*, 290 N.C. 748, 752, 228 S.E.2d 248, 250 (1976) (constitutional questions must have been presented to and passed upon by the trial court in order to be asserted on appeal).

For the foregoing reasons, we conclude that the superior court correctly affirmed respondent's decision certifying petitioner's household as an eight-person household.

Affirmed.

Judge PARKER concurs.

Judge WYNN concurs in the result only.

STATE OF NORTH CAROLINA v. TYRONE LEROY BROOKS, JR.

No. 9116SC191

(Filed 18 February 1992)

1. Robbery § 6.1 (NCI3d) — robbery — consecutive sentences — not required

Consecutive sentences imposed for two armed robberies were vacated and remanded for determination of whether consecutive or concurrent sentences should be imposed where a statement by the court indicated that the court concluded that consecutive sentences were required by N.C.G.S. § 14-87(d). The sentencing court may in its discretion impose consecutive sentences, but it is not required to do so.

Am Jur 2d, Criminal Law § 552; Robbery § 83.

2. Criminal Law § 145 (NCI4th) — guilty plea — factual basis

The trial court must first determine that there is a factual basis for a guilty plea, which may be presented in the form of a statement by the prosecutor or which may be based on

other information properly brought to the court's attention, but which must be in the record. The Transcript of Plea alone does not provide an adequate factual basis for the plea.

Am Jur 2d, Criminal Law §§ 469-472, 489.

3. Conspiracy § 44 (NCI4th)— conspiracy to commit armed robberies—one agreement to commit multiple offenses—one sentence

One of two sentences for conspiracy to commit armed robbery was vacated where the evidence pointed only to the existence of a single agreement to commit both robberies.

Am Jur 2d, Conspiracy §§ 11, 39.

4. Criminal Law § 145 (NCI4th)— guilty pleas—factual basis—adequate

A statement by the prosecutor, though brief, was sufficient to establish a factual basis for defendant's plea of guilty to misdemeanor traffic charges.

Am Jur 2d, Criminal Law §§ 469-472, 489.

5. Criminal Law § 1086 (NCI4th)— sentences in excess of presumptive terms—individual findings

The court complied with N.C.G.S. § 15A-1340.4 when sentencing defendant for multiple offenses where each Judgment and Commitment form recited that the court made findings of factors in aggravation and mitigation of punishment and, although there was only one form upon which these findings are listed, it is clear the court intended to make these findings applicable to each judgment.

Am Jur 2d, Criminal Law §§ 551, 598, 599.

6. Criminal Law § 139 (NCI4th)— guilty plea—mistake as to mandatory minimum sentence—no error

There was no prejudicial error in the acceptance of a guilty plea entered by defendant where the court mistakenly told defendant that the applicable mandatory minimum sentence was 28 years and the evidence only supported one count of conspiracy to commit armed robbery. Defendant admitted his guilt and understood that he was facing an extended prison

sentence, and neither the prosecution nor the court did anything which influenced or coerced his decision.

Am Jur 2d, Criminal Law §§ 473, 476, 478.

APPEAL by defendant from judgments entered 16 August 1990 by *Judge Dexter Brooks* in ROBESON County Superior Court. Heard in the Court of Appeals 7 January 1992.

On 16 August 1990, defendant appeared before the Robeson County Superior Court and pled guilty to two counts of robbery with a dangerous weapon and two counts of conspiracy to commit robbery with a dangerous weapon. He also pled guilty to the misdemeanors of aiding and abetting a person to speed 100 m.p.h. in a 35 m.p.h. zone; operating a vehicle without insurance; aiding and abetting a person to operate a vehicle while impaired; aiding and abetting failure to stop for a blue light and a siren; aiding and abetting speeding to elude arrest; and aiding and abetting careless and reckless driving.

Before accepting defendant's plea, the trial court examined defendant pursuant to G.S. 15A-1022 concerning his guilty plea and the possible sentence he could receive. The court advised defendant that he could be imprisoned for a maximum sentence of one hundred six years and ten months and a minimum sentence of twenty-eight years. Defendant then signed the Transcript of Plea indicating he understood the sentence that could be imposed. The trial court accepted the plea after determining it had been given freely, understandingly and voluntarily and that there was a factual basis for the plea.

Before sentencing, the court determined the aggravating factor outweighed the mitigating factor and defendant was sentenced in excess of the presumptive sentences. Defendant was sentenced to ten years on each count of conspiracy to commit armed robbery and to forty years on each count of armed robbery. All sentences were ordered to run consecutively. For purposes of judgment, the traffic offenses were consolidated with one of the conspiracy charges.

The State's evidence disclosed that on 19 December 1991, defendant and his companion, Charlene Durer (Durer), traveled from Maryland to North Carolina. On the way to Robeson County, they committed robberies in Virginia and Wilson, North Carolina. While in Robeson County, defendant with the use of a handgun robbed

two different businesses, the Southern Inn and Jack's Sixty-Six Station. Further, defendant and Durer had agreed that while defendant committed the robberies, Durer would act as lookout and drive the car. In an attempt to elude arrest, the two became involved in a high speed chase with the police with speeds reaching 100 m.p.h. The police eventually stopped the car and apprehended Durer, however defendant escaped and was not apprehended until several days later. Upon investigation, the police discovered the car was registered to defendant and was uninsured.

Attorney General Lacy H. Thornburg, by Assistant Attorney General R. Dawn Gibbs, for the State.

Appellate Defender Malcolm Ray Hunter, Jr. for defendant appellant.

WALKER, Judge.

[1] On appeal defendant brings forward four assignments of error. He first contends the court erred in imposing consecutive sentences for the two counts of armed robbery in that the court was under the mistaken impression that the law required these sentences to run consecutively. In support of his argument defendant states that prior to sentencing he was asked the following by the trial court:

> Do you understand that upon your plea, you could be imprisoned for a possible maximum sentence of one hundred six years, ten months—and that *the mandatory minimum sentence is twenty-eight years*? (Emphasis added).

Defendant correctly asserts that if the court imposed concurrent sentences on all charges the defendant could only be sentenced to a mandatory minimum of fourteen years since this is the mandatory minimum sentence for robbery with a dangerous weapon under G.S. 14-87(d). This showing by defendant is sufficient to indicate that the court concluded that consecutive sentences were required by G.S. 14-87(d). This Court has determined where two or more armed robbery offenses are disposed of in the same proceeding, consecutive sentences are not required. *State v. Thomas*, 85 N.C.App. 319, 354 S.E.2d 891 (1987); *State v. Crain*, 73 N.C.App. 269, 326 S.E.2d 120 (1985). The sentencing court may in its discretion impose consecutive sentences, but it is not *required* to do so. *State v. Crain, supra.* Where it appears the court believed consecutive sentences were required when in fact such sentencing

was merely discretionary, the imposition of consecutive sentences is erroneous. *State v. Thomas, supra.* For this reason, the consecutive sentences imposed for the two armed robberies are vacated and remanded for the superior court to determine, in its discretion, whether consecutive or concurrent sentences should be imposed.

[2] Defendant next contends one of the convictions for conspiracy to commit armed robbery must be vacated since the evidence disclosed only a single conspiracy to commit several offenses. We agree. Before a plea of guilty can be accepted, the trial court must first determine that there is a factual basis for the plea. *State v. Sinclair,* 301 N.C. 193, 270 S.E.2d 418 (1980). This determination may be based upon evidence in the form of a statement of the facts by the prosecutor. The court may also consider any other information properly brought to its attention. However, the evidence which is considered must appear in the record. If the evidence contained in the record does not support defendant's guilty plea, then the judgment based thereon must be vacated. Standing alone, the Transcript of Plea itself does not provide an adequate factual basis for the plea. *State v. Sinclair, supra.*

[3] In the present case, evidence in support of the guilty plea to the two counts of conspiracy consisted of the following statement by the prosecutor:

> At [the] time [of the robberies] the co-defendant was the driver of the car and assisted [defendant] in leaving from [the] site.
>
> . . . .
>
> The co-defendant is a Charlene Durer and the evidence would show that they had *an agreement* and had traveled from Maryland and made several stops and robbed different people from Maryland down to Lumberton. And *their agreement was to*—for her to be the lookout and to drive the vehicle where—while he went inside the store, threatened with the gun and took the items. (emphasis added).

This evidence does provide a factual basis for the court's acceptance of defendant's plea of guilty to conspiracy. However, the evidence only points to the existence of a single agreement to commit both robberies. In holding a single agreement to commit multiple offenses is only a single conspiracy, this Court in *State v. Medlin,* 86 N.C.App. 114, 121, 357 S.E.2d 174, 178 (1987) stated:

> The essence of the crime of conspiracy is the agreement to commit a substantive crime . . . . When the evidence shows a series of agreements or acts constituting a *single* conspiracy, a defendant cannot be prosecuted on multiple conspiracy indictments consistent with the constitutional prohibition against double jeopardy. (Emphasis in original).

The record shows defendant and Durer pursued the same goal throughout—to commit robberies. The record shows only one agreement to commit multiple offenses. For this reason we remand with instructions for the trial court to arrest the judgment of conspiracy to commit armed robbery in Case No. 89CRS22754.

[4] Defendant also contends the court erred in accepting his guilty pleas to the misdemeanor traffic charges. He argues the evidence in the record was insufficient to support the court's determination that a factual basis existed for the plea of guilty to these offenses. In support of the guilty plea, the prosecutor offered the following statement:

> As far as the misdemeanor [charges], your Honor, the evidence would be that they drove away from one of the stops—and I'm not sure exactly which one, but at that time, at some point they were pursued by Trooper Covington and that the speeds got up to at least a hundred miles per hour. That there was reckless driving, a long chase. That the defendant at one point got out of the car and ran and escaped.
>
> They stopped the car with Ms. Durer, the co-defendant, in it. The car was registered to the defendant and it was found it did not have the proper insurance.

Even though this is a brief statement by the prosecutor we find it sufficient to establish a factual basis for defendant's plea of guilty. This assignment of error is overruled.

[5] Defendant next assigns error to the trial court's imposition of sentences in excess of the presumptive terms. He argues the court failed to comply with G.S. 15A-1340.4 because it did not make individual findings of aggravating and mitigating factors for each judgment. In the present case, each Judgment and Commitment form recites that the court made findings of factors in aggravation and mitigation of punishment. Although there is only one form upon which these findings are listed, it is clear the court intended to make these findings applicable to each judgment. In

State v. Fletcher, 322 N.C. 415, 368 S.E.2d 633 (1988), our Supreme Court approved this procedure. Therefore, this assignment of error is without merit.

[6] In his last assignment of error, defendant contends his guilty pleas should be stricken since they were not made voluntarily or knowingly and instead were made under circumstances where the court mistakingly told defendant the applicable mandatory minimum sentence was twenty-eight years and the evidence supported only one count of conspiracy to commit armed robbery. A plea of guilty must be given with full knowledge and understanding of the consequences. *State v. Pait*, 81 N.C.App. 286, 343 S.E.2d 573 (1986). A plea is not voluntarily and knowingly made unless it is entered into by one fully aware of the direct consequences. *State v. Mercer*, 84 N.C.App. 623, 353 S.E.2d 682 (1987). The record discloses defendant admitted his guilt and understood he was facing an extended prison sentence. Further review shows that neither the prosecution nor the court did anything which influenced or coerced defendant's decision. Accordingly, we hold there was no prejudicial error committed in the acceptance of the plea tendered by defendant.

For the reasons stated, we arrest judgment for conspiracy to commit armed robbery in Case No. 89CRS22754, vacate all the remaining sentences, and remand the case to Robeson County Superior Court for a new sentencing proceeding consistent with our decision.

Arrested in part; vacated in part; and remanded for resentencing.

Judges ARNOLD and PARKER concur.

STATE OF NORTH CAROLINA v. DELMAR SUMMERS

No. 9118SC400

(Filed 18 February 1992)

1. **Constitutional Law § 360 (NCI4th)— requiring defendant to display teeth to jury**

The trial court did not err in ordering defendant to stand and display his teeth to the jury in a rape and sexual offense prosecution in which the victim described her assailant as a man with missing teeth.

Am Jur 2d, Criminal Law §§ 945, 946.

Propriety of requiring criminal defendant to exhibit self, or perform physical act, or participate in demonstration, during trial and in presence of jury. 3 ALR4th 374.

2. **Searches and Seizures § 43 (NCI3d)— seized evidence—absence of motion to suppress—waiver of right to challenge admissibility**

Defendant waived his right to challenge the admissibility of evidence seized from a "junked" automobile by failing to make a motion to suppress the evidence pursuant to N.C.G.S. § 15A-975.

Am Jur 2d, Evidence § 425.

3. **Criminal Law § 750 (NCI4th)— instruction—ascertainment of truth—no shift in burden of proof**

The trial court's instruction to the jury that "the highest aim of every legal contest is the ascertainment of the truth" did not shift the burden of proof to defendant and was not plain error.

Am Jur 2d, Trial § 1291.

4. **Constitutional Law § 200 (NCI4th)— double jeopardy—sexual offenses and kidnapping—arrest of kidnapping judgment—discretion of court**

Where defendant was convicted of first degree rape, first degree sexual offense, and first degree kidnapping for the purpose of facilitating the rape and sexual offense, the trial court properly exercised its discretion by arresting judgment on the first degree kidnapping conviction rather than on the

rape or sexual offense convictions in order to avoid placing defendant in double jeopardy.

Am Jur 2d, Abduction and Kidnapping § 9; Criminal Law §§ 267, 277, 279.

Seizure or detention for purpose of committing rape, robbery, or similar offense as constituting separate crime of kidnapping. 43 ALR3d 699.

APPEAL by defendant from Judgment entered 9 January 1991 by *Judge W. Steven Allen* in GUILFORD County Superior Court. Heard in the Court of Appeals 16 January 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

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

COZORT, Judge.

Defendant Delmar Summers was convicted of first-degree kidnapping, first-degree rape, and first-degree sexual offense. He was sentenced to life in prison for the first-degree rape and to a consecutive life sentence for the first-degree sex offense. The trial court arrested judgment for the first-degree kidnapping; defendant was sentenced to a further consecutive term of thirty years in prison for second-degree kidnapping. Defendant disputes the following on appeal: (1) the trial court's order forcing the defendant to display his teeth to the jury; (2) the trial court's failure to conduct a hearing on the introduction of evidence seized as a result of a search of a "junked" automobile; (3) the trial court's instruction to the jury that "the highest aim of every legal contest is the ascertainment of the truth"; and (4) the trial court's election to arrest judgment on the first-degree kidnapping conviction rather than on either the rape or sexual offense convictions. We find no error.

The State's evidence tended to show that, on 2 September 1989 some time after midnight, the sixteen-year-old victim and a friend walked a few blocks from the victim's home to Ken's Quickie Mart in Gibsonville, North Carolina. They intended to buy some snacks. The friend was frightened by a disturbance at a nearby bar and walked home. The victim continued on, went into

the store, purchased chewing gum and chips, and began to head home. As she passed near a phone booth under a light, the defendant grabbed her. She saw him clearly. She noticed he was a short, black, balding male, who had some teeth missing. He was wearing a light striped shirt and blue jeans. Defendant pointed a knife in the victim's back and ordered her to do as he said. He directed her through a fence opening to a railroad storage building. The victim was frightened and did as defendant asked. At the shed, defendant put the knife to the victim's chest, cut off her bra, forced her to undress, and told her to crawl under the outbuilding. The victim complied. Defendant then forced the victim to have anal intercourse, cunnilingus, and two acts of vaginal intercourse with him. After an hour and a half, the defendant left. The victim ran to the Gibsonville Police Department and told the police what had occurred. She was taken to the hospital where she was treated, and then returned to the police station. At the station, she identified the defendant as her assailant from a photographic array of six photos. The police showed the victim a knife and shirt taken from a "junked" automobile and she identified the items as those which were in her attacker's possession.

Dr. W. S. Willcockson testified he examined the victim at 1:50 a.m. on 2 September 1989. He discovered evidence of vaginal and anal intercourse. Officer Mike Woznick of the Elon College Police Department testified he obtained a warrant at 4:00 a.m. on 2 September 1989 to search a junked 1960 blue and white Ford automobile located in the front yard of 402 10th Street in Gibsonville, North Carolina. He recovered a knife and a shirt from the car. The following day, defendant was arrested when an officer recognized him from a police photograph. Defendant offered no evidence.

[1] Defendant initially contends the trial court committed prejudicial error by ordering the defendant to display his teeth to the jury. At one point in the trial, the District Attorney asked for the defendant to stand before the jury and reveal his teeth. Defendant's counsel objected, and defendant refused to comply with the request. The trial court then ordered the defendant to do as ordered. Defendant argues this humiliation caused him irreparable harm. This argument is without merit. A defendant's Fifth Amendment privilege is not violated when he or she is ordered to display himself or herself to the jury. *State v. Perry*, 291 N.C. 284, 291, 230 S.E.2d 141, 145 (1976). As long as the demonstration is relevant

to the facts to be proved or disproved in the case, such a demonstration is permissible. In the case below, the victim described her assailant as a man with missing teeth. The District Attorney's request was therefore relevant to the case and the trial court's order was not error.

[2] Defendant also disputes the trial court's decision not to conduct a hearing on the admissibility of items seized from a "junked" automobile. The trial court ruled, without a hearing, that defendant had no standing to contest the search because he had no ownership interest in the automobile. Defendant failed to make any motion to suppress the evidence pursuant to N.C. Gen. Stat. § 15A-975 (1988). Consequently, defendant has waived his right to challenge the admissibility of the evidence. *State v. Simmons*, 59 N.C. App. 287, 288, 296 S.E.2d 805, 807 (1982), *cert. denied*, 307 N.C. 701, 301 S.E.2d 395 (1983).

[3] Defendant's next argument challenges the trial court's instruction to the jury:

> Now, ladies and gentlemen of the jury, the highest aim of every legal contest is the ascertainment of the truth. Somewhere within the facts of every case, the truth abides, and where truth is, justice steps in, garbed in its robes and tips the scales. In these cases, you have no friends to reward, you have no enemies to punish, you have no anger to appease or sorrow to assuage. Yours is a solemn duty to let your verdicts speak the everlasting truth.

Defendant argues this pattern jury instruction improperly shifts the burden of persuasion to the defendant to prove his innocence. He contends this error mandates a new trial. We disagree. First and foremost, defendant failed to object to this instruction at trial. According to Rule 10(b)(2) of the Rules of Appellate Procedure, defendant has failed to preserve review of this issue on appeal. Defendant, however, claims the trial court's instruction amounted to plain error. We find no plain error. The instruction is employed frequently to bolster the instruction as to reasonable doubt. We cannot ascertain how this instruction prejudiced defendant in any way, and defendant cannot demonstrate how this instruction prompted the jury to convict him for a reason other than from the evidence presented.

[4] Finally, defendant maintains the trial court committed error in arresting judgment on the first-degree kidnapping conviction rather than on either the first-degree rape or first-degree sexual offense convictions. Defendant argues the trial court abused its discretion by failing to consider arresting one of the judgments for the sexual assault charges. He now seeks a new sentencing hearing. According to *State v. Freeland*, 316 N.C. 13, 24, 340 S.E.2d 35, 41 (1986), when a defendant is convicted of either rape or sexual offense plus first-degree kidnapping, and the sexual assault is the theory for first-degree kidnapping, one of the judgments must be arrested to avoid placing the defendant in double jeopardy. The arresting of the judgment, however, is purely a matter within the trial judge's discretion. In the case below, the judge chose to arrest judgment on the first-degree kidnapping conviction and enter a judgment of second-degree kidnapping. This, without more, is insufficient to justify a new sentencing hearing. The judgments are affirmed as entered.

No error.

Judges EAGLES and ORR concur.

CITY OF HIGH SHOALS, A MUNICIPAL CORPORATION, PLAINTIFF v. VULCAN MATERIALS COMPANY; GASTON COUNTY; DONALD E. BAILEY; AND JAMES E. THOMASON, DEFENDANTS

No. 9127SC176

(Filed 18 February 1992)

Municipal Corporations § 30.11 (NCI3d)— existence of zoning ordinance—prohibition of rock quarry—sufficient forecast of evidence

Plaintiff city's forecast of evidence was sufficient to raise a genuine issue of material fact as to whether defendant's operation of a rock quarry within the city limits was prohibited by a zoning ordinance enacted by the city council in 1973, although plaintiff failed to produce a copy of the 1973 ordinance at the summary judgment hearing, where plaintiff presented the affidavits of two city officials attesting to the existence of the 1973 ordinance, and plaintiff presented a certified copy

of public records stating that plaintiff has had a zoning ordinance applying to land within plaintiff's city limits since 28 November 1973.

Am Jur 2d, Summary Judgment §§ 23, 26, 27, 32, 33; Zoning and Planning §§ 101, 103, 121.

APPEAL by plaintiff from summary judgment entered 1 October 1990 in GASTON County Superior Court by *Judge Marvin K. Gray*. Heard in the Court of Appeals 6 January 1992.

The City of High Shoals (hereinafter plaintiff) instituted this suit seeking to enforce its zoning ordinance and prohibit defendant Vulcan Materials Company (hereinafter Vulcan) from developing a rock quarry on certain properties located within the city's zoning jurisdiction. The record on appeal tends to establish the following facts and circumstances.

Plaintiff is a municipal corporation located in Gaston County. Vulcan, a North Carolina corporation, develops, among other things, materials used in the construction of buildings and highways. In December of 1988, Vulcan began preliminary operations to determine if an area of land within and adjacent to plaintiff's boundaries was suitable for the operation of a rock quarry. These operations included acquiring options to purchase three adjoining parcels of land.

Vulcan acquired options to purchase all three parcels of land by March 1989 and then began surveying, drilling and bulldozer work in furtherance of their intent to develop a rock quarry. In July 1989, Vulcan applied to the Gaston County Inspections Department and Health Department for building, well installation and improvement permits. These permits were necessary for Vulcan to begin building structures for the operation of a rock quarry. On 21 September 1989, Vulcan applied to the North Carolina Department of Environment, Health and Natural Resources for a permit to operate a rock quarry as required by N.C. Gen. Stat. §§ 74-46 through 68 (1991). All of these permits were issued in July of 1989 with the exception of the State permit which was issued in March of 1990. Vulcan renewed their permits from Gaston County in December 1989.

Vulcan's State Sales Manager, S.B. Clarke, was informed in July 1989 that plaintiff had an effective zoning ordinance which pertained to land within its city limits. This ordinance purportedly

zoned all lands within the city limits as residential areas. This zoning scheme, enacted on 28 November 1973, purportedly prohibited industrial operations such as a rock quarry within the city limits. A portion of land Vulcan intended to use as a rock quarry was located within the city limits. Further, Clarke was told that the city council intended to pass a new zoning ordinance which would extend the jurisdiction of the original ordinance one mile beyond the city limits. The lands outside plaintiff's city limits on which Vulcan intended to place a portion of its rock quarry would be encompassed by the 1989 ordinance.

This new ordinance was enacted on 28 December 1989 and mirrored the existing ordinance pertaining to lands located within the city limits. The new ordinance specified that all lands, within the city limits and in the new one-mile perimeter, on which Vulcan intended to operate a rock quarry were zoned residential areas. The ordinance further specified that plaintiff would not allow the issuance of building permits for a rock quarry on these lands subsequent to its adoption. The operation of a rock quarry on these lands is a non-conforming use under the 1989 zoning ordinance.

Plaintiff filed its complaint against the named defendants for the enforcement of its zoning laws. All defendants joined the pleadings with defendants Gaston County, Bailey and Thomason moving to dismiss plaintiff's complaint as to them under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. This motion was allowed. Vulcan moved for summary judgment pursuant to Rule 56 of the Rules of Civil Procedure. This motion came on for hearing on 1 October 1990 in Gaston County Superior Court and was allowed. The trial court found there were no geniune issues of material fact and that defendant was entitled to judgment as a matter of law. Plaintiff appeals.

Wade W. Mitchem; and Whitesides, Robinson, Blue, Wilson and Smith, by Terry Albright Kenny and Henry M. Whitesides, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by H. Grady Barnhill, Jr., Roddey M. Ligon, Jr. and M. Elizabeth Gee; and Garland & Wren, P.A., by James B. Garland, for defendant-appellee Vulcan Materials Company.

WELLS, Judge.

Plaintiff presents three assignments of error to this Court on appeal. Plaintiff does not address its second assignment of error in its brief; therefore, it is deemed abandoned. N.C.R. App. P., Rule 28. In its remaining assignments, plaintiff first contends the trial court erred in granting Vulcan summary judgment on the ground that the forecast of evidence presented raised a genuine issue of fact as to whether Vulcan's quarrying activity was prohibited by a zoning ordinance enacted by plaintiff's city council in 1973. Plaintiff further contends the trial court erred in granting Vulcan summary judgment on the ground that a genuine issue of fact existed as to whether Vulcan had obtained a vested right to operate a rock quarry in light of the zoning ordinance enacted in December of 1989. We find that the trial court erred in granting summary judgment in favor of Vulcan and reverse.

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). The burden is upon the movant to establish the absence of any issue of fact, and if once satisfied, the opposing party must come forward with facts, rather than mere allegations, which negate the moving party's case. *Hotel Corp. v. Taylor and Fletcher v. Foreman's, Inc.*, 301 N.C. 200, 271 S.E.2d 54 (1980). Summary judgment is a drastic remedy, not to be granted unless it is perfectly clear that no issue of fact is involved and the inquiry into facts is not desirable to clarify application of law. *Overstreet v. City of Raleigh*, 75 N.C. App. 351, 330 S.E.2d 643 (1985).

In the present case, Vulcan relies upon the absence of the 1973 zoning ordinance or map to meet its burden of establishing the absence of an issue of fact. Vulcan contends that plaintiff's failure to produce the 1973 ordinance shows there is no question of fact regarding their right to operate a rock quarry within plaintiff's city limits. We disagree.

While plaintiff did fail to produce a copy of the 1973 ordinance at the summary judgment hearing, the record reveals that plaintiff presented at least two affidavits from city officials who attest to the existence of the 1973 ordinance. Further, plaintiff, through its attorney, presented at the summary judgment hearing a cer-

tified copy of the public records of Gaston County. This certified copy stated that plaintiff has had a zoning ordinance applying to land within plaintiff's city limits since 28 November 1973.

We hold that plaintiff has presented an adequate forecast of the evidence to raise an issue of fact concerning the existence of the 1973 ordinance and negate Vulcan's contention that there is no impediment to their operation of a rock quarry within plaintiff's city limits. Therefore, the decision of the trial court is reversed and this case should proceed to trial.

Reversed and remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

SHAUNNA DAUM, A MINOR, BY GARY D. HENDERSON, HER GUARDIAN AD LITEM v. LORICK ENTERPRISES, INC.

No. 9121SC356

(Filed 18 February 1992)

Rules of Civil Procedure § 59 (NCI3d)— emotional distress— damages—new trial

A jury arbitrarily ignored the evidence of plaintiff's pain and suffering and entered an inconsistent verdict not in accordance with the law in an action seeking damages for intentional infliction of emotional distress and negligent hiring or retention of an employee where plaintiff proffered uncontradicted evidence that she suffered severe mental distress as a result of intentional sexual harassment and molestation by defendant's manager and that she suffered from the permanent condition of Post-Traumatic Stress Disorder; the jury found that the manager had inflicted severe emotional distress upon plaintiff and that defendant was negligent in hiring and/or retaining the manager; and the jury awarded plaintiff $1300 for medical expenses incurred as of the date of trial, but awarded nothing for future medical expenses or severe emotional distress, the very essence of the claim. The error in assessing damages did not affect the entire verdict and it is therefore proper to order a partial new trial on the issue of damages alone.

Am Jur 2d, Damages §§ 240, 251, 252, 254, 269.

Recovery of damages as remedy for wrongful discrimination under state or local civil rights provisions. 85 ALR3d 351.

Recovery of damages for emotional distress resulting from discrimination because of sex or marital status. 61 ALR3d 944.

APPEAL by plaintiff from *Freeman (William H.), Judge*. Judgment entered 19 August 1990 in Superior Court, FORSYTH County. Heard in the Court of Appeals 10 February 1992.

This is a civil action wherein plaintiff, through her guardian *ad litem*, is seeking damages against defendants Lorick Enterprises, Inc., and Warren Holderman (hereinafter "Holderman") for intentional infliction of emotional distress and negligent hiring and/or retention of an employee. A default judgment was entered against Holderman on 28 August 1989, pursuant to N.C.R. Civ. P. 55(a), for failure to file an answer or responsive pleading. The facts of this action are summarized as follows: Defendant Lorick Enterprises, Inc. hired plaintiff Shaunna Daum, a fifteen year old, as a cashier and cook at its Little Caesar's Pizza Restaurant in Winston-Salem, North Carolina. On 10 February 1989, the new manager at this restaurant, Holderman, sent the employees home around 10:00 p.m., with the exception of plaintiff. After the other employees left, plaintiff and Holderman were alone in the restaurant.

When plaintiff went to the kitchen area in the rear of the restaurant to make a pizza, Holderman pushed her against a walk-in refrigerator and started kissing plaintiff on her lips and neck, and began fondling and pressing his chest against her breasts. Plaintiff yelled at Holderman, telling him to leave her alone. Holderman apologized, and told plaintiff that he would not do that again and would leave her alone. At that time, a customer entered the restaurant and plaintiff went to wait on him, with Holderman following behind her. After the customer left the store, Holderman told plaintiff to come into his office, although there was no office at the restaurant. Holderman then pushed plaintiff into the restroom and closed the door. Holderman unzipped both their pants, and told plaintiff that he really needed sex and that he "wanted it." Holderman also fondled the plaintiff's buttocks while he had her pinned in the restroom for fifteen to twenty minutes trying to have sex with her. Plaintiff yelled at him and was finally able to push him away and run out of the restaurant.

Evidence was presented at trial tending to show that prior to defendant hiring Holderman, he had sexually molested a ten year old girl, and had pled guilty to assault on a female. Holderman indicated on his application to defendant that he had been convicted of a crime, but defendant never questioned him about his criminal conviction. After defendant hired Holderman, he sexually molested another female employee in a manner similar to plaintiff. Defendant moved Holderman to the restaurant where he molested plaintiff within two weeks of his transfer. As a result of Holderman's sexual harassment and molestation of plaintiff, she suffered severe mental distress and was diagnosed as having the permanent psychological condition of Post-Traumatic Stress Disorder. Plaintiff's medical bills at the time of trial totalled $1,300.00. Plaintiff's evidence tends to show that her future medical expenses for continued psychiatric treatment will be approximately $22,000.00.

Judge Freeman charged the jury that plaintiff had presented evidence of past and future pain and suffering, past and future medical expenses, and a permanent psychiatric condition. The court also charged that if the jury found the corporate defendant negligent, plaintiff would be entitled to recover in a lump sum the present worth of all damages, past, present, and prospective, which naturally and proximately resulted from such negligence, and that these damages included medical expenses and pain and suffering.

The jury found Holderman did inflict severe emotional distress upon plaintiff, and that defendant Lorick Enterprises was negligent in hiring and/or retaining him as an employee. The jury awarded plaintiff $1,300.00 in actual damages and no punitive damages. Plaintiff filed a motion for a new trial on the issue of actual damages, which was denied by the court. From a judgment on the verdict and from the court's denial of her motion for a new trial, plaintiff appealed.

Kennedy, Kennedy, Kennedy & Kennedy, by Harold L. Kennedy, III, and Harvey L. Kennedy, for plaintiff, appellant.

David F. Tamer for defendant, appellee.

HEDRICK, Chief Judge.

Plaintiff's sole argument on appeal is that the trial court erred in denying her motion for a new trial on the issue of damages.

Rule 59 of the North Carolina Rules of Civil Procedure provides in pertinent part:

> A new trial may be granted to all or any of the parties and on all or part of the issues for any of the following causes or grounds: . . . (5) Manifest disregard by the jury of the instructions of the court; (6) Excessive or inadequate damages appearing to have been given under the influence of passion or prejudice; . . . .

Accordingly, the court may award a new trial in the situation where the damages awarded by the jury are inadequate as a matter of law. *Hinton v. Kline*, 238 N.C. 136, 76 S.E.2d 162 (1953).

In *Robertson v. Stanley*, 285 N.C. 561, 206 S.E.2d 190 (1974), plaintiff and his father brought suit to recover damages for injuries sustained when plaintiff was struck by an automobile. The jury found plaintiff and his father were damaged by the negligence of the defendant, and that neither was contributorily negligent. The jury awarded damages to the father for medical expenses incurred. However, despite plaintiff's uncontroverted evidence of permanent scarring and pain and suffering, the jury awarded plaintiff nothing on his claim for these damages. Pursuant to N.C.R. Civ. P. 59, plaintiff moved for a new trial. The trial court denied the motion and entered judgment on the verdict from which plaintiff appealed. On appeal, the Supreme Court stated:

> Under such circumstances, with the evidence of pain and suffering clear, convincing and uncontradicted, it is quite apparent that the verdict is not only inconsistent but also that it was *not rendered in accordance with the law*. Such verdict indicates that the jury arbitrarily ignored plaintiff's proof of pain and suffering. If the minor plaintiff was entitled to a verdict against defendant by reason of personal injuries suffered as a result of defendant's negligence, then he was entitled to *all* damages that the law provides in such case.

Id. at 566, 206 S.E.2d at 193-94.

As in *Robertson* plaintiff, in the present case, proffered uncontradicted evidence that she suffered severe mental distress as a result of the intentional sexual harassment and molestation by defendant's manager, Holderman, and that she suffered from the permanent condition of Post-Traumatic Stress Disorder. The jury found Holderman inflicted severe emotional distress upon plaintiff

and that defendant was negligent in hiring and/or retaining Holderman as an employee. The jury awarded plaintiff $1,300.00 for medical expenses incurred as of the date of trial, but awarded nothing for future medical expenses, or severe emotional distress, the very essence of the claim.

We hold the jury arbitrarily ignored the evidence of plaintiff's pain and suffering and entered an inconsistent verdict not in accordance with the law. Furthermore, we find the error in assessing damages did not affect the entire verdict, and therefore it is proper to order a partial new trial on the issue of damages alone. *See Fortune v. First Union National Bank*, 323 N.C. 146, 371 S.E.2d 483 (1988).

Therefore, the judgment is vacated, and the cause is remanded for a partial new trial solely on the issue of damages.

Vacated and remanded.

Judges WELLS and JOHNSON concur.

CHARLES C. HUNDLEY AND WIFE, DEBORAH B. HUNDLEY v. KENNETH D. MICHAEL AND WIFE, FREDA J. MICHAEL, PATRICIA B. MALLOY, AND VAN O'NEAL BOLIN, JR. AND WIFE, TAMMY L. BOLIN, AND GUILFORD COUNTY

No. 9118SC317

(Filed 18 February 1992)

1. Easements § 45 (NCI4th)— right of ingress and egress— exclusivity

The trial court did not err by granting summary judgment for plaintiffs in an action concerning an easement providing the only access to a lot owned by defendants where the court ordered that plaintiffs are entitled to make full use of the property within Pat's Place Lane so long as they do not interfere with access for ingress and egress to the property of defendants. Absent explicit language to the contrary, the owner of land subject to an easement has the right to continue to use the land in any manner and for any purpose which

is not inconsistent with the reasonable use and enjoyment of the easement.

Am Jur 2d, Easements and Licenses §§ 77, 89.

2. Easements § 45 (NCI4th)— right of ingress and egress—fence—injunction

The trial court did not err by ordering defendants to remove a fence which they had constructed to keep plaintiffs from using an easement held by defendants. Easement holders may not increase their use so as to increase the servitude or increase the burden upon the servient tenement.

Am Jur 2d, Easements and Licenses §§ 77, 79, 89-92.

Extent and reasonableness of use of private way in exercise of easement granted in general terms. 3 ALR3d 1256.

APPEAL by defendants Michael from judgment entered 4 January 1991 by *Judge A. Leon Stanback, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 14 January 1992.

The facts of this controversy are not in dispute. In May 1985, Kenneth and Freda Michael (defendants) purchased certain real property known as Lot 2 from Patricia Malloy. At the time of purchase, Ms. Malloy granted defendants "a permanent and exclusive easement of ingress and regress over a road fifteen feet in width." This easement, known as "Pat's Place Lane," runs along the northern boundary of the adjacent Lot 3 which was also owned by Ms. Malloy and provides the only access to the main road for Lot 2.

On 15 July 1987, Patricia Malloy sold Lot 3 to Van O'Neal and Tammy L. Bolin. The Bolin's deed stated that the conveyance was made subject to the easement known as Pat's Place Lane. Defendants complained to the Bolins when the Bolins began parking vehicles on this road. Thereafter, defendants erected a fence along the entire southern border of the easement in order to keep the Bolins from using the road to gain access to Lot 3. The Bolins had other access to Lot 3 by way of Spencer-Dixon Road.

In July 1989, the Bolins sold Lot 3 to Charles C. and Deborah B. Hundley (plaintiffs). The Hundley deed recited the conveyance was made subject to the easement. Plaintiffs brought this action alleging they were entitled to make full use of the property within the easement so long as the use did not interfere with access

to the property of defendants and their use of the easement. Plaintiffs also alleged that defendants' act of placing a fence along the easement constituted a continuing trespass upon plaintiffs' property and therefore they are entitled to an injunction compelling the removal of the fence.

The trial court granted summary judgment to plaintiffs ordering that plaintiffs are entitled to make full use of the property within Pat's Place Lane so long as they do not interfere with access for ingress and egress to the property of defendants, and further ordering defendants to remove the fence.

Turner Enochs & Lloyd, P.A., by Donald G. Sparrow, for plaintiff appellees.

Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Marion G. Follin and Tomi W. Bryan, for defendant appellants Kenneth D. and Freda J. Michael.

WALKER, Judge.

[1] In their first assignment of error, defendants contend the trial court erred in concluding plaintiffs are entitled to make full use of the property within the easement as long as plaintiffs do not interfere with defendants' access to Lot 2.

In asserting that plaintiffs have no right to make use of the property within Pat's Place Lane, defendants rely upon *Rollinwood Homeowners Association v. Jarman, Inc.*, 92 N.C.App. 724, 375 S.E.2d 700 (1989). In that case, a fifteen foot easement for the purposes of "placing and maintaining landscaping and shrubbery" existed in favor of plaintiffs' property. Defendants, the owners of the servient tenement, destroyed a portion of plaintiffs' shrubbery and placed a driveway over the easement. Defendants contended the term "landscaping" as used in the grant was ambiguous and that there was no evidence they interfered with the landscaping activities of plaintiffs. The Court said the grant of the easement for "maintaining landscaping and shrubbery" was clear and that defendants' construction and use of a driveway interfered with plaintiffs' use and enjoyment of the easement.

We do not consider *Rollinwood* to be dispositive of the present case. In *Rollinwood* the owners of the servient tenement attempted to make a use of the easement which was clearly contrary to the express purpose of the easement. In the present case, defendants

contend that Ms. Malloy intended for them to be the *only ones* to use the easement for ingress and regress since the easement was the sole access to their property and the grant was "exclusive." In determining what uses the servient tenement may make of the land within the easement the court should look to the words of the deed or instrument creating the easement. *Hine v. Blumenthal*, 239 N.C. 537, 80 S.E.2d 458 (1954). One must look at the language of the deed or instrument rationally and construe the language consistent with reason and common sense. If there is any doubt as to the parties' intentions, an interpretation should be adopted which conforms more to the presumed meaning, one that does not produce an *unusual* or unjust result. *Id.*

Ms. Malloy conveyed Lot 3 to the Bolins burdened with this easement. She elected not to retain the fee simple title to this fifteen feet of property or to convey it in fee simple to the Michaels. To have done so would have established her intent to give defendants an "exclusive" right to Pat's Place Lane. However, to now exclude the servient tenement owner from using the property within the easement would indeed produce an "unusual" result. Absent explicit language to the contrary, the owner of land subject to an easement has the right to continue to use his land in any manner and for any purpose which is not inconsistent with the reasonable use and enjoyment of the easement. *Chesson v. Jordan*, 224 N.C. 289, 29 S.E.2d 906 (1944). Therefore, we reject the interpretation urged by defendants. Obviously, plaintiffs cannot block or interfere with defendants' right of ingress and regress over Pat's Place Lane, but we agree with plaintiffs that the term "exclusive" as used here cannot be interpreted so as to exclude the owner of the servient tenement from using the property within the easement consistent with the purpose of the easement.

[2] Defendants next contend the trial court erred in ordering them to remove the fence which they had constructed to keep plaintiffs from using the easement. We note that an easement holder may not increase his use so as to increase the servitude or increase the burden upon the servient tenement. P. Hetrick, *Webster's Real Estate Law in North Carolina* Sec. 328 (rev. ed. 1981). If the easement holder makes an unwarranted use of the land in excess of the easement rights held, such use will constitute an excessive use and may be enjoined. *Hales v. Atlantic Coast Line Railroad Co.*, 172 N.C. 104, 90 S.E. 11 (1916).

As previously discussed, plaintiffs have the right to use their property within the easement consistent with the purpose for which the easement was created. However, by erecting the fence defendants have prevented plaintiffs from using Pat's Place Lane for egress and regress to Lot 3. Accordingly, the trial court properly entered an injunction requiring defendants to remove the fence.

Affirmed.

Judges ARNOLD and PARKER concur.

JACKSON N. EVANS, ADMINISTRATOR OF THE ESTATE OF JACKSON EDWARD EVANS, PLAINTIFF v. ROSE MARIE EVANS DIAZ, DEFENDANT

No. 9122SC179

(Filed 18 February 1992)

Death § 23 (NCI4th)— automobile accident—death of child—mother as sole beneficiary—mother's renunciation—wrongful death action against mother

Defendant mother's renunciation of her right to inherit from her son in favor of the son's two sisters related back to the time of the son's death pursuant to N.C.G.S. § 31B-3(a), and defendant mother is deemed to have predeceased her son. Therefore, the son's estate was not barred from recovery against the mother for the wrongful death of the son in an automobile accident on the ground that the alleged wrongdoer was the son's sole heir at the time of his death.

Am Jur 2d, Death § 165.

Fact that tortfeasor is member of class of beneficiaries as affecting right to maintain action for wrongful death. 95 ALR2d 585.

APPEAL by plaintiff-administrator from order entered 17 January 1991 by *Judge Preston C. Cornelius* in ALEXANDER County Superior Court. Heard in the Court of Appeals 14 November 1991.

On 16 October 1988, defendant Rose Marie Evans Diaz was driving an automobile involved in an accident wherein her son, Jackson Edward Evans, died. Jackson was survived by his mother and his two sisters, Angela Marie Evans and Dollie Victoria Diaz. No father's name appears on Jackson's birth certificate, and he was never legitimated or adopted.

On 12 January 1990, defendant Diaz, the sole heir to Jackson's estate, filed with the clerk of court in Alexander County, the renouncement of a right to qualify and renouncement of a right to inherit. The renouncement of the right to inherit was in favor of Angela and Dollie. Contemporaneously, Jackson N. Evans, defendant's father and Jackson's grandfather, applied for letters of administration of the estate of Jackson and was appointed as administrator on 16 January 1990. On 15 February 1990, Jackson N. Evans, as administrator, brought the wrongful death action against defendant, contending that the death of Jackson was caused by the negligence of defendant.

Joel C. Harbinson for plaintiff-administrator.

Patrick, Harper & Dixon, by Stephen M. Thomas, for defendant-appellee.

JOHNSON, Judge.

Both parties to this action concede that the controlling issue before this Court is "whether the plaintiff estate is barred from recovery for wrongful death against the defendant by virtue of the fact that the defendant was the sole [heir or beneficiary of the estate] of Jackson Edward Evans, the deceased." The trial court found that the plaintiff estate was barred from recovery. We disagree.

In *Carver v. Carver*, 310 N.C. 669, 314 S.E.2d 739 (1984), the Supreme Court held that where recovery in a wrongful death action depends on establishing liability of a party who is the sole beneficiary of the decedent's estate, the action may not be brought at all. Plaintiff contends, however, that this general rule does not apply because the renouncement of right to inherit, executed by defendant in favor of Jackson's two surviving sisters, relates back to the time of the decedent's death and causes decedent's two sisters to be his only heirs.

Considering plaintiff's argument, the issue then becomes whether the rights of claimants to wrongful death proceeds are to be determined at the time of the decedent's death or some later time. This issue was addressed in *Davenport v. Patrick*, 227 N.C. 686, 44 S.E.2d 203 (1947), where the administrator of the estate of the deceased wife brought a wrongful death action against the intestate's husband for his negligent operation of a motor vehicle. The husband was the sole beneficiary. The Court, denying recovery, held that "[t]he rights of claimants to the proceeds recovered in an action for wrongful death are determined as of the time of the intestate's death[,]" and "[a]t the time of the death of the plaintiff's intestate, the defendant was and still remains the sole beneficiary[.]" *Id.* at 688, 44 S.E.2d at 205. The case at bar, however, can be distinguished from *Davenport* in that the defendant, Rose Diaz, does not *still* remain Jackson's sole heir.

General Statute § 31B-3(a) provides, in pertinent part, that when there is a renunciation, "[u]nless the decedent or donee of the power has otherwise provided in the instrument creating the interest, the property or interest renounced devolves as if the renouncer had predeceased the decedent[.]" The statute also further mandates that the "renunciation relates back *for all purposes* to the date of the death of the decedent or the donee of the power." (Emphasis added.)

Applying G.S. § 31B-3(a) to the facts of the case *sub judice*, Rose Diaz was deemed to have predeceased her son when she filed the renunciation of the right to inherit. Furthermore, defendant's renunciation related back to the time of the decedent's death, which is also the time for determining the rights of claimants to the proceeds recovered in a wrongful death action. Therefore, under the Intestate Succession Act, G.S. § 29-15(4), the decedent's only heirs at the time of his death were Angela Evans and Dollie Diaz. Defendant is not a beneficiary in this wrongful death action, and the relation-back mandate of G.S. § 31B-3(a) signifies that defendant never had legal title to the proceeds or interests of the plaintiff estate. *See Hinson v. Hinson*, 80 N.C. App. 561, 569, 343 S.E.2d 266, 271 (1986) (Renouncer never actually holds legal title to the property.). Accordingly, the plaintiff estate should not be barred from recovery on the basis that the alleged wrongdoer, Rose Diaz, was Jackson's sole heir at the time of his death.

We do not believe that this decision contravenes public policy. The record shows no evidence that defendant received any fraudulent benefit from the renunciation, and absent such evidence, her motivation for renouncing is immaterial. *See Reese v. Carson*, 3 N.C. App. 99, 164 S.E.2d 99 (1968). We, therefore, hold that under the facts of this case the renunciation and the relation-back mandate of G.S. § 31B-3(a) change the result and distinguish this case from *Davenport* and *Carver* where no renunciations were filed and recovery was denied.

Reversed and remanded for entry of judgment pursuant to the amended stipulation of the parties.

Judges EAGLES and ORR concur.

MARY ELIZABETH BASS, PETITIONER v. ROBERT J. BASS, JR., RESPONDENT

No. 9126DC296

(Filed 18 February 1992)

Divorce and Separation § 464 (NCI4th)— child support hearing— absence of petitioner—dismissal

The trial court erred by dismissing a child support hearing based on the absence of petitioner where petitioner had not been ordered to appear. Moreover, N.C.G.S. § 52A-12.2 provides that in child support cases where the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the complaint or offers evidence constituting a defense, the court, upon request of either party, shall continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court.

Am Jur 2d, Divorce and Separation §§ 346, 1018.

APPEAL by petitioner from order entered 14 December 1990 by *Judge Richard D. Boner* in MECKLENBURG County District Court. Heard in the Court of Appeals 14 January 1992.

Petitioner and respondent were married on 24 May 1970 in Goldsboro, North Carolina; during their marriage one child was

born in North Carolina. On 1 April 1981 petitioner and respondent entered into a written "Stipulation" on child support which was later incorporated into their 11 May 1981 Iowa divorce decree. Petitioner is now a resident of Virginia. Respondent is a resident of North Carolina.

On 25 January 1990 petitioner filed this URESA action to enforce the Iowa decree and to collect $12,400.00 in arrears. On 26 June 1990 respondent filed a motion to vacate the arrears, to vacate that portion of the support order requiring respondent to pay support after his child graduated from high school, and in the alternative to reduce the amount of monthly child support. That same day, the court continued the matter until 14 August 1990.

The trial court held a hearing on 14 August 1990 and entered an order on 11 October 1990. That order found: "[t]hat the Respondent owe[d] an arrearage . . . in excess of $13,000.00"; "[t]hat an Order for temporary support in the amount of $220.00 per month was entered in open Court on August 14, 1990"; and that the respondent signed a "Stipulation" which provided that he would pay monthly child support payments of $450.00 "until [his daughter] reached the age of 22 years if she is enrolled in an accredited college or university." The court concluded that "the Respondent . . . contractually obligated himself to support [his daughter] until she . . . reached the age of 22 years if she is enrolled in an accredited college or university," and that this obligation was enforceable in North Carolina. The court also denied respondent's 15 August 1990 verified motion requesting the court to declare the Iowa judgment void and that the North Carolina courts were not available to enforce the Iowa order. The court then continued the matter until 16 October 1990 "to determine the amount of permanent ongoing child support and . . . the exact amount of arrears."

On 16 October 1990 the case was continued until 11 December 1990. The court also ordered the respondent to continue paying $220.00 per month as temporary support.

On 11 December 1990 Judge Boner conducted a hearing during which the petitioner's attorney attempted to introduce evidence to verify respondent's daughter's attendance at an accredited college. The respondent objected claiming that the evidence concerned a contested matter and that the petitioner should be required to be present to testify. Petitioner argued that if the judge wanted to require the petitioner's attendance, he should grant her a contin-

uance. Judge Boner concluded that "Petitioner was not present, and her testimony in court would be necessary because this matter is contested." He then denied the motion for continuance; dismissed the matter without prejudice and relieved the respondent of his obligation to make further payments. Petitioner appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, for the petitioner-appellant.

Ronald Williams, P.A., by Ronald C. Williams, for respondent-appellee.

EAGLES, Judge.

In her first and second assignments of error, petitioner argues the trial court erred in dismissing her complaint based on her absence when her trial counsel was present and prepared to proceed. We agree.

Judge Boner's order recited that he dismissed petitioner's complaint because the "Petitioner was not present, and her testimony in court would be necessary because this matter is contested." In *Terry v. Bob Dunn Ford, Inc.*, 77 N.C. App. 457, 335 S.E.2d 227 (1985), this court stated:

> "[O]ur research fails to disclose . . . any statute, rule of court or decision which mandates the presence of a party to a civil action or proceeding at the trial of, or a hearing in connection with, the action or proceeding unless the party is specifically ordered to appear. Those who are familiar with the operation of our courts in North Carolina know that quite frequently a party to a civil action or proceeding does not appear at the trial or a hearing related to the action or proceeding."
>
> *Hamlin v. Hamlin*, 302 N.C. 478, 482, 276 S.E.2d 381, 385 (1981). Plaintiff had not been ordered to appear for trial. The appearance of his attorney of record was sufficient to meet the requirement that he prosecute his action.

Terry, 77 N.C. App. at 458, 335 S.E.2d at 228. Here, too, the petitioner had not been ordered to appear at trial. Therefore, it was error to dismiss her complaint based on her absence. Accordingly, this case must be reversed and remanded for determination of

the amount of any permanent ongoing child support and the exact amount of arrears.

We also note that G.S. 52A-12.2 provides that in child support cases where "the obligee is not present at the hearing and the obligor denies owing the duty of support alleged in the complaint or offers evidence constituting a defense, the court, upon request of either party, *shall* continue the hearing to permit evidence relative to the duty to be adduced by either party by deposition or by appearing in person before the court." (Emphasis added.)

Because of our disposition of petitioner's first two assignments of error, we do not reach her remaining assignments.

Reversed and remanded.

Judges COZORT and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 FEBRUARY 1992

BOWERS v. SUMMERS No. 913SC323	Carteret (87CVS509)	Affirmed
HICKS v. GEORGE No. 9130SC311	Jackson (90CVS201)	Appeal Dismissed
HOFFNER v. ONASANYA No. 9126SC275	Mecklenburg (90CVS3943)	Dismissed
HYLER v. GTE PRODUCTS CO. No. 9010IC1310	Ind. Comm. (778125)	Reversed & remanded
IN RE MAPP No. 9110SC105	Wake (90CRS70891)	Vacated
KARNS v. GOSNEY No. 9126DC722	Mecklenburg (90CVD15575)	Reversed
L & O INVESTMENTS, INC. v. SMITH No. 9112SC135	Cumberland (89CVS2102)	New trial
O'NEAL v. R. L. DRESSER, INC. No. 9110IC140	Ind. Comm. (564146)	Affirmed
STATE v. BOND No. 913SC873	Carteret (89CRS2894) (89CRS2895)	No error
STATE v. BROWN No. 9121SC901	Forsyth (90CRS15029)	Affirmed
STATE v. GARRETT No. 9110SC834	Wake (90CRS57171-A&B) (90CRS57172)	No error
STATE v. JONES No. 9114SC39	Durham (89CRS17350) (89CRS17351) (89CRS17352)	No error
STATE v. MONROE No. 9016SC784	Robeson (89CRS4563)	Affirmed
STATE v. NANCE No. 9126SC879	Mecklenburg (90CRS9442) (90CRS9448)	No error

STATE v. PENN No. 9121SC874	Forsyth (91CRS5727) (91CRS5728)	No error
STATE v. TEMPLE No. 911SC800	Pasquotank (90CRS3547)	Affirmed
STATE v. TRUESDALE No. 9126SC87	Mecklenburg (90CRS46462)	Affirmed
STATE v. WESTBROOK No. 9110SC774	Wake (90CRS60539)	No error
STATE v. WHEELER No. 9127SC217	Gaston (89CRS10878) (12469)	The sentences are vacated & the case is remanded for a resentencing hearing
W. H. ODELL & ASSOCIATES v. GARLAND No. 9121SC816	Forsyth (90CVS6991)	Affirmed
WARREN v. RAYNOR STEEL ERECTION No. 9110IC915	Ind. Comm. (759575)	Affirmed

FILED 18 FEBRUARY 1992

DEBARON v. DEBARON No. 9112DC1051	Cumberland (90CVD5132)	Vacated
IN RE BENTON No. 9122DC337	Davidson (87J91) (87J92) (87J93)	Affirmed
IN RE SCINTO No. 913DC142	Craven (88J116)	Affirmed
IN RE SNODDY No. 9129DC377	Henderson (90J79)	Affirmed
MARTIN v. BAILEY No. 9015SC1320	Alamance (90CVS854)	Affirmed
N.C. LICENSING BD. FOR GENERAL CONTRACTORS v. LOWE No. 9110SC164	Wake (90CVS06921)	Affirmed
NAEGELE OUTDOOR ADVERTISING v. LANIER No. 915DC523	New Hanover (90CVD2946)	No error

NEWBERRY METAL MASTERS FABRICATORS v. MITEK INDUSTRIES No. 905SC1202	New Hanover (88CVS3574)	Summary judgment in favor of Mitek and Durand is reversed. This case is remanded for trial.
SANDHILL ROOFING CO. v. J. F. ADKINS, INC. No. 8920DC722	Richmond (87CVD779)	Affirmed
STATE v. BAYSDEN No. 9117SC244	Rockingham (89CRS5038) (89CRS5041) (89CRS5043) (89CRS5046)	No error
STATE v. BLACKBURN No. 9121SC268	Forsyth (90CRS12751) (90CRS12756) (90CRS12671) (90CRS12672) (90CRS14978) (90CRS14995) (90CRS15003) (90CRS15004) (90CRS15006) (90CRS15007) (90CRS12754) (90CRS12753) (90CRS12755)	Affirmed
STATE v. McKESEY No. 9026SC1156	Mecklenburg (89CRS79577) (89CRS86203)	No error
UNITED CAROLINA BANK v. HARRELSON FORD, INC. No. 9126SC260	Mecklenburg (89CVD11000DC)	Affirmed
WIREWAYS, INC. v. MITEK INDUSTRIES No. 905SC1203	New Hanover (88CVS3575)	Summary judgment in favor of Mitek and Durand is reversed.

MICHELLE MARIE WILSON, BY AND THROUGH HER GUARDIAN AD LITEM, RONALD C. WILSON, PLAINTIFF-APPELLANT v. DEAN BELLAMY, DOUG MUMMA, DONNIE BAUCOM, CHRIS BARCO, STEVE GHOULIS, EDDIE MEDFORD, JEFF GORDON, LAMBDA CHI ALPHA FRATERNITY, ZETA CHAPTER, AN UNINCORPORATED ASSOCIATION; LAMBDA CHI ALPHA FRATERNITY INCORPORATED, LCA-ALUMNI PROPERTIES, A NORTH CAROLINA LIMITED PARTNERSHIP, DEFENDANTS-APPELLEES

No. 9130SC245

(Filed 3 March 1992)

1. **Appeal and Error § 322 (NCI4th)— no certification of delivery of transcript or service of proposed record—no way to determine timeliness**

The Court of Appeals exercised its discretion to hear an appeal even though appellant did not include a copy of the court reporter's certification of delivery of transcript or a copy of the certification of service of the proposed record on appeal, so that the court was unable to determine whether the proposed record or record on appeal was timely filed. N.C.R. App. P. 2.

Am Jur 2d, Appeal and Error §§ 292, 495.

2. **Appeal and Error § 418 (NCI4th)— assignments of error—not set out in brief—no supporting authority—abandoned**

Assignments of error which were not set out in the plaintiff's brief and for which no support was offered were abandoned. N.C.R. App. P. 28(b)(5).

Am Jur 2d, Appeal and Error §§ 649, 650.

3. **Evidence and Witnesses § 694 (NCI4th)— exclusion of evidence—no offer of proof—assignment of error overruled**

An assignment of error to the exclusion of evidence was overruled where the record did not disclose what the witnesses' testimony would have been had they been permitted to testify. N.C.G.S. § 8C-1, Rule 103.

Am Jur 2d, Appeal and Error § 604.

4. **Evidence and Witnesses § 2891 (NCI4th)— sexual battery—action for damages—victim's prior sexual history and prior drinking incident—not admissible**

In an action for damages arising from an alleged gang rape at a fraternity party, reversed on other grounds, the

trial court should not have allowed the defense on cross examination to elicit testimony from plaintiff concerning her prior sexual experiences and a prior incident of passing out after drinking at a fraternity party. Although N.C.G.S. § 8C-1, Rule 412 has been applied to date only in criminal cases, the logic is of similar import in the civil arena and nothing elicited by the defense here through these questions would tend to indicate that the plaintiff gave her consent to the acts allegedly performed by the individual defendants. Furthermore, this court has specifically held that testimony as to the victim's alcohol consumption with other people in party settings has no tendency to prove that the victim consented to sexual activity with the defendant on the day in question.

Am Jur 2d, Evidence § 336; Rape §§ 119, 120.

5. Evidence and Witnesses § 1942 (NCI4th)— sexual assault at fraternity party—letter regarding alcohol abuse at fraternity—not relevant to time or circumstance

A letter written to a fraternity president by an Assistant Vice Chancellor reciting various alcohol abuses and placing the fraternity on probationary status was not relevant to time or circumstance in an action for damages arising from an alleged gang rape at the fraternity where the incident at issue in this case occurred almost a full eleven months after the incidents in the letter and well after the probationary status was to have terminated, and, while the incidents alleged in the letter include providing alcohol to non-drinking age individuals, they include several other activities not included in this case. Furthermore, even if the letter was deemed to be relevant, the probative value would be substantially outweighed by the danger of unfair prejudice.

Am Jur 2d, Evidence § 298.

6. Evidence and Witnesses § 154 (NCI4th)— telephone conversation—identification of voice—not properly authenticated

The trial court did not err by concluding that a witness had failed to properly authenticate a voice he had heard in a telephone call as that of one of the defendants where the witness failed to show that he had an opinion as to the identity of the caller based upon hearing the voice at any other time

under circumstances connecting it with the speaker. N.C.G.S. § 8C-1, Rule 901(b)(5).

Am Jur 2d, Evidence §§ 381, 383.

Sufficiency of identification of participants as prerequisite to admissibility of telephone conversation in evidence. 79 ALR3d 79.

7. Assault and Battery § 2 (NCI4th)— criminal battery—civil action—directed verdict

The trial court did not err in granting a directed verdict for several of the individual defendants in a civil action arising from an alleged gang rape even though plaintiff argued that defendants violated N.C.G.S. § 14-33(a) and (b). The same act may constitute both a crime and a tort, but no civil right can be predicated upon a mere violation of a criminal statute.

Am Jur 2d, Assault and Battery § 119.

8. Assault and Battery § 2 (NCI4th)— civil assault—unconscious victim—directed verdict for defendants

The trial court did not err by granting a directed verdict for defendants on a claim for civil assault arising from an alleged gang rape at a fraternity party where plaintiff admitted that she had no recollection of the happening of the things of which she had accused defendants. That testimony was an admission that plaintiff had no apprehension of harmful or offensive contact, which is the gist of an action for civil assault.

Am Jur 2d, Assault and Battery §§ 110, 111, 119, 213.

9. Assault and Battery § 2 (NCI4th)— gang rape—civil battery—sufficiency of evidence

The trial court correctly granted a directed verdict for some of the individual defendants on a claim for civil battery arising from an alleged gang rape at a fraternity where plaintiff failed to present any evidence that those defendants ever made any physical contact with her, and incorrectly granted directed verdict for other defendants who testified that plaintiff initiated their touching and that the touching was consensual, while plaintiff claimed that she was unconscious and that any contact was nonconsensual. The determination of whether

plaintiff consented to the contacts rests solely on the credibility of the witnesses and is properly presented to the jury.

Am Jur 2d, Assault and Battery § 213; Rape § 119.

10. Trespass § 2 (NCI3d)— sexual battery—intentional infliction of emotional distress—not extreme and outrageous conduct

The trial court did not err by granting a directed verdict for defendants on a claim for intentional infliction of emotional distress arising from an alleged gang rape at a fraternity where the evidence showed that one of the defendants knew that plaintiff had been drinking and couldn't make a judgment as to what she wanted to do and that defendant and one other engaged in kissing and heavy petting with the plaintiff in the presence of others. The record only presents some evidence of a sexual battery, and the Court of Appeals was not willing to hold, on this record, that a sexual battery standing alone constitutes the required extreme and outrageous conduct.

Am Jur 2d, Negligence §§ 281, 308.

Modern status of intentional infliction of mental distress as independent tort: "outrage." 38 ALR4th 998.

11. Negligence § 35.1 (NCI3d)— sexual battery—negligence of fraternity—contributory negligence of plaintiff

The trial court did not err by granting a directed verdict for a fraternity on negligence claims arising from a sexual battery at a fraternity party where, assuming that plaintiff stated valid negligence claims, plaintiff was contributorily negligent as a matter of law where plaintiff admitted that she voluntarily consumed half a bottle of champagne, at least five or six beers, and a shot of Southern Comfort liquor. Plaintiff failed to present sufficient evidence to support a claim for willful or wanton negligence in that, at best, plaintiff only showed that defendants may have been inattentive or inadvertent to the fact that alcohol was being served to minors.

Am Jur 2d, Assault and Battery § 153; Negligence §§ 859-861, 942, 943.

APPEAL by plaintiff from judgment entered 23 August 1990 by *Judge J. Marlene Hyatt*, JACKSON County Superior Court. Heard in the Court of Appeals 4 December 1991.

On 5 May 1988 Michelle Wilson (plaintiff) filed this action against the defendants. She alleged that the individual defendants Chris Barco (Mr. Barco), Donnie Baucom (Mr. Baucom), Dean Bellamy (Mr. Bellamy), Steve Ghoulis (Mr. Ghoulis) and Doug Mumma (Mr. Mumma) committed an assault and battery, sexual assault and battery, and gang rape upon her, and that each intentionally inflicted emotional distress upon her. The plaintiff also alleged that individual defendants Jeff Gordon (Mr. Gordon) and Eddie Medford (Mr. Medford) intentionally inflicted emotional distress upon her. The plaintiff further alleged that the Zeta Chapter of Lambda Chi Alpha Fraternity and Lambda Chi Alpha Fraternity, Inc. were negligent in that they served alcohol to minors; failed to properly govern the Zeta Chapter and those attending a fraternity party on the evening of the 8th and into the morning of the 9th of October 1987; and that the fraternity violated Chapter 18B of the North Carolina General Statutes and the common law. Finally, plaintiff alleged that LCA Alumni Properties negligently failed to prevent the Zeta Chapter from serving alcohol to minors. At the close of the plaintiff's evidence a motion for directed verdict was granted on behalf of each defendant. Plaintiff appeals.

The evidence, taken in the light most favorable to the plaintiff, shows the following: The plaintiff, a seventeen year old freshman at Western Carolina University, participated in a sorority "rush" and pledged Alpha Xi Delta Sorority. During the pledge process the plaintiff learned that her "big sister" from the sorority was Leslie Holshouser (Ms. Holshouser). Ms. Holshouser gave the plaintiff "a bottle of champagne as a gift of celebration." The plaintiff and other sorority members then "went over to the Lambda Chi House for a party or celebration." Prior to arrival at the Lambda Chi House, the plaintiff had not consumed any alcoholic beverages that day.

Upon arrival at the Lambda Chi House, plaintiff and her sorority sisters went inside. A short while later, plaintiff and Ms. Holshouser went outside to open the bottle of champagne. The two then returned inside, drank the champagne, and began socializing with their sorority sisters and the fraternity members. The plaintiff then engaged in two beer "chugging contests" during which

she drank "two beers really fast." After the contests the plaintiff socialized some more, danced, and consumed "about three or four" more beers. Fraternity members served the beer, which was provided by both the sorority and the fraternity. The plaintiff was never asked to present an I.D. card indicating her age. The plaintiff then noticed people going up and down the fraternity house stairs. She went upstairs where she "had a shot of Southern Comfort" liquor, returned downstairs, socialized, drank more beer, and began dancing with Phillip Brooks (Mr. Brooks). The plaintiff and Mr. Brooks danced for approximately fifteen or twenty minutes, and the two went outside to talk where it was cooler. After a short conversation, Mr. Brooks told the plaintiff that he was engaged and asked if she would mind going upstairs with him so that "people wouldn't bother him about him talking to another girl when he had a girlfriend." The plaintiff agreed.

After climbing the stairs, the plaintiff had only vague recollections of what transpired. She testified: "I remember the room was really dark. It was like totally black. I remember I was just lying there or leaning back or something and just shaking my head and saying, 'No, no.' It was just—I couldn't see anything, I just remember just, 'No, no.' " The plaintiff then remembers "coming to again and seeing like just a picture of guys standing in the doorway, just like I came to and saw them and then like I went right back out." The plaintiff also remembers waking up while lying on a couch. She did not have a shirt on, her bra was either fastened or hanging on her, and her panties were missing. Mr. Barco "came over" and she asked him to take her home. At that time the plaintiff "was extremely intoxicated. . . ." Mr. Barco gave her a shirt to wear and asked Mr. Bellamy to take her home. Before the plaintiff left, however, Mr. Barco found her shirt, returned it to her and retrieved his own shirt.

When the plaintiff arrived back at her dorm she was still intoxicated and felt "[v]ery confused, scared, totally helpless. [She] just felt terrible[,]" and she went to bed. When the plaintiff awoke, she was still feeling the effects of alcohol. Her "whole body ached . . . . like when you have the flu . . . ." The plaintiff got up, dressed and left to go to class. She met Ms. Holshouser in the hallway and the two conversed. Afterwards, the plaintiff "felt worse. [She] was scared, confused, [and] felt dirty." She remained in her room for most of the rest of the day.

Mr. Mark Buchanan, then a criminal investigator with the Jackson County Sheriff's Department, testified over objection that the plaintiff told him that Ms. Holshouser told her that Mr. Ghoulis had told Ms. Holshouser, "that he and some of his friends at the fraternity had done something at the party that he had not done in a long time. She said that he told her that he and a friend of his named Donnie Baucom and some other boys had gang banged a sorority sister of [hers] that was wearing a pink skirt. . . . [B]oth knew that [the plaintiff] was the girl." The plaintiff also told her boyfriend that "something terrible had happened to her. . . . She wasn't sure what it was, but she was pretty sure she had been raped and she didn't know to what degree." However, the plaintiff admitted that she has no personal recollection of any sexual intercourse or other battery which she has accused the defendants of committing upon her.

Phillip Price (Mr. Price), the plaintiff's boyfriend, testified that after talking to the plaintiff he confronted Mr. Barco. He asked Mr. Barco "if he heard [the plaintiff] speaking or talking or making any sort of noise. And [Mr. Barco] said all he heard was a few moans and groans and there were no words spoken." Mr. Price also testified that when he talked to Mr. Baucom, the following colloquy took place.

> "Look, man, I don't know what happened. You know, I'm confused about the whole thing. I don't know what happened." [Mr. Price] said, "Well, what do you know that happened?" And [Mr. Baucom] said he went up [sic] the room where [the plaintiff] was and he walked in the room and there was no one else there but there was a girl lying in [sic] the couch, covered in a blanket. He could not see her face. And he said her panties were lying on the floor. He picked up the panties and went out into the chapter room and swung them around and showed them to his brothers. And then they followed him back into the room. And then he told me that he pulled his pants down a little bit and then he told the other, he said, "Wouldn't it be great if she was awake and (then we could do it.") And then he pulled his pants back up and he said he went back downstairs to get some more beer and was down there for quite awhile. Came back upstairs and the next thing he saw was [the plaintiff] coming from the rest room and coming back through the chapter room.

The plaintiff did not visit a doctor the day after the party to determine whether there was semen or sperm in her vaginal area. However, she did visit a doctor about a week later and found out that she was not pregnant and that she did not have any sexual disease. The plaintiff also sought counseling. Dr. Kevin Roberts, a psychiatrist, diagnosed the plaintiff as having post-traumatic stress disorder, which in his opinion was caused by events that transpired at the fraternity house.

Mr. Ghoulis testified that he was a member of Lambda Chi Alpha and that he lived in the Lambda Chi Alpha fraternity house. He arrived at the party around 10:30 p.m. and drank approximately four beers between 10:30 p.m. and 2:00 a.m. At 2:00 or 2:30 a.m. Mr. Ghoulis decided to go upstairs to his room. He walked upstairs and went into Mr. Bellamy's and Mr. Barco's room, because he was told that the plaintiff was there. Mr. Ghoulis did not know the plaintiff personally but had seen her earlier that night and knew who she was. Mr. Ghoulis sat down on the couch beside the plaintiff and began talking with her. The plaintiff was coherent, sitting up and wearing a pink dress and a sweatshirt. Mr. Baucom, Mr. Mumma, Mr. Barco and Mr. Bellamy were also in the room. Mr. Ghoulis asked the plaintiff "if she wanted to go downstairs and have—continue with the partying, or if she wanted to go home, or what she wanted to do." She said that she did not want to do either one and began kissing Mr. Ghoulis. The other men continued talking. The kissing became more intense, and "[the plaintiff] proceeded to take her underwear off. [Mr. Ghoulis] gave [a] little assistance, but not much." The two became "more involved." The plaintiff grabbed Mr. Ghoulis's penis, unbuttoned Mr. Ghoulis's pants, and helped Mr. Ghoulis partially disrobe. The two lay down side by side on a couch facing each other. While "her skirt was up and [his] pants were loosened down they moved their hips together." Mr. Ghoulis did not penetrate the plaintiff's vagina. However, the heavy petting continued until Mr. Ghoulis ejaculated. Mr. Ghoulis did not know where his spermatozoa went and did not attempt to clean any up. The plaintiff's clothing was later determined to have spermatozoa on it. After he ejaculated Mr. Ghoulis left the room.

Mr. Barco testified that he arrived at the party at approximately 10:00 p.m., and drank about five beers before he left at 2:00 or 3:00 a.m. While there, he saw minors drinking alcoholic beverages. After Mr. Barco left the party, he went upstairs to his room. Mr. Ghoulis, Mr. Baucom, Mr. Mumma, Mr. Bellamy and the

plaintiff were already there. The plaintiff was clothed and sitting on a sofa. Mr. Barco "sat around and talked for awhile. . . . and [then] noticed [Mr. Ghoulis and the plaintiff] kissing." Mr. Ghoulis and the plaintiff began "touching each other pretty heavily." Mr. Barco and the others "just sat there and watched them and then they . . . got beside each other on the couch." "They began . . . to pull each other's clothes off, started touching each other and everything." Mr. Ghoulis touched the plaintiff "[o]n the breasts and on her butt and stuff like that." The petting progressed. The plaintiff's shirt and skirt came up, her panties came off and Mr. Ghoulis' pants came down. Both Mr. Ghoulis and the plaintiff took off her panties. The two "were lying beside each other and just moving against each other." "All the sudden [Mr. Ghoulis] sat up and excused himself and he walked out." Mr. Barco then left. When he left the plaintiff was sitting up on the couch, had her skirt on and her shirt was pulled up. Mr. Barco later saw the plaintiff in the hallway. She was wearing one of his shirts and she asked him where the bathroom was located. Mr. Barco told the plaintiff where that bathroom was and that he would try to find her shirt. Mr. Barco found her shirt in his room, returned it to her and retrieved his own shirt. The plaintiff then asked Mr. Barco for a ride home. He declined because he had been drinking but got Mr. Bellamy to drive her home. Mr. Barco did not kiss or touch the plaintiff and did not see Mr. Baucom kiss or touch the plaintiff. He also did not see anyone ejaculate on her sweatshirt.

Mr. Mumma testified that he attended the party and drank fewer than four beers. After being at the party for about thirty minutes, Mr. Mumma went upstairs to the "Chapter room." Mr. Baucom noticed someone in Mr. Bellamy's and Mr. Barco's room. Mr. Mumma followed Mr. Barco, Mr. Bellamy and Mr. Ghoulis into the room. The plaintiff was fully clothed and seated on the sofa. Mr. Ghoulis sat next to the plaintiff. The plaintiff began "making advances towards [Mr. Ghoulis] and it was kind of mutual." "[The plaintiff] took her panties off." Mr. Mumma did not remember whether the plaintiff's shirt was pulled up. Mr. Mumma continued talking with his friends and "making fun of" Mr. Ghoulis. Mr. Ghoulis then got up and left the room. Mr. Mumma and the others went out into the hall. The plaintiff also left, went to the bathroom and then returned to the same room. Mr. Mumma and the others returned to the room after the plaintiff. Mr. Baucom sat next to the plaintiff on the sofa. The plaintiff "was wearing a T-shirt or

something." The plaintiff began "making moves towards [Mr. Baucom]." "They were kissing and hugging and touching each other." The plaintiff then got up and went to the restroom again. Mr. Mumma returned to his room and went to sleep. Mr. Mumma did not touch the plaintiff and did not see anyone ejaculate on her sweatshirt or skirt.

Mr. Bellamy testified that he attended the party but did not drink because he was the designated driver. During the evening, Mr. Baucom told Mr. Bellamy that someone was in his and Mr. Barco's room. Mr. Bellamy and some other men then went into the room. When he walked in the plaintiff and Mr. Ghoulis were talking to each other. They started kissing and the plaintiff began "putting the moves" on Mr. Ghoulis. The plaintiff pulled Mr. Ghoulis' pants down and started "playing with him." Mr. Ghoulis "succumbed." The plaintiff then got up, went to the bathroom, came out, "stopped and looked at [the men,] . . . smiled and then strutted her way back into [Mr. Bellamy's] room." Mr. Mumma, Mr. Baucom and Mr. Bellamy followed her. Once inside, Mr. Baucom began talking to the plaintiff, and the two began kissing. The plaintiff then got up and went to the bathroom again. Mr. Bellamy later drove her home. Mr. Bellamy did not see anyone ejaculate on the plaintiff's shoulder.

According to Mr. Baucom's answers to the plaintiff's interrogatories, Mr. Baucom first saw the plaintiff when he walked by a fraternity house room. Because there had been a number of thefts from fraternity rooms, Mr. Baucom was "worried about her being in . . . [the room] by herself." Mr. Baucom told the people that lived in the room that someone was in their room. Five people then went in the room and one sat beside the plaintiff. Mr. Baucom and some others went to another room. The plaintiff then came out and asked where the bathroom was located. "[W]hen she came out of the bathroom she returned to the room where she had been [before]. The people that lived in the room then told [Mr. Baucom] that they wanted the plaintiff to leave so that they could go to bed. Mr. Baucom volunteered to ask the plaintiff to leave. When [Mr. Baucom] went in the room, [he] sat down beside [the plaintiff] and was trying to ask her to leave. At some point [the plaintiff] started kissing on [his] neck and holding [him]. She was persistent at kissing [him] so a couple of times [he] responded to her kisses. She then pulled up her sweater and lifted up her arms. [Mr. Baucom] understood that she wanted [him] to help

her take off her sweater so [he] did. She made no disapproval at any time . . . ." The plaintiff then got up and went to the bathroom again. When she returned she was ready to leave. Mr. Baucom gave her her sweater and one of the other men took her home.

Mr. James Medlin (Mr. Medlin) testified that he is both a limited partner in LCA Properties, which owned and leased the fraternity house to the Zeta Chapter of Lambda Chi Alpha at Western Carolina University, and an officer of the corporate general partner of LCA Alumni Properties, Lambda Chi Alpha Housing Corporation. Mr. Medlin was also the Lambda Chi Alpha fraternity advisor, the High Pi, at the time of the alleged incident. Because Mr. Medlin was the High Pi, he is a member of the High Zeta, the governing body of the local fraternity chapter. It is the duty of the High Zeta to enforce the laws and policies of the national fraternity including a national fraternity resolution that all local fraternal activities involving alcoholic beverages comply with institutional policies and state and local law.

Mr. Medlin testified that he knew that the local drinking age was twenty-one at the time of the alleged incident. However, he could not say whether he had seen anyone under the legal drinking age drink alcohol at a Lambda Chi Alpha party because he did not know how old everyone was. Mr. Medlin also testified that he did not make it a practice to check every fraternity party to insure that the fraternity complied with state and local liquor laws. However, if he was at a party he would conduct spot checks to see that the fraternity was in compliance. Mr. Medlin also testified that he did "step[] on a soapbox and explain[] to [the fraternity members] that they must be responsible and be alert and attune to the laws of the State and the Federal Government, . . . and the National Fraternity." Mr. Medlin did not know whether other partners of LCA Alumni Properties took any action to check consumption of alcohol. Mr. Barco testified that minors, including himself, drank in front of Mr. Medlin at Lambda Chi Alpha parties.

At the conclusion of the plaintiff's evidence, each defendant moved for a directed verdict. Plaintiff appeals from directed verdicts entered in favor of the defendants.

Patrick U. Smathers, P.A., by Patrick U. Smathers, for plaintiff-appellant.

Morris, Bell & Morris, by William C. Morris, Jr. and William C. Morris, III, for defendant-appellees.

EAGLES, Judge.

I

[1] We note initially that the appellant did not include a copy of the court reporter's certification of delivery of transcript or a copy of the appellant's certification of service of the proposed record on appeal to the appellee in the record on appeal. (The record does include a certificate of service dated 7 March 1991 which is incorrectly designated as being for the proposed record on appeal. This certification could not have been for the proposed record on appeal as the appellee served its objections to the appellant's proposed record on appeal on 21 February 1991.) Thus, we are unable to determine from the record before us whether the proposed record on appeal or the record on appeal was timely filed. However, in our discretion, we choose to address this appeal on its merits. N.C.R. App. Pro. 2.

II

[2] Plaintiff raises seventeen assignments of error. Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure provides that: "Assignments of error not set out in the appellant's brief, or in support of which no reason or argument is stated or authority cited, will be taken as abandoned." Here, the plaintiff's brief fails to both set out and offer support for assignments of error numbers 5, 6, 7, 8, 9, 10, 11 and 15. Accordingly, each has been abandoned.

III

[3] In her first, second, third and fourth assignments of error the plaintiff alleges that the trial court erred by sustaining objections of the defendant to plaintiff's questions of Mr. Ghoulis and Mr. Barco concerning alcohol use and instructions from defendant's national fraternity advisor regarding alcohol use. " 'It is well established that an exception to the exclusion of evidence cannot be sustained where the record fails to show what the witness' testimony would have been had he been permitted to testify.' " *River Hills Country Club, Inc. v. Queen City Automatic Sprinkler*

Corp., 95 N.C. App. 442, 446, 382 S.E.2d 849, 851 (1989) (citing *State v. Simpson*, 314 N.C. 359, 370, 334 S.E.2d 53, 60 (1985) and N.C. Gen. Stat. Sec. 8C-1, R. Evid. 103 (1988)). Because the record before us does not disclose what the witnesses' testimony would have been had they been permitted to testify, this assignment is overruled.

IV

[4] In her twelfth and fourteenth assignments of error, plaintiff argues that the trial court erred by allowing the defense to elicit testimony from the plaintiff concerning her prior sexual experiences. Our disposition does not require that we reach the merits of this assignment. However, because this issue is likely to arise on remand we choose to address it here. *Lowder v. All Star Mills, Inc.*, 82 N.C. App. 470, 478, 346 S.E.2d 695, 700 (1986).

