

NORTH CAROLINA  
COURT OF APPEALS  
REPORTS

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  2. Appointed and sworn in 1 August 1992 to replace James W. Hardison who became Chief Judge.
  3. Appointed Chief Judge 22 May 1992 to replace Charles E. Rice who resigned as Chief Judge 22 May 1992 and as District Court Judge 31 May 1992.
  4. Appointed and sworn in 22 June 1992.
  5. Resigned 30 June 1992.
  6. Resigned 15 August 1992.



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OF  
NORTH CAROLINA  
AT  
RALEIGH

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KATHERINE W. BRASWELL, EMPLOYEE, PLAINTIFF v. PITT COUNTY MEMORIAL HOSPITAL, EMPLOYER; **SELF-INSURED**, (ALEXIS RISK MANAGEMENT SERVICE), DEFENDANT

No. 9110IC426

(Filed 7 April 1992)

**1. Master and Servant § 75 (NCI3d) — workers' compensation — choice of physician — approval of Commission — findings required**

An Industrial Commission opinion denying workers' compensation for back surgery was remanded where the Commission found that the surgery was not authorized, but did not make findings as to whether approval for any of that doctor's treatment was sought within a reasonable time. Under N.C.G.S. § 97-25, plaintiff may choose her own physician, provided she obtains the approval of the Commission within a reasonable time after such procurement and the treatment is to effect a cure or provide rehabilitation. The first question is whether such approval was sought within a reasonable time, and the Commission must make findings upon this issue. If the Commission finds any of the doctor's services to have been authorized, then the Commission may proceed under the second prong of the statute to determine whether those services, viewed

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[106 N.C. App. 1 (1992)]

as a whole, effected a cure, afforded plaintiff relief, or otherwise lessened her disability.

**Am Jur 2d, Workmen's Compensation §§ 391, 394.****2. Master and Servant § 96.6 (NCI3d) — workers' compensation — maximum medical improvement — finding not based upon sufficient evidence**

An Industrial Commission opinion denying workers' compensation for back surgery was remanded for a de novo hearing on when plaintiff reached maximum medical improvement where the Commission's finding as to that issue was not based upon sufficient competent evidence.

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

Chief Judge HEDRICK concurring.

APPEAL by plaintiff from opinion and award filed 23 January 1991 by the North Carolina Industrial Commission. Heard in the Court of Appeals 9 March 1992.

Plaintiff was employed by defendant Pitt County Memorial Hospital as a registered nurse, for whom she had worked intermittently since 1978 or 1979 when she was a licensed practical nurse. On 19 January 1987 plaintiff and a nurse's aide were assisting a patient back to bed when the patient suddenly went limp causing them to have to support his entire weight in order to prevent him from falling. At that time plaintiff felt a stinging, tingling sensation in her back which radiated into her left buttock. Although she experienced pain during the night she returned to work the next day. After working approximately one hour, however, plaintiff was in severe pain and went to defendant's Employee Health Service for treatment, which sent her home.

On 21 January 1987 plaintiff was seen by Dr. Ramsdell who was a partner of Dr. White, the regular Employee Health Service physician. She was experiencing severe lower back pain and was treated with medication, bed rest, and physical therapy, and was later seen by Dr. White. When treatment was unable to afford her relief and she continued to complain of persistent pain, she was referred to Dr. Jones, a neurosurgeon for whom she indicated a preference.

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Plaintiff was first seen by Dr. Jones on 18 February 1987. He performed various tests and diagnosed her condition as a lumbar strain, recommending further conservative treatment but not surgery. She continued to complain of pain but Dr. Jones released her from his care in April 1987, having nothing further to offer her from a neurological standpoint. Her case was referred back to Dr. White with the indication that another referral might be appropriate.

Plaintiff asked to see another doctor and defendant subsequently sent her to Dr. Bowman, an orthopaedic surgeon, who evaluated her on 4 June 1987. Dr. Bowman diagnosed her condition as a healing or healed sprain superimposed on obesity. He was of the opinion that physically she should be able to return to work at that time but a one-month tapering process back towards work would be helpful to her psychologically and that she should complete her course of rehabilitation. (Plaintiff had a very emotional reaction to her injury which was compounded by the fact that her daughter ran away from home in May 1987). Dissatisfied with Dr. Bowman's evaluation, plaintiff consulted her family physician, Dr. Galloway, on 5 June 1987, who treated her with medication for anxiety and depression.

On 22 June 1987 plaintiff consulted with Dr. Miller, an orthopaedic surgeon, despite the Deputy Commissioner's finding that defendant specifically denied plaintiff's request to see him. Based upon her positive response to a facet joint injection he diagnosed her condition as facet syndrome and recommended surgery to fuse the joint. A motion to allow this change of physicians was filed with the Industrial Commission on 22 July 1987 and forwarded to defendant's insurance carrier. The Commission requested by letter dated 30 July 1987 that the carrier respond to this motion. Neither the carrier nor the Commission responded to plaintiff's motion.

On 19 August 1987 Dr. Miller performed surgery. Plaintiff initially obtained relief from the operation but shortly thereafter her condition began to degenerate. Unable to alleviate her pain, Dr. Miller referred her to Dr. Powers, a neurosurgeon on the faculty at the University of North Carolina at Chapel Hill. Dr. Powers was unable to determine what abnormality had been the basis for the surgery but felt that a single facet injection was not an

## BRASWELL v. PITT COUNTY MEM. HOSP.

[106 N.C. App. 1 (1992)]

adequate basis on which to perform a lumbar fusion absent other signs or symptoms of an injury.

Pursuant to defendant's acceptance of liability the parties entered into an Industrial Commission Form 21 Agreement, which was approved by the Commission on 24 February 1987. Under the terms of this agreement plaintiff was paid weekly temporary disability benefits from 20 January 1987 through 4 July 1987, the date on which Dr. Bowman released her to return to work. Plaintiff subsequently requested a hearing due to the failure of the Commission and its carrier to respond to plaintiff's motion for change of physician and additional rehabilitative treatment. From the opinion and award of the Commission filed 23 January 1991, plaintiff now appeals.

*Harrington and Edwards, by Roberta L. Edwards, for plaintiff appellant.*

*Teague, Campbell, Dennis & Gorham, by Linda Stephens and Kathryn G. Tate, for defendant appellee.*

WALKER, Judge.

[1] The pertinent portion of G.S. 97-25 provides:

Medical compensation shall be provided by the employer. In case of a controversy arising between the employer and employee relative to the continuance of medical, surgical, hospital, or other treatment, the Industrial Commission may order such further treatments as may in the discretion of the Commission be necessary.

The Commission may at any time upon the request of an employee order a change of treatment and designate other treatment suggested by the injured employee subject to the approval of the Commission, and in such a case the expense thereof shall be borne by the employer upon the same terms and conditions as hereinbefore provided in this section for medical and surgical treatment and attendance.

. . . .

[I]f he so desires, an injured employee may select a physician of his own choosing to attend, prescribe and assume the care and charge of his case, subject to the approval of the Industrial Commission.

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Under this statute plaintiff may choose her own physician provided she obtains the approval of the Commission within a reasonable time after such procurement, and the treatment sought is to effect a cure or provide rehabilitation. *Lucas v. Thomas Built Buses*, 88 N.C.App. 587, 364 S.E.2d 147 (1988). Approval is not necessary prior to her seeking assistance from another physician. *Schofield v. The Great Atlantic and Pacific Tea Co.*, 299 N.C. 582, 264 S.E.2d 56 (1980). The first question which must be answered under the statute, then, is whether such approval was sought within a reasonable time. *Forrest v. Pitt County Board of Education*, 100 N.C.App. 119, 394 S.E.2d 659 (1990), *aff'd*, 328 N.C. 327, 401 S.E.2d 366 (1991). The Commission *must make* findings bearing upon this issue for, “[i]f a plaintiff seeks approval of the physician within a reasonable time, if the Commission approves a plaintiff’s choice and if the treatment sought is to effectuate a cure or rehabilitation, then the employer has a statutory duty under [G.S.] 97-25 to pay for the treatment.” *Id.* at 126, 394 S.E.2d at 663; *See also, Hudson v. Mastercraft Div., Collins & Aikman Corp.*, 86 N.C.App. 411, 358 S.E.2d 134, *disc. review denied*, 320 N.C. 792, 361 S.E.2d 77 (1987).

In the case *sub judice* the Industrial Commission found:

8. Although as of 4 July 1987 plaintiff possessed the capacity to return to her normal work which she was performing prior to the time of her on-the-job injury, she made no effort to return to work. In fact, she chose to seek unauthorized medical treatment by a doctor of her own choosing. Unfortunately, his ultimate choice of treatment was inappropriate. Surgery should not have been performed. It did not effect a cure, give relief, of [sic] lessen her disability. Furthermore, the surgery was not authorized by the defendant or the Industrial Commission, and there was no emergency involved.

Any disability which plaintiff suffered after she was released from treatment to return to her normal work as of 4 July 1987 was not the result of her on-the-job injury, but, at least in part, was the result of unauthorized treatment, particularly the surgery by Dr. Miller. Such treatment did not lessen her period of disability but instead lengthened the period of disability. In fact, her condition worsened after the surgery and, thus, did not either effect a cure or give relief or lessen her period of disability.

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The Commission failed to make any preliminary requisite findings of whether plaintiff sought approval by the Commission for treatment by Dr. Miller within a reasonable time after procuring his assistance. Instead, the Commission's holding that plaintiff was not entitled to have the defendant pay for any expenses incurred under Dr. Miller was based upon the second prong of the statute, that the treatment did not effect a cure, give relief or lessen the period of plaintiff's disability. With this analysis we cannot agree.

In *Forrest v. Pitt County Board of Education, supra*, plaintiff was employed as a cafeteria manager when she fell and injured her back in the cafeteria freezer at one of defendant's public schools. She sought medical assistance from Dr. Boone who subsequently performed surgery and treated her with medications and physical therapy. Plaintiff continued to experience pain in her back and leg, however. The Deputy Commissioner concluded as a matter of law that plaintiff was not entitled to have the expenses incurred while under Dr. Boone's care paid pursuant to the provisions of the Workers' Compensation Act because she had chosen to see Dr. Boone on her own. The Full Commission affirmed noting that there was no evidence the surgery performed was in the nature of an emergency or otherwise authorized. This Court stressed that although the Full Commission stated there was no evidence "that the surgery was authorized, . . . [t]here [were] no findings of fact . . . indicating whether approval for any of Dr. Boone's treatment of plaintiff was sought within a reasonable time. *Id.* at 126, 394 S.E.2d at 663. (Emphasis in original). It was noted:

If Dr. Boone was an acceptable choice for a treating physician and the request before the Commission was made in a reasonable time, the next issue to be determined would be whether the services performed effected a cure or rehabilitation. If so, the fees should be paid. We find no findings of fact or conclusions of law addressing these issues as required by the statute.

*Id.* at 127, 394 S.E.2d at 664. Consequently, this Court vacated the portion of the Full Commission's opinion and award dealing with this issue and remanded with directions that "the Commission . . . mold its findings of fact and conclusions of law to conform to the statute." *Id.* at 128, 394 S.E.2d at 664.

Although the limited findings by the Commission in *Forrest* suggested it misconstrued the law to require approval prior to the surgical procedure, that case emphasizes the Commission's duty



## BRASWELL v. PITT COUNTY MEM. HOSP.

[106 N.C. App. 1 (1992)]

to make findings of fact in accordance with the statute. Insofar as the Commission in this case failed to address whether plaintiff requested a change of physician within a reasonable time, we remand this matter to the Commission for further findings on this issue. Upon a finding that the request was made within a reasonable time, the Commission must make a determination of whether approval by the Commission was granted or denied, in light of the Commission's apparent inaction on plaintiff's motion. Although the Commission stated in its Finding of Fact No. 8 that the surgery was not authorized, it must make findings of fact with regard to whether approval for *any* of Dr. Miller's treatment was sought within a reasonable time. The Commission's conclusion that "[p]laintiff is not entitled to have the defendant pay for any of the treatment rendered by Dr. Miller because such treatment was not authorized by the defendant, not approved by the Industrial Commission, was not sought under emergency circumstances, and was not necessary to effect a cure, give relief, or lessen the period of plaintiff's disability" is not amply supported by the findings of fact which stress the unauthorized nature of the *surgery*. If the Commission finds any of Dr. Miller's services to have been authorized then the Commission may proceed under the second prong of the statute to determine whether those services, when viewed as a whole, effected a cure, afforded plaintiff relief or otherwise lessened her disability.

[2] Plaintiff further assigns as error the Commission's determination that she had reached maximum medical improvement on 5 July 1987 and was therefore not entitled to temporary total disability compensation after that date. The Deputy Commissioner found:

8. As a result of this injury by accident, plaintiff was unable to work from July 5, 1987 through August 16, 1988 when this case was heard. She had not reached maximum medical improvement as of that date. No finding is made regarding the extent of any subsequent temporary total disability or permanent partial disability she might have sustained.

The Full Commission struck this finding and determined:

7. On 4 July 1987 plaintiff regained the capacity to earn the same wages which she was earning at the time of the injury in the same or a similar employment. She continued to retain that capacity through the date of the hearing. As

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[106 N.C. App. 1 (1992)]

of 4 July 1987 plaintiff sustained a five percent (5%) permanent partial impairment as a result of the on-the-job injury.

The Commission apparently based its decision upon Dr. Bowman's opinion of 4 June 1987 that plaintiff was capable of returning to work, but that due to her psychological condition a tapering period over the next month would be beneficial. However, we cannot conclude that this finding was based upon sufficient competent evidence. Upon remand, we therefore direct the Commission to conduct a *de novo* hearing on the issue of when plaintiff reached maximum medical improvement.

Reversed and remanded.

Judge ORR concurs.

Chief Judge HEDRICK concurs with a separate opinion.

Chief Judge HEDRICK concurring.

I concur in the opinion of the majority reversing and remanding this proceeding to the Industrial Commission for a "hearing on the issue of when plaintiff reached maximum medical improvement" and for a hearing with respect to "whether plaintiff sought approval by the Commission for treatment by Dr. Miller within a reasonable time after procuring his assistance." In my opinion, the proceeding before the Industrial Commission, in addition to being "*de novo*" as directed by the majority opinion, should be conducted pursuant to the provisions of G.S. 97-85.

In *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988), we undertook, in considerable detail, to explain the duties of the full Commission in reviewing a case pursuant to G.S. 97-85. In *Joyner*, we also explained that the North Carolina Industrial Commission does not judicially review cases pursuant to G.S. 97-85 in the same way that an appellate court reviews cases from the trial courts, and we suggested that the better practice to be followed by the full Commission is to make its own findings of fact, conclusions of law and enter an appropriate order rather than adopt the findings and conclusions of the hearing officer. *Id.* at 482-483, 374 S.E.2d at 613. The full Commission has consistently ignored what we perceived to be helpful suggestions in *Joyner*, and the present case is no different.

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[106 N.C. App. 1 (1992)]

Here, Deputy Commissioner Dianne C. Sellers, writing for the full Commission, stated, *inter alia*, that:

The Full Commission adopts as its own the Opinion and Award, as modified, of the Deputy Commissioner. The result reached by her [Deputy Commissioner Morgan S. Chapman] is hereby, in all respects, MODIFIED and AFFIRMED.

In reality, the decision of the full Commission *reversed* the decision of the Deputy Commissioner requiring defendant to:

1. . . . pay additional temporary total disability compensation to plaintiff at the rate of \$40.38 per week for 23 5/7 weeks for the period from January 20 through July 4, 1987 . . . .

2. . . . pay compensation to plaintiff for temporary total disability at the rate \$146.35 per week for 58 6/7 weeks, for the period from July 5, 1987 through August 16, 1988, and continuing thereafter until she is released to return to work by her physician, she returns to work, or she reaches maximum medical improvement . . . .

3. . . . pay all medical expenses incurred by plaintiff as a result of this injury by accident, excluding those arising from the surgery performed by Dr. Miller, when bills for the same have been submitted through the defendant to the Industrial Commission and approved by the Commission.

Moreover, in its decision, the full Commission found and concluded that:

2. As a result of the compensable injury plaintiff sustained a five percent (5%) permanent partial disability of her back. N.C.G.S. 97-31(15).

Yet, the full Commission made no award for plaintiff's permanent partial disability and gave no explanation as to why no award was made. This omission, as well as the errors cited by the majority, on the part of the full Commission requires that the decision of the full Commission be reversed and the case remanded to the full Commission to "review the award, . . . reconsider the evidence, receive further evidence, rehear the parties or their representatives and, if proper, amend the award" pursuant to G.S. 97-85 without remanding the case to the Deputy Commissioner.

IN THE COURT OF APPEALS  
CITY OF STATESVILLE v. CLOANINGER

[106 N.C. App. 10 (1992)]

CITY OF STATESVILLE, PLAINTIFF-APPELLANT v. JOE A. CLOANINGER AND  
JULIA W. CLOANINGER, DEFENDANTS-APPELLEES

No. 9122SC114

(Filed 7 April 1992)

**1. Eminent Domain § 242 (NCI4th)— flight easement—further takings by increased operations—instruction not required**

In an action to condemn a flight easement over defendants' property, the trial court properly refused to instruct the jury that further compensable takings may occur upon increases in operations since the issue in this case was the compensation for the specific rights taken, and the condemned easement was defined without limitation as to the type of aircraft, number of flights, or amount of noise, vibrations, fumes, dust, fuel particles and all other effects.

**Am Jur 2d, Aviation § 7; Eminent Domain §§ 162, 272.**

**2. Evidence and Witnesses § 572 (NCI4th)— condemnation of flight easement—forecast of airport activity**

In an action to condemn a flight easement across defendants' property for a municipal airport, an exhibit and testimony forecasting activity for the airport from 1978 to 2008 by types of aircraft and frequency of use were relevant and admissible on the issue of damages suffered by the property owners.

**Am Jur 2d, Eminent Domain § 422.**

**3. Evidence and Witnesses § 1724 (NCI4th)— videotape—foundation for admission**

In an action to condemn a flight easement over defendants' property for a municipal airport, a proper foundation was laid for the admission for illustrative purposes of a videotape of an airplane flying over the condemned property where the trial court found that the recorder was operated by a person competent to operate it, that the recording accurately represents the sound of the airplane entering and leaving the airport, that the sound and tape were accurately identified by one landowner, that the tape is accurate and authentic, and that the tape has been in the custody of the operator and has not been altered.

## CITY OF STATESVILLE v. CLOANINGER

[106 N.C. App. 10 (1992)]

**Am Jur 2d, Eminent Domain § 424; Evidence §§ 436, 801.5.**

**Admissibility of visual recording of event or matter giving rise to litigation or prosecution. 41 ALR4th 812.**

**Admissibility of sound recordings in evidence. 58 ALR2d 1024.**

**4. Evidence and Witnesses § 572.1 (NCI4th)— condemnation— value—capitalization of income approach**

The trial court in an action to condemn a flight easement properly permitted two expert witnesses to testify as to the fair market value of the landowners' property before the taking based on a capitalization of income approach.

**Am Jur 2d, Eminent Domain §§ 425, 427, 431.**

APPEAL by plaintiff from judgment entered 30 October 1990 by *Judge Preston Cornelius* in IREDELL County Superior Court. Heard in the Court of Appeals 6 November 1991.

The City of Statesville brought a condemnation action against defendants on 18 June 1989 condemning an easement over 11.5 acres of the defendants' property for "avigational" purposes. The City deposited \$52,200 with the Clerk of Superior Court of Iredell County as just compensation for the taking, and this amount was later disbursed to defendants. At trial on the issue of just compensation, the jury concluded that the defendants were entitled to recover \$350,000. On 30 October 1990 judgment was entered in accordance with the verdict.

From this judgment, plaintiff appeals.

*Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for plaintiff-appellant.*

*Long, Parker, Hunt, Payne & Warren, P.A., by Robert B. Long, Jr. and Ronald K. Payne, for defendant-appellees.*

ORR, Judge.

The City argues 15 issues on appeal. For the reasons below, we affirm the judgment of the trial court.

## CITY OF STATESVILLE v. CLOANINGER

[106 N.C. App. 10 (1992)]

## I.

[1] First the City contends that the trial court erred in denying its request for the following jury instruction:

Members of the jury though the compensation you award today represents all the compensation the defendants will receive for the easement rights being acquired in this action the law of this state recognizes that once a flight easement has been established, further compensable takings may occur upon increases in operations within the easement acquired with consequent decreases in land values significantly beyond the diminutions resulting from the initial taking; and should further flights become so frequent across the defendants' property as to be a direct and immediate interference with the enjoyment and use of their land and result in a substantial decrease in the value of their land beyond the decrease resulting from this taking they would have recourse in the Courts for further damages.

The easement is described as follows:

An easement and right of way, appurtenant to Statesville Municipal Airport for the unobstructed passage of all aircraft, ("aircraft" being defined for the purpose of this instrument as any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air) by whomsoever owned and operated in the air space above Grantors' property above an imaginary plane rising and extending in a generally Easterly direction over Grantors' property, said imaginary plane running from approximately 990 feet Mean Sea level above Point A on Exhibit A at the rate of one foot vertically for each 20 feet horizontally to approximately 1030 feet Mean Sea level above Point B on Exhibit A, to an infinite height above said imaginary plane, together with the right to cause in all air space above the surface of Grantors' property such noise, vibrations, fumes, dust, fuel particles, and all other effects that may be caused by the operation of aircraft landing at, or taking off from, or operating at or on said Statesville Municipal Airport. . . .

Pursuant to N.C. Gen. Stat. § 1A-1, Rule 51 (1990) of the North Carolina Rules of Civil Procedure, "[w]hen a party appropriately tenders a written request for a special instruction which is correct

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in itself and supported by the evidence, the failure of the trial judge to give the instruction, at least in substance, constitutes reversible error." *Millis Constr. Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C. App. 506, 509-10, 358 S.E.2d 566, 568 (1987).

The City cites *Avery v. United States*, 330 F. 2d 640, 642 (Ct. Cl. 1964), an inverse condemnation case, where the issue was "whether the introduction of larger, heavier, noisier aircraft can constitute a fifth amendment taking of an *additional* easement *even though* new aircraft do not violate the boundaries of the initial easement." The landowners in that case argued that the use of an air station for training, the building of longer runways, and the use of large bombers plus the decrease in property values together created a new taking beyond the original one. *Id.* at 641-42. The Court agreed and rejected the government's argument that the avigation easement covered all kinds and numbers of aircraft. *Id.* at 643. The City also cites *Cochran v. City of Charlotte*, 53 N.C. App. 390, 396, 281 S.E.2d 179, 185 (1981), *disc. review denied*, 304 N.C. 725, 288 S.E.2d 380 (1982), an inverse condemnation case, in which we relied on *Avery*, and held that "when compensation for initial takings of flight easements has been established, further compensatory takings occur upon increases in operations or introduction of new aircraft within the easements acquired with consequent decreases in land values significantly beyond the diminutions resulting from the initial takings."

We hold that the trial court's decision not to give the City's requested instruction was proper. "[O]nce an easement is taken, the condemnor ordinarily enjoys the right to use it without incurring further liability to the landowners and successors. That insulation from further liability extends only to the 'defined portion' of property actually taken, however." *Smith v. City of Charlotte*, 79 N.C. App. 517, 527, 339 S.E.2d 844, 850 (1986) (citation omitted). We recognize that further compensable takings of avigation easements may occur on an increase in air traffic. *See Cochran*, 53 N.C. App. at 396, 281 S.E.2d at 185. However, the issue in the case *sub judice* is the compensation for the specific rights taken, and thus an instruction as to the possibility of future compensable takings would not be appropriate.

Unlike the case *sub judice*, *Cochran* is an inverse condemnation action where the number of flights increased greatly. Here the easement defined its perpetual rights with no limitation as to the

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type of aircraft, which is defined in the easement as “any contrivance now known or hereafter invented, used or designed for navigation of or flight in the air,” amount of flights, noise, vibration, fumes, dust, fuel particles, and “all other effects.” In light of the broad nature of the rights acquired, the trial court correctly declined to give the requested instruction.

## II.

[2] Next the City argues that the trial court erred in overruling its objections to the introduction into evidence of defendant’s exhibit of forecast of activity for the airport from 1978 to 2008 and to testimony regarding this exhibit. The City argues that the exhibit and testimony prejudiced its case “by wrongly implying to the jurors that they were there required to anticipate, and provide compensation for, future increases in airport activity.” The City again cites *Cochran*, *Avery*, and *Smith*, and argues that the landowner may still recover for a subsequent taking “upon the necessary showing of diminution of value.” The City argues that defendants’ use of this forecast of activity is an improper attempt to bring together in one action damages currently suffered along with damages which, if incurred, should be brought in a later action.

We disagree. Generally all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1988). However, the probative value of the evidence must substantially outweigh the danger of unfair prejudice. N.C. Gen. Stat. § 8C-1, Rule 403 (1988). This evidence, which was prepared for the City of Statesville Municipal Airport, was relevant to show the types of aircraft that would be using the easement, the frequency of the use, and how extensive usage there would be across the easement, all of which related to the damages suffered by the property owner. Thus we conclude that the trial court did not err in admitting this evidence.

## III.

[3] The City further argues that the trial court erred in admitting into evidence a videotape of an airplane flying over the property on the grounds that no proper foundation had been laid as to accuracy and competency. We disagree. Videotapes are admissible under North Carolina law for both illustrative and substantive purposes. *State v. Cannon*, 92 N.C. App. 246, 254, 374 S.E.2d 604, 608 (1988), *rev’d on other grounds*, 326 N.C. 37, 387 S.E.2d 450 (1990). N.C. Gen. Stat. § 8-97 (1986) provides that a videotape is



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admissible as substantive evidence “upon laying a proper foundation and meeting other applicable evidentiary requirements.”

On *voir dire*, the landowner testified that he was present when the recording was made, that the sound on the tape was representative of the noise on the day the recording was made and representative of noise of airplanes approaching and departing the airport, and that nothing appeared to have been distorted or altered in any way so that it was different from what he heard on the day the tape was made. In its findings of fact, the trial court stated that the operator of the recorder was familiar with its proper use, the sounds were from an airplane flown by Gene Davis, the recording accurately records the sound level, and no changes to the tape were made. Based on these findings, the trial court concluded that the recorder was operated by a person competent to operate it, that the recording accurately represents the sound of the plane entering and leaving the airport, that the sound and tape were accurately identified by the landowner, that the tape is accurate and authentic and had been in the custody of the operator and no changes had been made. Then the trial court concluded that the tape was competent evidence for illustrative purposes. Thus defendants laid a proper foundation to introduce the videotape. Accordingly, the trial court did not err in admitting the tape.

## IV.

[4] The City next contends that the trial court erred in admitting defendant's schedule F of his 1988 tax return and testimony of witnesses Edmiston and Bell regarding the fair market value of the property before the taking. The basis of the City's argument is that the testimony of Edmiston and Bell as to the before value of the property was inadmissible since it was based on a capitalization of income approach to determine value.

We recognize that “[l]oss of profits or injury to a growing business conducted on property . . . are not elements of recoverable damages in an award for a taking under the power of eminent domain.” *Kirkman v. Highway Comm'n*, 257 N.C. 428, 432, 126 S.E.2d 107, 110 (1962) (citing *Pemberton v. City of Greensboro*, 208 N.C. 466, 181 S.E. 258 (1935)). Plaintiff cites *City of Kings Mountain v. Cline*, 19 N.C. App. 9, 198 S.E.2d 64 (1973), where this Court held that evidence as to the past profitability of defendants' dairy business, the cost of moving, and the loss in gross receipts after moving was inadmissible, and on *Dep't of Transp.*

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*v. Byrum*, 82 N.C. App. 96, 345 S.E.2d 416 (1986), in which we relied on *Cline*. In *Byrum* the Court held that the method utilized by the expert witness to calculate fair market value was improper. 82 N.C. App. at 98, 345 S.E.2d at 418. There the excluded evidence regarding fair market value was based on lost profits from the businesses. We distinguish *Byrum* as being limited to the use of lost profits as the methodology of the appraisal.

In a condemnation case the issue for determination is damages based upon the difference in fair market value of the property before and after the taking. *Metro. Sewerage Dist. of Buncombe Co. v. Trueblood*, 64 N.C. App. 690, 308 S.E.2d 340 (1983), cert. denied, 311 N.C. 402, 319 S.E.2d 272 (1984). Accepted methods of appraisal in determining fair market value include: (1) the comparable sales method, (2) the cost approach, and (3) the capitalization of income approach. See 4 J. Sackman, *Nichols' The Law on Eminent Domain* §§ 12B.04, 12B.08, 12B.11 (rev. 3d ed. 1990); *Highway Comm'n v. Conrad*, 263 N.C. 394, 139 S.E.2d 553 (1965) (comparable sales approach proper in condemnation cases). "[W]here no comparable sales are available, [the income] approach is generally accepted as the next best approach to valuation." 4 *Nichols* § 12B.08 at 48.

"Testimony of an expert in the form of an opinion is properly admitted into evidence if the expert's specialized knowledge will assist the jury in understanding the evidence or in determining a fact at issue in the case." *Thomas v. Dixon*, 88 N.C. App. 337, 342, 363 S.E.2d 209, 213 (1988); N.C. Gen. Stat. § 8C-1, Rule 702 (1988). "[T]he range of valuation methods available to experts is unlimited." *Dep't of Transp. v. McDarris*, 62 N.C. App. 55, 59, 302 S.E.2d 277, 279 (1983); see *Byrum*, 82 N.C. App. at 100-01, 345 S.E.2d at 419 (more latitude given to scope of an expert real estate appraiser's testimony to assess damages than to a judge or jury in deciding damages under N.C. Gen. Stat. § 136-112(1)).

The witnesses for both the property owner and the condemning authority utilized in whole or in part the income approach because of the shortcomings in evidence upon which the other two methods could be used. Defendant's expert Edmiston testified as to market value based on an income approach and that although he had found only one sale of a dairy farm in the county in recent years, it was not comparable. Bell also testified as to value using an income approach. Then Marlowe, the City's witness, stated that

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as to the comparable sales approach only the one sale of a dairy farm was discovered in the Iredell County market. He cited it for "indirect comparison" with the property at issue. His written report stated that "this property is difficult to compare directly with the subject because of differences in land and improvements." The report further stated that the income approach is "most appropriate" since dairy farms are income-producing properties.

To adopt the rationale of the City and its interpretation of *Byrum* of totally excluding the income approach under all circumstances would be to eliminate an accepted appraisal method where utilization of the other accepted methods is either wholly or in part inadequate. Therefore, we conclude this evidence was properly admitted.

Furthermore, Edmiston testified without objection as to value using an income approach. At the conclusion of this testimony, the City moved to strike. N.C. Gen. Stat. § 8C-1, Rule 103 (1988) of the North Carolina Rules of Evidence provides that an "[e]rror may not be predicated upon a ruling which admits . . . evidence unless a substantial right of the party is affected, and . . . a timely objection or motion to strike appears of record."

An objection is timely only when made as soon as the potential objector has the opportunity to learn that the evidence is objectionable, unless there is some specific reason for a postponement. Unless prompt objection is made, the opponent will be deemed to have waived it.

*Stimpson Hosiery Mills v. Pam Trading Corp.*, 98 N.C. App. 543, 550, 392 S.E.2d 128, 132, *disc. review denied*, 327 N.C. 144, 393 S.E.2d 909 (1990) (quoting 1 Brandis' *Brandis on North Carolina Evidence* § 27 (Cum. Supp. 1987)); *State v. Reid*, 322 N.C. 309, 367 S.E.2d 672 (1988).

As to Bell's testimony, similar testimony from Edmiston was admitted without timely objection and similar testimony from Marlowe was presented by the City and admitted without objection. "[W]hen . . . evidence is admitted over objection, but the same or similar evidence has been previously admitted or is later admitted without objection, the benefit of the objection is lost." *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989). The City also argues that Bell was no better qualified than jurors to express

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an opinion. However, the City made no objection as to Bell's qualifications.

An objection to a witness's qualifications as an expert in a given field or upon a particular subject is waived if it is not made in apt time upon this special ground, and a mere general objection to the content of the witness's testimony will not ordinarily suffice to preserve the matter for subsequent appellate review.

*State v. Hunt*, 305 N.C. 238, 243, 287 S.E.2d 818, 821 (1982). Therefore, any objections to the witness's qualifications were waived.

In further assignments of error, the City attacks the admissibility of certain evidence. As to the assignments of error relating to the income approach to valuation, we have concluded above that such testimony was admissible. Thus these assignments of error are without merit. Finally we have reviewed the City's remaining assignments of error and conclude that, as to them, there was no prejudicial error. See *McNabb v. Town of Bryson City*, 82 N.C. App. 385, 346 S.E.2d 285 (1986), *disc. review allowed*, 318 N.C. 507, 349 S.E.2d 862 (1986), *review improvidently granted*, 319 N.C. 397, 354 S.E.2d 239 (1987).

Affirmed.

Judges JOHNSON and EAGLES concur.

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SHERYL S. McDONALD, PLAINTIFF v. JAMES L. TAYLOR, DEFENDANT

No. 918DC431

(Filed 7 April 1992)

**1. Divorce and Separation § 385 (NCI4th)— child support—  
continuance denied—no abuse of discretion**

The trial court did not abuse its discretion by denying a continuance in a child support action where plaintiff had not filed a financial affidavit. Although the applicable Eighth Judicial District's Local Rule of Court requires the parties to file financial statements, a continuance is wholly within the court's discretion. Plaintiff asked the trial court to invoke

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its discretionary power to continue an action, had the burden to show sufficient grounds and must have acted in good faith and with due diligence. However, plaintiff did not allege any ground, did not show that substantial justice required a continuance, and did not act in good faith or with due diligence in that she failed to file the required financial affidavit and repeatedly failed to answer interrogatories.

**Am Jur 2d, Continuance §§ 4-6.****2. Divorce and Separation § 395 (NCI4th) — child support — medical expenses — psychological therapy included**

A consent order requiring each party to pay one half of a child's medical expenses included expenses for psychological services, even though psychologists cannot practice medicine. The practice of psychology is recognized by the legislature as falling within the healthcare domain and psychological therapy, designed to make a person whole in mind and restored to well being, should be included as a medical expense.

**Am Jur 2d, Divorce and Separation § 1044.****3. Appeal and Error § 418 (NCI4th) — interpretation of child support order — no authority cited — abandoned**

An argument concerning the interpretation of a child support order was deemed abandoned under N.C.R. App. P. 28(b)(5) where the Court of Appeals could not find any error in the trial court's interpretation and plaintiff did not cite any authority to lead to a contrary finding.

**Am Jur 2d, Appeal and Error § 700.****4. Divorce and Alimony § 402 (NCI4th) — child support — parents' actual income — findings insufficient**

The trial court erred by imputing income to plaintiff in a child support action where there was no written documentation of the parties' income, neither filed an affidavit of financial standing, there was no evidence before the court as to plaintiff's income, there was evidence that plaintiff is presently unemployed, and there was no evidence that plaintiff was deliberately suppressing her income. The Child Support Guidelines do not alter the trial court's duty to make specific

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findings of fact as to the parties' income, estates, present reasonable expenses, and ability to pay.

**Am Jur 2d, Divorce and Separation §§ 1041, 1042, 1072.**

APPEAL by plaintiff from an order entered by *Judge Kenneth R. Ellis* in WAYNE County District Court on 7 March 1991. Heard in the Court of Appeals on 10 March 1992.

*E. B. Borden Parker for plaintiff-appellant.*

*Farris A. Duncan for defendant-appellee.*

LEWIS, Judge.

Plaintiff and defendant were divorced on 28 February 1984 and have both since remarried. Plaintiff presently resides in Italy with her husband who is a member of the United States Air Force. Child support for the two children born of the marriage, Matthew Aaron Taylor and Jonathan Mark Taylor, was modified by order entered 3 August 1988. It provides:

All medical expenses incurred in behalf of either child . . . shall be shared equally and the party with custody of the child for whom the expense is incurred *shall pay the first \$35.00 not covered by insurance* or similar benefit of a party or a spouse of a party. Said expenses are to be paid as follows:

The party paying a bill not covered by insurance will supply a copy of the bill to the other party by the 20th day of the month following the month services are rendered. . . .

On 3 August 1990, defendant, the custodial parent, filed a motion to secure child support and for reimbursement of medical, psychological and dental expenses incurred on behalf of their minor son, Mark Taylor. Though she had ample time to make arrangements to be present, plaintiff did not appear at trial but was represented by her attorney. From defendant's testimony, the court determined that defendant had incurred \$2,400.00 in medical and dental expenses after insurance payments and the \$35.00 deduction. The court ordered plaintiff to reimburse defendant \$1,200.00.

Next, the trial court determined child support. Neither parent submitted financial statements. Defendant testified that he earned a gross income of \$3,500.00 per month. In a motion in the cause, plaintiff's attorney informed the court that plaintiff was unable

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to find employment at her husband's present post. The trial court found the following facts in regard to plaintiff's present income:

[P]laintiff was last employed and is apparently still employed at the child care center on the Air Force base. She holds a BA degree in education (K-6). The Court does not have specific information as to her income due to her failure to respond on a continuing basis to interrogatories filed by the defendant; however, the Court, by using the minimum pay scale of \$4.35 per hour at 40 hours per week, finds her gross income to be not less than \$702.00 per month.

Utilizing these figures, the court calculated that defendant earned 83.2 percent of the total gross income of the parties while plaintiff earned 16.8 percent. According to the North Carolina Child Support Guidelines, the child's needs were at least \$586.00 per month. The court ordered plaintiff to pay defendant \$98.44 per month child support for the benefit of Mark Taylor. Plaintiff appeals the order of child support and of medical expense reimbursement.

[1] Plaintiff argues that the trial court erred in not continuing this case based upon the Eighth Judicial District's Local Rule of Court pertaining to the filing of financial affidavits. This rule provides:

In cases involving *child support* . . . affidavits of financial standing shall be filed by both parties or their counsel.

\* \* \* \* \*

*The required affidavits shall be filed with the Clerk not less than 10 days prior to the call of the said case for hearing.* Failure of either party to file the affidavit and copy(s) may, in the discretion of the presiding judge, stay the hearing of the cause, and may subject the negligent party to such censures as are provided in Rule 37 of the Rules of Civil Procedure, to a dismissal for failure to comply with these rules, or to the striking of appropriate pleadings or entry of default, as may be appropriate and lawful.

Local Rule on Financial Affidavits, Eighth Judicial District, 5 (July 1, 1983) (emphasis original). The North Carolina Supreme Court mandates the creation of a "Case Management Plan" for each district. General Rules of Practice for the District and Superior Court, Rule 2 (1991). Local rules are created to fairly and efficiently implement this "Case Management Plan."

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Plaintiff claims that the trial court erred when it declined to continue the action below for defendant's failure to file an affidavit of financial standing. Though the local rule's usage of the word "shall file" requires the parties to file the financial statements, we do not agree with plaintiff's contention that the action should have been continued. Under the local rules, penalties for failure to file such affidavits are clearly discretionary. A continuance is one of the authorized penalties, but its imposition is wholly within the court's discretion.

"Continuances are not favored and the party seeking a continuance has the burden of showing sufficient grounds for it." *Shankle v. Shankle*, 289 N.C. 473, 482, 223 S.E.2d 380, 386 (1976). These grounds include a showing of good cause and just terms. N.C.G.S. § 1A-1, Rule 40(b) of the North Carolina Rules of Civil Procedure. Good faith and due diligence are also required of the movant. *Shankle*, 289 N.C. at 483, 223 S.E.2d at 386 (citation omitted). "The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice." *Id.* Continuances are "not reviewable absent a manifest abuse of discretion." *State v. Weimer*, 300 N.C. 642, 647, 268 S.E.2d 216, 219 (1980).

In the case at bar, plaintiff asked the trial court to invoke its discretionary power to continue an action. Plaintiff, therefore, had the burden to show sufficient grounds and must have acted in good faith and with due diligence. Here, plaintiff did not allege any grounds, nor did she show that substantial justice required a continuance. Further, plaintiff did not act in good faith or with due diligence. She failed to file the required financial affidavit and repeatedly failed to answer interrogatories. Though defendant failed to file an affidavit of financial standing, he appeared in court, he testified as to his financial status, and was available for cross examination by plaintiff's attorney. Under the circumstances, we find no prejudice. The trial court did not abuse its discretion when it denied the continuance.

[2] Next, plaintiff argues that psychiatric and psychological expenses are not medical expenses to be divided by plaintiff and defendant pursuant to the child support order. Plaintiff cites *Elmore v. Elmore*, 4 N.C. App. 192, 166 S.E.2d 506 (1969) for the proposition that medical expenses include only: services, treatment, and medication prescribed by a licensed physician. In *Elmore*, a prior consent



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judgment required the defendant to “pay all medical and hospital bills of plaintiff and the children.” *Id.* at 193, 166 S.E.2d at 507. The trial court construed defendant-Elmore’s liability to be “limited to payment of bills incurred for services, treatment or medication *actually prescribed or ordered* by a licensed physician.” *Id.* at 194, 166 S.E.2d at 507 (emphasis added). However, the questions upon appeal dealt with civil procedure matters and the trial court’s power to modify a consent judgment. Plaintiff’s reliance on *Elmore* is misplaced.

As plaintiff argues that medical expenses are limited to those services prescribed by a licensed physician, she does not dispute the psychiatric bills. The real question surrounds the psychological expenses. Plaintiff claims that psychological services cannot generate medical expenses because under North Carolina law, psychologists cannot practice medicine. The statute provides:

Nothing in this Article shall be construed as permitting licensed practicing psychologists or psychological associates to engage in any manner in all or any of the parts of the *practice of medicine* or optometry licensed under Articles 1 and 6 of Chapter 90 of the General Statutes. . . .

N.C.G.S. § 90-270.3 (1990) (emphasis added).

We agree that psychologists may not infiltrate the province of medicine reserved to physicians in the statutes. However, the practice of psychology is recognized by the legislature as falling within the healthcare domain. The practice of psychology is regulated under Chapter 90 which is titled: Medicine and Allied Occupations. The statutory boundaries of a psychologist’s practice are the following:

(e) “Professional psychological services” means the application of psychological principles and procedures for the purposes of understanding, predicting, or influencing the behavior of individuals in order to assist in *their attainment of maximum personal growth; optimal work, family, school and interpersonal relationships; and healthy personal adjustment.*

(g) “Psychotherapy” within the meaning of this Article means the use of learning or other psychological behavioral modification methods in a professional relationship to assist a person or persons to modify feelings, attitudes, and behavior which

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*are intellectually, socially or emotionally maladjustive or ineffectual.*

N.C.G.S. § 90-270.2 (1990) (emphasis added). Psychotherapy's aim is to "resolve mental and behavioral dysfunction by operating on the mind. This distinguishes psychotherapy from organic therapies which are biologically directed toward the brain. . . ." 3B Attorney's Textbook of Medicine § 104.00 (3rd ed. 1991).

The last child support order in the case at bar required each party to pay one half of Mark's medical expenses. Even though the original child support order was done by the incorporation of a separation agreement, the request for modification will be determined by statute. "Payments ordered for the support of a minor child shall be in such amount as to meet the *reasonable* needs of the child for *health*, education, and maintenance. . . ." N.C.G.S. § 50-13.4(c) (cum. sup. 1991) (emphasis added). Health is defined as "whole in body, mind or soul, well being. Freedom from pain or sickness." Black's Law Dictionary 648 (5th ed. 1979). Psychological therapy, which is designed to make a person, child or adult, whole in mind and restored to well being, should be included as a medical expense.

Plaintiff asks this Court to limit medical expenses to those services prescribed by a "physician." This interpretation is in conflict with the legislative intent of Chapter 90 which recognizes psychological services. This legislative recognition of psychiatric and psychological practices acknowledges treatment other than organic therapies, such as medication. Unable to find statutory or case law on point, we find that the term "medical expenses" in the consent order includes expenses for psychological services.

We note that had plaintiff wished to so limit the definition of medical expenses, she could have done so as the child support order in issue was a consent judgment. If we adopt plaintiff's construction, medical expenses would not include visits to or therapies initiated by: physician's assistants, nurse practitioners, physical or occupational therapists, respiratory therapists, and other licensed healthcare practitioners. We do not believe that there is a need for a physician's full employment act such as this. These allied health practitioners are statutorily recognized and regulated and as such their services should be included by the term "medical expenses."

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[3] Plaintiff argues that if the psychological visits constituted a medical expense, then defendant should be required to pay \$35.00 of each bill received rather than \$35.00 on the aggregate of all the bills as ordered by the court. We do not find any error in the trial court's interpretation of the support order. As plaintiff does not cite any authority to lead us to a contrary finding, this appeal is deemed abandoned. N.C.R. App. P. 28(b)(5) (1992).

[4] Last, plaintiff alleges that it was error for the trial court to impute income to the plaintiff in order to set the amount of support. We agree. Child support modification, as requested here, is permitted upon a showing of changed circumstances. The amount is set pursuant to the North Carolina Child Support Guidelines. The Guidelines indicate that child support is to be "determined based on (a) the combined income of the parents. . . ." N.C. Child Support Guidelines, Commentary (August 1, 1991). "[I]ncome is defined as actual gross income of the parent, if employed to full capacity, or potential income if [voluntarily] unemployed or under employed." N.C. Child Support Guidelines § A (August 1, 1991). Factors to be considered when calculating potential income are: "obligor's recent work history, occupational qualifications and prevailing job opportunities and earning levels in the community." N.C. Child Support Guidelines § A(3) (August 1, 1991). Where there is no recent work history, higher education, or vocational training, the Guidelines suggest that "income be imputed at least at the minimum hourly wage for a 40-hour week." *Id.* "Income statements of the parents should be verified with documentation of both current and past income." N.C. Child Support Guidelines § 4 (August 1, 1991).

"We enter a new period in North Carolina child support law . . ." with the enactment of child support guidelines. *Greer v. Greer*, 101 N.C. App. 351, 352, 399 S.E.2d 399, 400 (1991). The Guidelines do not alter the trial court's duty to make specific findings of fact as to the parties' income, estates, present reasonable expenses, and ability to pay. *Id.* at 354, 399 S.E.2d at 401. These findings are necessary so that the "appellate court [may] determine whether the trial court gave 'due regard' to the factors listed." *Id.* at 355, 399 S.E.2d at 402 (citation omitted). The ability to pay is determined by the party's actual income "at the time the award is made or modified." *Id.*

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When the trial court makes a finding that a party deliberately depressed his or her income, then the party's capacity to earn or his potential income may be used to determine the child support obligation. *Id.* The trial court abuses its discretion when it calculates a support award based upon an unsubstantiated expense. *Witherow v. Witherow*, 99 N.C. App. 61, 392 S.E.2d 627 (1990), *aff'd*, 328 N.C. 324, 401 S.E.2d 362 (1991) (this Court held that the determination of a party's ability to pay cannot take into consideration potential or future expenses). The determination of the ability to pay must be supported by the evidence presented. *Atwell v. Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985) (where the only evidence of the wife's income was her affidavit which stated her income to be \$650.00 per month, this Court held that the trial court's determination that the wife's income was \$800.00 per month was not supported by the evidence and was reversible error).

In the case at bar, there is no written documentation of the parties' income. Neither filed an affidavit of financial standing. There was no evidence before the court as to the plaintiff's income. To the contrary, there was evidence that plaintiff is presently unemployed. Because the determination of plaintiff's ability to pay was not substantiated by the evidence, the trial court committed reversible error. *Atwell*, 74 N.C. App. 231, 328 S.E.2d 47 (1985). There was no evidence that plaintiff was deliberately suppressing her income. Therefore, the court could not impute income to plaintiff.

Affirmed in part, reversed in part.

Judges ARNOLD and WYNN concur.

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STATE OF NORTH CAROLINA v. MARCUS BENJAMIN MAUNEY

No. 9125DC608

(Filed 7 April 1992)

**1. Contempt of Court § 39 (NCI4th)— willful refusal to provide support of illegitimate child— refusal to submit to blood test— contempt— appeal to appellate division**

The State's motion to dismiss defendant's appeal was denied where defendant was charged with willfully neglecting or refus-

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ing to provide adequate support or maintenance for his illegitimate child, refused to submit to blood tests as ordered, was found to be in "Indirect Civil Contempt," and appealed to the Court of Appeals. Although the State contended that the Court of Appeals lacked jurisdiction because this was a criminal action and appeal lies in superior court, the relief granted by the trial court, ordering defendant to submit to blood tests, was unequivocally civil in nature. N.C.G.S. § 5A-17 (1986).

**Am Jur 2d, Appeal and Error § 169; Contempt § 11.****2. Appeal and Error § 107 (NCI4th)— order to submit to blood test—contempt order—appeal not interlocutory**

An appeal from a contempt order was not interlocutory and the State's motion to dismiss was denied where, if defendant refuses the order to submit to blood tests, he would risk a fine or imprisonment, and if he complied, his challenge to the blood test would become moot.

**Am Jur 2d, Appeal and Error § 170.****3. Contempt of Court § 25 (NCI4th)— refusal to submit to blood tests—jurisdiction**

The trial court had jurisdiction to hold defendant in civil contempt for his refusal to submit to blood tests in a prosecution for willful failure to support his illegitimate child where the record demonstrates that defendant appeared at the Health Department on the day ordered, so that he at least had constructive notice of the order. Furthermore, defendant waived any jurisdictional argument since the district court already had jurisdiction over defendant as an ongoing case.

**Am Jur 2d, Bastards § 118.****4. Constitutional Law § 361 (NCI4th)— order to compel blood tests—no violation of due process**

Neither an order directing defendant to submit to blood tests in a prosecution for willful failure to support an illegitimate child nor N.C.G.S. § 8-50.1 violates defendant's constitutional rights to due process and to be free from unreasonable searches and seizures of his person. Blood tests are commonplace in our society and the statute and order in question do not authorize the indiscriminate taking of blood or the perform-

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ance of a blood test by anyone other than a trained technician or anywhere other than a medical facility.

**Am Jur 2d, Searches and Seizures §§ 29, 105.**

**Blood grouping tests. 46 ALR2d 1000.**

APPEAL by defendant from judgment entered 2 April 1991 in CALDWELL County District Court by *Judge L. Oliver Noble, Jr.* Heard in the Court of Appeals 19 February 1992.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie B. Spalding, for the State.*

*Wilson, Palmer and Lackey, P.A., by W.C. Palmer, for defendant-appellant.*

WYNN, Judge.

The State's evidence tended to show that defendant was charged with willfully neglecting or refusing to provide adequate support or maintenance for his illegitimate child pursuant to N.C. Gen. Stat. § 49-2 (1984). On 24 September 1990 and on 18 December 1990, the district court ordered defendant to submit to blood tests, but defendant refused.

The State made a show cause motion, and the district court found that Judge Hodges had entered an order compelling blood tests to determine parentage on 18 December 1990. The order directed defendant to appear at the Caldwell County Health Department on 16 January 1991 to submit to "Red Cell, HLA and any other blood-grouping tests and comparisons which have been developed and adapted for the purposes of establishing or disproving parentage." The district court further found that defendant appeared, but refused to submit to the test because the blood was to be withdrawn by a phlebotomist rather than a nurse or a physician licensed under Chapter 90 of the General Statutes.

The district court concluded, as a matter of law, that defendant, without reasonable cause, had failed to comply with a reasonable court order. The district court further found that defendant was in "Indirect Civil Contempt" and ordered him to submit to the blood test on 17 April 1991 as arranged by laboratory personnel. Finally, the district court named the person to withdraw defend-

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ant's blood, and determined that she was qualified. From the judgment or other disposition, defendant appealed.

## I.

[1] Prior to discussing the merits of this case, we must first address the State's motion to dismiss defendant's appeal. For the reasons which follow, we deny the State's motion.

The State contends that this Court lacks jurisdiction to hear this appeal because, as a criminal action, appeal lies in the superior court. Under N.C. Gen. Stat. § 5A-17 (1986), "[a] person found in criminal contempt may appeal in the manner provided for appeals in criminal actions, except appeal from a finding of contempt by a judicial official inferior to a superior court judge is by hearing de novo before a superior court judge." Alternatively, "[a] person found in civil contempt may appeal in the manner provided for appeals in civil actions," *id.* § 5A-24; specifically, to the Court of Appeals, *id.* § 7A-27 (1989).

In *O'Briant v. O'Briant*, 313 N.C. 432, 329 S.E.2d 370 (1985), our Supreme Court discussed the difficulty of distinguishing between civil and criminal contempt. The Court stated the following: "Where the punishment is to preserve the court's authority and to punish disobedience of its orders, it is criminal contempt. Where the purpose is to provide a remedy for an injured suitor and to coerce compliance with an order, the contempt is civil." *Id.* at 434, 329 S.E.2d at 372 (citing *Blue Jeans Corp. v. Amalgamated Clothing Workers of America*, 275 N.C. 503, 508-09, 169 S.E.2d 867, 869 (1969)). See also N.C. Gen. Stat. §§ 5A-11, 5A-21 (1986). This Court, in *Bishop v. Bishop*, 90 N.C. App. 499, 369 S.E.2d 106 (1988), because of the confusion engendered by discerning the purpose of a given remedy, clarified the *O'Briant* test. See Note, *The Distinction Between Civil and Criminal Contempt in North Carolina*, 67 N.C. L. Rev. 1281 (1989). The *Bishop* Court created a bright-line rule derived from the United States Supreme Court's decision in *Hicks ex rel. Feiock v. Feiock*, 485 U.S. 624, 99 L.Ed.2d 721 (1988):

*Civil Relief:* If the relief is imprisonment, it is coercive and thus civil if the contemnor may avoid or terminate his imprisonment by performing some act required by the court (such as agreeing to comply with the original order). If the relief is monetary, it is likewise civil if the monies are either paid

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to the complainant or defendant can avoid payment to the court by performing an act required by the court;

*Criminal Relief:* If the relief is imprisonment, it is punitive and thus criminal if the sentence is limited to a definite period of time without possibility of avoidance by the contemnor's performance of an act required by the court. If the relief is monetary, it is punitive if payable to the court rather than to the complainant.

*Bishop*, 90 N.C. App. at 505, 369 S.E.2d at 109.

In the case at bar, the trial judge concluded, as a matter of law, "that defendant has without reasonable excuse failed to comply with the lawful order of the court, and that the defendant had the means to comply with the court order and still has the means to comply with the court order, and that he is in indirect civil contempt for his failure to comply." Although the trial judge's characterization of the form of contempt is not conclusive, we agree that the defendant was in civil rather than criminal contempt. According to the *Bishop* Court's definition, the relief granted by the trial court, ordering defendant to submit to blood tests, was unequivocally civil in nature. Because we find this to be civil contempt, appeal lies in this Court.

[2] As an alternative basis for its motion to dismiss, the State contends that this appeal is interlocutory and is not immediately appealable. An appeal is available prior to a final decision if (1) the trial court's order affects a substantial right; and (2) the loss of that right will injure the party appealing if it is not corrected prior to final judgment. *Goldston v. American Motors Corp.*, 326 N.C. 723, 392 S.E.2d 735 (1990). See N.C. Gen. Stat. §§ 7A-27(d) (1989), 1-277 (1983).

In *Willis v. Power Co.*, 291 N.C. 19, 229 S.E.2d 191 (1976), the trial court found defendant in contempt for failure to comply with an order compelling discovery. Our Supreme Court reasoned that, by not entertaining defendant's appeal, defendant would be placed in the position of either risking a fine or imprisonment or complying with an erroneous order. *Id.* at 30, 229 S.E.2d at 198. The Court also stressed that the issues raised on appeal would become moot if the defendant complied with the purging conditions to avoid punishment. *Id.*



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In the instant case, upon consideration of the rationale set forth by the *Willis* Court, we find that the contempt order is immediately appealable. If defendant refuses to comply, he risks a fine or imprisonment; if he complies, his challenge to the blood test may become moot. Accordingly, we find the State's argument to be without merit and deny its motion to dismiss defendant's appeal.

## II.

[3] Defendant first contends that the record does not show that the order to compel blood tests was entered in open court or that it was served on the defendant or his attorney. Consequently, defendant argues that the trial court's finding that he was in willful contempt of the blood test order was erroneous. We disagree.

We note initially that defendant fails to cite any legal authority for this assignment of error. Nevertheless, we will address this issue, in our discretion, pursuant to N.C.R. App. P. 2 (1992). Defendant apparently argues that the district court was without jurisdiction to hold him in contempt for his refusal to submit to the blood tests. The record demonstrates that defendant appeared at the Caldwell County Health Department on the day as ordered, but refused to have his blood drawn. It is clear from the record before this Court that defendant at least had constructive notice of the district court's order. Furthermore, defendant has waived any jurisdictional argument since, as an ongoing case, the district court already had jurisdiction over defendant. See *Wilson v. Wilson*, 98 N.C. App. 230, 390 S.E.2d 354 (1990); *M.G. Newell Co., Inc. v. Wyrick*, 91 N.C. App. 98, 370 S.E.2d 431 (1988). We, therefore, find that defendant's argument is without merit.

## III.

[4] Defendant also contends that N.C. Gen. Stat. § 8-50.1 (1986), and the order to compel blood tests entered on 18 December 1990, violate his constitutional rights to due process and to be free from unreasonable searches and seizures of his person. For the reasons which follow, we find no merit to defendant's contentions.

Defendant bases his due process challenge on the United States Supreme Court's decision in *Breithaupt v. Abram*, 352 U.S. 432, 1 L.Ed.2d 448 (1957). In *Breithaupt*, law enforcement officers acquired probable cause to believe that the defendant was driving under the influence of alcohol. A physician withdrew blood from the unconscious defendant at the hospital. Defendant was convicted

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of involuntary manslaughter. Defendant then sought release from his imprisonment by a petition for a writ of habeas corpus, contending that the withdrawal of blood was a violation of his right to due process. The Supreme Court disagreed with defendant's due process challenge and stated the following concerning blood tests:

[D]ue process is not measured by the yardstick of personal reaction or the sphygmogram of the most sensitive person, but by that whole community sense of "decency and fairness" that has been woven by common experience into the fabric of acceptable conduct. It is on this bedrock that this Court has established the concept of due process. The blood test procedure has become routine in our everyday life. It is a ritual for those going into the military service as well as those applying for marriage licenses. Many colleges require such tests before permitting entrance and literally millions of us have voluntarily gone through the same, though a longer, routine in becoming blood donors.

*Id.* at 436, 1 L.Ed.2d at 451. The Court further stated, however, that the "indiscriminate taking of blood under different conditions or by those not competent to do so" may be subject to attack. *Id.* at 438, 1 L.Ed.2d at 452. *See id.* at 437 n.4, 1 L.Ed.2d at 452 n.4.

Similarly, the Supreme Court, in *Schmerber v. California*, 384 U.S. 757, 16 L.Ed.2d 908 (1966), rejected defendant's argument that a blood test taken without his consent violated his right to be free from unreasonable searches and seizures under the fourth amendment. The Court stressed that blood tests are commonplace in our society. *Id.* at 771, 16 L.Ed.2d at 920. Like the *Breithaupt* Court, however, the *Schmerber* Court stated the following: "We are thus not presented with the serious questions which would arise if a search involving use of medical technique, even of the most rudimentary sort, were made by other than medical personnel or in other than a medical environment — for example, if it were administered by police in the privacy of the stationhouse." *Id.* at 771-72, 16 L.Ed.2d at 920.

The statute at issue in the instant case, N.C. Gen. Stat. § 8-50.1(a), provides, in relevant part:

In the trial of any criminal action or proceeding in any court in which the question of parentage arises . . . the court before whom the matter may be brought, upon motion of the

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State or the defendant, shall order that the alleged-parent defendant, the known natural parent, and the child submit to any blood tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage and which are reasonably accessible to the alleged-parent defendant, the known natural parent, and the child.

*Id.* The order in question in this case directs defendant "to submit to Red Cell, HLA and any other blood-grouping tests and comparisons which have been developed and adapted for purposes of establishing or disproving parentage," with the blood to be withdrawn by a phlebotomist at the Caldwell County Health Department.

We find that neither the order directing defendant to submit to blood tests nor section 8-50.1 of the General Statutes violate defendant's constitutional rights to due process and to be free from unreasonable searches and seizures of his person. As stated by the United States Supreme Court, blood tests are commonplace in our society. Section 8-50.1 authorizes such testing only upon motion made by either the State or the defendant, and the court involved in the matter must order the test. The statute and order in question do not authorize the "indiscriminate taking of blood" as warned by the *Breithaupt* Court nor do they allow the performance of a blood test by anyone other than a trained technician or anywhere other than a medical facility as cautioned by the *Schmerber* Court. We, therefore, find that the order and the challenged statute are free from constitutional infirmities and overrule defendant's assignment of error.

No error.

Judges ARNOLD and LEWIS concur.

**MADRY v. MADRY**

[106 N.C. App. 34 (1992)]

JAMES T. MADRY, JR., PLAINTIFF v. DONNA MELTON MADRY, DEFENDANT

No. 9110DC489

(Filed 7 April 1992)

**1. Rules of Civil Procedure § 15.1 (NCI3d)— divorce— amendment of pleadings— denied— abuse of discretion**

The trial court erred by denying defendant's motion to amend her pleadings to assert the affirmative defense that she was incurably insane and that plaintiff's exclusive remedy for an absolute divorce was N.C.G.S. § 50-5.1. The trial judge was not required nor was it proper to adjudicate the merits of defendant's proposed affirmative defense at this stage of the proceedings.

**Am Jur 2d, Divorce and Separation §§ 297, 301.****2. Courts § 74 (NCI4th)— district court— authority of one judge to overrule another**

The trial court erred by granting summary judgment for defendant in a divorce action on the issue of whether N.C.G.S. § 50-5.1 provided the exclusive remedy for plaintiff where another judge, in ruling on defendant's motion to dismiss, had held that N.C.G.S. § 50-5.1 did not apply. The legal issue was precisely the same, the materials and arguments were essentially the same, and simply labeling the order a summary judgment did not change its essential character nor authorize the second judge to overrule the first.

**Am Jur 2d, Courts § 130.**

APPEAL by plaintiff from *Morelock (Fred M.)*, Judge. Judgment entered 19 March 1991 in District Court, WAKE County. Cross Appeal by defendant from *Fullwood (James)*, Judge. Order entered 19 December 1990 in District Court, Wake County. Heard in the Court of Appeals on 16 March 1992.

Plaintiff instituted this civil action by filing a complaint on 6 October 1989 wherein he requested an absolute divorce from defendant based upon G.S. 50-6, an equitable distribution of the parties' marital property, and custody of the minor child born to the marriage. On 11 December 1989, defendant filed an answer admitting that plaintiff was entitled to an absolute divorce pursuant

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to G.S. 50-6 and joining in his request for an equitable distribution. Defendant also admitted that plaintiff was entitled to custody of the minor child. Defendant counterclaimed for liberal visitation, temporary and permanent alimony, as well as attorney's fees.

Defendant filed a motion to amend her answer which was denied by Judge Fullwood on 19 December 1990. She thereafter filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure claiming that plaintiff could not obtain an absolute divorce pursuant to G.S. 50-6 due to the fact she is "incurably insane" within the meaning of G.S. 50-5.1 which statute would therefore provide the exclusive method by which plaintiff could obtain a divorce. Judge Morelock agreed with defendant and entered summary judgment dismissing plaintiff's claim pursuant to G.S. 50-6 on 19 March 1991.

Plaintiff appeals from the granting of summary judgment and defendant cross appeals from the order of Judge Fullwood denying her motion to amend her answer.

*Ragsdale, Kirschbaum, Nanney, Sokol & Heidgerd, P.A., by William L. Ragsdale, C. D. Heidgerd, and Connie E. Carrigan, for plaintiff, appellant, cross appellee.*

*Womble Carlyle Sandridge and Rice, by Susan D. Crooks, and Susan S. McFarlane, for defendant, appellee, cross appellant.*

HEDRICK, Chief Judge.

Plaintiff and defendant were married on 8 May 1982. Defendant was stricken by a cerebral hemorrhage on 9 August 1986 as a result of which she suffered severe and permanent brain damage and partial paralysis. The parties have lived continuously separate and apart since 19 February 1988. Following the institution of this action by plaintiff and the filing of an answer by defendant, Donna Madry was declared incompetent by the Clerk of Superior Court in Robeson County and her mother, Lula Melton, was appointed as her guardian on 5 July 1990.

On 13 July 1990, defendant moved the trial court pursuant to Rule 15(a) of the North Carolina Rules of Civil Procedure for leave to amend her previously filed answer in order to assert, among other things, her allegation that her "incurable insanity" was the cause of the parties' separation and that plaintiff is therefore required to pursue his divorce action in accordance with G.S. 50-5.1.

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Defendant also asserted in her proposed amended pleading a claim for both temporary and permanent support pursuant to that statute. When the matter came on for hearing, Judge Fullwood ruled that defendant had failed to present evidence that she was "incurably insane" and concluded that "NCGS 50-5.1 does not apply in this action." Based upon that conclusion, the trial judge denied defendant's motion to amend.

Defendant thereafter filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) and, in support of that motion, defendant again alleged that, due to the fact that she is "incurably insane," plaintiff's exclusive remedy for an absolute divorce is G.S. 50-5.1. When this motion came on for hearing, the trial court converted defendant's motion to one for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure and considered all of the pleadings as well as the affidavit of a medical doctor who had been involved in the treatment of Ms. Madry. Judge Morelock granted summary judgment in favor of defendant and dismissed plaintiff's claim for relief pursuant to G.S. 50-6 stating that "N.C. Gen. Stat. § 50-5.1 provides the exclusive remedy by which the plaintiff herein may obtain an absolute divorce from the defendant herein."

[1] We will first address defendant's appeal. Ms. Madry argues that the trial court abused its discretion in denying her motion to amend her pleadings in accordance with Rule 15(a) of the North Carolina Rules of Civil Procedure. As set forth above, defendant sought leave to amend in order to assert an affirmative defense to plaintiff's claim for an absolute divorce pursuant to G.S. 50-6 which she had failed to assert in her initial answer.

Under Rule 15(a), amendment of pleadings may be accomplished only by leave of court when the amendment is sought after responsive pleadings have been filed. That rule specifically provides, however, that "leave shall be freely given when justice so requires." The grant or denial of an opportunity to amend pleadings is within the discretion of the trial court, *Coffey v. Coffey*, 94 N.C. App. 717, 722, 381 S.E.2d 467, 471, *disc. review allowed*, 325 N.C. 705, 388 S.E.2d 450 (1989), *disc. review improvidently allowed*, 326 N.C. 586, 391 S.E.2d 40 (1990), and that court's decision will not be disturbed on appeal absent a showing of an abuse of discretion. *Henry v. Deen*, 310 N.C. 75, 82, 310 S.E.2d 326, 331 (1984). Although our Rules of Civil Procedure do not require the trial judge to

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declare the reasons for a denial of a motion to amend, *Coffey*, 94 N.C. App. at 722-723, 381 S.E.2d at 471, it is "an abuse of discretion to deny leave to amend if the denial is not based on a valid ground." *Id.*, citing 3 J. Moore, Moore's Federal Practice Sec. 15.08[4] at 15-65, 15-66. Similarly, a denial based upon a misapprehension of law is reversible error. *Ledford v. Ledford*, 49 N.C. App. 226, 233-34, 271 S.E.2d 393, 398-399 (1980).

The trial judge stated in his ruling that the motion to amend was denied due to his conclusion that G.S. 50-5.1 does not apply to this case and he further stated that his conclusion was based upon the fact that defendant had not presented at the motion hearing any of the evidence required by that statute to prove "incurable insanity." The only issue properly before Judge Fullwood at this hearing was whether "justice required" that defendant be granted leave to amend her responsive pleadings. G.S. 1A-1, Rule 15(a). The trial judge was not required nor was it proper to adjudicate the merits of defendant's proposed affirmative defense at this stage of the proceedings. The denial of defendant's motion was not therefore based upon "a valid ground" and was an abuse of discretion by the trial judge.

As our review of the record discloses no other apparent reason to deny defendant leave to amend her pleadings, *Banner v. Banner*, 86 N.C. App. 397, 400, 358 S.E.2d 110, 111, *disc. review denied*, 320 N.C. 790, 361 S.E.2d 70 (1987), and plaintiff has demonstrated no prejudice which would result from grant of leave, *Vernon v. Crist*, 291 N.C. 646, 654, 231 S.E.2d 591, 596 (1977), we hold that "justice required" in this case that defendant's motion be allowed.

[2] Plaintiff appeals Judge Morelock's granting of summary judgment in favor of defendant and argues that the trial court committed reversible error in ruling that G.S. 50-5.1 provides the exclusive remedy for plaintiff. In his first assignment of error, plaintiff contends that Judge Morelock's order for summary judgment improperly overruled the decision rendered by Judge Fullwood upon defendant's motion to dismiss. Judge Fullwood ruled that, as a matter of law, G.S. 50-5.1 does not apply to this case while Judge Morelock concluded that, as a matter of law, that statute provides plaintiff's exclusive means of obtaining an absolute divorce from defendant.

It is a well established rule 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

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judge may not modify, overrule, or change the judgment of another Superior Court judge made in the same action." *Smithwick v. Crutchfield*, 87 N.C. App. 374, 376, 361 S.E.2d 111, 113 (1987), quoting *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972). If, however, the initial ruling is one which was addressed to the discretion of the trial judge, another trial court judge may rehear an issue and enter a contradictory ruling if there has been a material change in the circumstances of the parties. *Calloway v. Ford Motor Company*, 281 N.C. at 505, 189 S.E.2d at 493.

Despite the fact that Judge Morelock's order is denominated a summary judgment, the legal issue decided by that judgment, whether G.S. 50-5.1 bars this plaintiff's claim for absolute divorce pursuant to G.S. 50-6, was precisely the same issue decided to the contrary by Judge Fullwood's earlier order denying defendant's motion to amend. The materials and arguments considered by Judge Morelock were essentially the same arguments and materials considered by Judge Fullwood. Simply labeling the order a summary judgment did not change its essential character nor authorize Judge Morelock to overrule Judge Fullwood. *Smithwick v. Crutchfield*, 87 N.C. App. at 377, 361 S.E.2d at 113.

Defendant's motion to amend was a request addressed to the discretion of the trial judge. There were no changed circumstances however which would justify Judge Morelock's reconsideration of this issue. In fact, defendant's motion to dismiss pursuant to Rule 12(b)(6) was filed by defendant on 14 December 1990 which was prior to the date that Judge Fullwood even signed the order denying her motion to amend. It is obvious from the record that, in filing her 12(b)(6) motion, defendant was simply attempting to again put before the court those contentions that Judge Fullwood had rejected.

We hold that Judge Morelock committed reversible error in ruling that G.S. 50-5.1 is the exclusive remedy for this plaintiff when Judge Fullwood had previously ruled otherwise.

Plaintiff's second assignment of error contends that summary judgment was improper as the record before Judge Morelock affirmatively established that plaintiff was entitled to an absolute divorce based upon one year's continuous separation of the parties in accordance with G.S. 50-6. In light of our decision to allow defendant the opportunity to amend her pleadings, summary judgment



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in favor of either party would be inappropriate at this time. We therefore decline to address plaintiff's contention.

The summary judgment entered by Judge Morelock dismissing plaintiff's claim is reversed. Judge Fullwood's order denying defendant's motion to amend is reversed and the cause is remanded to the District Court wherein defendant shall be allowed to file and serve amended pleadings and the plaintiff shall be allowed 30 days within which to file any necessary response.

Reversed.

Judges ORR and WALKER concur.

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RICHARD SIMON, PLAINTIFF EMPLOYEE v. TRIANGLE MATERIALS, INC.,  
EMPLOYER DEFENDANT AND LUMBERMEN'S UNDERWRITING ALLIANCE  
INSURANCE CO., CARRIER; DEFENDANT(S)

No. 9110IC177

(Filed 7 April 1992)

**Master and Servant § 75 (NC13d) — workers' compensation — back injury — surgery — relief from pain**

In a case decided under the pre-1991 amendment to N.C.G.S. § 97-25, the Industrial Commission erred by denying a workers' compensation plaintiff medical expenses for back surgery where there was evidence in support of findings that back surgery would not lessen plaintiff's period of disability or effect a cure, but no evidence to support the finding that surgery would not give plaintiff relief, and medical testimony that surgery would likely give plaintiff relief from his continuous pain. Relief from pain constitutes "relief" as that term is used in N.C.G.S. § 97-25.

**Am Jur 2d, Workmen's Compensation §§ 391, 393.**

APPEAL by plaintiff from an opinion and award entered 4 December 1990 by the North Carolina Industrial Commission. Heard in the Court of Appeals 14 November 1991.

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On 14 April 1988 plaintiff, then an employee of Triangle Materials, Inc. (Triangle), injured his back when he slipped and fell while unloading sheetrock at a building site. Plaintiff's job required that he and a co-worker hand-carry bundles of sheetrock weighing between 170 and 240 pounds from a boom truck to their designated location. At times plaintiff had to carry these bundles of sheetrock to the second or third story of a building under construction. Plaintiff's average weekly wage was \$475.20.

Plaintiff waited approximately one week before seeking medical attention for his neck and back injuries. However, when the pain did not subside, plaintiff sought treatment from Dr. John Glasson on 21 April 1988. Dr. Glasson, an orthopedic surgeon, examined plaintiff and took x-rays of his back. Dr. Glasson's impression at that time was that plaintiff had suffered ligamentous and muscular strain to the cervical and lumbar spine. He instructed plaintiff to go on a light duty work schedule and prescribed pain medication and a lumbosacral support for plaintiff to wear.

After his injury, plaintiff continued working at his same job until early September 1988. During that time plaintiff's co-workers assisted him with the performance of his duties because plaintiff was unable to continue carrying the sheetrock. On 8 September 1988 plaintiff was transferred to a job working in Triangle's warehouse at an average weekly wage of \$270.00. Plaintiff's back problems continued, however, as his warehouse job required him to move 65 pound pails of joint compound and other construction supplies weighing at least 45 pounds.

While working in the warehouse, plaintiff continued treatment with Dr. Glasson and was also seen on a diagnostic referral basis by Dr. Edwin Preston and Dr. David Fajgenbaum. The findings of Drs. Preston and Fajgenbaum do not appear in the record evidence. In April of 1989, plaintiff left employment with Triangle. After a period of self-employment, plaintiff obtained a light duty job in October 1989 where he earned \$380.00 per week.

On 11 May 1989, plaintiff saw Dr. Stephen Grubb, an orthopedic surgeon, on referral from Dr. Glasson and the North Carolina Division of Vocational Rehabilitation. Dr. Grubb admitted plaintiff to Durham County General Hospital on 3 August 1989 where he performed a myelogram, a diskogram, and related CAT scans. After reviewing the results of these tests, Dr. Grubb concluded that surgery was the treatment of choice in plaintiff's case.

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Plaintiff seeks medical expenses under the Workers' Compensation Act for surgery for his back injury. A Deputy Commissioner of the Industrial Commission awarded plaintiff (1) permanent partial disability for a period of 30 weeks at the rate of \$316.80 per week; (2) an as yet undetermined amount of temporary partial disability compensation; and (3) that defendants pay all medical expenses incurred by plaintiff as a result of his injury by accident. However, the Deputy Commissioner, using the language of N.C. Gen. Stat. § 97-25, denied medical expenses for back surgery finding that "[a]t this time, any surgery to plaintiff's back will not effect a cure, give relief or tend to lessen plaintiff's period of disability." Plaintiff appealed to the Full Commission. The Full Commission modified and affirmed the award of the Deputy Commissioner, the modification being the addition of a conclusion of law stating that "[a]t this time, any surgery to plaintiff's back will not effect a cure, give relief or tend to lessen plaintiff's period of disability." From the decision of the Full Commission, plaintiff appeals.

*Lore & McClearn, by F. Scott Templeton and R. Edwin McClearn, for plaintiff-appellant.*

*Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by P. Collins Barwick, III, for defendant-appellees.*

ORR, Judge.

Appellate review of an order and award of the Industrial Commission is limited to a determination of whether the findings of the Commission are supported by the evidence and whether the findings in turn support the legal conclusions of the Commission. *Cody v. Snider Lumber, Co.*, 328 N.C. 67, 399 S.E.2d 104 (1991) (citations omitted). This is so even though there is evidence which would support a finding to the contrary. *Crawford v. Warehouse Co.*, 263 N.C. 826, 140 S.E.2d 548 (1965). However, if the findings are predicated on an erroneous view of the law or a misapplication of the law, they are not conclusive on appeal. *See e.g., Bailey v. Dept. of Mental Health*, 272 N.C. 680, 159 S.E.2d 28 (1968) (remand required to consider evidence in its true legal light). Furthermore, findings of fact which are essentially conclusions of law will be treated as such upon review. *Cody*, 328 N.C. 67, 399 S.E.2d 104.

Plaintiff asserts that pursuant to N.C. Gen. Stat. § 97-25 defendants are required to pay for his back surgery and related medical expenses as long as the surgery is reasonably required

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to give plaintiff relief, regardless of whether such surgery will lessen the period of disability or effect a cure for his injury. In this case plaintiff contends the surgery will relieve a substantial portion of the pain he is suffering. Defendant argues that medical services that may reasonably be required to effect a cure or give relief may be required by the employer only if the period of disability would be lessened.

Our Supreme Court directly addressed the issue of whether a plaintiff is entitled to future medical expenses under N.C. Gen. Stat. § 97-25 even though they will not lessen the period of disability in *Little v. Penn Ventilator Co.*, 317 N.C. 206, 345 S.E.2d 204 (1986). In *Little* the court held that N.C. Gen. Stat. § 97-25 does *not* limit an employer's obligation to pay future medical expenses to those cases in which such expenses will lessen the period of disability. *Id.*, 345 S.E.2d 204. As a result of a 1973 amendment deleting the ten-week limitation with respect to medical treatments required to effect a cure or give relief, the Court held that N.C. Gen. Stat. § 97-25 provides alternate grounds for relief. As amended "[t]he statute also requires employers to pay the expenses of future medical treatments even if they will not lessen the period of disability as long as they are reasonably required to (1) effect a cure or (2) give relief." *Id.* at 210, 345 S.E.2d at 207.

The relevant portion of the statute provides:

Medical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, . . . shall be provided by the employer. . . .

N.C. Gen. Stat. § 97-25 (1985). We are advertent to the fact that effective 15 July 1991 the legislature again amended N.C. Gen. Stat. § 97-25 by substituting the term "medical compensation" for the statutory language cited above. However, it is the pre-1991 amended version that governs the resolution of this case.

Here the Deputy Commissioner found as fact that "[a]t this time, any surgery to plaintiff's back will not effect a cure, give relief or tend to lessen plaintiff's period of disability." The full Commission adopted and affirmed this finding and restated it as a conclusion of law in its opinion and award. Our review of the

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record reveals that while there is evidence in support of the findings that back surgery will not lessen plaintiff's period of disability or effect a cure, there is no evidence in support of the finding that surgery would not give plaintiff relief. Here both medical experts testified that surgery would likely give plaintiff relief from his continuous pain. Dr. Grubb testified as follows:

I felt due to his age, the pathology, the location of the pathology, how much this was functionally impairing him to—as far as being able to work and make a living and do the things that he needs to and wants to do . . . that surgery was the treatment of choice. . . . we feel that with this type of surgery, you have at least an eighty percent chance of getting rid of eighty percent of the pain. In Mr. Simon's case, knowing him as I do, I feel that our odds are higher than that.

Dr. Glasson testified that:

. . . with surgery . . . it is my opinion that [while] reducing this disability would not be likely . . . [rather] I would say that the objective of the surgery would be pain relief.

When questioned further, Dr. Glasson responded affirmatively that it was likely that surgery would give plaintiff some relief from continued back problems. Dr. Glasson, who originally treated plaintiff, also testified that at this point in plaintiff's recovery, continued conservative treatment would not offer any significant improvement in plaintiff's condition. While the evidence regarding whether plaintiff has reached maximum medical improvement is conflicting, there appears to be no conflict regarding whether or not surgery would lessen plaintiff's pain.

In our judgment, relief from pain constitutes "relief" as that term is used in N.C. Gen. Stat. § 97-25. While our courts have consistently recognized that the Workers' Compensation Act makes no provision for compensation for physical pain and suffering, *see e.g., Jackson v. Fayetteville Area System of Transp.*, 78 N.C. App. 412, 337 S.E.2d 110 (1985), *appeal after remand*, 88 N.C. App. 123, 362 S.E.2d 569 (1987), compensation may be awarded in some circumstances for pain resulting from an injury. *See Roper v. J.P. Stevens & Co.*, 65 N.C. App. 69, 308 S.E.2d 485 (1983), *disc. review denied*, 310 N.C. 309, 312 S.E.2d 652 (1984). Similarly, when a back injury causes referred pain to the extremities of the body and this pain impairs the use of the extremities, then the award of

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workers compensation must take into account such impairment. *Fleming v. K-Mart Corp.*, 312 N.C. 538, 324 S.E.2d 214 (1985). Furthermore, N.C. Gen. Stat. § 97-25 provides three alternate grounds for *future medical treatment*. This compensation for medical treatment seems distinguishable from compensation for lost earnings. The fact that "pain is not in and of itself a compensable injury," *Jackson*, 78 N.C. App. at 414, 337 S.E.2d at 112, should not foreclose extending the "relief" anticipated by N.C. Gen. Stat. § 97-25 to include relief from pain. If the psychological and emotional benefits to an employee that flow from monitoring his condition constitute "relief" as that term is used in the statute, *see Little*, 317 N.C. 206, 345 S.E.2d 204, then clearly, relief from pain is also contemplated. As in *Little*, to rule otherwise would yield an impracticable result. *Id.* at 214, 345 S.E.2d at 210. Had plaintiff's physician elected to perform surgery immediately after the accident, then surgery would have fallen within the statutory definition of relief. Because a conservative treatment (based on less extensive testing) was originally undertaken, plaintiff should not be barred from obtaining more extensive future medical treatment that may be anticipated to give him relief from the pain he suffers.

Having determined that relief from pain is a legitimate aspect of the "relief" anticipated by future medical treatment under N.C. Gen. Stat. § 97-25, we therefore reverse the Commission's denial of future medical expenses for plaintiff's back surgery. Plaintiff's additional assignments of error not being presented for appellate review are deemed abandoned pursuant to Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. The remainder of the Commission's order not having been challenged is therefore affirmed.

Affirmed in part and reversed in part.

Judges JOHNSON and EAGLES concur.

**McCLAIN v. OTIS ELEVATOR CO.**

[106 N.C. App. 45 (1992)]

WILLIE MAE McCLAIN, PLAINTIFF v. OTIS ELEVATOR COMPANY, INC.,  
DEFENDANT

No. 9114SC486

(Filed 7 April 1992)

**1. Evidence and Witnesses § 218 (NCI4th)— subsequent remedial measures—inadmissibility to show negligence**

In an action to recover for injuries received by plaintiff when an elevator allegedly dropped below the level of the hallway and she fell while exiting the elevator, evidence that defendant replaced a worn leveling brush in the elevator following plaintiff's accident was rendered inadmissible by N.C.G.S. § 8C-1, Rule 407 to prove negligence by defendant.

**Am Jur 2d, Evidence §§ 275, 628.**

**Admissibility of evidence of repairs, change of conditions, or precautions taken after accident. 64 ALR2d 1296.**

**2. Evidence and Witnesses § 2171 (NCI4th)— expert opinion— cross-examination not relevant to show basis**

In an action to recover for injuries received by plaintiff when a hospital elevator dropped below the level of the hallway and plaintiff fell while exiting the elevator, cross-examination of defendant's expert witness about entries in the hospital service records concerning prior and subsequent reports of leveling problems in other hospital elevators was not admissible to attack the basis of the witness's opinion that the elevator in question was operating properly on the date of plaintiff's accident and was correctly excluded as irrelevant where the witness repeatedly stated that his opinion was based only upon his observations of the particular elevator and his review of the service record for that elevator. Furthermore, the trial court did not err in ruling that evidence of incidents involving other elevators would likely confuse and mislead the jury.

**Am Jur 2d, Evidence §§ 301, 302.**

**3. Trial § 46 (NCI3d)— motion for new trial—juror affidavits incompetent**

The affidavits of two jurors purportedly showing that the jury disregarded the evidence and the trial court's instruc-

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tions were incompetent to support plaintiff's Rule 59 motion for a new trial.

**Am Jur 2d, New Trial §§ 210, 211.**

APPEAL by plaintiff from *Read (J. Milton, Jr.), Judge*. Judgment entered 15 February 1991 in Superior Court, DURHAM County. Heard in the Court of Appeals 16 March 1992.

Plaintiff instituted this civil action by filing a complaint wherein she alleged that she was injured when an elevator manufactured and maintained by Otis Elevator and installed at Durham County General Hospital, Durham, North Carolina, malfunctioned and caused her to fall as she attempted to exit the elevator. Ms. McClain alleged that defendant's negligent failure to service and maintain the elevator caused the malfunction which led to her injury.

The evidence presented to the jury tends to show that plaintiff is a licensed practical nurse who was employed by Durham County General Hospital on 8 January 1986. While at work that evening, Ms. McClain used an elevator designated by the hospital as "Elevator No. 1" to go from the fifth floor of the hospital to the ground floor. When the elevator stopped at the ground floor, the doors opened fully. According to plaintiff, as she walked toward the doors, the elevator "shuddered, jerked and dropped," causing the elevator floor to be uneven with the floor of the hallway landing. Plaintiff's right shoe caught on the ledge of the hallway landing, causing her to trip forward and fall. As a result of that fall, plaintiff suffered permanent injury to her right leg.

In January 1986, Durham County General Hospital had several passenger elevators. All were sold and installed by Otis Elevator and all were serviced and maintained by Otis Elevator pursuant to a contract with the hospital. Both the hospital and Otis Elevator maintain written logs for the service and maintenance performed on all hospital elevators. A service request in the hospital's log referencing the incident involving Ms. McClain on 8 January 1986 indicated that a passenger reported Elevator No. 1 was "bouncing." The service mechanic who responded to the complaint testified that he examined the elevator and found that the down direction leveling brush, a part of the elevator's selector, was badly worn.

The passenger elevators installed by defendant at the hospital were all generally similar in type. The service mechanics employed



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by Otis Elevator were required to examine, among other things, the leveling of each elevator during the regular weekly service visits to the hospital. At specified intervals during the year, the service mechanics were also required to pay specific attention to the elevators' "selectors," including its component leveling brushes, which was part of the system used to bring the elevator within the specified zone of leveling with hallway floors.

The defendant's expert witness, Dr. Charles Manning, testified that he first examined Elevator No. 1 in 1989. He stated that he was familiar with the service program and procedure of Otis Elevator and that he believed Otis Elevator had complied with those procedures with regard to Elevator No. 1 prior to plaintiff's accident. Dr. Manning further testified that, in his opinion, the elevator had been working properly on the day of Ms. McClain's injury and that the worn leveling brush found by the service mechanic would not cause the elevator to stop, bounce and then fall as plaintiff described.

Defendant filed a motion *in limine* prior to trial requesting that any evidence pertaining to the replacement of this worn leveling brush by defendant following Ms. McClain's accident be excluded along with any evidence of other alleged leveling problems with elevators other than Elevator No. 1 in the hospital. The trial judge granted defendant's motion.

The case was tried at the 22 January 1991 session of the Superior Court, Durham County and the jury returned a verdict finding no negligence on the part of defendant on 30 January 1991. Plaintiff thereafter requested a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure which the trial court denied.

Plaintiff appeals from the judgment entered on the verdict in favor of defendant.

*Merriman, Nicholls & Crampton, P.A., by Steven L. Evans, for plaintiff, appellant.*

*Maupin Taylor Ellis & Adams, P.A., by Mark S. Thomas, and John C. Millberg, for defendant, appellee.*

HEDRICK, Chief Judge.

[1] Plaintiff first assigns error to the trial court's exclusion of evidence that the worn leveling brush found in Elevator No. 1

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following Ms. McClain's accident was replaced and destroyed by defendant. Plaintiff contends that this evidence is admissible to show that the worn brush could have caused the elevator to malfunction in the manner described by Ms. McClain.

This issue is answered directly by the language of Rule 407 of the North Carolina Rules of Evidence which states:

When, after an event, measures are taken which, if taken previously, would have made the event less likely to occur, evidence of the subsequent measures is not admissible to prove negligence or culpable conduct in connection with the event. This rule does not require the exclusion of evidence of subsequent measures when offered for another purpose, such as proving ownership, control, or feasibility of precautionary measures, if those issues are controverted, or impeachment.

G.S. 8C-1, Rule 407. This rule is founded on the policy that persons "should be encouraged to improve, or repair, and not be deterred from it by the fear that if they do so their acts will be construed into an admission that they had been wrongdoers." *R. R. v. Trucking Co.*, 238 N.C. 422, 425, 78 S.E.2d 159, 161 (1953) (citations omitted).

Plaintiff's stated purpose in offering the evidence was to establish the causal link between the alleged improper maintenance by defendant and the injury to Ms. McClain. Such a link was crucial to plaintiff's proof of negligence. Introduction of evidence of the removal of the brush for this purpose is clearly prohibited by Rule 407. *See Klassette v. Mecklenburg County Area Mental Health*, 88 N.C. App. 495, 504, 364 S.E.2d 179, 185 (1988); *Jenkins v. Helgren*, 26 N.C. App. 653, 659, 217 S.E.2d 120, 124 (1975).

[2] Plaintiff next contends the trial judge erred in excluding evidence of leveling problems which had allegedly occurred in hospital elevators six months prior to and six months following the incident involving Ms. McClain. During cross examination, plaintiff attempted to question defendant's expert about entries appearing in the hospital elevator service record which referenced 20 reports of leveling problems in hospital elevators other than Elevator No. 1 during that time period. The trial court sustained defendant's objection based upon the relevance of the evidence and further concluded that allowing the cross examination would be unduly prejudicial to defendant as well as confusing and misleading to the jury. Plaintiff argues that cross examination concerning these

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incidents was crucial to attack the basis of Dr. Manning's opinion that Elevator No. 1 was operating properly on the date of Ms. McClain's accident.

Although Rules 703 and 705 of the North Carolina Rules of Evidence give plaintiff the right to vigorously cross examine defendant's expert regarding the underlying facts upon which he bases his opinion, *see Liss of Carolina v. South Hills Shopping Center*, 85 N.C. App. 258, 261-262, 354 S.E.2d 549, 551 (1987), it is the duty of the trial judge "to exercise his sound discretion in controlling the nature and scope of the cross-examination in the interest of justice and in confining the testimony within the rules of competency, relevancy and materiality." *Barnes v. Highway Commission*, 250 N.C. 378, 395, 109 S.E.2d 219, 232 (1959). A ruling of this nature by the trial court should not be disturbed absent an abuse of discretion and a showing that the ruling was so arbitrary that it could not have been the result of a reasoned decision. *State v. Smith*, 99 N.C. App. 67, 71, 392 S.E.2d 642, 645 (1990), *cert. denied*, 328 N.C. 96, 402 S.E.2d 824 (1991), *quoting State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985).

Plaintiff contends that defendant's expert based his conclusion that Elevator No. 1 had operated properly on the date of Ms. McClain's incident in part upon his opinion that defendant exercised a thorough and effective maintenance program with regard to all Otis elevators within the hospital. A careful review of Dr. Manning's testimony before the jury, however, clearly shows that he limited his opinion as well as the stated basis of his opinion to his observation of Elevator No. 1. At no point in his testimony did Dr. Manning state that his conclusions were based upon his investigation of the service and maintenance record of other elevators. Both on direct examination and cross examination, Dr. Manning repeatedly stated that his opinion was based upon the tests which he performed upon Elevator No. 1 as well as his review of the service and maintenance record of that particular elevator. It was only upon questioning by plaintiff, outside of the presence of the jury, that the expert stated that he believed Otis operated "one of the best safety prevention programs around." He further specified, however, that, in this case, his statements concerning the quality of maintenance by Otis dealt exclusively with the service record of Elevator No. 1.

## McCLAIN v. OTIS ELEVATOR CO.

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We see no relevance, therefore, in evidence of incidents regarding other elevators in the hospital. Further, the trial judge acted well within his discretion in ruling that the introduction of 20 separate and unrelated incidents would likely confuse and mislead the jury. Plaintiff's second assignment of error has no merit.

[3] Plaintiff's final contention is that the trial court erred in denying her motion for a new trial pursuant to Rule 59 of the North Carolina Rules of Civil Procedure. Plaintiff's only argument in support of this contention is that the trial court should have set the verdict aside following its review of the affidavits of two jurors which stated that the jury's verdict was based upon its conclusion that defendant was not negligent in failing to find the worn leveling brush. According to plaintiff, the statements of these jurors show that the jury "disregarded the evidence and the Court's instructions . . . ."

After a jury has rendered a verdict and has been discharged by the court, "jurors will not be allowed to attack or overthrow [the verdict], nor will evidence from them be received for such purpose." *Craig v. Calloway*, 68 N.C. App. 143, 150, 314 S.E.2d 823, 827 (1984), *citing Selph v. Selph*, 267 N.C. 635, 637, 148 S.E.2d 574, 576 (1966). Rule 606(b) of the North Carolina Rules of Evidence specifically states:

Upon an inquiry into the validity of a verdict or indictment, a juror may not testify as to any matter or statement occurring during the course of the jury's deliberations or to the effect of anything upon his or any other juror's mind or emotions as influencing him to assent to or dissent from the verdict or indictment or concerning his mental processes in connection therewith . . . . Nor may his affidavit or evidence of any statement by him concerning a matter about which he would be precluded from testifying be received for these purposes.

G.S. 8C-1, Rule 606(b).

Plaintiff's Rule 59 motion was presented to the court in an effort to convince the court to overrule the jury's verdict. She offered the testimony of individual jurors as reason for the allowance of her motion. Such use of juror testimony is clearly prohibited by the above stated rules of law and plaintiff's assignment of error is without merit.

## AMERSON v. LANCASTER

[106 N.C. App. 51 (1992)]

No error.

Judges ORR and WALKER concur.

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RUBY L. AMERSON, DOROTHY LAMOUR WAINWRIGHT HAINES,  
RUBY DIANE WAINWRIGHT LANCASTER AND CATHY DELOISE  
WAINWRIGHT THOMAS, PLAINTIFFS v. JAMES LANCASTER AND WIFE,  
ALMA LANCASTER, AND ANN LANCASTER NEWCOMB AND HUSBAND,  
JAMES NEWCOMB, DEFENDANTS

No. 918SC421

(Filed 7 April 1992)

**Deeds § 51 (NCI4th)— reservation — ambiguous — unenforceable**

The trial court correctly concluded that conveyances to defendants pursuant to a “reservation/exception” in a preceding deed were ineffective and correctly entered summary judgment for plaintiffs where life tenants retained the right to convey “certain lots which may from time to time be designated by them.” The terms “reservation” and “exception” are often used interchangeably and the modern tendency is not to focus on fine distinctions but to look to the character and effect of the provision itself. Since the description of these lots is vague and uncertain, the reservation is unenforceable; furthermore, even if the reservation was merely latently ambiguous, it would still fail as there is no extrinsic evidence which explains the ambiguity of “certain lots.”

**Am Jur 2d, Deeds §§ 310, 321, 327.**

APPEAL by defendants from order entered 8 February 1991 by *Judge Paul M. Wright* in WAYNE County Superior Court. Heard in the Court of Appeals 9 March 1992.

Plaintiffs brought this action to resolve the question of ownership of a certain 63-acre tract of land in Wayne County in which defendants claim an interest adverse to plaintiffs. The plaintiffs seek to remove what they contend is a cloud upon their title. The parties entered into a stipulation and the material facts are not in dispute.

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[106 N.C. App. 51 (1992)]

In a deed dated 9 November 1965, Bert Lancaster and Mandy T. Lancaster conveyed this 63-acre tract of land to Marvin Ray Lancaster and the deed was recorded on 23 December 1965. However, the transfer was made subject to the following reservation:

But this conveyance is made subject to the life estate of the parties of the first part [Bert and Mandy Lancaster] and subject to the condition that the parties of the first part hereby reserve all timber rights subject to the further condition that the parties of the first part reserve the right to convey certain lots which may from time to time be designated by them and as a part of the consideration for this conveyance, the party of the second part [Marvin Ray Lancaster] hereby agrees to join with the parties of the first part to sign such legal documents and deeds as might be necessary to effect such conveyances.

After Bert Lancaster died in 1976 Mandy Lancaster became the sole life tenant. Marvin Ray Lancaster died in 1977 and he devised all his real property to his wife, Ruby Lee Cole Lancaster, for life with remainder in fee simple to his three daughters, Dorothy Lamour Wainwright Hainey, Ruby Diane Wainwright Lancaster, and Cathy DeLoise Wainwright, all being the plaintiffs in the present action. Ruby Lee Cole Lancaster has since remarried and is presently Ruby L. Amerson.

On 15 August 1979 the remaining life tenant, Mandy T. Lancaster, conveyed several lots in fee simple from the 63-acre tract to certain relatives pursuant to the reservation in the 1965 deed. After these 1979 conveyances, there were certain quitclaim deeds executed by persons who claimed an interest in the 63-acre tract. After these quitclaim transfers, defendants were the only persons claiming title to portions of the 63-acre tract as a result of the 1979 conveyances.

Plaintiffs brought the present action asserting that after the death of the life tenant, fee simple title to this property thereafter vested in them as devisees under Marvin Ray Lancaster's will. Plaintiffs further assert the life tenant could not convey title to these certain lots in the 63-acre tract of land since the 1965 deed did not adequately describe the lots. Defendants claim the reservations in the 1965 deed were valid and therefore the life tenant had the ability to convey title in fee simple to certain lots which she could designate from time to time. According to defendants,

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they now own a portion of the 63-acre tract since the life tenant exercised her right to convey certain lots.

Both plaintiffs and defendants moved for summary judgment. In granting summary judgment for plaintiffs, the trial court found that all material facts were stipulated to by the parties. The court concluded that the conveyances by which the life tenant attempted to transfer certain lots to defendants failed as a matter of law because of the insufficiency of the legal description in the reservation portion of the 1965 deed. According to the court:

This reservation/exception does not describe the lots that might be conveyed with the same definiteness as the 63 acre dominant tract. Indeed, there is no definitive boundaries or guidance to other referenced documents nor has parole [sic] evidence been given the Court with any method which the Court could sufficiently identify and establish the lots to be conveyed by certain description so as to locate them on the ground and thereby fulfill the original intent of the grantors at the time of the 1965 deed. This insufficiency of legal description of the reservation to locate the same on the ground causes it to fail.

*Baddour, Parker & Hine, P.A., by Henry C. Smith, for plaintiff appellees.*

*Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for defendant appellants.*

WALKER, Judge.

Summary judgment is proper only when there is no genuine issue of material fact and one party is therefore entitled to judgment as a matter of law. *Frye v. Arrington*, 58 N.C.App. 180, 292 S.E.2d 772 (1982). In the present case since the parties agreed on the facts, the controversy centers upon the construction to be given the reservation in the 1965 deed, whereby the life tenants retained the right to convey "certain lots which may from time to time be designated by them."

In asserting the reservation gave the life tenant the right to convey certain lots, defendants assign as error the trial court's failure to draw a distinction between a "reservation" and an "exception." The trial court referred to the clause at issue as the "reservation/exception" portion of the 1965 deed. Although a distinction

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can be drawn between these terms, the trial court's use of both terms here does not render the judgment erroneous.

An exception means that some part of the estate is not granted at all or is withdrawn from the effect of the grant, while a reservation is some right which issues or arises out of the property granted. *Vance v. Pritchard*, 213 N.C. 552, 197 S.E. 182 (1938). A reservation is a clause in a deed whereby the grantor reserves something arising out of the thing being granted which is not in being at the time. The creation of a reservation is by some instrument in which there is a withholding of an interest for the benefit of the grantor. *River Birch Associates v. City of Raleigh*, 326 N.C. 100, 388 S.E.2d 538 (1990). These terms are often used interchangeably and frequently what purports to be a reservation has the force and effect of an exception. Therefore the modern tendency of the courts is not to focus on these fine distinctions, but to look to the character and effect of the provision itself. *Reynolds v. Hedrick Gravel & Sand Co.*, 263 N.C. 609, 139 S.E.2d 888 (1965).

In the present case, defendants contend the life tenant, Mandy Lancaster, did not except anything but rather she reserved the power to convey such lots as she might from time to time designate, and that what the life tenant reserved was the power to convey certain lots, not the lots themselves. Defendants further contend that even though an exception must be described with particularity, the Supreme Court in *Builders Supplies Co. of Goldsboro, North Carolina, Inc. v. Gainey*, 282 N.C. 261, 192 S.E.2d 449 (1972), seems to suggest that a deed conveying an ill defined tract out of a larger tract is valid if the grantee, under the terms of the deed, is allowed at a later time to lay off the tract being conveyed. However, the Court there did not decide that issue but said it may give effect to a deed which allowed the grantee to select a tract from a larger described tract at a later time and where the selection conforms to the intent of the parties. Here the reservation to determine the "certain lots" is solely within the discretion of the grantors. Also, in *Thompson v. Umberger*, 221 N.C. 178, 19 S.E.2d 484 (1942), the Court construed language in a deed which reserved two easements. In holding the reservation to be unenforceable, the Court noted that it was impossible to determine from the language of the deed who would benefit from the easements reserved and because the reservation gave no beginning point and no means by which the location of the proposed easements could



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be ascertained, they were too vague and uncertain to attach an easement to the land conveyed.

An ambiguity in a reservation does not necessarily render the reservation void. If the reservation is merely latently ambiguous, then parol evidence will be admitted to fit the reservation to the land. *Thompson v. Umberger, supra*. "A description is latently ambiguous if it is insufficient in itself to identify the property but refers to something extrinsic by which identification might possibly be made." *River Birch Associates v. City of Raleigh, supra*, at 123, 388 S.E.2d at 551. However, if the description is so vague and indefinite that the court would have to insert new language into the instrument in order to make the instrument effective, then the ambiguity in the deed is patent. *Carlton v. Anderson*, 276 N.C. 564, 173 S.E.2d 783 (1990). When a reservation in a deed is patently ambiguous, parol evidence is inadmissible and the attempted reservation is void for uncertainty. *River Birch Associates v. City of Raleigh, supra; Thompson v. Umberger, supra*.

Applying the aforementioned principles to the present case, it appears the reservation in the 1965 deed is patently ambiguous. The law favors creation of a fee simple estate unless it is clearly shown a lesser estate was intended. *Vestal v. Vestal*, 49 N.C.App. 263, 271 S.E.2d 306 (1980). The "instrument must be construed most favorably to the grantee, and all doubts and ambiguities are resolved in favor of the unrestricted use of the property." *Stegall v. Housing Authority of the City of Charlotte*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971). Nowhere in the 1965 deed is there any language to indicate where these lots are located. Neither does there appear any language indicating the beginning point, directions, distances, or size of these lots. In addition, there is no other language in this deed to clarify this ambiguity. Since the description of these lots is vague and uncertain, the reservation is unenforceable. Furthermore, even if this reservation was merely latently ambiguous, it would still fail as there is no extrinsic evidence which explains this ambiguity of "certain lots."

Therefore, the trial court correctly concluded the conveyances to defendants pursuant to this reservation were ineffective, and summary judgment in favor of the plaintiffs is affirmed.

## DUNN v. PATE

[106 N.C. App. 56 (1992)]

Affirmed.

Chief Judge HEDRICK and Judge ORR concur.

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MOLLIE JACKSON DUNN AND HUSBAND, CECIL DUNN; DAISY JACKSON TROGDON AND HUSBAND, JAMES H. TROGDON, JR.; PATRICIA JACKSON DAVIS AND HUSBAND, WILLIAM R. DAVIS; FAIRLYN JACKSON MONTELLA AND HUSBAND, MICHAEL MONTELLA, PLAINTIFFS-APPELLANTS v. WILLARD J. PATE; BOBBIE LOU JACKSON GRIMES; FAIRLEY JAMES GRIMES AND WIFE, JENNIFER B. GRIMES; DAVID E. GRIMES, JR.; ELIZABETH GRIMES FISHER AND HUSBAND, WILSON DAVID FISHER; LABON CHARLES GRIMES AND WIFE, LIBBY GRIMES, DEFENDANTS-APPELLEES

No. 9112SC324

(Filed 7 April 1992)

**Deeds § 25 (NCI4th) — 1962 deed from husband and wife to husband alone — certification lacking — constitutionality of statute**

In an action to set aside a 1962 deed from a husband and wife by entireties to the husband which did not contain the certification then required by statute that the conveyance was not unreasonable or injurious to the wife, the trial court erred by concluding that the statutes were unconstitutional and granting summary judgment for defendants. Although defendants have cited and relied on persuasive federal authority to support their contention that the statutes in question are a form of gender-based discrimination which violate both the United States and North Carolina Constitutions, the North Carolina Supreme Court upheld the constitutionality of the statute in *Butler v. Butler*, 169 N.C. 584, and research indicates no change of position up to the time the statute was repealed. The judicial policy of *stare decisis* is followed by the courts of North Carolina and is particularly applicable where property rights have vested in reliance on precedents. Moreover, the Court of Appeals has no authority to overrule decisions of the Supreme Court.

**Am Jur 2d, Courts §§ 183, 184, 196, 201, 225-227; Deeds §§ 31, 32; Husband and Wife § 260.**

## DUNN v. PATE

[106 N.C. App. 56 (1992)]

**Validity and effect of conveyance by one spouse to other of grantor's interest in property held as estate by entirety.**  
**8 ALR2d 634.**

APPEAL by plaintiffs from an order granting defendants' motion for summary judgment entered 31 December 1990 by Judge D.B. Herring, Jr. Heard in the Court of Appeals 15 January 1992.

This action was instituted by plaintiffs on 12 February 1989 and involves a dispute regarding the title to certain real property located in Cumberland County, North Carolina. Plaintiffs sought to have a 1962 deed set aside for failure to follow the requirements of N.C. Gen. Stat. § 52-12 (later § 52-6) and N.C. Gen. Stat. § 47-39.

The property in question was previously owned by Mary A. Jackson, the mother of Fairley J. Jackson. On 22 October 1951, Mary A. Jackson conveyed the property to Fairley J. Jackson and wife, Mary Elizabeth Jackson, as tenants by the entirety. Fairley J. Jackson and wife, Mary Elizabeth Jackson, executed a deed, recorded on 23 July 1962, conveying this property to Fairly J. Jackson individually. This deed did not contain a certification by the clerk of court that the conveyance was not unreasonable or injurious to the wife as was then required by N.C. Gen. Stats. § 52-12 and § 47-39.

On 12 May 1976, Fairley J. Jackson died testate and devised the property in question to his wife, Mary Elizabeth, for life; then in equal shares to each of his living children and his sister-in-law, Willard J. Pate. Pursuant to a codicil, the share which was devised to Willard J. Pate was for her life only and then the remainder was to be distributed to the children of Bobbie Lou Grimes (Fairley's grandchildren).

On 17 August 1980, Mary Elizabeth Jackson died intestate. At the time of her death, her heirs consisted of her five living children, to wit: Mollie Jackson Dunn, Daisy Jackson Trogdon, Patricia Jackson Davis, Fairlyn Jackson Montella and Bobbie Lou Grimes.

Plaintiffs alleged the 1962 deed was ineffective to convey the property to Fairley J. Jackson. Thus, at the time of his death the property was still held by Fairley J. Jackson and his wife as tenants by the entirety and upon his death the property passed by operation of law to his wife, Mary Elizabeth. Plaintiffs further

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[106 N.C. App. 56 (1992)]

alleged that upon Mary Elizabeth's death, the property passed to her children in five equal shares as opposed to being devised to the children and Willard J. Pate in six equal shares in accordance with the Will and Codicil of Fairley J. Jackson.

Both parties filed motions for summary judgment. On 16 March 1989, summary judgment was entered in favor of defendants by Judge Wiley F. Bowen. Plaintiffs appealed from that judgment.

In an opinion reported at 98 N.C. App. 351, 390 S.E.2d 712 (1990), this Court reversed the entry of summary judgment on state substantive law grounds, declined to consider the constitutional issues raised by defendants, and "remanded" the case.

Subsequent to this Court's decision, defendants filed a notice of appeal to our Supreme Court pursuant to N.C. Gen. Stat. § 7A-30(1) alleging that this case directly involved a substantial constitutional question. Defendants also filed a petition for discretionary review pursuant to N.C. Gen. Stat. § 7A-31. Plaintiffs filed a response to the petition for discretionary review and a motion to dismiss the appeal for lack of a substantial constitutional question. On 29 August 1990, the Supreme Court entered an order denying defendants' petition for discretionary review and granting plaintiffs' motion to dismiss. *Dunn v. Pate*, 327 N.C. 427, 395 S.E.2d 676 (1990).