During defense counsel's cross-examination of the plaintiff the following exchange took place:

Q. How long have you been having sexual relations prior to the 8th day of October, 1988 —7?

MR. SMATHERS: Objection.

THE COURT: Overruled.

MR. SMATHERS: Your Honor, he didn't ask for a specific answer. He said, "How long prior to."

THE COURT: Overruled.

A. About two and a half years.

Q. Pardon?

A. Two and a half years.

Q. You started when you were fourteen, I believe?

A. Right.

Upon further cross-examination the following exchange occurred:

Q. LINE 21. "Before the date of October 8, 1987, had you ever before passed out because of drinking?" Did I ask you that question?

MR. SMATHERS: Objection. Relevancy.

THE COURT: Overruled.

A. Yes.

Q. And did you not answer and say, "Once before"?

A. Yes.

Q. And didn't I ask you, "When was that?" And you said, "The night that I went to the Delta Sig party after I got home." Wasn't that your question and answer you gave?

A. Yes.

Q. And then I asked you, "That happened after you got back to your dormitory?" And your answer was, "Yeah, like I came home and my boyfriend had called me on the phone and I had answered the phone. But like after he called me I guess I passed out because when he got there"—

MR. SMATHERS: Objection.

Q. —"he said that he"—

MR. SMATHERS: Relevance.

THE COURT: Overruled.

Q. —"he said that he undressed me and like put me in bed but I don't remember him moving me around or anything." Isn't that correct?

A. Yes.

Plaintiff argues that the questions in each colloquy are irrelevant and therefore inadmissible. The defense, however, argues that "[t]he purpose of evoking these responses from the plaintiff was to demonstrate to the jury that the probabilities were that the plaintiff consented to alleged but unproved sexual overtures rather than rejecting them." We agree with the plaintiff.

Generally, all relevant evidence is admissible and all non-relevant evidence is not admissible. N.C.R. Evid. 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401.

In *State v. Younger*, 306 N.C. 692, 295 S.E.2d 453 (1982), our Supreme Court noted that at one time evidence of a prosecuting witness's general reputation for unchastity was admissible during a rape trial to attack her credibility and show her proneness to consent to sexual acts. *Id.* at 695, 295 S.E.2d at 455. However, the court continued and pointed out that "[t]oday, 'common sense and sociological surveys make clear that prior sexual experiences by a woman with one man does not render her more likely to consent to intercourse with an often armed and frequently strange attacker.' " *Id.* at 695-96, 295 S.E.2d at 455 (quoting *State v. Fortney*, 301 N.C. 31, 38, 269 S.E.2d 110, 114 (1980)). We note that this holding was reached only after the enactment of G.S. 8-58.6, the former rape victim shield statute, now codified in N.C.R. Evid. 412. G.S. 8-58.6 (cross-reference). We also note that our research reveals that, to date, Rule 412 has only been applied in criminal cases. However, the logic applied behind the law espoused in *Younger* under the auspices of G.S. 8-58.6, is of similar import in the civil arena. Nothing elicited by the defense through the objected to questions above would tend to indicate that the plaintiff gave her consent to the acts allegedly performed by the individual defendants. Furthermore, this court has specifically held that "testimony as to the victim's alcohol consumption with other people in party settings has no tendency to prove that the victim consented to sexual activity with the defendant on the day in question." *State v. Cronan*, 100 N.C. App. 641, 644, 397 S.E.2d 762, 764 (1990), *disc. review dismissed*, 328 N.C. 573, 403 S.E.2d 516 (1991). Neither the plaintiff's testimony as to the length of time she has engaged in sexual conduct nor the incident occurring after the Delta Sig party is relevant here.

V

[5] In her thirteenth assignment of error the plaintiff argues that the trial court erred by excluding from evidence the testimony of Mr. Douglas Davis (Mr. Davis), an Assistant Vice Chancellor for Student Development at Western Carolina University, as well as a letter that Mr. Davis wrote to Mr. Matt Barden (Mr. Barden), then president of the local chapter of Lambda Chi Alpha fraternity. Plaintiff argues that this evidence is "relevant in both time and circumstances" because it indicates "a pattern of alcohol abuse and knowledge of such abuse by the fraternity and its officers. . . ." We disagree and hold that the evidence is not relevant as to time or circumstance.

Generally, all relevant evidence is admissible and all non-relevant evidence is not admissible. N.C.R. Evid. 402. " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.R. Evid. 401. However, "[a]lthough relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice . . . ." N.C.R. Evid. 403.

The substance of Mr. Davis' *voir dire* testimony was devoted to laying a foundation for introduction of the letter which he wrote Mr. Barden on 11 November 1986. Thus, disposition of this assignment turns upon whether the letter itself was properly admissible into evidence. The letter, in pertinent part, reads as follows:

> This letter is to confirm our conversation of November 11, 1986 concerning recent incidents by the Lambda Chi Alpha Fraternity, i.e., providing alcohol to non-drinking age individuals (this was discussed with the fraternity by the adviser); charging admission and providing alcoholic beverages which constitutes illegal sales; alcohol being sold by the drink; posting public invitations and holding open type parties.

After reciting the above incidents, Mr. Davis imposed various restrictions on the fraternity including, but not limited to, placing the fraternity on probationary status through the school's 1987 spring break.

This letter is neither relevant to time or circumstance. The incidents cited in Mr. Davis's letter warranting imposition of restrictions on the fraternity must have occurred before the 11 November 1986 date of the letter. The incident at issue in this case occurred on 8 October 1987 almost a full eleven months after the incidents in Mr. Davis' letter and well after the probationary status was to have terminated. Also, the letter is addressed to the then president, Mr. Matt Barden. However, Mr. Barden's name does not appear on the Lambda Chi Alpha membership roster (plaintiff's exhibit 8) purporting to cover the time of the alleged incident. The letter does not indicate whether a copy was sent to the other fraternity officers who are listed on the membership roster.

Moreover, the incidents recited in the letter leading to the imposition of restrictions are not relevant to the circumstances of the instant case. The incidents alleged in the letter do include

"providing alcohol to non-drinking age individuals." However, they also include several other activities not involved in the instant case: charging admission to parties where alcohol is sold; selling alcohol by the drink; posting public invitations; and holding open parties. Furthermore, even if the letter was deemed to be relevant, the probative value of the letter's contents would be substantially outweighed by the danger of unfair prejudice. In short, the letter would unfairly tend to lead jurors to believe that because the fraternity had done things wrong in the past, the fraternity must have done something wrong here. We agree with the trial court and overrule this assignment of error.

VI

[6] By her sixteenth assignment of error plaintiff argues that the trial court committed reversible error by concluding that Mr. Price failed to properly authenticate a voice he heard in a telephone call as that of Mr. Gordon, and then striking Mr. Price's testimony. We disagree.

"G.S. § 8C-1, Rule 901(b)(5) provides for the authentication or identification of a voice where there is '[i]dentification of a voice, whether heard firsthand or through mechanical or electronic transmission or recording, by opinion based upon hearing the voice at any time under circumstances connecting it with the alleged speaker.' " *State v. Mullen*, 98 N.C. App. 472, 477, 391 S.E.2d 520, 523 (1990). Here, during direct examination Mr. Price testified:

Q. Do you know Jeff Gordon?

A. I've known of him. I've met him.

Q. And prior to October 8, 1987, had you occasion to talk with Jeff Gordon?

A. Yes, I had.

Q. For what purpose?

A. I was in a band and we were inquiring if we could of the fraternity—asking if we could play at a party.

Q. Okay. Had you occasion to talk to him on the telephone before?

A. Before what?

Q. October 8th of '87?

A. No, I don't think so.

Q. At the time that you talked to him, did you talk with him face to face?

A. Yes.

Q. And approximately how many times have you done that?

A. Maybe twice.

However, on cross-examination, Mr. Price testified:

Q. And you said that the voice on the other end of this telephone call that you got said, "Hello, I'm Jeff Gordon."

A. I don't know if that is what he said.

Q. Is that the substance of what he said?

A. Yes, he identified himself.

Q. He identified himself as Jeff Gordon?

A. Yes.

Q. Other than that how do you know it was Jeff Gordon?

A. Other than that?

Q. Yes.

A. No.

Q. You have no other way except for what he said to know that was Jeff Gordon?

A. Correct.

Here, Mr. Price initially indicated that he recognized Mr. Gordon's voice because of earlier conversations between Mr. Gordon and himself. However, he recanted that testimony when he stated that the only way he knew that the voice he heard was that of Mr. Gordon was identification the voice gave on the telephone. Mr. Price failed to show that he had an opinion as to the identity of the caller based upon hearing the voice at any time under circumstances connecting it with the speaker other than the phone call. "[W]hen there is no other evidence to authenticate the identity of the speaker who placed the call except that he states his name, the evidence is inadmissible as hearsay." *Santora, McKay & Ranieri*

v. Franklin, 79 N.C. App. 585, 587, 339 S.E.2d 799, 801 (1986) (citation omitted). Accordingly, this assignment is overruled.

VII

In her seventeenth assignment of error the plaintiff argues that the trial court erred in granting a directed verdict in favor of each defendant on each of the plaintiff's claims for relief.

"On a motion by a defendant for a directed verdict at [the] close of [the] plaintiff's evidence in a jury case, as here, the evidence must be taken as true and considered in the light most favorable to [the] plaintiff." *Farmer v. Chaney*, 292 N.C. 451, 452-53, 233 S.E.2d 582, 584 (1977). All evidentiary conflicts must be resolved in favor of the non-movant. *Daughtry v. Turnage*, 295 N.C. 543, 544, 246 S.E.2d 788, 789 (1978). Credibility of testimony is for the jury, not the court, and a genuine question of fact must be tried by a jury unless that right is waived. *Price v. Conley*, 21 N.C. App. 326, 328-29, 204 S.E.2d 178, 180 (1974). "[T]he motion should be denied if there is any evidence more than a scintilla to support plaintiff's prima facie case in all its constituent elements." *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982) (citations omitted). However, if a plaintiff fails to present evidence of each element of her claim for relief she will not survive a directed verdict motion. *Felts v. Liberty Emergency Serv.*, 97 N.C. App. 381, 383, 388 S.E.2d 619, 620 (1990).

Criminal Battery

[7] The plaintiff argues that the individual defendants Mr. Barco, Mr. Baucom, Mr. Bellamy, Mr. Ghoulis and Mr. Mumma violated G.S. 14-33(a) and 14-33(b) and, therefore, the trial court erred in granting the individual defendants a directed verdict. We disagree.

"The same wrongful act may constitute both a crime and a tort." 21 Am. Jur. 2d *Criminal Law* § 2 (1981). However, "no civil right can be predicated upon a mere violation of a criminal statute, . . .; the crime is an offense against the public pursued by the sovereign, [and] the tort is a private injury which is pursued by the injured party." 74 Am. Jur. 2d *Torts* § 1 (1974). *See, e.g., State v. Hines*, 36 N.C. App. 33, 42, 243 S.E.2d 782, 787, *disc. review denied and appeal dismissed*, 295 N.C. 262, 245 S.E.2d 779 (1978) ("The ultimate loss [or damage] to the victim . . . is an issue which is irrelevant to the purpose of the criminal statute

and is an issue properly within the province of the civil courts."). This argument is without merit.

Civil Assault

[8] Plaintiff also argues that the individual defendants Mr. Barco, Mr. Baucom, Mr. Bellamy, Mr. Ghoulis and Mr. Mumma committed a civil assault upon her. The plaintiff's brief states "[t]he undersigned will not insult this [C]ourt with an analysis of the law on assault and battery. . . ." This case, by its very essence, is an assault and battery case. "The elements of assault are intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury." *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475, *disc. review allowed*, 329 N.C. 496, 407 S.E.2d 533 (1991) (citation omitted). "The gist of an action for assault is apprehension of harmful or offensive contact." *Morrow v. Kings Department Stores, Inc.*, 57 N.C. App. 13, 19, 290 S.E.2d 732, 736, *disc. review denied*, 306 N.C. 385, 294 S.E.2d 210 (1982). Here, during cross-examination the plaintiff testified as follows:

> Q. Not that you remember. Now, while we're on the subject of that, you have no recollection of the happening of any of the things that you've accused the members of Al—of Lambda Chi Alpha do you?
>
> A. No.

This testimony is an admission by the plaintiff that she did not have any apprehension of harmful or offensive contact. This assignment is overruled.

Civil Battery

[9] The plaintiff also alleges that the individual defendants Mr. Barco, Mr. Baucom, Mr. Bellamy, Mr. Ghoulis and Mr. Mumma committed a civil battery upon her. "The elements of battery are intent, harmful or offensive contact, causation, and lack of privilege." *Hawkins*, 101 N.C. App. at 533, 400 S.E.2d at 475. "The gist of an action for battery is 'the absence of consent to . . . contact on the part of the plaintiff.' " *Morrow*, 57 N.C. App. at 19, 290 S.E.2d at 736 (citation omitted). However, a person who is unconscious or insensibly drunk cannot give consent to physical contact. *See, e.g., State v. Moorman*, 320 N.C. 387, 392, 358 S.E.2d 502, 505 (1987); and *State v. Aiken*, 73 N.C. App. 487, 499, 326

S.E.2d 919, 926, *disc. review denied and appeal dismissed*, 313 N.C. 604, 332 S.E.2d 180 (1985).

Here, the plaintiff failed to present any evidence that the individual defendants Mr. Barco, Mr. Bellamy, or Mr. Mumma ever made any physical contact with her. The plaintiff has no personal recollection of being touched by any of the men. The men did not admit touching her, and no one testified that any of them touched her. Accordingly, this assignment is overruled.

The plaintiff did, however, present testimony that both Mr. Ghoulis and Mr. Baucom touched her and participated in sexually motivated physical conduct with her. Indeed, during their testimony both men admitted touching the plaintiff. Both men also testified that the plaintiff initiated the touching and that the touching was consensual. The plaintiff, on the other hand, claimed that she was unconscious and that any contact was non-consensual. She testified:

> Q. And what's the next thing you remember after getting up to the top of the stairs?
>
> A. I remember that the room was really dark. It was like totally black. I remember I was just lying there or leaning back or something and just shaking my head and saying, "No, no." It was just—I couldn't see anything, I just remember just, "No, no."
>
> Q. Okay. After saying that, what's the next thing you remember?
>
> A. I remember coming to again and seeing like just a picture of guys standing in the doorway, just like I came to and saw them and then like I went right back out.
>
> Q. When you say, "came to," what do you mean by that?
>
> A. I was unconscious. I was—I didn't know what was going on. It was just like all the sudden a spot that I can remember, just like I woke up and then went right back to sleep.

Here, the plaintiff presented evidence of each element of civil battery, including conflicting testimony as to whether the plaintiff was conscious and able to give her consent to the admitted contacts by Mr. Ghoulis and Mr. Baucom. The crux of the matter, then, is the determination of whether the plaintiff consented to the contacts. That determination rests solely on the credibility of the

witnesses, and is an issue properly presented to the jury, not the court. *See Price*, 21 N.C. App. at 329, 204 S.E.2d at 180. Accordingly, it was error for the trial court to direct a verdict in favor of the individual defendants Mr. Ghoulis and Mr. Baucom on the civil battery claim, and we remand for a new trial on these claims.

Intentional Infliction of Emotional Distress

[10] The plaintiff next claims that each of the individual defendants (Mr. Baucom, Mr. Bellamy, Mr. Ghoulis, Mr. Gordon, Mr. Medford and Mr. Mumma) intentionally inflicted emotional distress upon her. She also argues that the individual defendants Mr. Medford and Mr. Gordon intentionally inflicted emotional distress upon her "on behalf of the fraternity."

> The tort of intentional infliction of mental or emotional distress was formally recognized in North Carolina by the decisions of our Supreme Court in *Stanback v. Stanback*, 297 N.C. 181, 254 S.E.2d 611 (1979). The claim exists "when a defendant's 'conduct exceeds all bounds usually tolerated by decent society' and the conduct 'causes mental distress of a very serious kind.' " *Id.* at 196, 254 S.E.2d at 622, *quoting* Prosser, The Law of Torts § 12, p. 56 (4th Ed. 1971). The elements of the tort consist of: (1) extreme and outrageous conduct, (2) which is intended to cause and does cause (3) severe emotional distress. *Dickens v. Puryear, supra.*
>
> The tort may also exist where defendant's actions indicate a reckless indifference to the likelihood that they will cause severe emotional distress. Recovery may be had for the emotional distress so caused and for any other bodily harm which proximately results from the distress itself. *Id.* at 452-53, 276 S.E.2d at 355.

Hogan v. Forsyth Country Club Co., 79 N.C. App. 483, 487-88, 340 S.E.2d 116, 119-20, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986). The issue, here, is whether the plaintiff presented sufficient evidence of each element of the tort of intentional infliction of emotional distress to withstand the defendants' directed verdict motions.

The standard for determining whether conduct is extreme or outrageous is well settled in this jurisdiction.

> It is a question of law for the court to determine, from the materials before it, whether the conduct complained of may reasonably be found to be sufficiently outrageous as to permit recovery . . . . However, once conduct is shown which may be reasonably regarded as extreme and outrageous, it is for the jury to determine, upon proper instructions, whether the conduct complained of is, in fact, sufficiently extreme and outrageous to result in liability.

Brown v. Burlington Industries, Inc., 93 N.C. App. 431, 436, 378 S.E.2d 232, 235 (1989), *review dismissed*, 326 N.C. 356, 388 S.E.2d 769 (1990) (quoting *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. at 491, 340 S.E.2d at 121).

We first address the claims against the defendants Mr. Ghoulis and Mr. Baucom. The evidence when taken as true and considered in the light most favorable to the plaintiff tends to show the following: that Mr. Ghoulis knew that the plaintiff had been drinking alcoholic beverages and that she "couldn't make a judgment call as to what she wanted to do"; that both Mr. Ghoulis and Mr. Baucom engaged in kissing and heavy petting with the plaintiff in the presence of others; and that the plaintiff was unconscious during physical contact. We do not condone the conduct alleged here. However, the record before us does not show conduct "so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community." *Hogan*, 79 N.C. App. at 493, 340 S.E.2d at 123 (quoting Restatement of Torts, § 46 comment (d) (1965)). Rather, the record only presents some evidence of a sexual battery, and we are unwilling to hold on this record that a sexual battery, standing alone, constitutes the required extreme and outrageous conduct. This assignment is overruled.

Similarly, the plaintiff claims that Mr. Bellamy, Mr. Gordon, Mr. Medford and Mr. Mumma exhibited extreme and outrageous conduct. However, the plaintiff has failed to present sufficient evidence in the record to show that each exhibited the required extreme and outrageous conduct. This assignment of error is likewise overruled.

Negligence

[11] Finally, the plaintiff argues that the trial court erred in directing a verdict against her on the negligence claims she raised

against the Zeta Chapter of Lambda Chi Alpha, Lambda Chi Alpha Fraternity, Inc. and LCA Alumni Properties. We disagree.

Assuming *arguendo*, but without deciding, that the plaintiff stated valid negligence claims against each of the defendants, we hold that the plaintiff was contributorily negligent as a matter of law.

> Contributory negligence is such an act or omission on the part of the plaintiff amounting to a want of ordinary care concurring and cooperating with some negligent act or omission on the part of the defendant as makes the act or omission of the plaintiff a proximate cause or occasion of the injury complained of.

Adams v. Board of Education, 248 N.C. 506, 511, 103 S.E.2d 854, 857 (1958). Here, the plaintiff admitted that she voluntarily consumed half a bottle of champagne, at least five or six beers and a shot of Southern Comfort liquor. In her own words, she became "extremely intoxicated" and at some point passed into a state of unconsciousness. "Plaintiff's act of consuming sufficient quantities of intoxicants to [cause her to become unconscious] amounts to 'a want of ordinary care' which proximately caused [any injury she suffered and constitutes] contributory negligence as a matter of law." *Brower v. Robert Chappell & Assocs., Inc.*, 74 N.C. App. 317, 320, 328 S.E.2d 45, 47, *disc. review denied*, 314 N.C. 537, 335 S.E.2d 313 (1985).

However, during oral argument the plaintiff argued that even if she was contributorily negligent as a matter of law, the defendants' actions amounted to willful and wanton negligence and therefore survive the plaintiff's contributory negligence. It is well established that a party's contributory negligence will not preclude recovery for injuries proximately caused by other's willful and wanton negligence. *Fry v. Southern Public Utilities Co.*, 183 N.C. 282, 314, 111 S.E. 354, 361 (1922). " 'Wilful and wanton' negligence is conduct which shows either a deliberate intention to harm, or an utter indifference to, or conscious disregard for, the rights or safety of others." *Siders v. Gibbs*, 31 N.C. App. 481, 485, 229 S.E.2d 811, 814 (1976).

Here, the plaintiff has failed to present sufficient evidence to support a claim of willful or wanton negligence. Rather, at best, the plaintiff has only shown that the defendants may have been inattentive or inadvertent to the fact that alcohol was being served

to minors at the Lambda Chi Alpha fraternity house. Evidence of mere inadvertence will not preclude the defense of contributory negligence. *See, e.g., Blevins v. France*, 244 N.C. 334, 341-43, 93 S.E.2d 549, 554-56 (1956) (evidence that stock car race officials started a race inadvertent to the fact that intestate's car was stalled on the track was insufficient to establish willful or wanton negligence so as to preclude the defense of contributory negligence). This assignment is overruled.

Remaining Claims

The plaintiff has abandoned any remaining claims for which the trial court directed a verdict in favor of the defendants by failure to offer reason, argument or authority in her brief. N.C.R. App. P. 28(b)(5).

VIII

In conclusion, we hold that the trial court correctly entered directed verdict on each cause of action except the civil battery actions against Mr. Ghoulis and Mr. Baucom. Accordingly, we reverse the trial court's entry of directed verdict against the plaintiff on those two claims and remand for a new trial.

Affirmed in part; reversed and remanded in part.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA EX REL. BEVERLY WILLIAMS, MOTHER OF LATOYA RASHUNDA WILLIAMS, MINOR CHILD v. WILLIAM EARL COPPEDGE

No. 919DC89

(Filed 3 March 1992)

1. Bastards § 5.1 (NCI3d)— expert on genetic determination of paternity—opinion as to defendant's paternity properly excluded

The trial court in a paternity action did not err in allowing an expert in the field of genetic determination of paternity who performed blood grouping tests to testify that he had an opinion as to whether defendant was the natural father but then denying the witness the opportunity to give his opin-

ion, since the witness's opinion was not of assistance to the trier of fact where the jury was in an equally good position to consider all the nongenetic surrounding circumstances, to assign weight to the nongenetic factors, to combine these figures with the paternity index, and to determine the probability that defendant was the father.

Am Jur 2d, Bastards § 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

2. Bastards § 5 (NCI3d)— mother's reputation for sexual promiscuity—attack on credibility inadmissible—admissibility to refute evidence of access to mother

Evidence in a paternity case as to the mother's reputation for sexual promiscuity was inadmissible to attack her credibility; however, such reputation evidence was admissible to refute the mother's testimony that she had a monogamous relationship with defendant from the time of conception until about the time of the child's birth. N.C.G.S. § 8C-1, Rule 608.

Am Jur 2d, Bastards §§ 115, 116.

Admissibility, in disputed paternity proceedings, of evidence to rebut mother's claim of prior chastity. 59 ALR3d 659.

Judge WALKER dissenting.

APPEAL by the State from a judgment filed 17 September 1990 by *Judge C. W. Allen, Jr.* in FRANKLIN County District Court. Heard in the Court of Appeals 6 November 1991.

Attorney General Lacy H. Thornburg, by Assistant Attorney General T. Byron Smith, for the State.

No brief for defendant-appellee.

LEWIS, Judge.

The first issue in this case is whether a court accepted expert in the field of genetic determination of paternity can be permitted to testify that he has an opinion as to whether the defendant in a paternity action is the natural father, but then be denied

the opportunity to give his opinion. Also at issue is whether the putative father may offer evidence of the mother's reputation.

On 14 February 1983, Latoya Williams was born out of wedlock to sixteen year old Beverly Williams. Latoya has received, via her caretaker Holly M. Williams, public assistance totaling $10,114.00 as of 30 June 1988. Plaintiff, the North Carolina Child Support Enforcement Agency (Agency), filed suit against Mr. Coppedge, on 1 July 1988, in order to establish paternity and support for the child and to obtain reimbursement for the state funds expended on Latoya's behalf. At the time of trial, Latoya was seven and Ms. Williams was twenty-three.

The Agency tendered and the court accepted an expert in genetic evaluation of paternity. The expert, an immunologist, testified that he performed blood tests and comparisons on Beverly Williams, Latoya Williams and on William Coppedge. The tests revealed that the probability that Mr. Coppedge was Latoya's biological father was 99.2%. The court permitted the expert to state this numerical test result and to say that he had an opinion as to whether or not Mr. Coppedge was Latoya's natural father. Upon objection he was not permitted to testify as to his opinion.

Beverly Williams testified that she first met William Coppedge in early spring and had a monogamous sexual relationship with him from April until the end of 1982. After Latoya was born defendant visited her in the hospital, held the baby, and "brought [the child] stuff." She alleges that they saw each other on and off for two years; however, after Latoya's birth, Mr. Coppedge requested that Ms. Williams not reveal their sexual interludes because Ms. Williams' age at the time of conception would place him in jeopardy of "going to jail" [i.e. for statutory rape].

Mr. Coppedge, on the other hand, denies paternity. He admits that he has known Ms. Williams for nine years, admits their cohabitation, but denies having intimate relations with Ms. Williams until July or August of 1982. Further, he admits to only one sexual contact because he learned of her true age of 15 years. Testifying on behalf of the defendant, a Child Support Enforcement Officer stated that Ms. Williams declined to name anyone as Latoya's father on the first interview, later named another man, but finally named Mr. Coppedge.

Over the State's objection, Mr. Coppedge was permitted to testify as to Ms. Williams' sexually promiscuous reputation at the time of Latoya's conception.

> Q: Mr. Coppedge, you need to answer this question yes or no. Do you know of your own knowledge what Beverly Williams' reputation was concerning her using her body for sex in exchange for drugs and alcohol? Answer yes or no.
>
> Objection.
>
> Overruled.
>
> A: Yes.
>
> COURT: Wait, now. When are you talking about?
>
> In July and August of 1982.
>
> COURT: Overruled. Go ahead.
>
> Q. What is her reputation. . .
>
> COURT: What was, what was.
>
> Q. What was her reputation during that period of time for using her body for sex in exchange for drugs and alcohol?
>
> Objection.
>
> Overruled.
>
> A: That's exactly what she was doing.
>
> COURT: No. What was her reputation?
>
> A: That was her reputation. If somebody had some money where they could give her or had some drugs, you know, they was good to go.
>
> Object and move to strike as being not responsive.
>
> Overruled. Motion to strike denied.

The jury found that Mr. Coppedge was not Latoya's father. The State appeals from imposition of judgment on the verdict.

The State assigns two errors. First, the State claims that the trial court erred in prohibiting the accepted expert's opinion as to whether Mr. Coppedge is Latoya's natural father. Second,

the State claims that it was error for the trial court to permit reputation testimony to discredit Ms. Williams' veracity.

[1] On the first allegation of error, we find instructive our Supreme Court's holding in *State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987). Though paternity was not a central issue in that rape trial, the Court upheld the following testimony presented at trial by a geneticist regarding the results of a genetic paternity evaluation:

> based on the [blood] tests of the [rape] victim (mother), defendant, and the [victim's] child, (1) defendant could not be excluded as the father of the victim's child; (2) the frequency of the defendant's genes in the black population, based upon a probability that a random man in the population would carry his gene markers is 0.0068, or less than 1%; (3) the "likelihood of paternity" is 93.4% at the low range, 99.21% at the median range, and 99.91% at the high range; (4) the "paternity index," expressed as an "odds ratio" is, at the low range, 14 to 1; at the median range 126.2 to 1; and at the high range, 1,135 to 1; (5) the likelihood of nonpaternity is 6.6% at the weak level, 0.79% at the median level, and 0.09% at the strong level.

Id. at 456, 358 S.E.2d at 681. Also upheld was the geneticist's testimony regarding the proper application of the numerical ranges, i.e., that the lower ranges apply if the jury finds that the nongenetic evidence is weak.

The Court overturned the admission of the geneticist's opinion as to whether the defendant was the father of the rape victim's child. Probability of paternity is calculated by combining nongenetic with genetic information. *Id.* at 458, 358 S.E.2d at 682. The nongenetic factor consists of evidence of all the surrounding circumstances such as: the putative father's access to the mother, the putative father's fertility, etc. The nongenetic factor is assigned a numerical value based upon the geneticist's determination of its weight or significance in the present case. *Id.* at 458-59, 358 S.E.2d at 682. The geneticist then inserts both genetic and nongenetic factors into the appropriate formula and the probability of paternity results.

The Court indicated that the geneticist's "testimony on the use of the paternity index was unquestionably of assistance to the trier of fact." *Id.* at 460, 358 S.E.2d at 683. However, because the probability of paternity was "based not only upon 'scientific, technical, or other knowledge,' . . . but also on [the geneticist's]

own assumptions about the [nongenetic surrounding circumstances information], . . . the jury was in as good a position as [the geneticist] to determine whether the defendant was 'probably' the father of the victim's child." *Id.* As an expert's opinion is admissible only where it "will assist the trier of fact to understand the evidence or to determine a fact in issue . . . ," N.C.G.S. § 8C-1, Rule 702 (1988), the geneticist's calculation of probability of paternity is of "no assistance to the trier of fact and should [be] excluded on that basis." *Jackson*, at 460, 358 S.E.2d at 683.

In the case at bar, the expert was permitted to give six pages of transcript testimony explaining the nature, process, reliability, and the significance of paternity blood tests in general. The expert testified as to the numerical probability of paternity (99.2%), the probability of nonpaternity, the power of exclusion, and the significance of each of these numerical values. The expert was also permitted to testify that no blood test gives a perfect result and that not even the mother has perfect knowledge regarding this matter. The State elicited further testimony from this expert which showed that the test gave the defendant the benefit of the doubt by considering nongenetic outside evidence equally with genetic evidence.

The portion of the transcript pertinent to the State's objection reveals the following interchange:

> Q: Doctor, based upon your evaluation, do you have an *opinion relative to William Earl Coppedge being the natural father* of Latoya Williams?
>
> Objection.
>
> side bar
>
> Court: Your question was "Do you have an opinion." Is that right?
>
> Prosecutor: That's correct.
>
> Court: I'm going to let you answer that just yes or no.
>
> A: Yes. I do have an opinion.
>
> Court: Stop right there. Next question.
>
> Q: Doctor would you express your opinion to the court?

Objection.

Court: Sustained. Don't answer that.

(Emphasis added). It is abundantly clear that the trial court complied with *Jackson* both in the testimony admitted and excluded. The trial court, in the case at bar, correctly prohibited the expert's opinion as to whether Mr. Coppedge was Latoya's natural father because it was not of "assistance to the trier of fact" where the jury is in an equally good position to consider all of the nongenetic surrounding circumstances to assign weight to the nongenetic factors, to combine these figures with the paternity index, and to determine the probability that Mr. Coppedge was Latoya's father. Proffer of the geneticist's opinion as to the probability of paternity would have gone beyond testimony as to scientific information and would thus have trampled upon the jury's domain. This is not permitted under N.C.G.S. § 8C-1, Rule 702 (1988). *Jackson*, at 460, 358 S.E.2d at 683. Hence, constrained by the holding in *Jackson* above, we uphold the trial court's exclusion of the expert's opinion as to the probability that Mr. Coppedge was Latoya's father.

[2] The State's second assignment of error alleges that Ms. Williams' reputation for sexual promiscuity was admitted to cast doubt upon Ms. Williams' credibility and, as such, should have been excluded. With this proposition we agree. North Carolina Rule of Evidence, Rule 608 prohibits attacking a witness' credibility by opinion, reputation, or specific prior acts by this witness unless those specific acts bear on the witness' character for truthfulness. "[E]vidence routinely disapproved as irrelevant to the question of a witness' general veracity (credibility) includes specific instances of conduct relating to 'sexual relationships or proclivities, the bearing of illigitimate [sic] children, the use of drugs or alcohol. . . .' " *State v. Morgan*, 315 N.C. 626, 635, 340 S.E.2d 84, 90 (1986) (citation omitted). Ms. Williams' reputation for sexual promiscuity would not be admissible to attack her credibility.

This reputation evidence, however, is admissible to refute Ms. Williams' testimony that she had a monogamous relationship with the defendant from the time of conception until about the time of the child's birth. This testimony "opened the door" to evidence regarding Ms. Williams' other sexual relationships during the window of the time that surrounded the child's conception. We recognize that character evidence is generally not admitted in civil cases unless it is character which is in issue because this evidence is

often more prejudicial than probative. N.C.G.S. § 8C-1, Rule 403 (1988). Here, however, evidence of sexual activity and promiscuity goes to a central element of this case: opportunity to impregnate Ms. Williams. Whether or not other men had the opportunity to father Latoya is of ultimate relevance to this issue of paternity. N.C.G.S. § 8C-1, Rule 401 (1988). In addition, this nongenetic outside information, as a factor in the probability of paternity calculation, must be received in order for the jury to weigh the expert's assumptions underlying the calculation of numerical probability of paternity. Hence, we uphold the admission of Ms. Williams' reputation for sexual promiscuity.

Further, we find both instructive and controlling the case of *State v. Warren*, 124 N.C. 807, 32 S.E. 552 (1899). *Warren* was a bastardy case in which our Supreme Court held that specific instance evidence that the mother had had intimate relations with another man during the time of conception was admissible by the alleged father. The Court indicated that this evidence is competent and admissible only for instances which occur during the time period of conception. "It [is] incompetent for the purpose of contradicting the prosecutrix (citation omitted). . . . It [is also] incompetent as corroborative evidence of the defendant. . . ." *Id.* at 809, 32 S.E. at 553. The rationale is that the only issue before the jury is whether or not the defendant is the child's father and "*whatever* tends to prove or disprove the affirmative of this issue is competent." *Id.* (emphasis added). Because evidence that another man had intercourse with the mother during the time period of conception "bears directly upon the issue," it is competent and as such it is admissible. *Id.*

The case at bar differs from *Warren* in that Mr. Coppedge proffered reputation rather than specific instance evidence. However, the *Warren* Court focused upon the issue at hand: paternity, and indicated that "whatever tends to prove or disprove" this issue is competent. *Id.* Reputation evidence falls within "whatever" evidence. Even though reputation evidence is less concrete than specific instance evidence and even though its offer into evidence may be suspect when presented by the putative father whose desire it is to exculpate himself, both of these concerns go to the weight rather than the admissibility of this type of evidence. It is for the jury to determine its weight and to balance the scales. We hold that the reputation evidence was properly admitted.

We find no prejudicial error.

Affirmed.

Judge WELLS concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from that portion of the majority opinion which holds Mr. Coppedge's testimony concerning Ms. Williams' reputation for sexual promiscuity was properly admitted. Before addressing the issue of whether such testimony is competent substantive evidence, I first take exception to the trial court's failure to sustain counsel's objections because the proper method of qualifying a character witness proffered to give reputation testimony was not followed. Established case law provides that:

> [W]hen an impeaching or sustaining character witness is called, he should first be asked whether he knows the general reputation and character of the witness or party about which he proposes to testify. This is a preliminary qualifying question which should be answered yes or no. If the witness answer [sic] it in the negative, he should be stood aside without further examination. If he reply [sic] in the affirmative, thus qualifying himself to speak on the subject of *general* reputation and character, counsel may then ask him to state what it is. This he may do categorically, i.e., simply saying that it is good or bad, without more, or he may, of his own volition, but without suggestion from counsel offering the witness, amplify or qualify his testimony, by adding that it is good for certain virtues or bad for certain vices.

State v. Sidden, 315 N.C. 539, 546, 340 S.E.2d 340, 345 (1986), *quoting State v. Hicks*, 200 N.C. 539, 540-541, 157 S.E. 851, 852 (1931). (Emphasis in original).

In this case the reputation evidence was solicited without laying the proper foundation for such testimony. Although it was established that Mr. Coppedge knew Ms. Williams, the record is devoid of any evidence that he knew of Ms. Williams' reputation for "using her body for sex in exchange for drugs and alcohol" from his contacts with members of the community in which Ms.

Williams worked or lived. There was no inquiry as to how and on what basis Mr. Coppedge gleaned his knowledge so as to qualify him as competent to testify concerning Ms. Williams' reputation. Further, counsel omitted any preliminary qualifying question on the subject of general reputation but directly sought to elicit testimony enumerating specific character traits, i.e. Ms. Williams' inclination to use her body for sex in exchange for drugs or alcohol. Mr. Coppedge was permitted to testify categorically concerning the general reputation of Ms. Williams and, by his own volition, could have amplified his testimony by stating it was bad for certain vices. Here, his testimony was elicited absent the proper foundation and preliminary questioning and after being prompted through counsel's leading question.

Although our Supreme Court has said on occasion it was error for failure to follow the correct procedures in eliciting reputation evidence, such is not usually prejudicial error. However, I am not convinced that no prejudice resulted from this noncompliance in light of the fact Mr. Coppedge's testimony was the only evidence regarding Ms. Williams' alleged use of her body for sex in exchange for drugs or alcohol. For this reason, I am of the opinion that the trial court should have sustained the objections and excluded the testimony concerning Ms. Williams' reputation.

Notwithstanding the fact it is reputation evidence, the majority holds this evidence is admissible because it relates to a central element of the case: the opportunity to impregnate Ms. Williams. I do not believe *State v. Warren*, 124 N.C. 807, 32 S.E. 552 (1899) can be so broadly construed as to support this conclusion. *Warren* held that evidence of specific conduct between the mother and another man at the time of conception was competent and admissible by the putative father as relevant to the issue of paternity. Notably, this evidence was of a specific and identifiable act at a certain time which, if accepted as true, would have a bearing on the issue of paternity. In the case before us the reputation evidence covering July and August 1982 would not increase the likelihood of proving or disproving the central issue of paternity but is no more than a broadside attack on the character of Ms. Williams.

Likewise in *State v. Farmer*, 63 N.C.App. 384, 304 S.E.2d 765 (1983), where the twins were born on 18 September 1978, defendant was permitted to ask the prosecuting witness about sexual

intercourse with Earl Jones in November and December 1977. The court sustained objections, however, to defendant's questions concerning how long the prosecuting witness had dated Jones, how many times she had sexual intercourse with him, and where he lived. This Court upheld the trial court's finding that the excluded evidence had no logical tendency to prove the fact in issue: whether defendant was the father of the twins.

Further, I cannot uphold the admission of this testimony into evidence as it does not pass muster under the requisite balancing test of G.S. 8C-1, Rule 403, which provides in pertinent part:

> Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice.

As the majority noted, character evidence is generally not admitted in civil cases unless character is an issue because this evidence is often more prejudicial than probative. This case offers a prime example. The evidence of Ms. Williams' character has questionable probative value, as it does not tend to prove or disprove the issue of paternity, and is highly prejudicial in that it attempts to discredit Ms. Williams through denigration of her reputation. Therefore, having concluded it was prejudicial error to admit this reputation evidence, I dissent.

MITCHELL E. GRAY, EMPLOYEE, PLAINTIFF v. CAROLINA FREIGHT CARRIERS, INC., SELF-INSURED EMPLOYER, DEFENDANT

No. 9110IC218

(Filed 3 March 1992)

1. **Master and Servant § 69 (NCI4th)— permanent partial disability—subsequent permanent total disability—credit for prior payments**

A workers' compensation award for permanent and total disability under N.C.G.S. § 97-29 without a credit to defendant for its prior payments for partial disability pursuant to N.C.G.S. § 97-31 was affirmed but remanded for a determination of whether plaintiff's compensation must be adjusted due to any overlap between the periods of payment for the awards under

N.C.G.S. §§ 97-31 and 29. Once the § 97-31 period of disability ends, the general rule is that any subsequent disability benefits to which the employee is entitled may be awarded to the employee without crediting the employer for the disability payments made under § 97-31 (although maximum periods of payment may apply) whether the same body part or a different body part is involved in the subsequent injury. However, the employee is precluded from simultaneously receiving a § 97-31 and a § 97-29 award where a permanently and totally disabling injury occurs during the period of time when the employee is entitled to partial disability benefits pursuant to § 97-31.

Am Jur 2d, Workmen's Compensation §§ 340, 365.

2. **Master and Servant § 69 (NCI4th)— subsequent injury—permanent disability—no apportionment**

A workers' compensation award for permanent and total disability without apportionment for a prior injury was affirmed. The Workers' Compensation Act does not provide for apportionment in the case of successive injuries (other than those specified in N.C.G.S. § 97-35) sustained by an employee in the same employment, regardless of whether or not the employee received compensation for the prior injury. The facts pertaining to plaintiff's total disability are inconsistent with every situation in which our courts have previously permitted apportionment of a permanent total award and defendant effectively concedes that it would be impossible to apportion that part of plaintiff's disability which was caused by his second back injuries as opposed to his first, so that any attempt at apportionment would be speculative.

Am Jur 2d, Workmen's Compensation § 333.

APPEAL by defendant from Opinion and Award of the Full Commission filed 4 December 1990. Heard in the Court of Appeals 3 December 1991.

Anderson & Clayton, by Michael J. Anderson, for plaintiff-appellee.

Brooks, Stevens & Pope, P.A., by Daniel C. Pope, Jr., for defendant-appellant.

GREENE, Judge.

Defendant appeals from an Opinion and Award of the North Carolina Industrial Commission filed 4 December 1990, affirming the Deputy Commissioner's decision finding plaintiff totally and permanently disabled, and denying defendant's request for credit for payments previously made to plaintiff for ten percent permanent partial disability of the back.

The facts pertinent to this appeal are as follows: From 1971 until September 1986, plaintiff worked as a long-distance truck driver for defendant. On 27 September 1985, plaintiff sustained an injury by accident arising out of and in the course of his employment with defendant which resulted in a herniated disc, for which plaintiff had surgery. By January 1986, plaintiff had no back or leg pain, and experienced only a minor backache. Defendant admitted liability for this accident, and paid plaintiff compensation benefits for temporary total disability from 28 September 1985 to 15 December 1985, at which time plaintiff returned to work. In addition, defendant admitted liability for ten percent permanent partial disability of the back as a result of the September 1985 accident, and paid plaintiff pursuant to N.C.G.S. § 97-31(23), compensation benefits at the rate of $280.00 per week for 30 weeks, the last check being sent on 10 November 1986. The payments for plaintiff's ten percent permanent partial disability to the back totaled $8400.00.

On 24 July 1986, while working for defendant at a truck terminal, plaintiff twisted his back while attempting to connect two trailers. Plaintiff experienced low back pain and missed some time from work. On 19 September 1986, plaintiff experienced another injury by accident arising out of and in the course of his employment with defendant when he felt sharp pain in his back while attempting to connect two trailers. Plaintiff worked through the next day, but has since done no work for wages. Defendant admitted liability for this accident, and undertook to pay plaintiff compensation benefits for disability at the rate of $294.00 per week beginning 21 September 1986, and continuing for necessary weeks.

From September 1986 until the present, plaintiff has received medical treatment, including additional back surgery, from several doctors. Plaintiff has been treated for a variety of medical problems, including but not limited to diabetes, back pain, leg pain and numbness, buttock pain, constipation, abdominal pain, stomach numbness, chest pain, and severe depression. In December 1987,

following a dispute between plaintiff and defendant regarding the payment of permanent disability compensation, plaintiff requested, pursuant to N.C.G.S. § 97-83, a hearing before the Industrial Commission for a ruling on plaintiff's entitlement to permanent and total disability benefits. Deputy Commissioner William Haigh heard the issues on 6 June 1988, and on 8 November 1989, entered an Opinion and Award finding plaintiff permanently and totally disabled as of 21 September 1986, and denying defendant's request for a credit of $8400.00 for the prior payments made to plaintiff for the ten percent permanent partial disability of the back. Specifically, Commissioner Haigh found that

> [t]he combined effect of the [July and September 1986 back injuries] aggravated plaintiff's pre-existing back condition and caused injury to his back . . . . By reason of the combined effects of the [1986 back injuries], independent of plaintiff's other medical conditions including depression and neuropathies, he has been rendered unable to earn any wages in any employment since September 21, 1986, and he remains so incapacitated thereby.

Commissioner's Finding of Fact No. 18.

The issues are whether I) an award made for permanent total disability as the result of a compensable injury pursuant to N.C.G.S. § 97-29, which follows a previous award to the same employee for permanent partial disability as the result of a prior compensable injury pursuant to N.C.G.S. § 97-31, entitles the employer to a credit equal to the amount of the Section 97-31 award; and II) the Section 97-29 award must be apportioned to reflect the percentage of total disability caused by the second compensable injury.

I

Credit

[1] North Carolina's Workers' Compensation Act, N.C.G.S. §§ 97-1 *et seq.* (1991) (the Act), provides compensation for an employee who suffers an injury by accident arising out of and in the course of his employment. N.C.G.S. § 97-2(6) (1991). The Act provides for compensation to be paid during the employee's healing period, that is, "the time when the [employee] is unable to work because of his injury, is submitting to treatment, . . . or is convalescing." *Crawley v. Southern Devices, Inc.*, 31 N.C. App. 284, 288-89, 229

S.E.2d 325, 328 (1976), *disc. rev. denied*, 292 N.C. 467, 234 S.E.2d 2 (1977). In addition, Section 97-31 and Section 97-30 of the Act entitle the employee to additional benefits for permanent partial disability. Under Section 97-31, a disability is deemed to continue after the employee's healing period, and the employee is entitled to compensation for the number of weeks specified in the statute. Under Section 97-30, an employee who proves partial disablement is entitled to compensation in accordance with the provisions of the statute. *Grant v. Burlington Indus., Inc.*, 77 N.C. App. 241, 251, 335 S.E.2d 327, 334 (1985). Moreover, N.C.G.S. § 97-29 provides that, where an employee's incapacity for work resulting from an injury is total and permanent, the employer shall pay compensation to the injured employee during the employee's lifetime.

The Act does not contain a provision, however, requiring that an award for permanent and total disability made pursuant to Section 97-29 be adjusted to credit an employer for any prior award made to the same employee pursuant to Section 97-31 or Section 97-30. A "credit" is a deduction by the employer of a prior payment made to an injured employee from the compensation benefit that is now due the employee. The only statute in North Carolina authorizing a credit is N.C.G.S. § 97-42. It provides, in order to encourage voluntary payments by the employer while the worker's claim is being litigated and he is receiving no wages, that any payments made by the employer to the injured employee which were not due and payable when made, may in certain cases be deducted from the amount of compensation due the employee. *See Evans v. AT&T Technologies*, 103 N.C. App. 45, 47-48, 404 S.E.2d 183, 185, *disc. rev. allowed*, 329 N.C. 787, 408 S.E.2d 519 (1991). For this Court to integrate into the Act an additional credit of the type sought by defendant would not only violate sound principles of statutory construction, *see State v. Camp*, 286 N.C. 148, 151-52, 209 S.E.2d 754, 756 (1974) (in construing a statute, court is without power to add provisions not contained therein), but would reduce an employee benefit specifically authorized by the Legislature. We conclude that we can do neither.

Our conclusion is consistent with the majority of jurisdictions considering this issue, and with prior decisions of this Court. *See* 2 Arthur Larson, Larson's Workmen's Compensation Law § 59.42 (1986) (hereinafter *Larson*); *Smith v. American & Efird Mills*, 51 N.C. App. 480, 277 S.E.2d 83 (1981), *modified on other grounds and aff'd*, 305 N.C. 507, 290 S.E.2d 634 (1982). The majority view

is that, in the absence of a statute providing otherwise, "the permanent partial award need not be deducted from the subsequent permanent total award." *Larson* at § 59.42(c). The basis for this view has been well-stated by Professor Larson:

> The capacities of a human being cannot be arbitrarily and finally divided and written off by percentages. The fact that a man has once received compensation as for 50 percent of total disability does not mean that ever after he is in the eyes of compensation law but half a man, so that he can never again receive a compensation award going beyond the other 50 percent of total. After having received his prior payments, he may, in future years, be able to resume gainful employment . . . . If so, there is no reason why a disability which would bring anyone else total permanent disability benefits should yield him only half as much. A similar principle may be applied to an individual member that has been restored in whole or in part.

Larson at § 59.42(g). In *Smith, supra,* this Court in an apparent adoption of the majority view, held that full payment of compensation pursuant to Section 97-29 "should be allowed without regard to the compensation previously awarded under G.S. 97-30." *Smith,* 51 N.C. App. at 490, 277 S.E.2d at 89.

Although in *Smith* the prior award at issue was one authorized by Section 97-30, rather than Section 97-31 as in the instant case, this difference is immaterial as it relates to the issue of credit. The two statutes serve the same purpose—to compensate the employee for partial disability suffered as the result of a work-related injury. An employee who suffers injuries resulting in partial disability of a general nature is entitled to compensation under Section 97-30, while an employee who sustains injuries of a specific nature is entitled to recover pursuant to the schedule provided in Section 97-31. In fact, an employee who sustains both general and specific injuries may recover benefits under both Section 97-30 and Section 97-31. *Little v. Food Service,* 295 N.C. 527, 533, 246 S.E.2d 743, 747 (1978). In light of the well-established compatibility of these two statutes, the rationale of *Smith* applies with equal force whether the prior partial disability benefits have been awarded under Section 97-30, or under Section 97-31.

Thus, once the Section 97-31 deemed period of disability ends, the general rule is that any subsequent disability benefits to which

the employee is entitled may be awarded to the employee without crediting the employer for the disability payments made under Section 97-31, although in certain situations, maximum periods of payment may apply. *See* N.C.G.S. § 97-35 (1991) (where permanent disability award is followed by Section 97-31 award in the same employment, employee limited to 500 weeks compensation). This rule applies whether the same body part that was the basis of a prior Section 97-31 award or a different body part is involved in the subsequent injury. However, where a permanently and totally disabling injury occurs *during* the period of time when the employee is entitled to partial disability benefits pursuant to Section 97-31, the employee is precluded from simultaneously receiving a Section 97-31 and a Section 97-29 award. N.C.G.S. § 97-34 (1991). Therefore, to the extent that plaintiff's Section 97-29 award overlaps with the benefits he received under Section 97-31, the Industrial Commission must adjust plaintiff's compensation to comply with Section 97-34. *See Smith*, 51 N.C. App. at 490, 277 S.E.2d at 89-90 (stacking of total benefits on top of partial benefits, for the same period, is not authorized by the Act).

II

Apportionment

[2] Although the general rule in workers' compensation law is that "an employer takes the employee as he finds her with all her pre-existing infirmities and weaknesses," *Morrison v. Burlington Indus., Inc.*, 304 N.C. 1, 18, 282 S.E.2d 458, 470 (1981), apportionment of compensation awards between an employer and an employee is recognized in a handful of states. *Larson* at § 59.21. In this context, apportionment means that "an employee with a prior disability receives for a subsequent disability only what he would have been entitled to for the latter disability considered alone." *Id.* North Carolina's Workers' Compensation Act contains two provisions for apportionment of disability awards. First, N.C.G.S. § 97-33 provides for "prorating" of a disability award for permanent injury, such as specified in Section 97-31, and prior disability resulting from epilepsy, injuries sustained in certain military service, or injuries sustained in another employment. *Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 256, 221 S.E.2d 355, 357 (1976). Second, N.C.G.S. § 97-35 provides that, where "an employee has previously incurred permanent partial disability through the loss of a hand, arm, foot, leg, or eye, and by subsequent accident incurs total permanent

disability through the loss of another member, the employer's liability is for the subsequent injury only."[1]

The Act does not provide, however, for apportionment in the case of successive injuries (other than as specified in Section 97-35) sustained by an employee in the same employment, regardless of whether or not the employee received compensation for the prior injury. *See Bailey v. Smoky Mt. Enters., Inc.*, 65 N.C. App. 134, 308 S.E.2d 489 (1983), *disc. rev. denied*, 311 N.C. 303, 317 S.E.2d 678 (1984) (Section 97-33 did not require apportionment where employee received successive Section 97-31 awards for injury to the back). Consistent with the Legislature's failure to mandate apportionment in such a case, Section 97-35 provides that an employee who receives a permanent injury compensable under Section 97-31, after having received another permanent injury in the same employment, is entitled to compensation for *both* injuries. N.C.G.S. § 97-35 (1991). Furthermore, because an employee sustaining an injury scheduled in Section 97-31 which renders him permanently and totally disabled may now elect to instead recover compensation under Section 97-29, *Whitley v. Columbia Lumber Mfg. Co.*, 318 N.C. 89, 96, 348 S.E.2d 336, 340 (1986), we read Section 97-35 as allowing recovery for successive permanent injuries in the same employment even when the employee is compensated for the subsequent injury under Section 97-29 instead of Section 97-31. In such a case, the provision in Section 97-35 limiting the period of recovery to 500 weeks would not apply since, unlike in the case of awards under Sections 97-31 and 97-30, no maximum period of recovery is set forth in Section 97-29.

In addition to the types of apportionment authorized in the Act, apportionment has also been allowed by our Courts when a non-work-related disease or infirmity actually *causes* part of the employee's total disability.[2] *See Morrison*, 304 N.C. at 18, 282

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1. Apportionment as provided for in Section 97-33 and Section 97-35, however, is covered under the Act's Second Injury Fund, N.C.G.S. § 97-40.1 (1991). Application of the Second Injury Fund statute in effect apportions the disability award between the employer and the Second Injury Fund, rather than between the employer and the employee, thus reducing the burden that would otherwise fall on the employee due to apportionment of the permanent disability award.

2. Apportionment is not appropriate, however, where a worker's disability results solely from lung disease, which disease is caused in part by occupational factors such as cotton fiber inhalation and in part by cigarette smoke and other non-work-related factors, if the worker's exposure to cotton dust significantly con-

S.E.2d at 470 (apportionment required where incapacity for work is caused in part by pre-existing, nondisabling, non-job-related diseases or infirmities, such as lung disease caused by smoking, bronchitis, and diabetes, without acceleration or aggravation by a compensable accident, and in part by lung disease resulting from work-related inhalation of cotton fibers); *Hansel v. Sherman Textiles*, 304 N.C. 44, 283 S.E.2d 101 (1981) (applying apportionment rule established in *Morrison*); *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 354 S.E.2d 477 (1987) (nothing in the Workers' Compensation Act prohibited the apportionment of an award where only a portion of claimant's total disability was caused by his work-related heart attack and the remaining disability was caused by two non-work-related heart attacks); *Pitman v. Feldspar Corp.*, 87 N.C. App. 208, 360 S.E.2d 696 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988) (where evidence showed that a portion of employee's total disability was caused by several medical conditions unrelated to employment, *Morrison* apportionment rule applied). However, where an employee sustains a compensable injury which merely aggravates or accelerates a pre-existing disease or infirmity, no apportionment is permitted. *See Morrison*, 304 N.C. at 15, 282 S.E.2d at 468 (quoting *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 374, 64 S.E.2d 265, 267 (1951)) (when an employee with a pre-existing disease or infirmity sustains a compensable injury by accident which "materially accelerates or aggravates the pre-existing disease or infirmity" and contributes to the employee's disability, "the injury is compensable, even though it would not have caused death or disability to a normal person").

The question therefore is, since the Act contains no provision allowing it, whether our case law authorizes apportionment in situations like that of plaintiff. In keeping with the requirement of construing workers' compensation law in favor of the claimant, and compensability, *Chandler v. Nello L. Teer Co.*, 53 N.C. App. 766, 768, 281 S.E.2d 718, 719 (1981), *aff'd*, 305 N.C. 292, 287 S.E.2d 890 (1982), we conclude that it does not. The facts pertaining to plaintiff's total disability are inconsistent with every situation in which our Courts have previously permitted apportionment of a permanent total award. First, the evidence established that plain-

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tributed to the disease's development, and the worker's occupation exposed the worker to a greater risk of contracting the disease than the general public. *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983).

tiff's pre-existing infirmity, if any, was *work-related.* Second, plaintiff's pre-existing infirmity, if anything, was *aggravated* by plaintiff's subsequent 1986 back injuries; the pre-existing infirmity, in and of itself, did not actually *cause* any portion of plaintiff's total disability. As such, plaintiff's situation is distinguishable from those situations in which judicial apportionment has been applied. However, even if we were to conclude that apportionment was required in this case, defendant effectively concedes that it would be impossible to apportion that part of plaintiff's disability which was caused by his second back injuries as opposed to his first. In this event, any attempt at apportionment would be speculative, thus entitling the employee to an award for his entire disability. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985).

For the foregoing reasons, the Industrial Commission's decision awarding plaintiff compensation for permanent and total disability, without a credit to defendant for its prior payments pursuant to Section 97-31, and without apportionment, is affirmed. However, we remand for a determination, consistent with this opinion, of whether plaintiff's compensation must be adjusted due to any overlap between the periods of payment for the Section 97-31 and Section 97-29 awards.

Affirmed and remanded.

Judges PARKER and WYNN concur.

STATE OF NORTH CAROLINA v. RODNEY WENDELL HILL AND RICKY HILL

No. 912SC232

(Filed 3 March 1992)

1. Criminal Law § 449 (NCI4th)— race of defendants and victim— references by court and attorneys—no plain error

There was no merit to the black defendants' contention that references to a murder victim as white by the prosecutor, the trial court and one defendant's counsel allowed the issue of race to dominate defendants' trial and constituted plain error, since the evidence supported the jury's conclusion that

both defendants were guilty of second degree murder; there was no indication that the particular references to the race of the parties had a probable impact on the jury's finding that defendants were guilty; and the record shows that, with regard to each reference set forth by defendants as error, the prosecutor, the court, or the defense attorney was responding to a witness who identified the persons about whom they were testifying by color.

Am Jur 2d, Trial §§ 276, 661.

2. Criminal Law § 382 (NCI4th)— questions by court—no expressions of opinion

The trial court did not improperly express or imply an opinion as to defendants' guilt by questions tendered to several witnesses where the court's questions were clearly attempts to clarify confusing remarks made by both prosecution and defense witnesses.

Am Jur 2d, Trial §§ 274, 294.

3. Evidence and Witnesses § 763 (NCI4th)— meaning of certain words—testimony improper—error cured by other proper testimony

Any error of the trial court in allowing a witness to testify as to what defendant meant when he said, in referring to the murder victim, "we can take him," or "let's get him," was harmless error where there was other proper evidence supporting the conclusion that "let's get him" meant "let's rob him."

Am Jur 2d, Witnesses § 434.

4. Homicide § 375 (NCI4th)— second degree murder—acting in concert—sufficiency of evidence

There was sufficient evidence to convict one defendant of second degree murder under the theory of acting in concert where the evidence was sufficient to permit the jury to find that both defendants and a third person, pursuant to a plan or scheme to commit a crime against the victim, whether it was to rob him or physically assault him, walked across the parking lot from a convenience store to where the victim was sitting on his bike; one defendant hit the victim, causing him to fall from his bike; the victim pulled a gun out of his coat;

and the other defendant took the gun from the victim and shot and killed him.

Am Jur 2d, Homicide §§ 28, 29, 425.

5. **Criminal Law § 708 (NCI4th)— flight of defendant—erroneous instruction—harmless**

The trial court's error in instructing the jury that flight of the accused was some evidence of guilt when there was no evidence to support such an instruction was harmless error in light of all other evidence concerning defendant's guilt.

Am Jur 2d, Trial § 1333.

6. **Homicide § 550 (NCI4th)— murder prosecution—no lesser included offense of misdemeanor assault**

The trial court in a murder prosecution did not err in refusing to submit to the jury the lesser included offense of misdemeanor assault where the State presented ample positive evidence of second degree murder, and defendant's only defense was that he committed no crime at all.

Am Jur 2d, Homicide § 530.

7. **Criminal Law § 1081 (NCI4th)— three mitigating factors outweighed by one aggravating factor—sentence beyond presumptive term proper**

The trial court did not err in finding that one factor in aggravation, that defendant induced another to participate in the commission of a crime which resulted in the death of the victim, outweighed three mitigating factors, including defendant's good character in the community and that the victim himself brought the sawed-off shotgun to the scene of the crime, and the court therefore did not abuse its discretion in imposing a sentence in excess of the presumptive term.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendants from *Griffin (William C., Jr.), Judge.* Judgment entered 12 September 1990 in the Superior Court, MARTIN County. Heard in the Court of Appeals 8 January 1992.

Defendants were charged in a proper bill of indictment with the murder of Jay Priddyman. Although the witnesses at trial offered conflicting testimony, the evidence, taken in the light most

favorable to the State, tends to show that at approximately 11:00 p.m. on 5 December 1989, Jay Priddyman rode a bicycle to a location in Williamston, North Carolina known as "Moore's Corner." A convenience store and a parking lot were located on this corner. Priddyman stopped his bicycle and sat on it near a telephone pole located on the edge of the parking lot.

State witness Kenneth Brown testified that he drove to Moore's store that evening and saw Priddyman sitting on his bicycle. Defendant Ricky Hill walked over to Brown's car and said "something [to Williams] about robbing [Priddyman]." Williams testified that he then watched as Ricky and Rodney Hill and George Rucker walked over to Priddyman and began struggling with him. After a few minutes, Williams heard a gunshot and saw Jay Priddyman fall from his bike. Williams also saw Rodney Hill holding a gun.

State witness Danny Brown testified that he and George Rucker drove to Moore's corner around 11:00 p.m. that same evening. Brown stated that when he arrived, Priddyman was sitting on his bicycle near the telephone pole and Ricky and Rodney Hill were standing near the convenience store. According to Brown, Ricky walked over to the car wherein Brown and George Rucker were sitting and said "the white guy over there we can take him . . ." and "[l]et's get him." George Rucker also stated to Danny Brown "we're going to . . . take this white guy. We're going to rob him." Al Freddy Whitley testified that he saw Ricky and Rodney Hill along with George Rucker walk across the parking lot to the telephone pole where Priddyman was standing and, within a few minutes, he heard a gunshot.

According to the testimony of George Rucker, when he and Ricky walked over to Priddyman, Ricky Hill hit Priddyman in the face several times, knocking him off his bicycle. After he was on the ground, Priddyman pulled a gun out of his coat. Rodney and Rucker both struggled to take the gun away from Priddyman. Rodney eventually took control of the gun and shot Priddyman. A pathologist testified that Priddyman died as a result of a shotgun wound to the chest.

The jury found both Ricky and Rodney Hill guilty of second degree murder. Judge Griffin sentenced Rodney to forty (40) years imprisonment and sentenced Ricky to thirty (30) years imprisonment. Both defendants appeal from the judgment.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General W. Dale Talbert, for the State.

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

J. Melvin Bowen for defendant, appellant Ricky Hill.

HEDRICK, Chief Judge.

[1] Defendants first contend that the trial court committed reversible error by "allowing the issue of race to dominate the defendants' trial" and by questioning various witnesses in a manner which defendants argue violated their right to a fair trial. Both defendants are black males and the victim, Jay Priddyman, was a white male. Throughout the trial, the prosecutor repeatedly referred to Priddyman as "the white man" and the trial judge also referenced the victim by color on two occasions. It is important to note that defendant Ricky Hill's attorney also referred to Mr. Priddyman as "a white dude" and as a "white male" throughout his cross-examination of the State's witnesses. No objection was addressed to the trial court by either defendant concerning these references and they now argue that this Court should nevertheless review the alleged improper remarks as plain error.

The plain error rule as adopted by our Supreme Court in *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983), allows an appellate court to notice "plain errors or defects affecting substantial rights . . . not brought to the attention of the [trial] court." *Id.*, at 660, 300 S.E.2d at 378, *quoting* Rule 52(b) of the Federal Rules of Civil Procedure. The rule must be applied cautiously, however, and "only in the exceptional case where, after reviewing the entire record, it can be said that the claimed error is a *fundamental* error, something so basic, so prejudicial, so lacking in its elements that justice cannot have been done . . . ." *State v. Odom*, 307 N.C. at 660, 300 S.E.2d at 378, *quoting United States v. McCaskill*, 676 F.2d 995, 1002 (4th Cir. 1982). Further, the record must indicate that the error ". . . had a probable impact on the jury's finding that the defendant was guilty." *State v. Black*, 308 N.C. 736, 741, 303 S.E.2d 804, 807 (1983).

As further discussed below, the evidence in this case supports the jury's conclusion that both defendants are guilty of second

degree murder. There is no indication that the particular references to the race of the parties about which defendants now complain "had a probable impact on the jury's finding that the defendant[s] [were] guilty." The record shows that, with regard to each reference set forth by defendants as error, the prosecutor, the court, or the defense attorney was responding to a witness who identified the persons about whom they were testifying by color. Allowing such a method of identification by witnesses did not cause the issue of race to improperly "dominate the defendants' trial."

[2] There is also no indication within the record that the questions tendered by the trial court to several witnesses improperly expressed or implied an opinion by the court as to the defendants' guilt. G.S. 8C-1, Rule 614(b) specifically allows the court to interrogate witnesses, whether called by itself or by a party, and our Supreme Court has held that "[i]t is proper for a trial judge to direct questions to a witness which are designed to clarify or promote a better understanding of the testimony being given." *State v. Hunt*, 297 N.C. 258, 263, 254 S.E.2d 591, 596 (1979). While we recognize that a trial judge can very easily and unwittingly influence a jury by seemingly impartial remarks and should, therefore, exercise the greatest restraint in his comments, *State v. Staley*, 292 N.C. 160, 162-163, 232 S.E.2d 680, 682-683 (1977), the five instances referenced by defendants herein were clearly attempts by the court to clarify confusing remarks made by both prosecution and defense witnesses. Even assuming *arguendo* that the questions of the court cast some negative inference concerning the credibility of a particular witness, defendants make no effort to show any effect such inference had upon the result of the trial. *See State v. Perry*, 231 N.C. 467, 57 S.E.2d 774 (1950); *State v. Cole*, 14 N.C. App. 733, 189 S.E.2d 510 (1972).

[3] Defendants next contend that the trial court erred in allowing State's witnesses Rucker and Brown to testify over objection concerning what defendant Ricky Hill meant by references to "taking" the victim. Specifically, on direct examination, Mr. Rucker stated, "[Ricky Hill] . . . told me um, there was a white guy, he was out there with a saw off [sic] and then he said let's get him." The prosecutor asked Mr. Rucker, "What did he mean by that?" and Mr. Rucker replied, "Rob him, I guess." Mr. Brown then testified that Ricky Hill stated, ". . . the white guy over there we can take him, you know," to which the prosecutor responded by asking,

"What do you think he meant by that?" Mr. Brown answered, "That they was going to rob him."

We agree that the question "[w]hat did he mean by that?" addressed to Mr. Rucker was improper in that it did not address the opinion of Mr. Rucker, and Mr. Rucker had no personal knowledge of Ricky Hill's meaning at the time Hill made this statement. G.S. 8C-1, Rule 602. It was proper, however, to ask Mr. Brown "[w]hat do you think he meant by that?" as the question was addressed to the personal perception of the witness and Mr. Brown's response was helpful to a clear understanding of the rest of his testimony. G.S. 8C-1, Rule 710; *State v. McElroy*, 326 N.C. 752, 392 S.E.2d 67 (1990). Any error in allowing Mr. Rucker to answer the improper question must therefore be harmless error in that there was other proper evidence supporting the conclusion that "let's get him" meant "let's rob him." *See State v. Torres*, 322 N.C. 440, 368 S.E.2d 609 (1988).

Further, Ricky Hill's statements alone, without any type of clarification by these witnesses, would allow the jury to conclude that Ricky had planned to commit a crime against Mr. Priddyman prior to the time that the codefendants and Rucker walked across the parking lot to where Priddyman was standing prior to the shooting. As discussed below, it is of no consequence whether the intended crime was robbery or assault.

[4] Defendant Ricky Hill next argues that the trial court erred in denying his motion to dismiss the charges against him at the close of the evidence as there was insufficient evidence to convict him of murder. Second degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Jones*, 287 N.C. 84, 214 S.E.2d 24 (1975). It is well settled in this State that a defendant may be convicted of a crime if he is present at the scene of the crime and evidence is sufficient to show he is acting together with another who does the act necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Giles*, 83 N.C. App. 487, 490, 350 S.E.2d 868, 870 (1986), *disc. rev. denied*, 319 N.C. 460, 356 S.E.2d 8 (1987); *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395-396 (1979). Further, "if two [or more] persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the

other in pursuance of the common purpose." *State v. Westbrook*, 279 N.C. 18, 41, 181 S.E.2d 572, 586 (1971), *death penalty vacated*, 408 U.S. 939, 33 L.Ed.2d 761 (1972). *See State v. Oliver*, 302 N.C. 28, 55, 274 S.E.2d 183, 200 (1981); *State v. Joyner*, 297 N.C. at 357-358, 255 S.E.2d at 395-396.

The evidence in this case is sufficient to permit the jury to find that both defendants and George Rucker, pursuant to a plan or scheme to commit a crime against Jay Priddyman, whether it was to rob him or physically assault him, walked across the parking lot from the convenience store to where Priddyman was sitting on his bike. Ricky Hill hit Priddyman, causing him to fall from his bike. Priddyman pulled a gun out of his coat and Rodney Hill took the gun from him and shot and killed Priddyman. We hold that these facts, when found by the jury, are sufficient to support a verdict that defendant Ricky Hill is guilty of second degree murder.

[5] Defendant Ricky Hill next contends that he is entitled to a new trial due to the trial court's error in instructing the jury that flight of the accused is some evidence of guilt when there was no evidence to support such an instruction. Although it is the rule in North Carolina that the flight of a defendant may be considered by the jury as some evidence of guilt, *State v. Lampkins*, 283 N.C. 520, 523, 196 S.E.2d 697, 698 (1973), no instruction should be given "which [is] not based upon a statement of facts presented by some reasonable view of the evidence." *Id.*, at 523, 196 S.E.2d at 699. Erroneous instructions, when prejudicial, entitle a defendant to a new trial. *Id., citing State v. McClain*, 282 N.C. 396, 193 S.E.2d 113 (1972); *State v. McCoy*, 236 N.C. 121, 71 S.E.2d 921 (1952); *State v. Wilson*, 104 N.C. 868, 10 S.E. 315 (1889).

The evidence shows that defendant Ricky Hill remained at the site of the crime for some time after the actual shooting occurred. Although he admitted that he was not present at the scene when police arrived, Ricky Hill took the time to speak with several persons who had observed the incident and to tell them that he had tried to stop the shooting. Ricky also requested that the police be called to the scene. Further, police arrested Ricky Hill at his place of residence the evening following the killing and there was nothing to indicate that he had deviated from his normal daily routine in any way.

The record is devoid of any indication that Ricky Hill fled following the commission of this crime. We cannot say, however, that this erroneous instruction caused prejudice to defendant Ricky Hill. The trial court instructed the jury as to both Ricky and Rodney Hill as follows:

> In this case, members of the jury, as you have been told the state contends that the defendant fled. Evidence of flight may be considered by you with all other facts and circumstances in this case in determining whether the combined circumstances amount to admission or show a consciousness of guilt. However, proof of this circumstance is not sufficient to establish either Defendants' guilt.

The court did not indicate by this instruction that there was in fact evidence to support the State's contention of flight with regard to Ricky. Further, in light of the sufficiency of all other evidence concerning Ricky's guilt, there is no reason to believe that the result of the trial would have been different had this instruction not been given. Any error was therefore harmless error. G.S. 15A-1443(a). *See State v. Ruffin*, 90 N.C. App. 705, 710, 370 S.E.2d 275, 278 (1988).

[6] Defendant Ricky Hill further argues that the trial court erred in refusing to submit to the jury the lesser included offense of misdemeanor assault. Several witnesses testified that Ricky hit the victim and caused him to fall from his bicycle prior to the shooting. Ricky Hill, however, denied that he touched Priddyman.

A trial court is required to submit to the jury a lesser included offense only when there is evidence from which the jury could find that the defendant committed the lesser included offense. *State v. Maness*, 321 N.C. 454, 460, 364 S.E.2d 349, 353 (1988), *citing State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982). When the State's evidence is positive as to each element of the crime charged and the defendant offers no evidence to negate these elements other than his denial of the commission of any crime, submission of the lesser included offense is not required. *Id.; State v. Williams*, 315 N.C. 310, 321-322, 338 S.E.2d 75, 83 (1986). The State presented ample positive evidence of the crime for which Ricky was convicted and his only defense was that he committed no crime at all. The trial court did not err in refusing to submit an assault instruction.

[7] Ricky Hill's final contention is that the trial court erred in finding that one factor in aggravation outweighed three factors in mitigation during the sentencing phase of the trial. The court imposed a 30 year sentence upon Ricky which exceeds the presumptive sentence for second degree murder by fifteen years. G.S. 15A-1340.4(f)(1). The trial judge made written findings in mitigation that Ricky Hill had no record of prior criminal convictions, that he had been a person of good character in the community, and that the victim had introduced the weapon which ultimately resulted in his death. In aggravation, however, the court made a written nonstatutory finding that Ricky Hill induced another to participate in the commission of a crime which resulted in the death of the victim. Defendant does not argue that this finding in aggravation was not supported by the evidence. Rather, Ricky argues that the trial judge abused his discretion in finding that the one factor in aggravation outweighed those found in mitigation.

The Fair Sentencing Act requires that a sentencing judge justify a sentence which deviates from a presumptive term to the extent that he must make findings in aggravation and mitigation properly supported by a preponderance of the evidence. *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985), *citing State v. Ahearn*, 307 N.C. 584, 596, 300 S.E.2d 689, 696-697 (1983). The judge is not required to justify the weight he or she attaches to any particular factor, *id.*, and it is within the court's discretion to either increase or decrease a sentence from the presumptive term based upon its conclusion that the factors in aggravation outweigh factors in mitigation or visa versa. *Id.* The balance struck by the sentencing judge in weighing the factors will not be disturbed by an appellate court unless it is "manifestly unsupported by reason," *White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985), or "so arbitrary that it could not have been the result of a reasoned decision." *State v. Wilson*, 313 N.C. 516, 538, 330 S.E.2d 450, 465 (1985).

We are compelled to conclude that the sentencing judge did not abuse his discretion in imposing a sentence in excess of the presumptive term. While the findings concerning defendant Ricky Hill's good character in the community and that the victim himself brought the sawed-off shotgun to the scene of the crime may be significant, "they do not tilt the scales so heavily in defendant's favor that the weighing process was removed from the sentencing judge's discretion and determinable as a matter of law." *State v. Parker*, 315 N.C. at 259, 337 S.E.2d at 503.

Regarding the appeal of both defendants, we find no error.

No error.

Judges WELLS and JOHNSON concur.

LELAND M. NEWSOME AND WELDON HALL, PLAINTIFFS v. NORTH CAROLINA STATE BOARD OF ELECTIONS; M. H. HOOD ELLIS, CHAIRMAN, GREGG O. ALLEN, WILLIAM A. MARSH, RUTH TURNER, JUNE K. YOUNGBLOOD, MEMBERS, STATE BOARD OF ELECTIONS; AND ALEX K. BROCK, EXECUTIVE SECRETARY-DIRECTOR, STATE BOARD OF ELECTIONS, DEFENDANTS, AND WILLIAM BURNETTE, MARIAN LANGFORD HARKINS, HAROLD HUNT, CLAUDE B. MARSHALL, SAMUEL B. McGINN, JR., DAVID MORGAN, JUDY PERKINS, CHARLOTTE DEMENT TIPPETT AND STELLA TRIPP, INTERVENING DEFENDANTS

No. 9110SC25

(Filed 3 March 1992)

1. **Appeal and Error § 440 (NCI4th)— reply brief—new matters in appellees' brief—reply considered**

The Court of Appeals denied the appellees' motion to dismiss the appellants' reply brief where the matters appellees argued in their brief did not arise naturally and logically from the record and question presented. N.C.R. App. P. 28(h).

Am Jur 2d, Appeal and Error § 689.

2. **Appeal and Error § 168 (NCI4th)— authority to call special election—new town board members seated—action not moot**

A challenge to the State Board of Elections' authority to call a special election and the procedures employed by the Board was not moot even though the new town board members had been seated where appellants did not dispute the election or its results, but rather challenged the State Board's authority to call the special election and the procedures employed by the Board.

Am Jur 2d, Appeal and Error §§ 761-763, 769.

3. Elections § 93 (NCI4th)— municipal election—delay in obtaining approval of United States Attorney General—authority of Board to hold election

The State Board of Elections had the authority to hold a special municipal election where the General Assembly ratified an act to incorporate the Town of North Topsail Beach; an election was to be held within a defined period to submit to the qualified voters of the area the question of incorporation; the act named the persons to serve as the initial mayor and aldermen until their successors were elected in the 1989 regular municipal election; the Onslow County Board of Elections began the preclearance process under the Voting Rights Act of 1965 with a written submission to the United States Attorney General; the Attorney General responded by letter requesting additional information; the additional material was sent, but the referendum did not occur because the preclearance was still pending; the preclearance was obtained and the special election was rescheduled for January 1990; the vote favored incorporation; the State Board of Elections entered an order directing the Onslow County Board of Elections to conduct an election for members of the governing body of the Town of North Topsail Beach; and this action was filed by two of the appointed members of the Town's Board of Aldermen. Although it was contended that the State Board of Elections had no authority to proceed under N.C.G.S. § 163-22.2 because the United States Attorney General never interposed an objection, the effect of an improper submission is tantamount to an objection by the Attorney General and is sufficient to authorize the State Board to intervene under its broad, remedial authority in the statute.

Am Jur 2d, Elections §§ 57, 115.

Requirements under sec. 5 of Voting Rights Act of 1965 (42 USCS sec. 1973c) and implementing regulations that state or political subdivision changing voting procedures seek federal approval—Supreme Court cases. 70 L. Ed. 2d 915.

4. Elections § 93 (NCI4th)— special election—Administrative Procedure Act—exemption

The State Board of Elections did not err by not following the procedures specified by the Administrative Procedure Act in calling a special election because N.C.G.S. § 163-22.2 contains

a grant of authority, limited to certain defined situations and with a time limitation, which exempted appellees from the rule making procedures of the A.P.A.

Am Jur 2d, Elections §§ 44, 45, 183, 184.

5. Elections § 93 (NCI4th)— special election—convening of General Assembly—authority of Board Elections

The action of the State Board of Elections in ordering a special election was not null and void under N.C.G.S. § 163-22.2, which gives the Board the authority to make interim rules and regulations for certain pending elections which become void 60 days after the convening of the next regular session of the General Assembly, because the session of the General Assembly which convened in 1990 was a short session, a continuation of the 1989 regular session.

Am Jur 2d, Elections §§ 44, 45, 183, 184.

APPEAL by plaintiffs from judgment entered 29 October 1990 in WAKE County Superior Court by *Judge George R. Greene*. Heard in the Court of Appeals 14 October 1991.

Tharrington, Smith & Hargrove, by Michael Crowell, for plaintiffs-appellants.

North Carolina Department of Justice, by Charles M. Hensey, for defendants-appellees.

Johnson, Gamble, Mercer, Hearn & Vinegar, by Charles H. Mercer, Jr., and M. Blen Gee, Jr., for intervening defendants-appellees.

WYNN, Judge.

On 11 May 1989, the General Assembly ratified Senate Bill 335: "An Act to Incorporate the Town of North Topsail Beach, Subject to a Referendum." 1989 N.C. Sess. Laws Ch. 100. The Act described an area north of the Town of Surf City on Topsail Island in Onslow County to be included within the boundaries of the new town; it established the structure of the governing body to consist of a mayor and a five member Board of Aldermen; and named the persons to serve as the initial mayor and aldermen until their successors were elected in the 1989 regular municipal election. The Act also provided that "the Onslow County Board

of Elections shall conduct an election on a date set by it, to be not less than 60 nor more than 120 days after the date of ratification of this act, for the purpose of submission to the qualified voters of the area . . . the question of whether or not such area shall be incorporated as North Topsail Beach."

On 23 May 1989, the Onslow County Board of Elections set 5 September 1989, as the date to conduct the incorporation election. This date was 117 days after the date of ratification of Chapter 100.

Onslow County is subject to the provisions of Section 5 of the federal Voting Rights Act of 1965, 42 U.S.C. § 1973c (1988). Section 5 of the Act prohibits enforcement of any change in election practice or procedure in a covered jurisdiction until it is precleared by the United States Attorney General or the United States District Court for the District of Columbia. *Id.*

In May 1989, the Onslow County Board of Elections began the preclearance process by a written submission to the United States Attorney General. The Attorney General responded by letter to the Onslow County Board of Elections on 31 July 1989: "Our analysis indicates that the information sent is insufficient to enable us to determine that the proposed changes do not have the purpose and will not have the effect of denying or abridging the right to vote on account of race or color." The letter requested the county board to provide certain additional information about its submission. The letter also contained the following statement:

> The Attorney General has sixty days in which to consider a completed submission pursuant to Section 5. This sixty-day review period will begin when this Department receives the information necessary for the proper evaluation of the change you have submitted. See the procedures for the Administration of Section 5 (28 C.F.R. 51.37(a)). Further, you should be aware that if no response is received within sixty days of this request, the Attorney General may object to the proposed change consistent with the burden of proof placed upon the submitting authority.

On 10 and 15 August 1989, the Onslow County Board of Elections sent additional information to the Attorney General. Because the Attorney General's actions on preclearance were still pending, the 5 September 1989 referendum did not occur; and, on 13 October 1989, the Attorney General wrote the Onslow County Board of

Elections: "You have advised us that the county did not conduct the September 5, 1989, special election. Accordingly, no determination by the Attorney General is required or appropriate with regard to that special election schedule and procedures . . . ." The letter also stated, "The Attorney General does not interpose any objections to the remaining changes in question."

The special election was rescheduled by the Onslow County Board of Elections with the approval of the State Board of Elections, precleared by the Attorney General by letter dated 27 December 1989, and held on 16 January 1990. The resulting vote favoring incorporation was certified on 18 January 1990.

The mayor and aldermen named in Chapter 100 took office on 24 January 1990. Thereafter, on 17 May 1990, the Onslow County Board of Elections provided to the State Board of Elections certified petitions containing the names of 142 of the 213 registered voters of the Town of North Topsail Beach requesting an election of town officers to be held "as soon as possible." The petitions sought the election "in view of the fact that the regular municipal election was not conducted when scheduled due to an objection entered by the U.S. Department of Justice."

At its meeting of 21 May 1990, the State Board of Elections unanimously adopted a motion ordering "an election consistent with authority in G.S. 163-22.2 on a day and date contained in a schedule that will provide ample time for submission to the U.S. Department of Justice for preclearance and comply with all preliminary provisions contained in Chapter 163 of the General Statutes of North Carolina." The State Board of Elections then entered an order directing the Onslow County Board of Elections to conduct an election for members of the governing body of the Town of Topsail Beach on 18 September 1990. The United States Attorney General precleared this election.

This action was filed by plaintiffs, two Chapter 100 appointed incumbent members of the Board of Aldermen of the Town of North Topsail Beach. Shortly thereafter, the additional defendants, one other incumbent alderman and eight candidates for the 18 September election, were allowed to intervene. Following a denial of the plaintiffs' motion to enjoin the 18 September election, a hearing on the merits was held on 12 October 1990 and judgment was entered against plaintiffs as follows: (1) the decisions and order of the State Board of Elections were fully authorized by and in

accord with law, (2) the 18 September 1990 election was valid, and (3) the election results could be certified. From this judgment, plaintiffs appealed.

I.

[1] Before considering the merits of appellants' arguments, we must address defendants-appellees' motion, made to this Court, to dismiss appellants' reply brief. Appellees contend that this Court should not consider the reply brief since appellees did not present additional or new questions for review, and the case was argued orally before this Court.

Rule 28(h) governs reply briefs and specifies that "[u]nless the court, on its own initiative, orders a reply brief to be filed and served, none will be received or considered by the court" unless an "appellee has presented in its brief new or additional questions as permitted by Rule 28(c)" or "the parties are notified under Rule 30(f) that the case will be submitted without oral argument." N.C.R. App. P. 28(h) (1991). A reply brief is "intended to be a vehicle for responding to matters raised in the appellees' brief" and is "not intended to be—and may not serve as—a means for raising entirely new matters." *Animal Protection Society v. North Carolina*, 95 N.C. App. 258, 269, 382 S.E.2d 801, 807 (1989).

In this case, appellants, in their reply brief, responded to two new issues raised in the briefs by defendants-appellees and intervening defendants-appellees. These issues concerned whether the appeal was moot and whether the plaintiffs lacked equity. Although appellees claim that they have adopted verbatim the question presented by appellants, the matters they argue in their brief do not arise naturally and logically from the record and question presented. We, therefore, deny appellees' motion to dismiss appellants' reply brief.

II.

[2] Next, prior to reviewing the merits of this case, we also must examine the argument presented by defendants-appellees and intervening defendants-appellees that this appeal is moot. The courts of this State only can rule on justiciable issues. *Poore v. Poore*, 201 N.C. 791, 161 S.E. 532 (1931); *Coastal Concrete Co., Inc. v. Garner*, 81 N.C. App. 523, 344 S.E.2d 376 (1986). Appellees contend that, because the new town board members have been seated, the case is moot and appellants must proceed by bringing a new

action in the nature of *quo warranto. See Cozart v. Fleming*, 123 N.C. 547, 31 S.E. 822 (1898). *Quo warranto*, which was a writ used to try title to an office, has been abolished, N.C. Gen. Stat. § 1-514 (1983), and replaced by a statutory action under N.C. Gen. Stat. § 1-515 (1991). Section 1-515 embodies the substance of the writ and provides, in pertinent part,

> An action may be brought by the Attorney General in the name of the State, upon his own information or upon the complaint of a private party, against the party offending, in the following cases:
>
> (1) When a person usurps, intrudes into, or unlawfully holds or exercises any public office, civil or military, or any franchise within this State, or any office in a corporation created by the authority of this State . . . .

Id. We find appellees' arguments are erroneous since appellants do not dispute the election or its results, but rather they challenge the State Board's authority to call the special election and the procedures employed by the Board. *See Ferguson v. Riddle*, 233 N.C. 54, 62 S.E.2d 525 (1950). We conclude, therefore, that there are justiciable issues presented for our review.

III.

The sole assignment of error raised by appellants concerns the State Board of Elections' authority to call the September 1990 special municipal election. Appellants base their assignment of error on the following: (1) the United States Attorney General never interposed an objection to any election, so the State Board had no authority to proceed under N.C. Gen. Stat. § 163-22.2 (1991); (2) even if there was authority to act, the Board did not follow the procedures specified by the North Carolina Administrative Procedure Act, N.C. Gen. Stat. §§ 150B-1 to 150B-57 (1991); and (3) even if there was authority to act and the resulting rule was procedurally correct, it became null and void sixty days after its promulgation because of the convening of the General Assembly's next regular session. For the reasons which follow, we reject appellants' contentions and affirm the decision of the trial court.

State Board's Authority

[3] Appellants contend that the United States Attorney General never interposed an objection to any election and, therefore, the

State Board had no authority to proceed under N.C. Gen. Stat. § 163-22.2 (1991). Section 163-22.2, in pertinent part, provides:

> In the event any portion of Chapter 163 of the General Statutes or any State election law or form of election of any county board of commissioners, local board of education, or city officer is held unconstitutional or invalid by a State or federal court or is unenforceable because of *objection interposed by the United States Justice Department under the Voting Rights Act of 1965* and such ruling adversely affects the conduct and holding of any pending primary or election, the State Board of Elections shall have authority to make reasonable interim rules and regulations with respect to the pending primary or election as it deems advisable so long as they do not conflict with any provisions of Chapter 163 of the General Statutes and such rules and regulations shall become null and void 60 days after the convening of the next regular session of the General Assembly.

Id. (emphasis added). The phrase "objection interposed" derives from Section 5 of the Voting Rights Act. *See* 42 U.S.C. § 1973c (1988). The Justice Department may interpose an objection if a change in election practice or procedure adversely affects the ability of minority persons to vote or elect candidates. *Beer v. United States*, 425 U.S. 130, 47 L.Ed.2d 629 (1976).

Appellants argue that the trial court disregarded section 163-22.2 in its conclusion of law: "6. N.C. Gen. Stat. § 163-22.2 provides the State Board of Elections with authority to reschedule an election which has been delayed because of the requirements of the Voting Rights Act of 1965." They insist that the State Board's authority exists only when the delay has occurred because of an "objection interposed," as defined under the Voting Rights Act, and not generally "because of the requirements of the Voting Rights Act of 1965."

Unlike criminal statutes or statutes in derogation of the common law which must be construed strictly, *Vogel v. Reed Supply Co.*, 277 N.C. 119, 177 S.E.2d 273 (1970), remedial statutes, such as N.C. Gen. Stat. § 163-22.2, must be construed liberally in the light of the evils sought to be eliminated, the remedies intended to be applied, and the legislative objective, *Burgess v. Joseph Schlitz Brewing Co.*, 298 N.C. 520, 259 S.E.2d 248 (1979); *Puckett v. Sellars*, 235 N.C. 264, 69 S.E.2d 497 (1952). Another tenet of statutory

construction is that the interpretation of a statute given by the regulatory agency involved, here the State Board of Elections, should be accorded considerable weight. *See Commissioner of Insurance v. North Carolina Automobile Rate Administration*, 294 N.C. 60, 241 S.E.2d 324 (1978).

We find, in the case at bar, that the Onslow County Board of Elections was unable to conduct the 5 September referendum because the United States Attorney General had not given his approval. The failure to preclear or approve, although it did not result from an articulated objection, had the same effect as if an objection had been interposed: The election was not conducted within the time mandated by Chapter 100. The effect of an improper submission is, therefore, tantamount to an objection by the Attorney General and sufficient to authorize the State Board to intervene under its broad, remedial authority in section 163-22.2.

The State Board, in its order, also carried out the clear intention of the General Assembly as evidenced in Chapter 100. This Act carefully structured the manner in which the town would be created. Delay in bringing the town into existence did not change the intent expressed in Chapter 100 to have a municipal election within a few months after a favorable vote on incorporation. Based on the foregoing, we disagree with appellants' arguments on this issue.

Procedural Defects

[4] Appellants further contend that even if the State Board of Elections had authority to proceed under N.C. Gen. Stat. § 163-22.2, the Board failed to follow the procedures specified by the North Carolina Administrative Procedure Act ("A.P.A."), N.C. Gen. Stat. §§ 150B-1 to 150-57 (1991), in their 21 May 1990 order calling the special election. We disagree.

The relevant provision of the A.P.A. in effect at the time of the Board's action provided: "This Chapter shall apply to every agency, as defined in G.S. 150B-2(1), except to the extent and in the particulars that any statute . . . makes specific provisions to the contrary." N.C. Gen. Stat. 150B-1(c) (1990) (repealed); *see* 1991 N.C. Sess. Laws ch. 418, § 17 (amendments to A.P.A. effective on 1 October 1991). Section 163-22.2 did contain "specific provisions to the contrary" and granted the Board the "authority to make reasonable interim rules and regulations" that became "null and

void 60 days after the convening of the next regular session of the General Assembly." This grant of authority, limited to certain defined situations and with a time limitation, exempted appellees from the rule making procedures of the A.P.A. We, therefore, find that the trial court did not err in concluding that the Board acted in accordance with the law regarding the 21 May 1990 order.

Regular Session of the General Assembly

[5] Finally, appellants argue that even if the Board had authority to act and did not violate the A.P.A., their action became null and void sixty days after its promulgation because of the convening of the General Assembly's next regular session. We disagree.

The Constitution of North Carolina provides: "The General Assembly shall meet in regular session in 1973 and every two years thereafter on the day prescribed by law." N.C. Const. art. II, § 11(1). *See Atkins v. Fortner*, 236 N.C. 264, 268, 72 S.E.2d 594, 596 (1952); *Garrou Knitting Mills v. Gill*, 228 N.C. 764, 765, 47 S.E.2d 240, 240 (1948). Under the directive in section 11(1), there are "regular" sessions of the General Assembly in the odd-numbered years after 1973. When the State Board ordered the special election in 1990, an even-numbered year, there was no "regular" session. The session of the General Assembly held in 1990 was a continuation of the 1989 "regular" session, commonly termed a "short" session, in which only a limited number of matters are considered. *See* H.R.J. Res. 34, 138th Leg., First Sess., 1989 N.C. Sess. 3064. Based on the foregoing, we find that the action by the Board was not null and void under N.C. Gen. Stat. § 163-22.2.

Based on our disposition of the issues in this case, we need not address appellants' remaining assignments of error. The decision of the trial court is,

Affirmed.

Judges WELLS and PARKER concur.

COOK v. MORRISON

[105 N.C. App. 509 (1992)]

SHARON R. COOK, EXECUTRIX OF THE ESTATE OF EVERETT E. COOK, PLAINTIFF v. JAMES MONROE MORRISON D/B/A MORRISON SEPTIC TANK AND CONSTRUCTION COMPANY AND DAVID H. OSTEEN, DEFENDANTS

No. 9129SC397

(Filed 3 March 1992)

1. **Master and Servant § 3.1 (NCI3d)— death of worker in trench— liability of developer—independent contractor**

Summary judgment was correctly granted for defendant Osteen in a wrongful death action based on respondeat superior where Osteen bought a piece of real estate which he later decided to develop; defendant was a truck driver by trade and had never built a house as a general contractor other than his own, although he held a residential contractor's license; defendant had an engineer design a sewer system for his property and entered into an oral contract with James Morrison, the sole proprietor of Morrison Construction and Septic Tank Company, to install the system; Morrison hired plaintiff's decedent; and plaintiff's decedent was killed when a trench collapsed during installation of the system. The evidence produced at the summary judgment hearing does not show that defendant retained any right to control and direct the manner in which Morrison executed the details of his task and, to the contrary, shows that Morrison was an independent contractor.

Am Jur 2d, Independent Contractors §§ 6-9.

2. **Negligence § 50 (NCI3d)— developer—contractor's employee killed in trench cave-in—no knowledge of circumstances**

Summary judgment was properly entered for defendant landowner in a wrongful death action arising from the death of a contractor's employee in a trench cave-in where, assuming that the forecast of evidence was sufficient to establish a genuine issue of material fact as to whether the trenching was inherently dangerous, the facts do not show that the defendant knew or should have known of the circumstances creating the danger to which the decedent was exposed. The general rules on the tort liability of owners and occupiers of land to invitees do not apply to the actual work undertaken by independent contractors and their employees. Unless the activity undertaken is inherently dangerous, an owner or oc-

cupier of land who hires an independent contractor is not required to provide employees of the independent contractor a safe place to work nor is he required to take proper safeguards against dangers which may be incident to the work undertaken by the independent contractor. If the activity is inherently dangerous and the owner or occupier of the land knows or should know of the circumstances creating the danger, then the owner or occupier of the land has a nondelegable duty to the independent contractor's employees.

Am Jur 2d, Independent Contractors §§ 40-43.

Liability of employer with regard to inherently dangerous work for injuries to employees of independent contractor. 34 ALR4th 914.

3. **Master and Servant § 21 (NCI3d)— death of contractor's employee—negligent hiring of contractor—summary judgment for defendant**

Summary judgment was properly granted for defendant landowner on a negligent hiring claim arising from the death of a contractor's employee in a trench cave-in. The Court of Appeals in *Woodson v. Rowland*, 92 N.C. App. 38, refused to recognize any duty flowing from the one hiring the independent contractor to the independent contractor's employee and, because the North Carolina Supreme Court did not disavow that holding nor the reasoning underlying it, the Court of Appeals is bound by it in this case.

Am Jur 2d, Independent Contractors § 26.

When is employer chargeable with negligence in hiring careless, reckless, or incompetent independent contractor. 78 ALR3d 910.

APPEAL by plaintiff from order entered 12 February 1991 in HENDERSON County Superior Court by *Judge Loto Greenlee Caviness.* Heard in the Court of Appeals 18 February 1992.

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

Blue, Fellerath, Cloninger & Barbour, P.A., by John C. Cloninger, for defendant-appellee David H. Osteen.

GREENE, Judge.

Plaintiff appeals from an order entered 12 February 1991 granting defendant David Osteen's motion for summary judgment.

Viewed in the light most favorable to the plaintiff, the evidence produced at the summary judgment hearing tends to show the following: In December, 1986, David Osteen (defendant) bought a piece of real estate located in Henderson County, North Carolina now known as the Sunny Pines Subdivision. Sometime in the early months of 1987, the defendant decided to develop the land. Although the defendant held a residential contractor's license, he was a truck driver by trade. He had never built a house as a general contractor, other than his own home, and when he built his own home, he had nothing to do with installing the septic system. Furthermore, the defendant did not know how to dig a trench or install a sewer system.

To begin developing his property, the defendant had an engineer design a sewer system for his property. He then entered into an oral contract with James Morrison (Morrison), the sole proprietor of Morrison Construction and Septic Tank Company (Morrison Company), to install the sewer system on the defendant's property at a cost of $3.40 per foot. The system was to consist of a treatment plant and sewer lines. Morrison ordered the materials needed for the job, and Morrison Company began working on about 1 July 1987. Morrison supplied the equipment needed for the job. Although Morrison could not recall whether he had the authority under the contract to hire employees for the job, he testified that he normally used his own employees to install sewer systems, and for this job, he hired several employees. One of his employees was Everett Cook (Cook). No one besides Morrison instructed Morrison's employees as to what they were to do and how they were to do it. The only people that the defendant had on the job site were the defendant's son and a friend of his son. They helped carry pipe and retrieve materials for Morrison's employees. Neither Morrison nor the defendant paid these people for their help. During the time period of this job, Morrison submitted bids for other projects for septic tank installation. With regard to the other jobs Morrison had at this time, he, not the defendant, decided when his crew would work at the defendant's property and when they would work elsewhere. To the best of the plaintiff's knowledge, however, Cook worked only on this job site.

The defendant visited the site about every other day usually during his lunch hour to check on Morrison's progress. Occasionally, the defendant gave instructions and made suggestions to Morrison about the work related to engineering requirements as set out in the blueprints for the sewer system, including the need for a certain piece of equipment, where to start, where to place the treatment plant, where to place the manholes, and how much dirt had to be on top of the pipe. Morrison, however, was in charge of digging the trench and installing the sewer system.

On 4 August 1987, Cook and two other employees were working in a newly excavated trench which was approximately twenty-six feet long, five feet wide, and thirteen feet deep when part of the trench collapsed killing Cook. The walls of the trench were vertical and had not been shored, sloped, braced, or otherwise supported to prevent a collapse. Furthermore, material removed from the trench was stored about six inches from the edge of the trench. The North Carolina Department of Labor cited Morrison for violations of the Occupational Safety and Health Act because of the absence of proper support for the walls of the trench and because of the closeness to the edge of the trench of the material removed from it. Morrison explained that the trench had not yet been prepared because he was still digging it at the time of the accident. He further explained that because his employees knew better than to enter an unprepared trench, he did not know why Cook and the other two employees were in this one. He testified that this was the first time that any of his employees had been in an unprepared trench on this job. At the time of the accident, Morrison was operating a backhoe and did not observe the collapse, and the defendant was not present at the site.

Sharon Cook (plaintiff) is the executrix of Cook's estate. On 25 July 1989, she filed this wrongful death action against the defendant and Morrison. She alleged that the defendant was liable to her for her husband's death on four theories: (1) *respondeat superior*, (2) breach of duty to an invitee, (3) breach of nondelegable duty, and (4) negligent hiring of an independent contractor. On 20 November 1990, the defendant filed a summary judgment motion which was granted on 12 February 1991.

The issues are (I) whether the forecast of the evidence shows that Morrison was the defendant's employee; (II) whether the forecast

of the evidence shows that the defendant knew or should have known of the circumstances creating the danger to which Cook was exposed for purposes of the plaintiff's cause of action against the defendant as a landowner; (III) whether the forecast of the evidence shows that the defendant knew or should have known of these same circumstances for purposes of the plaintiff's cause of action against the defendant for breach of a nondelegable duty; and (IV) whether the estate of an employee of an independent contractor may obtain relief from a party who negligently hires the independent contractor.

I

Independent Contractor or Employee

[1] The plaintiff argues that summary judgment on the issue of the defendant's liability under the doctrine of *respondeat superior* was improper because genuine issues of material fact exist as to whether Morrison was the defendant's employee. *See Harris v. Miller*, 103 N.C. App. 312, 322, 407 S.E.2d 556, 561, *appeal filed and disc. rev. allowed*, 329 N.C. 788, 408 S.E.2d 520 (1991) (employer-employee relationship required for liability under doctrine of *respondeat superior*).

An independent contractor is "one who exercises an independent employment and contracts to do certain work according to his own judgment and method, without being subject to his employer except as to the result of his work." *Youngblood v. North State Ford Truck Sales*, 321 N.C. 380, 384, 364 S.E.2d 433, 437, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 923 (1988). Where, however, the hiring party "retains the right to control and direct the manner in which the details of the work are to be executed," the working party is the hiring party's employee, not an independent contractor. *Id.* Whether the hiring party retains the right to control and direct the manner in which the working party executes the details of his task depends upon various factors which must be considered when implicated by the evidence. *Id.* at 384-86, 364 S.E.2d at 437-39; *Hayes v. Elon College*, 224 N.C. 11, 16, 29 S.E.2d 137, 140 (1944). When viewed in the light most favorable to the plaintiff, the evidence and the factors it implicates compel the conclusion that Morrison was an independent contractor. *Yelverton v. Lamm*, 94 N.C. App. 536, 538-39, 380 S.E.2d 621, 623 (1989) (whether working party is independent contractor or employee is question of law for court where evidence is susceptible of only one conclusion).

First, the defendant had agreed to pay Morrison $3.40 per foot for a specific task, a factor indicative of contractorship. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140 (specific piece of work upon quantitative basis indicates contractorship). Second, Morrison supplied the equipment and ordered the supplies used on the job site, factors indicative of contractorship. 1C A. Larson, The Law of Workmen's Compensation § 44.34(a) (1991) [hereinafter 1C Larson]. Third, although the defendant was not in the business of installing sewer systems, Morrison was engaged in this type of business, Morrison Company, and these factors indicate contractorship. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140; Restatement (Second) of Agency § 220(2)(b), (h) (1957). Fourth, although the defendant volunteered his son and a friend to the job site, Morrison hired his own employees for the job. "The freedom to employ such assistants as the . . . [working party] may think proper indicates contractorship." *Youngblood*, 321 N.C. at 384, 364 S.E.2d at 438. Fifth, Morrison had full control over his employees, a factor indicative of contractorship. *Hayes*, 224 N.C. at 16, 29 S.E.2d at 140. Sixth, Morrison decided when his employees would work on the defendant's project and when they would work elsewhere, a factor indicative of contractorship. *Youngblood*, 321 N.C. at 385, 364 S.E.2d at 438. Finally, Morrison believed that he was not the defendant's employee, a factor indicative of contractorship. Restatement (Second) of Agency § 220(2)(i). All of the factors implicated by the evidence suggest that Morrison was an independent contractor, not an employee. That the defendant occasionally gave instructions and made suggestions to Morrison concerning engineering requirements set out in the blueprints for the sewer system does not create an employer-employee relationship. As Professor Larson explains:

> An owner, who wants to get work done without becoming an employer, is entitled to as much control of the details of the work as is necessary to ensure that he gets the end result from the contractor that he bargained for. In other words, there may be a control of the quality or description of the work itself, as distinguished from control of the person doing it, without going beyond the independent contractor relation.

1C Larson, *supra*, § 44.21. The evidence produced at the summary judgment hearing does not show that the defendant retained any right to control and direct the manner in which Morrison executed the details of his task. To the contrary, the evidence shows that

Morrison was an independent contractor. Accordingly, summary judgment for the defendant on this cause of action was proper.

II

Owner-Invitee

[2] The plaintiff argues that summary judgment on her claim against the defendant as a landowner was improper because genuine issues of material fact exist as to whether the defendant breached his duty of care to Cook, an invitee.

While working on the defendant's land as an employee of an independent contractor, Cook was an invitee of the defendant. *Spivey v. Babcock & Wilcox Co.*, 264 N.C. 387, 388, 141 S.E.2d 808, 810 (1965). The defendant therefore owed Cook the duty "to exercise ordinary care to keep the premises in a reasonably safe condition so as not to expose him unnecessarily to danger, and to give warning of hidden conditions and dangers of which . . . [he] had express or implied knowledge." *Southern Ry. Co. v. ADM Milling Co.*, 58 N.C. App. 667, 673, 294 S.E.2d 750, 755, *disc. rev. denied*, 307 N.C. 270, 299 S.E.2d 215 (1982); *Spivey*, 264 N.C. at 388-89, 141 S.E.2d at 810 (defendant owed duty to employee of independent contractor to warn of hidden danger in its plant). The defendant had no duty, however, to warn Cook of an obvious condition on the land of which Cook had equal or superior knowledge, unless the defendant should have anticipated an unreasonable risk of harm to Cook notwithstanding the obviousness of the condition. *Southern*, 58 N.C. App. at 673, 294 S.E.2d at 755. In such cases, the particular circumstances may require the owner or occupier of the land to take precautions beyond warning the invitee of the obvious condition. *Id.* at 674, 294 S.E.2d at 756.

These general rules on the tort liability of owners and occupiers of land to invitees, however, do not apply to the actual work undertaken by independent contractors and their employees. Unless the activity undertaken is inherently dangerous, an owner or occupier of land who hires an independent contractor is not required to provide employees of the independent contractor a safe place to work nor is he required to take proper safeguards against dangers which may be incident to the work undertaken by the independent contractor. *Brown v. Texas Co.*, 237 N.C. 738, 741, 76 S.E.2d 45, 46-47 (1953); 62 Am. Jur. 2d *Premises Liability* § 457 (1990). If, however, the activity is inherently dangerous *and*

the owner or occupier of the land knows or should know of the circumstances creating the danger, then the owner or occupier of the land has the nondelegable duty to the independent contractor's employees "to exercise due care to see that . . . [these employees are] provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work [are taken]." *Woodson v. Rowland*, 329 N.C. 330, 357, 407 S.E.2d 222, 238 (1991) (where general contractor hired subcontractor to perform alleged inherently dangerous activity, general contractor liable for breach of nondelegable duty of care if it knew of circumstances creating danger).

Assuming *arguendo* that the forecast of the evidence at the summary judgment hearing is sufficient to establish a genuine issue of material fact as to whether the trenching was inherently dangerous, *id.* at 354, 407 S.E.2d at 236, there is no evidence in the record demonstrating that the defendant knew or should have known of the circumstances creating the danger to which Cook was exposed. Although the defendant, a truck driver by trade, held a residential contractor's license, he had never built a house as a general contractor other than the one he owned, and on that house he was not involved, even in a supervisory capacity, in installing the septic system. Although the defendant visited the site approximately every other day and occasionally gave instructions and made suggestions as to how Morrison should comply with various engineering requirements, the defendant did not know how to dig a trench, did not know what "shoring" a trench meant prior to Morrison's deposition, and testified that if Morrison had been improperly installing the system, he would not have known it. Finally, Morrison testified that to his knowledge the defendant would not have seen men in a trench before the dirt had been moved away from the edges of it because the day of the accident was the first time anyone had been in such a trench. Because these facts do not show that the defendant knew or should have known of the circumstances creating the danger to which Cook was exposed, summary judgment for the defendant was proper on this cause of action.

III

Nondelegable Duty

The plaintiff argues that the trial court erred in granting summary judgment on her claim for breach of the nondelegable duty to ensure that Morrison was taking adequate safety precautions.

On these facts, this cause of action is essentially identical to the plaintiff's cause of action for liability based upon the defendant's ownership of the land upon which Cook was killed. Unless the activity undertaken is inherently dangerous, one who hires an independent contractor is not required to provide employees of the independent contractor a safe place to work nor is he required to take proper safeguards against dangers which may be incident to the work undertaken by the independent contractor. *Id.* at 350-57, 407 S.E.2d at 234-38. If, however, the activity is inherently dangerous *and* the party who hired the independent contractor knows or should know of the circumstances creating the danger, then he has the nondelegable duty to the independent contractor's employees "to exercise due care to see that . . . [these employees are] provided a safe place in which to work and proper safeguards against any dangers as might be incident to the work [are taken]." *Id.* at 357, 407 S.E.2d at 238. Again, assuming *arguendo* that the forecast of the evidence is sufficient to establish a genuine issue of material fact as to whether the trenching was inherently dangerous, because there was no evidence in the record demonstrating that the defendant knew or should have known of the circumstances creating the danger to which Cook was exposed, summary judgment for the defendant was proper.

IV

Negligent Hiring

[3] The plaintiff argues that summary judgment on her negligent hiring claim was improper because genuine issues of material fact exist as to whether the defendant negligently hired Morrison.

In *Woodson v. Rowland*, 92 N.C. App. 38, 46-47, 373 S.E.2d 674, 678-79 (1988), *aff'd in part and rev'd in part*, 329 N.C. 330, 407 S.E.2d 222 (1991), this Court addressed the issue of whether one who hires an independent contractor is under a duty to the independent contractor's employees to select the independent contractor with reasonable care. Stated differently, the issue is "whether an injured employee of the incompetent or unqualified independent contractor can obtain relief from the party who negligently hired or retained the independent contractor." *Woodson*, 329 N.C. at 358, 407 S.E.2d at 239. This Court refused to recognize any duty flowing from the one hiring the independent contractor to the independent contractor's employee. *Woodson*, 92 N.C. App. at 46-47, 373 S.E.2d at 678-79. Because the North Carolina Supreme Court

did not disavow this Court's holding nor the reasoning underlying it, *Woodson*, 329 N.C. at 358, 407 S.E.2d at 239, we are bound by it and conclude that summary judgment for the defendant on this cause of action was proper. *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 overturned by higher court). We note, however, that courts in other states have resolved this issue contrary to the position taken by this Court. *See, e.g., Cassano v. Aschoff*, 543 A.2d 973, 975 (N.J. Super. Ct. App. Div.), *cert. denied*, 550 A.2d 476 (N.J. 1988); *Schlenk v. Northwestern Bell Tel. Co.*, 329 N.W.2d 605, 614 (N.D. 1983).

Accordingly, the trial court's order granting the defendant's motion for summary judgment is

Affirmed.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. MELVIN LEE MARSHALL

No. 911SC559

(Filed 3 March 1992)

Homicide § 637 (NCI4th) — victim's attempted reentry into home — defense of habitation — defendant entitled to instruction

Defendant was entitled to an instruction on the defense of habitation where defendant's evidence tended to show that the victim entered defendant's home, assaulted him, left defendant's home, and was shot by defendant as he attempted to reenter defendant's home, and the trial court's error in failing so to instruct entitled defendant to a new trial.

Am Jur 2d, Homicide §§ 174, 175, 177, 514.

APPEAL by defendant from judgment entered 14 February 1991 in DARE County Superior Court by *Judge Herbert W. Small.* Heard in the Court of Appeals 18 February 1992.

Lacy H. Thornburg, Attorney General, by V. Lori Fuller, Assistant Attorney General, for the State.

Aycock, Spence & Butler, by W. Mark Spence, for defendant-appellant.

GREENE, Judge.

The defendant appeals from a judgment entered 14 February 1991, which judgment was based upon a jury verdict convicting the defendant of voluntary manslaughter.

In this case, we must view the evidence in the light most favorable to the defendant. *State v. Mash*, 323 N.C. 339, 348, 372 S.E.2d 532, 537 (1988) (consider evidence of defenses in light most favorable to defendant). Viewed accordingly, the evidence tends to show the following: In June, 1990, the defendant lived in a trailer in a mobile home park in Buxton, North Carolina. Kil Jennette (Jennette) lived in the same mobile home park as the defendant in a trailer located close to the defendant's trailer. On two occasions in May, 1990, the defendant and Jennette argued and fought over the volume at which each of them played music from stereos. At approximately 10:00 p.m. on 18 June 1990, neighbors of the defendant and Jennette heard "screaming and hollering" coming from the direction of the defendant's trailer. One neighbor, Nacie Barnett, testified that a few seconds after he had heard the screaming, he heard two gunshots within one or two seconds of each other coming from the same direction as the screaming. Another neighbor, Michael Rak (Rak), also heard these gunshots. Approximately five minutes later, the defendant arrived at Rak's residence "in a state of almost shock bewilderment" and said, "Call the cops. I've shot someone. I think he's dying." Although the defendant remained relatively quiet until the police arrived, the defendant did tell Rak that Jennette had entered his trailer and had hit him with a 2 x 2 stick.

Doctor Page Hudson, a forensic pathologist, examined Jennette's body and discovered that Jennette had been shot in his left lower back at roughly his beltline and had died as a result of this injury. Furthermore, he also determined that Jennette had beverage alcohol in his system "to a concentration of 110 milligrams percent. That is the same as a point 11 percent on the Breathalyzer scale."

The defendant testified on his own behalf. His evidence tends to show the following: At approximately 10:00 a.m. on 18 June 1990, he and Eugene Clinton (Clinton) decided to take the day off from work because materials for a roofing job they were doing had not arrived. The defendant went home and began drinking beer while cleaning his trailer and doing other household chores. At about 6:00 p.m., Greg Austin (Austin) and Cord Powell (Powell) arrived at the defendant's trailer. The three of them sat around the defendant's trailer, talked, and drank beer. Sometime later, Clinton and his girlfriend came over to the defendant's trailer, and the five of them continued to talk and drink beer. Around 8:30 p.m., Austin and Powell left, and the defendant and Clinton began talking about the job they had to do the next day. Clinton's girlfriend saw the defendant's shotgun in the living room and wanted to take a closer look at it. The defendant unloaded it and allowed her and Clinton to examine it. He explained that the reason he kept it in the living room was because he had been having trouble with a local dog getting into his trash. After they had examined it, the defendant reloaded the shotgun and leaned it against the wall behind a chair about six to eight feet from the trailer door. Around 10:00 p.m., Clinton and his girlfriend left the defendant's trailer.

After everyone had gone, the defendant got another beer, turned up the music a little bit, sat down on his couch which was located in the living room opposite the trailer door, and began to think about his job. At that point, Jennette opened the trailer door, ran inside carrying an approximately three-foot-long 2 x 2 stick, and screamed that he was going to kill the defendant. As Jennette hit the defendant with the stick, the defendant covered himself to avoid blows to his head. The defendant then fought back. He tried to grab the stick, but Jennette slipped onto the defendant's back and pulled the stick to the defendant's throat. As the fighting eased up temporarily, the defendant tried to talk to Jennette. Soon, however, the fighting intensified. The defendant managed to push Jennette out of the trailer and onto the steps. Jennette drew the stick back "like a bat" and began yelling at the defendant. As Jennette lowered the stick, the defendant reached over to turn the volume down on his stereo. When he did, Jennette raised the stick and began moving towards the trailer. The defendant jumped backwards, and Jennette entered the trailer for a second time. They struggled, but the defendant again managed to

push Jennette out of the trailer. At this point, Jennette and the defendant had been fighting for the majority of five to eight minutes. The defendant was tired, scared, and unsure of his ability to continue to fight back. The defendant then grabbed his shotgun, and when he looked over his shoulder, he saw Jennette coming back into the trailer with the stick raised in the air. The defendant brought the butt of his shotgun to his waist and kept the barrel up. The shotgun discharged as Jennette was facing him just inside the doorway of the trailer. The defendant did not know if he had hit Jennette with his first shot. As Jennette jumped backwards, the defendant jumped forwards and quickly fired the shotgun a second time. The defendant fired both shots from inside his trailer. After firing the second shot, the defendant left the trailer and discovered Jennette on the ground. He then went inside his trailer, put on his socks, shoes, and a shirt, went to Rak's house, and told Rak to call the police.

The defendant was tried on the charge of first degree murder. The defendant requested in writing jury instructions on self defense and the defense of habitation. The trial court instructed the jury on self defense, but not on the defense of habitation. The jury returned a verdict of guilty of voluntary manslaughter.

The dispositive issue is whether a defendant is entitled to an instruction on the defense of habitation where the defendant's evidence tends to show that a person entered the defendant's home, assaulted the defendant, left the defendant's home, and was shot by the defendant as he attempted to re-enter the defendant's home.

The defendant argues that the trial court erred in refusing to instruct the jury on the defense of habitation. We agree.

"In determining whether to give the substance of an instruction concerning a defense, . . . the trial court must . . . assess the evidence first for the legal principles it implicates, and second for the sufficiency of the evidence itself." *State v. Clark*, 324 N.C. 146, 161, 377 S.E.2d 54, 63 (1989). The defendant met the first prong of this test. The North Carolina Supreme Court has stated the legal principles of defense of habitation as follows:

> A person has the right to use deadly force in the defense of his habitation in order to *prevent* a forcible entry, even if the intruder is not armed with a deadly weapon, where

> the attempted forcible entry is made under such circumstances that the person reasonably apprehends death or great bodily harm to himself or the occupants of the home at the hands of the assailant or believes that the assailant intends to commit a felony.

State v. Jones, 299 N.C. 103, 107, 261 S.E.2d 1, 5 (1980) (emphasis added). The defendant's evidence implicates these legal principles in that it tends to show that the defendant used deadly force to prevent an intruder armed with a three-foot-long 2 x 2 stick from forcibly entering his home.

"The second prong of the trial court's test for whether the evidence mandates an instruction requires that the court measure the substantiality of the evidence." *Clark*, 324 N.C. at 161, 377 S.E.2d at 63. Where the defendant's or the State's evidence when viewed in the light most favorable to the defendant discloses facts which are "legally sufficient" to constitute a defense to the charged crime, the trial court must instruct the jury on the defense. *Id.; Mash*, 323 N.C. at 348, 372 S.E.2d at 537; *Jones*, 299 N.C. at 107, 261 S.E.2d at 5 (defendant may produce evidence or rely on State's evidence to establish defense of habitation). With regard to the defense of habitation, the measure of legal sufficiency is the "any competent evidence" standard. *See Clark*, 324 N.C. at 162, 377 S.E.2d at 64; *Jones*, 299 N.C. at 107, 261 S.E.2d at 5; *State v. Miller*, 267 N.C. 409, 412, 148 S.E.2d 279, 282 (1966). Therefore, if there is any competent evidence in the record when viewed in the light most favorable to the defendant from which the jury could determine that the defendant acted to prevent a forcible entry into his home and that the defendant reasonably apprehended death or great bodily injury at the hands of the intruder, then the defendant is entitled to an instruction on the defense of habitation.

The defendant's evidence raises the issue of defense of habitation. From the defendant's evidence the jury could infer that Jennette ran unannounced into the defendant's home carrying a large stick and screaming that he was going to kill the defendant; that Jennette hit the defendant with the stick forcing the defendant to protect himself from potentially lethal strikes to his head; that Jennette also tried to choke the defendant with the stick; that the defendant twice repelled Jennette's attacks, but after five to eight minutes of nearly uninterrupted brawling, the defendant became weak and more afraid for his safety; that he was unsure

of his ability to continue to repel Jennette; that after he had pushed Jennette out of his home for a second time, he reached over and got his shotgun; and that the defendant shot and killed Jennette as he was entering the defendant's home for the third time with the stick in his hand. This evidence, if accepted by the jury, would support a determination by the jury that the defendant acted to prevent Jennette from forcibly entering his home and that the defendant reasonably apprehended death or great bodily harm to himself at the hands of Jennette. *State v. Martin*, 52 N.C. App. 326, 330, 278 S.E.2d 315, 318, *disc. rev. denied*, 303 N.C. 317, 281 S.E.2d 390 (1981) (defense arises when occupier acts to prevent forcible entry of home).

That Jennette was shot in the lower back does not on these facts eliminate the necessity of the defense of habitation instruction, and the State does not argue otherwise. We are not prepared to hold as a matter of law that under the circumstances facing the defendant, he should have fired only one shot and then waited to ascertain whether that one shot had repelled Jennette's attempted forcible re-entry. That issue is for the jury to decide after proper instructions on the defense of habitation. Furthermore, the facts presented here are analogous to the facts in *State v. Hedgepeth*, 46 N.C. App. 569, 265 S.E.2d 413, *disc. rev. denied*, 301 N.C. 100 (1980), in which case this Court held that the facts required an instruction of the defense of habitation. In *Hedgepeth*, an intruder "peeped" around the door frame to the defendant's home, said he was going to kill the defendant, pulled his head back out of the doorway, and again "peeped" around the door frame. *Id.* at 570, 265 S.E.2d at 415. The defendant then shot the intruder in the neck because it was the only body part of the intruder visible to the defendant. *Id.* Despite the fact that the intruder was only "peeping" around the door frame and not actually on his way into the defendant's home when the defendant shot him, this Court held that the defendant was entitled to the defense of habitation instruction. *Id.* at 573, 265 S.E.2d at 416. Likewise, in this case, the jury, not this Court, must decide "whether [the] defendant was acting within the framework of the defense of habitation when he shot the decedent." *Id.*

The State argues, however, that because Jennette had already entered the defendant's home before his third attempted forcible entry, the defendant was only entitled to an instruction on self defense. We disagree. We realize that once an intruder enters

a person's home, "the usual rules of self-defense replace the rules governing defense of habitation, with the exception that there is no duty to retreat." *State v. McCombs*, 297 N.C. 151, 157, 253 S.E.2d 906, 910 (1979). Under this rule, had Jennette been *inside* the defendant's home when the defendant shot and killed him, the defendant would not be entitled to an instruction on defense of habitation. *State v. Lilley*, 78 N.C. App. 100, 107, 337 S.E.2d 89, 93-94 (1985), *aff'd*, 318 N.C. 390, 348 S.E.2d 788 (1986) (defendant not entitled to defense of habitation instruction where defendant shot victim in bedroom of defendant's home); *Martin*, 52 N.C. App. at 330, 278 S.E.2d at 318 (defendant not entitled to defense of habitation instruction where defendant shot and killed victim inside defendant's home). However, the fact that Jennette had *previously* entered the defendant's home and had been repelled does not eliminate the requirement for the instruction where the defendant's evidence tends to show that Jennette was shot while attempting to *forcibly re-enter* the defendant's home. *See Hedgepeth*, 46 N.C. App. at 570, 265 S.E.2d at 415 (defendant shot decedent as decedent threatened to re-enter defendant's home and kill defendant). The defense of habitation is not limited to the situation where the occupant is unaware of the identity and motive of an intruder. *Id.* at 572, 265 S.E.2d at 416. To the contrary, "the defense is limited to the situation where one shoots in order to prevent a forcible entry into his habitation." *Id.* Accordingly, on the evidence presented, although the defendant was familiar with his intruder's identity and motive, he was entitled to have the jury instructed on the defense of habitation, and the trial court's failure to instruct the jury on this substantial feature of the case was error. *Jones*, 299 N.C. at 107, 261 S.E.2d at 5 (when supported by competent evidence, defense of habitation is substantial feature of case entitling defendant to instruction); *see* N.C.G.S. § 15A-1232 (1988); *State v. Rose*, 323 N.C. 455, 458, 373 S.E.2d 426, 428 (1988) (failure to instruct on substantial feature of case is error); *State v. Morgan*, 315 N.C. 626, 643, 340 S.E.2d 84, 95 (1986) (when supported by competent evidence, self defense is substantial feature of case entitling defendant to instruction).

Having determined that the trial court erred in failing to instruct the jury on the defense of habitation, we must decide whether this error entitles the defendant to a new trial. N.C.G.S. § 15A-1443 (1988); *see Mash*, 323 N.C. at 349, 372 S.E.2d at 538 (failure to instruct on voluntary intoxication viewed under N.C.G.S. § 15A-1443);

State v. Wallace, 104 N.C. App. 498, 505, 410 S.E.2d 226, 230 (1991) (instructional errors viewed under N.C.G.S. § 15A-1443). We conclude that it does.

"The right of an accused in a criminal trial to due process is, in essence, the right to a fair opportunity to defend against the State's accusations." *Chambers v. Mississippi*, 410 U.S. 284, 294, 35 L.Ed.2d 297, 308 (1973). A corollary to this right is the defendant's right to establish a defense. *Id.* at 294, 35 L.Ed.2d at 308; *Washington v. Texas*, 388 U.S. 14, 17-19, 18 L.Ed.2d 1019, 1022-23 (1967). Where, in cases like this, there is sufficient evidence to support an instruction on the defense of habitation, due process requires that the trial court instruct the jury on the defense. *See United States ex rel. Means v. Solem*, 646 F.2d 322, 328 (8th Cir. 1980) (self defense and defense of others); *State v. Miller*, 443 A.2d 906, 909 (Conn. 1982) (self defense); *State v. LeBlanc*, 660 P.2d 1142, 1143 (Wash. Ct. App. 1983) (self defense). To hold otherwise would unconstitutionally relieve the State of its burden of "proving beyond a reasonable doubt that the defendant did not act in lawful defense of home when defendant has met his burden of going forward to produce evidence that he did." *Jones*, 299 N.C. at 107, 261 S.E.2d at 5; *State v. Hankerson*, 288 N.C. 632, 643, 220 S.E.2d 575, 584 (1975), *rev'd on other grounds*, 432 U.S. 233, 53 L.Ed.2d 306 (1977); *see Mash*, 323 N.C. at 347, 372 S.E.2d at 537 (unconstitutional to shift burden of persuasion on essential elements of crime to defendant).

Because the trial court's error in this case is of constitutional dimension, we presume that the error prejudiced the defendant. N.C.G.S. § 15A-1443(b) (1988). Therefore, the burden is on the State to prove beyond a reasonable doubt that the error was harmless. *Id.* Although the State does not argue this issue in its brief, our review of the record reveals that the State has not met its burden. The State's evidence of guilt is not overwhelming. *State v. Arnold*, 329 N.C. 128, 140, 404 S.E.2d 822, 830 (1991). Furthermore, that the trial court instructed the jury on self defense does not cure the error for failing to give the required instruction. *Cf. Jones*, 299 N.C. at 107, 261 S.E.2d at 5 (trial court instructed jury on defense of family member not defense of habitation).

Because of our resolution of this issue, we need not address the defendant's remaining assignments of error. The defendant is entitled to a

New trial.

Judges JOHNSON and COZORT concur.

JOYCE SHERROD, PETITIONER v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES, RESPONDENT

No. 9110SC241

(Filed 3 March 1992)

1. **State § 12 (NCI3d)— termination of employment—notice of reasons for dismissal—opportunity for hearing—information about appeals process—no denial of due process**

Petitioner was not deprived of due process in her termination of unemployment where petitioner was given notice of the reasons for her dismissal and a pre-termination hearing; the internal process afforded her the opportunity for a full and fair post-termination hearing, only requiring that petitioner properly follow the procedure to obtain it; at each stage of the grievance procedure petitioner was furnished information about what steps she had to take in order to advance to the next stage of the process and where these steps had to be taken; and petitioner was provided information about where she could obtain procedural assistance with her appeals if needed.

Am Jur 2d, Civil Service §§ 68, 71.

2. **State § 12 (NCI3d)— written notice given simultaneously with dismissal—no error**

Written notice of petitioner's dismissal from her employment was adequate under the requirements of N.C.G.S. § 126-35, though it was given to her simultaneously with her dismissal, since the statute does not prevent notice from being given simultaneously with dismissal but is instead designed to give the employee a written statement of the reasons for discharge so that the employee may effectively appeal her discharge; moreover, the notice in this case informed petitioner that she

was being discharged because property belonging to the State and the clients of O'Berry Center was found in her possession.

Am Jur 2d, Civil Service § 68.

3. **State § 12 (NCI3d)— employee's appeal of dismissal—time provision not vague or ambiguous**

Evidence was sufficient to support the trial court's conclusion that the time provision with regard to petitioner's appeal of her dismissal from employment was not vague or ambiguous where the governing provision and letters which petitioner received containing information on how she was to appeal to the next step of the internal grievance procedure clearly referred to "calendar days," while petitioner admitted that she erroneously assumed she had a certain number of "working days" to file her appeal.

Am Jur 2d, Civil Service § 71.

4. **State § 12 (NCI3d)— employee's appeal of dismissal—enforcement of procedural deadline—action not arbitrary or capricious**

The trial court properly concluded that respondent agency's decision to enforce a procedural deadline and dismiss petitioner's appeal because it was not timely filed was neither arbitrary nor capricious where petitioner was given information as to how and when to file an appeal and where to get help if she needed it; petitioner filed her first two appeals within the prescribed time; and respondent acted in good faith and in accordance with the applicable statutes when making the determination to dismiss the appeal.

Am Jur 2d, Civil Service § 71.

APPEAL by petitioner from judgment entered 25 January 1991 in WAKE County Superior Court by *Judge Henry V. Barnette, Jr.* Heard in the Court of Appeals 4 December 1991.

At the time this action arose, petitioner worked as a Health Care Technician I at the O'Berry Center (hereinafter "Center"), a Department of Human Resources institution. Petitioner had been continuously employed by respondent for approximately 10 years preceding her dismissal on 24 February 1988.

Petitioner's sister, Betty Sutton, was a former employee of the Center, who had been discharged. On or about 15 February

1988, Ms. Sutton reported to Center officials that petitioner was stealing property from the Center. Ms. Sutton gave the officials a red skirt marked with a Center resident's name. She told the officials that petitioner had stolen the skirt and given it to her daughter (petitioner's niece). Based on Ms. Sutton's information, the Center obtained a search warrant on 23 February 1988 and searched the home where petitioner resided with her parents. Pursuant to the search, officials found three items of personal property later identified as belonging to the Center, to wit: a towel, a shampoo bottle and a deodorant bottle.

On 24 February 1988, a pre-termination conference was held at the Center. When questioned about the stolen items removed from her residence, petitioner denied taking any of them from the Center. Petitioner informed the officials she was being framed by her sister. In fact, when later confronted by petitioner, Ms. Sutton admitted she had made up the report.

By letter dated 24 February 1988, petitioner was notified that "effective immediately" she was dismissed from her position at the Center. The letter quoted a provision of the State Personnel Manual which states: "An employee who steals State property or funds or who knowingly misuses State property may be dismissed without prior warning under the personal conduct disciplinary process." The letter also notified petitioner that she could appeal that decision within fifteen calendar days after receipt of that letter. On the same day, criminal charges were instituted against petitioner regarding the same stolen property. Petitioner was subsequently found not guilty of the criminal charges.

Petitioner noted an appeal of her dismissal within the requisite fifteen calendar days and requested a conference with the Director of the Center. By letter dated 24 March 1988, the Director informed petitioner that he had received her appeal. The letter indicated he was upholding her termination since petitioner, even though acting pursuant to the advice of counsel, had not provided him any additional information during their meeting about how the stolen items ended up in her possession.

The letter from the Director also stated, in pertinent part:

> You have the right to appeal this decision. In the event you elect to appeal, *it must be filed within fifteen (15) calendar days from the date of receipt of this correspondence.* If you

need procedural guidance in the appeal process, you should contact [the following persons]. . . . (Emphasis added.)

Petitioner received this response on 28 March 1988. Petitioner filed her appeal from the Director's decision with respondent on 14 April 1988, eighteen days after 28 March 1988. Respondent dismissed petitioner's appeal for noncompliance with the grievance process: specifically, petitioner had failed to file her appeal within fifteen calendar days from receipt of the Director's decision.

On 11 May 1988, petitioner filed an appeal with the Office of State Personnel. Respondent filed a motion to dismiss and, in the alternative, a motion for summary judgment. In defense to respondent's motions, petitioner claimed the language of the directive in question was ambiguous. The Administrative Law Judge, (hereinafter "ALJ"), denied respondent's motions and subsequently held a hearing.

In his recommended decision, the ALJ concluded, *inter alia*, that (1) it would be manifestly unfair to allow respondent's motion to dismiss; (2) petitioner had complied with G.S. § 126-35 and had not abandoned her appeal efforts; (3) the language of the directive at issue in this case was ambiguous and vague and petitioner had timely filed her appeal based on the literal wording of the provision; and (4) respondent had failed to meet its burden of establishing just cause for petitioner's discharge. Based on those conclusions, the ALJ recommended petitioner be reinstated.

The State Personnel Commission (hereinafter "Commission") rejected the recommended decision of the ALJ. The Commission concluded that the record indicated petitioner had failed to follow required procedure in filing her appeal and further noted that petitioner admitted in her letter of appeal to the State Personnel Commission that she "failed to timely file" her appeal from dismissal. Thus, the Commission ordered that "petitioner's appeal be dismissed with prejudice for lack of subject matter jurisdiction."

Hearing was held on petitioner's petition for judicial review in Wake County Superior Court on 13 November 1990. The court concluded that the provision setting forth the appeal deadline in question was not vague or ambiguous, and further, that it would not be manifestly unfair to dismiss petitioner's appeal because the "manifest unfairness relied on by the petitioner ha[d] to do with the merits of the dismissal from employment" not the grievance

procedure. The court affirmed the decision of the Commission by judgment entered 25 January 1991. From this judgment, petitioner appeals.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Michael M. Jones, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Associate Attorney General Diane Martin Pomper, for respondent-appellee.

WELLS, Judge.

Pursuant to N.C. Gen. Stat. § 150B-52, our review of a trial court's consideration of a final agency decision is to determine whether the trial court committed any errors of law which would be based upon its failure to properly apply the review standard set forth in N.C. Gen. Stat. § 150B-51. *In re Kozy*, 91 N.C. App. 342, 371 S.E.2d 778 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989). A reviewing court may affirm the agency's decision or remand the case for further proceedings. N.C. Gen. Stat. § 150B-51 (1991). Additionally, the reviewing 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:

(1) In violation of constitutional provisions;

. . .

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

Id.

[1] Petitioner first contends the trial court erred in concluding the Commission's decision that it lacked subject matter jurisdiction was constitutional. Petitioner alleges there was sufficient evidence in the record to show the decision unconstitutionally deprived her of the full and fair hearing required by the due process clause of both the United States and North Carolina Constitutions. We find no merit to this argument.

The respondent's grievance procedure provides specific time limits for the filing of an appeal at each stage of the procedure. Further, the process provides that "a grievant who fails to comply . . . with procedures set out in this directive . . . may be deemed to have abandoned his/her appeal." At each stage of the grievance procedure, petitioner was furnished information about what steps she had to take in order to advance to the next stage of the process and when these steps had to be taken. Further, petitioner was provided information about where she could obtain procedural assistance with her appeals if needed. Petitioner's appeal at the third stage of the internal process was dismissed due to her failure to comply with the time provided to file her appeal. A permanent state employee is statutorily required to follow the grievance procedure established by his/her department or agency. N.C. Gen. Stat. § 126-34 (1991). On this record, we perceive that not only was there no denial of due process, but that at every stage of these proceedings, petitioner's due process rights were fully protected. Petitioner was given notice of the reasons for her dismissal and a pre-termination hearing. The internal process also afforded petitioner the opportunity for a full and fair post-termination hearing, only requiring that petitioner properly follow the procedure to obtain it. This argument must be rejected.

[2] Petitioner next contends the Commission's conclusion that it lacked subject matter jurisdiction was affected by other error of law. Petitioner argues the notice she received concerning her dismissal did not comply with the statutory requirements. First, petitioner contends the notice was inadequate because it was given to her simultaneously with her dismissal instead of prior to her termination. Secondly, petitioner argues the notice was insufficient because it did not specify the acts or omissions which justified the disciplinary action. We disagree.

N.C. Gen. Stat. § 126-35 provides, in pertinent part:

> No permanent employee subject to the State Personnel Act shall be discharged, suspended, or demoted for disciplinary reasons, except for just cause. In cases of such disciplinary action, the employee shall, before the action is taken, be furnished with a statement in writing setting forth in numerical order the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights.

As stated previously by this Court, "[w]e do not read G.S. 126-35 to *prevent* notice from being given simultaneously with the disciplinary action. . . . The purpose of G.S. 126-35 is to provide the employee with a written statement of the reasons for [her] discharge so that the employee may effectively appeal [her] discharge." *Leiphart v. N.C. School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 399 S.E.2d 862 (1986). (Emphasis in original.) The purpose of the statute is to prevent the employer from discharging the employee without notice and then, after the fact, finding a justifiable reason for the dismissal. *Id.*

At the pre-termination hearing, petitioner was notified that certain property, identified as belonging to the Center, had been found in her residence pursuant to the execution of a search warrant. Additionally, the letter of dismissal stated:

> On February 15, 1988, it was reported that you were in possession of stolen property from O'Berry Center. Our Security Department obtained that property on February 17, 1988. On February 23, 1988, additional property belonging to the State of North Carolina and the clients of O'Berry Center was found in your possession. . . . All of these items were tagged with O'Berry/client control numbers.
>
> . . .
>
> In the predismissal conference held today, February 24, 1988, you were notified of the above infractions.

There was substantial evidence in the record to show petitioner received adequate notice to enable her to effectively appeal her termination. Furthermore, petitioner effectively presented her appeal to the ALJ as is evidenced by both the record and the ALJ's recommended decision in her favor. Thus, the trial court properly concluded the written notice of dismissal was adequate under the requirements of N.C. Gen. Stat. § 126-35.

[3] As her next assignment of error, petitioner contends the trial court erred in concluding there was substantial evidence to support the trial court's conclusion that the time provision in question was not vague or ambiguous. Again, we disagree.

The pertinent provisions in question state:

STEP 3—APPEAL TO THE SECRETARY, DEPARTMENT OF HUMAN RESOURCES

(a) If the matter is not resolved to the grievant's satisfaction by the decision at Step 2, or if the grievant has not received a decision within the time limit set for Step 2, [not more than thirty calendar days from receipt of the Step 2 appeal] and the issue is subject to further appeal, he/she may appeal for a review by the Secretary of the Department of Human Resources.

(b) . . . The notice must be received by the unit personnel manager within fifteen calendar days from the date the grievant receives the Step 2 decision or from the date the Step 2 decision should have been issued.

In her letter of appeal to the Office of State Personnel, petitioner stated the reason she had "failed to timely file" her Step 3 appeal was because she "erroneously assumed that [she] had fifteen (15) *working* days to file [her] appeal." The trial court found as a fact that petitioner never suggested she had any problem determining when the fifteen-day period began. Petitioner's alleged confusion resulted from her failing to distinguish between calendar days and working days. The provision is clear with regard to this distinction, as were the letters petitioner received containing information on how she was to appeal to the next step of the internal grievance procedure. The trial court's conclusion that the provisions, when read together, were not ambiguous or vague, was proper.

[4] In her last assignment of error, petitioner contends the trial court erred in failing to find the Commission's decision to dismiss her appeal was arbitrary and capricious. Petitioner argues this constituted error because the agency's decision to enforce the procedural deadline resulted in manifest unfairness under the circumstances. We disagree.

The respondent's grievance procedure provides that "a grievant who fails to comply with the . . . procedures set out in this directive . . . may be deemed to have abandoned his/her appeal." The agency's decision regarding whether or not an appeal will be deemed abandoned in such circumstances is discretionary. A reviewing court does not have the authority to override decisions within the agency's discretion if the agency exercises that discretion in good faith and in accordance with the law. *Lewis v. N.C.*

Dept. of Human Resources, 92 N.C. App. 737, 375 S.E.2d 712 (1989) (*citing Burton v. City of Reidsville*, 243 N.C. 405, 90 S.E.2d 700 (1956)). Imposing procedural requirements which result in manifest unfairness under the circumstances may be arbitrary and capricious. *Id.*

As was the situation in *Lewis*, even though we find the result in this case to be unfortunate, we cannot say it is manifestly unfair under the circumstances. Petitioner was given information regarding the internal grievance procedure. She was informed at each level of the process what steps were necessary to contest the decision at that level and when those steps had to be completed. Additionally, petitioner was given information on how to obtain procedural guidance in the appeal process. Petitioner filed her first two appeals within the requisite fifteen-day calendar period. The record provides substantial evidence that the agency acted in good faith and in accordance with the applicable statutes when making the determination to dismiss the appeal. We agree with the trial court's finding that the manifest unfairness relied upon by petitioner had to do with the merits of her dismissal *not* the grievance procedure itself. The trial court properly concluded the agency's decision to enforce the procedural deadline was neither arbitrary nor capricious.

In conclusion, as to each assignment of error we find the trial court applied the proper standard of review without error of law. Thus, the decision below must be and is

Affirmed.

Judges LEWIS and WALKER concur.

DARRELL FOY AND PATRICIA FOY, PLAINTIFFS v. MARGARET SPINKS, DEFENDANT

No. 9021DC1336

(Filed 3 March 1992)

1. Trial § 40.1 (NCI3d)— alternative issues—reversible error

There was reversible error in a landlord-tenant action where the trial court submitted one issue which embodied

two separate questions, and another which included the term and/or.

Am Jur 2d, Trial § 1139.

2. Appeal and Error § 147 (NCI4th)— alternative issues—no objection—proposed instructions submitted

It was not necessary for plaintiffs to repeat their objections to jury instructions which included alternative verdicts where they had timely submitted proposed instructions to the trial judge.

Am Jur 2d, Trial § 1459.

3. Unfair Competition § 1 (NCI3d)— landlord-tenant dispute—counterclaim for unfair practices—premises unfit for habitation

The trial court did not err by denying plaintiffs' motion for a directed verdict on defendant's counterclaim for unfair or deceptive practices in a landlord-tenant dispute. It has been held under similar facts that where a tenant's evidence establishes that the residential rental premises were unfit for human habitation and the landlord was aware of needed repairs but failed to honor his promises to correct the deficiencies and continued to demand rent, then such evidence would support a factual finding by the jury that the landlord committed an unfair or deceptive trade practice.

Am Jur 2d, Landlord and Tenant § 642.

Modern status of rules as to existence of implied warranty of habitability or fitness for use of leased premises. 40 ALR3d 646.

4. Landlord and Tenant § 19.1 (NCI3d)— rent abatement—measure of damages—erroneous instruction

The trial court improperly instructed the jury on the measure of damages under the Residential Rental Agreements Act, N.C.G.S. §§ 42-38, *et seq.*, where the court failed to instruct the jury that damages for rent abatement are limited to the amount of rent actually paid by the tenant for the substandard housing, plus any additional special or consequential damages alleged and proved.

Am Jur 2d, Landlord and Tenant § 526.

Measure of damages for landlord's breach of implied warranty of habitability. 1 ALR4th 1182.

5. Trial § 32 (NCI3d)— pattern jury instructions—preliminary civil instructions—mandate as to facts

The Court of Appeals observed in a landlord-tenant action that the jury did not receive preliminary instructions or a clear mandate on each issue. The preliminary civil instructions help orient and educate the jury on such matters as credibility of witnesses and weighing the evidence; also, it is the duty of the court, without a request, to explain the law and apply it to the evidence and to give a clear mandate as to the facts the jury would have to find in order to answer an issue either in the affirmative or in the negative.

Am Jur 2d, Trial §§ 1105, 1281.

Judge WELLS concurring.

APPEAL by plaintiffs from judgment entered 13 August 1990, *nunc pro tunc* 23 July 1990, and by defendant from order entered 4 September 1990 by *Judge Margaret L. Sharpe* in FORSYTH County District Court. Heard in the Court of Appeals 4 November 1991.

This appeal arises out of a landlord-tenant dispute between the landlords Darrell and Patricia Foy [plaintiffs] and the tenant Margaret Spinks [defendant]. Plaintiffs owned a house in Winston-Salem, North Carolina and defendant had resided there as a tenant since 1982. From 1982 through 1984, defendant paid $235 per month in rent. In January 1985, the rent was raised to $250 per month and in January 1990, the rent was raised to $300 per month. Beginning in November 1989, defendant stopped paying rent because she claimed the house was unfit.

Defendant's evidence at trial showed that the roof leaked for several years and eventually collapsed in 1986, causing damage to her belongings in the amount of $216; that plaintiffs instituted repairs to the roof but the leakage continued; the furnace did not function properly and plaintiffs were informed several times that it needed to be replaced, however, only minor repairs were made and as a result there were numerous occasions when defendant had no heat in her home. Other problems defendant testified to included commodes overflowing, drafty windows and holes in the walls. Further, she testified that she had repeatedly informed plain-

tiffs of the problems with the house, but that little or no work was ever performed to make the necessary repairs.

Plaintiffs' evidence disclosed that repairs were promptly made once they received notice of any problems. Also, when the City of Winston-Salem inspected the premises and notified plaintiffs of required repairs in November 1989, plaintiffs eliminated all unfit conditions within thirty days. The City reinspected the following April and plaintiffs remedied four additional "unfit" conditions within six days. However, testimony from the City Housing Inspector tended to show that even after the second reinspection, the house was still not in compliance with the City Code.

On 18 January 1990, plaintiffs filed this action for summary ejectment, seeking possession of the premises and the rent owed for the months of December 1989 and January 1990. The Magistrate granted summary ejectment on 31 January 1990. Defendant appealed to the District Court for a trial *de novo*, and then began paying her monthly rent to the Clerk of Court. Defendant filed an answer denying plaintiffs' claim and counterclaimed, alleging plaintiffs had violated the rental agreement by failing to keep the premises in a fit and habitable condition pursuant to G.S. 42-42, thereby entitling defendant to rent abatement. She also alleged an unfair or deceptive trade practice under G.S. Chapter 75, *et seq.*

Petree Stockton & Robinson, by R. Rand Tucker and Mark A. Stafford, for plaintiff appellants-appellees.

Legal Aid Society of Northwest North Carolina, Inc., by Joseph P. Henry, for defendant appellee-appellant.

WALKER, Judge.

Trial was held during the 16 July 1990 session of District Court and the jury awarded plaintiffs the sum of $750 for back rent and awarded defendant $4,900 on her counterclaim for retroactive rent abatement for 1987-1990. In addition $3,750 was awarded to defendant for the 1986-1987 year. The trial court then found plaintiffs had committed an unfair trade practice and trebled the jury's verdict to $25,950. Plaintiffs' verdict is not in dispute and accordingly we affirm that portion of the judgment. However, we reverse the judgment in favor of defendant and remand the case for a new trial consistent with our decision.

I.

[1] Plaintiffs assign error to the trial court's submission of the third and fourth issues in the alternative, thus allowing the jury to answer these issues without reaching an unanimous verdict. We agree. The third issue was submitted and answered as follows:

> 3. Did plaintiffs fail to maintain the house rented by defendant in compliance with the Winston-Salem Housing Code or fail to make all repairs necessary to put and keep the house in fit and habitable condition?
>
> ANSWER: Yes

This issue embodies two separate questions: (1) "Did the plaintiffs fail to maintain the house in compliance with the housing code?"; *or* (2) "Did plaintiffs fail to make all repairs necessary to put and keep the house in a fit and habitable condition?" Our Supreme Court has recognized, "it is misleading to embody in one issue two propositions as to which the jury might give different responses." *Edge v. North State Feldspar Corp.*, 212 N.C. 246, 247, 193 S.E. 2 (1937). In *Edge*, the issue as framed was whether a certain provision was omitted from the deed involved in the lawsuit, "by mutual mistake or by the fraud of the grantee?" The jury answered "Yes." *Id.* The Court held the verdict was uncertain or ambiguous; that it was in the alternative; and that its inconclusiveness necessitated a new trial. *Id.* at 248, 193 S.E. at 3. We agree with plaintiffs that the phrasing of the third issue in the present case included two different propositions to which the jury might give different responses.

Likewise, the fourth issue was also submitted to the jury as an alternative question:

> 4. Did the plaintiffs continue to collect the full amount of rent from the defendant when there were material defects in heating and plumbing facilities or such other material defects that rendered the house unsafe or unfit and/or did the plaintiffs misrepresent that the house would be repaired?
>
> ANSWER: Yes

The trial court underscored the alternative nature of this question by instructing, "I want you to understand there are two parts to that issue . . . [it] is an and/or question. So, you may find an answer on both parts of that question or one."

Our Supreme Court, when faced with a similar issue which included the term "and/or," ordered a new trial and stated: "[T]he . . . issue submitted to the jury . . . is, in the use of the term 'and/or,' ambiguous and uncertain, and, hence, the verdict thereon is insufficient to support the judgment rendered." *Gibson v. Central Manufacturers' Mutual Insurance Co.*, 232 N.C. 712, 715, 62 S.E.2d 320, 322 (1950). The Court further stated:

> A judgment, in its ordinary acception, is the conclusion of the law upon facts admitted or in some way established, and, without the essential fact, the Court is not in a position to make final decision on the rights of the parties. A judgment must be definite. And while a verdict is not a judgment, it is the basis on which a judgment may or may not be entered. Hence a verdict should be certain and import a definite meaning free from ambiguity. . . . [T]he courts generally hold that the term "and/or" has no place in judicial proceedings,—pleadings, verdict, or judgment. (citations omitted).

Id. at 716-717, 62 S.E.2d at 322-323.

In the present case, the phrasing of this issue prevented the jury from establishing either of the alternative propositions with certainty or definiteness. Since the phrasing of the third and fourth issues rendered the verdict uncertain, this constitutes reversible error necessitating a new trial.

[2] Defendant contends plaintiffs waived their right to assign error to the issues previously discussed since plaintiffs failed to object to these issues before the jury retired. However, formally objecting to jury instructions is not the sole method of preserving error. Since plaintiffs timely submitted proposed jury instructions to the trial judge, it was not necessary for them to repeat their objections to the jury instructions. *See State v. Smith*, 311 N.C. 287, 316 S.E.2d 73 (1984).

II.

[3] Plaintiffs assign error to the trial court's denial of their motion for a directed verdict on defendant's counterclaim for unfair or deceptive trade practices. This contention is without merit. Chapter 75 was created to "provide means of maintaining ethical standards of dealings between persons engaged in business and the consuming public and to promote good faith and fair dealings between buyers and sellers." *Allen v. Simmons*, 99 N.C.App. 636, 643, 394 S.E.2d

478, 483 (1990). Whether a trade practice is unfair or deceptive usually depends upon the facts of each case and the impact the practice has on the marketplace. Under facts similar to those presented here, this Court has held that where a tenant's evidence establishes the residential rental premises were unfit for human habitation and the landlord was aware of needed repairs but failed to honor his promises to correct the deficiencies and continued to demand rent, then such evidence would support a factual finding by the jury that the landlord committed an unfair or deceptive trade practice. *Id.* at 644-645, 394 S.E.2d 483-484.

Upon properly submitted issues the jury is to determine the facts and the trial court is to determine, as a matter of law, whether the landlord engaged in unfair or deceptive trade practices. *Process Components, Inc. v. Baltimore Aircoil Co.*, 89 N.C.App. 649, 366 S.E.2d 907 (1988); *Morris v. Bailey*, 86 N.C.App. 378, 358 S.E.2d 120 (1987).

III.

[4] Next plaintiffs contend the trial court improperly instructed the jury on the measure of damages under the Residential Rental Agreements Act, G.S. 42-38, *et seq.* We agree the measure of damages in an action for rent abatement is well settled and is to be calculated as follows:

> [A] tenant may recover damages in the form of a rent abatement calculated as the difference between the fair rental value of the premises if as warranted (i.e., in full compliance with G.S. 42-42(a)) and the fair rental value of the premises in their unfit condition for any period of the tenant's occupancy during which the finder of fact determines the premises were uninhabitable, plus any special or consequential damages alleged and proved.

Miller v. C. W. Myers Trading Post, Inc., 85 N.C.App. 362, 371, 355 S.E.2d 189, 194 (1987). However, damages for rent abatement are limited to the amount of rent actually paid by the tenant for the substandard housing, plus any additional special or consequential damages alleged and proved. *Surratt v. Newton*, 99 N.C.App. 396, 393 S.E.2d 554 (1990). In the present case, the trial court failed to instruct the jury that damages for rent abatement are so limited.

IV.

[5] We make one final observation concerning the trial court's instructions to the jury. "The problems faced by a trial judge in charging the jury are complex. One facet, ever present, is a lack of time to draw together in explicit language a set of basic materials for quick and successful use on short notice." N.C.P.I. *Motor Vehicle Vol. .010.* The pattern jury instructions are designed to assist the trial judge by using language which can be understood by the jury and at the same time conform to the technicalities of the law. The preliminary civil instructions help orient and educate the jury on such matters as credibility of witnesses and weighing the evidence. Also, it is the duty of the court, without a request, to explain the law and apply it to the evidence and to give a clear mandate as to what facts, for which there is support in the evidence, the jury would have to find in order to answer an issue either in the affirmative or in the negative. *Owens v. Harnett Transfer, Inc.*, 42 N.C.App. 532, 540, 257 S.E.2d 136, 141 (1979). Here the jury did not receive preliminary instructions or a clear mandate on each issue.

V.

We decline to address the remaining assignments of error as those questions may not arise in the retrial of this action.

Affirmed in part; reversed in part; and remanded for a new trial on defendant's counterclaim.

Judge LEWIS concurs.

Judge WELLS concurs with a separate opinion.

Judge WELLS concurring.

Since this case is to be retried in part, I deem it appropriate to address, in more detail, the issue of unfair trade practices.

I perceive it to be the law in this jurisdiction that violations of the provisions of G.S. § 42-42 may form the basis for determining the question of violation of the provisions of G.S. § 75-1.1. The clarification I deem necessary breaks down into two aspects of the law of unfair trade practices.

It is my opinion that if a trier of fact determines that a landlord has maintained rented residential premises in a condition rendering those premises *unfit for habitation*, the trial court may then determine that the charging of rent for such premises while *unfit for habitation* would be an unfair trade practice.

The question of unfitness for habitation being one of fact, the violation of building codes would be only some evidence of such unfitness, but would not be conclusive of such unfitness. Therefore, a finding of building codes violations would not be the appropriate issue of fact to form the basis for the court's determination of unfair trade practices. Thus, the problem I perceive with issue number three is whether it contains the question of building codes violations at all. The issue should be the clean-cut, straightforward, uncluttered question of whether the premises were maintained in a condition *fit for habitation*.

STATE OF NORTH CAROLINA v. KAREN MARIE HESKETT HART

No. 9125SC445

(Filed 3 March 1992)

1. **Homicide § 295 (NCI4th); Robbery § 4.3 (NCI3d)— armed robbery—second degree murder of grandfather—acting in concert—sufficiency of evidence**

Evidence was sufficient to support verdicts of guilty of armed robbery and second degree murder of defendant's grandfather where the evidence tended to show that defendant and a friend, pursuant to a common plan and scheme to rob defendant's grandfather, went to the grandfather's home; while defendant sat at the kitchen table exposing her breasts in order to distract the victim, the friend obtained a baseball bat, began beating the victim, and knocked him to the floor; the friend took the victim's wallet; and the friend and defendant then left the victim's residence and left the state.

Am Jur 2d, Homicide §§ 29, 425.

2. **Criminal Law § 34 (NCI4th)— duress—acts subsequent to crime—evidence properly excluded**

In a prosecution of defendant for armed robbery and second degree murder of her grandfather, the trial court did

not err in excluding testimony that defendant was not acting in concert with another person to commit the crimes and that defendant fled with the other person and remained with him under duress, since this testimony detailed events which took place after the murder in question and was not relevant to the determination of whether defendant was acting in concert.

Am Jur 2d, Evidence § 278; Homicide § 119.

3. Attorneys at Law § 38 (NCI4th)— attorney's motion to withdraw to become witness—other witnesses available—motion properly denied

The trial court did not err in denying defendant's motion to allow her attorney to withdraw and testify with respect to his statements to defendant regarding the substance of the State's case where defendant argued that her attorney's testimony was necessary to discredit a witness's testimony by showing that defendant's statements to the witness were actually defendant's attempt to explain the State's theory of the case which had been told to her by her lawyer, but the trial court determined that other witnesses were available to present the evidence being tendered by defense counsel.

Am Jur 2d, Witnesses §§ 97, 98.5.

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

4. Criminal Law §§ 1079, 1091 (NCI4th)— presumptive sentences imposed—no mitigating factors considered—consecutive sentences—no error

Since the trial judge imposed the presumptive sentence for both armed robbery and second degree murder convictions, he was not required to consider either aggravating or mitigating factors, and it was within his discretion to determine that the sentences should run consecutively.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from *Sitton (Claude S.), Judge*. Judgment entered 15 October 1990 in Superior Court, CALDWELL County. Heard in the Court of Appeals 17 February 1992.

Defendant was charged in a proper bill of indictment with the armed robbery and murder of her grandfather, Theeman

Winebarger. The evidence presented tends to show that on 31 August 1989, 65 year old Theeman Winebarger was found by his son lying on the kitchen floor of his house on Blue Creek Road in rural Caldwell County. The son testified that his father was tossing and turning on the floor and that the kitchen was in disarray with broken glass and canned goods on the floor. The son also testified that his father's wallet could not be found on either the victim's person or in the house.

The victim was transported to Caldwell Memorial Hospital where he was found to have suffered a head injury. He was thereafter transferred to Frye Regional Medical Center where he died later the same day.

An autopsy of Winebarger's body showed extensive bruises and cuts as well as a skull fracture. The pathologist who performed the autopsy testified that the cause of Winebarger's death was trauma caused by a blow to the head "inflicted by someone with great force."

Police officers who investigated Winebarger's home testified that a woman's knit top was found lying on the kitchen floor and that several cigarette butts were found in an ashtray on the kitchen table. Blood and feces stains were found throughout the kitchen.

Defendant Karen Hart, the victim's granddaughter, was 25 years old in August 1989. Defendant was married and is the mother of two children. Karen had been separated from her husband for several months and she and the children were residing with her mother, Barbara Minton. During the summer of 1989, defendant also lived with Jerry Whittington on an intermittent basis. Whittington, along with John Hart, Dawn Dula and Teresa Walker, was involved in a check forging and uttering scheme and that group had also committed several other crimes together that summer. By the middle of August 1989, arrest warrants had been issued against Whittington arising out of the check offenses.

John Hart testified that he, Whittington, Dawn Dula and Teresa Walker had discussed robbing an old man on Blue Creek Road on six or eight occasions between July and August 1989. Defendant was present during more than one of those conversations. Hart testified that, on one occasion in July 1989, he, Whittington and defendant had driven to Blue Creek Road together and that defendant had pointed out Winebarger's house. Karen told Hart that

the man living in the house was her grandfather and that he kept a large amount of money in the house in a brown paper bag. Hart further stated that defendant said that she was going to visit Winebarger and could find out more about the money at that time.

After her arrest on 15 September 1989, defendant gave a statement to the investigating officers who testified at trial. According to Karen's statement to those officers, Whittington's sister, Diane Reynolds, received a note from Whittington on 28 August 1989, directing her to drive Karen to a secluded spot where he was hiding to avoid arrest. Ms. Reynolds drove Karen to the meeting place which Karen described as being four miles into the woods. Defendant stayed with Whittington after he assured her that he would arrange a way home for her the following day.

Karen stated that Whittington refused to allow her to leave the following day. On 30 August 1989, she wanted to go to Winebarger's house in order to pick vegetables from his garden. Defendant and Whittington arrived at her grandfather's house at about 5:00 p.m. that evening. She spoke with Winebarger and then went to the garden while Whittington went into the house with Winebarger.

According to defendant, she picked vegetables from the garden, went into the house where she changed the shirt she was wearing because it became muddy in the garden, and then sat down at the kitchen table with her grandfather. Whittington then claimed to have a headache and went outside allegedly to find headache medicine in the truck. When he came back into the kitchen, Whittington had a baseball bat. Karen stated that she then became frightened and that Whittington started hitting Winebarger with the bat. She jumped up from the table and attempted to leave the house but found that the doors were locked. As she ran through the house trying to find a way out, she heard Whittington repeatedly hitting Winebarger.

Karen later went back into the kitchen where she saw Whittington looking through Winebarger's pockets as he lay on the floor. Whittington and defendant then left the house and drove toward Interstate 20. Once in the truck, Karen saw Whittington put Winebarger's wallet on the dash.

Karen stated that she and Whittington traveled south on Interstate 20 to Talledega, Alabama where they stayed for approximately one week. They then traveled to Atlanta where they stayed for several days before driving to Inman, South Carolina. Defendant claimed that throughout this travel, Whittington forced her to stay with him and that she constantly feared he would injure her.

Defendant telephoned her sister Gina on 14 September 1989 from Inman, South Carolina. Karen told Gina to alert authorities that Whittington was coming to Caldwell County the next day at a particular time and place in order to rob a convenience store. Gina did alert authorities and on 15 September 1989, Whittington and Karen appeared at the Cotton Smith convenience store in Caldwell County. Sheriff's deputies testified that when Whittington walked into the store, defendant immediately slid under the wheel of the vehicle and drove off. Karen drove to her mother's house where officers arrested her and transported her to the Caldwell County Jail. Meanwhile, Whittington was killed by officers while he was attempting to rob the store.

The State further presented the testimony of Sharon Logan who had shared a jail cell with defendant following her incarceration at the Caldwell County Jail. Logan testified that Karen had told her on various occasions about the events of 30 August 1989 which led to the death of Winebarger.

Logan testified that defendant told her that she had distracted her grandfather by showing him her breasts while Whittington came from behind and hit Winebarger with the bat. Karen also stated, according to Logan, that she only meant to rob her grandfather and did not mean to kill him. Defendant also told Logan that she tried to run when Whittington began hitting Winebarger and that she was afraid of Whittington.

Defendant was found guilty of armed robbery and second degree murder and sentenced to fourteen years imprisonment for the armed robbery and fifteen years for the second degree murder. The judge ordered that the sentences be served consecutively.

Attorney General Lacy H. Thornburg, by Assistant Attorney General G. Lawrence Reeves, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Daniel R. Pollitt, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant assigns error to the denial of her motions to dismiss and argues that the evidence is insufficient to raise an inference that she committed either offense charged or that she "acted in concert" with Whittington to commit either offense.

It is well settled in this State that a defendant may be convicted of a crime if she is present at the scene of the crime and the evidence is sufficient to show she is acting together with another who does the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. *State v. Giles*, 83 N.C. App. 487, 490, 350 S.E.2d 868, 870 (1986), *disc. review denied*, 319 N.C. 460, 356 S.E.2d 8 (1987); *State v. Joyner*, 297 N.C. 349, 357, 255 S.E.2d 390, 395-96 (1979). Further, "if two persons join in a purpose to commit a crime, each of them, if actually or constructively present, is not only guilty as a principal if the other commits that particular crime, but he is also guilty of any other crime committed by the other in pursuance of the common purpose." *State v. Westbrook*, 279 N.C. 18, 41, 181 S.E.2d 572, 586 (1971), *death penalty vacated*, 408 U.S. 939, 33 L.Ed.2d 761 (1972). *See State v. Oliver*, 302 N.C. 28, 55, 274 S.E.2d 183, 200 (1981); *State v. Joyner*, 297 N.C. at 357-58, 255 S.E.2d at 395-96.