On remand, defendants argued that the remaining issue for disposition was the constitutionality of N.C. Gen. Stats. § 52-12 (later § 52-6) and § 47-39 which had been raised earlier at the trial level and preserved by defendants throughout the litigation. Again, both parties filed motions for summary judgment having stipulated there was no genuine issue of material fact. The trial judge granted defendants' motion for summary judgment. Plaintiffs appealed.

*McCoy, Weaver, Wiggins, Cleveland & Raper, by Richard M. Wiggins, for plaintiffs-appellants.*

*Garris Neil Yarborough for defendants-appellees.*

WELLS, Judge.

In granting defendants' motion for summary judgment, the trial court concluded, *inter alia*:

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## CONCLUSIONS OF LAW

. . .

3. As to the parties and subject matter of this action, the Court is of the opinion, concludes and so holds, that North Carolina General Statute 52-12 (later 52-6) and 47-39, are a form of gender based [sic] discrimination violative of the equal protection clause of the 14th Amendment to the United States Constitution, the Due Process Clause of the 14th Amendment to the United States Constitution and Article 1, Section 19 of the North Carolina Constitution.

. . .

Plaintiffs contend the trial court erred in granting summary judgment, based on constitutional grounds, in favor of defendants. Plaintiffs argue the constitutionality of N.C. Gen. Stats. § 52-12 (later § 52-6) and § 47-39 has previously been determined by our Supreme Court and the trial court was bound to follow this established precedent. Contending that the trial court's decision is in direct contradiction of the case law dealing with this question, plaintiffs argue that the trial court erred in concluding the statutes were unconstitutional. We agree.

We recognize that the defendants in this case have made a meritorious argument with regard to the constitutionality of the statutes at issue. The defendants have cited and relied on persuasive federal authority to support their contention that the statutes in question are a form of gender-based discrimination which violates both the United States and North Carolina Constitutions. However, in *Butler v. Butler*, 169 N.C. 584, 86 S.E. 507 (1915), our Supreme Court addressed the application of the statutory requirement in question to a deed from a wife to her husband and specifically held that the statute applied to such deeds. The Court upheld the constitutionality of the statute *citing* *Kearney v. Vann*, 154 N.C. 311, 70 S.E. 747 (1911); *Long v. Rankin*, 108 N.C. 333, 12 S.E. 987 (1891); and *Sims v. Ray*, 96 N.C. 87, 2 S.E. 443 (1887). The Court further stated that “. . . the validity of the statute as a constitutional exercise of legislative power and its application to deeds cannot be further questioned. . . .” *Butler, supra*. Our research indicates no change of position on this question up to the time the statute was repealed.

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The judicial policy of *stare decisis* is followed by the courts of this state. See, e.g., *Rabon v. Rowan Memorial Hospital, Inc.*, 269 N.C. 1, 152 S.E.2d 485 (1967). Under this doctrine, “[t]he determination of a point of law by a court will generally be followed by a court of the same or lower rank if a subsequent case presents the same legal problem, although different parties are involved in the subsequent case.” 20 Am. Jur. 2d *Courts* § 183 (1965). This doctrine is particularly applicable where property rights, especially rights in real property, are concerned and where the rights have become vested in reliance on the precedents. 20 Am. Jur. 2d *Courts* § 196 (1965). See also *Rabon, supra*. *Stare decisis* has as its purpose the stability of the law and the security of titles. It is necessary that the established rules be uniformly observed so that those called upon to advise may safely give opinions on titles to real property. *Whitley v. Arenson*, 219 N.C. 121, 12 S.E.2d 906 (1941).

Moreover, this Court has no authority to overrule decisions of our Supreme Court and we have the responsibility to follow those decisions “until otherwise ordered by the Supreme Court.” *Cannon v. Miller*, 313 N.C. 324, 327 S.E.2d 888 (1985). It necessarily follows that the trial court is bound by this same principle as well as the doctrine of *stare decisis*. We recognize that the mandate in our previous opinion, “reversed and remanded,” implied that the trial court could change the result of this case on constitutional grounds but that procedural quirk does not affect the decisions by which we are bound on this question. Thus, for the foregoing reasons, we hold that the trial court erred in concluding the statutes were unconstitutional.

“Once an appellate court has ruled on a question, that decision becomes the law of the case and governs the question not only on remand at trial, but on a subsequent appeal of the same case.” *N.C.N.B. v. Virginia Carolina Builders*, 307 N.C. 563, 299 S.E.2d 629 (1983). The previous panel of this Court rejected defendants’ arguments that the deed was cured by N.C. Gen. Stat. § 52-8 or validated by N.C. Gen. Stat. § 39-13.1(a) and held that the deed in question was void. This became the law of the case and as such is binding upon this panel and the trial court. Accordingly, we remand this case and direct that summary judgment be entered in favor of plaintiffs.

## IN RE APPEAL OF JOHNSON

[106 N.C. App. 61 (1992)]

Reversed and remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

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IN THE MATTER OF: THE APPEAL OF E. MARVIN JOHNSON AND STEVE A. QUINN  
FROM THE DENIAL OF PRESENT USE VALUE ASSESSMENT BY THE BLADEN COUNTY  
BOARD OF EQUALIZATION, AND REVIEW FOR 1989

No. 9110PTC118

(Filed 7 April 1992)

**Taxation § 25.9 (NCI3d)— ad valorem taxes—change in turkey  
house valuation—timely application for present use valuation  
of farm**

The term “real property” in N.C.G.S. § 105-287(a) encompasses not only land but also improvements to land, and a change in valuation was made in the taxpayers’ property pursuant to that statute when the county board of equalization and review notified them that the value of turkey houses on their farm had been reduced. Therefore, the taxpayers timely applied for present use value assessment of their farm pursuant to N.C.G.S. § 105-277.4(a) when they filed their application within thirty days of the date on the notice of the change in valuation.

**Am Jur 2d, State and Local Taxation §§ 759, 786.**

APPEAL by taxpayers from decision entered 19 September 1990 by the Property Tax Commission sitting as the State Board of Equalization and Review. Heard in the Court of Appeals 7 November 1991.

*Jordan, Price, Wall, Gray and Jones, by Henry W. Jones and Stephen R. Dolan, for taxpayers-appellants.*

*Johnson and Johnson, by W. Leslie Johnson, Jr., for Bladen County-appellee.*

WYNN, Judge.

On 28 June 1988, E. Marvin Johnson and Steve A. Quinn, (“taxpayers”) purchased a turkey farm which included the following

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improvements: several turkey houses, a well, septic tank, and a 2,270 square foot log cabin. In June of 1989, the taxpayers were notified by order of the Bladen County Board of Equalization and Review that the appraised value of the turkey houses on the farm had been reduced. As a result, the total value of the land and improvements was adjusted from \$2,971,130 to \$2,808,130.

Following this adjustment, the taxpayers applied for present-use value assessment and taxation for the farm, a classification that would result in a lower taxation of their property. The Bladen County Tax Assessor ("Assessor") refused their application stating that the taxpayers had failed to timely submit the application in accordance with N.C. Gen. Stat. § 105-277.4(a) (1989) which requires submission either within the regular listing period which runs from the 1st through the 31st of January of each year, or within 30 days after an adjustment has been made to the value of the land.

The taxpayers, maintaining that the adjustment in June 1989 met the requirements of the statute, appealed to the Bladen County Board of Commission ("Board"). The Board effectively denied their appeal from the Assessor's decision. For reasons not related to the application of the taxpayers, however, the Board reduced the market value of the taxpayers' real estate from \$1,378,550 to \$830,550, resulting in an adjustment of the total appraised value of the land and structures to \$2,285,110. The taxpayers next appealed to the Property Tax Commission ("Commission") which on 19 September 1990, affirmed the denial of their application for present-use value assessment. The taxpayers now appeal to this Court.

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The issue on appeal is whether the taxpayers failed to make a timely application for present-use value assessment. More specifically, we must decide whether the Tax Commission erroneously interpreted certain provisions of N.C. Gen. Stat. §§ 105-271 to -95 (1989), statutorily designated as the "Machinery Act." The Machinery Act governs the assessment, listing and collection of *ad valorem* taxes, *King v. Baldwin*, 276 N.C. 316, 322, 172 S.E.2d 12, 16 (1970), and it "prescribes the time and manner for listing and valuing property for *ad valorem* tax purposes," *Spiers v. Davenport*, 263 N.C. 56, 58, 138 S.E.2d 762, 763 (1964).

The right to appeal a decision of an administrative agency is usually governed by the Administrative Procedure Act ("APA"). But in the instant case, the review of a decision of the Property



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Tax Commission is controlled by N.C. Gen. Stat. § 105-345.2(b) (1989), which is equivalent to the standard of review set forth in the APA. *See In re McElwee*, 304 N.C. 68, 283 S.E.2d 115 (1981). Section 105-345.2(b) provides that “[t]he court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action.” *Id.* Moreover, our Supreme Court has held that where the issue on appeal is the interpretation of a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ a *de novo* review. *Savings and Loan League v. Credit Union Comm.*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981); *accord Brooks v. McWhirter Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (1981).

N.C. Gen. Stat. § 105-277.4(a) (1989), which sets forth the time for filing an application for present-use value assessment provides in relevant part as follows:

Property coming within one of the classes defined in G.S. § 105-277.3 shall be eligible for taxation on the basis of the value of the property in its present use if a timely and proper application is filed with the assessor of the county in which the property is located. The application shall clearly show that the property comes within one of the classes and shall also contain any other relevant information required by the assessor to properly appraise the property at its present-use value. An initial application shall be filed during the regular listing period of the year for which the benefit of this classification is first claimed, or *within 30 days of the date shown on a notice of a change in valuation made pursuant to G.S. § 105-286 or G.S. § 105-287.* . . . .

(emphasis added).

The taxpayers concede that they failed to apply during the regular listing period. They contend, however, that their application was submitted timely within 30 days of notice of a change in valuation that was made pursuant to section 105-287. (We note that section 105-286 is not applicable to this case because that provision applies to revaluations that occurred during the time for the general octennial reappraisal of real property, which was from 1975 to 1983 in Bladen County. *See* N.C. Gen. Stat. § 105-286(a)(1). The evaluation of the taxpayers' property did not occur during that time.)

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Section 105-287 provides in pertinent part:

(a) In a year in which a general reappraisal or horizontal adjustment of real property in the county is not made, the assessor shall increase or decrease the appraised value of *real property*, as determined under G.S. 105-286, to:

- (1) Correct a clerical or mathematical error;
- (2) Correct an appraisal error resulting from a misapplication of the schedules, standards, and rules used in the county's most recent general reappraisal or horizontal adjustment; or
- (3) Recognize an increase or decrease in the value of the property resulting from a factor other than one listed in subsection (b).

(b) In a year in which a general reappraisal or horizontal adjustment of real property in the county is not made, the assessor may not increase or decrease the appraised value of real property, as determined under G.S. 105-286, to recognize a change in value caused by:

- (1) Normal, physical depreciation of improvements;
- (2) Inflation, deflation, or other economic changes affecting the county in general; or
- (3) Betterments to the property . . . .

This section allows the Board to make an adjustment to real property to recognize an increase or decrease in the value of property, to correct a clerical or mathematical error or to correct an appraisal error. The record does not indicate, nor did the Commission argue, that any of the exceptions under section 105-287(b) are applicable. Thus, absent some other valid reason for reducing the value of the subject property, the June 1989 change in valuation made by the Board must be viewed in light of section 105-287(a).

It is the Commission's contention that section 287 is not applicable to the taxpayers' case because within the context of the Machinery Act, the term "real property," refers only to land and not land and improvements. This argument is not persuasive for the following reasons. The statutory definition of the term "real property" is set forth in section 105-273.13:

## IN RE APPEAL OF JOHNSON

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“Real property,” “real estate,” and “land” mean not only the land itself, but also buildings, structures, improvements, and permanent fixtures thereon, and all rights and privileges belonging or in any wise appertaining thereto.

It is clear that the Machinery Act intended “real property” to encompass not only the land, but any improvements.

Furthermore, the record on appeal shows that on 9 June 1989, the taxpayers were notified that the Bladen County Board of Equalization and Review reduced the appraised value of their turkey houses and that “[t]he total appraised value of land and structures listed on this tax account has been adjusted from \$2,971,130 to \$2,808,130, . . . . The Commission, in denying the present-use value application, affirmed that the appraised value of land and structures listed on Taxpayers’ Account . . . had been adjusted . . . .” This action on the part of the Commission is exactly the type of action contemplated within section 105-287(a)(3). Moreover, it is significant to note that the Commission offers no other basis for the 1989 change in valuation.

We agree with the taxpayers that the Bladen County Board’s change in valuation of the taxpayers’ property in 1989 was made pursuant to section 105-287(a). As such, we find that the change in the value of the turkey houses affected all the “real property,” not merely the land itself. We, therefore conclude that the taxpayers’ application for present-use valuation was made within the time limits imposed by section 105-277.4(a). Accordingly, the decision of the Commission is,

Reversed.

Judges PARKER and GREENE concur.

## LASSITER v. N.C. FARM BUREAU MUT. INS. CO.

[106 N.C. App. 66 (1992)]

WILMA Y. LASSITER, PLAINTIFF v. NORTH CAROLINA FARM BUREAU  
MUTUAL INSURANCE COMPANY AND GMAC, DEFENDANTS

No. 9120DC417

(Filed 7 April 1992)

**1. Rules of Civil Procedure § 11 (NCI3d)— sanctions—finding that action commenced—supported by record**

In a proceeding for the imposition of sanctions under N.C.G.S. § 1A-1, Rule 11, there was ample evidence in the record from which the trial judge could find that plaintiff did in fact institute an action against defendant GMAC where the complaint clearly indicates that GMAC was named as a defendant in the action, the record discloses that GMAC was served with a summons and copy of the complaint, the prayer for relief establishes that plaintiff sought affirmative relief from GMAC in the form of attorney's fees and costs, and a letter to defendant's counsel further indicated that attorney's fees were being sought.

**Am Jur 2d, Actions § 86; Damages § 616.**

**2. Rules of Civil Procedure § 11 (NCI3d)— sanctions—purpose of including party—frivolous**

There was no error in the trial judge's imposition of sanctions under N.C.G.S. § 1A-1, Rule 11, where plaintiff's contention that the purpose of including GMAC as a party in the pleading was to give it notice as a lienholder bordered on the frivolous.

**Am Jur 2d, Damages § 616.**

**3. Rules of Civil Procedure § 11 (NCI3d)— sanctions—ruling by second judge—no error**

The trial judge did not err in ruling on defendant's motion for sanctions and attorney's fees pursuant to N.C.G.S. § 1A-1, Rule 11, in spite of a voluntary dismissal by another judge.

**Am Jur 2d, Damages § 616; Dismissal, Discontinuance, and Nonsuit § 72.**

**Effect of nonsuit, dismissal, or discontinuance of action on previous orders. 11 ALR2d 1407.**

## LASSITER v. N.C. FARM BUREAU MUT. INS. CO.

[106 N.C. App. 66 (1992)]

APPEAL by plaintiff from *Honeycutt (Kenneth W.)*, Judge. Order entered 11 February 1991 in District Court, RICHMOND County. Heard in the Court of Appeals 9 March 1992.

This is a civil action wherein plaintiff seeks to recover the sum of \$9,000.00 for damages to her automobile allegedly covered by a collision policy issued by defendant North Carolina Farm Bureau. Plaintiff also named GMAC, the holder of a perfected security interest in the automobile, as a defendant in her complaint and prayed:

4. That the defendants be taxed with the cost of this action, including a reasonable attorney's fee to be taxed as part of the cost of this action and payable to plaintiff's attorney for defendants' willful and wanton refusal to pay the actual cash value of the vehicle.

The record discloses that on 23 May 1988, counsel for defendant GMAC wrote plaintiff's counsel asking him to furnish the theory of liability upon which plaintiff based her action and request for attorney's fees and costs against GMAC. On 25 May 1988, plaintiff's counsel responded as follows:

I have received your letter of May 23, 1988. Please be advised that the only reason GMAC is involved in this case is because they have a lien on my client's car. We are seeking no affirmative relief against GMAC, only relief against N. C. Farm Bureau is being sought. GMAC only has an interest in any proceeds received.

Please do not misconstrue that we are asking for attorney's fees, damages or costs against GMAC, as that is not the case.

On 8 June 1988, defendant GMAC's counsel again wrote plaintiff's counsel requesting that the suit against GMAC be dismissed and advising plaintiff's counsel of his intention to seek sanctions for failure to dismiss GMAC. Plaintiff's counsel responded on 10 June 1988 as follows:

As I have stated to you in my previous letter and I do not intend to state to you again, GMAC is in this case because we have an understanding that they have some lien against the proceeds in the case. I do not know the amount of the lien, nor will I protect GMAC in collecting their lien. We will collect a verdict in this matter. I do not intend to protect

## LASSITER v. N.C. FARM BUREAU MUT. INS. CO.

[106 N.C. App. 66 (1992)]

GMAC's lien on the proceeds at all. I intend to collect my attorney's fee, pursuant to the contract I have. If you think your lien ought to be protected, you had better file an Answer in the case. If you think you need to file motions, then get with it. I want to tell you this, if you file frivolous motions, you can expect that you Charlotte attorneys are going to pay a reasonable attorney's fee to plaintiff's attorney in the event that you do not win.

Defendant GMAC filed "Motions and Hypothetical Answer" on 14 June 1988, which pleading contained a motion to dismiss pursuant to Rule 12(b)(6), a motion to strike plaintiff's claim for relief, and a motion to tax both plaintiff and plaintiff's counsel with attorney's fees pursuant to Rule 11.

On 14 February 1989, Judge Michael Beale entered an order allowing plaintiff to voluntarily dismiss her claims for relief against defendant GMAC. On 17 February 1989, plaintiff also filed a voluntary dismissal of her claims against defendant Farm Bureau pursuant to the terms of a settlement agreement reached between those parties.

It was not until 22 January 1991 that defendant GMAC's motion for Rule 11 sanctions against plaintiff came on for hearing before Judge Kenneth Honeycutt. On 11 February 1991 Judge Honeycutt entered an order wherein he made findings of fact and conclusions of law and ordered that plaintiff and her counsel pay defendant GMAC's reasonable attorney fees incurred as the result of this lawsuit in the amount of \$1,187.50.

Plaintiff appeals from the order imposing sanctions.

*Henry T. Drake for plaintiff, appellant.*

*Law Office of Michael S. Shulimson, by Mary S. Mercer and Michael S. Shulimson, for defendant, appellee GMAC.*

HEDRICK, Chief Judge.

[1] On appeal, plaintiff first contends Judge Honeycutt erred in finding that plaintiff had instituted an action against GMAC and that this finding was not supported by the record. We disagree.

Plaintiff's complaint clearly indicates that GMAC was named as a defendant in the action, and the record discloses that GMAC was served with a Summons and a copy of the complaint on 29

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[106 N.C. App. 66 (1992)]

April 1988. Furthermore, paragraph 4 of plaintiff's prayer for relief establishes that she sought affirmative relief from defendant GMAC in the form of attorney's fees and costs. This prayer for relief is supported by the letter from plaintiff's counsel to defendant's counsel dated 10 June 1988, in which Mr. Drake declares, "you can expect that you Charlotte attorneys are going to pay a reasonable attorney's fee to plaintiff's attorney in the event that you do not win."

We find ample evidence in the record from which the trial judge could find that plaintiff did in fact institute an action against defendant GMAC. Plaintiff's contention is meritless.

[2] Plaintiff next assigns error to Judge Honeycutt's imposition of sanctions pursuant to Rule 11 against plaintiff and plaintiff's counsel. Rule 11(a) in pertinent part provides:

The signature of an attorney or party constitutes a certificate by him that he has read the pleading, motion, or other paper; that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law, and that it is not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation . . . . If a pleading, motion, or other paper is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction, which may include an order to pay to the other party . . . the amount of the reasonable expenses incurred because of the filing of the pleading, motion, or other paper, including a reasonable attorney's fee.

In the present case, Judge Honeycutt found that both Mr. Drake and his client signed the complaint causing legal process to be served on defendant GMAC. He further found:

16. That Attorney Henry T. Drake, stipulates in open Court that he did not sign the Complaint intending to make a good faith argument for the extension, modification, or reversal of existing law; further, that he offers neither existing law supporting the existence of any justiciable claim in the Complaint against the Defendant G.M.A.C. nor testimony that he has made reasonable inquiry that the claim against the

## LASSITER v. N.C. FARM BUREAU MUT. INS. CO.

[106 N.C. App. 66 (1992)]

Defendant G.M.A.C. was well-founded in fact; he offers no explanation as to the basis upon which the Plaintiff declared herself, in the Complaint, to be entitled to receive from the Defendant G.M.A.C. costs and attorney fees.

From these findings, Judge Honeycutt concluded that Mr. Drake and his client had violated Rule 11 and ordered that they pay defendant GMAC's costs and expenses in connection with the defense of the lawsuit.

Although not argued at the motion hearing, plaintiff now contends that the purpose of including GMAC as a party in the pleading was to give it notice as a lienholder. Plaintiff further argues that "[t]o construe this claim as an action against or adverse to GMAC is straining at gnats." We find plaintiff's argument on appeal to border on the frivolous, and in light of plaintiff's stipulations made at the motion hearing find no error in the trial judge's imposition of sanctions pursuant to Rule 11 against plaintiff and her attorney. Plaintiff's assignment of error is meritless.

[3] Finally, plaintiff contends the trial judge erred in ruling on defendant's motion for sanctions and attorney's fees pursuant to Rule 11 after the case was dismissed and adjudicated by another judge. Plaintiff, in his brief, points out that at the time the matter was heard by the trial judge a court ordered voluntary dismissal terminates all pending motions before the court. *Wesley v. Brand*, 92 N.C. App. 513, 374 S.E.2d 475 (1988). We note, however, that in an opinion filed 27 January 1992, the North Carolina Supreme Court ruled that the trial court is not deprived of jurisdiction to determine the appropriateness of sanctions under Rule 11 by plaintiff's filing of an involuntary dismissal. *See Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992). Plaintiff's contention is overruled.

Judge Honeycutt's order entered 11 February 1991 ordering plaintiff and her attorney to pay defendant GMAC's reasonable attorney's fees is affirmed.

Affirmed.

Judges ORR and WALKER concur.



**COMBS v. TOWN OF BELHAVEN**

[106 N.C. App. 71 (1992)]

ROBERT J. COMBS v. THE TOWN OF BELHAVEN, NORTH CAROLINA, A  
MUNICIPAL CORPORATION

No. 912SC423

(Filed 7 April 1992)

**Municipal Corporations § 12.3 (NCI3d)— waiver of sovereign immunity—terms of insurance policy**

The trial court properly granted defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6), in an action for damages arising from the removal of automobiles and a mobile home from plaintiff's property by municipal employees. As insurance coverage relating to all Public Employees/Officials specifically excluded the acts set forth in plaintiff's complaint and the town employees alleged to have committed these acts cannot be defined as Law Enforcement Employees, for whom there is no exclusion for such acts, the trial court properly concluded as a matter of law that defendant town had not waived its sovereign immunity with respect to plaintiff's claims.

**Am Jur 2d, Municipal, County, School, and State Tort Liability § 38.**

APPEAL by plaintiff from *Reid (David E., Jr.)*, Judge. Order entered 11 February 1991 in Superior Court, BEAUFORT County. Heard in the Court of Appeals on 9 March 1992.

In this civil action, plaintiff seeks to recover from defendant town for damages allegedly resulting from the wrongful entry upon his premises by employees of defendant who thereafter removed certain personal property from the premises and inflicted damage upon plaintiff's real property and remaining personal property.

In his complaint, plaintiff alleged that on 7 July 1986 he was the record owner of two lots located within the Town of Belhaven upon which was located a mobile home and its contents and several automobiles. The lots also contained fruit trees, flower gardens, ornamental trees and various shrubs. According to plaintiff, on that date "the defendants or their agents" wrongfully entered upon his property and removed the mobile home and its contents as well as the automobiles. Plaintiff further alleged that defendant's agents destroyed the flowers, trees and shrubs, and severely damaged the mobile home and automobiles.

## COMBS v. TOWN OF BELHAVEN

[106 N.C. App. 71 (1992)]

The answer filed by defendant stated that town employees, acting pursuant to instructions by the Town Manager, had in fact entered upon plaintiff's premises and removed "junked motor vehicles." Defendant cited G.S. 160A-193, as well as a similar municipal ordinance, as authority for the town to "summarily remove, abate or remedy everything in the city limits that is dangerous or prejudicial to the public health or public safety." Defendant further pled sovereign immunity as a bar to plaintiff's claims.

Defendant filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. When this motion came on for hearing before Judge Reid, the parties stipulated that, for the purposes of the 12(b)(6) motion, the pleadings would include the complaint and the answer, as well as an affidavit of the Town Manager to which were attached copies of the insurance policies which provided liability coverage to defendant town at the time plaintiff's alleged damage occurred.

Following this hearing, the trial court issued an Order as follows:

5. Plaintiff has urged the Court and the Court agrees that plaintiff may recover damages only if defendant Town of Belhaven was indemnified by an insurance contract against acts such as those addressed by the Complaint and Motion to Dismiss and Answer;
6. Review of Defendant Town of Belhaven's insurance contracts discloses that, as a matter of law, defendant was not indemnified against the acts set out in the Complaint and Motion to Dismiss and Answer;
7. Defendant, Town of Belhaven, has not waived sovereign immunity.

From the judgment dismissing the complaint against the Town of Belhaven, plaintiff appeals.

*James R. Vosburgh for plaintiff, appellant.*

*James B. McMullan, Jr., for defendant, appellee.*

HEDRICK, Chief Judge.

The only question brought forward and argued on appeal is whether the trial court erred in holding as a matter of law that defendant Town of Belhaven had not waived sovereign immunity

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[106 N.C. App. 71 (1992)]

with regard to actions by town employees such as those set forth in plaintiff's complaint.

Under the common law, a municipality may not be held liable for torts committed by its employees in their performance of a governmental function. *Shuping v. Barber*, 89 N.C. App. 242, 246, 365 S.E.2d 712, 715 (1988), citing *Galligan v. Town of Chapel Hill*, 276 N.C. 172, 175, 171 S.E.2d 427, 429 (1970); *Edwards v. Akion*, 52 N.C. App. 688, 691, 279 S.E.2d 894, 896, *aff'd per curiam*, 304 N.C. 585, 284 S.E.2d 518 (1981). According to G.S. 160A-485(a), however, a town may waive this immunity by purchasing liability insurance. Immunity is waived only to the extent that the city or town is indemnified by the insurance contract from liability for the acts alleged. *Id.*, *Shuping v. Barber*, 89 N.C. App. at 246, 365 S.E.2d at 715.

On 7 July 1986, the defendant town of Belhaven had in effect two insurance policies. All parties agree that the policy entitled "General Liability-Automobile Policy" has no application to the facts of this case. The second policy, entitled "North Carolina Public Officers & Employees Liability Insurance," contains Coverage A which applies to Law Enforcement Employees only and Coverage B which applies to all Public Employees/Officials except Law Enforcement Employees. Both coverages insure the Town of Belhaven against claims arising out of any wrongful act by any member of the specified class of employees which occurred while that employee was acting within the scope of his employment.

Both coverages contain exclusions. Coverage B specifically excludes claims against an employee or official other than a Law Enforcement Employee for ". . . loss, damage to or destruction of any tangible property or the loss of use thereof by reason of the foregoing; [and] . . . for injury arising from: . . . wrongful entry or eviction or other invasion of the right of private occupancy." These contractual provisions clearly exclude coverage for the claims set forth by plaintiff. Coverage A, however, does not contain an exclusion for such acts committed by a Law Enforcement Employee.

Plaintiff argues that the agents of defendant who allegedly damaged his property should fall within the policy definition of Law Enforcement Employees. Plaintiff asserts the position that any employee of the Town of Belhaven who is called upon to enforce a town ordinance should be classified as a Law Enforcement

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Employee. Defendant argues that such a construction is inconsistent with the clear language of the insurance contract.

The policy attempts to define the term "Law Enforcement Employee" by stating simply that it shall be any person employed by a "Law Enforcement Agency." There is no definition of Law Enforcement Agency within the policy. The declaration page does state, however, that the Town of Belhaven had only 12 "Law Enforcement Employees" upon the effective date of this policy. There was a total of 54 "Public Employees/Officials" who were not considered "Law Enforcement Employees."

When the terms of a contract are clear and unambiguous, a court may interpret that contract as a matter of law. *Martin v. Ray Lacky Enterprises*, 100 N.C. App. 349, 354, 396 S.E.2d 327, 330 (1990), citing *Lane v. Scarborough*, 284 N.C. 407, 200 S.E.2d 622 (1973). We hold that the declaration page of this insurance policy, along with the definitions set out above, conclusively establishes that the contracting parties did not intend to include every town employee who might be called upon to perform an action authorized or dictated by a municipal ordinance within the definition of "Law Enforcement Employee."

As coverage relating to all Public Employees/Officials specifically excluded the acts set forth in plaintiff's complaint and the town employees alleged to have committed these acts cannot be defined as Law Enforcement Employees, the trial court properly concluded as a matter of law that defendant town had not waived its sovereign immunity with respect to plaintiff's claims.

The order dismissing plaintiff's claim pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure is affirmed.

Affirmed.

Judges ORR and WALKER concur.

## CITY OF ALBEMARLE v. SECURITY BANK AND TRUST CO.

[106 N.C. App. 75 (1992)]

CITY OF ALBEMARLE v. SECURITY BANK AND TRUST COMPANY AND  
STANLY COUNTY

No. 9120SC387

(Filed 7 April 1992)

**1. Eminent Domain § 235 (NCI4th) — action to acquire property for intersection — DOT — not a necessary party**

The trial court did not err by denying defendant's motion to dismiss for failure to join DOT as a necessary party in an action by a municipality to acquire property to realign two intersections into a single intersection because a municipality is vested under N.C.G.S. § 136-66.3(g) with the same authority to acquire rights-of-way for any state highway system as is granted DOT. Also, N.C.G.S. § 136-66.3(j) provides that the municipality is a proper party to any court proceeding regarding the acquisition of a right-of-way when the municipality agrees to contribute to part of the cost of acquisition of a right-of-way for the state highway system. Furthermore, the absence of a necessary party does not merit dismissal of the action.

**Am Jur 2d, Eminent Domain §§ 45, 390.**

**2. Eminent Domain § 20 (NCI4th) — taking for intersection — conflict of interest by city council members**

There was no abuse of discretion in the taking of property by a municipality to realign an intersection where three members of the city council were employed by financial institutions in direct competition with defendant. Defendant admits that these council members did not have a direct pecuniary interest in the property.

**Am Jur 2d, Eminent Domain § 403.**

Chief Judge HEDRICK concurring.

APPEAL by defendant Security Bank and Trust Company from order entered 14 February 1991 by *Judge William H. Helms* in STANLY County Superior Court. Heard in the Court of Appeals 17 February 1992.

The City of Albemarle (plaintiff) commenced this action on 18 May 1990 in order to acquire by eminent domain certain property

## CITY OF ALBEMARLE v. SECURITY BANK AND TRUST CO.

[106 N.C. App. 75 (1992)]

owned by Security Bank and Trust (defendant). This property is to be used to realign two separate traffic intersections and create a single intersection. Funding for the project is provided in part by the Department of Transportation (DOT) through the Small Urban Improvements Program.

The project route which impacts defendant's property was first recommended by DOT in 1988 and adopted shortly thereafter by plaintiff. In December 1989, DOT requested that plaintiff consider an alternative route. Plaintiff's city council declined to accept DOT's second recommendation and selected the original route proposed in 1988.

On 17 August 1990, defendant moved to dismiss this action for failure to join DOT as a necessary party to the action. On 28 September 1990, the trial court denied this motion. Defendant also asserted that at least three members of plaintiff's city council had substantial conflicts of interest when they voted to condemn defendant's property. In an order issued 14 February 1991, the trial court concluded plaintiff had acted within its authority and did not abuse its discretion in adopting a resolution to condemn a portion of defendant's property.

*Doby & Beaver, by Henry C. Doby, Jr., for plaintiff appellee.*

*Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Malcolm B. Blankenship, Jr., for defendant appellant.*

WALKER, Judge.

[1] Defendant first asserts the trial court erred in denying defendant's motion to dismiss for failure to join DOT as a necessary party pursuant to G.S. 136-66.3. In this case plaintiff and DOT entered into an agreement whereby this project would be undertaken through the Department's Small Urban Improvements Program to assist municipalities with traffic problems. Under this agreement the parties agreed to share in the cost of the acquisition of the necessary right-of-way for this project. Pursuant to G.S. 136-66.3(g) a municipality is vested with the same authority to acquire rights-of-way for any state highway system as is granted to DOT. In the acquisition of these rights-of-way the municipality may use the procedure provided for in Article 9 of Chapter 136. Further, this statute provides that the authority given to municipalities for the purpose of acquiring rights-of-way is in addi-

## CITY OF ALBEMARLE v. SECURITY BANK AND TRUST CO.

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tion to any other authority given by local act or by other general statutes. Also, G.S. 136-66.3(j) provides that when the municipality agrees to contribute to part of the cost of acquisition of a right-of-way for the state highway system, then the municipality is a proper party to any court proceeding regarding the acquisition of such right-of-way. We do not find any authority requiring DOT to be a necessary party in this case where clearly the municipality is the proper and necessary party to acquire the right-of-way by eminent domain. Likewise, defendant has failed to cite any authority to the contrary.

Furthermore, we note that even if DOT was a necessary party, the trial court would not have erred in denying defendant's motion to dismiss. The absence of a necessary party under Rule 19, N.C. Rules of Civil Procedure, does not merit dismissal of the action. In *Rice v. Randolph*, 96 N.C.App. 112, 113, 384 S.E.2d 295, 297 (1989), this Court said:

Necessary parties are those who have or claim material interests in the subject matter of a controversy, and those interests will be directly affected by an adjudication of the controversy. . . . When there is an absence of necessary parties, the trial court should correct the defect *ex mero motu* upon failure of a competent person to make a proper motion. . . . A judgment which is determinative of a claim arising in an action in which necessary parties have not been joined is null and void.

Therefore, if the trial court were to determine DOT was a necessary party, then the court should join DOT in the action, however the trial court correctly determined that DOT was not a necessary party and it did not err in denying defendant's motion to dismiss.

[2] In its final assignment of error, defendant contends the trial court erred in dismissing its defense that the vote of three members of the city council on this matter involved substantial conflicts of interest since they were employed by financial institutions in direct competition with defendant, and therefore they should have abstained from voting. The three council members in question held positions of Director, Assistant Vice President, and Branch Manager in other area financial institutions. The trial court found as fact that:

[N]either of the council members, or the financial institutions with which they were associated, derived any benefit, privilege,

## CITY OF ALBEMARLE v. SECURITY BANK AND TRUST CO.

[106 N.C. App. 75 (1992)]

advantage, or enrichment from such vote and that defendant Security Bank's competitive position in the business community will not be affected in any way by the condemnation. The Court further finds that . . . the interest of the respective council members . . . was too remote and infinitesimal to give rise to a conflict of interest.

Based upon these findings, the trial court determined that plaintiff's city council did not abuse its discretion in adopting the resolution to condemn a portion of defendant's property. Findings of fact are conclusive on appeal if there is evidence to support the findings. *Curl By and Through Curl v. Key*, 311 N.C. 259, 316 S.E.2d 272 (1984).

A city council's choice of a route, or the land to be condemned for a street, will not be reviewed on the ground that another route may have been more appropriate unless there has been an abuse of discretion. *City of Charlotte v. Neely*, 281 N.C. 684, 190 S.E.2d 179 (1972). An abuse of discretion can arise when a public official who votes to condemn the property has a direct and substantial interest in the subject matter of the condemnation. *See Kistler v. Board of Education of Randolph County*, 233 N.C. 400, 64 S.E.2d 403 (1951); *Venable v. School Committee of Pilot Mountain*, 149 N.C. 120, 62 S.E. 902 (1908). A "direct and substantial interest" exists if the council member has a personal or pecuniary interest in the subject matter of the condemnation. *Id.*

In the case at bar, defendant admits these council members did not have a direct pecuniary interest in the property, but because they had direct ties to local competing financial institutions, they should have abstained from voting on this matter. Defendant also contends that G.S. 160A-75 would allow these members to be excused from voting on the grounds of direct or indirect financial interests. We disagree. G.S. 160A-75 provides that a member of a city council may not be excused from voting unless the vote concerns matters involving the council member's personal financial interest or official conduct. However, since the trial court found the interests of these council members to be too remote to give rise to a conflict of interest, we do not perceive that they could have been excused from voting on the issue.

As there exists no abuse of discretion, we may not concern ourselves with the wisdom of the municipality's chosen course of action. *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E.2d 263 (1949).



## HANOVER INSURANCE CO. v. AMANA REFRIGERATION, INC.

[106 N.C. App. 79 (1992)]

Here, the findings and conclusions by the trial court support the dismissal of defendant's second and third defenses.

Affirmed.

Judge ORR concurs.

Chief Judge HEDRICK concurs with a separate opinion.

Chief Judge HEDRICK concurring.

I concur in the result reached by the majority, but I would vote to dismiss the appeal. Defendants have appealed from an order striking certain of their defenses. In the order appealed from, the trial court expressly stated:

This cause is retained for further hearing upon the Third Defense set out in the answer of the Defendant Security Bank relating to the issue of damages suffered the defendant by the taking of its land.

Obviously, this is not a final judgment and does not deprive defendant of a substantial right within the meaning of G.S. 1-277. No good is served by our consideration of these fragmentary appeals.

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THE HANOVER INSURANCE COMPANY, SUBROGEE OF ZIMP ATKINSON,  
PLAINTIFF v. AMANA REFRIGERATION, INC., DEFENDANT

No. 9116SC372

(Filed 7 April 1992)

**1. Rules of Civil Procedure § 4 (NCI3d) — service on corporation — wrong registered agent — sixty day savings provision not applicable**

The sixty day savings provision against the statute of limitations found in N.C.G.S. § 1A-1, Rule 4(j2)(2), was not applicable where service by registered mail was attempted, but not on the registered agent or agent authorized by law to accept service for defendant. A careful review of the savings provision indicates it is limited in scope and may only be employed where the original service was made by registered

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or certified mail upon a person residing in the addressee's dwelling house or usual place of abode, and it later appears that the person who received the receipt was not a person of suitable age and discretion residing therein.

**Am Jur 2d, Limitation of Actions § 212; Process §§ 234, 265.**

**2. Limitation of Actions § 4.1 (NCI3d) — defective air conditioner — house fire — three year statute of limitations**

The trial judge properly concluded that the applicable limitation period was three years under N.C.G.S. § 1-52, rather than four years under N.C.G.S. § 25-2-725, where the action was not based on the air conditioner being defective, but on this defective unit causing a fire which resulted in damages to the house. The loss sought to be recovered is the damage to the real property and not just the value or replacement of the air conditioning unit.

**Am Jur 2d, Limitation of Actions §§ 121, 122.**

**3. Limitation of Actions § 12 (NCI3d) — improper service — order that action could be recommenced within one year — limitations period not extended**

An order by the trial court that plaintiff could recommence its action within one year of the date of the original dismissal for improper service did not have the force of extending the limitations period, which had already run its course.

**Am Jur 2d, Limitation of Actions § 311.**

APPEAL by plaintiff from order entered 18 December 1990 by *Judge Dexter Brooks* in ROBESON County Superior Court. Heard in the Court of Appeals 12 February 1992.

In October 1984, Zimp Atkinson (Atkinson), plaintiff's insured, purchased an air conditioner manufactured by Amana Refrigeration, Inc. (defendant). On 15 September 1986, this air conditioning unit allegedly malfunctioned, resulting in a fire which destroyed Atkinson's house. The Hanover Insurance Company (plaintiff) paid Atkinson's losses and became subrogated to his rights.

On 11 September 1989, plaintiff commenced an action against defendant by filing a complaint and issuing a summons. Defendant moved to dismiss this action since service of the summons and complaint was made upon CT Corporation System which was not

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the registered agent for accepting service of process. On 12 April 1990, the trial court granted defendant's motion to dismiss. On 2 May 1990 plaintiff filed the present action and defendant moved for summary judgment on 7 September 1990. On 18 December 1990, the trial court entered an order granting defendant's requested relief on the grounds that plaintiff's action was barred by the applicable three-year statute of limitations, however the order dismissing the first action was amended on that same date to provide that plaintiff could "recommence its action against defendant at any time within one year after the date of entry of this dismissal order."

*Bailey & Dixon, by Gary S. Parsons and David S. Coats; and Huggins & Pounds, by Dallas M. Pounds, for plaintiff appellant.*

*McLeod, Senter & Hockman, P.A., by William L. Senter, for defendant appellee.*

WALKER, Judge.

[1] In its first assignment of error, plaintiff contends its claim is not barred by the statute of limitations for two reasons: (1) Rule 4(j2)(2), N.C. Rules of Civil Procedure, allowed plaintiff an additional sixty days after the action was dismissed within which to file a new action; and (2) the appropriate statute of limitations applicable to this action was the four-year limitation period for Uniform Commercial Code (UCC) actions and not the three-year limitations period under G.S. 1-52.

In the present case, since plaintiff's cause of action arose when Atkinson's house burned on 15 September 1986 the first action was timely filed on 11 September 1989. However, when the first action was dismissed, plaintiff did not refile this action until 2 May 1990, more than three years after the cause of action arose. Plaintiff contends that since the first action was commenced within the three-year statute of limitations period then pursuant to Rule 4(j2)(2), N.C. Rules of Civil Procedure, the statute of limitations may not be raised as a defense since plaintiff refiled the second action within sixty days of the 12 April 1990 order of dismissal. The "saving provision" of this Rule provides that if an action was initially commenced within the period of limitation and service is completed within sixty days from the date the service is declared invalid, then the statute of limitations may not be pled as a defense. However, a careful review of this saving provision indicates it

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is limited in scope and may only be employed where: (1) the original service was made by registered or certified mail upon a person residing in the addressee's dwelling house or usual place of abode; and (2) it later appears "the person who received the receipt at the addressee's dwelling house or usual place of abode was not a person of suitable age and discretion residing therein." In the present case, with defendant being a corporation, service must be made upon its registered agent, an agent authorized by law, or the officers, directors or managing agent of the corporation as per Rule 4(j)(6), N.C. Rules of Civil Procedure. Service was attempted by registered mail as provided in Rule 4(j)(6)(c), however CT Corporation System was not the registered agent or agent authorized by law to accept service for defendant. It is therefore apparent that the savings provision is not applicable to these facts and the limitation period was not extended.

[2] We now turn to plaintiff's contention that its claims for breach of express and implied warranty are governed by the four-year statute of limitations under G.S. 25-2-725. Plaintiff alleges that its insured sustained damages to his real property as a result of a defect in the air conditioning unit manufactured by defendant. The question then is whether plaintiff can maintain this action for breach of warranty where the four-year statute of limitations under G.S. 25-2-725 applies; otherwise, the action is governed by the three-year statute of limitations. In *Bernick v. Jurden*, 306 N.C. 435, 444-445, 293 S.E.2d 405, 411-412 (1982), the Court held that "where bodily injury to the person or a defect in property is an essential element of the cause of action" the three-year statute of limitations found in G.S. 1-52 should be utilized. Here, plaintiff's action is not based on the air conditioning unit being defective, but instead is based on this defective unit causing a fire which resulted in damages to the Atkinson house. The loss sought to be recovered is the damage to this real property and not just an action to recover the value or a replacement of the air conditioning unit based on breach of warranty. Therefore, the trial judge properly concluded the applicable limitation period was three years under G.S. 1-52.

[3] In its final assignment of error, plaintiff argues that the 18 December 1990 order providing that it could recommence this action within one year of the date of the original dismissal order vitiated the applicable statute of limitations. According to plaintiff, it has complied with this order by commencing this action within one year of the dismissal of the first action. In *Long v. Fink*,

**MELTON v. MADRY**

[106 N.C. App. 83 (1992)]

80 N.C.App. 482, 342 S.E.2d 557 (1986), this Court dealt with a situation similar to the present case. There, plaintiff instituted his first action on 1 August 1979, the last date the action could be commenced before being barred by the applicable statute of limitations. Defendant was never served and the summons expired 30 October 1979. On 19 May 1980, the trial court dismissed the action without prejudice and in its order specified that plaintiff could refile within one year. Plaintiff argued his claim was not barred because his action was refiled within one year as provided by the trial court. This Court disagreed and said that when the action was discontinued by operation of law on 30 October 1979, the statute of limitations had run its remaining course and the court's order of voluntary dismissal on 19 May 1980 allowing plaintiff another year within which to refile the action did not have the effect of extending the limitations period.

In the present case, defendant was not properly served with summons and complaint and the limitations period expired 15 September 1989. As in *Long v. Fink, supra*, the trial court's order providing that plaintiff had an additional year to refile does not have the force of extending the limitations period which had already run its course. The trial court's entry of summary judgment in favor of the defendant is

Affirmed.

Judges ARNOLD and PARKER concur.

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LULA V. MELTON, GUARDIAN FOR DONNA MELTON MADRY, PLAINTIFF v.  
JAMES T. MADRY, JR., DEFENDANT

No. 9110DC490

(Filed 7 April 1992)

**Divorce and Separation § 188 (NCI4th) — insane spouse — claim for alimony — no claim for divorce**

The trial court did not err by dismissing plaintiff's complaint under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff asserted that she is incurably insane within the meaning of N.C.G.S. § 50-5.1 due to severe and permanent brain damage

**MELTON v. MADRY**

[106 N.C. App. 83 (1992)]

and that she is entitled to permanent support from defendant, but the complaint did not contain a claim for divorce. The statutory language specifically states that a court may enter a divorce only upon the petition of the sane spouse who has established the incurable insanity of the other spouse in accordance with the methods of proof set forth in the statute. The court may order the plaintiff to provide lifetime support for the defendant only upon the granting of a divorce decree in that manner and a showing of insufficient income and property by defendant.

**Am Jur 2d, Divorce and Separation §§ 531, 540-541; Husband and Wife §§ 387-391.**

APPEAL by plaintiff from *Morelock (Fred M.)*, Judge. Order entered 18 February 1991 in District Court, WAKE County. Heard in the Court of Appeals on 16 March 1992.

This is a civil action instituted by plaintiff Melton as guardian for Donna Melton Madry seeking temporary and permanent alimony pursuant to G.S. 50-5.1. Donna Melton Madry and defendant James Madry are also parties to another case consolidated for hearing before this Court and reference is made to the opinion filed on this same date in *Madry v. Madry*, 9110DC489, for further information regarding the events leading to this appeal.

James and Donna Madry were married on 8 May 1982. According to the complaint filed by plaintiff, Donna Madry suffered a stroke on 9 August 1986 which left her with severe and permanent brain damage. Donna and James Madry separated on 19 February 1988. Donna was declared incompetent on 5 July 1990 and her mother, Lula Melton, was appointed as her general guardian. Plaintiff's complaint alleged that, as a result of Donna's brain damage, she is "incurably insane" within the meaning of G.S. 50-5.1 and is entitled to permanent support from defendant pursuant to that statute.

Defendant filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Upon the hearing of defendant's motion, the trial court held that neither temporary nor permanent alimony is awardable under G.S. 50-5.1 absent a pending action for divorce under that statute and dismissed plaintiff's complaint for failing to state a claim for relief.

## MELTON v. MADRY

[106 N.C. App. 83 (1992)]

Plaintiff appeals from the dismissal of her complaint.

*Womble Carlyle Sandridge & Rice, by Susan D. Crooks, for plaintiff, appellant.*

*Ragsdale, Kirschbaum, Nanney, Sokol & Heidgerd, P.A., by William L. Ragsdale, C. D. Heidgerd, and Connie E. Carrigan, for defendant, appellee.*

HEDRICK, Chief Judge.

Plaintiff's sole contention on appeal is that the trial court erred by allowing defendant's motion pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and dismissing her complaint for temporary and permanent alimony based upon G.S. 50-5.1. In determining the propriety of an order pursuant to Rule 12(b)(6), we must accept as fact all allegations in the complaint and decide as a matter of law whether those allegations state a claim for relief. *Stanback v. Stanback*, 297 N.C. 181, 185, 254 S.E.2d 611, 615 (1979). We are not required, however, to accept plaintiff's conclusions of law. *Jackson v. Bumgardner*, 318 N.C. 172, 347 S.E.2d 743 (1986).

Plaintiff's complaint asserts the conclusion that, due to the severe and permanent brain damage suffered by Donna Madry prior to the separation of the parties, Donna Madry is "incurably insane" within the meaning of G.S. 50-5.1 and is entitled to the permanent support from defendant which is authorized by that statute. The complaint does not contain a claim for a divorce. Plaintiff argues vehemently that G.S. 50-5.1 should be interpreted by this Court as allowing an "insane" spouse both temporary and permanent alimony prior to the institution of an action for divorce by the "sane" spouse.

G.S. 50-5.1 is entitled "Grounds for absolute divorce in cases of incurable insanity" and states in part:

In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree of absolute divorce upon the petition of the sane spouse.

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In all decrees granted under this subdivision in actions in which the insane defendant has insufficient income and property to provide for his or her own care and maintenance, the court shall require the plaintiff to provide for the care and maintenance of the insane defendant for the defendant's lifetime, based upon the standards set out in G.S. 50-16.5(a).

The statute further specifies the evidence required to prove that a spouse suffers from "incurable insanity" and the method by which the period of separation is determined.

We are not compelled to decide whether Donna Madry is "incurably insane." We need only determine whether the language of the statute as set forth above allows a spouse who contends to be "incurably insane" to petition the court for support prior to the institution of a divorce action pursuant to that section.

A statute must be construed as written. Our Supreme Court stated in *State v. Williams*, 291 N.C. 442, 445-446, 230 S.E.2d 515, 518-519 (1976), that ". . . when the language of a statute is clear and unambiguous there is no room for judicial construction and the court must give the statute its plain and definite meaning . . . ." G.S. 50-5.1 cannot be said to be ambiguous or unclear. The language specifically states that a court may enter a divorce only upon the petition of the "sane" spouse who has established the incurable insanity of the other spouse in accordance with the methods of proof set forth in the statute. Only upon the granting of a divorce decree in that manner and a showing of insufficient income and property by "defendant," may the court order "plaintiff" to provide lifetime support for the "insane defendant."

The plain language of G.S. 50-5.1 allows no interpretation other than that given by the trial court. Plaintiff's complaint was properly dismissed pursuant to Rule 12(b)(6).

Affirmed.

Judges ORR and WALKER concur.



## FIRST FINANCIAL SAVINGS BANK v. SLEDGE

[106 N.C. App. 87 (1992)]

FIRST FINANCIAL SAVINGS BANK, INC. AND HENRY A. BOYD, TRUSTEE  
v. CHARLES H. SLEDGE AND WIFE, MARGARET T. SLEDGE, PHILIP I.  
WALKER AND WIFE, REBECCA G. WALKER, RUTH A. NOBLITT AND  
STATE EMPLOYEES CREDIT UNION

No. 913SC474

(Filed 7 April 1992)

**Mortgages and Deeds of Trust § 9 (NC13d) — unrecorded release  
deed — alteration by borrower — innocent purchaser — lender not  
negligent — priority of lender's lien**

A lender was not negligent in giving the borrower an unrecorded deed releasing one lot from a deed of trust and thus did not lose the priority of its lien for other lots covered by the deed of trust when the borrower altered the release deed to include three additional lots, recorded the deed for the release of four lots, and sold one of the additional lots to an innocent purchaser who placed a deed of trust on such lot.

**Am Jur 2d, Alteration of Instruments §§ 27, 53.**

APPEAL by defendants from judgment entered 14 January 1991 in CARTERET County Superior Court by *Judge W. Russell Duke, Jr.* Heard in the Court of Appeals 11 March 1992.

*Darden, Coyne, Simpson & Harris, by John P. Simpson, for plaintiffs-appellees.*

*Ward and Smith, P.A., by J. Nicholas Ellis, for defendant-appellant State Employees Credit Union.*

*Roger L. Crowe, Jr., P.A., by Andrew A. Lassiter, for defendants-appellants Philip I. Walker and Rebecca G. Walker.*

WYNN, Judge.

On or about 17 April 1987, Chuck and Lynn Sledge executed a promissory note secured by a deed of trust to Henry A. Boyd, trustee, and First Financial Savings Bank, Inc. (hereinafter "First Financial") in the original amount of \$40,000. The deed of trust was recorded on 17 April 1987 in Carteret County and secured First Financial's lien on lots 28, 29, 31, 34, and 35 of Riverside Estates.

On 29 October 1987, Chuck Sledge requested a release deed for lot 31 and agreed to pay First Financial the release fee of

## FIRST FINANCIAL SAVINGS BANK v. SLEDGE

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\$8,000. Teresa Arthur, a First Financial employee, forwarded an unexecuted release deed to Mr. Boyd, who later returned the executed deed to Ms. Arthur. After paying the release fee, Ms. Arthur gave Mr. Sledge a deed releasing lot 31. Without the knowledge or authorization of plaintiffs, Mr. Sledge subsequently altered the release deed to include lots 28, 29, and 34. He then recorded the document on 28 November 1987 for the release of lots 28, 29, 31, and 34 of Riverside Estates.

Chuck and Lynn Sledge later sold lot 34 to the Walkers. The deed for the sale of lot 34 was recorded, and the Walkers subsequently executed a deed of trust in favor of the State Employees Credit Union (hereinafter "Credit Union") on lot 34. After discovering the release deed was altered materially, First Financial and Mr. Boyd brought an action to set aside the release deed as it pertained to lots 34, 28, and 29. The trial court granted summary judgment in favor of First Financial and Mr. Boyd, and Mr. and Mrs. Walker and the Credit Union appealed to this Court.

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The sole issue presented by appellants is whether the trial court committed reversible error in granting plaintiffs' motion for summary judgment. Appellants contend that there is a genuine issue of material fact regarding plaintiffs' negligence in giving Chuck Sledge possession of the unrecorded release deed. For the reasons which follow, we disagree with appellants' arguments and affirm the decision of the trial court.

The law in this State is clear regarding material alterations of written instruments. The discharge of a perfected mortgage upon public record by the act of an unauthorized third party entitles the mortgagee to restoration of its status as a priority lienholder over an innocent purchaser for value. *Union Central Life Insurance Co. v. Cates*, 193 N.C. 456, 462, 137 S.E. 324, 327 (1927). The owner of a mortgage, however, will lose priority over an innocent purchaser if the mortgagee is negligent with respect to the release of the mortgage. *Id.*

In the case at bar, we find that plaintiffs did not breach a duty in giving Chuck Sledge possession of the unrecorded release deed. Mr. Sledge paid the proper release fee and was entitled to the deed. There are neither cases nor statutes which require a mortgagee to record a release deed prior to delivering it to the mortgagor. Mr. Sledge's alteration of the deed was an unauthor-

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ized act, and plaintiffs were in no way negligent for his act. We, therefore, affirm the decision of the trial court.

The decision of the trial court granting summary judgment in favor of plaintiffs is,

Affirmed.

Judges ARNOLD and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION  
FILED 7 APRIL 1992

ANGELL v. CITY OF SANFORD No. 9111SC332	Lee (90CVS00678)	Affirmed
BECK v. WILSON'S FOOD STORES No. 915SC505	New Hanover (88CVD3251)	Affirmed
BOLTON v. RICHARDSON No. 917SC435	Edgecombe (88CVS516)	Reversed & Remanded
GREENE v. TRUSTEES OF LIVINGSTONE COLLEGE No. 9119SC392	Rowan (89CVS1688)	No Error
LOG SYSTEMS, INC. v. WILKEY No. 9119SC338	Cabarrus (89CVS73)	No Error
MACON COUNTY SUPPLY CO. v. HOLLY SPRINGS GOLF & COUNTRY CLUB No. 9130SC516	Macon (86CVS30)	No Error
MIDLAND PETROLEUM CO. v. N.C. DEPT. OF ENVIRONMENT, HEALTH & NAT. RES. No. 9110SC520	Wake (90CVS502)	Affirmed
PENICK v. FINLEY GROUP, INC. No. 9124SC509	Watauga (90CVS181)	Affirmed
STATE v. HOWZE No. 9126SC427	Mecklenburg (90CRS64174)	No Error

**HAYWOOD v. HAYWOOD**

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EGBERT L. HAYWOOD, JR. v. MARY R. HAYWOOD

No. 9114DC188

(Filed 21 April 1992)

**1. Divorce and Separation § 176 (NCI4th)— equitable distribution—lot acquired with separate property—presumption of gift—findings not sufficient**

The trial court erred in an equitable distribution action by failing to make the required finding where there was a presumption of a gift to the marital estate of a lot (Plymouth Road) acquired in exchange for separate property, plaintiff introduced evidence to rebut the presumption, and the court failed to make a finding on that issue. When a party claims property to be separate and supports his or her claim with evidence, the trial court must consider the evidence and make a finding which demonstrates that the court has considered the evidence.

**Am Jur 2d, Divorce and Separation §§ 884, 887.****2. Divorce and Separation §§ 136, 148 (NCI4th)— marital home—value at date of distribution—evidence sufficient—mortgage payments as distributive factor**

The trial court did not err in an equitable distribution action by finding that the marital home had a value of \$225,000 at the date of distribution where there was competent evidence in the record to support the finding and the plaintiff did not argue that the trial court distributed the marital home on the basis of its value at the date of distribution or that the court failed to consider the post-separation appreciation as a distributional factor. However, on remand, the trial court must consider the defendant's post-separation mortgage payments as a distributional factor as opposed to giving defendant a credit for those payments.

**Am Jur 2d, Divorce and Separation §§ 937, 938.**

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

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**3. Divorce and Separation § 176 (NCI4th)— equitable distribution—lot deeded by entirety—acquired with separate property—presumption of gift—rebuttal evidence—findings insufficient**

The trial court failed to make the required findings in an equitable distribution action where it was undisputed that plaintiff used separate property to acquire the 200 12th Street lot which was titled by the entirety, so that the presumption arises that plaintiff made a gift of his separate property to the marital estate, but plaintiff produced competent evidence to rebut the presumption. The trial court was required to consider the evidence and make a finding as to whether the plaintiff had rebutted the presumption.

**Am Jur 2d, Divorce and Separation §§ 884, 887.**

**4. Divorce and Separation § 125 (NCI4th)— equitable distribution—gold coins—separate property**

The trial court erred in an equitable distribution action by classifying 100 gold Krugerrands as marital property where the evidence showed that the coins were acquired in exchange for plaintiff's separate property and no contrary intention was expressed in the conveyance. Storing the coins in a joint safety deposit box is not an express contrary intention in the conveyance that the coins be considered marital property.

**Am Jur 2d, Divorce and Separation § 887.**

**5. Divorce and Separation § 152 (NCI4th)— equitable distribution—master's degree in economics and business—separate property**

The trial court erred in an equitable distribution action by failing to make the required finding regarding defendant's master's degree in economics and business. Educational degrees are not property under the equitable distribution statute, but the trial court was required to treat plaintiff's direct and indirect contributions towards defendant's acquisition of her degree as a distributional factor. In this case, the trial court did not make a finding of fact, but merely concluded that the equitable distribution of the marital property of the parties requires that the marital property be divided equally.

**Am Jur 2d, Divorce and Separation § 898.**

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**Spouse's professional degree or license as marital property for purposes of alimony, support, or property settlement.**  
4 ALR4th 1294.

**6. Divorce and Separation § 158 (NCI4th)— equitable distribution—personal debts and medical problems—distributional factors—findings required**

The trial court erred in an equitable distribution action by failing to make findings regarding plaintiff's evidence concerning his personal debts and medical problems.

**Am Jur 2d, Divorce and Separation §§ 917, 935.**

Judge WYNN dissenting in part.

APPEAL by plaintiff from judgment entered 7 September 1990 in DURHAM County District Court by *Judge David Q. LaBarre*. Heard in the Court of Appeals 14 November 1991.

*Hunter, Wharton & Lynch, by John V. Hunter III, for plaintiff-appellant.*

*Randall, Jervis, Hill & Anthony, by John C. Randall, for defendant-appellee.*

GREENE, Judge.

The plaintiff appeals from an equitable distribution order entered 7 September 1990.

This appeal is the second appeal of this case to this Court. For the procedural history of this case prior to this appeal, see *Haywood v. Haywood*, 95 N.C. App. 426, 427-28, 382 S.E.2d 798, 799, *disc. rev. denied*, 325 N.C. 706, 388 S.E.2d 454 (1989). The facts which are relevant for the disposition of this appeal are contained in the context of the discussion of each assignment of error.

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The issues are whether (I) the trial court was required to make findings of fact on whether the plaintiff had rebutted the gift presumption regarding (A) the Plymouth Road lot and (B) the 200 12th Street lot; (II) the plaintiff rebutted the defendant's showing that the 100 gold Krugerrands are marital property; (III) the defendant's master's degree is property under the equitable distribution statute; and (IV) the trial court was required to make findings

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on the plaintiff's evidence concerning his personal debts and medical problems.

## I

## (A) Plymouth Road House and Lot

[1] The plaintiff argues that although the Plymouth Road *house* is marital property, because the parties acquired the *lot* upon which the house sits in exchange for his separate property, the *lot* remains his separate property.

The evidence at trial tends to show that on 9 April 1975, Arden Properties, Inc., which was controlled by the plaintiff's parents, gave the plaintiff a \$20,000 note payable to the plaintiff on demand. The parties were married on 3 March 1978, and in March, 1980, the plaintiff signed over his note to Thunder Oil Corporation, a corporation predominately owned by the plaintiff's parents, in exchange for the lot located on Plymouth Road in Durham, North Carolina which Thunder Oil transferred to the parties as tenants by the entireties. According to our Supreme Court,

[i]f a spouse uses separate funds to acquire property titled by the entireties, the presumption is that a gift of those separate funds was made, and the statute's interspousal gift provision applies. Unless that presumption is rebutted by clear, cogent and convincing evidence, the statute dictates that the gift 'shall be considered separate property only if such an intention is stated in the conveyance.' N.C.G.S. § 50-20(b)(2) (1987 [& Supp. 1991]).

*McLean v. McLean*, 323 N.C. 543, 552, 374 S.E.2d 376, 382 (1988). Therefore, because the plaintiff used his demand note to acquire the Plymouth Road lot which in the deed was titled by the entireties, the presumption arises that the plaintiff made a gift of his separate property to the marital estate. Consistent with *McLean*, the trial court found that the deed "to the parties as tenants by the entireties contained no reservation of interest nor was it encumbered by any deed of trust and was a gift to the marriage and is therefore marital property." The plaintiff, however, introduced evidence to rebut the presumption, and the trial court failed to make a finding on that evidence.

As with evidence of N.C.G.S. § 50-20(c) (1987 & Supp. 1991) factors, when a party claims property to be separate and supports



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his or her claim with evidence, the trial court must consider the evidence and make a finding which demonstrates that the trial court has considered the evidence. *See Taylor v. Taylor*, 92 N.C. App. 413, 419, 374 S.E.2d 644, 648 (1988); *cf. Armstrong v. Armstrong*, 322 N.C. 396, 404-06, 368 S.E.2d 595, 599-600 (1988) (findings required when party presents evidence of distributional factor). Without a finding of fact showing that the trial court has considered the party's evidence, a reviewing appellate court is unable to determine whether the trial court properly applied the law in determining the property to be marital. *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980). Here, the plaintiff testified that at the time of the conveyance he did not intend to make a gift of his separate property to the marital estate. This testimony is some competent evidence to rebut the presumed gift of his separate property to the marital estate. *Lawrence v. Lawrence*, 100 N.C. App. 1, 9, 394 S.E.2d 267, 270 (1990); *Draughon v. Draughon*, 82 N.C. App. 738, 739-40, 347 S.E.2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987); *see Thompson v. Thompson*, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768-69 (1989) (defendant testified that he did not intend to have wife's name placed on deed). Accordingly, because the plaintiff produced some competent evidence to rebut the presumption of gift to the marital estate, the trial court was required to consider the evidence and make a finding as to whether the plaintiff had rebutted the presumption with clear, cogent, and convincing evidence, such determination being within the trial court's discretion. *Thompson*, 93 N.C. App. at 232, 377 S.E.2d at 768-69; *Draughon*, 82 N.C. App. at 739-40, 347 S.E.2d at 872. The trial court erred in failing to make the required finding. If on remand the trial court determines that the Plymouth Road lot is marital property, the trial court must nonetheless consider as a distributional factor that the plaintiff contributed his separate property to the marital estate. N.C.G.S. § 50-20(c)(12) (1987 & Supp. 1991); *Lawrence*, 100 N.C. App. at 23, 394 S.E.2d at 279 (Greene, J., concurring) (means for acquiring marital property important in determining equitable distribution).

[2] The plaintiff also argues that the trial court erred in finding that the Plymouth Road house had a value of \$225,000 at the date of *distribution*. We disagree. A trial court's findings of fact are conclusive on appeal when there is any competent evidence in the record to support them. *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986). There is some competent evidence in

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the record to support the trial court's finding that the marital home located on Plymouth Road had a value of \$225,000 at the date of *distribution*. The plaintiff does not argue that the trial court distributed the marital home on the basis of its value at the date of distribution. In fact, the trial court valued the property at the date of separation at \$106,578.63 and distributed that amount as marital property. N.C.G.S. § 50-21(b) (1987 & Supp. 1991) (trial court must value marital property as of date of separation); *Mishler v. Mishler*, 90 N.C. App. 72, 77, 367 S.E.2d 385, 388, *disc. rev. denied*, 323 N.C. 174, 373 S.E.2d 111 (1988) (trial court must distribute date of separation value of marital property). The trial court must nonetheless consider evidence of the value of the marital property at the date of distribution because the post-separation appreciation in the value of marital property is a distributional factor under N.C.G.S. § 50-20(c)(11a) or (12) (1987 & Supp. 1991). *Mishler*, 90 N.C. App. at 77, 367 S.E.2d at 388; *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988). The plaintiff does not argue that the trial court failed to consider the post-separation appreciation as a distributional factor. The plaintiff argues, however, and we agree that on remand the trial court must consider the defendant's post-separation mortgage payments on the Plymouth Road house as a distributional factor under N.C.G.S. § 50-20(c)(11a) or (12) as opposed to giving the defendant a credit for those payments. *Fox v. Fox*, 103 N.C. App. 13, 20-21, 404 S.E.2d 354, 358 (1991); *Miller v. Miller*, 97 N.C. App. 77, 80-81, 387 S.E.2d 181, 184 (1990).

## (B) 200 12th Street House and Lot

[3] The plaintiff argues that the trial court erroneously classified the house built on the 200 12th Street lot located in Butner, North Carolina as marital property because the house was built before the parties' marriage. We disagree. Contrary to the plaintiff's testimony, the defendant testified and the trial court found that this house was built during the parties' marriage. We agree with the plaintiff, however, that the 200 12th Street *lot* has not been properly classified as marital property.

It is undisputed that the plaintiff used separate property to acquire the 200 12th Street lot which was titled by the entireties. Therefore, the presumption arises that the plaintiff made a gift of his separate property to the marital estate. *McLean*, 323 N.C. at 552, 374 S.E.2d at 382. The plaintiff testified, however, that he did not intend to make a gift of his separate property to the

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marital estate. As stated with regard to the Plymouth Road lot, because the plaintiff produced some competent evidence to rebut the presumption of gift to the marital estate, the trial court was required to consider the evidence and make a finding as to whether the plaintiff had rebutted the presumption with clear, cogent, and convincing evidence. The trial court erred in failing to make the required finding. If on remand the trial court determines that the 200 12th Street lot is marital property, the trial court must consider as a distributional factor that the plaintiff contributed his separate property to the marital estate. N.C.G.S. § 50-20(c)(12); *Lawrence*, 100 N.C. App. at 23, 394 S.E.2d at 279 (Greene, J., concurring).

## II

## 100 Gold Krugerrands

[4] The plaintiff argues that the trial court erred in classifying the 100 gold Krugerrands as marital property. We agree.

The trial court must identify and classify “property as marital or separate ‘depending upon the proof presented to the trial court of the nature’ of the assets.” *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991) (citation omitted). The party seeking to have property classified as marital or separate bears the burden of showing by a preponderance of the evidence that the property is marital or separate. *Id.* The party claiming the property to be marital meets this burden by showing that the property

(1) was ‘acquired by either spouse or both spouses’; and (2) was acquired ‘during the course of the marriage’; and (3) was acquired ‘before the date of the separation of the parties’; and (4) is ‘presently owned.’

*Id.* (citation omitted). If the party claiming the property to be marital shows these four elements by a preponderance of the evidence, the burden shifts to the party claiming the property to be separate to show by a “preponderance of the evidence that the property meets the definition of separate property under N.C.G.S. § 50-20(b)(2) (1987 [& Supp. 1991]).” *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 466, 409 S.E.2d 749, 752 (1991); *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 788. “If both parties meet their burdens, then under the statutory scheme of N.C.G.S. § 50-20(b)(1) and (b)(2), the property is excepted from the definition of marital property and is, therefore, separate property.” *Atkins*, 102 N.C. App. at

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206, 401 S.E.2d at 788; *Ciobanu*, 104 N.C. App. at 466, 409 S.E.2d at 752 (*Atkins* allocation of burdens of proof consistent with recent amendment to N.C.G.S. § 50-20(b)(1) (Supp. 1991) establishing rebuttable presumption that property acquired between dates of marriage and separation is marital).

The defendant showed and the trial court found that the 100 gold Krugerrands stored in Canada are marital property. The plaintiff acquired the coins during their marriage and before their separation, and they are presently owned and stored in Canada in a safety deposit box with the joint right of withdrawal. *Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787. The plaintiff, however, responded to this evidence by showing that he had obtained the coins in exchange for his separate property, namely, stocks he had owned prior to the parties' marriage.

Under N.C.G.S. § 50-20(b)(2) (1987 & Supp. 1991), "[p]roperty acquired in exchange for separate property shall remain separate property regardless of whether the title is in the name of the husband or wife or both and shall not be considered to be marital property unless a contrary intention is expressly stated in the conveyance." The plaintiff's evidence showed that in November, 1976, the plaintiff posted his separate stock as security for a line of credit at NCNB. The parties were married on 3 March 1978. On 14 July 1978, the plaintiff sold his stock for \$21,312.12 which amount he deposited into his checking account at NCNB. On that same day, NCNB wired \$21,175 from the plaintiff's account to Marine Midland Bank, the bank for Carrera and Company, a trader in precious metals. Carrera and Company then shipped the coins to NCNB. According to the NCNB bank official who handled this transaction, the coins replaced the plaintiff's stock as security for the plaintiff's line of credit. This evidence, which the defendant does not dispute, shows that the coins were acquired in exchange for the plaintiff's separate property, and because no contrary intention was expressed in the conveyance, the coins are the plaintiff's separate property. That the plaintiff stored the coins in a joint safety deposit box is not an express "contrary intention" "in the conveyance" that the coins "be considered to be marital property." See *Manes v. Harrison-Manes*, 79 N.C. App. 170, 172, 338 S.E.2d 815, 817 (1986) (husband's conduct of adding wife's name to bank account and annuity was not evidence of express contrary intention in conveyance); *Brown v. Brown*, 72 N.C. App. 332, 336, 324 S.E.2d 287, 289 (1985) (husband's conduct of depositing money into joint

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savings account was not evidence of express contrary intention in conveyance). Accordingly, because the plaintiff rebutted the defendant's showing that the coins are marital property, the coins are the plaintiff's separate property, and the trial court erred in classifying them as marital property.

## III

## Defendant's Master's Degree

[5] The plaintiff argues that the defendant's master's degree in economics and business should be classified as marital property. We disagree. Because educational degrees, like 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 degrees are not property for purposes of equitable distribution. L. Golden, *Equitable Distribution of Property* § 6.19 (1983); *cf. Sonek v. Sonek*, 105 N.C. App. 247, 255, 412 S.E.2d 917, 922 (1992) (Greene, J., concurring). Our legislature has accepted in part and rejected in part this majority rule.

"The primary goal of statutory construction is to arrive at legislative intent." *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 732, 407 S.E.2d 819, 822 (1991). The legislature has provided that "[a]ll professional licenses and business licenses which would terminate on transfer shall be considered separate property." N.C.G.S. § 50-20(b)(2) (1987 & Supp. 1991). By this statute, the legislature "has recognized that such licenses are in fact property for purposes of the equitable distribution statute." *Sonek*, 105 N.C. App. at 255, 412 S.E.2d at 922. The legislature, however, did not classify educational degrees as property for purposes of equitable distribution; rather, it provided that trial courts shall consider evidence of "[a]ny direct or indirect contribution made by one spouse to help educate or develop the career potential of the other spouse" in distributing marital property. N.C.G.S. § 50-20(c)(7) (1987 & Supp. 1991). When N.C.G.S. § 50-20(b) is construed *in pari materia* with N.C.G.S. § 50-20(c)(7), *Great Southern Media, Inc. v. McDowell County*, 304 N.C. 427, 430-31, 284 S.E.2d 457, 461 (1981), the relationship of these statutory provisions demonstrates the legislature's intent that educational degrees are not property, either marital or separate, under our equitable distribution statute, but rather are factors to be used in the distribution of marital property. Furthermore, viewed under the statutory construction doctrine of *expressio unius*

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*est exclusio alterius*, which means the expression of one thing is the exclusion of another, *Alberti*, 329 N.C. at 732, 407 S.E.2d at 822, the legislature's failure to mention educational degrees under the definitions of marital and separate property demonstrates an intent consistent with the majority rule to exclude educational degrees from the definition of property for purposes of equitable distribution. Accordingly, educational degrees are not property under the equitable distribution statute.

Although the defendant's advanced degree is not property for purposes of equitable distribution and therefore cannot be valued, the trial court was nonetheless required to treat as a distributional factor the plaintiff's direct and indirect contributions, if any, towards the defendant's acquisition of her degree. N.C.G.S. § 50-20(c)(7); *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). The plaintiff produced evidence which shows the following: That the defendant sought her advanced degree for its enhanced earnings potential; that she left her job paying nearly \$20,000 per year to acquire the degree; that while the defendant was in school, the plaintiff contributed more to their household expenses than did the defendant and paid for the defendant's medical insurance, hospital and periodontal bills, medication, and for all gifts the parties gave to people other than themselves; that the defendant relied on the plaintiff's support while attending school; that without that support, the defendant would not have been able to get the advanced degree in the manner in which she did; and that the defendant acquired her advanced degree just two months before the parties separated.

When a party introduces evidence of a distributional factor under N.C.G.S. § 50-20(c), the trial court must consider the factor and make a finding of fact with regard to it. *Armstrong*, 322 N.C. at 405-06, 368 S.E.2d at 600. In this case, the trial court, contrary to the dissenting opinion, did not make a finding of fact regarding this distributional factor. It merely concluded that "[t]he equitable distribution of the marital property of the parties requires that the marital property of the parties should be divided equally between the plaintiff and the defendant." This conclusion is insufficient. *Id.* at 406, 368 S.E.2d at 600. Because the trial court did not make the required finding of fact regarding the distributional factor implicated by the plaintiff's evidence, this Court cannot deter-

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mine from the record whether the trial court correctly applied the law in reaching its conclusion. *Id.* The trial court erred in failing to make the required finding.

## IV

## Other Distributional Factors

[6] We likewise agree with the plaintiff that the trial court erroneously failed to make findings regarding the plaintiff's evidence concerning his personal debts and medical problems including hypoglycemia and a herniated disk. On remand, the trial court must make findings on these distributional factors. N.C.G.S. § 50-20(c)(1), (3) (1987 & Supp. 1991); *Armstrong*, 322 N.C. at 406, 368 S.E.2d at 600; *Geer*, 84 N.C. App. at 475, 353 S.E.2d at 429.

We have considered the plaintiff's remaining assignments of error and find them to be without merit. In summary, we remand this case for new findings, conclusions, and order of distribution consistent with this opinion.

Affirmed in part, reversed in part, and remanded.

Judge PARKER concurs.

Judge WYNN dissenting in part with separate opinion.

Judge WYNN dissenting in part.

This is an action seeking review of an equitable distribution judgment and order. The parties were married for six years before their separation in 1984. There were no children born of the marriage. The plaintiff-husband in this action brought the original claim for absolute divorce, and the defendant-wife brought a claim for alimony, both in July 1985.

Following the trial court's award of temporary alimony and equitable distribution on 22 December 1987, plaintiff moved to amend the findings of fact and for a new trial. Plaintiff also moved to stay enforcement of the alimony and equitable distribution judgments pending a hearing on the motions. These motions were denied.

Plaintiff then appealed from the equitable distribution judgment and order and from the denial of his motions. This Court, in *Haywood v. Haywood*, 95 N.C. App. 426, 382 S.E.2d 798, *cert.*

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*denied*, 325 N.C. 706, 388 S.E.2d 454 (1989), reversed the order for temporary alimony, because temporary alimony was awarded improperly, vacated the equitable distribution order and reversed the order for attorney's fees. The case was remanded to the trial court for new findings of fact and conclusions of law to be made on the existing record without taking further evidence. On 7 September 1990, the trial court entered a new equitable distribution judgment and order. It is from this judgment and order that the plaintiff appeals.

Because I believe that the trial judge correctly distributed the following properties of the parties, I respectfully dissent from the majority's holding to the contrary.

## I.

## The Marital Home

On review before this Court, "[a]n equitable distribution order should not be disturbed unless 'the appellate court, upon consideration of the cold record, can determine that the division ordered . . . has resulted in an obvious miscarriage of justice.'" *Morris v. Morris*, 90 N.C. App. 94, 97, 367 S.E.2d 408, 410 (1988) (quoting *Alexander v. Alexander*, 68 N.C. App. 548, 552, 315 S.E.2d 772, 776 (1984)). Further, when the appellant contends that the findings of fact are not supported by the evidence, we look to see whether the findings are supported by any competent evidence in the record. *Id.*

The record indicates that there was competent evidence to support the finding of fact by the trial court that the marital home located at Plymouth Road was marital property rather than the separate property of the plaintiff. Plaintiff argues as he testified at trial, that the Plymouth Road house was purchased with separate funds and is therefore, separate property. However the record indicates that the trial court made detailed and specific findings of fact with regard to the property, and it concluded that, at the date of separation, the parties were owners as tenants by the entireties of the Plymouth Road house, by virtue of a deed from Thunder Oil Company, a corporation predominantly owned by the plaintiff's parents. The court also concluded that the conveyance from Thunder Oil Company contained no reservation of interest and was a gift to the marriage.



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Our Supreme Court, in *McLean v. McLean*, 323 N.C. 543, 374 S.E.2d 376 (1988), held that by placing title to property purchased with separate funds in both parties' names as tenants by the entirety, the presumption is that there has been a gift of separate property to the marital estate. As such, I believe that the evidence presented at trial was competent to support this finding of fact by the trial court.

Significantly, the majority concludes that the naked testimony by the plaintiff that he did not intend to make a gift of his separate property was "some competent evidence to rebut the presumed gift of his separate property to the marital estate." In my opinion, the majority's ruling in this respect represents a significant departure from previous holdings of our courts which have required that a presumption of a gift of separate property to the marital estate is rebuttable only by a showing of *clear, cogent, and convincing evidence*. See *id.* at 552, 374 S.E.2d at 382; *Lawrence v. Lawrence*, 100 N.C. App. 1, 394 S.E.2d 267 (1990). Moreover, whether a party has succeeded in rebutting the presumption of a gift to the marital estate by clear, cogent, and convincing evidence is a matter left to the trial court's discretion. *Lawrence*, 100 N.C. at 9, 394 S.E.2d at 270. Indeed, *Lawrence*, a case cited by the majority on this issue, states emphatically that "this court has affirmed findings that property is marital even though a donor spouse testified that a gift was not intended." *Id.* See also *Thompson v. Thompson*, 93 N.C. App. 229, 232, 377 S.E.2d 767, 768-69 (1989) (trial court did not err in determining that parties' home was marital property where only competent evidence that a gift was not intended was donor's testimony); *Draughon v. Draughon*, 82 N.C. App. 738, 347 S.E.2d 871, *disc. review denied*, 319 N.C. 103, 353 S.E.2d 107 (1987) (although donor spouse testified that she did not intend a gift there was evidence to support trial court's finding that the property was marital). The offshoot of the majority's ruling today is that any naked testimony by a party which tends to support that party's claim of separate property in equitable distribution cases, will require a specific finding by the trial court that it has considered that specific part of the testimony. In *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980), our Supreme Court required only that the trial court "make findings of those specific facts which support its ultimate disposition of the case . . . ." *Id.* at 712, 268 S.E.2d at 189. The *Coble* decision, in my opinion, does not require the trial judge to find facts regarding *all* evidence produced by a

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party at trial. In instances such as the one at hand, where it is clear that the trial judge's determination that the property should be classified as marital was based on competent evidence, to require the court to make additional findings would place a needless burden on our trial judges.

For the reasons stated above, I similarly disagree with the majority that the testimony of the donor-plaintiff that he did not intend to make a marital gift of the 200, 12th Street lot requires an additional finding of fact because it was "some competent evidence to rebut the presumption of gift . . ." Clearly, the evidence produced indicating that the property was titled by the entirety was sufficient to support the trial court's conclusion of law that the property was marital. Again, I would hold that the trial court did not err in determining that this property was marital where the only competent evidence that a gift was not intended was the plaintiff-donor's testimony.

## II.

## 100 Gold Krugerrands

Next, the majority concludes that the trial court erred in making the following classification:

The 100 gold Krugerrands listed by the parties as being in the plaintiff's possession were purchased during the marriage (Pl. Ex. 123) and placed in a deposit box in the Bank of Nova Scotia branch in Toronto, Canada, with the joint right of withdrawal, based on the testimony of the defendant, and are marital property.

The plaintiff argues and the majority agrees that the precious metals held in a safety deposit box in Toronto, Canada are his separate property. However, the record contains evidence that the safety deposit box was held under the joint names of the plaintiff and defendant. The defendant had a key to the safety deposit box at all times and was able to go in and out of the box at will. Moreover, plaintiff was unable to sufficiently trace the source of the funds with which he contends that he purchased the precious metals. This is competent evidence to support the trial court's finding of fact that the precious metals were indeed marital property and not the plaintiff's separate property.

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## III.

## Defendant's Master's Degree

The majority upheld the trial court's finding that the defendant's master's degree in business and economics was not property for purposes of equitable distribution. With that portion of the majority opinion, I agree. However, the majority nonetheless concludes that the trial court erred in failing to make findings regarding the plaintiff's direct and indirect contributions to defendant's degree. For the following reasons, I dissent from that part of the majority's holding.

Generally, one spouse's contribution to the attainment of a professional degree by the other is a distributional factor to be considered under § 50-20(c)(7), and if the efforts are substantial they can warrant an unequal distribution of the marital assets. See *Geer v. Geer*, 84 N.C. App. 471, 353 S.E.2d 427 (1987). The party seeking an unequal division bears the burden of showing, by a preponderance of evidence, that an equal division would not be equitable. *White v. White*, 312 N.C. 770, 776, 324 S.E.2d 829, 832 (1985). Moreover, N.C. Gen. Stat. § 50-20(c)(7) requires only that the court consider "[a]ny direct or indirect contribution made by one spouse to help educate . . . the other spouse."

The majority cites *Geer* for the proposition that one spouse who makes sacrifices and career enhancing contributions to the other should be reimbursed for the direct and indirect costs incurred. In the *Geer* equitable distribution action, the husband and wife were divorced shortly before the wife obtained a medical degree. However, unlike the plaintiff in the case at bar, the husband in *Geer* was able to point to concrete examples of the sacrifices that he made for his wife's education, which included interrupting his career, moving to a different state for his wife to attend medical school, paying for his wife's medical school supplies, assuming a greater role in child care and homemaking activities. The plaintiff, in the case at bar, testified that he made "numerous sacrifices" for his wife although the only evidence of these sacrifices is a general list of household expenditures without any itemization of what each expenditure represented. The defendant testified that the plaintiff had never supported her and offered no direct financial contribution. This, in my opinion, was competent evidence to support the finding of fact by the trial court that

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the plaintiff's contributions to the defendant's degree did not warrant an unequal distribution of the marital assets.

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STATE OF NORTH CAROLINA v. THOMAS FRANCIS QUARG, DEFENDANT

No. 911SC429

(Filed 21 April 1992)

**1. Evidence and Witnesses § 2185 (NCI4th)— testimony ruled inadmissible—door not opened by cross-examination—redirect testimony improper**

In a prosecution for taking indecent liberties with a child in which the trial court ruled that a social worker's testimony concerning four treatment sessions with the child was inadmissible for failure to comply with discovery, defendant's cross-examination of the witness did not cover new matter so as to permit the witness to state on redirect his opinion derived from these sessions that the child suffered from post traumatic stress disorder (PTSD).

**Am Jur 2d, Trial § 419.**

**2. Evidence and Witnesses § 2342 (NCI4th)— indecent liberties—victim suffering from PTSD—necessity for limiting instruction**

The trial court erred in admitting expert testimony that an alleged indecent liberties victim suffered from PTSD without an instruction that this testimony could be considered for corroborative purposes and not as substantive evidence that sexual abuse had occurred. Furthermore, the admission of this testimony was prejudicial error where the chief witness against defendant was the child victim, there was no physical evidence of abuse, and the State's case depended heavily on witnesses who corroborated the victim's statements.

**Am Jur 2d, Expert and Opinion Evidence § 197; Infants §§ 16, 17.5.**

**3. Rape and Allied Offenses § 19 (NCI3d)— indecent liberties—dates of offenses—sufficiency of evidence**

A seven-year-old indecent liberties victim's uncertainty of the dates on which the alleged offenses occurred went only to the weight of her testimony and did not require dismissal

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of the charges for insufficient evidence where the indictments charged defendant with taking indecent liberties with the child "on or about" five specific dates between 18 December 1989 and 6 January 1990; the evidence showed that the first act occurred about a week before Christmas and the last act occurred on 6 January; the victim's testimony was sufficient to show each element of the offense on five different occasions; and defendant did not rely on dates in the indictments to raise an alibi defense.

**Am Jur 2d, Infants §§ 16, 17.5; Rape § 68.5.**

APPEAL by defendant from judgment entered 11 January 1991 by *Judge Herbert W. Small* in DARE County Superior Court. Heard in the Court of Appeals 10 February 1992.

Defendant was indicted on five counts of taking indecent liberties with a seven year old child and was convicted on all five counts.

The evidence at trial tended to show the following. The victim, whom we will call S. W., lived with her mother and father in a trailer located behind the store they operated. On the back side of the store and attached to it was a garage. A door at the back of the store opened into the garage. Defendant leased the garage and worked there as an auto mechanic. On 6 January 1990, while S. W.'s mother was talking on the phone in the store, the defendant called S. W. into the garage and closed and locked the door behind her. When S. W. returned to the store, her mother noticed that she was hanging her head and twisting her hands. In response to her mother's question if anything was wrong, she said that defendant had asked her if she knew about sex. She also related that on several occasions defendant had put her up on the counter of his shop and had placed his hands up her skirt and had touched her on her private parts underneath her panties. S. W. testified that this touching occurred on five separate occasions and that she did not tell her parents of this because defendant threatened that if she did he would hurt her father and take her away.

S. W.'s mother testified that in the early morning hours of 7 January, defendant came to their trailer and offered them money saying "Jerry [S. W.'s father], let this make things right. Let us be friends again. This is \$1,200. Please just let this make things right."

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Mr. Braun, a social worker, was tendered by the State as an expert in child sexual abuse. Mr. Braun testified that he had treated S. W. over a several month period beginning in August 1990 and that she exhibited the symptoms of post traumatic stress disorder and adjustment disorder.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Angelina M. Maletto, for the State.*

*Aycock, Spence & Butler, by W. Mark Spence, for defendant-appellant.*

JOHNSON, Judge.

Defendant contends that the trial court erred in (I) allowing certain hearsay testimony which did not corroborate the victim's testimony, (II) allowing into evidence certain statements made by the defendant which were not disclosed to the defense prior to trial, (III) allowing certain expert testimony which was not disclosed prior to trial, and (IV) denying defendant's motion to dismiss for insufficiency of the evidence. We find reversible error in the testimony of the sexual abuse expert and award defendant a new trial. Because defendant's first two assignments of error relate to circumstances not likely to reoccur at the new trial, we discuss only defendant's third and fourth assignments.

## I.

[1] In his third Assignment of Error, defendant contends that the trial court erred in allowing opinion testimony of a social worker which was not disclosed in response to his discovery request. We agree.

Mr. Braun, a social worker, examined S. W. on 6 August and again on 13 August 1990. Following the second interview, he wrote a two page "Screening/Admission Assessment" report which included the "provisional diagnosis" of "adjustment disorder with mixed emotional features" and "post traumatic stress disorder" (PTSD). The State received this initial report but had in its possession no other material pertaining to information received or diagnosis made by Braun in the three or four subsequent treatment sessions with S. W. Defendant received a copy of Braun's initial report on 12 December 1990 but was unaware of any subsequent sessions between S. W. and Mr. Braun or of any final diagnosis and received no other material from the State.

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At trial, the State tendered Braun as an expert in child sexual abuse. He was allowed to testify from memory after having reviewed his entire file prior to trial. On *voir dire*, Braun testified that he had seen S. W. for a brief screening visit and for a longer admission assessment visit, the report of these two meetings being the report given by the State to defendant. Braun also testified that he subsequently saw S. W. three or four more times. On *voir dire*, it was determined that he had produced no final written report from these sessions and had not brought his notes concerning these sessions to trial. Defendant objected to the admission of Braun's testimony on the grounds that defendant had received only the initial report containing the provisional diagnosis and nothing else. The trial judge held that in the absence of a final written report, the notes that Braun had made during the subsequent three or four treatment interviews comprised the final report and since they had not been made available to defendant nor could they be obtained in a timely manner during the course of the trial, he sustained defendant's objection and ruled Braun's testimony inadmissible.

Following the trial court's ruling, defendant cross-examined Braun as to a statement S. W. made to him on 13 August 1990. This statement was in Braun's initial report and he had testified on direct concerning this statement. Braun was then allowed to testify on redirect, over repeated objections, that in his opinion S. W. suffered from PTSD.

Defendant contends that the trial court having ruled Braun's testimony inadmissible, it was error to admit his opinion testimony later over objection. The State argues that defendant "opened the door" in his cross-examination, making the opinion testimony admissible.

"After a witness has been cross-examined, the calling party may again examine him to clarify the subject matter of the direct examination and deal with new matter elicited on cross-examination. Counsel, on redirect, is not entitled either to have the direct testimony repeated or to bring out entirely new matter." 1 *Brandis on North Carolina Evidence* § 36 (3rd ed. and 1991 Supp.). The calling party is entitled to examine, on redirect, new matters which may have been brought out on cross-examination. *State v. Weeks*, 322 N.C. 152, 168, 367 S.E.2d 895, 905 (1988) (contents of defendant's medical records not discussed either on direct or on cross thus

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no testimony for which a clarification was needed and State's objection to defendant's redirect examination was properly sustained); *State v. Moore*, 103 N.C. App. 87, 95, 404 S.E.2d 695, 700, *disc. rev. denied*, 330 N.C. 122, 409 S.E.2d 607 (1991) (where evidence of bias is elicited on cross-examination, the witness on redirect is entitled to explain even though this evidence may not have been competent on direct).

We find from a review of the transcript that the testimony ruled inadmissible concerned the treatment sessions subsequent to the first two meetings which were the subject of the initial report. Defendant did not open the door during his cross-examination so as to bring Braun's opinion testimony derived from these sessions within the proper bounds of redirect examination. Defendant's cross-examination was limited to a few questions concerning a specific statement S. W. made to Braun and about which Braun had testified on direct. This questioning did not cover new matter so as to allow the State on redirect to question Braun about his diagnosis of PTSD. The admission of Braun's opinion testimony regarding his final diagnosis, after having been held inadmissible for failure to comply with discovery, was error.

**[2]** We further find that the admission of Braun's opinion testimony on PTSD was error in that it was admitted without proper limiting instructions. In *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), our Supreme Court specified three requirements that must be met before testimony on PTSD and closely related conditions, specifically rape trauma syndrome and conversion reaction, may be used in a sex abuse or rape case. First, the trial judge must find the testimony admissible under Evidence Rule 403 and helpful to the jury under Evidence Rule 702. Secondly, the testifying expert must be tendered and accepted by the court as an expert in the relevant field. Thirdly, the jury must be properly instructed on the limited use to which the testimony may be put. Expert testimony that the victim suffers from these disorders or shows symptoms consistent with these disorders may not be used substantively to prove that a rape or sexual offense did in fact occur. *Id.* This testimony is, however, properly admissible for purposes of "corroborating the victim's story, or it may help to explain delays in reporting the crime or to refute the defense of consent." *Id.* at 822, 412 S.E.2d at 891. As stated in *Hall*, in determining whether this evidence is admissible,



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[t]he trial court should balance the probative value of evidence of post-traumatic stress, or rape trauma, syndrome against its prejudicial impact under Evidence Rule 403. It should also determine whether admission of this evidence would be helpful to the trier of fact under Evidence Rule 702. If the trial court is satisfied that these criteria have been met on the facts of the particular case, then the evidence may be admitted for the purposes of corroboration. *If admitted, the trial judge should take pains to 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.* (Emphasis added.)

*Hall*, 330 N.C. at 822, 412 S.E.2d at 891. See also, *State v. Kennedy*, 320 N.C. 20, 357 S.E.2d 359 (1987) (“profile” evidence).

In the case *sub judice*, Braun testified over objection that during the initial assessment interview S. W. told him that she feared defendant, that he had made threats to harm her and her family, that she had trouble sleeping and had nightmares about her father being abducted and hurt, that she was afraid to play outside and go to school. Following a bench conference, the trial judge gave the following limiting instruction:

Members of the Jury, the testimony that is being elicited from this witness at this time about the symptoms that the witness, [S. W.], gave to him and that she was experiencing and was the purpose of the treatment is offered not to prove the truth of the matters stated in those symptoms, but to show the basis of the treatment that the witness administered to his patient.

Braun then testified that S. W. suffered from PTSD and described the symptomatology of the disorder. He further related the characteristics of PTSD to S. W.’s behavior.

We find that this limiting instruction is insufficient to notify the jurors that Braun’s testimony could be used only to corroborate the victim’s testimony and not as substantive evidence that sexual abuse had occurred. Because the testimony was not properly limited, its prejudicial impact outweighs its probative value and pursuant to Rule 403 it should not have been admitted. *Hall*, 330 N.C. 808, 412 S.E.2d 883; *State v. Huang*, 99 N.C. App. 658, 394 S.E.2d 279, *disc. rev. denied*, 327 N.C. 639, 399 S.E.2d 127 (1990).

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The erroneous admission of this evidence does not of itself require a new trial. The question is whether there is a reasonable possibility that had this error not been committed, a different result would have been reached at trial. N.C. Gen. Stat. § 15A-1443(a). We conclude that a new trial is required.

The chief witness against defendant was the victim. There was no physical evidence of abuse. There were no eye witnesses other than the victim. The State's case depended heavily on witnesses who corroborated the victim's statements. The effect of Braun's testimony would have been to allow the jury to infer that in fact the abuse had occurred, when the only direct evidence of it was the victim's statements.

Under these facts, we believe there is a reasonable possibility that had Braun's testimony not been admitted, a different result would have been reached at trial.

## II.

[3] By his fourth Assignment of Error, defendant contends that the trial court erred in denying his motion to dismiss for insufficiency of the evidence. Defendant argues only that the State's evidence as to the dates upon which the first four offenses occurred is insufficient because the victim did not testify as to the date or approximate date of these offenses. We disagree.

Defendant was indicted on five counts of taking indecent liberties with a minor. The indictments on the first four counts all read "that on or about the [18th, 27th, 28th, 30th day of December] 1989" the defendant took indecent liberties with the victim.

At trial, the victim testified that the first time it happened was before Christmas, "it wasn't a long time, but it wasn't a short time [before Christmas]." The second time was before Christmas but the victim couldn't say how long before Christmas and didn't remember whether she was still in school or on Christmas vacation. As to the third time it happened, the victim could not remember whether it was before or after Christmas or how many days after the second time it was, but that it happened in 1989. As to the fourth incident, the victim testified that she could not remember whether it was still in 1989 or after the first of the new year. As to the fifth incident, the victim could not say whether it was still 1989 or whether the new year had begun, but that after she left the garage and went into the store, she told her mother that

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defendant had asked her whether she knew about sex. Her mother testified that this occurred on 6 January 1990.

Susan Pearson, a nurse who interviewed S. W. on 7 January, quoted her as saying that the first incident occurred a week before Christmas. Deputy Suggs, who interviewed S. W. on 7 January and again on 3 February, testified to statements made to him indicating that the first four incidents occurred on or about the 18th, 27th, 28th, and 30th of December. The testimony of both Pearson and Suggs was admitted for the limited purpose of corroborating the victim's testimony.

In *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987), our Supreme Court stated:

This Court has repeatedly noted that 'a child's uncertainty as to the time or particular day the offense charged was committed' shall not be grounds for nonsuit 'where there is sufficient evidence that the defendant committed each essential act of the offense.' (Citations omitted.)

*Hicks*, 319 N.C. at 91, 352 S.E.2d at 428, citing *State v. Effler*, 309 N.C. 742, 749, 309 S.E.2d 203, 207 (1983); *State v. Swann*, 322 N.C. 666, 370 S.E.2d 533 (1988); *State v. Hardy*, 104 N.C. App. 226, 409 S.E.2d 96 (1991). A child's uncertainty as to the time that the offense occurred goes to its weight and not its admissibility. *State v. King*, 256 N.C. 236, 123 S.E.2d 486 (1962); *State v. Tessnear*, 254 N.C. 211, 118 S.E.2d 393 (1961).

In the case *sub judice*, the indictments charged defendant with taking indecent liberties with a minor "on or about" five specific dates between 18 December 1989 and 6 January 1990. The evidence at trial showed that the first act occurred about a week before Christmas and the last occurred on 6 January. Although the victim could not testify as to any specific date, her testimony was sufficient to show each element of the offense on five different occasions. Thus, her lack of specificity goes to the weight of her testimony and is not grounds for dismissal. *King*, 256 N.C. 236, 123 S.E.2d 486.

Defendant argues that under the holding in *State v. Whittemore*, 255 N.C. 583, 122 S.E.2d 396 (1961), the State must be held to prove the dates in the indictments. *Whittemore* is of no assistance to defendant. *Whittemore* stands for the proposition that when a defendant relies on the date in the indictment to put forth an

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alibi defense, the State may not then offer proof that he committed the offense on some other date. *See also State v. Price*, 310 N.C. 596, 313 S.E.2d 556 (1984); *State v. Cameron*, 83 N.C. App. 69, 349 S.E.2d 327 (1986). In the case *sub judice*, the defendant did not testify at all and certainly did not rely on the dates in the indictments to raise an alibi defense. This assignment of error is without merit.

The factual situations giving rise to defendant's first two assignments of error, regarding corroborating hearsay testimony and lack of compliance by the State with discovery rules, are not likely to arise again at defendant's new trial. We therefore do not address them.

New trial.

Chief Judge HEDRICK and Judge WELLS concur.

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JOHN J. ERRANTE, EMPLOYEE, PLAINTIFF v. CUMBERLAND COUNTY SOLID WASTE MANAGEMENT, EMPLOYER; SELF-INSURED (SEDGWICK JAMES OF THE CAROLINAS), SERVICING AGENT, DEFENDANT

No. 9110IC485

(Filed 21 April 1992)

**1. Master and Servant § 96.5 (NCI3d) — employment terminated due to pain — disability — findings supported by evidence**

The evidence supported the Industrial Commission's finding that a workers' compensation plaintiff had stopped working due to pain and that plaintiff was entitled to compensation for permanent and total disability where plaintiff testified that a few months after the accident he was hurting, couldn't do it anymore, and stopped working; and a doctor testified that there was very little plaintiff could do in the way of job duties, that plaintiff had been taking physical therapy but did not seem to improve, that plaintiff regularly complained of pain at his visits, and that in his opinion plaintiff's impairment is permanent.

**Am Jur 2d, Workmen's Compensation §§ 338-340.**

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**2. Master and Servant § 69 (NCI3d)— disability—compensable and noncompensable medical problems—total disability**

A workers' compensation plaintiff was entitled to compensation for total disability pursuant to N.C.G.S. § 97-29 even though part of plaintiff's total disability is caused by such non-work-related maladies as anemia, ulcers, and diabetes because N.C.G.S. § 97-30, under which plaintiff would have been compensated for partial disability, has no application where a claimant is totally incapacitated partially as a result of his compensable injuries and partially as a result of noncompensable medical problems.

**Am Jur 2d, Workmen's Compensation §§ 333, 334.**

**3. Master and Servant § 69 (NCI3d)— workers' compensation—total disability—no apportionment**

Defendant was not entitled to apportionment of plaintiff's workers' compensation award where neither of the apportionment statutes apply and, even though the evidence established that plaintiff's non-work-related anemia and diabetes caused part of plaintiff's permanent and total disability, no evidence was presented attributing any percentage of plaintiff's total incapacity solely to his compensable injuries.

**Am Jur 2d, Workmen's Compensation § 294.**

**4. Master and Servant § 69 (NCI3d)— workers' compensation—light duty refused—total disability**

A workers' compensation plaintiff was not precluded from receiving any compensation for total disability under N.C.G.S. § 97-32 where he was offered a light duty position. Where an employee is properly determined to be permanently and totally disabled under N.C.G.S. § 97-29, N.C.G.S. § 97-32 has no application.

**Am Jur 2d, Workmen's Compensation § 349.**

**5. Master and Servant § 75 (NCI3d)— workers' compensation—total disability—medical expenses**

An Industrial Commission award to a workers' compensation plaintiff of "reasonable and necessary" medical expenses was remanded for modification to provide expressly for plaintiff's medical expenses to include only those expenses incurred as a result of plaintiff's compensable injuries. If it cannot be

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determined which portion of plaintiff's medical expenses relate solely to his compensable injuries, then plaintiff would be entitled to compensation for his total expenses. In the case of a controversy arising between plaintiff and defendant relative to the continuance of medical treatment, the Industrial Commission is vested with the authority to order such further treatments as may in its discretion be necessary, and defendant shall have the right and opportunity at that time to challenge on appeal the Commission's approval of a medical bill that in defendant's opinion is not compensable.

**Am Jur 2d, Workmen's Compensation §§ 391, 393, 398.**

APPEAL by defendant from Opinion and Award of the Full Commission filed 7 March 1991. Heard in the Court of Appeals 12 March 1992.

*A. Maxwell Ruppe for plaintiff-appellee.*

*Teague, Campbell, Dennis & Gorham, by Thomas M. Clare and Richard L. Pennington, for defendant-appellant.*

GREENE, Judge.

Defendant appeals from an Opinion and Award of the North Carolina Industrial Commission filed 7 March 1991, affirming the Deputy Commissioner's decision finding plaintiff permanently and totally disabled, and awarding plaintiff compensation pursuant to N.C.G.S. §§ 97-29 and 97-25.

The evidence established that plaintiff is a 59 year old man with a sixth grade education who worked for defendant Cumberland County Solid Waste Management for approximately eleven and one half years. Plaintiff's duties varied during the time that he worked for defendant. On 24 May 1988, while performing his duties as landfill inspector, plaintiff suffered an injury by accident arising out of and in the course of his employment with defendant when he fell from a dump truck and landed on his head on concrete. Prior to the accident, plaintiff had various non-work-related and nondisabling medical problems, such as diabetes, arthritis, and anemia, however, his attendance record at work was good. As a result of the 24 May 1988 accident, plaintiff sought treatment from Dr. Garison, plaintiff's family physician who specializes in internal medicine, who subsequently referred plaintiff to Dr. Askins,

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an orthopedic surgeon. Dr. Askins determined that plaintiff's fall had aggravated plaintiff's pre-existing arthritic condition and resulted in shoulder tendonitis. After the accident, plaintiff continued to work for defendant at his usual job for several weeks, however, plaintiff eventually requested a transfer to a position requiring less physical activity due to increased pain. On 1 September 1988, plaintiff was assigned to a container site where his duties included opening and closing the gate, monitoring trash dumping, and operating the compactor.

On 21 October 1988, plaintiff terminated his employment with defendant due to the level of pain that he was experiencing. Since then, he has not worked for defendant or in any employment. On a typical day, plaintiff takes his wife to work in the morning, returns home and spends the entire day in bed, and then picks his wife up in the afternoon. Plaintiff sought worker's compensation benefits, and defendant denied liability. Deputy Commissioner Scott M. Taylor heard the issues on 22 November 1989, and on 19 October 1990 filed an Opinion and Award finding plaintiff permanently and totally disabled as of 21 October 1988 as a result of plaintiff's work-related shoulder tendonitis and aggravation of arthritis, his level of pain, age, education, work experience, diabetes, anemia, and ulcers. Plaintiff was awarded disability compensation at the rate of \$174.96 per week for the remainder of plaintiff's life, and reasonable and necessary medical compensation, pursuant to N.C.G.S. §§ 97-29 and 97-25. The Full Commission affirmed and adopted as its own the Deputy Commissioner's Opinion and Award.

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The issues presented are whether I) there is competent evidence to support the Industrial Commission's findings that plaintiff terminated his employment due to pain and that plaintiff was disabled at the time he terminated his employment; II) plaintiff's Section 97-29 award must be apportioned to reflect the percentage of disability caused by his work-related injury; III) Section 97-32 precludes plaintiff from receiving *any* worker's compensation benefits; and IV) the Industrial Commission's award for plaintiff's reasonable and necessary medical expenses is fatally non-specific.

## I

[1] The Industrial Commission found that plaintiff terminated his employment with defendant on 21 October 1988 due to the level of pain which he was experiencing, and that plaintiff has been

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incapable of earning wages since that date. Defendant contends that neither of these findings are supported by competent evidence. We disagree.

It is well settled that the authority to find facts necessary for a worker's compensation award is vested exclusively with the Industrial Commission, and that such findings must be upheld on appeal if supported by any competent evidence, even in the face of evidence to the contrary. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 432, 342 S.E.2d 798, 803 (1986). The evidence in the instant case supports the Industrial Commission's finding that excessive pain caused plaintiff to terminate his employment with defendant. Plaintiff testified that a few months after the accident, around the middle of October 1988, "it got so I just couldn't do it no more. . . . I was just hurting. . . . I just stopped working." Dr. Askins testified that in the fall of 1988, there was "very little" that plaintiff could do in the way of job duties, and that, even though plaintiff had been taking physical therapy regularly, "he did not seem to make a lot of improvement." Dr. Askins stated that plaintiff regularly complained of pain at his visits. This evidence supports the Industrial Commission's finding that plaintiff stopped working due to pain.

Dr. Askins also testified that plaintiff

certainly would qualify as a disabled individual with his multiple problems . . . . [H]e was truly disabled to go to his type of job from the time of initial injury. He never was able to be rehabilitated to the point that [he] could do any kind of job that was demanded of him; whether it be light duty or full duty. In my opinion he was disabled from the time of his injury and up to the time I saw him and he is still probably disabled . . . . I do not believe [plaintiff] can do any kind of gainful employment at this time, under any light duty of any kind.

Dr. Askins also stated that in his opinion plaintiff's impairment is permanent. This evidence supports the Industrial Commission's finding that plaintiff has been incapable of earning wages since 21 October 1988, and that plaintiff is accordingly entitled to compensation for permanent and total disability pursuant to Section 97-29.



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[106 N.C. App. 114 (1992)]

## II

[2] Defendant argues that plaintiff is not entitled to compensation for total disability pursuant to Section 97-29 because part of plaintiff's total disability is caused by such non-work-related maladies as anemia, ulcers, and diabetes. According to defendant, since only part of plaintiff's total incapacity is caused by his compensable injuries, plaintiff is entitled to compensation under Section 97-30 for partial disability, rather than under Section 97-29. Our Supreme Court has previously rejected a similar argument, holding that our Legislature intended for Section 97-30 to apply only in cases where the claimant is partially incapacitated. *Weaver v. Swedish Imports Maintenance, Inc.*, 319 N.C. 243, 252, 354 S.E.2d 477, 483 (1987). Section 97-30 has no application where a claimant is totally incapacitated partially as a result of his compensable injuries, and partially as a result of noncompensable medical problems. *Id.* at 252, 354 S.E.2d at 483. Because the evidence established that plaintiff is totally disabled, we reject defendant's argument.