The evidence in the present case, when considered in the light most favorable to the State, is sufficient to permit the jury to find that defendant and Whittington, pursuant to a common plan and scheme to rob defendant's grandfather, went to Winebarger's home, and while defendant sat at the kitchen table exposing her breasts in order "to distract him," Whittington obtained a baseball bat with which he "began to beat" Winebarger, knocking him to the floor, and that Whittington took the victim's wallet, that Whittington and defendant then left Winebarger's residence and left the State. We hold that these facts, when found by the jury, are sufficient to support the verdict that defendant was guilty of the armed robbery and second degree murder of her grandfather.

Defendant cites *State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987) in support of the proposition that one who is alleged to have acted in concert with a perpetrator is guilty as a principal only if the requisite *mens rea* is shown as to each defendant. In *Reese*, the court was discussing the specific intent, *mens rea*, required for a conviction of First Degree Murder and the applicability of G.S. 14-17, the "felony murder rule," to a finding of specific

intent. Thus *Reese* has no application to the present case and defendant's assignment of error has no merit.

[2] Defendant next argues that the trial court erred by not allowing defense witnesses Brenda Minton and Judith Heskett to testify that defendant "was not acting in concert with Whittington." Defendant offered the testimony of Heskett, defendant's stepmother, that Karen told her on 14 September 1989 that she "couldn't get away from Whittington," that Whittington "had already beat her up [and] busted her mouth," that Whittington "had guns, was doing terrible things, and had threatened to kill her mother and children if she tried anything else." Minton, defendant's mother, testified that Karen told her on 15 September 1989, that Whittington "tried to kill her," that Whittington "held the gun on her all the way up there," that she "didn't think [she'd] make it here," that Whittington "wouldn't let her go," that she tried to leave "but he wouldn't let me go," and that she "wanted to take out warrants for Whittington for assault and kidnapping." Upon objection and motion to strike, the trial court instructed the jury not to consider Minton's testimony.

There is no merit in defendant's contention that this testimony was relevant to the determination of whether defendant was "acting in concert" with Whittington on the date of the offenses for which she was convicted. Karen spoke to Heskett over the telephone on 14 September 1989 and to Minton on 15 September 1989. Both conversations detailed events following Winebarger's murder. Evidence having no tendency to prove a fact at issue in the case is not relevant and is properly excluded. G.S. 8C-1, Rules 401 and 402 (1983). We find no error in the exclusion of either Minton's or Heskett's testimony.

[3] Defendant further contends that the trial court erred in denying the motion to allow her attorney to withdraw and testify with respect to his statements to defendant regarding the substance of the State's case. Defendant argues that her attorney's testimony was necessary to discredit Logan's testimony by showing that defendant's statements to Logan were actually Karen's attempt to explain the State's theory of the case which had been told to her by her lawyer.

A motion to allow an attorney to withdraw his representation of a criminal defendant is addressed to the discretion of the trial judge. *State v. McGee*, 60 N.C. App. 658, 299 S.E.2d 796 (1983).

Such a ruling will not be disturbed absent an abuse of discretion. *State v. Locklear*, 322 N.C. 349, 356, 368 S.E.2d 377, 381 (1988). The trial judge conducted extensive *voir dire* and determined that other witnesses were available to present the evidence being tendered by defense counsel. There is no showing of discretionary abuse.

Defendant next argues that she is entitled to a new trial due to the trial court's erroneous admission of certain statements by S.B.I. Agent Brown and S.B.I. Agent Stubbs. These statements were offered by the State to corroborate the testimony of Sheila Bentley and Sharon Logan. Defendant now contends that the admission of these statements was improper as the statements were inconsistent with the trial testimony of Bentley and Logan.

There was no motion made by defendant at trial to strike those particular portions of testimony by Brown and Stubbs. Defendant was required to object and move to strike those portions of the statements which she felt did not corroborate previous testimony. *State v. Warren*, 289 N.C. 551, 223 S.E.2d 317 (1976); *Gibson v. Whitton*, 239 N.C. 11, 79 S.E.2d 196 (1953). This she failed to do and her contentions herein therefore have no merit.

[4] Finally, defendant argues that she is entitled to a new sentencing hearing because the trial court abused its discretion in ordering the presumptive sentence in both cases and in ordering that the two terms run consecutively. Defendant contends that the court abused its discretion by failing to find mitigating factors despite substantial uncontradicted evidence of such factors.

It is clear that, since the trial judge imposed the presumptive sentence for both the armed robbery and the second degree murder convictions, he was not required to consider either aggravating or mitigating factors. G.S. 15A-1340.4(b). *See State v. Horne*, 59 N.C. App. 576, 297 S.E.2d 788 (1982) and *State v. Cain*, 79 N.C. App. 35, 338 S.E.2d 898, *disc. review denied*, 316 N.C. 380, 342 S.E.2d 899 (1986). A decision to impose a presumptive sentence, as well as a decision that two or more terms should be served consecutively, is left to the trial court's discretion. *State v. Cain, supra, State v. Harper*, 96 N.C. App. 36, 384 S.E.2d 297 (1989). *See* G.S. 15A-1354(a). The defendant has not shown any indication of abuse of that discretion.

Affirmed.

Judges ORR and WALKER concur.

STATE OF NORTH CAROLINA v. MILTON SWIFT

No. 9126SC536

(Filed 3 March 1992)

1. **Arrest and Bail § 95 (NCI4th)— resisting an officer—proper officer named—indictment not defective**

There was no merit to defendant's contention that an indictment charging him with resisting an officer was fatally defective because it named the wrong officer, since there was ample evidence that defendant resisted the named officer by running away when the officer told defendant to come back; moreover, though naming the wrong officer would make an indictment defective, in this case either or both officers could have been named.

Am Jur 2d, Indictments and Informations §§ 128, 129; Obstructing Justice §§ 90, 91.

2. **Arrest and Bail § 111 (NCI4th)— resisting arrest—flight of defendant—defendant not legally entitled to flee**

There was no merit to defendant's argument that he was legally entitled to flee from officers because they did not have reasonable suspicion to stop him where officers were summoned to a Fast Fare parking lot to investigate a complaint of illegal conduct; the officers observed defendant emerge from a car and place a beer can down on the ground; as the Fast Fare had only an off-premises license, this action gave officers reasonable suspicion to believe that defendant committed a misdemeanor; his immediate flight led them to believe that he would not be apprehended unless immediately arrested; and beginning an investigation of illegal consumption with a request for identification was reasonably related.

Am Jur 2d, Obstructing Justice § 92.

3. Searches and Seizures § 15 (NCI3d)— search of vehicle— standing of passenger to challenge—scope of search proper— evidence admissible

Defendant did not have standing to challenge the search of a car in which he claimed to be a mere passenger, even if the car owner left defendant with the car in order to protect the car from others, since this guardianship was neither ownership nor the right to exclusive possession; moreover, even if defendant did have standing, the officers had a duty to secure the vehicle after arresting defendant, and searching the vehicle to determine its owner was reasonable so that evidence found pursuant to this search was properly admitted.

Am Jur 2d, Searches and Seizures §§ 16, 96.

APPEAL by defendant from judgment entered 4 April 1991 by *Judge J. Marlene Hyatt* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 18 February 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender William M. Davis, Jr., for defendant.

LEWIS, Judge.

Defendant was indicted and convicted of resisting a public officer, carrying a concealed weapon, and trafficking in drugs. Three consecutive sentences of six months, six months and seven years were imposed.

The State's evidence tended to show that on 28 August 1990, defendant was sitting in a car in a Fast Fare parking lot talking to three females. Officers Hurley and Dugan were on duty and were parked behind the Fast Fare in their patrol cars. At approximately 3:00 p.m. this same day, Officers Hurley and Dugan received calls to respond to a complaint about females drinking beer in the Fast Fare parking lot. Arriving first, Officer Hurley parked three spaces from the females. Officer Dugan parked next to the vehicle in which defendant was sitting. Defendant exited the car from the driver's side and placed a beer down beside the car when the officers entered the lot. Officer Hurley approached and asked defendant for a driver's license. Defendant said he did not have

one and fled. Officer Dugan approached and ordered defendant to come back. Both officers pursued. Officer Dugan caught and Officer Hurley assisted in detaining and handcuffing defendant. Defendant was arrested for resisting an officer and was placed in Officer Dugan's patrol car.

Officer Dugan checked the license plate numbers with the Department of Motor Vehicles, but the computer was not functioning. Unable to determine the identity of the registered owner via the computer, Officer Dugan looked into the car for the registration papers. He opened the driver's door, noticed an attache case protruding from under the driver's side floor mat. He opened the case to find a handgun concealed within. Still looking for the registration, Officer Dugan searched the glove compartment, but did not find anything. In a compartment between the bucket seats, he found ninety-nine individually tied bags of white powder and a bag containing a larger white substance which was referred to as "rock." This white powder was later determined to be cocaine. Upon a second search of the glove compartment, Officer Dugan found a doctor or dentist's appointment card with defendant's name on it.

Defendant's evidence tended to show that his friend Joe picked him up in the car in which he had been sitting. They drove to the Fast Fare, argued, and Joe went into the store leaving defendant to guard the car. Defendant went into the store and purchased a beer for himself and sodas for the three females. Defendant saw the police cars enter the parking lot, saw both Officers Hurley and Dugan approach him, and heard Officer Dugan order him to come back. Defendant maintains that he ran because he thought that drinking the beer violated his parole. Defendant denied owning the car or its contents, denied driving the car, and denied granting the officers permission to search the car.

Defendant assigns three errors: (1) failure to dismiss the charge of resisting an officer which was predicated on a fatally defective indictment; (2) failure to dismiss the same charge due to insufficiency of the evidence, and (3) failure to suppress the evidence retrieved from the car due to lack of probable cause necessary for such a search. We find no such errors.

[1] Defendant alleges that the indictment charging him with resisting an officer is fatally defective because it names the wrong officer. He claims that if he resisted anyone, he resisted Officer

Hurley, not Officer Dugan who was named in the indictment. In *State v. Eason*, 242 N.C. 59, 86 S.E. 2d 774 (1955), our Supreme Court held that an indictment for the charge of resisting an officer must: 1) identify the officer by name, 2) indicate the official duty being discharged, and 3) indicate generally how defendant resisted the officer. Indictments and warrants have been found fatally defective where the document stated only that the defendant "did obstruct, and delay a police officer by resisting arrest," *State v. Smith*, 262 N.C. 472, 137 S.E. 2d 819, 820 (1964), and where the document stated that defendant resisted "a Highway Patrolman." *Eason*, 242 N.C. App. at 61, 86 S.E. 2d at 776. Though the practice is discouraged, this Court upheld a warrant's reference to the officer as "this affiant" where the officer was specifically identified as the affiant elsewhere in the document. *State v. Powell*, 10 N.C. App. 443, 445, 179 S.E. 2d 153, 155 (1971).

In the case at bar, the indictment alleges that: "Milton Swift did unlawfully, willfully resist, delay, and obstruct M. J. Dugan, a public officer, holding the office of Charlotte Police officer, by running from the said officer. At the time, the officer was discharging and attempting to discharge a duty of his office by conducting an investigation." This indictment meets *Eason*'s three requirements. As such, it is not defective. There was ample evidence that defendant resisted Officer Dugan. On direct examination, defendant testified:

> Mr. Davis: But you actually ran from Officer Hurley?
>
> Defendant: Not exactly. He asked me for my license and I told him I didn't have any. I started to walking off. And then by the time I started walking off, then I see Officer Dugan come up and he said something like come back here, and then I just ran, you know, because I had the beer. You know, if I hadn't had the beer I wouldn't have ran. So by this time they had me in the police car. Officer Dugan came back with the gun. He had the gun in his hand. I said please don't touch that gun.

It is apparent that defendant saw both officers drive into the lot, saw Officer Dugan approach him, heard Officer Dugan request him to return, and must have known both officers were chasing him. Officer Dugan actually captured defendant and placed him in his patrol car with Officer Hurley merely assisting.

In addition, the record does not reflect any confusion as to whom defendant was alleged to have resisted. In charging the jury on the elements of resisting an officer, the judge repeatedly referred to Officer Dugan by name rather than by a generic term such as "police," "officer," "sheriff" or "big hat." Lack of the officer's name makes an indictment defective, as would the wrong name. Here, either or both officers could have been named. It was not necessary to name both when either would do.

Defendant is charged with resisting an officer. The statute provides:

> If any person shall willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office, he shall be guilty of a misdemeanor punishable by a fine not to exceed five hundred dollars ($500.00), imprisonment for not more than six months, or both.

N.C.G.S. § 14-223 (1986). A person is entitled to resist an illegal, but not a legal, arrest. *State v. McGowan*, 243 N.C. 431, 90 S.E. 2d 703 (1956). Not only may a person resist, but his subsequent flight from an unlawful arrest can not be considered as a circumstance to establish probable cause for an arrest. *State v. Williams*, 32 N.C. App. 204, 208, 231 S.E. 2d 282, 284-85, *appeal dismissed*, 292 N.C. 470, 233 S.E. 2d 924 (1977). Flight from a lawful investigatory stop "may provide probable cause to arrest an individual for violation of G.S. 14-223." *State v. Lynch*, 94 N.C. 330, 334, 380 S.E. 2d 397, 399 (1989) (citation omitted). Indeed, the Biblical provision that "[t]he wicked flee when no man pursueth," Proverbs 28:1, does not have the force of law. The innocent may flee if frightened enough.

[2] Defendant argues that he was legally entitled to flee from the officers because they did not have reasonable suspicion to stop him. We note that "[n]o one is protected by the Constitution against the mere approach of police officers in a public place." *State v. Streeter*, 283 N.C. 203, 208, 195 S.E. 2d 502, 506 (1973) (*citing*, *United States v. Hill*, 340 F. Supp. 344 (E.D. Pa. (1972)). Defendant is correct only if the officers attempted an illegal investigatory stop. *See, State v. Lynch*, 94 N.C. 330, 380 S.E. 2d 397 (1989). An investigatory stop does not constitute an unreasonable seizure nor violate an individual's Constitutional rights if: the officers' actions are both "justified at the inception, and . . . reasonably related in scope to the circumstances which justified the interference in

the first place." *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, 100 S. Ct. 220 (1979) (*citing*, *Terry v. Ohio*, 392 U.S. 1, 20 L. Ed. 2d 889, 88 S. Ct. 1868 (1968)). To stop a suspicious individual to determine his identity or to gather more information, the United States Supreme Court requires "specific and articulable facts, which taken together with rational inferences from those facts, reasonably warrant [the] intrusion." *Thompson*, 296 N.C. at 706, 252 S.E. 2d at 779. Our Supreme Court "requires only that the officer have a 'reasonable' or 'founded' suspicion as justification for a limited investigative seizure." *Id.*

Officers Hurley and Dugan were summoned to the Fast Fare parking lot to investigate a complaint of illegal conduct. Drinking beer on the grounds of an establishment which has an off-premises license is a misdemeanor. N.C.G.S. § 18B-300(b) (1989). An officer "may arrest without a warrant any person who the officer has probable cause to believe: . . . (b) [h]as committed a misdemeanor; and: (1) will not be apprehended unless immediately arrested. . . ." N.C.G.S. § 15A-401(b)(2) (cum. sup. 1991). The officers observed defendant emerge from the car and place a beer can down on the ground. As the Fast Fare parking lot has only an off-premises license, this action gave the officers "reasonable suspicion to believe" that defendant committed a misdemeanor. His immediate flight led them to believe that he would not be apprehended unless immediately arrested. Approaching defendant was justified and reasonable in its scope. Beginning an investigation of illegal consumption with a request for identification is reasonably related under the circumstances. For their own safety, officers need to know the name of the citizen with whom they are dealing. In addition, the officers had an obligation to determine whether defendant was old enough to possess the alcoholic beverage in the first place. A driver's license would provide a name and a date of birth.

Because the investigatory stop was legal, defendant did not have a right to resist. His subsequent flight from a lawful investigatory stop contributed to probable cause that defendant was in violation of both N.C.G.S. § 18B-300(b) as well as N.C.G.S. § 14-223. *See, State v. Lynch*, 94 N.C. 330, 380 S.E. 2d 397 (1989). With probable cause, the officers were entitled to arrest defendant for resisting an officer.

[3] Defendant claims that Officer Dugan's search of the car violates his fourth amendment right against unreasonable searches and seizures and that the evidence seized as a result must be suppressed. In order to challenge the reasonableness of a search or seizure, defendant must have standing. Standing requires both an ownership or possessory interest and a reasonable expectation of privacy. A person who owns, has the right to exclusive possession, or actually lives in the area searched has standing. *Minnesota v. Olson*, 495 U.S. 91, 109 L. Ed. 2d 85, 110 S. Ct. 1684 (1990). In the case at bar, defendant did not own, nor did he have the right to possession of the car from which he fled. Defendant's evidence revealed that the alleged car owner left defendant with the car in order to protect the car from others. This guardianship is neither ownership nor the right to exclusive possession. Therefore, defendant does not have standing to challenge the search of the car. A mere passenger, which defendant claims to be, does not have an expectation of privacy in the glove compartment, the area under the seats, or in the boot. *Rakas v. Illinois*, 439 U.S. 128, 58 L. Ed. 2d 387, 99 S. Ct. 421 (1978), *reh'g denied*, 439 U.S. 1122, 59 L. Ed. 2d 83, 99 S. Ct. 1035 (1979). The defendant may not assert a violation of the car owner's fourth amendment rights under these circumstances.

Even if defendant had standing, the officers had a right to search the passenger portion of the car pursuant to the arrest. *State v. Massenburg*, 66 N.C. App. 127, 310 S.E. 2d 619 (1984); *New York v. Belton*, 453 U.S. 454, 69 L. Ed. 2d 768, 101 S. Ct. 2860 (1981). Any container within the passenger compartment, which is capable of "holding another object," may be searched once the passengers have been arrested. *Massenburg*, 66 N.C. App. at 130, 310 S.E. 2d at 621 (citation omitted). Searches incident to arrest are necessary for the safety of the officers and to prevent the destruction of evidence. *Chimel v. California*, 395 U.S. 752, 762-63, 23 L. Ed. 2d 685, 694, 89 S. Ct. 2034, *reh'g denied*, 396 U.S. 869, 24 L. Ed. 2d 124, 90 S. Ct. 36 (1969). Search of containers within the passenger compartment is permitted because "the defendant may be permitted to reenter his automobile during or after the investigative detention." *State v. Truesdale*, 105 N.C. App. 444, 413 S.E. 2d 801 (1992) (*citing*, *Michigan v. Long*, 463 U.S. 1032, 77 L. Ed. 2d 1201, 103 S. Ct. 3469 (1983)). Once the officers arrested the apparent driver of the vehicle, the officers had a duty to secure the vehicle. Searching the vehicle to determine its owner was

reasonable in light of the need to determine ownership without the aid of the Department of Motor Vehicle's computerized records. The evidence found pursuant to this search was properly admitted.

No error.

Judges ARNOLD and WYNN concur.

STATE OF NORTH CAROLINA v. PHILLIP STUTTS

No. 9119SC312

(Filed 3 March 1992)

Evidence and Witnesses § 1009 (NCI4th)— child sexual abuse victim—unavailable to testify—out of court statements admitted

The trial court erred in a prosecution for taking indecent liberties by ruling that a four year old girl was unavailable to testify because she could not understand the difference between truth and falsehood and because of her inability to understand "what is reality and what is imagination," then finding that her earlier out-of-court statements possessed the required circumstantial guarantees of trustworthiness and were admissible at trial. Finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness's out-of-court statements from possessing guarantees of trustworthiness to be admissible at trial under the residual exception set forth in N.C.G.S. § 8C-1, Rule 804(b)(5).

Am Jur 2d, Evidence § 496; Witnesses §§ 88-91, 93.

Uniform Evidence Rule 803(24): the residual hearsay exception. 51 ALR4th 999.

APPEAL by defendant from judgment entered 10 October 1990 in MONTGOMERY County Superior Court by *Judge Russell G. Walker, Jr.* Heard in the Court of Appeals 13 January 1992.

Defendant was indicted on two counts of taking indecent liberties with a minor in violation of N.C. Gen. Stat. § 14-202.1. The State's evidence presented at trial tends to establish the following facts and circumstances.

Defendant is a 36-year-old married man with two children. Defendant's wife owns and operates a day-care center which is adjacent to their residence in Montgomery County. Defendant allegedly took indecent liberties with two minor girls: a fourteen-year-old (hereinafter "the teen"), and a four-year-old (hereinafter "the girl"), while they attended the day-care center.

On 31 July 1989, the teen's adoptive mother arrived at the day-care center. She testified that her daughter came running out of the day-care center, was crying and wanted to leave. Shortly afterwards, the teen's mother asked if anyone in the day-care center had hurt her. The teen responded that defendant had "twisted her nipples, touched her vagina, mashed on her chest and hit her behind." The teen's mother then called two employees who were operating the day-care center while defendant's wife was on maternity leave. She testified that each of the women informed her that the teen's accusations about defendant could not be true because he was rarely at the day-care center and was never alone with the children.

She further testified that the teen began to engage in bizarre behavior following this incident. The teen was taken to a psychiatrist who diagnosed these symptoms to be consistent with post-traumatic stress disorder. The teen was placed in Dorothea Dix Hospital for treatment and was unavailable as a witness at trial.

The Montgomery County Department of Social Services conducted an extensive investigation of the day-care center following the teen's accusations. This investigation was centered around the interviewing of ten to twelve children and led to only one additional accusation by the four-year-old girl. The girl was interviewed by a social worker, Rosemary Russell (hereinafter Russell).

Russell testified that she used anatomically correct dolls during her interviews with the girl. Russell testified that the girl told her that defendant once came out of the bathroom at the day-care center and said to her, "Are you going to see this?" The girl responded, "What is it?" Defendant then answered "a goober." Russell testified that she asked the girl what a "goober" was and that she pointed out the genitalia of the male doll. She told Russell that defendant asked her if the "goober" was soft and that she said "no." The girl also told Russell that defendant touched her "booba" and her "butt," which she identified as her vaginal area, and that she touched defendant's "butt."

The girl's parents testified that in March or April 1989 she began to have nightmares and stated she did not want to go back to the day-care center. On 3 October, the girl's mother was informed by Russell that sexual abuse had occurred at the day-care center and that the girl should be taken out of the day-care center. On 6 October, the girl informed her parents that defendant had never hurt her but if the "whole neighborhood" found out defendant would "cut their heads off." The next night, the girl told her parents that defendant had never seen her "butt-butt" and had never done anything to her.

In January 1990, the girl told her mother the same story she told Russell concerning defendant's "goober." The girl's statements were corroborated by the testimony of Melanie Thomas, an agent with the State Bureau of Investigation. Ms. Thomas interviewed the girl while investigating the allegations about defendant. Dr. Daljit Caberwal, a local urologist, testified that he examined the girl and found some irritation of the opening of her urethra. He further testified this irritation was normal in children her age and would not necessarily be linked to sexual abuse.

Defendant's evidence at trial tended to establish the following facts and circumstances. Defendant testified that he held a job with a local furniture company, has never worked at the day-care center and has never been alone with any of the children at the day-care center. Defendant has no criminal record. Defendant stated that he remembers seeing the girl once at the day-care center but was never alone with her. Defendant further stated that he was at the day-care center on 31 July 1989, the date the teen accused him of abusing her. He stated when he arrived at the day-care center his daughter was crying. One of the employees informed him that the teen had hit his daughter. Defendant and his wife were very harsh towards the teen but never touched her in any way.

Defendant's employer testified to defendant's work record and stated defendant often worked late or stayed late to play cards with some of his fellow employees. Several employees of the day-care center testified to day-care center procedures and the problems they had encountered with the teen, especially her hitting other children. One employee testified that whenever defendant was at the day-care center he was never alone with the girl.

Defendant's wife testified that her husband usually did not arrive at home until 7:00 or 7:30 p.m. She further stated that her husband would never be allowed to be alone with the children because of day-care center regulations. Defendant's wife never heard of any allegation of sexual abuse either from any child or parent involved with the day-care center. She was informed of the allegations only when the Department of Social Services contacted her to set up interviews at the day-care center with various children.

Defendant was indicted on 13 November 1989 and tried by a jury on 1 October 1990 in Montgomery County Superior Court. Defendant made a motion to dismiss the charges against him for insufficiency of the evidence, which was denied. Defendant was acquitted of the charge relating to the teen and was convicted of the charge relating to the girl. Defendant was sentenced to the presumptive term of three years imprisonment for this crime. Defendant appeals.

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

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

WELLS, Judge.

Defendant presents seventeen assignments of error to this Court for review. He does not address his first seven assignments as well as his eleventh, twelfth, thirteenth, sixteenth and seventeenth assignments and they are therefore deemed abandoned. N.C.R. App. P., Rule 28. In his remaining assignments, defendant contends the trial court erred in ruling that the girl was unavailable to testify and that the State had given improper notice of its intention to use statements made by the girl to others at trial.

Defendant further contends the trial court erred in allowing three of the State's witnesses to testify concerning the statements made by the girl under Rule 804(b)(5) of the North Carolina Rules of Evidence. Finally, defendant contends that the trial court erred in denying his motion to dismiss the charges for insufficiency of the evidence. We hold that the trial court erred in admitting the girl's out-of-court statements pursuant to Rule 804(b)(5) of the Rules of Evidence and award a new trial.

Defendant first assigns error to the trial court's finding that the girl was unavailable to testify at trial and that the State had given adequate notice of its intent to introduce the girl's statements at trial. Defendant contends these findings violated his rights to present a defense and to due process which are guaranteed under the State and Federal Constitutions.

Defendant next assigns error to the trial court's allowing three of the State's witnesses to testify concerning statements the girl made to them. He contends these statements, which pertain to defendant's alleged acts of abuse, were erroneously admitted under the residual or "catch-all" exception to the hearsay rule as found in Rule 804(b)(5) of the North Carolina Rules of Evidence.

Hearsay is defined as "a statement, other than one made by the declarant while testifying at the trial or hearing, offered in evidence to prove the truth of the matter asserted." N.C. Gen. Stat. § 8C-1, Rule 801(c) (1990). A hearsay statement is "not admissible except as provided by statute or by these rules." N.C. Gen. Stat. § 8C-1, Rule 802 (1990). In order for evidence to be admissible under the residual exception set out in Rule 803(24) or Rule 804(b)(5), it must possess circumstantial guarantees of trustworthiness equivalent to those required under the enumerated exceptions to the hearsay rule. *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). Our Courts have held that the threshold determination of trustworthiness is the most significant requirement of admissibility under the residual hearsay exception. *Smith, supra.*

In *State v. Deanes*, 323 N.C. 508, 374 S.E.2d 249 (1988), a sexual abuse (rape) case involving a five-year-old female victim who was declared unavailable as a witness, our Supreme Court analyzed and discussed at length the principles of law applying to the admissibility of hearsay in cases such as the one before us in this appeal. In *Deanes*, the Court stated the requirement in such cases dealing with the residual or "catch-all" exception to the hearsay rule, that the trial court must determine, in the following order:

(A) Has proper notice been given?

(B) Is the hearsay not specifically covered elsewhere?

(C) Is the statement trustworthy?

(D) Is the statement material?

(E) Is the statement more probative on the issue than any other evidence which the proponent can procure through reasonable efforts?

(F) Will the interests of justice be best served by admission?

The Court went on to state the rule that "the trial court is required to make both findings of fact and conclusions of law on the issues of trustworthiness and probativeness, because they embody the two-prong constitutional test for the admission of hearsay under the confrontation clause, *i.e.*, necessity and trustworthiness" *citing Ohio v. Roberts*, 448 U.S. 56, 65 L.E.2d 597 (1980) and *State v. Smith*, 312 N.C. 361, 323 S.E.2d 316 (1984). We center our discussion on the threshold question of trustworthiness.

The Court set out factors to be considered in determining whether hearsay statements admitted under Rule 804(b)(5) possess sufficient indicia of trustworthiness. The factors are:

(1) Assurances of the declarant's personal knowledge of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant recanted the statements; and (4) the practical availability of the declarant at trial for meaningful cross-examination.

State v. Smith, 315 N.C. 76, 337 S.E.2d 833 (1985), and *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986). Significantly, in *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988), the fourth factor was reworded to clarify the purpose of this factor, as follows:

(4) the reason, within the meaning of Rule 804(a), for the declarant's unavailability.

See State v. Garner, 330 N.C. 273, 410 S.E.2d 861 (1991).

In the present case, the trial court conducted a *voir dire* hearing to determine the girl's availability as a witness. The trial court found the girl unavailable to testify because she could not understand the difference between truth and falsehood and because of her inability to understand "what is reality and what is imagination." The trial court then found that the girl's earlier out-of-court statements possessed the required circumstantial guarantees of trustworthiness and were admissible at trial. These findings are simply inconsistent.

It is illogical that one be held unavailable to testify due to an inability to discern truth from falsehood or to understand the difference between reality and imagination and yet have their out-of-court statements ruled admissible because they possess guarantees of trustworthiness. The very fact that a potential witness cannot tell truth from fantasy casts sufficient doubt on the trustworthiness of their out-of-court statements to require excluding them. We hold that finding a witness unavailable to testify because of an inability to tell truth from fantasy prevents that witness' out-of-court statements from possessing guarantees of trustworthiness to be admissible at trial under the residual exception set forth in Rule 804(b)(5).

We hold that the trial court erred in allowing the girl's statements to be admitted and that this error was obviously prejudicial to defendant. For these reasons, there must be a

New trial.

Chief Judge HEDRICK and Judge JOHNSON concur.

THE AETNA CASUALTY AND SURETY COMPANY v. LARRY DENNIS FIELDS, MARY LOU SILVERS, DONNA MARIE BEAM, EDWARD NORMAN PETERSON, VIRGINIA ROBINSON BUCHANAN, LINDA CATHERINE HOLLOWAY, JANICE GROVE, BARBARA ANN BUCHANAN, HAZEL VIRGINIA FOX, TINA LEIGH McPETERS, AND FRANCIS LOUISE WILSON

No. 9126SC175

(Filed 3 March 1992)

Insurance § 69 (NCI3d)— automobile insurance—underinsured coverage—stacking—not a private passenger vehicle

Summary judgment was correctly granted for plaintiff insurance company in an action arising from an accident involving a van transporting defendants to work where the van in which defendants were riding when injured was owned by Mayland Transportation and insured by Aetna; Mayland's sole business was transporting employees of Baxter Health Care to and from Baxter's place of business; the policy issued by Aetna covered four 15 passenger vans; and defendants sought

to stack UIM coverage. The language of N.C.G.S. § 20-279.21(b)(4) makes it clear that intra-policy stacking is only available when the coverage is nonfleet and the vehicle is of the private passenger type. Although the vans are by definition nonfleet because N.C.G.S. § 58-40-10(2) provides that fleet coverage is available only if five or more vehicles are owned by a named insured, the insured vehicle here was not a private passenger vehicle because its use was commercial.

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverages provided in fleet policy. 25 ALR4th 896.

APPEAL by defendants from order entered 5 December 1990, by *Judge Chase B. Saunders*, in MECKLENBURG County Superior Court. Heard in the Court of Appeals 14 November 1991.

The order entered allowed plaintiff's motion for summary judgment and declared underinsurance coverage of $100,000 available to any single defendant and $300,000 for all appellants in this accident.

Bailey and Bailey, by G. D. Bailey and J. Todd Bailey, for defendant-appellant, Virginia Robinson Buchanan.

Duffus & Coleman, by Robert C. Younce, Jr., for defendants-appellants, Larry Dennis Fields, Edward Norman Peterson, and Mary Lou Silvers.

Donny J. Laws for defendant-appellant, Janice Grove.

Elmore & Powell, P.A., by Bruce A. Elmore, Jr., for defendants-appellants, Tina Leigh McPeters and Linda Catherine Holloway.

Norris & Peterson, P.A., by Staunton Norris, for defendant-appellant, Francis Louise Wilson.

Scott E. Jarvis & Associates, by Scott E. Jarvis, for defendants-appellees, Donna Marie Beam, Barbara Ann Buchanan, and Hazel Virginia Fox.

Underwood Kinsey Warren & Tucker, P.A., by Kenneth S. Cannaday and Frank W. Snepp, for plaintiff-appellee.

JOHNSON, Judge.

Appellee, The Aetna Casualty and Surety Company, (hereinafter Aetna), issued a policy of business auto coverage to Mayland Transportation, Incorporated, (hereinafter Mayland), with a policy period from 7 August 1988 through 7 August 1989, providing coverage for liability, uninsured motorists, and underinsured motorists. The vehicles covered were four 15 passenger Dodge vans. The limits of bodily injury liability were $100,000 for each person and $300,000 for each accident. The underinsured motorist coverage had the same limits.

Mayland is a for profit North Carolina corporation with its principal place of business in Spruce Pines, North Carolina. Its sole business is that of transporting employees of Baxter Health Care to and from their residences to Baxter's place of business near Marion, North Carolina, for a fee. The drivers of the vans were also Baxter employees, and received free transportation and a salary of $65 per month from Mayland. The other employees paid a fee based on the distance of their homes from Baxter.

Fortner Insurance Agency, Inc. wrote the policy. The risk was ceded to the North Carolina Reinsurance Facility. Because the passengers were charged, the drivers and passengers were transported to the same place of employment, and the vans were not furnished by the employer, Fortner rated the risk under the "van pool" classification contained in the Facility's "Commercial Automobile Manual of Rules and Rates." The Manual defines van pools as "[a]n automobile of the station wagon, van truck, or bus type used to provide prearranged commuter transportation for employees to and from work and is not otherwise used to transport passengers for a charge."

On 12 May 1989, one of the insured vehicles was being driven by appellant Fields to transport the other appellants to Baxter. The insured vehicle was involved in a collision with an automobile, and as a proximate result of the negligence of the driver of the automobile, all the appellants sustained severe bodily injuries. The negligent driver of the automobile had liability insurance with Nationwide Mutual Insurance Company, with liability limits in the aggregate amount of $100,000 for all claims arising out of any one accident. Aetna admits that each appellant sustained compensable damages in excess of all sums available from the Nationwide policy, and any other liability insurance policies or bonds applicable

to their claims. Thus, appellants seek to "stack" the underinsured coverages for each of Mayland's four vans.

Each appellant has made claims upon Aetna for benefits under the underinsured motorist provision of the policy. Aetna admits that it is liable to appellants but contends that its aggregate limit of $300,000 applies. Aetna denies that the law requires intra-policy stacking of the aggregate limits of U.I.M. coverage of all four vans insured under its policy.

The issue on appeal is whether the trial court correctly granted summary judgment for plaintiff. Summary judgment is properly granted if the pleadings, depositions, interrogatories, and admissions on file, together with any affidavits, show that there is no genuine issue as to any material fact and that any party is entitled to summary judgment as a matter of law. *Johnson v. Insurance Co.*, 300 N.C. 247, 252, 266 S.E.2d 610, 615 (1980). In granting summary judgment for Aetna, the trial court held that Aetna's maximum liability is limited to $100,000 for any one claimant and $300,000 for any one accident, regardless of the number of vehicles or insureds covered by the policy, or claims made pursuant to the policy.

First, we note that appellants and appellee raise issues as to whether the appellants, as class 1 or class 2 insureds, can avail themselves of intra-policy stacking. *See Sutton v. Aetna*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989); *See also Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *cert. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986). Our disposition of whether stacking is allowed in the case *sub judice*, however, does not rest upon the classification of the insureds, but rather upon the type of vehicle the insureds were occupying at the time of the accident.

General Statute § 20-279.21(b)(4) instructs this Court as to whether intra-policy stacking for underinsured motorist coverage is applicable to any claim:

> In any event, the limit of underinsured motorist coverage applicable to any claim is determined to be the difference between the amount paid to the claimant pursuant to the exhausted liability policy and the total limits of the owner's underinsured motorist coverages provided in the owner's policies of insurance; it being the intent of this paragraph to provide to the owner, in instances where more than one policy may

> apply, the benefit of all limits of liability of underinsured motorist coverage under all such policies: Provided that *this paragraph shall apply only to nonfleet private passenger motor vehicle insurance as defined in G.S. § 58-40-15(9) and (10).* (Emphasis added).

The language of this statute makes it clear that intra-policy stacking is only available when the coverage is nonfleet *and* the vehicle covered is of the private passenger type.

General Statute § 58-40-10(2) provides that fleet coverage is available only if five or more vehicles are owned by a named insured. Aetna's policy afforded coverage for only four vans; therefore, the first requirement of G.S. § 20-279.21(b)(4) is met. Although the vans are by definition nonfleet, they are not of the private passenger type also required by the statute. General Statute § 58-40-10(1)a, b and c state that a private passenger motor vehicle means:

> a. A motor vehicle of the private passenger or station wagon type that is owned or hired under a long-term contract by the policy named insured and that is neither used as a public or livery conveyance for passengers nor rented to others without a driver; or
>
> b. A motor vehicle with a pickup body, a delivery sedan or a panel truck that is owned by an individual or by husband and wife who are residents of the same household and that is not customarily used in the occupation, profession, or business of the insured other than farming or ranching. Such vehicles owned by a family farm co-partnership or corporation shall be considered owned by an individual for purposes of this Article; or
>
> c. A motorcycle, motorized scooter or other similar vehicle not used for commercial purposes.

We find that the insured vehicle in question was not a private passenger vehicle because its use was commercial. *Black's Law Dictionary* defines commercial as "connected with trade and traffic or commerce in general; occupied with business and commerce." 245 (5th ed. 1979). Commercial use has also been defined as "having financial profit as the primary aim." 15A C.J.S. 1 (1979). In its broad sense, "commercial" encompasses "all business and industrial enterprises, and in a comprehensive sense it includes occupations

and recognized forms of business enterprise which do not necessarily involve trading in merchandise[.]" *Id.* Commercial activity in its broad sense "includes any type of business activity which is carried on for a profit." *Id.* at 2; *See Kinney v. Sutton*, 230 N.C. 404, 53 S.E.2d 306 (1949) (Operating a restaurant or dining-room for profit is a commercial activity, as it is an undertaking relating to commerce or trade.).

The North Carolina Supreme Court stated in *Kirk v. Insurance Co.*, 254 N.C. 651, 656, 119 S.E.2d 645, 648 (1961), that the test as to whether an automobile is commercial "is the character of the use of the vehicle taken into consideration with the form of the car." In *Kirk*, the Court held that the truck in question, used principally in the business of Southern Railway Co., was a commercial automobile. *Id.; See Hardee v. Southern Farm Bureau Casualty Ins. Co.*, 127 So.2d 220 (1961) (Commercial automobile has a meaning readily ascertainable in the plain, ordinary, and popular sense of the language used, and truck used for transporting pulpwood for sale was a commercial automobile.). The *Kirk* Court also opined, "The words 'commercial use' connote use in a business in which one is engaged for profit." 254 N.C. at 656, 119 S.E.2d at 648.

In *Lloyd v. Insurance Co.*, 200 N.C. 722, 158 S.E. 386, (1931), the insurance policy included a provision for indemnity for fatal injury sustained while riding in or driving in a pleasure type automobile. The vehicle in question was a 1½ ton Ford truck used principally on a milk route. The Court found that the vehicle was by intention, use, and construction a commercial vehicle. Coverage was denied, as the vehicle was not of the pleasure type specified in the policy provision. *Id.*

In the case *sub judice*, Mayland was a for profit organization, created solely for the purpose of transporting Baxter's employees for a fee. The use of the van generated profit for the business, and without such use, no business would have existed. The only purpose for which Mayland existed was to provide transportation for Baxter's employees. Mayland's use of the insured van provided a service for a fee and thereby generated a profit. As in *Lloyd*, the van in the case *sub judice* was by intention, use, and construction a commercial vehicle, as it was engaged in a business for profit.

To further illustrate that the vehicle in question is not of the private passenger type required by statute, we look to G.S. § 20-4.01(27)(g). There, the General Assembly defined "private

passenger vehicles" as "[a]ll other passenger vehicles not included in the above definitions." Included in the "above definitions" is a "for hire passenger vehicle." G.S. § 20-4.01(27)(b) defines "for hire passenger vehicles" as:

> Vehicles transporting persons for compensation. This classification shall not include vehicles operated as ambulances; vehicles operated by the owner where the costs of operation are shared by the passengers; vehicles operated on behalf of any employer pursuant to a ridesharing arrangement as defined in G.S. 136-44.21; vehicles transporting students for the public school system under contract with the State Board of Education or vehicles leased to the United States of America or any of its agencies on a nonprofit basis; or vehicles used for human service or volunteer transportation.

The ridesharing exception found in G.S. § 136-44.21 does not apply in this case because to constitute ridesharing, the transportation must be "incidental to another purpose of the driver" and "not operated or provided for profit." Here, appellants concede that Mayland Transportation, Inc. operated the vans exclusively for transporting employees to and from work at Baxter Health Care. Thus, the vehicle in question fails to meet the threshold requirement of G.S. § 20-279.21(b)(4) which requires vehicles to be of the private passenger type before intra-policy stacking can occur.

In addition, the policy in question is by acknowledgement of all parties captioned "Business Auto Coverage Form" and appears on its face to be a type of insurance coverage that is excluded from the stacking provisions of G.S. § 20-279.21(b)(4) which covers only nonfleet private passenger motor vehicle insurance.

Accordingly, defendants-appellants are denied the benefits of stacking because the insured vehicle is not of the private passenger type required by G.S. § 20-279.21(b)(4). Under the facts of this case, the law does not require intra-policy stacking. The decision of the trial court limiting Aetna's liability for underinsurance coverage to $300,000 is therefore

Affirmed.

Judges EAGLES and ORR concur.

WILSON FORD TRACTOR, INC., PLAINTIFF-APPELLANT v. MASSEY-FERGUSON, INC., DEFENDANT-APPELLEE v. THURMAN ALLEN BASS AND WIFE, BARBARA D. BASS, ADDITIONAL PARTY DEFENDANTS-APPELLANTS

No. 917SC398

(Filed 3 March 1992)

1. **Statutes § 8.1 (NCI3d)— Farm Machinery Franchise Act—no retroactive application**

The Farm Machinery Franchise Act applied only to franchise agreements created after 1 October 1985 and was therefore inapplicable to this action arising from the termination of a franchise agreement entered into more than two years prior to the effective date of the legislation.

Am Jur 2d, Statutes § 347.

2. **Reference § 7.1 (NCI3d)— exceptions—no question presented for review**

In an action for breach of contract arising from the termination of a farm machinery franchise, plaintiff failed to show that the trial court erred by adopting the referee's proposed findings of fact and conclusions of law where plaintiff merely alleged that the referee improperly failed to find certain facts favorable to its position, and such exceptions did not present any question to the trial court for review.

Am Jur 2d, References §§ 38, 40.

APPEAL by plaintiff and additional party defendants from *Brown (Frank R.), Judge*. Judgment entered 19 November 1990 in the Superior Court, WILSON County. Heard in the Court of Appeals on 19 February 1992.

Plaintiff Wilson Ford Tractor, Inc. (hereinafter "Wilson Ford Tractor") instituted this civil action against defendant Massey-Ferguson, Inc. (hereinafter "Massey-Ferguson") alleging that defendant had breached a contract concerning a farm machinery franchise held by plaintiff until its termination on 18 November 1985. In the complaint, Wilson Ford Tractor alleged that the dealership termination was governed by the terms and conditions of the Dealer Sales and Service Agreement signed by the parties on 30 March 1983 (hereinafter the "Agreement") and by the Farm Machinery Franchise Act, G.S. 66-180 *et seq.* (hereinafter the "Fran-

chise Act"). Plaintiff complained that the accounting by defendant of amounts due plaintiff upon termination of the franchise violated the terms of both the Agreement and the Franchise Act.

Defendant counterclaimed alleging that its accounting established that the combined balances of plaintiff's various accounts with Massey-Ferguson exceeded the amounts due plaintiff by defendant pursuant to the repurchase requirements of the Agreement. Massey-Ferguson also alleged that the Franchise Act did not govern this termination due to the fact that the statute became law after the Agreement was signed by the parties. Thurman and Barbara Bass, who had personally guaranteed the accounts of Wilson Ford Tractor, were made additional party defendants to the action for the purposes of defendant's counterclaim.

Subsequent to discovery, the trial court entered partial summary judgment against Wilson Ford Tractor, ruling that the Franchise Act did not apply to this lawsuit. The court further ordered, pursuant to Rule 53 of the North Carolina Rules of Civil Procedure, that referee William R. Rand determine a proper accounting pursuant only to the provisions of the Agreement. The referee conducted an evidentiary hearing and thereafter presented proposed Findings of Fact and Conclusions of Law to the trial court.

The trial judge reviewed the record of the proceedings before the referee and adopted the proposed Findings of Fact. Based upon those findings, the court concluded that Wilson Ford Tractor was not entitled to recover any amount from the defendant and that Massey-Ferguson was entitled to recover $344.62 on its counterclaim against plaintiff and its crossclaim against Mr. and Ms. Bass.

Plaintiff and additional party defendants Bass appealed.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Robin K. Vinson, for plaintiff, appellant and additional party defendant, appellants.

Everett, Everett, Warren & Harper, by Edward J. Harper, II, and Ryal W. Tayloe, for defendant, appellee.

HEDRICK, Chief Judge.

The undisputed facts show that Wilson Ford Tractor and Massey-Ferguson entered into a franchise agreement on 30 March 1983. Pursuant to the Agreement, plaintiff became a retail dealer

of Massey-Ferguson farm equipment, implements, machinery, attachments and repair parts. On 15 October 1985, plaintiff notified Massey Ferguson by letter of its intent to terminate the franchise arrangement effective 18 November 1985. Pursuant to the Agreement, upon termination of the franchise relationship, Massey-Ferguson was obligated to repurchase from the dealer all new and unused Massey-Ferguson equipment, implements and parts which had been purchased by plaintiff from defendant and which were remaining in plaintiff's inventory at the time of termination. The Agreement specified the purchase price for each item and allowed for the deduction from that price of amounts due and owing to Massey-Ferguson on the accounts of Wilson Ford Tractor at the time of the termination.

The Franchise Act became effective on 1 October 1985. That statute regulates the termination and non-renewal of farm machinery and implement franchises and requires a manufacturer to repurchase the inventory of a dealer upon termination of a franchise. The Franchise Act defines the inventory which must be purchased and specifically sets forth the prices to be paid by the manufacturer and the time within which the repurchase must be completed. G.S. 66-184. The Act also allows a credit to the manufacturer for amounts owed to it by the dealer at the time of the termination. *Id.*

[1] Plaintiff first argues that the trial court erred by granting partial summary judgment in favor of defendant by ruling that the Franchise Act did not apply to plaintiff's lawsuit as a matter of law. We will, at this point, reference the fact that the appellants have failed to abide by our Rules of Appellate Procedure in that there are no assignments of error set out in their brief as required by Rule 28(b)(5). Although we would, therefore, according to that rule, be justified in ruling that the appellants have abandoned all assignments of error, we will nevertheless exercise our discretion and review the questions set out in the brief.

Plaintiff contends that the Franchise Act should apply to the termination of this Agreement despite the fact that the contract between the parties was signed more than two years prior to the effective date of this legislation. Plaintiff cites the "imminently clear" intent of the General Assembly to correct the abuses by manufacturers in connection with farm franchise terminations as support for the argument that the entire statute should be given a retroactive application.

It is a well established principal of law in this State that a statute is presumed to have prospective effect only and should not be construed to have a retroactive application unless such an intent is clearly expressed or arises by necessary implication from the terms of the legislation. *In re Mitchell*, 285 N.C. 77, 79-80, 203 S.E.2d 48, 50 (1974); *Smith v. Mercer*, 276 N.C. 329, 172 S.E.2d 489 (1970); *In Re Estate of Proctor*, 79 N.C. App. 646, 649, 340 S.E.2d 138, 141 (1986). Our Supreme Court has stated that "every reasonable doubt should be resolved against a retroactive operation of a statute." *Hicks v. Kearney*, 189 N.C. 316, 319, 127 S.E.2d 205, 207 (1925).

The Franchise Act is silent as to the issue of retroactivity, stating only that it "shall become effective October 1, 1985." Plaintiff contends, however, that, as the exclusive purpose of the Act is to govern franchise terminations and not to affect any "core expectation" of the contract itself, the intent for retroactive application is "inherent" in the terms of the statute. According to plaintiff and defendants Bass, the Franchise Act should be applicable to all franchise terminations occurring after the effective date of the legislation.

The Franchise Act very clearly regulates the termination of farm equipment franchise agreements. The Act also, however, imposes substantial warranty obligations upon a supplier which could arise at any time during the contractual relationship. The Act provides:

> (a) Whenever a supplier and a dealer enter into a franchise agreement, the supplier shall pay any warranty claim made by the dealer for warranty parts or service within 30 days after its approval. The supplier shall approve or disapprove a warranty claim within 30 days after its receipt. If a claim is not specifically disapproved in writing within 30 days after its receipt it is approved and payment must follow within 30 days.
>
> (b) Whenever a supplier and dealer enter into a franchise agreement, the supplier shall indemnify and hold harmless the dealer against any judgment for damages or any settlement agreed to by the supplier, including court costs and a reasonable attorney's fee arising out of a complaint, claim, or lawsuit

> including negligence, strict liability, misrepresentation, breach of warranty, or . . . other conduct beyond the dealer's control.

G.S. 66-187.

It cannot be said therefore that the Franchise Act deals exclusively with the termination of franchise contracts. There is no indication in either the express language set out above or in the necessary application of the statute that the General Assembly intended that the warranty obligations created by the Act should apply to franchise agreements created prior to the Act's effective date. Without the expression of such an intent, the entire statute must be interpreted as applying only to franchise agreements created after 1 October 1985. The trial judge properly concluded that the Franchise Act has no application to the facts of this case.

[2] The appellants next contend the trial court erred by adopting the referee's proposed Findings of Fact and Conclusions of Law. Again we will point out that the appellants have failed to abide by the unambiguous requirements of Rule 28(b)(5) of the Rules of Appellate Procedure. Not only do they fail to set forth the assignments of error pertinent to this question, there is no authority cited in the brief in support of the appellants' contentions. Such failures will generally result in this Court ruling all relevant assignments of error abandoned. *Id.*

We will nevertheless set forth our conclusion that the appellants' second argument also lacks merit. The referee's report to the trial judge sets forth numerous findings concerning the various amounts due to each party and concluded that plaintiff's debts to defendant exceeded the amounts owed by defendant for the repurchase of plaintiff's inventory. The trial court reviewed the record of the proceedings before the referee and each proposed exception filed by plaintiff and defendants Bass. Those exceptions consisted of plaintiff and defendants Bass' allegation that the referee improperly failed to find certain facts favorable to their position, and of the simple statement that "exception is taken" to each proposed finding and conclusion. The court overruled each purported exception by concluding that all of the objections to the failure of the referee to find certain facts were "untenable" and that the remaining exceptions were unacceptably "nonspecific" and "broadside."

Exceptions predicated simply upon the contention that a referee failed to find certain facts are improper and do not present any question to the trial court for review. *Murphy v. Smith*, 235 N.C. 455, 70 S.E.2d 697 (1952); *Tilly v. Bivens*, 110 N.C. 343, 14 S.E. 111 (1892). Exceptions must specifically identify an alleged error. *Godwin v. Hinnant*, 250 N.C. 328, 108 S.E.2d 658 (1959); *Cooper v. Middleton*, 94 N.C. 86 (1886). The Court in *Godwin* explained:

> The statute providing for a compulsory reference, when it appears an accounting is necessary to determine the rights of the parties, rests on the assumption that this procedure will eliminate items not controverted and will enable the parties, by appropriate exceptions to the referee's findings, to bring into sharp focus the items which are in controversy.
>
> . . . A dissatisfied party is not permitted to take broadside exceptions to the findings. His exceptions, to be helpful and therefore effective in a just settlement of the controversy—the court's objective, must be both specific and directed to a particular finding of fact.

250 N.C. at 332, 108 S.E.2d at 661 (citations omitted).

The trial court properly concluded that the exceptions filed failed to present any issue for the court's review. Without effective exceptions to the factual findings of the referee, those findings are conclusive. *State ex rel. Gilchrist v. Hurley*, 48 N.C. App. 433, 452, 269 S.E.2d 646 (1980), *disc. review denied*, 301 N.C. 720, 274 S.E.2d 233 (1981); *Bank v. Graham*, 198 N.C. 530, 152 S.E.2d 493 (1930); *State ex rel. Gilchrist v. Cogdill*, 74 N.C. App. 133, 327 S.E.2d 647 (1985).

A decision by the trial court to adopt a referee's factual findings will not be disturbed by this Court if there is any evidence in the record to support those findings. *Whitaker v. Earnhardt*, 289 N.C. 260, 221 S.E.2d 316 (1976); *Hall v. Fayetteville*, 248 N.C. 474, 103 S.E.2d 815 (1958); *Spruce Co. v. Hayes*, 169 N.C. 254, 85 S.E. 382 (1915). Plaintiff and defendants Bass do not indicate that any particular factual finding by the referee lacked an evidentiary basis. Rather, they argue only that further evidence presented supported their position. The judgment of the trial court may not be attacked on such grounds. *In re Montgomery*, 311 N.C. 101, 316 S.E.2d 246 (1984); *Rose v. Vulcan Materials Co.*, 282 N.C. 643,

194 S.E.2d 521 (1973); *Blackwell v. Butts*, 278 N.C. 615, 180 S.E.2d 835 (1971).

Both the order of the trial court granting partial summary judgment in favor of defendants and the final judgment in favor of defendants are affirmed.

Affirmed.

Judges ORR and WALKER concur.

STATE OF NORTH CAROLINA v. ANDRE DORAN JONES

No. 913SC634

(Filed 3 March 1992)

Evidence and Witnesses § 2327 (NCI4th)— rape—post traumatic stress disorder—admitted as substantive evidence—error

There was prejudicial error in a prosecution for second degree rape, second degree sexual offense, and crime against nature where the trial court admitted without a limiting instruction expert testimony that the victim had exhibited various behavioral and emotional reactions consistent with those exhibited by victims of PTSD and physical symptoms consistent with those of victims of rape crisis syndrome. Expert testimony relating to PTSD and variations such as rape trauma or crisis syndrome are admissible, but only for certain corroborative purposes and not as substantive evidence of rape.

Am Jur 2d, Rape § 68.5.

Admissibility, at criminal prosecution, of expert testimony on rape trauma syndrome. 42 ALR4th 879.

APPEAL by defendant from judgments entered 7 February 1991 in CARTERET County Superior Court by *Judge H. O. Phillips III.* Heard in the Court of Appeals 20 February 1992.

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

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

GREENE, Judge.

The defendant appeals from judgments entered 7 February 1991, which judgments were based upon jury verdicts convicting the defendant of two violations of N.C.G.S. § 14-27.3 (1986), second degree rape, one violation of N.C.G.S. § 14-27.5 (1986), second degree sexual offense, and one violation of N.C.G.S. § 14-177 (1986), crime against nature.

The State's evidence tends to show the following: On the night of 6 July 1990, the victim, her husband, and some friends went to a trailer park in Morehead City, North Carolina where she and her friends drank a few beers. After a short period of time, her husband returned to their apartment. The victim remained with her friends for about an hour at which time her girlfriend offered to drive her home. She accepted. On their way home, they bought a six-pack of beer. Upon her arrival, the victim found that the door to her apartment was locked. Because she did not have a key to her home, she knocked on the door. Her husband, however, did not answer. Unable to enter her home at about 1:00 a.m., she sat outside and drank her beer with about six other people, one of whom was the defendant.

After about three or four hours, the victim got into an argument with the defendant. The defendant hit her with his fist above her right eye creating a cut which bled. She awakened her husband, got a butter knife out of the apartment, used it to open their truck, and got a stick out of it to hit the defendant. Her husband took the stick away from her and tried to talk to her. She would not listen because she was angry. Her husband became angry with the victim and went back inside their apartment without her. The defendant then handed the victim a towel for her cut. The defendant and the victim were the only people outside at this point. The victim calmed down as the two of them began to talk. The defendant asked her if she wanted to go to his apartment on the other end on the apartment complex and smoke some marijuana. She said that she would, and the two of them began walking to his apartment.

When they arrived at his apartment, the defendant opened the door. As soon as the victim entered the apartment, the defendant walked in behind her, put his hands over her mouth and nose, and pushed her back towards the bedroom. The victim struggled, but the defendant succeeded in getting the victim into the bedroom.

Once in the bedroom, the victim noticed another person standing by the door. The victim could not see his face because he was wearing a blanket or towel over his head. The defendant pushed her onto the bed, took off her pants, and held her hands over her head. The victim resisted his efforts, but he forced her legs apart and had intercourse with her. While he did, he forced the victim to have oral sex with the other man. After the defendant finished, the other man held the victim's hands above her head and had intercourse with her. When he finished, he left the apartment, and the defendant again had intercourse with the victim. When the defendant finished for the second time, he grabbed the victim's pants, cleaned himself with them, and then threw them at her. She dressed and went home. The defendant, however, followed her to her apartment. When she arrived, she told her husband that she had been raped. A few minutes later, the defendant knocked on the door. The victim opened the door, and the defendant told her that she had a phone call at someone's house. She shut the door and said to her husband, "that's the person."

Soon afterwards, she and her husband went to the Beaufort County Sheriff's Department, then to the Morehead City Police Department, and then to Carteret General Hospital. While at the hospital, a doctor and a nurse examined the victim and took various samples of bodily fluid for analysis. The State Bureau of Investigation examined these samples. Although they detected the presence of semen in vaginal swabs and other material, they were unable to determine the identity of the source of the semen. On 9 July 1990, the victim identified the defendant as her rapist from a photographic line-up at the Morehead City Police Department.

Constance Bell (Bell), a counselor and instructor at Carteret Community College, testified for the State. Bell received a bachelor's degree in English from the University of Charleston and a master's degree in counseling from West Virginia University in 1986. In late 1985, Bell served as an intern for the Family Service Agency (Agency) in Charleston, West Virginia. During this time, Bell began specializing in sexual assault crimes. In early 1986, Bell was hired as a staff counselor for the Sexual Assault Unit at the Agency where she counseled victims of sexual assaults. During her eight months as a staff counselor, Bell took several training courses and attended various seminars concerning sexual assault and abuse. In October, 1986, she moved to North Carolina and immediately volunteered with the Rape Crisis Unit (Unit) in Carteret County.

As a volunteer, Bell handled two to three cases of sexual assault per year. In 1990, she became a paid staff member as a counselor and consultant to the Unit primarily counseling sexual assault victims and their families. Bell also worked as an instructor at Carteret Community College where she designed and implemented a counseling program for inmates at the Newport Correctional Facility. Without objection, the State tendered Bell and the trial court qualified her as an expert in counseling victims of sexual assault.

Bell testified that on 7 July 1990, she was called to the Carteret General Hospital regarding a rape. When she arrived, she spoke with two police officers and then with the victim. She stayed with the victim during her physical examination and talked with her about the events of that morning. After that day, Bell met with the victim approximately 17 to 18 times for counseling. Each session lasted from one to one and one-half hours. Over an objection, Bell testified that she was familiar with post traumatic stress disorder (PTSD) and rape crisis syndrome. Over a continuing objection, Bell described the three phases of PTSD and the types of behavioral and emotional reactions exhibited by victims of PTSD. She then testified that in their counseling sessions, the victim had exhibited various behavioral and emotional reactions consistent with those exhibited by victims of PTSD. Specifically, Bell testified that consistent with a victim's reactions in the first phase of PTSD, this victim had been angry, defensive, upset, nervous, and aggressive and had felt powerless and fearful. Consistent with a victim's reactions in the second phase, this victim withdrew. Consistent with a victim's reaction in the third phase, this victim exhibited characteristic mood swings. Bell also described, over objections, the physical symptoms associated with victims of rape crisis syndrome and testified that this victim had exhibited various physical symptoms consistent with those of victims of the syndrome such as sleeplessness, loss of appetite, and nightmares.

The defendant testified at his trial. He admitted hitting the victim above the eye, but testified that he and the other man in the apartment had consensual intercourse with the victim.

The issue is whether the trial court erred in allowing as substantive evidence expert testimony that an alleged rape victim exhibited behavioral and emotional reactions consistent with those exhibited by victims of PTSD and that she also exhibited physical

symptoms consistent with those exhibited by victims of rape crisis syndrome.

Expert testimony relating to PTSD and variations of it such as rape trauma or crisis syndrome is admissible evidence in North Carolina. *State v. Hall*, 330 N.C. 808, 818-21, 412 S.E.2d 883, at 819, 412 S.E.2d at 889 (1992). This is so because these disorders have gained sufficient recognition to be considered as proper subjects for expert testimony. *Id.* This testimony may be either direct, i.e., that the victim suffers from PTSD, or indirect, i.e., that the victim exhibits symptoms consistent with those who suffer from PTSD. *Id.* at 817-22, 412 S.E.2d at 887-91. Because of the real danger of prejudice to the defendant and its tenuous probative value, however, a trial court may admit such evidence only for certain corroborative purposes and not as substantive evidence of rape. *Id.* at 821, 412 S.E.2d at 890; *State v. Huang*, 99 N.C. App. 658, 665-66, 394 S.E.2d 279, 284, *disc. rev. denied*, 327 N.C. 639, 399 S.E.2d 127 (1990). Accordingly, if the trial court determines that the proffered evidence meets the criteria of N.C.G.S. § 8C-1, Rules 403 and 702 (1988), the trial court may admit the evidence for purposes of corroboration. *Hall*, 330 N.C. at 822, 412 S.E.2d at 891. These purposes include, but are not limited to, corroborating the victim's story, explaining delays in reporting the alleged crime, and refuting the defense of consent. *Id.* When the trial court admits such evidence, however, it must "explain to the jurors the limited uses for which the evidence is admitted. In no case may the evidence be admitted substantively for the sole purpose of proving that a rape or sexual abuse has in fact occurred." *Id.*

In this case, Bell testified over repeated objections that the victim had exhibited various behavioral and emotional reactions consistent with those exhibited by victims of PTSD and that the victim had exhibited various physical symptoms consistent with those of victims of rape crisis syndrome. Accordingly, this evidence was admissible only for corroborative purposes. *Id.* The trial court, however, did not limit the use of this evidence to any particular purpose. Bell's testimony was apparently admitted for the substantive purpose of allowing the jury to infer that the victim had been raped. This was error. *Id.* at 823, 412 S.E.2d at 891-92. That the defendant did not request a limiting instruction as required by N.C.G.S. § 8C-1, Rule 105 (1988) does not preclude our review of the trial court's error. *See State v. Short*, 322 N.C. 783, 789, 370 S.E.2d 351, 354 (1988) (defendant must request desired lim-

iting instruction). This is so because at the time of the defendant's trial, testimony relating directly or indirectly to PTSD was admissible as substantive evidence. *State v. Hall*, 98 N.C. App. 1, 8, 390 S.E.2d 169, 173 (1990), *rev'd*, 330 N.C. 808, 412 S.E.2d 883 (1992).

Furthermore, this error prejudiced the defendant thereby entitling him to a new trial. N.C.G.S. § 15A-1443(a) (1988). The evidence at trial conflicted. The State's evidence consisted of the victim's out-of-court identification of the defendant as her rapist, her in-court testimony that she had been raped by the defendant, the corroborative testimony of two police officers, and Bell's testimony. The defendant, to the contrary, testified that he and the victim had consensual intercourse. As the State argued in its brief, Bell's testimony "was necessary for the jury's consideration in determining defendant's guilt or innocence of the offenses charged." On these facts, the defendant has shown a reasonable possibility that had the trial court not admitted Bell's testimony for substantive purposes, a different result would have been reached at the defendant's trial. *Id.*

Because we have determined that the defendant is entitled to a new trial, we do not address the defendant's remaining assignment of error.

New trial.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. LADAVID FOSTER, DEFENDANT

No. 9122SC560

(Filed 3 March 1992)

1. Criminal Law § 260 (NCI4th)— continuance to retain private counsel—denied—no error

The trial court did not err in a robbery prosecution by denying defendant's motion for a continuance to retain private counsel where the record indicates that defendant was indicted on 13 November 1990; his case had been placed on the trial

docket three times before coming on for trial on 11 February 1991; defendant remained in custody during this time and the assistant district attorney assured defendant's counsel that the case would be tried on that date; defendant's counsel learned the day before trial that defendant's father had supposedly retained a private attorney, but neither defendant nor his counsel had been contacted by defendant's father or another attorney; and defendant's appointed counsel appeared for defendant the following day ready to proceed with the trial. The holding in *State v. Little*, 56 N.C. App. 765, establishes that the denial of a motion to continue for the purpose of retaining private counsel presents a constitutional question, but recognizes that the right to be defended by chosen counsel is not absolute.

Am Jur 2d, Criminal Law § 989.

Withdrawal, discharge, or substitution of counsel in criminal case as ground for continuance. 73 ALR3d 725.

2. Criminal Law § 133 (NCI4th)— guilty plea—not accepted—dissatisfaction with counsel

The trial court did not err in a robbery prosecution by refusing to accept defendant's negotiated guilty plea, tendered to the court during presentation of the State's evidence, where the trial judge determined that defendant was not satisfied with his counsel's representation.

Am Jur 2d, Criminal Law §§ 484, 486.

3. Evidence and Witnesses § 1219 (NCI4th)— statement after arrest—voluntariness—findings of judge conclusive

There was competent evidence in the record to support the trial court's findings in a robbery prosecution that defendant had waived his right to counsel and made his statement freely and voluntarily. Whether a statement is freely and voluntarily made is a question of fact for the trial court and, if the findings made by the trial judge are supported by competent evidence in the record, they are conclusive on appeal.

Am Jur 2d, Evidence §§ 529, 582, 587.

4. Evidence and Witnesses § 728 (NCI4th)— ownership of shotgun—excluded—prejudicial error not shown

Defendant in a robbery prosecution did not show prejudice from the court's refusal to allow testimony concerning ownership of a shotgun.

Am Jur 2d, Evidence §§ 278, 288.

5. Criminal Law § 1079 (NCI4th)— nonstatutory aggravating factors—supported by facts

The trial court did not err in a robbery prosecution by finding in aggravation that the offense was committed following flight from a previous offense and that, after completion of the robbery, defendant fired an automatic pistol at individuals trying to apprehend him for the purpose of avoiding apprehension. The trial judge may find any factor in aggravation which is reasonably related to sentencing and supported by the facts.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from *Cornelius (C. Preston), Judge.* Judgment entered 13 February 1991 in Superior Court, DAVIDSON County. Heard in the Court of Appeals 19 February 1992.

Defendant was charged in proper bills of indictment with two counts of robbery with a dangerous weapon in violation of G.S. 14-87. The jury found defendant guilty on both counts, and the court entered a judgment sentencing defendant to fourteen years in prison for the first offense and thirty years in prison for the second offense. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Teresa L. White, for the State.

Wilson, Biesecker, Tripp & Sink, by Roger S. Tripp, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial judge erred in denying his motion for a continuance in order for him to retain counsel of his own choosing. Defendant argues the holding of this Court in *State v. Little*, 56 N.C. App. 765, 290 S.E.2d 393 (1982), establishes that the denial of his motion to continue for the purpose of retaining private counsel presents a constitutional question concerning his

right to have counsel of his choice prepare his defense. While defendant is correct with respect to our decision in *Little* for this proposition, his reliance on this case to show the trial judge erred in denying his motion to continue in the present case is misplaced.

Our opinion in *Little* recognizes the right to be defended by chosen counsel is not absolute. *Id.* at 768, 290 S.E.2d at 395; *See also State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). In *Little*, we held defendant's constitutional right had not been violated by the trial judge's denial of his motion for a continuance to retain private counsel where defendant's right to have counsel of his choice was balanced with the need for speedy disposition of the criminal charges and the orderly administration of the judicial process. *Id.* at 768, 290 S.E.2d at 395-96.

We find the facts in the case at bar to be similar to those in *Little*. The record in the present case indicates that defendant was indicted on 13 November 1990, and his case had already been placed on the trial docket three times before coming on for trial on 11 February 1991. During this time, defendant remained in custody, and the assistant district attorney had assured defendant's counsel, Mr. Tripp, that the case would be tried on this date. On the day before trial, Mr. Tripp learned that defendant's father had supposedly retained a private attorney for him. However, neither defendant nor Mr. Tripp had been contacted by defendant's father or another attorney. Mr. Tripp appeared for defendant the following day ready to proceed with the trial.

From these facts, we find defendant was not prejudiced in any way by beginning the trial as scheduled with the court appointed attorney as his counsel. Therefore, the trial judge did not err in denying his motion for a continuance. This contention is without merit.

[2] Defendant next contends the trial court erred in refusing to accept his negotiated guilty plea tendered to the court during the presentation of the State's evidence. Defendant argues the trial court erred in not inquiring as to whether the plea was entered voluntarily and understandingly. We disagree.

We note at the outset that there is no absolute right to have a negotiated guilty plea accepted. *State v. Collins*, 300 N.C. 142, 265 S.E.2d 172 (1980). In fact, G.S. 15A-1022(a) prohibits a superior

court judge from accepting a plea of guilty from a defendant without first addressing him personally and:

> (1) Informing him that he has a right to remain silent and that any statement he makes may be used against him;
>
> (2) Determining that he understands the nature of the charge;
>
> (3) Informing him that he has a right to plead not guilty;
>
> (4) Informing him that by his plea he waives his right to trial by jury and his right to be confronted by the witnesses against him;
>
> (5) Determining that the defendant, if represented by counsel, is satisfied with his representation; and
>
> (6) Informing him of the maximum possible sentence on the charge, including that possible from consecutive sentences, and of the mandatory minimum sentence, if any, on the charge.

In the present case, the record indicates that upon defendant's request to change his plea to guilty, the trial judge addressed defendant and inquired as follows:

> THE COURT: Have you discussed this case fully with Mr. Tripp and are you satisfied with his legal services?
>
> THE DEFENDANT: No, sir.
>
> THE COURT: Well, you are not satisfied with the way he has represented you?
>
> THE DEFENDANT: No.

Based upon defendant's response to these questions, Judge Cornelius determined that defendant was not satisfied with his counsel's representation and refused to accept defendant's guilty plea. Under these circumstances, where the record affirmatively demonstrates that defendant is not satisfied with his counsel's representation, we hold the trial judge did not err in refusing to accept defendant's plea of guilty.

[3] In his third assignment of error argued on appeal, defendant asserts the trial court erred in admitting into evidence a statement which he made to law enforcement officers on the date of his arrest. Defendant argues the statement was inadmissible because it was made while defendant was in custody and after he had

exercised his constitutional rights to remain silent and to have legal counsel present. We disagree.

In the present case, the trial court held a *voir dire* hearing to determine the admissibility of defendant's statement to Detective Gilley made following his arrest. Both Detective Gilley and defendant testified on *voir dire*, and from their testimony, the judge found that:

> defendant indicated to Officer Gilley that he did not want to make a statement, that he wanted a lawyer present before he talked, that Officer Gilley told him, fine, and was in the process of leaving with the defendant. Within a period of approximately two minutes the defendant asked the officer to tear up the first waiver, that he wanted to talk without an attorney being present, that thereupon the defendant was transported to the Randolph County Police Department in a conference room with Officer Gilley and Officer MacGeavor of the Asheboro Police Department, that he was again advised of his constitutional rights, . . . that the defendant signed the rights form, that thereupon the defendant did make an oral statement to Officer Gilley.

Based upon these findings, Judge Cornelius concluded that:

> none of the constitutional rights, either state or federal of the defendant were violated by his arrest, interrogation or statement, no promises or offer of award or inducement were offered to the defendant to persuade him. That there was no threat or show of violence to commit the defendant to induce the statement, that the statement that the defendant made to Rick Gilley on the 22nd day of August, 1990 was made freely, voluntarily and understandingly and the defendant was in full control of his faculties.

Whether a statement is freely and voluntarily made is a question of fact for the trial court. *State v. Hinson*, 310 N.C. 245, 311 S.E.2d 256, *cert. denied*, 469 U.S. 839, 105 S.Ct. 138 (1984); *State v. Whitley*, 288 N.C. 106, 215 S.E.2d 568 (1975). If the findings of fact made by the trial judge with respect to defendant's statement are supported by competent evidence in the record, they are conclusive on appeal. *State v. Washington*, 102 N.C. App. 535, 402 S.E.2d 851 (1991).

We have reviewed the testimony presented on *voir dire* and hold there was competent evidence in the record to support Judge Cornelius' findings that defendant had waived his right to counsel and made his statement freely and voluntarily to Detective Gilley. Thus, we find no error in his allowing defendant's statement to be admitted into evidence.

[4] Defendant's fourth assignment of error appears in his brief as follows: "The Trial Court erred in refusing to allow defendant to elicit testimony as to ownership of a shotgun which was introduced into evidence by the State." Although defendant's assignment of error concerns his inability to cross-examine Detective Gilley about the owner of the shotgun, defendant's argument relates to the admissibility of the shotgun.

Defendant alleges "the only effect of the evidence of the shotgun presented by the State was to excite prejudice against the defendant" and "[r]efusal to allow defendant to elicit testimony as to ownership of the shotgun prevented defendant from curbing the prejudice incited against him by the State." We note, however, that defendant has raised this issue for the first time on appeal. The record discloses that defendant failed to object when the shotgun was identified and introduced into evidence by the State. Furthermore, defendant failed to properly preserve for appeal the trial judge's refusal to allow testimony of the shotgun owner's identity. The transcript indicates that when defendant asked Detective Gilley if the gun was owned by Mr. Alston, the State objected, the trial court sustained the objection, and defendant asked another question. Defendant has not shown and we are unable to tell from the record if and/or how he was prejudiced by the trial court's refusal to allow testimony concerning the ownership of the shotgun. This assignment of error has no merit. N.C.R. App. 10(b).

[5] Defendant next assigns error to the trial judge's finding aggravating factors in the commission of the second armed robbery and to his sentencing defendant to a prison term greater than the presumptive for this offense.

This Court has previously held that the trial judge may find any factor in aggravation which is reasonably related to sentencing and is supported by the facts. *State v. Setzer*, 61 N.C. App. 500, 301 S.E.2d 107, *disc. review denied*, 308 N.C. 680, 304 S.E.2d 760 (1983). In the present case, evidence was presented to show defendant committed the second armed robbery while fleeing from the

first robbery. Following the second robbery, two witnesses testified they observed defendant fire five shots in their direction as they were attempting to apprehend him. From this evidence, the trial judge found the following nonstatutory aggravating factors applicable to the second armed robbery:

> The offense was committed in this case following flight from having committed a previous offense. After the completion of the robbery the defendant did fire an automatic pistol after the robbery having been completed; this was fired in the direction of individuals who were trying to apprehend him and was for the purpose of avoiding apprehension.

We find the aggravating factors found by the trial judge to have been amply supported by the evidence presented and reasonably related to the purposes of sentencing. This assignment of error is overruled.

Finally, defendant contends the trial court erred in failing to find as a mitigating factor in sentencing defendant that he did not have a prior criminal record. This contention is without merit, however, because the record clearly indicates that Judge Cornelius did specifically find that "The defendant has no record of criminal convictions."

Defendant received a fair trial, free from prejudicial error.

No error.

Judges ORR and WALKER concur.

JOHN A. THOMAS, JR. AND WIFE, LAURA MAIE THOMAS, BETSY T. GALLIHER, AND DEBORAH KERN THOMAS, PLAINTIFFS v. DONALD L. MILLER AND WIFE, CRESSIE Y. MILLER, AND RANDOLPH E. SHELTON, JR., SUBSTITUTE TRUSTEE, DEFENDANTS

No. 9120SC60

(Filed 3 March 1992)

1. **Costs § 34 (NCI4th)— collection of attorney fees—voluntary dismissal—new notice required in second action**

The 10 September 1987 notice defendants gave plaintiffs for collection of attorney fees did not survive the voluntary dismissal of their initial foreclosure action, and defendants were not entitled to recover attorney fees in their second foreclosure proceeding where they failed to notify plaintiffs in writing of their intention to seek attorney fees. N.C.G.S. § 6-21.2(5).

Am Jur 2d, Costs §§ 21, 72.

2. **Costs § 49 (NCI4th)— holders' right to other reasonable expenses—effect of voluntary dismissal of first action—right not affected by failure to give written notice**

Defendants' right to "other reasonable expenses" incurred by them in the enforcement of a promissory note which provided for such expenses was not affected by defendants' failure to notify plaintiffs in writing of their intention to seek "other expenses" in their second foreclosure proceeding, since N.C.G.S. § 6-21.2 was inapplicable to this provision which was simply a contract agreed to by the parties. Therefore, the trial court properly awarded defendants reasonable travel expenses incurred in the enforcement of the note.

Am Jur 2d, Costs § 21.

3. **Appeal and Error § 175 (NCI4th)— amount of interest—note satisfied—moot question**

The matter of the date of default on a promissory note and the amount of interest awarded by the court in an 11 September 1990 order pursuant to a clause of the note providing that it would bear interest of twelve percent after default until paid was moot where the note contains a notation that it was "satisfied in full" on 30 October 1990, since the

language "satisfied in full" indicates a cancellation of the entire debt, including both principal and interest.

Am Jur 2d, Appeal and Error §§ 761, 762.

APPEAL by plaintiffs from order entered 11 September 1990 by *Judge William H. Helms* in RICHMOND County Superior Court. Heard in the Court of Appeals 4 November 1991.

Gill & Dow, by Douglas R. Gill, for plaintiffs-appellants.

Van Camp, West, Webb & Hayes, P.A., by W. Carole Holloway, for defendants-appellees.

LEWIS, Judge.

This case poses several questions; namely, what effect does a voluntary dismissal without prejudice pursuant to N.C.G.S. § 1A-1, N.C.R. Civ. P. 41(a) (1990) have on a foreclosure action with respect to a promissory note's terms which provide for: (1) attorneys' fees and other reasonable expenses, and (2) with respect to the date of default when the noteholders institute a second foreclosure suit based upon the same note but a new default.

On 15 December 1984, plaintiffs purchased a home and surrounding real estate and executed a promissory note and a deed of trust in favor of defendants. Under the terms of these documents, the plaintiffs were required to pay the principal sum of $75,000.00 with twelve per cent interest during the first year. Thereafter, on each December 31st, the interest rate was to be adjusted to a rate one and one half percent "below the prime rate at First Union National Bank, Rockingham, North Carolina." Further, the terms of the documents provide that upon default, the principal and accrued interest, if any, "shall bear interest at the rate of twelve per cent per annum after default until paid." In addition, upon default the note entitled defendants to fifteen per cent of the outstanding balance owing on the note for "reasonable attorneys' fees," as well as any other "reasonable expenses incurred by the holder[s]."

On 10 September 1987, defendants mailed to the plaintiffs a letter giving them notice that they were being held in default for what the defendants deemed were insufficient monthly payments. In this notice of default, defendants notified plaintiffs that if the remainder of the debt were not paid in full in fifteen days, defend-

ants would invoke their right to collect attorneys' fees, pursuant to the terms of the promissory note. There was no mention of the defendants' intent to invoke the "other reasonable expenses" clause also contained in the note. On 9 March 1988 defendants gave plaintiffs a Notice of Hearing on Foreclosure. The Clerk of the Richmond County Superior Court, after a hearing on the matter on 31 March 1988, declined to authorize a foreclosure sale. After initially appealing this decision, the defendants subsequently took a voluntary dismissal without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure, thereby terminating their action against plaintiffs.

On 19 July 1988, defendants filed a second Notice of Hearing on Foreclosure. Presumably, the precipitating factor in this second action was that the June 1988 payment check tendered by plaintiffs was returned for insufficient funds. The defendants in this second notice declared plaintiffs to be in default for the returned check and for the reasons enumerated in their first foreclosure suit. Significantly, the second notice was silent as to defendants' invoking either the promissory note's attorneys' fee clause or the clause for collection of other reasonable expenses.

Defendants again lost at the Clerk's hearing, appealed, and on 6 February 1989 the Superior Court permitted the foreclosure. A dispute then arose over the correct interpretation of the term "prime rate" in conjunction with the proper amount of interest owed by plaintiffs. The plaintiffs then brought this suit for declaratory judgment. Plaintiffs sought and received a temporary restraining order enjoining the foreclosure sale pending the outcome of the declaratory judgment action.

In the order entered 11 September 1990 the trial court found: (1) that the prime rate is "that rate recognized as the 'prime rate' at First Union National Bank of Rockingham, North Carolina," (2) that the plaintiffs defaulted on the note on 1 September 1987, and (3) that defendants were entitled to both attorneys' fees and other reasonable expenses. Plaintiffs do not contest the holding on the prime rate, but appeal the remainder of the court's order. We reverse as to the attorneys' fees, affirm the court's award of other reasonable expenses incurred in the second foreclosure action, and dismiss as to date of default.

[1] Plaintiffs' first assignment of error concerns the lower court's award of reasonable attorneys' fees to defendants. To collect at-

torneys' fees, a party must comply with N.C.G.S. § 6-21.2(5) (1986) which says

> . . . the holder of a note and . . . other security agreement . . . *shall*, after maturity of the obligation by default or otherwise, *notify the maker*, debtor, account debtor, endorser or party sought to be held on said obligation that the provisions relative to payment of attorneys' fees in addition to the 'outstanding balance' shall be enforced and that such maker, debtor, account debtor, endorser or party sought to be held on said obligation has five days from the mailing of such notice to pay the 'outstanding balance' without the attorneys' fees.

(Emphasis added). The case law is clear that a party seeking to collect attorneys' fees incurred in the enforcement of a note must *notify in writing* the opposing party of this intent. *Northwestern Bank v. Barber*, 79 N.C. App. 425, 339 S.E.2d 452, *disc. rev. denied*, 316 N.C. 733, 345 S.E.2d 391 (1986); *Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E.2d 560 (1984). While defendants claim their letter dated 10 September 1987 satisfies the notice requirement for both foreclosure actions, we find this notice to be insufficient for the second proceeding. The dispositive factor here is defendants' voluntary dismissal pursuant to N.C.G.S. § 1A-1, N.C.R. Civ. P. 41 (1990). Once a party files for and is granted a voluntary dismissal without prejudice, "it [is] as if the suit had never been filed." *Tompkins v. Log Sys. Inc.*, 96 N.C. App. 333, 335, 385 S.E.2d 545, 547 (1989), *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). If that party later refiles the same claim within the one year period as allowed in the Rule, the case is begun "anew for all purposes." *Id.*

Defendants' voluntary dismissal without prejudice acted to terminate their initial foreclosure action. The 10 September 1987 notice defendants gave plaintiffs for collection of attorneys' fees did not survive the voluntary dismissal. If defendants wanted to collect reasonable attorneys' fees pursuant to the terms of the note, they would have had to provide plaintiffs with new notice as to that fact, in accordance with *Blanton v. Sisk*, 70 N.C. App. 70, 318 S.E.2d 560 (1984). *See also Raleigh Fed. Sav. Bank v. Godwin*, 99 N.C. App. 761, 394 S.E.2d 294 (1990) (award of attorneys' fees is error if party has not complied with § 6-21.2(5)). Even if the parties in the second suit were exactly those in the action dis-

missed, the fees would be calculated, if at all, on the basis of activity related to the second suit only.

[2] The plaintiffs next assign as error the trial court's award of "other reasonable expenses." Neither party directs us to case law which addresses this precise issue. We note that like the award of reasonable attorneys' fees, the promissory note expressly provides for the award of these expenses. However, N.C.G.S. § 6-21.2 applies only to attorneys' fees, interest, and finance charges, and so is inapplicable to these expenses. This provision, then, is simply a contract agreed to by the parties, and as such, the terms of the agreement control. Consequently, defendants' lack of notice to plaintiffs as to "expenses" is not fatal.

We find ample evidence in the record to support the finding of fact and conclusion of law concerning "other reasonable expenses." We find the award of defendants' travel expenses incurred in the enforcement of the note to be reasonable under the facts of this case, and therefore overrule this assignment of error.

[3] The final assignment of error concerns the date of default as found by the trial court. The trial court found plaintiffs to be in default on the note as of 1 September 1987.

This Court finds a complete lack of evidence to support the finding of fact and conclusions of law holding that default occurred on 1 September 1987. The trial court gives no basis for this determination. This Court is unable to ascertain from the record why the trial court chose the seemingly random date of 1 September 1987, as we can find no default occurring on that date. Therefore, we find there is no basis for the trial court's holding as to this issue, and likewise no basis for applying the twelve per cent default interest rate as of 1 September 1987.

However, we take note of the satisfaction of the debt which occurred on 30 October 1990. Defendants direct us to the promissory note as found in an appendix to the record. The note contains the following language: "SATISFACTION: THE OUTSTANDING DEBT REPRESENTED BY THIS PROMISSORY NOTE HAS BEEN SATISFIED IN FULL. THIS THE 30TH DAY OF OCT., 1990." We find this language dispositive of plaintiffs' appeal on this issue. The plain language—"satisfied in full"—indicates to this Court a cancellation of the debt, including both principal and interest. We believe, therefore, that the matter

of interest, twelve per cent or otherwise, is mooted. We dismiss the appeal of this issue.

The order of the trial court is therefore reversed as to attorney's fees, affirmed as to reasonable travel expenses, and dismissed as to date of default and interest arising therefrom.

Judges WELLS and WALKER concur.

STATE OF NORTH CAROLINA v. TONY HAMMONDS

No. 9120SC348

(Filed 3 March 1992)

1. **Constitutional Law § 287 (NCI4th)— motion to dismiss court appointed counsel—denied—no error**

The trial court did not err in a rape, burglary, and kidnapping prosecution by denying defendant's motion to dismiss his court-appointed counsel where the only reason cited by defendant in support of his motion was that the attorney, in his opinion, had not spent enough time on the case. There was nothing in the record to substantiate defendant's assertion or to demonstrate that his representation was inadequate; furthermore, the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused.

Am Jur 2d, Criminal Law §§ 981, 984-986.

2. **Evidence and Witnesses § 1242 (NCI4th)— statements at police station—volunteered**

The trial court did not err in a prosecution for rape, burglary, and kidnapping by admitting statements made by defendant while in police custody and before he had been advised of his constitutional rights against self-incrimination. The testimony on voir dire supports the trial judge's findings that the statements were made voluntarily and not as a result of any question by law enforcement officers.

Am Jur 2d, Evidence §§ 529, 582, 583.

3. Evidence and Witnesses § 356 (NCI4th)— defendant's statement—reference to other offenses—admissible

The trial court did not err in a prosecution for rape, burglary and kidnapping by admitting at trial statements from defendant which contained references to two other crimes of rape for which defendant had not been tried or convicted. The statements were clearly relevant and were not offered to prove defendant's character, but to explain the motive or reason for his commission of the offense charged.

Am Jur 2d, Evidence § 325.

APPEAL by defendant from *Helms (William H.), Judge*. Judgment entered 16 January 1991 in Superior Court, UNION County. Heard in the Court of Appeals 15 January 1992.

Defendant was charged in proper bills of indictment with first degree rape in violation of G.S. 14-27.2(a)(2), first degree burglary in violation of G.S. 14-51, first degree kidnapping in violation of G.S. 14-39 and assault with a deadly weapon with intent to kill inflicting serious injury in violation of G.S. 14-32(a).

The evidence presented at trial tends to show the following: On the night of 24 May 1990, the prosecuting witness attended a party given by Laverne Hammonds at a nearby apartment. While there, she spoke to defendant who was Laverne's brother-in-law. At around 2:00 a.m., the prosecuting witness left the party and returned to her apartment. She fell asleep on the living room couch, but was awakened by a noise sometime later. When she awoke, she saw defendant standing at the bottom of the stairs inside her apartment, carrying a stick and a knife. Defendant told her not to scream or he would kill her and her daughter who was sleeping upstairs. Defendant then hit the prosecuting witness in the face with the stick, placed the knife to her throat and raped her.

Following the attack, defendant gagged the witness, tied her hands behind her back and put her in the closet, placing a chair against the closet door to prevent her escape. However, she managed to untie herself and get out of the closet. She then ran next door to a neighbor's apartment and banged on the door crying for help. Defendant, who was standing nearby, grabbed her and dragged her into the woods. He again threatened to kill her, hitting her about the head and tried to stab her with the knife. At this point, Laverne Hammonds, defendant's sister-in-law, came from

around the corner of the apartment building calling for the witness, and defendant fled.

The jury found defendant guilty as charged. From judgments imposing prison sentences of life for first degree rape, fifteen years for first degree burglary, fifteen years for first degree kidnapping, and ten years for assault with a deadly weapon with intent to kill, all sentences to be served concurrently, defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Laura E. Crumpler, and Barbara A. Shaw, for the State.

Joseph L. Hutcherson, II, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends "the trial court committed error by denying his motion to dismiss his court appointed attorney and obtain other counsel." We disagree.

Although "in a serious criminal prosecution the accused [has] the right to have the assistance of counsel for his defense," *State v. Hutchins*, 303 N.C. 321, 335, 279 S.E.2d 788, 797 (1981), the right to be defended by chosen counsel is not absolute. *State v. McFadden*, 292 N.C. 609, 234 S.E.2d 742 (1977). The Supreme Court has stated,

> In the absence of any substantial reason for the appointment of replacement counsel, an indigent defendant must accept counsel appointed by the court, unless he wishes to present his own defense. A disagreement over trial tactics does not, by itself, entitle a defendant to the appointment of new counsel. Nor does a defendant have the right to insist that new counsel be appointed merely because he has become dissatisfied with the attorney's services. Similarly, *the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused*; . . . (citations omitted; emphasis added).

Hutchins, at 335, 279 S.E.2d at 797. "The trial court's sole obligation when faced with a request that counsel be withdrawn is to make sufficient inquiry into defendant's reasons to the extent necessary to determine whether defendant will receive effective assistance of counsel." *State v. Poole*, 305 N.C. 308, 311, 289 S.E.2d 335, 338 (1982).

In the present case, defendant moved to dismiss his court-appointed counsel after his case had been called for trial, but before the jury had been impaneled. The transcript discloses the following then took place:

THE COURT: You want to be heard?

DEFENDANT: Yes sir. I feel like I need another lawyer because Mr. Hutcherson hasn't spent enough time with me on this case and really wasn't concerned about hearing my case. And I've been talking to another lawyer for quite some time. He told me to hold out and see what Mr. Hutcherson offered me.

THE COURT: Told you what?

DEFENDANT: Told me to hold out and see what Mr. Hutcherson offered me.

THE COURT: Anything else?

DEFENDANT: No.

THE COURT: Motion denied. Bring the jury back.

From the foregoing, it is clear the trial court fulfilled its obligation to inquire into defendant's reasons for wanting to discharge his attorney. The only reason cited by defendant in support of his motion was that, in his opinion, Mr. Hutcherson had not spent enough time with him on his case. We find nothing in the record to substantiate defendant's assertion, nor to demonstrate that defendant's representation was inadequate. Furthermore, "the effectiveness of representation cannot be gauged by the amount of time counsel spends with the accused . . . ." *Hutchins* at 335, 279 S.E.2d at 797. Therefore, we hold the trial court correctly determined that there was no "substantial reason" requiring the discharge of defendant's court-appointed counsel and properly denied his motion. This contention is overruled.

In his second and third assignments of error argued on appeal, defendant challenges the trial court's ruling allowing defendant's oral statements made to law enforcement officers to be admitted into evidence.

[2] Defendant first argues the trial court erred in admitting the statements because they were made while defendant was in custody and defendant had not been advised of his constitutional rights against self-incrimination. Defendant admits, however, that "vol-

unteered or spontaneous statement[s] made by a [d]efendant to a police officer without any interrogation on the part of the officer are not barred by any theory of our law." *State v. Parker*, 59 N.C. App. 600, 297 S.E.2d 766 (1982).

The record indicates that, upon objection by defense counsel, the trial judge conducted a *voir dire* hearing to determine the admissibility of the statements. The court heard evidence from Detective Roger Coan who was present at the Monroe Public Safety Department when defendant was brought in. Detective Coan testified that, at that time, defendant was not under arrest, was not handcuffed and was free to leave. He also stated that neither he nor Officer Haulk, who was also present, attempted to question defendant. Detective Coan said that Officer Haulk asked defendant how he was doing and in response, defendant stated, "I messed up. This was a good girl. She doesn't deserve what I did to her. Whatever I get I deserve. I been accused of a couple, so I just thought I would do one."

From the evidence presented on *voir dire*, Judge Helms found that defendant was in custody at the time he made the oral statements, but that they were "made voluntarily and not as a result of any question or interrogation by [the] law enforcement officers." Defendant does not challenge the findings of the trial court, and we are bound by his findings if supported by competent evidence. *State v. Washington*, 102 N.C. App. 535, 402 S.E.2d 851 (1991).

We hold the testimony of Detective Coan supports the findings made by the trial judge with respect to defendant's statements, and these statements were properly admitted.

[3] In his third assignment of error, defendant argues the trial judge erred in admitting his oral statements because they contained references to two other crimes of rape for which defendant had not been tried or convicted. Defendant contends the statements, "I've been accused of a couple" and "I just thought I'd do one" were so prejudicial as to inflame the jury against him. However, the record reveals that defendant did not object to the admission of these statements on this ground at trial; and defendant has, therefore, not properly preserved this issue for appellate review. N.C.R. App. 10(b).

In the interests of justice, however, we have considered the issue defendant has attempted to raise and find no error in the trial court's admission of defendant's statements concerning other rapes which he may have committed. As part of defendant's confession, these statements were clearly relevant and were not offered to prove defendant's character, but to explain the motive or reason for his commission of the offense charged. *See* N.C.R. Evid. 404(b). This assignment of error is without merit.

Finally, defendant contends "the numerous questions asked by the trial judge were prejudicial to him." However, defendant has failed to discuss in his brief how he was prejudiced by the judge's questions or to even refer us to specific questions he finds erroneous, and does not cite any authority supporting his contention. Ordinarily, when an appellant's brief does not adequately state a reason or argument upon which the assignment of error is based or cite appropriate authority for that argument, the assignment of error is deemed abandoned. N.C.R. App. 28(b)(5). Nevertheless, we have reviewed the record and find no prejudicial error in the questions posed by the trial judge to the witnesses.

Defendant received a fair trial, free from prejudicial error.

No error.

Judges WELLS and JOHNSON concur.

IN THE MATTER OF THE WILL OF DOROTHY J. HUBNER, DECEASED

No. 9128SC406

(Filed 3 March 1992)

1. Wills § 66 (NCI3d)— failure of testatrix to prevent lapse of gift—no substitution made

Where testatrix had both the knowledge and the ability to prevent the lapse of the gifts to the parties in her will who would not otherwise be eligible to share in her estate, her failure to do so indicated no testamentary intent to prevent the lapse of such gifts, nor was there any sufficiently clear language of substitution for these devisees; therefore, there

was no basis for the court to conclude that testatrix intended the daughter of one of her husband's half-brothers to take the lapsed shares to the exclusion of all others.

Am Jur 2d, Wills §§ 1665-1669.

Testator's intention as defeating operation of antilapse statute. 63 ALR2d 1172.

2. Wills § 66.1 (NCI3d)— anti-lapse statute—qualified issue—share of lapsed residuary gift

The 1987 amendment to N.C.G.S. § 31-42(a) ensures that qualified issue will take by substitution the "whole legal share" to which his or her predecessor was entitled. If the predecessor would have taken a share of a lapsed residuary gift, the qualified issue may also participate in this lapsed gift.

Am Jur 2d, Wills §§ 1671, 1673.

APPEAL by respondents from summary judgment filed 3 January 1991 by *Judge C. Walter Allen* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 19 February 1992.

Roberts, Stevens & Cogburn, by Allan P. Root, for Respondent-Appellant Florence Stephens.

Richard S. Daniels for Respondent-Appellant Ruth McGuire.

Adams, Hendon, Carson, Crow & Saenger, by Philip G. Carson and Martin K. Reidinger, for Respondents-Appellees Jean Peterson, Barbara Tschopp, Linda Mandell, and Sharon Ribordy.

No brief for First Union National Bank, Executor of the Estate of Dorothy J. Hubner.

LEWIS, Judge.

The issue in this case is whether heirs who partake of a devise pursuant to the anti-lapse statute are entitled to a share of a lapsed residuary gift.

Dorothy J. Hubner died testate on 3 July 1989. After reciting multiple gifts, item six of the will provided:

> In the event my husband predeceases me, after payment of the bequests set forth in Item Five hereof, I direct my Executor to divide my Residuary Estate into two equal shares:

A.

One of such shares shall be further divided into four equal parts and I give, devise and bequeath one part to each of my brothers and sisters, Julius S. Gregorius, . . . , Ruth M. McGuire, . . . , Hazel I. Ehlers, . . . , and Earl G. Gregorius . . . , absolutely and forever. In the event either or both Ruth M. McGuire and/or Hazel I. Ehlers have predeceased me, I direct that the equal part to which either or both would have been entitled be divided equally between Julius S. Gregorius and Earl G. Gregorius.

B.

The other and equal share shall be further divided into two equal parts, and I give, devise and bequeath one part to my husband's half brother, Louis H. Figgins, . . . , absolutely and forever, and the other and equal part shall be divided into three equal portions which I give and bequeath to the surviving children of my husband's half brother, Edward O. Figgins, to-wit: my nieces, Corinne Figgins, . . . , Florence Stephens, . . . , and Helen Davis, . . . , absolutely and forever.

Decedent left neither husband nor descendants. She was survived by: Ruth McGuire, Florence Stephens, Julius Gregorius' daughter, Jean Peterson, and by Earl Gregorius' daughters, Barbara Tschopp, Linda Mandell, and Sharon Ribordy. On 9 July 1990, the executor, First Union National Bank, filed suit for guidance as to the distribution of the estate. Upon summary judgment, the trial court determined that the estate should be divided accordingly: Jean Peterson 9/28, Barbara Tschopp 3/28, Linda Mandell 3/28, Sharon Ribordy 3/28, Ruth McGuire 6/28, and Florence Stephens 4/28. Both Ruth McGuire and Florence Stephens appeal.

There is no argument as to the disposition of the lapsed bequests to Julius and Earl Gregorius. Their shares are to be distributed to their respective daughters. At issue is the proper distribution of the lapsed bequest to Helen Davis, Louis and Corinne Figgins. At common law, gifts to deceased individuals lapsed. North Carolina's Anti-lapse Statute, N.C.G.S. § 31-42, prevents this common law result under certain circumstances. A devise to a deceased individual does not lapse when the deceased devisee leaves surviving issue who would have been testator's heirs by intestate succession. These surviving issue are designated "qualified issue." N.C.G.S.

§ 31-42(b) (cum. sup. 1991). The anti-lapse statute does not apply where the will expresses a "contrary intent." N.C.G.S. § 31-42(a) (cum. sup. 1991).

[1] Florence Stephens argues that the will reflects Dorothy Hubner's intent to distribute her estate equally between her family and her husband's.

> The paramount aim in the interpretation of a will is to ascertain if possible the intent of the testator. In our effort to ascertain the testator's intent, we must consider the instrument as a whole and give effect to such intent, unless it is contrary to some rule of law or at variance with public policy.

Entwistle v. Covington, 250 N.C. 315, 318, 108 S.E. 2d 603, 606 (1959) (citation omitted). Should the testator desire to prevent lapse, he must express his intent that the gift not lapse or must provide for substitution of another devisee to receive the gift. *Entwistle*, 250 N.C. at 321, 108 S.E. 2d at 607. The anti-lapse and substitution language must be "sufficient[ly] [clear], what person or persons [testator] intended to substitute for the legatee dying in his lifetime." *Id.*, (*quoting* 96 CJS, Wills, § 1216, page 1053, *et seq.*). Otherwise, the anti-lapse statute applies.

In *Wachovia Bank & Trust Co. v. Shelton*, 229 N.C. 150, 48 S.E. 2d 41 (1948), a devise to one of collateral kinship lapsed because the devisee predeceased the testatrix. Taking into consideration that decedent obviously drafted her will with advice of counsel and that she had provided for substitution to prevent the lapse of some gifts, but not others, our Supreme Court concluded that decedent knew how to prevent lapse of gifts to collateral kin. Because she had the knowledge and ability to prevent lapse, but did not do so, the Court held that there was no intent in the will to keep the gift in question from lapsing.

In the case at bar, there was no clear language which prevented lapse of the gifts in question, nor language which substituted Florence Stephens for the other members of Mr. Hubner's family. Upon review, we find that Mrs. Hubner's will was obviously drafted with legal assistance, that she required that her sisters survive her in order to take, and that she provided for substitution in the case her sisters predeceased her. As in *Shelton*, Mrs. Hubner had both the knowledge and the ability to prevent the lapse of the gifts to the parties in her will who would not otherwise be

eligible to share in her estate. Mrs. Hubner's failure to do so, like the failure to take such action in *Shelton*, indicates no testamentary intent to prevent the lapse of the Figgins or Davis gift. Nor is there any "sufficiently clear" language of substitution for these devisees. We find no basis for concluding that Mrs. Hubner intended Florence Stephens to take the lapsed shares to the exclusion of all others.

[2] The second and third arguments can be consolidated. Ruth McGuire and Florence Stephens argue that pursuant to N.C.G.S. § 31-42(c)(2) (cum. supp. 1991) the lapsed gifts should be split equally between them. The statute provides:

> Where a residuary devise or legacy is void, revoked, lapsed or for any other reason fails to take effect with respect to any devisee or legatee named in the residuary clause itself or a member of a class described therein, then such devise or legacy shall continue as part of the residue and shall pass to the other residuary devisees or legatees if any; or, if none, shall pass as if the testator had died intestate with respect thereto.

N.C.G.S. § 31-42(c)(2) (cum. sup. 1991).

This argument relies upon *Bear v. Bear*, 3 N.C. App. 498, 165 S.E. 2d 518 (1969). In *Bear*, another panel of this Court indicated "[a]s we view G.S. 31-42 (c) (2), [this] subsection is applicable only where there are other residuary devisees or legatees *named in the will who survive the testator.*" *Id.* at 505, 165 S.E. 2d at 523 (emphasis original). The Court in *Bear* held that heirs who take pursuant to a section (a) substitution are not "named in the will" and are not eligible to participate in the lapsed residuary gift under section (c). *Id.* at 506, 165 S.E. 2d at 523. Two factors were significant to this holding. First, the Court focused on the fact that section (c) begins by stating that it applies when section (a) does not apply. Second, the language in section (c) which provides that "[w]here a residuary devise or legacy . . . *lapsed* . . . with respect to any devisee or legatee *named in the residuary clause* itself . . . , then such devise or legacy shall continue as a part of the residue and shall pass to the other residuary devisees or legatees if any. . . ." N.C.G.S. § 31-42(c)(2) (1984) (emphasis added).

Circumstances have changed since the *Bear* decision. The anti-lapse statute has been amended. The 1987 amendments, applicable

to wills taking effect on or after 1 October 1987, added the following underlined portion to section (a):

> Unless a contrary intent is indicated by the will, where a devise or legacy of any interest in property is given to a person as an individual or as a member of a class and the person dies survived by qualified issue before the testator dies, then the qualified issue of such deceased person that survive the testator shall represent the deceased person, and the entire interest that the deceased person would have taken had he survived the testator shall pass by substitution to his qualified issue.

N.C.G.S. § 31-42(a) (cum. sup. 1991) (emphasis added). The question at hand requires the reinterpretation of the anti-lapse statute in view of the amendment. "When courts are called upon to interpret legislative intent, the words selected by the Legislature should be given their generally accepted meaning unless it is manifest that such definition will do violence to the legislative intent." *Bear*, 3 N.C. App. at 504, 165 S.E. 2d at 522 (*quoting, Sayles Biltmore Bleacheries Inc. v. Johnson*, 266 N.C. 692, 694, 147 S.E. 2d 177 (1966)). Entire is defined as "whole; without division, separation, or diminution; unmingled; complete in all its parts; not participated in by others." Black's Law Dictionary 477 (5th ed. 1979). Interest denotes a "right, claim, title, or legal share in something." *Id.* at 729. Hence, this additional language ensures that qualified issue will take by substitution the "whole legal share" to which his predecessor was entitled. If the predecessor would have taken a share of a lapsed residuary gift, then the qualified issue may also participate in this lapsed gift.

In the case at bar, all parties agree that Jean Peterson, Barbara Tschopp, Linda Mandell, and Sharon Ribordy (Appellees) are qualified issue. They are entitled to take the "entire interest" that their fathers would have taken had the men survived. Had the fathers, Julius and Earl Gregorius, survived, there would have been four members of the residuary class able to participate in the lapsed Figgins and Davis residuary gifts: i.e., Julius, Earl, Ruth, and Florence. Each member would have taken ¼ of the residuary gift. Accordingly, the lapsed gifts would be divided as follows: Ruth McGuire 1/4, Florence Stephens 1/4, Jean Peterson 1/4, Barbara

Tschopp 1/12, Linda Mandell 1/12, and Sharon Ribordy 1/12. This is precisely how the trial court divided the lapsed gifts. We affirm.

Affirmed.

Judges ARNOLD and WYNN concur.

AL URBACK, PETITIONER-APPELLEE v. EAST CAROLINA UNIVERSITY, RESPONDENT-APPELLANT

No. 912SC385

(Filed 3 March 1992)

State § 12 (NCI3d)— state employee—refusal to work with asbestos—not insubordination

The Superior Court correctly reversed the Personnel Commission's decision that a state employee's dismissal be upheld where petitioner was terminated from his employment for insubordination when he refused to remove material containing asbestos from a ceiling; the Commission specifically found that petitioner had an actual, legitimate, genuine, and reasonable fear of asbestos and concern for his health; and the Commission nevertheless concluded that petitioner's refusal to perform the job assignment amounted to insubordination due to its conclusion following testimony from a Department of Labor investigator that the assignment was both reasonable and safe. While it is not within the Court of Appeals' scope of review to determine whether petitioner acted reasonably in light of the conditions existing at the time he refused to move the asbestos, a ruling that an employee's refusal to act amounted to insubordination despite the reasonableness of his fears was clearly erroneous as a matter of law.

Am Jur 2d, Civil Service §§ 61, 63.

APPEAL by respondent from *Griffin (William C.), Judge*. Order entered 21 February 1991 in Superior Court, BEAUFORT County. Heard in the Court of Appeals 17 February 1992.

Petitioner Al Urback was terminated from his employment by Respondent East Carolina University (hereinafter "E.C.U.") on 1 July 1987. At the time of his termination, Urback was an employee subject to the State Personnel Act, G.S. 126-35, and could not

be discharged without cause. Urback contested his termination and, after completing the E.C.U. grievance procedures which affirmed his dismissal, Urback filed a petition for a Contested Case Hearing pursuant to G.S. 150B-23, *et seq.*

An administrative law judge conducted an evidentiary hearing on 19 and 20 April 1988 and thereafter issued extensive proposed Findings of Fact and Conclusions of Law and recommended that the State Personnel Commission order the reinstatement of Urback to his former position with back pay, front pay, attorney's fees and all other benefits of continuous state employment. The Personnel Commission adopted many of the Findings of Fact proposed by the administrative law judge, yet nevertheless rejected both the Conclusions of Law and the Recommended Decision and ordered that Urback's dismissal be upheld.

Urback then filed a Petition for Judicial Review pursuant to G.S. 150B-43 *et seq.* which came on for hearing at the 4 January 1991 session of the Superior Court, Beaufort County. Judge William C. Griffin reversed the Commission's decision after finding it to be erroneous as a matter of law and ordered that Urback be reinstated to his former position.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Thomas J. Ziko, for respondent, appellant.

Gary B. Davis for petitioner, appellee.

HEDRICK, Chief Judge.

The facts relevant to this appeal are undisputed by the parties. The Personnel Commission found that the petitioner had been an employee at E.C.U. for fourteen and one-half (14½) years at the time of his termination and had consistently received a rating of "more than satisfactory" from his supervisors. During the last seven years of his employment, Urback was specifically classified as an air conditioning technician in the heating ventilation and air conditioning section of the utilities division of the physical plant department.

During June 1987, E.C.U. hired outside contractors to install air conditioning in the basement of Fletcher Dormitory located on the university campus. In order to attach the ductwork for the air conditioning unit, material containing 25-30% asbestos had to be removed from the ceiling. On the morning of 30 June 1987,

Urback's immediate supervisor instructed him to remove those asbestos patches. Urback refused to participate in the removal stating that he was concerned about the health hazards related to asbestos exposure. When petitioner continued to refuse the job assignment despite repeated orders to comply, he was suspended. Urback's employment was formally terminated the following day with the cause identified by E.C.U. as insubordination.

The Personnel Commission determined that a job assignment is reasonable and proper as long as it is within the mental capabilities of the employee and is not unsafe, illegal or a violation of professional/ethical standards. The Commission then specifically found that the petitioner "had an actual, legitimate, genuine, and reasonable fear of asbestos and actual concern for his health after he received the job assignment on the morning of June 30," and that "he reasonably believed that exposure to asbestos would cause him serious injury." A further finding adopted by the Commission concedes that "exposure to respirable asbestos at certain levels can increase the petitioner's risk of contracting a permanently disabling or fatal lung disease or cancer or both."

Despite these findings, the Commission nevertheless concluded that Urback's refusal to perform the job assignment amounted to insubordination due to its conclusion that the assignment was both reasonable and safe. An investigator from the Department of Labor had testified at the administrative hearing that he had reviewed the job assignment following petitioner's dismissal and had determined that "the work practices [actually employed by the workers who completed the removal following Urback's dismissal] and duration of the job precluded employee exposure above the Permissible Exposure Limit." The Commission then concluded that further findings concerning the petitioner's perception of the safety of the job were irrelevant.

Respondent E.C.U. argues that the Superior Court erred in reversing the Commission's decision by holding that petitioner's conduct did not amount to insubordination as a matter of law. Pursuant to G.S. 150B-51(4), the Superior Court may reverse an agency's decision if it finds that the agency's decision was affected by an error of law. Our consideration of the Superior Court's decision is limited to determining whether that court committed any error of law in the review of the agency decision. *Henderson v. N.C. Dept. of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d

887, 890 (1988); *American Nat'l Insurance v. Ingram*, 63 N.C. App. 38, 41, 303 S.E.2d 649, 651, *cert. denied*, 309 N.C. 819, 310 S.E.2d 348 (1983).

The Superior Court held that the Commission's decision was based upon the erroneous conclusion that petitioner's perception of the safety of the job assignment was irrelevant, despite its finding that Urback's fear was "legitimate, genuine and reasonable" in light of the circumstances existing on the morning of 30 June 1987. The Commission found, and the respondent argues, that the testimony of the investigator from the Department of Labor indicating that the job was later found to pose no serious risk of harm to employees, supports the conclusion that Urback's conduct amounted to insubordination. We agree with the superior court's ruling that such a conclusion is erroneous as a matter of law.

The State Employee's Handbook defines insubordination as the refusal to accept a reasonable and proper assignment from an authorized supervisor. *See Employment Security Commission v. Lachman*, 305 N.C. 492, 506, 290 S.E.2d 616, 624-625 (1982). The refusal which is the basis of the offense must be a willful refusal, *Id.*, *Kandler v. Department of Correction*, 80 N.C. App. 444, 451, 342 S.E.2d 910, 914 (1986), and the reasonableness of the assignment must be determined in light of the relative circumstances existing at the time of the incident, *Lachman*, 305 N.C. at 506, 290 S.E.2d at 624-625, and in light of the employee's reasonable perception of those circumstances. *Kandler*, 80 N.C. App. at 451, 342 S.E.2d at 914. The conduct of an employee cannot be termed willful misconduct if it is determined that the employee's actions were reasonable and taken with good cause. *See Williams v. Burlington Industries Inc.*, 318 N.C. 441, 456, 349 S.E.2d 842, 851 (1986); *Intercraft v. Industries Corp. v. Morrison*, 305 N.C. 373, 375, 289 S.E.2d 357, 359 (1982); *In the matter of Helmandollar v. M.A.N. Truck & Bus Corp.*, 74 N.C. App. 314, 316, 328 S.E.2d 43, 44 (1985).

While it is not within our scope of review to determine whether Urback acted reasonably in light of the conditions existing at the time he refused to remove the asbestos, *Henderson*, 91 N.C. App. at 535, 372 S.E.2d at 890, the Commission itself specifically found that Urback reasonably believed that the exposure to asbestos would cause him serious injury. A ruling that despite the reasonableness of an employee's fears, his refusal to act never-

theless amounted to insubordination is clearly erroneous as a matter of law.

As a finding that the Commission's decision was affected by an error of law is sufficient basis for the superior court's reversal of the agency decision pursuant to G.S. 150B-51(4), there is no need to address respondent's further assignments of error.

Affirmed.

Judges ORR and WALKER concur.

WHITLEY'S ELECTRIC SERVICE, INC., PLAINTIFF v. STUART WALSTON, JR., D/B/A STUART WALSTON CONSTRUCTION COMPANY AND STUART WALSTON CONSTRUCTION COMPANY, AND WALSTON CONSTRUCTION COMPANY, DEFENDANT

No. 917SC358

(Filed 3 March 1992)

Courts § 84 (NCI4th)— summary judgment denied by one judge— summary judgment by another judge on same issue—error

Where one judge denies a motion for summary judgment, another judge may not reconsider the issue and grant summary judgment on the same issue.

Am Jur 2d, Courts § 130.

APPEAL by plaintiff from judgment entered 18 February 1991 by *Judge Franklin R. Brown* in WILSON County Superior Court. Heard in the Court of Appeals 10 February 1992.

Farris & Farris, P.A., by Thomas J. Farris and Robert A. Farris, Jr., for plaintiff-appellant.

Rose, Rand, Orcutt & Cauley, P.A., by James P. Cauley, III, for defendants-appellees.

JOHNSON, Judge.

Plaintiff is an electrical contractor. Defendants are the individual sole shareholder and the construction companies he operated. By

amended complaint filed 18 May 1989, plaintiff alleges that defendants owe plaintiff monies for work performed and goods delivered on the Page house project. Defendants answered the complaint alleging the statute of limitations as a defense. On 10 October 1989, defendants moved for summary judgment on the basis that the suit was barred by the three year statute of limitations. Plaintiff responded, alleging that defendants had acknowledged the debt and renewed their intention to pay the obligation. By order dated 25 October 1989, Judge Butterfield, Jr., found that a genuine issue of material fact existed as to whether defendants had acknowledged the account and he denied defendants' motion for summary judgment. On 11 October 1990, before Judge Brown, defendants again moved for summary judgment on the identical issue and in support of their motion added the deposition of plaintiff's president, Doug Whitley. By judgment filed 18 February 1991, Judge Brown found that no genuine issue of material fact existed and allowed defendants' motion for summary judgment.

In his second Assignment of Error, plaintiff argues that Judge Brown was without authority to grant defendants' second motion for summary judgment. We agree.

> The well established rule in North Carolina is that no appeal lies from one Superior Court judge to another; that one Superior Court judge may not correct another's errors of law; and that ordinarily one judge may not modify, overrule, or change the judgment of another Superior Court judge previously made in the same action.

Calloway v. Motor Co., 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). The reason for this is that

> if the rule were otherwise, the normal reviewing function of appellate courts would be usurped, and, in some instances, the orderly trial process could be converted into a chaotic, protracted affair as one party attempted to shop around for a more favorable ruling from another superior court judge.

State v. Duvall, 304 N.C. 557, 562, 284 S.E.2d 495, 498 (1981). A superior court judge can, however, modify a prior interlocutory order of another judge "where the party seeking to alter that prior ruling makes a sufficient showing of a substantial change in circumstances during the interim which presently warrants a different or new disposition of the matter." *Id.* at 562, 284 S.E.2d

at 499. The interlocutory order at issue, however, must have been one within the discretion of the court. *Id.; Calloway*, 281 N.C. 496, 189 S.E.2d 484. Thus, there are two requirements which must be met before a modification of a prior interlocutory order is proper: (1) the prior order was discretionary and (2) there has been a substantial change in circumstances. *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 374 S.E.2d 160 (1988); *Stone v. Martin*, 69 N.C. App. 650, 318 S.E.2d 108 (1984).

The rules stated above do not help defendants. Judge Brown's order granting defendants' motion for summary judgment was subsequent to Judge Butterfield's denial of defendants' earlier motion for summary judgment on the identical issue. Even though it is interlocutory in terms of appealability, a ruling on a motion for summary judgment involves an issue of law, not discretion. *Carr v. Carbon Corp.*, 49 N.C. App. 631, 272 S.E.2d 374 (1980), *disc. rev. denied*, 302 N.C. 217, 276 S.E.2d 914 (1981). Where a judge rules as a matter of law, the rights of the parties are finally determined, subject only to reversal on appeal. *Green v. Laboratories, Inc.*, 254 N.C. 680, 120 S.E.2d 82 (1961). Thus, where one judge denies a motion for summary judgment, another judge may not reconsider the issue and grant summary judgment on the same issue. *Iverson*, 92 N.C. App. 161, 374 S.E.2d 160; *Smithwick v. Crutchfield*, 87 N.C. App. 374, 361 S.E.2d 111 (1987); *Stone*, 69 N.C. App. 650, 318 S.E.2d 108; *Carr*, 49 N.C. App. 631, 272 S.E.2d 374.

Defendants argue that if Judge Brown's order is vacated, the parties will be forced to have a jury trial even though Judge Brown has now found that no genuine issue of material fact exists. While this contention may be true, it is also irrelevant. It was defendants who initially moved for summary judgment on 10 October 1989. Judge Butterfield denied the motion on the basis of the materials presented to him by both parties. It was incumbent upon both parties at the time of the hearing on the motion to present to the court the evidence which would support either the granting or denial of the motion. As stated in *American Travel Corp. v. Central Carolina Bank*, 57 N.C. App. 437, 291 S.E.2d 892, *disc. rev. denied*, 306 N.C. 555, 294 S.E.2d 369 (1982):

> 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.

Piecemeal litigation of motions for summary judgment is to be avoided.

Id. at 441, 291 S.E.2d at 895. *See also Carr*, 49 N.C. App. 631, 272 S.E.2d 374. Since it was defendants who filed for summary judgment on 10 October 1989, it was their burden to present evidence which would support the granting of their motion. If discovery was necessary to accomplish this task then discovery should have been carried out before the summary judgment motion was filed. This argument has no merit.

We find that Judge Brown had no authority to grant summary judgment in favor of defendants and we vacate the order of 18 February 1991 granting defendants' motion for summary judgment.

Because of our holding on plaintiff's second Assignment of Error, vacating Judge Brown's order, we find that we need not consider plaintiff's argument on the issue of acknowledgment.

Vacated.

Chief Judge HEDRICK and Judge WELLS concur.

DALE PRICE JONES, PLAINTIFF v. GENERAL ACCIDENT INSURANCE COMPANY OF AMERICA, DEFENDANT

No. 918SC246

(Filed 3 March 1992)

Insurance § 69 (NCI3d)— automobile insurance—stacking—driving car with permission—person insured

The trial court correctly recognized that plaintiff was entitled to stack UIM insurance coverage where she was injured while driving her father's car. Although not a member of her father's household or a named insured on his policy, plaintiff was driving her father's car with his permission and was a person insured under the policy and under N.C.G.S. § 20-279.21(b)(3). Once claimants establish that they are a person insured, regardless of class or status, they have the ability to stack UIM coverage.

Am Jur 2d, Automobile Insurance § 329.

APPEAL by defendant from an order entered 13 February 1991 by *Judge George R. Greene* in WAYNE County Superior Court. Heard in the Court of Appeals 4 December 1991.

On 7 June 1989, while driving her father's car, plaintiff was struck by a car driven by Sheila Marie Nelson. The car plaintiff was driving was insured by defendant under a policy issued to plaintiff's father, Donald Ray Price. The policy covered three other vehicles owned by Price. Each vehicle was insured with underinsured motorist coverage (UIM) of $100,000 per person and $300,000 per accident. Nelson was killed in the accident and plaintiff received various injuries. A passenger in each car was also injured. For purposes of this action the parties agreed that the accident was due to the negligence of Nelson. Nelson's car was insured by Seibels Bruce Insurance Companies with liability coverage limits of $25,000 per person and $50,000 per accident.

Plaintiff alleged injuries in excess of $100,000 as a result of her collision with Nelson. After exhausting the limits of Nelson's insurance coverage, plaintiff sought underinsured motorist coverage from defendant in the amount of $400,000. On 18 October 1990, plaintiff brought an action for declaratory judgment against defendant to determine the limits of underinsured motorist coverage available to her. Defendant answered and moved for summary judgment contending that its policy limit for underinsured motorist coverage was no greater than $100,000 under the policy covering the car which plaintiff was driving. The parties stipulated to all pertinent facts and plaintiff filed a cross-motion for summary judgment. The trial court granted plaintiff's motion and awarded plaintiff $400,000 less the amounts previously paid to plaintiff by Seibels Bruce and defendant. From the trial court's order granting plaintiff's motion for summary judgment and denying defendant's motion, defendant appeals.

Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr. for plaintiff-appellee.

Smith Helms Mulliss & Moore, by Alan W. Duncan and J. Donald Hobart, Jr., for defendant-appellant.

ORR, Judge.

The issue on appeal is whether plaintiff, an insured by virtue of her occupancy in a covered vehicle owned by her father, may

aggregate or "stack" the UIM coverage on her father's four insured vehicles covered by the policy issued by defendant.

Our courts have consistently held that N.C. Gen. Stat. § 20-279.21 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. *See, e.g., 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); *see also Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991) (under N.C. Gen. Stat. § 20-279.21(b)(3) "persons insured" include any person who uses with the consent, express or implied, of the named insured, the insured vehicle). For UIM purposes, class one persons insured are covered even where the insured vehicle is not involved in the insured's injuries while class two persons insured are covered only when the insured vehicle is 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).

Two recent opinions of this Court addressed the previously unanswered question of whether the ability to stack UIM coverage is available to a class two person insured. In *Nationwide Mutual Ins. Co. v. Silverman*, 104 N.C. App. 783, 411 S.E.2d 152 (1991) (filed 17 December 1991) (*pet. for. disc. review pending*), a unanimous court held that once a claimant is a "person insured" they are entitled to stack UIM coverage. This is true whether the claimant is a class one insured or a class two insured. *Id.* Likewise, the majority opinion on the stacking issue in *Leonard v. North Carolina Farm Bureau Mut. Ins. Co.*, 104 N.C. App. 665, 411 S.E.2d 178 (1991) (filed 17 December 1991) (*appeal pending*) held that stacking of UIM coverage is allowed whenever an injured party qualifies as a "person insured" under the statute. In that case, the person insured was a class two insured.

In this case it is undisputed that plaintiff, by virtue of her occupancy in a covered vehicle, is a "person insured" under the policy. Likewise, plaintiff is a "person insured" pursuant to N.C. Gen. Stat. § 20-279.21(b)(3). Although not a member of Price's household or a named insured on his policy, plaintiff was driving her father's car with his permission. Under the reasoning of the *Silverman* and *Leonard* decisions, once a claimant establishes that

he is a "person insured"—regardless of class status—he has the ability to stack UIM coverage.

In the present case, the trial court correctly recognized that plaintiff, as a "person insured," was entitled to stack the coverage from all four Price vehicles totaling $400,000. The defendant is entitled to credits of $15,000, the amount previously paid to plaintiff on behalf of the liability carrier for the underinsured motorist, and $85,000, the amount previously paid to plaintiff by defendant which represents the available underinsured motorist coverage provided by defendant on the automobile which plaintiff was driving at the time of the accident.

The decision of the trial court is

Affirmed.

Judges JOHNSON and EAGLES concur.

CAROLINE PUGH WILLIAMS v. ROBERT ALEXANDER WILLIAMS

No. 9122DC952

(Filed 3 March 1992)

1. Divorce and Separation § 417 (NCI4th)— past due child support—denial improper

The trial court erred in denying defendant past due child support since the arrearage could be determined by a clear and easily calculated formula and the arrearage was vested in defendant. N.C.G.S. § 50-13.10(a).

Am Jur 2d, Divorce and Separation §§ 1056, 1069.

2. Divorce and Separation § 392 (NCI4th)— child support—guidelines presumptive—*no* showing of need for deviation—award improper

The trial court erred in ordering child support payments in an amount less than that mandated by statute where the court made no findings of fact which would allow for a determination that to apply the guidelines would fail to meet the

child's needs or would be otherwise unjust or inappropriate. N.C.G.S. § 50-13.4(c1).

Am Jur 2d, Divorce and Separation §§ 1035, 1069.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 864.

APPEAL by defendant from order signed 15 June 1991 and filed 19 June 1991 by *Judge Samuel A. Cathey* in IREDELL County District Court. Heard in the Court of Appeals 17 February 1992.

Sally W. Smith for plaintiff-appellee.

Harris, Pressly & Thomas, by Gary W. Thomas, for defendant-appellant.

EAGLES, Judge.

On 6 September 1989 an order was entered giving the parties joint custody of their children. Defendant was given custody of the children during the school year with plaintiff having alternate weekend visitation. Plaintiff was given custody during the summer with defendant having alternate weekend visitation. In addition, plaintiff was ordered to pay child support to defendant in an amount equal to twenty-nine percent of her gross income. The order stated plaintiff's annual income was to be divided by fifty-two and twenty-nine percent of that figure was to be paid weekly to defendant during the months when he had primary custody.

Plaintiff was current with her payments until 12 December 1990. For the next twenty-six weeks, through 15 June 1991, plaintiff made nine payments of $150.00 each, totaling $1,350.00. During the time plaintiff failed to pay the required support payments, she was denied visitation with the children by defendant.

Plaintiff filed a motion for contempt on 13 February 1991 on the grounds of denial of visitation. A motion for contempt for child support arrearage and change of custody was filed by defendant on 12 March 1991. A counter motion for contempt and change in custody was filed by plaintiff on 22 March 1991. A hearing on the motions was held on 29 April 1991 and the order was signed on 15 June 1991. The order stated in part that although support arrearage was owed defendant, the court found the figure to be undeterminable. Further, the court modified the support due by

plaintiff in the future to the amount of $125.00 per week while defendant had custody.

[1] Defendant offers two arguments in support of three assignments of error on appeal. First, defendant contends the child support arrearage owed by appellee is easily determined and is vested in appellant, making it error for the court to deny him payment. Plaintiff concedes that defendant is correct and we agree.

G.S. 50-13.10(a) states that each past due child support payment vests "when it accrues and may not thereafter be vacated, reduced or otherwise modified in any way for any reason . . . ." Further, the court's finding that the amount in arrears is undeterminable is not supported by the evidence. The order of 6 September 1989 provides a clear and easily calculated formula for determining the amount owed on a weekly basis. By subtracting the amount of payments made by plaintiff, the accumulated arrearage may be determined and awarded to defendant.

[2] In defendant's second argument, he contends the court erred in setting a child support amount which is in deviation from the guidelines contained in G.S. 50-13.4(c1). Again, plaintiff agrees with defendant's contention and offers no argument in opposition. We agree with defendant as well.

The court completed a "Worksheet B Child Support Obligation" form on which it states plaintiff's support obligation pursuant to the statutory guidelines to be $614.00 per month. Weekly the payments amount to $142.79. The trial court, however, ordered plaintiff to pay $125.00 per week, a deviation of approximately $17.00 per week from the statutory figure. The guidelines contained in G.S. 50-13.4(c1) are presumptive. *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 740 (1991). If the court deviates from the guideline figure, the court must make findings of fact which allow for a determination that to apply the guidelines would fail to meet the child's needs or would be otherwise unjust or inappropriate. *Id.* at 625, 400 S.E.2d at 741. In the case before us, the findings of the court fail to address in any manner the need for a deviation. It was error, therefore, for the court to order a payment other than that mandated by the statute.

For these reasons, we find the court erred in the above respects and we remand this case to the District Court of Iredell County for a determination of the amount of arrearage owed defendant

and for an order determining future child support in a manner consistent with this opinion.

Reversed and remanded.

Judges ARNOLD and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 MARCH 1992

BARHAM v. BARHAM No. 9110DC238	Wake (87CVD5041)	Affirmed
BAROTTI v. BAROTTI No. 914DC88	Onslow (89CVD2281)	Affirmed
IN RE BURTON No. 9128DC1008	Buncombe (89J101)	Affirmed
IN RE RHODES No. 915SC1003	Pender (91J13)	Affirmed
McCAULEY & McDONALD INVESTMENTS, INC. v. PIEDMONT RAX, INC. No. 9112SC284	Cumberland (89CVS4464)	Affirmed
STATE v. ARRINGTON No. 9128SC862	Buncombe (89CRS16291)	No Error
STATE v. GODWIN No. 913SC1007	Craven (91CRS652)	No Error
STATE v. LEDWELL No. 9114SC768	Durham (90CRS21994)	No Error
STATE v. MILLIGAN STATE v. GRIGGS No. 9120SC200	Richmond (90CRS5282) (90CRS5278)	No Error
STATE v. SADLER No. 9126SC941	Mecklenburg (90CRS4413)	No Error
STATE v. TARLETON No. 9127SC1037	Gaston (90CRS21935)	No Error
STATE v. THOMAS No. 9118SC903	Guilford (89CRS44989)	No Error
STATE v. YOUNG No. 9127SC544	Gaston (89CRS27155) (89CRS27156) (89CRS27158) (89CRS27160) (89CRS27161) (89CRS27162) (89CRS27163) (89CRS27166)	No Error

GREGORY N. TAYLOR v. TAYLOR PRODUCTS INCORPORATED, NATIONAL LEASE SERVICES, INC., RONALD TAYLOR AND OREN TAYLOR

No. 9112SC234

(Filed 17 March 1992)

1. Rules of Civil Procedure § 56.7 (NCI3d)— denial of Rule 12(b)(6) motion to dismiss—subsequent summary judgment

The denial of defendants' Rule 12(b)(6) motion to dismiss for failure to state a claim for relief did not preclude another judge from subsequently granting defendants' motion for summary judgment.

Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 43; Summary Judgment § 27.

2. Contracts § 80 (NCI4th)— breach of contract—tender of performance—summary judgment improper

Defendants were not entitled to summary judgment on plaintiff's claim for breach of contract for the sale of corporate stock and assets by failing to make an annual payment where defendants submitted the affidavit of an attorney stating that he tendered the payment to plaintiff on the default date, but plaintiff offered an opposing affidavit in which plaintiff stated that defendants defaulted on the payment.

Am Jur 2d, Summary Judgment §§ 16-18.

3. Contracts § 90 (NCI4th)— anticipatory breach of contract—summary judgment improper

Defendants were not entitled to summary judgment on plaintiff's claim for anticipatory breach of a contract for the sale of corporate stock and assets where defendants offered an affidavit of one individual defendant stating that he did not threaten to withhold annual payments to plaintiff if a compromise settlement could not be reached, but plaintiff offered an opposing affidavit stating that tape recordings of conversations with the individual defendants will support his allegation that defendants told plaintiff that no further payments would be made to plaintiff unless plaintiff agreed to accept a lesser sum than was otherwise due plaintiff under the terms of the contract.

Am Jur 2d, Contracts §§ 733, 734; Summary Judgment §§ 16, 17.

4. Courts § 85 (NCI4th)— Rule 11 sanctions—denial by one judge—jurisdiction of second judge

Where one superior court judge had previously denied Rule 11 sanctions based on defendants' contention that plaintiff's complaint was not grounded in law, a second superior court judge did not have jurisdiction subsequently to impose sanctions based on this same contention. However, the second judge did have jurisdiction to determine whether sanctions should be imposed on the grounds that discovery was sought by plaintiff for an improper purpose and that plaintiff's failure to accept defendants' offer of judgment exhibited an improper purpose where these issues were not before the first judge.

Am Jur 2d, Courts § 130.

5. Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions—absence of findings and conclusions—insufficient evidence to support sanctions—remand not necessary

An order imposing or denying sanctions requires findings of fact and conclusions of law, and the trial court's failure to make findings and conclusions generally requires remand in order for the trial court to resolve any disputed factual issues. However, remand was not necessary when there was no evidence in the record which would support the imposition of sanctions against plaintiff on any basis asserted by defendants.

Am Jur 2d, Damages § 615; Depositions and Discovery § 357.

6. Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions—improper purpose—insufficient evidence

Defendants' evidence was insufficient to support the imposition of Rule 11 sanctions against plaintiff on the ground that discovery sought by plaintiff in his action against defendants for breach of a contract for the sale of corporate stock and assets was for an improper purpose where defendants presented the affidavit of an individual defendant stating that plaintiff had previously deposed the two individual defendants and wanted to take their depositions again, that plaintiff subpoenaed documents from a corporation which was not a party to the lawsuit, and that the affiant "believed" that plaintiff's discovery requests were for the purpose of harassment and to seek information regarding an unrelated lawsuit. Deposing

a party twice is not prohibited and does not constitute harassment as a matter of law, Rule 45(c) authorizes obtaining documentary evidence from persons who are not parties to the lawsuit, and the affiant's subjective belief that the lawsuit was brought for an improper purpose is immaterial in determining whether sanctions should be imposed.

Am Jur 2d, Damages § 615; Depositions and Discovery § 357.

7. **Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions— failure to accept offer of judgment—insufficient evidence of improper purpose**

Plaintiff's failure to accept defendants' offer of judgment for the total amount due under a contract for the sale of corporate assets and stock did not show that plaintiff instituted an action on that contract for an improper purpose so as to support Rule 11 sanctions against plaintiff where plaintiff had a viable claim for treble damages under N.C.G.S. Ch. 75 at the time he refused to accept defendants' offer of judgment.

Am Jur 2d, Damages § 615; Depositions and Discovery § 357.

APPEAL by plaintiff from order filed 6 November 1990 in CUMBERLAND County Superior Court by *Judge D. B. Herring, Jr.* Heard in the Court of Appeals 3 December 1991.

Beaver, Holt, Richardson, Sternlicht, Burge & Glazier, P.A., by Mark A. Sternlicht, and Parish, Cooke & Russ, by H. Gene Russ, for plaintiff-appellant.

Reid, Lewis, Deese & Nance, by Marland C. Reid and Cheryl D. Howell, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from an order entered 6 November 1990, granting defendants' motion for judgment on the pleadings, N.C.G.S. § 1A-1, Rule 12(c) (1990), and imposing sanctions against plaintiff in the amount of defendants' attorney's fees pursuant to N.C.G.S. § 1A-1, Rule 11 (1990).

Plaintiff instituted this action against defendants Taylor Products, Inc., National Lease Services, Inc., Ronald Taylor, and Oren

Taylor on 26 February 1990 seeking damages for breach of an "Agreement of Sale of Stock/Assets" pursuant to which defendants agreed to purchase plaintiff's interest in Taylor Products, Inc. and National Lease Services, Inc. for a total price of $140,000. The agreement, which is attached to plaintiff's complaint as an exhibit, provides that $15,000 of the purchase price is to be paid upon execution of the agreement, with the remainder payable in ten annual installments of $12,500 to begin on 1 January 1989. The agreement contains a provision which states that "all sums that have not been paid within ten (10) days after the date due are considered in default and the purchasers shall not be entitled to notice of default." Plaintiff alleges the following: (1) that defendants failed to make the $12,500 annual payment that was due on or before 1 January 1990, or within ten days thereafter, and that therefore defendants are in default; (2) that defendants anticipatorily repudiated the contract by telling plaintiff that unless plaintiff agreed to accept a lesser total sum than was otherwise due plaintiff under the terms of the contract, that no further payments would be made to plaintiff; and (3) that defendants' actions constitute unlawful and unfair methods of competition and unfair and deceptive acts and practices in violation of N.C.G.S. §§ 75-1.1 *et seq.* Plaintiff seeks damages in the amount of $112,500, and requests that the judgment be trebled pursuant to Section 75-16.

On 25 April 1990, defendants filed their answer, which included a motion to dismiss for failure to state a claim upon which relief can be granted, N.C.G.S. § 1A-1, Rule 12(b)(6), and a motion for sanctions pursuant to N.C.G.S. § 1A-1, Rule 11. In their answer, defendants denied plaintiff's allegation that the 1 January 1990 payment was not tendered by the due date or the default date, and pleaded as a bar to plaintiff's action the affirmative defenses of waiver and estoppel. In support of their Rule 11 motion, defendants argued that plaintiff's action was not grounded in fact or law, and was interposed for the purpose of harassment, specifically noting the "ongoing controversy" between plaintiff's father and the individual defendants. On 14 June 1990, Judge Craig B. Ellis heard and denied defendants' Rule 12(b)(6) and Rule 11 motions.

On 29 June 1990, defendants made an offer of judgment to plaintiff pursuant to N.C.G.S. § 1A-1, Rule 68, for the sum of $112,500, together with interest on the $12,500 payment that was due on 1 January 1990. On 17 October 1990, defendants filed a motion for judgment on the pleadings, N.C.G.S. § 1A-1, Rule 12(c), as well

as a second Rule 11 motion in which defendants sought attorney's fees on the grounds that (1) plaintiff's complaint was not grounded in law; (2) the discovery sought by plaintiff was for an improper purpose; and (3) that plaintiff's failure to accept defendants' offer of judgment exhibited an improper purpose. Defendants' motions were accompanied by several exhibits, including affidavits signed by Reuben Moore, attorney for defendant Ronald Taylor, and Ronald Taylor, as well as correspondence between plaintiff's attorney and defendants' attorneys. Plaintiff offered no evidence in opposition to the Rule 11 motion. In opposition to defendants' motion for judgment on the pleadings, plaintiff submitted his own affidavit. After hearing on these motions on 5 November 1990, Judge D.B. Herring, Jr., granted defendants' motion for judgment on the pleadings and for Rule 11 sanctions in the amount of $11,728.50, defendants' total attorney's fees.

The issues presented are whether I) Judge Herring was precluded from granting defendants' motion for judgment on the pleadings, which was converted to one for summary judgment, because Judge Ellis had previously denied defendants' Rule 12(b)(6) motion; II) material issues of fact preclude entry of summary judgment in favor of defendants; and III) the manner in which plaintiff conducted discovery, or his failure to accept defendants' offer of judgment, constitute a violation of the improper purpose prong of Rule 11.

I

[1] Plaintiff argues that Judge Herring was without authority to grant defendants' Rule 12(c) motion because Judge Ellis had previously denied defendants' Rule 12(b)(6) motion. It is unnecessary for us to address the question of whether a denial of a Rule 12(b)(6) motion precludes another judge from subsequently entering a Rule 12(c) order because here defendants offered in support of their Rule 12(c) motion the affidavits of individual defendant Ronald Taylor, and of his attorney, Reuben Moore. Thus, defendants' Rule 12(c) motion was converted to one for summary judgment. *Battle v. Clanton*, 27 N.C. App. 616, 618, 220 S.E.2d 97, 98 (1975), *disc. rev. denied*, 289 N.C. 613, 223 S.E.2d 391 (1976). Because the denial of a defendant's Rule 12(b)(6) motion does not prevent the subsequent granting of a motion for summary judgment, *Burton v. NCNB Nat'l Bank*, 85 N.C. App. 702, 704, 355 S.E.2d 800, 802 (1987), Judge

Herring was not without authority to enter summary judgment for defendants.

II

When a defendant moves for summary judgment, he has the burden of showing that an essential element of the plaintiff's claim is nonexistent, or that the plaintiff cannot produce evidence to support an essential element of his claim. *Bicycle Transit Auth., Inc. v. Bell*, 314 N.C. 219, 223-24, 333 S.E.2d 299, 302-03 (1985). The defendant may meet this burden through the use of admissions in the pleadings, depositions on file, answers to interrogatories, admissions on file, stipulations, evidence of which the court may take judicial notice, material which would be admissible in evidence, oral testimony, or affidavits. *Battle v. Nash Technical College*, 103 N.C. App. 120, 128, 404 S.E.2d 703, 707 (1991) (Greene, J., concurring). Once the defendant meets his burden, the burden shifts to the plaintiff to present a forecast of evidence which shows that a genuine issue of material fact exists. *Cheek v. Poole*, 98 N.C. App. 158, 162, 390 S.E.2d 455, 458, *disc. rev. denied*, 327 N.C. 137, 394 S.E.2d 169 (1990). The plaintiff may not rest on the allegations in his complaint, *Five Star Enters., Inc. v. Russell*, 34 N.C. App. 275, 278, 237 S.E.2d 859, 861 (1977), and any affidavits used by either party must comply with the requirements of Rule 56(e), that is, they must be based on personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated in the affidavit. N.C.G.S. § 1A-1, Rule 56(e) (1990).

Defendants sought and obtained the dismissal of all three of plaintiff's claims for relief. We review the arguments of plaintiff on each claim to determine whether summary judgment was proper.

A

Breach of Contract Claim

[2] An application of the foregoing principles reveals that defendants are not entitled to summary judgment on plaintiff's breach of contract claim. Although defendants submitted in support of their motion the affidavit of attorney Reuben Moore stating that Moore tendered the 1 January 1990 payment to plaintiff on the default date (10 January 1990), plaintiff offered an opposing affidavit in which plaintiff stated that defendants defaulted on this payment. The question of whether the payment was tendered by

the default date bears directly on plaintiff's claim for breach of contract, and the aforementioned evidence reveals that that issue is in dispute. *See Gore v. George J. Ball, Inc.*, 279 N.C. 192, 199, 182 S.E.2d 389, 393 (1971) (failure to render the performance required by the contract is a breach thereof). Therefore, the trial court's dismissal of plaintiff's breach of contract claim was error.

B

Anticipatory Repudiation Claim

[3] "[L]anguage that under a fair reading amounts to an intention not to perform [the contract] except on conditions which go beyond the contract constitutes a repudiation." John D. Calamari & Joseph M. Perillo, Contracts § 12-4 (3d ed. 1987) (hereinafter *Calamari & Perillo*). A repudiation is anticipatory when it takes place before a party's time for performance arises under the terms of the contract. *Id.* at § 12-3; *see also Cook v. Lawson*, 3 N.C. App. 104, 107, 164 S.E.2d 29, 32 (1968) (anticipatory breach is the "outcome of words evincing intention to refuse performance in the future"). The general rule is that an anticipatory repudiation will give rise to an action for total breach of the contract. *Calamari & Perillo* at § 12-8. However, this rule does not apply in the case of repudiation of an installment contract which contains no acceleration clause. *Roberts Co. v. Aladdin Knit Mills, Inc.*, 8 N.C. App. 612, 619, 175 S.E.2d 289, 293 (1970). In such a case, the aggrieved party is not entitled to immediately sue for the total amount of the contract, but must wait until each installment becomes due. *Id.* at 619, 175 S.E.2d at 293.

A factual dispute exists with regard to the alleged conduct on which plaintiff bases his claim for anticipatory repudiation. Defendants offered the affidavit of individual defendant Ronald Taylor in which he stated that, contrary to the allegations in plaintiff's complaint, "at no time did I threaten to withhold the January 1, 1990, payment if a compromise settlement could not be reached . . . ." In his opposing affidavit, plaintiff states that, in an attempt to gather evidence and information concerning defendants' "intentions to abide by or otherwise repudiate the contract," he taped the conversations between plaintiff and the individual defendants occurring after the default. Plaintiff states in his affidavit that such tapes will support and prove all of the allegations in plaintiff's complaint, one of which is that "defendants specifically and unequivocally told plaintiff that no further payments would be made

under this agreement unless plaintiff agreed to compromise his rights and . . . accept a much less lump sum payment than was otherwise payable to plaintiff under the terms [of] said agreement." Whether plaintiff's affidavit meets the requirements of Rule 56(e), one being that the facts stated must be admissible in evidence, is immaterial in light of the fact that defendants failed to make a timely objection to the form of plaintiff's affidavit. *Mozingo v. Pitt County Memorial Hosp., Inc.*, 101 N.C. App. 578, 584, 400 S.E.2d 747, 750, *disc. rev. denied*, 329 N.C. 498, 407 S.E.2d 537 (1991).

Because a genuine issue of material fact exists with regard to plaintiff's claim for anticipatory breach of the contract, the trial court's dismissal of this claim was error.

C

Section 75-1.1 Claim

Plaintiff in his brief fails to discuss his claim for unfair or deceptive acts or practices pursuant to Section 75-1.1. Accordingly, we deem this argument abandoned, *see* N.C.R. App. P. 28(a) (1991) (questions not presented and discussed in party's brief deemed abandoned), and therefore affirm the grant of summary judgment on this claim.

III

Sanctions—Rule 11

[4] Plaintiff first argues that Judge Herring was without authority to sanction him because Judge Ellis had previously denied defendants' request for sanctions, and both of defendants' sanctions motions raised the same legal issues. The determination of whether to impose or deny Rule 11 sanctions presents a legal question, *Turner v. Duke*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989), and a trial judge is without jurisdiction to enter an order imposing or denying Rule 11 sanctions based on the same legal issue previously presented to and decided by another trial judge.[1] *Iverson v. TM One, Inc.*, 92 N.C. App. 161, 164, 374 S.E.2d 160, 163 (1988). Therefore,

1. The selection of the *type* of sanction to impose is a discretionary issue, *Turner*, 325 N.C. at 165, 381 S.E.2d at 714, therefore, if changed circumstances occur after entry of an interlocutory sanctions order, the issue of the type of sanction imposed may be subsequently reconsidered by another trial court. *Stone v. Martin*, 69 N.C. App. 650, 653, 318 S.E.2d 108, 110 (1984).

the question is whether the legal issues before Judge Herring were the same as those presented to and decided by Judge Ellis.

Defendants stated as the grounds for their first Rule 11 motion that the complaint was not grounded in law or fact and was interposed for the purpose of harassment. The bases for defendants' second Rule 11 motion were that the complaint was not grounded in law, the discovery sought by plaintiff was for an improper purpose, and plaintiff's failure to accept defendants' offer of judgment exhibited an improper purpose.[2] Thus, the common legal issue raised by both Rule 11 motions was whether plaintiff's complaint was grounded in law. Because Judge Ellis had previously *denied* sanctions based on plaintiff's complaint not being grounded in law, Judge Herring did not have jurisdiction to subsequently *impose* sanctions on the same grounds. Furthermore, the reasonableness of the belief that a complaint is warranted by existing law must be "judged as of the time the document was signed." *Bryson v. Sullivan*, 330 N.C. 644, 656, 412 S.E.2d 327, 333 (1992). Therefore, any events occurring after the denial of sanctions by Judge Ellis were not relevant to the issue of whether plaintiff's complaint was warranted by existing law.

In contrast, Judge Herring did have jurisdiction to determine whether plaintiff's use of discovery and failure to accept defendants' offer of judgment exhibited some improper purpose. These issues were not before Judge Ellis. Furthermore, in North Carolina, the duty imposed by the improper purpose prong of Rule 11 is a continuing one. *Bryson*, 330 N.C. at 658, 412 S.E.2d at 334. Accordingly, the denial of sanctions does not insulate a party or an attorney from the future imposition of sanctions under the improper purpose prong of Rule 11 if the litigation is continued "after subsequent developments in the case render it meritless." *Id.* at n.2. We now review the record to determine if there is competent evidence to support the imposition of sanctions on plaintiff.

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2. We note that defendants did not seek sanctions pursuant to N.C.G.S. § 1A-1, Rule 26(g), even though they allege an improper purpose on plaintiff's part relating to discovery requests. However, this failure to proceed under Rule 26(g) is not material because the language of Rule 26(g) is essentially the same as the language of Rule 11. *See Turner* (applying Rule 11 to discovery abuse). Therefore, the procedure for imposing sanctions under Rule 11 is the same as the procedure for imposing sanctions under Rule 26(g).

Procedure

We must first determine whether defendants alleged and offered any competent evidence of improper purpose on the part of plaintiff which justifies the imposition of sanctions. The nature and detail of defendants' allegation is relevant because due process requires that an alleged Rule 11 offender be given timely notice, not only that sanctions are being sought or considered, but of the bases for those sanctions and against whom they are sought. Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 17(D)(1) (1989). In order to timely notify the alleged Rule 11 offender, Rule 6(d) requires that a Rule 11 motion be served on the alleged offender not later than five days "before the time specified for the hearing." N.C.G.S. § 1A-1, Rule 6(d) (1990). Here, defendants served plaintiff with notice of their second Rule 11 motion on 17 October 1990. The hearing was scheduled on 5 November 1990, therefore defendants complied with Rule 6(d). Although defendants' motion did not state any bases for the sanctions requested, defendants attached to the motion a memorandum setting forth in detail the bases asserted. Thus, defendants' Rule 11 motion and accompanying memorandum gave plaintiff adequate notice of the bases for the sanctions sought by defendants.

When the motion came on for hearing, the trial court, as it was required to do in this case, conducted an evidentiary hearing. *See In re Kunstler*, 914 F.2d 505, 521 (4th Cir. 1990), *cert. denied sub nom. Kunstler v. Britt*, --- U.S. ---, 113 L. Ed. 2d 669 (1991) (evidentiary hearing required when necessary to resolve issues of fact or issues of credibility prior to determining whether sanctions should be imposed). At the hearing, defendants presented affidavits in support of their Rule 11 motion. *See* N.C.G.S. § 1A-1, Rule 43(e) (1990) (when motion is based on facts not appearing of record, the parties may present evidence in form of affidavits). We note that any affidavits submitted, either in support of or in opposition to a Rule 11 motion, must be based on personal knowledge, must set forth facts which would be admissible in evidence, and must show that the affiant is competent to testify to the matters stated therein. *Cf.* N.C.G.S. § 1A-1, Rule 56(e) (1990). Although permitted in the discretion of the court, neither party presented any oral testimony or depositions. N.C.G.S. § 1A-1, Rule 43(e) (1990); *see also* Fed. R. Civ. P. 11 advisory committee's note (discovery in Rule 11 proceedings is permitted only by leave of court, and only in extraordinary circumstances). Though the trial court, as it was

required to, gave plaintiff an opportunity to present evidence, plaintiff presented none. *See* Stephen A. Stallings, Note, *Rule 11: What Process Is Due?*, 62 St. John's L. Rev. 586, 598-99 (1988) (individual facing possible sanctions should be given the opportunity to provide competent evidence in opposing sanctions). The attorneys for both plaintiff and defendants presented oral argument. At the conclusion of the hearing, the trial court, without making any findings of fact or conclusions of law, ordered that plaintiff pay $11,728.50 to reimburse defendants for attorney's fees expended in defense of the action, plus costs.[3]

[5] The trial court's failure to enter findings of fact and conclusions of law was error. It is now well established in North Carolina that an order imposing or denying sanctions requires findings of fact and conclusions of law. *Turner*, 325 N.C. at 165, 381 S.E.2d at 714; *see also McKinney v. Avery Journal, Inc.*, 99 N.C. App. 529, 534, 393 S.E.2d 295, 298, *disc. rev. denied*, 327 N.C. 636, 399 S.E.2d 123 (1990) (remanding case to trial court for findings of fact to support its conclusion of law that Rule 11 sanctions were inappropriate). This error generally requires remand in order for the trial court to resolve any disputed factual issues. When there is any competent evidence in the record to support the choice of findings, this Court is bound thereby. *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 414 (1988). However, remand is not necessary when there is no evidence in the record, considered in the light most favorable to the movant, which could support a legal conclusion that sanctions are proper. *See Texas Western Financial Corp. v. Mann*, 36 N.C. App. 346, 349, 243 S.E.2d 904, 907 (1978). Because our review of the record reveals no evidence to support an award of sanctions on any of the bases asserted by defendants, remand is not necessary in this case.

Discovery

[6] Defendants offered in support of their argument that plaintiff's prosecution of this action was for an improper purpose the affidavit of defendant Ronald Taylor (Ronald). In support of defendants' asser-

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3. We note that plaintiff did not sign or verify the complaint in this case. However, this absence of the represented party's signature is immaterial because "Rule 11(a) allows the trial court to impose sanctions on the *signer* of the pleading, 'a represented party, or both . . . .' " *Higgins v. Patton*, 102 N.C. App. 301, 305, 401 S.E.2d 854, 856 (1991); *see also* Fed. R. Civ. P. 11 advisory committee's note (appropriate to impose sanctions on a non-signing client).

tion that plaintiff conducted discovery for an improper purpose, Ronald states that (1) plaintiff previously deposed Ronald and Oren Taylor and now "wants to take our depositions again"; (2) plaintiff subpoenaed documents from Taylor Manufacturing, Inc., which is not a party to this lawsuit, and is seeking financial information on the four Taylor companies for the period 1987 through 1989; (3) none of the information sought by plaintiff deals with the merits of plaintiff's lawsuit against defendants for payment of the stock; and (4) "I believe . . . plaintiff is trying to obtain this information to give to his father so that his father can use it against us in some way." These statements are insufficient to support a finding of improper purpose.

First, the bare assertion that plaintiff "wants to take our depositions again" is insufficient to meet defendants' burden of proving improper purpose. The record contains no such notice of deposition by plaintiff, *see* N.C.G.S. § 1A-1, Rule 30 (1990) (notice of deposition must be in writing and served on all parties), nor does Ronald state when or for what purpose plaintiff seeks to depose him and Oren Taylor. Furthermore, even if plaintiff has properly noticed a second deposition of both Ronald and Oren Taylor, our discovery rules do not expressly prohibit deposing a party twice, nor are we persuaded that deposing a party twice constitutes harassment as a matter of law, as Ronald implies. Second, although defendants fail to include in the record a copy of the subpoena *duces tecum* that Ronald states plaintiff served on non-party Taylor Manufacturing, Inc., N.C.G.S. § 1A-1, Rule 45(c) provides express authority for obtaining documentary evidence from any person, whether or not the person is a party to the lawsuit. Moreover, Ronald fails to specify what documents plaintiff subpoenaed, and fails to offer any grounds for his assertion that such a request was improper, other than the immaterial fact that the recipient of the subpoena is not a party. Thus, Ronald has failed to meet his burden of proving that this discovery request violates the improper purpose prong of Rule 11. Third, although Ronald states that "none of the information" requested by plaintiff deals with the merits of the instant lawsuit, he fails to specify how such requests are unrelated, and again fails to include in the record any of the objectionable requests. Finally, Ronald's "belief" that plaintiff's discovery requests are for the purpose of harassment and to seek information regarding an unrelated lawsuit is not competent evidence to support defendants' Rule 11 motion. The movant's subjective belief

that the lawsuit has been brought for improper purposes is immaterial in determining whether an alleged offender's conduct is sanctionable, and the court must ignore such evidence. *Kunstler*, 914 F.2d at 518-19.

Failure To Settle

[7] Defendants argued before Judge Herring and reassert before this Court that plaintiff's failure to accept defendants' offer of judgment in the amount of $112,500 plus interest is further evidence warranting sanctions upon plaintiff. We disagree. Plaintiff in his complaint alleges a violation of N.C.G.S. § 75-1.1, and seeks damages pursuant thereto. If successful, such a claim would have entitled plaintiff to treble damages. N.C.G.S. § 75-16 (1988). With our affirming of Judge Herring's dismissal of plaintiff's Chapter 75 claim, plaintiff is not now entitled to recover treble damages. However, we must not judge plaintiff's refusal to accept defendants' offer of judgment using the wisdom of hindsight, but rather should view it in light of the circumstances existing at the time of the offer. *See* Fed. R. Civ. P. 11 advisory committee's note.

At the time of defendants' offer of judgment, plaintiff had a viable Chapter 75 claim, the trial court having denied defendants' Rule 12(b)(6) motion and defendants' motion for sanctions based on plaintiff's claim not being warranted by existing law. Moreover, defendants' offer of judgment, though it included the total amount due plaintiff under the contract, did not take into account the treble damages sought by plaintiff. Thus, plaintiff's decision to proceed with rather than settle the lawsuit was objectively reasonable and cannot itself support a conclusion that the continued pursuit of this action was for an improper purpose. *See Bryson*, 330 N.C. at 663, 412 S.E.2d at 337 (violations of improper purpose prong of Rule 11 determined by inferring subjective state of mind of alleged offender from his objective behavior).

We are aware that a claim, while well grounded in law, can nevertheless violate the improper purpose prong of Rule 11. *Id.* However, defendants offer no evidence of improper purpose related to plaintiff's failure to accept the offer of judgment, other than the mere fact that they offered plaintiff the total amount due under the contract and he refused it. Absent other meritorious evidence of improper purpose, we conclude that plaintiff's failure to settle this case by refusing to accept defendants' offer of judgment does not rise to the level of a violation of Rule 11.

For the foregoing reasons, Judge Herring's order dismissing plaintiff's claims for breach and anticipatory breach of contract is reversed; his order dismissing plaintiff's claim pursuant to Section 75-1.1 is affirmed; and his order imposing Rule 11 sanctions on plaintiff in the amount of $11,728.50 is reversed.

Reversed in part, affirmed in part, and remanded.

Judges PARKER and WYNN concur.

BUFORD D. VIEREGGE, JR., EMPLOYEE, PLAINTIFF-APPELLANT v. N.C. STATE UNIVERSITY, EMPLOYER, SELF-INSURED, DEFENDANT-APPELLEE

No. 9110IC357

(Filed 17 March 1992)

1. **Master and Servant § 94.3 (NCI3d) — workers' compensation — review by full Commission — failure to fulfill statutory duties — insufficient order**

The Industrial Commission is not an appellate court but a quasi-judicial agency with statutory authority to make findings of fact, state conclusions of law and enter an order resolving the issues between the parties arising out of the application of the Workers' Compensation Act. The full Commission failed to carry out its duties under N.C.G.S. § 97-85 when it entered an order stating that "[t]he undersigned have reviewed the record in its entirety and find no reversible error" and that the Commission "affirms and adopts as its own the Opinion and Award as filed."

Am Jur 2d, Workmen's Compensation §§ 590, 598, 606.

2. **Master and Servant § 77.2 (NCI3d) — workers' compensation — change of condition — statute of limitations — burden of proof**

The statute of limitations in N.C.G.S. § 97-47 is not jurisdictional but is a technical legal defense which the employer may assert, and the hearing commissioner improperly raised the question of the statute of limitations at the compensation hearing and erroneously put the burden on plaintiff to prove

that his claim was not barred by the one-year statute of limitations in N.C.G.S. § 97-47.

Am Jur 2d, Workmen's Compensation §§ 482, 484, 511.

3. **Master and Servant § 94.3 (NCI3d) — workers' compensation — review by full Commission — necessity for hearing**

Where the record before the full Commission clearly disclosed that the hearing commissioner had not conducted a complete hearing and that his findings were inadequate to support his conclusion of law that plaintiff's compensation claim was barred by the one-year statute of limitations of N.C.G.S. § 97-47, it was the duty of the full Commission pursuant to N.C.G.S. § 97-85 to conduct its own hearing, make findings, draw conclusions and enter the appropriate order.

Am Jur 2d, Workmen's Compensation § 606.

4. **Master and Servant § 97.1 (NCI3d) — workers' compensation — remand to Industrial Commission — further remand to hearing commissioner inappropriate**

When the appellate court remands a case to the Industrial Commission for further review, findings and entry of an appropriate order, it is not sufficient for the full Commission to remand the case to the hearing commissioner to carry out its duties.

Am Jur 2d, Workmen's Compensation §§ 641, 642.

APPEAL by plaintiff from a decision of the North Carolina Industrial Commission (Full Commission) entered 11 December 1990. Heard in the Court of Appeals 10 February 1992.

This is a proceeding pursuant to the Worker's Compensation Act wherein plaintiff seeks to recover benefits for an injury he sustained while working for defendant North Carolina State University.

The record discloses the following: Plaintiff was employed by defendant as a maintenance mechanic. On 25 April 1985, plaintiff was repairing a motor starter when it exploded, blowing him approximately twenty feet into the air. Plaintiff landed on the back of his head and sustained burns to his hands and body.

As a result of the accident, plaintiff suffered a cervical strain. He was treated by Dr. W. L. Beason until 31 May 1985 when he was released to return to work. Plaintiff returned to work on 5 June 1985, but continued to receive medical treatment, including physical therapy for his condition.

Plaintiff was treated by Capital Physical Therapy, Inc. until 28 June 1985. After his release by the physical therapist, plaintiff continued to experience headaches. The therapist suggested that plaintiff be reevaluated by Dr. Beason. Plaintiff discovered that Dr. Beason had moved out of the state, and he sought treatment instead from Dr. Richard Adelman, who had practiced with Dr. Beason at Capital Family Medicine. Dr. Adelman treated plaintiff for his cervical strain in 1986, during which time, Dr. Adelman left Capital Family Medicine and opened his own practice. As of 31 May 1988, Dr. Adelman was still treating plaintiff and did not feel that he had "fully recovered from this unfortunate accident."

Plaintiff has never received any compensation for disability resulting from his injury. His absences from work from 25 April 1985 until 5 June 1985 were covered by sick leave. Plaintiff's medical bills from Dr. Beason and Capital Physical Therapy, Inc., as well as a bill for medication, were submitted to the Industrial Commission in August and September 1985. These bills were approved and subsequently paid by defendant-employer, although no evidence was presented as to the exact date on which these payments were made.

Plaintiff did not submit any bills for his treatment by Dr. Adelman until October 1987 when he learned that during Dr. Adelman's move into private practice, his records had been misplaced and the bills had not been filed with the Industrial Commission. Defendant-employer refused payment of Dr. Adelman's bill on the grounds that the time for submitting further bills for treatment had lapsed, and on 14 April 1987, defendant-employer filed a Form 28B "REPORT OF COMPENSATION AND MEDICAL PAID" with the Industrial Commission stating that insofar as the employer was concerned the case was closed. With respect to the Form 28B filed by the employer, there is nothing in this record to indicate the employee ever received notice of the filing of this form.

On 12 January 1988, plaintiff filed a Form 33 "REQUEST FOR HEARING" with the Industrial Commission seeking payment of medical expenses and compensation for permanent disability of

the neck. The case came on for hearing before Deputy Commissioner Charles Markham on 14 September 1988. At the commencement of the hearing, Deputy Commissioner Markham stated:

> The record should show that . . . the Form 33 was filed with the Commission more than two years after the date of the injury and more than one year after the date, so far as this file shows, of the date of the last medical payment. Based on these facts alone, it appears to me that the plaintiff's claim is barred by one or more Statutes of Limitations; however, I am going to give him the opportunity here today to make a statement for the record and to explain, if he can, why no claims were filed within the statutory limitations period.