[3] Defendant in the alternative seeks apportionment of plaintiff's Section 97-29 award. North Carolina's Worker's Compensation Act contains two provisions for apportionment of disability awards: (1) N.C.G.S. § 97-33 (1991) (providing for prorating of a permanent disability award where employee sustained prior disability due to epilepsy, military service, or injuries in another employment); and (2) N.C.G.S. § 97-35 (1991) (providing for apportionment of permanent injury award when employee has previously incurred partial disability through loss of one of specific body parts). Apportionment also has been allowed by our Courts when a non-work-related disease or infirmity actually causes part of an employee's total disability. *Gray v. Carolina Freight Carriers, Inc.*, 105 N.C. App. 480, 487, 414 S.E.2d 102, 106 (1992) (citations omitted). However, apportionment is not permitted when an employee becomes totally and permanently disabled due to a compensable injury's aggravation or acceleration of the employee's nondisabling, pre-existing disease or infirmity. *Id.* at 485, 414 S.E.2d at 107. An employee is also entitled to full compensation for total disability without apportionment when the nature of the employee's total disability makes any attempt at apportionment between work-related and non-work-related causes speculative. *Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52 (1985).

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An application of the foregoing principles reveals that defendant is not entitled to apportionment of plaintiff's Section 97-29 award. Neither of the apportionment statutes previously discussed apply in plaintiff's case. Moreover, even though the evidence established that plaintiff's non-work-related anemia and diabetes caused part of plaintiff's permanent and total disability, thus permitting the application of judicial apportionment, no evidence was presented attributing any percentage of plaintiff's total incapacity solely to his compensable injuries. In fact, Dr. Askins testified that "there is no way anybody can honestly say" what percentage of plaintiff's total disability is caused by his compensable injuries and what percentage is caused by his noncompensable medical problems. Accordingly, under *Harrell*, plaintiff is entitled to full compensation for total and permanent disability.

## III

[4] Defendant argues that, in light of the fact that plaintiff was offered a "light duty" position, Section 97-32 precludes plaintiff from receiving any compensation whatsoever. Section 97-32 provides that "if an injured employee refuses employment procured for him suitable to his capacity he shall not be entitled to any compensation at any time during the continuance of such [unjustified] refusal." N.C.G.S. § 97-32 (1991). However, our Supreme Court has held that "where an employee is properly determined to be totally and permanently disabled under [Section] 97-29, [Section] 97-32 has no application." *Peoples*, 316 N.C. at 444-45, 342 S.E.2d at 810. Because the Industrial Commission properly determined that plaintiff is permanently and totally disabled under Section 97-29, defendant's argument is without merit.

## IV

[5] Part of plaintiff's disability award included, pursuant to Sections 97-25 and 97-29, compensation for all of plaintiff's "continuing reasonable and necessary nursing services, medicines, sick travel, medical, hospital, and other treatment or course of rehabilitative services when the bills for same have been submitted . . . and approved by the [Industrial] Commission." Section 97-25 requires the employer to provide to the employee compensation for medical treatment and supplies. The version of Section 97-25 in effect at the time of plaintiff's award specifically provided for the payment of:

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[m]edical, surgical, hospital, nursing services, medicines, sick travel, rehabilitation services, and other treatment including medical and surgical supplies as may reasonably be required to effect a cure or give relief and for such additional time as in the judgment of the Commission will tend to lessen the period of disability, and in addition thereto such original artificial members as may be reasonably necessary at the end of the healing period . . . .

N.C.G.S. § 97-25 (1973).<sup>1</sup> The version of Section 97-29 in effect at the time also contained a provision for compensation for the same medical expenses as those delineated in Section 97-25. Defendant contends that the Commission's failure to specify those conditions for which defendant must provide medical treatment constitutes reversible error. In effect, defendant maintains that an award for medical compensation must be limited to medical expenses reasonably related to the employee's compensable injury. We agree.

The Industrial Commission's award to plaintiff for medical expenses specifically limited such expenses to those which are "reasonable and necessary." In light of our Courts' repeated admonition that our Worker's Compensation Act was never intended to be a general accident and health insurance policy, *see, e.g., Weaver*, 319 N.C. at 253, 354 S.E.2d at 483, it is axiomatic that "reasonable and necessary" worker's compensation awards for continuing medical expenses pursuant to Sections 97-29 and 97-25 contemplate only those reasonable and necessary expenses that are related to the *compensable* injury or injuries. However, in order to alleviate any confusion on the subject, we specifically so hold and remand the award to the Industrial Commission for modification to provide expressly for plaintiff's medical expenses to include only those expenses incurred as a result of plaintiff's compensable injuries. However, if it cannot be determined which portion of plaintiff's medical expenses relate solely to his compensable injuries, then, in keeping with *Harrell*, plaintiff would be entitled to compensation for his total expenses. In any event, we note that in the case of a controversy arising between plaintiff and defendant

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1. Section 97-25 was amended effective 15 July 1991, and now simply provides that "medical compensation" shall be provided by the employer. Section 97-29 was similarly amended. However, the substitution of the term "medical compensation" for the more specific list of compensable expenses would not compel a result different from the one we reach in construing the pre-July 1991 versions.

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relative to the continuance of medical treatment, the Industrial Commission is vested with the authority to order such further treatments as may in its discretion be necessary, N.C.G.S. § 97-25 (1991), and if the Commission approves a medical bill that in defendant's opinion is not compensable, then defendant at that time shall have a right and opportunity on appeal to challenge the Commission's decision. *Bass v. Mecklenburg County*, 258 N.C. 226, 235, 128 S.E.2d 570, 576 (1962).

For the foregoing reasons, the Industrial Commission's decision awarding plaintiff compensation for permanent and total disability and medical expenses pursuant to Sections 97-29 and 97-25 is affirmed as modified.

Remanded for modification.

Judges JOHNSON and COZORT concur.

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MINNIE G. GRANT AND BEALE G. VICK, PLAINTIFFS v. EUGENE COX AND  
C. & H. TIMBER SERVICE, INC., DEFENDANTS

No. 912SC439

(Filed 21 April 1992)

**1. Rules of Civil Procedure § 55.1 (NCI3d)— entry of default—  
second service of summons—belief of additional time to answer—no excusable neglect**

Defendants were not entitled to have an entry of default set aside on the ground of excusable neglect where defendants were served by registered mail, return receipt requested, on 5 June 1990, they were served again on 21 June 1990 by delivery of the summons and complaint to the individual defendant's mother at his dwelling house, and defendants contended that their failure to answer the complaint within thirty days after service of the first summons was excusable because the deputy serving the second summons told the individual defendant's mother that defendants had thirty days after service to respond, since a man of ordinary prudence treating this matter as he would his important business affairs would not believe that the receipt of a second summons negated

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the requirements of the first summons which stated the legal requirements on its face.

**Am Jur 2d, Judgments § 718.****2. Rules of Civil Procedure § 55 (NCI3d)— action not for sum certain—summary judgment erroneous**

The clerk of court erred in entering a default judgment for plaintiffs in their action to recover for the wrongful cutting of timber because their action was not for a "sum certain" where plaintiffs alleged that the fair market value of the timber was \$25,000 but there was no information in the complaint by which it could be determined how that amount was computed. N.C.G.S. § 1A-1, Rule 55(b)(1).

**Am Jur 2d, Summary Judgment §§ 26, 27.**

APPEAL by defendants from order entered 31 January 1991 by *Judge William C. Griffin, Jr.*, in HYDE County Superior Court. Heard in the Court of Appeals 10 March 1992.

This is an appeal from an order denying defendants' motion to set aside a default judgment. Plaintiffs are owners of 58 acres of timberland. In their verified complaint, filed 25 May 1990, plaintiffs allege that in February or early March, 1989, the defendants entered their lands and, without their permission, cut all merchantable timber from the property in violation of G.S. § 1-539.1. Plaintiffs claim that they were damaged in the amount of \$25,000 and prayed for double damages pursuant to G.S. § 1-539.1(a). Defendants were served by registered mail, return receipt requested, on 5 June 1990. Defendants were served again on 21 June 1990 by delivery of the complaint and summons to Sophia Cox, the mother of defendant Eugene Cox, at his dwelling house. Deputy Gibbs informed Sophia Cox that the defendants had thirty days from the day of service to respond and this information was relayed to defendant Eugene Cox. On 11 July 1990, plaintiffs filed a motion for entry of default stating that defendants had been served on 5 June 1990 and had not filed a response. An entry of default and default judgment were entered by the clerk against defendants on 12 July 1990 in the amount of \$50,000. Notice of entry and filing of judgment was sent by the clerk to all parties on 13 July 1990. On 17 September 1990, defendants filed a Rule 60(b) motion in superior court asking that they be relieved from the judgment on the grounds of mistake, inadvertence, surprise and excusable neglect and that

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they be allowed to answer. In defense of the claim they presented two canceled checks totalling \$5,000.00, made payable to plaintiffs and dated 15 March 1989. Defendants' motion was denied by Judge Griffin on 31 January 1991. An affidavit from David Faircloth, a consulting forester, dated 17 October and filed on 23 October 1990, was before Judge Griffin at the hearing on the motion. In that affidavit, Faircloth stated that one year prior to the time the timber was cut, he had viewed the timber and had expressed his opinion that the value of the standing timber was from \$25,000 to \$30,000.

*Pritchett, Cooke & Burch, by Stephen R. Burch, David J. Irvine and Lars P. Simonsen, for plaintiffs-appellees.*

*W. T. Culpepper, III, for defendants-appellants.*

JOHNSON, Judge.

Defendants first contend that the trial court abused its discretion in denying their motion to set aside the default judgment on the basis of excusable neglect.

[1] Initially, we note that defendants' motion to the superior court was for relief "from the judgment on the grounds of mistake, inadvertence, surprise and excusable neglect and on the other grounds specified in Rule 60b." In their motion, defendants argued that the receipt of the second summons and the deputy's advice led them to believe that they had 30 days from service of the second summons to respond. This argument goes specifically to the entry of default. G.S. § 1A-1, Rule 55(a) ("When a party against whom a judgment for affirmative relief is sought has failed to plead . . . the clerk shall enter his default."); G.S. § 1A-1, Rule 55(d) ("For good cause shown, the court may set aside an entry of default, and if a judgment by default has been entered, the judge may set it aside in accordance with Rule 60(b)."). Judge Griffin's order denied defendants' motion and was styled "Order Denying Motion to Set Aside Default Judgment." Because the arguments on appeal concern both the *entry of default* by the clerk and the *default judgment* also entered by the clerk, we will make the distinctions as required despite the terminology used in the record and briefs.

Pursuant to G.S. § 1A-1, Rule 60(b)(1), a party may be relieved from a final judgment on the grounds of mistake, inadvertence, surprise or excusable neglect. A motion for relief under Rule 60(b)

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is addressed to the sound discretion of the trial court and will not be disturbed absent an abuse of discretion. *Sink v. Easter*, 288 N.C. 183, 217 S.E.2d 532 (1975); *Perkins v. Perkins*, 88 N.C. App. 568, 364 S.E.2d 166 (1988). Setting aside a judgment under Rule 60(b)(1) requires that the moving party show both excusable neglect and a meritorious defense. *Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E.2d 148, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). When ruling on the motion, the trial court is not required to make written findings of fact unless requested to by a party, G.S. § 1A-1, Rule 52(a)(2), although it is the better practice to do so. *Financial Corp. v. Mann*, 36 N.C. App. 346, 243 S.E.2d 904 (1978). Where the trial court does not make findings of fact in its order denying the motion to set aside the judgment, the question on appeal is "whether, on the evidence before it, the court could have made findings of fact sufficient to support its legal conclusion[.]" *Id.* at 349, 243 S.E.2d at 907. Thus, the question before us is, given the facts which were before the trial court at the time, whether the court could have made findings of fact sufficient to support its conclusion that the motion to set aside the entry of default should have been denied.

As has often been stated, "a party served with a summons must give the matter the attention that a person of ordinary prudence would give to his important business." *East Carolina Oil Transport, Inc. v. Petroleum Fuel & Terminal Co.*, 82 N.C. App. 746, 748, 348 S.E.2d 165, 167 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987). *See also Boyd v. Marsh*, 47 N.C. App. 491, 267 S.E.2d 394 (1980); *Norton*, 30 N.C. App. 420, 227 S.E.2d 148. Failure to respond to a summons within the time allowed is not excusable neglect. *East Carolina Oil Transport*, 82 N.C. App. 746, 348 S.E.2d 165.

Defendants contend that the receipt of the second summons on 21 June and the deputy sheriff's advice that they had thirty days in which to respond, led them to believe that they were free to respond to the complaint at any time up to thirty days after 21 June and therefore their failure to respond within thirty days of service of the first summons constitutes excusable neglect. This argument has no merit. The summonses received by defendants on 5 June and 21 June were identical. Both summonses stated that defendants had thirty days in which to respond and further stated the consequences of their failure to respond. A man of ordinary prudence treating this as he would his important business

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affairs would not believe that the receipt of a second summons somehow negated the requirements of the first summons which was clearly legal process and which stated the legal requirements on its face. *See Gregg v. Steele*, 24 N.C. App. 310, 210 S.E.2d 434 (1974).

We find that the trial court did not abuse its discretion in denying defendants' motion for relief from entry of default. Having found that the trial court could conclude that there was no excusable neglect, we need not consider defendants' arguments as to their meritorious defense.

[2] By their second Assignment of Error, defendants contend that the trial court erred in failing to set aside the default judgment pursuant to Rule 60(b)(4) as being void *ab initio*. They contend that the amount of damages in this case was not for a "sum certain" and therefore the default judgment is void. We agree.

A clerk of court is authorized to enter a default judgment against a defendant "[w]hen the plaintiff's claim against a defendant is for a sum certain or for a sum which can by computation be made certain[.]" G.S. § 1A-1, Rule 55(b)(1). The amount due must appear in an affidavit. *Id.* A verified pleading may be used in lieu of an affidavit when the pleading contains information sufficient to determine or compute the sum certain. *Id.* However, where the claim is not for a "sum certain or for a sum which can by computation be made certain," the party entitled to the default judgment must make his application to a judge. G.S. § 1A-1, Rule 55(b)(2).

In the case *sub judice*, the plaintiffs alleged in their complaint that they are the owners of 58 acres of timberland, that defendants entered on the land without permission and cut, or allowed to be cut, the timber from the land. In paragraph 8 of their verified complaint they alleged "[t]hat by reason of the wrongful cutting of said trees by the defendants, the plaintiffs have been damaged in the amount of \$25,000." In paragraph 9, they alleged "[t]hat, by virtue of N.C.G.S. 1-539.1(a), the plaintiffs are entitled to recover from the defendant [sic], double the value of the timber wrongfully cut." In their prayer for relief, plaintiffs demanded that they recover (1) \$25,000, the fair market value of the timber, (2) that they recover twice their actual damages pursuant to G.S. § 1-539.1(a). The question before us is whether the allegations in the verified complaint as to the damages is sufficient under Rule 55 to support the default



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judgment entered by the clerk. This requires that we decide whether the complaint is for a "sum certain." We must look to the cases for an answer.

In *Smith v. Barfield*, 77 N.C. App. 217, 334 S.E.2d 487 (1985), plaintiffs alleged in a verified complaint that defendants had agreed to move a house for \$10,700, one-half to be paid when the house was loaded for moving, and that plaintiffs paid \$5,350 under the agreement but that defendants failed to move the house. This was held to constitute a "sum certain" under Rule 55(b)(1). In *McGuire v. Sammonds*, 247 N.C. 396, 100 S.E.2d 829 (1957), the Court upheld a default judgment based on "breach of an express contract to pay sums of money fixed by the terms of the contract" for personal services. In *Thompson v. Dillingham*, 183 N.C. 566, 112 S.E. 321 (1922), a verified complaint alleging that defendants owed plaintiff \$2,000 on the purchase price of an automobile which defendants had expressly promised to pay was sufficient to sustain a clerk's entry of default judgment. In *Lewis Clarke Associates v. Tobler*, 32 N.C. App. 435, 232 S.E.2d 458, *disc. rev. denied*, 292 N.C. 641, 235 S.E.2d 60 (1977), this Court upheld a default judgment entered by the clerk for an amount allegedly owed on three promissory notes even though the amount demanded in the complaint was less than the total of the face amounts of the promissory notes.

In contrast, in *Williams v. Moore*, 95 N.C. App. 601, 383 S.E.2d 416 (1989), plaintiffs alleged that defendants owed them \$306,046.92. The materials before the clerk consisted of an unverified complaint and affidavits of plaintiffs' attorney. The affidavits supported the amounts set out in the complaint. The total amount claimed was the amount of plaintiffs' damages less an amount in mitigation based upon the "fair rental value" of some unspecified amount of land. This Court found that the amount claimed was not a "sum certain" because of uncertainty as to how plaintiff had arrived at the amount in mitigation and several other elements of plaintiffs' damages.

Defendants cite *Hecht Realty, Inc. v. Hastings*, 45 N.C. App. 307, 262 S.E.2d 858 (1980) in support of their contention that the amount of damages in this case was not for a "sum certain" as required by Rule 55(b)(1). In *Hecht*, the plaintiff demanded judgment in the amount of \$3,210. This demand appeared only in the prayer for relief. Exhibit A, a copy of the exclusive sales agreement, and Exhibit B, a copy of the sales contract, which presumably

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would have supported the amount of the demand, were not attached to either the original complaint filed with the clerk nor were they attached to the complaint sent to the defendant. This Court held that the mere *demand* for judgment of a specified dollar amount, and no other allegations as to the amount, was insufficient to make the amount a "sum certain."

In deciding whether the complaint at issue is for a "sum certain," we do not consider Faircloth's affidavit. This affidavit was not before the clerk on 12 July 1990. We can consider only that which was before the clerk, namely the verified complaint.

We find that the clerk did not have authority under G.S. § 1A-1, Rule 55(b)(1) to enter a default judgment against defendants. In all the cases cited above, there was more evidence of the amount of the claim than simply the plaintiffs' bare assertion of the amount owed. Under Rule 55(b)(1), "[a] verified pleading may be used in lieu of an affidavit *when the pleading contains information sufficient to determine or compute the sum certain*" (our emphasis). Clearly, plaintiffs stated what they determine the damages to be. Just as clearly, there is no information whatsoever in the complaint by which it can be determined how that figure was computed.

For the reasons above, the default judgment is vacated. The entry of default stands and fixes the defendants' liability. The case is remanded to the trial court for the determination of the amount of the damages.

Default judgment vacated. Remanded to the trial court on the issue of damages.

Judges COZORT and GREENE concur.

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STATE OF NORTH CAROLINA v. JAMES ALFRED GARFIELD BUNCH, JR.

No. 916SC173

(Filed 21 April 1992)

**1. Criminal Law § 261 (NCI4th)— motions for continuance—  
insufficient time to prepare defense—denied**

The trial court did not abuse its discretion in a prosecution for kidnapping two deputies and possession of a stolen firearm

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by denying motions for a continuance from defendant's counsel on the ground that he had not had sufficient time to prepare due to his heavy trial schedule and from defendant after he discharged his attorney and elected to represent himself. Defendant had been in custody since June 1990 and counsel was appointed on 24 July 1990; the case was not called for trial until 17 September 1990, so that counsel had 55 days to prepare; neither defense counsel nor defendant asserted that they expected to present any witnesses or that defendant intended to testify; the state called only two witnesses; a copy of the statement of one had been previously supplied to counsel and the court ordered the prosecutor to supply counsel and defendant with a copy of the other before trial even though defendant was not entitled to the copy until after the witness's testimony; and defendant thoroughly cross-examined the two witnesses at trial. Even assuming the court erred in denying the motions, defendant failed to show error.

**Am Jur 2d, Continuance §§ 98, 107-109.****2. Kidnapping § 1.2 (NCI3d) — indictment — purpose of holding hostages — evidence sufficient**

The trial court properly denied defendant's motion to dismiss kidnapping charges where the indictments alleged that the kidnapping was for the purpose of holding the victims hostage, and the evidence was sufficient to support a finding that defendant unlawfully confined or restrained the officers as security for prevention of his arrest by other law enforcement authorities.

**Am Jur 2d, Abduction and Kidnapping §§ 20, 21, 29.**

APPEAL by defendant from judgments entered 19 September 1990 by *Judge Thomas Watts* in HERTFORD County Superior Court. Heard in the Court of Appeals 7 January 1992.

Defendant was charged in proper bills of indictment with possession of a stolen firearm and two counts of first-degree kidnapping. The State's evidence tended to show the following: On 18 April 1989, Deputy Sheriff Elizabeth Callis and Raymond Eure, both employees of the Hertford County Sheriff's Department, were transporting defendant and Juan Stephenson to different facilities to await trial. Both prisoners wore security belts and were handcuffed to the belts. The prisoners were then placed in the backseat

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of a marked patrol car and seat belts were placed on them. Defendant was being transported to Central Prison in Raleigh.

After driving approximately three hours, Callis stopped at the intersection of Highway 158 and Highway 86. She looked to the left to check for oncoming traffic and when she turned back around, defendant was over the top of the frontseat with Callis' loaded .357 Magnum revolver in his hand. Defendant sat back in his seat and pointed the revolver at Callis. He ordered Callis to make the turn and to then pull over on the side of the road. He told Callis and Eure that if they would do as they were told, no one would get hurt. Defendant also stated that he had to get back to Hertford County "because he had some things he had to straighten out."

Defendant told Callis to put the car in park, turn off the ignition, and give him the keys. She did as she was told. Defendant unlocked his handcuffs and took off his security belt. He also unlocked one cuff on Stephenson's hand. Defendant exited the car, opened the front passenger door and ordered Eure to get out. He then forced Eure into the backseat behind the driver and handcuffed him. Defendant instructed Callis to move into the front passenger seat and defendant got into the driver's seat. He started the car and headed back toward Hertford County. Defendant held the gun between his legs.

Defendant told Eure that he needed Eure's shirt. Between Roxboro and Oxford, defendant pulled onto a "woods path." He drove approximately one hundred yards into a wooded area where there were no houses. Defendant ordered Eure to get out of the car and remove his shirt. Eure did so and gave the shirt to defendant. Defendant put it on. Then they both reentered the car which defendant backed down the path to the road. He continued driving toward Hertford County. As defendant was driving through Jackson, a police car pulled in behind them and followed them all the way through town before turning around.

Upon arriving in Hertford County, defendant drove down a road to what appeared to be an abandoned farm house with an old barn beside it. He parked the car behind the barn. Defendant ordered Callis and Eure out of the car and handcuffed them to the hinges of the trunk. Defendant put on a dark blue shirt which he had among his personal belongings. He and Stephenson then began walking toward the city of Union. After a few minutes,

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Eure was able to remove his handcuff key from his pocket and unlock himself and Callis. Callis radioed for assistance and ten minutes later, police officers arrived.

Defendant was convicted of possession of a stolen firearm and two counts of first-degree kidnapping. He was sentenced to consecutive terms of ten years imprisonment for possession of the stolen firearm and thirty and twelve years for the two counts of kidnapping. From these judgments, defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Julia F. Renfrow, for the State.*

*Kevin M. Leahy for defendant appellant.*

ARNOLD, Judge.

[1] Defendant first argues the trial court erred in denying his motions to continue. On 11 September 1990, defense counsel filed a written motion to continue on the ground that counsel had not had sufficient time to prepare for trial due to his heavy trial schedule. On Monday, 17 September 1990, after the jury was selected, the trial court heard from defense counsel and denied the motion. Defendant then discharged his attorney and elected to represent himself. The trial court recessed in the early afternoon until Wednesday morning, 19 September 1990, in order to give defendant a chance to prepare. On Wednesday morning, defendant orally moved for a continuance and the trial court denied his motion. Defendant asserts that the trial court's denial of the two motions to continue infringed upon his constitutional right to effective assistance of counsel.

Even when filed in a timely manner pursuant to N.C. Gen. Stat. § 15A-952 (Cum. Supp. 1991), a motion for continuance is ordinarily left to the sound discretion of the trial court "whose ruling thereon is not subject to review absent an abuse of such discretion." *State v. Branch*, 306 N.C. 101, 104, 291 S.E.2d 653, 656 (1982). However, when a motion for a continuance "raises a constitutional issue, the trial court's action upon it involves a question of law which is fully reviewable by an examination of the particular circumstances of each case." *State v. Searles*, 304 N.C. 149, 153, 282 S.E.2d 430, 433 (1981). But even where the motion raises a constitutional question, its denial "is grounds for a new trial only" when the defendant shows "that the denial was er-

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roneous and also that his case was prejudiced as a result of the error." *Branch*, 306 N.C. at 104, 291 S.E.2d at 656. Our Supreme Court stated in *Branch*:

The constitutional guarantees of due process, assistance of counsel and confrontation of witnesses unquestionably include the right of a defendant to have a reasonable time to investigate and prepare his case. No precise time limits are fixed, however, and what constitutes a reasonable length of time for the preparation of a defense must be determined upon the facts of each case.

*Id.* at 104-05, 291 S.E.2d at 656.

Here, the record reveals that defendant had been in custody since 18 June 1990 and counsel was appointed on 24 July 1990. The case was not called for trial until 17 September 1990. Thus, counsel had approximately 55 days to prepare for trial. In support of the motions to continue, neither defense counsel nor defendant asserted that they expected to present any witnesses on defendant's behalf, nor did either state that defendant intended to testify. The State called only two witnesses: Callis and Eure. A copy of Callis' statement had been previously supplied to counsel. The trial court ordered the prosecutor to supply counsel and defendant with a copy of Eure's statement before trial, even though defendant was not entitled to such copy until after Eure's testimony. At trial, defendant thoroughly cross-examined Callis and Eure. He presented no evidence.

After reviewing the record, we are unable to say that the trial court abused its discretion in denying the motions to continue. Furthermore, even assuming the trial court erred in denying the motions, defendant has failed to show how that error prejudiced his case.

**[2]** Defendant next argues the trial court erred by denying his motion to dismiss the kidnapping charges at the close of the State's evidence.

On a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. If there is substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged has been committed and that the defendant committed it, the case is for the jury and the motion to dismiss should be denied.

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*State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382-83 (1988) (citation omitted). "Substantial evidence" is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). "The trial court must determine as a question of law whether the State has offered substantial evidence of defendant's guilt on every essential element of the crime charged." *Id.*

N.C. Gen. Stat. § 14-39 (Cum. Supp. 1991) provides in pertinent part:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person, . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

(1) Holding such other person for a ransom or as a hostage or using such other person as a shield.

Because "kidnapping is a specific intent crime, the State must prove that the defendant unlawfully confined, restrained, or removed the person for one of the . . . purposes set out in the statute." *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986).

"The indictment in a kidnapping case must allege the purpose or purposes upon which the State intends to rely, and the State is restricted at trial to proving the purposes alleged in the indictment." *Id.* Here the indictments alleged that defendant unlawfully confined, restrained, and removed Eure and Callis from one place to another, without their consent, for the purpose of holding them as hostages. "[T]he term 'hostage' as used in G.S. § 14-39(a)(1) implies the unlawful taking, restraining, or confining of a person with the intent that the person, or victim, be held as security for the performance or forbearance of some act by a third person." *State v. Lee*, 33 N.C. App. 162, 165-66, 234 S.E.2d 482, 484 (1977). Defendant could have released Callis and Eure when he stopped in the wooded area near Roxboro, North Carolina if he had not intended to hold them as hostages to guarantee his escape would not be thwarted.

The evidence, viewed in the light most favorable to the State, was sufficient to support a finding that defendant unlawfully confined or restrained the officers as security for prevention of his arrest by other law enforcement authorities. This action constitutes

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[106 N.C. App. 134 (1992)]

holding others as hostages within the meaning of the kidnapping statute. The determination of defendant's guilt or innocence was therefore for the jury, and the trial court properly denied his motion to dismiss.

No error.

Judges PARKER and WALKER concur.

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CAPRICORN EQUITY CORPORATION, A NORTH CAROLINA CORPORATION,  
PETITIONER v. THE TOWN OF CHAPEL HILL BOARD OF ADJUSTMENT,  
RESPONDENT

No. 9115SC456

(Filed 21 April 1992)

**Municipal Corporations § 31.2 (NCI3d) — development ordinance — reversal of board of adjustment decision — absence of supporting findings**

The trial court erred in reversing a board of adjustment's decision that proposed structures having six bedrooms, three bathrooms, a kitchen and a common eating area in each unit were rooming houses rather than duplexes constituting dwelling units within the meaning of a town development ordinance where the court made no findings of fact to support this conclusion or to show that the board of adjustment's decision was arbitrary, oppressive, or an abuse of discretion.

**Am Jur 2d, Administrative Law §§ 650-652.**

APPEAL by respondent from order and judgment entered 20 February 1991 by *Judge Richard B. Allsbrook* in ORANGE County Superior Court. Heard in the Court of Appeals 11 March 1992.

In October, 1989 petitioner sought building permits to construct duplexes on Roberson Street in the Town of Chapel Hill. Each dwelling unit comprised approximately 3100 square feet and contained six bedrooms, three bathrooms, a kitchen, and a living room. Subsequently, the Chapel Hill Planning Director notified a representative of petitioner that the structures appeared to be rooming houses, in violation of the municipal ordinance, and that



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certificates of occupancy would not be issued. Modifications were made on the Roberson structures whereby the leases provided that tenants were jointly and severally liable, subleasing was prohibited, the number of available parking spaces was reduced, and individual bedrooms were fitted with privacy locks instead of individual keyed locks. On 27 July 1990 certificates of occupancy for the structures were issued.

On 14 September 1990 petitioner applied to the Inspections Department for zoning compliance and building permits authorizing the construction of three structures on Green Street in Chapel Hill. These structures are the subject matter of this action. The relevant lots are each approximately one-half acre in size and are located in an R-4 zoning district, within which duplexes are a permitted use. Each unit was proposed to have a floor area of approximately 3,000 square feet, with six bedrooms, three bathrooms, a kitchen and a common eating area.

Although the Roberson Street and Green Street projects were substantially similar, the Chapel Hill Planning Director determined that the Green Street structures constituted rooming houses such that permits should not be issued. The Town Manager officially denied the permit requests on this basis on 10 October 1990. On 29 October 1990 the Chapel Hill Town Council amended Sections 2.36, 2.38, 2.39 and 2.108 of the Development Ordinance. Specifically, Section 2.39 was amended to provide in part:

A duplex structure with more than three (3) bedrooms within either dwelling unit shall be classified as a Rooming House unless each dwelling unit is occupied by persons related by blood, adoption, or marriage, with not more than two unrelated persons.

Pursuant to Article 24 of Chapel Hill's Development Ordinance and G.S. 160A-388, petitioner sought review of the Manager's decision by the Board of Adjustment. On 5 December 1990 the Board conducted a *de novo* hearing during which both sides presented evidence. At the close of the hearing the Board voted 6-4 in favor of issuing the permits. This vote was insufficient to overturn the Manager's denial of the permit, however, because G.S. 160A-388 requires a four-fifth's vote in order to reverse the Manager's determination.

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Petitioner appealed the Board's decision and the Superior Court reversed, finding the structures for which the permits were sought to be duplexes and directing that the requested permits be issued.

*Michael B. Brough & Associates, by Michael B. Brough, for petitioner appellee.*

*Ralph D. Karpinos for respondent appellant.*

WALKER, Judge.

Respondent argues (1) it correctly denied the building and zoning compliance permits because the proposed structures were rooming houses not duplexes, and (2) the trial court erred in reversing the Board on the basis of its own interpretation of the ordinance. For the purposes of this appeal we find it necessary to address only the second contention.

The relevant pre-amended portions of the ordinance considered by the Board in upholding the Manager's decision to deny issuance of the permits provide:

*Rooming House:* A building or group of buildings containing in combination three (3) to nine (9) lodging units intended primarily for rental or lease for periods of longer than one week, with or without board. Emergency shelters for homeless persons and residential support facilities, as defined elsewhere in this ordinance, are not included. (Dev. Ord. Sec. 2.108).

*Lodging Unit:* A room or group of rooms forming a separate habitable unit used or intended to be used for living and sleeping purposes by one family only, without independent kitchen facilities; or a separate habitable unit, with or without independent kitchen facilities, occupied or intended to be occupied by transients on a rental or lease basis for periods of less than one week. (Dev. Ord., Sec. 2.66).

*Dwelling Unit:* A room or group of rooms within a dwelling forming a single independent habitable unit used or intended to be used for living, sleeping, sanitation, cooking, and eating purposes by one family only; for owner occupancy or for rental, lease, or other occupancy on a weekly or longer basis; and containing independent kitchen, sanitary, and sleeping facilities; and provided such dwelling unit complies with Chapel Hill's Minimum Housing Code. (Dev. Ord., Sec. 2.41)

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In this regard the ordinance defines:

*Family*: An individual living alone or two (2) or more persons living together as a single housekeeping unit, using a single facility in a dwelling unit for culinary purposes. . . . The term "family" shall not be construed to include a fraternity or sorority, club, rooming house, institutional group or the like. (Dev. Ord., Sec. 2.45).

Thus, the ordinance imposes neither a numerical nor a relationship requirement within its definition of "family" and does not specifically define the term except to enunciate certain exclusions.

Petitioner argues that the structures are duplexes which fall within the definition of dwelling units. Although a dwelling unit is defined as a use by a family, petitioner contends the expansive meaning afforded the term "family" under the ordinance encompasses the anticipated use by graduate students in this case. Further, petitioner contends the proposed structures must be viewed as duplexes in light of the fact that permits were issued on the substantially similar Roberson structures, which were thereby characterized as duplexes.

In its construction of the ordinance, however, the Board upheld the Manager's determination that the proposed structures most closely matched the definition of rooming houses. The Manager considered that each unit was to be comprised of six bedrooms, with two sharing a bathroom, and a communal kitchen and eating area and "concluded that each structure . . . should either be considered as a rooming house with six (6) lodging units, or as a pair of rooming houses, each with three (3) lodging units." Although the Manager agreed the designs for the Roberson and Green Street structures were similar, he believed the Roberson Street building permits were erroneously issued. As rooming houses, the Green Street project must obtain site plan approval by the Planning Board and must satisfy additional regulations in the Development Ordinance. Dwelling units only need obtain a building permit and a zoning compliance permit.

In reversing the Board the trial court stated:

Having reviewed the undisputed facts set forth in the record stipulated by counsel for petitioner and respondent as the official record of the board of adjustment's decision, and having considered the arguments of counsel and authorities submitted

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in support thereof, the court concludes that the structures for which petitioner sought building permits. . . constituted duplexes and (satisfied all applicable requirements for issuance of building and zoning compliance permits for duplexes under the development ordinance as it existed before the October 29, 1990 amendments.) Therefore, interpreting the words of the ordinance in light of the undisputed facts in this case, the court concludes that the board of adjustment's decision affirming the town manager's interpretation of the development ordinance was erroneous as a matter of law.

We cannot affirm this conclusion except for that portion holding as applicable the pre-amended Development Ordinance. In *P.A.W. v. Town of Boone Board of Adjustment*, 95 N.C.App. 110, 113, 382 S.E.2d 443, 444-445 (1989), this Court held that:

Because a board of adjustment is vested with reasonable discretion in determining the intended meaning of an ordinance, a court may not substitute its judgment for the board's in the absence of error of law, or arbitrary, oppressive, or manifest abuse of authority.

Here, the court reversed the Board's decision on the grounds that its interpretation of the ordinance was erroneous as a matter of law. However, the court failed to enumerate any findings of fact which support this conclusion or otherwise tend to show that the Board's decision was arbitrary, oppressive, or an abuse of authority. In the absence of the trial court making adequate findings of fact establishing the erroneous nature of the Board's interpretation and decision, its conclusion cannot stand. Upon remand, it is therefore incumbent upon the court to make findings of fact based upon competent evidence which support the court's determination that the Board's decision was erroneous as a matter of law.

We further find the trial court's order and judgment to be deficient in that the language used does not conform with that of the ordinance. The ordinance defines "dwelling units" and "rooming houses" with regard to zoning requirements. However the trial court made no findings in this regard, instead concluding as a matter of law that the structures constituted duplexes. Nowhere in the ordinance does the term "duplex" appear concerning zoning requirements. Upon remand the trial court should mold its findings to the language of the ordinance.

LEE COUNTY BD. OF EDUCATION v. ADAMS ELECTRICAL, INC.

[106 N.C. App. 139 (1992)]

Reversed and remanded.

Chief Judge HEDRICK and Judge ORR concur.

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LEE COUNTY BOARD OF EDUCATION v. ADAMS ELECTRICAL, INC. AND  
AMERICAN ARBITRATION ASSOCIATION

No. 9111SC513

(Filed 21 April 1992)

**Appeal and Error § 124 (NCI4th)— preliminary injunction prohibiting arbitration—nonappealable order**

The trial court's preliminary order enjoining arbitration is a nonappealable interlocutory order where the trial court has not yet summarily determined the issue of whether the parties have entered into an enforceable contract providing for arbitration. N.C.G.S. § 1-567.3(b).

**Am Jur 2d, Appeal and Error § 864; Arbitration and Award § 83.**

APPEAL by defendant Adams Electrical, Inc., from order entered 6 February 1991 in LEE County Superior Court by *Judge Knox Jenkins*. Heard in the Court of Appeals 17 March 1992.

*Love & Wicker, P.A., by Jimmy L. Love, for plaintiff-appellee.*

*Tanner & Rogel, P.A., by LeAnn M. Tanner, for defendant-appellant Adams Electrical, Inc.*

GREENE, Judge.

Defendant appeals from an order entered 6 February 1991 granting the plaintiff's motion for a preliminary injunction.

In late 1987, the Lee County Board of Education (plaintiff) decided to begin the third phase of its school construction program which included construction of the Greenwood Elementary School (project) in Lemon Springs, North Carolina. After the plaintiff's architect had completed the required plans and specifications, contractors were invited to submit bids on separate aspects of the project. William Johnson (Johnson), superintendent for the Lee

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County Schools, disseminated the "Invitations to Bid." Adams Electrical, Inc. (defendant) submitted the lowest bid for the electrical work for the project, and on 12 December 1988, the plaintiff voted to accept the defendant's bid, and Johnson signed the contract for the electrical work. At the board meeting, Johnson was directed to send three signed copies of the contract to the defendant, and the next day, he did. Jeff Adams, president of the defendant, then signed the three copies of the contract.

Under the terms of the parties' contract, the initial completion date for the defendant's work was 15 April 1990. The plaintiff issued a change order to the contract which extended the completion date to 5 July 1990. According to the defendant, however, it was unable to complete its work until 17 October 1990 because of delays attributable to the plaintiff, and because of these delays, the defendant incurred additional costs in completing its work. The defendant submitted claims for these additional costs. The plaintiff's architect responded to the defendant's claims on 27 August 1990 by informing the defendant that the plaintiff's attorney would contact the defendant's attorney to schedule a meeting for the parties. On or about 1 October 1990, the defendant filed a Demand for Arbitration under the terms of the contract. On 7 November 1990, the plaintiff filed a complaint for declaratory judgment, a motion to stay arbitration, and a motion for a preliminary injunction. According to the plaintiff, the parties' contract is invalid because Johnson was not a member of the plaintiff nor did he have the authority to contract for the plaintiff. The trial court entered a temporary restraining order prohibiting the defendant, among other things, from arbitrating its claim. This order was continued in effect until the 28 January 1991 Civil Session of the Superior Court of Lee County at which time the trial court heard arguments on the plaintiff's motion for a preliminary injunction. On 6 February 1991, the trial court granted the plaintiff's motion enjoining the defendant from arbitrating its claim until its further orders. The trial court, however, did not determine the validity of the contract.

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The dispositive issue is whether the trial court's order is a non-appealable interlocutory order.

In this case, as in *Peloquin Assocs. v. Polcaro*, 61 N.C. App. 345, 346, 300 S.E.2d 477, 477-78 (1983), a party has attempted to appeal a preliminary order enjoining arbitration prior to a deter-

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mination of whether the parties have entered into an enforceable contract providing for arbitration of disputes. North Carolina Gen. Stat. § 1-567.3(b) (1983) provides the following:

On application, the court may stay an arbitration proceeding commenced or threatened on a showing that there is no agreement to arbitrate. Such an issue, when in substantial and bona fide dispute, shall be forthwith and summarily tried and the stay ordered if found for the moving party. If found for the opposing party, the court shall order the parties to proceed to arbitration.

Accordingly, if the trial court summarily determines that the parties entered into an enforceable contract which provides for arbitration, the trial court "shall order the parties to proceed to arbitration." *Id.* There is no immediate right of appellate review of such interlocutory orders. *Bluffs, Inc. v. Wysocki*, 68 N.C. App. 284, 285-86, 314 S.E.2d 291, 293 (1984); *cf. Routh v. Snap-On Tools Corp.*, 101 N.C. App. 703, 706, 400 S.E.2d 755, 757 (1991) (trial court required under N.C.G.S. § 1-567.3(a) (1983) to summarily determine whether valid arbitration agreement exists). If, however, the trial court summarily determines that the parties did not enter into such a contract, the trial court shall grant the moving party's application to stay arbitration, N.C.G.S. § 1-567.3(b), and pursuant to N.C.G.S. § 1-567.18(a)(2) (1983), the opposing party may be allowed to appeal the order. *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992) (appeal of order staying arbitration on ground that contract did not contain agreement to arbitrate); *Peloquin*, 61 N.C. App. at 346, 300 S.E.2d at 477 (appeals of orders staying arbitration subject to N.C.G.S. § 1-277(a) (1983) and N.C.G.S. § 7A-27(d) (1989)).

In this case, however, because the trial court has not yet summarily determined the issue of whether the parties have entered into an enforceable contract providing for arbitration, the trial court's order enjoining arbitration is not appealable. *A.E.P. Indus. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983) (appeals of preliminary injunctions subject to N.C.G.S. §§ 1-277 and 7A-27). As in *Peloquin*, this order is not a final determination of the merits of the plaintiff's motion to stay arbitration. *Id.* at 346, 300 S.E.2d at 478. This order only maintains the status quo pending a determination of whether the parties have entered into a contract providing for arbitration of their disputes. It does not determine the

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[106 N.C. App. 142 (1992)]

action, N.C.G.S. § 1-277(a); N.C.G.S. § 7A-27(d)(2), it does not discontinue the action, N.C.G.S. § 1-277(a); N.C.G.S. § 7A-27(d)(3), and it does not grant or refuse a new trial. N.C.G.S. § 1-277(a); N.C.G.S. § 7A-27(d)(4). Furthermore, the order does not prejudice a substantial right. N.C.G.S. § 1-277(a); N.C.G.S. § 7A-27(d)(1); *Peloquin*, 61 N.C. App. at 346, 300 S.E.2d at 478; see *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d 812, 815 (1987). Because the order from which the defendant appeals is a non-appealable interlocutory order, the defendant's appeal is

Dismissed.

Judges JOHNSON and COZORT concur.

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LARRY F. GREGORY AND WIFE, DOROTHY S. GREGORY, PLAINTIFFS v. ATRIUM DOOR AND WINDOW COMPANY, A TEXAS CORPORATION; W. R. JONES COMPANY, A NORTH CAROLINA CORPORATION; AND JAMES R. BURRIS, D/B/A JAMES R. BURRIS CONSTRUCTION COMPANY, DEFENDANTS

No. 9119DC468

(Filed 21 April 1992)

**Sales § 17.2 (NC13d)— windows and doors—implied warranty of merchantability and fitness for a particular purpose**

The trial court erred by finding that defendant Atrium, the manufacturer, breached the implied warranty of merchantability and an implied warranty of fitness for a particular purpose as to windows and doors installed on a house on Figure Eight Island where there was no competent evidence of the privity required between defendant Atrium and the plaintiffs.

**Am Jur 2d, Sales § 720.**

APPEAL by defendant from judgment entered 21 December 1990 by *Judge Frank M. Montgomery* in ROWAN County District Court. Heard in the Court of Appeals 11 March 1992.

Plaintiffs contracted with defendant James R. Burris, d/b/a James R. Burris Construction Company, to build a residence on Figure Eight Island near Wilmington, North Carolina. Doors manufac-



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[106 N.C. App. 142 (1992)]

tured by defendant Atrium Door and Window Company were purchased by plaintiffs from defendant W. R. Jones Company for installation in this residence.

Plaintiff Larry F. Gregory testified at trial that the doors did not function properly from the time of installation and that some of the doors were deteriorating. The express warranty introduced by defendant-manufacturer Atrium at trial covered only the glass in the doors, which was not the defect of which plaintiffs complained. Plaintiffs' answer to defendant Atrium's interrogatories stated that no employee of Atrium made representations as to the doors' suitability for use near the ocean, but that employees of defendant W. R. Jones Company did make such representations.

After finding defendant Atrium to be a merchant as defined by the Uniform Commercial Code, the trial court found that defendant Atrium gave plaintiffs an implied warranty of merchantability. The trial court concluded that plaintiffs were damaged when defendant Atrium breached both this warranty and an implied warranty of fitness for a particular purpose, although it made no finding of fact as to this second implied warranty. In its judgment the trial court awarded plaintiffs \$8,105.70 in damages to be recovered jointly and severally from defendants Atrium and W. R. Jones Company. From this judgment defendant Atrium appeals.

*Woodson, Linn, Ford, Sayers, Lawther, Short, Parrott & Hudson, by S. Edward Parrott, for plaintiff appellees.*

*Thomas M. King for defendant appellant Atrium Door and Window Company.*

*No brief filed by defendants W. R. Jones Company or James R. Burris, d/b/a James R. Burris Construction Company.*

ARNOLD, Judge.

In its first two arguments defendant Atrium Door and Window Company contends that the trial court committed reversible error in finding that it gave plaintiffs implied warranties of merchantability and fitness for a particular purpose for the doors. Defendant attacks these findings as being unsupported by competent evidence. "Where a trial court sitting without a jury makes findings of fact, the sufficiency of those facts to support the judgment may be raised on appeal. The standard by which we review the findings is whether any competent evidence exists in the record to support

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them." *Hollerbach v. Hollerbach*, 90 N.C. App. 384, 387, 368 S.E.2d 413, 415 (1988) (citations omitted).

The trial court found that "Defendant[ ] . . . Atrium, in selling the windows and doors to the Plaintiffs for use in their residence, gave an implied warranty of merchantability concerning the windows and doors, and said implied warranty of merchantability was not excluded or modified by any actions of the parties." An implied warranty of merchantability (N.C. Gen. Stat. § 25-2-314 (1986) ) and an implied warranty of fitness for a particular purpose (G.S. § 25-2-315) are based upon contractual theory. *Richard W. Cooper Agency v. Irwin Yacht and Marine Corp.*, 46 N.C. App. 248, 251, 264 S.E.2d 768, 770 (1980). Plaintiffs were in privity of contract with defendant-retailer W. R. Jones Company, from whom they had purchased the doors, but were not in privity of contract with defendant-manufacturer Atrium Door and Window Company.

"[O]utside the exceptions created by G.S. Chapter 99B [products liability], the general rule is that privity is required to assert a claim for breach of an implied warranty involving only economic loss. See *Holland v. Edgerton*, 85 N.C. App. 567, 355 S.E.2d 514 (1987)." *Sharrard, McGee & Co., P.A. v. Suz's Software, Inc.*, 100 N.C. App. 428, 432, 396 S.E.2d 815, 817-18 (1990). The trial court's findings reflect that only economic loss resulted from the alleged breach in the form of malfunctioning and deteriorating doors, along with some water damage to flooring. There is no competent evidence in the record of the privity between defendant Atrium and the plaintiffs required to support the trial court's findings and conclusion as to the alleged breach of these implied warranties. The judgment of the trial court is reversed.

While we are constrained by existing case law to reach this result, perhaps consideration should be given to whether the privity requirement for implied warranties is still good policy. Allowing consumers to bring direct actions against the manufacturer "avoids the chain of litigation which may otherwise be necessary to pursue liability up the chain of distribution." 16 A.L.R.3d 683, 690 § 2 (1967).

Reversed.

Judges LEWIS and WYNN concur.

**LOWDER v. LOWDER**

[106 N.C. App. 145 (1992)]

MALCOLM M. LOWDER AND WIFE, PATTY STIWELL LOWDER, PETITIONERS v.  
W. HORACE LOWDER AND WIFE, JEANNE R. LOWDER, AND LOIS L.  
HUDSON AND HUSBAND, BILLY JOE HUDSON, RESPONDENTS

No. 9019SC1309

(Filed 21 April 1992)

**Appeal and Error § 510 (NCI4th) — frivolous appeal — sanctions —  
show cause order**

Respondents' appeal is frivolous where they have again raised the jurisdiction issue which repeatedly has been rejected by the Court of Appeals, and respondents are directed to show cause in writing as to why this appeal should not be dismissed and why they should not be taxed for all reasonable expenses and costs incurred, including attorney fees and any other appropriate sanctions. Appellate Rules 34(a)(1), (a)(2), (b)(1) and (b)(2); Appellate Rule 35.

**Am Jur 2d, Appeal and Error §§ 912, 1024.****Award of damages for dilatory tactics in prosecuting appeal in state court. 91 ALR3d 661.**

APPEAL by respondents from order entered 15 August 1990 by *Judge Howard R. Greeson, Jr.* in MONTGOMERY County Superior Court. Heard in the Court of Appeals 17 March 1992.

Real estate belonging to Consolidated Industries, Inc. was conveyed by a receivers' deed to Malcolm M. Lowder, W. Horace Lowder and Lois Lowder Hudson as tenants in common on 30 December 1988. Petitioners then filed for partition. The trial court appointed commissioners to divide the property. Respondents filed no exceptions and did not appeal either the commissioners' original or amended report, which the trial court confirmed.

Six weeks later respondents filed a "Motion to Delay Judgment and Hold in Abeyance." The trial court denied respondents' motion and imposed sanctions of \$700.00 upon them for petitioners' reasonably incurred fees and expenses in responding to the motion. From the order and judgment denying respondents' motion and imposing sanctions, respondents appeal.

## DUNLEAVY v. YATES CONSTRUCTION CO.

[106 N.C. App. 146 (1992)]

*Moore & Van Allen, by James P. McLoughlin, Jr., for petitioner appellees.*

*W. Horace Lowder, respondent appellant, pro se.*

*Lois L. Hudson, respondent appellant, pro se.*

ARNOLD, Judge.

This is the twenty-sixth appeal in a series of cases emanating from *Malcolm v. All Star Mills*, Stanly Co. 79CVS015. In this latest guise, respondents once again have raised the jurisdiction issue which repeatedly has been rejected by this Court. We note nothing new in respondents' arguments and find this appeal to be frivolous under N.C.R. App. P. 34(a)(1) and (a)(2). Pursuant to Rule 34(d) we direct that within not more than thirty days from the certification of this opinion respondents shall show cause in writing as to why this appeal should not be dismissed and why they should not be taxed for all reasonable expenses and costs incurred, including reasonable attorney fees and any other appropriate sanction. See N.C.R. App. P. 34(b)(1) and (b)(2); N.C.R. App. P. 35.

Remanded.

Judges LEWIS and WYNN concur.

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RACHEL DUNLEAVY AND JOHNNY GLENN COBB, ADMINISTRATORS OF THE ESTATE OF JOHNNY GLENN COBB II, DECEASED, PLAINTIFFS v. YATES CONSTRUCTION COMPANY, INC.; SPRINGFIELD PROPERTIES, INC.; ROBERT G. YATES; DOUGLAS B. YATES; AND DONALD BAYNES, DEFENDANTS

No. 9018SC333

(Filed 5 May 1992)

**1. Master and Servant § 87 (NCI3d)— Woodson v. Rowland—retroactivity**

The decision in *Woodson v. Rowland*, 329 N.C. 330, will be applied retroactively by the Court of Appeals.

**Am Jur 2d, Master and Servant § 139.**

## DUNLEAVY v. YATES CONSTRUCTION CO.

[106 N.C. App. 146 (1992)]

**2. Master and Servant § 19 (NCI3d)— independent contractor's employee—death in trench cave-in—liability of landowner—nondelegable duty of care**

In an action to recover for the death of an independent contractor's employee in a trench cave-in, plaintiffs' complaint was sufficient to state a claim against defendant landowner for breach of a nondelegable duty of care arising from an inherently dangerous activity where plaintiffs alleged that the landowner hired the independent contractor to perform an inherently dangerous activity, i.e., digging a trench without required shoring, bracing or other supportive devices; that defendant "had direct knowledge" of the circumstances creating the danger; and that defendant breached its duty to the employee and this breach was a proximate cause of plaintiffs' damages.

**Am Jur 2d, Premises Liability § 457.**

**3. Master and Servant § 21 (NCI3d)— injury to independent contractor's employee—no liability for negligent selection or retention of contractor**

North Carolina law does not recognize claims of an injured employee of an incompetent or unqualified independent contractor against a party for its negligent selection or retention of the independent contractor.

**Am Jur 2d, Premises Liability § 457.**

**4. Master and Servant § 87 (NCI3d)— employee's death from trench cave-in—action against employer and officers—"substantial certainty" test—new summary judgment hearing**

In an action to recover for the death of a corporate contractor's employee in a trench cave-in, the "substantial certainty" test set forth in *Woodson v. Rowland*, 329 N.C. 330, applies to the corporate employer. This standard also applies to the president and vice president of the corporate employer in their individual capacities if, at the time of the trenching, these corporate officers were acting in furtherance of the corporate business. Accordingly, plaintiffs are entitled to a new hearing on the summary judgment motions of the corporate employer and its two officers where the court's entry of summary judg-

**DUNLEAVY v. YATES CONSTRUCTION CO.**

[106 N.C. App. 146 (1992)]

ment for these defendants was based upon a misapprehension of the applicable law.

**Am Jur 2d, Master and Servant § 139.****5. Master and Servant § 89.1 (NCI3d) — employee's death in trench cave-in — liability of foreman as co-employee — willful, wanton or reckless negligence standard**

The potential liability of the foreman of an employee killed in a trench cave-in was as a co-employee and was governed by the willful, wanton and reckless negligence standard.

**Am Jur 2d, Master and Servant § 398.****6. Master and Servant § 89.1 (NCI3d) — employee's death in trench cave-in — summary judgment for foreman**

In an action to recover for an employee's death in a trench cave-in, defendant foreman's forecast of evidence was sufficient to show that his conduct was not willful, wanton and reckless, and summary judgment was properly entered for defendant where plaintiffs did not produce any evidence to refute defendant's evidence, and defendant's affidavit tended to show that he was the pipe crew foreman in charge of an inexperienced pipe crew of which the deceased employee was a member; during the afternoon the employee was killed, the crew was beginning the second leg of the trench work when the foreman was called away to another part of the work site; at this point the trench had not exceeded five feet, the depth at which trenches were required to be supported, and was not to exceed five feet during the second leg of the work; no one in the crew was working in any part of the trench that exceeded a depth of five feet; while the foreman was gone, however, the backhoe operator made more progress than had been expected and began digging the trench deeper than five feet; and the employee was killed some time later when a small portion of the trench where the depth exceeded five feet collapsed.

**Am Jur 2d, Master and Servant § 398.**

APPEAL by plaintiffs from judgment entered 8 November 1989 and order entered 9 November 1989 in GUILFORD County Superior Court by *Judge Howard R. Greeson, Jr.* Heard in the Court of

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Appeals 16 November 1990. Heard in the Court of Appeals on remand from the Supreme Court on 18 March 1992.

*Smith, Patterson, Follin, Curtis, James, Harkavy & Lawrence, by Norman B. Smith and Bryan E. Lessley, and Smith, Follin & James, by J. David James, for plaintiff-appellants.*

*Henson Henson Bayliss & Sue, by Jack B. Bayliss, Jr., A. Robinson Hassell, and Daniel L. Deuterman, for defendant-appellees Yates Construction Company, Inc., Robert G. Yates, Douglas B. Yates and Donald Baynes.*

*Adams Kleemeier Hagan Hannah & Fouts, by J. Alexander S. Barrett and Edward L. Bleyntat, Jr., for defendant-appellee Springfield Properties, Inc.*

GREENE, Judge.

Plaintiffs appeal from an order entered 8 November 1989 granting summary judgment for Yates Construction Company (Company), Robert Yates, Douglas Yates, and Donald Baynes (Baynes). Plaintiffs also appeal from an order entered 9 November 1989 dismissing the plaintiffs' complaint as to Springfield Properties (Springfield) for failure to state a claim upon which relief can be granted.

In October, 1985, Company, an independent contractor, contracted with Springfield to construct, among other things, sewer lines within the Raven Ridge Subdivision located in Guilford County, North Carolina. Springfield owned the property on which the subdivision was being built. At this time, Johnny Glenn Cobb, II (Cobb) worked for Company as a member of a "new and inexperienced pipe crew." Cobb had no prior experience on a pipe crew. On 17 October 1985, Cobb and the other members of the crew arrived with their equipment at the Raven Ridge work site to begin installing the sewer lines. Before 17 October 1985, the pipe crew had been digging trenches to lay water lines at a location different than the Raven Ridge work site. They did not begin any trench work that day because Baynes, the crew foreman, did not plan to make much progress with such a new and inexperienced crew.

On the morning of 18 October 1985, the pipe crew began the first leg of the trench work at the Raven Ridge work site. The soil at the work site was "firm and stable." At no time that morning did the depth of the trench exceed five feet. Douglas Yates, vice

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president of Company, "requested that trench boxes owned by the company be transferred from another construction site for use during the progress of the construction work at the Raven Ridge subdivision . . . ." By the afternoon, the pipe crew had begun the second leg of the trench work. In the early stages of this second leg, the trench was not to exceed five feet in depth. Baynes was called away to another side of the project, and while he was gone, the operator of the backhoe made more progress than Baynes had expected. In fact, the operator of the backhoe was digging well ahead on the pipe laying crew. When Baynes left, the trench did not exceed five feet in depth. While Baynes was gone, however, the digging increased at such a rate that before Baynes could return to the trench, the trench exceeded five feet in depth in certain parts. According to Robert Yates, president of Company, "it was the policy of the Company to use trench boxes or slope the sides of a trench when conditions warranted such action, including whenever the depth of a trench exceeded five feet . . . ." It is undisputed that Occupational Safety and Health Act (OSHA) regulations in effect at the time required trenches of more than five feet in depth to be properly supported. This trench, however, was approximately 150 feet long, the walls of the trench were vertical and had not been shored, sloped, braced, or otherwise supported to prevent a collapse, and the trench boxes which Douglas Yates had requested had not yet arrived. While Cobb was in a portion of the trench where the depth exceeded five feet, a small portion of one side of the trench collapsed and struck Cobb in the head resulting in his death. Cobb, contrary to OSHA regulations, had not been provided a hard helmet and consequently was not wearing such protective equipment at the time of his death. Baynes was not present when the trench collapsed.

The plaintiffs, in addition to filing a claim for workers' compensation benefits, filed a complaint against Company, Robert Yates, Douglas Yates, Baynes, and Springfield. As to Company, Robert Yates, Douglas Yates, and Baynes, the plaintiffs alleged that Cobb's death was the result of a deliberate and intentional assault and willful, wanton, and reckless negligence. As against Springfield, the plaintiffs alleged that Springfield was liable to the plaintiffs on the theories of inherently dangerous activity, negligent selection of Company, and negligent retention of Company. On 17 July 1989, Springfield filed a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) (Rule 12(b)(6)). On 27 July 1989, the remaining defendants



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jointly filed an answer, and on 18 August 1989, they filed a motion to dismiss under Rule 12(b)(6), and in the alternative, for summary judgment under N.C.G.S. § 1A-1, Rule 56 (Rule 56). On 26 October 1989, the plaintiffs made a motion to stay all proceedings pending the North Carolina Supreme Court's resolution of *Woodson v. Rowland*, 92 N.C. App. 38, 373 S.E.2d 674 (1988), *disc. rev. allowed*, 324 N.C. 117, 377 S.E.2d 247 (1989). On 8 November 1989, the trial court denied the plaintiffs' motion to stay and granted summary judgment for Company, Robert Yates, Douglas Yates, and Baynes. The next day, the trial court granted Springfield's motion to dismiss the plaintiffs' complaint. The plaintiffs appealed to this Court which, in an unpublished opinion, affirmed the trial court's orders based on *Woodson*, 92 N.C. App. 38, 373 S.E.2d 674. *Dunleavy v. Yates Constr. Co.*, 103 N.C. App. 804, 407 S.E.2d 905 (1991). The plaintiffs then petitioned the North Carolina Supreme Court for discretionary review of this Court's decision, and on 6 November 1991, the North Carolina Supreme Court allowed the plaintiffs' petition for discretionary review "for the limited purpose of entering the following order: the case is remanded to the Court of Appeals for reconsideration in light of" *Woodson v. Rowland*, 329 N.C. 330, 407 S.E.2d 222 (1991). *Dunleavy v. Yates Constr. Co.*, 330 N.C. 194, 412 S.E.2d 54 (1991).

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The issues are whether (I) the North Carolina Supreme Court's decision in *Woodson* operates retroactively; (II) (A) the plaintiffs sufficiently alleged a cause of action for breach of the nondelegable duty of care arising from an alleged inherently dangerous activity, and (B) North Carolina law recognizes claims of an injured employee of an independent contractor for negligent selection and retention of the independent contractor; and (III) (A) this Court should remand the trial court's order of summary judgment for Company, Robert Yates, and Douglas Yates, and (B) Baynes' conduct towards Cobb was willful, wanton, and reckless.

## I

[1] The plaintiffs argue, and Springfield disagrees, that this Court should apply the North Carolina Supreme Court's decision in *Woodson* retroactively to cases like this one arising before 14 August 1991, the date *Woodson* was filed.

Under the well-established judicial policy in North Carolina, decisions of the North Carolina Supreme Court "are generally

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presumed to operate retroactively." *State v. Rivens*, 299 N.C. 385, 390, 261 S.E.2d 867, 870 (1980). Furthermore, decisions of the North Carolina Supreme Court overruling former decisions are also presumed to operate retroactively. *Cox v. Haworth*, 304 N.C. 571, 573, 284 S.E.2d 322, 324 (1981). These rules of judicial policy are based upon the "Blackstonian Doctrine" of judicial decision-making," *id.*, also known as the "declaratory theory of law," *James B. Beam Distilling Co. v. Georgia*, 501 U.S. ---, ---, 115 L.Ed.2d 481, 488 (1991), which provides that courts do not make the law, they merely discover and announce it. *Cox*, 304 N.C. at 573, 284 S.E.2d at 324. Compelling reasons must exist, however, before courts will apply an overruling decision of a court of supreme jurisdiction in a purely prospective manner. *Cox*, 304 N.C. at 573-74, 284 S.E.2d at 324; *Rivens*, 299 N.C. at 390, 261 S.E.2d at 870. We need not decide whether compelling reasons exist which would require a purely prospective application of *Woodson*. Although the *Woodson* Court was silent on whether its decision was to operate retroactively, the Court did not require its decision to operate purely prospectively. See *Rabon v. Rowan Mem. Hosp., Inc.*, 269 N.C. 1, 21, 152 S.E.2d 485, 499 (1967) (specifically requiring prospective application of holding). Furthermore, implicit in the North Carolina Supreme Court's order directing this Court to reconsider *Dunleavy* in light of *Woodson* is the directive that the *Woodson* decision apply retroactively, a directive that this Court has recently followed in *Cook v. Morrison*, 105 N.C. App. 509, 413 S.E.2d 922 (1992). Accordingly, this Court will continue to apply all aspects of the *Woodson* decision retroactively.

## II

The plaintiffs argue that the trial court erred in granting Springfield's Rule 12(b)(6) motion to dismiss the plaintiffs' complaint for breach of the nondelegable duty of care arising from an inherently dangerous activity and for negligent selection and retention of Company.

## (A) Nondelegable Duty

A motion to dismiss under Rule 12(b)(6) tests the legal sufficiency of the complaint by presenting "the question whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief can be granted under some [recognized] legal theory." *Lynn v. Overlook Dev.*, 328 N.C. 689, 692, 403 S.E.2d 469, 471 (1991). Under Rule 12(b)(6), a

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plaintiff is required to allege sufficient facts in the complaint to support the substantive elements of the claim, otherwise, the complaint is subject to dismissal. *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 63, 401 S.E.2d 126, 128-29, *aff'd per curiam*, 330 N.C. 439, 410 S.E.2d 392 (1991); *see also Sutton v. Duke*, 277 N.C. 94, 104-05, 176 S.E.2d 161, 167 (1970) (under N.C.G.S. § 1A-1, Rule 8(a)(1), pleading must give sufficient notice of events or transactions which produced claim). When deciding a Rule 12(b)(6) motion, the court must read the complaint as a whole and view it "broadly and liberally in conformity with the mandate in [N.C.G.S. § 1A-1,] Rule 8(f)." 5A C. Wright & A. Miller, *Federal Practice and Procedure* § 1363 (2d ed. 1990); *Lynn*, 328 N.C. at 692, 403 S.E.2d at 471.

[2] Where a landowner hires an independent contractor to perform an inherently dangerous activity, and the owner knows or should know of the circumstances creating the danger, the owner "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].'" *Cook*, 105 N.C. App. at 517, 413 S.E.2d at 927 (quoting *Woodson*, 329 N.C. at 357, 407 S.E.2d at 238). Read as a whole and viewed liberally, the plaintiffs' complaint alleges sufficient facts to support the substantive elements of their claim against Springfield for breach of this nondelegable duty. The plaintiffs alleged that Springfield hired Company, an independent contractor, to perform an inherently dangerous activity, i.e., digging a trench without required shoring, bracing, or other supportive devices, and that Springfield "had direct knowledge" of the circumstances creating the danger. Furthermore, the plaintiffs alleged that Springfield breached this duty and that the breach proximately caused their damages. Because the plaintiffs' allegations are sufficient to state a claim upon which relief can be granted, the trial court erred in granting Springfield's Rule 12(b)(6) motion on this cause of action.

## (B) Negligent Selection and Retention

[3] North Carolina law, however, does not currently recognize claims of an injured employee of an incompetent or unqualified independent contractor against a party for its negligent selection or retention of the independent contractor. *Cook*, 105 N.C. App. at 517-18, 413 S.E.2d at 927. Accordingly, because our law does

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not recognize such claims, the trial court properly granted Springfield's Rule 12(b)(6) motion on the claims of negligent selection and retention of Company. *Lynn*, 328 N.C. at 692, 403 S.E.2d at 471.

## III

The plaintiffs argue that in light of *Woodson's* new "substantial certainty" standard for potential civil liability of employers, this Court should remand this case to the trial court for a *de novo* hearing on the Rule 56 motions for summary judgment by Company, Robert Yates, Douglas Yates, and Baynes.

## (A) Company, Robert Yates, and Douglas Yates

[4] We agree that the "substantial certainty" standard applies to Company as Cobb's corporate employer. *Woodson*, 329 N.C. at 342-46, 407 S.E.2d at 229-32. This standard also applies to Robert Yates and Douglas Yates in their individual capacities if, at the time of the trenching, these corporate officers were "acting in furtherance of corporate business . . ." *Id.* at 347-48, 407 S.E.2d at 232-33. Accordingly, the plaintiffs are entitled to a new hearing on the summary judgment motions of Company, Robert Yates, and Douglas Yates. This is true because "[w]here a ruling is based upon a misapprehension of the applicable law, the cause will be remanded in order that the matter may be considered in its true legal light." *Nationwide Mut. Ins. Co. v. Chantos*, 298 N.C. 246, 252, 258 S.E.2d 334, 338 (1979); *see also State v. McDowell*, 310 N.C. 61, 74, 310 S.E.2d 301, 310 (1984). Accordingly, we remand the trial court's order of summary judgment with regard to Company, Robert Yates, and Douglas Yates for a *de novo* hearing in light of *Woodson*.

## (B) Baynes

[5] Baynes, unlike the above-mentioned defendants, was not Cobb's "employer in person nor a person who is realistically the alter ego of the" Company, but was merely a foreman and as such was Cobb's co-employee. 2A A. Larson, *The Law of Workmen's Compensation* § 68.21 (1990) (drawing distinction between employers and supervisory employees such as foremen); *see Abernathy v. Consolidated Freightways Corp.*, 321 N.C. 236, 240-41, 362 S.E.2d 559, 561-62 (1987) (supervisor of injured employee classified as co-employee). The *Woodson* decision, therefore, does not entitle the plaintiffs to a *de novo* hearing with regard to Baynes whose poten-

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tial liability to the plaintiffs as a co-employee of Cobb is governed by the “willful, wanton, and reckless negligence” standard of *Pleasant v. Johnson*, 312 N.C. 710, 325 S.E.2d 244 (1985). The *Pleasant* decision explained that although the Workers’ Compensation Act (Act) bars an employee “who is injured in the course of his employment from suing a co-employee whose negligence caused the injury,” *id.* at 713, 325 S.E.2d at 247, the Act does not bar such an employee from suing a co-employee for intentional torts. *Id.* Because the Act does not bar an employee from suing a co-employee for injuries caused by intentional torts, and because willful, wanton, and reckless negligence is “equated” with intentional injury for purposes of the Act, the Court concluded that the Act does not bar an employee from suing a co-employee for injuries caused by willful, wanton, and reckless negligence. *Id.* at 715, 325 S.E.2d at 248. The *Woodson* decision does not alter this standard for co-employee civil liability.

Because Baynes moved for summary judgment, Baynes had the burden of showing that (1) an essential element of the plaintiffs’ claim did not exist, (2) the plaintiffs could not produce evidence to support an essential element of their claim, or (3) the plaintiffs could not surmount an affirmative defense which would bar their claim. *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). Baynes submitted his affidavit which shows that an essential element of the plaintiffs’ claim does not exist, namely, that Baynes’ conduct was willful, wanton, and reckless.

**[6]** “Wanton” and “reckless” conduct is such conduct “manifesting a reckless disregard for the rights and safety of others.” *Pleasant*, 312 N.C. at 714, 325 S.E.2d at 248. “Willful negligence” is “the intentional failure to carry out some duty imposed by law or contract which is necessary to the safety of the person or property to which it is owed.” *Id.* Baynes’ evidence tends to show that he was the pipe crew foreman in charge of an inexperienced pipe crew of which Cobb was a member. During the afternoon of 18 October 1985, the crew was beginning the second leg of the trench work when Baynes was called away to another part of the work site. At this point, the trench had not exceeded five feet in depth and was not to exceed five feet during the second leg of the work, and no one in the crew was working in any part of the trench that exceeded a depth of five feet. While Baynes was gone, however, the backhoe operator made more progress than had been expected and began digging the trench deeper than five feet. Some time

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later, Cobb was killed when a small portion of the trench where the depth exceeded five feet collapsed. This evidence shows that Baynes' conduct, although arguably negligent, was not willful, wanton, and reckless. Baynes' conduct did not manifest reckless disregard for the rights and safety of the pipe crew, nor did it amount to the intentional failure to carry out a duty of care owed to the crew. See *Abernathy*, 321 N.C. at 241, 362 S.E.2d at 562 (dock worker injured by ordinary negligence of co-employees, one of whom was a supervisor). Because Baynes met his burden on his summary judgment motion, the burden shifted to the plaintiffs to refute Baynes' showing. *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 plaintiffs did not produce any evidence in response to Baynes' affidavit. Accordingly, the trial court properly entered summary judgment for Baynes. *White v. Hunsinger*, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988).

In summary, we affirm the trial court's order granting Springfield's motion to dismiss the plaintiffs' claims for negligent selection and retention. We also affirm the trial court's order granting Baynes' motion for summary judgment. We reverse and remand, however, the trial court's order granting Springfield's motion to dismiss the plaintiffs' claim for breach of a nondelegable duty, and we remand the trial court's order granting summary judgment for Company, Robert Yates, and Douglas Yates for a *de novo* hearing in light of *Woodson*.

Affirmed in part, reversed in part, and remanded.

Judges ORR and WALKER concur.

## STATE v. HEDGECOE

[106 N.C. App. 157 (1992)]

STATE OF NORTH CAROLINA v. BOBBY LEE HEDGECOE, JR.

No. 9126SC638

(Filed 5 May 1992)

**1. Robbery § 5.4 (NCI3d)— assault with a deadly weapon and simple assault as lesser included offenses—instruction not given—no error**

The trial court did not err by denying defendant's motion to instruct the jury on the crimes of assault with a deadly weapon and simple assault as lesser included offenses of common law robbery where the State's evidence establishes that defendant committed only the crime of common law robbery and defendant's evidence only tended to show that he committed no offense, not a lesser offense.

**Am Jur 2d, Robbery § 75.**

**2. Robbery § 5.3 (NCI3d)— common law robbery—instructions—language of indictment not followed—no error**

The trial court did not err by denying defendant's motion to amend jury instructions on common law robbery regarding robbing the victim of personal property to conform to language in the indictment referring to robbery of jewelry. The trial court properly charged the jury on the elements of common law robbery and the use of the term personal property rather than jewelry as found in the indictment cannot be considered prejudicial in the context of the evidence.

**Am Jur 2d, Robbery § 71.**

**3. Narcotics § 4.1 (NCI3d)— possession of drug paraphernalia—intent to use in connection with controlled substances—evidence insufficient**

The trial court erred by failing to grant defendant's motions to dismiss the charge of possession of drug paraphernalia where the State introduced the hypodermic syringe and needle found in defendant's possession on the night of his arrest and the arresting officer testified that these items were used to introduce drugs of some kind into the body. The mere possession of the needle and syringe fails to establish the crucial element of possession with intent to use the syringe in connection with controlled substances.

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**Am Jur 2d, Drugs, Narcotics, and Poisons § 45.****Prosecutions based upon alleged illegal possession of instruments to be used in violation of narcotics laws. 92 ALR3d 47.****4. Criminal Law § 912 (NCI4th)— motion to poll jury— evidence on which defendant found guilty—denied—no error**

The trial court did not err in a prosecution for robbery by denying defendant's request to poll the jury to determine on what evidence he was found guilty. The court had already polled the jury to determine the unanimity of the verdict; N.C.G.S. § 15A-1238 does not entitle defendant to an unlimited number of polls.

**Am Jur 2d, Trial § 1765.**

APPEAL by defendant from judgment entered 15 March 1991 in MECKLENBURG County Superior Court by *Judge Shirley L. Fulton*. Heard in the Court of Appeals 6 April 1992.

Defendant was indicted for robbery with a dangerous weapon in violation of N.C. Gen. Stat. § 14-87 and possession of drug paraphernalia in violation of N.C. Gen. Stat. § 90-113.22. The evidence presented by the State at trial tends to establish the following facts and circumstances.

Defendant and his co-defendant Ricky Davis (hereinafter Davis) were together in the vicinity of the B-1 Convenience Store on the evening of 27 October 1990. Around 10:00 p.m., Dean Duckworth (hereinafter Duckworth) left the convenience store and began to walk to his home. Duckworth testified that he saw defendant and Davis run across the street, hide behind several cars and finally get behind some bushes in a nearby field. Duckworth continued to walk and was approached by Davis. Davis asked Duckworth for a cigarette. Duckworth told Davis that he only had one cigarette and that Davis could have it. Duckworth then attempted to leave but Davis said, "Hold on, have you got any money?" Duckworth replied that he did not have any money. Davis again asked Duckworth for money when defendant began to run towards Duckworth and Davis.

Defendant asked Duckworth if he had any money and Duckworth said, "No." Duckworth testified that Davis then began looking at the necklaces Duckworth was wearing. Defendant again asked for money and Duckworth again stated that he did not have any. Davis



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then grabbed at Duckworth's necklaces as Duckworth attempted to back away. Davis said, "Hold up," and defendant grabbed Duckworth by the shirt. Davis then ripped the necklaces from around Duckworth's neck.

Defendant then raised his voice and angrily asked Duckworth if he had any money. Defendant reached into his jacket and told Duckworth, "I got a gun, you better give me all your money." Duckworth began backing away when defendant took the gun out of his jacket and pointed it at Duckworth's chest. Duckworth then emptied the contents of his pockets onto the ground. Duckworth testified that Davis left him and defendant in order to talk to a woman in a truck. The woman, Vicky Jones (hereinafter Jones), yelled at Davis and told him to "stop messing with him [Duckworth]." Duckworth stated that Davis instructed defendant to "shoot his ass" as Davis walked toward Jones. Defendant, still holding the gun to Duckworth's chest, turned towards Davis. Duckworth then ran away.

Jones testified that she knew Davis and spoke to him on the night of 27 October. She stated that she was riding around with some of her friends when she noticed Davis, Duckworth and defendant standing in a field. She yelled at Davis telling him to leave Duckworth alone. She testified that Davis then approached the truck in which she sat and started talking to her. She asked Davis what he was doing and he said, "Nothing." She noticed that Davis was holding some necklaces in his hand and told him to give them back to Duckworth. Davis responded, "I ain't gonna give a god-damned thing back." Jones then told Davis she was going to call the police.

Duckworth's testimony was corroborated by Terrence Clark (hereinafter Clark) who testified that he saw the three men as he was walking to his home on the night of 27 October. He stated he saw Duckworth and Davis in a field across the street from the B-1 Convenience Store and heard Davis ask Duckworth for cigarettes and money. Clark stated he hid between a dumpster and a building and watched defendant approach the two men in the field.

Defendant then began asking Duckworth if he had any money and Duckworth again said that he had none. Clark stated he saw Duckworth begin to back up and then he saw defendant grab Duckworth's shirt and "jack him up." He also saw defendant and

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Davis searching Duckworth's pockets. He further noticed that defendant had drawn a gun and pointed it at Duckworth's chest. Clark continued to watch the event until Duckworth ran away. He stated he began to run and almost ran into Duckworth. Clark testified that Duckworth told him he had been robbed and that he and Clark should call the police.

Defendant's evidence tended to establish the following facts and circumstances. Davis testified that he and defendant had been together drinking wine earlier in the evening. He further stated that while they were together defendant found a broken BB pistol in the trash and placed it in the waistband of his pants. Davis stated that he and defendant soon parted company and that he went to the convenience store to buy some beer.

Davis acknowledged seeing Duckworth on the night of 27 October. He said he approached Duckworth and asked him for a cigarette. Davis said Duckworth told him he did not have a cigarette, would not give him one if he did and then called him a son-of-a-bitch. Davis stated he and Duckworth began to argue over a girl in the neighborhood that both men were dating. Davis said he grabbed at Duckworth as a result of this argument and that Duckworth's necklaces fell off as a result of this encounter. Davis denied that defendant was present during this incident and further stated he did not see defendant again until both men were arrested at the convenience store. He also denied talking to Jones or having any part of robbing Duckworth. Defendant did not testify.

Defendant and Davis were tried together. Defendant made motions to dismiss the charges against him for insufficiency of the evidence at the close of the State's evidence. The trial court granted defendant's motion as to the charge of armed robbery and the case proceeded on the theory of common law robbery. Defendant's motion to dismiss was denied as to the charge of possession of drug paraphernalia. Defendant renewed his motions to dismiss at the close of all the evidence which were denied. Defendant was found guilty of common law robbery and possession of drug paraphernalia and was given a consolidated sentence of seven years for these crimes. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Kathryn Jones Cooper, for the State.*

*William M. Davis, Jr., Assistant Public Defender, for defendant-appellant.*

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WELLS, Judge.

Defendant presents three assignments of error to this Court on appeal. He assigns error to the trial court's denial of his motion to instruct the jury on the lesser included offenses of assault with a deadly weapon and simple assault on the ground the evidence presented at trial would support a verdict from the jury on either of the lesser offenses. Defendant also assigns error to the trial court's denial of his motion to amend the jury instructions as to the elements of common law robbery on the ground that the instructions did not conform to the language of the indictment. Defendant last assigns error to the verdict of guilty of possession of drug paraphernalia on the ground it was unsupported by the evidence and to the trial court's denial of his motion to poll the jury to determine the ground on which he was found guilty of common law robbery.

[1] Defendant first assigns error to the trial court's denial of his motion to instruct the jury on the crimes of assault with a deadly weapon and simple assault as lesser included offenses of common law robbery. He contends the trial court committed prejudicial error by denying his motion and that the evidence presented at trial would allow the jury to convict him of either of these lesser offenses if the jury had received instructions on them. We disagree.

A defendant is entitled to jury instructions on a lesser included offense of a crime, even in the absence of a specific request for such instruction, when there is some evidence to support the lesser offense. *State v. Chambers*, 53 N.C. App. 358, 280 S.E.2d 636 (1981). However, when all the evidence tends to show that defendant committed the crime with which he is charged and there is no evidence of guilt of the lesser included offense, the court correctly refuses to charge on the unsupported lesser offense. *Id.*; citing *State v. Redfern*, 291 N.C. 319, 230 S.E.2d 152 (1976).

Defendant was tried on the charge of committing common law robbery. The elements of the offense of common law robbery are (1) the felonious, non-consensual taking of (2) money or personal property (3) from the person or presence of another (4) by means of violence or fear. *State v. Smith*, 305 N.C. 691, 292 S.E.2d 264, cert. denied, 459 U.S. 1056, 103 S.Ct. 474, 74 L.Ed.2d 622 (1982).

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It is clear the evidence presented by the State establishes that defendant committed the crime of common law robbery by acting in concert with his co-defendant. The State's evidence tended to show that defendant and Davis positioned themselves to accost Duckworth by hiding between buildings and behind bushes in a field. Davis asked Duckworth for money several times and was soon joined by defendant who repeated the requests. Defendant and Davis grabbed Duckworth and defendant held Duckworth by his shirt as Davis took his necklaces. Further, defendant pointed an inoperable gun at Duckworth's chest demanding money from him and preventing Duckworth's attempt to get away from defendant.

The evidence presented by the State establishes that defendant committed only the crime of common law robbery against Duckworth. Defendant's evidence only tended to show that he committed no offense, not a lesser offense. The trial court was correct in denying his request for instructions on the lesser crimes of assault with a deadly weapon and simple assault. Therefore, this assignment of error is overruled.

**[2]** Defendant next assigns error to the trial court's denial of his motion to amend the jury instructions on the charge of common law robbery. He contends the language of the jury instruction on this charge should have conformed to the charge in defendant's indictment that he robbed Duckworth of jewelry rather than "personal property." He further contends that the failure of the trial court to amend the instruction may have allowed the jury to convict defendant on evidence presented at trial that he also took a dollar bill rather than jewelry as charged in the indictment. We disagree.

It is well settled that the trial court must instruct the jury on all substantial and essential issues of a case arising on the evidence presented at trial. *State v. Lawrence*, 94 N.C. App. 380, 380 S.E.2d 156, *review denied*, 325 N.C. 548, 385 S.E.2d 506 (1989). It is equally well settled 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. *State v. Townsend*, 99 N.C. App. 534, 393 S.E.2d 551 (1990).

Our review of the contested jury instruction shows that the trial court properly charged the jury on the elements of common law robbery. The trial court's use of the term "personal property" rather than "jewelry" as found in the indictment cannot be considered prejudicial in the context of the evidence. Defendant seeks

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to draw a distinction between the charge in the indictment and the evidence presented at trial that defendant did not physically remove jewelry from Duckworth but rather took money instead. This distinction is irrelevant. Defendant was tried on the theory of acting in concert with Davis and the evidence presented at trial clearly shows that defendant and Davis acted in concert to take the property and money of Duckworth from his person by fear and violence. Defendant need not have physically removed Duckworth's personal property in order to be guilty of common law robbery. This assignment of error is also overruled.

[3] Defendant next assigns error to the jury's verdict finding him guilty of possession of drug paraphernalia. He contends the evidence presented by the State was insufficient to convict him of this crime and that the trial court should have granted his motions to dismiss this charge for insufficiency of the evidence and not submit this issue to the jury. We agree.

This assignment raises the question of whether the evidence presented at trial was sufficient to convict defendant of the crime of possession of drug paraphernalia. The State must present substantial evidence of each element of the crime with which defendant has been charged to sustain a conviction of that crime. *State v. Beatty*, 64 N.C. App. 511, 308 S.E.2d 65 (1983). If substantial evidence has been presented to support each element of the crime charged, the trial court must submit the charged crime to the jury. *State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1990).

G.S. §§ 90-113.20-113.24 (1990), our Drug Paraphernalia Act, defines "drug paraphernalia" as "all equipment, products and materials of any kind that are used to facilitate, or intended or designed to facilitate, violations of the Controlled Substances Act, including . . . ingesting, inhaling, or otherwise introducing controlled substances into the human body." Further, this Act provides that "hypodermic syringes, needles, and other objects for parenterally injecting controlled substances into the body" are considered drug paraphernalia. See G.S. § 90-113.21. G.S. § 90-113.22 provides in pertinent part, as follows:

**Possession of Drug Paraphernalia.**

(a) It is unlawful for any person to knowingly use, or to possess with intent to use, drug paraphernalia to . . . inject, ingest,

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inhale, or otherwise introduce into the body a controlled substance which it would be unlawful to possess.

Thus, the State must present substantial evidence that defendant possessed the hypodermic syringe and needle found on him by the arresting officers with the intent to use the syringe in connection with controlled substances.

The State introduced the hypodermic syringe and needle found in defendant's possession on the night of his arrest. This evidence was accompanied by the testimony of the arresting officer who stated that these items were used to introduce drugs of "some kind" into the body. This evidence presented by the State merely established that defendant possessed a hypodermic syringe and needle but did not show any other incriminating circumstances. *See, e.g., State v. Jones*, 96 N.C. App. 389, 386 S.E.2d 217 (1990) (weighing scales found in defendant's car near 54 grams of cocaine; conviction of possession of paraphernalia upheld). In this case, the mere possession of the needle and syringe fails to establish the crucial element of possession of drug paraphernalia with the accompanying intent necessary to establish a violation of our Controlled Substances Act. Therefore, the trial court erred by failing to grant defendant's motions to dismiss this charge.

[4] Finally, defendant assigns as error the trial court's failure to poll the jury to determine on what evidence defendant was found guilty of common law robbery. He contends the trial court's denial of this request prejudiced his constitutional rights to a jury trial, a unanimous verdict and further entitles him to a new trial. We note the record in this case reveals the trial court had already polled the jury to determine the unanimity of the verdict in accordance with G.S. § 15A-1238 (1990) prior to defendant's request on which he appeals. G.S. § 15A-1238 entitles every defendant to a polling of the jury to determine the unanimity of the verdict. This statute does not entitle defendant to an unlimited number of polls. *State v. Martin*, 315 N.C. 667, 340 S.E.2d 326 (1986). This assignment of error is overruled.

For the reasons stated, we find no error in defendant's conviction of common law robbery and vacate the conviction of possession of drug paraphernalia. Accordingly, this case is remanded to the trial court for resentencing. *See State v. Wortham*, 318 N.C. 669, 351 S.E.2d 294 (1987).

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As to 90 CRS 79257, no error in the trial, remanded for resentencing.

As to 90 CRS 79258, judgment vacated.

Judges ARNOLD and EAGLES concur.

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STATE OF NORTH CAROLINA v. PHILLIP GERMANE FLEMING

No. 9118SC673

(Filed 5 May 1992)

**1. Searches and Seizures § 12 (NCI3d) — pat-down and questions — seizure of person**

A seizure of defendant occurred within the meaning of the Fourth Amendment when an officer began to pat him down while simultaneously asking him questions.

**Am Jur 2d, Search and Seizure § 33.**

**What constitutes “seizure” within meaning of Federal Constitution’s Fourth Amendment — Supreme Court cases. 100 L. Ed. 2d 981.**

**2. Searches and Seizures § 12 (NCI3d) — no reasonable suspicion of criminal activity — unlawful stop and frisk — seized evidence inadmissible**

An officer did not have a reasonable articulable suspicion that defendant was engaged in criminal activity and thus had no right to “stop and frisk” defendant where the officer observed defendant and another man standing in an open area between two apartment buildings in a housing project at 12:10 a.m.; the housing project was known as an area where “crack” cocaine and other contraband were sold on a daily basis; the officer had not previously seen either of the two young men in the area of the housing project; when first observed, the two men were watching several officers who were standing on a public street; the officer then observed the two men walk in a direction that led away from the group of officers and begin walking down a public sidewalk in front of the apartments; and the officer stopped defendant and his compan-

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ion and patted them down while simultaneously asking them questions. This initial seizure of defendant was unlawful, and "crack" cocaine discovered on defendant's person as a result of this unlawful seizure of defendant was not admissible in evidence at defendant's trial for trafficking in cocaine by possession.

**Am Jur 2d, Search and Seizure § 58.**

**Law enforcement officer's authority, under Federal Constitution's Fourth Amendment, to stop and briefly detain, and to conduct limited protective search of or "frisk," for investigative purposes, person suspected of criminal activity—Supreme Court cases. 104 L. Ed. 2d 1046.**

APPEAL by defendant from judgment entered 2 April 1991 in GUILFORD County Superior Court by *Judge Julius A. Rousseau, Jr.* Heard in the Court of Appeals 8 April 1992.

Defendant was indicted for trafficking in "crack" cocaine by possession. The case was tried on 1 April 1991. Prior to trial, defendant made a motion to suppress the evidence seized from his person on the date of the alleged offense. Defendant argued the search was improper and violated the Fourth Amendment. The trial court conducted a *voir dire*, pre-trial hearing to determine whether to grant the motion. Defendant did not offer any evidence at the hearing; the State offered evidence in the form of testimony by the officer who stopped defendant and subsequently seized the evidence. The State's evidence tended to show the following facts and circumstances.

On 23 September 1990, several Greensboro police officers were in the vicinity of the Ray Warren Homes housing project. The officers were members of a tactical division and were operating a drug suppression program in the project on this date. Officer J. Williams, a veteran officer of seventeen years and a member of the tactical division, described the Ray Warren Homes project as an area where numerous arrests for drug violations had been made and where "crack" cocaine and other contraband was sold on a daily basis. At approximately 12:10 a.m., Officer Williams observed defendant and another black male standing in an open area between two apartment buildings located on Best and Rugby Streets. When first observed, defendant and his companion were standing in the open area looking at the officers located on Best



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Street. Officer Williams was out of his vehicle at the time talking to the other officers. Officer Williams further testified that the gentlemen "stood there and they watched us for a few minutes, and then the defendant and the other young man turned and started walking towards Rugby Street out of the area."

When the two young men started walking the other way, Officer Williams got into his vehicle and drove around to Rugby Street where the gentlemen were walking out from between two buildings. He then observed the defendant and the other male walking on the sidewalk along Rugby Street towards him. Officer Williams told the court he had never seen either of the two young men in the area of the housing project. On cross examination, he admitted he decided to stop them because he had never seen them. Officer Williams got out of his vehicle and asked them to "hold it a minute." At this time, defendant and the other male were approximately 35 to 40 feet from the officer. Defendant turned right towards Best Street, and Officer Williams said, "Come here." Defendant hesitated for approximately one minute, then both young men complied and approached the officer.

Officer Williams testified that when defendant approached he acted "real nervous." Officer Williams asked them to identify themselves and they both complied; neither were residents of the Ray Warren Homes project. When questioned about why he was in the area, defendant stated a friend had dropped him off and he was walking through. When asked if the conversation with defendant was before he patted him down, Officer Williams responded, "I was talking to him as I was patting him down." Officer Williams felt an object in defendant's underwear while he was patting him down. Officer Williams testified that when he asked defendant what the object was, defendant replied "crack cocaine." Pursuant to Officer Williams' instructions, defendant subsequently removed the object and placed it on Officer Williams' car hood.

The trial court made findings of fact and conclusions of law at the close of the hearing. The trial court concluded the evidence was admissible and therefore denied defendant's motion to suppress. After a trial on the merits, the jury found defendant guilty of trafficking in cocaine by possession. The trial court entered judgment sentencing defendant to seven years in prison. Defendant appealed.

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*Attorney General Lacy H. Thornburg, by Associate Attorney General H. Alan Pell, for the State.*

*Robert O'Hale, Assistant Public Defender of the Eighteenth Judicial District, for defendant-appellant.*

WELLS, Judge.

Defendant argues the trial court erred in denying his motion to suppress. Defendant contends the findings of fact were insufficient to support the trial court's conclusions of law regarding the reasonableness of the seizure.

In our review of the denial of defendant's motion to suppress, we must first determine whether there was competent evidence to support the trial court's underlying findings of fact. If the evidence presented was competent, the findings are conclusive and binding on appeal. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). We must then determine whether the findings of fact support the trial court's ultimate conclusions of law. *Id.*

Defendant does not contest whether there was competent evidence to support the findings of the trial court. Therefore, the findings are conclusive and binding on appeal. *State v. Cooke, supra.*

The determinative issue before us is whether the findings of fact support the conclusions of law. After hearing the evidence during the pre-trial hearing, the trial court concluded Officer Williams had articulable grounds for suspicion and therefore had the right to "stop and frisk" the defendant. Specifically, the trial court concluded that when the officer observed defendant and his companion, (who, based upon Officer Williams' knowledge, were unfamiliar to the area), in a "high drug area" at twelve o'clock midnight, Officer Williams had articulable grounds to suspect defendant was engaged or had been engaged in criminal conduct and therefore had the right to detain him and search him for weapons. The trial court further concluded that the evidence was admissible. Defendant contends the evidence presented at the hearing was insufficient for the trial court to conclude Officer Williams had a reasonable articulable suspicion to seize him. In order to determine if this conclusion of law is supported by the findings, we must examine whether the officer's actions constituted a seizure, and if so, whether that seizure was legally justified.

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[1] A seizure of a person occurs only when (1) an officer has applied actual physical force to the person or, (2) absent physical force, the defendant submits to an officer's show of authority. *California v. Hodari D.*, 499 U.S. ---, 113 L.Ed.2d 690 (1991). When defendant approached Officer Williams, the officer immediately began to pat him down while simultaneously asking him questions. Thus, Officer Williams applied actual physical force to defendant's person and this action constituted a seizure. *Id.* See also *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968). (When a law enforcement officer takes hold of an individual and pats down the outer surface of his clothing, he has "seized" that individual within the meaning of the Fourth Amendment). Accordingly, the Fourth Amendment is applicable to the facts and circumstances in this case.

The Fourth Amendment to the United States Constitution provides that "[T]he right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated. . . ." U.S. Const. amend. IV. It protects all individuals, those suspected or known to be offenders as well as the innocent. *Go-Bart Importing Co. v. United States*, 282 U.S. 344, 75 L.Ed. 374 (1931). This constitutional right of personal security applies to all seizures of the person, including seizures that involve only a brief detention short of traditional arrest, *Davis v. Mississippi*, 394 U.S. 721, 22 L.Ed.2d 676 (1969); *Terry, supra*, and is applicable to the states through the Fourteenth Amendment. *Ker v. California*, 374 U.S. 23, 10 L.Ed.2d 726 (1963); *State v. Roberts*, 276 N.C. 98, 171 S.E.2d 440 (1970).

The Constitution does not prohibit all searches and seizures; it only protects against *unreasonable* searches and seizures. *Elkins v. United States*, 364 U.S. 206, 4 L.Ed.2d 1669 (1960). (Emphasis added.) Since Officer Williams' conduct did not rise to the level of a traditional arrest requiring probable cause, his conduct must be measured in light of the reasonableness standard established in *Terry v. Ohio, supra*. *State v. Thompson*, 296 N.C. 703, 252 S.E.2d 776, *cert. denied*, 444 U.S. 907, 62 L.Ed.2d 143 (1979). "A brief investigative stop of an individual must be based on specific and articulable facts as well as inferences from those facts, viewing the circumstances surrounding the seizure through the eyes of a reasonable cautious police officer on the scene, guided by his experience and training." *State v. Allen*, 90 N.C. App. 15, 367 S.E.2d 684 (1988). See also *Terry, supra*; *State v. Thompson, supra*. Law enforcement officers are required to have reasonable suspi-

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cion, based on objective facts, that the individual is involved in criminal activity. *Brown v. Texas*, 443 U.S. 47, 61 L.Ed.2d 357 (1979).

[2] Defendant argues that the facts of this case are analogous to those in *Brown v. Texas*, *supra*. In *Brown*, two police officers observed defendant and another person walking away from one another in an alley. The officers drove into the alley, approached defendant and asked him to identify himself and to explain what he was doing there. Defendant refused and told the officers they had no right to stop him. One of the officers told defendant he was in a high drug area; the other officer then “frisked” defendant and found nothing. At trial, one officer testified that he had stopped defendant because the situation “looked suspicious and we had never seen that subject in that area before.” *Id.* Further, the area where defendant was stopped had a high incidence of drug traffic. The officers never claimed to suspect defendant of any specific misconduct, nor did they have any reason to believe defendant was armed.

The Supreme Court stated that “none of the circumstances preceding the officers’ detention of [defendant] justified a reasonable suspicion that he was involved in criminal conduct.” *Id.* There were no facts supporting the officers’ conclusion that the situation in the alley “looked suspicious.” *Id.* “The fact that [defendant] was in a neighborhood frequented by drug users, standing alone, is not a basis for concluding that [defendant] himself was engaged in criminal conduct.” *Id.* The Court further concluded that the guarantees of the Fourth Amendment do not allow stopping and demanding identification from an individual without any specific basis for believing he is involved in criminal activity. *Id.*

In the case now before us, at the time Officer Williams first observed defendant and his companion, they were merely standing in an open area between two apartment buildings. At this point, they were just watching the group of officers standing on the street and talking. The officer observed no overt act by defendant at this time nor any contact between defendant and his companion. Next, the officer observed the two men *walk* between two buildings, out of the open area, toward Rugby Street and then begin *walking* down the public sidewalk in front of the apartments. These actions were not sufficient to create a reasonable suspicion that defendant was involved in criminal conduct, it being neither unusual nor suspicious that they chose to walk in a direction which led away

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from the group of officers. At this time, Officer Williams "stopped" defendant and his companion and immediately proceeded to ask them questions while he simultaneously "patted" them down.

We find that the facts in this case are analogous to those found in *Brown*. Officer Williams had only a generalized suspicion that the defendant was engaged in criminal activity, based upon the time, place, and the officer's knowledge that defendant was unfamiliar to the area. Should these factors be found sufficient to justify the seizure of this defendant, such factors could obviously justify the seizure of innocent citizens unfamiliar to the observing officer, who, late at night, happen to be seen standing in an open area of a housing project or walking down a public sidewalk in a "high drug area." This would not be reasonable.

Considering the facts relied upon by the officer, together with the rational inferences which the officer was entitled to draw therefrom, we conclude they were inadequate to support the trial court's conclusion that Officer Williams had a reasonable articulable suspicion that defendant was engaged in criminal activity. Were we to conclude otherwise, we would invite intrusions upon constitutionally guaranteed rights based on nothing more substantial than inarticulate hunches which the Fourth Amendment is specifically designed to protect against. *Terry, supra*.

As we have determined the initial seizure of defendant was a violation of his Fourth Amendment right against unreasonable searches and seizures, we next consider the admissibility of the evidence seized thereby. Evidence must be suppressed if its exclusion is required by the protection provided under the United States Constitution. N.C. Gen. Stat. § 15A-974 (1988). The Fourth Amendment forbids the government from convicting a person of a crime by using evidence obtained from him by an unreasonable search and seizure. *Mapp v. Ohio*, 367 U.S. 643, 6 L.Ed.2d 1081 (1961). See also *Davis v. Mississippi, supra*, ("illegally seized evidence is inadmissible at trial, however relevant and trustworthy the seized evidence may be as an item of proof."). For the foregoing reasons, the evidence obtained by Officer Williams as a result of his unreasonable seizure of defendant is inadmissible.

We are cognizant that there is a significant government interest in eradicating the sale and use of illegal drugs in our society, but we also recognize that, in order to protect our individual liberties, the Fourth Amendment forbids every search that is un-

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reasonable. As Justice O'Connor wrote in a recent majority opinion, the "court[s] . . . [are] not empowered to suspend constitutional guarantees so that the Government may more effectively wage a 'war on drugs.' If that war is to be fought, those who fight it must respect the rights of individuals whether or not those individuals are suspected of having committed a crime." *Florida v. Bostick*, 501 U.S. ---, 115 L.Ed.2d 389 (1991).

In conclusion, we hold the trial court erred in denying defendant's motion to suppress and admitting the evidence seized from defendant. We therefore reverse the decision of the trial court. This being the only evidence presented by the State in support of defendant's indictment, we hereby order that defendant's conviction be vacated.

Since defendant's first assignment of error is dispositive of this appeal, we decline to address the constitutionality of the subsequent search of his person for weapons and his other assignment of error.

Judgment vacated.

Judges ARNOLD and EAGLES concur.

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GRADY LEE BEAVER AND WIFE, NANCY BEAVER v. LARRY P. HAMPTON  
AND LARRY O. HAMPTON

No. 9122SC50

(Filed 5 May 1992)

**1. Appeal and Error § 203 (NCI4th)— notice of appeal—served on counsel for insurance carrier—sufficient**

Service of notice of appeal on an insurance carrier was sufficient and a motion to dismiss the appeal pursuant to Rule 3 of the Rules of Appellate Procedure was denied where the insurance carrier contended that its counsel, Pinto, did not represent the named defendants at trial and that any notice of appeal given to Pinto was not sufficient to serve defendants where Pinto conducted the examination of witnesses for the defense at trial, conducted the direct examination of de-

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defendants, one of the defendants told the attorney for the plaintiffs that any pertinent correspondence should be sent to Pinto, and Pinto appeared as attorney of record representing "the defendants" on all documents filed in the appeal.

**Am Jur 2d, Appeal and Error §§ 316-318.****2. Appeal and Error § 147 (NCI4th) — denial of motion in limine — no objection when evidence introduced — issue not preserved**

Plaintiff in an action arising from an automobile collision failed to preserve for appeal issues involving evidence that defendant-driver's brother was killed in the accident and that other people were injured where plaintiff filed a motion in limine to exclude that evidence, the trial court did not conduct a full hearing of the evidentiary matters underlying the motion and did not hear the undesired evidence until it was offered for trial, and plaintiffs objected only once to eleven testimonial references to the death and made no objection to testimony regarding injuries to other persons. It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; the movant must make at least a general objection when the evidence is offered at trial. N.C.G.S. § 1A-1, Rule 46; N.C. R. App. P. 10.

**Am Jur 2d, Appeal and Error §§ 517, 545, 553.****3. Rules of Civil Procedure § 59 (NCI3d) — automobile collision case — amount of damages — motion for a new trial — denied**

The trial court did not abuse its discretion in an action arising from an automobile collision by denying plaintiff Grady Beaver's motion for a new trial on the grounds that award of \$30,000 was inadequate and given under the influence of passion or prejudice. While there was evidence that Mr. Beaver's medical bills amounted to \$69,440.54 and that he suffered \$38,000 in lost wages, there was also evidence that his ruptured disc could have occurred on several other occasions and may not have been caused by the subject accident.

**Am Jur 2d, Appeal and Error § 887; Trial § 1955.****4. Judgments § 55 (NCI3d) — prejudgment interest — not awarded on full amount — error**

The trial court erred in an action arising from an automobile collision by not awarding prejudgment interest on the full

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amount of the judgment from the time of filing where the court granted prejudgment interest on only the \$5,000 that remained due on the \$30,000 judgment after subtracting the \$25,000 policy limits the liability carrier paid after the filing date of the complaint but before the judgment. N.C.G.S. § 24-5 clearly authorizes the payment of prejudgment interest on the full amount of the judgment. Because the record was devoid of references to the specific language of the insurer's liability policy, the trial court upon remand should review the policies in question and, absent any statutory provision that requires the liability carrier to pay prejudgment interest in excess of its liability limits, the prejudgment interest properly payable to the plaintiffs should be paid by the underinsured carrier.

**Am Jur 2d, Automobile Insurance § 428.**

APPEAL by plaintiffs from judgment entered 8 June 1990 in IREDELL County Superior Court by *Judge F. Fetzer Mills*. Heard in the Court of Appeals 15 October 1991.

*Harris, Pressly & Thomas, by Scott E. Lawrence and Edwin Pressly, for plaintiffs-appellants.*

*Nichols, Caffrey, Hill, Evans & Murrelle, by Matthew L. Mason, for Nationwide Mutual Insurance Company, unnamed defendant-appellee.*

WYNN, Judge.

On 23 May 1988, a tractor-trailer dump truck driven by the plaintiff, Grady Beaver, collided with a car driven by the defendant, Larry P. Hampton, and owned by his father, defendant, Larry O. Hampton. The defendant driver's twin brother, Lynn Hampton, was a passenger in the Hampton car and was killed as a result of the accident. Prior to trial, the defendant's liability carrier tendered its policy limit of \$25,000, and the trial court allowed it to withdraw from the case. Nationwide Mutual Insurance Company, ("Nationwide"), is the underinsured carrier for the plaintiffs, and on appeal is the unnamed defendant-appellee.

Initially, plaintiffs filed a motion in limine to exclude any evidence or reference to injuries suffered by persons other than the plaintiff. This motion was denied. During the trial, the issue



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of Larry P. Hampton's negligence was not contested, and the jury considered only the following four issues: (1) Mr. Beaver's contributory negligence; (2) the measure of Mr. Beaver's damages; (3) whether Larry P. Hampton's negligence caused Mrs. Beaver's loss of consortium; and (4) the measure of Mrs. Beaver's damages. The jury found that Mr. Beaver was not contributorily negligent and awarded him damages in the amount of \$30,000. The jury also found that Larry Hampton's conduct did not cause Nancy Beaver's loss of consortium. The trial court entered judgment in conformity with the jury's verdict and, after deducting the \$25,000 previously paid by defendant's liability carrier, awarded prejudgment interest only on the remaining \$5,000.

Thereafter, the plaintiffs moved to amend the judgment and for a new trial, contending in both motions, that the jury was "swayed by sympathy for the defendant because he suffered the loss of his brother," which resulted in an artificially low damage award. From the denial of both motions and the judgment of the trial court, the plaintiffs appeal.

## I.

[1] At the outset, we consider the defendant-appellee's motion made before this Court to dismiss the plaintiffs' appeal pursuant to Rule 3 of Appellate Procedure which provides that notice of appeal must be given thirty days after the entry of a judgment or order. *See* N.C.R. App. P. 3. Nationwide contends that its counsel, Richard L. Pinto, did not represent the named defendants ("the Hamptons") during the trial of this case. As such, Nationwide maintains that any notice of appeal that was given to Mr. Pinto was not sufficient to serve the named defendants, the Hamptons.

The Hamptons' liability insurance carrier retained Mr. Michael R. Greeson to represent them for this case; however, the trial court allowed him to withdraw following payment of the liability carrier's policy limits. At trial, Mr. Pinto apparently represented the Hamptons as well as Nationwide. He not only conducted the examination of witnesses for the defense, but it is significant to note that he conducted the direct examination of the Hamptons.

The judgment in this case was entered on 8 June 1990, and the plaintiffs filed and served Mr. Pinto with their notice of appeal on 28 June 1990, well within the thirty day limitation of Rule 3. Moreover, in response to correspondence sent to him, Larry

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O. Hampton told the attorney for the plaintiffs that any correspondence pertinent to the Hamptons should be sent to Richard Pinto. Furthermore, we note that on all documents filed in the appeal before this Court, Mr. Pinto appears as the attorney of record representing "the defendants." We, therefore, deny appellees' motion to dismiss this appeal under Rule 3.

## II.

[2] The plaintiffs assign error to the trial court's denial of their motion in limine to prohibit the introduction of evidence that the defendant-driver's brother died in the accident and that other persons were injured. First, we consider whether plaintiffs have preserved this issue for appeal after failing to object when the evidence was introduced at trial.

The issue of whether the making of a pretrial motion in limine, in and of itself, is sufficient to preserve a question for appeal is a matter of first impression for this state. Plaintiffs contend however, that Rule 10 of Appellate Procedure and Rule 46 of Civil Procedure support their position. Rule 10 in pertinent part provides:

In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context.

N.C.R. App. P. 10 (1991). Rule 46 in pertinent part provides:

[W]hen there is objection to the admission of evidence including a specified line of questioning, it shall be deemed that a like objection has been taken to any subsequent admission of evidence including the same line of questioning.

N.C. Gen. Stat. § 1A-1, Rule 46(a)(1) (1990). We disagree with the plaintiffs' contention that these rules allow the preservation of an issue solely through the making of a motion in limine.

In *State v. Wilson*, 289 N.C. 531, 223 S.E.2d 311 (1976), our Supreme Court addressed an analogous issue. The defendant, in *Wilson*, contended that his pretrial motion to suppress was sufficient to preserve for appeal the question of the admissibility of evidence which was admitted during the trial of his case without objection. Instructively, the Court held that, "[i]t does not suffice merely to file a pretrial motion to suppress evidence which the

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trial judge has not heard and ordinarily will not hear until it is offered at trial. To challenge the admissibility of in-court testimony defendant is required to interpose at least a general objection when such evidence is offered." *Id.* at 537, 223 S.E.2d at 315 (citing *State v. Haskins*, 278 N.C. 52, 178 S.E.2d 610 (1971)).

Paraphrasing the rationale of *Wilson*, we conclude that it is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard. As in *Wilson*, to preserve for appeal matters underlying a motion in limine, the movant must make at least a general objection when the evidence is offered at trial. We note that our ruling is consistent with the holdings of other jurisdictions on this issue. *See McEwen v. City of Norman, Okl.*, 926 F.2d 1539 (10th Cir. 1991) (where a party objected to the admissibility of evidence in a motion in limine but did not interpose an objection at trial, the issue was not preserved for appeal); *Bolton v. Tesoro Petroleum Corp.*, 871 F.2d 1266 (5th Cir.), *cert. denied*, 493 U.S. 823, 107 L.Ed.2d 49 (1989) (an objection is required to preserve error in the admission of testimony or the allowance of cross-examination even when a party has unsuccessfully moved in limine to suppress that testimony or cross-examination); *Collins v. Wayne Corp.*, 621 F.2d 777 (5th Cir. 1980) (after a motion in limine is overruled a party must object to preserve an error for appellate review).

In the instant case, the record reflects that the trial judge did not conduct a full hearing of the evidentiary matters underlying the motion in limine. As such, the trial judge did not hear the undesired evidence until it was offered at trial. During the trial, of the eleven testimonial references to the death of Lynn Hampton, plaintiffs objected only once. Moreover, the plaintiffs made no objection during the trial to testimony regarding injuries to other persons. Applying the above-stated rule to these facts, we find that plaintiffs failed to preserve these issues for appeal. Accordingly, plaintiffs' assignment of error is dismissed.

## III.

[3] The plaintiff, Grady Beaver, next assigns error to the trial court's denial of his motion for a new trial pursuant to N.C. Gen. Stat. § 1A-1, Rule 59. He contends that he is entitled to a new trial under Rule 59(a)(6) because the jury's award of \$30,000 was inadequate and was given under the influence of passion or preju-

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[106 N.C. App. 172 (1992)]

dice. For the reasons that follow, we find his contention to be without merit.

A motion under Rule 59(a)(6) is "directed to the sound discretion of the trial court." *Haas v. Kelso*, 76 N.C. App. 77, 82, 331 S.E.2d 759, 762 (1985). "Consequently, an appellate court should not disturb a discretionary Rule 59 order unless it is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice." *Andrews v. Peters*, 318 N.C. 133, 137-38, 347 S.E.2d 409, 412 (1986) (citing *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982)). Furthermore, when there is no stipulation of damages, the testimony of witnesses becomes evidence for the sole province of the jury to consider. *Blow v. Shaughnessy*, 88 N.C. App. 484, 494, 364 S.E.2d 444, 449 (1988).

In the case at bar, the proximate cause of Mr. Beaver's injuries was hotly contested at trial. Thus, while there was evidence that Mr. Beaver's medical bills amounted to \$69,440.54 and that he suffered \$38,000 in lost wages, there was also evidence that Mr. Beaver's ruptured disc could have occurred on several other occasions, and may not have been caused by the subject accident. Mr. Beaver testified at trial that he injured his back on three occasions after the accident: On 30 July 1988, while twisting around in his truck; on 11 September 1988, while moving a bed; and on 23 September 1988 while maneuvering on some steps. Furthermore, there was testimony from the plaintiffs' own medical expert agreeing that "there was no way to know" whether the vehicular accident caused the disc protrusion and its subsequent rupture or whether the accident merely strained some of the plaintiff's ligaments and another event caused the disc to rupture.

This testimony, left properly to the sole province of the jury for consideration, was sufficient for the jury to enter the subject award of damages. As such, the trial judge's denial of the plaintiff's motion for a new trial did not amount to a miscarriage of justice. Accordingly, we find the trial court did not abuse its discretion in denying the plaintiffs' motion for new trial on the issue of damages.

## IV.

[4] In their final assignment of error, plaintiffs contend that the trial court erred in failing to award prejudgment interest on the full amount of the judgment from the time of filing. We agree.

## BEAVER v. HAMPTON

[106 N.C. App. 172 (1992)]

The relevant statutory provision is N.C. Gen. Stat. § 24-5 (1991), which provides:

In an action other than contract, the portion of money judgment designated by the fact finder as compensatory damages bears interest from the date the action is instituted until the judgment is satisfied. Interest on an award in an action other than contract shall be at the legal rate.

*Id.* This statute clearly authorizes the payment of prejudgment interest on the full amount of the judgment.

In the subject case, the trial court granted prejudgment interest on only the \$5,000 that remained due on the \$30,000 judgment after subtracting the \$25,000 policy limits paid by the liability carrier after the filing date of the complaint but before the judgment. Thus, the trial court erred in failing to award prejudgment interest on the \$25,000 paid by the liability carrier from the filing date until it was paid by the liability carrier on 30 March 1989. Regarding the remaining \$5,000, prejudgment interest should be taxed from the date of filing to the time of judgment as a cost, less any interest already paid.

Having determined that prejudgment interest must be taxed to the full judgment in this case, we next consider whether the liability carrier or the underinsured carrier must pay this additional cost. Recently, in *Sproles v. Greene*, 329 N.C. 603, 407 S.E.2d 497 (1991), the Supreme Court reversed an earlier decision by this Court, see *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1991). The *Sproles* decision interpreted two liability payment provisions in which one policy provided that the insurer would pay "all costs taxed against the insured," and another policy provided a promise to pay for "all defense costs" incurred. The Court differentiated the two provisions by noting that the promise to pay "all costs taxed against the insured" was quite broad and included "prejudgment interest because that is a cost taxed against the insured," *Sproles*, 329 N.C. at 611, 407 S.E.2d at 502, whereas the promise to pay "all defense costs" referred to only those costs associated with the process of defending the claim "such as attorney fees, deposition expenses, and court costs." *Id.* The Court further held that absent any statutory or policy provision that required the liability carrier to pay prejudgment interest in excess of its policy limits, the prejudgment interest cost should not be taxed against the liability insurance carrier. *Id.* at 611-12, 407 S.E.2d at 502.

## CHRISTOPHER PROPERTIES, INC. v. POSTELL

[106 N.C. App. 180 (1992)]

In the case at hand, we note that the record is devoid of references to the specific language of the insurer's liability policy. Without knowledge of the contents of each insurer's policy, we are unable to determine which carrier should be responsible for paying the prejudgment interest. Upon remand, the trial court should review the policies in question and absent any statutory provision that requires the liability carrier to pay prejudgment interest in excess of its liability limits, the prejudgment interest properly payable to the plaintiffs should be paid by the underinsured carrier.

For the foregoing reasons, we affirm the judgment of the trial court in part and reverse on the issue of prejudgment interest with instructions to the trial court to enter a judgment accordingly.

Affirmed in part; reversed and remanded in part,

Judges WELLS and PARKER concur.

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CHRISTOPHER PROPERTIES, INC. AND LAWSON DEVELOPMENT CO. v.  
JAMES M. POSTELL, JR. AND WIFE, SUSAN H. POSTELL AND LAURA  
K. POSTELL

No. 9119SC501

(Filed 5 May 1992)

**1. Deeds § 67 (NCI4th) — restrictive covenants — owners required to submit plans for approval — valid**

The trial court erred by determining as a matter of law that a restrictive covenant provision requiring property owners to submit written construction plans for approval by the Architectural Control Committee was arbitrary and capricious and therefore invalid. Provisions such as the one at issue in the case at bar are valid in North Carolina.

**Am Jur 2d, Covenants, Conditions, and Restrictions § 182.**

**Validity and construction of restrictive covenant controlling architectural style of buildings to be created on property.**  
**47 ALR3d 1232.**

**CHRISTOPHER PROPERTIES, INC. v. POSTELL**

[106 N.C. App. 180 (1992)]

**2. Deeds § 77 (NCI4th)— restrictive covenants—determination of compliance—genuine issue of material fact**

There was a genuine issue of material fact in an action to enforce residential restrictive covenants, and the trial court erred by granting judgment for defendants, where the complaint alleges that defendants' above ground pool and deck decrease the fair market value of the lots in the subdivision, are unsightly, unattractive and not in harmony of external design with already existing structures on lots in the subdivision; plaintiffs submitted three affidavits, including one from a real estate appraiser; and defendants presented a set of draftsman's black and white renderings of the pool and deck.

**Am Jur 2d, Covenants, Conditions, and Restrictions §§ 312-313.**

APPEAL by plaintiffs from order entered 25 March 1991 in CABARRUS County Superior Court by Judge James C. Davis. Heard in the Court of Appeals 17 March 1992.

*James, McElroy & Diehl, P.A., by Lawrence W. Hewitt and Janet P. Welton, for plaintiffs-appellants.*

*Hartsell, Hartsell & Mills, P.A., by Fletcher L. Hartsell, Jr., for defendants-appellees.*

WYNN, Judge.

Christopher Properties, Inc., (CPI) and Lawson Development Co. (Lawson) instituted this action against James M. Postell, Jr., Susan H. Postell, and Laura K. Postell for their violation of recorded restrictive covenants running with land owned by plaintiffs.

CPI is the owner of real property located in Harrisburg, Cabarrus County. CPI and Lawson entered into a joint venture agreement in August of 1987, to develop this property into a single-family residential subdivision known as Stallings Glen, and CPI still owns a number of the lots. Lawson purchased from CPI some of the lots upon which it is constructing or has constructed single-family residences. These residences sell for \$140,000 to \$180,000.

On 26 September 1988, CPI recorded restrictive covenants in the Cabarrus County Registry. These restrictive covenants between CPI and subsequent owners of the lots form part of a general plan of development of the Stallings Glen subdivision and run with

## CHRISTOPHER PROPERTIES, INC. v. POSTELL

[106 N.C. App. 180 (1992)]

the land. Consequently, all grantees of the lots take subject to these restrictions.

Paragraph Two of the covenants requires that, before any construction is carried out on subdivision property, plans and specifications showing the structure's location on the lot and indicating its dimensions and other features of the structure's appearance must be approved in writing by the Architectural Control Committee. The provision sets out several bases for the Committee's evaluation of any proposed construction. The Committee's members are listed as Betty S. Christopher, President of CPI, and Thomas L. Kale, President of Lawson.

CPI sold Lot Six in Stallings Glen to Hobart Smith Construction Co., Inc., which built a house on the property and conveyed it by general warranty deed to defendants. Defendants took title to the property subject to "enforceable easements and restrictions of record," which include the restrictive covenants recorded in September of 1988.

On 18 June 1990, Betty Christopher was informed by Susan Postell that the defendants intended to install an above-ground swimming pool behind their home located in Stallings Glen subdivision. Christopher consulted with Kale, and they agreed that such a pool would not be appropriate in the subdivision and would violate the restrictive covenants because it would not be in harmony with the existing structures. Christopher advised defendants accordingly that evening. Nevertheless, on 19 June 1990, defendants began construction on the pool and adjoining deck. Later that same day, a letter addressed to Christopher and Kale as the Architectural Committee of Stallings Glen was hand-delivered to Christopher. The letter advised them of defendants' plans to install the above-ground pool and bi-level deck. Further, the letter asked for a response to the design of the deck within ten days. The pool was constructed, installed and filled with water by defendants on or about 20 June 1990.

On 21 June 1990, Kale delivered to defendants a letter from him and Christopher, stating that defendants' letter was unaccompanied by construction plans or specifications. The letter demanded that construction of the structure cease as the Architectural Control Committee had not approved the building of this structure on the lot.



## CHRISTOPHER PROPERTIES, INC. v. POSTELL

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Plaintiffs then filed suit on 28 June 1990, and alleged that defendants had violated the terms of the covenants by constructing the pool and deck without submitting plans to the Architectural Control Committee and by completing the pool even after the Committee had disapproved of the construction proposals. Plaintiffs requested that defendants remove the pool and deck and not attempt further violations. In the alternative, plaintiffs sought damages for injury to the property values of the lots they still owned in the Stallings Glen subdivision caused by the pool and deck.

Plaintiffs moved for a preliminary injunction on 10 July 1990, which was denied. In March of 1991, defendants filed a motion for judgment on the pleadings which was granted. It is from this order that plaintiffs appealed.

## I.

Prior to discussing the merits of appellants' assignments of error, we must first determine whether the trial court's order is a grant of a motion for summary judgment or a dismissal. When the trial court considers materials that go beyond the pleadings, the judgment is one for summary judgment. See *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Asheville Contracting Co., Inc. v. City of Wilson*, 62 N.C. App. 329, 303 S.E.2d 365 (1983).

In the case at bar, the trial court considered materials outside the pleadings including affidavits by appellants' agents and appellants' expert witness, correspondence between the parties, and a drawing of appellees' proposed deck and pool. We, therefore, will review the trial court's ruling as a grant of a motion for summary judgment rather than a judgment on the pleadings.

## II.

[1] Appellant first assigns error to the trial court's finding that the restrictive covenants' provision requiring property owners to submit written construction plans for approval by the Architectural Control Committee is arbitrary and capricious and, therefore, invalid.

We begin by examining the language of the restrictive covenants. The section governing new structures provides, in relevant part,

*Architectural Control.* No building or other structure of any kind shall be erected, placed or altered on any lot shown

## CHRISTOPHER PROPERTIES, INC. v. POSTELL

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upon said maps until the construction plans and specifications and a plan showing the location on the lot of such structure or other building has been approved in writing by the architectural control committee (as hereafter defined) as to the quality of workmanship and materials, harmony of external design with existing structures, and location with respect to topography, finished grade elevation and other residences on adjoining or nearby lots. As used in these restrictive covenants, the term architectural control committee shall mean Thomas L. Kale, president of Lawson Development Company, and Betty S. Christopher, president of Christopher Properties, Inc., or their respective successors; either Thomas L. Kale or Betty S. Christopher shall have the right to grant approval by the architectural control committee of the subdivision. Decisions of the architectural control committee shall be final and conclusive and shall be made in the sole discretion and judgment of the committee.

The trial court found that the above provision was "arbitrary and capricious" and "therefore, invalid, void and of no effect whatsoever," as applied to these defendants.

Because restrictive covenants are not favored in the law, ambiguities are to be resolved in favor of the unrestricted use of land. *Hobby & Son v. Family Homes*, 302 N.C. 64, 274 S.E.2d 174 (1981). This rule of strict construction, however, must not be used to defeat the plain and obvious purposes of the restriction and the intentions of the parties. *Long v. Branham*, 271 N.C. 264, 156 S.E.2d 235 (1967).

In *Boiling Spring Lakes v. Coastal Services Corp.*, 27 N.C. App. 191, 218 S.E.2d 476 (1975), this Court, in a case of first impression, considered the validity of a restrictive covenant which provided that "no building or other structure shall be erected or altered on any lot until the building plans shall have been approved in writing by the developer group." *Id.* at 193, 218 S.E.2d at 477. The *Boiling Springs* Court held that the covenant was valid "when applicable to all of the lots in a residential subdivision as part of a uniform plan of development, or when used in connection with some other stated restriction within which approval may operate." *Id.* at 195, 218 S.E.2d at 478.

Additionally, this Court, in *Smith v. Butler Mtn. Estates Property Owners Assoc.*, 90 N.C. App. 40, 367 S.E.2d 401 (1988), *aff'd*,

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324 N.C. 80, 375 S.E.2d 905 (1989), stated that such provisions are reasonable, even in the absence of specific approval standards in the covenants:

The majority view, which this Court has adopted, with respect to covenants requiring submission of plans and prior consent to construction, is that such clauses, even if vesting the approving authority with broad discretionary power, are valid and enforceable so long as the authority to consent is exercised reasonably and in good faith.

*Id.* at 48, 367 S.E.2d at 407. These covenants, noted the *Smith* Court, are upheld because of the important purposes they serve in modern society:

“It is no secret that housing today is developed by subdividers who, through the use of restrictive covenants, guarantee to the purchaser that his house will be protected against adjacent construction which will impair its value, and that a general plan of construction will be followed. Modern legal authority recognizes this reality and recognizes also that the approval of plans by an architectural control committee is one method by which guarantees of value and general plan of construction can be accomplished and maintained.”

*Id.* at 47, 367 S.E.2d at 406 (quoting *Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 8, 449 P.2d 361, 362 (1969)).

In the instant case, we find that the trial judge erred in determining, as a matter of law, that the Architectural Control Committee's approval requirement was void. Provisions, such as the one at issue in the case at bar, are valid in the State of North Carolina as indicated by the decisions in *Boiling Springs* and *Smith. Accord Black Horse Run Property Owners Assoc. v. Kaleel*, 88 N.C. App. 83, 362 S.E.2d 619 (1987), *cert. denied*, 321 N.C. 742, 366 S.E.2d 856 (1988).

## III.

[2] The appellants also assign error to the trial court's determination that, even if the Architectural Control provision is valid on its face, the appellees' pool and deck comply with the restrictive covenants. For the reasons which follow, we find that the record clearly indicates that there exists a genuine issue of material fact, and that the trial court erred in granting judgment for appellees.

## CHRISTOPHER PROPERTIES, INC. v. POSTELL

[106 N.C. App. 180 (1992)]

As stated above, in determining whether plans for a proposed structure comply with the restrictive covenant, the court must examine the plans for consistency with the general development scheme of the homes in the area. *Smith*, 90 N.C. App. at 48, 367 S.E.2d at 407. We must determine, therefore, whether a genuine issue of material fact exists as to whether the pool and deck are consistent with the scheme of the area.

Appellants' complaint alleges that the pool and deck "decreas[e] the fair market value of the lots in the subdivision . . . are unsightly, unattractive and not in harmony of external design with already existing structures on lots in the subdivision." The covenant specifically provides that the committee has the authority to disapprove of structures that are deficient "as to quality of workmanship and materials [or] harmony of external design with existing structures. . . ." Appellants, to support their allegations, submitted three affidavits; one of these affidavits was from a real estate appraiser who had examined the pool after its construction and who concluded that the pool will decrease the value of the other lots and is not in harmony with the existing structures in the subdivision. Other sections of the restrictive covenants prohibit temporary structures, satellite dishes, trailers, shacks and barns, revealing a plan to restrict the construction of structures other than the main dwelling house in order to maintain higher property values. Evidence presented by appellees, on the other hand, consisted of a set of draftsman's black-and-white renderings of the pool and deck. Based on the foregoing, we conclude that there exists a genuine issue of material fact as to whether the pool and deck comply with the covenants.

The order of the trial court is,

Reversed and remanded.

Judges ARNOLD and LEWIS concur.

**CARDWELL v. SMITH**

[106 N.C. App. 187 (1992)]

JAMES D. CARDWELL AND WIFE, ELVA R. CARDWELL, J. V. BODENHEIMER AND WIFE, PEGGY BODENHEIMER, A. LEOLIN SELLS AND WIFE, NAOMI W. SELLS, ROBERT F. LINVILLE, RONALD R. SMITH AND WIFE, M. D. SMITH, ADA S. FRYE, AND PEARL S. SELLS, PLAINTIFFS v. AUBREY SMITH, ZONING OFFICER AND SUPERINTENDENT OF INSPECTIONS OF FORSYTH COUNTY, SALEM STONE COMPANY, WILLIAM E. AYERS, JR., AND MARTIN MARIETTA AGGREGATES, AN OPERATING UNIT OF MARTIN MARIETTA CORPORATION, DEFENDANTS

No. 9121SC457

(Filed 5 May 1992)

**Municipal Corporations § 30.6 (NCI3d)— quarry—special use permit—subsequent amendment of ordinance**

The trial court properly granted summary judgment for defendants where the uncontradicted forecast of evidence establishes as a matter of law that defendants made substantial expenditures for the operation of a quarry on the property in question in good faith and in reliance upon the special use permit previously granted by the Zoning Board. Defendants may not now be deprived of their right to continue operation of the quarry by application of the zoning ordinance amendment. Plaintiffs' argument that N.C.G.S. § 153A-344(b) changes the law for obtaining vested rights by requiring that landowners must first obtain a building permit prior to the enactment of the zoning amendment is rejected.

**Am Jur 2d, Statutes § 347.**

APPEAL by plaintiffs from *Beaty (James A.)*, Judge. Judgment entered 20 February 1991 in Superior Court, FORSYTH County. Heard in the Court of Appeals 11 March 1992.

This is a civil action wherein plaintiffs seek declaratory and injunctive relief prohibiting defendants from operating a quarry on a certain piece of property in Forsyth County. Plaintiffs are owners of real property which adjoins or abuts the property at issue.

The record discloses the following: On 21 August 1986, defendant Salem Stone applied for a special use permit to operate a quarry on the property in question. On 7 October 1986, the Forsyth County Zoning Board of Adjustment granted defendant the special use permit.

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On 5 November 1986, plaintiffs filed a petition for writ of certiorari seeking to have the superior court review the Zoning Board's decision. Plaintiffs also filed an action in superior court for an order declaring the action of the Zoning Board to be improper and enjoining any county agency from granting defendant the necessary permits to begin operation of the quarry. These matters were consolidated for hearing before Judge Albright on 26 January 1987, who dismissed both the writ of certiorari and the action for declaratory and injunctive relief with prejudice.

Plaintiffs appealed Judge Albright's decision to this Court, but on 11 May 1987, before we considered the appeal, the Forsyth County Commissioners adopted an amendment to the Zoning Ordinance prohibiting the operation of a quarry on property zoned R-6, like the property in question.

In response to the Commissioners' actions, plaintiffs filed a second action on 22 May 1987 seeking declaratory and injunctive relief contending that the zoning amendment applied to defendant Salem Stone. Both parties moved for summary judgment. Judge Walker entered summary judgment as to all defendants in the matter and plaintiffs appealed.

On 2 December 1987, this Court heard plaintiffs' appeal from Judge Albright's decision dismissing their writ of certiorari and action for declaratory relief. In that case [hereinafter "*Cardwell I*"], we held the vote of the Zoning Board granting the special use permit was not in violation of G.S. 153A-3, but the Board had failed to follow its procedure after the vote requiring a summary of the evidence and proper findings of fact to support its decision. *Cardwell v. Forsyth County Zoning Board of Adjustment*, 88 N.C. App. 244, 362 S.E.2d 843 (1987), *disc. review denied*, 321 N.C. 742, 366 S.E.2d 858 (1988). Judge Albright's decision was reversed and the matter was remanded to the Zoning Board for the preparation of a summary of the evidence and the setting out of findings of fact. *Id.*

In accordance with our decision in *Cardwell I*, the Zoning Board held special meetings in July and August 1988 to summarize the evidence and make findings of fact supporting its decision granting defendant the special use permit. Following the Board's action, plaintiffs filed and were granted a petition for writ of certiorari to have the superior court review these findings.

## CARDWELL v. SMITH

[106 N.C. App. 187 (1992)]

Before the superior court had an opportunity to review these findings, however, plaintiffs' appeal from Judge Walker's decision granting summary judgment in favor of defendants on the issue of whether plaintiffs were entitled to declaratory and injunctive relief as a result of the 11 May 1987 amendment to the Zoning Ordinance was heard by this Court. In that opinion [hereinafter "*Cardwell II*"], we held:

This declaratory action raises the question of whether the amended zoning ordinance applies to defendants; thus, precluding them from receiving building permits, or whether defendants are entitled to building permits by virtue of the special use permit. To answer that, it is necessary to have a final determination of the validity of the special use permit originally granted. That determination has only now begun to proceed through our Court system.

*Cardwell v. Smith*, 92 N.C. App. 505, 508, 374 S.E.2d 625, 627 (1988), *disc. review denied*, 324 N.C. 334, 378 S.E.2d 790 (1989). Because the matter was not "ripe for determination," we reversed the trial court's entry of summary judgment for defendants and remanded the cause to the superior court for entry of an order dismissing the action. *Id.*

On 30 January 1989, plaintiffs' petition for writ of certiorari to review the findings of the Zoning Board came on for hearing. On that same date, Judge Martin entered an order affirming the action of the Board and validating its grant of the special use permit to defendant. Plaintiffs again appealed to this Court.

Before this appeal could be heard and in order to prevent the possible running of the statute of limitations, plaintiffs filed the present action seeking declaratory and injunctive relief based on the amendment to the Zoning Ordinance. Plaintiffs also filed a "Motion To Stay Proceedings" pending the decision of this Court on the validity of the permit.

On 17 July 1990, this Court entered an opinion affirming Judge Martin's decision validating the action of the Zoning Board in granting the special use permit to defendant. *Cardwell v. Forsyth County, et al.*, Slip Op. No. 8921SC586 (filed 17 July 1990). Plaintiffs accordingly amended their complaint alleging that:

16. On or about May 22, 1987, the Plaintiffs sought a determination by the courts that Defendants had no vested

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[106 N.C. App. 187 (1992)]

right to proceed with its proposed quarry operation since it was contrary to the May 11, 1989 zoning and they did not have a building permit as of that date as required by N.C.G.S. 153A-344(b). The Court of Appeals held that the issue was "not ripe for determination" at that time due to the uncertainty about the special use permit. The Plaintiffs contend that that question, as well as the question of good faith on the part of the corporate defendants, is now ripe for determination.

On 21 January 1991, defendants filed a motion for summary judgment attaching supporting affidavits and exhibits including among other things copies of the special use permit, a state highway permit, a state mining permit, a county air quality permit, and county building permits dated 20 August 1987, 30 September 1987, 6 October 1987 and 16 October 1987. Plaintiffs also filed a motion for summary judgment and both motions were heard before Judge Beaty on 18 February 1991. On 20 February 1991, Judge Beaty entered an order denying plaintiffs' motion for summary judgment and granting defendants' motions dismissing plaintiffs' action. Plaintiffs appealed.

*Hutchins, Tyndall, Doughton & Moore, by Claude M. Hamrick, Thomas W. Moore, Jr., and Maureen T. Orbock, for plaintiff, appellants.*

*Petree Stockton & Robinson, by Ralph M. Stockton, Jr., Jeffrey C. Howard and Stephen R. Berlin, for defendant, appellees, William F. Ayers, Jr., Salem Stone Company and Martin Marietta Aggregates.*

*P. Eugene Price, Jr., for defendant, appellee, Aubrey Smith.*

HEDRICK, Chief Judge.

The only question presented by this appeal is whether the amendment to the Zoning Ordinance adopted by the Forsyth County Commissioners on 11 May 1987 applied to defendant Salem Stone so as to preclude defendant from operating a quarry on the property in question pursuant to a previously obtained, valid special use permit.

The courts of this state have long recognized that "[a] zoning ordinance . . . is in derogation of the right of private property and provisions therein granting exemptions or permissions are to be liberally construed in favor of freedom of use." *In re Application*



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of *Construction Co.*, 272 N.C. 715, 718, 158 S.E.2d 887, 890 (1968). In *Town of Hillsborough v. Smith*, 276 N.C. 48, 170 S.E.2d 904 (1969), our Supreme Court held:

[O]ne who, in good faith and in reliance upon a permit lawfully issued to him, makes expenditures or incurs contractual obligations, substantial in amount, incidental to or as part of the acquisition of the building site or the construction or equipment of the proposed building for the proposed use authorized by the permit, may not be deprived of his right to continue such construction and use by the revocation of such permit, whether the revocation be by the enactment of an otherwise valid zoning ordinance or by other means, and this is true irrespective of the fact that such expenditures and actions by the holder of the permit do not result in any visible change in the condition of the land.

*Id.* at 55, 170 S.E.2d at 909. This Court has further held “[t]o acquire a right to carry on construction, a property owner must make a substantial beginning toward the end result of the project.” *Sunderhaus v. Bd. of Adjustment of Biltmore Forest*, 94 N.C. App. 324, 326-27, 380 S.E.2d 132, 134 (1989).

In the present case, defendants submitted the affidavit of Mr. William E. Ayers, Jr., employee of defendant Martin-Marietta, to show the expenditures made by defendants in reliance upon the special use permit. He averred as follows:

Between October 8, 1986 and May 11, 1987, Martin Marietta spent over \$1,000,000 to begin the quarry operations. Specifically, Martin Marietta Aggregates spent approximately \$950,000 to purchase the real property upon which the quarry now operates. Martin Marietta also spent approximately \$250,000 on various services including engineering, drainage design, erosion control, mapping, environmental and geotechnical consulting, the process for obtaining various permits, core drilling, legal fees, public relations and efforts to address various environmental matters. I spent \$1,119.75 to get various permits, including the state mining permit, driveway permit, air quality permit, NPDES permit, and to copy various maps and documents recorded at the Register of Deeds Office.

As with other businesses, before a quarry can be opened a substantial amount of preparatory work must be done. This

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has included meetings with various land owners, meetings and discussions with county and state officials, attending and testifying at various public hearings, preparing applications for various permits related to mining operations, conducting tours for officials inspecting the site, negotiating the purchase of equipment, discussing the erosion control plan with landscape architects, various testing, and meetings with attorneys concerning the previous lawsuits brought by the opposition to this quarry against Salem Stone before the instant case.

Plaintiffs failed to produce any evidence to counter Mr. Ayers' affidavit.

On a motion for summary judgment, the question before the court is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that a party is entitled to judgment as a matter of law. *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E.2d 584 (1980). We hold the uncontradicted forecast of evidence establishes as a matter of law that defendants made substantial expenditures for the operation of a quarry on the property in question in good faith and in reliance upon the special use permit previously granted by the Zoning Board. Therefore, defendants may not now be deprived of their right to continue operation of the quarry by application of the zoning ordinance amendment.

Plaintiffs' argument that G.S. 153A-344(b) changes the law for obtaining vested rights by requiring that land owners must first obtain a building permit prior to the enactment of the zoning amendment is rejected.

The judgment of the trial court entering summary judgment in favor of all defendants and dismissing plaintiffs' action is affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

**OLVERA v. CHARLES Z. FLACK AGENCY**

[106 N.C. App. 193 (1992)]

ESTEBAN GARCIA OLVERA, PLAINTIFF v. CHARLES Z. FLACK AGENCY,  
INC., DEFENDANT

No. 9129SC419

(Filed 5 May 1992)

**1. Insurance § 2.3 (NCI3d)— agency's failure to procure insurance—breach of contract—negligence and contributory negligence**

Plaintiff's evidence was sufficient for the jury on the issue of defendant insurance agency's breach of contract to procure homeowners insurance for plaintiff where it tended to show that plaintiff's girlfriend took to defendant agency a bill for homeowners insurance that had been mailed by the agency to a prior owner of plaintiff's home; she told an employee of defendant agency that plaintiff wanted the insurance changed to his name and paid the premium; the employee asked how to spell defendant's name so she would "know how to do it"; the employee told plaintiff's girlfriend that the policy period was one year; the employee gave the girlfriend a receipt stating that payment was received from the prior owner with plaintiff's name in parentheses; no policy of homeowners insurance was ever issued to plaintiff; and plaintiff's home was destroyed by fire seven months later. This evidence was also sufficient to permit the jury to find negligence on the part of defendant agency and presented a question for the jury on the issue of contributory negligence by plaintiff.

**Am Jur 2d, Insurance § 139.****Liability of insurance broker or agent to insured for failure to procure insurance. 64 ALR3d 398.****2. Insurance § 2 (NCI3d)— receptionist for insurance agency— authority to bind agency**

There was sufficient evidence for the jury to find that a receptionist sitting at the front desk of defendant insurance agency had the authority to bind defendant agency in a contract to procure homeowners insurance for plaintiff.

**Am Jur 2d, Insurance § 139.****Liability of insurance broker or agent to insured for failure to procure insurance. 64 ALR3d 398.**

## OLVERA v. CHARLES Z. FLACK AGENCY

[106 N.C. App. 193 (1992)]

APPEAL by plaintiff from judgment entered 15 January 1991 by *Judge Loto Greenlee Caviness* in RUTHERFORD County Superior Court. Heard in the Court of Appeals 9 March 1992.

Plaintiff brought this action 14 December 1988 against defendants Charles Z. Flack Agency, Inc. (hereinafter "the Agency") and Auto-Owners Insurance Company alleging breach of contract and negligence. Auto-Owners moved for summary judgment, and the trial court granted the motion on 21 September 1990. At trial upon the conclusion of plaintiff's evidence, the trial court granted the Agency's motion for a directed verdict.

From this order, plaintiff appeals.

*Goldsmith & Goldsmith, P.A., by C. Frank Goldsmith, Jr., for plaintiff-appellant.*

*Kennedy Covington Lobdell & Hickman, by Wayne P. Huckel and Cory Hohnbaum, for defendant-appellee.*

ORR, Judge.

The issue on appeal is whether the trial court erred in granting the Agency's motion for a directed verdict. For the reasons below, we reverse the order of the trial court.

The Agency issued through Auto-Owners Insurance Company a homeowners insurance policy to Willie Lee Little for coverage from 31 October 1985 to 31 October 1986. On or about 17 December 1985, Little conveyed the house and lot to his mother, Myra Childress. On 24 November 1986, plaintiff contracted to purchase the house and lot from Myra Childress. Plaintiff moved into the house with his children and Vicki Driscoll, the mother of one of his children.

Driscoll testified that in April 1987 a letter addressed to Willie Lee Little arrived in the mail. She took the letter to Ms. Childress who told her it was a bill for insurance and gave it back to Driscoll. The bill from the Agency for a homeowners policy was dated 1 April 1987 and included service charges. Driscoll then took the bill to the Agency and told "a receptionist sitting at the first desk," Ms. Allison Irons, that she wanted to pay the bill. She further testified:

I told her I wanted to make—to pay this and I wanted to have the insurance changed over into Steve's [plaintiff's] name. And she asked me how to spell Steve—or Esteban, and I

## OLVERA v. CHARLES Z. FLACK AGENCY

[106 N.C. App. 193 (1992)]

told her. And she put Willie's name on top of it. She said so I'll know how to do it. And then I asked her how long the insurance stayed in effect. I thought maybe six months or something. And she turned around to another lady that was behind her and verified a year. And she told me it lasted a year.

Ms. Irons gave Driscoll a receipt stating that the money was received from Willie Lee Little with plaintiff's name in parentheses. On 25 November 1987, the house was destroyed by fire. A formal proof of loss standard form was submitted. Payment under the policy was denied.

[1] Plaintiff brought this action alleging breach of contract and negligence. The trial court granted the Agency's motion for a directed verdict on the grounds that the evidence was insufficient to establish a breach of contract or negligence on the part of the Agency and that in addition the evidence established the plaintiff's contributory negligence as a matter of law.

In determining a motion for a directed verdict pursuant to N.C. Gen. Stat. § 1A-1, Rule 50 (1990), the trial court must "consider all the evidence in the light most favorable to the nonmoving party. A directed verdict may be granted only if, as a matter of law, the evidence is insufficient to justify a verdict for the nonmovant." *Watkins v. Hellings*, 321 N.C. 78, 81, 361 S.E.2d 568, 570 (1987).

[W]here an insurance agent . . . undertakes to procure a policy of insurance for another, affording protection against a designated risk, the law imposes upon him the duty, in the exercise of reasonable care, to perform the duty he has assumed and within the amount of the proposed policy he may be held liable for the loss properly attributed to his negligent default.

*Johnson v. George Tenuta & Co.*, 13 N.C. App. 375, 379, 185 S.E.2d 732, 735 (1972) (quoting *Elam v. Smithdeal Realty and Ins. Co.*, 182 N.C. 599, 602, 109 S.E. 632 (1921)). "If a[n] . . . agent is unable to procure the insurance he has undertaken to provide, he impliedly undertakes—and it is his duty—to give timely notice to his customer, the proposed insured, who may then take the necessary steps to secure the insurance elsewhere or otherwise protect himself." *Wiles v. Mullinax*, 267 N.C. 392, 395, 148 S.E.2d 229, 232 (1966). "When, under these circumstances, the broker fails to give such notice,

## OLVERA v. CHARLES Z. FLACK AGENCY

[106 N.C. App. 193 (1992)]

he renders himself liable for the resulting damage which his client suffered from lack of insurance." *Id.* "To enforce such liability the plaintiff, at his election, may sue for breach of contract, or for negligent default in performance of duty imposed by contract." *Johnson*, 13 N.C. App. at 379, 185 S.E.2d at 735 (quoting *Bank v. Bryan*, 240 N.C. 610, 83 S.E.2d 485 (1954)).

In *Johnson*, plaintiff elected to sue for breach of contract, and this Court affirmed the trial court's order granting a directed verdict in favor of defendant on the grounds that there was insufficient evidence to establish a contract. There the evidence only showed that plaintiff took over the existing policy of the prior owners and sent to defendant through the real estate agent a check for the pro rata portion of the premium. Plaintiff never requested nor did defendant agree to procure any insurance in addition to that already in force. At most, the evidence showed that defendant promised without consideration to get a copy of the existing policy and told plaintiff not to worry because he was "fully covered." *Johnson*, 13 N.C. App. at 380, 185 S.E.2d at 736.

In *Alford v. Tudor Hall & Assoc.*, 75 N.C. App. 279, 330 S.E.2d 830, *disc. review denied*, 315 N.C. 182, 337 S.E.2d 855 (1985), this Court affirmed the trial court's grant of defendant's motion for judgment notwithstanding the verdict on plaintiff's negligence claim. The Court stated:

In determining whether an agent has undertaken to procure a policy of insurance, a court must look to the conduct of the parties and the communications between them, and more specifically to the extent to which they indicate that the agent has acknowledged an obligation to secure a policy. Where "an insurance agent or broker promises, or gives some affirmative assurance, that he will procure or renew a policy of insurance under circumstances which lull the insured into the belief that such insurance has been effected, the law will impose upon the broker or agent the obligation to perform the duty which he has thus assumed." 3 *Couch on Insurance* 2d (Rev. ed.) §25:46 (1984).

*Id.* at 282, 330 S.E.2d at 832. "Evidence that an agent took an application from the customer is sufficient to support a duty to procure insurance." *Id.* "A 'bare acknowledgement' of a contract to protect the insured against casualty of a specified kind until a formal policy can be issued is enough, even if the parties' com-

## OLVERA v. CHARLES Z. FLACK AGENCY

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munications have not settled all the terms of the contemplated contract of insurance." *Id.* at 282, 330 S.E.2d at 833 (quoting *Sloan v. Wells*, 296 N.C. 570, 251 S.E.2d 449 (1979)).

In *Alford*, the evidence indicated that plaintiff told defendant's employee he needed insurance on his home but left open the amount of the premium and extent of coverage. Plaintiff asked defendant to calculate premiums for several coverages and told him he would bring a check later. Further, defendant did not expressly or impliedly promise or undertake to procure insurance for plaintiff. The Court stated: "An agreement by the agent to calculate premiums at various levels of coverage, without more, is in the nature of preliminary discussion, and does not reflect an undertaking to secure insurance." *Id.* at 283, 330 S.E.2d at 833. Therefore, the Court held that defendant was not under any duty to contact plaintiff or warn him of the lack of insurance coverage. *Id.* at 283-84, 330 S.E.2d at 833.

Here Driscoll told Ms. Irons, who works for the Agency, that plaintiff wanted to have the insurance policy changed to his name and paid the premium. Ms. Irons asked how to spell plaintiff's name so she would "know how to do it." The Agency knew the identity of the property and the extent of the coverage, and Ms. Irons clarified the duration of the policy. In looking at the evidence in the light most favorable to plaintiff, the evidence is sufficient for the jury to infer that the Agency agreed to transfer the policy to plaintiff's name and accepted plaintiff's payment as consideration for the policy. Thus the trial court erred in granting the Agency's motion for a directed verdict on the breach of contract claim.

Further, there is sufficient evidence from which a jury could find that the Agency was negligent. The trial court also determined that the evidence establishes plaintiff's contributory negligence as a matter of law. In *Elam*, 182 N.C. at 603, 109 S.E. at 634, our Supreme Court stated:

[W]here a person of mature years, of sound mind, who can read and write, signs or accepts a deed or formal contract affecting his pecuniary interest, it is his duty to read it, and knowledge of the contents will be imputed to him in case he has negligently failed to do so. But this is subject to the qualification that nothing has been said or done to mislead him or to put a man of reasonable business prudence off his guard.

## OLVERA v. CHARLES Z. FLACK AGENCY

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In *Elam*, the Court held that whether failure to hold an adequate policy is due to plaintiff's own negligence in failing to read his policy and taking out a sufficient policy to protect himself was a question for the jury. *Id.* at 603-04, 109 S.E. at 634. Here the issue of any contributory negligence on the part of plaintiff is a question for the jury. *See id.*

[2] The Agency argues that there is no evidence that Ms. Irons had authority to bind the Agency. We disagree.

A principal is liable upon a contract duly made by its agent with a third person in three instances: when the agent acts within the scope of his or her actual authority; when a contract, although unauthorized, has been ratified; or when the agent acts within the scope of his or her apparent authority, unless the third person has notice that the agent is exceeding actual authority.

*Footte & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985). The Agency cites *Fleming v. Employers Mut. Liability Ins. Co.*, 269 N.C. 558, 153 S.E.2d 60 (1967), where our Supreme Court stated:

“The mere opinion of an agent as to the extent of his powers, or his mere assumption of authority without foundation, will not bind the principal; and a third person dealing with a known agent must bear the burden of determining for himself, by the exercise of reasonable diligence and prudence, the existence or nonexistence of the agent's authority to act in the premises.”  
3 Am. Jur. 2d, Agency § 78.

*Id.* at 561, 153 S.E.2d at 62. There the Court held that there is no presumption that one answering the telephone may waive the provisions of an insurance policy or bind the employer in important matters. *Id.*

[I]t is a matter of common knowledge that the insurance business is carried on by agents largely through subordinates, that it cannot properly be carried on in any other way, and that therefore a general agent may, as a matter of implied consent, appoint subagents and subordinates whose statements, acts, knowledge, or receipt of notice within the ordinary course of business will bind the company.



## STATE AUTOMOBILE MUTUAL INS. CO. v. HOYLE

[106 N.C. App. 199 (1992)]

43 Am. Jur. 2d *Insurance* § 124 at 206-07 (1982). Thus there is sufficient evidence that Ms. Irons had authority to bind defendant to defeat a directed verdict motion.

For the above stated reasons, the decision of the trial court is reversed and a new trial ordered.

Chief Judge HEDRICK and Judge WALKER concur.

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STATE AUTOMOBILE MUTUAL INSURANCE COMPANY v. MICHAEL W. HOYLE, ELIZABETH HOYLE, CYNTHIA THOMAS McABEE, JAMES B. McABEE, AND THOMAS WALKER McABEE

No. 9114SC441

(Filed 5 May 1992)

**1. Insurance § 149 (NCI3d) — homeowners insurance — exclusionary clause — go-cart not motor vehicle**

A go-cart is not a “motor vehicle” within the meaning of an exclusionary clause of a homeowners insurance policy where the term “motor vehicle” is not defined in the policy, since the ordinary meaning as well as the statutory definition of “motor vehicle” contemplates suitability for highway use, and a go-cart is not designed or suitable for use on public highways and is not subject to the motor vehicle laws.

**Am Jur 2d, Insurance § 727.**

**2. Insurance § 149 (NCI3d) — homeowners insurance — exclusionary clause — go-cart as motorized land conveyance**

A go-cart is a “motorized land conveyance” within the meaning of an exclusionary clause of a homeowners insurance policy. Furthermore, an exception to this exclusionary clause providing coverage for injuries arising out of the use of recreational motorized land conveyances owned by an insured and on an insured location did not apply where the accident in question occurred on a public street and not on an insured location.

**Am Jur 2d, Insurance § 727.**

## STATE AUTOMOBILE MUTUAL INS. CO. v. HOYLE

[106 N.C. App. 199 (1992)]

APPEAL by plaintiff from judgment filed 5 March 1991 in DURHAM County Superior Court by *Judge Anthony M. Brannon*. Heard in the Court of Appeals 10 March 1992.

*Teague, Campbell, Dennis & Gorham, by John A. Tomei, for plaintiff-appellant.*

*Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Robert E. Levin, for defendant-appellees Michael W. Hoyle and Elizabeth Hoyle.*

*Poe, Hoof and Reinhardt, by Martha A. New, for defendant-appellees Cynthia Thomas McAbee and Thomas Walker McAbee.*

GREENE, Judge.

Plaintiff appeals from an order filed 5 March 1991, denying plaintiff's motion for summary judgment on plaintiff's declaratory judgment action, and entering summary judgment in favor of defendants.

The evidence established that on 13 April 1990, Will Hoyle (Will), son of defendants Michael W. and Elizabeth D. Hoyle (the Hoyles), was driving his go-cart approximately two and one half blocks from his home in Durham, North Carolina. Generally speaking, a go-cart is a recreational device made out of some type of tubing and generally about four to five feet long, with four small tires, a steering wheel, a lawnmower-type engine, and gas and brake pedals, but usually without lights, directional signals, a rear-view mirror, a horn, or a proper breaking system. See *Zapp v. Ross Pontiac, Inc.*, 332 N.Y.S.2d 121 (N.Y. 1972); *Sentry Ins. Co. v. Castillo*, 574 A.2d 138 (R.I. 1990). Go-carts are not designed for use on public highways. At the intersection of Falkirt Road and Farintosh Court, Will's go-cart struck defendant Thomas Walker McAbee (Thomas), causing injury to Thomas' left leg. At the time of the incident, the Hoyles were insured under a homeowner's policy with plaintiff. The policy provides coverage for personal liability and medical payments to others due to bodily injury. The policy also contains the following exclusionary clause:

1. Coverage E—Personal Liability and Coverage F—Medical Payments to Others do not apply to bodily injury or property damage:

. . .

## STATE AUTOMOBILE MUTUAL INS. CO. v. HOYLE

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e. arising out of:

(1) the ownership, maintenance, use, loading or unloading of motor vehicles or all other motorized land conveyances, including trailers, owned or operated by or rented or loaned to an insured.

The policy does not provide a definition of the terms "motor vehicle" or "motorized land conveyance." However, the policy states that the above exclusion does not apply to "a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and (a) not owned by an insured; or (b) owned by an insured and on an insured location." It is undisputed that the go-cart was owned by an insured, and that the go-cart accident did not occur on an insured location.

On 22 May 1990, plaintiff instituted an action seeking a declaratory judgment that the insurance policy at issue provides no coverage for personal liability or medical payments to others for Thomas' injuries resulting from the go-cart accident. On 17 January 1991, plaintiff filed a motion for summary judgment. On 5 March 1991, the trial court determined that the insurance policy provides coverage for the accident, and accordingly denied plaintiff's motion and granted defendants' oral motion for summary judgment.

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The issues presented are whether (I) the undefined term "motor vehicle" as used in the exclusionary clause of a homeowner's insurance policy encompasses a go-cart; and (II) the undefined term "motorized land conveyance" as used in the same exclusionary clause encompasses a go-cart.

The general rule applicable to insurance contracts is that, in the absence of an ambiguity, the language used must be given its plain, ordinary, and accepted meaning. *Integon Gen. Ins. Corp. v. Universal Underwriters Ins. Co.*, 100 N.C. App. 64, 68, 394 S.E.2d 209, 211 (1990). However, where an ambiguity or uncertainty as to the meaning of words exists, the insurance contract must be construed in favor of the insured. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). A word is ambiguous when it is reasonably capable of more than one meaning. *Chadwick v. Aetna Ins. Co.*, 9 N.C. App. 446, 447, 176 S.E.2d 352, 353 (1970). When included in an

## STATE AUTOMOBILE MUTUAL INS. CO. v. HOYLE

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insurance contract, exclusionary clauses are to be strictly construed in favor of coverage. *Wachovia*, 276 N.C. at 355, 172 S.E.2d at 522-23. However, if such exclusions are plainly expressed, "insurers are entitled to have them construed and enforced as expressed." 43 Am Jur 2d Insurance § 291 (1982).

## I

## "Motor Vehicle"

[1] Plaintiff argues that a go-cart is "obviously" a "motor vehicle." Defendants, on the other hand, contend that the term is ambiguous since it is not defined in the policy.

When an insurance policy contains no definition of a non-technical term, the ordinary meaning of the term controls. *Wachovia*, 276 N.C. at 354, 172 S.E.2d at 522. The dictionary defines "motor vehicle" as "a vehicle on wheels having its own motor and not running on rails or tracks, *for use on streets or highways*; especially, an automobile, truck or bus." Webster's New World Dictionary, Second College Edition (1970) (hereinafter *Webster's*) (emphasis added). A "vehicle" is "any device or contrivance for carrying or conveying persons or objects, including land conveyances . . ." *Id.*; see also 60 C.J.S. Motor Vehicles § 1 (1969) ("motor vehicle" is commonly applied to any form of self-propelled vehicle suitable for use on a street or roadway). North Carolina's motor vehicle statutes define a "motor vehicle" as "every vehicle which is self-propelled and every vehicle designed to run upon the highways which is pulled by a self-propelled vehicle," excluding mopeds. N.C.G.S. § 20-4.01(23) (1989). A "vehicle" is defined as "every device in, upon, or by which any person or property is or may be transported or drawn upon a highway, excepting devices moved by human power or used exclusively upon fixed rails or tracks . . .," and including bicycles. N.C.G.S. § 20-4.01(49) (1989) (emphasis added).

Thus, the common, ordinary meaning as well as the statutory definition of the term "motor vehicle" contemplates suitability for highway use. As previously noted, a go-cart is not designed nor suitable for use on public highways, nor is a go-cart subject to our motor vehicle laws, including the requirement of registration. In fact, the term "go-cart" is not mentioned anywhere in our motor vehicle statutes. Accordingly, a go-cart is not a motor vehicle within the ordinary meaning of that term. Even accepting as true the assertion that some definitions or uses of the term "motor vehicle"

## STATE AUTOMOBILE MUTUAL INS. CO. v. HOYLE

[106 N.C. App. 199 (1992)]

might include *any* self-propelled vehicle regardless of its suitability for highway use, this simply renders the term capable of more than one meaning. As previously discussed, words contained in an insurance policy which are capable of more than one meaning are ambiguous, in which case the policy must be construed in favor of the insured. Thus, under either analysis, the exclusion from coverage of injuries arising out of "motor vehicles" contained in the Hoyle's insurance policy does not operate to exclude coverage for the injuries arising out of the go-cart accident.

## II

## "Motorized Land Conveyance"

[2] Plaintiff asserts that a go-cart is a "motorized land conveyance" within the plain meaning of that term. Moreover, according to plaintiff, since the exclusionary clause in the Hoyle's insurance policy expressly does not apply to injuries arising out of motorized land conveyances designed for recreational use off public roads, not subject to motor vehicle registration, and owned by an insured and used on an insured location, that the exclusion *does* apply to such motorized land conveyances that are owned by an insured and *not* used on an insured location. Defendants contend that the term "motorized land conveyance" is ambiguous, and that therefore the policy should be construed in favor of coverage.

According to the dictionary, the term "motorized" means "to equip (vehicles, machines, etc.) with a motor or motors." *Webster's*. A "motor" is defined as "anything that produces or imparts motion." *Id.* The term "conveyance" is defined as "a means of [taking from one place to another]; a carrying device, especially a vehicle." *Id.* Thus, a "motorized land conveyance" can be fairly said to describe anything equipped with something that produces motion which is used on land as a means of taking something or someone from one place to another. This term, therefore, is much broader than the term "motor vehicle," and unquestionably includes a go-cart. Moreover, the exclusionary clause in the Hoyle's policy expressly provides coverage for injuries arising out of the use of any motorized land conveyance that is designed for recreational use off public roads, is not subject to motor vehicle registration, and (a) is not owned by an insured; or (b) is owned by an insured and on an insured location. Thus, a reading of the clause in its entirety reveals that motorized land conveyances which do not meet the requirements of the foregoing exception to the exclusion remain within the general

## IN RE WILL OF HUBNER

[106 N.C. App. 204 (1992)]

exclusion for motorized land conveyances. Whether coverage is provided for the accident in the instant case depends solely on whether the go-cart falls within this exception.

We have already determined that a go-cart is a motorized land conveyance, and it is undisputed that a go-cart is designed for recreational use off public roads and is not subject to motor vehicle registration. The language of the Hoyle's policy provides that in order for injuries arising out of the use of such recreational motorized land conveyances which are owned by an insured to be covered, such use must be on an insured location. Because the accident involving the Hoyle's go-cart did not occur when the go-cart was being used on an insured location, the trial court erred in determining that the policy provided coverage.

For the foregoing reasons, the trial court's order granting summary judgment in favor of defendants is

Reversed.

Judges JOHNSON and COZORT concur.

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IN THE MATTER OF THE WILL OF DOROTHY J. HUBNER, DECEASED

No. 9128SC406

(Filed 5 May 1992)

**1. Wills § 66 (NCI3d) — lapsed devisees — no testamentary intent to prevent lapses**

Where testatrix had both the knowledge and the ability to prevent the lapse of gifts to parties in her will who would not otherwise be eligible to share in her estate, and there was no sufficiently clear language of substitution for these devisees, there was no testamentary intent to prevent the lapse of such gifts; 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.**

## IN RE WILL OF HUBNER

[106 N.C. App. 204 (1992)]

**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. Therefore, where two devisees would have taken a share of a lapsed gift had they survived testatrix, their daughters, who are qualified issue, may take the entire share which the devisees would have taken had they survived.

**Am Jur 2d, Wills § 1671.**

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.

This opinion supersedes our opinion filed 3 March 1992.

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:

## IN RE WILL OF HUBNER

[106 N.C. App. 204 (1992)]

## 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 lapsed residuary gifts should be distributed on a pro rata basis among Ruth McGuire, Florence Stephens and the daughters of Julius and Earl Gregorius. The court divided the estate 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



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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 a 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

## IN RE WILL OF HUBNER

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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.

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).

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[2] 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." *Blacks 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, Julius and Earl Gregorius would have taken a share of the lapsed gift in question had they survived. Therefore, their daughters, who are qualified issue, may take the entire share to which Julius and Earl Gregorius "would have taken" had they survived. We affirm the trial court's pro rata distribution of the lapsed residuary gifts.

Affirmed.

Judges ARNOLD and WYNN concur.

## PERKINS v. CCH COMPUTAX, INC.

[106 N.C. App. 210 (1992)]

JACK PERKINS, CPA, APPELLEE v. CCH COMPUTAX, INC., APPELLANT

No. 9110SC1257

(Filed 5 May 1992)

**1. Appeal and Error § 111 (NCI4th)— failure to state claim — denial of motion to dismiss — nonappealable interlocutory order**

The denial of an N.C.G.S. § 1A-1, Rule 12(b)(6) motion to dismiss for failure to state a claim is interlocutory and not immediately appealable.

**Am Jur 2d, Appeal and Error § 50.****2. Appeal and Error § 418 (NCI4th)— abandonment of issue not argued**

An issue not argued in the brief is normally deemed abandoned. Appellate Rule 28(b)(5).

**Am Jur 2d, Appeal and Error § 693.****3. Venue § 1 (NCI3d)— forum selection clause invalid**

A forum selection clause in a contract providing that any action relating to the contract shall only be instituted in Los Angeles County, California was invalid and of no effect, since the regulation of venue is a matter within the discretion of the legislature.

**Am Jur 2d, Courts § 141.**

APPEAL by defendant from order entered 21 October 1991 by *Judge Knox V. Jenkins, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 16 April 1992.

On 2 February 1990, plaintiff and defendant entered into a license and service agreement for a computer software program. On 13 May 1991, plaintiff filed a complaint in Wake County District Court seeking damages from defendant for unfair and deceptive trade practices, breach of warranty of merchantability, breach of implied warranty of fitness, breach of express warranty, negligence, and breach of contract. On 13 August 1991, the case was transferred to Wake County Superior Court. On 10 July 1991, defendant filed a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rule 12(b) on the grounds that there was a lack of subject matter jurisdiction, that the action was brought in an improper venue, and that the

## PERKINS v. CCH COMPUTAX, INC.

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complaint failed to state a claim upon which relief can be granted. On 21 October 1991, the trial court entered an order denying defendant's motion to dismiss. Defendant appeals.

*Clifton, Singer & Russell, by J. Kenneth Edwards, for plaintiff-appellee.*

*Patton, Boggs & Blow, by Kenneth J. Gumbiner and Julie A. Davis, for defendant-appellant.*

LEWIS, Judge.

The two pertinent clauses in the license agreement (contract) provide as follows:

29D. This Agreement shall be governed by and interpreted in accordance with the law of the State of California.

29E. This Agreement shall be treated as though it were executed in the County of Los Angeles, State of California, and were to have been performed in the County of Los Angeles, State of California. Any action relating to this Agreement shall only be instituted and prosecuted in courts in Los Angeles County, California. Customer/Licensee specifically consents to such jurisdiction and to extraterritorial Service of Process.

(Emphasis added). The first clause, 29D, is a choice of law provision. The second clause, 29E, contains both a forum selection provision (first underlined segment) and a consent to jurisdiction provision (second underlined segment). Contractual provisions purporting to govern the jurisdiction and applicable law are discussed in a recent North Carolina Supreme Court decision, *Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 414 S.E.2d 30 (1992). In *Rouse*, our Supreme Court sets out the three types of contractual provisions: 1) choice of law, 2) consent to jurisdiction, and 3) forum selection provisions. The first type indicates which jurisdiction's substantive laws are to be used when construing the contract. This jurisdiction's laws are to apply no matter where the suit is filed. The second type sets out the name of the state in which the parties agree to submit to personal jurisdiction. Last, the forum selection provision indicates the only jurisdiction in which the parties will litigate an action arising out of the contract.

It is precisely this third type of provision which is at issue in the case at bar and is also the one type of provision which

## PERKINS v. CCH COMPUTAX, INC.

[106 N.C. App. 210 (1992)]

our Supreme Court clearly indicated was not involved in *Rouse*. Defendant argues on appeal that the trial court erred by refusing to enforce the exclusive venue clause in the contract, the forum selection provision. Specifically, defendant contends Wake County is not the proper venue in this case because the contract specifies Los Angeles County, California as the exclusive forum for any action instituted pursuant to the contract.

**[1, 2]** Defendant assigns as error the trial court's denial of his motion to dismiss based upon 1) failure to state a claim upon which relief may be granted, 2) lack of subject matter jurisdiction, and 3) improper venue. The denial of a 12(b)(6) motion to dismiss for failure to state a claim is interlocutory and not immediately appealable. *See, Godley Auction Co., Inc. v. Meyers*, 40 N.C. App. 570, 253 S.E.2d 362 (1979). Defendant's brief on appeal does not argue lack of subject matter jurisdiction. Normally, an issue not argued in the brief is deemed abandoned. N.C.R. App. P. 28(b)(5). We exercise our discretion to consider this matter, but find this assignment of error to be without merit. *See, Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 567 (1978), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

A motion for change of venue for the convenience of witnesses and the ends of justice is discretionary and its denial is not immediately appealable. *Furches v. Moore*, 48 N.C. App. 430, 269 S.E.2d 635 (1980). However, an immediate appeal is permitted where "an erroneous order denying a party the right to have the case heard in the proper court would work an injury to the aggrieved party which would not be corrected if no appeal was allowed before the final judgment." *DesMarais v. Dimmette*, 70 N.C. App. 134, 136, 318 S.E.2d 887, 889 (1984). Assuming *arguendo* that the denial of the motion to dismiss based upon improper venue is immediately appealable, we have examined defendant's argument and find it too to be without merit.

**[3]** Our Supreme Court has addressed the question of whether parties may select the forum for an action by way of a contract provision:

The regulation of venue is a matter within the discretion of the Legislature. . . . To permit parties to a contract to enforce a stipulation which purports definitely to fix the forum long before there is a cause of action would be to nullify the law and to substitute the will of the parties in its stead.

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*Gaither v. Charlotte Motor Car Co.*, 182 N.C. 498, 499, 109 S.E. 362, 363 (1921). In this case, the contract provision specifying an exclusive forum was of no effect. Defendant has failed to show any other reason to support its contention that Wake County was the improper venue for this action, and the trial court's order is affirmed.

We have reviewed the authority cited by defendant, but find none to be controlling. The United States Supreme Court held that a forum-selection clause should be specifically enforced unless the resisting party could clearly show that enforcement would be unreasonable and unjust or that the clause was invalid for fraud or overreaching. *The Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1, 32 L. Ed. 2d 513, 92 S.Ct. 1907 (1972). The Court, however, clearly limited the holding to all federal district courts sitting in admiralty. In *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 101 L. Ed. 2d 22, 108 S.Ct. 2239 (1988), the Court held that, in diversity actions, 28 U.S.C. § 1404 governs the federal court's decision whether to "give effect to a contractual forum selection clause and transfer the action to [the] venue provided." *Id.* Later, the Supreme Court held that the denial of a motion to dismiss based upon a contractual forum selection clause was interlocutory in nature, pursuant to 28 U.S.C. § 1291, and was not immediately appealable. *Lauro Lines v. Chasser*, 490 U.S. 495, 104 L. Ed. 2d 548, 109 S.Ct. 1976 (1989). Though "not perfectly secured by appeal after final judgment," *id.* at 501, 104 L. Ed. 2d at 555, the Court indicated that the trial court's failure to enforce the forum selection provision is "adequately vindicable at that stage." *Id.*

As *The Bremen* deals with admiralty and both *Stewart* and *Lauro Lines* deal with federal civil procedure, North Carolina is not bound to apply these rulings to civil cases within our jurisdiction. We note that no North Carolina cases cite *Gaither*, *The Bremen*, *Stewart*, or *Lauro Lines*. *The Bremen* is indirectly cited for an unrelated point in *Blow v. Shaughnessy*, 68 N.C. App. 1, 313 S.E.2d 868, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). *The Bremen* reasoning has been followed by the Fourth Circuit Court of Appeals in cases beyond the admiralty setting. *See, Sterling Forest Associates, Ltd. v. Barnett-Range Corp.*, 840 F.2d 249 (4th Cir. 1988); *Bryant Elec. Co. v. City of Fredericksburg*, 762 F.2d 1192 (4th Cir. 1985); *Mercury Coal & Coke, Inc. v. Mannesmann Pipe & Steel, Corp.*, 696 F.2d 315 (4th Cir. 1982); *but see, Petition of International Precious Metals Corp.*, 917 F.2d 792 (4th Cir. 1990)

## STATE v. JONES

[106 N.C. App. 214 (1992)]

(applying *Lauro Lines v. Chasser*, 490 U.S. 495, 104 L. Ed. 2d 548, 109 S.Ct. 1976 (1989)); *Southern Distributing Co., Inc. v. E. & J. Gallo Winery*, 718 F. Supp. 1264 (W.D.N.C. 1989) (applying *Stewart Organization, Inc. v. Ricoh Corp.*, 487 U.S. 22, 101 L. Ed. 2d 22, 108 S.Ct. 2239 (1988)). Despite these federal court developments regarding forum selection clauses, we are without authority to overrule our Supreme Court's decision in *Gaither*. Based upon the foregoing, we find no error in the trial court's denial of defendant's motion to dismiss on all three bases. .

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

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STATE OF NORTH CAROLINA v. CHARLES CLIFTON JONES

No. 9115SC562

(Filed 5 May 1992)

**Constitutional Law § 255 (NCI4th)— driving while impaired—  
breath sample not preserved—no violation of due process**

A defendant in a driving while impaired prosecution was not denied his state or federal due process rights by the State's failure to take and to preserve an additional breath sample for independent testing by defendant or to produce the control and test ampules for defendant's examination. This was in no way an adjudication based on unrevealed evidence gathered in secret from a source undisclosed to defendant or his counsel; defendant had ample opportunity and adequate means to test, explain, or rebut the State's evidence; and there was no evidence to suggest that the breath samples and test ampules would provide exculpatory evidence.

**Am Jur 2d, Automobiles and Highway Traffic § 377.**

**Destruction of ampoule used in alcohol breath test as warranting suppression of result of test. 19 ALR4th 509.**



## STATE v. JONES

[106 N.C. App. 214 (1992)]

APPEAL by defendant from judgment entered 2 April 1991 by *Judge J. Milton Read, Jr.* in ORANGE County Superior Court. Heard in the Court of Appeals 19 February 1992.

On 21 October 1990, defendant was stopped for speeding on U.S. 70. The trooper who stopped defendant smelled alcohol on his breath and arrested him for driving while impaired and speeding. After being taken to the Highway Patrol District Office, defendant submitted to a chemical analysis of his breath using a breathalyzer. Defendant was tested twice, the results of each test showing an alcohol concentration of 0.15.

Defendant was found guilty in district court of speeding and driving while impaired. Defendant then appealed to the superior court. Prior to trial in superior court, defendant filed a Request for, or in the alternative, Motion for Discovery in an effort to obtain a breath sample taken at the same time he was tested as well as the test ampule and the control ampule used in the tests. The trial court denied defendant's motion after determining that these items were disposed of in keeping with standard procedures and were no longer available. Defendant next filed a Motion to Suppress and an Amended Motion to Suppress breath test evidence. These motions, which were consolidated for hearing, were also denied. Defendant then pled guilty to both charges while preserving his right to appeal. From this judgment, defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Joseph P. Dugdale, for the State.*

*Coleman, Bernholz, Bernholz, Gledhill, Hargrave & Herman, by John D. Loftin, for defendant-appellant.*

ORR, Judge.

The question on appeal is whether the trial court erred by denying defendant's motion to suppress the breathalyzer results. Defendant asserts that failure to take and to preserve an additional breath sample for independent testing by defendant or to produce the control and test ampules for defendant's examination violates state and federal due process.

The United States Supreme Court has held that the Due Process Clause of the Fourteenth Amendment does not require state or local law enforcement agencies to preserve breath samples in order to introduce breath analysis results at trial. *California v.*

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*Trombetta*, 467 U.S. 479, 491, 81 L.Ed.2d 413, 423 (1984). In reaching this conclusion, the Court distinguished access-to-evidence cases, which require the prosecution to deliver exculpatory evidence to the defendant, from cases in which the government may have a duty to preserve potentially exculpatory evidence on behalf of a defendant. Failure to make available exculpatory evidence clearly violates the due process guarantee to present a meaningful defense, whereas failure to preserve potentially exculpatory evidence does not automatically constitute a violation of the Federal Constitution. 467 U.S. at 485-86, 81 L.Ed.2d at 420-21.

In *Trombetta*, the Court first noted that the officers acted in good faith and in accordance with their normal practice when they destroyed the breath samples. 467 U.S. at 488, 81 L.Ed.2d at 422, citing *Killian v. United States*, 368 U.S. 231, 7 L.Ed.2d 256 (1961). Of primary significance, however, when determining if there is a constitutional duty to preserve evidence is whether the evidence in question meets the standard of "constitutional materiality." 467 U.S. at 489, 81 L.Ed.2d at 422, citing *U.S. v. Agurs*, 427 U.S. 110, 49 L.Ed.2d 342 (1984). In order to meet this standard, evidence must possess both an exculpatory value that was apparent before the evidence was destroyed and be of such nature that the defendant would be unable to obtain comparable evidence by other reasonably available means.

In the case at bar, the trial court found as fact that the sample and test ampules were disposed of by the officer performing the test in accordance with standard test procedures. Defendant does not challenge this finding or make any allegation to the contrary. More importantly, defendant presented no evidence to indicate that the breath samples would have been exculpatory. We also note that defendant potentially has other means of calling into question the reliability of the breath samples and demonstrating his innocence. These alternative means included attacking the reliability of the particular machine used in performing the breathalyzer test. See, e.g., N.C. Gen. Stat. § 20-139.1(b2)(2) (breath analysis results inadmissible if preventive maintenance not performed). Defendant also has a statutory right to have a witness present when the breathalyzer test is administered. N.C. Gen. Stat. § 20-16.2(6) (person charged has the right to call an attorney and select a witness to view testing procedure provided testing may not be delayed for longer than 30 minutes). Furthermore, defendant has the right, pursuant to N.C. Gen. Stat. § 20-139.1(d) to have a qualified person

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of his own choosing administer additional chemical tests, or to have a qualified person withdraw blood for later testing by a person of defendant's choosing. *See, e.g., State v. Bumgarner*, 97 N.C. App. 567, 389 S.E.2d 425, *disc. review denied*, 326 N.C. 599, 393 S.E.2d 873 (1990) (procedure established by N.C. Gen. Stat. § 20-139.1(d) for obtaining additional chemical tests satisfies due process requirements). Finally, defendant can cross-examine the officer who administered the test and the charging officer and can call witnesses to testify regarding the amount of alcohol consumed and present medical evidence as to the effect of the alcohol consumed.

Likewise, we conclude that the chemical analysis statute does not violate the Law of the Land Clause of Article I, Section 19 of our State Constitution. The Law of the Land Clause is synonymous with Fourteenth Amendment due process. *State v. Smith*, 90 N.C. App. 161, 368 S.E.2d 33 (1988). In construing the Law of the Land Clause, our courts have historically held that while decisions of the U.S. Supreme Court concerning federal due process are not binding on the courts of this state, they are highly persuasive. 90 N.C. App. at 163, 368 S.E.2d at 35, *citing Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974).

Defendant, relying on *In re Gupton*, 238 N.C. 303, 77 S.E.2d 716 (1953), argues that the Law of the Land Clause requires the prosecution to produce equivalent breath samples and control ampules so that the accused may test, explain or rebut the results of the breath test. We disagree. First, *Gupton* is factually distinguishable from the case at bar. In *Gupton*, the trial judge made an independent investigation of the private lives of the litigants in a custody proceeding. The information gathered as a result of this secret investigation was then relied upon in making the factual adjudication. In holding that the constitutional right of the petitioner was violated by this practice, Justice Ervin stated that "the constitutional right . . . to an adequate and fair hearing requires that [the litigant] be apprised of all the evidence received by the court and given an opportunity to test, explain, or rebut it." *Id.* at 304, 77 S.E.2d at 717-18. In contrast, defendant in the case at bar had ample opportunity and adequate means to test, explain, or rebut the state's evidence. This was in no way an adjudication based on unrevealed evidence gathered in secret from a source undisclosed to defendant or his counsel. Absent any evidence to

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[106 N.C. App. 218 (1992)]

suggest that the breath samples and test ampules would provide exculpatory evidence, we cannot say that as a matter of constitutional law, the defendant has been denied his due process rights under the state or federal Constitution. The trial court therefore did not err in denying defendant's motion to suppress evidence obtained as the result of a breathalyzer test.

No error.

Chief Judge HEDRICK and Judge WALKER concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. (APPELLANT), AND PIEDMONT NATURAL GAS COMPANY, INC. (APPLICANT-CROSS APPELLANT)

No. 9110UC203

(Filed 5 May 1992)

**Utilities Commission § 22 (NCI3d)— natural gas—increased costs—rate increase sought—general rate case required**

A Utilities Commission order which partially allowed a requested natural gas rate increase was reversed where the Commission in an earlier order allowed Piedmont Natural Gas Company to reduce its rates but provided that it could remove that rate reduction if its gas cost later increased, and the Commission in this order took judicial notice of its earlier order and allowed a portion of the increase pursuant to N.C.G.S. § 62-133(f). These filings by Piedmont reflect decisions by Piedmont's management to make fundamental changes in its sources of supply of natural gas and to access substantial additional volumes of natural gas. The rate changes generated by these decisions are simply not of the nature of those to be allowed under N.C.G.S. § 62-133(f), and must be considered in a general rate case.

**Am Jur 2d, Public Utilities § 242.**

APPEAL by Carolina Utility Customers Association, Inc. and cross-appeal by Piedmont Natural Gas Company, Inc. from the order

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[106 N.C. App. 218 (1992)]

of the North Carolina Utilities Commission entered in Docket Numbers G-9, Sub 300 and G-9, Sub 306 on 31 October 1990. Heard in the Court of Appeals 2 December 1991.

*Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant Carolina Utility Customers Association, Inc.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos, for applicant-cross appellant Piedmont Natural Gas Company, Inc.*

WELLS, Judge.

The cases on appeal now before us had their genesis in a prior proceeding before the Utilities Commission in Docket Numbers G-9, Sub 289, G-9, Sub 291, and G-9, Sub 296. The combined proceedings in those dockets involved a hearing before the Commission in which appellant Carolina Utility Customers Association, Inc. (hereinafter CUCA) participated as an intervening party. Following that hearing, the Commission entered a lengthy order on 13 February 1990 in which it made and entered extensive findings of fact and conclusions of law and allowed cross-appellant Piedmont Natural Gas Company, Inc. (hereinafter Piedmont) to reduce its rates by \$1.0159 per dekatherm, but provided that it could remove that rate reduction if its "gas cost" later increased.

The Commission's order of 13 February 1990 was appealed by CUCA to this Court. In *State ex rel. Utilities Commission v. CUCA*, 104 N.C. App. 216, 408 S.E.2d 876, *disc. review denied*, 330 N.C. 618, 412 S.E.2d 95 (1991), this Court found that because the order resulted in a reduction in rates, CUCA was not an "aggrieved party" within the meaning of G.S. § 62-90 and dismissed that appeal. We refer to that opinion to reflect the factual background which prompted Piedmont to initiate these proceedings. Our Supreme Court denied discretionary review, 330 N.C. 618, 412 S.E.2d 95 (1991).

In the proceedings now before us, Piedmont sought to increase its rates. In its response, CUCA sought a full-scale, general rate case hearing. The Commission denied CUCA's petition for an evidentiary hearing, and in its order of 31 October 1990, took judicial notice of its order of 13 February 1990, and on that basis allowed a portion of Piedmont's requested rate increase and denied a por-

## STATE EX REL. UTILITIES COMM. v. CAROLINA UTILITY CUST. ASSN.

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tion. Both CUCA and Piedmont have appealed from certain aspects of that order.

The fundamental and dispositive question presented in this appeal is whether these proceedings before the Commission should have been declared a general rate case pursuant to the provisions of G.S. § 62-133(b), (c), and (d), or, whether it was appropriate and lawful for the Commission to allow these proposed rate changes to be considered and passed upon in proceedings under G.S. § 62-133(f), which, in summary, authorizes the Commission to consider and pass upon natural gas companies' rate changes brought about by changes in the companies' wholesale cost of natural gas, in an expedited proceeding not involving the many facets of a general rate case.

The Commission considered and passed upon Piedmont's proposed rate changes in these dockets pursuant to the provisions of G.S. § 62-133(f). We hold that the Commission erred in its action and that its order in these dockets must be vacated.

No natural gas is produced in North Carolina. All the natural gas ultimately consumed in this State reaches our boundaries through the facilities of interstate natural gas pipelines, which either sell or transport gas to local gas utilities in this State. The rates charged by these interstate pipelines are regulated by the Federal Energy Regulatory Commission (FERC). In the late 1960's and early 1970's natural gas supplies in the United States became inadequate, uncertain, and unpredictable. These conditions resulted in volatile fluctuations in the rates and prices charged by pipelines and producers. North Carolina's natural gas distributors were being plagued by frequent changes in their wholesale cost of gas. In response to the problems associated with these circumstances, the General Assembly enacted G.S. § 62-133(f). *See* Ch. 1092, 1971 Session Laws. The purpose was to allow our local natural gas companies to react to these sudden and frequent changes in their wholesale cost of gas by using what might be referred to as expedited "flow-through" rate proceedings before our Utilities Commission.

Such is not the case here. These filings reflect decisions by Piedmont's management to make fundamental changes in its sources of supply of natural gas and to access substantial additional volumes of natural gas. While these decisions may be arguably laudable, having substantial long-range benefits for Piedmont's customers and the economy of this State, the rate changes generated by

## DAVIS v. NATIONWIDE MUTUAL INS. CO.

[106 N.C. App. 221 (1992)]

these decisions are simply not of the nature of those to be allowed under G.S. § 62-133(f). The factors underlying Piedmont's application in these dockets—additional pipeline capacity, and alternative supply sources—are not distinguishable from those factors at issue in *State ex rel. Utilities Commission v. C.F. Industries, Inc.*, 39 N.C. App. 477, 250 S.E.2d 716 (1979), where we disapproved of and disallowed a G.S. § 62-133(f) rate change order and held that such rate changes must be considered and passed upon in a general rate case proceeding pursuant to G.S. § 62-133(a)-(e). Such is our decision here, and therefore the order of the Commission of 31 October 1990 under appeal must be and is

Reversed and vacated.

Judges EAGLES and WALKER concur.

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WILSON L. DAVIS, INDIVIDUALLY AND AS EXECUTOR OF THE ESTATE OF CAROLYN FULBRIGHT DAVIS, DECEASED, LISA F. COLLUMS AND SUSAN F. ROGERS, PLAINTIFFS v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9125SC472

(Filed 5 May 1992)

**Insurance § 69 (NCI3d)— automobile insurance—underinsured motorist coverage—single policy insuring two vehicles—named individual not owner of the policy—stacking permitted**

The trial court properly allowed intrapolicy stacking of underinsured motorist coverage by a named individual not the owner of the policy where plaintiff's decedent was fatally injured in an automobile accident while driving an automobile owned by her husband and covered under a policy issued by defendant which was in the husband's name but covered decedent as his wife and a member of his household, and which covered two automobiles with separate premiums on each. Although defendant contended that *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, can be distinguished because the person attempting to stack in that case was the owner of the policy, and that the language of N.C.G.S. § 20-279.21 refers to the policy owner, the Court of Appeals clearly permitted

## DAVIS v. NATIONWIDE MUTUAL INS. CO.

[106 N.C. App. 221 (1992)]

intrapolicy stacking by nonowners in *Manning v. Tripp*, 104 N.C. App. 601. Furthermore, defendant's argument that policy language explicitly precluding intrapolicy stacking controls must fail because that language appeared in *Sutton*, and, although defendant argues that public policy justifies prohibiting nonowners from stacking coverage, the public policy set forth in *Sutton* likewise applies and is valid in this case.

**Am Jur 2d, Automobile Insurance § 329.**

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

APPEAL by defendant from judgment entered 7 February 1991 by Judge Forrest A. Ferrell in CATAWBA County Superior Court. Heard in the Court of Appeals 11 March 1992.

*Finger, Parker & Avram, by M. Neil Finger and Raymond A. Parker, II, for the plaintiffs-appellees.*

*Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and Matthew L. Mason, for the defendant-appellant.*

LEWIS, Judge.

Once again this Court is asked to confront the controversial insurance "stacking" question. We are asked here to determine whether an individual named in—but not the "owner" of—a motor vehicle insurance policy is permitted to "stack" underinsured (UIM) coverage when the single policy insures two vehicles. The trial court held that such stacking was permissible. Given the recent case law in this Court, we find no error in the trial court's judgment.

This action arose when plaintiffs' decedent, Carolyn Fulbright Davis, was fatally injured in an automobile accident on 2 June 1989. Decedent was driving a 1985 automobile owned by her husband, Wilson L. Davis, and covered under an insurance policy issued by defendant. The policy was taken in the name of Mr. Davis, but because decedent was his wife and a member of his household at the time of the accident, the policy covered her as well.

The other vehicle involved in the accident was owned by Harry C. Nunnery and his wife, Paulette C. Nunnery, with Mrs. Nunnery driving at the time of the accident. Plaintiffs in this action presently



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have pending a separate wrongful death action against the Nunnerys. In addition, the Nunnerys had a liability insurance policy with Travelers Insurance Company which has paid plaintiffs \$50,000.00. None of these facts is disputed by the defendant.

Plaintiffs brought a declaratory judgment action against defendant to determine their rights under their policy. The Nationwide insurance policy provides underinsured motorist coverage at limits of \$100,000.00 per person and \$300,000.00 per accident for bodily injury. There were two vehicles covered under this single policy, with separate premiums paid on each vehicle. Relying on N.C.G.S. § 20-279.21 (1989), plaintiffs sought to aggregate, or “stack,” their coverage to increase their liability limit to \$200,000.00—i.e., apply the \$100,000.00 limit to *each* vehicle insured under the policy. The trial court permitted this intrapolicy stacking. From this, defendant appeals.

According to our review of the law, the result in this case seems clear. First, our Supreme Court, in *Sutton v. Aetna Casualty & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), held that the North Carolina legislature “intended N.C.G.S. § 20-279.21(b)(4) to require both interpolicy and intrapolicy stacking of UIM coverages.” *Id.* at 265, 382 S.E.2d at 763. However, defendant distinguishes *Sutton*, since the person attempting to stack in that case was the owner of the insurance policy. Defendant argues that the language of the statute, which refers specifically to the “policy’s owner,” demands a different result when, as here, the person injured was named under the policy but did not actually own the policy.

Defendant’s argument is not without judicial support. Several key dissents, authored by Judge K. Edward Greene of this Court, have argued that the correct interpretation of the statute is that only the *owner* of the policy is allowed the benefits of stacking. *See, e.g., Harris v. Nationwide Mut. Ins. Co.*, 103 N.C. App. 101, 404 S.E.2d 499, *disc. rev. allowed*, 329 N.C. 788, 408 S.E.2d 521 (1991) (Greene, J., dissenting). His is the minority view, however, and we are bound by the prevailing majority position.

In *Harris*, this Court upheld the trial court’s granting of a summary judgment in favor of Harris to permit intrapolicy stacking of UIM coverage. In that case, the daughter of the insured was permitted to stack a single insurance policy which covered three separate vehicles. Michelle Harris, the daughter, owned neither

## DAVIS v. NATIONWIDE MUTUAL INS. CO.

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the vehicles insured under the policy nor the policy itself, yet this Court relied on *Sutton* to hold that the benefits of N.C.G.S. § 20-279.21(b)(4) “flow to the *insured injured party*.” *Id.* at 103, 404 S.E.2d at 501 (emphasis in original).

Similarly, in *Amos v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 406 S.E.2d 652, *disc. rev. allowed*, 330 N.C. 193, 412 S.E.2d 52 (1991), this Court again allowed intrapolicy stacking for a nonowner of the policy. Finally, in *Manning v. Tripp*, 104 N.C. App. 601, 410 S.E.2d 401 (1991), *disc. rev. allowed*, 330 N.C. 852, 413 S.E.2d 551 (1992), this Court clearly permitted intrapolicy stacking by nonowners. This Court stated, “As our decision in *Harris* indicates, defendant’s position that Mrs. Manning cannot aggregate the UIM coverage because she is *not* an owner of the vehicles is without merit.” *Id.* at 606, 410 S.E.2d at 404 (emphasis added).

Defendant nonetheless argues that the language of the policy constitutes a contractual issue that controls this case. Defendant points out that Mr. Davis’ policy explicitly precludes intrapolicy stacking. The language to which it refers is found in Part D of the policy, under “Limit of Liability” of “Uninsured Motorists Coverage.” This language says:

The limit of bodily injury liability shown in the Declarations for ‘each person’ for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury sustained by any one person in any one auto accident. . . . This is the most we will pay for bodily injury and property damage regardless of the number of: . . .

3. Vehicles or premiums shown in the Declarations.

We note that this exact language appeared in the *Sutton* policy. In examining this language, the Supreme Court said, “The question[] before us [is] . . . whether the statute prevails over the policy language.” *Sutton*, 325 N.C. at 263, 382 S.E.2d at 762. The Court made this rough place plain. It held, “We are confident the statute prevails over the language of the policy.” *Id.* For this reason, defendant’s contractual argument must fail.

Finally, defendant argues that public policy reasons justify prohibiting nonowners from stacking coverage. While we recognize that *Sutton* concerned stacking by a policy “owner,” we have held invalid the practice of distinguishing between a policy owner and

## BAILEY v. NATIONWIDE MUTUAL INS. CO.

[106 N.C. App. 225 (1992)]

a nonowner family member insured for UIM coverage purposes. See, e.g., *Harris*, 103 N.C. App. at 103, 404 S.E.2d at 501. Therefore, the public policy set forth in *Sutton* likewise applies and is valid in this instance. There, the Supreme Court said, "Our construction of the statute [permitting stacking] avoids anomalous results, is fairer to the insured and . . . gives the insured due consideration for the separate premiums paid for each UIM coverage within a policy." *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764. We therefore find no merit to defendant's argument on this basis.

Affirmed.

Judges ARNOLD and WYNN concur.

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DANIEL JOEL BAILEY AND LINDA FAYE SHULER, PLAINTIFF-APPELLANTS  
v. NATIONWIDE MUTUAL INSURANCE COMPANY, A STOCK INSURANCE  
COMPANY, DEFENDANT-APPELLEE

No. 9128SC522

(Filed 5 May 1992)

**Insurance § 69 (NCI3d) — automobile insurance — named driver not owner — stacking of underinsured motorist coverages**

A person listed as a named driver in a motor vehicle insurance policy but who is not an owner of the policy may stack the underinsured motorist coverage on each of two vehicles when the single policy insures both vehicles.

**Am Jur 2d, Automobile Insurance § 329.**

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

APPEAL by plaintiffs from an order entered on 7 March 1991 by *Judge C. Walter Allen* in BUNCOMBE County Superior Court. Heard in the Court of Appeals on 18 March 1992.

## BAILEY v. NATIONWIDE MUTUAL INS. CO.

[106 N.C. App. 225 (1992)]

*Bazzle, Carr & Gasperson, P.A., by Ervin W. Bazzle, for plaintiffs.*

*Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant.*

LEWIS, Judge.

The question in this case is whether an individual named in, but not the "owner" of, a motor vehicle liability insurance policy is permitted to "stack" coverage when the single policy insures two vehicles.

On 27 August 1988, plaintiffs Daniel Bailey and Linda Shuler were hit by a truck while riding on Mr. Bailey's motorcycle. Plaintiff's action against the truck driver is pending in Buncombe County Superior Court. The truck driver offered Ms. Shuler the limit on his bodily injury coverage, \$100,000.00. Ms. Shuler filed a claim with Mr. Bailey's insurance company, defendant-Nationwide, to stack the underinsured motorist coverage on 26 June 1990. Mr. Bailey's policy, 61J165548, was issued for the period of 22 January 1988 through 22 July 1988 and was renewed until 22 January 1989. This policy listed Ms. Shuler as a named driver and insured, it listed her traffic violation within the last 5 years, and quoted a separate premium for each of Mr. Bailey's two vehicles: a 1988 Chevrolet Barretta and a 1978 Harley Davidson. The underinsured motorist bodily injury coverage was \$100,000.00 per person and \$300,000.00 limit per accident. At the time of the accident, Ms. Shuler resided with Mr. Bailey.

Defendant-Nationwide refused to allow Ms. Shuler to stack the underinsured coverage for both the Barretta and the motorcycle. Nationwide insists that as a class II insured, Ms. Shuler is entitled only to the \$100,000.00 underinsured coverage on the motorcycle and not to the \$200,000.00 combined amount on both the Barretta and on the motorcycle. Plaintiffs filed suit against Nationwide on 19 September 1990. Because the trial court found that there was "no underinsured coverage available to plaintiff in this action," the court granted summary judgment in favor of Nationwide on 7 March 1991. Plaintiffs appeal.

We have addressed the legal question at the heart of this suit in the recent case of *Davis v. Nationwide Mut. Ins. Co.*, 106 N.C. App. 221, 415 S.E.2d 767 (1992). In *Davis*, we held that a

**BAILEY v. NATIONWIDE MUTUAL INS. CO.**

[106 N.C. App. 225 (1992)]

person listed as a named driver, but not the owner of the insurance policy, may stack the underinsured coverage on each of two cars when a single policy insures both vehicles. In light of this decision, summary judgment was improperly granted. Since no material issue of fact exists, and considering *Davis*, we reverse and remand for entry of summary judgment for the plaintiffs.

Reversed and remanded.

Judges ARNOLD and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION  
FILED 21 APRIL 1992

BRINSON v. HIATT No. 913SC319	Craven (89CVS380)	Affirmed
COLE v. COLE No. 915DC905	New Hanover (90CVD3622)	Affirmed
COUNTY OF RUTHERFORD ex rel. HEDRICK v. WHITENER No. 9129DC953	Rutherford (88CVD551)	New Trial
DRAKE v. MABE No. 9121SC1035	Forsyth (89CVS5844)	Reversed
FINANCIAL FIRST FEDERAL SAVINGS BANK v. MANER No. 9115SC906	Alamance (91CVS744)	Affirmed
GLEN v. CHAPIN No. 9129SC937	Transylvania (90CVS121)	Affirmed
GRYB v. HIATT No. 913SC321	Craven (90CVS1018)	Affirmed
IN RE JACKSON No. 9118DC689	Guilford (90J105)	Appeal Dismissed
KEITH v. MARTIN No. 9117DC795	Rockingham (89CVD1265)	Appeal Dismissed
KENNEDY v. CHATHAM MFG. CO. No. 9110IC1220	Ind. Comm. (713741)	Affirmed
MEHAFFEY v. BESSEMER No. 9130DC534	Haywood (88CVD325)	Affirmed
N.C. FARM BUREAU MUTUAL INS. CO. v. McDONALD No. 9123SC1134	Wilkes (90CVS961)	Affirmed
SMIGIEL v. SMIGIEL No. 9113DC495	Brunswick (85CVD587)	Affirmed
STATE v. ANDERSON No. 9126SC914	Mecklenburg (90CRS15246)	No Error
STATE v. ARMS No. 9118SC968	Guilford (90CRS16273) (90CRS20104) (90CRS20106) (90CRS20108)	No Error

STATE v. AUSTIN No. 9130SC721	Jackson (90CRS1690) (90CRS1691)	No Error
STATE v. BENNETT No. 9117SC1048	Surry (88CRS6139) (88CRS6140) (88CRS6143) (88CRS6144) (88CRS6145)	No Error
STATE v. BOWDEN No. 9118SC1054	Guilford (89CRS68310) (89CRS68311) (89CRS68312)	Dismissed
STATE v. BREWER No. 9126SC1075	Mecklenburg (90CRS25031)	Affirmed
STATE v. BROWN No. 9125SC867	Caldwell (90CRS6528) (90CRS6815) (90CRS6533) (90CRS6816)	Affirmed
STATE v. CAPPS No. 9129SC615	Transylvania (90CRS440) (90CRS441) (90CRS442) (90CRS443) (90CRS504) (90CRS506) (90CRS507)	No Error
STATE v. CHAPMAN No. 913SC958	Pitt (90CRS24792) (90CRS25247)	New Trial
STATE v. DUNCAN No. 9118SC1069	Guilford (90CRS50505)	No Error
STATE v. FAY No. 9115SC845	Alamance (90CRS9783)	No Error
STATE v. FINLEY No. 9128SC1122	Buncombe (91CRS205) (91CRS206) (91CRS207) (91CRS208)	No Error
STATE v. GOODWIN No. 9121SC1172	Forsyth (91CRS09052)	No Error
STATE v. GRIFFIN No. 9125SC998	Caldwell (89CRS10191)	No Error

STATE v. HERBIN No. 916SC980	Northampton (89CRS619)	No Error
STATE v. HYDER No. 911SC1012	Pasquotank (91CRS1024)	No Error
STATE v. JACKSON No. 914SC978	Onslow (91CRS5131)	No Error
STATE v. KALE No. 9127SC811	Gaston (90CRS00868)	New Trial
STATE v. LINEBERGER No. 9127SC1092	Gaston (91CRS003522) (91CRS003524)	No Error
STATE v. MAGGETTE No. 916SC1072	Northampton (90CRS1654) (90CRS1655) (90CRS1656) (90CRS1657)	No Error
STATE v. MONROE No. 9116SC1028	Robeson (90CRS14693) (90CRS14694) (90CRS14695)	No Error
STATE v. NICHOLSON No. 9121SC1076	Forsyth (91CRS19481) (91CRS19482) (91CRS19483) (91CRS19484)	No Error
STATE v. RIDDLE No. 9110SC366	Wake (90CRS49008)	Affirmed
STATE v. ROPER No. 9130SC335	Cherokee (90CRS846)	No Error
STATE v. RORIE No. 9121SC840	Forsyth (90CRS35485) (90CRS35486)	No Error
STATE v. SCALES No. 9118SC871	Guilford (90CRS71775) (90CRS71777)	Affirmed
STATE v. SURRETT No. 9130SC1031	Haywood (90CRS1112) (90CRS1487)	No Error
STATE v. SUTTON No. 918SC1178	Lenoir (90CRS11505) (90CRS11506)	No Error



STATE v. TAYLOR No. 917SC856	Nash (90CRS4383)	No Error
STATE v. VANCE No. 9121SC1052	Forsyth (88CRS31023)	Affirmed
STATE v. WRAY No. 9118SC1118	Guilford (91CRS688)	No Error
THOMAS v. HOWELL BUICK, INC. No. 917SC487	Edgecombe (90CVS514)	Dismissed

## FILED 5 MAY 1992

BALLARD v. CORNELIA NIXON DAVIS NURSING HOME No. 915SC573	New Hanover (90CVS1579)	Affirmed
CARSON v. TOWNSEND No. 9118SC249	Guilford (90CVS6508)	Reversed
CONYERS v. LINCOLN COMMUNITY HEALTH CENTER No. 9114SC361	Durham (90CVS01186)	Affirmed
DAVIS v. DAVIS No. 9128DC1190	Buncombe (91CVD1391)	Affirmed
DEVOE v. N.C. STATE PORTS AUTHORITY No. 9110SC351	Wake (89CVS3077)	Affirmed
DIBALA-WRIGHT v. DIBALA-WRIGHT No. 915DC1227	New Hanover (90CVD3936)	Affirmed
GARY v. OLDE POINT DEVELOPMENT No. 9120SC59	Moore (87CVS894)	Reversed & remanded in part & affirmed in part
HENLINE v. MONTGOMERY No. 9125SC1185	Catawba (91CVS832)	Affirmed
HOUCK & SONS, INC. v. N.C. DEPT. OF ENVIRONMENT No. 9110SC399	Wake (88CVS11028)	Affirmed
IN RE ASHBURN No. 917DC565	Edgecombe (90J63)	Affirmed

LONG DRIVE APT'S v. PARKER No. 9120DC613	Richmond (91CVD233)	Reversed
PREVO v. LUMBERMENS MUT. CASUALTY CO. No. 9126SC574	Mecklenburg (90CVS10511)	Affirmed
SHEFFIELD v. PITNEY BOWES, INC. No. 9210SC2	Wake (91CVS4686)	Affirmed
SMALL v. METTS No. 914SC1266	Jones (91CVS82)	Dismissed
SQUIRES v. SQUIRES No. 915DC612	New Hanover (79CVD0057)	Affirmed
STATE v. CARDWELL No. 9112SC1278	Cumberland (90CRS49582)	No Error
STATE v. CHILES No. 9126SC1244	Mecklenburg (90CRS71260)	No Error
STATE v. GARCIA No. 9127SC725	Lincoln (91CRS00048)	No Error
STATE v. GRAHAM No. 9118SC1237	Guilford (91CRS20516) (91CRS45404) (91CRS45405) (91CRS45406)	No Error
STATE v. LUNSFORD No. 9114SC1184	Durham (90CRS9860)	No Error
STATE v. MAPP No. 9115SC514	Chatham (90CRS1458) (90CRS2144)	No Error
STATE v. OLIVER No. 9121SC1245	Forsyth (91CRS21974)	No Error
STATE v. PROCTOR No. 917SC362	Nash (90CRS3542)	Affirmed
STATE v. RICHARDSON No. 9221SC8	Forsyth (91CRS28422)	Affirmed
STATE v. SEAWOOD No. 9126SC483	Mecklenburg (90CRS75682) (90CRS79652) (90CRS81411)	No Error
STATE v. WHITE No. 9112SC1175	Cumberland (90CRS10153)	No Error

STATE v. WILLIAMS  
No. 9114SC1020

Durham  
(90CRS11404)

Affirmed

THOMAS D. GILLIAM CO. v.  
NCNB NATIONAL BANK  
No. 9122SC282

Iredell  
(90CVS00881)

Affirmed

## FRIZZELLE v. HARNETT COUNTY

[106 N.C. App. 234 (1992)]

ROSCOE FRIZZELLE, MARTIN B. BAREFOOT, DEBBIE BAAS, JOHNNIE J. CHALMERS, WILLIAM N. STEWART, L. V. BETHEA, RICHARD D. STEVENS, FOSTER MATTHES, MELVIN STEWART, THOMAS L. HAYES, RONNIE THORNE, CALVIN DOUGLAS, BENNY J. PHILLIPS, WAYNE G. CURRIN, LINWOOD TURNER, AND OTHERS, PLAINTIFFS v. HARNETT COUNTY, LLOYD STEWART, BILL SHAW, RUDY COLLINS, MACK REID HUDSON, MAYO SMITH, COUNTY COMMISSIONERS, THE HARNETT COUNTY ZONING BOARD OF ADJUSTMENTS, H. L. SORRELL, C. P. TARKINGTON, BLOUNT WHITESIDE, DAN ANDREWS, AND HAROLD ALLEN, DEFENDANTS

No. 9111SC247

(Filed 19 May 1992)

**1. Municipal Corporations § 30.20 (NCI3d) — zoning ordinance — notice — sufficiency**

Summary judgment was properly granted for defendant county in a challenge to a zoning ordinance where the first notice was inadequate but the second gave plaintiffs the opportunity to present their objections to the zoning map as it pertained to their section of the county. The first notices of a hearing prior to the enactment of the zoning ordinance were neither reasonable nor adequate to apprise plaintiffs and other landowners within the southern section of Harnett County of the pending process of adopting a zoning ordinance where the notices were entitled "NOTICE OF PUBLIC HEARING ON ZONING ORDINANCE AND ZONING MAP FOR THE FIRST QUADRANT." The title was misleading and failed to adequately apprise those landowners in the southern section of the county that their rights might be affected by the proposed zoning ordinance. Although defendant county argues that plaintiff landowners did in fact have notice of the ordinance because some plaintiffs and one plaintiff's attorney were present at the hearing, there is no evidence in the record which shows that all of the plaintiffs or landowners in the southern section of Harnett County had actual notice of the intended purpose of the hearing or were represented at the hearing. However, defendant county gave proper notice to the residents of the southern section of the county in the second notices which were published after the enactment of the zoning ordinances and which stated that there would be a hearing on the zoning map for the southern half of Harnett County. The second notices were not inadequate, as plaintiffs contended, because they

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[106 N.C. App. 234 (1992)]

related only to the map and not to the enactment or extension of the ordinance to the southern half of the county, because the mere mentioning of the map implies that there is an accompanying zoning ordinance text. N.C.G.S. § 153A-344 only requires the zoning agency to prepare both the map and zoning ordinance; it does not require that both be mentioned in the title of the legal notice.

**Am Jur 2d, Zoning and Planning §§ 50, 53.**

**Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation. 96 ALR2d 449.**

**2. Municipal Corporations § 30.20 (NCI3d)— zoning ordinance— failure to have map for entire county— zoning implemented on area by area basis— no error**

Plaintiffs' contention was without merit where plaintiffs contended that a zoning ordinance was invalid because there was no map of the southern half of the county available at the public hearing on 18 July 1988, when the ordinance was adopted. N.C.G.S. § 153A-342 does not require the county to have a zoning map for the entire county when its objective is to implement zoning on an area by area basis. N.C.G.S. § 153A-344 must be read in conjunction with N.C.G.S. § 153A-342; reading the two statutes together indicates that only a map of the area then being zoned and the full text of the ordinance are required.

**Am Jur 2d, Zoning and Planning §§ 49, 53.**

**3. Municipal Corporations § 30.20 (NCI3d)— zoning ordinance— amendment— procedures**

The addition of the southern section of the county to the northern half, which was already zoned, constituted an amendment to the zoning ordinance. N.C.G.S. § 153A-343 applies only when tax maps are available for the areas to be zoned.

**Am Jur 2d, Zoning and Planning §§ 49, 53.**

**4. Municipal Corporations § 30.20 (NCI3d)— zoning ordinance— notice requirements for amendment— not followed— set aside**

A zoning amendment was set aside as to the southern section of Harnett County where the clear and unequivocal language of the zoning ordinance itself required notice by mail

**FRIZZELLE v. HARNETT COUNTY**

[106 N.C. App. 234 (1992)]

and posting of the property to be zoned and the county failed to follow its own procedures as delineated in the ordinance that it wrote. Although the county contended that the sections of the ordinance apply only to changes and amendments made after the initial adoption of the ordinance in a particular area, the county was the drafter of the ordinance and failed to exclude county-wide zoning from the sections requiring notice by posting and by mail.

**Am Jur 2d, Zoning and Planning § 50.**

**Validity and construction of statutory notice requirements prerequisite to adoption or amendment of zoning ordinance or regulation. 96 ALR2d 449.**

**5. Limitation of Actions § 16 (NCI3d)— challenge to zoning ordinance—statute of limitations—raised in affidavit**

The defendants in a challenge to a zoning ordinance could not raise the statute of limitations in N.C.G.S. § 1-54.1 where defendants failed to affirmatively plead the statute of limitations in their answer, but raised it by affidavit at the summary judgment hearing. Although an affirmative defense may be raised for the first time by affidavit for the purpose of ruling on summary judgment, both parties must be aware of the defense and there is no evidence in this case that plaintiffs were aware of the defense.

**Am Jur 2d, Limitation of Actions § 454.**

Judge ORR concurring in the result.

APPEAL by plaintiffs from judgment entered 12 December 1990 by *G. K. Butterfield, Jr.*, in HARNETT County Superior Court. Heard in the Court of Appeals 4 December 1991.

Plaintiffs initiated this suit on 4 August 1989, contesting the validity of the enactment and implementation of a Harnett County zoning ordinance and its application to the residents and landowners of the southern section of Harnett County. Defendants filed a motion to dismiss and an answer denying the invalidity of the zoning ordinance and seeking dismissal of plaintiffs' action. After discovery, both parties filed motions for summary judgment. Defendants' motion for summary judgment was granted. Plaintiffs gave timely notice of appeal.

## FRIZZELLE v. HARNETT COUNTY

[106 N.C. App. 234 (1992)]

The Harnett County Board of Commissioners published notices in various local newspapers, entitled: "NOTICE OF PUBLIC HEARING ON ZONING ORDINANCE AND ZONING MAP FOR THE FIRST QUADRANT." The notices stated that the purpose of the hearing was "to hear the views of the residents of Harnett County on the proposed Zoning Ordinance Text. In addition, the hearing will also solicit views of the residents in the first zoning quadrant on the district boundaries and zoning map of this quadrant."

The Cape Fear River roughly divides Harnett County into northern and southern sections. The notices defined the first zoning quadrant as "the area north of the Cape Fear River and west of North Carolina Highway 210." At the time of these hearings, prior to 18 July 1988, the only map showing proposed district boundaries, related to the first quadrant north of the Cape Fear River.

The Harnett County Board of Commissioners voted on 18 July 1988 to adopt a zoning ordinance. Article II of the ordinance provided that "[t]he provisions of the Ordinance shall apply to the unincorporated areas of Harnett County as specifically identified and delineated on the zoning map identified as 'The Official Map of Harnett County, North Carolina.'" At that time, no map relating to the southern section of the county was available.

In October of 1988, notices were again published. The notices were entitled: "NOTICE OF PUBLIC HEARING ON THE ZONING MAP FOR THE SOUTHERN HALF OF HARNETT COUNTY." The stated purpose of this hearing was "to solicit the views of the residents of Harnett County on the proposed Zoning Map of the Southern Half of the County (all of the area South of the Cape Fear River)." In addition, the hearing was to address an amendment to the zoning ordinance text which would add a fourth residential district to the zoning ordinance.

On 3 April 1989, by resolution, the Harnett County Board of Commissioners stated that they deemed it "appropriate to implement the Zoning Ordinance for Harnett County, adopted July 18, 1988, in the Southern Section of Harnett County[.]" It was resolved that "the Zoning Ordinance for Harnett County shall be and become effective in all of the unincorporated areas in Harnett County . . . to which said Zoning Ordinance has not heretofore applied, and that the Zoning Maps for the northern and southern sections

## FRIZZELLE v. HARNETT COUNTY

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of Harnett County dated July 18, 1988 and April 3, 1989 be integrated to form the Official Zoning Maps for Harnett County[.]”

*Edgar R. Bain and Alton D. Bain for plaintiffs-appellants.*

*W. Glenn Johnson and W. A. Johnson for defendants-appellees.*

JOHNSON, Judge.

[1] Plaintiffs, contesting the validity of the Harnett County zoning ordinance as to the southern section of the county, first argue that the trial court erred in granting defendants’ motion for summary judgment because the notices of the hearing prior to the enactment of the zoning ordinance on 18 July 1988 were neither reasonable nor adequate to apprise plaintiffs and other landowners within the southern section of Harnett County of the pending process of adopting a zoning ordinance; therefore, the notices were in contravention of G.S. § 153A-323 (1987) and due process of law.

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 a 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).

General Statutes § 153A-323 provides that before adopting or amending any ordinance authorized by Article 18, the board of commissioners shall hold a public hearing on the ordinance or amendment. The statute further provides that the board shall cause notice of the hearing to be published once a week for two successive calendar weeks and that the notice shall be published not less than ten days nor more than twenty-five days before the date fixed for the hearing. It is not disputed that the Board caused notices to be published prior to its enactment of the zoning ordinance on 18 July 1988. Plaintiffs-appellants contend, however, that the notices published were insufficient and inadequate, failing to comply with G.S. § 153A-323 and due process of law.

As a guarantee of due process, parties whose rights are to be affected are entitled to be heard. *In re Wilson*, 257 N.C. 593, 596, 126 S.E.2d 489, 491 (1962); *State v. Wheeler*, 249 N.C. 187, 193, 105 S.E.2d 615, 621 (1958); *In re Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 717 (1953). Consequently, notice is an essential element of due process. *Forman & Zuckerman, P.A. v. Schupak*,



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38 N.C. App. 17, 247 S.E.2d 266 (1978). In North Carolina, due process requires adequate notice and an opportunity to be heard. *Id.* The required notice must be reasonably calculated under all circumstances to apprise interested parties of the pendency of the action or proceeding and afford them an opportunity to present their objections. *Id.*; *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 314-15, 94 L.Ed. 865, 873 (1950). The notice must also reasonably convey the required information, as well as afford a reasonable time for those interested to make their appearance. *Id.*

In the case *sub judice*, the first notices published were not adequate. The first notices, published prior to 18 July 1988, were entitled: "NOTICE OF PUBLIC HEARING ON ZONING ORDINANCE AND ZONING MAP FOR THE FIRST QUADRANT." The title of this notice indicated that the zoning ordinance was only for the first quadrant. The conjunction "and" allowed the reasonable inference that the hearing for the zoning ordinance and the zoning map was exclusively for residents of the first quadrant. We find the notice title misleading, and are of the opinion that it failed to adequately apprise those landowners in the southern section of the county that their rights might be affected by the proposed zoning ordinance. We find the notices inadequate notwithstanding the language included in the body of the notice, which attempts to explain that the hearing is for Harnett County residents, but goes on to speak of soliciting only "the views of residents in the first zoning quadrant on the district boundaries and zoning map of this quadrant."

Defendant county argues that plaintiff landowners did in fact have notice of the zoning ordinance, which is evidenced by the presence of some plaintiffs and one plaintiff's attorney at the hearing. There is no evidence in the record which shows that all of the plaintiffs or landowners in the southern section of Harnett County had actual notice of the intended purpose of the hearing or were represented at the hearing. In the absence of such evidence, we are unwilling to hold that all interested parties had notice consistent with procedural due process. We do recognize, however, that such notice was not necessary since the county's intent at that time was to zone only the northern section of the county. Moreover, defendant county gave proper notice to the residents of the southern section of the county in the second notices which were published after the enactment of the zoning ordinance on 18 July 1988. Those notices, published in October of 1988, stated that there would be a hearing on the zoning map for the southern

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half of Harnett County. Plaintiffs, at this hearing, had the opportunity to present their objections to the zoning map as it pertained to their section of the county.

Plaintiffs also complain that when the second notices were published regarding hearings for zoning of the southern section, the notices related only to the map, not to the enactment or extension of the ordinance to the southern half of the county. The notices stated:

NOTICE OF PUBLIC HEARING ON THE ZONING MAP FOR THE SOUTHERN HALF OF HARNETT COUNTY. . . . The purpose of this hearing is to solicit the views of the residents of Harnett County on the proposed Zoning Map for the Southern half of the county[.] In addition, the hearing will also address an amendment to the Zoning Ordinance Text which would add a fourth Residential District to the Zoning Ordinance.

We find plaintiffs' argument unpersuasive. The mere mentioning of the map implies that there is an accompanying zoning ordinance text. Moreover, G.S. § 153A-344 (1987) only requires the zoning agency to *prepare* both the map and zoning ordinance; the statute does not require that both be mentioned in the title of the legal notice. We find that the residents of the southern section of Harnett County did have adequate notice and an opportunity to prepare and present their objections to the pending process. This assignment of error is overruled.

[2] Plaintiffs next argue that the county failed to conform to the provisions of G.S. § 153A-344 in enacting the zoning ordinance as it pertains to the southern section of the county. General Statute § 153A-344 provides that in order to exercise the power granted under the zoning portion of Article 18, the county shall create or designate a planning agency which shall then prepare a proposed zoning ordinance, including both the full text of such ordinance and maps showing proposed district boundaries. Plaintiffs argue the county's failure to have a zoning map for those areas south of the Cape Fear River prior to 18 July 1988, is fatal. We disagree, recognizing that county-wide zoning may be undertaken on an area by area basis pursuant to G.S. § 153A-342 (1987) which provides:

A county may divide its territorial jurisdiction into districts of any number, shape, and area that it may consider best suited to carry out the purposes of this Part. . . . A county

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may determine that the public interest does not require that the entire territorial jurisdiction of the county be zoned and may designate one or more portions of that jurisdiction as a zoning area or areas[.]

Applying this statute to the instant case, we conclude that G.S. § 153A-342 does not require the county to have a zoning map for the *entire* county when its objective is to implement zoning on an area by area basis. General Statutes § 153A-344, which requires the planning agency to prepare a zoning ordinance including both the full text of the ordinance and a map showing the proposed district boundaries, must be read in conjunction with G.S. § 153A-342. A reading of the two statutes together indicates that the full text of the ordinance and only a map of the area then being zoned is required. Plaintiffs' argument that the ordinance is invalid because there was no map of the southern half of the county available at the public hearing on 18 July 1989, therefore, is without merit.