The only evidence presented at the hearing was the testimony of plaintiff. Plaintiff, who was unrepresented by counsel, testified that he was unaware that Dr. Adelman's bills had not been submitted to the Industrial Commission because he thought Dr. Adelman had billed "Workman's compensation and [he] didn't have to worry with it."

Deputy Commissioner Markham found that:

> 3. . . . [Plaintiff's] pharmacy bill for June 3, 1985 was approved by the Commission August 21, 1985. His bill from Capital Physical Therapy, Inc. was approved by the Commission August 5, 1985. His bill from Dr. Beason was approved by the Commission September 10, 1985.
>
> 4. The undersigned infers that all such bills were paid within a reasonable time after Commission approval and no later than the calendar year 1985.
>
> 5. Plaintiff submitted no bills for further medical treatment until about October in the fall of 1987. He was treated during 1986 for his 1985 injury by Dr. Richard Adelman, but Dr. Adelman did not file any claims because his records on plaintiff were accidentally misplaced when he moved his practice at an indeterminate date.
>
> 6. Defendant employer closed its case on plaintiff's injury with execution of Commission Form 28B, April 14, 1987 . . . .
>
> 7. Plaintiff filed Commission Form 33, Request for Hearing, on January 12, 1988, requesting payment of medical ex-

penses and compensation for permanent disability of the neck . . . .

8. At least 12 months elapsed between the last payment of plaintiff's medical bills and the date on which he sought Commission review of his case.

Deputy Commissioner Markham then concluded that "Plaintiff's claims for medical expenses and compensation for permanent disability of the neck are barred by the 12-month period specified in G.S. 97-47" and denied plaintiff's claim on 14 August 1989.

Plaintiff appealed to the full Commission which heard the case on 28 November 1990. On 11 December 1990, the full Commission entered the following:

This matter is before the Full Commission on plaintiff's appeal from an Opinion and Award filed by Deputy Commissioner Charles Markham on August 14, 1990.

The undersigned have reviewed the record in its entirety and find no reversible error.

In view of the foregoing, the Full Commission AFFIRMS and ADOPTS as its own the Opinion and Award as filed.

Plaintiff appealed.

Augustus S. Anderson for plaintiff, appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kim L. Cramer, for defendant, appellee.

HEDRICK, Chief Judge.

G.S. 97-84 in pertinent part provides:

The Commission or any of its members shall hear the parties at issue and their representatives and witnesses, and shall determine the dispute in a summary manner. The award, together with a statement of the findings of fact, rulings of law, and other matters pertinent to the questions at issue shall be filed . . . .

G.S. 97-85 further provides:

. . . the full Commission shall review the award, and, if good ground be shown therefor, reconsider the evidence,

> receive further evidence, rehear the parties or their representatives, and, if proper, amend the award . . . .

This Court has long recognized that the Industrial Commission is the sole fact finding agency in cases in which it has jurisdiction and that the finding of facts is one of the primary duties of the Commission. *Cannady v. Gold Kist*, 43 N.C. App. 482, 259 S.E.2d 342 (1979); *Morgan v. Furniture Industries, Inc.*, 2 N.C. App. 126, 162 S.E.2d 619 (1968).

The importance of the Commission's fact-finding duty cannot be overstated as Justice Ervin, writing for the Supreme Court in *Thomason v. Cab Co.*, 235 N.C. 602, 70 S.E.2d 706 (1952), noted:

> It is impossible to exaggerate how essential the proper exercise of the fact-finding authority of the Industrial Commission is to the due administration of the Workmen's Compensation Act. The findings of fact of the Industrial Commission should tell the full story of the event giving rise to the claim for compensation. They must be sufficiently positive and specific to enable the court on appeal to determine whether they are supported by the evidence and whether the law has been properly applied to them. It is obvious that the court cannot ascertain whether the findings of fact are supported by the evidence unless the Industrial Commission reveals with at least a fair degree of positiveness what facts it finds. It is likewise plain that the court cannot decide whether the conclusions of law and the decision of the Industrial Commission rightly recognize and effectively enforce the rights of the parties upon the matters in controversy if the Industrial Commission fails to make specific findings as to each material fact upon which those rights depend.

Id. at 605-06, 70 S.E.2d at 709.

This Court has held that when the matter is "appealed" to the full Commission pursuant to G.S. 97-85, it is the duty and responsibility of the full Commission to decide all of the matters in controversy between the parties. *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988). In *Joyner*, we said, "[i]nasmuch as the Industrial Commission decides claims without formal pleadings, it is the duty of the Commission to consider every aspect of plaintiff's claim whether before a hearing officer or on appeal to the full Commission." *Id.* at 482, 374 S.E.2d at 613.

[1] In the present case, in our opinion, the full Commission has failed to carry out its duties and responsibilities pursuant to G.S. 97-85. The self-serving statement by the Commission that "The undersigned have reviewed the record in its entirety and find no reversible error," is not sufficient to resolve the issues raised between the parties as to whether plaintiff is entitled to any relief under the Worker's Compensation Act. G.S. 97-85 clearly provides that the aggrieved party is entitled to a review by the full Commission.

The present plaintiff, having appealed to the full Commission pursuant to G.S. 97-85 and having filed his Form 44 "APPLICATION FOR REVIEW," is entitled to have the full Commission respond to the questions directly raised by his appeal. In the Form 44, plaintiff specifically enumerated the "assignments of error" he was raising on appeal to the full Commission. His Assignments of Error directed to the full Commission are:

> 1. [H]is conclusion of law that the limitation of G.S. 97-47 applies is incorrect because plaintiff was not alleging a change of condition, nor requesting a review of any award previously decided, nor had there been any decision by the Commission that a final payment or settlement had been made.
>
> 2. Even if G.S. 97-47 applied the defendant waived this affirmative defense by failing to plead it prior to the hearing.
>
> 3. Even if defendant did not waive the defense, no evidence was presented of the date the final payment was made, therefore there was no evidence of when the statute should begin to run and defendant has failed to meet the burden of proof on this affirmative defense.

The full Commission, however, failed to address these issues in its self-serving order and has thus failed to satisfy the requirements of G.S. 97-85.

In the case *sub judice*, the full Commission has again entered an order affirming the decision of the Deputy Commissioner as if it were an appellate court. As we have said previously, the North Carolina Industrial Commission is not an appellate court. *Joyner*, 92 N.C. App. 478, 374 S.E.2d 610. It is a quasi-judicial agency with statutory authority to make findings of fact, state conclusions of law and enter an order resolving the issues between the employee and the employer and the employer's insurance car-

rier, if any, arising out of the application of the Worker's Compensation Act. For the Commission to say, as it did in this case, that it "affirms and adopts as its own the Opinion and Award as filed," is, in our opinion, not sufficient.

[2] In the present case, the Deputy Commissioner announced at the commencement of the hearing that it appeared to him that plaintiff's claim was barred by "one or more Statutes of Limitations," but that he was going to give plaintiff an "opportunity here today to make a statement for the record and to explain, if he can, why no claims were filed within the statutory limitations period." G.S. 97-47 in pertinent part provides:

> Upon its own motion or upon the application of any party in interest on the grounds of a change in condition, the Industrial Commission may review any award, and on such review may make an award ending, diminishing, or increasing the compensation previously awarded . . . . No such review shall be made after two years from the date of the last payment of compensation pursuant to an award under this Article, except that in cases in which only medical or other treatment bills are paid, no such review shall be made after 12 months from the date of the last payment of bills for medical or other treatment, paid pursuant to this Article.

With respect to the statute of limitations contained in G.S. 97-47, our courts have consistently held that the limitation is not jurisdictional, but is a technical legal defense which the employer may assert. *See Hand v. Fieldcrest Mills, Inc.*, 85 N.C. App. 372, 355 S.E.2d 141, *disc. review denied*, 320 N.C. 792, 361 S.E.2d 76 (1987); *Watkins v. Motor Lines*, 10 N.C. App. 486, 179 S.E.2d 130, *rev'd on other grounds*, 279 N.C. 132, 181 S.E.2d 588 (1971). Clearly, the Deputy Commissioner improperly raised the question of G.S. 97-47 and erroneously put the burden on plaintiff to prove that his claim was not barred by the one year statute of limitation.

The only testimony offered at the hearing before the deputy was that of plaintiff who, at that time, was unrepresented by counsel. While the deputy questioned plaintiff, he did not obtain any evidence to support his finding and conclusion that plaintiff's claim was barred by "one or more Statutes of Limitations." Nor does the record support such a finding or conclusion.

By the time the Deputy Commissioner entered his order, he was apparently satisfied that plaintiff's claim was not barred by the two year statute of limitations in G.S. 97-24; but he conducted no hearing and made no findings with respect to any benefits to which plaintiff was entitled for the injury, temporary or permanent, he sustained as a result of the accident on 25 April 1985.

Furthermore, he found and concluded that plaintiff's claim was barred by the one year statute of limitation contained in 97-47. We note that this provision is primarily applicable in situations where there has been a prior determination and entry of an award of compensation by the Commission. In the present case, the Commission merely approved payment of a portion of plaintiff's medical bills. Plaintiff's right to receive compensation has never been determined by the Commission, and consequently, no award has ever been entered. Assuming, *arguendo*, that this provision is applicable, no evidence was presented at the hearing, nor does the record contain any evidence as to the date of the last payment of plaintiff's medical bills. The Deputy Commissioner "inferred" that since these bills were approved by the Commission in August and September 1985 that they were paid "within a reasonable time after Commission approval and no later than the calendar year 1985." It was and still is the duty of the Commission to hear evidence and make findings of fact with respect to these matters before it can enter such an order as it did in this proceeding.

[3] The errors described above disclose that the full Commission erred in its statement that it had fully reviewed the record and found no error. Since the record before the full Commission clearly discloses that the Deputy Commissioner had not conducted a complete hearing and that his findings were inadequate and did not support his conclusions of law, it was the duty of the full Commission pursuant to G.S. 97-85 to conduct its own hearing, make findings, draw conclusions and enter the appropriate order. Upon remand, the full Commission should now conduct a hearing, make its own findings of fact and conclusions of law and enter an order resolving all issues raised by plaintiff's claims under the Worker's Compensation Act.

[4] When the appellate court remands a case to the Industrial Commission for further review, findings and entry of an appropriate order, it is not sufficient, in our opinion, for the full Commission to then remand the case to the deputy to carry out its duties.

Such procedure merely extends the time to a final order in a case already too long delayed.

Vacated and remanded.

Judges WELLS and JOHNSON concur.

GREGORY POOLE EQUIPMENT COMPANY v. BILLY MURRAY AND HENRY E. MURRAY

No. 9110SC223

(Filed 17 March 1992)

1. **Uniform Commercial Code § 35 (NCI3d)— accommodation endorser—agreement not a negotiable instrument**

A guarantor was not an accommodation endorser because the agreement which was guaranteed contained a number of promises in addition to an unconditional promise or order to pay a sum certain and was therefore not a negotiable instrument. N.C.G.S. § 25-3-104.

Am Jur 2d, Bills and Notes §§ 138, 139, 141.

2. **Uniform Commercial Code § 47 (NCI3d)— guaranty—notice of sale of collateral—summary judgment for guarantor**

The trial court did not err by concluding that a guarantor, as a "debtor," had the right to notice of sale of the collateral in an action for a deficiency judgment where notice of sale had not been given to the guarantor. N.C.G.S. § 25-9-504(3), N.C.G.S. § 25-9-105.

Am Jur 2d, Secured Transactions § 616.

Uniform Commercial Code: failure of secured creditor to give required notice of disposition of collateral as bar to deficiency judgment. 59 ALR3d 401.

3. **Uniform Commercial Code § 47 (NCI3d)— sale of collateral—guarantor's right to notice—not waivable**

A predefault waiver of notice signed by the guarantor in a guaranty agreement was invalid because, under N.C.G.S. § 25-9-501(3), a debtor may not waive the rights appearing

in N.C.G.S. § 25-9-504(3), which include notice of sale and a commercially reasonable disposition of the collateral. The decision in *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, is not dispositive on the issue of a guarantor's waiver.

Am Jur 2d, Secured Transactions § 617.

Loss or modification of right to notification of sale of repossessed collateral under Uniform Commercial Code sec. 9-504. 9 ALR4th 552.

4. Uniform Commercial Code § 47 (NCI3d); Guaranty § 21 (NCI4th) — notice of sale not given to guarantor — deficiency judgment — summary judgment for guarantor

A summary judgment for a guarantor in an action for a deficiency judgment was reversed where the guarantor did not receive notice of sale of the collateral and there was a genuine issue of material fact as to whether the sale was commercially reasonable. Although a creditor's failure to give notice does not bar recovery of a deficiency judgment, lack of notice raises a presumption that the collateral was worth at least the amount of the debt, a presumption which may be overcome by proving that the collateral was sold at market value and that the market value was less than the amount of the debt.

Am Jur 2d, Secured Transactions §§ 616, 618, 619, 621-623.

Uniform Commercial Code: burden of proof as to commercially reasonable disposition of collateral. 59 ALR3d 369.

Judge GREENE concurring in the result.

APPEAL by plaintiff from order entered 7 December 1990 in WAKE County Superior Court by *Judge Howard E. Manning, Jr.* Heard in the Court of Appeals 3 December 1991.

Howard, From, Stallings & Hutson, P.A., by Peggy S. Vincent and John N. Hutson, Jr., for plaintiff-appellant.

Ramsey, Galloway & Abell, by Mark E. Galloway, for defendant-appellee.

WYNN, Judge.

The defendant Henry E. Murray ("Henry") is the brother of the defendant Billy Murray ("Billy"), and there is no business relationship between these brothers. Henry executed the following "Guaranty by Seller or Third Persons" guarantying a Purchase Money Security Agreement (hereinafter "Security Agreement") which had been signed by Billy in favor of the plaintiff, creditor:

> Undersigned jointly and severally guarantee the payment, when due, to any holder hereof of all amounts from time to time owing thereunder, and the payment, upon demand, of the entire amount owing on said Contract in the event of default in payment by Debtor named therein. Undersigned waives notice of acceptance of this guaranty, of any extensions in time of payment, of sale of any collateral and of all other notices to which the undersigned would be otherwise entitled by law and agrees to pay all amounts owing hereunder upon demand, without requiring any action or proceeding against Debtor.

Billy defaulted in payment of the Security Agreement and voluntarily surrendered possession of the collateral to plaintiff in compliance with the Security Agreement. Plaintiff then posted the notice of sale at the Alamance County Courthouse and mailed a notice of public sale to Billy, but not to Henry. Prior to the public sale, plaintiff's equipment manager appraised the collateral at approximately seventy thousand dollars. Plaintiff then purchased the collateral at the public sale on 26 August 1987 for seventy-three thousand dollars.

Subsequently, plaintiff invested more than fifteen thousand dollars in labor and materials to improve the collateral's marketability, but later sold it at a second public sale for sixty-five thousand dollars. Plaintiff deducted the proceeds of the first public sale from the debt owed by Billy and proceeded against both defendants for a deficiency judgment of $80,703.51 plus interest. The trial court granted summary judgment in favor of Henry and granted plaintiff's motion for summary judgment against Billy. From the order granting summary judgment in favor Henry, plaintiff appealed.

I.

[1] Prior to discussing the merits of the case, we must determine whether Henry is an accommodation endorser as defined by Article

Three of North Carolina's codification of the Uniform Commercial Code, N.C. Gen. Stat. §§ 25-1-101 to 25-11-108 (1986 & Supp. 1991) (hereinafter "U.C.C."). Appellant contends, in a reply brief, that the appellee's designation of himself as an accommodation endorser is inaccurate. We agree.

An accommodation party is any party who signs a negotiable instrument "in any capacity for the purpose of lending his name to another party to it." N.C. Gen. Stat. § 25-3-415 (1986). Henry is an accommodation endorser, therefore, if the Security Agreement at issue is a negotiable instrument. Article Three of the U.C.C. contains the following definition of a negotiable instrument:

> (1) Any writing to be a negotiable instrument within this Article must
>
> (a) be signed by the maker or drawer; and
>
> (b) contain an unconditional promise or order to pay a sum certain in money and no other promise, order, obligation or power given by the maker or drawer except as authorized by this article; and
>
> (c) be payable on demand or at a definite time; and
>
> (d) be payable to order or bearer.

Id. § 25-3-104.

The agreement between the parties in the instant case is a Purchase Money Security Agreement (Conditional Sales Contract). It is not a negotiable instrument because it contains a number of promises in addition to "an unconditional promise or order to pay a sum certain." Accordingly, we find that Henry is not an accommodation endorser.

II.

[2] Plaintiff contends that the trial judge erred in concluding that Henry Murray, the guarantor, was entitled to notice of the public sale of the collateral securing the debt. We disagree with plaintiff's contention.

A guarantor is one who makes "a promise to answer for the payment of a debt or the performance of some duty in the event of the failure of another person who is himself primarily liable for such payment or performance." *Branch Banking and Trust Co.*

v. Creasy, 301 N.C. 44, 52, 269 S.E.2d 117, 122 (1980). The crux of this controversy is whether the term "debtor" in Article Nine includes guarantors. This is a matter of first impression for our courts. We begin by examining the definition of the term "Debtor" under the statute:

> "Debtor" means the person who owes payment or other performance of the obligation secured, whether or not he owns or has rights in the collateral, and includes the seller of accounts or chattel paper. Where the debtor and the owner of the collateral are not the same person, the term "debtor" means the owner of a collateral in any provision of the article dealing with the collateral, the obligor in any provision dealing with the obligation, and may include both where the context so requires . . . .

N.C. Gen. Stat. § 25-9-105(1)(d) (1991). Section 25-9-112 expands on this definition by describing the secured party's obligations to an owner of collateral who is not the debtor. *See id.* (1986), Official Comment.

Because a guarantor stands in the shoes of the debtor with respect to liability, a guarantor who unconditionally guarantees the debt of another "owes payment or other performance of the obligation secured." Also, expanding the definition of debtor under section 25-9-112 to include a third-party owner of collateral who is not liable for a deficiency while excluding a guarantor who is liable for the entire deficiency is both arbitrary and unfair. We, therefore, find that a guarantor is a "debtor" as defined in section 25-9-105. Our position reflects the basic policy of the Code to place function over form. *See* N.C. Gen. Stat. § 25-9-101 (1986), Amended Official Comment ("The scheme of this Article is to make distinctions, where distinctions are necessary, along functional rather than formal lines."). This interpretation also is in accord with the overwhelming majority of jurisdictions in the United States. *See, e.g., Prescott v. Thompson Tractor Co.*, 495 So. 2d 513 (Ala. 1986); *Connolly v. Bank of Sonoma County*, 184 Cal. App. 3d 1119, 229 Cal. Rptr. 396 (1986); *May v. Women's Bank, N.A.*, 807 P.2d 1145 (Colo. 1991); *Commercial Discount Corp. v. Bayer*, 57 Ill. App. 3d 295, 372 N.E.2d 926 (1978); *U.S. v. Jensen*, 418 N.W.2d 65 (Iowa 1988); *Bank of Burwell v. Kelley*, 233 Neb. 396, 445 N.W.2d 871 (1989); *Credit Car Leasing Co. v. DeCresenzo*, 138 Misc. 2d 726, 525 N.Y.S.2d

492 (1988); *Vermont National Bank v. Hamilton*, 149 Vt. 477, 546 A.2d 1349 (1988).

Under the Code, a "debtor" has the right to receive notice of sale, N.C. Gen. Stat. § 25-9-504(3):

> (3) Disposition of the collateral may be by public or private proceedings and may be made by way of one or more contracts. Sale or other disposition may be as a unit or in parcels and at any time and place and on any terms but every aspect of the disposition including the method, manner, time, place and terms must be commercially reasonable. Unless collateral is perishable or threatens to decline speedily in value or is of a type customarily sold on a recognized market, reasonable notification of the time and place of any public sale or reasonable notification of the time after which any private sale or other intended disposition is to be made shall be sent by the secured party to the *debtor*, if he has not signed after default a statement renouncing or modifying his right to notification of sale.

N.C. Gen. Stat. § 25-9-504(3) (emphasis added). Notice of sale allows those persons with an interest in the collateral to protect their "interest in the collateral by paying the debt, finding a buyer, or being present at the sale to bid, so that the collateral is not sacrificed by a sale at less than its true value." *Hodges v. Norton*, 29 N.C. App. 193, 197, 223 S.E.2d 848, 850 (1976). *See First Alabama Bank of Montgomery, N.A. v. Parsons*, 390 So. 2d 640, 642 (Ala. Civ. App. 1980).

Based on our conclusion that a debtor includes a guarantor under Article Nine, we find that a guarantor is entitled to the protections of 25-9-504(3). Our decision is based on the preference for construing terms within a statute consistently, the policy of the Code, and the existence of North Carolina's nonuniform default provisions. The drafters of the Code were extremely protective of the debtor's rights upon default. N.C. Gen. Stat. § 25-9-101, Amended Official Comment ("Except for procedure on default, freedom of contract prevails between the immediate parties to the security transaction."). Additionally, failure to include guarantors within the definition of debtor may result in the ultimate deprivation of the debtor's section 25-9-504(3) defense since the guarantor may seek reimbursement from the debtor. The maintenance of the primary debtor's rights are particularly important when viewed in light of North Carolina's nonuniform provision

on default, Part Six of Article Nine, which establishes a conclusive presumption of commercial reasonableness when a secured party gives notice of a disposition by public sale in substantial compliance with its provisions. N.C. Gen. Stat. §§ 25-9-601 to 25-9-607 (1986). *See North Carolina Nat'l Bank v. Burnette*, 297 N.C. 524, 256 S.E.2d 388 (1979); *Triad Bank v. Elliott*, 101 N.C. App. 188, 399 S.E.2d 1 (1990); *ITT-Industrial Credit Co. v. Milo Concrete Co.*, 31 N.C. App. 450, 229 S.E.2d 814 (1976).

Moreover, sending notice of sale to guarantors will not place an undue hardship on creditors. The creditor presumably has possession of the guarantor's address on the guaranty. Furthermore, section 25-9-603(2) does not require actual receipt of notice. *Burnette*, 297 N.C. at 531-32, 256 S.E.2d at 392-93. Rather, the secured party need only "mail by registered or certified mail a copy of the notice of sale to each debtor . . . (a) at the actual address of the debtors, if known to the secured party, or (b) at the address, if any, furnished the secured party, in writing, by the debtors, or otherwise at the last known address." N.C. Gen. Stat. § 25-9-603(2) (1986).

In the instant case, therefore, we find that the trial court did not commit error in finding that the guarantor, Henry Murray, as a "debtor," had the right to notice of sale under sections 25-9-501(3)(b), 25-9-603, and 25-9-504(3). We affirm the trial court on this issue.

III.

[3] Plaintiff also assigns error to the trial court's determination that the guarantor's right to notice is not waivable. For the reasons which follow, we overrule plaintiff's assignment of error.

Under N.C. Gen. Stat. § 25-9-501(3), a debtor may not waive, among other things, the rights appearing in section 25-9-504(3), which include notice of sale and a commercially reasonable disposition of the collateral. Appellant argues that this Court's decision in *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 389 S.E.2d 429 (1990), established that a guarantor can waive Article Nine protections. We do not find that *Borg-Warner* is dispositive on this issue for the following reasons: (1) the statements concerning waiver were dicta; (2) the Court addressed the waiver issue as to sections 25-9-504(1)(a)—(b) and 25-9-504(2), rather than 25-9-504(3); and (3) the case arose in the context of a bankruptcy, so the guarantor had lost rights in the collateral.

We find that a predefault waiver of the protections under section 25-9-501(3) by the guarantor, as a "debtor," is unenforceable. In the case at bar, therefore, the waiver of notice signed by Henry Murray in the guaranty agreement is invalid. We affirm the decision of the trial judge on this issue.

IV.

[4] The plaintiff also argues that the trial court erred in concluding that the failure of the secured party to provide notice of sale to the guarantor deprives the secured party of the right to seek a deficiency judgment and in granting summary judgment in favor of Henry. We agree.

A secured party, when seeking a deficiency judgment, has the burden of establishing reasonable notification and a commercially reasonable disposition. *Don Jenkins & Son Ford-Mercury, Inc. v. Catlette*, 59 N.C. App. 482, 297 S.E.2d 409 (1982). As stated above, a secured party seeking a deficiency judgment gains a conclusive presumption of commercial reasonableness if the party shows substantial compliance with the notice provisions of Part Six, N.C. Gen. Stat. §§ 25-9-601 to 25-9-607. *Burnette*, 297 N.C. at 530-31, 256 S.E.2d at 391-92.

A creditor's failure to give notice, however, does not constitute an absolute bar to the recovery of a deficiency judgment. *Hodges*, 29 N.C. App. at 198, 223 S.E.2d at 851. In *Church v. Mickler*, 55 N.C. App. 724, 287 S.E.2d 131 (1982), this Court decided that although a creditor's failure to give notice under section 25-9-504(3) does not bar recovery of a deficiency judgment, lack of notice raises a presumption that the collateral was worth at least the amount of the debt. *Id.* at 730, 287 S.E.2d at 135. The creditor may overcome this presumption by proving that the collateral was sold at market value, and that the market value was less than the amount of the debt. *Id.*

Plaintiff, the secured party in the instant case, will not gain the presumption under Part Six because no notice was sent to Henry Murray. Plaintiff will have to prove that the sale was commercially reasonable under Part Five of the Code. *See* N.C. Gen. Stat. § 25-9-507(2); *Don Jenkins & Son Ford-Mercury v. Catlette*, 59 N.C. App. 482, 297 S.E.2d 409 (1982). Accordingly, we reverse the trial court's determination that plaintiff is barred from seeking a deficiency judgment against Henry Murray.

Because we find that there is a genuine issue of material fact as to whether the sale was commercially reasonable, we reverse the trial court's order granting summary judgment in favor of Henry Murray and remand this case for trial. *See Parks Chevrolet, Inc. v. Watkins*, 74 N.C. App. 719, 329 S.E.2d 728 (1985) (Commercial reasonableness is a question of fact which does not lend itself to summary judgment.).

Based on our disposition of the other issues in this case, we need not address plaintiff's remaining assignments of error. For reasons stated above, we affirm in part and reverse in part the decision of the trial court and remand for a trial on the issue of commercial reasonableness.

Affirmed in part, reversed in part and remanded.

Judge PARKER concurs.

Judge GREENE concurs in the result by separate opinion.

Judge GREENE concurring in the result.

Although I agree with the majority's resolution of all issues, I write separately to explain why I believe *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 389 S.E.2d 429 (1990) does not preclude our holding that Henry Murray's waiver of notice in the guaranty agreement is invalid. Because this Court in *Borg-Warner* did not resolve the issue of whether a pre-default waiver of notice of sale by the guarantor is enforceable, but rather held that a guarantor may waive the right to a commercially reasonable disposition of collateral, *id.* at 581-82, 389 S.E.2d at 433, *Borg-Warner* does not preclude our holding that pre-default waivers of notice of sale by guarantors are unenforceable.

IN THE MATTER OF JULIE ANN MURPHY AND STEPHANIE MURPHY

No. 9123DC271

(Filed 17 March 1992)

1. **Parent and Child § 1.5 (NCI3d); Constitutional Law § 108 (NCI4th)— termination of parental rights—incarcerated parent—presence at proceeding—no constitutional requirement**

The termination of an incarcerated respondent's parental rights at a hearing where he was represented by counsel but not present did not violate his state or federal constitutional rights. While the fundamental liberty interest protected by the Fourteenth Amendment includes the natural parents' ability to provide and maintain the care, custody and management of their child, fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case by case basis rather than through rules of general application. The record in this case does not disclose whether the trial court balanced the factors in *Mathews v. Eldridge*, 424 US 319, and made specific findings and conclusions regarding the minimum requirements of fundamental fairness; however, because child-custody litigation must be decided as rapidly as is consistent with fairness, the Court of Appeals concluded that analysis of the *Eldridge* factors, especially the risk of error, supported the trial court's denial of respondent's request to be present.

Am Jur 2d, Parent and Child §§ 23, 34, 35.

2. **Parent and Child § 1.5 (NCI3d)— termination of parental rights—incarcerated parent—not present at hearing—no statutory requirement**

There was no prejudicial error in the termination of an incarcerated respondent's parental rights without his presence where the trial court preserved the adversarial nature of the proceeding by allowing respondent's counsel to cross examine witnesses, with the questions and answers recorded, and respondent failed to produce any evidence of prejudice. N.C.G.S. § 7A-631.

Am Jur 2d, Parent and Child §§ 23, 34, 35.

IN RE MURPHY

[105 N.C. App. 651 (1992)]

APPEAL by respondent from judgment and order entered 9 January 1991 by *Judge Samuel L. Osborne* in YADKIN County District Court. Heard in the Court of Appeals 7 January 1992.

On 28 November 1988 the Juvenile Court of Cedar County, Iowa removed respondent's daughters from the custody of their mother and placed them in the custody of their father, the respondent. On 13 April 1989 respondent was convicted of three counts of first degree sexual offense (one count was reversed on appeal) and three counts of indecent liberties against one of his two daughters. Respondent was sentenced to three life terms with the North Carolina Department of Correction (one life term was vacated on appeal) to be served concurrently with three consecutive three year terms. On 6 February 1989 both of respondent's minor daughters were found to be "abused juveniles" and their custody was awarded to the Yadkin County Department of Social Services (YDSS). On 13 July 1990 YDSS filed a petition with the district court seeking termination of respondent's parental rights. An adjudicatory hearing was held on 31 December 1990. At the hearing respondent's motion that he be transported to the hearing from the Piedmont Correctional Center in Salisbury, North Carolina, where he was incarcerated was denied and his parental rights were terminated.

Richard N. Randleman, P.A., by Richard N. Randleman, for petitioner-appellees.

Shore, Hudspeth and Harding, by Benjamin H. Harding, Jr., Guardian Ad Litem, for petitioner-appellees.

W. Lee Zachary, Jr. for respondent-appellant.

EAGLES, Judge.

The sole issue raised in this appeal is whether the trial court violated respondent's State statutory rights as well as his constitutional rights under both the United States Constitution and the North Carolina Constitution by denying respondent's motion that he be transported from the State correctional facility where he was incarcerated to the termination hearing. The narrow question we face today is whether the State must transport incarcerated parents to court proceedings where their parental rights may be terminated in order that they may be present. We hold that an incarcerated parent does not have an absolute right to be transported to a termination of parental rights hearing in order that he may

be present under either statutory or constitutional law. Accordingly, we affirm.

United States Constitution

[1] Our federal constitution recognizes that "freedom of personal choice in matters of family life is a fundamental liberty interest protected by the Fourteenth Amendment." *Santosky v. Kramer*, 455 U.S. 745, 753, 71 L.Ed.2d 599, 606 (1982) (citations omitted). That fundamental liberty interest includes natural parents' ability to provide and maintain the care, custody and management of their child. *Id.* It does not evaporate simply because a parent has not been a model parent or has lost temporary custody of his or her child to the State. *Id.* Indeed, "[i]f anything, persons faced with forced dissolution of their parental rights have a more critical need for procedural protections than do those resisting state intervention into ongoing family affairs. When the State moves to destroy weakened familial bonds, it must provide the parents with fundamentally fair procedures," which meet the rigors of the due process clause. *Id.*

> [T]he nature of process due in parental rights termination proceedings turns on a balancing of the "three distinct factors" specified in *Mathews v. Eldridge*, 424 US 319, 335, 47 L Ed 2d 18, 96 S Ct 893 (1976): the private interests affected by the proceeding; the risk of error created by the State's chosen procedure; and the countervailing governmental interest supporting use of the challenged procedure.

Id. at 754, 71 L.Ed.2d at 607 (citations omitted). However, "fundamental fairness may be maintained in parental rights termination proceedings even when some procedures are mandated only on a case-by-case basis, rather than through rules of general application." *Id.* at 757, 71 L.Ed.2d at 609. In *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 68 L.Ed.2d 640, *reh'g denied*, 453 U.S. 927, 69 L.Ed.2d 1023 (1981), the Supreme Court affirmed a North Carolina ruling, (*In re Lassiter*, 43 N.C. App. 525, 259 S.E.2d 336 (1979), *disc. review denied and appeal dismissed*, 299 N.C. 120, 262 S.E.2d 6 (1980)) and held that appointment of counsel was not constitutionally required in every termination of parental rights proceeding. The Court stated:

> If, in a given case, the parent's interest were at their strongest, the State's interests were at their weakest, and the risks of

> error were at their peak, it could not be said that the Eldridge factors . . . and that due process [do] not therefore require the appointment of counsel. But since the Eldridge factors will not always be so distributed, and since "due process is not so rigid as to require that the significant interests in informality, flexibility, and economy must always be sacrificed," *Gagnon v. Scarpelli*, 411 US, at 788, 36 L Ed 2d 656, 93 S Ct 1756, 71 Ohio Ops 2d 279, neither can we say that the Constitution requires the appointment of counsel in every parental termination proceeding. We therefore adopt the standard found appropriate in *Gagnon v. Scarpelli*, and leave the decision whether due process calls for the appointment of counsel for indigent parents in termination proceedings to be answered in the first instance by the trial court, subject, of course, to appellate review.

Lassiter, 452 U.S. at 31, 68 L.Ed.2d at 652 (citation omitted). A parent's absence from a termination proceeding is of similar import. Accordingly, we are unable to say, as a matter of law, that fundamental fairness requires that the State transport an incarcerated parent to a termination hearing in order that he may be present. We leave that determination in the first instance to the trial court, subject to appellate review.

Here, the record does not disclose whether the trial court balanced the *Eldridge* factors and made specific findings and conclusions regarding the minimum requirements of fundamental fairness. "Nevertheless, because child-custody litigation must be concluded as rapidly as is consistent with fairness, we decide today whether the trial judge denied [the respondent] due process of law when he [denied respondent's request that he be transported to the hearing in order that he may be present]." *Lassiter*, 452 U.S. at 32, 68 L.Ed.2d at 653.

Analysis of the *Eldridge* factors supports the trial court's decision to deny respondent's request. The first *Eldridge* factor, the private interest affected, weighs against the respondent's absence from the adjudicatory hearing. The Supreme Court has held:

> [I]t [is] "plain beyond the need for multiple citation" that a natural parent's "desire for and right to 'the companionship, care, custody, and management of his or her children' " is an interest far more precious than any property right. (Citations omitted). . . . "A parent's interest in the accuracy and

justice of the decision to terminate his or her parental status is, therefore, a commanding one."

Santosky, 455 U.S. at 758-59, 71 L.Ed.2d at 610 (citation omitted). However, the third *Eldridge* factor, the countervailing government interest, is equally commanding in favor of the State. Transportation of the respondent from his jail cell to the adjudicatory hearing would have worked more than a mere financial burden on the State. Respondent's presence at the hearing combined with his parental position of authority over his children may well have intimidated his children and influenced their answers if they had been called to testify. *See In re Barkley*, 61 N.C. App. 267, 270, 300 S.E.2d 713, 715 (1983). That risk becomes particularly significant where, as here, the respondent parent's incarceration is the result of his being convicted of sexual offenses he committed against his own children. This is exacerbated where the incarcerated respondent's victim-children have previously had to testify and be subject to cross examination in the criminal trial of their parent. The State also has a commanding interest in a correct decision. *Carrington v. Townes*, 306 N.C. 333, 338, 293 S.E.2d 95, 99 (1982), *cert. denied*, 459 U.S. 1113, 74 L.Ed.2d 965 (1983) (citing *Lassiter v. Dep't of Social Services*, 452 U.S. 18, 68 L.Ed.2d 640 (1981)). Additionally, transportation of the respondent from a secure prison cell to the adjudicatory hearing would have presented the respondent with an opportunity to attempt an escape and jeopardize the safety of the public as well as that of the officers assigned to transport respondent to the hearing.

Thus, determination of whether respondent's federal due process rights have been violated turns upon the second *Eldridge* factor, risk of error created by the State's procedure. On this record the risk of error caused by respondent's absence was slight. During the hearing, respondent's attorney did not argue that his client would be able to testify concerning any defense to termination, nor did he indicate how his client would be prejudiced by not being present. Indeed, he could point to no reason that the respondent should be transported to the hearing other than for respondent to contest his sexual assault convictions, an impermissible reason. *In re Wheeler*, 87 N.C. App. 189, 194-95, 360 S.E.2d 458, 462 (1987) (A parent may not relitigate prior convictions of sexual abuse at an adjudicatory hearing to terminate parental rights). The transcript of the hearing provides the following colloquy:

THE COURT: All right. And it's my understanding that you represent him not only in the criminal part but in this proceeding?

MR. ZACHARY: Yes, sir.

THE COURT: The question arises in my mind as to whether or not it would serve any useful purpose to bring him back from prison. Do you know why, for the record, he wants to be brought back?

MR. ZACHARY: Well, he denies that any of these things occurred and—

THE COURT: Well, have you explained to him that these convictions are res judicata?

MR. ZACHARY: Yes, sir, but he still wants to be present.

THE COURT: Is that the only reason he wants to be here that you know of? It's obvious if he's serving a life sentence he doesn't have any prospects of being able to raise these children.

MR. ZACHARY: No.

THE COURT: And the children are now—

MR. ZACHARY: Twelve and nine. (inaudible)

THE COURT: Well, if his only purpose, based on your statement, is to try to challenge these allegations of sexual abuse that were tried criminally, I'm going to express my opinion that that's res judicata at this point now that his appeals have ended.

MR. ZACHARY: Okay.

THE COURT: So I see no reason to bring him back from the prison system at this time, even though he may have that desire.

MR. ZACHARY: (inaudible)

The record before us is devoid of anything which would indicate any risk of error to the respondent caused by his absence. Indeed, during oral argument, respondent's attorney remained unable to offer any viable argument of any risk of error caused by his client's absence. The respondent did contend during oral argument that

he should have been allowed to testify that he wanted his mother (the children's grandmother) to gain custody of his children. However, respondent's wishes could have been adequately stated on his behalf by his counsel. This assignment does not present constitutional error. Accordingly, it is overruled.

North Carolina Constitution

Respondent next argues that his absence from the termination proceeding violated his State due process rights found in the "Law of the land" clause of the North Carolina Constitution. N.C. Const. art. I, § 19. We disagree.

Our State has long recognized that the procedural protections afforded by our State Constitution are not to be lightly disregarded or trampled as a matter of convenience. The protections and the ideals which support them must be vigorously protected and held in highest regard. Nevertheless, constitutional interpretation must be guided by the dictates of rational minds. The protections afforded must be fair and reasonable and must not lead to either unfair, unreasonable or absurd results.

Here, we believe the standard adopted by the United States Supreme Court to determine what process is due in a parental rights termination proceeding, discussed above, is also the appropriate standard to determine whether the requirements of constitutional due process afforded by our State Constitution have been met. *See, e.g., Carrington v. Townes*, 306 N.C. 333, 339, 293 S.E.2d 95, 98-99 (1982), *cert. denied*, 459 U.S. 1113, 74 L.Ed.2d 965 (1983) (adopting same standard to determine whether counsel should be appointed in civil paternity cases); and *Jolly v. Wright*, 300 N.C. 83, 93, 265 S.E.2d 135, 142-43 (1980) (adopting same standard to determine whether counsel should be appointed in nonsupport civil contempt cases). Accordingly, we adopt that standard here. We emphasize that ordinarily the determination of whether minimal requirements of fundamental fairness have been met should occur in the first instance in the trial court, *See, e.g., Carrington*, 306 N.C. at 340-41, 293 S.E.2d at 99. However, because child custody decisions should be made as rapidly as the dictates of fairness allow, we adopt our analysis from above and decide the issue here against the respondent. This assignment of error is overruled.

Statutory Rights

[2] Finally, respondent argues that the trial court committed prejudicial error by denying his statutory right to confront and cross examine witnesses. We disagree.

G.S. 7A-631 provides:

> The adjudicatory hearing shall be a judicial process designed to adjudicate the existence or nonexistence of any of the conditions alleged in a petition. In the adjudicatory hearing, the judge shall protect the following rights of the juvenile and his parent to assure due process of law: . . . the right to confront and cross-examine witnesses . . . .

"Although G.S. 7A-631 guarantees respondent the right to confront and cross examine . . . witnesses, the right to confront witnesses in civil cases is subject to 'due limitations.' *See Davis v. Wyche*, 224 N.C. 746, 32 S.E.2d 358 (1944)." *In re Barkley*, 61 N.C. App. at 270, 300 S.E.2d at 715 (1983). When, as here, a parent is absent from a termination proceeding and the trial court preserves the adversarial nature of the proceeding by allowing the parent's counsel to cross examine witnesses, with the questions and answers being recorded, the parent must demonstrate some actual prejudice in order to prevail upon appeal. *In re Barkley*, 61 N.C. App. at 270, 300 S.E.2d at 715-16. Here, the respondent has failed to produce any evidence of prejudice. Accordingly, this assignment is overruled.

Affirmed.

Judges COZORT and ORR concur.

STATE OF NORTH CAROLINA v. GARY JAMES HAM, DEFENDANT

No. 9118SC499

(Filed 17 March 1992)

Arrest and Bail § 135 (NCI4th)— arrest for DWI—right to communicate with counsel and friends—no denial

The right of access to counsel and friends of a defendant arrested for DWI at 1:35 a.m. was not substantially impaired

during the crucial period after he was taken before a magistrate at 4:00 a.m. where the conditions for defendant's release set by the magistrate provided that he would be held under a $300 secured bond which would be reduced to $100 if a sober responsible adult agreed to assume custody of him, and that he could be released at 9:00 a.m. solely upon posting a $100 bond; defendant telephoned a friend and left a message that $300 was needed to get him out of jail and that if the friend waited until 9:00 a.m. the bond would be reduced to $100; although defendant had a copy of the release order, he failed to mention that the bond would be reduced to $100 should a responsible adult assume custody; when the friend called the jail he was told that the bond was $300 but would be reduced to $100 at 9:00 a.m.; since the friend had only $100, he did not attempt to secure defendant's release until 10:00 a.m.; the record is silent as to the time the friend received defendant's message and subsequently telephoned the jail; and any confusion concerning the conditions for defendant's release thus originated with defendant. Furthermore, defendant's right of access to counsel and friends was not violated by the jailer's refusal to release defendant at 9:00 a.m. when defendant informed him that he was subject to release at that time by posting a $100 cash bond and that he had $100 on his person because his confinement between 9:00 a.m. and his release at 10:00 a.m. was not during a crucial period in that more than seven hours had passed since his arrest and there was little likelihood that any testimony concerning defendant's condition during this time would be relevant. N.C.G.S. § 20-138(a)(2).

Am Jur 2d, Automobiles and Highway Traffic § 308; Bail and Recognizance §§ 4, 29; Criminal Law §§ 970, 971.

APPEAL by State from order entered 20 November 1990 by *Judge W. Steven Allen, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 17 February 1992.

Defendant is a Michigan resident who was attending the furniture market in North Carolina with Michael L. Alpers and others. At approximately 1:35 a.m. on Saturday, 21 October 1989, he was charged with a violation of G.S. 20-138.1(a)(2), driving while impaired (DWI), in Greensboro. He was taken to the Guilford County Law Enforcement Center where a chemical analysis of his breath

showed an alcohol concentration of 0.22. During his processing defendant did not ask to make any telephone calls.

Defendant was taken before Magistrate Michael S. James just prior to 4:00 a.m. Based upon the evidence of defendant's poor driving, the results of his breathalyzer exam, and the fact he was from out of State, the magistrate determined it was necessary to place him under a secured bond as an incentive to insure his attendance in court. The conditions for defendant's release provided he would be held under a $300 secured bond, which would be reduced to $100 if a sober responsible adult with a valid driver's license appeared at the jail willing to assume custody of him. At 9:00 a.m., however, he could be released solely upon posting a $100 bond.

After the conditions for pretrial release were set defendant was allowed to use the telephone to call anyone he chose. He phoned Mr. Alpers and after first reaching the answering machine, called back a short time later and left a message. The message stated that he was being held for DWI and that his bond would be $300 until 9:00, when it would be reduced to $100. Although he had a copy of the release order he did not mention anything to Mr. Alpers about being released into his custody but did ask if Mr. Alpers would come down to the jail. After making these calls defendant was taken to the Guilford County Jail and was admitted at 3:58 a.m.

Mr. Alpers stated he did not remember what time it was when he was awakened and found defendant's message but did remember defendant asking him to come to the magistrate's office and that defendant was in custody on a DWI charge and could be released for $300 which would be reduced to $100 after 9:00 a.m. Mr. Alpers stated he called the magistrate's office and was told the same thing as defendant's message. Since he did not have $300 with him he did not go to the magistrate's office to post bond until the following morning.

Shortly after 9:00 a.m. defendant informed the jailer that he was subject to release at that time by posting a $100 cash bond and that he had $100 on his person. The jailer subsequently checked and informed defendant he could only be released upon a $300 bond or into the custody of a sober adult with the posting of $100. He was released at approximately 10:00 a.m. after Mr. Alpers and another adult arrived with $100.

Defendant pled guilty in District Court and received Level 5 punishment. He appealed to Superior Court and filed a motion to dismiss alleging his rights were violated, as he was denied access to witnesses who could assist him in his defense to the DWI charge. On 26 October 1990 defendant's motion to dismiss was granted, from which the State appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

No brief filed for defendant appellee.

WALKER, Judge.

In order to sustain a dismissal of a charge under G.S. 20-138.1(a)(2) North Carolina law requires a defendant to show a substantial statutory violation and prejudice arising therefrom. *State v. Eliason*, 100 N.C.App. 313, 395 S.E.2d 702 (1990). In ascertaining whether there was a substantial violation of defendant's right of access to counsel and friends three statutes are applicable: G.S. 15A-511(b), G.S. 15A-533(b) and G.S. 15A-534(c). The magistrate is required to inform the defendant of the charges against him, his right to communicate with counsel and friends, and to establish the conditions under which he can post bond and be released.

In this case the procedures followed by the magistrate are not at issue, but rather defendant contends the confusion and misunderstanding as to the terms of release denied him access to friends and witnesses and the opportunity to gather evidence. He argues he was therefore prejudiced since there was a responsible adult who could have posted bond and secured his release. The State contends that the trial court committed error in determining defendant's right of access to witnesses and friends had been denied and that lack of access was the result of the actions of the defendant or inadvertence on the part of others. Further, the State argues it is not required to insure the defendant obtains access to friends and witnesses so that he has failed to show any violation of law or prejudice.

Since this case arises under G.S. 20-138.1(a)(2), a violation of defendant's statutory rights is not *per se* prejudicial. *State v. Knoll*, 322 N.C. 535, 545, 369 S.E.2d 558, 564 (1988)

> [U]nder the current 0.10 statute, a defendant's only opportunity to obtain evidence is not lost automatically when he is de-

> tained, and improperly denied access to friends and family. Prejudice may or may not occur since a chemical analysis result of 0.10 or more is sufficient, on its face, to convict.

Id. In *State v. Dietz*, 289 N.C. 488, 493, 223 S.E.2d 357, 360 (1976), the Court stated that to establish such prejudice and thereby be entitled to relief:

> [D]efendant must show that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost.

A defendant is no less prejudiced, though, simply because his statutory rights were violated through inadvertence. *State v. Knoll* at 548, 369 S.E.2d at 565.

Here, the trial court made the following findings:

> 18. That the failure to release Mr. Ham on the posting of $100 bond by a sober adult into his custody prior to 10:00 was through inadvertance [sic];
>
> 19. That the failure to release was not a denial by the magistrate of the setting of conditions of pretrial release, but resulted in confusion arising from the various terms and conditions of release set forth in the release order;
>
> 20. That the defendant was denied the constitutional right of access to witnesses and friends consistent with the Court's opinion in *State v. Knoll*, and for these reasons, the Court is going to allow the motion to dismiss the charge.

The court concluded as a matter of law that the confusion and miscommunication resulting in defendant's continued confinement prejudiced him. The record contains no findings by the court that defendant made a sufficient showing of impairment of substantial rights, however, but merely a summary conclusion that he was denied the constitutional right of access to witnesses and friends. This conclusion is not adequately supported by the facts and a finding of prejudice sufficient to warrant dismissal of the charges against defendant.

In *Knoll* the trial court found that each of the defendants was confined at a time crucial to his ability to gather evidence and to have witnesses to his condition following arrest. Each defendant was also able to show lost opportunities during the iden-

tifiable crucial period. In this case the trial court failed to make findings that defendant was denied access to witnesses and friends at a crucial period during which exculpatory evidence could have been gathered. Further, defendant has not shown himself to have been prejudiced and entitled to relief under *Dietz* by establishing that lost evidence or testimony would have been helpful to his defense, that the evidence would have been significant, and that the evidence or testimony was lost. We cannot conclude, therefore, that the trial court's Finding of Fact No. 20 was adequately supported by sufficient, competent evidence.

The facts of this case indicate defendant was charged at 1:35 a.m. and, although the trial court did not expressly so find, we must conclude defendant was advised of his rights under G.S. 20-16.2 prior to administration of the breathalyzer test. This statute requires the attending chemical analyst to inform defendant both orally and in writing that:

> (6) He has the right to call an attorney and select a witness to view for him the testing procedures, but the testing may not be delayed for these purposes longer than 30 minutes from the time he is notified of his rights.

Though we are not prepared to promulgate a bright line test for determining the crucial period during which valuable evidence may be lost to a defendant charged under G.S. 20-138.1(a)(2), the time interval including defendant's processing and breathalyzer exam would certainly fall within the crucial period.

The trial court found that defendant called Alpers and left a message stating that $300 was needed to get him out of jail but that if Alpers waited until 9:00 a.m. the bond would be reduced to $100. When Alpers called the Guilford County Jail he was again told the bond was $300 but reduced to $100 at 9:00 a.m. However, since he only had $100 he did not attempt to secure defendant's release at that time. During this time any confusion concerning the conditions for defendant's release originated with the defendant, who had a copy of the release order but failed to clearly convey that the bond would be reduced to $100 should a responsible adult assume custody. Further, the record is silent as to the time Alpers received defendant's message and subsequently telephoned the jail. All of these factors establish defendant has not shown himself to have been prejudiced during this crucial period.

Although defendant was entitled to be released at 9:00 a.m. since he had the $100 necessary to post bond, we cannot say that his confinement until shortly after 10:00 a.m., when Alpers arrived, came within a crucial period. Our Supreme Court has noted:

> When one is taken into police custody for an offense of which intoxication is an essential element, time is of the essence. Intoxication does not last. . . . Thus, if one accused of driving while intoxicated is to have witnesses for his defense, he must have access to his counsel, friends, relatives, or some disinterested person within a relatively short time after his arrest.

State v. Hill, 277 N.C. 547, 553, 178 S.E.2d 462, 466 (1971). Since more than seven hours had passed since defendant was initially taken into custody, there was little likelihood by this time that any testimony by Alpers concerning defendant's condition after arrest would be relevant. We also do not believe defendant's sobriety was likely affected during this one hour period.

Insofar as we find defendant has failed to adequately prove he was prejudiced by any statutory violations he is not entitled to relief. Defendant's burden of establishing prejudice, by showing valuable evidence was lost due to a failure to timely release him, is not alleviated simply because he is an out of state resident.

Reversed.

Chief Judge HEDRICK and Judge ORR concur.

BRUCE McKINNON MEYERS v. DEPARTMENT OF HUMAN RESOURCES OF THE STATE OF NORTH CAROLINA, AND THE STATE PERSONNEL COMMISSION OF THE STATE OF NORTH CAROLINA

No. 913SC170

(Filed 17 March 1992)

1. **Administrative Law and Procedure § 64 (NCI4th)— judicial review of agency decision—applicable statute—place for seeking review**

Plaintiff's contested case filed in 1983 came to an end when the State Personnel Commission dismissed the personnel action against him pursuant to a Court of Appeals decision reversing his demotion and ordering that the action be dismissed due to a lack of proper notice. Therefore, plaintiff's January 1990 petition to the State Personnel Commission for reinstatement to his supervisory position, back pay, attorney fees and expungement of his record was a separate case rather than an extension of his initial case, and plaintiff was not required to seek review of the Commission's decision in the Wake County Superior Court under former N.C.G.S. § 150A-45 but could seek review in the superior court of the county of his residence under N.C.G.S. § 150B-45, which became effective on 1 January 1986.

Am Jur 2d, Administrative Law § 737.

2. **State § 12 (NCI3d)— State Personnel Commission—demotion reversed—reinstatement, back pay, attorney fees, and expungement**

The State Personnel Commission acted arbitrarily and capriciously in refusing to grant plaintiff's petition for reinstatement to his supervisory position, back pay, attorney fees and expungement of his record after the Court of Appeals reversed plaintiff's demotion and ordered that the personnel action against him be dismissed due to lack of proper notice.

Am Jur 2d, Civil Service § 68.

Judge WALKER dissenting.

APPEAL by respondents from an order filed on 13 November 1990 in CRAVEN County Superior Court by *Judge Frank R. Brown.* Heard in the Court of Appeals 13 November 1991.

Plaintiff, Bruce Meyers, was dismissed from State employment in October of 1983. He appealed his dismissal pursuant to the grievance procedures of the Department of Human Resources. Subsequent to a hearing, the hearing officer issued a report, on 20 July 1984, which recommended that plaintiff be reinstated because the dismissal was not in accordance with State policy. The dismissal was set aside but plaintiff was then demoted to a lower level, non-supervisory position. The demotion was appealed but the State Personnel Commission held, on 5 December 1985, that the action was justified. Plaintiff then appealed that decision to the Superior Court of Wake County, which dismissed the Petition for Judicial Review in light of its finding that the decision of the State Personnel Commission was proper in law and fact. Plaintiff appealed to the North Carolina Court of Appeals which reversed with instructions that the action against plaintiff be "dismissed" due to lack of proper notice. *Meyers v. Dep't of Human Resources*, 92 N.C. App. 193, 374 S.E.2d 280 (1988), *disc. rev. denied*, 324 N.C. 247, 377 S.E.2d 754 (1989).

On 9 January 1990 Mr. Meyers petitioned the State Personnel Commission for dismissal of the personnel action, reinstatement, back pay, attorney's fees and expungement of his record. The State Personnel Commission dismissed the personnel action but took no action with regard to reinstatement, back pay, attorney's fees and expungement of the record. This left plaintiff in a lower level position with lower pay and with essentially no remedy despite a Court of Appeals ruling in his favor.

On 8 March 1990, plaintiff filed a petition in Craven County Superior Court seeking judicial review of the decision of the State Personnel Commission in regard to reinstatement in his supervisory position, back pay, attorney's fees and expungement of his record. After a hearing on 8 October 1990, the trial court found that the State Personnel Commission had acted arbitrarily and capriciously and granted the plaintiff the relief sought. Respondents appeal.

David P. Voerman for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Norma S. Harrell, for the State Personnel Commission.

Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Ann Reed, for the Department of Human Resources.

LEWIS, Judge.

[1] Respondents argued that the Superior Court of Craven County lacked subject matter jurisdiction to hear this case under the provisions of N.C.G.S. § 150A-45, which was recodified as N.C.G.S. 150B effective 1 January 1986. They argue that this case commenced prior to the 1 January 1986 effective date of Chapter 150B and therefore is governed by 150A. N.C.G.S. § 150A-45 requires that any appeal from the State Personnel Commission be brought in Wake County Superior Court. Plaintiff, a resident of Craven County, argues that his filing in Craven County Superior Court was not an extension of the original case filed in 1983 but rather a separate "contested case" which he filed 9 January 1990 for reinstatement, back pay, attorney's fees and expungement of his record and that it falls under the new statute N.C.G.S. § 150B-45. Under the provisions of N.C.G.S. § 150B-43 and § 150B-45, plaintiff would then be an aggrieved person who had the right to seek judicial intervention and Craven County Superior Court would have jurisdiction since the new statute allows review in Wake County or in the county of plaintiff's residence.

[2] With plaintiff's argument, we agree. Upon dismissal of the action, ordered by this Court, *Meyers v. Dep't of Human Resources*, 92 N.C. App. 193, 374 S.E.2d 280 (1988), *disc. rev. denied*, 324 N.C. 247, 377 S.E.2d 754 (1989), plaintiff's contested case came to an end. Though not specifically articulated, implied in this Court's prior ruling was a return to the status quo as it existed prior to the demotion proceedings. After dismissal, there remained no reason to deprive plaintiff of his prior job status. The only impediment remained in the Commission's refusal to reinstate plaintiff. Now plaintiff seeks to enforce the remedy implied in this Court's dismissal order. We find the trial judge was correct in findings of fact 6(ee) of his order, that "under the provisions of North Carolina Administrative Code § .0432, the State Personnell [sic] Commission is required to reinstate Meyers, grant him back pay and attorney's fees. . . ." In addition, all records of these proceedings should be expunged from his personal record. To rule otherwise would be futile. The Commission has already refused to consider plaintiff's petitions. Requiring plaintiff to seek relief within the agency grievance procedures would be time consuming.

We distinguish this case from *Community Sav. & Loan Ass'n. v. North Carolina Sav. & Loan Commission*, 43 N.C. App. 493,

259 S.E.2d 373 (1979), in that the case at bar has been to the Court of Appeals and the Personnel Commission has refused to act on the intent of the order of this Court.

The trial court reviewed the record and found that the Personnel Commission's decision was "arbitrary and capricious." The trial court then went forward with very specific orders to correct the deficiencies of the Commission's actions. We agree that the Commission's refusal to take any action on plaintiff's petitions was arbitrary and capricious.

The Commission argues that it is not a necessary party. As it is the quasi-judicial branch of the agency, it had the power to act on plaintiff's petitions. It had not only the power, but the duty to do so as these actions were implied in the order of dismissal which it was directed to carry out.

The trial court's order of 10 October 1990 is

Affirmed.

Judge WELLS concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from that portion of the majority opinion which holds that upon dismissal of the personnel action by the State Personnel Commission, petitioner's contested case came to an end.

When petitioner's initial personnel action was previously before this Court it reversed the petitioner's demotion and mandated "that the matter be remanded to the [State Personnel] Commission with instructions that the action be dismissed due to lack of proper notice under Section 126-35." *Meyers v. Dept. of Human Resources*, 92 N.C.App. 193, 198, 374 S.E.2d 280, 283 (1988), *disc. review denied*, 324 N.C. 247, 377 S.E.2d 754 (1989). On or about 9 January 1990 petitioner filed a second petition for dismissal of the personnel action, reinstatement, back pay, attorney's fees and expungement of his record. On 9 February 1990 the Commission ordered that the personnel action be dismissed due to lack of proper notice under G.S. 126-35, but petitioner's other claims were not addressed.

Apparently the State Personnel Commission misconstrued this Court's instruction to "dismiss" the personnel "action" as ordering the dismissal of petitioner's "case." Since petitioner's "case" was not limited solely to the personnel action but was comprised of other pending claims which had arisen out of the same occurrence, including his claims for back pay, attorney's fees, and expungement of his record, it is my view that petitioner's contested case survived despite dismissal of the personnel action.

Having determined that petitioner's contested case continued and was commenced prior to 1 January 1986, G.S. 150A-45 would govern. Pursuant to this statute, Wake County Superior Court would be the proper forum in which to seek judicial review of the decision of the State Personnel Commission concerning petitioner's claims for reinstatement, back pay, attorney's fees, and expungement of his record. Craven County Superior Court would not have subject matter jurisdiction and petitioner's petition for judicial review, having been improperly filed, should have been dismissed.

In my judgment proper disposition of this case would require that the Commission's order dismissing the personnel action due to lack of proper notice under G.S. 126-35 be affirmed and the case remanded to Wake County Superior Court with directions to remand it to the State Personnel Commission for petitioner's reinstatement to a position comparable to the one he held on 19 October 1983. At that time the Commission must act upon petitioner's petition for back pay, attorney's fees and expungement of the record.

CLIMATOLOGICAL CONSULTING CORPORATION, PLAINTIFF v. STEPHEN M. TRATTNER, DEFENDANT

No. 9128DC376

(Filed 17 March 1992)

1. Process § 9 (NCI3d)— out of state defendant—long arm jurisdiction

The trial court did not err in denying defendant's motion to dismiss for lack of personal jurisdiction on the basis of North Carolina's long arm statute where plaintiff was a North

Carolina corporation which provided expert consulting on weather, defendant was an attorney residing in Maryland and practicing in Washington, D.C. who contracted with plaintiff for expert weather consulting in connection with an airplane crash, and plaintiff alleged that defendant failed to pay sums due for professional services rendered. Defendant made a promise to plaintiff to pay for services to be performed in North Carolina by plaintiff and plaintiff actually performed services for defendant within North Carolina which were authorized by defendant. N.C.G.S. § 1-75.4(5)a and b.

Am Jur 2d, Process § 178.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

2. Process § 9.1 (NCI3d)— out of state defendant—minimum contacts

The requirements of the due process clause for jurisdiction over an out of state defendant were met where defendant contacted plaintiff's president to engage plaintiff's services in connection with an airplane crash case; plaintiff accepted the offer and all services were performed in North Carolina; plaintiff's president offered, upon completion of the work, to perform additional services at a later time if the defendant's clients decided to pursue another related claim; defendant telephoned plaintiff's president in his North Carolina office to engage plaintiff's services; it is logical to conclude that defendant knew the majority of plaintiff's services would be performed in North Carolina; and defendant does not dispute that eighty percent of the work was performed in North Carolina.

Am Jur 2d, Process §§ 186-188.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

APPEAL by defendant from Order entered 8 February 1991 by *Judge Gary Cash* in BUNCOMBE County District Court. Heard in the Court of Appeals 12 February 1992.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, for plaintiff appellee.

Powell & Deutch, by John A. Powell, for defendant appellant.

COZORT, Judge.

Plaintiff is a North Carolina corporation engaged in the business of expert consulting on the topic of weather. Defendant Trattner is an attorney who resides in Maryland and practices law in Washington, D.C. In 1985 defendant contracted with plaintiff for expert weather consulting in connection with an airplane crash involving defendant's clients. On 2 August 1989 plaintiff filed suit in Buncombe County Superior Court alleging that defendant and his clients failed to pay sums due for the professional services rendered. On 25 September 1989 defendants moved to dismiss the complaint for lack of personal jurisdiction and *forum non conveniens*. On 8 February 1991 the trial court granted the clients' motion, but denied defendant Trattner's motion. Defendant Trattner appeals.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to dismiss for lack of personal jurisdiction. We affirm.

[1] We apply a two-step analysis in determining whether our state courts have in personam jurisdiction over non-resident defendants. "First, the transaction must fall within the language of the State's 'long-arm' statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 364, 348 S.E.2d 782, 785 (1986). The second step is the ultimate test of jurisdiction. *Id.*

N.C. Gen. Stat. § 1-75.4 (1983) provides in pertinent part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * * *

(5) Local Services, Goods or Contracts.—In any action which:

a. Arises out of a promise, made anywhere to the plaintiff . . . by the defendant . . . to pay for services to be performed in this State by the plaintiff; or

b. Arises out of services . . . actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; . . .

In his affidavits, defendant states that he contacted plaintiff by telephone in 1985 and hired him directly to perform consulting services. In an affidavit, the president of plaintiff corporation stated that defendant approved the price quoted for the services and that over eighty percent of the services were performed in North Carolina. From the facts presented in the record, we conclude that defendant made a promise to plaintiff to pay for services to be performed in North Carolina by plaintiff. Plaintiff actually performed services for the defendant within this state which performance was authorized by defendant. We find the transaction within §§ 1-75.4 (5)a. and (5)b.

[2] Our next inquiry is whether the exercise of jurisdiction over defendant is permitted by the due process clause of the Fourteenth Amendment of the United States Constitution. In *Tom Togs, Inc.*, a case closely analogous to the one at bar, the North Carolina Supreme Court stated:

> To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.' " *International Shoe Co. v. Washington*, 326 U.S. 310, 316, 66 S.Ct. 154, 158, 90 L.Ed. 95, 102 (1945) (quoting from *Milliken v. Meyer*, 311 U.S. 457, 463, 61 S.Ct. 339, 342-43, 85 L.Ed. 278, 283 (1940)). In each case, there must be some act by which the defendant purposefully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its laws; the unilateral activity within the forum state of others who claim some relationship with a non-resident defendant will not suffice. *Hanson v. Denckla*, 357 U.S. 235, 253, 78 S.Ct. 1228, 1239-40,

2 L.Ed.2d 1283, 1298 (1958). This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there." *World-Wide Volkswagen Corp. v. Woodson*, 444 U.S. 286, 297, 100 S.Ct. 559, 567, 62 L.Ed.2d 490, 501 (1980).

. . . Where the controversy arises out of the defendant's contacts with the forum state, the state is said to be exercising "specific" jurisdiction. In this situation, the relationship among the defendant, the forum state, and the cause of action is the essential foundation for the exercise of *in personam* jurisdiction. . . . [F]or purposes of asserting "specific" jurisdiction, a defendant has "fair warning" that he may be sued in a state for injuries arising from activities that he "purposefully directed" toward that state's residents. *Burger King. Corp. v. Rudzewicz*, 471 U.S. 462, 471-78, 105 S.Ct. 2174, 2181-83, 85 L.Ed.2d 528, 540-41 (1985). . . .

* * * *

Although a contractual relationship between a North Carolina resident and an out-of-state party alone does not *automatically* establish the necessary minimum contacts with this State, nevertheless a single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has a substantial connection with this State. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 105 S.Ct. 2174, 2185-86, 85 L.Ed.2d 528, 545; *McGee v. International Life Insurance Co.*, 355 U.S. 220, 78 S.Ct. 199, 2 L.Ed.2d 223 (1957); *Goldman v. Parkland*, 277 N.C. 223, 176 S.E.2d 784.

Tom Togs, Inc., 318 N.C. at 365-67, 348 S.E.2d at 786.

In *Tom Togs, Inc.*, plaintiff was a North Carolina clothing manufacturer and defendant was a clothing distributor incorporated in New Jersey with its principal place of business in New York City. At a showroom in New York, defendant's buyer examined clothing manufactured by plaintiff. The following day defendant gave plaintiff's independent clothing sales representative an order to forward to plaintiff for over $44,000 worth of merchandise. Upon receipt of the order, plaintiff accepted the offer by sending the merchandise to defendant within the specified time. Two weeks after delivery, defendant complained to plaintiff that the merchandise did not conform to the samples. Defendant returned the mer-

chandise to plaintiff, but plaintiff discovered that some of the merchandise was missing or damaged. Plaintiff then brought suit in Wake County Superior Court. Defendant moved to dismiss for lack of personal jurisdiction.

Analyzing the facts in *Tom Togs, Inc.*, the Court concluded that "the contract between defendant and plaintiff had a 'substantial connection' with this State . . . [and] defendant purposefully availed itself of the protection and benefits of our laws." *Id.* at 367, 348 S.E.2d at 787. The Court found the following facts to be significant: defendant made an offer to plaintiff whom defendant knew to be located in North Carolina; plaintiff accepted the contract in North Carolina; defendant was aware that the contract was going to be substantially performed in this State; and the shirts were in fact manufactured in and shipped from this State.

Similarly, in the case before us, we conclude that the requirements of the due process clause have been met. The record indicates that on 5 August 1983 defendant initially contacted plaintiff's president, William Haggard, to engage plaintiff's services in connection with an airplane crash case in which defendant was representing Joseph and Helen Ambrose. Mr. Haggard accepted the offer on behalf of Climatological Consulting Corporation and all services were performed in North Carolina. According to defendant, in 1984 upon completion of the work initially contracted for, plaintiff's president offered to perform additional services at a later time if the Ambroses decided to pursue another related claim against the United States Government. On 19 July 1985 defendant telephoned Mr. Haggard in his North Carolina office in order to engage plaintiff's services. Although we cannot conclusively determine from the record where the contract was made, we find it significant that defendant initiated contact at least six months *after* plaintiff completed work on the first case and Mr. Haggard indicated his company's willingness to assist defendant in any subsequent cases. Based upon his previous work experience with plaintiff and the location of plaintiff's offices, it is logical to conclude that defendant knew the majority of plaintiff's services would be performed in North Carolina. Defendant does not dispute that eighty percent of the services were performed in this state. From these facts, we conclude that the contract between plaintiff and defendant had substantial connections with this state and defendant purposefully availed himself of the protection and benefit of our laws.

In support of our conclusion, we note the State's manifest interest in providing its residents with a convenient forum for redressing injuries inflicted by non-residents who seek services offered by North Carolina professionals. *See Burger King Corp. v. Rudzewicz*, 471 U.S. 462, 478-79, 85 L.Ed.2d 528, 541 (1985). Although defendant has indicated there are three material witnesses located in Washington, D.C., this fact is counterbalanced by the fact that plaintiff's materials and offices are located here. North Carolina is a convenient forum to determine the rights of the parties.

The judgment below is

Affirmed.

Judges EAGLES and ORR concur.

EMPIRE OF CAROLINA, INC., PLAINTIFF v. CONTINENTAL CASUALTY COMPANY, DEFENDANT

No. 917SC410

(Filed 17 March 1992)

1. Insurance § 6.1 (NCI3d)— fidelity insurance—payment of interest on money stolen—not required

The language of a fidelity insurance policy did not require defendant to pay the lost interest on $278,759.51 stolen by plaintiff's former president where defendant agreed to pay, under this policy, for loss of money, securities and other property sustained through the fraudulent or dishonest act or acts of an employee; plaintiff's former president misappropriated $502,201.99 from plaintiff, $278,759.51 during the policy periods; the SEC ordered the former president to disgorge the $502,201.99 and returned it to plaintiff; and plaintiff demanded interest on the $278,759.51 under the fidelity insurance policy. The policy specifically provides that the term "loss" does not include "damage" to money.

Am Jur 2d, Fidelity Bonds and Insurance § 76.

2. Rules of Civil Procedure § 56.1 (NCI3d)— summary judgment— incomplete discovery—unrelated issue

There was no prejudicial error in the granting of summary judgment on the issue of whether an insurance policy provided coverage while discovery was incomplete because the incomplete discovery related to defendant's affirmative defenses and would not have created any genuine issue of material fact regarding whether the policy provided coverage.

Am Jur 2d, Summary Judgment § 27.

APPEAL by plaintiff from order entered 25 January 1991 in EDGECOMBE County Superior Court by *Judge Frank R. Brown.* Heard in the Court of Appeals 20 February 1992.

Womble Carlyle Sandridge & Rice, by Thomas L. Nesbit, for plaintiff-appellant.

Petree Stockton & Robinson, by James P. Cain and Katherine E. Flanagan, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order entered 25 January 1991 granting the defendant's motion for summary judgment.

Viewed in the light most favorable to the plaintiff, the evidence produced at the summary judgment hearing tends to show the following relevant facts: On 11 April 1979, the plaintiff, a public corporation engaged in manufacturing and marketing children's toys, purchased and the defendant issued a "Comprehensive Dishonesty, Disappearance, and Destruction Policy" of insurance. Under this fidelity insurance policy, the defendant agreed to pay to the plaintiff for "Loss of Money, Securities and other property which the Insured shall sustain" through the fraudulent or dishonest act or acts of an employee. The limit of the defendant's liability under this policy was $500,000 per officer. From 1977 through 1982, the former president of the plaintiff misappropriated $502,201.99 from the plaintiff. The former president stole $278,759.51 of the total amount during the policy periods.

On 6 August 1982, the plaintiff notified the defendant that it had sustained a loss of money resulting from fraudulent or dishonest acts of an employee. The defendant granted the plaintiff an extension of time within which to submit a Proof of Loss, and

the plaintiff submitted the required document on 1 April 1983. In the Proof of Loss, the plaintiff explained that on 31 August 1982 the Securities and Exchange Commission (SEC) had issued a Formal Order of Investigation in connection with its former president's dishonest acts. In 1984, the SEC sued the plaintiff's former president for his alleged violation of federal securities laws in connection with his misappropriation of money from the plaintiff, and on 8 April 1987, U.S. District Judge Pierre N. Leval granted the SEC's motion for summary judgment against the former president and ordered him to "disgorge" to the SEC the $502,201.99 he had misappropriated from the plaintiff. *SEC v. Benson*, 657 F. Supp. 1122, 1134 (S.D.N.Y. 1987).

On 9 November 1987, the plaintiff requested that the defendant "recognize coverage" for its $278,759.51 loss. Because the defendant believed that the plaintiff's Proofs of Loss were inadequate, the defendant refused to recognize the claim. On 23 February 1988, the plaintiff again demanded that the defendant recognize coverage for its loss. On 22 September 1988, however, the former president complied with the district court's order, and thereafter, the SEC returned the money to the plaintiff. On 1 March 1989, the plaintiff informed the defendant that it had received the $502,201.99 previously stolen by its former president. Furthermore, the plaintiff informed the defendant that under the terms of the fidelity insurance policy it was entitled to interest on the $278,759.51 stolen by its former president during the policy periods. Computed from 1 January 1981 until 22 September 1988, the plaintiff determined that the lost interest amounted to more than $560,000, and because that amount exceeded the policy limits, the plaintiff demanded that the defendant pay to the plaintiff the $500,000 limit of liability under the policy.

The defendant did not comply with the plaintiff's demand, and on 29 December 1989, the plaintiff filed an action against the defendant. The defendant answered the complaint denying that "[t]he loss of potential income or interest is a loss covered under the terms of the policy." The defendant also raised various affirmative defenses to the plaintiff's action including the statute of limitations, doctrine of laches, and failure to mitigate damages. On 19 November 1990 and 30 November 1990, the plaintiff and the defendant, respectively, filed motions for summary judgment. The plaintiff also filed on 19 November 1990 a motion to compel discovery of material relating to the defendant's affirmative defenses. On

25 January 1991, the trial court granted the defendant's motion, denied the plaintiff's motion, and dismissed the plaintiff's action.

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[1] The dispositive issue is whether the language of the fidelity insurance policy requires the defendant to pay the lost interest on the $278,759.51 stolen by the plaintiff's former president.

"[A]n insurance policy is a contract and its provisions govern the rights and duties of the parties thereto." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). "Our courts have a 'duty to construe and enforce insurance policies as written, without rewriting the contract or disregarding the express language used. . . . The duty is a solemn one, for it seeks to preserve the fundamental right of freedom of contract.' " *Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 789, 403 S.E.2d 571, 572 (1991) (citation omitted). The fidelity insurance policy provided that the defendant was to pay to the plaintiff for "Loss of Money, Securities and other property which the Insured shall sustain" through the fraudulent or dishonest act or acts of an employee. This is the language this Court must construe. *See Thomas & Howard Co. v. American Mut. Liab. Ins. Co.*, 241 N.C. 109, 113, 84 S.E.2d 337, 340 (1954) (fidelity bond "subject to rules of construction applicable to insurance policies generally"). Because the defendant chose this language, we must resolve any ambiguity in the language in favor of the plaintiff and against the defendant. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970).

The plaintiff argues that the trial court erroneously granted the defendant's motion for summary judgment because the phrase "loss of money" as used in the policy covers not only the principal amount stolen but also the lost interest on the $278,759.51 until the plaintiff's former president returned it. This argument assumes, however, that the term "money" as used in the policy is ambiguous. It is not. When an insurance policy defines a term, the definition in the policy controls the meaning of the term. *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co.*, 326 N.C. 133, 142, 388 S.E.2d 557, 563 (1990). The policy defines "money" as "currency, coins, bank notes and bullion, and travelers checks, register checks and money orders held for sale to the public." Interest on stolen currency, coins, etc. is not included in the definition of "money." Accordingly, the defendant's contractual obligation under this unam-

biguous fidelity insurance policy was limited to compensating the plaintiff for the principal amount stolen by the plaintiff's former president.

Contrary to the plaintiff's argument, the policy in question is distinguishable from the policies in *American Ins. Co. v. First Nat'l Bank*, 409 F.2d 1387, 1391-92 (8th Cir. 1969) and *Social Sec. Admin. v. Employers Mut. Liab. Ins. Co.*, 199 A.2d 918, 921 (Md. 1964). In *American*, the defendant had issued a banker's blanket bond which indemnified the plaintiff from "any loss" the plaintiff sustained as a result of loans made by the plaintiff on the basis of forged signatures, and the plaintiff, a bank, made such loans which proved to be uncollectable. *Id.* at 1388-89. The court held that although the policy did not make any provision for payment of interest, the policy provisions indemnifying the plaintiff from "any loss" were "sufficiently broad" to cover loss of use of money. *Id.* at 1391-92. In the present case, however, the policy language is narrow in that it does not cover "any loss" but only the "loss of money." This narrow policy language is also distinguishable from the policy language in *Social Sec.*, 199 A.2d at 921. The policy in that case indemnified the plaintiff against " 'direct loss of, or damage to' money resulting from dishonesty of an employee." *Id.* The court held that interest on money embezzled by an employee was a " 'direct loss of, or damage to' " the money embezzled and was therefore covered by the policy. *Id.* In the present case, however, the policy specifically provides that the term "loss" does not include "damage" to money. Accordingly, this Court may not construe "loss of money" as meaning "damage to the money," i.e., interest, stolen by the plaintiff's former president.

[2] Furthermore, we recognize that ordinarily a trial court may not enter summary judgment until discovery is complete, *Moore v. Crumpton*, 306 N.C. 618, 628, 295 S.E.2d 436, 443 (1982), and that in this case, the trial court entered summary judgment for the defendant before the plaintiff had completed its discovery. The incomplete discovery, however, was related to the defendant's affirmative defenses, not to whether the fidelity insurance policy provided coverage for the lost interest. Therefore, contrary to the plaintiff's argument, any error in the trial court's entry of summary judgment was harmless because the incomplete discovery related to the defendant's affirmative defenses and therefore would not have created any genuine issue of material fact regarding whether the policy provided coverage for the lost interest.

Because the fidelity insurance policy does not provide coverage for the lost interest, the trial court's order of summary judgment for the defendant is

Affirmed.

Judges JOHNSON and COZORT concur.

JUDY JOHNSON, PETITIONER-APPELLANT v. U.S. TEXTILES CORPORATION AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, RESPONDENTS-APPELLEES

No. 9124SC243

(Filed 17 March 1992)

1. Master and Servant § 108 (NCI3d) — unemployment compensation — leaving job for health reasons — insufficient findings — remand

The Employment Security Commission's finding that claimant failed to present evidence of adequate health reasons to justify leaving her employment was erroneous, and the findings were insufficient to support the Commission's conclusion that claimant left her employment without good cause attributable to her employer, where claimant testified that her blood pressure was high, that her job made her a nervous wreck, and that her doctor advised her to slow down and work at her own speed, but the evidence was inconclusive as to what claimant's blood pressure was, what treatment she was receiving, whether there was a direct correlation between her blood pressure and her job, and what medical advice she received from her physician. Therefore, the cause must be remanded to the Employment Security Commission for proper findings of fact and an additional evidentiary hearing if necessary. N.C.G.S. § 96-14(1).

Am Jur 2d, Unemployment Compensation §§ 92-94.

2. Master and Servant § 108 (NCI3d)— unemployment compensation—pro se claimant—duty of appeals referee to ask relevant questions

The appeals referee had the responsibility to assist a *pro se* claimant for unemployment compensation by asking her relevant questions which would have given her the opportunity to show that she left her employment for adequate health reasons.

Am Jur 2d, Unemployment Compensation § 92.

APPEAL by petitioner from order entered 8 October 1990 by *Judge Judson D. DeRamus* in AVERY County Superior Court. Heard in the Court of Appeals 4 December 1991.

Petitioner-appellant, Judy Johnson, filed an additional claim for unemployment insurance benefits effective 3 December 1989. The matter was referred to an adjudicator of the Employment Security Commission (ESC), who held that plaintiff was disqualified from receiving unemployment insurance benefits beginning 3 December 1989.

Plaintiff appealed the decision to an appeals referee. A hearing was conducted by Charles M. Brown, Jr., appeals referee, who rendered a decision holding the claimant to be disqualified because she failed to comply with G.S. § 96-14(1) (1990).

Petitioner appealed to the Commission and Chief Deputy Commissioner Thelma M. Hill affirmed the decision of the appeals referee and adopted the findings of facts, memorandum of law, and decision. From the decision of the chief deputy commissioner, petitioner appealed to the superior court which affirmed the decision of the Commission. From the order of the superior court, petitioner appeals.

Legal Services of the Blue Ridge, by Charlotte Gail Blake, for petitioner-appellant.

C. Coleman Billingsley, Jr., for defendant-appellee, Employment Security Commission.

No counsel for appellee U. S. Textiles Corporation.

JOHNSON, Judge.