[3] Plaintiffs also contend that the county failed to follow the proper procedures to extend the ordinance to the southern section of the county by amendment pursuant to G.S. § 153A-343 (1987), G.S. § 153A-344, and the terms of the zoning ordinance.

General Statutes § 153A-344 provides:

Zoning regulations and restrictions and zone boundaries may from time to time be amended, supplemented, changed, modified, or repealed. Whenever territory is added to an existing designated zoning area, it shall be treated as an amendment to the zoning ordinance for that area.

Accordingly, the addition of the southern section of the county to the northern half which was already zoned, constitutes an amendment to the zoning ordinance. Plaintiffs argue that the amendment to the zoning ordinance is governed by G.S. § 153A-343. Plaintiffs, however, are incorrect, as this statute applies only when tax maps are available for the areas to be zoned. At the time of the zoning, there were no tax maps available for Harnett County. This assignment of error is also overruled.

[4] Although G.S. § 153A-343 is qualified and restricted in its application, the Harnett County Zoning Ordinance does not contain such restrictions. Article XIII, sections 3.0 and 3.1 of the zoning ordinance provide that from time to time the Board of Commis-

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sioners may amend the ordinance according to the following procedure:

*Notice of Public Hearing*

No amendment or map change shall be adopted by the County Board of Commissioners until and after public notice and hearing. Notice of public hearing shall be published in a newspaper of general circulation in the county, at least once a week for two successive weeks prior to the hearing, the first publication not being less than 15 days nor more than 25 days before the date of the hearing. Notices shall also be made by posting the property concerned and by sending notices by first class mail to owners of the affected and surrounding property. The Zoning Administrator shall be responsible for mailing the notices and certifying that the notices were sent.

The clear and unequivocal language of the zoning ordinance itself requires notice by mail and posting of the property to be zoned. Because the county failed to follow its own procedures as delineated in the zoning ordinance that it wrote, the zoning ordinance must be adjudicated invalid as to the southern section of the county.

Our decision finds support in *Lee v. Simpson*, 44 N.C. App. 611, 261 S.E.2d 295, *disc. review denied*, 299 N.C. 737, 267 S.E.2d 662 (1980). In *Simpson*, the issue was whether the Union County Board of Commissioners violated the provisions of the county's zoning ordinance when it failed to give notice to adjoining landholders as required by the ordinance. The ordinance required in part that "[a]ll petitions for change in the zoning map shall include a legal description of the property involved and the names and addresses of current abutting property owners[.]" Petitioners' names and addresses were not listed in the rezoning petition. The ordinance also required the mailing of copies of the petition to the landowners at their last known address by regular mail. The county failed to notify the owners in this way. The *Simpson* Court held that although the board may have complied with G.S. § 153A-323, it must also comply with its own rule. The Court, setting the amendment aside, stated:

The procedural rules of an administrative agency are binding upon the agency which enacts them as well as upon the public. . . . To be valid, the action of the agency must conform to its rules which are in effect at the time the action is taken,

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particularly those designed to provide procedural safeguards for fundamental rights. *Refining Co. v. Board of Aldermen*, 284 N.C. 458, 467-68, 202 S.E.2d 129, 135 (1974); *George v. Town of Edenton*, 294 N.C. 679, 242 S.E.2d 877 (1978).

*Simpson* at 612, 261 S.E.2d at 296. In the case *sub judice*, the zoning ordinance as it relates to the southern quadrant is also invalid because the board failed to comply with its own notice requirements.

Defendant county contends that Article XIII, sections 3.0 and 3.1 of the zoning ordinance apply only to changes and amendments made after the initial adoption of the zoning ordinance in a particular area, and the purpose and intent was "that posting of property and notification of owners of adjoining property relates only to actions to re-zone parcels of property, not with respect to the initial zoning of all of the area north or all of the area south of the Cape Fear River." In light of the fact that defendant county was the drafter of the ordinance in question and in a position to include any restrictions and qualifications it chose, we are unwilling to give great weight to the county's unmanifested, unwritten intention. Harnett County failed to exclude county-wide zoning from sections 3.0 and 3.1 of the ordinance which requires notice by posting and by mail; the sections are, therefore, applicable to the instant case. Because the Harnett County Board of Commissioners violated its own ordinance's notice requirements for amending the zoning ordinance, the zoning amendment must be set aside as to the southern section of the county.

[5] In addition, defendants argue that this action is barred by the nine month statute of limitations set out in G.S. § 1-54.1 (1983). Defendants failed to affirmatively plead the statute of limitations in its answer, but raised the defense by affidavit at the summary judgment hearing. Although an affirmative defense may be raised for the first time by affidavit for the purposes of ruling on a motion for summary judgment, both parties must be aware of the defense. *Wilson Heights Church of God v. Autry*, 94 N.C. App. 111, 379 S.E.2d 691 (1989); *Gillis v. Whitley's Discount Auto Sales*, 70 N.C. App. 270, 319 S.E.2d 661 (1984). In this case, there is no evidence indicating that plaintiffs were aware of the defense. The defense should not have been considered, if it was, by the trial court in granting summary judgment.

The decision of the trial court is

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Reversed.

Judge EAGLES concurs.

Judge ORR concurring in the result by separate opinion.

Judge ORR concurring in the result.

I agree with the majority that the original notices prior to 18 July 1988 were inadequate to apprise residents of the southern section of the county of the Commissioners' intent to adopt a zoning ordinance. Those citizens in the southern section were not properly notified of this pending enactment. However, I disagree with the majority's conclusion that the second notice of October 1988 pertaining to the southern half of the county was adequate to overcome the earlier failure. This second notice pertained only to the proposed Zoning Map and not to the enactment of the actual Zoning Ordinance which had been already enacted without proper notice to the residents of the southern section of the county.

Since the majority concludes, however, that the trial court's decision should be reversed based on a failure to properly amend the ordinance, I concur in the result.

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STATE OF NORTH CAROLINA v. WILLIAM LESTER HOLDEN

No. 9129SC165

(Filed 19 May 1992)

**1. Evidence and Witnesses § 123 (NCI4th) — rape of child — prior abuse of child by another — irrelevancy**

In a prosecution for first degree rape of a child, evidence that someone else may have abused the child in 1986 was irrelevant and not admissible under N.C.G.S. § 8C-1, Rule 412(b)(2) to show that defendant did not abuse her in 1989.

**Am Jur 2d, Rape § 54.**

**2. Criminal Law § 951 (NCI4th) — motion for new trial — question of law — hearing not required**

The trial court did not err in denying defendant's motion for a new trial without a hearing where only a question of

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law was presented as to whether the court had properly excluded certain evidence.

**Am Jur 2d, New Trial § 340.****3. Evidence and Witnesses § 977 (NCI4th)— child's hearsay statements— admission under residual exception— circumstantial guarantees of trustworthiness**

A six-year-old rape victim's statements to an officer and a counselor naming "Cricket," the defendant, as her abuser possessed circumstantial guarantees of trustworthiness so as to support the trial court's admission of the statements under the Rule 803(24) residual exception to the hearsay rule where the trial court's findings on the trustworthiness factor were supported by competent evidence, and the witness was found to be unavailable because of "fear and trepidation." The trial judge's statement in the transcript of the *in camera* hearing that the child "did not seem to understand the consequences of not telling the truth," standing alone and not made the basis for his finding that the child was unavailable, was insufficient to overcome the circumstantial indicia of reliability properly found by the trial judge in his order. Furthermore, any error in the admission of the victim's statements to the officer and counselor was rendered harmless when similar statements made by the victim to her mother and a pediatrician were admitted without objection. N.C.G.S. § 1A-1, Rule 803(24).

**Am Jur 2d, Rape §§ 94, 95, 101.**

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

Judge WELLS concurring in the result.

APPEAL by defendant from judgment entered 28 August 1990 by *Judge Hollis M. Owens, Jr.*, in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 6 January 1992.

Defendant is the grandfather of the victim. He was indicted on one count of first degree rape and one count of first degree sex offense and was convicted of first degree rape. Defendant appeals from the imposition of a life sentence.

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At trial, the State's evidence tended to show the following. The six year old victim, whom we will call T.L., lived part of each month with her mother and the remainder of the month with her grandparents, Minnie Holden and the defendant, pursuant to a visitation order. In April 1989, Steve Lewis, a social worker with the Transylvania County Department of Social Services, investigated a report of possible physical abuse of the victim and as a result of his observations, referred her for a medical evaluation. Dr. Wells, a pediatrician, examined T.L. on 19 June 1989. His examination revealed abnormal findings in her vaginal and rectal areas consistent with sexual abuse. T.L. would not tell Dr. Wells who was responsible for the injuries. Dr. Wells saw T.L. again on 27 July 1989, during which visit she whispered to her mother that "Cricket" had hurt her. "Cricket" is "papaw," the defendant.

T.L. was interviewed by Detective Rita Smith of the Transylvania County Sheriff's Department and by Judy Nebrig, a counselor at Trend Community Mental Health Services, both of whom testified at trial as to what T.L. told them "Cricket" had done to her.

Steve Lewis testified that T.L. exhibited the "classic behavior" of a sexually abused child. Judy Nebrig testified that T.L. exhibited evidence of sexual abuse.

Six family members and two Head Start workers testified for defendant at trial. Their testimony was to the effect that they suspected and saw evidence that T.L. was being physically abused by her mother and stepfather. Defendant testified that he had never hurt T.L. and that he felt that T.L.'s mother, Donna, and Donna's mother had plotted against him.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.*

*V. Scott Peterson for defendant-appellant.*

JOHNSON, Judge.

## I.

[1] Defendant first contends that the trial court erred in excluding evidence of sexual abuse occurring prior to the incident for which defendant was on trial. Defendant contends that this evidence was admissible under G.S. § 8C-1, Rule 412(b) (1988), which states: "Not-



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withstanding any other provision of law, the sexual behavior of the complainant is irrelevant to any issue in the prosecution unless such behavior: . . . (2) Is evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant[.]”

Defendant presented the following evidence on *voir dire*. On 10 November 1986, two and a half years before the event at issue, the victim was returned to the defendant’s house after staying with her mother as she normally did during the first 10 days of every month. Her grandmother, Minnie Holden, noticed dried blood on her panties. The next morning, Minnie took the victim to Dr. Volk, who examined her and noted swelling and an associated inflammation at the vaginal orifice but no bleeding. The blood, swelling and inflammation were consistent with sexual abuse but could have resulted from some trauma other than sexual abuse. Volk testified that the swelling could have been the result of a trauma occurring within the previous few days. Steven Lewis and Detective Smith testified that an investigation of the incident by the Department of Social Services and the sheriff’s department included interviews with several family members but that a perpetrator could not be identified.

Defendant contends that the excluded evidence points to someone other than the defendant as being the perpetrator of the abuse which occurred in June 1989 and thus should have been admitted under Rule 412(b)(2). We disagree.

The issue is whether the excluded testimony is relevant to show that someone other than the defendant sexually abused T.L. on 28 June 1989. We find that the evidence was properly excluded as being irrelevant and confusing to the jury.

Defendant cites us to *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986), *State v. Wright*, 98 N.C. App. 658, 392 S.E.2d 125 (1990), and *State v. Maxwell*, 96 N.C. App. 19, 384 S.E.2d 553 (1989), *disc. review denied*, 326 N.C. 53, 389 S.E.2d 83 (1990). These cases do not help defendant. In all of them there is a temporal connection between the dates of the alleged offense and the evidence pointing to another perpetrator. *Ollis*, 318 N.C. 370, 348 S.E.2d 777 (evidence that another man abused victim during same time period as alleged against defendant held admissible to explain physical evidence); *Maxwell*, 96 N.C. App. 19, 384 S.E.2d 553 (evidence of abuse when victim was 4 is relevant because the victim alleged defendant had

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been molesting her since age 4); *Wright*, 98 N.C. App. 658, 392 S.E.2d 125 (evidence of masturbation occurring during same time period as alleged offense relevant to explain physical findings).

In the case *sub judice*, the abuse at issue occurred two and a half years before the incident resulting in the charge against defendant. Neither the indictment nor any evidence adduced at trial connects defendant with any incident occurring in 1986, therefore, any evidence that someone else may have abused T.L. in 1986 is irrelevant to show that defendant did not abuse her in 1989. This assignment is overruled.

## II.

[2] Defendant next contends that the trial court erred in denying his motion for a new trial. He alleges error in the exclusion of the Rule 412(b)(2) evidence which is the subject of his first argument. Having found that the exclusion of this evidence was not error, we find that the trial court did not err in denying defendant's motion for a new trial.

Defendant also contends that the trial court erred in denying his motion without a hearing as required by G.S. § 15A-1420(c)(1) (1988). Under subsection (c)(3), "[t]he court must determine the motion without a hearing when the motion and supporting and opposing information present only questions of law." G.S. § 15A-1420(c)(3). Here the only question to be decided by the trial court was whether it had properly excluded the Rule 412(b)(2) evidence, a question of law which defendant supported by supplying two cases to the trial judge for consideration. Because only a question of law was involved, a hearing was not required. G.S. § 15A-1420(c)(3). This assignment is overruled.

## III.

[3] Defendant next contends that the trial court erred in admitting hearsay statements of the victim pursuant to the residual hearsay exception, G.S. § 8C-1, Rule 803(24) (1988). He contends that the trial court improperly found that the statements possessed "circumstantial guarantees of trustworthiness" so as to satisfy due process requirements and the confrontation clause. We disagree.

On the first day of trial, the State served defendant with notice of its intention to offer statements of the victim by and through the testimony of Detective Smith and Judy Nebrig. The judge held an *in camera* examination of the child attended only

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by the judge, the child, the guardian ad litem and the court reporter. After the examination, the trial court placed in the record its conclusion that the victim was unavailable due to fear and trepidation in that she was "entirely incapable of going to the witness stand, taking the oath and relating the events in question." The trial court also found that the victim "did not seem to understand the consequences of not telling the truth."

The trial court then heard Smith, Nebrig and several other witnesses on *voir dire*, following which he held that the victim's hearsay statements to Smith and Nebrig were admissible under Evidence Rule 803(24). In his written order, Judge Owens made findings of fact and conclusions of law as required by *State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985). See also *State v. Deanes*, 323 N.C. 508, 374 S.E.2d 249 (1988), cert. denied, *Deanes v. North Carolina*, 490 U.S. 1101, 104 L.E.2d 1009 (1989). In his written order, Judge Owens made no mention of his previous statement in the record that T.L. "did not seem to understand the consequences of not telling the truth."

With regard to the trustworthiness factor, the trial court made the following findings of fact:

that the infant assuredly had personal knowledge of how and by whom she was being sexually abused, especially in light of the corroborating medical evidence. That the infant would have been motivated to deal truthfully with Officer Smith and Mrs. Nebrig as persons in authority. That the infant was specific as to the location where the alleged rape and sodomy took place. That the infant never recanted or substantially altered her statement. That, therefore, the totality of the circumstances in this case assure a high probability of the truthfulness of the statements made by the infant to Officer Smith and Mrs. Nebrig. . . . That the infant at all times identified her abuser as "Cricket."

Defendant contends that the trial court erred in finding that the hearsay statements admitted through Detective Smith and Judy Nebrig possess sufficient indicia of reliability for admission under Rule 803(24). He points to the trial court's statement in the record that the victim "does not seem to understand the consequences of not telling the truth." Defendant does not contest the trial court's finding that the child is unavailable.

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Before hearsay statements may be admitted as substantive evidence under Rule 803(24), the trial judge must undertake a six part inquiry. *Smith*, 315 N.C. at 92, 337 S.E.2d at 844; *Deanes*, 323 N.C. 508, 374 S.E.2d 249. The trial judge must determine in the affirmative that (A) the proper notice has been given, (B) the hearsay is not specifically covered elsewhere, (C) the statement is trustworthy, (D) the statement is material, (E) the statement is more probative on the issue than any other evidence which the proponent can procure through reasonable efforts, and (F) the interests of justice will be best served by admission. *Smith*, 315 N.C. at 92-96, 337 S.E.2d at 844-47.

We need discuss only the trustworthiness factor.

Although a hearsay statement is not specifically covered by any of the 23 "pigeonhole" exceptions, it may be admissible under the residual exception if it possesses "circumstantial guarantees of trustworthiness" equivalent to those required for admission under the enumerated exceptions. This threshold determination has been called "the most significant requirement" of admissibility under Rule 803(24). Courts and commentators have struggled with the meaning of this requirement, and certain factors are acquiring recognition as significant in guiding the trial judge's determination of the proffered statement's trustworthiness. Among these factors are (1) assurance of personal knowledge of the declarant of the underlying event; (2) the declarant's motivation to speak the truth or otherwise; (3) whether the declarant ever recanted the testimony; and (4) the practical availability of the declarant at trial for meaningful cross-examination[.] (Citations omitted.)

*Smith*, 315 N.C. at 93-94, 337 S.E.2d at 844-45. As explained in *Deanes*, the first two factors, the assurance of personal knowledge and the declarant's motivation to speak the truth, bear upon the declarant at the time the hearsay statements are made. The second two factors, whether the declarant ever recanted the statement(s) and whether the declarant is available for cross-examination, go to the truthfulness of the statement, even though viewed in retrospect. *Deanes*, 323 N.C. at 516-17, 374 S.E.2d at 255-56.

None of these factors, alone or in combination, may conclusively establish or discount the statement's "circumstantial guarantees of trustworthiness." The trial judge should focus upon the factors that bear on the declarant at the time of

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making the out-of-court statement and should keep in mind that the peculiar factual context within which the statement was made will determine its trustworthiness.

*Smith*, 315 N.C. at 94, 337 S.E.2d at 845. Thus, the emphasis in the analysis of the trustworthiness factor is on the circumstances surrounding the declarant at the time the statements were made, not the competency of the declarant at the time of trial. *But see State v. Stutts*, 105 N.C. App. 557, 414 S.E.2d 61 (1992).

Speaking of the standard of review on appeal, our Supreme Court has stated:

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. On the other four issues, the trial court must make conclusions of law and give its analysis. We will find reversible error only if the findings are not supported by competent evidence, or if the law was erroneously applied. (Citations omitted.)

*Deames*, 323 N.C. at 515, 374 S.E.2d at 255.

We find no error in the admission of the victim's hearsay statements. The trial judge's findings of fact on the trustworthiness factor are supported by competent evidence. The trial judge's lone statement, found in the transcript of the *in camera* hearing, that the child "did not seem to understand the consequences of not telling the truth," standing alone and not made the basis for his finding that she was unavailable, is insufficient to overcome the other competent evidence which supports the admission of the hearsay statements under Rule 803(24). As explained in *Smith* and *Deames*, the determination as to whether the hearsay statements are trustworthy must focus on the circumstantial guarantees of reliability which surround the declarant at the time the statement was made and not on the witness' competence at the time of the hearing.

We distinguish this case from *Stutts*, 105 N.C. App. 557, 414 S.E.2d 61. In *Stutts*, the trial court found that the child-witness 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. The trial

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court nevertheless found that her prior hearsay statements were admissible under Evidence Rule 804(b)(5). G.S. § 8C-1, Rule 804(b)(5) (1988). This Court found error, noting that the fourth “trustworthiness” factor, common to both Rule 803(24) and Rule 804(b)(5), has been reworded to clarify its purpose in Rule 804(b)(5). *Smith*, 315 N.C. 76, 337 S.E.2d 833, (Rule 803(24)); *State v. Triplett*, 316 N.C. 1, 340 S.E.2d 736 (1986), (Rule 804(b)(5)); *State v. Nichols*, 321 N.C. 616, 365 S.E.2d 561 (1988). As applied to Rule 804(b)(5), the fourth factor now should be read as “the reason, within the meaning of Rule 804(a), for the declarant’s unavailability.” *Nichols*, 321 N.C. at 624, 365 S.E.2d at 566. *Accord State v. Garner*, 330 N.C. 273, 285, 410 S.E.2d 861, 867 (1991). The *Stutts* Court applied the fourth factor as reworded in *Nichols*, and held that finding a four year old witness unavailable because she could not tell truth from fantasy precluded her prior hearsay statements from possessing sufficient guarantees of trustworthiness to be admissible under Rule 804(b)(5).

*Stutts* does not require that we find error in the case before us. In the case *sub judice*, the trial court found the victim’s hearsay statements admissible under Rule 803(24), not Rule 804(b)(5). The witness was found to be unavailable because of “fear and trepidation” and not because she could not distinguish truth from fantasy. The trial judge’s statement in the *voir dire* transcript that the witness did not understand the consequences of not telling the truth, alone, is not sufficient to overcome the circumstantial indicia of reliability properly found by the trial judge in his order.

We also note that T.L.’s hearsay statements naming “Cricket” as her abuser were admitted without objection in the testimony of her mother and Dr. Wells. Thus, even assuming that their admission under Rule 803(24) was error, it was harmless error. *State v. Hunt*, 325 N.C. 187, 196, 381 S.E.2d 453, 459 (1989) (benefit of objection lost when same or similar evidence has been admitted or is later admitted without objection); *State v. Moses*, 316 N.C. 356, 362, 341 S.E.2d 551, 555 (1986) (benefit of defendant’s objection to introduction of letter lost when defendant later read from letter); *State v. Hyder*, 100 N.C. App. 270, 396 S.E.2d 86 (1990) (no prejudice in admission of evidence already entered without objection in previous testimony).

No error.

Chief Judge HEDRICK concurs.

## MAJEBE v. NORTH CAROLINA BOARD OF MEDICAL EXAMINERS

[106 N.C. App. 253 (1992)]

Judge WELLS concurring in the result.

Judge WELLS concurring in the result.

On the issue of trustworthiness, I find it difficult to distinguish this case from *State v. Stutts*, 105 N.C. App. 557, 414 S.E.2d 61 (1992). Because the defendant did not object to the testimony of the victim's mother and Dr. Wells, I concur in the result.

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M. C. MAJEBE, INDIVIDUALLY, AND AS THE SOLE PROPRIETOR OF THE CHINESE ACUPUNCTURE AND HERBOLOGY CLINIC, AND SUSAN HICKERSON, FRANCES KELLY, MATILANN THOMS, CINDA DOBBS, BOB JAMES AND WIFE, BECKY JAMES, TOM AND CINDY REDINGER, AND WILL RUGGLES, PLAINTIFFS-APPELLANTS v. THE NORTH CAROLINA BOARD OF MEDICAL EXAMINERS, EBEN ALEXANDER, JR., M.D., JOHN THOMAS DANIEL, JR., M.D., HAROLD L. GODWIN, M.D., HECTOR HIMEL HENRY, II, M.D., JOHN WESLEY NANCE, M.D., F. M. SIMMONS PATTERSON, JR., M.D., NICHOLAS STRATAS, M.D., AND KATHRYN HOWELL WILLIS, NOT INDIVIDUALLY BUT IN THEIR OFFICIAL CAPACITY, THE HONORABLE LACY THORNBURG, AS ATTORNEY GENERAL OF THE STATE OF NORTH CAROLINA AND A MEMBER OF THE COUNCIL OF STATE; ROBERT MORGAN, AS AN EMPLOYEE OF THE DEPARTMENT OF JUSTICE AND DIRECTOR OF THE STATE BUREAU OF INVESTIGATION, AND ROBERT B. KAISER, AS AN AGENT OF THE STATE BUREAU OF INVESTIGATION, AND INDIVIDUALLY, DEFENDANTS-APPELLEES

No. 9028SC1335

(Filed 19 May 1992)

**1. Physicians, Surgeons, and Allied Professions § 1 (NCI3d) — acupuncturist and naturopath — practicing medicine without a license — declaratory judgment action regarding investigation — no actual controversy**

The trial court properly granted summary judgment for defendants on plaintiffs' action for declaratory relief regarding a criminal investigation of plaintiff Majebe for the unauthorized practice of medicine where the trial court determined that plaintiffs had failed to forecast a controversy regarding referral to the local district attorney. The Board of Medical Examiners followed the language of N.C.G.S. § 90-21 and referred to defendant Attorney General the information it had obtained concerning plaintiff Majebe; the Attorney General then complied with the language of the statute and initiated

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the investigation; and there is nothing in the statute that requires the Board to refer alleged violations to the district attorney instead of to the Attorney General.

**Am Jur 2d, Physicians, Surgeons, and Other Healers**  
**§§ 42, 127.**

**Acupuncture as illegal practice of medicine. 72 ALR3d**  
**1257.**

- 2. Declaratory Judgment Actions § 7 (NCI4th)— acupuncturist and naturopath—practicing medicine without license— declaratory judgment action regarding investigation— validity of search warrant—no actual controversy**

The trial court properly granted summary judgment for defendants on plaintiffs' action for declaratory relief regarding a criminal investigation of plaintiff Majebe for practicing medicine without a license where the trial court determined that there was no controversy appropriate for a declaratory judgment. Plaintiff challenged a search which had already occurred, not a statute which authorized the search, and it was not clear that plaintiff would be subjected to a search in the future.

**Am Jur 2d, Physicians, Surgeons, and Other Healers**  
**§§ 42, 127.**

**Acupuncture as illegal practice of medicine. 72 ALR3d**  
**1257.**

- 3. Physicians, Surgeons, and Allied Professions § 1 (NCI3d)— acupuncturist and naturopath—practicing medicine without license— investigation—no violation of 42 U.S.C. 1983**

The trial court did not err by granting summary judgment in favor of defendants in an action for declaratory relief regarding a criminal investigation for practicing medicine without a license where plaintiffs alleged violations of 42 U.S.C. 1983. It is clear from the Court's decision in *In re Guess*, 327 N.C. 46, that there exists no protected privacy right to practice unorthodox medical treatment.

**Am Jur 2d, Physicians, Surgeons, and Other Healers**  
**§§ 42, 127.**

**Acupuncture as illegal practice of medicine. 72 ALR3d**  
**1257.**



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**4. Searches and Seizures § 19 (NCI3d)— acupuncturist and naturopath—practicing medicine without license—investigation—not an illegal search**

The trial court properly granted summary judgment for defendants in an action in which plaintiffs sought declaratory relief from a criminal investigation for practicing medicine without a license where plaintiffs contended that plaintiff Majebe's right to be free from illegal searches and seizures under the fourth amendment was violated. The SBI agent relied upon a memorandum from the Attorney General's office, a detailed letter from the Board of Medical Examiners to the Attorney General, and published advertisements when applying for the warrant to search the clinic. The agent also interviewed a man who had taken his wife to the clinic for treatment.

**Am Jur 2d, Searches and Seizures §§ 64-70.**

**5. Physicians, Surgeons, and Allied Professions § 1 (NCI3d)— acupuncturist and naturopath—practicing medicine without a license—no selective enforcement**

The trial court properly granted summary judgment for defendants in an action for declaratory relief from a criminal investigation for practicing medicine without a license where plaintiffs contended that defendants selectively enforced N.C.G.S. § 90-18. Plaintiff Majebe did not allege a pattern of intentional discrimination and did not assert that defendants relied upon an invidious classification such as race, religion, or national origin.

**Am Jur 2d, Declaratory Judgments § 71.**

**6. Trespass § 1 (NCI3d)— practicing medicine without license—search of office—not a trespass**

The trial court did not err by granting summary judgment for defendant Kaiser on a civil action for trespass arising from a criminal investigation of plaintiff Majebe for practicing medicine without a license. The entry in the case at bar was a permitted entry since defendant Kaiser conducted the search pursuant to a search warrant issued by an impartial magistrate.

**Am Jur 2d, Searches and Seizures § 19.**

## MAJEBE v. NORTH CAROLINA BOARD OF MEDICAL EXAMINERS

[106 N.C. App. 253 (1992)]

**7. Privacy § 1 (NCI3d)— acupuncturist and naturopath—investigation—no invasion of patient's privacy**

The trial court did not err by dismissing plaintiffs' invasion of privacy claims based on seizure of records and their right to obtain treatment by acupuncture. North Carolina has recognized no fundamental right to receive unorthodox medical treatment, and state regulation of the medical profession is a legitimate exercise of the police power.

**Am Jur 2d, Physicians, Surgeons, and Other Healers § 27.**

APPEAL by plaintiffs from order entered 24 September 1990 in BUNCOMBE County Superior Court by *Judge Robert D. Lewis*.

*Ronald W. Howell, P.A., by Ronald W. Howell, for plaintiffs-appellants.*

*Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by Michael Weddington and Susan M. Parker, and McGuire, Wood & Bisette, P.A., by Joseph P. McGuire, for defendant-appellee Board of Medical Examiners.*

*Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General James J. Coman and Assistant Attorney General David F. Hoke, for defendants-appellees Thornburg, Morgan, and Kaiser.*

WYNN, Judge.

M.C. Majebe is an acupuncturist, naturopath, and the sole proprietor and owner of the Chinese Acupuncture and Herbology Clinic located in Buncombe County. Pursuant to N.C. Gen. Stat. § 90-21 (1990), the Board of Medical Examiners of the State of North Carolina, on 2 January 1990, requested the Attorney General to investigate Ms. Majebe, regarding her possible violation of N.C. Gen. Stat. § 90-18 (1990), which prohibits the unauthorized practice of medicine. Assistant Attorney General Martha K. Walston initiated an investigation of plaintiff Majebe by the State Bureau of Investigation.

Upon affidavit of defendant Special Agent Robert Kaiser, a search warrant for Ms. Majebe's Clinic was issued on 5 June 1990. The search was conducted pursuant to this warrant, and patient files, financial records, and diplomas were seized.

## MAJEBE v. NORTH CAROLINA BOARD OF MEDICAL EXAMINERS

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Ms. Majebe and her patients requested injunctive and declaratory relief and damages regarding the criminal investigation of plaintiff Majebe for the practice of medicine without a license. From the summary judgment dismissing their complaint, Majebe and her patients appealed. All records have been returned to plaintiff Majebe, and she continues to practice acupuncture, herbology, and naturopathy without a medical license.

I. *Declaratory Judgment*

[1] In their first assignment of error, plaintiffs contend that the trial court erred in granting summary judgment in favor of the North Carolina Board of Medical Examiners and its individual members (hereinafter "Board") and defendants Thornburg, Morgan and Kaiser. The trial judge determined that plaintiffs, in seeking two declarations, failed to forecast a controversy within the purview of the North Carolina Declaratory Judgment Act, N.C. Gen. Stat. § 1-253 (1983).

A trial court has jurisdiction to render a declaratory judgment only when the complaint shows the following:

- (1) that a real controversy exists between or among the parties to the action;
- (2) that such controversy arises out of opposing contentions of the parties, made in good faith, as to the validity or construction of a statute, . . . ; and
- (3) that the parties to the action have or may have legal rights, or are or may be under legal liabilities which are involved in the controversy, and may be determined by a judgment or decree in the action . . . .

*Carolina Power and Light Co. v. Iseley*, 203 N.C. 811, 820, 167 S.E.2d 56, 60 (1933). See also *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E.2d 25 (1986). An actual controversy exists when litigation arising out of conflicting contentions as to rights and liabilities appears unavoidable. *Gaston Board of Realtors, Inc. v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984).

The first of the two declarations sought by plaintiffs was whether the Board was required to refer the information concerning Majebe to the local district attorney under N.C. Gen. Stat. § 90-21 when it found a violation of N.C. Gen. Stat. § 90-18. For the reasons

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which follow, we find no merit to plaintiffs' argument that an actual controversy existed respecting this issue.

In *State v. Loesch*, 237 N.C. 611, 75 S.E.2d 654 (1953), defendant was prosecuted for practicing medicine without a license in violation of N.C. Gen. Stat. § 90-18. Defendant sought to quash the bill of indictment on the basis of the State's failure to comply strictly with the provisions of section 90-21. Section 90-21 provides, in pertinent part,

In case of the violation of the criminal provisions of G.S. 90-18, the Attorney General of the State of North Carolina, upon complaint of the Board of Medical Examiners of the State of North Carolina, shall investigate the charges preferred, and if in his judgment the law has been violated, he shall direct the district attorney of the district in which the offense was committed to institute a criminal action against the offending persons.

N.C. Gen. Stat. § 90-21. The *Loesch* Court determined that the procedures in section 90-21 "merely establish a method whereby the Board of Medical Examiners of the State of North Carolina may procure an investigation by the Attorney-General with respect to alleged violations of sections 90-18 to 90-20 of our General Statutes." *Loesch*, 237 N.C. at 613, 75 S.E.2d at 656.

In the instant case, the Board followed the language of section 90-21 and referred to defendant Attorney General the information it had obtained concerning Ms. Majebe. The Attorney General then complied with the language of the statute and initiated the investigation of plaintiff Majebe by the Diversion Investigative Unit of the State Bureau of Investigation. As *Loesch* indicates, there is nothing in the language of section 90-21 which requires the Board to refer alleged violations of section 90-18 to the district attorney instead of to the Attorney General. Since there was no controversy regarding section 90-21, we hold that the trial court properly granted summary judgment in favor of defendants on plaintiffs' claim for declaratory relief.

[2] Plaintiff Majebe sought a second declaration as to the validity of the search of her office, urging the trial court to declare the search warrant invalid and direct the return of her property. Plaintiff argued that the warrant failed to meet the requirement of particularity, the information in the affidavit was stale, and the

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statements in the affidavits were conclusions of law. We also agree with the trial court's decision to grant summary judgment in favor of defendants on this issue.

In *Adams v. Dep't of N.E.R.*, 295 N.C. 683, 249 S.E.2d 402 (1978), plaintiffs challenged the constitutionality of a statute which allegedly authorized warrantless searches. Our Supreme Court found that there was no controversy because the plaintiffs had not been subjected to actual searches. *Id.* at 705, 249 S.E.2d at 415. Plaintiff in the instant case contends that the *Adams* decision implies that a declaratory judgment is appropriate after a search has occurred. We find no merit to this argument. In *Adams*, plaintiffs were not challenging the validity of a search but rather the statute which authorized the search. There was no controversy because it was not clear that plaintiffs would be subjected to a search in the future. Plaintiff in the case at bar challenges a search, not a statute which authorizes a search, and the search already has occurred. There simply is no controversy appropriate for a declaratory judgment. If, in the future, plaintiff is prosecuted by the State, that proceeding will be the proper forum to challenge the search. Accordingly, we find the plaintiff's assignment of error to be without merit.

## II. 42 U.S.C. § 1983

[3] Plaintiffs further contend that the trial court committed prejudicial error in granting summary judgment in favor of defendants on their claims for relief pursuant to 42 U.S.C. § 1983, based on the violation of plaintiff Majebe's rights. The rights allegedly violated by defendants include an illegal search and seizure, invasion of privacy, and selective enforcement of the provisions of the Medical Practice Act. We disagree.

Section 1983 affords the claimant a civil remedy for a deprivation of federally protected rights by persons acting under the color of state law. In pertinent part, section 1983 provides:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress.

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42 U.S.C. § 1983. To state a cause of action under section 1983, a claimant must allege an intentional deprivation of a protected right. *Rizzo v. Goode*, 423 U.S. 362, 46 L.Ed.2d 561 (1976).

In the case of *In re Guess*, 327 N.C. 46, 393 S.E.2d 833 (1990), *cert. denied*, --- U.S. ---, 112 L.Ed.2d 774 (1991), the Board of Medical Examiners conditionally revoked a physician's license for administering homeopathic medical treatments to his patients. Our Supreme Court held that the Board's decision did not invade the physician's privacy right by invading his right to select his method of practice: "[T]here is no right to practice medicine which is not subordinate to the police power of the states." *Id.* at 57, 393 S.E.2d at 839 (quoting *Lambert v. Yellowley*, 272 U.S. 581, 596, 71 L.Ed. 422, 429 (1926)). It is clear from the Court's decision in *Guess* that there exists no protected privacy right to practice unorthodox medical treatment, here acupuncture.

[4] Plaintiffs also argue that plaintiff Majebe's right to be free from illegal searches and seizures under the fourth amendment was violated. We disagree. Agent Kaiser relied upon a memorandum from the Attorney General's office regarding the investigation of Ms. Majebe, a detailed letter from the Board to the Attorney General, and published advertisements for the Chinese Acupuncture & Herbology Clinic when applying for the warrant to search the Clinic. Kaiser also interviewed Mr. John Voda who confirmed that he took his wife to the office of Ms. Majebe for treatment of insomnia and a nervous condition. In the opinion of this Court, there was sufficient evidence from which the trial court could conclude that there were no genuine issues of material fact regarding the violation of Majebe's fourth amendment rights.

[5] Finally, as to plaintiffs' contention that defendants selectively enforced the provisions of N.C. Gen. Stat. § 90-18, we agree with the trial court's decision to grant summary judgment in favor of defendants. In order to show selective prosecution, this Court has stated the following:

The generally recognized two-part test to show discriminatory selective prosecution is (1) the defendant must make a *prima facie* showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; (2) upon satisfying (1) above, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible

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considerations as race, religion, or the desire to prevent his exercise of constitutional rights.

*State v. Howard*, 78 N.C. App. 262, 266-67, 337 S.E.2d 598, 601-02 (1985), *disc. review denied*, 316 N.C. 198, 341 S.E.2d 581 (1986). As stated repeatedly by our Supreme Court, a party alleging selective enforcement must present evidence of a pattern of discrimination, "an evil eye and an unequal hand." *Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 445, 358 S.E.2d 372, 376 (1987) (quoting *Yick Wo v. Hopkins*, 118 U.S. 356, 373-74, 30 L.Ed. 220, 227 (1886)). Our Supreme Court has rejected the following argument:

He complains that he has been singled out for prosecution; that others have been guilty of unethical conduct who have not been punished or who have not received as severe punishment as did he, and, in effect, because all have not been prosecuted and punished, he should not be.

. . .

This is equivalent to the position that until all murderers, robbers, and other criminals have been convicted and punished, the remainder, even though their guilt is clearly established, should not be either. The fallacy of this position is apparent from a statement of his contentions.

*State Bar v. Frazier*, 269 N.C. 625, 636, 153 S.E.2d 367, 374, *cert. denied*, 389 U.S. 826, 19 L.Ed.2d 81 (1967).

In the case at bar, plaintiff Majebe alleged no pattern of intentional discrimination by any of the defendants. Furthermore, plaintiff did not assert that defendants relied upon an invidious classification such as race, religion, or national origin. We, therefore, find that the trial court did not err in granting summary judgment in favor of defendants on this issue.

### III. Trespass

[6] Plaintiff Majebe further assigns error to the trial court's order granting summary judgment in favor of defendant Kaiser on her claim for trespass against Kaiser.

The civil action of trespass to land protects the possessory interest in land from unpermitted physical entry. *See e.g., Paris v. Carolina Portable Aggregates, Inc.*, 271 N.C. 471, 157 S.E.2d 131 (1967); *Wall v. Trogdon*, 249 N.C. 747, 107 S.E.2d 757 (1959).

## MAJEBE v. NORTH CAROLINA BOARD OF MEDICAL EXAMINERS

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The entry in the case at bar, however, was a permitted entry since defendant Kaiser conducted the search pursuant to a search warrant issued by an impartial magistrate. Kaiser's failure to execute the warrant would have constituted a dereliction of duty. We find, therefore, that the plaintiff's assignment of error is meritless.

IV. *Invasion of Privacy*

[7] Finally, the patient plaintiffs contend that the trial court committed error in dismissing their claims for invasion of privacy based on the seizure of their records and on their right to obtain treatment by acupuncture. We disagree.

Plaintiffs urge this Court to follow the Southern District of Texas' decision in *Andrews v. Ballard*, 498 F. Supp. 1038 (S.D. Texas 1980), in which plaintiffs challenged provisions of the Texas Medical Practice Act as applied to the practice of acupuncture by maintaining that the constitutional right of privacy encompasses the decision to obtain medical treatment. *Id.* at 1039. The *Andrews* Court agreed with plaintiffs and held that there was a "constitutional right, encompassed by the right of privacy, to decide to obtain acupuncture treatment." *Id.* at 1057.

The North Carolina Supreme Court's decision in *Guess*, however, controls this issue. With respect to the practice of homeopathy, Dr. Guess argued that the Board's decision invaded his patients' privacy rights. Our Supreme Court rejected this argument and stated that "we have recognized no fundamental right to receive unorthodox medical treatment, and we decline to do so now." *Guess*, 327 N.C. at 57, 393 S.E.2d at 840. The *Guess* Court further held that state regulation of the medical profession is a legitimate exercise of the police power. *Id.* at 57, 393 S.E.2d at 839.

In the case at bar, we are bound by the *Guess* decision and choose not to adopt the disfavored view expounded by the *Andrews* Court. See *New York State Ophthalmological Soc. v. Bowen*, 854 F.2d 1379 (D.C. Cir. 1988), *cert. denied*, 490 U.S. 1098, 104 L.Ed.2d 1003 (1989); *Rutherford v. U.S.*, 616 F.2d 455 (10th Cir.), *cert. denied*, 449 U.S. 937, 66 L.Ed.2d 160 (1980); *Jacob v. Curt*, 721 F. Supp. 1536 (D.R.I. 1989), *aff'd*, 898 F.2d 838 (1st Cir. 1990). We, therefore, find no error in the trial court's dismissal of plaintiffs' claims.



## ROSE'S STORES, INC. v. BOYLES

[106 N.C. App. 263 (1992)]

We have examined plaintiffs' remaining assignments of error and find them to be without merit. Accordingly, the order of the trial court is,

Affirmed.

Judges WELLS and PARKER concur.

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ROSE'S STORES, INC., PLAINTIFF v. HARLAN E. BOYLES, STATE TREASURER  
OF THE STATE OF NORTH CAROLINA; AND THE DEPARTMENT OF THE STATE  
TREASURER, DEFENDANTS

No. 919SC503

(Filed 19 May 1992)

**Abandoned, Lost, and Escheated Property § 15 (NC14th) — unrefunded layaway payments — abandoned property — escheat to State**

Layaway payments made by retail customers who failed to complete the purchases but who did not request a refund of their payments constituted property held in the ordinary course of the holder's business and became abandoned property subject to escheat to the State pursuant to N.C.G.S. § 116B-21 after they had been held by the retailer for greater than five years.

**Am Jur 2d, Abandoned, Lost, and Unclaimed Property § 6.**

**Validity, construction, and application of lost or abandoned goods statutes. 23 ALR4th 1025.**

APPEAL by the defendants from an order entered 11 January 1991 by *Judge Henry W. Hight, Jr.* in VANCE County Superior Court. Heard in the Court of Appeals on 17 March 1992.

*George T. Blackburn, II, Vice President, General Counsel, for plaintiff-appellee.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Douglas A. Johnston, for the defendants-appellants.*

## ROSE'S STORES, INC. v. BOYLES

[106 N.C. App. 263 (1992)]

LEWIS, Judge.

Plaintiff-appellee, Rose's Stores, Inc., is a Delaware corporation with an office and principal place of business in Henderson, North Carolina. Appellee operates retail stores in eleven southeastern states. Defendants-appellants are the Treasurer of North Carolina and the Department of the State Treasury. Incident to its sales, Rose's furnishes a layaway service under the terms of which the customer agrees to purchase a retail item or items from one of Rose's stores. After the customer signs the layaway agreement, Rose's removes the item from the sales floor and places it in the stockroom. Pursuant to the agreement, the customer is required to make periodic payments toward the purchase of this item. Upon completion of the payments, the customer receives the item. If the customer fails to make all of the payments, the item is returned to the sales floor. Company policy is that the amount paid on the layaway item is retained by Rose's or returned to the customer upon request.

Rose's treats all layaway transactions as sales for the contract price from the date of layaway. The proceeds of the sale are counted as income and the appropriate sales tax is remitted to the North Carolina State Treasury. The customer's payments on the item are reflected in Rose's accounts receivable. During an October 1988 audit, appellants discovered a considerable sum of accumulated layaway payments retained by Rose's on items which had been returned to the sales floor. Appellants claimed that these funds were abandoned property which should escheat to the State and demanded that Rose's deliver these funds pursuant to N.C.G.S. § 116B-21. Prior to this audit, appellants had not labeled layaway payments as unclaimed or abandoned property and had not required Rose's or other retailers to deliver these funds to the State. Since this audit, appellants have notified other retailers that they must remit these funds to the State.

Rose's filed suit on 19 September 1990 seeking a declaratory judgment on the application of N.C.G.S. § 116B-21 in the context of layaway transactions. By order entered 11 January 1991, the trial court held that layaway payments made by customers who failed to complete the purchase, but who did not request a return of their payments, were not subject to the escheat statute. The Treasurer and the Department appeal.

## ROSE'S STORES, INC. v. BOYLES

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At early common law, the property of an intestate, who died without heirs, escheated to the crown. Now, all property present within this State which is determined to be unclaimed or abandoned escheats to North Carolina's Escheat Fund. N.C.G.S. §§ 116B-2, 116B-11, and 116B-27 (1990). The statute makes the State a custodian of the property or its proceeds for the rightful owners. As a mere custodian, the State holds the property or its proceeds in perpetuity until rightful ownership is determined. The property or its proceeds is held in the trust with the income distributed annually to the State Education Assistance Authority for loans to needy students. N.C.G.S. §§ 116B-36(b) and 116B-37. The Escheat Fund must maintain a \$5,000,000.00 permanent refund reserve in order to pay "refunds of escheated or abandoned property to persons entitled thereto." N.C.G.S. § 116B-36(f) (1990). Upon proving their claims, heirs and creditors may obtain the escheated property or its proceeds, N.C.G.S. § 116B-4, and owners, or their successors-in-interest, may obtain the abandoned property or its proceeds. N.C.G.S. § 116B-38.

The State Treasurer is the administrator of the Escheat Fund. N.C.G.S. § 116B-27 (1990). The administration of the Fund is governed by N.C.G.S. §§ 116B-1 through 116B-49. The sections relevant to this appeal provide:

Property held in the ordinary course of business.

(a) Property.—All property, not otherwise covered in this Chapter, held in the ordinary course of the *holder's* business, including accounts payable and other obligations of any type, shall be presumed abandoned if it has not been claimed within five years after becoming payable or distributable. . . .

N.C.G.S. § 116B-21 (1990) (emphasis added). A holder is "any person in possession of property subject to this Chapter belonging to another. . . ." N.C.G.S. § 116B-10(4) (1990). An owner is "any person having a legal or equitable interest in property subject to this Chapter, or his legal representative." N.C.G.S. § 116B-10(6) (1990).

Property which is held in the ordinary course of business is deemed abandoned and subject to escheat when it is: 1) any item of property, not otherwise specifically covered under the escheat statute, 2) in the possession of one not the owner, and 3) held for five years after the sum becomes payable or distributable. N.C.G.S. § 116B-21 (1990). Rose's does not dispute that layaway

## ROSE'S STORES, INC. v. BOYLES

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payments meet the first part of the test. Rose's disputes both the second and third parts. Rose's argued and the trial court concluded, with regard to the unrefunded layaway payments, that Rose's is not a holder, the layaway customers are not owners, the sum is not property held in the ordinary course of business, is not payable or distributable, and is not unclaimed or abandoned personal property.

Rose's claims that these layaway payments are not abandoned within the meaning of the statute because the funds never leave the owner's possession. According to this argument, money enters the store in the customer-owner's possession. Upon tender as a layaway payment, Rose's becomes the *owner* due to its accounting of the money as income and its paying the appropriate sales tax. In the alternative, Rose's argues that the funds are not subject to escheat because they are not payable or distributable until the damages resulting from the incomplete layaway transaction have been determined. We do not agree. For the following reasons, we reverse the trial court.

Because it permits refunds, Rose's is not the owner of the layaway funds. Rose's refunds, upon request, the total of the accumulated layaway payments, less a \$2.00 service charge. The parties stipulated that the layaway agreement is a contract for the sale of goods. Rose's policy on refunds is a material part of this contract. Should Rose's refuse to repay the amount paid in, the customer could sue on the layaway contract and get a refund. As long as a customer may get a refund, merely possession of the funds, not ownership, has been ceded. Rose's asserts it never refuses to refund layaway payments when requested. At the very least, the customer retains an equitable interest in the money. The retention of a legal or an equitable interest in the funds makes the customer the statutory owner of the layaway payments. N.C.G.S. § 116B-10(6) (1990). Since Rose's maintains physical possession of the layaway payments and the goods pursuant to a contract for the sale of goods, Rose's is a holder of the funds in the course of business. As a holder, not an owner, the layaway funds within its control are subject to the escheat statute.

Pursuant to its belief in its ownership of the unclaimed funds, Rose's argues that its policy of returning the accumulated payments upon request does not waive its right, as the owner, to keep the money. The trial court agreed and concluded the refund policy

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did not constitute waiver. As we have determined that Rose's is not the owner, but a holder, waiver is not an issue. The layaway customers remain the owners of the payments despite Rose's possession of the funds. Under our escheat statute, the State steps into the shoes of the absent owner after a five year period of separation of property from owner and takes possession until such time as the owner asserts title. As custodian, the State's rights in this property are derivative in nature. Pursuant to its derivative rights, the State may assert the absent customer-owner's right to reclaim and retrieve the unrefunded layaway payments from Rose's possession. Rose's argument and the trial court's holding to the contrary are overruled.

Rose's argues that the intent of the layaway contract determines the ownership of the funds. Rose's claims that it did not intend to be a "holder" as evidenced by its accounting practices. This argument is misplaced. Neither Rose's intentions, nor its actions override a statute. Rose's is a holder, despite its payment of sales taxes or its accounting methods, but is not penalized for this status. First, the Sales and Use Tax Division of the North Carolina Department of Revenue indicated by letter to the Administrator of the Escheat Fund that North Carolina does not require the payment of sales taxes upon layaway payments until the final payment is received and the customer takes possession of the merchandise. Second, Rose's is immunized from liability for the value of the layaway payments once they are delivered to the escheat fund. N.C.G.S. § 116B-32 (1990).

In the alternative, Rose's argues that the layaway funds are not subject to escheat because they are not payable or distributable until the damages resulting from the incomplete layaway transaction have been determined. Upon a customer's default, various damages result. Rose's claims that it needs to retain the unrefunded layaway payments to cover these damages. It is this element of default which Rose's argues sets layaway payments apart from all other types of escheatable property. Other property held to escheat, such as the contents of safety deposit boxes, are not purchased from the holder. These items placed with the holder are paid in full and generate merely storage costs for the holder. In contrast, default on a layaway contract generates not only holding costs, but resale and markdown expenses. Rose's concedes, however, that once damages have been deducted, the amount remaining may escheat.

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We recognize that some damage may result from an incompleated layaway contract. However, the statute specifically provides a means for holders to recoup these amounts. "Lawful charges may be deducted from property that is presumed to be abandoned, provided the lawful charges are specifically authorized by statute or by a *valid enforceable contract*." N.C.G.S. § 116B-21(b) (1990) (emphasis added). Rose's did not provide for this eventuality. It could have contracted to cover such damages but for reasons not appearing in the record, it did not choose so to do.

Permitting Rose's to retain the unrefunded layaway payments creates a de facto forfeiture of the customer's funds in favor of Rose's. Forfeitures for breach of contract are abhorred. The Federal Trade Commission (FTC) has held that layaway provisions which permit the seller to keep all of the layaway payments are adhesive and unfair. *See, S. Klein, Inc.*, 95 FTC 387 (1980); *See Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 262, 266 S.E.2d 610, 620 (1980), *overruled on other grounds, Myers & Chapman Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 374 S.E.2d 385 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989) (our courts accept FTC rulings when applying our Unfair and Deceptive Trade Act). Although forfeitures are not favored, provisions in a contract to deal with potential default situations are acceptable as liquidated damages if: 1) it is a fixed, agreed upon sum, 2) contained within a valid contract, 3) damages are otherwise difficult to ascertain due to uncertainty, and 4) the fixed amount is a reasonable estimate of the projected damages or is a reasonable proportion of the actual damages. *Knutton v. Cofield*, 273 N.C. 355, 361, 160 S.E.2d 29, 34 (1968). The layaway contract at issue meets only the uncertainty requirement of part three. Because it does not meet all four of the requirements, Rose's may not seek liquidated damages by simply retaining the layaway payments.

Rose's argues further that the customer must demand a refund prior to the funds being deemed abandoned and subject to escheat. We note that the escheat statute does not require the customer to make a demand for the return of the item before it is deemed to be abandoned property. In fact, the statute clearly indicates that property is considered abandoned after five years have passed since the last assertion of ownership. The only instance in which customer demand is relevant is where there is a danger that the customer will receive a double recovery. It is on this basis that we distinguish the case upon which Rose's relies: *North Carolina*

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*State Treasurer v. City of Asheville*, 61 N.C. App. 140, 300 S.E.2d 283 (1983).

In that case, the State Treasurer claimed that the unrefunded purchase price of tickets to a cancelled Elvis Presley concert escheated to the State. The court reasoned that even though the tickets would no longer impart the benefit for which they were purchased, these unreturned tickets still had value as collector's items. This Court held that absent a presentation of the ticket and a demand for a refund, the ticket proceeds were not abandoned and did not escheat as the purchasers had elected to retain the tickets for their sentimental or pecuniary value. This reasoning seems to indicate that even though one party breached the contract, each side received a benefit from the bargain. Had this Court permitted the State to step into the shoes of the customer and to retrieve the unrefunded ticket proceeds, then this would be tantamount to letting ticket holders obtain a refund and keep the valuable memorabilia. In that instance, the "ticket holder would be unjustly enriched. . . ." *Id.* at 142, 300 S.E.2d at 285.

In the case at bar, the layaway customers receive nothing in return for their monetary investment until they make the final payment and take possession of the merchandise. There is no inherent value, either sentimental or pecuniary, in a layaway deposit slip. The State may retrieve and hold the layaway deposits until the rightful owners come forward to claim the funds.

We hold that the unrefunded layaway payments held by Rose's for greater than five years are abandoned property subject to escheat to the State pursuant to N.C.G.S. § 116B-21. The trial court ruling is reversed and this case is remanded for judgment in accordance with this opinion.

Reversed.

Judges ARNOLD and WYNN concur.

## WATAUGA COUNTY BD. OF EDUCATION v. TOWN OF BOONE

[106 N.C. App. 270 (1992)]

WATAUGA COUNTY BOARD OF EDUCATION, PLAINTIFF v. TOWN OF BOONE,  
DEFENDANT

No. 9124SC143

(Filed 19 May 1992)

**1. Municipal Corporations § 38 (NCI3d)— resolution by town council—appropriation of ABC revenues to county school board—ultra vires—unenforceable**

Even if a resolution by the Boone Town Council that 18% of the profits from the Boone ABC Store should be paid to the Watauga County Board of Education constituted a contract with the Town of Blowing Rock and the Watauga County Board of Education, the contract is void and unenforceable because it is outside the statutory authority of a town council to appropriate money to a county board of education. Furthermore, the resolution is also unenforceable because it did not have a pre-audit certification as required by N.C.G.S. § 159-28(a). N.C.G.S. § 18B-805(e).

**Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions § 129.****2. Estoppel § 3 (NCI4th)— resolution by town council—ultra vires appropriation—estoppel inapplicable**

Since a resolution appropriating ABC revenue to a county board of education was outside the authority of a town council, the town council cannot be estopped from terminating payments in accordance with the resolution without prior notice.

**Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 128, 129.**

APPEAL by plaintiff from order entered 29 October 1990 by *Judge Charles C. Lamm* in WATAUGA County Superior Court. Heard in the Court of Appeals 12 November 1991.

This is an appeal from summary judgment granted in favor of defendant Town of Boone ("Boone"). In this declaratory judgment action, plaintiff asked that the court order Boone to comply with its 13 April 1987 resolution by which plaintiff County Board of Education ("school board") was to receive 18% of the profits of the Boone Alcohol Beverage Control (ABC) Store. The resolution



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at issue was an attempt by the parties and the Town of Blowing Rock ("Blowing Rock") to adjust to a decrease in profits from the Blowing Rock ABC store resulting from competition by the new ABC store in Boone.

Boone and Blowing Rock are municipalities located about eight miles apart in Watauga County, North Carolina. In 1965, Blowing Rock began operating an ABC store under the authority of special legislation passed by the North Carolina General Assembly. This legislation required Blowing Rock to pay 25% of the store's profits to plaintiff school board. In 1986, defendant Boone opened its own ABC store. The distribution of revenue from this store was controlled by G.S. § 18B-805, enacted in 1981, which does not require any portion of the profits to be distributed to the Board of Education.

As a result of competition from the Boone store, the profits generated by the Blowing Rock store, and hence the school board's receipt of educational assistance money, was substantially reduced.

In early 1987, Blowing Rock officials decided to seek new legislation which would lower the percentage of its ABC profits required to be assigned to the school board. Blowing Rock officials requested that plaintiff school board not oppose this bill in the General Assembly. This action precipitated negotiations between the school board, Blowing Rock officials and Boone officials. These negotiations resulted in an agreement whereby the school board agreed that it would not oppose Blowing Rock's amendment to the 1965 legislation removing the requirement that it provide 25% of its annual ABC store's profits for the county schools. In return, Blowing Rock would designate 18% of its ABC profits for school board use and Boone would also contribute 18% of its profits to the school board. On 13 April 1987, the Boone Town Council passed a resolution stating:

WHEREAS, the Boone Town Council recognizes the importance of educating the children of Watauga County; and

WHEREAS, the opening of the Boone ABC Store has reduced the revenues to the Blowing Rock ABC Store, thereby reducing revenue received by the Watauga County Board of Education from ABC sales in Watauga County.

NOW, THEREFORE, BE IT RESOLVED, that 18% of revenues received from the Boone ABC Store by the Town of Boone be given to the Watauga County Board of Education. The

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share allotted to the Watauga County Board of Education shall be based on net revenues after all statutory obligations (primary and secondary distributions—NCGS 18B) have been met.

Blowing Rock passed a similar resolution on 14 April 1987. On 22 May 1987, the General Assembly passed the Blowing Rock amendment.

Over the next three fiscal years, Blowing Rock and Boone paid an average of 18% of their ABC stores' profits to the school board. Boone's contribution amounted to \$33,000, \$27,000 and \$38,000 for fiscal years 1987, 1988 and 1989, respectively. On 26 April 1990, the Boone Town Council adopted a resolution which rescinded the 13 April 1987 resolution. Plaintiff filed this declaratory judgment action on 27 June 1990. Plaintiff appeals from the trial court's granting of defendant's motion for summary judgment and the dismissal of plaintiff's complaint.

*Parker, Poe, Adams & Bernstein, by Robert W. Spearman and Pope McCorkle, III, and Miller & Moseley, by Paul Miller, for plaintiff-appellant.*

*Paletta & Hedrick, by David R. Paletta, and Brough & Associates, by Michael B. Brough, for defendant-appellee.*

JOHNSON, Judge.

Plaintiff first contends that the trial court erred in granting defendant's motion for summary judgment. Plaintiff advances two legal theories in support of its position: (a) the agreement is an enforceable contract and Boone's withdrawal from the agreement with no prior notice is a breach of contract, and (b) Boone is estopped on equitable principles from discontinuing its payments without prior notice.

Summary judgment is proper when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

[1] We find that we need not determine whether the resolution constitutes a contract. Even assuming that there is a contract, it is void and unenforceable because it is outside the power of the town council to appropriate money to the county school board.

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Towns and cities are creations of the legislature. They have no powers which are not given to them by the General Assembly. N.C. Const., art. VII, § 1. Under the state constitution,

[t]he General Assembly may enact laws whereby the State, any county, city or town, and any other public corporation may contract with and appropriate money to any person, association or corporation for the accomplishment of public purposes only.

N.C. Const., art. V, § 2(7).

A municipality is a creature of the Legislature and it can only exercise (1) the powers granted in express terms; (2) those necessarily or fairly implied in or incident to the powers expressly granted; and (3) those essential to the accomplishment of the declared objects of the corporation—not simply convenient, but those which are indispensable, to the accomplishment of the declared objects of the corporation.

*Madry v. Scotland Neck*, 214 N.C. 461, 462, 199 S.E. 618, 619 (1938) (municipality has no authority to offer reward for capture of police chief's murderer). See also *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E.2d 716 (1967) (providing of county-wide ambulance service is neither expressly authorized nor is it a necessary expense, therefore county cannot be held to contract granting franchise); *Town of Emerald Isle v. State of N.C.*, 320 N.C. 640, 360 S.E.2d 756 (1987) (power of municipal corporation to regulate the use of public streets arises in legislature and is subject to authority of legislature to regulate the use and control of public roads); *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953) (city cannot be estopped from terminating payments to hospital it is not statutorily authorized to make). Cities and towns are like counties with respect to their authority to enter into contracts and appropriate and expend public funds. N.C. Const., art. V, § 2(7); *Moody*, 271 N.C. at 386, 156 S.E.2d at 717.

The appropriation of public funds by a town council requires that two conditions be met. First, the appropriation must be for a "public purpose" consistent with article V, § 2(7) of the N.C. Constitution. *Hughey v. Cloninger*, 297 N.C. 86, 253 S.E.2d 898 (1979). Second, there must be statutory authority for the appropriation. *Id.*

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There is no question but that the appropriation of funds for the education of the children of North Carolina satisfies the "public purpose" requirement. *Hughey*, 297 N.C. at 95, 253 S.E.2d at 904, citing *Education Assistance Authority v. Bank*, 276 N.C. 576, 174 S.E.2d 551 (1970). We can find, however, no statutory authority for this appropriation to the county school board. Plaintiff admits that Boone has no mandatory governmental responsibility in the realm of education. The question becomes whether a resolution appropriating funds for a public purpose, but one outside the statutorily authorized powers of the town, can be enforced against the town council.

In *Board of Managers*, 237 N.C. 179, 74 S.E.2d 749, defendants City of Wilmington and New Hanover County each made appropriations, pursuant to local acts, for the benefit of the James Walker Memorial Hospital. These payments were made over a period of almost fifty years. In 1951, the City stopped its contributions after concluding that the local acts were in violation of [then] Article II, § 29 of the state constitution. The hospital board sued the City, contending that the City had "given its solemn pledge for its generous support to such hospital" and was therefore estopped from challenging the constitutionality of the local acts under which it had paid or its obligation to continue the appropriations in the future. *Id.* at 189, 74 S.E.2d at 757. The Supreme Court concluded that the City could not be estopped from challenging the constitutionality of laws affecting it in its governmental capacity. "The doctrine of ultra vires is applied with greater strictness to public than to private corporations, and the rule is that a municipality . . . is not estopped by an act or contract which is beyond the scope of its corporate powers[.]" *Id.*, quoting 21 C.J. *Estoppel*, at 1194-95. The Court found that the hospital appropriations were not a necessary governmental expense and therefore, absent a vote by a majority of the voters as required by Article VII, § 7 [since repealed], the City could not appropriate city revenues for this purpose. *Accord Madry*, 214 N.C. 461, 199 S.E. 618 (town may not be held to its tender of reward which it has no authority to offer).

We hold that the appropriation of funds for the education of the children of Watauga County is outside the statutory authority of Boone; the appropriation is ultra vires and the resolution purporting to commit the town of Boone to make the appropriation cannot be enforced. *Board of Managers*, 237 N.C. 179, 74 S.E.2d 749.

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Plaintiff argues that the operation of an ABC store is a proprietary function, *citing Waters v. Beisecker*, 60 N.C. App. 253, 298 S.E.2d 746 (1983); therefore, the distribution of ABC store revenues also involves a proprietary function. We disagree. *Waters* is of no assistance to plaintiff. The Court of Appeals decision in *Waters* was heard by the Supreme Court on discretionary review. *Waters v. Beisecker*, 309 N.C. 165, 305 S.E.2d 539 (1983). The Supreme Court affirmed the result reached by the Court of Appeals but stated explicitly that this Court had addressed the wrong issue and that the holding that the operation of an ABC store is a proprietary function was entirely *obiter dictum* and not approved. The Court expressly refrained from ruling "upon this interesting issue." *Waters*, 309 N.C. at 166, 305 S.E.2d at 540.

We find that it is irrelevant to our decision whether an ABC store is a proprietary function. Even if it is, pursuant to G.S. § 18B-805 (1989), the gross receipts of a local ABC board are distributed first according to subsections (b) [primary distribution], (c) [other statutory distributions] and (d) [working capital].

After making the distributions provided in subsections (b), (c), and (d), the local board shall pay each quarter the remaining gross receipts to the general fund of the city or county for which the board is established, unless some other distribution or some other schedule is provided for by law. If the governing body of each city and county receiving revenue from an ABC system agrees, and if the Commission approves, those governing bodies may alter at any time the distribution to be made under this subsection.

G.S. § 18B-805(e) (1989).

The authority of a local government unit to collect taxes and expend revenues is controlled by the Local Governmental Budget and Fiscal Control Act, G.S. § 159-7 *et seq.* Pursuant to this Act, local governments are required to operate under an annual balanced budget ordinance. G.S. § 159-8(a) (1987).

It is the intent of this Article that . . . all moneys received and expended by a local government or public authority should be included in the budget ordinance. Therefore, notwithstanding any other provision of law, no local government or public authority may expend any moneys, regardless of their source

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. . . except in accordance with a budget ordinance or project ordinance adopted under this Article[.]

*Id.* Thus, the gross receipts of an ABC store remaining after the required distributions are paid into the general fund of the city from which any appropriation must be in accordance with a budget ordinance. Although G.S. § 18B-805(e) allows the distribution of ABC revenues to be altered with the approval of the Commission, plaintiff has alleged no such action. We can find no support for plaintiff's contention that because these proceeds originate from an ABC store they can therefore be appropriated in a way other than pursuant to the statutory mechanisms required by the General Assembly.

We conclude that the resolution of 13 April 1987 appropriating the Boone ABC store revenues to the county school board is an act outside the powers of the town council and thus is void and unenforceable as a contract.

Furthermore, even assuming that the Boone Town Council resolution is not unenforceable for the reason stated above, it is not enforceable because it does not comply with G.S. § 159-28(a) which provides:

No obligation may be incurred in a program, function, or activity accounted for in a fund included in the budget ordinance, unless the budget ordinance includes an appropriation authorizing the obligation . . . . If an obligation is evidenced by a contract or agreement requiring the payment of money . . . , the contract, agreement or purchase order shall include on its face a certificate stating that the instrument has been pre-audited to assure compliance with this subsection[.]

An obligation incurred in violation of this subsection is invalid and may not be enforced.

The resolution at issue does not have a pre-audit certification as required by this statute and thus the agreement is not enforceable. See *Cincinnati Thermal Spray, Inc. v. Pender County*, 101 N.C. App. 405, 399 S.E.2d 758 (1991).

[2] Finally, we disagree with plaintiff's contention that Boone is estopped from discontinuing its payments without prior notice. A municipality cannot be estopped by an act or contract which is beyond the scope of its corporate powers. *Board of Managers*,

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237 N.C. at 189, 74 S.E.2d at 757. Since the appropriation of the ABC revenue to the county school board is outside the authority of the town council, the town council cannot be estopped from terminating the unauthorized payments without notice.

Because of the resolution of plaintiff's first Assignment of Error, we need not consider its second.

We hold that the trial judge did not err in granting defendant's motion for summary judgment.

Affirmed.

Judges EAGLES and ORR concur.

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RALPH N. COLVARD v. HERBERT FRANCIS, FIRST-CITIZENS BANK & TRUST  
COMPANY AND PAUL REEVES

No. 9123SC586

(Filed 19 May 1992)

**1. Conspiracy § 12 (NCI4th)— civil conspiracy by auctioneer—  
sale of land—summary judgment for defendant**

Summary judgment was properly granted for defendant Paul Reeves in a civil conspiracy action arising from the sale of an entire tract of land, rather than an auction of lots, where plaintiff contended that the best evidence of Paul Reeves' participation in the conspiracy was his solicitation and receipt of bids for the entire tract of 180 acres when the contract for sale set the acreage at 30 to 100 acres. Though the solicitation of bids on the entire tract may have been beyond the scope of his contractual authority and to his personal benefit, it does not show an overt act necessary to prove participation in a conspiracy. Reviewing bids for the entire tract also does not reflect a conspiracy.

**Am Jur 2d, Conspiracy § 51.**

**2. Conspiracy § 12 (NCI4th)— civil conspiracy by banker—sale  
of land—summary judgment for defendant proper**

The trial court did not err by granting summary judgment for a banker in a civil conspiracy action arising from the sale

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of land where the evidence asserted against the banker concerned his professional and social position, but a man's community standing, professional position, or financial status does not reflect membership in a conspiracy, and there was no overt act which evidences a conspiracy.

**Am Jur 2d, Conspiracy § 51.****3. Unfair Competition § 1 (NCI3d) — sale of land — auctioneer — summary judgment for defendant**

The trial court did not err by granting summary judgment for defendant auctioneer on an unfair practices claim arising from the sale of land where plaintiff claimed that the auctioneer's unfair and deceptive act was the soliciting and receiving of bids on the entire 180-acre tract when the auction contract was for a maximum of 100 acres. The auctioneer had a fiduciary duty to his client to obtain the best price for the land and the sale of the entire tract brought the highest price per acre. As it met his fiduciary obligation to obtain the highest price for plaintiff's land, the auctioneer did not commit an unfair or deceptive act by either accepting the bid for the entire tract or by recommending the sale of the entire tract at that price.

**Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 696.****4. Unfair Competition § 1 (NCI3d) — sale of land — failure to make loan — summary judgment for defendant**

The trial court did not err by granting summary judgment for defendants Bank and Francis, the banker, on an unfair practices claim for promising a loan for \$235,000 and then failing to make the loan. Francis promised to loan \$100,000 and kept that promise. Plaintiff does not allege an overt act by the Bank, such as was found in *Pedwell v. First Union Nat. Bank of North Carolina*, 51 N.C. App. 236. The fact that Francis received phone calls regarding the loans to plaintiff, without anything further, does not show an unfair or deceptive act on the part of Francis or the Bank.

**Am Jur 2d, Banks § 683.**



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APPEAL by plaintiff from an order filed 11 March 1991 by Judge Thomas W. Ross in WILKES County Superior Court. Heard in the Court of Appeals on 9 April 1992.

*Franklin Smith for plaintiff-appellant.*

*Ward & Smith, by Kenneth R. Wooten and Leigh A. Allred, for defendants-appellees First-Citizens Bank & Trust Company.*

*Patrick, Harper & Dixon, by Eloise D. Bradshaw, for defendant-appellee Herbert Francis.*

*Di Santi, Watson & McGee, by Anthony S. di Santi, for defendant-appellee Paul Reeves.*

LEWIS, Judge.

Plaintiff Ralph Colvard inherited, along with his two sisters, several tracts of land from his parents. A family settlement agreement was signed whereby each sibling agreed to pay a percentage of the mortgage and estate taxes. At 56 percent, plaintiff's portion of the debts was approximately \$400,000.00. In order to raise this amount, plaintiff divided one of the inherited tracts into lots. Plaintiff contracted with defendant Paul Reeves, a certified Independent Fee Appraiser, a licensed real estate broker and auctioneer, to sell these lots at auction. The May 1986 sale of this land and the family home place brought approximately \$290,000.00; defendant Reeves' fee was 10 percent. On 19 May 1986, plaintiff again contracted with Paul Reeves to sell from 30 to 100 acres of a 180 acre tract of the family farm; defendant Reeves' fee was again 10 percent. The land was divided into lots and roads were graded and graveled. The sale was set for 21 June 1986.

One week prior to the sale, plaintiff contacted defendant Herbert Francis, a Senior Vice President of defendant First-Citizens Bank and Trust Company (Bank) in West Jefferson and took him out to evaluate the 180 acre tract as collateral for a loan. Plaintiff explained that he would need a loan of \$235,000.00 in case the 21 June 1986 sale did not bring enough money to cover his portion of the estate debts. Mr. Francis informed plaintiff that his lending limit was \$100,000.00 and that the rest of the loan would have to be approved by the Hickory office. Mr. Francis assured plaintiff that this loan would not be a problem. Mr. Francis contends he told plaintiff that the additional loan amount would require a signed

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loan application, financial statement, and a repayment plan. Plaintiff gave Mr. Francis a phone number where he could be reached, 24 hours a day, should a problem with the loan occur. During this one week interval, neither party contacted the other about the loan.

On the night prior to the sale, Mr. Francis alleges that an unidentified man phoned to tell him that plaintiff claimed to have unlimited credit from the Bank. Mr. Francis informed the caller that the agreed amount of the loan was only \$100,000.00. The next morning, the day of the auction, Mr. Francis states he received another inquiry regarding this loan, this time from Mr. Ritz Ray, director of the Bank's West Jefferson branch, in which Mr. Ray posed the question, "Do you have to make that loan?" Later that morning, Mr. Francis went to plaintiff's farm to make sure plaintiff understood that the loan was only for \$100,000.00. He found plaintiff, the auctioneer and the executor of the estate, in a mobile home. Plaintiff claims that these parties coerced him into selling his land for less than its fair market value. The statements of coercive force are as follows: the executor told him that the bank required the estate debts to be paid on the Monday following the auction, Mr. Francis told him that he could not get the \$235,000.00 loan, and Paul Reeves presented a \$600,000.00 offer for the entire 180 acre tract which the auctioneer represented as a good offer. Under pressure from these parties, plaintiff agreed to take the offer and to sell the entire 180 acre tract for \$600,000.00 to a Mr. J.C. Faw. Plaintiff alleges that he had rejected several offers for the entire tract and as late as the day prior to the auction, plaintiff claims that he had refused to sell the 180 acre tract for \$600,000.00.

On 26 June 1986, plaintiff signed the deed granting title to the executor of the Colvard estate to hold in trust for the new owners. The next day, on 27 June 1986, the executor-trustee signed a deed of trust naming Wade Vannoy as trustee and Ritz Ray as beneficiary. The executor then disbursed the proceeds to plaintiff, less the amount to cover his portion of the estate debts. Two years later, May 1988, the land was conveyed to Mountain Associates. This 180 acre tract was combined with other surrounding parcels and developed into an exclusive residential country club golf course by Mountain Associates, a partnership composed of Ritz Ray, Eddie Vannoy, Mark Vannoy, Jim Jones and Bob Jones. Plaintiff filed suit on 19 June 1989 claiming civil conspiracy and unfair trade

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practices. Summary judgment was granted in favor of defendants. Plaintiff appeals.

Plaintiff assigns as error the trial court's grant of summary judgment for the defendants. Plaintiff's brief on appeal alleges three theories: breach of contract, civil conspiracy, and unfair and deceptive practices. In the trial court's order of summary judgment, the court indicated that "[d]uring the course of oral arguments Plaintiff's counsel stated to the Court that Plaintiff did not contend that he had alleged a claim for breach of contract." Because plaintiff's complaint does not allege a breach of contract and because he failed to argue the issue below, he may not base an appeal on this theory. N.C.R. App. P. Rule 28 (b)(5).

Plaintiff claims that he was coerced into selling his land at a price below market value by several co-conspirators. Plaintiff's recitation of the facts alleges that Jimmy Reeves (executor of the estate), Paul Reeves (auctioneer), Herbert Francis (banker), Ritz Ray, J.C. Faw, Eddie and Mark Vannoy (clients of Jimmy Reeves), James Lyles, and Dallas Sturgill, were the perpetrators of the conspiracy. These people, identified as "the Ashe County Gang" planned to defeat plaintiff's attempt to borrow the funds necessary to pay his part of the estate debts. However, plaintiff elected to sue only the auctioneer, banker, and the Bank.

Our Supreme Court has defined a conspiracy as "'an agreement between two or more individuals to do an unlawful act or to do a lawful act in an unlawful way.'" *Muse v. Morrison*, 234 N.C. 195, 198, 66 S.E.2d 783, 784 (1951) (citation omitted). Technically, there is no action for civil conspiracy. *Shope v. Boyer*, 268 N.C. 401, 405, 150 S.E.2d 771, 774 (1966). "'The action is for damages caused by acts committed pursuant to a formed conspiracy, rather than by the conspiracy itself; and unless something is actually done by one or more of the conspirators which results in damage, no civil action lies against anyone.'" *Id.* (citation omitted). Plaintiff must allege facts, not conclusions. *Id.* The act alleged must be overt. *Id.* Conspirators are jointly and severally liable for all the acts of their co-conspirators done in furtherance of the conspiracy. *Muse*, 234 N.C. at 198, 66 S.E.2d at 785.

[1] Plaintiff argues that the best evidence of Paul Reeves' participation in the conspiracy was his solicitation and receipt of bids for the entire 180 acre tract when the contract for sale set the acreage at 30 to 100 acres. As further proof, plaintiff points to

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the hefty \$60,000.00 commission which Paul Reeves received on the \$600,000.00 sale of the entire tract as compared with the smaller amount he would have received on the sale of only 30 acres. We disagree that this evidence reflects membership in a conspiracy. As an auctioneer, Paul Reeves had a "good faith duty . . . to secure for the principal the best bargain and terms that his skill, judgment and diligence can obtain." *Spence v. Spaulding and Perkins, Ltd.*, 82 N.C. App. 665, 667, 347 S.E.2d 864, 865 (1986) (citation omitted). Though the *solicitation* of bids on the entire tract of land may have gone beyond the scope of his contractual authority, to his personal benefit, it does not show an overt act necessary to prove participation in a conspiracy. As to his reviewing bids for the entire tract, this does not reflect a conspiracy. Paul Reeves, as auctioneer, was plaintiff's public agent for the sale of this land. It seems reasonable that anyone with an interest in one lot or the entire tract of land would make inquiries and submit bids to the auctioneer. Summary judgment on the conspiracy issue was properly granted for Paul Reeves.

[2] Plaintiff alleges the same civil conspiracy theory against Mr. Francis and the Bank. The evidence asserted against Mr. Francis concerns his professional and social position. He was the Bank's Senior Vice President, he was a well known banker in the county for 30 years, and was known as a wealthy man. He told plaintiff that the additional \$135,000.00 over his lending authorization limit would be no problem. He admitted that he had received calls questioning this loan and exerting subtle pressure on him to make no loan at all. Viewing these allegations as facts and in a light most favorable to plaintiff it does not appear that Mr. Francis was part of a conspiracy. A man's community standing, professional position, or financial status does not, without more, reflect membership in a conspiracy. Even combined with the failure to make the entire \$235,000.00 loan, there is no overt act which evidences a conspiracy. Mr. Francis made it clear that he could only authorize \$100,000.00 and he upheld this promise by reiterating his willingness to make this loan on the auction date. The receipt of calls regarding the loan does not reflect a conspiracy unless plaintiff could show that Mr. Francis either solicited these calls or that he acquiesced in the caller's demands. The evidence is to the contrary. Mr. Francis continued to make available the \$100,000.00 loan that he had promised despite these calls.

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[3] Plaintiff alleges that the defendants' conspiracy and coercive behavior constitute unfair and deceptive practices within N.C.G.S. § 75-1.1. This statute provides:

(a) Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful.

(b) For purposes of this section, "commerce" includes all business activities, however denominated, but does not include professional services rendered by a member of a learned profession.

(d) Any party claiming to be exempt from the provisions of this section shall have the burden of proof with respect to such claim.

N.C.G.S. § 75-1.1 (1988). The statute does not define the terms unfair or deceptive. "To determine whether a particular act is unfair or deceptive, the court must look at the facts surrounding the transaction and the impact on the marketplace." *Bernard v. Central Carolina Truck Sales, Inc.*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584, *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984) (citation omitted). The jury finds the facts and the court "determine[s] as a matter of law whether the defendant's conduct violated G.S. 75-1.1." *Love v. Pressley*, 34 N.C. App. 503, 516, 239 S.E.2d 574, 583 (1977), *cert. denied*, 294 N.C. 441, 241 S.E.2d 843 (1978). "The purpose of G.S. 75-1.1 is to provide a civil means to maintain ethical standards of dealing between persons engaged in business and the consuming public within this State. . . ." *United Virginia Bank v. Air-Lift Assocs. Inc.*, 79 N.C. App. 315, 319-20, 339 S.E.2d 90, 93 (1986) (citation omitted). If successful, the claimant is entitled to treble damages and attorney's fees. *State ex. rel. Edmisten v. J.C. Penny Co., Inc.*, 292 N.C. 311, 320, 233 S.E.2d 895, 901 (1977).

Plaintiff claims that Paul Reeves' unfair and deceptive act was the soliciting and receiving of bids on the entire 180 acre tract when the auction contract was for a maximum 100 acres. As above, Mr. Reeves had a fiduciary duty to his client to obtain the best price for the land. The sale of the entire 180 acre tract brought the highest price per acre. Three days prior to the 21 June 1986 auction, plaintiff's sister granted an option to purchase the 169 acre tract adjacent to plaintiff's 180 acre tract for \$3,000.00 per acre. The lots prepared for the 21 June 1986 sale were actually

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auctioned and they brought \$2,646.00 per acre. When they did not generate enough money to cover plaintiff's debts, the lots were blocked pursuant to the pre-auction agreement with Mr. Faw and the entire tract was sold to Mr. Faw for \$3,394.00 per acre or \$600,000.00. As it met his fiduciary obligation to obtain the highest price for plaintiff's land, Mr. Reeves did not commit an unfair or deceptive act by either accepting the \$600,000.00 bid or by recommending the sale of the entire tract at this price. Therefore, Mr. Reeves is entitled to summary judgment as a matter of law.

[4] Plaintiff alleges that Mr. Francis and the Bank committed unfair and deceptive practices by promising to make a loan for \$235,000.00 and then failing to make this loan. Acts designed to unfairly deny credit are unlawful. *Concrete Serv. Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 687, 340 S.E.2d 755, 761, cert. denied, 317 N.C. 333, 346 S.E.2d 137 (1986) (citing, *Pedwell v. First Union Nat. Bank of North Carolina*, 51 N.C. App. 236, 275 S.E.2d 565 (1981)). Mr. Francis promised to loan \$100,000.00 and he kept this promise. He informed plaintiff that he would have to get approval from Hickory for the remaining \$135,000.00. In light of the fact that the additional \$135,000.00 loan was not made, the question is whether Mr. Francis' statement that the loan would be "no problem" constitutes the unfair denial of credit. In *Pedwell*, this Court found that a conspiracy existed when a bank obtained a promise by another lender to deny a loan to plaintiffs so that the bank could back out of a deal to sell plaintiffs a condominium. Plaintiff does not allege such an overt act by the Bank not to make the requested loan. The fact that Mr. Francis received phone calls regarding the loans to plaintiff, without anything further, does not show an unfair or deceptive act on the part of Mr. Francis or the Bank. Therefore, both Mr. Francis and the Bank are entitled to summary judgment as a matter of law.

Affirmed.

Judges WYNN and WALKER concur.

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MADIE M. HENSELL, PLAINTIFF-APPELLANT v. ROBERT B. WINSLOW, M.D.  
AND CAROLINA PLASTIC SURGERY SPECIALISTS, P.A., DEFENDANTS-  
APPELLEES

No. 9110SC465

(Filed 19 May 1992)

**1. Physicians, Surgeons, and Allied Professions § 13 (NCI3d)—  
foreign object left in body—x-ray by chiropractor—time of  
discovery—statute of limitations**

Plaintiff “discovered” the presence of a foreign object (drain) left in her body during plastic surgery within the meaning of N.C.G.S. § 1-15(c) when she was informed by her chiropractor on 21 March 1989 that an x-ray revealed an unusual object in her abdomen which might be a drain left from her plastic surgery, that the drain should be removed to prevent serious injury or death, and that she should contact her plastic surgeon. The statute does not require that a plaintiff be informed beyond a reasonable doubt by an expert in the field that a foreign object exists in his or her body to constitute “discovery.” Therefore, plaintiff’s action commenced against the plastic surgeon on 21 May 1990 was barred by the one-year statute of limitations of N.C.G.S. § 1-15(c) for malpractice actions relating to foreign objects left inside the body.

**Am Jur 2d, Physicians, Surgeons and Other Healers  
§§ 258, 321, 323.**

**Liability of physician, surgeon, anesthetist, or dentist for  
injury resulting from foreign object left in patient. 10 ALR3d  
9.**

**2. Physicians, Surgeons, and Allied Professions § 13 (NCI3d)—  
malpractice—statute of limitations—letters from surgeon—  
not continued course of treatment**

A plastic surgeon’s letters to a patient upon whom he had performed surgery pertaining to the need to remove a surgical drain left in the patient’s body during the surgery did not constitute a continued course of treatment for statute of limitations purposes where the letters were written five years after the last physician-patient contact in response to a chiropractor’s suggestion that an x-ray may have revealed that a surgical drain was left in the patient’s body.

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**Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 318, 320.**

**When statute of limitations commences to run against malpractice action based on leaving foreign substance in patient's body. 70 ALR3d 7.**

**3. Estoppel § 13 (NCI4th)— letters from surgeon—no equitable estoppel to assert statute of limitations**

Defendant plastic surgeon was not equitably estopped to rely on the statute of limitations as a defense to plaintiff's malpractice action by his letters to plaintiff indicating that there was no urgency about removing a surgical drain left in plaintiff's body during plastic surgery where defendant's letters encouraged plaintiff to make an appointment and come in for an examination right away, there was no false representation or concealment by defendant, and plaintiff put off being examined by defendant for nearly a year.

**Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 322, 323.**

**Fraud, misrepresentation, or deception as estopping reliance on statute of limitations. 43 ALR3d 429.**

APPEAL by plaintiff from judgment entered 18 January 1991 by *Judge Henry V. Barnette* in WAKE County Superior Court. Heard in the Court of Appeals 11 March 1992.

*McNamara, Pipkin, Knott & Crawley, by Jack B. Crawley, Jr., for plaintiff-appellant.*

*Yates, McLamb & Weyher, by Patti L. Holt and Dan J. McLamb, for defendants-appellees.*

LEWIS, Judge.

Several issues are presented. First, does plaintiff "discover" under N.C.G.S. § 1-15(c), the presence of a foreign object left in her body when her chiropractor interprets an x-ray's reflection of an abnormality to be a foreign object? Second, does a physician's letter to a patient upon whom he has performed surgery, indicating the need for the removal of a foreign object, qualify as a "continuing relationship" under the continuing treatment doctrine when the letter is written five years after the last physician-patient contact



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and which letter was prompted by a chiropractor's suggestion of an abnormality in the surgical area? Third, does a physician's professional opinion as to a medical condition, if relied upon by a patient as legal advice regarding the statute of limitations for a malpractice suit, estop the physician from pleading the statute of limitations as an affirmative defense to a malpractice action relating to this medical condition?

Defendant Dr. Winslow, a plastic surgeon, performed bilateral reduction mammoplasty and abdominoplasty upon plaintiff on 17 April 1984. This surgery removed adipose tissue from plaintiff's abdomen and both breasts. On 21 March 1989, plaintiff's chiropractor informed her that an x-ray revealed an unusual object in her abdomen. Upon learning of plaintiff's plastic surgery, the chiropractor deduced that the object could be a drain which would need to be removed to prevent the possibility of serious injury or death and so informed the plaintiff. The chiropractor notified Dr. Winslow of the x-ray findings. Dr. Winslow sent plaintiff two letters. The first, dated 3 April 1989, requested that plaintiff make an appointment so that Dr. Winslow could check the abnormality. The second, dated 22 May 1989, advised plaintiff that the x-ray revealed that a piece of drain had been left in one breast. This letter further indicated that there was "no urgency about removing the drain, but it is my obligation to you to correct the situation and I want to do that before a problem arises." On 30 March 1990, Dr. Winslow removed the drain.

Plaintiff commenced this action on 21 May 1990 to recover damages for malpractice in leaving a surgical drain in her body. Defendants answered that plaintiff's action was barred by the statute of limitations in N.C.G.S. § 1-15(c) (1983). The trial court agreed and granted partial summary judgment in favor of defendants on plaintiff's malpractice claims relating to the drain left in her body. Plaintiff took a voluntary dismissal on her remaining claim of malpractice arising out of the 30 March 1990 surgery to remove the drain. Plaintiff appeals the grant of partial summary judgment.

Plaintiff claims that the trial court erred in granting summary judgment for several reasons. First, she disputes the date upon which the applicable statute of limitations began to run. Second, she alleges that an exception to the statute of limitations, the doctrine of continued treatment, applies so that her action is not barred. Third, plaintiff asserts that defendants are equitably estopped

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from pursuing the affirmative defense of statute of limitations. We disagree. For the reasons set out below, we affirm the grant of summary judgment in favor of defendants.

[1] All parties agree that the applicable statute of limitation is contained within N.C.G.S. § 1-15(c) (1983). This statute provides:

Provided further, that where damages are sought by reason of a foreign object, which has no therapeutic or diagnostic purpose or effect, having been left in the body, a person seeking damages for malpractice may commence an action therefor within *one year after discovery* thereof as hereinabove provided, but in no event may the action be commenced more than 10 years from the last act of the defendant giving rise to the cause of action.

N.C.G.S. § 1-15(c) (1983) (emphasis added). Plaintiff seeks damages for Dr. Winslow's failure to remove a nontherapeutic nondiagnostic foreign object (drain) from her body at the close of surgery. Plaintiff's suit is barred by the four year outer limits provision of G.S. 1-15(c) so that in order to proceed, she must have filed suit within the one year post-discovery period provided for malpractice actions relating to foreign objects left inside the body. N.C.G.S. § 1-15(c) (1983). The statute provides that the one year begins to run when plaintiff *discovers* that a foreign object has been left in his or her body. Our Supreme Court extended the discovery time when it held that "the one-year-from-discovery provision in G.S. 1-15(c) can and should be interpreted to include an awareness by plaintiff that wrongful conduct was involved." *Black v. Littlejohn*, 312 N.C. 626, 645, 325 S.E.2d 469, 482 (1985).

On 21 March 1989, plaintiff was shown an x-ray of her abdomen which revealed the presence of a foreign object and was informed by her chiropractor that the foreign object looked like a drain left over from her prior plastic surgery. The chiropractor made plaintiff aware of the potential for severe illness or death if the drain remained, and he advised plaintiff to contact the plastic surgeon to have the drain removed. During this 21 March 1989 visit to her chiropractor, plaintiff was made aware, not only that a foreign object was present in her body, but that it was due to wrongful conduct. Hence, the *Black v. Littlejohn* test is met. Plaintiff had one year from 21 March 1989 to file suit against defendants for malpractice involving the foreign body. As she did not file within this time, her claim is barred by the statute of limitations. Therefore,

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the trial court properly granted summary judgment on this basis.

Plaintiff claims that because she was informed of the foreign body's presence by a chiropractor, not a medical doctor, that she did not "discover" the presence of the foreign body until Dr. Winslow's 22 May 1989 letter which specifically identified the foreign object as a drain. The legislature has defined chiropractic as "the science of adjusting the cause of disease by realigning the spine, releasing pressure on nerves radiating from the spine to all parts of the body, and allowing the nerves to carry their full quota of health current (nerve energy) from the brain to all parts of the body." N.C.G.S. § 90-143(a) (1990). Because the scope of this definition appears limited to neurological pursuits, plaintiff argues that the chiropractor was not qualified to make her aware of the presence of the foreign body. We disagree.

The statute, N.C.G.S. § 1-15(c), clearly provides that malpractice suits regarding foreign bodies must be filed within "one year after *discovery*." "Usually, words of a statute will be given their natural, approved, and recognized meaning. . . . To determine the intended meaning of the language, courts may resort to dictionaries to determine definitions of words within statutes." *Black*, 312 N.C. at 638, 325 S.E.2d at 478 (citations omitted). Discovery is defined as "[t]o get first sight or knowledge of; to get knowledge of what has existed but has not theretofore been known to the discoverer." *Black's Law Dictionary* 418 (5th ed. 1979) (citation omitted). The x-ray gave plaintiff "first sight" and the chiropractor's professional advice gave plaintiff "knowledge" that a foreign object, probably a drain, was lodged in her body and must be removed. The statute does not qualify "discovery" by requiring that a plaintiff be informed by an expert in the field, beyond a reasonable doubt, that a foreign object exists in his or her body. Hence, plaintiff had one year from 21 March 1989 to file suit against defendants as this was the day on which she "discovered" the foreign body.

[2] In the alternative, plaintiff asserts the continued treatment doctrine which alters the date upon which the statute of limitations begins to run. Plaintiff claims that Dr. Winslow's letters concerning drain removal constitute "continued treatment" such that the statute of limitations did not begin to run until the last letter dated 22 May 1989.

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The continued course of treatment rule, . . . , applies to situations in which the doctor continues a particular course of treatment over a period of time. The theory is that "so long as the relationship of surgeon and patient continued, the surgeon was guilty of malpractice during that entire relationship for not repairing the damage he had done and, therefore, the cause of action against him arose at the conclusion of his contractual relationship."

*Ballenger v. Crowell*, 38 N.C. App. 50, 58, 247 S.E.2d 287, 293 (1978). "To take advantage of the 'continuing course of treatment' doctrine, plaintiff must 'show the existence of a *continuing* relationship with his physician, and . . . that he received *subsequent* treatment from that physician.'" *Stallings v. Gunter*, 99 N.C. App. 710, 715, 394 S.E.2d 212, 216, *disc. rev. denied*, 327 N.C. 638, 399 S.E.2d 125 (1990) (citation omitted) (emphases original). This subsequent treatment must be for the "same injury." *Id.* (citing *Callahan v. Rogers*, 89 N.C. App. 250, 255, 365 S.E.2d 717, 720 (1988)). Under this doctrine, the cause of action accrues at "the earlier of (1) the termination of defendant's treatment of the plaintiff or (2) the time at which the plaintiff knew or should have known of his injury." *Ballenger*, 38 N.C. App. at 60, 247 S.E.2d at 294.

In the case at bar, defendant, Dr. Winslow, performed elective surgery upon plaintiff to remove unwanted adipose (fatty) tissue on 17 April 1984. The record does not reflect any post-operative check-ups or other contact between plaintiff or defendant. The lack of any follow-up visits, initiated by either party, revealed that the doctor-patient relationship ended upon completion of the plastic surgery. Dr. Winslow's letters were in response to the chiropractor's suggestion of a problem; they were not in regard to any continued treatment related to the 1984 plastic surgery. Hence, the defendant's treatment of plaintiff ended on 17 April 1984.

[3] Lastly, plaintiff asks this Court to invoke the doctrine of equitable estoppel to prevent defendants from relying on the statute of limitations.

The essential elements of estoppel are (1) conduct on the part of the party sought to be estopped which amounts to a false representation or concealment of material facts; (2) the intention that such conduct will be acted on by the other party; and (3) knowledge, actual or constructive, of the real facts. The party asserting the defense must have (1) a lack of

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knowledge and the means of knowledge as to the real facts in question; and (2) relied upon the conduct of the party sought to be estopped to his prejudice.

*Parker v. Thompson-Arthur Paving Co.*, 100 N.C. App. 367, 370, 396 S.E.2d 626, 628-29 (1990). Fraud, intentional or unintentional, and bad faith are not required to invoke equitable estoppel. *Id.* at 371, 396 S.E.2d at 629. "It is the subsequent inconsistent position, and not the original conduct that operates to the injury of the other party." *Id.* (citation omitted).

Plaintiff alleges that Dr. Winslow's letters, which indicated that there was no hurry in removing the drain, lulled plaintiff into believing that she could wait until after the drain removal surgery to file suit against defendants. We disagree. There was no false representation or concealment. Dr. Winslow tried to get plaintiff to make an appointment and come in for an examination as evidenced by letters dated 3 April 1989 and 22 May 1989. According to the April letter, defendants "tried to call [plaintiff] at home and work, but have been unable to reach [plaintiff], therefore we are writing this letter to let you know that we do need to see you and would you please call for an appointment right away. We'll work you in anytime. . . ." Further, in the May letter, Dr. Winslow writes, "[p]lease allow me to see you, examine you, and evaluate this problem. I think that it is important for you." Plaintiff put off the visit until 30 March 1990 for reasons not in the record. Plaintiff is unable to prove elements of equitable estoppel delineated in *Parker*, and therefore, this claim was properly denied.

"Summary judgment may be granted when the movant establishes a complete defense." *Schneider v. Brunk*, 72 N.C. App. 560, 564, 324 S.E.2d 922, 925 (1985) (citation omitted). Defendants asserted the statute of limitations as an affirmative defense. For the reasons stated above, we find that the one year statute of limitations contained in N.C.G.S. § 1-15(c) bars plaintiff's action. Therefore, the trial court properly granted summary judgment in favor of defendants.

Affirmed.

Judges ARNOLD and WYNN concur.

## LUSK v. CRAWFORD PAINT CO.

[106 N.C. App. 292 (1992)]

CONRAD RAY LUSK v. CRAWFORD PAINT COMPANY; RUSCON CORPORATION; GEORGE W. KANE, INCORPORATED; CAROLINA STEEL CORPORATION

No. 9121SC542

(Filed 19 May 1992)

**Rules of Civil Procedure §§ 3, 4 (NCI3d) — process and complaint — dismissal for failure to properly and timely issue and serve — error**

In an action in which the complaint was served eight months after the summons was served, the trial court erred by finding that plaintiff had failed to comply with N.C.G.S. § 1A-1, Rules 3, 4, and 11 for failure to properly and timely issue and serve the process and complaint and with Rule 41 for failure to timely prosecute the action. The record clearly shows that plaintiff did not violate or fail to comply with the provisions of Rules 3 or 4 in the manner in which he commenced his action or in the manner in which he accomplished service of process upon each defendant. Rules 3 and 4 do not contain a stated requirement as to the time within which a complaint must be served and it cannot be concluded that the facts and circumstances of this case rise to the level of an intent to thwart progress or to implement a delaying tactic.

**Am Jur 2d, Process § 117.**

APPEAL by plaintiff from order entered 23 January 1991 in FORSYTH County Superior Court by *Judge James A. Beaty, Jr.* Heard in the Court of Appeals 6 April 1992.

Plaintiff instituted this personal injury negligence action in Forsyth County Superior Court against defendants by filing an Application and Order Extending Time to File a Complaint on 20 April 1990. The record reflects this application and order was duly approved by the Forsyth County Clerk of Superior Court and extended the time in which plaintiff could file his complaint to 10 May 1990. Plaintiff caused to be issued against all defendants a Civil Summons To Be Served With Order Extending Time To File A Complaint on 20 April 1990. These summonses were contemporaneously issued by the Clerk of Superior Court with plaintiff's application and order extending time to file his complaint.

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Plaintiff filed his complaint along with a Delayed Service of Complaint form on 10 May 1990. Plaintiff alleged in his complaint that he was employed by Piedmont Erection and Rigging Company and, at the time of his injury on 23 April 1987, was working on a job site in Durham County, North Carolina. He alleges in the following pertinent language of his complaint that all defendants were involved with the construction of a building on which plaintiff worked at the Durham County job site:

8. Upon information and belief, [defendant] Kane was the General Contractor for the above-alleged construction project.

9. Upon information and belief, [defendant] Ruscon Corporation contracted to provide architectural and supervisory services on the above-alleged construction project.

10. Upon information and belief, [defendant] Carolina Steel provided material and services pursuant to contract on the above-alleged construction project.

11. [Defendant] Crawford Paint subcontracted to paint the steel superstructure of the building at the above-alleged construction project. Pursuant to that subcontract, Crawford Paint provided the labor of its employees to paint the steel superstructure.

Plaintiff alleges in his complaint that he was severely injured during the course and scope of his employment with Piedmont by slipping on paint overspray on a steel joist and falling twenty-five feet from the joist to the ground. He alleges he suffered severe, disabling and permanent injuries to his legs and back as well as lost wages in excess of \$40,000 as a result of this fall. Plaintiff alleges that the proximate cause of his injuries was the combined negligence of the defendants and alleges the following concerning each defendant:

1. **Crawford Paint Company** was negligent in painting the steel superstructure prior to the completion of Piedmont Erection and Rigging of the building, in permitting paint overspray to fall upon the steel joist from which plaintiff fell prior to the completion of the work that plaintiff had to perform for Piedmont and was otherwise negligent in the manner and method in which it performed its work at the construction project.

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2. **George W. Kane** was negligent in its instruction and supervision of Crawford Paint in requiring or permitting Crawford Paint to do the negligent acts complained of it herein, in its instruction and supervision of Piedmont in requiring or permitting it to have the plaintiff working on the steel joist from which he fell while the paint overspray posed a danger to plaintiff and was otherwise negligent in its actions and omissions at the construction project.

3. **Ruscon Corporation** was negligent in its instruction and supervision of Crawford Paint in requiring or permitting Crawford Paint to do the negligent acts complained of it herein, in its instruction and supervision of Piedmont in requiring or permitting it to have the plaintiff working on the steel joist from which he fell while the paint overspray posed a danger to plaintiff and was otherwise negligent in its actions and omissions at the construction project.

4. **Carolina Steel Corporation** was negligent in its instruction and supervision of Piedmont in requiring or permitting it to have the plaintiff working on the steel joist from which he fell while the paint overspray posed a danger to plaintiff and was otherwise negligent in its actions and omissions at the construction project.

Plaintiff thereafter served the Civil Summonses To Be Served With Order Extending Time To File A Complaint together with a copy of the Application and Order Extending Time to File A Complaint to each defendant by certified mailing, return receipt requested, on 9 May 1990. The record reveals the following disposition of service to each defendant:

1. **Crawford Paint Company:** The summons and application and order were received on 10 May 1990 by registered agent M.C. Crawford, Jr., at 614 Broome Road in Greensboro, North Carolina.

2. **Ruscon Corporation:** The summons and application and order were received on 11 May 1990 by registered agent R.B. Russell at 149 E. Bay Street in Charleston, South Carolina.

3. **Carolina Steel Coporation:** The summons and application and order were received on 10 May 1990 by registered agent R.H. Davis at 1451 S. Elm Eugene Street in Greensboro, North Carolina.



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4. **George W. Kane, Incorporated:** The summons and application and order were received by registered agent Littard H. Mount at 105 S. Mangum Street in Durham, North Carolina. However, the return receipt was not dated. Plaintiff then swore out an Alias and Pluries Summons as to defendant George W. Kane, Incorporated on 18 July 1990, within 89 days of the issue of the original summons. Plaintiff served the alias summons along with a copy of the complaint on defendant Kane by certified mail, return receipt requested on or about 16 August 1990, within 29 days of the issuance of the alias summons. This summons and complaint were received by defendant Kane's registered agent Littard H. Mount at 105 S. Mangum Street in Durham, North Carolina on 17 August 1990.

The record further reveals that a period of eight months elapsed between the time defendants Crawford, Ruscon and Carolina Steel received the summonses and application and order which initiated the action and the time each received a copy of the complaint. Plaintiff served the complaint along with a Delayed Service of Complaint form in the following manner:

1. **Crawford Paint Company:** by certified mail, return receipt requested on 17 January 1991. These documents were received by registered agent M.C. Crawford, Jr., at 614 Broome Road in Greensboro, North Carolina on 22 January 1991.

2. **Ruscon Corporation:** by certified mail, return receipt requested on 17 January 1991. These documents were received by registered agent R.B. Russell at 149 E. Bay Street in Charleston, South Carolina on 22 January 1991.

3. **Carolina Steel Corporation:** by certified mail, return receipt requested on 17 January 1991. These documents were received by registered agent R.H. Davis at 1451 S. Elm Eugene Street in Greensboro, North Carolina on 22 January 1991.

Defendant Kane answered plaintiff's complaint first on 16 October 1990 and included in its answer an array of motions to dismiss plaintiff's complaint under Rule 12(b) of the North Carolina Rules of Civil Procedure. Defendant Kane moved for dismissal on the grounds of lack of jurisdiction, insufficiency of process, insufficiency of service of process and failure to state a claim upon which relief can be granted. Defendant also pled crossclaims against defendants Crawford, Ruscon and Carolina Steel.

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[106 N.C. App. 292 (1992)]

Defendant Carolina Steel answered plaintiff's complaint on 21 November 1990 and included in its answer motions to dismiss for insufficiency of process and insufficiency of service of process. Carolina Steel also filed a third-party action against plaintiff's employer Piedmont Erection and Rigging Company and, by separate pleading, answered the crossclaims set out by defendant Kane.

On 3 December 1990, defendant Crawford Paint filed motions to dismiss for insufficiency of process and insufficiency of service of process based on the three-year statute of limitations for negligence actions as set out in G.S. § 1-52 (1990). Defendant Crawford did not answer the allegations in plaintiff's complaint but filed a response to the crossclaims of defendant Kane. Defendant Ruscon filed only an answer to the purported crossclaim or third-party complaint of defendant Carolina Steel on 19 December 1991.

The motions to dismiss of defendants Crawford, Kane and Carolina Steel came on for hearing on 23 January 1991. The trial court allowed defendant Ruscon to make an oral motion to dismiss plaintiff's complaint on the grounds previously asserted by the other defendants. The trial court also allowed all defendants to make oral motions to dismiss pursuant to Rule 41(b) of the North Carolina Rules of Civil Procedure and granted all motions to dismiss pursuant to Rules 12 and 41. In its order of dismissal, the trial court set out the following language in separate paragraphs for each defendant as to the grounds on which it granted the motions:

That for good cause shown and in the Court's sound discretion, the Motion of the Defendant[s] . . . to dismiss pursuant to Rule 12 and Rule 41 is hereby allowed for failure of the Plaintiff to comply with Rules 3,4 and 11 of the Rules of Civil Procedure in failing to properly and timely issue and serve process and the Complaint in this action and based upon the Plaintiff's failure to timely prosecute this action.

The trial court further dismissed plaintiff's action with prejudice as to all defendants. Plaintiff appeals.

*The Law Office of Herman L. Stephens, by Herman L. Stephens, for plaintiff-appellant.*

*Teague and Rotenstreich, by Stephen G. Teague, for defendant-appellee Crawford Paint Company.*

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*Smith Helms Mullis & Moore, by Richmond G. Bernhardt, Jr., for defendant-appellee Ruscon Corporation.*

*Petree Stockton & Robinson, by Robert J. Lawing and Jane C. Jackson, for defendant-appellee George W. Kane, Incorporated.*

*Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr., for defendant-appellee Carolina Steel Corporation.*

WELLS, Judge.

Through his various assignments of error, plaintiff brings forward the questions of (1) whether the trial court correctly found that he had failed to comply with Rules 3, 4 and 11 of the Rules of Civil Procedure for failure "to properly and timely issue and serve process and complaint," and (2) whether the trial court correctly found that plaintiff failed to comply with Rule 41 for "failure to timely prosecute" the action. We answer both questions in the negative and reverse.

The record clearly shows that plaintiff did not violate or fail to comply with the provisions of Rules 3 or 4 in the manner in which he commenced his action or in the manner in which he accomplished service of process upon each defendant. See G.S. § 1A-1, Rules 3 and 4 of the Rules of Civil Procedure.

The dispositive question before us is whether plaintiff's action was subject to dismissal for failure to "timely" serve his complaint, and whether the delay of the service of his complaint constituted failure to "timely" prosecute his action.

Rules 3 and 4 do not contain a stated requirement as to the time within which a complaint must be served. In *Childress v. Hospital Authority*, 70 N.C. App. 281, 319 S.E.2d 329 (1984) and *Hasty v. Carpenter*, 40 N.C. App. 261, 252 S.E.2d 274 (1979), this Court has taken the position that the service of the complaint is not a part of "the chain of process" contemplated by Rule 4; thus, following that reasoning, there is no *per se* failure to comply with that rule in this case.

In contrast, in *Smith v. Quinn*, 324 N.C. 316, 378 S.E.2d 28 (1989), our Supreme Court upheld the trial court's dismissal of the plaintiff's action where it appeared that plaintiff's counsel deliberately withheld delivery of the summons to the sheriff so that there would be a delay of eight months in the defendant's

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learning of the action. The reasoning applied by the Court in that case was that the trial court “properly dismissed plaintiff’s action pursuant to Rule 41(b) based upon plaintiff’s violation of Rule 4(a) *for the purpose of delay and in order to gain an unfair advantage [over the defendant].*” (Emphasis added.)

This Court has applied a similar standard in *Jones v. Stone*, 52 N.C. App. 502, 279 S.E.2d 13, *disc. review denied*, 304 N.C. 195, 285 S.E.2d 99 (1981) and *Green v. Eure*, 18 N.C. App. 671, 197 S.E.2d 599 (1973), for “failure to prosecute” under Rule 41(b), but with different results. “Dismissal for failure to prosecute is proper only [when] the plaintiff manifests an intention to thwart the progress of the action to its conclusion, or by some delaying tactic plaintiff fails to progress the action towards its conclusion.” *Jones, supra, quoting Green, supra.*

We cannot conclude that the facts and circumstances of this case rise to the level of demonstrating an intent to thwart progress or to implement a delaying tactic. There appears to be no demonstrable intent here, but only arguable inadvertence or neglect of counsel.

We deem it appropriate to suggest that this case may demonstrate the need for our Legislature to re-examine the provisions of Rules 3 and 4 with respect to the time requirements for service of the complaint in civil actions.

For the reasons stated, the order of the trial court is reversed and this case is remanded to the trial court for further appropriate proceedings.

Reversed and remanded.

Judges ARNOLD and EAGLES concur.

## OSBORNE v. CONSOLIDATED JUDICIAL RETIREMENT SYSTEM

[106 N.C. App. 299 (1992)]

SAMUEL L. OSBORNE, PETITIONER-APPELLEE v. THE CONSOLIDATED JUDICIAL RETIREMENT SYSTEM OF NORTH CAROLINA, RESPONDENT-APPELLANT

No. 9223SC52

(Filed 19 May 1992)

**Pensions § 1 (NCI3d) — judges — retirement system — purchase of credit — method of calculation**

In an action challenging respondent's method of calculating the cost for petitioner to purchase service credits in the Consolidated Judicial Retirement System for his military service, the Recommended Decision of the Administrative Law Judge correctly concluded that petitioner's rights under N.C.G.S. § 135-4(m) as of 1 July 1981 allowed him to purchase his credit at the reduced rate unrestricted by the three year limitation. The legislation repealing the former N.C.G.S. § 135-4(f)(6) specifically recognized and protected the accrued rights of all members covered by that statute.

**Am Jur 2d, Pensions and Retirement Funds § 1645.**

APPEAL by respondent from *Freeman (William H.)*, Judge. Order entered 18 November 1991 in Superior Court, WILKES County. Heard in the Court of Appeals on 11 May 1992.

Petitioner instituted this civil action by filing a Petition for a Contested Case Hearing pursuant to G.S. 150B-23 on 13 August 1990 in which petitioner challenged respondent's method of calculation of the cost for him to purchase service credits in the Consolidated Judicial Retirement System for his military service as allowed by G.S. 135-4. The contested case hearing was held before an Administrative Law Judge on 23 August 1991 who entered and filed a Recommended Decision and Entry of Summary Judgment for Petitioner.

On 23 October 1991 the contested case was heard by the Board of Trustees of the Consolidated Judicial Retirement System and on 29 October 1991, the Chairman of the Board of Trustees, Harlan E. Boyles, issued the Board's Final Agency Decision which held that the Recommended Decision of the Administrative Law Judge should not be adopted. The Board made Findings of Fact and Con-

## OSBORNE v. CONSOLIDATED JUDICIAL RETIREMENT SYSTEM

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clusions of Law contrary to those made by the Administrative Law Judge and denied petitioner's request for relief.

Petitioner thereafter filed a Petition for Judicial Review pursuant to G.S. 150B-45 in Superior Court, Wilkes County on 4 November 1991. On 19 November 1991, Judge Freeman entered an order finding that the Final Agency Decision of the Board of Trustees was erroneous as a matter of law and adopting the Recommended Decision of the Administrative Law Judge in favor of petitioner.

Respondent appeals from the order entered by the superior court.

*Ferree, Cunningham & Gray, P.A., by George G. Cunningham, for petitioner, appellee.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Alexander McC. Peters, for respondent, appellant.*

HEDRICK, Chief Judge.

The parties have stipulated to the facts relevant to this appeal. Petitioner has been a district court judge for the Twenty-Third Judicial District in North Carolina continuously since 7 December 1970 and has served as a chief district court judge for that district since 2 March 1981. Petitioner became a member of the Uniform Judicial Retirement System (now the Consolidated Judicial Retirement System) on 7 December 1970 and had completed ten (10) years of membership service as of 7 December 1980. After completing ten (10) years of membership service, petitioner became eligible pursuant to G.S. 135-4(f)(6) to purchase three (3) years and ten (10) months retirement credit based upon petitioner's prior military service of three (3) years and ten (10) months in the Armed Forces of the United States.

In December, 1986, petitioner inquired as to the cost of purchasing his credit for military service. He was informed by letter from the retirement system that the purchase cost, through 1 April 1987, would be Fifty Thousand One Hundred Seventy-One Dollars and 39/100 (\$50,171.39). This cost was calculated by the retirement system using the formula provided by G.S. 135-4(m) (the "full actuarial cost") and was valid only through 1 April 1987 after which date the price had to be recalculated. As of July, 1990, the cost to petitioner pursuant to this formula had risen to One Hundred

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Ninety-One Thousand Three Hundred Sixteen Dollars and 18/100 (\$191,316.18).

There is an alternative formula set forth in G.S. 135-4(f)(6) or 135-4(f)(7)a (the "reduced cost"). All parties agree that, were petitioner eligible to purchase pursuant to this formula, his cost for retirement credit for three (3) years and ten (10) months of military service would have been Three Thousand Six Hundred Forty-Seven Dollars and 87/100 (\$3,647.87) as of July, 1990. Petitioner is ready, willing and able to pay the cost for the purchase of his military service credit under the formula provided in G.S. 135-4(f)(6) or 135-4(f)(7)a. Respondent contends that petitioner is not entitled to use of this formula and must purchase at the full actuarial cost.

North Carolina General Statutes Section 135-4(f)(6) was repealed as of 1 July 1981. Session Laws 1981, c. 636, s.1. The repealing act specified however that "any inchoate or accrued rights of any member on July 1, 1981 shall not be diminished." At the time of its repeal, G.S. 135-4(f)(6) stated in pertinent part:

*Notwithstanding any other provision of this Chapter, teachers and other State employees not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at that time, with sufficient interest added thereto so as to equal one-half the cost of allowing such service, plus a fee to cover expense of handling payment . . . .*

(Emphasis added). The formula for the "reduced rate" that was embodied within G.S. 135(f)(6) until 1981 is presently embodied within G.S. 135-4(f)(7)a which was enacted in 1989. Session Laws 1989, c.762, s.3.

As the legislation repealing former G.S. 135-4(f)(6) specifically recognized and protected the accrued rights of all members covered by that statute, the issue on this appeal is the determination of petitioner's accrued rights as a member of the Retirement Fund as of 1 July 1981. Respondent argues that the terms of G.S. 135-4(m), as that statute was written on 1 July 1981, required that petitioner purchase the retirement credit at the "reduced rate" within three

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(3) years after becoming eligible to purchase. After the expiration of the three (3) year period, according to respondent, petitioner can only purchase the credit pursuant to the formula set forth in 135-4(m) which is the "full actuarial cost." All agree that petitioner "became eligible to purchase" this credit on 7 December 1980.

North Carolina General Statutes Section 135-4 is an extensive statute which is denominated "Credible Service." The numerous sections and subsections of this statute set forth various types of employee service, one of which is prior military service, which may entitle a member employee to additional retirement credit. The language of G.S. 135-4(m) upon which respondent relies reads: "All repayments and purchases of service credits, allowed under the provisions of this section, must be made within three years after the member first becomes eligible to make such repayments and purchases." This provision is obviously intended to have general application to section 4 of Chapter 135.

As set out above, however, section 4(b)(6) of Chapter 135 as it was written at the time of its repeal contained the restrictive introductory phrase "Notwithstanding any other provision of Chapter 135 . . ." Considering the well established rule of statutory construction that "words in a statute must be given their natural, ordinary meaning," *In re Arthur*, 291 N.C. 640, 642, 231 S.E.2d 614, 615 (1977), and that "a section of a statute dealing with a specific situation controls . . . other sections which are general in their application . . . [and] the specifically treated situation is regarded as an exception to the general provision . . .," *State ex. rel. Utilities Comm. v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969), we find that the qualifying language "Notwithstanding any other provision of Chapter 135" necessarily excluded the application of 135-4(m) to those members eligible for the "reduced rate" formula pursuant to the terms of 135-4(b)(6).

The Superior Court correctly held that the Final Agency Decision of the respondent was erroneous as a matter of law in that it wrongfully concluded that petitioner was required by G.S. 135-4(m) to purchase his military credit within three (3) years at the "reduced rate" or pay "full actuarial cost" any time thereafter. The Recommended Decision of the Administrative Law Judge correctly concluded that petitioner's rights under this statute as of 1 July 1981 allowed him to purchase his credit at the "reduced rate" unrestricted



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[106 N.C. App. 303 (1992)]

by the three (3) year limitation. Pursuant to the language of the repealing statute, petitioner retains his rights as they existed on that date.

The order of the Superior Court is affirmed.

Affirmed.

Judges ARNOLD and COZORT concur.

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BILLY D. FAIRCLOTH v. N.C. DEPARTMENT OF TRANSPORTATION

No. 9110IC1281

(Filed 19 May 1992)

**1. Master and Servant § 94.3 (NCI3d) — workers' compensation — review by full Commission — failure to fulfill statutory duties**

The decision of the full Commission indicates on its face that plaintiff was not afforded the review on appeal from the hearing commissioner to which he was entitled under N.C.G.S. § 97-85 where it stated only 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 §§ 614, 631.**

**2. Master and Servant § 96.5 (NCI3d) — workers' compensation — finding of no injury by accident — supporting evidence**

The evidence supported the Industrial Commission's determination that plaintiff did not suffer any injury by accident when the dump truck he was backing at five miles per hour struck another vehicle.

**Am Jur 2d, Workmen's Compensation §§ 225, 227.**

APPEAL by plaintiff from a decision of the North Carolina Industrial Commission. Order entered 24 September 1991. Heard in the Court of Appeals 21 April 1992.

Plaintiff filed a claim for worker's compensation alleging injury by accident during the course of his employment. Defendant denied

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the claim, and a hearing was held before Deputy Commissioner Edward Garner, Jr., on 11 December 1989.

At the hearing, testimony was presented that plaintiff suffers from brain damage received at birth which results in a weakness of his left side. This condition makes it difficult for plaintiff to walk. On 6 July 1987, plaintiff was employed by the North Carolina Department of Transportation as a truck driver. On his first day of employment, plaintiff was backing a tandem-axle dump truck toward a piece of machinery. The truck was traveling at approximately five miles per hour when plaintiff backed into another vehicle. Plaintiff was reassigned by the Department of Transportation and put to work as a flagman, a position requiring a great deal of walking. Plaintiff began experiencing pain shortly after beginning this job, and was unable to continue performing the duties required. Plaintiff sought worker's compensation benefits, claiming that his inability to perform the new job was a result of injuries he sustained in the 6 July 1987 accident.

Deputy Commissioner Garner denied plaintiff's claim, and plaintiff appealed to the full Commission pursuant to G.S. 97-85 and Worker's Compensation Rule 701. In accordance with the requirements of Rule 701(3), plaintiff filed a Form 44, "APPLICATION FOR REVIEW" stating "with particularity" the grounds for his appeal and including the following specific errors allegedly committed by Deputy Commissioner Garner:

1. Finding of Fact Number Three is in error. The Plaintiff did suffer physical injury as a result of his vehicular accident not as [a] result of his flagman's duties.

2. Finding of Fact Number Four is in error. The Plaintiff was injured by accident and his condition did not come on gradually as he attempted to perform his new duties.

3. Finding of Fact Number Five is in error in that credible evidence from the Plaintiff was presented that the Plaintiff was injured as a result of an accident.

On 24 September 1991, the full Commission entered the following:

The undersigned have reviewed the record in its entirety and find no reversible error.

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In view of the foregoing, the Full Commission AFFIRMS and ADOPTS as its own the Opinion and Award as filed.

Plaintiff appeals.

*Popkin and Associates, by Samuel S. Popkin for plaintiff, appellant.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General William H. Borden for defendant, appellee.*

HEDRICK, Chief Judge.

[1] The order of the full Commission denying plaintiff's claim under the Worker's Compensation Act fails to demonstrate that plaintiff received the review to which he was entitled under G.S. 97-85 and Workers' Compensation Rules of the N.C. Industrial Commission 701 which in pertinent part provides:

(1) A letter expressing an intent to appeal shall be considered notice of appeal to the Full Commission within the meaning of N.C.G.S. 97-85, provided that it clearly specifies the Order of Opinion and Award from which appeal is taken.

(2) After receipt of notice of appeal, the Industrial Commission will supply to the appellant Form 44 upon which he must state the grounds for his appeal. The grounds must be stated with particularity, including the specific errors allegedly committed by the Commissioner or Deputy Commissioner and the pages in the transcript on which the alleged errors are recorded . . . .

We explained in *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988), *Vieregge v. N.C. State University*, 105 N.C. App. 633, 414 S.E.2d 771 (1992), and *Braswell v. Pitt County Mem. Hosp.*, 106 N.C. App. 1, 415 S.E.2d 86, 90 (1992), (Hedrick, CJ., concurring), the duties of the full Commission when considering an appeal from the Deputy Commissioner pursuant to G.S. 97-85 and Rule 701. Had plaintiff, in the present appeal to this Court, assigned as error the failure of the full Commission to afford him the review to which he was entitled under G.S. 97-85 and Rule 701, and had plaintiff additionally demonstrated on appeal to us that such failure of the full Commission to provide him with such review was prejudicial, we would remand the proceeding to the full Commission to "review the award, and, if good

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[106 N.C. App. 306 (1992)]

ground be shown therefor, reconsider the evidence, receive further evidence, rehear the parties or their representatives, and, if proper, amend the award." See *Braswell*, filed 7 April 1992.

[2] While the decision entered by the full Commission in the present case indicates on its face that plaintiff was not afforded the review on appeal from the Deputy Commissioner to which he was entitled pursuant to G.S. 97-85, plaintiff has not assigned error to such failure upon the part of the full Commission. Nor does plaintiff argue that he was prejudiced in any way by any error upon the part of the full Commission. Plaintiff's sole question raised on appeal is set out in his brief as follows:

1. WHETHER THE EMPLOYEE PRESENTED CREDIBLE EVIDENCE TO PROVE THAT HE WAS INJURED BY AN ACCIDENT DURING THE COURSE OF HIS EMPLOYMENT WITH HIS EMPLOYER?

We have examined each of the findings of fact set out in the Deputy Commissioner's decision and find them to be supported by the evidence in the record. We also find that the conclusions of law drawn therefrom are supported by the findings, and that the findings and conclusions support the decision entered by the Deputy Commissioner. Therefore, the decision of the full Commission on appeal from the decision of the Deputy Commissioner will be affirmed.

Affirmed.

Judges LEWIS and WALKER concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC. (APPELLANT), AND PIEDMONT NATURAL GAS COMPANY, INC. (APPELLANT-CROSS APPELLANT)

No. 9110UC205

(Filed 19 May 1992)

APPEAL by intervenor Carolina Utility Customers Association, Inc. from the order of the North Carolina Utilities Commission entered 21 November 1990. Heard in the Court of Appeals 2 December 1991.

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[106 N.C. App. 307 (1992)]

*Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant Carolina Utility Customers Association, Inc.*

*Brooks, Pierce, McLendon, Humphrey & Leonard, by Jerry W. Amos, for applicant-cross appellant Piedmont Natural Gas Company, Inc.*

WELLS, Judge.

The disposition of this appeal is controlled by our opinion in *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 106 N.C. App. 218, 415 S.E.2d 758 (1992). Accordingly, the Commission's order of 21 November 1991 in this case is

Reversed and vacated.

Judges EAGLES and WALKER concur.

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LOUISE PRICE PARSONS v. JEFFERSON-PILOT CORPORATION

No. 9118SC852

(Filed 2 June 1992)

**1. Corporations § 133 (NCI4th)— disclosure of names of shareholders—beneficial owners**

A beneficial owner of corporate shares is a "shareholder" whose name must be disclosed to a qualified shareholder pursuant to N.C.G.S. § 55-16-02(b)(3) when the corporation has obtained a nonobjecting beneficial owners (NOBO) list pursuant to 17 C.F.R. § 240.14b-1(c) or when there is a nominee certificate regarding that owner on file with the corporation. Where the record reveals that defendant corporation has not obtained a NOBO list, defendant has an obligation to disclose to plaintiff shareholder only the names of nonobjecting beneficial owners who have filed nominee certificates with the defendant.

**Am Jur 2d, Corporations § 349.**

**What corporate documents are subject to shareholder's right to inspection. 88 ALR3d 663.**

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[106 N.C. App. 307 (1992)]

**2. Corporations § 151 (NCI4th)— accounting records of public corporation—inspection by shareholder—no statutory or common law right**

Plaintiff, a shareholder of a public corporation, had no right under N.C.G.S. § 55-16-02(b)(2) to inspect the accounting records of the corporation because N.C.G.S. § 55-16-02(b) provides in part that “a shareholder of a public corporation shall not be entitled to inspect or copy any accounting records of the corporation.” Nor did N.C.G.S. § 55-16-02(e)(2) preserve for plaintiff shareholder the common law right to inspect defendant corporation’s accounting records since this common law right could properly be restricted by statute. However, this cause must be remanded for a determination as to whether the records sought by plaintiff are in fact accounting records.

**Am Jur 2d, Corporations § 349.**

**What corporate documents are subject to shareholder’s right to inspection. 88 ALR3d 663.**

**3. Corporations § 151 (NCI4th)— minutes of shareholders’ meetings—shareholder actions without meetings—three-year period—inspection by shareholder**

Plaintiff shareholder was entitled under N.C.G.S. § 55-16-02(a) and (e)(4) to inspect the minutes of all shareholders’ meetings for the three years preceding her demand and the records of all shareholder actions taken without meetings for the three years preceding her demand without meeting the requirements of N.C.G.S. § 55-16-02(c).

**Am Jur 2d, Corporations § 349.**

**What corporate documents are subject to shareholder’s right to inspection. 88 ALR3d 663.**

**4. Corporations § 151 (NCI4th)— shareholder inspection of corporate records—statement of proper purpose**

Plaintiff shareholder stated a proper purpose for demanding to inspect corporate records within the purview of N.C.G.S. § 55-16-02(c)(1) where she stated that her purpose was to determine “any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company.”

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**Am Jur 2d, Corporations § 369.**

**Purposes for which stockholder or officer may exercise right to examine corporate books and records. 15 ALR2d 11.**

**5. Corporations § 151 (NCI4th)— shareholder inspection of corporate records—describing purpose and records with particularity**

Plaintiff shareholder described her purpose for seeking to inspect corporate records with reasonable particularity where she stated that her purpose was to determine possible mismanagement of the corporation or improper use of corporate property where the record shows that plaintiff had knowledge only of a poor return on her investment in the corporation. Plaintiff also described the records with reasonable particularity where she designated "all records of any final action taken" by the board of directors or by a committee of the board of directors, the "minutes of any meeting of the shareholders," and the "records of action taken by the shareholders of the Company without a meeting."

**Am Jur 2d, Corporations § 369.**

**Purposes for which stockholder or officer may exercise right to examine corporate books and records. 15 ALR2d 11.**

**6. Corporations § 151 (NCI4th)— shareholder inspection of corporate records—direct connection to purpose**

Where it appears that many corporate records sought to be inspected by plaintiff shareholder have no connection to plaintiff's proper purpose of determining mismanagement and improper use of corporate property, plaintiff's action under N.C.G.S. § 55-16-04(b) to compel disclosure of the records is remanded to the trial court for an *in camera* examination of the desired records to determine which records, if any, are directly connected with plaintiff's purpose. N.C.G.S. § 55-16-02(c)(3).

**Am Jur 2d, Corporations § 369.**

**Purposes for which stockholder or officer may exercise right to examine corporate books and records. 15 ALR2d 11.**

## PARSONS v. JEFFERSON-PILOT CORP.

[106 N.C. App. 307 (1992)]

**7. Rules of Civil Procedure § 11 (NCI3d)— complaint meeting factual and legal sufficiency prongs—sanctions for improper purpose—remand to trial court**

The trial court erred in concluding that plaintiff's complaint and motion for a preliminary injunction could not have been interposed for an improper purpose so as to permit Rule 11 sanctions because they met the factual and legal sufficiency prongs of Rule 11, and the case must be remanded to the trial court for a determination as to whether plaintiff filed her complaint and motion for an improper purpose. N.C.G.S. § 1A-1, Rule 11.

**Am Jur 2d, Pleading § 211.**

APPEAL by plaintiff and defendant from order entered 16 July 1991 in GUILFORD County Superior Court by *Judge Steve Allen*. Heard in the Court of Appeals 7 April 1992.

*Stern, Graham & Klepfer, by James W. Miles, Jr., and Jones, Day, Reavis & Pogue, by Richard M. Kirby and Michael J. McConnell, for plaintiff-appellant/appellee.*

*Robinson, Bradshaw & Hinson, P.A., by Russell M. Robinson, II, Mark W. Merritt, and Frank E. Emory, Jr., for defendant-appellee/appellant.*

GREENE, Judge.

Both the parties appeal from an order entered 16 July 1991 allowing in part and denying in part the plaintiff's request under N.C.G.S. § 55-16-04 (1990) to inspect and copy various corporate records of the defendant and denying the defendant's motion for sanctions under N.C.G.S. § 1A-1, Rule 11 (1990) (Rule 11).

At the time of the trial court's order, the plaintiff owned 300,000 shares of common stock of the defendant valued at more than 12.5 million dollars. She had owned that stock for at least six months before 14 February 1991. On 14 February 1991, the plaintiff sent to the defendant a written notice of her demand to inspect and copy various materials of the defendant pursuant to N.C.G.S. § 55-16-02 (1990 & Supp. 1991). The plaintiff requested, among other things, the following:

8. For the purpose of enabling the Shareholder to communicate with other shareholders of the Company, a complete



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record or list of the holders of Common Stock of the Company, certified by the Company's transfer agent, showing the name and address of each holder and the number of shares of Common Stock of the Company registered in the name of each holder, as of the most recent date that such list is available and, as promptly as possible following the record date for the 1991 Annual Meeting of Shareholders, as of such record date.

9. For the purpose of enabling the Shareholder to communicate with other shareholders of the Company, magnetic computer tape lists of the holders of Common Stock or the Company as of the most recent date that such items are available and, as promptly as possible following the record date for the 1991 Annual Meeting of Shareholders, as of such record date, in each case showing the name and address of each holder and the number of shares of Common Stock of the Company held by each holder, such computer processing data as is necessary to make use of such magnetic tape and a printout of such magnetic computer tape for verification purposes.

10. For the purpose of enabling the Shareholders to communicate with other shareholders of the Company, all transfer sheets in the possession of the Company or its transfer agent showing changes in the lists of holders of Common Stock of the Company referred to above from the date of such lists to the date of inspection hereunder.

11. For the purpose of enabling the Shareholder to communicate with other shareholders of the Company, all information in the Company's possession or control or that can reasonably be obtained from nominees of any central certificate depository system up to the day of inspection hereunder concerning the number and identities of the actual beneficial owners of Common Stock of the Company, including a breakdown of any holdings in the name of Cede & Co. or any other clearing agency or other similar nominee, and a list or lists containing the name and address of each participant, and the number of shares of Common Stock of the Company attributable to such participant, in any employee stock ownership or comparable plan of the Company in which the voting of Common Stock of the Company is controlled, directly or indirectly, individually or collectively, by the participants in the plan.

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12. For the purpose of enabling the Shareholder to communicate with other shareholders of the Company, all lists and other data in the possession or control of the Company or reasonably obtainable or available pursuant to the Securities and Exchange Act Rule 14B-1(c) and 14b-2(e)(2) and (3) regarding the names and addresses of, and number of shares of Common Stock held by each of, the beneficial owners of shares of Common Stock, which information the Shareholder undertakes to utilize solely for purposes of corporate communications.

13. For the purpose of determining any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company, all records of any final action taken, with or without a meeting, by the Board of Directors of the Company, or by a committee of the Board of Directors of the Company while acting in place of the Board of Directors of the Company on behalf of the Company, minutes of any meeting of the shareholders of the Company and records of action taken by the shareholders of the Company without a meeting.

14. For the purpose of determining any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company, all accounting records of the Company, including without limitation any and all records evidencing, reflecting or describing:

(a) Any and all cash or non-cash compensation directly or indirectly paid or distributed to any executive officer or director of the Company for services rendered in all capacities to the Company or a subsidiary of the Company during the past five years;

(b) Any and all cash or non-cash compensation that would have been directly or indirectly paid or distributed to any executive officer or director of the Company for services rendered in all capacities to the Company or a subsidiary of the Company during the past five years but for the fact that such payment or distribution was deferred;

(c) Any and all cash or non-cash compensation proposed to be directly or indirectly paid or distributed in

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the future to executive officers or directors of the Company or any subsidiary of the Company pursuant to a plan;

(d) Any and all full or partial, direct or indirect, payments or reimbursements by the Company to or on behalf of any executive officer or director of the Company or any spouse or other companion or relative of any such executive officer or director in the past five years, in respect of matters that would normally be considered to be of a personal nature, including without limitation (i) home repairs or improvements, (ii) housing or other living expenses provided at such executive officer's, director's, spouse's companion's or relative's principal or vacation residence, (iii) domestic, security or other services, (iv) personal use of any automobile, airplane, boat, yacht or recreational vehicle, (v) personal use of any lodge, hunting, fishing or other sporting or recreational facility or apartment, residence or other living quarters, (vi) personal travel, entertainment or related expenses (including club memberships), and (vii) legal, tax, accounting, investment or other professional fees for matters unrelated to the business of the Company;

(e) Any and all third-party benefits, including without limitation favorable bank loans or benefits from suppliers, to any executive officer or director of the Company or any spouse or other companion or relative of any such executive officer or director in the past five years wherein the Company compensated, directly or indirectly, the bank, supplier or other third party for providing such loans, services or other benefits;

(f) Any and all "incidental" personal benefits, such as furnishing for executive officers or directors at offices maintained by the Company, parking spaces and meals at facilities operated or maintained by the Company in the past five years;

(g) any and all insurance benefits or other life, health, hospitalization, medical, disability, retirement, education or relocation plans or benefits directly or indirectly provided by the Company to executive officers or directors of the Company or any spouse or other companion or relative

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of any such executive officer or director in the past five years;

(h) Any and all nonmonetary benefits directly or indirectly derived in the past five years by any executive officer or director of the Company or any spouse or other companion or relative of any such executive officer or director that are not included in subsections (a) through (g) above; and

(i) Any and all direct or indirect cash or noncash payments by the Company or direct or indirect contributions by the Company of property or services in the past five years to or on behalf of, or for the direct or indirect benefit of, any governmental official, lobbyist, chamber of commerce, trade association, business or civic organization or other person, entity or organization with the purpose or effect of influencing any governmental, judicial, legislative or regulatory action, including without limitation any action relating to legislation or regulations pertaining to corporate takeovers, acquisitions or changes of corporate control, corporate business combination transactions, the granting or denial of voting rights to holders of shares of corporate stock, the validity of so-called "poison pill" rights plans or any other takeover defensive measure.

The defendant responded to the plaintiff's demand by letter dated 27 February 1991. The defendant agreed to allow the plaintiff to inspect and copy various corporate documents pursuant to N.C.G.S. § 55-16-02(a) including, among other things, the defendant's articles of incorporation, bylaws of the corporation, the minutes of all meetings of shareholders of the company for the three years preceding her demand, and the records of all shareholder action taken without a meeting for the three years preceding her demand. Pursuant to N.C.G.S. § 55-16-03(d) (1990), the defendant also agreed to allow the plaintiff to inspect and copy its shareholder list as of the 7 March 1991 record date for the defendant's 1991 annual shareholders' meeting scheduled for 6 May 1991. The defendant, however, refused to allow the plaintiff to inspect the other materials requested in her written demand.

On 4 March 1991, the plaintiff again demanded that the defendant allow the plaintiff to inspect the materials requested in paragraphs 8 through 14 of her written demand dated 14 February

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1991. In an attempt to narrow the scope of her demand with regard to the accounting records sought under paragraph 14, however, the plaintiff stated that "the accounting records sought deal only with compensation paid to, perquisites made available to and relationships with *only* the executive officers and directors of the Company (as listed in the Company's most recent annual report), their family members and companions. Shareholders are entitled to know how scarce corporate resources are utilized."

On 12 March 1991, the defendant made available to the plaintiff its list of shareholders who were entitled to receive notice of the 1991 annual shareholders' meeting. The defendant again refused, however, to allow the plaintiff to inspect any other materials relating to shareholders such as magnetic computer tapes, daily transfer sheets, and a CEDE breakdown.<sup>1</sup> The defendant also refused to obtain and make available to the plaintiff a NOBO list that it did not have and had never used.<sup>2</sup> By letter dated 21 March 1991, the plaintiff complained to the defendant about its repeated "stonewalling" tactics. On 25 March 1991, the defendant responded to the plaintiff's 21 March 1991 letter and denied any "stonewalling" on its part. The defendant reaffirmed its position that the plaintiff's request for inspection of the various corporate materials was "vague, burdensome and totally without basis under North Carolina law."

On 6 May 1991, the day of the defendant's annual shareholders' meeting, the plaintiff filed a complaint and a motion for a preliminary injunction seeking to compel the defendant to allow her to inspect

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1. A CEDE breakdown is a list which "identifies the brokerage firms and other record owners who bought shares in a street name for their customers and who have placed those shares in the custody of depository firms such as Depository Trust Co.; these shares are reflected in the corporation's records only under the names of nominees used by such depository firms. Depository Trust Co. uses 'CEDE & Co.' as the name of the nominee for shares it holds for brokerage firms, and such lists, regardless of the nominee names adopted by other depository firms, are known as 'CEDE lists.'" *Sadler v. NCR Corp.*, 928 F.2d 48, 50 (2d Cir. 1991). A CEDE breakdown, however, does not contain the names of the non-objecting beneficial owners of the shares in the custody of the depository firms.

2. "A 'NOBO list' (non-objecting beneficial owners) contains the names of those owning beneficial interests in shares of a corporation who have given consent to the disclosure of their identities. The Securities and Exchange Commission requires brokers and other record holders of stock in street name to compile a NOBO list at a corporation's request." *Sadler*, 928 F.2d at 50; see 17 C.F.R. § 240.14b-1(e) (1991) (allowing but not requiring corporation to require production of NOBO list).

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the materials outlined in her previous written demands. At the end of the shareholders' meeting, a representative of the plaintiff made a public announcement that the plaintiff, at that moment, was filing a lawsuit against the defendant. After the announcement, the plaintiff held a press conference where she invited members of the press to obtain copies of her pleadings from the courthouse.

The defendant filed an answer on 4 June 1991 denying the material allegations of the complaint, and on 17 June 1991, the defendant filed a motion for sanctions under Rule 11. On 18 June 1991, the plaintiff moved to amend her complaint. At some time before the hearing on these motions, the defendant allowed the plaintiff to inspect its magnetic computer tapes, daily transfer sheets, CEDE breakdown, and all other items the defendant used in communicating with its shareholders. The defendant, however, again refused to obtain and make available a NOBO list for the plaintiff.

The plaintiff's motion for a preliminary injunction and the defendant's motion for sanctions were heard at the 1 July 1991 Civil Non-Jury Session of Superior Court in Guilford County. On 16 July 1991, the trial court entered its order in which it concluded the following: That the plaintiff was a qualified shareholder; that she had made a timely, written demand to inspect the defendant's records; that she made her demand in good faith and for the proper purpose of determining any possible mismanagement, misappropriation, misapplication, or improper use of corporate assets or property; that in her demand she described her purpose and the records with reasonable particularity; that the records are directly connected with her purpose; that to the extent that her demand did not comply with N.C.G.S. § 55-16-02(c), she nonetheless may inspect the defendant's records pursuant to her common law right of inspection; that the records concerning executive compensation, "perks," benefits, and other incidentals are not true accounting records, but to the extent that they are accounting records, the plaintiff nonetheless has a common law right to inspect them under N.C.G.S. § 55-16-02(e)(2) despite N.C.G.S. § 55-16-02(b); that the plaintiff filed her complaint and motion after diligent factual and legal inquiry and therefore for a proper purpose; and that N.C.G.S. § 55-16-02(b) does not require the defendant to obtain a NOBO list for the plaintiff. Based on its findings and conclusions, the trial court denied the defendant's motion for sanctions and ordered the defendant to allow the plaintiff to inspect and copy all the items listed in

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paragraphs 13 and 14 of the plaintiff's 14 February 1991 written demand.

The issues are whether (I) the plaintiff may require the defendant to produce a list of its non-objecting beneficial owners who are in no way registered in the records of the defendant; (II) the plaintiff may require the defendant to allow her to inspect the defendant's accounting records; (III) the plaintiff's designation of various corporate records was "directly connected" to her proper purpose for inspection; and (IV) a pleading or motion which meets the factual and legal sufficiency prongs of Rule 11 may nonetheless be interposed for an improper purpose.

## I

## NOBO List

[1] A corporation or its agent is required to maintain a record of its shareholders in a form which permits it to prepare an alphabetical list of the names and addresses of its shareholders. N.C.G.S. § 55-16-01(c) (1990). Upon a timely, written demand and subject to the requirements of N.C.G.S. § 55-16-02(c), a qualified shareholder of a corporation may inspect and copy this record of shareholders. N.C.G.S. § 55-16-02(b)(3). The plaintiff argues that the term "shareholders" in the phrase "record of shareholders" includes non-objecting beneficial owners of shares whether or not they are registered in the records of the corporation. We disagree.

Under the Revised Model Business Corporation Act (Act) as enacted in North Carolina, a "shareholder" is "the person in whose name shares are registered in the records of a corporation or the beneficial owner of shares to the extent of the rights granted by a nominee certificate on file with a corporation." N.C.G.S. § 55-1-40(22) (Supp. 1991); *see* N.C.G.S. § 55-16-02(f) ("shareholder" includes beneficial owners whose beneficial ownership has been certified to corporation by voting trust or nominee). Therefore, a beneficial owner of shares is a "shareholder" within the meaning of N.C.G.S. § 55-16-02(b)(3) when the corporation has obtained a NOBO list pursuant to 17 C.F.R. § 240.14b-1(c) listing that owner or when there is a nominee certificate regarding that owner *on file* with the corporation. *See RB Assocs. v. Gillette Co.*, No. 9711, 1988 WL 27731 (Del. Ch. Mar. 22, 1988) (although corporation not required to exercise federal rights under SEC shareholder com-

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munication rules and thereby obtain NOBO list for shareholder, corporation in fairness should provide shareholder with such list if corporation has it or, to prevent manipulation, if it obtains such list after proper demand); *Shamrock Assocs. v. Texas American Energy Corp.*, 517 A.2d 658, 661 (Del. Ch. 1986) (where corporation has obtained NOBO list and is or will be using it to solicit stockholders, stockholder entitled to such list); *Bohrer v. International Banknote Co.*, 540 N.Y.S.2d 445, 446 (N.Y. App. Div. 1989) (because "record of shareholders" must be liberally construed to facilitate shareholder communication, shareholder entitled to NOBO list in corporation's possession at time of request and at any time after request but before annual meeting to elect board of directors). The record reveals that the defendant has not obtained a NOBO list. Accordingly, to the extent that any of the non-objecting beneficial owners have filed nominee certificates with the defendant, the defendant must disclose their names to the plaintiff. However, the non-objecting beneficial owners who have not filed nominee certificates with the defendant, if any, are not "shareholders" within the meaning of N.C.G.S. § 55-16-02(b)(3), and the defendant does not have an obligation to obtain and make available to the plaintiff a list of their names. Accordingly, we remand this aspect of the case to the trial court for a determination of whether there are any non-objecting beneficial owners who have filed nominee certificates with the defendant, and if so, for an order compelling the defendant to disclose their names to the plaintiff.

## II

## Accounting Records

[2] The defendant argues that the trial court erred in concluding that the plaintiff has a right to inspect the defendant's accounting records. We agree.

A corporation is required to "maintain appropriate accounting records," N.C.G.S. § 55-16-01(b), which, as a general rule, are subject to inspection under N.C.G.S. § 55-16-02(b)(2). This general rule, however, does not apply to the accounting records of a public corporation. North Carolina Gen. Stat. § 55-16-02(b) provides in part "that a shareholder of a public corporation shall not be entitled to inspect or copy any accounting records of the corporation . . . ." "Accounting records," although not defined by the Act, are generally defined as "[t]he formal journals and ledgers, and the vouchers, invoices, correspondence, contracts, and other sources



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or support for such records . . . .” Kohler’s Dictionary for Accountants 13-14 (W.W. Cooper & Y. Ijiri eds., 6th ed. 1983). In this case, the parties agree that the defendant is a public corporation. Accordingly, to the extent that the records demanded by the plaintiff are in fact “accounting records,” the trial court erred in allowing the plaintiff to inspect them. The defendant argues that because the plaintiff referred to these records as accounting records, the plaintiff is not entitled to inspect them. We disagree. How a shareholder designates desired corporate records does not determine whether the shareholder is entitled to inspect them. Because we are unable to determine from this record whether these records are “accounting records,” we remand this case to the trial court for new findings, conclusions, and an order on whether these records are in fact “accounting records.”

The plaintiff argues and the trial court concluded, however, that irrespective of any statutory restriction on the inspection of accounting records, N.C.G.S. § 55-16-02(e)(2) preserves for her the common law right to inspect the defendant’s accounting records. We disagree. We acknowledge that N.C.G.S. § 55-16-02(e)(2) preserves for a shareholder whatever rights of inspection exist at common law. N.C.G.S. § 55-16-02(e)(2) official comment 4 and North Carolina commentary. However, a shareholder’s common law right to inspect the books and records of a corporation may be restricted by statute. *Cooke v. Outland*, 265 N.C. 601, 610, 144 S.E.2d 835, 841 (1965); *Carter v. Wilson Constr. Co.*, 83 N.C. App. 61, 64, 348 S.E.2d 830, 832 (1986). In N.C.G.S. § 55-16-02(b), the legislature specifically restricted a shareholder’s right to inspect the accounting records of a public corporation. Accordingly, the plaintiff’s common law right to inspect the defendant’s accounting records is no greater than that granted by N.C.G.S. § 55-16-02(b).

## III

## Other Corporate Records

North Carolina Gen. Stat. § 55-16-02(c) provides that the plaintiff as a qualified shareholder may inspect and copy the records described in N.C.G.S. § 55-16-02(b) “only if” (1) she made her demand in “good faith and for a proper purpose,” (2) she described her purpose and the desired records with “reasonable particularity,” and (3) the records are “directly connected” with her purpose. The trial court concluded that the plaintiff had complied with N.C.G.S. § 55-16-02(c) in her written demand to inspect all records of final

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action taken by the defendant's board of directors or by a committee of the board of directors, the minutes of any meeting of the shareholders, and the records of action taken by the shareholders without a meeting. The defendant does not argue that the trial court erred in concluding that the plaintiff had made her demand in good faith. The defendant argues, however, that the plaintiff failed to describe in her demand either her purpose or the desired records with reasonable particularity and furthermore that the desired records are not directly connected with her purpose.

[3] The records sought by the plaintiff pertinent to this issue are those described in paragraph 13 of her demand. This paragraph of her demand virtually mirrors N.C.G.S. § 55-16-02(b)(1) which allows inspection of the following:

[r]ecords of any final action taken with or without a meeting by the board of directors, or by a committee of the board of directors while acting in place of the board of directors on behalf of the corporation, minutes of any meeting of the shareholders and records of action taken by the shareholders without a meeting, *to the extent not subject to inspection under G.S. 55-16-02(a)* . . . .

*Id.* (emphases added). By its express language, N.C.G.S. § 55-16-02(c) applies only to the records described in N.C.G.S. § 55-16-02(b), not to those described in N.C.G.S. § 55-16-02(a). North Carolina Gen. Stat. § 55-16-02(a) provides that the plaintiff as a qualified shareholder may inspect and copy "any of the records of the corporation described in G.S. 55-16-01(e) . . . ." Included among the various records described in subsection (e) are "[t]he minutes of all shareholders' meetings, and records of all action taken by shareholders without a meeting, for the past three years . . . ." N.C.G.S. § 55-16-01(e)(4). Therefore, the plaintiff was entitled to inspect the minutes of all shareholders' meetings for the three years preceding her demand and the records of all shareholder action taken without meetings for the three years preceding her demand, and her demand to inspect these records was not subject to the requirements of N.C.G.S. § 55-16-02(c). In compliance with N.C.G.S. § 55-16-02(a), the defendant allowed the plaintiff to inspect these records. Accordingly, we consider whether the plaintiff's demand for the records of final action taken by the board of directors or by a committee of the board of directors, the minutes of shareholders' meetings beyond the three years preceding her demand, and the records

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of shareholder action taken without meetings also beyond the three years preceding her demand complied with the requirements of N.C.G.S. § 55-16-02(c).

## (A) Proper Purpose

[4] The plaintiff's stated purpose for demanding to inspect these records was to determine "any possible mismanagement of the Company or any possible misappropriation, misapplication or improper use of any property or asset of the Company . . . ." The traditional "proper purpose" language of N.C.G.S. § 55-16-02(c)(1) defines "the scope of the shareholder's right of inspection and its use ensures that the very substantial case law that has developed under it will continue to be applicable under the revised Act." N.C.G.S. § 55-16-02(c)(1) official comment 3; *see* N.C.G.S. § 55-38(b) (1982 & Supp. 1989) (proper purpose); *Cooke*, 265 N.C. at 611-12, 144 S.E.2d at 842-43; *Carter*, 83 N.C. App. at 64-65, 348 S.E.2d at 832. Prior appellate decisions of our courts have determined that a shareholder has a proper purpose when the shareholder desires to investigate the conduct of management where circumstances justify suspicion of mismanagement, *Cooke*, 265 N.C. at 611-12, 144 S.E.2d at 842, and when the shareholder desires to determine whether the corporation is being "efficiently and properly managed in the best interests of the corporation." *Carter*, 83 N.C. App. at 63, 348 S.E.2d at 831. In light of these prior decisions, the plaintiff's stated purpose is a proper one under N.C.G.S. § 55-16-02(c)(1).

## (B) Reasonably Particular Description

[5] The defendant argues that the plaintiff did not describe either her purpose or the desired records with reasonable particularity. We disagree. Whether the plaintiff described her purpose or the desired records with reasonable particularity depends upon the facts and circumstances of each case. By analogy to the "reasonable particularity" requirement of N.C.G.S. § 1A-1, Rule 34(b) (1990),

the test must be a relative one, turning on the degree of knowledge that a movant in a particular case has about the documents he requests. In some cases he has such exact and definite knowledge that he can designate, identify, and enumerate with precision the documents to be produced. This is the ideal designation, since it permits the party responding to go at once to his files and without difficulty produce the

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document for inspection. But the ideal is not always attainable and Rule 34 does not require the impossible. Even a generalized designation should be sufficient when the party seeking discovery cannot give a more particular description and the party from whom discovery is sought will have no difficulty in understanding what is wanted.

8 C. Wright & A. Miller, Federal Practice and Procedure § 2211 (1970). This test is consistent with the Official Comment to N.C.G.S. § 55-16-02(c)(2) which states that under the "reasonable particularity" requirement, a shareholder should make "more meaningful" designations of her purpose and the desired records when "feasible."

The record does not reveal that the plaintiff had any direct knowledge of mismanagement of the defendant or that she had any direct knowledge of improper use of corporate property at the time she made her demand of the defendant. The record shows only that she had knowledge of an alleged poor return on her investment with the defendant. In light of her apparent knowledge at the time of her demand, it would not have been feasible to state her purpose with any greater particularity. Accordingly, on these facts, the trial court properly determined that the plaintiff designated her purpose with reasonable particularity. Furthermore, she specifically described the desired records. She designated "all records of any final action taken" by the board of directors or by a committee of the board of directors, the "minutes of any meeting of the shareholders," and the "records of action taken by the shareholders of the Company without a meeting." Although her demand was extremely broad, there is nothing in this record to show that the plaintiff could have described the desired records with any greater particularity than she did, and the defendant should have had no trouble in understanding what the plaintiff desired. Accordingly, the trial court properly determined that the plaintiff had described the desired records with reasonable particularity.

## (C) Direct Connection

[6] The defendant argues that given the plaintiff's broad demand, many of the records within the scope of her request cannot be "directly connected" with her purpose. This argument has merit. It would appear that many of the desired records will have no connection to the plaintiff's proper purpose of determining mismanagement and improper use of corporate property. The plain-

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tiff argues, however, that her designation was not overly broad because in her motion for a preliminary injunction, she limited her demand to records of action "taken during the last five years." We disagree. To determine whether a shareholder's *demand* meets the requirements of N.C.G.S. § 55-16-02(c), the trial court must focus upon the demand itself, not upon the shareholder's subsequent pleadings or motions filed in an attempt to compel inspection under N.C.G.S. § 55-16-04(b). Accordingly, we remand this aspect of the case to the trial court and order the trial court to conduct an *in camera* examination of the desired records to determine which records, if any, are directly connected with the plaintiff's purpose. N.C.G.S. § 55-16-02(c)(3) official comment 3. The plaintiff may thereafter inspect those documents which are directly connected with her purpose.

The plaintiff argues and the trial court concluded that even if the plaintiff's demand does not meet the requirements of N.C.G.S. § 55-16-02(c)(3), she nonetheless has a common law right of inspection protected by N.C.G.S. § 55-16-02(e)(2) which is not subject to the requirements of N.C.G.S. § 55-16-02(c). We disagree. As previously stated with regard to accounting records, N.C.G.S. § 55-16-02(e)(2) merely preserves for a shareholder whatever rights of inspection exist at common law. At common law, a shareholder's right to inspect corporate records is clearly subject to statutory restriction. *Cooke*, 265 N.C. at 610, 144 S.E.2d at 841; *Carter*, 83 N.C. App. at 64, 348 S.E.2d at 832. By enacting N.C.G.S. § 55-16-02(c), the legislature specifically restricted shareholder inspection rights thereby precluding impermissible "fishing expeditions" in corporate records. *See Cooke*, 265 N.C. at 611, 144 S.E.2d at 842 (neither common law nor N.C.G.S. § 55-38(b) allowed "fishing expeditions"); *Carter*, 83 N.C. App. at 64, 348 S.E.2d at 832 (neither common law nor N.C.G.S. § 55-38(b) allowed "fishing expeditions").

## IV

## Rule 11 Sanctions

[7] A pleading violates Rule 11 if (1) it is not well grounded in fact, (2) it is not warranted by existing law or by "a good faith argument for the extension, modification, or reversal of existing law," or (3) it is interposed for an improper purpose. We agree with the plaintiff that her complaint and motion met the factual and legal sufficiency prongs of Rule 11. We agree with the defend-

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ant, however, that the trial court erred in concluding that the plaintiff did not file these documents for an improper purpose.

The trial court determined that because the plaintiff met both the factual and legal sufficiency prongs of Rule 11, her complaint and motion could not have been interposed for an improper purpose. This was a correct understanding of the law as it existed on the day the trial court entered its order. *Bryson v. Sullivan*, 102 N.C. App. 1, 11, 401 S.E.2d 645, 653 (1991). In *Bryson v. Sullivan*, 330 N.C. 644, 663, 412 S.E.2d 327, 337 (1992), however, our Supreme Court held that “[t]he improper purpose prong of Rule 11 is separate and distinct from the factual and legal sufficiency requirements,” and that therefore, a pleading which meets both the factual and legal sufficiency prongs of Rule 11 may nonetheless be interposed for an improper purpose. We presume that the *Bryson* decision applies retroactively, *State v. Rivens*, 299 N.C. 385, 390, 261 S.E.2d 867, 870 (1980), and therefore we remand this aspect of the case to the trial court for a determination on this record as to whether the plaintiff filed her complaint and motion for an improper purpose.

Accordingly, the trial court’s order is

Affirmed in part, reversed in part, and remanded.

Judges JOHNSON and COZORT concur.

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VICKIE ANN BUCHANAN CREWS AND DIANE NELSON BUCHANAN v.  
W. A. BROWN & SON, INC., FOODCRAFT EQUIPMENT COMPANY, AND  
CALVARY BAPTIST CHURCH OF WINSTON-SALEM, INC.

No. 9121SC532

(Filed 2 June 1992)

**1. Sales § 22 (NCI3d)— products liability—freezer door—  
negligence claim—summary judgment for seller—no error**

The trial court did not err by granting summary judgment for defendant Foodcraft where plaintiff Vickie Crews suffered severe frostbite injuries when she became trapped in a walk-in freezer while doing volunteer work at church and brought an action against the church, Foodcraft, which sold the freezer equipment to the church, and Brown, which sold the parts

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for the freezer to Foodcraft. Foodcraft's evidence showed that it did not breach its duty of care in assembling and installing the freezer, in inspecting it for latent defects, and in failing to warn of the alleged latent defect.

**Am Jur 2d, Products liability § 690.**

**Products liability: Industrial refrigeration equipment. 72 ALR4th 90.**

**Products liability: Household equipment relating to storage, preparation, cooling and disposal of food. 58 ALR4th 131.**

**2. Sales § 17 (NCI3d)— products liability— freezer door— breach of warranties— summary judgment for seller— no error**

The trial court did not err by granting summary judgment for defendant Foodcraft on breach of warranty claims where plaintiff Crews suffered severe frostbite injuries after being trapped in a walk-in freezer at church and brought an action against the church, Foodcraft, which sold the freezer equipment to the church, and Brown, which sold the equipment to Foodcraft. Foodcraft is the seller rather than the manufacturer under the Products Liability Act and is properly classified as the seller of the freezer under the Uniform Commercial Code. Assuming the existence of express and implied warranties, those warranties do not extend to plaintiffs because a church does not have a family or a household in the ordinary meanings of those terms and cannot be classified as a home. Furthermore, plaintiffs did not allege any facts indicating that they were third-party beneficiaries of Foodcraft's contract with the church, so that implied privity is not considered. N.C.G.S. § 25-2-318; N.C.G.S. § 99B-1 *et seq.*

**Am Jur 2d, Products liability § 609.**

**Products liability: Industrial refrigeration equipment. 72 ALR4th 90.**

APPEAL by plaintiffs from order entered 14 January 1991 in FORSYTH County Superior Court by *Judge Lester P. Martin, Jr.* Heard in the Court of Appeals 18 March 1992.

## CREWS v. W. A. BROWN &amp; SON

[106 N.C. App. 324 (1992)]

*The Law Office of Herman L. Stephens, by Herman L. Stephens and Howard C. Jones, II, for plaintiff-appellants.*

*Petree, Stockton & Robinson, by James H. Kelly, Jr. and Michael D. Hauser, for defendant-appellee Foodcraft Equipment Company.*

*Elrod & Lawing, P.A., by Frederick K. Sharpless and Pamela A. Robertson, for defendant-appellant W. A. Brown & Son, Inc.*

*Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr. and Laurie L. Hutchins, for defendant-appellant Calvary Baptist Church of Winston-Salem, Inc.*

GREENE, Judge.

The plaintiffs appeal from an order entered 14 January 1991 allowing Foodcraft Equipment Company's (Foodcraft) motion for summary judgment.

In mid-1984, Foodcraft, a corporation, sold a walk-in freezer to Calvary Baptist Church (Church). Foodcraft was not in the business of manufacturing freezer equipment and did not manufacture the walk-in freezer that it sold to Church. In July, 1984, Foodcraft contracted with W. A. Brown & Son, Inc. (Brown) for the purchase of the parts needed to "field assemble" a walk-in freezer. Brown maintained its principal place of business in Rowan County, North Carolina. Brown shipped all the necessary parts to Foodcraft on 25 October 1984. Included in this shipment was a pre-assembled door. The inside of the door to the freezer contained a label stating:

YOU ARE NOT  
LOCKED IN!

The manufacturer of this unit has equipped it with a STANDARD-KEIL EASY ACTION latch assembly. You cannot be locked in, even if the door closes behind you and the cylinder is locked. By pushing the inside release on the inside of this unit, you may operate the latch and open the door.

No Foodcraft employee removed this label from the door.

Installed in the door by Brown was a Standard-Keil door latch assembly with inside and outside releases. Foodcraft did not adjust this door latch assembly or alter it in any way. When Foodcraft received the freezer parts, Foodcraft employees took them to the



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church, assembled the freezer, and tested it to be sure that it operated properly. After the Foodcraft employees assembled the freezer, they tested the door latch assembly to be sure that the freezer could be opened from the inside by pressing the red release button. They concluded that the door latch assembly worked properly, and according to Jack Kroustalis, an officer with Foodcraft, “[a]t the time we received and hung the door, there was no indication that the Standard-Keil easy action latch assembly of the door to the walk-in freezer was defective or that the seal and/or door latch assembly in the door of the walk-in freezer was improperly installed in any fashion.” Furthermore, Harry Gallins, vice-president of Foodcraft, installed a “heated pressure release port” in the freezer to prevent a vacuum from being created inside the freezer whenever the door is closed.

Vickie Ann Buchanan Crews (Crews), a thirteen-year-old member of Church, was working at the church on the evening of 2 July 1985 as a volunteer managing the registration desk to the Family Life Center at the church. As a registration desk volunteer, Crews signed people in and out of the church gymnasium, signed equipment in and out to those people using the gym, and answered the telephone. At approximately 8:45 p.m., Crews went into the church’s kitchen to get some ice for a soft drink. She was wearing shorts and a shirt, but no shoes. Once inside the kitchen, Crews heard a noise which she thought came from the walk-in freezer. She went to the freezer, opened the door, and stepped inside. When she did, the freezer door closed behind her. She pushed on the red release button on the inside of the door, but the door would not open. She continued to try to open the door, but she could not open it. She banged on the door with her hands and feet, she pushed on the door with her shoulder, and she screamed. After about an hour of unsuccessful attempts, Crews became tired and sat down on a small rack. She had lost all feeling in her feet which were now completely white. Despite being tired, she continued to kick the door. At approximately 10:00 p.m., someone discovered Crews in the freezer. By that time, however, she had suffered severe frostbite to her feet, legs, and buttocks. Paramedics took her to a nearby hospital where she remained for approximately two months and where she underwent approximately five separate operations. During the first operation, doctors removed nine and one-half of her toes. During the remaining operations, doctors performed, among other things, skin grafts.

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Crews later recalled noticing a thick, white substance resembling frost on the inside of the release button. According to the plaintiffs' expert, Crews was unable to open the door from the inside because frost had accumulated inside the release mechanism. The expert opined that the frost had accumulated inside the release mechanism through the seal that separates the plastic cover of the latch assembly from the metal of the freezer door "and that this was caused by improper installation of the seal and/or latch assembly in the door of the walk-in freezer."

Crews and her mother filed a complaint against Brown, Foodcraft, and Church. Crews sought recovery for, among other things, the loss of her toes and her pain and suffering, and her mother sought recovery for Crews' medical expenses. With regard to Foodcraft, the plaintiffs alleged that Foodcraft was negligent in failing to assemble, install, and inspect the freezer properly and in failing to provide adequate warnings on the freezer. The plaintiffs also alleged breach of warranty claims against Foodcraft including breach of express warranties and breach of the implied warranties of merchantability and fitness for a particular purpose. Brown, Foodcraft, and Church made motions for summary judgment. The trial court granted Foodcraft's motion, but denied Brown's and Church's motions. The plaintiffs appealed the trial court's grant of Foodcraft's motion for summary judgment, and Brown and Church appealed the denial of their motions for summary judgment. On 25 July 1991, the plaintiffs moved to dismiss Brown's and Church's appeals on the grounds that the orders from which they were appealing are interlocutory and do not affect substantial rights. On 19 August 1991, this Court dismissed Brown's and Church's appeals and denied Church's petition for writ of certiorari.

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The issues are whether (I) there is a genuine issue of material fact as to whether Foodcraft assembled and installed the freezer with reasonable care and inspected it for latent defects with reasonable care; and (II) Foodcraft's alleged express and implied warranties extend to members of Church who suffer personal injury while on church property.

The plaintiffs' action against Foodcraft is a products liability action as it has been "brought for or on account of personal injury . . . [allegedly] caused by or resulting from the" assembly, instructing, labeling, selling, testing, or warning of a product, namely,

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a walk-in freezer. N.C.G.S. § 99B-1(3) (1989). The plaintiffs' products liability action is based on two separate theories, negligence and breach of warranties. See *Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498 (1987) (action for breach of implied warranty of merchantability is products liability action where action is for injury to person resulting from sale of product); *Wilson Bros. v. Mobil Oil*, 63 N.C. App. 334, 341, 305 S.E.2d 40, 45, *disc. rev. denied*, 309 N.C. 634, 308 S.E.2d 718 (1983) (products liability actions determined by principles of negligence and breach of warranty); C. Daye & M. Morris, North Carolina Law of Torts §§ 26.10, 26.30 (1991) (because Products Liability Act not source of liability, liability determined by rules of negligence, breach of warranty, or other theory of recovery).

## I

## Negligence Claims

[1] The plaintiffs argue that the trial court erred in granting Foodcraft's summary judgment motion on their negligence claims of failure to assemble, install, and inspect the freezer properly and of failure to provide adequate warnings on the freezer. We disagree.

As with other negligence actions, the essential elements of a products liability action based upon negligence are (1) duty, (2) breach, (3) causation, and (4) damages. *McCollum v. Grove Mfg. Co.*, 58 N.C. App. 283, 286, 293 S.E.2d 632, 635 (1982), *aff'd per curiam*, 307 N.C. 695, 300 S.E.2d 374 (1983). In North Carolina, where the seller of a product made by a reputable manufacturer "acts as a mere conduit and has no knowledge or reason to know of a product's dangerous propensities, [the seller] 'is under no affirmative duty to inspect or test for a latent defect, and therefore, liability cannot be based on a failure to inspect or test in order to discover such defect and warn against it.'" *Sutton v. Major Prods. Co.*, 91 N.C. App. 610, 614, 372 S.E.2d 897, 900 (1988) (citation omitted). Because the alleged defect in the latch assembly of the freezer door is hidden and not apparent, the alleged defect is properly classified as a latent one. Black's Law Dictionary 883 (6th ed. 1990); see *Sutton*, 91 N.C. App. at 614, 372 S.E.2d at 899 (because product not patently dangerous or defective, alleged defect characterized as latent). Where as here, however, the seller assembles and installs the product thereby acting as more than a "mere conduit," the seller has the duty to exercise reasonable care in assem-

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bling and installing the product and in inspecting the product for latent defects "and may be liable for a failure to exercise reasonable care not only in installation but also to discover defects." 2 L. Frumer & M. Friedman, *Products Liability* § 6.03[4] (1992); *Davis v. Siloo Inc.*, 47 N.C. App. 237, 247, 267 S.E.2d 354, 360, *disc. rev. denied*, 301 N.C. 234, 283 S.E.2d 131 (1980) (seller not mere conduit where seller performs auxiliary functions in connection with sale such as installation). Furthermore, the non-manufacturing seller has the duty to warn of hazards attendant to the assembled and installed product's use but only when the seller "has actual or constructive knowledge of a particular threatening characteristic of the product" and simultaneously "has reason to know that the purchaser will not realize the product's menacing propensities for himself." *Ziglar v. E. I. Du Pont De Nemours & Co.*, 53 N.C. App. 147, 151, 280 S.E.2d 510, 513, *disc. rev. denied*, 304 N.C. 393, 285 S.E.2d 838 (1981).

At the summary judgment hearing, Foodcraft's evidence showed that it did not breach its duty of care in assembling and installing the freezer, in inspecting it for latent defects, and in failing to warn of the alleged latent defect. According to this evidence, Foodcraft employees assembled and installed the various pre-assembled parts of the freezer, including the freezer door in which the manufacturer had previously installed the Standard-Keil door latch assembly. Once constructed, the employees inspected the freezer to be sure that it operated properly. Furthermore, they inspected the door latch assembly and concluded that it worked properly. In fact, nothing in their inspection indicated that the door latch assembly was defective or had been improperly installed. With this evidence, Foodcraft showed that an essential element of the plaintiffs' claims did not exist. See *Clark v. Brown*, 99 N.C. App. 255, 260, 393 S.E.2d 134, 136-37, *disc. rev. denied*, 327 N.C. 426, 395 S.E.2d 675 (1990). Foodcraft's showing shifted the burden to the plaintiffs to show that Foodcraft had breached its duty of care. *White v. Hunsinger*, 88 N.C. App. 382, 383, 363 S.E.2d 203, 204 (1988). The plaintiffs presented evidence at the hearing, but their evidence did not rebut Foodcraft's showing. Accordingly, the trial court properly entered summary judgment for Foodcraft on the plaintiffs' negligence claims. *Id.*

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## II

## Breach of Warranties Claims

[2] The plaintiffs argue that the trial court erred in granting Foodcraft's summary judgment motion on their breach of express and implied warranties claims. Foodcraft argues that the trial court properly granted its motion because the plaintiffs' claims are barred by a lack of privity with Foodcraft.

Except where the barrier of privity has been legislatively or judicially removed, the absence of a contractual relationship between the seller or manufacturer of an allegedly defective product and the person injured by it continues to preclude products liability actions for breach of express and implied warranties. See N.C.G.S. § 25-2-318 (1986) North Carolina comment; Daye & Morris, *supra*, § 26.33; cf. *Gregory v. Atrium Door & Window Co.*, 106 N.C. App. 142, 144, 415 S.E.2d 574, 575 (1992) (privity required to assert breach of implied warranty claim involving economic loss). To determine whether the barrier has been removed, a court must examine the basis for the breach of warranty action and determine whether the defendant in the action is the seller or the manufacturer.

## Claims Against Manufacturers

"Where the cause of action is based on breach of *express* warranty, directed by the *manufacturer* to the *ultimate purchaser*, lack of privity between the plaintiff-purchaser and the defendant-manufacturer is not a bar." Daye & Morris, *supra*, § 26.33 (emphases added); *Kinlaw v. Long Mfg.*, 298 N.C. 494, 499-500, 259 S.E.2d 552, 556-57 (1979). This rule applies when the express warranty addressed to the ultimate consumer is written as well as when the manufacturer makes oral representations to a retailer which "are intended to be communicated to remote buyers to induce them to buy a product." *Alberti v. Manufactured Homes, Inc.*, 329 N.C. 727, 737, 407 S.E.2d 819, 825 (1991). Furthermore, by statute, not only may the *ultimate purchaser* sue the manufacturer for breach of express warranty, but "any natural person who is in the family or household of his buyer or who is a guest in his home if it is reasonable to expect that such person may use, consume or be affected by the goods and who is injured in person by breach of the warranty" may sue the manufacturer for breach of its express warranty. N.C.G.S. § 25-2-318; *Bernick v. Jurden*, 306 N.C. 435, 448, 293 S.E.2d 405, 413-14 (1982) (where mother

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purchased and her son used an allegedly defective product, son allowed to sue manufacturer for breach of express warranty).

Where the cause of action against the *manufacturer* is based on breach of *implied* warranty, the Products Liability Act (Act) eliminates the privity requirement where the claimant "is a buyer, as defined in the Uniform Commercial Code, of the product involved, or . . . is a member or a guest of a member of the family of the buyer, a guest of the buyer, or an employee of the buyer . . . ." N.C.G.S. § 99B-2(b) (1989); *Bernick*, 306 N.C. at 448-49, 293 S.E.2d at 414 (son of purchaser allowed to sue manufacturer for breach of implied warranty); see *Tedder v. Pepsi-Cola Bottling Co.*, 270 N.C. 301, 304-06, 154 S.E.2d 337, 339-40 (1967) (in pre-Act case, buyer of product intended for human consumption allowed to sue manufacturer for breach of implied warranty despite the absence of privity); see also *Kinlaw*, 298 N.C. at 499, 259 S.E.2d at 556 (discussing *Tedder*); C. Cain & J. Murray, Survey of Developments in North Carolina Law, 1979, *Commercial Law*, 58 N.C. L. Rev. 1290, 1313 (1980).

## Claims Against Sellers

Where, however, the products liability action is brought against the *seller* for breach of either *express* or *implied* warranty, the privity barrier has been removed legislatively to the same extent as it has been removed in actions against manufacturers for breach of express warranty. N.C.G.S. § 25-2-318. Accordingly, assuming the existence of express and implied warranties, N.C.G.S. § 25-2-318 extends those warranties beyond the buyer but *only* to natural persons suffering personal injury who are in the buyer's family or household or who are guests in the buyer's home and only if it is reasonable to expect such persons may use, consume, or be affected by the goods. *Id.*; 3 R. Anderson, Anderson on the Uniform Commercial Code § 2-318:21 (3d ed. 1983); J. White & R. Summers, Uniform Commercial Code § 11-3 (3d ed. 1988). The statute does not extend warranty coverage to persons beyond those specifically enumerated. This construction is consistent with the legislative intent behind N.C.G.S. § 25-2-318 which was to eliminate the doctrine of privity as to the buyer's family, household, and guests, but not to abolish the doctrine as it relates to strangers to the contract. N.C.G.S. ch. 25, art. 2 North Carolina comment; N.C.G.S. § 25-2-318 North Carolina comment. Furthermore, this Court has applied N.C.G.S. § 25-2-318 consistently with this legislative

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intent. This Court has previously held that because N.C.G.S. § 25-2-318 “specifically limits actions on warranties, either express or implied,” an employee of a buyer of a dangerous chemical was barred by a lack of privity from suing the seller for breach of implied warranty. *Davis*, 47 N.C. App. at 248-49, 267 S.E.2d at 361.

The plaintiffs have brought against Foodcraft claims for breach of express and implied warranties. Because the plaintiffs do not contend either that Foodcraft was owned in whole or significant part by Brown or that it owned Brown in whole or significant part, and because Foodcraft assembled the freezer *after* it had sold it to Church, Foodcraft is not the manufacturer of the freezer under the Act but rather the seller. *See* N.C.G.S. § 99B-1(2) (1989) (manufacturer means entity assembling product prior to sale and includes “a seller owned in whole or significant part by the manufacturer” and “a seller owning the manufacturer in whole or significant part”); N.C.G.S. § 99B-1(4) (1989) (seller means entity engaged in business of selling a product). Furthermore, Foodcraft is properly classified as the seller of the freezer under the Uniform Commercial Code as enacted in North Carolina as Chapter 25 defines “seller” to include corporations which sell goods. N.C.G.S. § 25-1-201(28), (30) (1986); N.C.G.S. § 25-2-103(1)(d) (1986). Neither party disputes that Foodcraft, as a merchant, sold goods to Church. *See* 3 Anderson, *supra*, §§ 2-314:9, 2-315:11 (discussing predominant element test).

Assuming the existence of express and implied warranties, however, those warranties do not extend to the plaintiffs. Because a church does not have a “family” or a “household” in the ordinary meanings of those terms, Crews cannot be classified as a member of Church’s “family” or “household” under N.C.G.S. § 25-2-318. *See State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984) (where words in statute do not have technical meaning, court must construe them according to their common and ordinary meaning); *Lafayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973) (presume that legislature intended words of statute to be given ordinary meaning). Because a church is not a “home” within the ordinary meaning of that term, Church cannot be classified as a “home.” Accordingly, because Crews was not in the buyer’s “family” or “household,” and because she was not a guest in the buyer’s “home,” N.C.G.S. § 25-2-318 does not extend the coverage of Foodcraft’s warranties to the plaintiffs. *See Williams v. General Motors Corp.*, 19 N.C. App. 337, 339-40, 198 S.E.2d 766, 767-68, *cert. denied*, 284 N.C. 258, 200 S.E.2d 659

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(1973) (borrower of car not member of buyer's family or household and not guest in buyer's home).

Furthermore, because the plaintiffs did not allege in their complaint any facts indicating that they were third-party beneficiaries of Foodcraft's contract with Church, we will not consider whether to imply privity in this case. *See Coastal Leasing Corp. v. O'Neal*, 103 N.C. App. 230, 236, 405 S.E.2d 208, 212 (1991) (privity implied as to third-party beneficiaries); *Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 63-64, 401 S.E.2d 126, 128-29, *aff'd per curiam*, 330 N.C. 439, 410 S.E.2d 392 (1991) (pleading must allege sufficient facts to support required elements of third-party beneficiary claim). Accordingly, because N.C.G.S. § 25-2-318 does not extend the coverage of Foodcraft's warranties to the plaintiffs, the trial court's order allowing Foodcraft's summary judgment motion is

Affirmed.

Judges JOHNSON and COZORT concur.

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ROBERT C. SEMONES v. SOUTHERN BELL TELEPHONE & TELEGRAPH COMPANY

No. 9126SC478

(Filed 2 June 1992)

**1. Malicious Prosecution § 11 (NCI3d)— bad check—inference of knowledge of insufficient funds—insufficient**

The trial court erred by granting summary judgment for defendant on a malicious prosecution claim arising from a worthless check prosecution where there was no evidence in the record that defendant had reasonable grounds to believe that plaintiff knew when he drew the check that there were insufficient funds or lack of credit with which to pay the check upon presentation. The mere issuing of a check which is returned due to insufficient funds or lack of credit, without more, is not evidence from which the requisite knowledge can be inferred.

**Am Jur 2d, Malicious Prosecution § 125.**



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**2. Process § 18 (NCI3d)—worthless check prosecution—no improper act after issuance of process—summary judgment**

The trial court properly granted summary judgment for defendant on an abuse of process claim arising from a worthless check prosecution where plaintiff presented no meritorious evidence of an improper act after issuance of process. Plaintiff's contention that defendant's failure to notify the district attorney of the bankruptcy of the corporation of which plaintiff had been president was without merit because the automatic stay triggered by a bankruptcy does not operate against the commencement or continuation of criminal actions.

**Am Jur 2d, Process § 52.**

APPEAL by plaintiff from order entered 26 February 1991 in MECKLENBURG County Superior Court by *Judge Loto Greenlee Caviness*. Heard in the Court of Appeals 12 March 1992.

*Weinstein & Sturges, P.A., by Fenton T. Erwin, Jr. and L. Holmes Eleazer, Jr., for plaintiff-appellant.*

*Petree Stockton & Robinson, by John T. Allred, Richard E. Fay, and Charles H. Rabon, Jr., for defendant-appellee.*

GREENE, Judge.

Plaintiff appeals from an order entered 26 February 1991, granting defendant's motion for summary judgment on plaintiff's claims for malicious prosecution and abuse of process.

The facts pertinent to this appeal are as follows: Plaintiff was the president of Today's World Furniture, Inc. (Today's World) in Claremont, North Carolina, from its founding in 1979 until early March, 1986. In November, 1985, Rothwell Corporation purchased Today's World. Plaintiff, however, remained president until he resigned in March, 1986. On 3 January 1986, Today's World made a deposit into its account at First Union National Bank (First Union) in Conover. On the same day, Today's World issued a check signed by plaintiff made payable to defendant in the amount of \$1,084.88. After plaintiff mailed the check to defendant, plaintiff learned that Today's World's account had been put on hold by First Union. Plaintiff discovered that three of Today's World's creditors had placed the company in involuntary bankruptcy on 15 December

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1985. Plaintiff was unaware of the bankruptcy action at the time that he signed the check made payable to defendant.

Defendant presented the check to First Union, which later returned the check marked with the notation "uncollected funds." Defendant notified Today's World that the check had been dishonored and that, unless it was covered and other amounts owed to defendant paid, defendant would disconnect telephone service to Today's World. In late January, 1986, defendant disconnected Today's World's telephone service. Defendant notified Today's World that service would be restored upon payment of amounts owed defendant, which included the amount of the returned check. On 25 January 1986, Today's World made a cash payment of \$2,100.00 at Dellinger's Department Store, an authorized collection agent for defendant. This payment included payment for the dishonored check. Defendant restored telephone service to Today's World, and William Self, Rothwell Corporation's liaison at Today's World, informed plaintiff of the payment of Today's World's account with defendant.

In March, 1986, plaintiff resigned from Today's World and moved to Greensboro. On 6 October 1986, one of defendant's service representatives prepared a "Dishonored Check Security Referral" for the 3 January 1986 check that had previously been dishonored. Defendant sent the dishonored check referral to its Security Division where it was assigned to Mike Payne (Payne). Payne was the staff manager who performed investigative work and obtained issuance of warrants for bad checks delivered to defendant. On 8 October 1986, Payne sent a certified letter to plaintiff at plaintiff's Greensboro address. In the letter, Payne stated that the 3 January 1986 check in the amount of \$1,084.88 had been dishonored, and that unless it was made good within fifteen days, defendant would institute legal action against plaintiff in accordance with N.C.G.S. § 14-107, North Carolina's worthless check statute.

Near the latter part of October, 1986, plaintiff telephoned Payne concerning the letter. Plaintiff's version and Payne's version of the telephone conversation conflict. Plaintiff stated that he explained the circumstances surrounding the check to Payne, specifically, (1) that the check had been dishonored due to "held funds"; (2) that the check was thereafter paid at Dellinger's Department Store; (3) that service was subsequently reinstated; (4) that plaintiff had resigned from Today's World in March, 1986, and moved to Greensboro; (5) that Today's World was bankrupt; and (6) that

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Payne should contact William Self at Today's World. According to Payne, plaintiff told him only that he no longer worked at Today's World and that he was merely an employee when he had worked there. Furthermore, plaintiff did not mention the payment at Dellinger's or the bankruptcy. Both plaintiff and Payne stated, however, that at the end of the telephone conversation, Payne told plaintiff that he would look into the matter and get back in touch with plaintiff.

Payne described his investigation of the case as follows:

[a] copy of the business office record list was attached to the [file] when I received it, and I looked at the credit information on that. It listed [plaintiff] as the owner of the company. I contacted the business office to determine whether there had been any changes in ownership or anything of the company, other than what information I had. And I was advised that [plaintiff] had been the owner of the company and the person they had contacted to collect bills and so on. They had contacted him a number of times, when there had been collection problems with him in the past. And that, essentially, is it.

Payne also stated that he checked the signature card on file at First Union in order to verify that the signature on the check was not a forgery. First Union still had plaintiff listed as an officer of Today's World, and advised Payne that there had been no change in the company ownership.

On 10 December 1986, Payne procured a warrant for plaintiff's arrest charging plaintiff with violating North Carolina's worthless check statute by unlawfully and willfully drawing, making, uttering, and issuing and delivering to defendant a check drawn on First Union for \$1084.88, while knowing at the time that he did not have sufficient funds on deposit or credit with the bank with which to pay the check upon presentation.<sup>1</sup> Payne stated that he based his determination that plaintiff *knew* that there were insufficient funds in the Today's World First Union account with which to

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1. The general rule is that a corporate officer who issues a worthless check on behalf of the corporation may be guilty of violating the worthless check statute. 68 A.L.R.2d 1269, 1271 (1959); see also *State v. Dowless*, 217 N.C. 589, 590, 9 S.E.2d 18, 19 (1940) (proper procedure is to indict corporate officer in his official capacity, and not in his individual capacity). Here, although the warrant charged plaintiff individually, and not as an officer of Today's World, this error is not before this Court.

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pay the check on “[j]ust the fact that the check was not good.” In February, 1987, prior to plaintiff’s arrest, defendant was notified that an involuntary bankruptcy petition had been filed against Today’s World on 29 October 1986. On 23 February 1987, defendant filed a proof of claim for the sum of \$2,851.24 in the United States Bankruptcy Court for the Western District of North Carolina. Plaintiff was arrested at his home pursuant to the worthless check warrant on 25 February 1987. After several continuances, the district attorney voluntarily dismissed the prosecution on 5 October 1987.

In December, 1988, plaintiff filed this action against defendant for malicious prosecution and abuse of process. The trial court granted defendant’s motion for summary judgment on both claims.

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The issues presented are whether I) the return of a check due to insufficient funds or lack of credit constitutes prima facie evidence that the person issuing the check had knowledge at the time of issuance that there were insufficient funds or lack of credit with which to pay the check upon presentation; and II) defendant’s failure to notify the district attorney of Today’s World’s bankruptcy supports plaintiff’s claim for abuse of process.

## I

[1] Plaintiff argues that the trial court erroneously granted summary judgment for defendant on plaintiff’s claim for malicious prosecution because defendant failed to show that an essential element of plaintiff’s claim is nonexistent.

A claim for malicious prosecution has four essential elements: (1) initiation by the defendant of an earlier proceeding; (2) lack of probable cause for such initiation; (3) malice, either actual or implied; and (4) termination of the earlier proceeding in favor of the plaintiff. *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984). Probable cause in the context of a malicious prosecution action is “the existence of such facts and circumstances, known to him at the time, as would induce a reasonable [person] 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)). “Implied” or “legal” malice may be inferred from proof that the defendant lacked probable cause for initiating the proceeding. *Pitts*, 296 N.C. at 86-87, 249 S.E.2d at 379.

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Because defendant moved for summary judgment in this case, [it] 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." *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 625, 414 S.E.2d 568, 572 (1992). The existence of the first and fourth elements of malicious prosecution in the instant case is undisputed. Defendant's employee Michael Payne procured the issuance of a warrant for plaintiff's arrest on 10 December 1986 for violation of N.C.G.S. § 14-107, North Carolina's worthless check statute. The proceeding was subsequently voluntarily dismissed by the district attorney. See *Pitts*, 296 N.C. at 87, 249 S.E.2d at 379 (voluntary dismissal constitutes termination in favor of plaintiff so as to satisfy that element of malicious prosecution). Defendant, however, argues that it is entitled to summary judgment because defendant had probable cause to initiate the worthless check proceeding.

In order to have probable cause to initiate a worthless check proceeding, one need not be certain that the person against whom the action is instituted will be convicted of the crime. It is necessary only that the initiator of the action have reasonable grounds to believe that the person charged is guilty of the crime. 52 Am Jur 2d Malicious Prosecution § 52 (1970). A person commits the crime of issuing a worthless check when he

draw[s], make[s], utter[s] or issue[s] and deliver[s] to another, any check or draft on any bank or depository, for the payment of money or its equivalent, knowing at the time of the making, drawing, uttering, issuing and delivering such check or draft as aforesaid, that the maker or drawer thereof has not sufficient funds on deposit in or credit with such bank or depository with which to pay the same upon presentation.

N.C.G.S. § 14-107 (1991).<sup>2</sup> Subsequent payment of the check is immaterial because knowingly putting the worthless commercial paper into circulation is the act made criminal by Section 14-107. *State v. Cruse*, 253 N.C. 456, 459, 117 S.E.2d 49, 51 (1960). Accordingly, the essential elements of this crime are that (1) the person charged issued a check to another; (2) such person had insufficient funds

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2. Our use in this opinion of only the term "issue" when addressing violations of Section 14-107 is for convenience and is intended to incorporate drawing, making, uttering or issuing and delivering a check, as specified in the statute.

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on deposit in or lack of credit with the drawee bank with which to pay the check upon presentation; and (3) at the time the check was written, the issuer knew that there were insufficient funds or lack of credit with which to pay the check upon presentation. Knowledge in this context "connotes a certain and definite mental attitude" on the part of the person charged. *State v. Miller*, 212 N.C. 361, 363, 193 S.E. 388, 389 (1937).

In 1979, our Legislature enacted a statute which sets forth methods by which the State can establish a prima facie case of the first two elements of the crime of issuing a worthless check. See N.C.G.S. § 14-107.1 (1991). However, Section 14-107.1 does not set forth a method by which the State can establish a prima facie case of the essential element of knowledge. Defendant argues nonetheless that a prima facie case of knowledge is established whenever a person issues a check without sufficient funds or credit with which to pay the check upon presentation. We disagree.

Knowledge or intent "is a mental attitude seldom provable by direct evidence. It must ordinarily be proved by circumstances from which it may be inferred." *State v. Bell*, 285 N.C. 746, 750, 208 S.E.2d 506, 508 (1974). For example, the knowledge required under Section 14-107 can be inferred from evidence that the defendant issued other worthless checks within the same time period as the check at issue, or from evidence that the defendant issued a check immediately after making a deposit into his account, knowing that the policy of his drawee bank is not to pay checks until deposits made into the drawer's account are actually collected. See *Cruse*, 253 N.C. at 459, 117 S.E.2d at 51. However, the mere issuing of a check which is returned due to insufficient funds or lack of credit, without more, is not evidence from which the requisite knowledge can be inferred. To allow such an inference would essentially eliminate knowledge as a separate element of the criminal offense. This would *ipso facto* transform the worthless check statute into a version which was repealed by our Legislature in 1927, see C.S. § 4283(a) (1925) (issuing a check with insufficient funds or credit to pay check upon presentation constitutes a crime), and would raise serious questions about the statute's constitutionality. See *State v. Yarboro*, 194 N.C. 498, 140 S.E. 216 (1927) (new worthless check statute does not unconstitutionally impose imprisonment for a debt because Legislature added guilty knowledge as an essential element of the offense).

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There is no evidence in the record that defendant had reasonable grounds to believe that plaintiff knew when he drew the check that there were insufficient funds or lack of credit with which to pay the check upon presentation. Therefore, on the evidence before the court at the summary judgment hearing, defendant did not have probable cause to initiate against plaintiff a criminal prosecution for issuing a worthless check. Thus, defendant was not entitled to summary judgment on this basis. Furthermore, summary judgment cannot be supported on the malice element because malice in a malicious prosecution action can be inferred from a lack of probable cause. Accordingly, the trial court erred in granting summary judgment for defendant.

## II

[2] Plaintiff argues that defendant is not entitled to summary judgment on plaintiff's claim for abuse of process. We disagree.

In order to succeed on a claim for abuse of process, the plaintiff must establish that (1) a prior proceeding was initiated against the plaintiff by the defendant or used by him to achieve an ulterior motive or purpose; and (2) once the proceeding was initiated, the defendant committed some willful act not proper in the regular prosecution of the proceeding. *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979). It is well established that without evidence of this second element, that is, of an improper act occurring *subsequent to* the issuance of process, no claim for abuse of process will lie. *Ellis v. Wellons*, 224 N.C. 269, 271, 29 S.E.2d 884, 885 (1944); *see also Edwards v. Advo Sys., Inc.*, 93 N.C. App. 154, 157, 376 S.E.2d 765, 767 (1989), *overruled on other grounds*, 327 N.C. 283, 395 S.E.2d 85 (1990) (summary judgment for defendants on plaintiff's abuse of process claim proper where plaintiff raised no issue of fact regarding abuse of judicial system after the institution of the prior counterclaims). Because we determine that plaintiff presented no meritorious evidence of this second element, we need not address plaintiff's argument that defendant initiated the worthless check proceeding in order to achieve an ulterior purpose.

Plaintiff argues that defendant's failure to notify the district attorney of Today's World's second involuntary bankruptcy (filed 29 October 1986), of which defendant became aware sometime in February, 1987, constitutes an act not proper in the regular prosecution of the proceeding. Plaintiff argues that defendant had a

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duty to seek dismissal of the prosecution against plaintiff after learning of the bankruptcy. However, plaintiff's argument is without merit because the automatic stay of actions triggered by a bankruptcy does not operate against the commencement or continuation of criminal actions, such as worthless check prosecutions. 11 U.S.C. § 362(b)(1) (1979). Absent meritorious evidence of an improper act on the part of defendant after issuance of process, plaintiff has failed to establish a claim for abuse of process.

For the foregoing reasons, the trial court's grant of summary judgment against plaintiff on plaintiff's claim for malicious prosecution is reversed, and the grant of summary judgment against plaintiff on the abuse of process claim is affirmed.

Affirmed in part, reversed in part and remanded.

Judges JOHNSON and COZORT concur.

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STATE OF NORTH CAROLINA v. VERNON FOREST WILSON, JR.

No. 9114SC664

(Filed 2 June 1992)

**1. Conspiracy § 44 (NC14th) — armed robberies — single conspiracy**

Defendant could properly be convicted only for a single conspiracy to commit a series of armed robberies, and three of the four conspiracy convictions against defendant must be vacated and the case remanded for entry of a single judgment on one count of conspiracy, where the evidence tended to show that the participants intended to commit the robberies to acquire cash; the participants were the same each time; the robberies occurred over a two week period; three of the four robberies involved commercial establishments; and in each case the participants were armed, wore masks and gloves, forced those present to lie face down on the floor, and primarily took cash.

**Am Jur 2d, Conspiracy § 11.**



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**2. Receiving Stolen Goods § 5.1 (NCI3d) — possession of stolen property — knowledge that property stolen**

The State presented sufficient evidence in a prosecution for possession of stolen property to show that defendant knew or had reasonable grounds to believe that a pistol he possessed was stolen where it tended to show that the pistol was stolen during a break-in of a residence; defendant used the pistol in a subsequent robbery; when officers chased an automobile occupied by defendant and another person, defendant took the pistol from his coat and gave it to the other person to dispose of; and officers subsequently found the automobile abandoned and the pistol lying on the ground nearby.

**Am Jur 2d, Criminal Law § 136.**

**3. Evidence and Witnesses § 300 (NCI4th) — conviction thirteen years earlier — similarity and remoteness — admissibility to show modus operandi, motive and identity**

Evidence of defendant's 1975 conviction of armed robbery was sufficiently similar to the crimes charged and not too remote to be admissible in defendant's trial for six 1988 robberies for the purpose of showing modus operandi, motive and identity where defendant was armed, wore a ski mask and gloves, ordered the people present to lie face down on the floor, and took cash in both the 1975 and 1988 robberies, and defendant spent eight of the thirteen years between 1975 and 1988 in prison.

**Am Jur 2d, Evidence § 326.**

**Robbery: Admissibility in robbery prosecution of evidence of other robberies. 42 ALR2d 854.**

APPEAL by defendant from judgments and commitments entered 21 November 1990 by *Judge Orlando F. Hudson* in DURHAM County Superior Court. Heard in the Court of Appeals 7 April 1992.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie B. Spalding, for the State.*

*Appellate Defender Malcolm Ray Hunter, by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.*

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LEWIS, Judge.

Defendant was convicted by a jury of first degree burglary, attempted armed robbery, possession of stolen property, six counts of armed robbery, and four counts of conspiracy to commit armed robbery. Defendant appeals three of the conspiracy convictions and the conviction for possession of stolen property.

The evidence presented at trial tended to show that a series of robberies occurred in and around Durham during a two week period in December 1988. On 14 December 1988, someone broke into the Tollison residence and stole a pearl-handled pistol, jewelry, and Christmas presents. Another private residence, the Lynn household in Durham, was burglarized on 17 December 1988. The Lynns, who were present during the robbery, testified that two armed, masked and gloved men entered their house. As one of the men held a gun on the Lynns, the other "ransacked" the house. The robbers stole money, jewelry and Christmas gifts. At trial, both Mr. and Mrs. Lynn testified that they were unable to distinguish the race of the robbers.

Also during this two week time period, the Pine State Creamery, the Weeping Radish restaurant and brewery, and Rigsbee's Lounge were robbed. In all three instances, men wearing ski masks and gloves and brandishing guns entered the establishments. At Pine State, two men, and at the Weeping Radish and Rigsbee's Lounge three men perpetrated the crimes. In all three instances, the men forced everyone present to lie face down on the floor, and in all three instances the armed men took cash. Witnesses testified that the Pine State robbers were two white males. Witnesses from the Weeping Radish were less sure; one said three white males were involved and another said one was white, one was black and could not identify the race of the third man. Mr. Rigsbee of Rigsbee's Lounge testified that two of the robbers were white but he was unsure about the third.

On 21 December 1988, in the middle of this two week period, Officer Hall of the Durham Police Department observed what he considered to be a "suspicious" situation—a green Buick LaSabre, traveling about twenty to twenty-five miles per hour, occupied by two white males wearing camouflage clothing. Officer Hall and his partner put their blue light on the dashboard of their unmarked car, whereupon the Buick sped away. A chase ensued. Subsequently, the officers found the Buick abandoned, the passenger door

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open and a .25 caliber pearl-handled pistol lying on the ground nearby. Officer Hall testified as to these occurrences at trial, and identified defendant as one of the Buick's occupants.

[1] At trial, the jury convicted defendant of, among other charges, four conspiracies. Defendant assigns as error his convictions for multiple conspiracies, arguing that the facts support only a single conspiracy conviction. Defendant cites as authority for this argument this Court's earlier case, *State v. Medlin*, 86 N.C. App. 114, 357 S.E.2d 174 (1987).

In *Medlin*, the defendant had been convicted by a jury of, among other charges, seven counts of conspiracy to break or enter. These charges arose out of ten break-ins during the summer of 1985 of several retail stores in Durham. In each of the seven break-ins for which defendant was convicted, the evidence tended to show these facts: Either one or two men would break a panel of glass in the store's windows, enter the store through this opening, carry out radios, televisions, and other merchandise, and place the property in defendant's waiting truck. After the break-ins, the participants usually met to discuss the next job and divide the loot. Our Court held that this evidence supported a *single* conspiracy to break or enter various retail stores in Durham. *Id.* at 122, 357 S.E.2d at 179. The judgments and sentencing on multiple conspiracies were vacated and the case remanded with instructions to the trial court to enter judgment on a single conspiracy. *Id.* at 123, 357 S.E.2d at 179. Though not appealed and not yet cited by the Supreme Court, *Medlin* controls here.

According to North Carolina law, a criminal conspiracy is an agreement by two or more persons to perform either an unlawful act or a lawful act in an unlawful manner. *State v. Rozier*, 69 N.C. App. 38, 49, 316 S.E.2d 893, 900, *cert. denied*, 312 N.C. 88, 321 S.E.2d 907 (1984) (citation omitted). Because the crime of conspiracy lies in the agreement itself, and not the commission of the substantive crime, *State v. Looney*, 294 N.C. 1, 240 S.E.2d 612 (1978), a defendant can, under certain fact situations, be convicted of a single conspiracy when there are multiple acts or transactions. *See, e.g., Rozier*, 69 N.C. App. at 52, 316 S.E.2d at 902. To determine 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." *Id.* Applying

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these factors to the present fact situation, we find a single conspiracy under *Medlin*.

We find the present case to be legally indistinguishable from *Medlin*. Andrew Hyde, one of the admitted participants in the robberies, was a witness for the State in this case. During direct examination, Hyde testified that a few days before their first robbery of a commercial establishment, the 15 December 1988 robbery of Pine State Creamery, defendant told him that

cash money . . . was what it was all about and the onliest way to get cash money was in armed robberies. [Defendant] said, 'Damn a bunch of property, stealing a bunch of property, taking a bunch of property and trying to sell it and you not getting nothing compared to what it was worth. . . . You really didn't have anything to worry about as long as you had a mask over your face and gloves on your hand. . . . There's no way that anybody can ever identify you.'

Hyde also testified that once this course of action started, "[w]e didn't want to stop robbing places. We decided it was to the death. We just weren't going to stop. It was to the death." We find these conversations clear evidence that a common scheme of a single conspiracy to commit armed robberies to acquire cash existed.

In addition, our examination of the *Rozier* factors leads us to the same conclusion. As in *Medlin*, the participants here were the same each time. The fact that in two of the robberies the conspirators solicited the assistance of a third man is inconsequential. The entering and exiting of various participants in an otherwise ongoing plan to commit a particular felonious act does not convert a single conspiracy into several. *See, e.g., State v. Overton*, 60 N.C. App. 1, 13, 298 S.E.2d 695, 710 (1982), *disc. rev. denied*, 307 N.C. 580, 299 S.E.2d 652 (1983). Further, the robberies occurred over a two week period. The objectives were clear in that the parties intended to commit armed robbery to acquire cash. This case differs from *Medlin* in that there is no evidence that the parties held meetings of their "board" after each robbery. However, the facts suggest that there was a common scheme at play: First, we note Hyde's testimony concerning the purpose of armed robbery for cash; second, we note that "the break-ins occurred in essentially the same manner." *Medlin*, 86 N.C. App. at 121, 357 S.E.2d at 178. Three of the four robberies involved commercial establishments, and in each case, the participants were armed, wore masks and

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gloves, forced those present to lie face down on the floor, and primarily took cash.

We find that "these facts show one unlawful agreement to break or enter as many times as the participants could get away with." *Id.* at 122, 357 S.E.2d at 179. There was but a "single scheme or plan to commit an ongoing series of felonious breakings or enterings." *Id.* at 121, 357 S.E.2d at 178. Accordingly, we vacate three of the conspiracy convictions against defendant, and remand with instructions to the trial court to resentence defendant on the remaining conspiracy conviction. Given our ruling on this assignment of error, we find it unnecessary to address defendant's second assignment of error on the trial court's failure to instruct the jury as to a single conspiracy.

[2] Defendant also contends that the evidence presented was insufficient to support a conviction for possession of stolen property under N.C.G.S. § 14-71.1 (1986). The elements of this crime are (1) possession of personal property (2) which has been stolen, (3) the possessor knowing or having reasonable grounds to believe the property was stolen, and (4) the possessor acts with dishonest purpose. *Id.* See also *State v. Perry*, 305 N.C. 225, 233, 287 S.E.2d 810, 815 (1982). Possession of a stolen firearm by one who knows or has reasonable grounds to believe it is stolen is a felony. *State v. Taylor*, 311 N.C. 380, 384, 317 S.E.2d 369, 371 (1984).

In the present case, Barbara Tollison testified that a .25 caliber handgun with a pearl handle was stolen from her residence on 14 December 1988. A witness at the Pine State Creamery robbery testified that one of the gunmen was armed with a small .25 caliber pearl-handled pistol. Mr. Lynn testified to the same effect as regards the robbery of his residence. Andrew Hyde testified that defendant used this handgun during the Pine State Creamery robbery, and Officer Hall testified that after chasing the green Buick with defendant inside, he found the pearl-handled pistol lying on the ground near the abandoned car. When the gun was introduced as evidence at trial, Tollison stated, "It looks like the gun that was taken from my bedroom."

Under the evidence as presented, the only element that we need to address is the third. Defendant's guilty knowledge can be implied from the circumstances. *State v. Parker*, 316 N.C. 295, 303, 341 S.E.2d 555, 560 (1986). *Parker* was similar to this case. When police attempted to stop defendant Parker's vehicle, he pro-

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ceded to flee at high speed, then attempted to escape on foot. Our Supreme Court held, "We have recognized that an accused's flight is evidence of consciousness of guilt and therefore of guilt itself." *Id.* at 304, 341 S.E.2d at 560. In *State v. Taylor*, 64 N.C. App. 165, 307 S.E.2d 173 (1983), *modified*, 311 N.C. 380, 317 S.E.2d 369 (1984), we held that evidence that defendant removed a firearm from his coat and threw it into bushes was sufficiently incriminating to permit a reasonable inference that defendant knew the firearm was stolen, and therefore sufficient to go to the jury on that issue. Here, defendant fled from police in the green Buick. Hyde testified that, as in *Taylor*, defendant removed the gun from his coat and gave it to Hyde to dispose of, which he accomplished by throwing the gun from the car. We find no error in defendant's conviction for possession of stolen property.

[3] Finally, defendant asserts the trial court erred when it admitted evidence that thirteen and one-half years prior to trial defendant had been convicted of armed robbery. The State presented evidence that defendant robbed an A&P store in Durham on 25 June 1975. The State's witness, an A&P employee who had been on duty the night of 25 June 1975, testified that at approximately three o'clock a.m. an armed, masked, and gloved man entered the store. The man forced everyone present to lie face down on the floor, and proceeded to commit the robbery. On 6 October 1975 defendant pled guilty to armed robbery. Defendant now contends that because this conviction was more than thirteen years old at the time of his trial, it was too remote in time to be probative of any fact at issue, and hence under Rule 404(b) was unduly prejudicial.

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.

N.C.G.S. § 8C-1, Rule 404(b) (1988). The test for admissibility under this Rule has two parts. The first part examines whether the incidents are sufficiently similar; the second part asks whether the incidents are too remote in time. *State v. Davis*, 101 N.C. App. 12, 19, 398 S.E.2d 645, 649 (1990), *disc. rev. denied*, 328 N.C.

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574, 403 S.E.2d 516 (1991) (evidence of rape occurring ten years prior is admissible when similar in nature and when defendant spent all but 132 days of that time interval serving a prison sentence).

In the case at bar, the trial court carefully considered this test when ruling on admissibility. Upon review, this Court finds that the first part of the test is clearly met. The evidence presented by the State of the 1975 armed robbery is sufficiently similar to the crimes charged here to be admitted for the purpose of showing a modus operandi, motive and even identity. In both 1975 and 1988, defendant was armed, wore a ski mask and gloves, ordered people present to lie face down on the floor, and took cash.

Furthermore, we hold this evidence not too remote in time. Although the armed robbery of the A&P to which defendant pled guilty was more than thirteen years prior to this trial, defendant spent approximately eight years in prison between these occurrences. *See, e.g., Davis*, 101 N.C. App. at 20, 398 S.E.2d at 650. Finally, a recent Supreme Court case, *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) is instructive, if not controlling. In that case, our Supreme Court held that evidence of the shooting death of defendant's first husband ten years earlier was admissible even though there was never a conviction. The Court held that the deaths of both of defendant's husbands were sufficiently similar to show intent, and that "remoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Id.* at 307, 406 S.E.2d at 893.

Vacated in part and remanded for resentencing as to the conspiracies—Case numbers: 90CRS17196; 97; 98.

No error as to the remaining convictions or the trial.

Judges WYNN and WALKER concur.

## HARDING v. N.C. DEPT. OF CORRECTION

[106 N.C. App. 350 (1992)]

JANICE HARDING v. NORTH CAROLINA DEPARTMENT OF CORRECTION

No. 9110SC386

(Filed 2 June 1992)

**State § 12 (NCI3d)— correctional officer—leave without pay—  
refusal to reinstate—improper dismissal**

Petitioner was wrongfully dismissed as a correctional officer both substantively and procedurally where she was placed on leave without pay status for "approximately two months" on 2 April 1987 after she had hip replacement surgery and exhausted her sick and vacation leave; in September 1987 the Department of Correction received a "return to work" notice from petitioner's doctor stating that she was ready to return to light duty, full-time work with certain restrictions; the Department of Correction informed petitioner by letter dated 22 October 1987 that it was unable to accommodate light duty work in her situation, could not reinstate her, and was terminating her from that date; and nothing in the record indicates that, at the time of petitioner's notice of return to work, the Department of Correction considered her to have resigned. Since petitioner gave written notice of her intention to return to work at least thirty days before expiration of her leave without pay, the Department of Correction was required to reinstate her and could discharge her only upon a finding of just cause pursuant to N.C.G.S. § 126-35 after the procedures required by that statute and the rules and regulations implementing that statute had been followed.

**Am Jur 2d, Civil Service § 76.**

APPEAL by respondent from order entered 22 January 1991 by *Judge George R. Greene* in WAKE County Superior Court. Heard in the Court of Appeals 17 February 1992.

In December 1987, petitioner filed a petition for a hearing to review the adverse personnel action of respondent Department of Correction (DOC). Following a hearing, the administrative law judge on 30 June 1989 filed his recommended decision that the personnel action be reversed. The State Personnel Commission considered the recommended decision of the administrative law judge, and on 27 December 1989 issued its decision and order, ordering DOC's decision to separate petitioner to remain undis-



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turbed. Petitioner then filed this action for judicial review of the final decision of the State Personnel Commission. Following a hearing, on 22 January 1991 the trial court reversed the decision and order of the State Personnel Commission and ordered that petitioner be reinstated with back pay.

From this order, respondent appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie L. Bateman, for respondent-appellant.*

*Marvin Schiller for petitioner-appellee.*

ORR, Judge.

The issue on appeal is whether the trial court erred in reversing the decision of the State Personnel Commission and ordering that petitioner be reinstated with back pay. For the reasons below, we affirm the order of the trial court.

Petitioner was employed at the North Carolina Correctional Center for Women. She called in sick on 31 December 1986, did not return to work, and had hip replacement surgery the following February. From 5 January to 30 March 1987 she was allowed to exhaust her sick leave and vacation leave. After 30 March 1987, she was placed on leave without pay status for "approximately two months." Because she was unable to work, petitioner received disability benefits.

On 24 September 1987, petitioner's doctor sent DOC a notice stating that petitioner was able to return to work for full-time light duty as long as she avoided heavy lifting, repetitive bending, lifting or stooping, prolonged walking, standing, climbing, stooping or crawling, and overuse of the injured limb and that she could progress her activity to full duty slowly which was estimated at six to eight months with some permanent restrictions. Between 25 September and 22 October 1987, DOC discussed petitioner's condition with petitioner and her doctor. On 22 October 1987, DOC notified petitioner that it would not reinstate her but would give her strong consideration for re-employment when she was able to work without restrictions.

In her petition for review of the adverse personnel action, petitioner alleged age and handicap discrimination and that her termination was without procedural and substantive due process

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including failure to provide a pre-termination hearing. The allegations of discrimination were dismissed as untimely prior to the hearing.

Following a hearing, the administrative law judge made findings of fact. In his conclusions of law, he stated in relevant part:

2. . . . Based upon the evidence presented, I do not think the Respondent acted justly, impartially or fairly in separating the Petitioner for she had received no oral or written warnings, employees with similar situations had been accommodated in the past, and she was willing to return to work with no desire to resign. She continued to be a permanent state employee while taking leave without pay. She was therefore entitled to be reinstated as a correctional officer or placed in another suitable position at the termination of leave without pay. Upon reinstatement, Petitioner will have to perform required duties of the position or suffer termination through the progressive warnings process which was lacking in this case.

The Commission, in declining to adopt the administrative law judge's recommendations, adopted his findings of fact but rejected his second conclusion of law and added four of its own conclusions of law. The Commission concluded that DOC did not administer its leave without pay policy unfairly. Further, the Commission stated in its conclusions of law the following:

4. . . . State Personnel policy dealing with the separation of an employee defines the procedural safeguards imposed upon management. Where an employee is separated for disciplinary reasons, (job performance, personal conduct) the policy requires a showing of just cause. In separations such as in the instant case the policy is not to be interpreted to impose upon management an obligation to follow a disciplinary process for a non-disciplinary separation. It would be unreasonable to require an agency to give an employee an oral, written and final written warning, where the employee is separated due to inability to perform the job responsibilities required of the position. This is inapplicable to the job performance category of disciplinary dismissal, where the employee is incapable of performing the work due to a lack of knowledge, understanding or ability. This addresses situations as in the present case where the employee is incapable of performing duties and responsibilities because of injury.

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5. After reviewing the statement from Petitioner's doctor and his assessment of her abilities . . . , Respondent determined that Petitioner's particular situation could not be accommodated. Due to the nature of the work required of a Correctional Officer and certain basic security considerations, the Respondent determined that it could not reinstate Petitioner from her leave without pay status and separated her. The separation was not for disciplinary reasons under NCGS 126-35, therefore Petitioner's allegations that she was denied both substantive and procedural due process cannot be substantiated.

Petitioner then sought judicial review. Following a hearing, the trial court in its order stated that it

finds and concludes based upon the whole record that the Petitioner was entitled to the substantive and procedural due process protections, including a meaningful pre-termination hearing, guaranteed permanent state employees pursuant to N.C.G.S. § 126-35 and regulations adopted pursuant thereto, and, therefore, Respondent's dismissal of Petitioner was without either substantive or procedural just cause and without a meaningful pre-termination hearing which is an essential element of procedural just cause, in contravention of N.C.G.S. § 126-35.

The trial court further found that the the administrative law judge's findings of fact and conclusions of law were correct and supported by the evidence and that the Commission's conclusions were not supported by the findings. Then the trial court ordered petitioner be reinstated with back pay, attorneys fees, and benefits of continued state employment.

\* \* \*

The standard of review is governed by N.C. Gen. Stat. § 150B-51(b) (1991). A court in reviewing an agency's final decision may reverse or modify the decision

. . . if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:

- (1) In violation of constitutional provisions;
- (2) In excess of the statutory authority or jurisdiction of the agency;

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- (3) Made upon unlawful procedure;
- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence . . . in view of the entire record as submitted; or
- (6) Arbitrary and capricious.

N.C. Gen. Stat. § 150B-51(b). Our review is also limited to the assignments of error to the trial court's order. *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 362 S.E.2d 294 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988).

"The proper standard to be applied depends on the issues presented on appeal. If it is alleged that an agency's decision was based on an error of law then a *de novo* review is required." *Walker v. N.C. Dep't of Human Resources*, 100 N.C. App. 498, 502, 397 S.E.2d 350, 354 (1990), *disc. review denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). "Incorrect statutory interpretation by an agency constitutes an error of law under G.S. 150B-51(b) and allows this court to apply a *de novo* review." *Brooks v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

A review of whether the agency decision is supported by sufficient evidence, or is arbitrary and capricious, requires the court to employ the whole record test. *Id.* at 463, 372 S.E.2d at 344. "Agency findings of fact are conclusive if, upon review of the whole record, they are supported by competent, material, and substantial evidence." *In re Humana Hosp. Corp. v. N.C. Dep't of Human Resources*, 81 N.C. App. 628, 633, 345 S.E.2d 235, 238 (1986). Moreover, where respondent did not object to the findings of fact adopted by the Commission at the superior court level, the findings were binding on the trial court and are binding on appeal. *Walker*, 100 N.C. App. at 502, 397 S.E.2d at 354.

The intent and purpose of Chapter 126 of the North Carolina General Statutes is "to establish for the government of the State a system of personnel administration under the Governor, based on accepted principles of personnel administration and applying the best methods as evolved in government and industry." N.C. Gen. Stat. § 126-1 (1991). Pursuant to Chapter 126, the State Personnel Commission has the authority to establish rules and policies governing personnel matters. *N.C. Dep't of Justice v. Eaker*, 90 N.C. App. 30, 34, 367 S.E.2d 392, 395, *disc. review denied*, 322

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N.C. 836, 371 S.E.2d 279 (1988), *overruled in part on other grounds, Batten v. N.C. Dept of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990). "The Legislature has delegated, to the extent of the Commission's statutory powers, its own legislative powers over the State's personnel system. Therefore, rules and policies made pursuant to the Commission's statutory authority have the effect of law." *Id.* at 37-38, 367 S.E.2d at 398.

Pursuant to this authority, the Commission established a policy as to leave without pay. Under the policy in effect at the time of petitioner's separation, 30 days before the expiration of the leave without pay, the employee must give notice in writing of an intention to return to work. N.C. Admin. Code tit. 25, r. 1E.1103. If such notice is not given, the employer is not required to reinstate the employee but may do so if "feasible." *Id.* "Failure to report at the expiration of a leave of absence, unless an extension has been requested, may be considered as a resignation." *Id.* "Reinstatement to the same position or one of like status and pay *must* be made upon the employee's return to work unless other arrangements are agreed to in writing. . . ." N.C. Admin. Code tit. 25, r. 1E.1104 (emphasis added). Because this policy has the effect of law, it must be strictly followed. *Eaker*, 90 N.C. App. at 38, 367 S.E.2d at 398.

According to the Office of State Personnel personnel action form dated 30 March 1987 and approved 2 April 1987, petitioner was placed on leave without pay status for "approximately two months." In September 1987 DOC received a "return to work" notice from petitioner's doctor stating that she was ready to return to light duty, full-time work with certain restrictions. In a letter to DOC dated 6 October 1987, petitioner's doctor described her abilities. By letter dated 22 October 1987, DOC informed petitioner that DOC was unable to accommodate temporary light duty work in her situation, was therefore unable to reinstate her, and was separating her as of that date. The Office of State Personnel personnel action form approved 30 October 1987 states as the reason for separation of petitioner: "Resigned - Unable to return from leave without pay."

Pursuant to the required procedures to be followed at the termination of the leave without pay period, DOC was required to reinstate petitioner provided she gave notice in writing 30 days prior to the expiration of her leave without pay. *See* N.C. Admin.

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Code tit. 25, r. 1E.1103. Otherwise, DOC was not required to reinstate her but could have done so if "feasible." *See id.* The rules further provide that failure to report at the end of the leave without pay period "may be considered as a resignation." *See id.* However, although ultimately DOC considered petitioner to have resigned according to the personnel action form approved 30 October 1987, nothing in the record indicates that DOC at the time of petitioner's notice to return to work considered her to have resigned. On the contrary, the record indicates that DOC reviewed her medical records in light of her request to return to work but declined to reinstate her. Thus under the applicable rule at the time petitioner stated her intent to return to work, DOC should have reinstated her and DOC's summary dismissal of petitioner was in error.

If, following reinstatement, DOC wanted to discharge petitioner, it could have done so only on a finding of just cause pursuant to N.C. Gen. Stat. § 126-35. *See Batten*, 326 N.C. at 345, 389 S.E.2d at 40 (1990) (holding that even though section 126-35 refers to "disciplinary action," an employee's reallocation to a lower grade pursuant to a managerial reorganization falls under the statute since the "focus of the review is justification of the adverse departmental action."). Moreover, petitioner would also have been entitled to the procedures required under N.C. Gen. Stat. § 126-35 and the rules and regulations implemented thereto which were in effect at the relevant time. *See* N.C. Admin. Code tit. 25, r. 1J.0605 and r. 1J.0606(2) (warnings must be given where an employee is dismissed for performance of duties and a predismisal conference is required).

We conclude therefore that the trial court correctly determined that petitioner was wrongfully dismissed both substantively and procedurally. DOC contends though that it is the Commission's duty to fashion the appropriate remedy not the trial court. However, since we have determined that the rules require petitioner's reinstatement and she would, of course, be entitled to compensation for the time during which she was wrongfully terminated, we conclude that the trial court's action does not constitute error.

For the above reasons, we affirm the order of the trial court.

Affirmed.

Chief Judge HEDRICK and Judge WALKER concur.