The findings of fact by the appeals referee, affirmed by the chief deputy commissioner, adequately set forth the facts in this case and are as follows:

> 1. Claimant last worked for U.S. Textiles Corporation on November 6, 1989 as an automatic sewing machine operator. From January 21, 1990 until January 27, 1990, claimant has registered for work and continued to report to an employment office of the Commission and has made a claim for benefits in accordance with G.S. 96-15(a). The claimant filed a New Initial Claim effective July 9, 1989. An AIC claim was filed effective December 3, 1989, and an NIE claim was effective January 21, 1990. The claimant's weekly benefit amount is $143.00. The claimant's maximum benefit amount is $3,108.00.
>
> 2. The Adjudicator, Robert C. Johnson, issued a conclusion under Docket No. 00035-1 holding claimant disqualified from receiving benefits beginning December 3, 1989. Claimant appealed. Pursuant to G.S. 96-15(c), this matter came on before the undersigned Appeals Referee for hearing. Present for the hearing was the claimant.
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> 3. The claimant was employed with the above-named employer from October 16, 1989 until November 6, 1989.
>
> 4. Claimant left this job under the following circumstances: She had to work very fast to operate the machine to which she was assigned, and that caused anxiety in claimant.
>
> 5. After working for the employer for three weeks, claimant was nervous, and her blood pressure was elevated. Claimant consulted a physician, but he did not recommend that she leave her job.
>
> 6. Claimant asked for a transfer to a job at which she would not have to work so fast, but that request was denied. At that point, claimant quit her job.
>
> 7. Continuing work was available for claimant at the time she quit her job.

The petitioner, Ms. Johnson, contends that the superior court erred in affirming the ESC's decision because the facts found by the ESC support only the conclusion that Ms. Johnson left her

job due to adequate health reasons in accordance with G.S. § 96-14(1). Petitioner, who appealed *pro se*, also contends that the superior court erred in affirming the ESC's decision because the ESC failed to assist her in developing a full record and obtaining all information relevant to the decision. We find that under the facts of this case, the evidence presented before the appeals referee was insufficient to determine whether the petitioner left her employment with good cause attributable to the employer.

General Statute § 96-14(1) states that one is not disqualified from receiving unemployment compensation benefits where the employee leaves work due solely to a disability incurred or other health condition, whether or not related to work, if the employee shows:

> (a) That, at the time of leaving, an adequate disability or health condition, either medically diagnosed or otherwise shown by competent evidence, existed to justify the leaving and prevented the employee from doing other alternative work offered by the employer which pays a minimum wage of eighty-five percent (85%) of the individual's regular wage, whichever is greater; and
>
> (b) That, at a reasonable time prior to leaving, the individual gave the employer notice of his disability or health condition.

In *Hoke v. Brinlaw Mfg. Co.*, 73 N.C. App. 553, 327 S.E.2d 254 (1985), the Commission had concluded that the claimant presented insufficient medical evidence to show that the conditions on her job aggravated her high blood pressure or caused dizziness and faintness. This Court opined that "[t]hough it has not been unequivocally stated, evidence of a health problem and of medical advice to leave work or change a job because of that problem is ordinarily sufficient to establish the existence of adequate health reasons." *Id.* at 556, 327 S.E.2d at 256.

The *Hoke* Court further stated that the claimant presented undisputed evidence by her own sworn testimony that she had high blood pressure and had several times become ill at work, thereby expressing its acceptance of such testimony as competent evidence to prove an adequate health condition. 73 N.C. App. at 557, 327 S.E.2d at 256-57. In *Hoke*, there was no evidence that the claimant's physician had told her that her high blood pressure was aggravated by conditions on her job or that he had advised

her to seek a change; such evidence, however, is not necessary. *See Ray v. Broyhill Furniture Industries*, 81 N.C. App. 586, 344 S.E.2d 798 (1986) (Claimant must only show by *competent* evidence that the health condition existed at the time of leaving; competent evidence may include physician's statement, but does not exclude other evidence tending to prove the existence of claimant's health condition.).

The *Hoke* Court found that the Commission's conclusion that claimant had failed to prove she left work due to adequate health reasons was based in part on its finding that claimant "apparently had not been advised of any restrictions on her ability to work in her regular job." 73 N.C. App. at 557, 327 S.E.2d at 257. The finding was derived from the dialogue at the hearing where the referee asked the claimant if her doctor had advised her about work and she responded, "No," while continuing to unsuccessfully answer the referee's question. 73 N.C. App. at 557-58, 327 S.E.2d at 257. Rejecting the Commission's finding that the record was quite clear with regard to claimant's medical treatment or physician's advice, this Court held that the referee's questions were vague and the *pro se* claimant's answers were unresponsive. *Id.* The inconclusive evidence in *Hoke* did not support a finding either way on the question of whether claimant had received medical advice. The case at bar is analogous to *Hoke*.

[1] In the case *sub judice*, Ms. Johnson presented her own sworn testimony that her blood pressure was high and that her job made her a nervous wreck. She also testified that her doctor advised her to slow down and work at her own speed, although she did not present a statement from her doctor. There is no way of determining from the record how high the petitioner's blood pressure was; whether she was on medication for hypertension; or whether there was a direct correlation between the level of Ms. Johnson's blood pressure and her job. The evidence is not clear as to the petitioner's treatment or the physician's medical advice. We, therefore, find the medical evidence presented inconclusive. Accordingly, the Commission's finding that petitioner failed to present evidence of adequate health reasons to justify her leaving U.S. Textiles' employ is error.

[2] We also find that evidence necessary to make the decision about Ms. Johnson's health may have been more forthcoming had the referee properly assisted Ms. Johnson in obtaining all informa-

tion relevant to the decision. The responsibility of asking questions which would have produced evidence to fulfill the statutory obligation under G.S. § 96-14(1) fell upon the referee. The referee failed to meet this responsibility; the questions he asked were vague, and the claimant's answers were unresponsive. This Court has recognized that "[e]specially in the case of an uncounseled claimant, the Commission's responsibility involves asking the right questions." 73 N.C. App. at 559, 327 S.E.2d at 258.

Although the ESC was not required to notify Ms. Johnson of the specific facts she had to show to prove her case, it did have the "responsibility to conduct its hearings in a manner that [allowed her] the opportunity to make the required showing." *Id.* The ESC's responsibility to assist *pro se* claimants is not only recognized by the courts of this State, but also by the Commission. The ESC's own regulations state that:

> In any hearing the referee may examine the parties and their witnesses. Where a party is not represented by counsel, the referee before whom the hearing is being held should advise him/her as to his/her rights, aid him in examining and cross-examining witnesses, and give him/her every assistance compatible with the impartial discharge of his/her official duties.

ESC Reg. No. 14.28(G), 3 Unempl. Ins. Rep. (CCH) paragraph 5415 (N.C. June 16, 1989).

Although the findings of fact made by the ESC are binding on appeal if supported by competent evidence, the facts found may not be sufficient to determine the issues before the Court. In such a case, as in the case at bar, a remand to the ESC is appropriate for additional fact finding. *Williams v. Burlington Industries, Inc.*, 318 N.C. 441, 445-46, 267 S.E.2d 842, 845 (1986).

We reverse the order of the superior court and remand this case with directions that it be remanded to the Employment Security Commission for proper findings of fact consistent with this opinion and an additional evidentiary hearing, if necessary.

Reversed and remanded.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. JOHNNY MACK McCOY, DEFENDANT

No. 9110SC584

(Filed 17 March 1992)

1. **Evidence and Witnesses § 2224 (NCI4th)— narcotics trafficking—officer's expert testimony—packaging of drugs—admissible**

The trial court did not err in a prosecution for trafficking in cocaine by allowing an officer to testify concerning how small ziplock bags are commonly used to package cocaine for sale in small quantities and that the minimum price of 38 grams of cocaine was $3,800. Evidence that ziplock bags are frequently used in the illegal drug trade along with the value of the cocaine was both helpful and relevant in showing that defendant intended to distribute the narcotics and was therefore engaged in trafficking in cocaine.

Am Jur 2d, Drugs, Narcotics, and Poisons § 46; Expert and Opinion Evidence §§ 298, 403, 406.

Admissibility of expert testimony as to modus operandi of crime—modern cases. 31 ALR4th 798.

2. **Evidence and Witnesses § 2808 (NCI4th)— narcotics—leading question on direct examination—testimony already received—no error**

The trial court did not abuse its discretion in a prosecution for trafficking in cocaine by allowing the prosecutor to ask an SBI agent a leading question on direct examination where the information elicited by the prosecutor's question had been previously received into evidence without objection.

Am Jur 2d, Witnesses §§ 429-431.

3. **Narcotics § 4 (NCI3d)— trafficking—evidence sufficient**

There was sufficient evidence for the trial court to deny defendant's motions to dismiss cocaine trafficking charges where defendant was a passenger on a bus chosen for investigation by a narcotics interdiction unit; officers questioned all the passengers in a non-intrusive manner; officers made sure that every item of luggage on the bus was claimed by passengers; officers discovered a brown paper bag under defendant's suit

bag; defendant denied ownership of the bag, which contained what appeared to be cocaine and fifty small plastic ziplock bags; defendant was placed under arrest; analysis of the bag confirmed that it contained cocaine; defendant's fingerprints were found on the bag; and defendant testified that he found the bag while on the bus, found costume jewelry inside, and placed the bag back in the luggage rack.

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

4. Criminal Law § 1043 (NCI4th)— cocaine trafficking—inconsistency of indictment and verdict—clerical error

There was no prejudicial error where a jury returned verdicts of guilty of trafficking in cocaine in an amount between 28 grams and 400 grams on indictments charging defendant with possessing and transporting more than 28 but less than 200 grams of cocaine because the evidence before the jury clearly indicated that defendant possessed and transported 38 grams of cocaine.

Am Jur 2d, Trial § 1913.

5. Constitutional Law § 184 (NCI4th)— cocaine—trafficking by possession and by transporting—not double jeopardy

The constitutional prohibition against double jeopardy was not violated by defendant's two convictions for trafficking in cocaine by possessing and by transporting more than 28 grams. The transporting of 28 grams or more of cocaine and the possession of 28 grams or more of cocaine constitute separate offenses for which a defendant may be convicted and punished separately.

Am Jur 2d, Criminal Law §§ 266, 267, 277, 279.

6. Criminal Law § 1101.1[1] (NCI4th)— cocaine trafficking—sentencing—nonstatutory aggravating factor—intent to sell

The trial court did not err when sentencing defendant for cocaine trafficking by finding as a nonstatutory aggravating factor defendant's intent to sell the cocaine. The evidence of the quantity of cocaine and ziplock bags clearly support the aggravating factor, and intent to sell is not an element of

1. New section pending publication of 1992 supplement.

manufacturing, transporting, or possessing 28 or more grams of cocaine.

Am Jur 2d, Criminal Law §§ 598, 599.

APPEAL by defendant from judgments entered 25 October 1989 by *Judge Samuel T. Currin* in WAKE County Superior Court. Heard in the Court of Appeals 19 February 1992.

Defendant was charged in two separate bills of indictment with (1) trafficking of a controlled substance by transporting more than 28 grams but less than 200 grams of cocaine; and (2) trafficking of a controlled substance by possession of more than 28 grams but less than 200 grams of cocaine. These charges were consolidated for trial.

The State's evidence tends to show that on 8 May 1989, Terry Turbeville, a special agent with the State Bureau of Investigation (SBI), and other law enforcement officials were monitoring buses at the bus station in Raleigh. These officers were part of an interdiction unit which specialized in intercepting narcotics coming into the State. The bus on which defendant was a passenger was chosen for investigation and the officers questioned all the passengers in a non-intrusive manner. The officers made sure that every item of luggage on the bus was claimed by the passengers. One of the officers identified himself to defendant who responded he was traveling from New York City to Columbia, South Carolina. Defendant identified his belongings, however the officers discovered a brown paper bag under defendant's suit-bag. Defendant denied ownership of this bag which contained what appeared to be cocaine and fifty small plastic ziplock bags. Defendant was then placed under arrest. A chemical analysis of the contents revealed the bag contained 38 grams of cocaine. Defendant's fingerprints were also found on the plastic bags.

Defendant testified that at some point on the bus ride he discovered the paper bag, found costume jewelry inside and placed the bag back in the luggage rack. At the close of all the evidence, the trial court denied defendant's motion to dismiss based on the insufficiency of the evidence. The jury returned guilty verdicts on both charges and defendant was sentenced to two consecutive terms of 15 years.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Julia F. Renfrow, for the State.

John T. Hall for defendant appellant.

WALKER, Judge.

[1] In his first assignment of error, defendant contends the trial court erred when it allowed Turbeville to testify concerning how the small ziplock bags are commonly used to package cocaine for sale in small quantities and further that the minimum price of 38 grams of cocaine was $3,800. He argues this evidence was inadmissible hearsay not relevant to any issue in the case, and even if it was relevant, this evidence should have been excluded since its prejudicial effect outweighed its probative value. We disagree.

Otherwise inadmissible hearsay can be admitted as a basis for an expert opinion. *State v. Jones*, 322 N.C. 406, 368 S.E.2d 844 (1988). Although Turbeville was never formally qualified as an expert witness, the record reveals his opinions were based upon his many years of personal experience in the field of narcotics. Admission of this testimony amounted to a finding by the trial court that the witness had certain expertise concerning narcotics paraphernalia and the pricing of cocaine which was beyond the realm of that of the average juror. *State v. Hart*, 66 N.C.App. 702, 311 S.E.2d 630 (1984); *State v. Covington*, 22 N.C.App. 250, 206 S.E.2d 361 (1974). Officer Turbeville's years of training and experience placed him in a much better position than the jury to evaluate the significance of the ziplock bags found with the cocaine and the price of 38 grams of cocaine.

The opinion testimony of an expert witness is admissible if the expert is better qualified than the jury and therefore can assist the jury to glean certain inferences from the facts. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). Contrary to defendant's contentions, the testimony of Turbeville was relevant to the disposition of this proceeding. The offense of "trafficking" under G.S. 90-95(h) was enacted to help deter the flow of drugs into this state. *State v. Willis*, 61 N.C.App. 23, 300 S.E.2d 420, *modified and affirmed*, 309 N.C. 451, 306 S.E.2d 779 (1983). In creating this offense, our legislature has determined that certain amounts of controlled substances indicate an intent to distribute on a large scale. *State v. Proctor*, 58 N.C.App. 631, 294 S.E.2d 240, *disc. review denied*, 306 N.C. 749, 295 S.E.2d 484 (1982), *cert. denied*, 459 U.S. 1172,

74 L.Ed.2d 1016 (1983). Evidence that these ziplock bags are frequently used in the illegal drug trade along with evidence of the value of the cocaine was both helpful and relevant in showing defendant intended to distribute the narcotics and was therefore engaged in trafficking in cocaine. Accordingly, Turbeville's testimony was properly admitted.

[2] Defendant next contends the trial court erred in allowing the prosecutor to ask a leading question to Turbeville on direct examination. The exchange between the prosecutor and this witness was as follows:

> Q Did the defendant ever suggest to you that he had found that brown paper bag?
>
> . . . .
>
> A No. He vigorously said he knew nothing about the paper bag, had never seen it, it was not his.

A leading question is one that suggests the desired answer. *State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). Normally, leading questions are not allowed on direct examination so as to prevent counsel from injecting the desired answer into the witness' mind. *State v. Royal*, 300 N.C. 515, 268 S.E.2d 517 (1980). However, rulings by the trial court on the use of leading questions are discretionary and reversible only for an abuse of discretion. *Id.* In several recognized circumstances, the trial court does not abuse its discretion when it permits counsel to lead a witness on direct examination. One such circumstance is where the leading question elicits testimony already received without objection into evidence. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985). In the present case, the information elicited by the prosecutor's question had been previously received into evidence without objection. Accordingly, there has been no abuse of discretion on the part of the trial court and this assignment of error is overruled.

[3] In his next assignment of error defendant contends that the trial court committed reversible error when it denied his motion to dismiss at the close of all the evidence in the case. He argues that there was insufficient evidence to convict him on the trafficking charges. In determining if the evidence is sufficient to withstand defendant's motion to dismiss made at the close of all the evidence, the court must consider the evidence in the light most favorable to the State, allowing every reasonable inference to be drawn

therefrom. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981). Our review of the record discloses that the evidence is sufficient to support a finding that defendant committed the offenses as charged. Therefore this assignment of error is overruled.

In his final assignment of error, defendant contends the trial court erred in sentencing him to two consecutive terms of fifteen years. In support of his contention, defendant makes three arguments. We will examine each of these separately.

[4] *First*, defendant argues that the trial court was without jurisdiction to enter any sentence because the jury verdict was inconsistent with the indictments. We find no merit in this argument. The indictments correctly charged defendant with violations of G.S. 90-95(h)(3)(a) in that defendant possessed and transported more than 28 grams but less than 200 grams of cocaine. Although the jury returned verdicts of guilty for trafficking in cocaine in an amount between 28 grams and 400 grams, the record shows this discrepancy was merely a clerical error and had no resulting prejudice since the evidence before the jury clearly indicated defendant possessed and transported 38 grams of cocaine.

[5] *Second*, defendant argues his two convictions for trafficking in cocaine by possessing and by transporting more than 28 grams of cocaine violate the constitutional prohibition against double jeopardy. G.S. 90-95(h)(3)(a) provides that any person who "sells, manufactures, delivers, transports, or possesses" 28 grams or more of cocaine shall be guilty of trafficking in cocaine. The transporting of 28 grams or more of cocaine and the possession of 28 grams or more of cocaine constitute separate offenses for which a defendant may be convicted and punished separately. *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986).

[6] *Third*, defendant argues the trial court abused its discretion by imposing a sentence on each conviction in excess of the presumptive term after finding as a non-statutory aggravating factor "defendant's intent to sell the cocaine in question." He contends there was not sufficient evidence to support a finding of "intent to sell." We disagree. An aggravating factor must be proved by a preponderance of the evidence. G.S. 15A-1340.4(b). In order for there to be a preponderance of the evidence, the evidence in support of the aggravating factor must be uncontradicted, substantial and manifestly credible. *State v. Vanstory*, 84 N.C.App. 535, 353 S.E.2d 236, *disc. review denied*, 320 N.C. 176, 358 S.E.2d 67 (1987).

Intent to sell is not an element of manufacturing, transporting, or possessing 28 grams or more of cocaine. In the present case, the evidence of the quantity of cocaine and ziplock bags clearly supports this aggravating factor. Our Supreme Court has previously found evidence of this type will support a finding of the non-statutory aggravating factor of "intent to sell." *State v. Perry, supra.*

For the aforementioned reasons we find

No error.

Chief Judge HEDRICK and Judge ORR concur.

STATE OF NORTH CAROLINA v. JAMES BYRON FERGUSON

No. 9130SC550

(Filed 17 March 1992)

1. **Indictment and Warrant § 15 (NCI3d)— sufficiency of citation—waiver of right to challenge**

When defendant entered his plea and proceeded to trial without a motion to quash the citation charging him with DWI, defendant waived his right to challenge the sufficiency of the citation on the ground that neither he nor the issuing officer signed portions of the citation indicating delivery to defendant.

Am Jur 2d, Indictments and Informations § 3.

2. **Evidence and Witnesses § 724 (NCI4th)— DWI case—investigation of hit-and-run accident—relevancy—probative value outweighing prejudice**

An officer's testimony that he was investigating a hit-and-run accident possibly involving a car registered to defendant's wife when he arrested defendant for DWI was relevant to explain the officer's presence at defendant's home, his reason for approaching defendant when defendant drove up to the home, and the nature of the conversation between the officer and defendant. Furthermore, the probative value of this evidence was not outweighed by unfair prejudice because the hit-and-run investigation did not center on the vehicle defendant was

driving and defendant was not charged in connection with the hit-and-run accident. N.C.G.S. § 8C-1, Rules 401, 402, and 403.

Am Jur 2d, Evidence § 321.

3. **Evidence and Witnesses § 765 (NCI4th)— DWI case—dog in patrol car for drug interdiction—opening door to testimony**

The trial court in a DWI prosecution did not err in admitting testimony by the arresting officer that a dog was in his patrol car for use in drug interdiction missions where defendant opened the door to such testimony by initially questioning the officer about the dog's presence in his patrol car.

Am Jur 2d, Evidence § 254.

4. **Criminal Law § 612 (NCI4th)— DWI case—motion to dismiss—incredible testimony—jury question**

The trial court properly denied defendant's motion to dismiss a DWI charge on the ground that the arresting officer's testimony was incredible because of a lack of memory concerning the incident, missing notes and a missing alcohol information sheet where there was sufficient evidence of each element of the crime charged, since questions of credibility are left solely to the jury.

Am Jur 2d, Witnesses § 658.

DEFENDANT appeals from Judgment entered 15 January 1991 by *Judge J. Marlene Hyatt* in HAYWOOD County Superior Court. Heard in the Court of Appeals 18 February 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Hal F. Askins, for the State.

Roy H. Patton Jr., for defendant appellant.

COZORT, Judge.

On 13 November 1990 defendant was convicted in Haywood District Court of driving while impaired. On appeal to superior court, the jury found defendant guilty as charged. Defendant received a one-year suspended sentence. From the judgment, defendant appeals. We find no error.

The State presented the following evidence: On 13 February 1990 Highway Patrol Trooper James Gladden went to defendant's

home at approximately 5:35 p.m. to investigate a hit-and-run automobile accident possibly involving a car registered to defendant's wife. As he was leaving the house, Trooper Gladden met a 1964 Buick approaching the house. Trooper Gladden observed defendant exiting the car on the driver's side and Ray White exiting the car on the passenger side. As Trooper Gladden approached defendant to question him concerning the hit-and-run, he noticed defendant smelled strongly of alcohol. He also observed that defendant was unsteady on his feet, had slightly slurred speech, and his eyes had a glazed look. From his observations, Trooper Gladden formed the opinion that defendant was impaired. He placed defendant under arrest for driving while impaired in violation of N.C. Gen. Stat. § 20-138.1 (1988). The chemical breath analysis test administered according to state law indicated defendant's blood alcohol level was 0.12.

Defendant offered the following evidence: Ray White and defendant were returning to defendant's house from an American Legion meeting. Since defendant knew he had consumed too much alcohol at the meeting to drive, Mr. White drove them both to defendant's house. Mr. White testified that he was the operator of the vehicle immediately prior to the encounter with Trooper Gladden. J. C. Cashwell testified that he was at the American Legion meeting and observed Mr. White enter the car on the driver's side and defendant enter the car on the passenger's side.

On appeal defendant contends the trial court (1) lacked jurisdiction to hear the case, (2) committed prejudicial error in admitting Trooper Gladden's testimony that he was at defendant's residence to investigate a hit-and-run accident, (3) committed plain error in admitting Trooper Gladden's testimony that he was at defendant's residence to investigate a hit-and-run accident, (4) committed prejudicial error in admitting Trooper Gladden's testimony that the normal mission of his dog was interstate drug interdiction, and (5) erred in denying defendant's motion to dismiss the charge at the close of all the evidence.

[1] In his first assignment of error, defendant argues the trial court lacked jurisdiction over the offense charged because neither he nor Trooper Gladden signed the citation indicating delivery to defendant. N.C. Gen. Stat. § 15A-302 (Cum. Supp. 1991) requires a copy of the citation to be delivered to the cited person who may sign a receipt on the original. If the cited person refuses

to sign, the officer issuing the citation must sign the original indicating delivery. *Id.* Although Trooper Gladden signed the citation once, he did not sign in the designated space to indicate delivery of the citation to defendant. We find defendant has waived his right to challenge the sufficiency of the citation by entering his plea and proceeding to trial without a motion to quash the indictment. *See State v. Perry*, 69 N.C. App. 477, 317 S.E.2d 428 (1984).

[2] In his second assignment of error, defendant contends the trial court committed prejudicial error in admitting Trooper Gladden's testimony that he was at defendant's residence for the purpose of investigating a hit-and-run accident possibly involving a car registered to defendant's wife. Specifically, defendant argues that the hit-and-run investigation was irrelevant to the impaired driving charge and should be excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 402 (1988). Alternatively, defendant argues, if relevant, the evidence should have been excluded pursuant to N.C. Gen. Stat. § 8C-1, Rule 403 because the probative value was outweighed by the prejudicial effect of repeated implications that defendant was connected in some way to another crime involving the driving of a motor vehicle.

We find no error. N.C. Gen. Stat. § 8C-1, Rule 401 (1988) defines relevant evidence as "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." Upon reviewing the transcript, we find the statements were relevant to explain the officer's presence at defendant's residence, his reason for approaching defendant, and the nature of the conversation between the officer and defendant.

We further conclude the probative value of the evidence was not outweighed by unfair prejudice. Unfair prejudice is defined as "undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one." Commentary, N.C. Gen. Stat. § 8C-1, Rule 403 (1988). The admission of evidence under Rule 403 is within the sound discretion of the trial court and the court's ruling "may be reversed for an 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) (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)). There was evidence presented to the jury that the hit-and-run investiga-

tion did not center on the vehicle defendant was driving, but rather his wife's vehicle, and defendant was not charged in connection with the hit-and-run accident. Considering the context of the officer's statements and all the evidence presented, we find no abuse of discretion since the statements were not so prejudicial as to cause the jury to find defendant guilty on an improper basis.

[3] In his next assignment of error, defendant contends the trial court erred in admitting Trooper Gladden's testimony that a dog was in the patrol car for use in drug interdiction missions. Specifically, defendant argues the evidence was irrelevant to the crime charged and unduly prejudicial because of the implication that defendant was involved in interstate drug trafficking, since the dog was present in the car at the time of the arrest. On cross-examination defendant initially questioned Trooper Gladden about the dog's presence. On redirect the State elicited the testimony at issue. Defendant opened the door on the issue of the dog's presence and cannot now be heard to complain that the evidence was irrelevant. Once elicited by defendant on cross-examination, the State had the right to examine the officer on the new information. *See State v. Erby*, 56 N.C. App. 358, 289 S.E.2d 86 (1982).

[4] In his final assignment of error, defendant argues the trial court erred in denying his motion to dismiss the charge at the close of all the evidence. Defendant concedes there was sufficient evidence of each element of the crime charged. He argues nonetheless that Trooper Gladden's testimony was not credible because of lack of memory concerning the incident, missing notes, and a missing alcohol information sheet. On a motion to dismiss, the trial court need only consider whether, giving the State every reasonable inference, there is substantial evidence to support a finding that the offense charged has been committed and the defendant was the perpetrator. *State v. Stocks*, 319 N.C. 437, 355 S.E.2d 492 (1987). Questions of credibility are left solely to the jury. *State v. Lester*, 294 N.C. 220, 240 S.E.2d 391 (1978). Defendant's argument is without merit.

No error.

Judges JOHNSON and GREENE concur.

JEAN GOOD LOFTIS AND CEDRIC J. LOFTIS, JR., PLAINTIFFS v. JERRY RALPH REYNOLDS AND DEBORAH REYNOLDS FULP, DEFENDANTS

No. 9121SC304

(Filed 17 March 1992)

Rules of Civil Procedure § 60.4 (NCI3d)— motion for relief from judgment—not substitute for appeal

The trial court properly denied plaintiffs' Rule 60(b) motion for relief from summary judgment entered for defendants where plaintiffs asserted that the entry of summary judgment was erroneous as a matter of law because the trial court misconstrued their position as to defendants' counterclaim and defendant automobile owner's acceptance of payment and settlement by plaintiffs' automobile insurance carrier. Rule 60(b) motions for relief from judgment cannot be used as a substitute for appeal, and erroneous judgments may be corrected only by appeal.

Am Jur 2d, Judgments §§ 671, 674.

APPEAL by plaintiffs from order entered 4 January 1991 in FORSYTH County Superior Court by *Judge Joseph R. John, Sr.* Heard in the Court of Appeals 13 January 1992.

On 27 January 1988, while operating her 1977 Chevrolet on N.C. 66 near Kernersville, plaintiff Jean Loftis was involved in a collision with a 1979 Ford owned by defendant Deborah Fulp and being operated by defendant Jerry Reynolds.

On 9 May 1989, plaintiffs instituted this action seeking recovery for personal injury to Jean Loftis and for loss of consortium by her husband, Cedric Loftis.

Defendants Jerry Reynolds and Deborah Fulp answered with general denials as to both claims for relief and pleaded the affirmative defenses of contributory negligence and unavoidable accident. Defendants also asserted a counterclaim for property damage to defendant Fulp's automobile, alleging that the sole proximate cause of the collision was the negligence of plaintiff Jean Loftis in the operation of her automobile.

Plaintiffs answered defendants' counterclaim with general denials, and as a "Third Defense" alleged that Deborah Fulp had

received compensation for her damages suffered as a result of the collision and therefore defendants were estopped from asserting their claim.

Discovery followed, and on 8 March 1990, defendants filed a motion for summary judgment. In their motion they did not indicate whether they were seeking summary judgment as to plaintiffs' claims or as to their counterclaim. On 15 March 1990, plaintiffs filed a reply to defendants' motion for summary judgment, supported by reference to certain discovery materials.

Further discovery ensued, and on 16 April 1990, plaintiffs filed a motion for summary judgment on defendants' counterclaim in which plaintiffs alleged that discovery materials in the case had established that defendant Deborah Fulp had received a payment from American Mutual Fire Insurance Company "in full settlement, release, and discharge of any and all claims arising from the loss or damage" on 27 January 1988. In support of their motion, plaintiffs filed discovery materials showing that on 9 February 1988, American Mutual Insurance Company issued its bank draft on behalf of its insured Cedric Loftis in the amount of $3050.00, payable to Deborah Fulp for property damage for a loss on 27 January 1988, with this entry: "Total loss—owner keeps salvage." Deborah Fulp endorsed and cashed the draft. Above her signature appeared an aknowledgement of complete and full release and settlement of "all claims" . . . "as set forth on the reverse hereof."

On 26 April 1990, plaintiffs filed a "withdrawal of motion for summary judgment."

On 9 May 1990, the trial court entered an order granting defendants' motion for summary judgment and on its own motion granted summary judgment for plaintiffs against defendants' counterclaim. Plaintiffs did not appeal from the order of 9 May 1990, but on 21 May 1990 filed a Rule 59(a)(7) and Rule 60(b)(6) motion for relief from the 9 May 1990 judgment. That motion was subsequently denied by the trial court's order of 4 January 1991. It is from that order that plaintiffs have appealed.

White and Crumpler, by Fred G. Crumpler, Jr. and Dudley A. Witt, for plaintiffs-appellants.

Womble Carlyle Sandridge & Rice, by Reid C. Adams, Jr. and Mary J. Davis, for defendants-appellees.

WELLS, Judge.

In their motion for relief from judgment, plaintiffs argued the forecast of evidence with respect to the payment by plaintiffs' insurance company to defendant Deborah Fulp, and then concluded their motion with the following two paragraphs and prayer:

VI.

That the plaintiffs thereby submit that the defendant should have been estopped from asserting that Counterclaim as there would be no facts to support the jury awarding any more compensation to the defendant than she had already received. That the only purpose for filing the counterclaim would be to unduly confuse the jury and the defendant Fulp should have been estopped from presenting said claim.

VII.

That the Judgment filed May 14, 1990 was contrary to law in that the plaintiffs were asserting the defense of estoppel and not compromise and settlement as contended by the defendants.

WHEREFORE, the plaintiffs pray this Court that the Order entered on May 14, 1990 hereby be vacated and that the defendant be estopped from asserting the counterclaim and that the plaintiff and the defendant have a trial as to what amount, if any, the plaintiffs are entitled to recover as a result of the negligence of the defendant.

Plaintiffs' pertinent assignments of error are as follows:

1. The Trial Court erred in its Finding of Fact and Conclusion of Law that there was no genuine issue of material fact and that the defendants were entitled to Summary Judgment as a matter of law.

2. The Trial Court erred in entering its Order which was signed on [sic] dated May 9, 1990 and entered on May 14, 1990 as it is contrary to existing law.

3. The Trial Court erred in denying plaintiff's Motion for Relief from the Judgment entered by the Honorable Joseph R. John, Sr. on May 14, 1990 in an Order entered January 4, 1991 as said Order is contrary to existing law.

In their brief, plaintiffs present the following question:

I. DID THE TRIAL COURT ERR IN DENYING PLAINTIFFS' RULE 60(b) MOTION BASED UPON EXCUSABLE NEGLECT?

The foregoing question references plaintiffs' assignments of error numbers 1 and 3.

Plaintiffs' argument relating to the foregoing question attempts to persuade this Court that the entry of summary judgment against them was due to their attorneys' excusable neglect, which should not be attributed to them, and that they were for that reason entitled to relief pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure. Plaintiffs cite and argue excusable neglect case law precedent interpreting entitlement to relief for the excusable neglect of a party's attorney.

Of course, that is not what is at issue here. In their motion for relief and in their assignments of error, plaintiffs have asserted that the entry of summary judgment against them was erroneous as a matter of law because the trial court misunderstood or misconstrued their position as to defendants' counterclaim and defendant Fulp's subsequent acceptance of payment and settlement by plaintiffs' insurance carrier. As our appellate courts have consistently held, Rule 60(b) motions for relief from judgment cannot be used as a substitute for appeal and erroneous judgments may be corrected only by appeal. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E.2d 115, *appeal dismissed and cert. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). *See also Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211 (1990); *J.D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 376 S.E.2d 254 (1989).

For the reasons stated, the trial court's order of 4 January 1991 must be and is

Affirmed.

Chief Judge HEDRICK and Judge JOHNSON concur.

MARGIE LEAN DUNBAR, PLAINTIFF v. CITY OF LUMBERTON, A MUNICIPAL CORPORATION, DEFENDANT

No. 9116SC409

(Filed 17 March 1992)

Negligence § 13.1 (NCI3d)— tree branches left on property—fall by property owner—contributory negligence

The trial court did not err in a negligence action by granting a directed verdict for defendant based on contributory negligence where plaintiff's neighbor asked defendant to remove a tree which had been struck by lightning and which hung precariously over power lines and over his house; cuttings were discarded on both the neighbor's and plaintiff's property; plaintiff could not pull into her driveway when she arrived home from work because of the branches; plaintiff was forced to go to the side of her porch where she sat down, rotated her legs around, and then stood up in order to enter her house; the neighbor and plaintiff's son-in-law attempted to clear a path for her from her car to her front steps; plaintiff kept her back door locked due to break-ins and did not use it for entry and exit; plaintiff carefully made her way to her car the next morning by stepping in and out of branches; she realized she had left a bag of clothes in her car and did not want them to remain there because of the risk of theft; plaintiff began to return to her house with the clothes the same way she had come; she stepped on one of the branches and fell, twisting her back, and then crawled to the house; and, after several hours, plaintiff went out the back door, made her way to her car, and drove to the hospital. Plaintiff was contributorily negligent because her own testimony reflected that, in spite of her recognition of a hazardous condition, she thought she could make her way through the area if she was careful. She had two safe routes to travel from her house to her car, both of which presented safer alternatives than the path which forced her to negotiate her way in and out of the tree cuttings.

Am Jur 2d, Negligence §§ 876, 880, 894.

Tree or limb falls onto adjoining private property: personal injury or property damage liability. 54 ALR4th 530.

APPEAL by plaintiff from Judgment entered 15 October 1990 by *Judge B. Craig Ellis* in ROBESON County Superior Court. Heard in the Court of Appeals 20 February 1992.

Britt & Britt, by William S. Britt, for plaintiff appellant.

McLean, Stacy, Henry & McLean, by H. E. Stacy, Jr., for defendant appellee.

COZORT, Judge.

Plaintiff brought an action to recover damages from the City of Lumberton for injuries she sustained from tripping on some tree branches on her property. She alleged negligence, gross negligence, trespass and strict liability as theories of recovery in her complaint. At the close of plaintiff's evidence, the trial court granted the defendant's motion for a directed verdict as to all of plaintiff's claims except for her trespass claim, which was later settled. The trial court found that although plaintiff established negligence on the part of defendant, her own contributory negligence barred her claim as a matter of law. We agree and thus affirm.

Plaintiff's evidence at trial demonstrated that in June of 1984, the plaintiff's neighbor, Mr. Carl Rogers, asked the City of Lumberton to remove from his property a large tree which had been struck by lightning and had branches that hung precariously over power lines and over his house. After one work crew initially only completed part of the job, another group of workers was dispatched to cut the remaining limbs on 22 June 1984. The work crew cut down both the trunk and limbs of the tree, and discarded the cuttings on Mr. Rogers' and plaintiff's property. The limbs and branches on plaintiff's property stretched across the yard from her front porch to Dresden Avenue.

Plaintiff arrived home from work that day and could not pull her car into the driveway because of the branches. To get into her house, plaintiff was forced to go to the side of her porch where she sat down, rotated her legs around, and then stood up. Later that evening, Mr. Rogers and plaintiff's son-in-law attempted to clear a path for plaintiff from her front steps to her car by moving some of the branches. Plaintiff did not use her back door for entry and exit because she kept the door locked at all times due to several past break-ins.

The next morning, plaintiff carefully made her way from the front door to her car by stepping in and out of the branches. When plaintiff arrived at her destination, she realized she had left a bag of old clothes in the car. The plaintiff did not want to leave the bag in her car while she was at the market, because she thought someone might steal the clothes. She started to take the clothes back into the house. She made her way to the house through the branches the same way she had come. On her return trip to the car, plaintiff lost her balance when she stepped on one of the branches, fell down, and twisted her back. Plaintiff crawled back to the house. After several hours, she went out the back door, made her way to her car, drove to the hospital, and was treated for her injury. The trial court found this evidence established both defendant's negligence and plaintiff's contributory negligence. The only issue presented is whether the trial court erred in granting the defendant's motion for a directed verdict by finding the plaintiff to have been contributorily negligent as a matter of law.

When the granting of a motion for a directed verdict is appealed to this Court, our task is identical to that of the trial court. This task is to determine whether the evidence, when considered in the light most favorable to the nonmovant, was sufficient to have been submitted to the jury. *Harshbarger v. Murphy*, 90 N.C. App. 393, 395, 368 S.E.2d 450, 451 (1988). In the present case, as in any case when a defendant moves for a directed verdict on the grounds of plaintiff's contributory negligence, the question becomes whether the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable inferences or conclusions may be drawn therefrom. *Hicks v. Food Lion, Inc.*, 94 N.C. App. 85, 90, 379 S.E.2d 677, 680 (1989).

It is a basic legal tenet that the law imposes upon a person the duty to use due care to protect himself or herself from injury, and the degree of care should be commensurate with the danger to be avoided. *Rosser v. Smith*, 260 N.C. 647, 653, 133 S.E.2d 499, 503 (1963). Furthermore, it is well settled that a person is contributorily negligent if he or she knows of a dangerous condition and voluntarily goes into a place of danger. *Cook v. Winston-Salem*, 241 N.C. 422, 430, 85 S.E.2d 696, 701-02 (1954).

The law of our State is filled with several illustrations of these precepts. For example, in *Rockett v. City of Asheville*,

6 N.C. App. 529, 170 S.E.2d 619 (1969), this Court upheld the trial court's finding the plaintiff to be contributorily negligent where the plaintiff observed a defective and dangerous condition of a sidewalk, but decided to traverse the depressed and broken section. The Court held that once plaintiff discovered the defective area which she knew to be dangerous, she was under a duty for her own safety to exercise a degree of care commensurate with the danger or appearance thereof. *Id.* at 533, 170 S.E.2d at 621. "'"If two ways are open to a person to use, one safe and the other dangerous, the choice of the dangerous way, with knowledge of the danger, constitutes contributory negligence."'" *Id.* (quoting *Dunnevant v. R.R.*, 167 N.C. 232, 83 S.E. 347 (1914)). The Court stated:

> After considering the evidence in the light most favorable to the plaintiff, we believe that, after discovering the defective condition of the sidewalk, for her own convenience she thought she was choosing the least perilous of the three dangerous routes. Prudence, rather than convenience, should have motivated the plaintiff's choice. The plaintiff was not compelled to undertake to traverse the area at all. Although it may have been inconvenient, the plaintiff could have returned [another way].

Id.

In another case, *Wyrick v. K-Mart Apparel Fashions*, 93 N.C. App. 508, 378 S.E.2d 435 (1989), plaintiff was a business invitee in a department store. While shopping, she saw a garden hose where the floor was watered down. While trying to step over the hose, she caught her foot and tripped. She admitted she could have returned to where she started and gone the long way to get to where she was going. *Id.* at 509, 378 S.E.2d 435. The Court held that when an invitee sees an obstacle not hidden or concealed and proceeds with full knowledge and awareness, there can be no recovery. *Id.*, 378 S.E.2d at 436.

Applying the general principles and rationale enunciated in these cases, we find the plaintiff to have been contributorily negligent. Plaintiff, while carrying a ten-pound bag of clothing, tried to maneuver her way through several large limbs and branches which had been left on her lawn. Plaintiff's own testimony reflected that in spite of her recognition of a hazardous condition, she thought if she was very careful, she could make her way safely through

the area by slowly stepping on and over tree branches lying in her path. Plaintiff had two safe routes to travel from her house to the car. She used the first way, by going to the end of the porch and climbing onto the porch, when she initially discovered the branches. She used the second passage, through her back door, after suffering her fall. Both presented safer alternatives than the path which forced plaintiff to negotiate her way in and out of the tree cuttings. For these reasons, we find plaintiff's actions to have constituted contributory negligence as a matter of law and to have been a proximate cause of her injury.

Affirmed.

Judges JOHNSON and GREENE concur.

LINDA SORRELLS, ADMINISTRATRIX OF THE ESTATE OF TRAVIS CAIN SORRELLS, PLAINTIFF v. M.Y.B. HOSPITALITY VENTURES OF ASHEVILLE, D/B/A RHAPSODY'S FOOD AND SPIRITS, DEFENDANTS

No. 9130SC184

(Filed 17 March 1992)

Intoxicating Liquor § 24 (NCI3d)— serving drunken patron— contributory negligence—12(b)(6) dismissal—inappropriate

The trial court erred by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff brought a wrongful death action for serving the decedent a large drink containing various liquors after being informed that decedent was driving and did not need another drink. While contributory negligence will bar a recovery for damages caused by negligence, allegations of the willful and wanton negligence of the defendant would survive a finding that the decedent was contributorily negligent.

Am Jur 2d, Intoxicating Liquors § 265.

Contributory negligence allegedly contributing to cause of injury as defense in Civil Damages Act proceeding. 64 ALR3d 849.

APPEAL by plaintiff from order entered 3 January 1991 by *Judge J. Marlene Hyatt* in HAYWOOD County Superior Court. Heard in the Court of Appeals 14 November 1991.

The plaintiff's evidence tends to show the following: On or about 21 May 1990 the plaintiff's intestate, a twenty-one year old student at Haywood Community College, and three of his friends (Carla Jacobson, Lisa Durham and a young man identified only as Tim) went to the defendant's place of business in Asheville, Rhapsody's Food and Spirits. Upon arrival the group ordered drinks. The intestate ordered a shot of tequila. Later, the intestate tried to order another drink from a waitress. However, Carla Jacobson intervened and told the waitress that the intestate had driven his vehicle to Rhapsody's, that he was driving home and that he should not be served any more alcoholic beverages. The waitress refused to take the intestate's order.

The intestate and Tim then left the table and went to the restroom. While the intestate was away the waitress returned and asked Ms. Jacobson and Lisa Durham whether the two men really wanted another drink. Once again, Ms. Jacobson told the waitress that the intestate was driving and that he and Tim had already had "plenty to drink." When the intestate and Tim returned from the restroom, the waitress again came over to "check on them." The intestate and Tim tried again to order another drink. The waitress asked who was driving. Ms. Jacobson and Ms. Durham intervened again and told the waitress that the intestate was driving and that the men did not need another drink. The waitress said "OK" and left the table. At that point both men were red faced, had red eyes and their speech was slow.

After a few minutes the intestate and Tim went to the restroom again. When they came out of the restroom, they went to the bar. The waitress then walked over to Ms. Jacobson and Ms. Durham and told them that the two men were ordering drinks at the bar. The waitress also told them that she had told the manager what Ms. Jacobson and Ms. Durham had said to her about not serving the two men and that the manager told the bartender to go ahead and serve them anyway. The waitress apologized.

The bartender served the intestate and Tim a glass of Ice Age Tea, a large drink containing various liquors. Tim fell asleep. The intestate, finished his drink and started to leave. He refused both girls' requests that he not drive as well as their requests

that he allow someone else to drive him home. The intestate got in his automobile and attempted to follow Ms. Jacobson home. However, while en route home he lost control of his car and struck a bridge abutment on Interstate Highway 26 and was killed.

Plaintiff sued for wrongful death alleging negligence and "willful, wanton and gross negligence" on the part of the defendant. The defendant made a Rule 12(b)(6) motion to dismiss which the trial court granted. Plaintiff appeals.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff-appellant.

Harrell & Leake, by Larry Leake, for defendant-appellee.

EAGLES, Judge.

The sole issue before us is whether the trial court erred by granting the defendant's motion to dismiss. We hold that the trial court did err and accordingly we reverse.

The essential question in considering the appropriateness of a Rule 12(b)(6) motion is whether the complaint, when liberally construed and taken to be true, states a claim upon which relief can be granted. *See Barnaby v. Boardman*, 70 N.C. App. 299, 302, 318 S.E.2d 907, 909 (1984), *rev'd on other grounds*, 313 N.C. 565, 330 S.E.2d 600 (1985); and *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 449, 368 S.E.2d 892, 893, *disc. review denied and appeal dismissed*, 323 N.C. 366, 373 S.E.2d 547 (1988). Here, the plaintiff alleges that the "wilful, wanton and gross negligence" of the defendant proximately caused the intestate's death. The defendant, however, argues that the plaintiff was contributorily negligent as a matter of law and is therefore barred from recovery. *Brower v. Robert Chapel & Assoc., Inc.*, 74 N.C. App. 317, 328 S.E.2d 45, *disc. review denied*, 314 N.C. 537, 335 S.E.2d 313 (1985); *Clark v. Inn West*, 89 N.C. App. 275, 365 S.E.2d 682, *rev'd on other grounds*, 324 N.C. 415, 379 S.E.2d 23 (1989). We agree that the intestate here was contributorily negligent as a matter of law. *Brower* at 319-20, 279 S.E.2d at 47. However,

> [i]t is well established that a party's contributory negligence will not preclude recovery for injuries proximately caused by other's willful and wanton negligence. *Fry v. Southern Public Utilities Co.*, 183 N.C. 282, 111 S.E. 354 (1922). . . . The concept of willful and wanton negligence was explained by our Supreme

Court in *Foster v. Hyman*, 197 N.C. 189, 191, 148 S.E. 36, 37-38 (1929):

> An act is done willfully when it is done purposely and deliberately in violation of law (citations omitted), or when it is done knowingly and of set purpose, or when the mere will has free play, without yielding to reason. (Citation omitted). "The true conception of willful negligence involves a deliberate purpose not to discharge some duty necessary to the safety of the person or property of another, which duty the person owing it has assumed by contract, or which is imposed on the person by operation of law." (Citation omitted).
>
> An act is wanton when it is done of wicked purpose, or when done needlessly, manifesting a reckless indifference to the rights of others. (Citations omitted). A breach of duty may be wanton and wilful while the act is yet negligent. . . . (Citation omitted).

Robinson v. Seaboard System Railroad, 87 N.C. App. 512, 519-20, 361 S.E.2d 909, 914 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988).

Here, the plaintiff has alleged sufficient facts of the defendant's gross negligence, under the foregoing definitions, to survive the defendant's Rule 12(b)(6) motion to dismiss. Plaintiff alleged that the intestate's waitress was requested by intestate's companions on three separate occasions that she not serve alcohol to the intestate because he was going to drive home and he had already had too much to drink. The complaint also alleges that when the intestate went to the bar to order another drink, the waitress told the manager what the intestate's companions had told her. The manager disregarded this information, observed the plaintiff's intestate and instructed his bartender to go ahead and serve the intestate a large mixed drink despite the waitress' warnings.

We conclude that these allegations are sufficient to state a claim for injuries caused by the defendant's wilful and wanton negligence. Accordingly, the Rule 12(b)(6) motion was improperly allowed. We base our ruling on the premise that while contributory negligence will bar a recovery for damages caused by negligence, allegations of the willful and wanton negligence of the defendant

would survive a finding that the intestate was contributory negligent as a matter of law because he drove while impaired.

On remand the jury will consider whether the evidence shows that defendant's conduct amounts to wilful and wanton negligence. If so, the additional issue that may arise is whether the actions of the plaintiff's intestate in refusing requests not to drive himself and in refusing to allow someone else to drive him home were sufficient to establish contributory wilful and wanton negligence.

Reversed and remanded.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. LOREN DAVID HUNTLEY, A/K/A DAVID LEE HUNTER

No. 9126SC331

(Filed 17 March 1992)

1. **Appeal and Error § 80 (NCI4th)— driving while impaired—district court dismissal—appeal by State to superior court**

The superior court had jurisdiction under N.C.G.S. § 15A-1432 to hear the State's appeal from a district court order dismissing the charges against defendant. That order, regardless of whether a valid judgment previously had been entered, was a decision by the district court judge to dismiss the criminal charge and the State could properly appeal to superior court.

Am Jur 2d, Appeal and Error § 268.

2. **Appeal and Error § 80 (NCI4th)— driving while impaired—remanded from superior to district court—conclusion that defendant did not comply with remand order—no error**

A superior court judge did not err by concluding that defendant did not comply with an order of remand where defendant appealed a driving while impaired conviction to superior court; after perfecting his appeal, defendant filed a motion that the case be remanded to district court for compliance with the judgment with the provision that it not be

appealed again to superior court; the motion was granted; defendant filed a motion for appropriate relief in district court; that motion was granted; and the State appealed to superior court. Defendant's motion was in direct conflict with both his prior motion and the order of remand, and the district court had jurisdiction pursuant to the remand order only for the limited purpose of permitting compliance with the district court judgment.

Am Jur 2d, Appeal and Error § 962.

APPEAL by defendant from Order filed 1 February 1991 by *Judge Robert M. Burroughs* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 14 January 1992.

On 1 January 1990 defendant was arrested for driving while impaired. On 22 May 1990 the defendant moved to dismiss the charges based on *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). District Court Judge Boner denied the motion, and the defendant pleaded guilty to driving while impaired. The defendant was sentenced as a level five offender and received a thirty day jail term which was suspended on the conditions that he pay a $100 fine, obtain a substance abuse assessment, surrender his driver's license and perform 24 hours of community service. Defendant appealed to the superior court.

On 7 November 1990 defendant by written motion in superior court moved to remand the case to the district court "for compliance with the judgment previously entered therein with the provision that this case will not be appealed again to the Superior Court." The motion was granted by Superior Court Judge Burroughs in an order which conditioned the remand as follows: "The above case . . . is hereby ordered remanded to District Court for compliance with the judgment therein with the provision that this matter will not be appealed again to the Superior Court." The same day, defendant filed a motion for appropriate relief in district court seeking to have the previous judgment vacated and the charges dismissed based on *Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988). District Court Judge Boner granted defendant's motion, vacated the judgment and dismissed the charges. The State filed notice of appeal to the superior court.

After hearing arguments, Judge Burroughs entered an order setting aside the dismissal by the district court, reinstating the

22 May 1990 district court judgment and ordering the defendant to comply with the judgment by 5 February 1991.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isaac T. Avery, III, for the State.

Goodman, Carr, Nixon & Laughrun, by George V. Laughrun, II, for defendant-appellant.

EAGLES, Judge.

[1] Defendant first argues that the superior court lacked jurisdiction to hear the State's appeal from the district court's order dismissing the charges against the defendant because the State did not have a valid judgment from which to appeal. This argument is without merit.

G.S. 15A-1432 provides in pertinent part:

> (a) Unless the rule against double jeopardy prohibits further prosecution, the State may appeal from the district court judge to the superior court:
>
> (1) When there has been a *decision or judgment* dismissing criminal charges as to one or more counts.

G.S. 15A-1432(a)(1) (emphasis added). Here, the district court entered an order vacating the judgment and dismissing the charges against the defendant. This order, regardless of whether a valid judgment previously had been entered, was a decision by the district court judge to dismiss the criminal charge pending against the defendant. Accordingly, the State could properly appeal that decision to the superior court under G.S. 15A-1432(a)(1). This assignment is overruled.

[2] Defendant next argues that nine of the superior court's thirteen conclusions of law were erroneous. Defendant first argues that Judge Burroughs erred when he concluded that "[t]he Defendant did not comply with the Order to Remand." This contention is without merit.

On 7 November 1990, after perfecting his appeal to the superior court, the defendant filed the following written motion.

> The undersigned hereby makes motion to the Court that Case #90 31 [sic] by [sic] remanded to District Court *for com-*

> *pliance with the judgment previously entered therein* with the provision that this case will not be appealed again to the Superior Court.

(Emphasis added.) The same day Judge Burroughs granted defendant's motion and entered the following order:

> The above case #90-00031 is hereby ordered remanded to District Court *for compliance with the judgment therein* with the provision that this matter will not be appealed again to the Superior Court.

(Emphasis added.) The defendant's motion was conditioned upon his compliance with the district court judgment. Judge Burroughs' order allowing defendant's motion was also conditioned upon defendant's compliance with the district court judgment. However, after defendant's case was remanded to the district court for compliance, defendant made a motion for appropriate relief seeking to have the prior judgment vacated and the charge against him dismissed. By making this motion, defendant was in direct conflict with both defendant's prior motion and Judge Burroughs' order. By seeking withdrawal of his appeal and remand to the district court for the purpose of complying with the prior judgment, the defendant lost his opportunity to have his argument addressed on the merits in superior court because by withdrawing his appeal, the superior court lost jurisdiction. The district court had jurisdiction pursuant to the superior court remand order only for the limited purpose of permitting compliance with the district court judgment. This argument is overruled.

Because defendant's motion and Judge Burroughs' order limited the purpose and scope of remand to compliance with the judgment previously entered in district court, any error Judge Burroughs may have committed in his remaining conclusions in his 1 February 1991 order was harmless error. Accordingly, we do not address defendant's remaining arguments under this assignment. Having found no prejudicial error, we affirm.

Affirmed.

Judges COZORT and ORR concur.

CITY OF BURLINGTON, PLAINTIFF v. ISLEY PLACE CONDOMINIUM ASSOCIATION (FORMERLY INGLEWOOD APARTMENTS, INC.); LELAND T. WILLIAMS, FAY H. WILLIAMS, FAYE DUNCAN COBB TAYLOR, ANITA B. YOUNG, C. E. KERNODLE, JR., MARY JO F. HOLT, FOY E. LANE, BERTA K. HORNE, AND JO ANN M. HARRIS, DEFENDANTS

CITY OF BURLINGTON, PLAINTIFF v. STEPHEN I. MOORE, JR. AND WIFE, NANCY MOORE, DEFENDANTS

No. 9115SC402
No. 9115SC403

(Filed 17 March 1992)

Eminent Domain § 87 (NCI4th)— condemnation by city—street extension—public use or benefit

A city council acted within its authority under N.C.G.S. § 40A-3 in authorizing the condemnation of property in order to extend an existing street, and one defendant's affidavit that the street was being extended to serve only two lots which already had other access and that the city did not intend to construct any improvements upon the area acquired by condemnation was insufficient to overcome the city council's determination that the street extension was for the public use and benefit.

Am Jur 2d, Eminent Domain §§ 103, 419.

APPEAL by plaintiff from order and judgment entered 19 March 1991 by *Judge J. B. Allen, Jr.* in ALAMANCE County Superior Court. Heard in the Court of Appeals 19 February 1992.

The City of Burlington sought to acquire certain property in order to extend and improve the existing Isley Place cul-de-sac. After being unable to procure the subject property by negotiated conveyance, the City Council enacted resolutions on 7 August 1990 and 4 September 1990 authorizing condemnation of the property. The City thereby initiated two actions seeking condemnation of approximately 337 square feet and of approximately 369 square feet, both located at the end of Isley Place. The parties' motion to consolidate these cases was granted.

Defendants answered the complaint denying the City's authority to condemn the property on the ground the condemnation was not for a public use or purpose. Thereafter plaintiff filed motions

for partial summary judgment and defendants filed motions for summary judgment. By order and judgment dated 19 March 1991 plaintiff's motions were denied and defendants' motions were granted.

Robert M. Ward for plaintiff appellant.

Charles L. Bateman, P.A., by Charles L. Bateman and Linda J. Hartwell, for defendant appellees.

WALKER, Judge.

G.S. 40A-3 provides in pertinent part:

> (b) Local Public Condemnors.—For the public use or benefit, the governing body of each municipality or county shall possess the power of eminent domain and may acquire by purchase, gift or condemnation any property, either inside or outside its boundaries, for the following purposes.
>
> (1) Opening, widening, extending, or improving roads, streets, alleys, and sidewalks. The authority contained in this subsection is in addition to the authority to acquire rights-of-way for streets, sidewalks and highways under Article 9 of Chapter 136.

The City Council thereby acted pursuant to its authority when adopting resolutions authorizing condemnation to acquire certain property in order to extend an existing street.

In *City of Charlotte v. McNeely*, 281 N.C. 684, 690, 190 S.E.2d 179, 184 (1972), our Supreme Court stated:

> The taking of property to construct or enlarge a public street is, as a matter of law, a taking for a public purpose. The public purpose being established, "the question as to the necessity or expediency of devoting the property to the public use is one which must be left to the legislative department." . . . Thus, the advisability of widening a public street is a matter within the discretion of a city's governing body. (Citation omitted).

The City Council's decision that it was necessary and in the public interest to condemn this particular property for the public purpose of extending an existing street was therefore within its discretion.

Insofar as the City Council acted within its scope of authority on a subject matter afforded legislative discretion the burden shifted

to the property owners to refute the City's showing of a public purpose. The only showing in either action in support of the summary judgment motions was the affidavit of Stephen I. Moore, Jr., which was to the effect that Isley Place was being extended to serve only two lots which already had other access and that the City did not intend to construct any improvements upon the area acquired by exercise of eminent domain. This evidence was insufficient to overcome the City's determination that the extension of Isley Place was for the public use and benefit. Since neither party challenged the vehicle of summary judgment as an inappropriate means through which to establish public purpose, summary judgment pursuant to Rule 56, N.C. Rules of Civil Procedure, should have been entered for plaintiff and defendants' motions for summary judgment should have been denied.

Reversed.

Chief Judge HEDRICK and Judge ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 17 MARCH 1992

COLEMAN v. HIATT No. 9114SC1001	Durham (91CVS616)	Affirmed
DAVIS v. ARMSTRONG WORLD INDUSTRIES No. 9110IC1010	Ind. Comm. (867342)	Affirmed
IN RE SMITH FORECLOSURE No. 9129SC315	Rutherford (90SP36)	Reversed & Remanded
M-H INTERNATIONAL v. LASSITER No. 914DC154	Onslow (90CVD1498)	Affirmed
N.C. DEPT. OF HUMAN RESOURCES v. TABOR No. 9110SC353	Wake (90CVS9851)	Affirmed
ROBBINS v. E. J. POPE & SONS No. 9110IC390	Ind. Comm. (700389) (704697)	Affirmed
STATE v. ANDERSON No. 918SC287	Lenoir (90CRS4291)	No Error
STATE v. GARY No. 916SC891	Halifax (90CRS5618) (90CRS5619) (90CRS5620)	No Error
STATE v. HECHLER No. 9130SC896	Jackson (90CRS2517)	No Error
STATE v. McNEILL No. 9116SC237	Robeson (89CRS017693) (89CRS017694) (89CRS017695) (89CRS017696) (89CRS017697) (89CRS017698) (89CRS017699) (89CRS017692)	No Error
STATE v. MURPHY No. 915SC1034	New Hanover (90CRS14890)	No Error
STATE v. THOMPSON No. 9126SC947	Mecklenburg (90CRS56761) (90CRS56763)	No Error

STATE v. WILLIAMS No. 918SC1046	Lenoir (90CRS651) (90CRS652)	No Error
SULLIVAN v. SULLIVAN No. 9129DC11	Henderson (90CVD57)	Affirmed & modified with instructions to reduce the money judgment awarded to the plaintiff in the amount of $2,180.40
SWEENEY v. WILKINS No. 918SC970	Wayne (91CVS273)	Affirmed
WILKIE v. WILKIE No. 9128DC281	Buncombe (89CVD853)	Affirmed

APPENDIXES

ORDER ADOPTING AN AMENDMENT TO CANON 5E OF THE CODE OF JUDICIAL CONDUCT

ORDER ADOPTING AMENDMENTS TO THE RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS

ORDER ADOPTING AN AMENDMENT TO CANON 5E OF THE CODE OF JUDICIAL CONDUCT

Canon 5E of the Code of Judicial Conduct is hereby amended to read as follows:

> E. A judge should not act as an arbitrator or mediator. However, an emergency justice or judge of the Appellate Division designated as such pursuant to Article 6 of Chapter 7A of the General Statutes of North Carolina, and an Emergency Judge of the District Court or Superior Court commissioned as such pursuant to Article 8 of Chapter 7A of the General Statutes of North Carolina may serve as an arbitrator or mediator when such service does not conflict with or interfere with the justice's or judge's judicial service in emergency status.

Adopted by the Court in Conference this 4th day of March, 1992, this amendment is effective immediately.

This amendment shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

LAKE, J.
For the Court

ORDER ADOPTING AMENDMENTS TO THE RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS PURSUANT TO N.C. GEN. STAT. 7A-459

The Rules and Regulations Relating to the Appointment of Counsel for Indigent Defendants Pursuant to N.C. Gen. Stat. 7A-459, are hereby amended to read as stated on the attached resolution adopted by the Council of the North Carolina State Bar and filed with the Supreme Court on 3 March 1992.

Adopted by the Court in Conference this 4th day of March, 1992, this amendment is effective immediately.

These amendments shall be promulgated by publication in the Advance Sheets of the Supreme Court and the Court of Appeals.

LAKE, J.
For the Court

Be it RESOLVED that the amendments to the Appointment of Counsel for Indigents pursuant to G.S. 7A-459 were adopted by the Council and the rules as shown in Article VI, Section 5, and as appear in 275 N.C. 709 and amended are hereby amended and rewritten to provide as follows:

RULES AND REGULATIONS RELATING TO THE APPOINTMENT OF COUNSEL FOR INDIGENT DEFENDANTS PURSUANT TO N.C. GEN. STAT. 7A-459

ARTICLE I.

Authority.

Section 1.1. These Rules and Regulations are issued pursuant to the authority contained in G.S. 7A-459, Chapter 1013 of the Session Laws of 1969.

ARTICLE II.

Determination of Indigency.

Section 2.1. Prior to the appointment of counsel on grounds of indigency, the Court shall require the defendant to complete and sign under oath an Affidavit of Indigency in a form approved by the Director of the Administrative Office of the Courts.

Section 2.2. Prior to the call of the case for trial, the judge shall make reasonable inquiry of the defendant personally under oath to determine the truth of the statements made in the Affidavit of Indigency.

Section 2.3. The defendant's Affidavit of Indigency shall be filed in the records of the case.

Section 2.4. Upon the basis of the defendant's Affidavit of Indigency, his statements to the Court on this subject, and such other information as may be brought to the attention of the Court which shall be made a part of the record in the case, the Court shall determine whether or not the defendant is in fact indigent.

ARTICLE III.

Waiver of Counsel.

Section 3.1. Any defendant desiring to waive the right to counsel as provided in G.S. 7A-457 shall complete and sign under oath

a Waiver of Counsel in a form approved by the Director of the Administrative Office of the Courts. If such defendant waives the right to counsel but refuses to execute such waiver, the court shall so certify in a form approved by the Director of the Administrative Office of the Courts.

Section 3.2. Prior to the call of the case for trial, the Judge shall make reasonable inquiry of the defendant personally to determine that the defendant has understandingly waived his right to counsel.

Section 3.3. The Judge, upon being so satisfied, shall accept the Waiver of Counsel executed by the defendant, sign the same and cause it to be filed in the record of the case.

ARTICLE IV.

Appointment of Counsel.

Section 4.1. The North Carolina State Bar shall adopt a model plan for the appointment of counsel for indigent persons charged with certain crimes or otherwise entitled to representation. Each judicial district bar shall adopt a plan or plans for the appointment of counsel by the public defender and or the court to represent indigent persons which provides for the appointment of experienced counsel for persons charged with serious crimes, with respect to which the model plan may serve as a guide or example. A plan may be applicable to the entire district, or, at the election of the district bar, separate plans may be adopted by the district bar for use in each separate county within the district.

Section 4.2. Such plan or plans as adopted by the judicial district bar shall be certified to the Council of the North Carolina State Bar for its approval, following which the plan or plans shall be certified to the Clerk of Superior Court of each county to which each plan is applicable by the Secretary of the North Carolina State Bar and shall constitute the method by which counsel shall be selected in said district for appointment to indigent defendants. Thereafter all appointments of counsel for indigent defendants in said district shall be made in conformity with such plan or plans, unless the trial judge or, where authorized, the public defender, in the exercise of his discretion deems it proper in furtherance of justice to appoint as counsel for an indigent defendant or defendants some lawyer or lawyers residing and practicing in the judicial district, who is or are not on the plan or list certified to the Clerk of Superior Court, and if so, the trial judge or, where authorized, the public defender, may appoint as counsel to represent

an indigent defendant some lawyer or lawyers not on said plan or list residing and practicing in the judicial district.

Section 4.3. No attorney shall be appointed as counsel for an indigent defendant in a court of any district except the district in which he resides or maintains an office except by consent of counsel so appointed.

Section 4.4. No indigent defendant shall be entitled or permitted to select or specify the attorney who shall be assigned to defend him.

Section 4.5. The Clerk of Superior Court of each county shall file or record in his office, maintain and keep current the plan for the assignment of counsel applicable to said county as certified to him by the Secretary of the North Carolina State Bar.

Section 4.6. The Clerk of Superior Court of each county shall keep a record of all counsel eligible for appointment under the plan applicable to said county as certified to him by the Secretary of the North Carolina State Bar.

Section 4.7. Orders for the appointment of counsel shall be entered by the court in a form approved by the Director of the Administrative Office of the Courts.

Section 4.8. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, two counsel shall be appointed to represent an indigent defendant charged with murder where the State is seeking the death penalty.

Section 4.9. Notwithstanding any other provisions of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime

(a) Who does not have a minimum of five years' experience in the general practice of law, provided that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the court or, where authorized, the public defender, appointing him to have demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Section 4.10. Notwithstanding any other provision of this Article or any plans or assigned counsel lists adopted by a district bar pursuant thereto, no attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime

(a) Who does not have a minimum of five years' experience in the general practice of law, provided, that the Court or, where authorized, the public defender, may in its or his discretion appoint as assistant counsel an attorney who has less experience.

(b) Who has not been found by the trial judge or, where authorized, the public defender, to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section the term general practice of law shall be deemed to include service as a prosecuting attorney in any District Attorney's office.

Unless good cause is shown an attorney representing the indigent defendant at the trial level shall represent him at the appellate level if the attorney is otherwise qualified under the provisions of this section.

Section 4.11. In those cases in which a public defender has authority to appoint a member of a judicial district bar to represent an indigent person, the public defender shall make the appointment pursuant to the procedures set out herein.

Section 4.12. It is contemplated that in those districts with a public defender, additional outside counsel will be appointed in those instances in which the volume of work handled by the public defender necessitates additional counsel and in those instances where a conflict of interest exists as regards the public defender and multiple defendants. Provided, when a conflict of interest on the part of the public defender necessitates additional counsel, the court shall appoint outside counsel.

Section 4.13. Nothing in these regulations or in the Model Plan shall be construed to prohibit assignment of otherwise qualified counsel to represent indigent defendants pursuant to specialized programs, plans or contracts which may be implemented from time to time to improve efficiency and economy where such programs, plans or contracts are consistent with the ends of justice and are approved by the Council of the N.C. State Bar.

ARTICLE V.

Withdrawal by Counsel.

Section 5.1. At any time during or pending the trial or re-trial of a case the trial judge, the appointing judge, or the resident judge of the district upon application of the attorney, and for good cause shown, may permit said attorney to withdraw from the defense of the case.

Section 5.2. At any time after the trial of a case and during the pendency of an appeal, the trial attorney, for good cause shown, may apply to the Appellate Court for permission to withdraw from the defense of the case upon the appeal.

Section 5.3. Applications for permission to withdraw as counsel shall be made only for good cause where compelling reasons or actual hardship exists.

ARTICLE VI.

Procedure for Payment of Compensation.

Section 6.1. Upon completion of the representation of an indigent defendant by appointed counsel in the trial court, the trial judge shall, upon application enter an order allowing such compensation as is provided in G.S. 7A-458.

Section 6.2. Upon the completion of any appeal, the trial judge, the resident judge or the judge holding the courts of the district, shall, upon application, enter a supplemental order in the cause allowing the appointed attorney upon the appeal such additional compensation as may be appropriate.

Section 6.3. Orders for the payment of compensation to counsel for representation of indigent defendants shall be entered by the judge in a form approved by the Director of the Administrative Office of the Courts.

Section 6.4. Two certified copies of the order for the payment of fees shall be forwarded by the Clerk of the Superior Court to the Administrative Office of the Courts, Attention: Assistant Director, Raleigh, North Carolina, for payment.

Section 6.5. Upon the entry of the order for the payment of counsel fees, the court shall upon final conviction likewise enter a judgment against the defendant for whom counsel was assigned in the amount allowed as counsel fees, said judgment to be in the form approved by the Director of the Administrative Office of the Courts.

Section 6.6. Counsel appointed for the representation of indigent defendants shall not accept any compensation other than that awarded by the Court.

MODEL PLAN

REGULATIONS FOR APPOINTMENT OF COUNSEL IN INDIGENT CASES IN THE _____ JUDICIAL DISTRICT

ARTICLE I.

Purpose.

The purpose of these regulations is to provide for effective representation of indigent criminal defendants at all stages of trial and appellate proceedings.

ARTICLE II.

Applicability.

These regulations apply to any criminal case arising in the _____ Judicial District in which the court has determined that the defendant is entitled to the appointment of counsel. Reference to the masculine gender shall be construed to include both male and female persons. Reference to the singular shall, as appropriate, be construed to include the plural.

ARTICLE III.

Lists of Attorneys.

Section 3.1. Any attorney engaged in the private practice of law primarily in the _____ Judicial District who

(a) Maintains an office in the _____ Judicial District, and

(b) Practices criminal law in the courts of the _____ Judicial District to an appreciable extent, or intends or desires to do so,

may be placed on one of three lists governing the appointment of counsel in criminal cases involving indigent persons. No other attorneys will be placed on the lists.

Section 3.2. Attorneys included on the first list may only be appointed to represent defendants charged with misdemeanors or felonies punishable by imprisonment for not more than five years.

Section 3.3. Attorneys on the second list may be appointed to represent defendants charged with misdemeanors or felonies other than capital crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointment to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.4. Attorneys on the third list may be appointed to represent defendants charged with any crimes, provided that an attorney may request the Committee on Indigent Appointments that he not be subject to appointments to represent defendants charged only with misdemeanors. If the committee approves the request, the list shall reflect the limited availability of that attorney for appointments.

Section 3.5. The Committee on Indigent Appointments shall, prior to the effective date of these regulations, meet and develop three lists of attorneys of the types described herein from the roster of attorneys currently accepting appointments in indigent cases in the _____ Judicial District. The first list shall include all such attorneys who have been licensed less than two years or who have been admitted by comity. The second list shall include all such attorneys who have been licensed for two years or more. The third list shall include all such attorneys who have had not less than five years experience in the general practice of law and who have demonstrated proficiency in the field of criminal trial practice. With respect to these initial lists, any other requirement not otherwise met by any listed attorney is hereby waived unless the committee determines that it ought not to be waived.

Section 3.6. Subject to the exception contained in Section 3.5 requirements for inclusion on the three lists are as follows:

(a) An attorney licensed to practice law in North Carolina may be included on the first list if the Committee on Indigent Appointments finds that:

(1) He is competent to represent criminal defendants charged with misdemeanors and felonies, and

(2) Two attorneys who have engaged in the practice of law in the _____ Judicial District for not less than three years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with misdemeanors and felonies and that they

recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation.

(b) An attorney who has been licensed to practice law in North Carolina for not less than two years or who has been admitted to the North Carolina State Bar by comity may be included on the second list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than four years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with felonies and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He is competent to represent criminal defendants charged with felonies.

(c) An attorney who has been licensed to practice law in North Carolina for not less than five years may be included on the third list if the committee finds that:

(1) He has demonstrated proficiency in the field of criminal trial practice and has the ability to handle appellate matters, and

(2) Two attorneys who have engaged in the private practice of law in the _____ Judicial District for not less than five years preceding the committee's consideration, at least one of whom being included on one of the three lists, have stated in writing that they believe he is competent to represent criminal defendants charged with capital crimes and that they recommend that he be included on the list, provided that the recommending attorneys may not be members of the petitioning attorney's law firm at the time of recommendation, and

(3) He has not less than five years experience in the general practice of law, provided that the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any District Attorney's office, and

(4) He is competent to represent criminal defendants charged with capital crimes.

Section 3.7. The Committee on Indigent Appointments shall review the lists not less than once a year to ensure that the lists are current and that the attorneys whose names appear on the lists meet the qualifications set out herein.

ARTICLE IV.

Committee on Indigent Appointments.

Section 4.1. A Committee on Indigent Appointments is hereby established to assist in the implementation of these regulations. The committee shall have authority to act when the regulations become effective.

Section 4.2. All members of the committee shall be attorneys who

(a) Are included on one of the appointment lists, and

(b) Have practiced criminal law in the _____ Judicial District, whether as a prosecutor or defense counsel, for not less than five years, and

(c) Are knowledgeable about practicing attorneys in the _____ Judicial District.

Section 4.3. The committee shall consist of _____ members appointed by the President of the _____ Judicial District Bar. At least one member shall be appointed from each county in the district. Members of the committee shall be appointed for terms of two years, except that initially a minority of the members shall be designated to serve one year terms in order to stagger terms. The appointments shall be made by letter, a copy of which shall be maintained in the records of the committee. No member shall serve two consecutive terms, except that a person who has been appointed to replace a member who did not complete his term may be appointed to a full term following his completion of the partial term. Any member who resigns or otherwise becomes ineligible to continue serving as a member shall be replaced for his term as soon as practicable.

Section 4.4. The President of the _____ Judicial District Bar shall appoint one of the members as Chairman of the Committee, who shall serve at the pleasure of the president as shall all other members of the committee.

Section 4.5. The committee shall meet at the call of the Chairman upon reasonable notice. The first meeting shall be on _____.

Thereafter, the committee shall meet as often as is necessary to dispatch its business.

Section 4.6. The committee shall have complete authority to accomplish the following:

(a) Supervise the administration of these regulations;

(b) Review requests from attorneys concerning their placement on any list and obtain information pertaining to such placement;

(c) Approve or disapprove an attorney's addition to or deletion from any list or the transfer of any attorney from one list to another, provided that an attorney's request to be deleted from a list or transferred to a lower numbered list shall not require committee approval;

(d) Establish procedures with which to carry out its business;

(e) Interview attorneys seeking placement on any list and witnesses for or against such placement.

Section 4.7. A majority of the committee must be present at any meeting in order to constitute a quorum. The committee may take no action unless a quorum is present. A majority vote in favor or a motion or any proposed action shall be required in order for the motion to pass or for the action to be taken.

Section 4.8. The committee shall meet in private, except it may invite persons to make limited appearances to be interviewed. Discussions of the committee, its records, and its actions shall be treated as confidentially as possible. The names of the members of the committee shall not be confidential.

ARTICLE V.

Placement of Attorneys on List.

Section 5.1. Any attorney who wishes to have his name added to or deleted from any list, or to have his name transferred from one list to another, shall file a written request with the administrator. The request shall include information that will facilitate the committee's determination whether the attorney meets the standards set forth in Article III for placement on a certain list. The written statements of competency required by Article III must be attached to the request.

Section 5.2. The administrator shall maintain records for the committee and shall advise each member of the committee of the name

of the requesting attorney and the nature of this request before the committee meets to review the request. The administrator shall assure that all requests properly filed are brought to the committee's attention at the next meeting at which it is practicable for the committee to review the request.

Section 5.3. The administrator shall assure that all District Court Judges, Resident Superior Court Judges, any special Superior Court Judge with a permanent office in the _____ Judicial District, and the District Attorney for the _____ Judicial District are advised of any request concerning placement on any list so that such officials will have an opportunity to comment on the request to the committee.

Section 5.4. When the committee meets to review placement requests, it may require any requesting attorney to appear before it to be interviewed and may require information in addition to that submitted in the request. Any member of the committee may discuss requests with other members of the bar in a confidential manner and may relate information obtained thereby to the other members. Rules of evidence do not apply with respect to the review of requests. The committee may hold a request in abeyance for a reasonable period of time while obtaining additional information.

Section 5.5. The committee shall determine whether an attorney requesting to be added to a list when he is not currently on any list or to be transferred from a lower numbered list to a higher numbered list (such as from the first list to the second list) meets all the applicable standards set out in Article III. The request shall be granted or the addition or transfer allowed if the committee finds that he does meet all the standards. Conversely, the request shall be denied if the committee does not find that he meets all the standards. The findings shall be reduced to writing and kept in the regular records of the committee by the administrator. The committee shall assure that the requesting attorney is given prompt notice of the action taken with respect to his request and is advised of the basis for denial if the request is not granted.

Section 5.6. If at any time it reasonably appears to the committee that an attorney no longer meets a standard set forth in Article III for the list on which he is placed, or that he can no longer meet the responsibilities of representing indigent defendants with respect to such list, the committee shall direct the attorney to show cause why he should not be deleted from the list or transferred from a higher numbered list to a lower numbered list. If the attorney cannot show sufficient cause, the committee may take

appropriate action, including suspending the attorney from receiving appointments in indigent cases for a definite or indefinite time, or deleting his name from the list he is on, or transferring him from a higher numbered list to a lower numbered list. Appropriate written findings shall be made by the committee in this regard, and the attorney shall be informed of the basis of any action taken.

Section 5.7. An attorney whose name is deleted from a list or who is transferred to another list by the committee may appeal the committee's action to the senior resident Superior Court Judge of the _____ Judicial District. In such a case the resident superior court judge will make the final decision regarding the deletion or transferral of the attorney.

Section 5.8. Whenever an attorney who provided information to the committee, collectively or through any member, requests that his name not be used or that his information be treated confidentially, his request shall be granted unless doing so results in manifest unfairness.

ARTICLE VI.

Appointment Procedure (Non-Capital Cases).

Section 6.1. The administrator shall provide the clerk in each courtroom in the district and Superior Criminal Courts of the _____ Judicial District with current lists of attorneys subject to appointment in indigent cases. Attorneys shall be appointed only in accordance with the lists on which they appear, and only in cases to be tried in counties in which they maintain offices, unless they agree in advance to accept cases from other counties.

Section 6.2. Each courtroom clerk shall maintain a record of attorneys subject to appointment to represent indigents. Beside each attorney's name shall appear the number of any list he is on. The court shall proceed in sequence in appointing attorneys. If an attorney's name is passed over because he is not on a list relating to a particular charge, the court shall return to his name for the next appointment consistent with his lists. The court may pass over the name of any attorney known not to be reasonably available because of vacation, illness or other reasons.

Section 6.3. In its discretion, the court may appoint an attorney in any case without regard to sequence or an attorney not maintaining an office in the county where the case is to be tried.

Section 6.4. The clerk shall provide notice of the appointment to the attorney concerned as soon as possible. Further, the clerk shall advise the defendant of the name of his attorney.

Section 6.5. The court may appoint an attorney to represent more than one defendant in a single case.

Section 6.6. In those cases in which the public defender cannot serve, and is authorized to appoint a substitute member of the bar to represent an indigent defendant, the public defender shall consult the current lists of attorneys subject to appointment in indigent cases maintained by the court administrator and referred to in Article III herein, and shall appoint the next eligible attorney on the list. The public defender shall proceed in sequence in appointing attorneys, but may pass over the name of any attorney known to be unavailable because of vacation, illness or other reasons, or, in his or her discretion, where justice so requires.

Section 6.7. If a judge is not reasonably available to appoint counsel to represent an indigent defendant, the clerk of court shall appoint the next eligible attorney on the list. Appointments of counsel by the clerk shall be subject to review and approval by the judge.

ARTICLE VII.

Appointments in Capital Cases.

Section 7.1. In addition to the provisions of Article VI, the provisions of this Article shall apply to the appointment of counsel in capital cases.

Section 7.2. A counsel and an assistant counsel shall be appointed to represent an indigent defendant charged with murder, in cases in which the State is seeking the death penalty. The assistant counsel may be on the second list or the third list of attorneys.

Section 7.3. No attorney shall be appointed to represent at the trial level any indigent defendant charged with a capital crime:

(a) Who has less than five years experience in the general practice of law, provided that the court may, in its discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court appointing him to have a demonstrated proficiency in the field of criminal trial practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE VIII.

Appellate Appointments.

Section 8.1. If a criminal defendant who has given notice of appeal from a conviction is found to be eligible, because of indigency, for appointment of counsel at the appellate level, the attorney representing the defendant at the trial level may be appointed to represent the defendant at the appellate level. If the attorney representing the defendant at the trial level was retained, he may be appointed to represent the defendant at the appellate level even though he does not meet all the requirements of Article III or the other pertinent provisions of these regulations. For good cause, the attorney at the trial level may be relieved of responsibility for the appeal. Whenever it is otherwise necessary to appoint an attorney to represent an indigent person at the appellate level, the attorney appointed shall be selected in a manner consistent with appointment of counsel at the trial level. If the trial attorney is not appointed, the appellate defender's office or any other qualified attorney may be appointed, in a manner consistent with these rules, to represent the defendant at the appellate level.