**COLLINS & AIKMAN CORP. v. HARTFORD ACCIDENT & INDEMNITY CO.**

[106 N.C. App. 357 (1992)]

COLLINS &amp; AIKMAN CORPORATION v. THE HARTFORD ACCIDENT &amp; INDEMNITY COMPANY, AND AETNA CASUALTY AND SURETY COMPANY

No. 9126SC451

(Filed 2 June 1992)

**1. Insurance § 149 (NCI3d)— general liability insurance—insurance of interest in N.C.—N.C. law governs**

The laws of North Carolina govern the construction of a general liability insurance policy where the policy application was not taken in North Carolina but the policy insured an interest in North Carolina. Liability insurance by its very nature protects an interest of the insured in that it shields the insured from being required to make any payment on a claim for which he is liable, and the policy insures an interest in North Carolina because North Carolina is a principal location of a risk insured by the policy. N.C.G.S. § 58-3-1.

**Am Jur 2d, Insurance § 341.****2. Insurance § 149 (NCI3d)— general liability insurance—punitive damages included**

Punitive damages were included in general liability insurance coverage where the policy provided coverage for damages because of bodily injury. The punitive damages in this case arose from and were in consequence of the bodily injuries; furthermore, incorporating the policy's definitions into its coverage provision reveals that the policy expressly provides coverage for all sums which the insured shall become legally obligated to pay as damages, including damages for death, because of bodily injury.

**Am Jur 2d, Insurance § 1557.****Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR4th 11.****3. Insurance § 149 (NCI3d)— general liability insurance—punitive damages—exclusion— not applicable**

Summary judgment was improperly granted for the insurer in a declaratory judgment action to determine, among other things, whether a general liability insurance policy excluded punitive damages. It is undisputed that the policy con-

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tains no express exclusion for punitive damages and the Court of Appeals would not attempt to determine if somehow punitive damages can be construed as a "fine" or "penalty," both of which are excluded. If the insurer intended to eliminate coverage for punitive damages it could and should have inserted a single provision so stating.

**Am Jur 2d, Insurance § 1558.****Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR4th 11.**

APPEAL by plaintiff from order entered 18 March 1991 in MECKLENBURG County Superior Court by *Judge Chase Boone Saunders*. Heard in the Court of Appeals 10 March 1992.

*Parker, Poe, Adams & Bernstein, by Irvin W. Hankins III and Josephine H. Hicks, for plaintiff-appellant.*

*Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Ronald C. Dilthey, Theodore B. Smyth, and Susan K. Burkhart, for defendant-appellee Hartford Accident & Indemnity Company.*

GREENE, Judge.

Plaintiff appeals from an order filed 18 March 1991, denying plaintiff's motion for partial summary judgment and granting the partial summary judgment motion of defendant The Hartford Accident & Indemnity Company (Hartford).

Plaintiff Collins & Aikman Corporation (C&A) is a Delaware corporation with offices in New York and Charlotte which manufactures and distributes textile products. C&A is licensed to do business in eight states, including North Carolina. C&A's transportation division is located in Albemarle, North Carolina, and ninety-seven of C&A's 102 trucks are registered in North Carolina.

*The Accident*

On 29 February 1988, C&A employee Wayne Smith was driving a C&A tractor trailer on U.S. Highway 421 in Yadkin County, North Carolina, when he collided with a car driven by Gregory Howard. Both Gregory Howard and his wife, Jane Howard, were killed. In May, 1989, the executrix of the Howards' estate filed a wrongful death action against C&A seeking compensatory and punitive damages. The lawsuit was tried in Cumberland County,



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North Carolina, and on 14 June 1990, judgment was entered on a jury verdict against C&A for \$2,500,000 in compensatory damages and \$4,000,000 in punitive damages, plus costs. The parties thereafter settled the judgment for approximately \$4,200,000.

*The Insurance Coverage*

In January, 1987, Wickes Companies, Inc. (Wickes), a Delaware corporation with its principal place of business in Santa Monica, California, acquired C&A. Thereafter, Wickes asked Marsh & McLennan, an independent insurance broker in Los Angeles, California, to purchase an excess liability insurance policy for C&A for the period of 1 March 1987 to 1 March 1988. Marsh & McLennan, with input from Steve Baker of Wickes and Don Duncan (Duncan), C&A's risk manager in Charlotte, negotiated the purchase from Hartford of a policy which provided five million dollars of liability insurance coverage in excess of a two million dollar primary policy issued by the Aetna Casualty and Surety Company (Aetna). On 27 February 1987, Marsh & McLennan placed the order for the policy via a telecopier letter from its office in California to Hartford at its Connecticut office. Hartford mailed the policy to Marsh & McLennan in California sometime in March, 1987. Marsh & McLennan forwarded the policy binder confirming coverage to Duncan in Charlotte in March, 1987. However, the record reveals that on 8 April 1987, Marsh & McLennan notified Duncan that three exclusion endorsements had to be signed and accepted by C&A "before a policy can be issued." Duncan signed the endorsements in Charlotte and returned them to Marsh & McLennan. Marsh & McLennan retained the Hartford policy in California until 8 March 1988, when it was forwarded to Duncan in Charlotte.

The named insured under the policy (hereinafter "the Hartford policy") is "Collins & Aikman Corporation, 210 Madison Avenue, New York, New York 10016." The three exclusion endorsements signed by Duncan list C&A's Charlotte office as the address of the named insured. The coverage portion of the Hartford policy states:

The company will pay on behalf of the insured ultimate net loss in excess of the total applicable limit . . . of underlying insurance . . . because of bodily injury, personal injury, property damage or advertising injury to which this insurance applies caused by an occurrence.

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“Ultimate net loss” is defined as “all sums which the insured and his or her insurers shall become legally obligated to pay as damages, whether by final adjudication or settlement . . . .” Under the terms of the policy, “‘damages’ include damages for [death] which result[s] at any time from bodily injury to which this policy applies . . . .” The policy states that “‘damages’ do not include fines or penalties or damages for which insurance is prohibited by the law applicable to the construction of this policy.” “Bodily injury” is defined as “bodily injury, sickness or disease . . . .” The policy’s definitions of personal injury, property damage, and advertising injury establish that none of these are involved in the instant case. An “occurrence” means “an accident . . . which results in bodily injury . . . neither expected nor intended from the standpoint of the insured . . . .”

The Hartford policy expired on 1 March 1988.

*The Coverage Dispute*

On 18 July 1990, Hartford issued a denial of coverage and reservation of rights, contending that the punitive damages awarded in the Howard lawsuit are not covered under the Hartford policy. On 24 August 1990, Hartford filed a declaratory judgment action against C&A in federal district court in New York, alleging that punitive damages are excluded under the Hartford policy. On 18 September 1990, Hartford, Aetna, C&A, and Wickes entered into a funding agreement pursuant to which Aetna and Hartford each contributed to the funding of the settlement of the judgment in the Howard lawsuit, and in which each party reserved the right to litigate its rights and obligations.

On 1 October 1990, C&A filed this action against Hartford and Aetna seeking, among other things, a declaratory judgment that the Hartford policy covers the punitive damages award. C&A also filed a motion to stay the New York action, which was granted by the New York district court. On 24 October 1990, C&A filed a motion for partial summary judgment, which the trial court continued pursuant to a motion by Hartford.

On 11 December 1990, Hartford filed its answer which included a counterclaim against C&A seeking reimbursement from C&A in the amount of \$733,112.75, the sum paid by Hartford as punitive damages pursuant to the funding agreement. On 18 March 1991, the trial court denied C&A’s motion for partial summary judgment

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and granted Hartford's motion for partial summary judgment, determining that the Hartford policy provides no coverage to C&A for the payment of the punitive damages award and ordering, pursuant to the funding agreement, that Hartford recover from C&A the sum of \$733,112.75 plus interest. The trial court, pursuant to N.C.G.S. § 1A-1, Rule 54(b), certified the order for immediate appeal.

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The issues are I) whether liability insurance constitutes insurance on "property, lives, or interests in this State," thus subjecting the construction of the Hartford policy to North Carolina law pursuant to N.C.G.S. § 58-3-1; II) if so, under North Carolina law, whether the Hartford policy by its terms provides coverage for punitive damages; and III) if so, under North Carolina law, whether the Hartford policy's provision that "'damages' do not include fines or penalties or damages for which insurance is prohibited by the law applicable to this policy" operates as an exclusion from coverage of punitive damages.

## I

[1] C&A argues that N.C.G.S. § 58-3-1 mandates that we construe the Hartford policy in accordance with the laws of North Carolina. Hartford argues that Section 58-3-1 is not applicable to liability insurance. Section 58-3-1 provides:

All contracts of insurance on property, lives, or interests in this State shall be deemed to be made therein, and all contracts of insurance the applications for which are taken within the State shall be deemed to have been made within this State and are subject to the laws thereof.

N.C.G.S. § 58-3-1 (1991). Because the Hartford policy application was not "taken" in North Carolina, the question is whether the policy insures "property, lives, or interests" in North Carolina. If it does, then the policy must be construed in accordance with the laws of North Carolina.

The Hartford policy is a general liability insurance policy wherein Hartford agrees to pay "on behalf of the insured" certain claims for which C&A shall become liable due to, among other things, bodily injury to others caused by C&A. As such, the policy does not insure "property [or] lives." It is, however, insurance on an "interest." Liability insurance by its very nature protects an interest of the insured in that it "shield[s] the insured from being

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required to make any payment on [a] claim for which he is liable." 11 Mark S. Rhodes, *Couch on Insurance* 2d § 44:4 (1982). Moreover, the Hartford policy insures an interest "in this State" because North Carolina is a principal location of a risk insured by the policy. The record establishes that C&A's fleet of nearly one hundred tractor trailer trucks is garaged in North Carolina, thus increasing C&A's potential for liability in North Carolina. See Restatement (Second) of Conflict of Laws § 193 cmt. b. (1969) (the place where a vehicle is garaged is the principal location of the risk insofar as liability insurance is concerned). In sum, the Hartford policy insures an "interest in this State," and therefore the laws of North Carolina govern the construction of the policy.

## II

[2] If the terms of an insurance contract provide coverage for punitive damages, public policy does not prohibit such coverage. *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984). Thus, the question presented is whether the terms of the Hartford policy provide coverage for punitive damages.

C&A argues that the definition of the term "ultimate net loss" encompasses punitive damages because it includes *all sums* which the insured becomes legally obligated to pay as damages because of bodily injury, including death. C&A asserts that it became legally obligated to pay the punitive damages award as a direct result of the Howards' bodily injuries, specifically, their deaths. Hartford, on the other hand, argues that the policy covers only compensatory damages awarded because of bodily injury.

In *Mazza, supra*, our Supreme Court interpreted a liability insurance policy in which the insurer contracted to pay on behalf of its insured "all sums which the insured . . . shall become legally obligated to pay as damages . . ." because of claims arising out of the performance of professional services. The Court, construing the policy in favor of coverage, concluded that this coverage provision was "so broad that it must be interpreted to provide coverage for punitive damages . . ." *Mazza*, 311 N.C. at 628-29, 319 S.E.2d at 222. Furthermore, in the policy "damages" were defined as "all damages, including damages for death, which are *payable because of injury* to which this insurance applies" (emphasis added). The Court rejected the insurer's argument that the use of the phrase "payable because of injury" operated in any way to exclude punitive

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damages from the damages covered by the policy. *Id.* at 629-30, 319 S.E.2d at 222-23.

Like the policy at issue in *Mazza*, the Hartford policy provides coverage for “all sums which the insured . . . shall become legally obligated to pay as damages . . . .” Nevertheless, Hartford contends that the policies are materially different and that therefore *Mazza* is not controlling. In support thereof, Hartford suggests that, unlike the policy in *Mazza*, its policy provides coverage only for those sums which C&A becomes legally obligated to pay as damages because of *bodily* injury, which is defined in the policy as “bodily injury, sickness or disease . . . .” Hartford, relying on *South Carolina Ins. Co. v. White*, 82 N.C. App. 122, 345 S.E.2d 414 (1986), contends that damages recoverable because of “bodily injury” are limited to damages because of physical pain, illness or any impairment of physical condition. We disagree. In *White*, the Court held that damages for “bodily injury” were not limited to damages because of physical pain, illness or impairment of physical condition, but included damages arising from or in consequence of a covered bodily injury. *Id.* at 124, 345 S.E.2d at 416 (wife entitled under a “bodily injury” insurance policy to damages for loss of consortium arising out of husband’s bodily injuries unless policy limit has been exhausted). In the case at bar, the punitive damages arose from and were in consequence of the bodily injuries suffered by the Howards.

Furthermore, the Hartford policy in its definitions section expressly provides that “damages” include damages for death which results from bodily injury to which the policy applies. Incorporating the policy’s definitions into its coverage provision reveals that the policy expressly provides coverage for *all sums* which the insured shall become legally obligated to pay as damages, including damages for death, because of bodily injury. Nothing in this coverage provision suggests that the policy covers only compensatory damages. Therefore, punitive damages are included in the policy’s coverage provision.

## III

[3] Hartford argues that the following policy provision operates to exclude punitive damages from the damages covered by the policy: “‘Damages’ do not include fines or penalties or damages for which insurance is prohibited by the law applicable to the construction of this policy.”

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It is well established that if an exclusionary clause in an insurance policy is not expressed plainly and without ambiguity, then the exclusion will be construed in favor of the insured. *State Automobile Mutual Ins. Co. v. Hoyle*, 106 N.C. App. 199, ---, --- S.E.2d ---, --- (1992). "The reason for this rule is that the insurance company selected the phrase to be construed and should have specifically excluded the risk if there was any doubt." 43 Am Jur 2d Insurance § 291 (1982); *accord Mazza*, 311 N.C. at 631, 319 S.E.2d at 223. In the instant case, Hartford chose to exclude from the definition of damages "fines," "penalties," and "damages for which insurance is prohibited by the law applicable to the construction of this policy," without further explanation. It is undisputed that the policy contains no express exclusion for punitive damages. Under these facts, we will not attempt to determine if somehow punitive damages can be construed as either a "fine" or a "penalty," as Hartford suggests. Rather, the language of the Supreme Court in *Mazza* is pertinent: If Hartford "intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating 'this policy does not include recovery for punitive damages.'" *Mazza*, 311 N.C. at 630, 319 S.E.2d at 223.

For the foregoing reasons, we reverse the trial court's order granting summary judgment for Hartford, and remand this case for entry of summary judgment for C&A.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

**SHIELDS v. METRIC CONSTRUCTORS, INC.**

[106 N.C. App. 365 (1992)]

SHIELDS, INC., PLAINTIFF/APPELLANT v. METRIC CONSTRUCTORS, INC.,  
EQUITABLE VARIABLE LIFE INSURANCE COMPANY AND THE  
EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES,  
DEFENDANTS/APPELLEES, AND METRIC CONSTRUCTORS, INC., THIRD-PARTY  
PLAINTIFF v. AI GROUP, INC., THIRD-PARTY DEFENDANT/CROSS-APPELLANT

No. 9121SC488

(Filed 2 June 1992)

**1. Contractors § 42 (NCI4th)— change of roofing materials—  
contractor's refusal to pay— instruction on subcontractor's con-  
tributory negligence**

In an action arising from a change in roofing materials for which the contractor refused to pay the subcontractor, the trial court's instruction on the subcontractor's contributory negligence failed to adequately set forth the relevant standard of care to which a subcontractor such as plaintiff would be held in submitting a bid under these circumstances. Additionally, even if the instruction was proper, the negligence issues only bear upon whether the subcontractor satisfied its duty under the contract to independently verify the accuracy of the plans and submit its bid accordingly and would not be a complete bar to the subcontractor's recovery.

**Am Jur 2d, Building and construction contracts § 26.**

**2. Contractors § 42 (NCI4th)— change in roofing materials—  
refusal of contractor to pay subcontractor— instruction on quan-  
tum meruit required**

There was prejudicial error warranting a new trial where the trial court did not instruct the jury on theories of recovery under contract and quantum meruit in an action arising from a change in roofing materials which was not in writing and for which the contractor refused to pay the subcontractor. The trial court had a duty to instruct the jury on the law as it applies to the substantive features of the case arising from the evidence without any specific requests by the parties.

**Am Jur 2d, Building and construction contracts § 26.**

APPEAL by plaintiff and cross-appeal by AI Group, Inc. from judgment entered 26 October 1990 by *Judge James A. Beaty, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 16 March 1992.

**SHIELDS v. METRIC CONSTRUCTORS, INC.**

[106 N.C. App. 365 (1992)]

Defendant Metric Constructors, Inc. was the general contractor on a hotel project at Duke University and plaintiff Shields was a subcontractor on the project. Sometime before 14 June 1987 a representative from Metric notified plaintiff of a contract it had to build this project. Plaintiff was thereby asked to submit a bid on portions of the work including the drywall, acoustical ceilings, exterior finish system and light gauge framing on the roof. It was supplied with some structural drawings, architectural drawings and specifications prepared by AI Group in order to prepare its bid. The structural drawings bore the stamp and seal of a North Carolina professional engineer which signified that the plans had been reviewed and determined to be correct. The drawings called for the use of 20 gauge material for construction of the roof.

After plaintiff's bid was accepted by Metric, plaintiff began its work on the project. The parties later signed a formal subcontract which was prepared by Metric. Under this contract plaintiff was not responsible for the design and engineering of the roof system. However, plaintiff was required to submit roof shop drawings detailing how it intended to construct the roof and calculations of a registered professional engineer confirming the accuracy and feasibility of the design. It thereby retained the services of Gene Farach, an engineer licensed in North Carolina and an expert in structural engineering with a specialty in light gauge.

Upon reviewing the design documents, Farach found that the 20 gauge material shown on the structural drawings would not withstand the wind loads required by the North Carolina Building Code. Further, the structural drawings did not show bridging between trusses and did not provide any information about the sizes or number of screws necessary to make connections between the studs to be used to construct the trusses.

Subsequently, Farach met with Metric's project engineer to discuss these problems. Farach submitted a new set of roof drawings showing a change from 20 gauge material to 18 gauge material and suggested some other changes in the design. Farach ultimately prepared a new set of plans with the changes, which were actually followed in the construction of the roof.

Approximately three weeks before plaintiff started construction on the roof it advised Metric that there would be additional cost to change from 20 gauge material to 18 gauge material. The subcontract required any change in the work effecting the cost



**SHIELDS v. METRIC CONSTRUCTORS, INC.**

[106 N.C. App. 365 (1992)]

of the project to be agreed upon in writing prior to beginning performance. The parties discussed the possibility of ceasing work and obtaining a change order but decided against it. Thus, although no change order was submitted to Metric, plaintiff alleges it was advised to proceed with the new plans drawn by Farach, thereby incurring additional expenses of \$136,976.62 in constructing the roof.

On 17 January 1989 plaintiff filed a complaint against Metric for compensation for the additional costs incurred in constructing the roof. Metric denied liability and counterclaimed for damages incurred due to plaintiff's conduct. Metric also filed a third-party complaint against AI Group seeking indemnity in the event Metric was found liable to plaintiff for damages resulting from any alleged defect in the roof plans prepared by AI Group. Metric and AI Group stipulated in the pre-trial order that if the jury found Metric liable to plaintiff for extra expense incurred in performing its work because of defective and/or incomplete plans for construction of the light gauge roof system, then AI Group would indemnify Metric on its third-party complaint.

At the close of its evidence, plaintiff moved pursuant to Rule 15 to amend its pleadings to conform to the evidence by asserting a claim for negligent design, which was allowed. The trial court submitted issues of negligence and contributory negligence to the jury and a verdict was returned in defendants' favor. From that verdict plaintiff appeals. AI Group cross-appeals the denial of its motion for directed verdict.

*Hendrick, Zotian, Cocklereece & Robinson, by T. Paul Hendrick and William A. Blancato, for plaintiff appellant/cross-appellee.*

*Moore & Van Allen, by William E. Freeman, for defendant appellee Metric Constructors, Inc.*

*Carruthers & Roth, P.A., by Grady Shields; and Lightmas & Delk, Atlanta, GA, by Glenn A. Delk, for appellee/cross-appellant AI Group, Inc.*

WALKER, Judge.

Plaintiff brings forth eight assignments of error for this Court to consider on appeal. Of these, we find it only necessary to address the issue of the trial court's jury instructions, which is the focus of six of plaintiff's eight contentions.

**SHIELDS v. METRIC CONSTRUCTORS, INC.**

[106 N.C. App. 365 (1992)]

The issues submitted and answered were as follows:

1. Was the plaintiff, Shields, Inc., in making this bid on the Duke Hotel Project damaged by the negligence of the defendants, Metric and AI Group, in providing an engineering design for the roof trusses in any one or more of the following manners:

ANSWER: Yes

1(a) Did the contract documents provided by the defendants consisting of drawings and specifications fail to comply with the North Carolina Building Code as it relates to the required gauge construction of material and wind load conditions for the roof trusses in this case?

ANSWER: No

1(b) Did the contract documents provided to Shields, Inc., prior to its bid on the Duke Hotel Project fail to present sufficient instructions on bridging, bracing and connections in order for Shields to bid and build roof trusses as designed and described in all of the original contract documents?

ANSWER: Yes

2. Did the plaintiff by its own negligence contribute to its own injury?

ANSWER: Yes

3. What amount, if any, is the plaintiff, Shields, Inc., entitled to recover of the defendants?

ANSWER: 0

Under the second group of issues submitted, the jury awarded damages to plaintiff for the services of Gene Farach in reviewing the work performed on this project.

Pursuant to plaintiff's amended complaint asserting a claim in negligence, the issues framed by the trial court for the jury focused on the theories of negligence and contributory negligence. Plaintiff contends Metric was negligent in supplying it with drawings and designs which were either incomplete or in noncompliance with the North Carolina Building Code, knowing that it would

## SHIELDS v. METRIC CONSTRUCTORS, INC.

[106 N.C. App. 365 (1992)]

rely on said documents when calculating and submitting its bid. On the other hand, Metric argues plaintiff was contributorily negligent in failing to use reasonable care by independently verifying the accuracy and feasibility of the plans submitted by Metric.

[1] Since plaintiff does not dispute the trial court's instruction on the issue of negligence we do not consider it on this appeal. With regard to the contributory negligence issue the trial court instructed:

The defendant contends and the plaintiff denies that the plaintiff was negligent in submitting a bid for the construction of the roof trusses on the Duke hotel project as designed by the contract documents without having sufficient information in order to make an effective bid and that in so acting the plaintiff failed to use reasonable care in submitting its bid.

The defendant further contends and the plaintiff denies that the plaintiff's negligence was a proximate cause of and contributed to the plaintiff's own damage.

Finally as to this contributory negligence issue, I instruct you that if you find that the defendant has proved by the greater weight of the evidence that the plaintiff in making its bid was negligent in any one or more of the ways which I have indicated to you and if the defendant has further proved by the greater weight of the evidence that such negligence was a proximate cause of and contributed to the plaintiff's own damage, then it would be your duty to answer this second issue "yes" in favor of the defendant.

This instruction, while stating the contentions of defendant, fails to adequately set forth the relevant standard of care to which a subcontractor such as plaintiff should be held in submitting a bid under these circumstances. Additionally, even if the instructions as to contributory negligence were proper, the answering of this issue in favor of defendant Metric would not be a complete bar to plaintiff's recovery, since the negligence issues only bear upon whether plaintiff satisfied its duty under the contract to independently verify the accuracy of the plans and to submit its bid accordingly.

[2] Plaintiff contends that when Metric was informed that the new drawings prepared by Gene Farach specified 18 gauge material it advised plaintiff to go forward with this work and waived the

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[106 N.C. App. 365 (1992)]

provision requiring a written change order. We agree with plaintiff that an issue arises from this evidence as to whether or not plaintiff and Metric entered into an agreement, either express or implied, that 18 gauge material would be substituted for the 20 gauge material specified in Metric's drawings and designs. It is undisputed that the roof with 18 gauge is structurally more sound than a roof with 20 gauge material and that Metric received the benefit thereof, yet plaintiff has not been compensated for its work. Furthermore, quoting from *J. R. Graham and Son, Inc. v. The Randolph County Board of Education*, 25 N.C.App. 163, 212 S.E.2d 542, cert. denied, 287 N.C. 465, 215 S.E.2d 623 (1975), this Court stated in *W. E. Garrison Grading Co. v. Piracci Construction Co., Inc.*, 27 N.C.App. 725, 729, 221 S.E.2d 512, 515 (1975), disc. review denied, 289 N.C. 296, 222 S.E.2d 695 (1976):

'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. . . . This principle has been sustained even where the instrument provides for any modification of the contract to be in writing.' (Citations omitted.)

Insofar as the evidence would support a claim in contract or *quantum meruit*, the trial court had a duty, without any specific requests by the parties, to instruct the jury on the law as it applies to the substantive features of the case arising from the evidence. *Millis Construction Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C.App. 506, 358 S.E.2d 566 (1987). "This means, among other things, that the judge must submit to the jury such issues as when answered by them will resolve all material controversies between the parties." *Bare v. Barrington*, 97 N.C.App. 282, 285, 388 S.E.2d 166, 167, disc. review denied, 326 N.C. 594, 393 S.E.2d 873 (1990). (Citations omitted). Since the inferences from plaintiff's evidence support theories of recovery under contract and *quantum meruit*, the failure of the trial court to so instruct the jury on these substantial features of the case constitutes prejudicial error warranting a new trial. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 87 N.C.App. 438, 361 S.E.2d 608 (1987), disc. rev. denied, 326 N.C. 801, 393 S.E.2d 898 (1990); *Hood v. Faulkner*, 47 N.C.App. 611, 267 S.E.2d 704 (1980).

## STATE v. USSERY

[106 N.C. App. 371 (1992)]

Vacated and remanded for new trial.

Chief Judge HEDRICK and Judge ORR concur.

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STATE OF NORTH CAROLINA v. DERRICK KEITH USSERY

No. 926SC41

(Filed 2 June 1992)

**1. Narcotics § 4 (NCI3d)— offense within 300 feet of school—  
proof of school boundary**

The evidence in a prosecution for the possession and sale of cocaine within 300 feet of school property was sufficient to show that the offenses occurred within 300 feet of the legal boundary of a school where a middle school principal and a school superintendent testified that a measurement of 242 feet was made from the boundary of the school to the site of the offenses, and that their identification of the boundary was based on a deed and plat of the property and on their experience in supervising the use of the school property.

**Am Jur 2d, Drugs, Narcotics, and Poisons § 22.**

**2. Narcotics § 5 (NCI3d)— two purchases by undercover agent—  
separate offenses**

Defendant could properly be convicted of two separate offenses of sale of cocaine within 300 feet of school property where an undercover agent made two purchases of cocaine from defendant within a short period of time.

**Am Jur 2d, Drugs, Narcotics, and Poisons § 22.**

**3. Criminal Law § 109.1 (NCI4th)— requiring defendant to furnish  
list of witnesses—no error**

The trial court did not err in requiring defendant to furnish a list of his potential witnesses to the State so that during *voir dire* the State and the court could ascertain the potential jurors' knowledge of and relationship to any witnesses that might be called to testify.

**Am Jur 2d, Witnesses § 73.**

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[106 N.C. App. 371 (1992)]

**Social or business relationship between proposed juror and nonparty witness as affecting former's qualification as juror. 11 ALR3d 859.**

**4. Appeal and Error § 411 (NCI4th)— alleged error in closing argument—omission of argument from record on appeal**

The appellate court is precluded from addressing alleged error in the prosecutor's closing argument where defendant failed to provide a transcript of the argument in question since appellate review is limited to what appears in the record or in the verbatim transcript of the proceedings. Appellate Rule 9(a).

**Am Jur 2d, Appeal and Error § 541.**

APPEAL by defendant from *Allsbrook (Richard B.)*, Judge. Judgments entered 20 July 1991 in Superior Court, HALIFAX County. Heard in the Court of Appeals 14 May 1992.

Defendant was charged in proper bills of indictment with two counts each of possession of cocaine with intent to sell or deliver within 300 feet of school property, sale of cocaine within 300 feet of school property, and delivery of cocaine within 300 feet of school property, all in violation of G.S. 90-95(e)(8). The State presented evidence at trial which tends to show the following:

On 10 January 1991, Agent Geri Bowen of the Roanoke-Chowan Narcotics Task Force met with Captain Charles E. Ward, Detective Don Stanfield, Detective Ron Baird, and a confidential informant at the Farmer's Market in Halifax County. Baird gave Bowen \$250.00 and instructed her to go to High's Grocery to attempt to buy drugs.

Bowen and the confidential informant proceeded to High's with the officers following. She arrived at High's at about 7:15 p.m. and the officers observed from the parking lot of Chaloner Middle School. Bowen asked a man, later identified as defendant, for Connie Parker. Defendant told her that Parker had already left and asked what she wanted. Bowen told defendant she wanted a "rock," the street term for cocaine. Defendant then went over to another man, got something, and returned to her. Defendant handed Bowen a plastic packet that contained an off-white, rock-like substance and she handed him twenty dollars. Bowen left the store and radioed the officers with a description of defendant. The officers advised Bowen to return and make another purchase. Bowen returned to

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the store and asked defendant for another "rock." Defendant went to the other man and again returned with a plastic packet for which Bowen gave defendant twenty dollars. The substance in each of the packets was later identified as cocaine.

On about 9 July 1991, Principal Kathy Landen of Chaloner Middle School, Superintendent Mike Williams of the Roanoke Rapids Graded School District, Detective Stanfield, and Agent Bowen measured from the boundary of the Chaloner Middle School property to the spot where the drug purchases were made. Landen and Williams were familiar with the school's boundary because they had reviewed the plats and deed descriptions of the property and because of their experience in supervising the use of school property. The distance from the property to the spot where the purchases were made was 242 feet. Prior to trial, the distance was again measured and found to be 242 feet.

Defendant did not testify. He presented evidence that at the time of the alleged purchases he was undergoing treatment for a gunshot wound and had been advised to walk with the aid of crutches.

The jury found defendant guilty as charged, but the trial court arrested the judgments as to delivery of cocaine. In 91CRS1791, the trial court sentenced defendant to concurrent fifteen-year prison terms for the possession and sale charges. In 91CRS1792, the trial court sentenced defendant to concurrent fifteen-year prison terms for the additional possession and sale charges, and the sentences were ordered to run following the expiration of the sentences in 91CRS1791. Defendant appeals.

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

*Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Teresa A. McHugh, for defendant, appellant.*

HEDRICK, Chief Judge.

[1] Defendant first argues that the trial court erred by denying his motions to dismiss because the evidence presented was insufficient. Specifically, defendant contends there was no evidence presented that the offense was committed within 300 feet of the legal boundary of a school. We disagree.

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In ruling on a motion to dismiss, the trial court must determine whether the State presented substantial evidence of each element of the offense charged. *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). The evidence must be 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. *Id.*

In this case, an element of the offense charged is that the offense was committed "on property used for an elementary or secondary school or within 300 feet of the boundary of real property used for an elementary or secondary school . . ." G.S. 90-95(e)(8). Principal Kathy Landen testified that a measurement was made from the boundary of Chaloner Middle School to the site of the offense. Her identification of the boundary was based on a deed and plat of the property and on the use of the property by the school. Likewise, Superintendent Mike Williams of the Roanoke Rapids Graded School District testified that the measurement was made from the boundary of the school as he knew it based on the deed and plat and on his experience in supervising the school. The distance was measured twice and found to be 242 feet. We hold this evidence was sufficient to show that the site of the drug purchases was within 300 feet of the boundary of real property used for a school. Defendant's argument is meritless.

[2] Defendant next argues the trial court should have dismissed one of the indictments because there was only one transaction. Specifically, defendant contends his right to due process was violated because an undercover agent made two purchases of cocaine within a short time of each other. We disagree.

Clearly, evidence of two separate offenses was presented in this case. Our Supreme Court has stated that relief may be granted "where, through vindictive prosecutorial abuse, criminal charges, arising out of the same course of conduct, have been arbitrarily stacked like pancakes, one upon another, with the result that the total punishment imposed is so disproportionate to his offenses as to violate that fundamental concept of fairness which is the basis of due process of law." *State v. Fulcher*, 294 N.C. 503, 526, 243 S.E.2d 338, 353 (1978). In this case, defendant's consecutive prison terms total thirty years. Since the trial court found there was an aggravating factor and no mitigating factors, defendant could have been sentenced to the maximum thirty years in prison



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for any one of the offenses. For that reason, the total punishment is not so disproportionate as to violate defendant's right to due process. Defendant's argument is meritless.

Finally, defendant argues that the trial court erred by requiring him to provide a list of witnesses and by refusing to grant a mistrial based upon the prosecutor's closing argument. We disagree.

[3] Prior to jury selection, the State requested a list of defendant's potential witnesses and defendant objected. The trial court denied the objection and ordered defendant to furnish the State with the names. The trial court ordered the names to be divulged so that during *voir dire* of potential jurors the State and the court could ascertain the jurors' knowledge of and relationship to any witnesses that might be called to testify. A requirement that a defendant divulge the names of potential witnesses for this purpose is not in and of itself error or abuse of discretion. *See State v. Smith*, 320 N.C. 404, 358 S.E.2d 329 (1987).

[4] Defendant further contends the requirement that he divulge the names of potential witnesses was prejudicial to him because the prosecutor used the names during closing argument to show he did not call certain witnesses in his defense. Defendant has failed to provide a transcript of the closing argument in question. Our review is limited to what appears in the record or in the verbatim transcript of proceedings. N.C.R. App. P. 9(a). We cannot assume or speculate that there was prejudicial error when none appears on the record. *See State v. Moore*, 75 N.C. App. 543, 331 S.E.2d 251, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985). For that reason, we are precluded from addressing the alleged error in the prosecutor's closing argument. Defendant has failed to show the trial court erred by requiring him to provide a list of witnesses and by refusing to grant a mistrial based on the prosecutor's closing argument.

We hold defendant had a fair trial, free from prejudicial error.

No error.

Judges JOHNSON and WYNN concur.

## IN RE GALLINATO

[106 N.C. App. 376 (1992)]

IN THE MATTER OF CLAYTON GALLINATO AND CRYSTAL GALLINATO

No. 917DC383

(Filed 2 June 1992)

**Evidence and Witnesses § 980 (NCI4th) — hearsay — admission under residual exception — failure to make findings and conclusions**

The trial court erred in admitting statements by two children to a social worker and two day care workers under the residual exception to the hearsay rule set forth in N.C.G.S. § 8C-1, Rule 803(24) without making the findings and conclusions required by *State v. Deanes*, 323 N.C. 508 (1988).

**Am Jur 2d, Federal Rules of Evidence § 264.**

**Admissibility of statement under Rule 803(24) of Federal Rules of Evidence providing for admissibility of hearsay statement not covered by any specific exception but having equivalent circumstantial guarantees of trustworthiness. 36 ALR Fed 742.**

APPEAL by respondent from an order entered 30 November 1990 by *Judge George M. Britt* in EDGECOMBE County District Court. Heard in the Court of Appeals 12 February 1992.

On 14 August 1990, a juvenile petition pursuant to N.C. Gen. Stat. § 7A-560 was filed by the Edgecombe County Department of Social Services against Clayton Gallinato, respondent-appellant, and Linda Gallinato, parents of the juveniles Clayton and Crystal Gallinato. The petition alleged abuse and neglect as defined by N.C. Gen. Stat. § 7A-517. The Edgecombe County Department of Social Services received a complaint alleging that respondent had sexually abused his daughter and that his son had witnessed the abuse. The mother was charged with neglect based on failure to protect the children from abuse by the father. The children were removed from the home and placed in foster care until hearing on the matter. At the time of the complaint the children were ages three and six respectively.

On 30 November 1990 at the conclusion of the hearing on the petition, the court determined that the children were abused by their father but that the evidence was insufficient to sustain the allegation of neglect as to the mother. The children were then placed in the custody of their mother. The court further ordered

## IN RE GALLINATO

[106 N.C. App. 376 (1992)]

that the children were not to have any contact with their father, pending the outcome of criminal charges arising out of this incident. The court also concluded that a review of the matter, as well as consideration of a plan to begin contact between father and children, if appropriate, would be considered following disposition of the criminal charges. From the order adjudicating the two children as abused, respondent father appeals.

*Edward B. Simmons for petitioner-appellee.*

*Weeks, Muse & Muse, by Eugene W. Muse, for respondent-appellant.*

ORR, Judge.

Respondent brings forward two assignments of error challenging the court's rulings on the admissibility of evidence and one assignment of error challenging the sufficiency of the evidence.

Respondent first contends that the trial court erred in allowing social worker Beverly Dickens and day care workers Lynn Moore Christenberry and Darlene Stallings to testify regarding statements made to them by the children. Respondent asserts that the testimony was inadmissible because the court failed to make inquiries required for admission of evidence under N.C. Gen. Stat. § 8C-1, Rule 803(24) (1988), the residual hearsay exception, and because the hearsay statements "did not have the sufficient indicia of trustworthiness required."

In order "[t]o facilitate appellate review of the propriety of the admission of evidence under 803(24), [our Supreme Court] has prescribed a sequence of inquiries which the trial court *must* make before admitting or denying evidence under Rule 803(24)." *State v. Deanes*, 323 N.C. 508, 515, 374 S.E.2d 249, 255 (1988), *cert. denied*, 490 U.S. 1101, 109 S.Ct. 2455, 104 L.Ed.2d 1009 (1989) (emphasis supplied); *see also State v. Smith*, 315 N.C. 76, 337 S.E.2d 833 (1985) (trial court must engage in six-part inquiry prior to admitting or denying proffered hearsay evidence pursuant to Rule 803(24)).

When ruling on the admission of evidence pursuant to Rule 803(24), the trial court must determine, in order, the following:

- (A) Has proper notice been given?
- (B) Is the hearsay not specifically covered elsewhere?

## IN RE GALLINATO

[106 N.C. App. 376 (1992)]

(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?

*Deanes*, 323 N.C. at 515, 374 S.E.2d at 255; *see also Smith*, 315 N.C. at 92-97, 337 S.E.2d at 844-46. The rationale for including in the record these findings and conclusions is to ensure that the trial court “necessarily undertake[s] the serious consideration and careful determination contemplated by the drafters of the Evidence Code,” *see Smith*, 315 N.C. at 97, 337 S.E.2d at 847, as well as to facilitate appellate review. *Id.* at 96-97, 337 S.E.2d at 847; *see also Deanes*, 323 N.C. at 515, 374 S.E.2d at 255.

At the 30 November 1990 proceeding the trial court ruled the children incompetent to testify; however, statements allegedly made by the children to Dickens, Christenberry and Stallings were ruled admissible. The record indicates that in the presence of all parties and the court, petitioner’s attorney provided oral notice that he intended to introduce evidence of statements made by the minor children to third parties. At that time, petitioner asserted that the evidence should be allowed under the ruling of *Deanes*. Respondent objected and moved to suppress this evidence, basing his objection in part on grounds that the court had previously found the children incompetent to testify. Respondent’s objection was overruled and his motion to suppress was denied. The testimony of the three witnesses was apparently admitted without restrictions. However, there are no findings or conclusions to indicate that the trial court analyzed the appropriateness of admitting this testimony in light of the specific requirements set out in *Deanes*. Unlike *State v. Felton*, 330 N.C. 619, 412 S.E.2d 344 (1992), in which the defendant argued that the trial court’s findings failed to show sufficient guarantees of trustworthiness for the admission of evidence under Rule 804(b)(5), in the case at bar the court made no findings whatsoever. The petitioner concedes this point on brief. Because no particularized findings were made, we have no way to determine if the ruling was supported by competent evidence.

*Deanes* and *Smith* make clear that the trial court is “required” to conduct this analysis. Failure to do so renders appellate review

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[106 N.C. App. 379 (1992)]

of the ruling on admissibility impossible and constitutes reversible error. Accordingly, the judgment of the trial court must be vacated and remanded for a new hearing on the allegations of abuse. Because we are ordering that the judgment be vacated, it is unnecessary for us to address respondent's remaining assignments of error.

Vacated and remanded.

Judges EAGLES and COZORT concur.

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RICHARD CRAIG SCOTT v. CAROL PALMER SCOTT

No. 9110DC603

(Filed 2 June 1992)

**1. Rules of Civil Procedure § 12.1 (NCI3d)— motion for judgment on the pleadings—filed in response to post-trial motions— inappropriate**

The trial court erred by granting relief on defendant's motion under N.C.G.S. § 1A-1, Rule 12(c) for judgment on the pleadings where the motion was made in response to defendant's post-trial motions. Motions under Rule 12(c) are pretrial motions requiring a review of the pleadings and cannot be employed to test the validity of post-trial motions.

**Am Jur 2d, Summary Judgment § 13.**

**2. Rules of Civil Procedure § 60 (NCI3d)— motion to amend judgment—treated as Rule 59 motion—untimely filed**

Although the trial court erred by granting defendant's motion for judgment on the pleadings as to a post-trial motion by plaintiff, plaintiff's motion should have been denied because, although it was labeled as a motion for relief under N.C.G.S. § 1A-1, Rule 60(b), it was in substance a motion to amend the judgment under N.C.G.S. § 1A-1, Rule 59 made well beyond the limit of ten days from entry of judgment.

**Am Jur 2d, Appeal and Error § 308.**

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[106 N.C. App. 379 (1992)]

APPEAL by plaintiff from order entered 24 May 1991 in WAKE County District Court by *Judge Joyce A. Hamilton*. Heard in the Court of Appeals 14 April 1992.

*Ragsdale, Kirschbaum, Nanney, Sokol & Heidgerd, P.A., by William L. Ragsdale, C. D. Heidgerd, and Connie E. Carrigan, for plaintiff-appellant.*

*Howard, From, Stallings & Hutson, P.A., by Catherine C. McLamb, for defendant-appellee.*

GREENE, Judge.

The plaintiff appeals from an order entered 24 May 1991 granting the defendant's motion under N.C.G.S. § 1A-1, Rule 12(c) (1990) (Rule 12(c)) for judgment on the pleadings.

The facts pertinent to the resolution of this appeal are as follows: The plaintiff and defendant were married to each other on 18 March 1972 and were divorced in Georgia on 19 June 1979. The parties remarried on 3 December 1983. On 2 February 1990, the plaintiff filed a complaint for absolute divorce from the defendant. In his verified complaint, the plaintiff alleged that "[t]here have been two children born of the marriages of the parties, namely, Jennifer Renee [sic] Scott, born October 18, 1979 and Jonathan Edward Scott, born August 20, 1984." The defendant did not file an answer, and on 28 March 1990, the trial court granted the plaintiff an absolute divorce from the defendant. In the judgment, the trial court found as fact that Jennifer and Jonathan Scott had been born of the parties' marriages.

On 20 November 1990, the plaintiff made a motion under N.C.G.S. § 1A-1, Rule 60(b) (1990) (Rule 60(b)) for relief from the judgment of absolute divorce entered 28 March 1990 and made a motion under N.C.G.S. § 1A-1, Rule 15 (1990) to amend his complaint for absolute divorce filed 2 February 1990. The plaintiff contended that the above allegation in the complaint and the resulting finding of fact as they related to Jennifer Scott were based on mistake, inadvertence, and excusable neglect, and that therefore, the trial court should strike the allegation from his complaint and should strike the finding of fact from the resulting judgment. Specifically, the plaintiff contended that he was not the father of Jennifer Scott.

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On 26 November 1990, the defendant responded to the plaintiff's motions with, among other things, a motion under Rule 12(c) for judgment on the pleadings, and on 6 December 1990, the defendant filed a motion in the cause requesting child support for Jennifer and Jonathan Scott. On 27 December 1990, the defendant made another Rule 12(c) motion which the defendant calendared for hearing. The plaintiff never calendared his motions for hearing. The trial court heard the defendant's Rule 12(c) motion on 8 May 1991, and on 24 May 1991, entered judgment on the pleadings for the defendant. The trial court has not heard nor ruled upon the plaintiff's motion to amend his complaint or his motion for relief from judgment.

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The issues are whether (I) the trial court may grant a Rule 12(c) motion made in response to a post-trial motion; and (II) a motion requesting that a paragraph of a judgment of absolute divorce be stricken is properly classified as a Rule 60(b) motion.

## I

[1] A motion for judgment on the pleadings under Rule 12(c) "shall be heard and determined *before* trial on application of any party, unless the judge orders that the hearing and determination thereof be deferred *until the trial*." N.C.G.S. § 1A-1, Rule 12(d) (1990) (emphases added). As this rule of civil procedure makes clear, Rule 12(c) motions are pretrial motions requiring a review of the *pleadings*. They cannot be employed to test the validity of post-trial motions. See *Vermont Inv. Capital, Inc. v. Kramer*, 533 A.2d 1193, 1194 (Vt. 1987) (trial court properly denied Rule 12(c) motion made after entry of judgment). Accordingly, the trial court erred in granting relief on the defendant's Rule 12(c) motion which was made in response to the plaintiff's post-trial motions.

## II

[2] Despite the trial court's error in entering judgment for the defendant on her Rule 12(c) motion, the plaintiff's motions, nonetheless, should have been denied. North Carolina Gen. Stat. § 1A-1, Rule 59 (1990) (Rule 59) governs amendments to judgments while Rule 60(b) governs relief from the legal effects of judgments. In the plaintiff's motion which was labelled as a Rule 60(b) motion, the plaintiff did *not* request an order relieving himself of the divorce judgment. See *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585,

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588 (1987) (party cannot seek to nullify or avoid one or more legal effects of judgment while leaving judgment itself intact); *see also Wood v. Wood*, 297 N.C. 1, 3, 252 S.E.2d 799, 800 (1979) (plaintiff sought to have divorce judgment vacated). On the contrary, the plaintiff only sought to *amend* the judgment. Specifically, the plaintiff requested an order "striking paragraph 5 of the Findings of Fact of the Divorce Judgment as it relates to Jennifer Rene Scott." Because motions are properly treated according to their substance rather than their labels, *Harrell v. Whisenant*, 53 N.C. App. 615, 617, 281 S.E.2d 453, 454 (1981), *disc. rev. denied*, 304 N.C. 726, 288 S.E.2d 380 (1982), we treat the plaintiff's motion for what it was, namely, a Rule 59 motion. Because a Rule 59 motion to amend a judgment must "be served not later than 10 days after entry of the judgment," N.C.G.S. § 1A-1, Rule 59(e) (1990), and because the plaintiff's motion was made well beyond the 10-day limit, the plaintiff's motion to amend was not timely and should have been denied. *See Coleman v. Arnette*, 48 N.C. App. 733, 735, 269 S.E.2d 755, 756 (1980); *see also State ex rel. Envtl. Mgmt. Comm'n v. House of Raeford Farms*, 101 N.C. App. 433, 447, 400 S.E.2d 107, 116, *disc. rev. denied*, 328 N.C. 576, 403 S.E.2d 521 (1991).

Accordingly, because the trial court erred in granting the defendant's Rule 12(c) motion, the trial court's order is vacated. Nonetheless, because the plaintiff's motion to amend the judgment was untimely, we remand this case to the trial court for an order denying the plaintiff's motions to amend his complaint and the judgment. *See Gallbronner v. Mason*, 101 N.C. App. 362, 366, 399 S.E.2d 139, 141, *disc. rev. denied*, 329 N.C. 268, 407 S.E.2d 835 (1991) (trial court without authority to allow amendment of complaint after entry of judgment).

Vacated and remanded.

Judges PARKER and COZORT concur.



**KINSEY CONTRACTING CO. v. CITY OF FAYETTEVILLE**

[106 N.C. App. 383 (1992)]

KINSEY CONTRACTING COMPANY, INC., PLAINTIFF v. CITY OF FAYETTEVILLE, A MUNICIPAL CORPORATION, DEFENDANT

No. 9112SC637

(Filed 2 June 1992)

**1. Municipal Corporations § 22 (NCI3d); Contracts § 11 (NCI3d) — letting of municipal contract — award standard — factors other than cost**

The trial court did not err by concluding that plaintiff failed to show that defendant's rejection of its bid for a contract to build a pumping station was an abuse of discretion. The language in N.C.G.S. § 143-128(b), "the lowest responsible bidder or bidders," is construed to be an abbreviated reference to the general award standard set out in N.C.G.S. § 143-129, which allows consideration of various factors.

**Am Jur 2d, Public works and contracts § 67.****2. Municipal Corporations § 22 (NCI3d); Contracts § 11 (NCI3d) — municipal contract — winning bidder not the lowest bidder — finding of no abuse of discretion — no error**

The evidence supported the trial court's finding that the letting of a municipal contract to build a pumping station to the second lowest bidder was not an abuse of discretion. The consulting engineers supported their recommendation to defendant with a seven page document entitled "Discussion of Bids" and the trial court concluded based on the evidence before it that plaintiff had failed to show that the rejection was a result of any fraud, corruption, abuse of discretion or other improper motive.

**Am Jur 2d, Public works and contracts § 76.**

APPEAL by plaintiff from order entered 24 April 1991 by *Judge Giles R. Clark* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 15 April 1992.

Defendant advertised for bids for the construction of a project known as the Cape Fear River Raw Water Pumping Station. Plaintiff was the low dollar bidder for the general construction contract, bidding \$3,954,847.00. Crowder Construction Company, Inc. (Crowder), which bid \$4,079,000.00, was the second lowest bidder.

## KINSEY CONTRACTING CO. v. CITY OF FAYETTEVILLE

[106 N.C. App. 383 (1992)]

Consulting engineers for defendant requested that both bidders submit information by 1 April 1991 to be used in determining whether plaintiff and Crowder were responsible bidders. Defendant reserved the right to reject any or all bids submitted in its advertisements for bids.

While plaintiff failed to supply all the requested information by the deadline, Crowder did so in a timely manner. After receiving this information the consulting engineers recommended the contract not be awarded to plaintiff, but rather to Crowder. Defendant followed this recommendation and awarded the contract to Crowder.

Plaintiff filed a complaint and obtained a temporary restraining order on 15 April 1991. At the show cause hearing on 22 April 1991 the trial court found defendant's rejection of plaintiff's bid proper in all respects, denied plaintiff's motion for a preliminary injunction, and dissolved plaintiff's temporary restraining order. From this order plaintiff appeals.

*Bryan, Jones, Johnson & Snow, by James M. Johnson, for plaintiff appellant.*

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

ARNOLD, Judge.

[1] Plaintiff argues the trial court erred in concluding that plaintiff failed to show that defendant's rejection of its bid was an abuse of discretion under N.C. Gen. Stat. § 143-128 (1990). In reviewing the decision of a local government to award a public contract " [i]t is a general rule that officers of a municipal corporation, in the letting of municipal contracts, perform not merely ministerial duties but duties of a judicial and discretionary nature, and that courts, in the absence of fraud or a palpable abuse of discretion, have no power to control their action.' " *Mullen v. Town of Louisburg*, 225 N.C. 53, 60, 33 S.E.2d 484, 488-89 (1945) (citations omitted).

The language upon which plaintiff relies in G.S. § 143-128(b) was added in 1989. When awarding contracts where the entire cost of the work exceeds one hundred thousand dollars, a municipality must "award the contract to the *lowest responsible bidder or bidders* for the total project." G.S. § 143-128(b) (emphasis added). Plaintiff contends that this award standard does not allow factors other

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[106 N.C. App. 383 (1992)]

than cost to be taken into consideration and that defendant abused its discretion by considering other factors. We disagree.

While plaintiff argues “lowest responsible bidder” requires only that a contractor with the lowest bid have the proper license for the job, provide the necessary performance and payment bonds, and have adequate financial resources to perform the contract, the term “must be held to imply skill, judgment and integrity necessary to the faithful performance of the contract, as well as sufficient financial resources and ability.” *McQuillin Mun. Corp.* § 29.73.05 (3d ed. revised 1990).

The general award standard for formal contracts is set out in N.C. Gen. Stat. § 143-129 and allows consideration of various factors. Given that this general award standard has been well established for many years, it is unlikely that the legislature would attempt to promulgate a new award standard by omitting part of the established standard’s language, “taking into consideration quality, performance and the time specified in the proposals for the performance of the contract.” G.S. § 143-129. We construe the language used in G.S. § 143-128(b), “the lowest responsible bidder or bidders,” to be an abbreviated reference to the general award standard set out in G.S. § 143-129. *See also* A. Fleming Bell, II, *Construction Contracts with North Carolina Local Governments*, 14-15 (2d ed. 1991); Bluestein, *North Carolina’s “Lowest Responsible Bidder” Standard for Awarding Public Contracts*, Popular Gov’t, Winter 1992, at 16 n.1.

[2] Plaintiff next argues the trial court erred in finding no abuse of discretion by defendant because the evidence did not support this finding. Denial of a preliminary injunction is subject to *de novo* review based upon the facts and circumstances of the particular case. *Electrical South, Inc. v. Lewis*, 96 N.C. App. 160, 385 S.E.2d 352 (1989), *review denied*, 326 N.C. 595, 393 S.E.2d 876 (1990). When reviewing the evidence presented at the hearing, there is a presumption the trial court’s decision was correct and the appellant has the burden of showing that the trial court erred. *Id.*

Defendant’s consulting engineers requested that plaintiff and Crowder submit

by April 1, 1991, a list of references, a description of projects similar to the project under consideration, an experience record of projects completed by the bidders, a detailed inventory

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of personnel and equipment proposed to be used on the project, a detailed resume of the resident superintendent responsible for the project, banking, insurance and bonding company references, a list of any pending claims filed against the bidder, a list of all current projects under contract and other information necessary for Black & Veatch [the consulting engineers] to determine whether the Plaintiff and Crowder Construction Company, Inc. were responsible bidders within the meaning of N.C.G.S. 143-129.

Two sections of the Instructions to Bidders, (B-1) qualification of bidders and (B-10) award of contract, listed factors that would be used in determining the bidder's qualifications. The trial court found that

Plaintiff has failed to submit to Black & Veatch a copy of an audited financial statement, a list of any pending claims, resumes of supervisory personnel which the Plaintiff intended to assign to the construction project, or the identity of the proposed excavation contractor the Plaintiff intended to use to perform the excavation work required by the contract. Crowder Construction Company, Inc. timely submitted all information requested by Black & Veatch.

The consulting engineers supported their recommendation to defendant with a seven page document entitled "Discussion of Bids." Based on the evidence before it the trial court concluded that "the Plaintiff has failed to show that the rejection of the low bid of the Plaintiff was a result of any fraud, corruption, abuse of discretion or any other improper motive on behalf of the defendants[.]" Upon our review of the evidence and the applicable statutes, we affirm the order of the trial court.

Affirmed.

Judges WELLS and EAGLES concur.

**KOGER PROPERTIES, INC. v. LOWE**

[106 N.C. App. 387 (1992)]

KOGER PROPERTIES, INC., PLAINTIFF-APPELLANT v. DOUGLAS K. LOWE,  
DEFENDANT-APPELLEE

No. 9110SC569

(Filed 2 June 1992)

**Brokers and Factors § 26 (NCI4th) — real estate broker — finder's fee for procuring tenant**

The trial court properly entered summary judgment that plaintiff owed defendant, a licensed real estate broker, an \$80,157.60 commission based on a "letter of registration" signed by plaintiff's general manager in which plaintiff agreed to pay defendant a commission of 4% of the gross rental in the event that a lease was signed between a named prospect and plaintiff where the evidence showed that the prospect subsequently entered into a lease with plaintiff. This "finder's fee" contract did not violate N.C.G.S. § 93A-1 since defendant was licensed as a broker in North Carolina.

**Am Jur 2d, Brokers § 178.****Validity, construction and enforcement of business opportunities or "finder's fee" contract. 24 ALR3d 1160.**

APPEAL by plaintiff from judgment entered 14 March 1991 by *Judge George R. Greene* in WAKE County Superior Court. Heard in the Court of Appeals 8 April 1992.

Plaintiff, a company in the business of building and leasing commercial property, filed a complaint seeking a declaratory judgment regarding payment of an \$80,157.60 commission to defendant for a lease entered into by defendant and Management Systems Associates (MSA). Defendant answered and counterclaimed for the commission he contended was owed on the basis of a "letter of registration."

Mark F. Hayden, General Manager for plaintiff, signed this letter of registration on 3 February 1988. The prospect named in the letter, MSA, later entered a lease for 33,399 square feet with plaintiff. Defendant moved for summary judgment, which the trial court granted. From this judgment plaintiff appeals.

## KOGER PROPERTIES, INC. v. LOWE

[106 N.C. App. 387 (1992)]

*Hunter, Wharton & Lynch, by John V. Hunter, III, for plaintiff appellant.*

*Smith, Debnam, Hibbert & Pahl, by Jack P. Gulley, for defendant appellee.*

ARNOLD, Judge.

Plaintiff contends the trial court erred in granting defendant's motion for summary judgment that plaintiff owed defendant a \$80,157.60 commission based upon a signed letter of registration. We do not agree. Summary judgment shall be granted "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.R. Civ. P. 56(c). No genuine issue of material fact is apparent from the record.

"Generally, a broker becomes entitled to a commission only if he is the procuring cause of the [lease]." *Beckham v. Klein*, 59 N.C. App. 52, 57, 295 S.E.2d 504, 507 (1982) (citations omitted). "Of course, the contract of the parties can vary this general rule." *Id.* (citation omitted).

The parties' agreement, a "letter of registration," stated:

This letter shall serve to register the following prospect, Management Systems Associates, hereinafter referred to as "Prospect," for approximately 30,000 net usable square feet on a three-year (or longer) term with possible renewal options at the end of the term(s).

Should a lease be consummated between Prospect and Koger Properties, Inc., Koger agrees to pay to me, my heirs or assigns, a commission of four percent (4%) of the total gross aggregate rental due under the terms of the lease for the initial term (payment of commission due one-half upon execution and one-half upon occupancy).

Plaintiff admitted in its answer to defendant's counterclaim that Mark F. Hayden signed this "letter of registration" in his capacity as General Manager of Koger Properties, Inc. Plaintiff, as principal, is liable for the acts of its agent acting within the scope of the agent's employment. *Allen v. Simmons*, 99 N.C. App. 636, 394 S.E.2d 478 (1990).

**HARWELL v. HARWELL**

[106 N.C. App. 389 (1992)]

Although defendant was licensed as a broker in North Carolina, this letter of registration did not take the form of a conventional brokerage agreement. Defendant was not required to be the procuring cause of the lease, nor was he required to have negotiated with the lessee. See *Cooper v. Henderson*, 55 N.C. App. 234, 284 S.E.2d 756 (1981). Rather, under the letter's terms defendant became entitled to a commission upon the occurrence of an event, the signing of a lease between the Prospect and plaintiff. The agreement was similar to a "finder's fee" contract, "an arrangement by which an intermediary finds, introduces, and brings together parties to a real estate transaction, leaving the ultimate transaction and consummation of the transaction to the broker." *Gower v. Strout Realty, Inc.*, 56 N.C. App. 603, 605, 289 S.E.2d 880, 882 (1982). Such a "finder's fee" contract would not be a violation of N.C. Gen. Stat. § 93A-1 (1989) since defendant was licensed as a broker in North Carolina.

In his deposition defendant (a former employee of plaintiff) stated plaintiff preferred to conduct its own negotiations with prospective clients. Although plaintiff argues that defendant was required to do more than simply provide the name of a prospect, the agreement's language clearly requires only the consummation of a lease between the Prospect and plaintiff, nothing more. The judgment of the trial court is affirmed.

Affirmed.

Judges WELLS and EAGLES concur.

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BOBBY WAYNE HARWELL, JR., PLAINTIFF-APPELLANT v. GINA ELIZABETH  
DUNCAN HARWELL, DEFENDANT-APPELLEE

No. 9222DC11

(Filed 2 June 1992)

**Bastards § 5.1 (NCI3d)— blood grouping test—paternity not in  
issue—erroneous order**

The trial court had no authority to enter an order in an action for divorce from bed and board and child custody requiring plaintiff to submit to a blood grouping test to establish

## HARWELL v. HARWELL

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his paternity of the child where the pleadings clearly show that plaintiff admits that he is the biological father of the child, who was born in wedlock; that defendant does not deny that plaintiff is the natural father; and that defendant denies plaintiff's allegations concerning her commission of adultery.

**Am Jur 2d, Bastards § 118.**

**Admissibility and weight of blood grouping tests in disputed paternity cases.** 43 ALR4th 579.

Judges JOHNSON and WYNN concur in the result only.

APPEAL by plaintiff from *Harbinson (Kimberly T.)*, Judge. Order entered 29 October 1991 in District Court, IREDELL County. Heard in the Court of Appeals 14 May 1992.

Plaintiff instituted this civil action by complaint wherein he requested a divorce from bed and board from defendant based upon his allegations of adultery on the part of defendant. Plaintiff also requested custody of the minor child, Kiya Nichole Harwell, who he alleged was born to the parties during the marriage. Defendant answered plaintiff's complaint denying the allegations of adultery and requesting that she be granted a divorce from bed and board from plaintiff based upon allegations of plaintiff's indignities toward her. Defendant further requested full custody of the minor child as well as child support from plaintiff.

Defendant's attorney thereafter filed an unverified "Motion for Physical Examination" wherein defendant requested that plaintiff be required to submit to a blood grouping test in order to establish his paternity of Kiya Harwell. Within that motion, defendant alleged that "[t]he paternity of [the minor child] is of paramount importance to the disposition of the issues presented to the court and is in controversy." The record on appeal contains an affidavit of plaintiff wherein he reiterates the allegation of his complaint that he is the biological father of the child and wherein he states that defendant has at no time denied that plaintiff is in fact the child's father.

Judge Harbinson granted defendant's motion and ordered that plaintiff submit to a blood test. The trial judge found as fact that "the paternity of Kiya Nichole Harwell is of paramount importance to the disposition of the issues presented to the court and is in controversy." Plaintiff appeals from the entry of this order.



**HARWELL v. HARWELL**

[106 N.C. App. 389 (1992)]

*Homesley, Jones, Gaines & Fields, by Edmund L. Gaines, for plaintiff, appellant.*

*David P. Parker for defendant, appellee.*

HEDRICK, Chief Judge.

Although Judge Harbinson found that the question of the paternity of the minor child born during the marriage of the parties herein "is in controversy," there is nothing within the record on appeal disclosing such an issue. The pleadings clearly show that plaintiff admits that he is the biological father of Kiya, who was born in wedlock, that defendant does not deny that plaintiff is the natural father, and that defendant denies all allegations concerning her commission of adultery. The trial judge had absolutely no authority to enter the order from which plaintiff appeals as it addresses an issue which has not been raised by either party involved in this lawsuit. The order will be vacated and the cause will be remanded to the trial court.

We will further point out to these parties that Rule 11 of the North Carolina Rules of Civil Procedure states that:

. . . The signature of an attorney or party [upon a motion filed with the court] constitutes a certificate by him that he has read the . . . motion . . . ; 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 . . . , and that it is not interposed for any improper purpose . . . . If a . . . motion . . . is signed in violation of this rule, the court, upon motion or upon its own initiative, shall impose upon the person who signed it, a represented party, or both, an appropriate sanction . . . .

G.S. 1A-1, Rule 11. This Court does not have authority to impose sanctions pursuant to this rule. Likewise, as Judge Harbinson actually granted the motion filed by defendant, we believe that it would not be proper for her to hear or decide any motion which may be made pursuant to Rule 11 following the remand of this cause.

The costs of this appeal are taxed to defendant.

Vacated and Remanded.

Judges JOHNSON and WYNN concur in the result only.

CASES REPORTED WITHOUT PUBLISHED OPINION  
FILED 19 MAY 1992

GORTON v. CITY OF GREENSBORO No. 9118SC1247	Guilford (91CVS7292)	Dismissed
HAGGARD v. MITCHELL No. 9117SC1202	Stokes (90CVS0097)	Affirmed
HOOD v. HOOD No. 9110DC1022	Wake (88CVD1508)	Affirmed
McGEE v. McGEE No. 914DC763	Onslow (89CVD2317)	Affirmed
MEWBORN v. MEWBORN No. 9115DC1129	Alamance (89CVD1708)	Affirmed in part; vacated & remanded in part
MEYER v. HOGLEN No. 9119SC1280	Randolph (88CVS601)	Dismissed
PORTER v. STARKS No. 9112SC1	Cumberland (88CVS6396)	Affirmed in part and reversed and remanded for new trial on the sole issue of compensatory damages with an instruction to recalculate the interest on the punitive damages from the date of judgment
STATE v. BISSELL No. 9116SC1143	Robeson (91CRS195)	No Error
STATE v. CAMPBELL No. 9130SC491	Haywood (90CRS2861) (90CRS2860) (90CRS2821)	No Error
STATE v. DAVIDSON No. 9112SC1179	Cumberland (90CRS32111) (90CRS31943)	No Error
STATE v. HAIRSTON No. 9121SC1120	Forsyth (91CRS8853)	No Error

STATE v. HINTON No. 911SC1229	Gates (88CRS294)	No Error
STATE v. HORTON No. 9115SC1142	Orange (90CRS4405) (90CRS4406)	No Error
STATE v. LITTLE No. 9116SC1065	Robeson (89CRS9131)	Vacated & remanded for resentencing
STATE v. NOBLES No. 9118SC1296	Guilford (88CRS20118)	Affirmed
STATE v. PETRIE No. 9126SC1125	Mecklenburg (90CRS36189) (90CRS36190) (90CRS38134)	No Error
STATE v. PORTER No. 9126SC1123	Mecklenburg (91CRS22716)	Affirmed
STATE v. RICHARDSON No. 9128SC1223	Buncombe (91CR003873)	No Error
STATE v. ROBINSON No. 9125SC1282	Burke (87CRS4863) (87CRS4864) (87CRS4865) (87CRS4866) (87CRS3000) (87CRS3001)	Affirmed
STATE v. SANDERSON No. 9116SC1138	Robeson (90CRS22279) (90CRS22280)	No Error
STATE v. SIMS No. 9127SC1305	Cleveland (89CRS11293)	No Error
STATE v. SMITH No. 9112SC1176	Cumberland (90CRS46107) (90CRS13657) (90CRS13653) (90CRS13660)	No Error
STATE v. STEVENS No. 9114SC1262	Durham (90CRS27209) (90CRS27210) (90CRS27211) (90CRS29312)	No Error
STATE v. STRICKLAND No. 9115SC1188	Alamance (90CRS18588)	No Error

STATE v. WARE No. 9126SC1243	Mecklenburg (91CRS9546)	No Error
STATE v. WEBB No. 9114SC1258	Durham (90CRS24514)	No Error
STATE v. YOUNG No. 9126SC1279	Mecklenburg (91CRS41316) (91CRS41318)	No Error
STATE EX REL. REICHERT v. BELANGER No. 9112DC1155	Cumberland (78CVD2470)	Reversed & Remanded

## FILED 2 JUNE 1992

CASH v. CASH No. 9127DC1240	Lincoln (91CVD767)	Vacated in part & affirmed in part
CLARK v. HANCKEL No. 911SC1293	Dare (90CVS38)	Dismissed
DIGGS v. DIGGS No. 925DC63	New Hanover (91CVD885)	Affirmed
HALL v. TILLER No. 9122SC425	Davie (90CVS271)	Affirmed in part & reversed in part
IN RE CUMBERLAND COUNTY DRAINAGE DISTRICT NO. 3 No. 9112SC263	Cumberland (79SP0168)	Affirmed
MESSER v. ADVOCATES, INC. No. 9130SC405	Haywood (90CVS701)	Affirmed
RECHTIN v. RECHTIN No. 9115DC1269	Alamance (87CVD359)	Affirmed
STATE v. BAXLEY No. 9112SC605	Cumberland (90CRS44727) (90CRS44728) (90CRS44729) (90CRS44730) (90CRS44731) (90CRS44732) (90CRS44733) (90CRS44734) (90CRS32608) (90CRS32609) (90CRS32611)	No Error

STATE v. BLAKE No. 9120SC434	Stanly (90CRS3107) (90CRS5114)	No Error
STATE v. DAVIS No. 9212SC92	Cumberland (91CRS13547)	No Error
STATE v. EVANS No. 9112SC1204	Cumberland (90IFS13301)	Dismissed
STATE v. HARRIS No. 9218SC114	Guilford (89CRS74354)	No Error
STATE v. McRAE No. 9218SC62	Guilford (88CRS41843) (88CRS41844)	No Error
STATE v. MOSELY No. 9121SC1297	Forsyth (91CRS2656) (91CRS2657) (91CRS17207)	Remanded for resentencing
STATE v. SAUNDERS No. 9118SC229	Guilford (88CRS61830) (88CRS61833) (88CRS61878) (88CRS61880)	As to both Atkins and Saunders, we find no error in the conviction and punishment for trafficking by possession but arrest judgment on the charges of possession with intent to sell. No. 88CRS61830 possession with intent to sell a controlled substance-arrested; No. 88CRS61833 trafficking in drugs-no error; No. 88CRS61878 possession with intent to sell a controlled substance-arrested; No. 88CRS61880 trafficking in drugs-no error.
STATE v. WELLS No. 9228SC153	Buncombe (90CRS15767)	Affirmed

STATE v. WORSLEY  
No. 922SC10

Martin  
(90CRS2776)  
(90CRS2777)  
(90CRS2778)

No Error

TATE v. BARKLEY  
No. 9118SC660

Guilford  
(90CVS3087)

As to plaintiff's  
appeal—no error;  
As to defendant's  
appeal—affirmed

YARBOROUGH & CO. v. E. I.  
Du PONT DE NEMOURS  
& CO.

Guilford  
(89CVS5946)

Affirmed in part,  
reversed and  
remanded  
in part

No. 9118SC430

**HOOTS v. PRYOR**

[106 N.C. App. 397 (1992)]

FURMAN ANTHONY HOOTS AND WIFE, PAULA HOOTS, PLAINTIFFS v. GARY PRYOR, CHAMPION INTERNATIONAL CORPORATION, A NEW YORK CORPORATION, AND PUBLIC SERVICE COMPANY OF NORTH CAROLINA, INC., A NORTH CAROLINA CORPORATION, DEFENDANTS

No. 9129SC149

(Filed 16 June 1992)

**1. Appeal and Error § 114 (NCI4th) — 12(b)(6) motion granted — appeal — interlocutory — substantial right exception**

An appeal from an order granting motions by two defendants to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) was interlocutory because it did not dispose of a claim against a third defendant, but was reviewable under the substantial right exception because a dismissal now would raise the possibility of inconsistent verdicts in later proceedings.

**Am Jur 2d, Appeal and Error § 62.**

**2. Appeal and Error § 99 (NCI4th) — motion to amend pleadings denied — appeal interlocutory — treated as petition for certiorari**

The denial of a motion to amend pleadings did not affect a substantial right and was interlocutory; however, because a determination of the correctness of the denial of the motion to amend was necessary to decide the appeal from the 12(b)(6) dismissal, the appeal was treated as a motion for certiorari and allowed. N.C.R. App. P. 21(a)(1).

**Am Jur 2d, Appeal and Error § 62.**

**3. Pleadings § 32 (NCI3d) — motion to amend denied — 12(b)(6) dismissal previously granted — no error**

The trial court did not err by denying plaintiffs' motion to amend their complaint as to two of three defendants where another judge had previously granted a dismissal as to those two defendants under N.C.G.S. § 1A-1, Rule 12(b)(6). While a motion to dismiss under Rule 12(b)(6) does not terminate a party's unconditional right to amend pursuant to N.C.G.S. § 1A-1, Rule 15(a), the entry of a dismissal under Rule 12(b)(6) does terminate that right. The judge denying the motion to amend found as a fact that plaintiffs had stipulated to the entry of dismissal before the motion to amend and plaintiffs have not objected to that finding, so that it was not necessary

**HOOTS v. PRYOR**

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to determine whether the dismissal was entered with the oral grant of the 12(b)(6) motion before the motion to amend.

**Am Jur 2d, Pleading § 317.****4. Negligence § 47 (NCI3d) — 4 wheel drive accident along pipeline excavation — trespasser — 12(b)(6) dismissal**

The trial court correctly granted a motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) for defendants Champion and Gas Company where plaintiff Furman Hoots was injured when the four wheel drive vehicle in which he was riding overturned on steep, uneven ground on a cleared strip beside a gas pipeline excavation ditch located on an easement sold by Champion to Gas Company for construction of a gas pipeline. Allegations that the accident occurred about one-quarter mile from a public recreational access area and roadway leased by Champion to the State for a public sport fishing and recreational area and that Champion and Gas Company knew or should have known that vehicles frequented the public area and frequently attempted to drive up and down the cleared strip along the easement were not sufficient to allege that plaintiff Hoots was a licensee. Plaintiffs do not allege that either defendant actually created the hazardous condition or that it was a hidden condition, or any facts that would constitute willful or wanton negligence by either defendant.

**Am Jur 2d, Premises Liability §§ 109, 163, 164, 166.****5. Contracts § 116 (NCI4th) — third party beneficiary — failure to allege that contract enforceable — failure to allege direct beneficiary**

The trial court correctly granted a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) for defendants Champion and Gas Company in an action arising from an accident involving a four wheel drive vehicle on a gas pipeline easement where plaintiffs alleged that plaintiff Hoots was a third party beneficiary of a contract between Champion and Gas Company the easement and requiring it to erect barriers to prevent motor vehicle access onto the easement. Plaintiffs did not allege that the contract was valid and enforceable and did not allege that plaintiffs were the direct and not the incidental beneficiaries of the contract.

**Am Jur 2d, Contracts §§ 435, 449.**



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APPEAL by plaintiffs from order entered 3 December 1990 by *Judge Hollis M. Owens, Jr.*, in HENDERSON County Superior Court and from order entered 3 December 1990 by *Judge Edward K. Washington* in HENDERSON County Superior Court. Heard in the Court of Appeals 12 November 1991.

*Waymon L. Morris, P.A., by Waymon L. Morris, for plaintiffs-appellants.*

*Roberts Stevens & Cogburn, P.A., by Steven D. Cogburn and W. O. Brazil, III, for defendant-appellee Champion International Corporation.*

*Stott, Hollowell, Palmer & Windham, by Grady B. Stott and Martha R. Holmes, for defendant-appellee Public Service Company of North Carolina, Inc.*

JOHNSON, Judge.

This case arises from a motor vehicle accident which occurred when defendant Pryor attempted to drive his four-wheel drive vehicle along a cleared strip beside a gas pipeline ditch dug by defendant Public Service Company of North Carolina, Inc. (Gas Company). Plaintiff Hoots was a passenger in the vehicle and was seriously injured when the vehicle overturned on the steep uneven ground, trapping plaintiff underneath it. The land on which the accident occurred was owned by defendant Champion International Corporation (Champion). The excavation ditch and the cleared strip beside it were located on an easement sold by Champion to Gas Company for the purpose of the construction of a gas pipeline. The accident site was not far from other land, also owned by Champion, which was leased to the N.C. Department of Natural Resources and Community Development for use by the public.

Plaintiffs brought suit against defendant Pryor on 25 May 1989 and on 28 August 1990 amended their complaint to join defendants Champion and Gas Company. Defendants Champion and Gas Company filed motions to dismiss pursuant to Rule 12(b)(6) for failure to state a claim upon which relief can be granted. Judge Owens, on 26 November 1990, in open court, allowed defendants' Rule 12(b)(6) motions and dismissed plaintiffs' claims as to them. On 28 November 1990, plaintiffs filed a motion for leave to amend their complaint as to defendants Gas Company and Champion. On 3 December 1990, Judge Owens signed an order granting the Rule

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12(b)(6) motions as to each corporate defendant. This order was filed at 11:21 a.m. The dismissal did not affect plaintiffs' negligence claim against defendant Pryor, which remains. Later that same day (3 December 1990), plaintiffs' motion to amend was heard by Judge Washington who denied the motion, concluding, as a matter of law, that the dismissal of plaintiffs' complaint by Judge Owens had operated as an adjudication on the merits.

Plaintiffs appeal from Judge Owens' order granting defendants Champion and Gas Corporation's motion to dismiss and from Judge Washington's order denying plaintiffs' motion to amend their complaint.

## I.

Plaintiffs appeal from two different orders. Initially, we must decide whether these appeals are interlocutory and should be dismissed.

THE APPEAL FROM THE RULE 12(b)(6) DISMISSALS.

[1] Champion and Gas Company argue that plaintiffs' appeal from the order granting their Rule 12(b)(6) motions is interlocutory and thus should be dismissed.

A judgment of a trial court is either interlocutory or is a final determination of the rights of the parties. G.S. § 1A-1, Rule 54(a) (1990). Interlocutory orders are those made during the pendency of an action which do not dispose of the case but leave it for further action by the trial court in order to settle and determine the entire controversy. *Veazey v. Durham*, 231 N.C. 357, 57 S.E.2d 377, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950); *Cook v. Bankers Life and Casualty Co.*, 329 N.C. 488, 406 S.E.2d 848 (1991) (granting of summary judgment in favor of one defendant does not finally determine all the claims in the case and is thus an interlocutory order). Interlocutory orders are normally not appealable. *See Veazey*, 231 N.C. 357, 57 S.E.2d 377. An appeal from a nonappealable interlocutory order is fragmentary and premature and will be dismissed. *Cement Co. v. Phillips*, 182 N.C. 437, 109 S.E. 257 (1921). But under certain circumstances, an appeal of right lies from an interlocutory order and such appeal will not be dismissed. G.S. § 1A-1, Rule 54(b); G.S. §§ 1-277 (1983) and 7A-27(d) (1989).

Judge Owens' order dismissing plaintiffs' claims against Champion and Gas Company is an interlocutory order since it was made

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during the pendency of the action and it does not dispose of the case but leaves plaintiffs' negligence claim against defendant Pryor. Even though interlocutory, plaintiffs' appeal of Judge Owens' order will not be dismissed if either of two means of appealing interlocutory judgments applies. See *Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 376 S.E.2d 488, *disc. review denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

Under G.S. § 1A-1, Rule 54(b), when multiple parties are involved in an action, the court may enter a final judgment as to one or more but fewer than all of the parties. Such a judgment, though interlocutory for appeal purposes, shall then be subject to review if the trial judge certifies that there is no just reason for delay. *Davidson*, 93 N.C. App. at 24, 376 S.E.2d at 490. Here, the dismissal of defendants upon their Rule 12(b)(6) motions operates as a final judgment as to the cause of action against them but there is no certification in the dismissal order as to delay as required by Rule 54(b), thus there is no right of appeal under Rule 54(b).

Even though an interlocutory order cannot be appealed under Rule 54(b), an appeal is allowed if the provisions of G.S. §§ 1-277(a) and 7A-27(d) apply. Under these statutes, an appeal of right lies from an interlocutory order which prejudices "a substantial right." Whether or not a substantial right will be prejudiced by delaying an interlocutory appeal must be decided on a case by case basis. "It is usually necessary to resolve the question in each case by considering the particular facts of that case and the procedural context in which the order from which the appeal is sought is entered." *Bernick v. Jurden*, 306 N.C. 435, 439, 293 S.E.2d 405, 408 (1982) (quoting *Waters v. Qualified Personnel, Inc.*, 294 N.C. 200, 208, 240 S.E.2d 338, 343 (1978)). The determination of appealability under the substantial right exception is a two step process. See *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 362 S.E.2d 812 (1987). First, there must be a "substantial right" and second, "the enforcement of the substantial right must be lost, prejudiced or be less than adequately protected by exception to entry of the interlocutory order." *Id.* at 6, 362 S.E.2d at 815.

In *Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982) our Supreme Court stated that "the right to avoid the possibility of two trials on the same issues can be such a substantial right." *Green*, 305 N.C. at 606, 290 S.E.2d at 595. As explained in *Davidson*,

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This general proposition is based on the following rationale: when common fact issues overlap the claim appealed and any remaining claims, delaying the appeal until all claims have been adjudicated creates the possibility the appellant will undergo a second trial of the same fact issues if the appeal is eventually successful. This possibility in turn 'creat[es] the possibility that a party will be prejudiced by different juries in separate trials rendering inconsistent verdicts on the same factual issue.'

*Davidson*, 93 N.C. App. at 25, 376 S.E.2d at 491 (quoting *Green*, 305 N.C. at 608, 290 S.E.2d at 596); see also *Cook*, 329 N.C. 488, 406 S.E.2d 848.

We find that under the facts of this case, plaintiffs' appeal is reviewable under the substantial right exception because a dismissal now would raise the possibility of inconsistent verdicts in later proceedings. Plaintiffs' claims against defendant Pryor sound in negligence. Plaintiffs' claims against Gas Company and Champion are based on their interest in the land and their duty to warn of hazardous conditions on the land. Gas Company alleges that defendant Pryor's actions constitute intervening negligence and that plaintiff Furman Hoots' conduct constitutes contributory negligence. It is conceivable that in a proceeding against defendant Pryor alone, the jury could find that plaintiff was contributorily negligent. If, in an appeal from that verdict, plaintiffs renew their appeal of the dismissal of defendants Gas Company and Champion and we were to find that the dismissal was improperly granted, then a second trial would be required as against these defendants. It is conceivable that at the second trial, plaintiff could be found not to have been contributorily negligent. See *DeHaven v. Hoskins*, 95 N.C. App. 397, 382 S.E.2d 856, *disc. review denied*, 325 N.C. 705, 388 S.E.2d 452 (1989).

Because of the possibility of inconsistent verdicts if this case were to be tried in two separate proceedings, we find that plaintiffs' appeal of Judge Owens' order is not premature and should not be dismissed.

APPEAL FROM THE DENIAL OF MOTION TO AMEND.

[2] We now consider whether plaintiffs' appeal from Judge Washington's order denying their motion to amend is properly before this Court.

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An appeal from the *denial* of a *motion to amend* a pleading is ordinarily interlocutory and not immediately appealable. *Calloway v. Ford Motor Co.*, 281 N.C. 496, 501, 189 S.E.2d 484, 488 (1972) (denial of motion to amend answer); *Buchanan v. Rose*, 59 N.C. App. 351, 296 S.E.2d 508 (1982) (appeal from denial of motion to amend answer is interlocutory and not immediately appealable unless it affects a substantial right); *Overton v. Overton*, 260 N.C. 139, 132 S.E.2d 349 (1963) (rulings on motions to amend are not *res judicata* unless they involve a substantial right). As with any other interlocutory order, if the order affects a substantial right which the appellant would lose if the order or ruling is not reviewed before final judgment, it is appealable. *Goodwin v. Zeydel*, 96 N.C. App. 670, 387 S.E.2d 57 (1990) (where denial of motion to amend answer would effectively bar forever a claim for equitable distribution, it affects a substantial right and is appealable); *Hudspeth v. Bunzey*, 35 N.C. App. 231, 241 S.E.2d 119, *disc. review denied*, 294 N.C. 736, 244 S.E.2d 154 (1978) (denial of motion to amend answer to assert a compulsory counterclaim affects a substantial right and is appealable).

We find that the order appealed from does not affect a substantial right and is interlocutory. However, the posture of this case is such that a determination of the correctness of Judge Washington's denial of plaintiffs' motion to amend is necessary to decide the appeal from the Rule 12(b)(6) dismissals, which we have found is properly before us. We therefore treat this appeal as a petition for certiorari and allow it. N.C.R. App. P. 21(a)(1).

**[3]** We find that Judge Washington did not err in denying plaintiffs' motion to amend. In his order denying the motion, Judge Washington made the following findings of fact and conclusion of law. We paraphrase the determinative parts, except where a quote is indicated:

1. A hearing was held on 26 November before Judge Owens on defendants' motions to dismiss for failure to state a claim.
2. Attorneys for plaintiffs and defendants Champion and Gas Company were present.
3. "That plaintiffs' attorney and attorneys for [Champion] and [Gas Company] stipulated that on November 26, 1990 in open court, after hearing arguments of counsel for the parties, Judge

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Owens granted the motions of [Champion] and [Gas Company] to dismiss plaintiffs' complaint[.]”

4. On 28 November plaintiffs filed a Notice of Motion and a Motion to Amend pursuant to Rule 15 with the clerk.

. . .

7. The parties “stipulated that on December 3, 1990 in open court the Order signed by Judge Owens and filed with the [clerk] on December 3, 1990 contained no modifications from the ruling of Judge Owens made in open court on November 26, 1990 granting the Motions of [defendants] pursuant to Rule 12(b)(6), and that the written Order of Judge Owens was in all respects the same as his oral Order entered in open court on November 26, 1990.”

“UPON THE FOREGOING FINDINGS OF FACT, the Court concludes as a matter of law that dismissal of Plaintiffs' Complaint by Judge Owens as to [Champion] and [Gas Company] pursuant to Rule 12(b)(6) operates as an adjudication upon the merits and that Plaintiffs' Motion to Amend should be denied.”

Judge Washington's order, in paragraph 7, states that plaintiffs stipulated that Judge Owens granted defendants' motions to dismiss on 26 November and that the oral order was entered on that date. Plaintiffs do not object to Judge Washington's findings of fact. We are therefore bound by those findings and only need determine whether the conclusion of law is supported by the findings of fact. We hold that it is.

A dismissal under Rule 12(b)(6) operates as an adjudication on the merits unless the court specifies that the dismissal is without prejudice. N.C.R. Civ. P. 41(b) (1990); *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987). In the case *sub judice* the trial judge did not so indicate and the dismissal is thus with prejudice. While a motion to dismiss under Rule 12(b)(6) does not terminate a party's unconditional right to amend pursuant to Rule 15(a), the entry of a dismissal under Rule 12(b)(6) does terminate that right. *Id.* at 7, 356 S.E.2d at 382 (citing federal cases).

We find that we need not decide whether the dismissal was “entered” on 26 November with Judge Owens' oral grant of defendants' Rule 12(b)(6) motion or whether the dismissal was “entered” on 3 December when he signed the order. Judge Washington found

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as a fact that plaintiffs had stipulated to the entry of dismissal on 26 November. Plaintiffs did not object to this finding of fact nor do they object now. Having stipulated that the order was entered on 26 November, plaintiffs will not now be heard to complain that the order was not "entered" then, so as to make a case that their later motion to amend was timely.

We find that Judge Washington did not err in holding that the dismissal of plaintiffs' complaint on 26 November operated as an adjudication on the merits and that it terminated plaintiffs' right to amend their complaint. Therefore, our consideration of plaintiffs' appeal from the Rule 12(b)(6) dismissals must be based on the legal sufficiency of plaintiffs' amended complaint filed on 28 August 1990.

## II.

We now consider plaintiffs' appeal from the order granting defendants' motions to dismiss. Plaintiffs contend that the trial court erred in dismissing plaintiffs' claims against Gas Company and Champion for failure to state a claim upon which relief can be granted.

A dismissal under Rule 12(b)(6) tests the legal sufficiency of the complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). "[A] complaint should not be dismissed for insufficiency *unless it appears to a certainty that plaintiff is entitled to no relief under any state of facts which could be proved in support of the claim.*" *Id.* at 103, 176 S.E.2d at 166 (original emphasis). In ruling on the motion, the allegations in the complaint must be viewed as admitted and the court must determine as a matter of law whether the allegations state a claim for which relief can be granted. *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 299 S.E.2d 297 (1976).

THE NEGLIGENCE CLAIM.

[4] Plaintiffs' first cause of action alleges negligent failure of defendants to warn of a hazardous condition. Plaintiffs' complaint alleges in pertinent part that defendant Champion is the owner and Gas Company is the easement holder of the land on which the accident occurred:

8. The location of said accident was upon a portion of the [Gas Company's] easement in extremely steep mountainous terrain unfit for the operation of even four wheel vehicles and

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which portion of the easement was bereft of vegetation. The surface was loose uneven soil and rocks thereby constituting a dangerous, hazardous condition upon which motor vehicles should not have been permitted.

9. Said conditions existed along a strip of terrain adjacent to [Gas Company's] excavation for installation of its gas transmitting pipe line and extended from a construction area on the northerly side of Big Hungry River at its intersection with the above described easement; thence in a cleared up-hill strip of soil from a public recreational access area and vehicular roadway approximately one-quarter (1/4) mile with a curve to the left to the place of occurrence.

10. That [Champion] . . . leased the tract of land lying along the Big Hungry River to the North Carolina Department of Public Resources for a public sport fishing and recreational area.

. . .

12. Champion and Gas Company had a duty to warn by appropriate signs, or in the alternative, to erect barricades to prevent access to the cleared strip of easement which Defendants knew . . . or should have known, constituted a hazardous condition[.]

The standard of care of an owner or possessor of land owed to one who comes on the land depends upon whether the injured party is an invitee, a licensee or a trespasser. Initially, we must decide what status plaintiff Hoots has with regard to the land in question. Plaintiffs make no allegations in their complaint as to plaintiff Hoots' status, nor do they argue this point in their brief.

An invitee is one who goes upon the premises of another in response to an express or implied invitation by the landowner for the mutual benefit of the landowner and himself. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979); *Hood v. Coach Co.*, 249 N.C. 534, 107 S.E.2d 154 (1959). Plaintiffs allege no facts which would give plaintiff Hoots the status of an invitee.

A licensee is one who enters on the premises with the possessor's permission, express or implied, solely for his own purposes rather than for the possessor's benefit. *Mazzacco v. Purcell*, 303 N.C. 493, 279 S.E.2d 583 (1981); *Pafford v. Const. Co.*, 217 N.C. 730, 735, 9 S.E.2d 408, 411 (1940) (a licensee is neither customer, servant



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nor trespasser and has no contractual relation with the owner but who is permitted, expressly or impliedly, to go thereon merely for his own interest, convenience or gratification). Plaintiffs do not allege that plaintiff Hoots had permission, express or implied, to go upon the land where the accident occurred. They do allege that the spot where the accident occurred is about one-quarter mile from a public recreational access area and roadway leased by Champion to the N.C. Department of Public Resources for a public sport fishing and recreational area; that Champion and Gas Company knew or should have known that vehicles frequented the public access and recreational area and that drivers had frequently attempted to drive up and down the cleared strip along the easement. These allegations are not sufficient to allege that plaintiff Hoots was a licensee at the spot where the accident occurred.

A trespasser is one who enters the land of another without permission. We find that the complaint alleges facts that would make plaintiff Hoots no more than a trespasser on the land where the accident occurred. The duty owed to a trespasser is to refrain from willfully or wantonly injuring the trespasser. *Jessup v. High Point, Thomasville and Denton Railroad*, 244 N.C. 242, 245, 93 S.E.2d 84, 87 (1956).

To constitute willful injury there must be actual knowledge, or that which the law deems to be the equivalent of actual knowledge, of the peril to be apprehended, coupled with a design, purpose, or intent to do wrong and inflict injury. A wanton act is one which is performed intentionally with a reckless indifference to injurious consequences probable to result therefrom. Ordinary negligence has as its basis that a person charged with negligent conduct should have known the probable consequences of his act. Wanton and willful negligence rests on the assumption that he knew the probable consequences, but was recklessly, wantonly or intentionally indifferent to the results.

*Wagoner v. North Carolina Railroad Co.*, 238 N.C. 162, 168, 77 S.E.2d 701, 706 (1953).

We find that plaintiffs' complaint fails to allege willful and wanton negligence on the part of either defendant. The most that plaintiffs allege is that a hazardous condition, consisting of loose uneven soil and rocks, existed on a strip of terrain adjacent to Gas Company's excavation. This was in an area of "extremely steep,

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mountainous terrain unfit for the operation of even four wheel vehicles." Plaintiffs do not allege that either defendant actually created the hazardous condition or that it was a hidden condition. Plaintiffs do not allege any facts which would constitute willful or wanton negligence on the part of either defendant. This cause of action was properly dismissed.

THE THIRD PARTY BENEFICIARY CLAIM.

[5] In their second cause of action, plaintiffs allege that plaintiff Hoots is a third party beneficiary of a contract between Champion and Gas Company granting Gas Company the easement and requiring it to erect barriers to prevent motor vehicle access onto the easement. Plaintiffs allege a breach of that contract by Gas Company, either because Champion failed to designate the location of such barriers or because Gas Company failed to erect such barriers. Plaintiffs allege that plaintiff Hoots is a member of a class of persons intended to be benefited by the contract and that the breach by Gas Company resulted in the injury to him.

We find that plaintiffs have failed to allege sufficient facts to avoid a dismissal under Rule 12(b)(6).

To establish a claim based on the third party beneficiary contract doctrine, a complaint's allegations must show: (1) the existence of a contract between two other persons; (2) that the contract was valid and enforceable; (3) that the contract was entered into for his direct, and not incidental, benefit.

*Leasing Corp. v. Miller*, 45 N.C. App. 400, 405-06, 263 S.E.2d 313, 317, *disc. review denied*, 300 N.C. 374, 267 S.E.2d 685 (1980), *citing Trust Co. v. Processing Co.*, 242 N.C. 370, 88 S.E.2d 233 (1955). Complaints which fail to allege the required elements of the tort are subject to dismissal under Rule 12(b)(6). *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 79 N.C. App. 81, 339 S.E.2d 62 (1986), *rev'd on other grounds*, 322 N.C. 200, 367 S.E.2d 609 (1988). *See also Metric Constructors, Inc. v. Industrial Risk Insurers*, 102 N.C. App. 59, 401 S.E.2d 126, *aff'd*, 330 N.C. 439, 410 S.E.2d 392 (1991) (summary judgment).

Plaintiffs' complaint does not allege that the contract between Champion and Gas Company is valid and enforceable. "[I]t omits the second of the 'essential allegations' and thus 'leaves to conjecture that which must be stated.'" *Raritan*, 79 N.C. App. at 86,

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339 S.E.2d at 66 (quoting *Leasing Corp.*, 45 N.C. App. at 406, 263 S.E.2d at 317). Plaintiffs' second cause of action was properly dismissed on that account. *Id.* Plaintiffs have also failed to allege that they are the direct and not the incidental beneficiaries of the contract. Their allegation is found in paragraph 19 of the amended complaint.

19. Plaintiff, Hoots, was a member of a class of persons, to wit: a passenger in a motor vehicle, which vehicle had invited access to the public access and recreational areas abutting, touching, and traversing the gas line easement granted to Gas Company by Champion. Said class was intended by the contracting parties to be benefited by said provisions for barriers and permanent structures as before set out.

An allegation that plaintiff is a member of a class of persons "intended" by the contracting parties to be benefited falls far short of alleging that the contract was entered into for the direct, not incidental, benefit of plaintiff. Dismissal was also properly entered on this basis.

In conclusion, we find that plaintiffs' complaint was properly dismissed for failure to state a claim upon which relief can be granted.

Affirmed.

Judges EAGLES and ORR concur.

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[106 N.C. App. 410 (1992)]

WAYNE D. HOWELL, PLAINTIFF v. TOWN OF CAROLINA BEACH, NORTH CAROLINA, A BODY POLITIC AND INCORPORATE, THE TOWN OF CAROLINA BEACH BOARD OF COMMISSIONERS, DAVID SERRELL, IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES, AND HUBERT VINCENT, PATSY R. EFIRD, AND DOUGLAS BATSON, IN THEIR INDIVIDUAL AND OFFICIAL CAPACITIES, AND ROBERT L. DOETSCH AND EDWARD CHINNIS, IN THEIR OFFICIAL CAPACITIES, DEFENDANTS

No. 915SC552

(Filed 16 June 1992)

**1. Appeal and Error § 418 (NCI4th)— claims not argued in brief—abandoned**

Claims of intentional infliction of emotional distress, invasion of privacy, and defamation arising from the termination of plaintiff's employment which were not argued in his brief were abandoned. N.C.R. App. P. 28(b)(5).

**Am Jur 2d, Appeal and Error §§ 691, 693.****2. Master and Servant § 10.2— employment termination—breach of employment contract—personnel manual not part of contract**

Summary judgment was properly granted for defendants on a breach of employment contract claim where plaintiff contended that the town's Personnel Policies and Procedures Manual took him out of the employment at will category, but plaintiff did not show that the Manual was expressly included within his terminable at will contract or that the Manual provided for discharge only for cause.

**Am Jur 2d, Master and Servant §§ 14, 27, 32, 48.3.****3. Master and Servant § 10.2 (NCI3d)— wrongful discharge—exceptions to employment at will not shown—summary judgment for defendants**

The trial court correctly granted summary judgment for defendants on a wrongful discharge claim based on failure to follow procedures in a personnel manual where the manual was found not to be part of the employment contract, and plaintiff did not allege facts which fall within the exceptions to the employment at will doctrine. Plaintiff did not show that he provided any additional consideration other than his services and did not allege that his termination was due to

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an unlawful purpose or resulted from acts which contravene public policy.

**Am Jur 2d, Master and Servant §§ 14, 27, 32, 48.3.**

**4. Constitutional Law § 105 (NCI4th) — personnel manual — town ordinance — due process**

Summary judgment was improperly granted for defendants on plaintiff's due process claim where plaintiff was discharged as a Carolina Beach policeman and claimed that the Town's failure to follow the grievance procedure in its personnel manual violated his rights under the Fourteenth Amendment to the United States Constitution, Article 1, Section 19 of the North Carolina Constitution, and 42 U.S.C. 1983. Plaintiff's employment was terminable at will and did not in and of itself provide him with a Fourteenth Amendment property right or a vested interest in continued employment, but the Manual, which was also a town ordinance, created the reasonable expectation of continued employment within the meaning of the due process clause. Regardless of whether the town manager had the discretion to terminate plaintiff, he had the responsibility to provide plaintiff with a proper review which could have included a hearing.

**Am Jur 2d, Public Officers and Employees § 261.**

**5. Constitutional Law § 115 (NCI4th) — free speech — memo by police officer regarding malfunctioning weapons — employment terminated**

Summary judgment was improperly granted for defendants in an action in which plaintiff alleged that he was terminated as a police officer because he wrote a memo documenting the poor condition of the police department's firearms and because he campaigned against the mayor and a councilwoman. The issue is one of public concern because members of the public are as likely as officers to be harmed by malfunctioning police firearms and the memo, which plaintiff alleges was written in accordance with his duties as a firearms instructor, was not unreasonable as to form or context. The answer to questions of whether plaintiff was fired due to the memo and whether the Town was justified require the determination of issues of fact.

**Am Jur 2d, Public Officers and Employees § 223.**

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APPEAL by plaintiff from summary judgment issued 21 March 1991 by *Judge E. Lynn Johnson* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 17 October 1991.

Plaintiff was first hired as an auxiliary policeman for the town of Carolina Beach, but became a full time officer in 1982. Before beginning each position, plaintiff was required to read the town's "Personnel Policies and Procedures Manual" (Manual). Plaintiff eventually rose to the rank of captain. On 4 January 1988, plaintiff drafted a memorandum to the chief of police which documented the malfunction of some of the police weapons. The chief issued a memorandum to the town manager, dated 8 January 1988, in which he requested funds to purchase new firearms. As justification for the purchase, the chief attached a copy of plaintiff's 4 January memorandum. The chief and town manager met on 8 January 1988, to discuss the issue of new weapons. It was at this meeting that the town manager ordered the chief, who in turn ordered plaintiff, to cancel the firearms order previously placed.

On 4 February 1988, a police training session led to a discussion concerning the frequent jamming and misfiring of the weapons then in use. The officers requested a letter of "protection" be drafted to document the weapons' condition. On this same date, plaintiff drafted a memorandum to the chief of police outlining the inadequacy of a particular revolver which jammed after one or two rounds. Plaintiff concluded the memorandum with the following statement, "I would hope that the Town Manager will realize by this memorandum that if one (1) of our officers is killed in the line of duty and it is found that his firearm will not properly function, the Town Manager will have to suffer the liability." A copy was circulated to all sworn officers.

On 10 February 1988, the town manager called plaintiff and the chief of police into his office. The town manager verbally reprimanded both officers. He refused to reduce the reprimand to writing despite requests from both officers. The only written record of the meeting was contained within a set of shorthand notes taken by the town manager's secretary during the meeting. Plaintiff's written request for a copy of these notes was denied. On 17 February 1988, plaintiff was discharged as a police officer because of

gross insubordination to the Town Manager as a result of your circulating a memorandum concerning firearms which was

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personally demeaning to me as Town Manager and for your profane, rude and abusive language, and insolent behavior when being verbally reprimanded by me on February 10, 1988. In addition you attempted to physically intimidate me at this meeting which is inexcusable.

Subsequent to his termination, on 18 February, plaintiff dispatched a written request for a hearing to the town attorney, to the town manager, to the mayor, and to the town board. The town manager responded that such a hearing was not necessary.

On 13 April 1988, plaintiff filed a civil action against the town, the town board, and the town manager for breach of employment contract, wrongful discharge, violations of free speech and due process, invasion of privacy, defamation and intentional infliction of emotional distress. Plaintiff sought compensatory and punitive damages. Summary judgment on all claims was granted in favor of defendants on 21 March 1991.

*A. A. Canoutas for plaintiff-appellant.*

*Johnson and Lambeth, by Carter T. Lambeth and Maynard M. Brown, for defendants-appellees.*

LEWIS, Judge.

[1] Summary judgment is proper if there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56; *Bolick v. Townsend Co.*, 94 N.C. App. 650, 381 S.E.2d 175, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 495 (1989). "A defendant is entitled to summary judgment only when he can produce a forecast of evidence, which when viewed most favorably to plaintiff would, if offered by plaintiff at trial, without more, compel a directed verdict in defendant's favor, (citation omitted) or if defendant can show through discovery that plaintiff cannot support his claim (citation omitted)." *Coats v. Jones*, 63 N.C. App. 151, 154, 303 S.E.2d 655, 657, *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). Therefore, we must consider each of plaintiff's claims, in the light most favorable to him, to determine if plaintiff's forecast of the evidence revealed any genuine issue of material fact. Before such discussion, we note that in his brief, plaintiff fails to argue his claims of intentional infliction of emotional distress, invasion of privacy, and defamation. Therefore, these claims

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are deemed abandoned pursuant to N.C.R. App. P. 28(b)(5) and we decline to address them.

[2] Plaintiff's claims for breach of employment contract and for wrongful discharge rely on his argument that the town's Personnel Policies and Procedures Manual takes him out of the employment-at-will category.

It is clear in North Carolina that, in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason. (Citation omitted). This Court has held, however, that in some circumstances employee manuals setting forth reasons and procedures for termination may become part of the employment contract even where an express contract is nonexistent. (Citation omitted).

*Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991), *disc. rev. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). Without more, "unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Walker v. Westinghouse Elec. Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84 (1985), *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986) (citation omitted).

In *Salt*, plaintiff filed suit against her employer for both breach of contract and wrongful discharge. Plaintiff-Salt argued that her employer's personnel manual, which she was required to sign to confer receipt, constituted part of her employment contract. By failing to follow the disciplinary procedure outlined in the manual, plaintiff-Salt alleged that the employment contract was breached. The manual classified employees as either probationary or tenured. In this manual, the employer specifically reserved the right to "[t]erminate an employee at any time. Suspend from work any employee . . . [or] [r]eturn to probationary status from tenured status any employee. . . ." *Salt*, 104 N.C. App. at 656, 412 S.E.2d at 99. Plaintiff-Salt could not show that the manual was "expressly included within [her] terminable-at-will contract." *Rosby v. General Baptist State Convention of North Carolina Inc.*, 91 N.C. App. 77, 81, 370 S.E.2d 605, 608, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988). She also could not show that the manual provided for discharge only "for cause." *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987). Therefore, we held that defendant-Applied Analytical's personnel manual could not be considered a



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part of plaintiff's employment contract. Summary judgment on the issue of breach of contract was, therefore, properly granted in favor of defendant-Applied Analytical.

In the case at bar, the Town imposed upon itself the requirements set out in its Personnel Policies and Procedures Manual. The parties agree that the Manual provides a grievance procedure: "To provide a means whereby any employee who feels that he/she has been subjected to unfair, discriminatory or abusive treatment may secure a hearing without delay and be assured of a prompt, orderly, and fair response to the grievance or appeal." Dismissals and suspensions are specifically set out as matters within the grievance procedure. The Manual requires a grievance hearing to take place within 25 days of the incident in question. Plaintiff filed the required written grievance request but the record indicates that the town manager never called the required grievance hearing.

In the case at bar, there is no doubt that the Council adopted a "Personnel Policies and Procedures Manual." This was submitted to the plaintiff who signed it, indicating that he had read and understood it. There is no evidence that there was any intent by either party that the offering of the document by the Town and the reading and signing by the plaintiff was to create an employment contract. Plaintiff-Howell has not shown that the Manual was "expressly included within [his] terminable-at-will contract." *Rosby*, 91 N.C. App. at 81, 370 S.E.2d at 608. Nor has he shown that the Manual provided for discharge only "for cause." *Harris v. Duke Power Co.*, 319 N.C. 627, 356 S.E.2d 357 (1987). Hence, the Town's Personnel Policies and Procedures Manual could not be considered as part of plaintiff's employment contract. Consequently, there is no breach of contract and summary judgment in favor of defendants on this issue is affirmed.

[3] Plaintiff-Howell claims that summary judgment on his wrongful discharge claim was improper because the Manual was a lawfully adopted ordinance which provided procedures for discharge which were not followed. Plaintiff also implies that his discharge was due to bad faith by the town manager and three of the town council members. Where, as here, an employment manual was found not to be a part of an employment contract, plaintiff-Salt argued that her employer's personnel manual was an "independent unilateral contract made by defendant[-Applied Analytical] to her." *Salt*, 104

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N.C. App. at 658, 412 S.E.2d at 100. Previously, this Court declined "to apply a unilateral contract analysis to the issue of wrongful discharge . . . [because to do so] would, in effect, require us to abandon the 'at-will' doctrine which is the law in this State." *Id.* (citing *Rucker v. First Union Nat. Bank*, 98 N.C. App. 100, 103, 389 S.E.2d 622, 625, *disc. rev. denied*, 326 N.C. 801, 393 S.E.2d 899 (1990)). However, our Supreme Court has recognized two exceptions to the terminable-at-will doctrine. First, where plaintiff-employee is assured that he cannot be fired except for incompetence and "[w]here the employee gives some special consideration in addition to his services" then the additional consideration removes "plaintiff's employment contract from the terminable-at-will rule. . . ." *Sides v. Duke University*, 74 N.C. App. 331, 345, 328 S.E.2d 818, 828, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 and *disc. rev. denied*, 314 N.C. 331, 335 S.E.2d 13 (1985) (citation omitted). Second, where an employment contract is terminated "for an unlawful reason or purpose that contravenes public policy," the contract is removed from within the terminable-at-will doctrine. *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989) (citation omitted), *see Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992). Public policy was defined as "the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Coman*, 325 N.C. at 175 n.2, 381 S.E.2d at 447 n.2. (citation omitted). In dicta, the *Coman* Court stated, "[b]ad faith conduct should not be tolerated in employment relations, just as it is not accepted in other commercial relationships." *Id.*, at 177, 381 S.E.2d at 448; *see also Amos*. "[T]here is no independent tort action for wrongful discharge of an at-will employee based solely on allegations of discharge in bad faith." *Salt*, 104 N.C. App. at 662, 412 S.E.2d at 103; *see also Amos*.

In the case at bar, plaintiff-Howell has not alleged facts which fall within the exceptions to the "at-will" doctrine. Plaintiff has not shown that he provided any "additional consideration" other than his services. He has not alleged that his termination was due to an unlawful purpose or resulted from acts which contravene public policy. Further, plaintiff is unable to rely upon the theory of an "independent unilateral contract" or upon termination due to bad faith as neither of these theories is recognized in wrongful discharge actions. Though the manual set out grievance procedures it was not a part of plaintiff's employment contract. As in *Salt*,

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“plaintiff’s employment relationship with defendant [Town] was not ‘governed’ by the policy manual given to [him] . . .” *Salt*, 104 N.C. App. at 664, 412 S.E.2d at 104. Therefore, defendants’ failure to follow the grievance procedures does not constitute wrongful discharge. Summary judgment on this issue was properly granted.

[4] Plaintiff-Howell claims the Town’s failure to follow the Manual’s grievance procedure violated his due process rights under the Fourteenth Amendment and Article 1, Section 19 of the North Carolina Constitution and constituted a violation of 42 U.S.C. § 1983. The requirement of “procedural due process applies only to the deprivation of interests encompassed within the Fourteenth Amendment’s protection of liberty and property. . . .” *Board of Regents of State Colleges v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S.Ct. 2701 (1972). We acknowledge that in the case before us, plaintiff’s employment, which was terminable at will, in and of itself did not provide him with a Fourteenth Amendment property right or a vested interest in continued employment. See *Burwell v. Griffin*, 67 N.C. App. 198, 209, 312 S.E.2d 917, 924, *disc. rev. denied*, 311 N.C. 303, 317 S.E.2d 678 (1984). However, an enforceable interest in continued employment can be “created by ordinance, or by an implied contract.” *Id.* (citing *Bishop v. Wood*, 426 U.S. 341, 344-45, 48 L.Ed. 2d 684, 690, 96 S.Ct. 2074, 2077-78 (1976)). Here, the Manual, which was also a town ordinance, created the reasonable expectation of continued employment within the meaning of the due process clause. The Town’s ordinance, in effect, is comparable to rights given State employees pursuant to N.C.G.S. § 126-35 (1991). That statutory provision delineates certain procedures relating to grievances and disciplinary actions with respect to State employees. Cases decided pursuant to N.C.G.S. § 126-35 have held the statute to create a reasonable expectation of employment and a property interest within the meaning of the Due Process Clause. See *i.e.*, *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, *cert. denied*, 318 N.C. 507, 349 S.E.2d 862 (1986); *Faulkner v. North Carolina Dept. of Corrections*, 428 F. Supp. 100 (W.D.N.C. 1977).