Section 8.2. No attorney shall be appointed to represent at the appellate level any indigent defendant convicted of a capital crime:

(a) Who has less than five years experience in the general practice of law, provided, however, that the court or, where authorized, the public defender, may in its or his discretion, appoint as assistant counsel an attorney who has less experience; or

(b) Who has not been found by the court or the public defender to have a demonstrated proficiency in the field of appellate practice.

For the purpose of this section, the term "general practice of law" shall be deemed to include service as a prosecuting attorney in any district attorney's office.

ARTICLE IX.

Administration.

Section 9.1. The Senior Resident Superior Court Judge for the _____ Judicial District shall designate a person to serve as administrator of these regulations.

Section 9.2. The administrator will perform the duties described previously and particularly shall:

(a) Maintain records relating to these regulations and to the actions of the Committee on Indigent Appointments;

(b) Keep current the three lists of attorneys;

(c) Assist the courtroom clerks and the Clerk of Superior Court in carrying out these regulations;

(d) Attend meetings of the committee as appropriate;

(e) Inform the judges of the district and the district attorney and the members of the committee of requests by attorneys concerning placement on any lists;

(f) Perform other administrative tasks necessary to the implementation of these regulations.

Section 9.3. The administrator shall have such office, supplies, and equipment as can be provided by the Senior Resident Superior Court Judge or the committee.

Section 9.4. The Clerk of Superior Court of each county in the _____ Judicial District shall file and keep current these regulations for the assignment of counsel as certified to him by the Secretary of the North Carolina State Bar.

Section 9.5. The Clerk of Superior Court of each county in the _____ Judicial District shall keep a record of all counsel eligible for appointment under these regulations and a permanent record of all appointments made in his county.

ARTICLE X.

Miscellaneous.

Section 10.1. These regulations are issued pursuant to Article IV of the rules and regulations promulgated in accordance with North Carolina General Statute 7A-459 by the North Carolina State Bar Council, entitled Regulations Relating to the Appointment of Counsel for Indigent Defendants in Certain Criminal Cases, as set

out in the Rules Volume of The General Statutes of North Carolina (published by The Michie Company). Nothing contained herein shall be construed or applied inconsistently with the regulations established by the North Carolina State Bar Council or with other provisions of state law.

Section 10.2. It is recognized that the court has the inherent discretionary power in any case to decline to appoint a particular attorney to represent an indigent person. It is also recognized that occasionally the court may determine that the interests of justice would be best served by appointing a particular lawyer to handle a particular case even though he is not next in sequence or does not maintain an office in the county where the case is to be tried.

Section 10.3. These regulations shall be construed liberally in order to carry out the purpose stated in Article I.

Section 10.4. These regulations shall become effective on _____, and shall supersede any existing regulations or plan concerning the appointment of counsel indigent cases.

APPROVED AND PROMULGATED THIS _____ DAY OF _____, 199__.

NORTH CAROLINA
WAKE COUNTY

I, B. E. James, Secretary-Treasurer of the North Carolina State Bar, do hereby certify that the foregoing amendments to the Rules and Regulations Relating to the Appointment of Counsel of the North Carolina State Bar were duly adopted by the Council of the North Carolina State Bar at its meeting on January 17, 1992, and the amendments as certified were duly adopted at a regularly called meeting of the Council.

Given over my hand and the Seal of the North Carolina State Bar, this the 17th day of January, 1992.

B. E. JAMES
Secretary

After examining the foregoing amendments to the Rules and Regulations Relating to Appointment of Counsel of the North Carolina State Bar as adopted by the Council of the North Carolina State Bar, it is my opinion that the same are not inconsistent with Article 4, Chapter 84 of the General Statutes.

This the 4th day of March, 1992.

JAMES G. EXUM
Chief Justice

Upon the foregoing certificate, it is ordered that the foregoing amendments to the Rules and Regulations Relating to Appointment of Counsel of the North Carolina State Bar be spread upon the minutes of the Supreme Court and that they be published in the forthcoming volume of the Reports as provided by the Act incorporating the North Carolina State Bar.

This the 4th day of March, 1992.

I. BEVERLY LAKE, JR.
For the Court

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.

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ADMINISTRATIVE LAW AND PROCEDURE

§ 64 (NCI4th). Applicability of current or former provisions as to place for seeking review

Plaintiff's contested case filed in 1983 ended when the State Personnel Commission dismissed the personnel action against him pursuant to a Court of Appeals decision reversing his demotion and ordering that the action be dismissed due to a lack of proper notice; therefore, plaintiff's 1990 petition to the State Personnel Commission for reinstatement to his supervisory position, back pay, attorney fees and expungement of his record was a separate case, and plaintiff was not required to seek review of the Commission's decision in the Wake County Superior Court under former G.S. 150A-45 but could seek review in the superior court of the county of his residence under G.S. 150B-45. *Meyers v. Dept. of Human Resources*, 665.

ADVERSE POSSESSION

§ 8 (NCI4th). Possession under mistake as to boundary

The trial court did not err in instructing the jury that the intent to claim title element of adverse possession is met if defendants took possession under a mistaken belief as to the true boundary between their property and plaintiffs' property but that this element is not met if defendants had "conscious doubt" concerning the state of title. *Sebrell v. Carter*, 322.

The evidence was sufficient to support the jury's verdict finding that defendants did not acquire title by adverse possession to the 167 acres in dispute. *Ibid.*

§ 45 (NCI4th). Nonsuit and directed verdict

The trial court properly submitted the issue of adverse possession to the jury where both parties raised the issue in their pleadings and the evidence tended to show that plaintiffs adversely possessed property within a fence they built in 1957 on property that defendants later purchased. *Wilson v. Pearce*, 107.

APPEAL AND ERROR

§ 80 (NCI3d). Appeal by State from district to superior court

The superior court had jurisdiction to hear the State's appeal from a district court order dismissing charges regardless of whether a valid judgment had previously been entered, and the superior court judge did not err by concluding that defendant had not complied with an earlier order of remand from superior to district court. *State v. Huntley*, 709.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

It was not necessary for plaintiffs to repeat their objections to jury instructions where they had timely submitted proposed instructions to the trial judge. *Foy v. Spinks*, 534.

§ 168 (NCI4th). Mootness of questions involving statutes and ordinances

A challenge to the State Board of Elections' authority to call a special election and to its procedures was not moot even though new town board members had been seated. *Newsome v. N.C. State Bd. of Elections*, 499.

§ 175 (NCI4th). Mootness of other particular questions

The matter of the date of default on a promissory note and the amount of interest awarded by the court in an 11 September 1990 order pursuant to a clause

of the note providing that it would bear interest of twelve percent after default until paid was moot where the note contains a notation that it was "satisfied in full" on 30 October 1990. *Thomas v. Miller*, 589.

§ 209 (NCI4th). Content of notice of appeal in civil actions

That portion of defendant's appeal which questioned the trial court's orders denying defendant's motions to amend its answer is dismissed where defendant's notice of appeal designated only the court's order on unconscionability of the parties' contract, directed verdict, and the subsequent judgment. *Rite Color Chemical Co. v. Velvet Textile Co.*, 14.

§ 322 (NCI4th). Filing date and signature on papers

The Court of Appeals exercised its discretion to hear an appeal even though the proposed record on appeal did not include a copy of the court reporter's certification of delivery of transcript or a copy of the certification of service of the proposed record on appeal. *Wilson v. Bellamy*, 446.

§ 342 (NCI4th). Cross-assignments of error by appellee

A cross-assignment of error was not before the appellate court where defendant did not give notice of appeal and did not file an appellant's brief. *Milliken v. Milliken*, 319.

§ 364 (NCI4th). Omission of necessary part of record; miscellaneous

The merits of an attorney fee award in a child support action were not reached where a copy of the child support order was not included in the record. *Sonek v. Sonek*, 247.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

Assignments of error which were not set out in plaintiff's brief and for which no support was offered were abandoned. *Wilson v. Bellamy*, 446.

§ 425 (NCI4th). Citation of cases; additional authorities

Defendants abandoned an assignment of error by failing to cite authority in support of their argument. *Taylor v. Kenton*, 396.

§ 440 (NCI4th). Reply briefs

The appellees' motion to dismiss the appellants' reply brief was denied where the matters appellees argued in their brief did not arise naturally and logically from the record and question presented. *Newsome v. N.C. State Bd. of Elections*, 499.

§ 447 (NCI4th). Issues first raised on appeal

Defendant's appeal from summary judgment for plaintiff on a claim for equitable distribution is dismissed where defendant attempted to raise for the first time on appeal issues of fraud and the statute of limitations. *Topper v. Topper*, 239.

§ 513 (NCI4th). Affirmance, modification, or reversal generally

The trial court's judgment will stand where the correct result was reached even though the court used incorrect reasoning. *Hinshaw v. Wright*, 158.

§ 556 (NCI4th). Effect of decision on former judgment

A trial court may not grant relief from its judgment which has been upheld on appeal. *Severance v. Ford Motor Co.*, 98.

ARBITRATION AND AWARD

§ 17 (NCI4th). Waiver of right to arbitration generally

The trial court erred in denying defendant's motion to compel arbitration on the basis that defendant had delayed unreasonably in demanding arbitration where defendant demanded arbitration two months after plaintiff breached the contract by filing suit, and defendant did not waive any right to arbitration by delaying the demand until after pursuing other motions and after plaintiff had incurred attorney fees. *Miller Building Corp. v. Coastline Assoc. Ltd. Partnership*, 58.

§ 30 (NCI4th). Arbitration hearing; evidence and witnesses

Arbitrators did not deny respondents a fair hearing on their claim of unauthorized trading on their securities account when they refused to compel the production of original audio tapes of conversations between plaintiff's broker and respondent for expert analysis. *Pinnacle Group, Inc. v. Shrader*, 168.

§ 54 (NCI4th). Award; costs

Arbitrators properly awarded attorney fees as part of the costs where the arbitration agreement provided that New York law should govern, and such law would uphold the arbitrators' award of attorney fees since the costs were expressly provided for in the arbitration agreement. *Pinnacle Group, Inc. v. Shrader*, 168.

ARREST AND BAIL

§ 95 (NCI4th). Resisting arrest generally

An indictment charging defendant with resisting an officer was not fatally defective because of the officer it named where there was evidence that defendant resisted the named officer by running away when the officer told defendant to come back. *State v. Swift*, 550.

§ 111 (NCI4th). Issues regarding sufficiency of evidence of attempted flight

There was no merit to defendant's argument that he was legally entitled to flee from officers because they did not have a reasonable suspicion to stop him. *State v. Swift*, 550.

§ 135 (NCI4th). Right of arrested person to communicate with friends or counsel generally

The right of access to counsel and friends of a defendant arrested for DWI at 1:35 a.m. was not substantially impaired during the crucial period after he was taken before a magistrate at 4:00 a.m. where any confusion concerning the conditions for defendant's release originated with defendant. *State v. Ham*, 658.

ASSAULT AND BATTERY

§ 2 (NCI4th). Civil assault and battery; sufficiency of evidence

The trial court did not err in granting a directed verdict for several of the individual defendants in a civil action arising from an alleged gang rape even if there was a criminal violation. *Wilson v. Bellamy*, 446.

The trial court did not err by granting a directed verdict for defendants on a claim for civil assault arising from an alleged gang rape at a fraternity party where plaintiff admitted that she had no recollection of the happening of the things of which she had accused defendants. *Ibid.*

ASSAULT AND BATTERY — Continued

The trial court correctly granted a directed verdict for some of the individual defendants on a claim for civil battery arising from an alleged gang rape where plaintiff presented no evidence that those defendants ever made any physical contact with her, and incorrectly granted directed verdict for other defendants who testified that plaintiff initiated their touching and that it was consensual. *Ibid.*

ATTORNEYS AT LAW

§ 38 (NCI4th). Withdrawal from case

The trial court did not err in denying defendant's motion to allow her attorney to withdraw and testify where the court determined that other witnesses were available to present the evidence being tendered by defense counsel. *State v. Hart*, 542.

§ 56 (NCI4th). Compensation agreements void as against public policy

A contingent fee contract for alimony and child support based on the amount of an equitable distribution is void as against public policy. *Williams v. Garrison*, 79.

AUTOMOBILES AND OTHER VEHICLES

§ 502 (NCI4th). Negligence in failure to yield to vehicle on dominant highway

Plaintiff motorcyclist's evidence was sufficient for submission to the jury on the issue of whether defendant negligently pulled in front of plaintiff at an intersection. *Cobb v. Reitter*, 218.

§ 637 (NCI4th). Contributory negligence in intersection accidents generally

The evidence required the trial court to submit the issue of whether plaintiff motorcyclist was speeding and was thus contributorily negligent in an intersection accident. *Cobb v. Reitter*, 218.

§ 697 (NCI4th). Identity of driver from circumstantial evidence

Plaintiff was not entitled to a new trial based on the trial court's alleged abuse of discretion in finding that defendant's medical records contained no relevant information on who was driving for purposes of discovery where the circumstantial evidence tended to show that plaintiff was driving and plaintiff failed to show that a different result would have likely occurred had the court not committed the alleged error. *Adams v. Lovette*, 23.

§ 789 (NCI4th). Instruction as to death by vehicle and manslaughter

The trial court did not err in failing to charge the jury on felony death by vehicle in a prosecution in which the court submitted second degree murder and involuntary manslaughter as possible verdicts since that crime is not a lesser included offense of involuntary manslaughter. *State v. Byers*, 377.

§ 813 (NCI4th). Driving under the influence; requirement of alcohol test

Testimony concerning the results of blood tests performed at a hospital may be admitted into evidence under the "other competent evidence" exception in G.S. 20-139.1 even though the tests were not performed in accordance with G.S. 20-16.2 and 20-139.1. *State v. Byers*, 377.

BAILMENT

§ 4 (NCI4th). Delivery of property for storage or repair

Where defendant bailee took plaintiff bailor's boat into its sole possession to perform repairs on the boat, its disclaimer of liability for ordinary negligence in its repair order was against public policy and void as a matter of law. *Brockwell v. Lake Gaston Sales and Service*, 226.

BASTARDS

§ 5 (NCI3d). Competency and relevancy of evidence generally

Evidence in a paternity case as to the mother's reputation for sexual promiscuity was inadmissible to attack her credibility but was admissible to refute her testimony that she had a monogamous relationship with defendant from the time of conception until about the time of the child's birth. *State ex rel. Williams v. Coppedge*, 470.

§ 5.1 (NCI3d). Competency and relevancy of evidence; blood tests

The trial court in a paternity action did not err in refusing to permit an expert in the field of genetic determination of paternity who performed blood grouping tests to state his opinion as to whether defendant was the natural father. *State ex rel. Williams v. Coppedge*, 470.

CONSPIRACY

§ 44 (NCI4th). Conviction and sentencing generally

Although defendant was charged with conspiracy to commit larceny of a motor vehicle and conspiracy to burn personal property, the evidence was sufficient to support only one conviction for conspiracy where it tended to show that defendant and others conspired to steal and burn an officer's car for revenge. *State v. Jacobs*, 83.

One of two sentences for conspiracy to commit armed robbery was vacated where the evidence pointed only to the existence of a single agreement to commit both robberies. *State v. Brooks*, 413.

CONSTITUTIONAL LAW

§ 184 (NCI4th). Former jeopardy; multiple violations of controlled substance laws

The constitutional prohibition against double jeopardy was not violated by defendant's two convictions for trafficking in cocaine by possessing and transporting more than 28 grams. *State v. McCoy*, 686.

§ 186 (NCI4th). Former jeopardy; multiple offenses arising out of operation of motor vehicle

Where defendant was involved in a high speed chase giving rise to several misdemeanor traffic convictions, defendant was not placed in double jeopardy by his trial for assault on a law officer with a deadly weapon, an automobile, which occurred after he was pursued and stopped by officers. *State v. Evans*, 236.

§ 200 (NCI4th). Former jeopardy; kidnapping and rape

The trial court properly exercised its discretion by arresting judgment on a first degree kidnapping conviction rather than on rape or sexual offense convictions in order to avoid placing defendant in double jeopardy. *State v. Summers*, 420.

CONSTITUTIONAL LAW — Continued

§ 247 (NCI4th). Discovery; examination of investigating agency's files

The trial court did not err in reversing its ruling ordering the State to turn over for inspection to defendant all items belonging to defendant in possession of the State or the FBI. *State v. Martin*, 182.

§ 287 (NCI4th). Failure to remove counsel at defendant's request

The trial court did not err by denying defendant's motion to dismiss his court appointed counsel where the only reason cited by defendant was that the attorney had not spent enough time on the case. *State v. Hammonds*, 594.

§ 359 (NCI4th). Nontestimonial disclosures by defendant generally

The trial court did not err in allowing an in-court demonstration requiring defendant to model a mask to aid the jury in determining whether the victim could see the color of defendant's eyes. *State v. Suddreth*, 122.

§ 360 (NCI4th). Testimony or evidence as to defendant's physical condition

The trial court did not err in ordering defendant to stand and display his teeth to the jury in a rape and sexual offense prosecution in which the victim described her assailant as a man with missing teeth. *State v. Summers*, 420.

§ 366 (NCI4th). Prohibition on cruel and unusual punishment; sentences within maximum fixed by statutes

Defendant's sentences for first degree sexual offense and indecent liberties were within the prescribed statutory limitations and therefore were constitutionally valid in the absence of extraordinary circumstances. *State v. Reeder*, 343.

CONTRACTS

§ 80 (NCI4th). Tender of performance

Defendants were not entitled to summary judgment on plaintiff's claim for breach of contract for the sale of corporate stock and assets where an issue of fact existed as to whether defendants' attorney tendered an annual payment to plaintiff on the default date. *Taylor v. Taylor Products, Inc.*, 620.

§ 90 (NCI4th). Anticipatory breach generally

Defendants were not entitled to summary judgment on plaintiff's claim for anticipatory breach of a contract for the sale of corporate stock and assets. *Taylor v. Taylor Products, Inc.*, 620.

§ 106 (NCI4th). Novation and substitution generally

The trial court did not err in concluding that the terms of the parties' 1986 withdrawal agreement superceded and controlled the withdrawal provisions of their 1983 partnership agreement. *Hinshaw v. Wright*, 158.

COSTS

§ 30 (NCI4th). Attorney fees in personal injury actions or property damage suits

It was within the trial judge's discretion whether to award attorney fees as part of the costs where an arbitrator entered an award in favor of plaintiff in a personal injury action and the damages award was confirmed by the trial court. *Bass v. Goss*, 242.

COSTS — Continued

§ 34 (NCI4th). Attorney fees in actions to collect debts; notice requirement

Notice defendants gave plaintiffs for collection of attorney fees did not survive the voluntary dismissal of their initial foreclosure action, and defendants were not entitled to recover attorney fees in their second foreclosure proceeding where they failed again to notify plaintiffs in writing of their intention to seek such fees. *Thomas v. Miller*, 589.

§ 37 (NCI4th). Attorney fees; other particular actions or proceedings

Plaintiffs were not entitled to attorney fees under G.S. 6-19.1 in their class action lawsuit seeking declaratory and injunctive relief where the parties settled the lawsuit but plaintiffs did not succeed on any significant issue which brought about the results they were seeking and were thus not the prevailing party. *House v. Hillhaven, Inc.*, 191.

§ 49 (NCI4th). Other miscellaneous fees

The trial court properly awarded defendants reasonable travel expenses incurred in the enforcement of a promissory note where the note allowed defendants to collect "other reasonable expenses" incurred by them in the enforcement of the note. *Thomas v. Miller*, 589.

COURTS

§ 56 (NCI4th). Superior court jurisdiction generally

The superior court did not have subject matter jurisdiction over a prosecution for publishing unsigned campaign material in connection with an election in violation of G.S. 163-274(7) since a violation of that statute is a misdemeanor. *State v. Petersilie*, 233.

§ 84 (NCI4th). Review of ruling of another superior court judge; motion for summary judgment or judgment on pleadings

Additional defendants who were added to the action after the trial court denied the original defendants' motion for summary judgment were not bound by the earlier ruling and were entitled to a ruling on their summary judgment motion. *Vandervoort v. McKenzie*, 297.

It was error for one superior court judge to determine one defendant's second motion for summary judgment where another judge had denied a prior motion for summary judgment on identical issues by this same defendant. *Ibid.*

Where one judge denies a motion for summary judgment, another judge may not grant summary judgment on the same issue. *Whitley's Electric Service v. Walston*, 609.

§ 85 (NCI4th). Jurisdiction to review rulings of another superior court judge; imposition of sanctions

Where one superior court judge had previously denied Rule 11 sanctions based on defendants' contention that plaintiff's complaint was not grounded in law, a second superior court judge did not have jurisdiction subsequently to impose sanctions based on this same contention, but the second judge did have jurisdiction to determine whether sanctions should be imposed on grounds not considered by the first judge. *Taylor v. Taylor Products, Inc.*, 620.

CRIMINAL LAW

§ 34 (NCI4th). Compulsion and duress; particular circumstances

Testimony that defendant fled with another person after the murder of her grandfather and remained with him under duress was not relevant to the determination of whether defendant was acting in concert with the other person at the time of the murder. *State v. Hart*, 542.

§ 133 (NCI4th). Acceptance of guilty plea

The trial court did not err in a robbery prosecution by refusing to accept defendant's negotiated guilty plea where the judge determined that defendant was not satisfied with his counsel's representation. *State v. Foster*, 581.

§ 139 (NCI4th). Requirement of voluntary and understanding guilty plea; effect of misstatement or misunderstanding of maximum punishment

There was no prejudicial error in the acceptance of a plea entered by a defendant where the court mistakenly informed defendant of the mandatory minimum sentence. *State v. Brooks*, 413.

§ 145 (NCI4th). Factual basis for guilty plea

The trial court must first determine that there is a factual basis for a guilty plea, and the Transcript of Plea alone does not provide an adequate factual basis for the plea. *State v. Brooks*, 413.

§ 260 (NCI4th). Continuance; substitution of private counsel

The trial court did not err by denying defendant's motion for a continuance to retain private counsel. *State v. Foster*, 581.

§ 373 (NCI4th). Expression of opinion; comments to counsel when ruling on objections

The court did not express an opinion on the evidence when defendant objected to the State's introduction of bank records and the court stated, "Would you indicate the inquiry of the witness' familiarity with the system itself. And his position, please." *State v. Martin*, 182.

§ 382 (NCI4th). Examination of witnesses by trial court; clarification of testimony

The trial court did not improperly express or imply an opinion as to defendants' guilt by questions tendered to several prosecution and defense witnesses in an attempt to clarify confusing remarks made by the witnesses. *State v. Hill*, 489.

§ 424 (NCI4th). Jury argument; comment on failure to call defendant's spouse

The State's comment on defendant's wife's failure to take the stand violated G.S. 8-57(a) but was not prejudicial to defendant. *State v. Martin*, 182.

§ 441 (NCI4th). Jury argument; comment on character and credibility of expert witnesses

The prosecutor's jury argument suggesting that the testimony of defendant's expert medical witness was motivated by pay was grossly improper but did not require a new trial in light of the strong and convincing evidence against defendant. *State v. Vines*, 147.

§ 444 (NCI4th). Jury argument; comment on defendant's guilt or innocence

The prosecutor's jury argument that "I didn't do that . . . because I felt that there was sufficient evidence before the jury" was not improper. *State v. Martin*, 182.

CRIMINAL LAW — Continued

§ 449 (NCI4th). Conduct of counsel; racial prejudice

There was no merit to the black defendants' contention that references to a murder victim as white by the prosecutor, the trial court and one defendant's counsel allowed the issue of race to dominate defendants' trial and constituted plain error. *State v. Hill*, 489.

§ 553 (NCI4th). Mistrial; particular testimony

The trial court did not err in failing to grant a mistrial when the State elicited testimony previously determined inadmissible by the trial court where the court polled the jury and determined that the jurors could disregard the testimony. *State v. Vines*, 147.

§ 612 (NCI4th). Insufficiency of evidence; incredible evidence

The trial court properly denied defendant's motion to dismiss a DWI charge on the ground that the arresting officer's testimony was incredible because of a lack of memory concerning the incident, missing notes and a missing alcohol information sheet. *State v. Ferguson*, 692.

§ 685 (NCI4th). Tender of written instructions; requests for instructions

The trial court committed no error in failing to give the instruction requested by defendant where the instruction given by the court was a correct statement of law and substantially conformed to the pattern instruction requested by defendant. *State v. Vines*, 147.

§ 708 (NCI4th). Error in statement of evidence; nonprejudicial statements

The trial court's error in instructing the jury that flight of the accused was some evidence of guilt when there was no evidence to support such an instruction was harmless error. *State v. Hill*, 489.

§ 720 (NCI4th). Correction or cure of misstatement or other error generally

While the better practice is to issue curative instructions immediately following a sustained objection, there was no prejudicial error in the court's failure to reissue general curative instructions upon defendant's request. *State v. Vines*, 147.

§ 750 (NCI4th). Instructions on reasonable doubt, presumption of innocence

The trial court's instruction to the jury that "the highest aim of every legal contest is the ascertainment of the truth" did not shift the burden of proof to defendant and was not plain error. *State v. Summers*, 420.

§ 1043 (NCI4th). Judgment and sentence; conformity to indictment

There was no prejudicial error where a jury returned verdicts of guilty of trafficking in cocaine in an amount between 28 and 400 grams on indictments charging defendant with possessing and transporting more than 28 but less than 200 grams because the evidence clearly indicated possession and transportation of 38 grams of cocaine. *State v. McCoy*, 686.

§ 1079 (NCI4th). Consideration of aggravating and mitigating factors generally; discretion of trial court

Since the trial judge imposed the presumptive sentence for both armed robbery and second degree murder, he was not required to consider either aggravating or mitigating factors. *State v. Hart*, 542.

CRIMINAL LAW — Continued

The trial court did not err in a robbery prosecution by finding in aggravation that the offense was committed following flight from a previous offense and that defendant fired a pistol at individuals trying to apprehend him. *State v. Foster*, 581.

§ 1081 (NCI4th). Consideration of aggravating and mitigating factors; cases where mitigating factors outnumbered aggravating factors

The trial court did not err in finding that one factor in aggravation, that defendant induced another to participate in the commission of the crime which resulted in the death of the victim, outweighed three mitigating factors, including defendant's good character and that the victim himself brought the shotgun to the scene of the crime. *State v. Hill*, 489.

§ 1086 (NCI4th). Findings of aggravating and mitigating factors where two or more convictions are consolidated for hearing or judgment

The court complied with statutory requirements when sentencing defendant for multiple offenses where each Judgment and Commitment form recited that the court made findings of aggravating and mitigating factors, even though there was only one form on which they were listed. *State v. Brooks*, 413.

§ 1091 (NCI4th). Imposition of consecutive sentences

It was within the trial court's discretion to determine that sentences for armed robbery and murder should run consecutively. *State v. Hart*, 542.

§ 1101.1 (NCI4th). Nonstatutory aggravating factors generally

The trial court did not err when sentencing defendant for cocaine trafficking by finding intent to sell as a nonstatutory aggravating factor. *State v. McCoy*, 686.

§ 1186 (NCI4th). Date or nature of prior conviction or underlying crime

The trial court did not err in imposing the maximum term of imprisonment for manufacturing marijuana based on defendant's one prior conviction which was more than fifteen years old. *State v. Tate*, 175.

DEATH

§ 23 (NCI4th). Effect of negligence of sole beneficiary

A son's estate was not barred from recovery against the mother for the wrongful death of the son in an automobile accident on the ground that the alleged wrongdoer was the son's sole heir at the time of his death where the mother renounced her right to inherit from the son in favor of the son's two sisters. *Evans v. Diaz*, 436.

DEDICATION

§ 12 (NCI4th). Offer of dedication

A clause in a deed "excepting and reserving" from the conveyance an existing road to "the general public" constituted an offer of dedication of the road to the general public. *Bumgarner v. Reneau*, 362.

§ 13 (NCI4th). Acceptance of dedication

Acceptance of an offer of dedication of a road is implied when the road is used by the general public coupled with control of the road by public authorities for a period of twenty years or more. *Bumgarner v. Reneau*, 362.

DEEDS

§ 59 (NCI4th). Effect of rule against perpetuities

A right of first refusal was void and a conveyance pursuant to that right was void because the reservation of right for 25 years extended beyond 21 years in gross. *Mizell v. Greensboro Jaycees*, 284.

§ 79 (NCI4th). Enforcement of restrictive covenants where enforcing parties are specified in deed

The trial court did not err by denying defendants' motion to dismiss based on plaintiffs' alleged lack of standing where defendants contended that the developer was the only person with standing to challenge the violation of these restrictive covenants. *Taylor v. Kenton*, 396.

§ 85 (NCI4th). Enforcement of residential-only covenants

The trial court correctly granted summary judgment for plaintiffs in an action for injunctive relief to prevent defendants from constructing a driveway across a lot in a residential subdivision in violation of the subdivision's restrictive covenants. *Taylor v. Kenton*, 396.

DESCENT AND DISTRIBUTION

§ 34 (NCI4th). Willful and unlawful killing of decedent

The N.C. Slayer Statute does not establish the order of death between the slayer and the victim for purposes of distributing both the victim's and the slayer's estates. *Mothershed v. Schrimsher*, 209.

DIVORCE AND SEPARATION

§ 139 (NCI4th). Valuation of property; goodwill

The trial court erred in an equitable distribution action by finding that defendant's medical practice had goodwill where defendant was a salaried employee at the time of the separation. *Sonek v. Sonek*, 247.

§ 165 (NCI4th). Distributive awards generally

The trial court's distributive award to plaintiff in an equitable distribution action was not erroneous. *Sonek v. Sonek*, 247.

§ 288 (NCI4th). Changed circumstances as ground for modification of alimony; jurisdiction

A permanent alimony award may not be modified retroactively absent a showing of a sudden emergency. *Hill v. Hill*, 334.

§ 289 (NCI4th). Modification of foreign alimony decrees

A district court which had jurisdiction over both parties had authority to modify a South Carolina alimony order upon a showing of changed circumstances. *Hill v. Hill*, 334.

§ 291 (NCI4th). What constitutes changed circumstances generally

The trial court did not err in increasing a permanent alimony award to plaintiff based on a substantial change in circumstances where the court found that plaintiff's actual needs and expenses have increased substantially while her income has increased only minimally. *Hill v. Hill*, 334.

DIVORCE AND SEPARATION — Continued

§ 377 (NCI4th). Visitation in general

The trial court erred in a child custody action by requiring plaintiff to move within 90 miles of defendant to make it easier for defendant to be more involved with the children. *Milliken v. Milliken*, 319.

§ 392 (NCI4th). Amount of child support generally

The trial court erred in ordering child support payments in an amount less than that mandated by statutory guidelines. *Williams v. Williams*, 615.

§ 417 (NCI4th). Past due child support vested

The trial court erred in denying plaintiff past due child support since the arrearage could be determined by a clear and easily calculated formula and the arrearage was vested in defendant. *Williams v. Williams*, 615.

§ 449 (NCI4th). Child support; obligation to pay college expenses

A provision in a separation agreement that defendant husband "obligates himself to assist the said children in the obtaining of educational training beyond high school" was unenforceable because there was no mutuality of agreement as to a specific amount or percentage of college expenses for which defendant was obligated. *Rosen v. Rosen*, 326.

§ 464 (NCI4th). Commencement and pursuit of child support action generally

The trial court erred by dismissing a child support hearing based on the absence of petitioner where petitioner had not been ordered to appear. *Bass v. Bass*, 439.

EASEMENTS

§ 32 (NCI4th). Creation by prescription; effect of permissive use

Plaintiff's forecast of evidence was insufficient to establish a prescriptive easement in a roadway because his evidence showed that his use of the roadway was permissive rather than adverse. *Vandervoort v. McKenzie*, 297.

§ 45 (NCI4th). Obstructions

The trial court did not err by granting summary judgment for plaintiffs and ordering defendants to remove a fence in an action concerning an easement providing access to a lot owned by defendants where the court ordered that plaintiffs are entitled to make full use of the property so long as they do not interfere with defendant's access for ingress and egress. *Hundley v. Michael*, 432.

ELECTIONS

§ 93 (NCI4th). Generally; authority of the board

The State Board of Elections had the authority to hold a special municipal election where approval by the United States Attorney General was delayed, although no objection was interposed by the Attorney General, and the election was held after the statutorily defined period. *Newsome v. N.C. State Bd. of Elections*, 499.

The State Board of Elections did not err by not following the procedures specified by the Administrative Procedure Act in calling a special election. *Ibid.*

The action of the State Board of Elections in ordering a special election was not null and void under a statute giving the Board authority to make interim

ELECTIONS — Continued

rules and regulations for certain pending elections which become void 60 days after the convening of the next regular session of the General Assembly because the session which convened was a short session, a continuation of the previous regular session. *Ibid.*

ELECTRICITY

§ 3 (NCI3d). Rates

The issuance of an order requiring CP&L to provide NCEMC with its real-time system demand signal would have some impact upon the fairness of the wholesale rates at which NCEMC's member cooperatives are sold electricity, and such issue is more appropriately addressed to the FERC. *State ex rel. Utilities Comm. v. N.C. Electric Membership Corp.*, 136.

EMINENT DOMAIN

§ 87 (NCI4th). Particular takings as for public purpose, use, or benefit; to construct or enlarge public street

A city council acted within its statutory authority in authorizing the condemnation of property to extend an existing street, and one defendant's affidavit that the street was being extended to serve only two lots which already had other access and that the city did not intend to construct improvements upon the condemned area was insufficient to overcome the city council's determination that the street extension was for the public use and benefit. *City of Burlington v. Isley Place Condominium Assn.*, 713.

ENERGY

§ 21 (NCI4th). Construction of power plants

The Utilities Commission did not grant its "unqualified approval" of least cost integrated resource plans submitted by Duke Power and CP&L but only found that the plans were reasonable for analyzing the long-range needs for expansion of facilities for the generation of electricity in North Carolina. *State ex rel. Utilities Comm. v. N.C. Electric Membership Corp.*, 136.

NCEMC was not prejudiced by the Utilities Commission's decision finding the least cost integrated resource plans of Duke Power and CP&L reasonable although the Commission deferred consideration of the testimony of two of NCEMC's witnesses since the testimony raised issues which were more appropriately directed to a proceeding before the FERC. *Ibid.*

The newly-designed least cost integrated resource planning proceeding was not intended to provide an occasion for the issuance of mandatory orders requiring substantive changes in a given utility's operations. *Ibid.*

ESTOPPEL

§ 15 (NCI4th). Acceptance of benefits

Defendant was estopped from denying a modification to a water contract. *Mulberry-Fairplains Water Assn. v. Town of North Wilkesboro*, 258.

EVIDENCE AND WITNESSES

§ 154 (NCI4th). Telephone conversations; identification of caller; voice recognition

The trial court did not err by concluding that a witness had failed to properly authenticate a voice he had heard in a telephone call. *Wilson v. Bellamy*, 446.

§ 174 (NCI4th). Facts indicating state of mind; malice

Evidence that defendant knew his license was revoked and did not have permission to use the car he was driving was admissible to show malice in a prosecution for second degree murder arising from a collision while defendant was driving under the influence of alcohol. *State v. Byers*, 377.

§ 322 (NCI4th). Admissibility of other crimes, wrongs, or acts to show knowledge

Testimony concerning certain of defendant's checks being returned for insufficient funds was relevant to show defendant's knowledge regarding the financial condition of a car dealership and his inability to meet the promises he made to investors regarding a guaranteed return on investment. *State v. Martin*, 182.

§ 339 (NCI4th). Admissibility of other crimes to show malice, premeditation, or deliberation

Evidence that a charge of driving while impaired was pending against defendant at the time of a collision was admissible to show malice in a prosecution for second degree murder arising out of a collision which occurred while defendant was driving under the influence of alcohol. *State v. Byers*, 377.

§ 345 (NCI4th). Other offenses; rape and other sex offenses

The trial court did not err in a prosecution for first degree sexual offense and taking indecent liberties by admitting into evidence defendant's statement concerning a prior incident of taking indecent liberties. *State v. Reeder*, 343.

§ 356 (NCI4th). Other offenses; rape and other sex offenses

The trial court did not err in a prosecution for rape, burglary and kidnapping by admitting statements from defendant which contained references to two other rapes for which he had not been charged. *State v. Hammonds*, 594.

§ 621 (NCI4th). Time of motion to suppress in superior court

Defendant waived his right to challenge the admissibility of blood tests performed at a hospital by failing to make a motion to suppress the test results prior to trial. *State v. Byers*, 377.

§ 694 (NCI4th). Necessity for making record

An assignment of error to the exclusion of evidence was overruled where the record did not disclose what the testimony would have been. *Wilson v. Bellamy*, 446.

§ 701 (NCI4th). Exhibiting defendant to show physical characteristics

The trial court did not err in allowing an in-court demonstration requiring defendant to model a mask to aid the jury in determining whether the victim could see the color of defendant's eyes. *State v. Suddreth*, 122.

The trial court did not err in its limiting instruction about an in-court demonstration requiring defendant to model a hood similar to the one worn by the victim's attacker. *Ibid.*

EVIDENCE AND WITNESSES — Continued

§ 724 (NCI4th). Other criminal activity in which defendant not implicated

An officer's testimony that he was investigating a hit-and-run accident possibly involving a car registered to defendant's wife when he arrested defendant for DWI was relevant to explain the officer's presence at defendant's home, his reason for approaching defendant when defendant drove up to the home, and the nature of the conversation between the officer and defendant. *State v. Ferguson*, 692.

§ 728 (NCI4th). Ownership or possession of firearms or other weapons

Defendant in a robbery prosecution did not show prejudice from the court's refusal to allow testimony concerning ownership of a shotgun. *State v. Foster*, 581.

§ 763 (NCI4th). Substance of incompetent testimony established by competent evidence

Any error by the trial court in allowing a witness to testify as to what defendant meant when he said "we can take him" or "let's get him" was harmless error where there was other proper evidence supporting the conclusion that "let's get him" meant "let's rob him." *State v. Hill*, 489.

§ 765 (NCI4th). Where party opposing admission of evidence had opened door

The trial court in a DWI prosecution did not err in admitting testimony by the arresting officer that a dog was in his patrol car for use in drug interdiction missions where defendant opened the door to such testimony by initially questioning the officer about the dog's presence in his patrol car. *State v. Ferguson*, 692.

§ 842 (NCI4th). Secondary evidence; primary evidence voluminous or complicated

Plaintiff's purported summaries of trip reports were not admissible as summaries of voluminous writings under Rule of Evidence 1006 where they did not accurately represent the underlying documents because they contained additional information as to hourly times of departure and arrival of the drivers which was not shown on the trip reports but was based on speculation by plaintiff. *Coman v. Thomas Manufacturing Co.*, 88.

§ 1009 (NCI4th). Residual hearsay exception; equivalent guarantees of trustworthiness

The trial court erred in a prosecution for taking indecent liberties by ruling that a four year old girl was unavailable to testify because she could not understand the difference between truth and falsehood, but then finding that her earlier out-of-court statements possessed the required circumstantial guarantees of trustworthiness and were admissible at trial. *State v. Stutts*, 557.

§ 1219 (NCI4th). Confession; voluntariness; fact that defendant under arrest or in custody

There was competent evidence in the record to support the trial court's findings in a robbery prosecution that defendant had waived his right to counsel and made his statement freely and voluntarily. *State v. Foster*, 581.

§ 1237 (NCI4th). Statements made during general investigation of crime scene

The trial court erred in denying defendant's motion to suppress his statement to the arresting officers that he had lived at a house where cocaine and drug paraphernalia were found for approximately one month since the statement was obtained as a result of custodial interrogation without Miranda warnings. *State v. Beckham*, 214.

EVIDENCE AND WITNESSES — Continued

§ 1242 (NCI4th). Statements made in police custody following arrest

The trial court did not err by admitting statements made by defendant while in police custody and before he had been advised of his rights where the voir dire testimony supported the judge's findings that the statements were voluntary. *State v. Hammonds*, 594.

§ 1354 (NCI4th). Reading of transcript or confession to jury

The trial court did not err in admitting an officer's notes recording verbatim the questions he had asked defendant and defendant's answers to those questions and in permitting the officer to read his notes to the jury even though the notes were not signed by defendant or admitted by defendant to be correct. *State v. Byers*, 377.

§ 1475 (NCI4th). Possession of weapons after crime

The trial court properly admitted a photograph of weapons found during a search of defendant's car and residence where the victim testified that similar weapons were used against her in a rape, burglary, assault, sexual offense and kidnapping. *State v. Suddreth*, 122.

§ 1767 (NCI4th). Experiments and tests; similarity of conditions generally

In a prosecution for murder of a child who died from burns received from hot water in a bathtub, the trial court did not err in admitting evidence of an experiment conducted by officers to determine the temperature of hot water which they ran into the tub. *State v. Vines*, 147.

§ 1898 (NCI4th). Photographs of defendant; admissibility to show that prior to crime defendant wore items similar to those of person who attacked victim

The trial court properly admitted an arrest report and photograph of defendant to show that defendant, who had brown eyes, had worn blue contact lenses in the past. *State v. Suddreth*, 122.

§ 1932 (NCI4th). Testimony relating to contents of documents

Plaintiff's purported summaries of trip reports were not admissible to explain the contents of the reports where the summaries also contained additional information as to hourly times of departure and arrival of the drivers which was not shown on the reports but was based on speculation by plaintiff. *Coman v. Thomas Manufacturing Co.*, 88.

§ 1942 (NCI4th). Documentary evidence; letters

A letter to a fraternity president reciting various alcohol abuses and placing the fraternity on probationary status was not relevant to time or circumstance in a civil action for damages arising from an alleged gang rape at the fraternity. *Wilson v. Bellamy*, 446.

§ 1958 (NCI4th). Medical records and other medical documents

The trial court erred in a prosecution for first degree sexual offense and indecent liberties by admitting a medical report where the document contained matters which were immaterial and irrelevant and statements which amounted to hearsay upon hearsay. *State v. Reeder*, 343.

EVIDENCE AND WITNESSES — Continued

§ 2024.1 (NCI4th). Parol evidence resolving other ambiguities

In an action to determine the rights and liabilities of the parties pursuant to a withdrawal agreement executed in 1986 which superceded their partnership agreement of 1983, the trial court did not err in allowing defendants to testify about plaintiff's representations concerning a fee for work performed by plaintiff while still part of the firm in order to explain a paragraph of the 1986 agreement regarding receivables. *Hinshaw v. Wright*, 158.

§ 2200 (NCI4th). Expert testimony on identification or comparison of persons

The trial court did not err in excluding the testimony of an expert witness concerning the factors affecting the reliability of eyewitness identification. *State v. Suddreth*, 122.

§ 2201 (NCI4th). Evidence pertaining to the person; hair

Testimony by a hair analysis expert that a hair found at the crime scene is "quite likely to have originated from defendant," coupled with the expert's statistical probability opinion, did not constitute an improper positive identification of defendant. *State v. Suddreth*, 122.

§ 2224 (NCI4th). Practices and paraphernalia of drug trade

The trial court did not err in a prosecution for trafficking in cocaine by allowing an officer to testify concerning the use of ziplock bags and the minimum price of a quantity of cocaine. *State v. McCoy*, 686.

§ 2327 (NCI4th). Post Traumatic Stress Disorder

There was prejudicial error in a rape prosecution in the admission without a limiting instruction of expert testimony that the victim had exhibited reactions and symptoms consistent with PTSD and rape crisis syndrome. *State v. Jones*, 576.

§ 2332 (NCI4th). Testimony by experts in child sexual abuse; characteristics and symptoms of abuse, generally

The trial court properly permitted a psychologist to state her opinion that a child exhibited symptoms consistent with child sexual abuse. *State v. Johnson*, 390.

§ 2337 (NCI4th). Expert testimony; credibility of child victim

The trial court properly admitted the testimony of two examining psychologists in a prosecution for taking indecent liberties and first degree sexual offense. *State v. Reeder*, 343.

§ 2488 (NCI4th). Expert witness' compensation

The trial court did not err in finding that a physician testified as an expert witness rather than as a fact witness where the main purpose for his testimony was to establish the extent of plaintiff's future disability due to rheumatoid arthritis. *Sonek v. Sonek*, 247.

§ 2658 (NCI4th). Waiver of physician-patient privilege; information in medical records

When plaintiff requested defendant's medical records, defendant impliedly waived his alleged privilege where he objected to the request only on the ground of relevance. *Adams v. Lovette*, 23.

EVIDENCE AND WITNESSES — Continued

§ 2808 (NCI4th). Leading questions; similar evidence in record

The trial court did not abuse its discretion in a prosecution for trafficking in cocaine by allowing the prosecutor to ask a leading question on direct examination where the information had previously been admitted without objection. *State v. McCoy*, 686.

§ 2891 (NCI4th). Cross-examination as to particular matters; sexual behavior

The trial court should not have allowed cross-examination of plaintiff concerning her prior sexual experiences and a prior drinking episode in a civil action arising from an alleged gang rape at a fraternity. *Wilson v. Bellamy*, 446.

FALSE PRETENSE

§ 3 (NCI3d). Evidence

Testimony of defendant's attorney that he advised defendant that a security agreement between a car dealership network and a third corporation was void was relevant to show defendant's intent in prosecutions for obtaining property by false pretenses in which it was alleged that defendant pledged the inventory of a bogus car dealership network as collateral. *State v. Martin*, 182.

Intent to repay is no defense to a charge of obtaining property by false pretenses. *Ibid.*

FIDUCIARIES

§ 2 (NCI3d). Evidence of fiduciary relationship

The evidence was sufficient to support the trial court's determination that plaintiff was responsible for procuring life insurance and retirement benefits for a law firm, and that he breached his fiduciary duty to defendants by failing to deliver the insurance policies to defendants within the rescission period as defendants requested. *Hinshaw v. Wright*, 158.

The Superior Court of Forsyth County had subject matter jurisdiction over defendants' claim against plaintiff for breach of fiduciary duty to inform his fellow law partners that he had received an insurance policy prior to the expiration of the rescission period since this conduct fell outside the purview of ERISA. *Ibid.*

GUARANTY

§ 21 (NCI3d). Summary judgment

The trial court did not err by concluding that a guarantor had the right to notice of sale of the collateral. However, summary judgment for the guarantor was reversed where there was a genuine issue of material fact as to whether the sale was commercially reasonable. *Gregory Poole Equipment Co. v. Murray*, 642.

HOMICIDE

§ 15.2 (NCI3d). Defendant's mental condition; malice

Evidence that defendant knew his license was revoked and did not have permission to use the car he was driving was admissible to show malice in a prosecution for second degree murder arising from a collision while defendant was driving under the influence of alcohol. *State v. Byers*, 377.

HOMICIDE — Continued

§ 21.7 (NCI3d). Sufficiency of evidence of guilt of second degree murder

Evidence tending to show that defendant deliberately placed his infant stepdaughter in a tub of scalding hot water was sufficient to show the malice required to support a verdict of second degree murder. *State v. Vines*, 147.

§ 30.2 (NCI3d). Submission of question of guilt of manslaughter; generally

There was no plain error in a second degree murder prosecution in the court instructing the jury on voluntary manslaughter. *State v. Mathis*, 402.

§ 295 (NCI4th). Second degree murder; killing by beating and the like

The evidence was sufficient to support defendant's conviction of second degree murder of her grandfather where the evidence showed that defendant distracted the victim and an accomplice beat the victim with a baseball bat. *State v. Hart*, 542.

§ 375 (NCI4th). Acting in concert; second degree murder

There was sufficient evidence to support defendant's conviction of second degree murder under the theory of acting in concert where defendant and a codefendant planned either to rob or assault the victim, defendant hit the victim, the victim pulled a gun out of his coat, and the codefendant took the gun from the victim and shot and killed him. *State v. Hill*, 489.

§ 550 (NCI4th). Instructions on lesser included offenses generally

The trial court in a murder prosecution did not err in refusing to submit to the jury the lesser included offense of misdemeanor assault. *State v. Hill*, 489.

§ 637 (NCI4th). Defense of habitation or property generally

Defendant was entitled to an instruction on the defense of habitation where his evidence tended to show that the victim entered defendant's home, assaulted him, left the home, and was shot by defendant as he attempted to reenter defendant's home. *State v. Marshall*, 518.

INDICTMENT AND WARRANT

§ 15 (NCI3d). Time for making motion to quash, and waiver of defects

When defendant entered his plea and proceeded to trial without a motion to quash the citation charging him with DWI, defendant waived his right to challenge the sufficiency of the citation on the ground that neither he nor the issuing officer signed portions of the citation indicating delivery to defendant. *State v. Ferguson*, 692.

INSURANCE

§ 6.1 (NCI3d). Construction and operation of policies; meaning of words and phrases

The language of a fidelity insurance policy did not require defendant to pay the lost interest on an amount stolen by plaintiff's former president where the policy specifically provides that the term "loss" does not include "damage" to money. *Empire of Carolina v. Continental Casualty Co.*, 675.

§ 69 (NCI3d). Protection against injury by uninsured or underinsured motorists generally

Summary judgment was correctly granted for plaintiff insurance company in an action arising from an accident involving a van transporting defendants to

INSURANCE — Continued

work where defendants sought to stack UIM coverage. *Aetna Casualty and Surety Co. v. Fields*, 563.

The trial court correctly recognized that plaintiff was entitled to stack coverage where she was injured while driving her father's car with his permission and was a person insured under the policy. *Jones v. General Accident Insurance Co. of America*, 612.

INTOXICATING LIQUOR

§ 24 (NCI3d). Dram shop

The trial court erred by granting defendant's motion to dismiss where plaintiff brought a wrongful death action for serving the decedent a large drink containing various liquors after being informed that decedent was driving and did not need another drink. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 705.

JURY

§ 7.14 (NCI3d). Manner, order, and time of exercising peremptory challenges

The State showed neutral reasons for the exercise of peremptory challenges excusing two black jurors. *State v. Martin*, 182.

KIDNAPPING

§ 1.2 (NCI3d). Sufficiency of evidence

The State's evidence was sufficient to support defendant's conviction of kidnapping the victim for the purpose of facilitating a felonious assault upon her companion. *State v. Brayboy*, 370.

LANDLORD AND TENANT

§ 11 (NCI3d). Assignment and subletting

The trial court erred by granting defendant's motion to dismiss where plaintiffs filed an action seeking past-due rent and damages and the court erroneously found that an agreement between the original tenant and defendant was a sublease rather than an assignment, so that there was no privity of contract. *Northside Station Associates Partnership v. Maddry*, 384.

§ 19.1 (NCI3d). Defenses; recovery back of payment

The trial court improperly instructed the jury on the measure of damages under the Residential Rental Agreements Act. *Foy v. Spinks*, 534.

LARCENY

§ 6 (NCI3d). Competency and relevancy of evidence

The prosecutor was properly permitted to ask defendant if the owner of a stolen vehicle had previously found marijuana in defendant's pants pockets and whether defendant was angry because the owner had arrested him for possession of marijuana to show defendant's motive to steal and burn the owner's vehicle. *State v. Jacobs*, 83.

LARCENY — Continued

§ 7.2 (NCI3d). Identity of property stolen; value of property

The trial court did not err in failing to submit a verdict of misdemeanor larceny to the jury where the only evidence of the value of the car at the time it was stolen was that it was worth $3,500, and all defendant's evidence of value related to the car before the owner restored it and made it driveable. *State v. Jacobs*, 83.

§ 8 (NCI3d). Instructions generally

The trial court did not err to defendant's prejudice by submitting to the jury the possible verdict of aiding and abetting misdemeanor larceny where the evidence was sufficient for the jury to find that defendant aided and abetted felonious larceny by driving the actual perpetrator to and from the crime scene. *State v. Lawson*, 329.

LIMITATION OF ACTIONS

§ 4 (NCI3d). Accrual of right of action and time from which statute begins to run in general

An administrative civil penalty assessment was barred by the statute of limitations; a cause of action accrues under the Sedimentation and Pollution Control Act the last date a violation occurs, but the statute of limitation is inoperative as long as a violation continues. *Ocean Hill Joint Venture v. N.C. Dept. of E.H.N.R.*, 277.

MALICIOUS PROSECUTION

§ 13 (NCI3d). Sufficiency of evidence

The evidence was sufficient for the jury in an action for malicious prosecution of an embezzlement case in which defendant provided police with all documents used in the prosecution. *Williams v. Kuppenheimer Manufacturing Co.*, 198.

Plaintiff husband's evidence was sufficient for the jury in an action against both of his next door neighbors for malicious prosecution arising from the arrest of plaintiff while he was mowing the grass on his side of a fence placed by plaintiffs around disputed property. *Wilson v. Pearce*, 107.

MASTER AND SERVANT

§ 3.1 (NCI3d). Distinction between employee and independent contractor; evidence of employer's control and supervision of work

Summary judgment was correctly granted for defendant in a wrongful death action based on respondeat superior where defendant owned a piece of real estate which he decided to develop; defendant hired Morrison Construction and Septic Tank Company to install the system; Morrison hired plaintiff's decedent; and plaintiff's decedent was killed when a trench collapsed during installation of the system. *Cook v. Morrison*, 509.

§ 21 (NCI3d). Liability of contractee for injuries to third persons

Summary judgment was properly granted for defendant landowner on a negligent hiring claim arising from the death of a contractor's employee in a trench cave-in. *Cook v. Morrison*, 509.

MASTER AND SERVANT — Continued

§ 48 (NCI3d). Employers subject to Act

The Industrial Commission properly concluded that the owner of a house was not a joint or co-general contractor on the work site when plaintiff sustained a compensable injury. *Postell v. B&D Construction Co.*, 1.

The Industrial Commission properly pierced the corporate veil and determined that the president of defendant corporation was personally liable for the corporation's failure to obtain workers' compensation insurance. *Ibid.*

§ 50 (NCI3d). Independent contractors

The Industrial Commission properly found that defendant owner was not an employer of plaintiff carpenter who was doing frame work on the owner's house but that plaintiff was an independent contractor. *Postell v. B&D Construction Co.*, 1.

§ 69 (NCI3d). Amount of recovery

A workers' compensation award for permanent and total disability without a credit for prior payments for partial disability was affirmed but remanded for a determination of whether plaintiff's compensation must be adjusted due to any overlap between the periods of payment. *Gray v. Carolina Freight Carriers*, 480.

A workers' compensation award for permanent and total disability without apportionment for a prior injury was affirmed. *Ibid.*

§ 71 (NCI3d). Computation of average weekly wage under exceptional circumstances

The Industrial Commission properly computed the average weekly wage of a carpenter who worked sporadically by taking his total earnings for the year, excluding dates of temporary total disability, dividing by the total days of available work, and multiplying by seven. *Postell v. B&D Construction Co.*, 1.

§ 77.2 (NCI3d). Modification and review of award; time for application

The hearing commissioner improperly raised the question of the statute of limitations at the compensation hearing and erroneously put the burden on plaintiff to prove that his claim was not barred by the one-year statute of limitations in G.S. 97-47. *Vieregge v. N.C. State University*, 633.

§ 91 (NCI3d). Filing of claim generally

The Industrial Commission erred in a workers' compensation action by dismissing plaintiff's claim as barred by the statute of limitations where plaintiff was not incapable of earning the wages he had received at the onset of his illness until well within the limitations period. *Rutledge v. Stroh Companies*, 307.

§ 94.3 (NCI3d). Rehearing and review by Commission

The Industrial Commission failed to carry out its duties under G.S. 97-85 when it entered an order stating that "[t]he undersigned have reviewed the record in its entirety and find no reversible error" and that the Commission "affirms and adopts as its own the Opinion and Award as filed." *Vieregge v. N.C. State University*, 633.

Where the record before the full Commission disclosed that the hearing commissioner had not conducted a complete hearing and that his findings were inadequate to support his conclusion that plaintiff's compensation claim was barred by the one-year statute of limitations of G.S. 97-47, it was the duty of the full Commission to conduct its own hearing, make findings, draw conclusions and enter the appropriate order. *Ibid.*

MASTER AND SERVANT — Continued

§ 95.1 (NCI3d). Procedure to perfect appeal

Appeal from an opinion and award of the Industrial Commission is dismissed where notice of appeal was not timely filed. *Goins v. Sanford Furniture Co.*, 244.

§ 97.1 (NCI3d). Remand

When the appellate court remands a case to the Industrial Commission for further review, findings and entry of an appropriate order, it is not sufficient for the full Commission to remand the case to the hearing commissioner to carry out its duties. *Vieregge v. N.C. State University*, 633.

§ 108 (NCI3d). Right to unemployment compensation generally

The Employment Security Commission's finding that claimant failed to present evidence of adequate health reasons to justify leaving her employment was erroneous, the findings were insufficient to support the Commission's conclusion that claimant left her employment without good cause attributable to her employer, and the cause must be remanded for proper findings and an additional evidentiary hearing if necessary. *Johnson v. U.S. Textiles Corp.*, 680.

The appeals referee had the responsibility to assist a pro se claimant for unemployment compensation by asking her relevant questions which would have given her the opportunity to show that she left her employment for adequate health reasons. *Ibid.*

§ 108.1 (NCI3d). Right to unemployment compensation; effect of misconduct

Petitioner was not entitled to receive unemployment benefits where he was discharged following his conviction for possession of cocaine with intent to sell or deliver. *Lynch v. PPG Industries*, 223.

MORTGAGES AND DEEDS OF TRUST

§ 32.1 (NCI3d). Restriction of deficiency judgments respecting purchase-money mortgages and deeds of trust

The anti-deficiency statute prohibits a holder of a second purchase money deed of trust from bringing an in personam action on the purchase money note after the security for the note has been destroyed by foreclosure of the first deed of trust. *Paynter v. Maggiolo*, 312.

§ 33.1 (NCI3d). Foreclosure; disposition of surplus proceeds

Summary judgment should have been granted for defendant trustee where the purchasers at a foreclosure on a junior lien and defendant trustee had agreed that the purchase price would include a sum to be paid in discharge of the senior lien so that clear title would pass to the purchasers and plaintiffs filed this action claiming those funds as surplus. *Shaikh v. Burwell*, 291.

§ 36 (NCI3d). Estoppel and waiver of right to attack foreclosure

The trial court erred by granting summary judgment for plaintiffs in an action to recover allegedly surplus funds from the foreclosure of a junior lien where plaintiffs had requested a notice of satisfaction from the senior lienholder, to whom the funds were paid. *Shaikh v. Burwell*, 291.

MUNICIPAL CORPORATIONS

§ 5.2 (NCI3d). Proprietary functions

The trial court correctly granted partial summary judgment for plaintiff in an action in which plaintiff water company alleged that defendant had breached a price provision in a contract under which defendant sold water to plaintiff. *Mulberry-Fairplains Water Assn. v. Town of North Wilkesboro*, 258.

§ 22 (NCI3d). Formation and construction of contracts; duration of contracts

The trial court did not err by concluding that the effect of a new water rate was a breach of contract, but erred by deciding as a matter of law that the contract under which defendant sold water to plaintiff had not been modified. *Mulberry-Fairplains Water Assn. v. Town of North Wilkesboro*, 258.

§ 30.6 (NCI3d). Special permits and variances

Petitioners had sufficient competent and material evidence before the Town Board to establish their entitlement to a special use permit for a day care facility, and the Town Board must then have before it competent, material and substantial evidence to the contrary in order to deny the permit. *Triple E Associates v. Town of Matthews*, 354.

§ 30.11 (NCI3d). Zoning ordinances; specific businesses, structures, or activities

Plaintiff city's forecast of evidence was sufficient to raise a genuine issue of material fact as to whether defendant's operation of a rock quarry within the city limits was prohibited by a zoning ordinance enacted by the city council in 1973 although plaintiff failed to produce a copy of the 1973 ordinance at the summary judgment hearing. *City of High Shoals v. Vulcan Materials Co.*, 424.

§ 30.19 (NCI3d). Changes in continuation of nonconforming use

Petitioner's intent to resume operation of an oil refinery on its property was irrelevant in determining whether the property's use as a refinery had been discontinued, and respondent board of adjustment properly informed petitioner that it would need a special use permit for oil refinery operations to resume on its property because use of the property as an oil refinery had been discontinued for greater than 365 days. *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 32.

§ 30.21 (NCI3d). Hearing in zoning proceeding

Petitioner was not denied due process by respondent board of adjustment's refusal to reopen a hearing on discontinuance of a nonconforming use to allow petitioner to present additional evidence which it contended was newly discovered. *CG&T Corp. v. Bd. of Adjustment of Wilmington*, 32.

NARCOTICS

§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient

The evidence was sufficient to support defendant's conviction for possession of drug paraphernalia. *State v. Beckham*, 214.

There was sufficient evidence for the trial court to deny defendant's motions to dismiss cocaine trafficking charges where cocaine and ziplock bags were found under defendant's suit bag on a bus. *State v. McCoy*, 686.

NARCOTICS — Continued

§ 4.3 (NCI3d). Sufficiency of evidence of constructive possession; cases where evidence was sufficient

Evidence of defendant's constructive possession of a growing marijuana plant and drying marijuana found on his premises and patches of marijuana growing near his home was sufficient to be submitted to the jury in a prosecution for manufacturing marijuana. *State v. Tate*, 175.

NEGLIGENCE

§ 2 (NCI3d). Negligence arising from the performance of a contract

A licensed real estate appraiser who performs an appraisal of real property at the request of a client does not owe a prospective purchaser of such property who relies on the appraisal a duty to use reasonable care in the preparation of the appraisal. *Ballance v. Rinehart*, 203.

§ 10.2 (NCI3d). Foreseeability of intervening act

Where defendant's vehicle struck a utility pole and caused an electrical fire in a house across the street, defendant could not reasonably foresee that a resident of the house would arrive on the scene, enter the house while water was being applied to it, and injure his back in the process of retrieving personal property. *Westbrook v. Cobb*, 64.

§ 10.3 (NCI3d). Intervening causes; negligence on the part of others

Statements of defense counsel in a medical negligence action concerning a pharmacist who was not a party to the action did not raise a question of insulating negligence, but addressed the cause-in-fact element of plaintiff's prima facie case of negligence. *Wallace v. Haserick*, 315.

§ 13.1 (NCI3d). Contributory negligence; knowledge and appreciation of danger; degree and standard of care in discovery and avoidance of danger

The trial court did not err in a negligence action by granting a directed verdict for defendant based on contributory negligence where plaintiff fell after stepping on a tree limb left in her yard by defendant. *Dunbar v. City of Lumberton*, 701.

§ 17 (NCI3d). Doctrine of rescue

The rescue doctrine was not applicable in a case where plaintiff purposefully left a place of safety to enter his house to extricate belongings after a fire had been extinguished but while water was still being administered to the house. *Westbrook v. Cobb*, 64.

§ 35.1 (NCI3d). Particular cases where evidence discloses contributory negligence as a matter of law

The trial court did not err by granting a directed verdict for a fraternity on negligence claims arising from a sexual battery at a fraternity party where plaintiff admitted consuming half a bottle of champagne, at least five or six beers, and a shot of liquor, and failed to present sufficient evidence of willful or wanton negligence. *Wilson v. Bellamy*, 446.

§ 50 (NCI3d). Excavating and duty to shore up

Summary judgment was properly entered for defendant landowner in a wrongful death action arising from a trench cave-in where the facts did not show that

defendant knew or should have known of the circumstances creating the danger to which the defendant was exposed. *Cook v. Morrison*, 509.

PARENT AND CHILD

§ 1.5 (NCI3d). Procedure for termination of parental rights; right to counsel

In a proceeding for termination of parental rights involving an Indian child, a dual burden of proof is created in which the state provision, that grounds for termination must be supported by clear and convincing evidence, and federal provisions requiring evidence which justifies termination beyond a reasonable doubt, must be satisfied separately. *In re Bluebird*, 42.

The trial court's appointment of counsel in a termination of parental rights proceeding sufficiently protected respondent's rights where the trial judge determined at the first hearing to declare the child neglected or abused that respondent was not indigent and not entitled to court-appointed counsel, and the court appointed counsel to represent respondent when the petition to terminate parental rights was filed. *Ibid.*

The termination of an incarcerated respondent's parental rights at a hearing where he was represented by counsel but not present did not violate his state or federal constitutional rights or his statutory rights. *In re Murphy*, 651.

§ 1.6 (NCI3d). Competency and sufficiency of evidence in termination proceedings

The evidence was sufficient to support termination of respondent's parental rights on grounds of neglect, willful abandonment, and willfully leaving her child in foster care for more than eighteen months without reasonable progress being made toward correcting those conditions which led to removal of the child. *In re Bluebird*, 42.

Evidence beyond a reasonable doubt supported the termination of respondent's parental rights and thus met the federal burden of proof under the Indian Child Welfare Act where it tended to show that respondent abandoned the child, neglected him and left him in foster care for more than eighteen months, and a psychologist testified as to the child's success in the home of foster parents, the manner in which the foster parents had encouraged the child's Native American heritage, and the child's living arrangements, happiness, and security. *Ibid.*

Because the evidence strongly supported the trial court's order terminating parental rights, the trial court's erroneous statement in its termination order that parental rights were being terminated pursuant to nonexistent statutes was harmless. *Ibid.*

PARTNERSHIP

§ 4 (NCI3d). Rights and liabilities of partners as to third persons ex contractu

The trial court erred in assigning to each defendant a pro rata share of the debt owed to plaintiff pursuant to the parties' agreement for plaintiff's withdrawal from the law firm. *Hinshaw v. Wright*, 158.

PLEADINGS

§ 10.1 (NCI3d). Affirmative evidence; new matter in avoidance

The trial court did not err in a medical negligence action by allowing defendants' counsel to make statements about a pharmacist (who was not a party to

PLEADINGS — Continued

the action) misreading a prescription because those statements do not raise a question of insulating negligence, but address the cause-in-fact element of plaintiff's prima facie case of negligence. *Wallace v. Haserick*, 315.

PROCESS

§ 9 (NCI3d). Personal service on nonresident individuals in another state

The trial court did not err in denying defendant's motion to dismiss for lack of jurisdiction under North Carolina's long arm statute where defendant was an out of state attorney who contracted with a North Carolina corporation for expert consulting on weather. *Climatological Consulting Corp. v. Trattner*, 669.

§ 9.1 (NCI3d). Minimum contacts

The requirements of the due process clause for jurisdiction were satisfied where an out of state attorney contracted with a North Carolina corporation for expert consulting where the majority of plaintiff's services would be performed in North Carolina. *Climatological Consulting Corp. v. Trattner*, 669.

§ 14 (NCI3d). Service of process on foreign corporation

The sole act of a manufacturer's intentional injection of its product into the stream of commerce provides sufficient grounds for a forum state's exercise of personal jurisdiction over the foreign manufacturer defendant. *Cox v. Hozelock, Ltd.*, 52.

RAPE AND ALLIED OFFENSES

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The State's evidence was insufficient to show that defendant intended to engage in forcible, nonconsensual intercourse with the victim and was thus insufficient to support defendant's conviction of attempted second degree rape. *State v. Brayboy*, 370.

The State's evidence was sufficient to support defendant's conviction of two first degree sexual offenses of fellatio against two five-year-old girls. *State v. Johnson*, 390.

The trial court did not err by denying defendant's motion to dismiss a charge of first degree sexual offense. *State v. Reeder*, 343.

§ 6.1 (NCI3d). Instructions on lesser degrees of the crime

The trial court in a prosecution for first degree sexual offense did not err in refusing to instruct the jury as to the lesser offense of attempted first degree sexual offense. *State v. Johnson*, 390.

§ 19 (NCI3d). Taking indecent liberties with child

The trial court did not err by denying defendant's motion to dismiss a charge of taking indecent liberties with a child. *State v. Reeder*, 343.

REFERENCE

§ 7.1 (NCI3d). Exceptions and objections to report of referee

The trial court did not err in adopting the referee's proposed findings of fact and conclusions of law where plaintiff merely alleged that the referee im-

REFERENCE — Continued

properly failed to find certain facts favorable to its position, since such exceptions did not present any question to the trial court for review. *Wilson Ford Tractor v. Massey-Ferguson, Inc.*, 570.

ROBBERY

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

The evidence was sufficient to support defendant's conviction of armed robbery of her grandfather where it tended to show that defendant distracted the victim and that an accomplice beat the victim with a baseball bat and took his wallet. *State v. Hart*, 542.

§ 6.1 (NCI3d). Sentence

Consecutive sentences imposed for two armed robberies were vacated and remanded where the trial court had concluded that consecutive sentences were required by statute. *State v. Brooks*, 413.

RULES OF CIVIL PROCEDURE

§ 6 (NCI3d). Time

The trial court did not err in dismissing plaintiff's case on the ground that it did not have authority to extend the time for issuing the alias and pluries summons so that it would relate back to the original summons since the action was discontinued when the alias and pluries summons was filed 92 days after issuance of the original summons, and the action was deemed to have commenced on the date the alias summons was issued. *Dozier v. Crandall*, 74.

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court properly imposed Rule 11 sanctions against an attorney for filing a proceeding not well grounded in fact, not warranted by existing law, and interposed for an improper purpose where the attorney filed a petition for partition and sale of lakefront property belonging to respondent and her husband in violation of a temporary restraining order postponing the sale of the property and effectively barring the attorney from taking any such action. *Williams v. Garrison*, 79.

The trial court's failure to make findings and conclusions in an order imposing or denying sanctions generally requires remand in order for the trial court to resolve any disputed factual issues, but remand was not necessary when there was no evidence in the record which would support the imposition of sanctions against plaintiff on any basis asserted by defendants. *Taylor v. Taylor Products, Inc.*, 620.

Defendants' evidence was insufficient to support the imposition of Rule 11 sanctions against plaintiff on the ground that discovery sought by plaintiff in his action against defendants for breach of a contract for the sale of corporate stock and assets was for an improper purpose. *Ibid.*

Plaintiff's failure to accept defendants' offer of judgment for the total amount due under a contract for the sale of corporate assets and stock did not show that plaintiff instituted an action on that contract for an improper purpose so as to support Rule 11 sanctions against plaintiff where plaintiff had a viable claim for treble damages at the time he refused to accept defendants' offer of judgment. *Ibid.*

RULES OF CIVIL PROCEDURE — Continued

§ 55 (NCI3d). Default judgment

The trial court erred in granting default judgment pursuant to Rule 55(b) where the basis for plaintiff's pursuit of default judgment was defendant's failure to respond to requested discovery, and Rule 37(d) was thus the proper rule under which plaintiff should have sought relief. *O'Neal v. Murray*, 102.

§ 56.1 (NCI3d). Summary judgment; timeliness of motion; notice

There was no prejudicial error in the granting of summary judgment while discovery was incomplete because the discovery related to defendant's affirmative defenses and would not have created any genuine issue of material fact on the issue on which summary judgment was granted. *Empire of Carolina v. Continental Casualty Co.*, 675.

§ 56.7 (NCI3d). Summary judgment in negligence cases

The denial of defendants' motion to dismiss for failure to state a claim for relief did not preclude another judge from subsequently granting defendants' motion for summary judgment. *Taylor v. Taylor Products, Inc.*, 620.

§ 59 (NCI3d). New trials; amendment of judgments

A jury arbitrarily ignored the evidence of plaintiff's pain and suffering in an action seeking damages as a result of intentional sexual harassment and molestation. *Daum v. Lorick Enterprises*, 428.

§ 60 (NCI3d). Relief from judgment or order

Relief from a judgment does not cancel a satisfaction of that judgment so as to require vacation of a subsequent judgment based upon satisfaction of the prior judgment. *Severance v. Ford Motor Co.*, 98.

§ 60.2 (NCI3d). Grounds for relief from judgment or order

The trial court did not err in denying plaintiff's Rule 60(b) motion to set aside an equitable distribution provision in a divorce judgment granting defendant 38% of plaintiff's military retirement income on the ground of "mistake" under subsection (1) or for "any other reason justifying relief" under subsection (6). *Hoolapa v. Hoolapa*, 230.

§ 60.4 (NCI3d). Relief from judgment or order; appeal

The trial court properly denied plaintiffs' Rule 60(b) motion for relief from summary judgment entered for defendants where plaintiffs asserted that summary judgment was erroneous as a matter of law because the trial court misconstrued their position as to defendants' counterclaim and defendant automobile owner's acceptance of a settlement by plaintiffs' automobile insurance carrier. *Loftis v. Reynolds*, 697.

SCHOOLS

§ 13.1 (NCI3d). Election and reelection of principals and teachers

A probationary teacher has no statutory right to appeal a board of education's decision not to renew her contract but could sue in the appropriate court for alleged statutory violations. *Spry v. Winston-Salem/Forsyth Bd. of Educ.*, 269.

Plaintiff probationary teacher's evidence was insufficient to support a jury finding that defendant board of education failed to renew her contract for arbitrary, capricious or personal reasons in violation of G.S. 115C-325(m)(2). *Ibid.*

SEARCHES AND SEIZURES

§ 15 (NCI3d). Standing to challenge lawfulness of search generally

Defendant did not have standing to challenge the search of a car in which he claimed to be a mere passenger even if the car owner left defendant with the car in order to protect the car from others. *State v. Swift*, 550.

§ 43 (NCI3d). Motions to suppress evidence

Defendant waived his right to challenge the admissibility of seized evidence by failing to make a motion to suppress the evidence pursuant to G.S. 15A-975. *State v. Summers*, 420.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1 (NCI3d). Generally

An adult child who lives at home with his parents and siblings, and who has no minor child of his own, will not be excluded from the computation of the family's food stamp household even if the adult child purchases and prepares meals separately from the others in the home. *Lilly v. N.C. Dept. of Human Resources*, 408.

SPECIFIC PERFORMANCE

§ 2 (NCI3d). Inequitable conduct in making contract; waiver of right to sue; plaintiff's performance or tender of performance

Plaintiff did not waive his right to specific performance where he made an offer to purchase property, the third party defendant exercised its right of first refusal, plaintiff accepted return of his earnest money, and the right of first refusal was held to be void. *Mizell v. Greensboro Jaycees*, 284.

STATE

§ 12 (NCI3d). State employees; State Personnel Commission authority and actions

Respondent did not have just cause to terminate petitioner's employment as a health care technician at the Caswell Center where petitioner became upset and argued with a charge nurse when informed that the bathing procedure for the Caswell Center residents had been changed. *Wiggins v. N.C. Dept. of Human Resources*, 302.

The State Personnel Commission's decision that it lacked subject matter jurisdiction because petitioner had not timely filed her appeal did not deprive petitioner of her due process right to a full and fair hearing. *Sherrod v. N.C. Dept. of Human Resources*, 526.

Written notice of petitioner's dismissal from her employment was adequate under G.S. 126-35 although it was given to her simultaneously with her dismissal. *Ibid.*

The time provision with regard to petitioner's appeal of her dismissal from employment was not vague or ambiguous where the governing provision and letters which petitioner received containing information on how she was to appeal to the next step of the internal grievance procedure clearly referred to "calendar days" rather than "working days." *Ibid.*

Respondent agency's decision to enforce a procedural deadline and dismiss petitioner's appeal because it was not timely filed was neither arbitrary nor capricious. *Ibid.*

STATE — Continued

The Superior Court correctly reversed the Personnel Commission's decision that a state employee's dismissal be upheld because a ruling that an employee's refusal to act amounted to insubordination despite the reasonableness of his fears was clearly erroneous as a matter of law. *Urbeck v. East Carolina University*, 605.

The State Personnel Commission acted arbitrarily and capriciously in refusing to grant plaintiff's petition for reinstatement to his supervisory position, back pay, attorney fees and expungement of his record after the Court of Appeals reversed plaintiff's demotion and ordered that the personnel action against him be dismissed due to lack of proper notice. *Meyers v. Dept. of Human Resources*, 665.

STATUTES

§ 8.1 (NCI3d). Prospective and retroactive effect of particular statutes

The Farm Machinery Franchise Act applied only to franchise agreements created after 1 October 1985 and was inapplicable to an action arising from the termination of a franchise agreement entered into prior to the effective date of the legislation. *Wilson Ford Tractor v. Massey-Ferguson, Inc.*, 570.

TORTS

§ 5 (NCI3d). Judgment in prior action as affecting right to contribution or right to file cross action

A defendant who settles with a plaintiff and invokes G.S. 1B-4 to bar a cross claim for contribution from a codefendant does not extinguish his rights to pursue his own cross claim or counterclaim against the same codefendant for personal and property damages allegedly inflicted upon him by the codefendant. *Menard v. Johnson*, 70.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

Plaintiffs' evidence was sufficient to be submitted to the jury on the issue of intentional infliction of emotional distress by both defendants during a disagreement by next door neighbors over the ownership of land within a fence erected by plaintiffs. *Wilson v. Pearce*, 107.

The trial court did not err by granting a directed verdict for defendants on a claim for intentional infliction of emotional distress arising from an alleged gang rape at a fraternity party where the record only presented some evidence of a sexual battery. *Wilson v. Bellamy*, 446.

§ 10 (NCI3d). Damages for forcible trespass or trespass to the person

The trial court erred in refusing to submit the issue of punitive damages to the jury in an action to recover for intentional infliction of emotional distress arising out of a disagreement between next door neighbors over the ownership of a strip of land. *Wilson v. Pearce*, 107.

TRIAL

§ 3.1 (NCI3d). Motions for continuance; discretion of trial judge

There was no abuse of discretion in the denial of a continuance in an action to enforce subdivision restrictive covenants where defendants asked for the con-

TRIAL — Continued

tinuance so that they could depose the developer of the subdivision, but his testimony was irrelevant to whether building a driveway over a lot violates the restrictive covenants. *Taylor v. Kenton*, 396.

§ 32 (NCI3d). Instructions; purpose; power and duty of court

The Court of Appeals observed in a landlord-tenant action that the jury did not receive preliminary instructions or a clear mandate on each issue. *Foy v. Spinks*, 534.

§ 40.1 (NCI3d). Form of issues

There was reversible error where the trial court submitted one issue which embodied two separate questions, and another which included the term and/or. *Foy v. Spinks*, 534.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices in general

The trial court did not err by denying plaintiffs' motion for a directed verdict on defendant's counterclaim for unfair or deceptive trade practices in a landlord-tenant dispute. *Foy v. Spinks*, 534.

UNIFORM COMMERCIAL CODE

§ 7 (NCI3d). The sales contract; offer and acceptance

A finding that the terms of a contract for the sale of goods are not unreasonably favorable to one of the parties precludes a determination that the contract is unconscionable since a finding of unconscionability requires an absence of meaningful choice on the part of one of the parties (procedural unconscionability) together with contract terms which are unreasonably favorable to the other (substantive unconscionability). *Rite Color Chemical Co. v. Velvet Textile Co.*, 14.

§ 35 (NCI3d). Accommodation parties

A guarantor was not an accommodation endorser because the agreement which was guaranteed was not a negotiable instrument. *Gregory Poole Equipment Co. v. Murray*, 642.

§ 47 (NCI3d). Notice of sale

The trial court did not err by concluding that a guarantor had the right to notice of sale of the collateral, and a predefault waiver of notice was invalid. However, there was a material issue of fact as to whether the sale was commercially reasonable. *Gregory Poole Equipment Co. v. Murray*, 642.

VENDOR AND PURCHASER

§ 10 (NCI3d). Actions involving and interests of third persons

A third party defendant which purchased property pursuant to a void right of first refusal was denied its claim for carrying costs because it admitted knowledge of the lis pendens filed by plaintiff. *Mizell v. Greensboro Jaycees*, 284.

VENUE

§ 4 (NCI3d). Actions against municipalities, counties, and public officers

The trial court correctly denied defendant's motion for a change of venue as a matter of right because the Handicapped Persons Protection Act allows plaintiff the option of bringing suit in the county where the alleged discriminatory action took place or the county where he resides. *Jarrell v. Town of Topsail Beach*, 331.

§ 7 (NCI3d). Motions to remove as matter of right

Although plaintiff's claims for Rule 11 sanctions, attorney fees and unfair trade practices would require a determination of the validity of a lease assignment and the propriety of notice of default and termination to the landlord, the claims did not affect an interest in realty so as to entitle defendant to removal to the county where the leased property was located. *Rose's Stores, Inc. v. Bradley Lumber Co.*, 91.

WATERS AND WATERCOURSES

§ 7 (NCI3d). Marsh and tidelands

A trial court is not required to order the restoration of coastal wetlands (marshlands) to predevelopment condition once the court has determined that there has been unpermitted development activities pursuant to the Coastal Area Management Act and the Dredge and Fill Act. *State ex rel. Cobey v. Simpson*, 95.

WILLS

§ 66 (NCI3d). Lapsed legacies

Where testatrix had both the knowledge and ability to prevent the lapse of the gifts to the parties in her will who would not otherwise be eligible to share in her estate, her failure to do so indicated no testamentary intent to prevent the lapse of such gifts, and there was no basis for the court to conclude that testatrix intended the daughter of one of her husband's half-brothers to take the lapsed shares to the exclusion of all others. *In re Will of Hubner*, 599.

§ 66.1 (NCI3d). Effect of anti-lapse statute

The 1987 amendment to G.S. 31-42(a) ensures that qualified issue will take by substitution the "whole legal share" to which his or her predecessor was entitled, and if the predecessor would have taken a share of a lapsed residuary gift, the qualified issue may also participate in this lapsed gift. *In re Will of Hubner*, 599.

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