In the present case, the facts do not suggest, nor do defendants argue that the Manual is inapplicable to plaintiff. The Manual was adopted as a town ordinance on 13 February 1979 and became effective 14 February 1979. The scope of the Manual covers “all employees of the Town.” A permanent employee includes “[a]n employee who has successfully completed his or her probationary

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period." A probationary employee is defined as "[a]ny employee who has not successfully completed the required six (6) months probationary period immediately after being hired," except for police officers who must complete twelve months as a probationary employee. Plaintiff was sworn in as a police officer in the Town of Carolina Beach on 25 February 1982 and completed the requisite twelve (12) month probationary period. The Manual's provisions therefore apply directly to plaintiff.

Questions remain as to whether plaintiff received the process he was due. With respect to employee grievances, the personnel policy outlined detailed procedures, indicating:

It is the policy of the Town that all employees shall be treated fairly and consistently in all matters related to their employment. When an employee feels that he/she has not been so treated, he/she shall have the right to present a grievance or appeal free from interference, restraint, coercion, discrimination, or reprisal.

The Manual delineated specific procedures using a three-step process. Step One included an oral appeal by the employee to his or her immediate supervisor. Step Two required the employee to put the grievance into writing no later than ten (10) days following the incident leading to the grievance. Step Three of the process indicated, "[t]he Town Manager shall personally conduct, or at his discretion, direct a Grievance Committee to conduct a grievance hearing not later than twenty-five (25) work days after the date of the incident or action which caused the grievance." As for the personnel policies associated with disciplinary procedure, the Manual indicated that a single act of insubordination "[m]ay result in discharge after review and approval by the Town Manager; file to be documented as necessary."

The facts in this case demonstrate that following plaintiff's circulation of the firearm memorandum, the town manager verbally reprimanded him on 10 February 1988. At that time, plaintiff orally requested the town manager to reduce the reprimand to writing, but he refused. Later the same day, plaintiff submitted a written request to the town manager asking for a written reprimand which request was again refused. In a letter dated 17 February 1988, the town manager dismissed plaintiff. Defendants argue that plaintiff received all the process that he was due and any hearing before the town manager "would have been an unnecessary exercise in

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futility on the part of the Town.” However, based on these facts, it is evident plaintiff was not afforded the proper procedure pursuant to either the grievance policy or the disciplinary policy. Regardless of whether the town manager had the discretion to terminate plaintiff, he had the responsibility to provide plaintiff with a proper review which could have included a hearing. Consequently, summary judgment as to plaintiff’s due process claim was improperly granted and is now reversed.

[5] Plaintiff’s last allegation of error concerns his claim that defendants’ action violated his First Amendment right to free speech. Defendants fired plaintiff for insubordination. Defendants claim that plaintiff’s memorandum containing the language to the effect that the town manager would be liable for deaths in the line of duty should a policeman’s weapon malfunction due to its age or its present state of disrepair was insubordinate behavior. During the verbal reprimand, defendants claim plaintiff became verbally abusive which was also insubordination. Plaintiff claims that he had a First Amendment right to draft the memorandum documenting the poor condition of the police department’s firearms. Plaintiff insinuates that he was fired for campaigning against the mayor and a councilwoman which he claims also violates his right to free speech. The seminal case in this area is *Connick v. Myers*, 461 U.S. 138, 75 L.Ed. 2d 708, 103 S.Ct. 1684 (1983). Normally, government has “wide latitude in managing their offices, without intrusive oversight by the judiciary in the name of the First Amendment.” *Id.* at 146, 75 L.Ed. 2d at 719. This broad discretion is curtailed when a decision to fire a government employee is made based upon an employee’s expression on an issue of public concern: one of political, social or other concern to the community. *Id.* “[A] public employee does not relinquish First Amendment rights to comment on matters of public [concern] by virtue of government employment.” *Id.* at 140, 75 L.Ed. 2d at 715 (citation omitted). The test for determining whether plaintiff’s expression was one of “legitimate public concern” is whether the matter is one in “which free and open debate is vital to informed decisionmaking by the electorate.” *Id.* at 145, 75 L.Ed. 2d at 719. The reviewing court must examine the employee’s speech in light of the “content, form [manner, time, place], and context of a given statement, as revealed by the whole record[.]” to determine whether it is a matter of public concern. *Id.* at 147-48, 75 L.Ed. 2d at 720.

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If it is determined that the employee's expression does touch upon a matter of public concern and that it was one of the reasons for terminating this employee, then the court must determine whether the government employer was justified in discharging the employee. The government's burden of proving justification "varies depending upon the nature of the employee's expression." *Id.* at 150, 75 L.Ed. 2d at 722. The employee's constitutional rights are balanced against the "government's interest in effective and efficient fulfillment of its responsibilities to the public." *Id.* The essential question is whether plaintiff's expression impedes his or her ability to fulfill the responsibilities of the job. However, "[w]hen close working relationships are essential to fulfilling public responsibilities, a wide degree of deference to the employer's judgment is appropriate." *Id.* at 151-52, 75 L.Ed. 2d at 723. Employers do not have to let the situation degenerate into a hostile working environment before taking action. The First Amendment does not require an employer to "tolerate action which he reasonably believe[s] would disrupt the office, undermine his authority, and destroy close working relationships." *Id.* at 154, 75 L.Ed. 2d at 724. The more substantially the employee's speech touches or involves a matter of public concern, the stronger the showing and the heavier the burden is for the State to prove justification for terminating the plaintiff. *Id.* at 152, 75 L.Ed. 2d at 723.

Plaintiff-Howell alleges that he was fired because of the memorandum he authored and because of his political activities. Our first determination must be whether the memorandum covers an issue of public concern. The question is whether this memorandum dealt with an issue upon which "free and open debate is vital to informed decisionmaking by the electorate." *Id.* at 145, 75 L.Ed. 2d at 719. Because members of the public are as likely as officers to be harmed by malfunctioning police firearms, we find that this issue is one of public concern.

Further, we evaluate the content, manner, time, place, and context in which the issue arose. Plaintiff alleges that the memorandum was written in accordance with his duties as a firearms instructor. We do not find the memorandum to be unreasonable as to form or context.

As the memorandum regards a matter of public concern, there remain two questions: whether plaintiff was fired due to the memorandum and, if so, whether the Town was so justified. The

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answer to these two questions require the determination of several issues of fact. Therefore, summary judgment on this issue was not properly granted. Plaintiff's allegations and the depositions of the council members indicate that there is a genuine issue of material fact as to whether plaintiff's political activities may have contributed to his termination. Plaintiff's forecast of the evidence presents a colorable claim that a constitutionally protected "liberty interest" (freedom of speech) encompassed by the Due Process Clause of the Fourteenth Amendment has been violated.

Summary judgment as to the First Amendment claim and the Due Process claim is reversed. Summary judgment as to the other claims is affirmed.

Reversed in part.

Affirmed in part.

Judges ARNOLD and COZORT concur.

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KHALID ISMAEL, PLAINTIFF v. GOODMAN TOYOTA, DEFENDANT

No. 9110DC643

(Filed 16 June 1992)

**1. Uniform Commercial Code § 10 (NCI3d); Sales § 5 (NCI3d) — used car sale — Magnuson-Moss Warranty Act**

The Magnuson-Moss Warranty Act applied to the sale of a used 1985 car by defendant dealer to plaintiff consumer.

**Am Jur 2d, Automobiles and Highway Traffic §§ 731, 733.**

**What are "merchantable" goods within meaning of UCC § 2-314 dealing with implied warranty of merchantability. 83 ALR3d 694.**

**2. Uniform Commercial Code § 13 (NCI3d) — used car sale — implied warranty of merchantability**

An implied warranty of merchantability arises upon the sale of a used car by a dealer.

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**Am Jur 2d, Automobiles and Highway Traffic §§ 731, 733.**

**What are “merchantable” goods within meaning of UCC § 2-314 dealing with implied warranty of merchantability. 83 ALR3d 245.**

**3. Uniform Commercial Code § 13 (NCI3d)— “as is” sale of used car—service contract—Magnuson-Moss Warranty Act—warranty of merchantability**

Although an implied warranty of merchantability is generally excluded by an “as is” sale, N.C.G.S. § 25-2-316(3)(a), the Magnuson-Moss Warranty Act prohibited defendant dealer from disclaiming such warranty by an “as is” sale of a used car to plaintiff where plaintiff and defendant, at the time of the sale, entered into a written service contract for repair of the car. The written agreement was a service contract within the meaning of the Magnuson-Moss Warranty Act where defendant agreed to perform certain repairs for a specified duration of 24,000 miles or a fixed period of 24 months, and plaintiff paid defendant an additional \$695.00 for the contract.

**Am Jur 2d, Automobiles and Highway Traffic §§ 732, 733.**

**Liability on implied warranties in sale of used motor vehicle. 22 ALR3d 1387.**

**4. Uniform Commercial Code § 13 (NCI3d)— warranty of merchantability—sufficient evidence of breach**

Plaintiff was entitled to recover for breach of the implied warranty of merchantability of a used car sold to him by defendant dealer where plaintiff’s evidence showed that the car was unfit for its ordinary purpose at the time of sale in that plaintiff returned the car to defendant for repairs on at least six occasions during the first six months of his ownership, there was no evidence that plaintiff sought to have the repairs made pursuant to his service contract with defendant, and plaintiff had driven the car only 700 miles when he was informed that the car was unrepairable; plaintiff’s evidence showed that he was injured by the purchase of the used car in that the purchase price was \$5,054, plaintiff traded in a car valued at \$1,600 toward the purchase price and service agreement and financed the remaining balance for a total cost of \$7,414.60, plaintiff continued making payments on the car loan up to the time of trial, plaintiff had the car for less than two weeks



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of his first four months of ownership because defendant repeatedly had possession of the car for repairs, and plaintiff has been unable to drive the car since he was told it was unrepairable; plaintiff's evidence showed that the car's mechanical defects were the proximate cause of his resulting injury; and the evidence established that plaintiff gave timely notice of the defects to defendant by returning the car to defendant the day following his purchase and thereafter repeatedly returning the car to defendant for repair. N.C.G.S. § 25-2-314.

**Am Jur 2d, Automobiles and Highway Traffic §§ 732, 733.**

**Liability on implied warranties in sale of used motor vehicle. 22 ALR3d 1387.**

**5. Uniform Commercial Code § 10 (NCI3d)— used car sale— service agreement— administrator not liable for warranty**

The trial court erred in concluding that warranty obligations for a used car sold to plaintiff by defendant dealer were the responsibility of the administrator of a service agreement where the agreement specifically stated in two distinct places that the administrator is not a party to the agreement or to the sale of the car, and the service agreement also stated that it was between plaintiff and defendant dealer.

**Am Jur 2d, Automobiles and Highway Traffic §§ 732, 733.**

**Liability on implied warranties in sale of used motor vehicle. 22 ALR3d 1387.**

APPEAL by plaintiff from judgment entered 21 March 1991 in WAKE County District Court by *Judge James R. Fullwood*. Heard in the Court of Appeals 15 April 1992.

Plaintiff instituted this action to recover damages he allegedly suffered as a result of his purchase of a used car from defendant. Plaintiff claimed that the defendant breached its implied warranty of merchantability because the car was unroadworthy, was not repairable at the time of purchase and was therefore unfit for its particular purpose. The case was heard by the trial court without a jury.

Plaintiff's evidence tended to show the following facts and circumstances. On 13 April 1989, plaintiff purchased a used 1985

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Ford Tempo, with recorded mileage of 58,810, from defendant. The purchase price was \$5,054.00. Additionally, plaintiff simultaneously purchased from defendant a Vehicle Service Agreement for \$695.00, which was to cover the car for 24 months or 24,000 miles, whichever first occurred. Plaintiff testified that defendant assured him the service agreement would cover the car's engine, transmission, axles, brakes and air conditioning among other things. Plaintiff traded in a 1985 Ford Escort wagon valued at \$1,600.00 in exchange for the Tempo and service agreement. Plaintiff financed the remaining purchase price of \$4,626.44. The total cost of the Ford Tempo, including finance charges, was \$7,414.60.

Plaintiff testified that he and his wife noticed the car "shook" during their test drive on the night of their purchase. Defendant's salesman assured them that the car "probably just needed a tune-up and that Goodman would repair anything that was found wrong with the car at no charge." Plaintiff admitted he purchased the car "as is" but contended he did so only because of the salesman's assurance of repair and because of the vehicle service agreement he purchased to cover the car.

On the day after plaintiff purchased the car, he returned it to defendant for repair because "the engine kept cutting off, the engine light stayed on, and the car pulled from side to side, shook badly and made loud noises." During the first four months of his ownership, plaintiff had to return the car to defendant for repairs on at least six occasions. Defendant did not charge for these repairs, and did not file claims under the service agreement. Each time defendant returned the car to plaintiff, plaintiff was assured it was fixed. However, plaintiff was never able to keep the car for more than three days before having to return it to defendant again for repair. Defendant kept the car one to three weeks every time plaintiff returned the car. Plaintiff had use of the car for less than two weeks of his first four months of ownership.

Plaintiff finally decided to stop taking the car back to defendant for repairs. Plaintiff testified that defendant told him that the car could not be repaired and that the problems he was experiencing with the car were normally experienced with used 4-cylinder cars. Plaintiff then spent in excess of \$900.00 trying to have the car repaired by various Ford dealer service departments and auto mechanics to no avail. Plaintiff was told the car was not repairable due to sludge in the engine. The car has not been driven since

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December 1989. However, plaintiff continued to make payments of \$193.82 on the car each month up to the time of trial in order to protect his credit record. From April 1989 to the time of trial, plaintiff was able to drive the car a total of only 700 miles.

Defendant offered evidence in the form of testimony by David Goodman. Defendant's evidence tended to show that all of the used cars on defendant's lot are in varying conditions. Further, defendant sells all of its used cars "as is" and the "purchase price is adjusted according to the car's worth and its mileage." Goodman further testified that the Tempo's mileage was very high when plaintiff purchased the car and that plaintiff had not maintained the car in a clean fashion.

In its judgment, the trial court made findings of fact, entered conclusions of law and denied any relief to plaintiff. The trial court concluded that plaintiff had purchased the vehicle in used "as is" condition and defendant "assumed and bore no responsibility for subsequent repair of the vehicle or its roadworthiness." The trial court further concluded defendant was not liable to plaintiff "for negligence or breach of warranty, as the duty and warranty obligations in this matter ran to the General Warranty company under the service contract and not to Defendant dealership." The trial court held that plaintiff was not entitled to have and recover damages from defendant. Plaintiff appealed from this judgment.

*Moore & Van Allen, by Denise Smith Cline and A. Bailey Nager, for plaintiff-appellant.*

*Abraham Penn Jones, Esquire for defendant-appellee.*

WELLS, Judge.

On appeal, plaintiff contends, *inter alia*, that the trial court erred in making the following conclusions of law:

CONCLUSIONS OF LAW

. . .

2. Due to the purchase of the subject vehicle in used 'as is' condition, the Defendant dealer assumed and bore no responsibility for subsequent repair of the vehicle or its road worthiness.
3. Defendant also bore no responsibility for repairing the vehicle, notwithstanding any alleged verbal promises and

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agreements made subsequent to the purchase of the vehicle in 'as is' condition.

4. Defendant is not liable to Plaintiff for negligence or breach of warranty, as the duty and warranty obligations in this matter ran to the General Warranty company under the service contract and not to defendant dealership.

The underlying premise of plaintiff's contention is that defendant violated the Magnuson-Moss Warranty Act and is therefore liable for damages plaintiff suffered as a result of that violation.

We first point out that on appeal the trial court's conclusions of law are reviewable *de novo*. *Humphries v. City of Jacksonville*, 300 N.C. 186, 265 S.E.2d 189 (1980). After a thorough review of the record in this case, we agree with plaintiff's foregoing contention for the reasons set forth below.

## I.

APPLICABILITY OF MAGNUSON-MOSS

In 1975, Congress passed the Magnuson-Moss Warranty—Federal Trade Commission Improvement Act, (hereinafter the "Act"), 15 U.S.C.A. §§ 2301 *et seq.*, (West 1982), which applies to consumer products manufactured after 4 July 1975. 15 U.S.C.A. § 2312(a). The Act was passed in an attempt to make warranties on consumer products more understandable and enforceable and further to establish a more effective procedural mechanism for consumer claims which typically involve a small amount of damages and for which a remedy may otherwise be unavailable. 17 Am. Jur. 2d *Consumer Product Warranty Acts* § 1 (1990). A consumer alleging a violation of the Act can bring suit in any state court of competent jurisdiction or, subject to certain jurisdictional requirements, in federal court. 15 U.S.C.A. § 2310(d)(1)(A), (B).

The Act provides a cause of action to a consumer who is damaged by the failure of a supplier, warrantor or service contractor to comply with any obligation under the Act, or under a written warranty, implied warranty, or service contract. 15 U.S.C.A. § 2310(d)(1). The Act does not invalidate or restrict any right or remedy available to a consumer under State law or any other Federal law, 15 U.S.C.A. § 2311(b)(1); nor does it "supercede any provision of State law regarding consequential damages for injury to the person or other injury," 15 U.S.C.A. § 2311(b)(2)(B). Further-

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more, the Act provides that a consumer who prevails in an action brought under § 2310(d)(1) may recover as part of his judgment "a sum equal to the aggregate amount of cost and expenses (including attorneys' fees based on actual time expended) determined by the court to have been reasonably incurred by the plaintiff for or in connection with the commencement and prosecution of such action. . . ." 15 U.S.C.A. § 2310(d)(2). The award of attorneys' fees is within the discretion of the court. *Id.*

[1] For purposes of the Act, the term "consumer" is defined as ". . . a buyer (other than for purposes of resale) of any consumer product, any person to whom such product is transferred during the duration of an implied or written warranty (or service contract) applicable to the product, and any other person who is entitled by the terms of such warranty (or service contract) or under applicable State law to enforce against the warrantor (or service contractor) the obligations of the warranty (or service contract)." 15 U.S.C.A. § 2301(3). A "consumer product" is any tangible personal property used for family, personal or household purposes which is distributed in commerce. 15 U.S.C.A. § 2301(1). A "supplier" is defined as "any person engaged in the business of making a consumer product directly or indirectly available to consumers." 15 U.S.C.A. § 2301(4). In order to determine whether the Act applies, we must relate the above definitions to the facts and circumstances of this case.

First, plaintiff purchased the Ford Tempo for his personal use and not for resale. Consequently, plaintiff is a consumer within the meaning of the Act and is therefore protected by its provisions.

Second, since the car is tangible personal property which is distributed in commerce and used for family, personal and household uses, it is a consumer product as defined by the Act. Further, the fact that the car was manufactured after 4 July 1975 was undisputed. Although the Act does not make reference to whether it applies to "used" consumer products, we find that the provisions of the Act, when read together, support the conclusion that the Act does apply to such products. Further, we find that the Act specifically applies to the sale of used cars. In 15 U.S.C.A. § 2309(b) Congress directed the Federal Trade Commission (hereinafter "FTC") to initiate a rulemaking proceeding dealing with warranties and warranty practices in connection with the sale of used motor vehicles, and to prescribe rules dealing with such warranties and practices

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“to the extent necessary to **supplement** the protections offered the consumer by this chapter. . . .” (Emphasis added.) By necessary implication, Chapter 50, which contains the Act, applies to used motor vehicles. We also note that the FTC did in fact promulgate the “Used Motor Vehicle Trade Regulation Rule” which is codified at 16 C.F.R. § 455 *et seq.*, and imposes specific requirements upon the sales activities and warranty practices of used motor vehicle dealers.

Finally, defendant is a supplier within the meaning of the Act because the dealership was engaged in the business of making cars directly available to consumers. Therefore, the Act is applicable to the case before us.

In order for this plaintiff to have established his entitlement to relief under the Act, he must have shown he was damaged by the defendant’s failure to comply with an obligation under the Act, the service contract, and/or an implied warranty. 15 U.S.C.A. § 2310(d)(1). Defendant contends that since the uncontradicted evidence proved the car was sold “as is,” all express and implied warranties were effectively disclaimed pursuant to our Uniform Commercial Code, specifically N.C. Gen. Stat. § 25-2-316(3)(a), and therefore plaintiff had no claim for breach of an implied warranty. Defendant also contends that since no express or implied warranties were given, the Act does not apply in this case. We disagree.

**[2]** “Implied warranty” as defined by the Act is “an implied warranty arising under State law (as modified by sections 2308 and 2304(a) of this title) in connection with the sale by a supplier of a consumer product.” 15 U.S.C.A. § 2301(7). Under our Uniform Commercial Code, an implied warranty of merchantability arises in a contract for the sale of goods by a merchant unless excluded or modified. N.C. Gen. Stat. § 25-2-314(1) (1986); *Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972). Furthermore, our courts have specifically held that an implied warranty of merchantability arises upon the sale of a used car by a dealer. *Rose v. Epley Motor Sales*, 288 N.C. 53, 215 S.E.2d 573 (1975); *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985).

**[3]** Defendant correctly contends that, as a general rule, the implied warranty of merchantability is excluded by an “as is” sale. N.C. Gen. Stat. § 25-2-316(3)(a). However, the Act significantly limits a supplier’s ability to modify or disclaim implied warranties. 15 U.S.C.A. § 2308(a). If, at the time of sale or within 90 days thereafter,

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a supplier enters into a service contract with the consumer which applies to such consumer product, the supplier may not disclaim or modify any implied warranty with respect to that product. *Id.* Furthermore, a disclaimer made in violation of § 2308(a) is ineffective for purposes of the Act and State law. 15 U.S.C.A. § 2308(c). (Emphasis added.) See, e.g., *Patton v. McHone*, 822 S.W.2d 608 (Tn. 1991); *Auburn Ford, Lincoln Mercury v. Norred*, 541 So.2d 1077 (Ala. 1989).

The Act defines the term "service contract" as "a contract in writing to perform, over a fixed period of time or for a specified duration, services relating to the maintenance or repair (or both) of a consumer product." 15 U.S.C.A. § 2301(8). Further, in its "Rules, Regulations, Statements and Interpretations Under the Magnuson-Moss Warranty Act," the FTC gave examples of what was meant by the term "service contract" as used in the Act. The FTC stated, *inter alia*, that "an agreement which calls for some consideration in addition to the purchase price of the consumer product, or which is entered into at some date after the purchase of the consumer product to which it applies, is a service contract." 16 C.F.R. § 700.11(c).

In this case, the evidence that plaintiff and defendant, at the time of sale, entered into a written service contract for repair of the Tempo was undisputed. The agreement was a service contract within the meaning of the Act because it was in writing and defendant agreed to perform certain repairs for a specified duration (24,000 miles) or fixed period of time (24 months). Further, the plaintiff paid defendant an additional \$695.00 for the contract. Therefore, under § 2308(a)(2) of the Act, defendant was prohibited from disclaiming the implied warranty of merchantability which arose in the contract of sale under State law and the "as is" sale was ineffective as a disclaimer of this warranty.

We conclude that plaintiff could properly seek relief under § 2310(d)(1) of the Act because defendant violated the Act when he failed to comply with § 2308. Furthermore, plaintiff could pursue a claim for breach of the implied warranty of merchantability which arose upon this sale since the disclaimer was ineffective for purposes of the Act and State law. Accordingly, we hold that the trial court's conclusions of law numbered 2 and 3 were erroneous.

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## II.

IMPLIED WARRANTY OF MERCHANTABILITY

In order to recover for breach of the implied warranty of merchantability, plaintiff must establish:

(1) a merchant sold goods, (2) the goods were not 'merchantable' at the time of sale, (3) the plaintiff (or his property) was injured by such goods, (4) the defect or other condition amounting to a breach of the implied warranty of merchantability proximately caused the injury, and (5) the plaintiff so injured gave timely notice to the seller.

*Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985), citing *Reid v. Eckerd's Drugs, Inc.*, 40 N.C. App. 476, 253 S.E.2d 344, *disc. review denied*, 297 N.C. 612, 257 S.E.2d 219 (1979).

[4] First, the uncontradicted evidence established that the Ford Tempo was sold to plaintiff by defendant who is a merchant for purposes of N.C. Gen. Stat. § 25-2-314. *Rose, supra*. (A used car dealer is a "merchant" as that term is defined in the Uniform Commercial Code, G.S. 25-2-104).

Second, in order for goods to be merchantable at the time of sale, they must, among other things, be fit for the ordinary purposes for which such goods are used. N.C. Gen. Stat. § 25-2-314(c). The trial court found as a fact that "subsequent to purchasing the subject vehicle, plaintiff experienced considerable problems with the vehicle remaining roadworthy and came to defendant on a number of occasions seeking to have the vehicle repaired 'pursuant to the warranty.'" There was no evidence that plaintiff sought to have the repairs made pursuant to the service contract or that defendant had filed claims for the repairs pursuant to that contract. Thus, we find this part of the finding to be surplusage as it is unsupported by the evidence. Plaintiff's evidence indicated he had returned the car to defendant for repairs on at least six occasions during the first six months of his ownership. The evidence also indicated plaintiff had driven the car a total of only 700 miles before he was informed the car was not repairable and before he permanently stopped driving the car in December 1989. This evidence was unrefuted and undisputed. There is no suggestion by defendant that the representations made with respect to the faulty condition of the car were not as represented by the plaintiff.



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Under the circumstances of this case, plaintiff's evidence demonstrated that the car was unfit for its ordinary purpose at the time of the sale and was therefore "unmerchantable" at that time.

Third, the evidence showed that plaintiff was injured by the purchase of the used car. The purchase price of the car was \$5,054.00. Plaintiff traded in a car valued at \$1,600.00 towards the purchase price of the car and service agreement and financed the remaining balance for a total cost of \$7,414.60. Plaintiff continued making payments on the car loan up to the time of trial. Yet, plaintiff had the car for less than two weeks of his first four months of ownership because he had to return the car to defendant for repair, and on each occasion defendant kept the car one to three weeks, leaving plaintiff without its use for transportation. Plaintiff has been unable to drive the car since December 1989 due to its unroad-worthy condition which is not repairable. Further, plaintiff was able to drive the car a total of only 700 miles in between repairs prior to that time. In essence, plaintiff was denied the benefit of his bargain.

Fourth, plaintiff's evidence clearly proved that the car's mechanical defects made the car unfit for its ordinary purpose of providing reliable transportation to the plaintiff and his family, and thus established the injury. Furthermore, the evidence showed that the car's mechanical defects were the proximate cause of plaintiff's resulting injury.

Finally, the evidence clearly established that plaintiff gave timely notice of the defects in the car to defendant. The first time plaintiff returned the car was the day immediately following his purchase. Plaintiff then repeatedly returned the car to defendant for repair. Each time plaintiff took the car back to defendant, defendant was unable to satisfactorily repair it.

[5] For the foregoing reasons, we conclude that plaintiff's evidence conclusively established the necessary requirements to recover damages from defendant for breach of the implied warranty of merchantability. Thus, the trial court improperly concluded that defendant was not liable to plaintiff for breach of warranty. We also note at this point that the trial court's conclusion that "the duty and warranty obligations in this matter ran to the General Warranty company under the service contract and not to defendant dealership" was contrary to the evidence presented by plaintiff. The service agreement specifically and unambiguously states in

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two distinct places that "The Administrator [*i.e.*, General Warranty Co.] is not a party to this Agreement nor to the sale or lease of your car." Furthermore, the agreement states that it is between plaintiff and the dealer who sold the car, *i.e.* defendant. We therefore hold that the trial court's conclusion of law numbered 4 was also erroneous.

## III.

DAMAGES

The remaining issue with regard to plaintiff's claim is the amount of damages he is entitled to recover. Having improperly concluded that the "as is" sale negated defendant's responsibilities under the implied warranty of merchantability, the trial court made no findings of fact or reached any conclusions of law with regard to the issue of damages.

Plaintiff is entitled to any remedy provided by the Act. Moreover, since the Act does not invalidate or restrict any right or remedy available to a consumer under State law, plaintiff is entitled to the remedy provided by our State law for breach of the implied warranty of merchantability.

## IV.

CONCLUSION

For the reasons set forth above, we hold that the trial court erred in concluding that (1) defendant bore no responsibility for subsequent repair of the vehicle or its roadworthiness, (2) defendant bore no responsibility for repairing the vehicle notwithstanding any agreements made subsequent to the purchase of the vehicle in "as is" condition, (3) defendant is not liable to plaintiff for breach of warranty, and (4) plaintiff is not entitled to recover any money from defendant.

Since, as stated earlier, plaintiff conclusively established his entitlement to relief, the only issue remaining to be resolved is the amount of damages to which plaintiff is entitled. Following a partial new trial on the issue of damages, the trial court shall enter an appropriate judgment consistent with this opinion. See *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 65 N.C. App. 242, 310 S.E.2d 33 (1983), *disc. review denied*, 310 N.C. 624, 315 S.E.2d 689, *cert. denied*, 469 U.S. 835, 83 L.Ed.2d 69 (1984).

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Since the issues above are dispositive of this appeal, we decline to address plaintiff's other assignments of error.

Reversed and remanded.

Judges ARNOLD and EAGLES concur.

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STATE OF NORTH CAROLINA v. AMOS ANDREW SHAW

No. 9114SC661

(Filed 16 June 1992)

**1. Kidnapping § 1.2 (NCI3d) — restraint to facilitate flight — sufficiency of evidence**

The evidence was sufficient to support the trial court's submission of a kidnapping charge to the jury on the theory that defendant's purpose for unlawfully restraining the victim was to facilitate flight after having committed first degree burglary where the State presented evidence that, when an officer knocked on the victim's front door, defendant, while holding a gun taken from the victim, told the victim to say that everything was okay and that defendant was her grandson, and that if the victim did not do as defendant instructed, he would kill her; and the victim testified that, when defendant opened the door to speak with the officer, she wanted to talk to the officer but "was scared."

**Am Jur 2d, Abduction and Kidnapping §§ 12, 13, 15, 21.**

**2. Burglary and Unlawful Breakings § 68 (NCI4th) — burglary — sufficient evidence of breaking**

The State's evidence of a breaking was sufficient to support defendant's conviction of first degree burglary where the victim testified that defendant gained entry to her home by jumping through the window and that the window "was shut" prior to defendant's entry.

**Am Jur 2d, Burglary §§ 16, 50.**

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**3. Burglary and Unlawful Breakings § 165 (NCI4th) — first degree burglary — instruction on misdemeanor breaking or entering not required**

The trial court in a first degree burglary prosecution properly refused to instruct the jury on the lesser included offense of misdemeanor breaking or entering where the State's evidence tended to show that defendant entered the victim's home without permission at 11:00 p.m. through a window that was closed prior to his entry, the victim was in the home at the time, and defendant demanded money from the victim, and defendant denied having committed the offense of first degree burglary by testimony that the victim invited him into her home and that he had no intent to steal anything from her.

**Am Jur 2d, Burglary §§ 67, 69.**

**4. Evidence and Witnesses § 2146 (NCI4th) — inadmissible opinion testimony — harmless error**

An officer's testimony in a first degree burglary trial that "it appeared just by looking over there there had indeed been a break-in" at the victim's home constituted inadmissible opinion evidence since it was not based on personal knowledge, and the jury was as qualified as the witness to infer from the facts that a break-in had occurred. However, defendant was not prejudiced by the erroneous admission of this testimony because there is no reasonable possibility that the jury would have reached a different verdict in light of the other evidence of defendant's guilt. N.C.G.S. § 8C-1, Rules 602, 701.

**Am Jur 2d, Expert and Opinion Evidence §§ 5-7, 12.**

**5. Criminal Law § 1118 (NCI4th) — entitlement to peace of mind and body — improper aggravating factor**

Although the trial court did not formally find as a nonstatutory aggravating factor for burglary and kidnapping that the victim, like any other citizen, is entitled to peace of mind and body in her home, defendant is entitled to a new sentencing hearing where the trial judge's comments indicate that he improperly considered this factor in imposing sentences greater than the presumptive terms. Such a finding is indistinguishable from a finding that the sentence imposed is necessary to protect the public, which is a stated purpose of sentencing under N.C.G.S. § 15A-1340.3 and therefore an

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improper basis for increasing a defendant's presumptive sentence.

**Am Jur 2d, Criminal Law §§ 535, 538.**

APPEAL by defendant from judgments entered 7 February 1990 in DURHAM County Superior Court by *Judge Anthony M. Brannon*. Heard in the Court of Appeals 7 April 1992.

*Lacy H. Thornburg, Attorney General, by Robin Michael, Associate Attorney General, for the State.*

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

GREENE, Judge.

Defendant appeals from judgments entered 7 February 1990, which judgments are based on jury verdicts convicting defendant of one count of first degree burglary, N.C.G.S. § 14-51 (1986), and one count of second degree kidnapping, N.C.G.S. § 14-39 (1986 and Supp. 1991). The trial court sentenced defendant to a term of natural life for the burglary conviction and a term of twenty years, to begin at the expiration of the life sentence, for the kidnapping conviction.

The evidence in this case is conflicting. The State's evidence established that Sally Gibson (Gibson) is a ninety-four years old woman who lives alone in a house in Durham. She rarely has visitors other than members of her family. At approximately 11:00 p.m. on 11 November 1989, Gibson was at home alone watching television when defendant entered her residence through a window. Gibson testified that, prior to defendant's entry, the window had been closed. When defendant entered, Gibson picked up a gun that she owned and kept in her house. Defendant knocked her onto the floor on her face and straddled her. Gibson screamed, and defendant told her to "hush before I choke you," and demanded that she "turn loose [of the gun] before I shoot you." Defendant twisted the gun out of Gibson's hand and then asked Gibson where "the money" was. At this time, Durham Police Officer R. M. Davis (Officer Davis) knocked on the door. Defendant got off of Gibson and placed the gun on top of the television. He told Gibson, "I am going to tell them you are my grandmother," and for her to say the same.

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Defendant answered the door and began talking with Officer Davis. He told Officer Davis that Gibson was his grandmother. Gibson testified that she went to the door and wanted to talk to Officer Davis, but was scared. Gibson saw her next-door neighbor step outside, and ran to her neighbor's house. Both defendant and Officer Davis followed Gibson. Gibson was "hysterical" and told Officer Davis that she did not know defendant, that defendant had come in her window, and that defendant told her that if she did not say that everything was okay, he would kill her. Officer Davis arrested defendant. Thereafter, defendant was indicted on charges of first degree burglary, second degree kidnapping, and assault with a deadly weapon.

Defendant's evidence established that defendant is a house painter in Durham who does much of his work on credit for senior citizens. Defendant met Gibson for the first time in April, 1989, and spoke with her again in July, 1989. On the evening of 11 November 1989, defendant left a lounge which is located in Gibson's neighborhood and decided to call on Gibson to see if she needed any work done around the house. Defendant had a friend drop him off at Gibson's house at approximately 8:00 p.m. Gibson invited defendant inside. Gibson and defendant had been talking for approximately two hours when Gibson said that she heard something outside and started getting upset. Defendant went outside to check, but did not see anything unusual. When defendant came back inside Gibson's house, Gibson was pointing a pistol at him. Defendant grabbed the pistol out of Gibson's hand and Gibson and defendant both accidentally fell down. Gibson "hollered" for a few minutes, and defendant took the gun and put it on top of the television.

At this time, Officer Davis knocked on Gibson's door. Defendant answered the door, produced identification, and told Officer Davis that he was visiting "Ma Gib." As Officer Davis began to leave Gibson's residence, Gibson suddenly ran toward a neighbor's house screaming. Defendant testified that Gibson was probably tired, confused, and upset about the noise that she had heard earlier and her fall. He testified that he did not intend to steal anything from Gibson, that he did not break into Gibson's house, and that he did not restrain or coerce Gibson inside her home.

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The issues are whether I) on the charge of second degree kidnapping, the State presented substantial evidence that defend-

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ant restrained Gibson for the purpose of facilitating flight after commission of a felony; II) on the charge of first degree burglary, the State presented substantial evidence of the breaking element; III) defendant's denial at trial that he committed first degree burglary made it unnecessary for the trial court to instruct the jury on the lesser included offense of misdemeanor breaking and entering; IV) Officer Davis' testimony that "it appeared that there had indeed been a break in" at Gibson's residence constitutes inadmissible opinion evidence, and, if so, whether there is a reasonable possibility that the jury would have reached a different verdict had this evidence been excluded; and V) the trial court erroneously found and relied on as a non-statutory aggravating sentencing factor that "the lady, like any other citizen, is entitled to peace of mind and body in her home."

## I

[1] Defendant's indictment for second degree kidnapping charged defendant, pursuant to N.C.G.S. § 14-39, with unlawfully confining and restraining Gibson without her consent for the purpose of (1) using her as a shield; (2) facilitating the commission of the felony of first degree burglary; (3) facilitating flight following defendant's participation in the commission of the felony of first degree burglary; and (4) terrorizing her. The trial court, without objection, submitted the kidnapping charge to the jury on the theory that defendant's purpose for unlawfully restraining Gibson was to facilitate flight after having committed first degree burglary.

Defendant argues that the State failed to present substantial evidence at trial that he unlawfully restrained Gibson for the purpose of facilitating flight after commission of a felony. According to defendant, his physical restraint of Gibson, if any, was for the purpose of robbing her and not for the purpose of facilitating flight. Therefore, defendant argues, the trial court erroneously denied defendant's motion to dismiss the charge of second degree kidnapping at the close of all the evidence. The State argues that defendant restrained Gibson in her home by threatening her with bodily harm if she refused to tell Officer Davis that she was defendant's grandmother. Defendant's purpose for using such restraint, according to the State, was to facilitate his escape from Gibson's residence after committing first degree burglary.

In order to survive a defendant's motion to dismiss in a prosecution for kidnapping, the State must present substantial evidence

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that the defendant unlawfully restrained or confined the victim without the victim's consent for one or more of the purposes delineated in Section 14-39. *State v. Fulcher*, 294 N.C. 503, 523, 243 S.E.2d 338, 351 (1978). 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, 265 S.E.2d 164, 169 (1980). The restraint contemplated by Section 14-39 need not be physical; a person who is restricted from freedom of movement by the threatened use of a deadly weapon is "restrained" within the meaning of the statute. *Fulcher*, 294 N.C. at 523, 243 S.E.2d at 351.

The State presented evidence at trial that, when Officer Davis knocked on Gibson's front door, defendant, while holding Gibson's gun, told Gibson to say that everything was okay and that defendant was Gibson's grandson, and that if she did not do as defendant instructed, he would kill her. Gibson testified that, when defendant opened the door to speak with Officer Davis, she wanted to go out and talk to the policeman but "I was scared." Such evidence is sufficient to support the jury's determination that defendant restrained Gibson, that such restraint was unlawful and without Gibson's consent, and that such restraint was for the purpose of facilitating flight after commission of a felony by preventing Officer Davis from discovering that defendant had committed first degree burglary and arresting him. Accordingly, the trial court properly denied defendant's motion to dismiss the charge of second degree kidnapping.

## II

[2] Defendant argues that the State failed to present substantial evidence of a "breaking" by defendant into Gibson's house, and that therefore his conviction for first degree burglary cannot be sustained. Specifically, defendant contends that the State failed to show that the window through which defendant allegedly entered Gibson's home was closed prior to defendant's entry.

A "breaking" is an essential element of the crime of burglary, *State v. Bell*, 285 N.C. 746, 749, 208 S.E.2d 506, 508 (1974), and is defined as "any act of force, however slight, used to make an entrance 'through any usual or unusual place of ingress . . .'" *State v. Eldridge*, 83 N.C. App. 312, 314, 349 S.E.2d 881, 882-83 (1986) (quoting *State v. Jolly*, 297 N.C. 121, 127-28, 254 S.E.2d 1, 5-6 (1979)). A breaking is sufficiently shown by testimony that, prior to entry, the window or door through which the defendant



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allegedly made entry was closed. *State v. Sweezy*, 291 N.C. 366, 383, 230 S.E.2d 524, 535 (1976); *Eldridge*, 83 N.C. App. at 314-15, 349 S.E.2d at 883.

At trial, the State presented the testimony of Gibson who, when asked whether the window through which defendant allegedly entered her home was open or not prior to defendant's entry, stated, "Yeah, it was shut, certainly was." Furthermore, Gibson testified that defendant gained entry into her home by "jump[ing] through the window." This testimony constitutes substantial evidence of the breaking element of burglary, and therefore this assignment of error is without merit.

## III

[3] Defendant contends that he is entitled to a new trial because the trial court erroneously refused to submit the offense of misdemeanor breaking and entering to the jury. Defendant argues that there was evidence from which the jury could find him guilty of this lesser included offense of burglary, and therefore the trial court was required to instruct the jury on it.

When there is evidence presented at trial from which the jury could find that the defendant committed a lesser included offense of the crime with which he is charged, then the trial court must instruct the jury on the lesser included offense. *State v. Maness*, 321 N.C. 454, 461, 364 S.E.2d 349, 353 (1988). However, when the defendant denies having committed the complete offense for which he is being prosecuted, and evidence is presented by the State of every element of the offense, and there is no evidence to negate these elements other than the defendant's denial that he committed the offense, then no lesser included offense need be submitted. *State v. Williams*, 314 N.C. 337, 352-53, 333 S.E.2d 708, 719 (1985). The State in the instant case prosecuted defendant for first degree burglary. The elements of this crime are: "(1) the breaking (2) and entering (3) at night (4) into a dwelling house or room used as a sleeping apartment (5) which is actually occupied at the time of the offense (6) with the intent to commit a felony . . . therein." *State v. Coleman*, 65 N.C. App. 23, 27, 308 S.E.2d 742, 745 (1983).

The State's evidence established that at approximately 11:00 p.m. on the night in question, defendant without permission entered Gibson's house through a window that, prior to his entry, had

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been closed and that Gibson was home at the time. This constitutes positive evidence of the first five elements of first degree burglary. The State also presented testimony that, once inside, defendant demanded money from Gibson. From this, the jury could properly infer that defendant had the requisite intent to commit larceny. See *Coleman*, 65 N.C. App. at 27-28, 308 S.E.2d at 745-46 (intent to commit larceny must be inferred from the evidence when larceny is not actually committed). Defendant, on the other hand, testified that Gibson invited him into her home, and that he had no intent to steal anything from her. In other words, defendant denies having committed the offense of first degree burglary. Because "mere denial of the charges by the defendant does not require submission of a lesser included offense," *Maness*, 321 N.C. at 461, 364 S.E.2d at 353 (quoting *State v. Horner*, 310 N.C. 274, 283, 311 S.E.2d 281, 288 (1984)), the trial court properly refused to instruct the jury on misdemeanor breaking and entering.

## IV

[4] Defendant argues that Officer Davis' testimony that "it appeared just by looking over there there had indeed been a break in" at Gibson's home on the night in question constitutes inadmissible opinion evidence, and that defendant was prejudiced by its erroneous admission at trial.

Officer Davis testified that, in response to a call, he went to Gibson's house, talked to defendant, and eventually went inside. He described what he saw once inside Gibson's house as follows:

The table was disturbed like a break-in had occurred. I could see a stick in the window. It appeared just by looking over there there had indeed been a break-in—

We agree that this portion of Officer Davis' testimony, to which defendant objects, was not based on personal knowledge and was not helpful to the jury in understanding Officer Davis' testimony, and therefore was inadmissible. See *State v. Cuthrell*, 233 N.C. 274, 276, 63 S.E.2d 549, 550 (1951) (sheriff's testimony that building was "set afire," which was not based on first-hand knowledge, constituted inadmissible opinion evidence); see also N.C.G.S. § 8C-1, Rule 602 (1988) (witness may not testify to a matter unless he has personal knowledge of the matter); N.C.G.S. § 8C-1, Rule 701 (1988) (lay witness' opinions must be helpful to a clear understanding of his testimony or the determination of a fact in issue). Here,

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the jury was as qualified as Officer Davis to infer from the facts that defendant broke into Gibson's home. *See State v. Watson*, 294 N.C. 159, 165, 240 S.E.2d 440, 445 (1978) (testimony that defendant "ripped off the service station," where the witness had not actually observed the robbery, inadmissible because the jury was as qualified as the witness to draw an inference from the facts). However, defendant is not entitled to a new trial unless the erroneous admission of this testimony prejudiced him.

In determining whether a criminal defendant is prejudiced by the erroneous admission of evidence, the question is whether there is a reasonable possibility that, had the evidence not been admitted, the jury would have reached a different verdict. N.C.G.S. § 15A-1443(a) (1988). Gibson testified that on the night of the alleged burglary, her front window had been closed, and that, while she was watching the 11:00 news, defendant, whom she did not know, "jumped in that window," knocked her down, and demanded money. Moreover, Officer Davis properly testified that as he was preparing to leave Gibson's residence, Gibson fled to a neighbor's house, screaming, and told Officer Davis that defendant made her say that everything was okay. Officer Davis testified that he then went inside Gibson's house and observed that underneath the window "on the floor was a picture, something was knocked off a table, and you could see where the corner was disturbed." Furthermore, Gibson's relatives testified at trial that defendant is not Gibson's grandson and is not related to Gibson in any way, and that they had never seen him before. In light of the foregoing evidence of defendant's guilt, there is no reasonable possibility that the jury would have reached a different verdict had the trial court excluded Officer Davis' inadmissible opinion testimony.

## V

[5] After arguments by counsel, and before sentencing, the trial court made the following statements regarding defendant's sentence:

I understand the appellate court has said it is best to find as few aggravating factors as possible to be argued about. So we have found one aggravating [that the defendant has prior convictions for criminal offenses punishable by more than 60 days confinement] and we have found one mitigating [that the defendant has been honorably discharged from the United States Armed Services], and that appears to be the extent

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of it. The Court also finds without any argument that the lady, like any other citizen, is entitled to peace of mind and body in her home.

The sole aggravating factor entered by the trial court on Form AOC-CR-303 is that the defendant has a prior conviction or convictions for criminal offenses punishable by more than 60 days confinement. The trial court sentenced defendant to life imprisonment on the burglary conviction and twenty years imprisonment to begin at the expiration of the life sentence on the kidnapping conviction. The presumptive sentence for first degree burglary is fifteen years, and the presumptive sentence for second degree kidnapping is nine years. N.C.G.S. § 15A-1340.4(f) (1988).

Defendant argues that he is entitled to a new sentencing hearing because the trial court erroneously found as a non-statutory aggravating sentencing factor that "the lady, like any other citizen, is entitled to peace of mind and body in her home." The State argues that, contrary to defendant's assertion, the trial court only considered one aggravating factor—defendant's prior convictions—and did not consider Gibson's entitlement to peace of mind and body in her home as an aggravating factor in sentencing defendant. According to the State, even if the trial court considered Gibson's entitlement to peace of mind and body in her home as an aggravating factor, such a factor would not be improper.

Although the trial court did not formally find as a non-statutory aggravating factor that Gibson, like any other citizen, is entitled to peace of mind and body in her home, the court's comments indicate that it nevertheless improperly considered it in determining defendant's sentence. *See State v. Cannon*, 326 N.C. 37, 39, 387 S.E.2d 450, 451 (1990) (where it could reasonably be inferred from the language of the trial judge that the sentence was imposed at least in part for an improper reason, defendant was entitled to a new sentencing hearing); *State v. Harrell*, 100 N.C. App. 450, 451, 397 S.E.2d 84, 85 (1990), *disc. rev. denied*, 328 N.C. 94, 402 S.E.2d 422 (1991) (even though court did not formally find defendant's denial of guilt as a non-statutory aggravating sentencing factor, its comments to the defendant indicated that the court improperly considered this factor). The trial court's failure to formally document the finding does not insulate its remarks from appellate review. *Cannon*, 326 N.C. at 39, 387 S.E.2d at 451. It must now be determined whether the finding itself is improper.

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[106 N.C. App. 433 (1992)]

In sentencing a defendant, the trial court may consider non-statutory aggravating factors in determining whether to increase the presumptive term for the offense. N.C.G.S. § 15A-1340.4(a) (1988). These factors, however, must be "(1) related to the purposes of sentencing and (2) supported by the evidence in the case." *State v. Taylor*, 322 N.C. 280, 287, 367 S.E.2d 664, 668 (1988); N.C.G.S. § 15A-1340.4(a) (1988). Among the primary purposes of sentencing a person convicted of a crime are the protection of the public by restraining offenders and the provision of a general deterrent to criminal behavior. N.C.G.S. § 15A-1340.3 (1988). However, a sentencing purpose itself may not form the basis of a trial court's decision to increase the presumptive sentence for an offense. This is because the legislature took the purposes of sentencing into account when it determined presumptive sentences under the Fair Sentencing Act, and to use one as a basis for increasing a presumptive sentence would be duplicative and therefore prohibited. *See State v. Chatman*, 308 N.C. 169, 180, 301 S.E.2d 71, 78 (1983). For example, a finding in aggravation that the sentence imposed on the defendant is necessary to deter others is improper because deterrence is a stated purpose of sentencing criminal offenders. *Id.*

In the instant case, the trial court found that the victim is entitled, like any other citizen, to peace of mind and body in her home. This is indistinguishable from a finding that the sentence imposed is necessary to protect the public, which is a stated purpose of sentencing under Section 15A-1340.3, and therefore in and of itself is an improper basis for increasing a defendant's presumptive sentence. *See State v. Tyler*, 66 N.C. App. 285, 287, 311 S.E.2d 354, 356 (1984) (finding by trial court that the sentence imposed on the defendant was "necessary to protect society" improper because such factor was presumably considered by the legislature in determining the presumptive sentence for the offense).

When it is determined that a trial court erred in a finding in aggravation and imposed a sentence beyond the presumptive term, then the case must be remanded for a new sentencing hearing. *State v. Ahearn*, 307 N.C. 584, 602, 300 S.E.2d 689, 701 (1983). Because we have determined that the trial court erred in a finding in aggravation, and because the trial court increased defendant's sentence beyond the presumptive terms for both offenses of which defendant was convicted, defendant is entitled to a new sentencing hearing.

## STATE v. PAKULSKI

[106 N.C. App. 444 (1992)]

Guilt/innocence phase: No error.

Sentencing phase: Remanded for resentencing.

Judges PARKER and COZORT concur.

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STATE OF NORTH CAROLINA v. MITCHELL JOHN PAKULSKI AND ELLIOTT  
CLIFFORD ROWE, III

No. 9130SC446

(Filed 16 June 1992)

**1. Judges § 5 (NCI3d) — comments by judge — motion to disqualify denied — no error**

There was no merit to defendants' contentions that the trial judge should have recused himself because a defense counsel testified that he had heard the judge say "Why don't you just plead the slimy sons-of-bitches guilty?" The record contains no affidavit setting forth the facts as required by N.C.G.S. § 15A-1223(c); other witnesses present at the time did not recall the judge making such a statement, nor did the judge himself recall making the statement, and there was not sufficient force in the allegations made by defendants to require the judge to disqualify himself or refer the matter to another judge; and the statement attributed to the judge occurred prior to a hearing in March, 1988 and defendants elected not to seek recusal until after 4 May 1989. One must raise a motion to recuse at the earliest moment after acquiring knowledge of the facts which give rise to the motion; a defendant cannot choose to wait and seek recusal after the judge rules unfavorably to the defendant on other grounds.

**Am Jur 2d, Judges § 202.**

**2. Constitutional Law § 248 (NCI4th) — failure to disclose exculpatory evidence until 4th trial — no error**

The trial court did not err by denying defendants' motion for appropriate relief to bar imposition of judgment for armed robbery where defendants had made a general request for all exculpatory evidence in the possession of the prosecution

## STATE v. PAKULSKI

[106 N.C. App. 444 (1992)]

and contended that the prosecution failed to disclose certain exculpatory evidence until the fourth trial. It is doubtful that this evidence is exculpatory; even so it is not so material that there was a reasonable possibility that the result of the trial would have been different had it been disclosed.

**Am Jur 2d, Criminal Law §§ 770, 785.**

**3. Robbery § 6.1 (NCI3d)— sentencing—felony murder conviction not sought—sentencing on armed robbery proper**

The trial judge did not err by imposing active sentences for armed robbery where the first two trials ended with mistrials; the third trial resulted in convictions on charges of first degree murder based on felony murder, felonious larceny of a motor vehicle, felonious breaking or entering, felonious larceny, armed robbery, and conspiracy; the trial court arrested judgment on the convictions for breaking or entering, larceny and armed robbery since those were the felonies upon which the first degree felony murder convictions were based; the North Carolina Supreme Court granted a new trial on the murder charges but specifically found no error in the convictions for armed robbery, felonious breaking or entering, larceny of an automobile, and conspiracy; a fourth trial ended in a mistrial; the State prayed judgment on the felonious breaking or entering and felonious larceny charges; defendants were sentenced on those charges; the State subsequently elected to pray judgment on the convictions for armed robbery rather than retry defendants for murder; and defendants were given life sentences to run consecutively to any previously imposed sentences. Once the State elected not to pursue convictions under the felony murder theory, the imposition of sentences on the armed robbery convictions was proper.

**Am Jur 2d, Criminal Law § 814; Robbery § 84.**

**4. Robbery § 6.1 (NCI3d)— delay between conviction and sentencing—no prejudicial error**

There was no prejudicial error in a delay of five and one-half years between convictions for armed robbery and the imposition of life sentences where defendants appealed to the Supreme Court twice during that period, filed other motions

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requiring hearings, and have not shown prejudice resulting from the delays.

**Am Jur 2d, Criminal Law § 526.****5. Criminal Law § 1684 (NCI4th)— sentencing for armed robbery—following appeal of felony murder conviction—no error**

The trial court did not violate N.C.G.S. § 15A-1335 by imposing life sentences for armed robbery to run consecutively with all previously imposed sentences where the trial court was for the first time imposing life sentences after the armed robbery convictions had been upheld and felony murder convictions set aside. Even if the imposition of sentences for armed robbery is construed to be a resentencing of the murder convictions which were set aside, the new sentences for armed robbery based on the same conduct are not more severe than the prior sentences for murder.

**Am Jur 2d, Criminal Law § 814; Robbery § 84.**

APPEAL by defendants from judgments entered 31 July 1990 by *Judge Marvin K. Gray* in HAYWOOD County Superior Court. Heard in the Court of Appeals 11 February 1992.

In this case the State's evidence tended to show that on the night of 16 September 1978, the defendants and two accomplices, David Chambers and Donna Rowe, met in the vicinity of Dr. Guy Abbate's office located on Church Street in Waynesville, N. C. Defendants arrived in a pickup truck, while the two accomplices were in a 1968 burgundy Chevrolet. The pickup truck was parked next to Dr. Abbate's office and the Chevrolet was parked on Montgomery Street near the corner of Church Street. Defendant Pakulski and the accomplices went to a nearby bar and stayed until that establishment closed. Thereafter, defendants and Chambers broke into the offices of Dr. Guy Abbate, while Donna Rowe was left as lookout in the burgundy Chevrolet. While they were inside ransacking the office, a security guard, Willard Setzer, arrived. A scuffle ensued and Setzer was shot in the head and subsequently died. Defendants took Setzer's gun, wallet and money, and fled in the Chevrolet and Setzer's car, but left the pickup truck in the parking lot. Other facts are set forth in *State v. Pakulski and Rowe*, 319 N.C. 562, 356 S.E.2d 319 (1987) and *State v. Pakulski and Rowe*, 326 N.C. 434, 390 S.E.2d 129 (1990).



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We now turn to the lengthy history of the case which has bearing upon the current appeal. Indictments against the defendants were returned charging them with (1) first degree murder; (2) robbery with a dangerous weapon; (3) larceny of a motor vehicle; (4) felonious breaking or entering; (5) felonious larceny; (6) conspiracy to commit murder; and (7) conspiracy to break or enter. The first and second trials in 1984 ended in mistrials because the jury was unable to reach a verdict. The third trial in November, 1984 resulted in convictions on the charges of murder in the first degree (based upon felony murder), felonious larceny of a motor vehicle, felonious breaking or entering, felonious larceny, armed robbery, and conspiracy to commit felonious breaking or entering and larceny. *State v. Pakulski and Rowe*, 326 N.C. 434, 390 S.E.2d 129 (1990). Sentences were imposed on each defendant as follows: (1) life sentence for the murder; (2) a consecutive term of ten years for larceny of a motor vehicle; and (3) a concurrent term of ten years for conspiracy to commit breaking or entering and larceny. The trial court arrested judgment on the convictions for felonious breaking or entering, felonious larceny and armed robbery since these were the felonies upon which the first degree felony murder convictions were based. *Id.*

Defendants appealed to the Supreme Court of North Carolina which granted a new trial on the first-degree murder charges because of the improper submission of breaking or entering as a possible predicate felony of the felony murder. *State v. Pakulski and Rowe*, 319 N.C. 562, 356 S.E.2d 319 (1987). However, the Court specifically found no error in defendants' convictions for robbery with a dangerous weapon, felonious breaking or entering, larceny of an automobile, and conspiracy to commit felonious breaking or entering. *Id.*

The fourth trial ended in a mistrial when the jury was unable to reach a verdict on 13 February 1988. On 31 March 1988, the State prayed judgment on the felonious breaking or entering and felonious larceny charges, and Judge William H. Freeman sentenced each defendant to ten-year terms on each of these two convictions to run consecutively to any sentence they were then serving. Defendants appealed the imposition of these new sentences and the Supreme Court concluded the sentencing was proper. The Court found these felonies were no longer the predicate felonies for felony murder and therefore the trial court was free to sentence defend-

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ants for these convictions. *State v. Pakulski and Rowe*, 326 N.C. 434, 390 S.E.2d 129 (1990).

In May of 1989, while the murder charges were still pending, defendants filed a motion to recuse Judge Freeman from hearings set for 30 May 1989 based upon a remark he supposedly made a year earlier. They also filed a motion for appropriate relief based upon exculpatory evidence not being divulged to defendants before the earlier trials. Judge Freeman denied both motions.

On 30 July 1990 the State elected to pray judgment on the convictions of armed robbery, rather than retry defendants on the murder charge. The trial court imposed life sentences on each defendant to run consecutively to any previously imposed sentences.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General William P. Hart and Assistant Attorney General John H. Watters, for the State.*

*Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Gordon Widenhouse, for defendant appellant Pakulski.*

*McLean and Dickson, P.A., by Russell L. McLean, III, for defendant appellant Rowe.*

WALKER, Judge.

On appeal defendants argue the following: (1) the court erred in denying their motion to bar imposition of judgment on the armed robbery conviction based on a violation of their rights because certain exculpatory evidence was not timely disclosed; (2) the court erred in the imposition of sentences for armed robbery by violating their rights to freedom from double jeopardy and to due process of law; and (3) the court erred in sentencing defendants on their armed robbery convictions as this violated G.S. 15A-1335 because each defendant received a longer total sentence than was originally imposed.

## I.

In their motion to bar imposition of judgment on the convictions for armed robbery, defendants renewed their motion to recuse Judge Freeman which was denied in May, 1989 and for appropriate relief which was denied 17 April 1990. We will treat each of these grounds separately.

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## A.

[1] In regards to the motion to recuse, Russell McLean, attorney for defendant Rowe, testified that prior to the 31 March 1988 hearing he heard Judge Freeman say, "Why don't you just plead the slimy sons-of-bitches guilty?" On the basis of this alleged statement, defendants assert that Judge Freeman should have excused himself or referred the motion to another trial judge.

G.S. 15A-1223 provides in pertinent part:

(b) A judge, on motion of the State or the defendant, must disqualify himself from presiding over a criminal trial or other criminal proceeding if he is:

(1) Prejudiced against the moving party or in favor of the adverse party;

. . . .

(c) A motion to disqualify must be in writing and must be accompanied by one or more affidavits setting forth facts relied upon to show the grounds for disqualification.

(d) A motion to disqualify a judge must be filed no less than five days before the time the case is called for trial unless good cause is shown for failure to file within that time. Good cause includes the discovery of facts constituting grounds for disqualification less than five days before the case is called for trial.

We find no merit in defendants' contentions for three reasons.

*First*, as noted in G.S. 15A-1223(c), a motion to disqualify must be supported by an affidavit setting forth the facts. Here the record contains no such affidavit or supporting document.

*Second*, although Mr. McLean testified to the statement he attributed to Judge Freeman, other witnesses present at the time did not recall Judge Freeman making such a statement, nor did Judge Freeman himself recall making this comment. He stated for the record that he did not have any prejudice for or against either side in the case. Although a trial judge should either recuse himself or refer the matter to another judge if there is "sufficient force in the allegations contained in defendant's motion to proceed to find facts," *State v. Poole*, 305 N.C. 308, 320, 289 S.E.2d 335, 343 (1982), we do not find "sufficient force" in the allegations made

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by defendants to require Judge Freeman to disqualify himself or refer the matter to another judge. We do not believe that "a reasonable man knowing all of the circumstances would have doubt about the judge's ability to rule on the motion to recuse in an impartial manner." *Id.* at 321, 289 S.E.2d at 343.

*Third*, the statement attributed to Judge Freeman occurred prior to a hearing in March, 1988, in which the trial court denied defendants' motion to dismiss. However, for whatever reasons, the defendants elected not to seek recusal of Judge Freeman until after the Supreme Court's order of 4 May 1989. One must raise a motion to recuse at the earliest moment after acquiring knowledge of the facts which give rise to the motion to recuse. *United States v. Owens*, 902 F.2d 1154 (4th Cir. 1990). A defendant cannot choose to wait and seek a trial judge's recusal until after the trial judge rules unfavorably to the defendant on some other grounds. *Id.* Defendants were dilatory and therefore waived their right to assign error to the denial of their motion to recuse.

## B.

[2] Defendants made a motion for appropriate relief after the fourth trial resulted in a mistrial, asserting the prosecution failed to disclose certain exculpatory testimony of Coleman Swanger until the fourth trial. Swanger testified that on the night of the incident at Dr. Abbate's office he had just left work as a Waynesville police officer and was driving home on Church Street. His attention was focused on the left side of Church Street where he noticed the victim's car, the doctor's office and a pickup truck with dew on it in the parking lot of Ray's Supermarket. He did not notice anything suspicious nor did he look to the right at the intersection of Montgomery Street and see Donna Rowe in a parked car. Swanger was not involved in the investigation and he never made any notes about his observations. Although Swanger mentioned his observations to other police officials, he was never interviewed by the prosecution until January, 1988. Defendants contend Swanger's testimony was inconsistent with other evidence produced by the State and supports their theory that they were not in the state at the time of the incident.

The prosecution's suppression of evidence favorable to an accused violates due process where the evidence is "material" either to guilt or punishment. *Brady v. Maryland*, 373 U.S. 83, 10 L.Ed.2d 215 (1963). In the present case, after their indictment, defendants

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made a general request for all exculpatory evidence in the possession of the prosecution. In evaluating whether the prosecutor has failed in his duty to disclose exculpatory evidence, the court must determine if the evidence is "material" to the question of guilt. *United States v. Agurs*, 427 U.S. 97, 49 L.Ed.2d 342 (1976). Undisclosed evidence "is material only if there is a reasonable probability that, had the evidence been disclosed to the defense, the result of the proceeding would have been different." *United States v. Bagley*, 473 U.S. 667, 682, 87 L.Ed.2d 481, 494 (1985); *State v. Coats*, 100 N.C.App. 455, 464, 397 S.E.2d 512, 518 (1990). While it is doubtful that this evidence is exculpatory, even if so, it is not so material that there was a reasonable probability had it been disclosed the result of the trial would have been different. Accordingly, the trial court did not err in denying defendants' motion for appropriate relief to bar imposition of judgment on the basis of the prosecution's suppression of evidence.

## II.

[3] In their second and third assignments of error, defendants contend that the imposition of life sentences on the armed robbery charges violated due process and constituted double jeopardy. We disagree.

In a previous appeal, defendants asserted the trial court violated their constitutional rights when it imposed active sentences on defendants' convictions for felonious breaking or entering and felonious larceny. *State v. Pakulski and Rowe*, 326 N.C. 434, 390 S.E.2d 129 (1990). The Court noted these judgments were originally arrested only because these crimes were the predicate felonies underlying defendants' felony murder convictions. However, when the State elected not to seek convictions of defendants on the theory of felony murder, there was no legal impediment to imposition of sentences on these valid felony convictions. Therefore, the trial court did not err in imposing active sentences for felonious breaking or entering and felonious larceny. *Id.*

In the present case, the State elected to seek judgments on the convictions of armed robbery in lieu of proceeding to a fifth trial on the murder charges. Once the State elected not to pursue convictions under the felony murder theory, the imposition of sentences on the armed robbery convictions was proper.

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[4] Defendants further contend that the imposition of life sentences for armed robbery some five and one-half years after they were convicted of armed robbery constitutes inexcusable delay precluding the State from imposing such sentences. However, we note that defendants have appealed to the Supreme Court twice during this period and in addition, filed other motions requiring hearings, so clearly much of the delay in sentencing is attributable to defendants themselves. Furthermore, they have not shown any prejudice resulting from these delays and this assignment of error is overruled.

## III.

[5] In their final assignment of error, defendants contend the trial court violated G.S. 15A-1335 by imposing a life sentence against each defendant for armed robbery to run consecutively with all previously imposed sentences, thereby causing them to receive longer sentences following their appeals. G.S. 15A-1335 provides:

When a conviction or sentence imposed in superior court has been set aside on direct review or collateral attack, the court may not impose a new sentence for the same offense, or for a different offense based on the same conduct, which is more severe than the prior sentence less the portion of the prior sentence previously served.

Here, for the first time, the trial court imposed life sentences after the armed robbery convictions had been upheld by the Supreme Court. This does not constitute a resentencing within the meaning of G.S. 15A-1335. At the time of the commission of the crimes of armed robbery by defendants, G.S. 14-87 provided for punishment up to life imprisonment. Therefore, the trial court had the discretion to impose the maximum sentence of life imprisonment in each case.

We agree with the State that if the imposition of sentences for armed robbery is construed to be a resentencing of the murder convictions which were set aside, then the new sentences for armed robbery based on the same conduct are not more severe than the prior sentences, i.e., the life sentences of imprisonment for armed robbery are identical to the previous sentences each defendant received for murder.

Defendants have likewise failed to establish that the imposition of the two ten-year consecutive sentences in 1988 constituted a

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resentencing within the purview of G.S. 15A-1335. The judgments of the trial court are

Affirmed.

Judges ARNOLD and PARKER concur.

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MELVIN W. SNOVER v. NORMA SELLARS GRABENSTEIN

HIDEAWAY SHORES HOMEOWNERS ASSOCIATION, FRAN BRUTON, JOHN E. HARRIS, GEORGE M. KOSEKUBA, VINCENT R. MALAVE, JAMES T. PERRY, MELVIN W. SNOVER, BOBBY LEE SMITH AND WIFE, PEGGY M. SMITH, TONY FESTA AND TERRENCE CARR v. NORMA SELLARS GRABENSTEIN

No. 915SC567

(Filed 16 June 1992)

**1. Attorneys at Law § 39 (NCI4th) — withdrawal of co-counsel — absence of notice — client not prejudiced**

Defendant was not prejudiced by the trial court's decision permitting defendant's co-counsel to withdraw without prior notice to defendant on the second day of trial of an action to try title where defendant's lead counsel remained in the case, and there was nothing in the record to indicate that the lead counsel was incapable of representing defendant's interests and continuing the case by himself. Rule 16, General Rules of Practice for the Superior and District Courts.

**Am Jur 2d, Attorneys at Law § 173.**

**2. Attorneys at Law § 39 (NCI4th) — withdrawal of co-counsel — absence of notice — continuance properly denied**

The trial court did not err in denying defendant's motion for a continuance when defendant's co-counsel was permitted to withdraw without notice to defendant on the second day of the trial where the court did recess the trial from Tuesday afternoon until Thursday morning to give defendant the opportunity to hire additional counsel; when the case resumed on Thursday morning, there was no mention of additional counsel by defendant, no further motion for continuance, and no show-

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ing by defendant that her remaining counsel was unprepared to proceed with the trial; and defendant's counsel who remained in the case was actively involved in the case from the beginning, was the sole signer of the pleadings and other documents, and was defendant's only attorney of record.

**Am Jur 2d, Attorneys at Law § 173.****3. Trespass to Try Title § 4 (NCI3d)— disputed property— determination of ownership by court—sufficiency of evidence and findings**

The trial court did not err in adjudging that plaintiff and petitioners are the owners of disputed land where the evidence supported the court's findings and conclusions that plaintiff is the record owner of the disputed property in one action and defendant and her agents have trespassed onto such property; petitioners established a record marketable chain of title to the disputed property in the second action; petitioners and their predecessors in title have possessed the disputed property under color of title for more than seven years; an old wire boundary line fence was in place for more than fifty years such that possession exercised by the respective parties on either side was open, notorious and continuous so as to constitute adverse possession; and petitioners are the rightful owners and title holders of the property lying to the west of the eastern boundary line of the disputed property in the second action.

**Am Jur 2d, Trespass § 41.**

APPEAL by defendant from judgments entered 3 July 1990 and 31 July 1990 by *Judge Ernest B. Fullwood* in PENDER County Superior Court. Heard in the Court of Appeals 7 April 1992.

This case stems from the consolidation of two separate actions in which the location of the boundary line between the parties' properties was disputed. Three separate surveys were conducted with regard to the boundary line between the parties' properties. In 1923 a survey showed the boundary as a straight line, but surveys conducted in 1973 and 1976 showed the boundary line not to be straight but with a deflection to the south, which increased defendant's sound frontage. The properties were separated, however, by an old wire fence which had been in place and uncontested for more than fifty years.



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The facts of the first action (the "Snover action"), as found by the trial court, indicate that plaintiff Snover is the record owner of Lot 10, Block A, Section 1, and Lot 1, Block B, Section 1, Hideaway Shores Subdivision. Defendant Grabenstein owns property adjacent to plaintiff, which she received via quitclaim deed in April 1988. On or about 23 April 1988 defendant or her agents entered plaintiff's property and erected a new wire fence. Plaintiff removed the fence whereby defendant entered upon plaintiff's property and re-erected it. Plaintiff filed a complaint seeking damages in the sum of \$25,850, the costs of the action, and a temporary injunction restraining defendant or her agents from interfering with plaintiff's possession, use and enjoyment of said property. Defendant answered denying that plaintiff is the owner of the entire tract as claimed in the complaint and asserting herself to be the owner in possession of the property which is the subject of the complaint. She also asserted a counterclaim against plaintiff for trespass upon her property and sought relief in the form of damages and a permanent injunction. Defendant requested that she be adjudged the exclusive owner of the real property.

In the second action petitioners are Hideaway Shores Homeowners Association and affected individual landowners within the subdivision. Defendant Grabenstein is the owner of a parcel of property lying immediately adjacent to and east of Hideaway Shores Subdivision. Petitioners initiated a special proceeding alleging that defendant disputes the eastern boundary of Hideaway Shores Subdivision and requesting a determination of the correct boundary line. Defendant answered denying that petitioners are the owners of the lots indicated in their petition, asserting title to a portion of the real property claimed by petitioners, and asking to be adjudged the exclusive owner of the disputed real property.

On 23 July 1990 the parties stipulated that the Hideaway Shores action had been converted from a boundary dispute proceeding under G.S. Chapter 38 into an action to try title. Since the Snover action was also an action to try title, both actions were tried together without a jury. Judgments were entered in favor of plaintiff Snover and petitioners Hideaway Shores from which defendant now appeals.

*James A. MacDonald for plaintiff appellees.*

*Ward and Smith, P.A., by Kenneth R. Wooten and Leigh A. Allred; and Prevatte, Prevatte, Peterson & Campbell, by R. Glen Peterson, for defendant appellant.*

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WALKER, Judge.

[1] Defendant first assigns as error the trial court's decision to grant the motion for withdrawal of defendant's co-counsel on the second full day of trial and without prior notice to defendant of counsel's intent to withdraw. Rule 16 of the General Rules of Practice for the Superior and District Courts, which codified the holding in *Smith v. Bryant*, 264 N.C. 208, 141 S.E.2d 303 (1965), provides:

No attorney who has entered an appearance in any civil action shall withdraw his appearance, or have it stricken from the record, except on order of the court. Once a client has employed an attorney who has entered a formal appearance, the attorney may not withdraw or abandon the case without (1) justifiable cause, (2) reasonable notice to the client, and (3) the permission of the court.

In the case before us defendant alleges she received no notice by Mr. Moore of his intent to withdraw as her attorney prior to doing so. Instead, immediately preceding the afternoon proceedings on the second day, Mr. Moore offered the following explanation in support of his motion:

It was called to my attention today at the break for lunch that in 1983, my partner, who was then my law partner, . . . certified title to one of the lots in this subdivision to one of the witnesses and one of the parties. . . . I have checked and it is true that at that time, he and I were in partnership. It's probably my fault that I did not check more carefully and remember that, of course, as we had then associated during those years and that titles were done by the partnership. Although I didn't actually do the title or sign the certificate, Your Honor, I feel that it would be highly improper or certainly be a conflict and very likely, could be unethical for me to continue to appear in this case and for that reason, I move that I be allowed to withdraw.

The trial court thereby found:

Based upon statements of counsel, the Court does find that its continuing appearance at the trial of this matter would put him in a position that he would be taking a position adverse to the interest of a former client in respect to the subject matter of representation of that client and the Court concurs

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that such would be improper and would represent a conflict of interest, and therefore, accordingly grants the motion.

Despite the absence of prior notice, we hold that the trial court did not commit reversible error in granting the motion for withdrawal because defendant was not prejudiced thereby. Our holding is limited to the facts of this case, however, and should not be construed as allowing the notice requirement of Rule 16 to be waived where no apparent prejudice results to the client. Here, Mr. Peterson had been involved since the inception of the action as lead counsel and Mr. Moore was co-counsel. There is nothing in the record to indicate Mr. Peterson was not capable of adequately representing defendant's interests and continuing the litigation by himself. Two cases from this Court cited by defendant, *Williams and Michael, P.A. v. Kennamer*, 71 N.C.App. 215, 321 S.E.2d 514 (1984) and *Underwood v. Williams*, 69 N.C.App. 171, 316 S.E.2d 342 (1984), are not dispositive, as both of those cases resulted in a previously represented party being left without counsel when such counsel was allowed to withdraw without prior notice. *Underwood* is further distinguishable in that the trial court entered summary judgment against the party at the same time his counsel was allowed to withdraw. In the instant case, defendant has not shown herself to have been prejudiced as a result of the withdrawal.

[2] Defendant's second assignment of error asserts that, upon allowing counsel's motion to withdraw, the trial court erred in denying defendant's motion for a continuance. In *Williams and Michael, P.A. v. Kennamer* at 217, 321 S.E.2d at 516, this Court stated:

Where an attorney has given his client no prior notice of an intent to withdraw, the trial judge has no discretion. The Court must grant the party affected a reasonable continuance or deny the attorney's motion for withdrawal.

Since defendant did not receive prior notice of Mr. Moore's intent to withdraw, she argues the court erred in not granting a continuance which was clearly mandated under the circumstances of this case. She contends the recess taken by the court was not reasonable and that she was prejudiced by having to proceed with trial, especially since Mr. Moore had been the primary participant in the trial prior to his withdrawal. (Mr. Moore had made ten objections and had undertaken the sole cross-examination of four of six witnesses.)

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On Tuesday afternoon after the court allowed Mr. Moore to withdraw, defendant made a motion to continue "the remaining testimony in this case until a time in the future at which Mr. and Mrs. Grabenstein may have the opportunity to assess their counsel and see whether they wish to hire additional counsel as they did with Mr. Moore." The court granted the motion "to the extent that this matter is to be continued no later than this coming Thursday morning at 9:30, in order to give the Respondents an opportunity, if they desire to do so, to hire counsel to assist Mr. Peterson and also to give Mr. Peterson an opportunity to re-examine his case in light of the potential, in light of the possibility that he will have to represent his clients alone."

However, when court commenced on Thursday morning, 26 July 1990, at 9:30, there was no mention of additional counsel by defendant, any further motion for continuance, or any other showing by defendant that Mr. Peterson was not prepared to proceed with the remainder of the trial.

In *Williams and Michael, P.A. v. Kennamer, supra*, the trial court granted the motion of defendant's counsel to withdraw and set trial for two days later. Defendant was not present for the motion and had not received prior notice of her counsel's intent to withdraw. She subsequently appeared and attempted to represent herself at trial, stating that she had not received notice of the trial or of her counsel's withdrawal until the previous day. In vacating the judgment and remanding for new trial this Court stated:

It is indisputable that defendant was prejudiced by the Court's actions. Defendant is an elderly woman and is in poor health. At trial, she had difficulty in speaking and in following the simple instructions of Judge Brown. A one or two day period was insufficient time for her to either prepare her own defense or acquire alternative representation.

*Id.* at 217, 321 S.E.2d at 516.

Defendant asserts the foregoing case as support for her position that the recess by the court was insufficient. In the case before us, however, Mr. Peterson was actively involved from the beginning, was the sole signer of the pleadings and other documents, and was defendant's only attorney of record. Under all of these circumstances we cannot conclude the recess was unreasonable

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since it appears Mr. Peterson was amply suited to represent defendant's interests during the remainder of the trial. *See also Gillis v. Whitley's Discount Auto Sales, Inc.*, 70 N.C.App. 270, 319 S.E.2d 661 (1984). Since defendant was not placed in a position of having to represent herself or seek alternative representation as a result of the withdrawal, we agree with plaintiff and petitioners that the record indicates defendant was ably represented by Mr. Peterson. The trial court did not abuse its discretion by refusing to grant defendant's motion to continue the case.

[3] Defendant next asserts the trial court erred in adjudging plaintiff and petitioners to be the owners with the exclusive right to possession of the disputed real property. The primary contention of this argument is that the evidence was insufficient to support the trial court's findings and conclusions. It is well settled that the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though there may also be evidence to sustain findings to the contrary. *Williams v. Pilot Life Insurance Co.*, 288 N.C. 338, 218 S.E.2d 368 (1975). In this case defendant states in her brief that:

The trial of this action included testimony of several surveyors as to the correct surveying methods and when a line actually changes due to physical evidence and possession evidence found on the ground, the testimony of several of the parties as to their beliefs as to their correct boundary lines and the testimony of certain predecessors in title to parties and other unrelated parties opining as to the boundary lines and the prior uses of the property.

From this testimony the trial court made findings of fact and subsequently concluded that: Plaintiff is the record owner of the property in question such that defendant and/or her agents have trespassed onto the property; petitioners have established a record marketable chain of title pursuant to G.S. 47B-2(a) to the property; petitioners and their predecessors in title have possessed the same under color of title for a period in excess of seven years preceding this action; the old wire boundary line fence was in place for more than fifty years such that the possession exercised by the respective parties on either side of it was open, notorious and continuous so as to constitute adverse possession as to the other; and petitioners are the rightful owners and title holders of the property lying to the west of the eastern boundary line of the Hideaway

## IN RE ERNIE'S TIRE SALES &amp; SERVICE v. RIGGS

[106 N.C. App. 460 (1992)]

Shores property. We find there was ample evidence to support the trial court's findings and conclusions and therefore do not disturb them on appeal.

Affirmed.

Judges LEWIS and WYNN concur.

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IN THE MATTER OF: ERNIE'S TIRE SALES & SERVICE, PLAINTIFF v.  
RICHARD JOE RIGGS, DEFENDANT

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LLOYDS OF LONDON AND STRICKLAND INSURANCE BROKERS, PLAINTIFFS  
v. ERNEST NORTON, JR., D/B/A ERNIE'S TIRE SALES AND SERVICE,  
DEFENDANT

No. 9112SC583

(Filed 16 June 1992)

**Laborers' and Materialmen's Liens § 8 (NCI3d) — abandoned motor vehicle — disposal — mail notice undeliverable**

The trial court correctly set aside the sale of a stolen and recovered BMW where DMV was unable to secure delivery to the owner by certified mail of the notice of intent to sell; the lienholder obtained an order authorizing the sale from the clerk of court and mailed a copy to the bank which had previously held the car loan and another copy to the address of the owner listed with DMV, which was not then his actual address; the lienholder did not advertise the sale in the newspaper or publicize the sale other than to tell a friend that he needed two bidders present at the sale; the friend and his son were present at the sale and entered one bid, followed by a bid from the lienholder; the lienholder solicited other bids from his friend, then declared the car sold to himself; the insurance company which had become subrogated to the rights of the car owner subsequently learned of the sale and filed a motion to set aside the report of sale and the order directing transfer of the title; and plaintiffs filed an action alleging that the sale was improper. Although the lienholder alleges that a special proceeding serves as a substitute for a public or private sale, there is language within N.C.G.S.

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§ 44A-4(b)(1) which indicates that a special proceeding does not replace the public or private sale requirement. To adopt the interpretation urged by appellant would allow a lienholder to sell a vehicle in a commercially unreasonable manner to himself or his friends simply because the debtor cannot be located.

**Am Jur 2d, Auctions and Auctioneers §§ 1, 12.**

APPEAL by plaintiff from judgment entered 4 February 1991 in CUMBERLAND County Superior Court by *Judge Gregory A. Weeks*. Heard in the Court of Appeals 9 April 1992.

*Walen & McEniry, P.A., by James M. Walen, for plaintiff-appellant.*

*Anderson, Broadfoot, Johnson, Pittman & Lawrence, by John H. Anderson, II, for defendants-appellees, Richard Joe Riggs and Lloyds of London and Strickland Insurance Brokers.*

WYNN, Judge.

On 6 January 1987, Richard Joe Riggs' 1985 BMW was stolen; he reported the theft to the Raleigh Police Department. The residential address of Riggs listed with the Division of Motor Vehicles (DMV) was in Clayton, but Riggs' address at the time of the theft was actually in Raleigh.

Also at the time of the theft, Lloyds of London, by and through Strickland Insurance Brokers, had \$30,000 of insurance coverage on said theft, even though the BMW was valued in excess of \$30,000. On 19 March 1987, Riggs submitted a Sworn Statement In Proof of Loss concerning the theft of the BMW, and was paid the full amount of coverage under the policy of insurance. Lloyds of London then became subrogated to all legal ownership rights in said BMW and informed Raleigh Police of its interest in the BMW and requested notification in the event of the recovery of said vehicle.

The BMW was recovered on 9 September 1989, in Cumberland County, by the North Carolina State Highway Patrol and was towed to appellant's place of business in Fayetteville, North Carolina. On 19 January 1990, appellant notified the DMV of its intent to sell the BMW to satisfy its lien acquired under N.C. Gen. Stat. § 44A-2 (1989), in the amount of \$100 for towing and \$1,300 for storage.

## IN RE ERNIE'S TIRE SALES &amp; SERVICE v. RIGGS

[106 N.C. App. 460 (1992)]

The DMV mailed notice of appellant's intent to sell on 2 May 1990, to Riggs' Clayton as well as his Raleigh address, to Trooper McLeod who had authorized appellant to tow and store the BMW, and to appellant. Subsequently, the DMV notified appellant that it had been unable to secure delivery of the certified mail notice to Riggs. DMV also informed appellant that it could contact the Clerk of Court in its county and file a petition for authorization to sell the vehicle.

Appellant filed a Petition for Motor Vehicle Lien Sale Authorization to have a public sale on 30 June 1990 at 10:00 a.m. The Cumberland County Clerk of Court issued an order authorizing the sale as requested to take place at appellant's place of business. Appellant made several copies of the order and mailed one to the bank which previously held the car loan and one to Riggs at the Clayton address. Appellant did not advertise the sale in the newspaper or publicize the sale other than to tell his friend, Wimpy McCorquodale, that he needed two bidders present at the sale.

On the date set for the sale, appellant arrived at his place of business between 10:30 and 10:45 a.m. Wimpy McCorquodale and his son were already there, and one of them bid \$1,200 for the BMW. Appellant then bid \$1,325 on the BMW. After soliciting other bids from Mr. McCorquodale and his son and receiving no response, appellant declared that the car was sold and that he was the legal owner. The average retail book value of the BMW on the date of sale was \$20,150, and the average trade-in value was \$17,450, not including add-ons for accessories.

Appellant later filed a Report of Sale with the Cumberland County Clerk of Court, stating that a copy of the petition and order authorizing the sale had been sent to Riggs at the Clayton address, appellant was the highest bidder in the amount of \$1,325, and Mack's Towing Service was the second highest bidder at \$1,200. The Report also stated that the total amount collected was \$1,325, of which appellant retained \$25 for the cost of the proceeding and \$1,300 to satisfy the lien. After receiving this Report, the Clerk issued an Order Directing Transfer of Motor Vehicle After Lien Sale which directed the DMV to cancel the existing title and to issue a new title to Ernie's Tire Sales & Service.

Lloyds of London first became aware that the BMW had been recovered on 17 July 1990, and subsequently filed a Motion to



## IN RE ERNIE'S TIRE SALES &amp; SERVICE v. RIGGS

[106 N.C. App. 460 (1992)]

Set Aside Report of Sale and a Motion to Set Aside Order Directing Transfer of Motor Vehicle After Lien Sale. The Clerk issued an Amended Order on 20 July 1990, to protect and preserve the automobile and not dispose of same until ownership could be determined by the court.

Plaintiffs filed suit, alleging that the sale of the BMW, as conducted by defendant, was improper. They also made a motion requesting that the sale be set aside which the trial judge granted. It is from this order that defendant appealed to this Court.

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The sole issue presented for our review is whether N.C. Gen. Stat. § 44A-4(b)(1) (1991) allows lienors of abandoned motor vehicles to dispose of them without complying with the requirements of section 44A-4 as they pertain to other types of personal property when the registered or certified mail notice has been returned as undeliverable. For the reasons which follow, we affirm the decision of the trial court.

The issue presented by appellant is a matter of first impression for this Court. We begin our analysis by examining the statutory language of N.C. Gen. Stat. § 44A-4(b)(1). The pertinent provisions follow:

If the Division notifies the lienor that the registered or certified mail notice has been returned as undeliverable, the lienor may institute a *special proceeding* in the county where the vehicle is being held, for authorization to sell that vehicle. In such a proceeding a lienor may include more than one vehicle, but the proceeds of the sale of each shall be subject only to valid claims against that vehicle, and any excess proceeds of the sale shall escheat to the State . . . .

The application to the clerk in such a special proceeding shall contain the notice of sale information set out in subsection (f) hereof. If the application is in the proper form the clerk shall enter an order authorizing the sale on a date not less than 14 days therefrom, and the lienor shall cause the application and order to be sent immediately by first-class mail pursuant to G.S. 1A-1, Rule 5, to each person to whom the Division has mailed notice pursuant to this subsection. Following the authorized sale the lienor shall file with the clerk a report in the form of an affidavit, stating that two or more bona

## IN RE ERNIE'S TIRE SALES &amp; SERVICE v. RIGGS

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vide bids on the vehicle were received, the names, addresses and bids of the bidders, and a statement of the disposition of the sale proceeds. The clerk then shall enter an order directing the Division to transfer title accordingly.

*Id.* (emphasis added).

When reviewing appellant's assertion that a "special proceeding" serves as a substitute for a public or private sale, we must keep in mind the well-established maxim of statutory construction that all parts of a statute must be read together, neither taking specific words out of context, nor interpreting one part so as to render another meaningless. *State v. Tew*, 326 N.C. 732, 392 S.E.2d 603 (1990); *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981); *State ex rel. Comm'r of Ins. v. North Carolina Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547, *reh'g denied*, 301 N.C. 107, 273 S.E.2d 300 (1980). We, therefore, will examine section 44A-4, in its entirety, for language which sheds light on the meaning of "special proceeding" under subsection (b).

Within subsection 44A-4(b)(1), there is language which indicates that a "special proceeding" does not replace the public or private sale requirement. An application for a "special proceeding" must contain the information specified in subsection (f); one of the items of information called for is as follows: "(6) If a private sale the date upon or after which the sale is proposed to be made, or if a public sale the date and hour when the sale is to be held." N.C. Gen. Stat. § 44A-4(f)(6) (1991). Appellant, in the application to the clerk, stated an intention to conduct a public sale, indicating that he read the statute as requiring him to conduct either a commercially reasonable public or private sale.

Furthermore, subsection 44A-4(a), in relevant part, provides,

(a) Enforcement by Sale. — If the charges for which the lien is claimed under this Article remain unpaid or unsatisfied for 30 days following the maturity of the obligation to pay any such charges, the lienor may enforce the lien by public or private sale as provided in this section.

N.C. Gen. Stat. § 44A-4(a) (1991). Subsection (a), Enforcement by Sale, is a general provision and addresses methods of enforcing liens. The provision at issue, subsection (b), on the other hand, is entitled Notice and Hearing and does not purport to prescribe the method of sale. A "special proceeding" under subsection (b)

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[106 N.C. App. 465 (1992)]

serves as a means of securing authorization to sell the vehicle and as a method for obtaining a title transfer from the DMV. Such a proceeding is necessary since registered motor vehicles, unlike other items of personal property, require the involvement of a state agency to effect a transfer of title. *See Caesar v. Kiser*, 387 F. Supp. 645 (M.D.N.C. 1975).

In the case before this Court, appellant concededly failed to conduct a proper private sale since subsection 44A-4(c) prohibits a lienholder from purchasing the subject property at a private sale. Appellant likewise did not comply with the public sale requirements under subsection 44A-4(d). The language of N.C. Gen. Stat. § 44A-4 clearly mandates that a lienholder conduct either a public or private sale. To adopt the interpretation urged by appellant would allow for a lienholder to sell a vehicle in a commercially unreasonable manner to himself or his friends simply because the debtor cannot be located. For the foregoing reasons, we affirm the decision of the trial court to set aside the sale.

The decision of the trial court is,

Affirmed.

Judges LEWIS and WALKER concur.

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UNITED SERVICES AUTOMOBILE ASSOCIATION, PLAINTIFF v. UNIVERSAL  
UNDERWRITERS INSURANCE COMPANY, DEFENDANT

No. 9110SC198

(Filed 16 June 1992)

**Insurance § 92.1 (NCI3d)— loaner car—garage liability policy—  
driver's family policy—primary and secondary coverage**

A dealer's garage liability policy provided primary coverage and the driver's family automobile policy provided secondary coverage for an accident involving a loaner car being used while a truck purchased from the dealer was being repaired where each policy contained language purporting to establish itself as secondary coverage in the presence of other coverage.

**Am Jur 2d, Automobile Insurance §§ 2, 220.**

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[106 N.C. App. 465 (1992)]

APPEAL by plaintiff from judgment entered 9 January 1991 in WAKE County Superior Court by *Judge Henry V. Barnette, Jr.* Heard in the Court of Appeals 2 December 1991.

This case presents the question of determining primary and secondary coverage between two insurance policies when each policy contains a clause purporting to establish itself as secondary coverage in the presence of other applicable coverage. Plaintiff United Services Automobile Association (hereinafter "USAA") is the insurance carrier for William H. Murdaugh, Jr. (hereinafter "Murdaugh"). USAA insures Murdaugh's family vehicles including a 1983 Ford Escort. Defendant Universal Underwriters Insurance Company (hereinafter "Universal") is the insurance carrier for Helmold Ford, Inc. of Raleigh, North Carolina. Universal insures the automobiles of the dealership. These include those automobiles for sale by the dealership and those used in the operation of the dealership.

Prior to 18 June 1985, Murdaugh brought his 1983 Ford Escort to Helmold Ford as a trade-in on a 1985 Ford truck. On 15 June, Murdaugh instructed USAA to delete his Ford Escort from his policy and then requested USAA to add the Ford truck on 17 June. The purchase date of the Ford truck was to be 18 June; however, minor problems with the truck prevented it from being delivered on this date. The registered title to the truck remained with Helmold Ford until all necessary repairs were made on the truck. Helmold Ford provided Murdaugh with a Ford LTD for his use while waiting for repairs to be completed on the truck. The LTD's title was held by Helmold Ford and dealer tags issued to Helmold Ford were used on the car.

Murdaugh gave permission to his son to drive the Ford LTD on 18 June. Murdaugh's son was an insured driver according to the language found in both the USAA policy and the Universal policy. Murdaugh's son was involved in a collision with another car on 18 June which seriously injured one person in the other car. This accident gave rise to a lawsuit against Murdaugh and his son for the personal injuries of the other party.

Murdaugh then made repeated requests upon Universal to defend him and his son in the lawsuit filed against them. Universal declined these requests. Murdaugh then assigned and transferred his rights against Universal to USAA who then agreed to defend Murdaugh according to the conditions set out in the USAA policy.

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This lawsuit was later settled out of court by USAA paying the injured party approximately \$23,000.00.

USAA filed suit against Universal seeking to recover any costs it would incur in its representation of Murdaugh at trial or in settling the lawsuit without a trial. USAA alleged that the language in Universal's policy made the Universal policy primary to the USAA policy and that Universal had breached its contractual obligations in declining to represent Murdaugh. USAA alleged in the alternative that Universal owed it a pro-rata share of the expenses to be incurred by representing Murdaugh and prayed for declaratory judgment for all sums to be incurred on the ground that Universal was legally bound to afford primary liability coverage to Murdaugh.

Universal answered with general denials to USAA's allegations and moved for dismissal under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. Universal alleged that the language contained in its policy clearly established in this instance that it was not responsible for primary coverage and alleged, in the alternative, the most for which they would be liable was a pro-rata share of the expenses incurred by USAA. Universal provided this pertinent language found in the general conditions section of its policy:

**OTHER INSURANCE**—Unless stated otherwise in a Coverage Part, this insurance is excess over any other insurance, whether it is collectible or not.

If more than one Coverage Part should insure a LOSS or INJURY the most WE will pay is the highest limit applicable. The limit under that Coverage Part will be inclusive of the lower limit in the other Coverage Part(s), not in addition to them.

Universal also provided this pertinent language from the garage insurance section of its policy:

**WHO IS AN INSURED**—With respect to GARAGE OPERATIONS, other than the AUTO HAZARD or INJURY as defined in Group 5:

\* \* \*

With respect to the AUTO HAZARD:

\* \* \*

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3. Any other person or organization required by law to be INSURED while using an AUTO covered by the Coverage Part with the scope of YOUR permission.

OTHER INSURANCE—The insurance afforded by this Coverage Part is primary, except it is excess:

\* \* \*

(2) for any person or organization who becomes an INSURED under this Coverage Part as required by law.

Finally, Universal alleged that the language found in the USAA policy established that the car provided by Helmod Ford and driven by Murdaugh's son was a "replacement" vehicle and this established that USAA was responsible for primary liability coverage. The applicable language of the USAA policy is as follows:

"Your covered auto" means:

1. Any vehicle shown in the Declarations.
2. Any of the following types of vehicles on the date you became the owner:
  - a. A private passenger auto;

\* \* \*

If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.

This case came on for trial on 29 October 1990. Both parties waived trial by jury and agreed that the trial court may make findings of fact and reach appropriate conclusions of law. The trial court found that both policies contained "other insurance" clauses as attempts to make the coverage provided under their respective policies contingent upon the occurrence of certain events. Further, the trial court found that the Murdaughs were insureds under the Universal policy; that the Universal policy did not provide other "applicable liability insurance" or "other collectible insurance" within the meaning of the "Other Insurance" clause found in the USAA policy; and that the coverage provided under the Universal policy was in excess of the USAA policy.

Finally, the trial court found that USAA specifically contracted to defend the Murdaughs and provide primary liability coverage, that this coverage was sufficient to cover the expenses of the

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[106 N.C. App. 465 (1992)]

lawsuit against the Murdaughs and that Universal owed no duty to provide a defense to the Murdaughs or pay any of the defense costs. The trial court concluded USAA should not recover any amount from Universal and dismissed the action. USAA appeals.

*Nichols, Caffrey, Hill, Evans & Murrelle, by Karl N. Hill, Jr., for plaintiff-appellant.*

*Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Reid Russell, for defendant-appellee.*

WELLS, Judge.

This case is controlled by our decision in *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 104 N.C. App. 206, 408 S.E.2d 750, *disc. review allowed*, 330 N.C. 445, 412 S.E.2d 81 (1991). In *United Services*, this Court was faced with the identical issue of determining primary and secondary coverage between insurance policies issued by Universal and USAA. The facts of *United Services* reveal that USAA insured cars owned by Sanford E. Isenhour (hereinafter "Isenhour"). Universal provided coverage to Warden Motors in Forsyth County, North Carolina. Isenhour went to Warden Motors on 27 January 1988 for the purpose of purchasing a truck and was given permission to test drive a 1981 Ford truck. Isenhour ran into the rear of another vehicle while test driving the truck. As a result of this collision, the owner of the other vehicle filed a personal injury action against Isenhour which was eventually settled by USAA.

USAA then made demands on Universal to reimburse them for the cost of settling the Isenhour case which Universal refused. USAA then filed a declaratory action seeking a declaration that the garage policy issued by Universal was primary coverage in an accident involving an automobile owned by Warden Motors. The trial court then examined pertinent provisions in each policy and concluded that the Universal policy provided primary coverage. On appeal, this Court examined the applicable provisions found in the USAA and Universal policies and determined that the trial court was correct in determining the Universal policy provided primary coverage.

Our review of the *United Services* case and the present case reveals that these cases are not distinguishable. The competing provisions in *United Services* and the present case are nearly iden-

## STATE EX REL. LONG v. INTERSTATE CASUALTY INS. CO.

[106 N.C. App. 470 (1992)]

tical and the facts relating to the application of these provisions are nearly identical as well. Therefore, we are bound by this Court's rationale and decision in *United Services*. Accordingly, the decision of the trial court in this case is reversed and this case is remanded for entry of judgment consistent with this opinion.

Reversed and remanded.

Judges LEWIS and WALKER concur.

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STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA, PLAINTIFF v. INTERSTATE CASUALTY INSURANCE COMPANY, DEFENDANT v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, DEFENDANT-INTERVENOR v. IFCO, INC., FINCO, INC., AND SHIVAR AND SON PREMIUM FINANCE COMPANY, INC., DEFENDANT-INTERVENORS

No. 9110SC777

(Filed 16 June 1992)

**1. Rules of Civil Procedure § 24 (NCI3d)— service contracts guaranteed by insurer— liquidation of insurer— no right of purchasers to intervene**

Purchasers of canceled extended automobile service contracts guaranteed by defendant insurer were not entitled to intervene as a matter of right under N.C.G.S. § 1A-1, Rule 24(a)(2) in a proceeding to liquidate defendant since they may protect their interests by filing a proof of claim pursuant to N.C.G.S. § 58-30-190.

**Am Jur 2d, Parties § 127.**

**2. Rules of Civil Procedure § 24 (NCI3d)— denial of permissive intervention— no abuse of discretion**

The trial court did not abuse its discretion in denying appellants' motion under N.C.G.S. § 1A-1, Rule 24(b)(2) for permission to intervene in a proceeding to liquidate defendant insurer on the ground that such intervention would unduly delay and prejudice the adjudication of the rights of the original parties.

**Am Jur 2d, Parties § 127.**



## STATE EX REL. LONG v. INTERSTATE CASUALTY INS. CO.

[106 N.C. App. 470 (1992)]

APPEAL by plaintiff intervenor G. Harrison Hamil, on behalf of himself and his proposed class, from order entered 4 January 1991 by *Judge Henry V. Barnette, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals 14 April 1992.

In 1985, William C. Shackelford (Shackelford) founded National Warranty Corporation (National Warranty) for the purpose of selling extended automobile service contracts to purchasers of new and used cars. These contracts were known as the "Winners Circle Protection Plan." Purchasers of "Winners Circle" contracts paid an extra several hundred dollars at the time they purchased an automobile and in return they received a warranty longer than that offered by the selling dealer or manufacturer. During 1985 and 1986, National Warranty sold thousands of these contracts in eight states, including North Carolina. The terms of these contracts provided that National Warranty had the right to terminate the contracts, but guaranteed a "refund for the cost of the unused protection."

Interstate Casualty Insurance Company (Interstate) guaranteed some of these "Winners Circle" contracts. The terms of Interstate's guarantee provided that if National Warranty did not pay the claim within sixty days, the consumer could apply directly to Interstate for the protection promised by the warranty.

In September 1986, National Warranty mailed a Notice of Cancellation to all service contract purchasers whose contracts were still in force. Soon thereafter, the N. C. Attorney General's office received a large number of complaints from holders of these Winners Circle contracts. After investigation, the State advised National Warranty, Interstate, Shackelford and James W. McDaniel (President of National Warranty) that it considered their acts and practices in relation to the Winners Circle contracts to constitute an unfair and deceptive trade practice in violation of G.S. 75-1.1. On 23 February 1987, all parties entered into a settlement agreement which provided that National Warranty would make a *pro rata* refund to every Winners Circle contract purchaser who requested it.

After execution of this settlement agreement, the State observed that National Warranty was not in compliance with the terms of the settlement. The State then filed an enforcement action, which was settled by a second settlement agreement dated 10 February 1989, under which the State released National Warranty, Interstate,

## STATE EX REL. LONG v. INTERSTATE CASUALTY INS. CO.

[106 N.C. App. 470 (1992)]

Shackelford and McDaniel from all claims in consideration of a lump sum payment of \$122,429.

On 28 March 1989, a class action was filed against National Warranty on behalf of purchasers of the terminated Winners Circle contracts. This class action complaint asserted claims against National Warranty, Interstate, and Shackelford. Shackelford was alleged to be the *alter ego* who completely dominated both National Warranty and Interstate. On 1 August 1989, the Lenoir County Superior Court dismissed this complaint and this Court affirmed the dismissal in an unpublished opinion. *Cox v. National Warranty Corp.*, 103 N.C.App. 170, 404 S.E.2d 512 (1991).

While the *Cox v. National Warranty* appeal was pending, as a result of the apparent insolvency of Interstate, the State instituted the present liquidation proceeding in Wake County Superior Court. On 9 April 1990, an order was entered appointing the North Carolina Commissioner of Insurance as the liquidator of Interstate. On 8 May 1990, the plaintiffs in the *Cox v. National Warranty* action filed a class Proof of Claim in the liquidation proceeding. Thereafter, on 7 September 1990, Philip J. Wise (Wise) filed a Motion to Intervene on behalf of himself and other persons similarly situated. Wise was a plaintiff class member in the original *Cox v. National Warranty* action. Before this motion was heard, Wise moved that G. Harrison Hamil (Hamil) be substituted as representative for the intervenors.

On 4 January 1991, the trial court entered an order denying the motion to intervene. Hamil and the class he represents (appellants) appeal the denial of their motion to intervene.

*Attorney General Lacy H. Thornburg, by Associate Attorney General William W. Finlator, Jr., for plaintiff appellee.*

*Moore & Brown, Washington, D. C., by Beverly C. Moore, Jr., and Moore & Brown, Winston-Salem, N. C., by B. Ervin Brown, II, for plaintiff intervenor appellant G. Harrison Hamil.*

*Moore & Van Allen, by Joseph W. Eason, A. Bailey Nager, and Christopher J. Blake, for defendant appellee North Carolina Insurance Guaranty Association.*

WALKER, Judge.

Appellants contend the trial court should have granted their motion to intervene both as a matter of right pursuant to Rule

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[106 N.C. App. 470 (1992)]

24(a)(2), N.C. Rules of Civil Procedure and permissively pursuant to Rule 24(b), N.C. Rules of Civil Procedure. We now examine each of these contentions separately.

[1] Appellants argue that they should be allowed to intervene as a matter of right in order to obtain copies of all the Winners Circle contracts. They assert this information is needed so that other Winners Circle purchasers can be informed of their rights. In particular, appellants contend that unless they are allowed to intervene, Winners Circle purchasers in Georgia will not be informed of a \$25,000 Interstate deposit available in that state. We find no merit in appellants' contentions.

Rule 24(a)(2) provides:

(a) *Intervention of right.*—Upon timely application anyone shall be permitted to intervene in an action:

. . . .

- (2) When the applicant claims an interest relating to the property or transaction which is the subject of the action and he is so situated that the disposition of the action may as a practical matter impair or impede his ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

Rule 24(a)(2) requires three prerequisites before intervention is granted as a matter of right: (1) an interest relating to the property or transaction; (2) practical impairment of the protection of that interest; and (3) inadequate representation of that interest by existing parties. *Ellis v. Ellis*, 38 N.C.App. 81, 247 S.E.2d 274 (1978).

We recognize that appellants have met the first requirement for intervention as a matter of right. As purchasers of the terminated Winners Circle contracts (which were guaranteed by Interstate), they have an interest in the subject matter of this liquidation proceeding. However, appellants have failed to establish the other requirements which must be met before intervention as a matter of right is allowed.

In order to adequately protect their interests, appellants assert that intervention is required. However, they may protect their interests by filing a Proof of Claim pursuant to G.S. 58-30-190, which from the record it appears they have already done. If the

## STATE EX REL. LONG v. INTERSTATE CASUALTY INS. CO.

[106 N.C. App. 470 (1992)]

liquidator denies their Proof of Claim, appellants may thereafter obtain judicial review of the matter under G.S. 58-30-205. Furthermore, we fail to see how their interest will not be adequately represented by the liquidator. In his capacity as Liquidator, the Commissioner of Insurance is bound by law to protect the interests of policyholders, claimants and creditors. G.S. 58-30-1; G.S. 58-30-105; G.S. 58-30-120.

Pursuant to Article 30 of Chapter 58, the proper mechanism for asserting a claim against an insurer in liquidation is by means of filing a Proof of Claim and the purpose of this procedure is in part to enhance "efficiency and economy of liquidation." G.S. 58-30-1(c)(3). Allowing intervention as an alternative to the established procedures of Article 30 could only increase the costs of liquidation and therefore decrease the assets available to all claimants (including appellants). Accordingly, we hold the trial court did not err in denying appellants' motion to intervene as a matter of right.

[2] Appellants next contend the trial court erroneously denied their motion to intervene under Rule 24(b)(2), N.C. Rules of Civil Procedure. Permissive intervention under Rule 24(b)(2) rests within the discretion of the trial court and will not be disturbed on appeal absent an abuse of discretion. *Ellis v. Ellis*, 38 N.C.App. 81, 247 S.E.2d 274 (1978). In the present case, the trial court denied appellants' motion under Rule 24(b)(2) "because such intervention will unduly delay and prejudice the adjudication of the rights of the original parties." The record before us supports this conclusion and does not reveal any abuse of discretion.

For the aforementioned reasons, the decision of the trial court is

Affirmed.

Judges LEWIS and WYNN concur.

## N.C. FARM BUREAU MUT. INS. CO. v. AYAZI

[106 N.C. App. 475 (1992)]

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY,  
PLAINTIFF v. AMIR H. AYAZI, FAROUKH HASHEMI AND NATIONWIDE  
MUTUAL INSURANCE COMPANY, DEFENDANTS

No. 9124SC636

(Filed 16 June 1992)

**1. Appeal and Error § 175 (NCI4th)— automobile accident—  
insurance— settlement— appeal of declaratory judgment action  
not moot**

An appeal was not moot in a declaratory judgment action arising from a motor home accident where the seller, Henderson, had a policy with North Carolina Farm Bureau; the motor home was sold to Hashemi but the credit corporation holding title did not transfer title; defendant Ayazi was injured in a collision while a passenger in the motor home; Ayazi was an insured under a policy with Nationwide owned by his mother; Farm Bureau brought this action; summary judgment was entered for Ayazi holding that Hashemi was an insured under the Farm Bureau policy; and Farm Bureau settled with Ayazi. Farm Bureau would have a claim against Nationwide based on equitable subrogation if it were held that Hashemi was not an insured under the Farm Bureau policy.

**Am Jur 2d, Automobile Insurance §§ 438, 467.**

**2. Insurance § 91 (NCI3d)— automobile accident— vehicle recently sold—title not transferred—buyer insured under seller's policy**

Farm Bureau was liable for damages to a passenger in an automobile accident where Henderson owned a motor home and had a policy with Farm Bureau; Henderson sold the motor home to Hashemi but the credit company which held the title did not transfer the title; Ayazi was injured as a passenger when the motor home was being driven by Hashemi; and Ayazi was an insured under a UM/UIM policy with Nationwide owned by his mother. Although Hashemi assumed the loan and took possession of the vehicle, the certificate of title was never executed and, under *Jenkins v. Aetna Casualty and Surety Co.*, 324 N.C. 394, Hashemi is not the owner of the motor home for purposes of the Farm Bureau policy and Farm Bureau is liable. Although Farm Bureau contended that an exception should be created because both Henderson and Hashemi ex-

## N.C. FARM BUREAU MUT. INS. CO. v. AYAZI

[106 N.C. App. 475 (1992)]

cuted a power of attorney to transfer title as part of the Transfer Agreement and the credit company held the certificate of title, the Court of Appeals held that *Ohio Casualty Insurance Co. v. Anderson*, 59 N.C. App. 621, was distinguishable and declined to establish the exception.

**Am Jur 2d, Automobile Insurance § 226.**

APPEAL by plaintiff from judgment entered 21 March 1991 by *Judge Charles C. Lamm* in WATAUGA County Superior Court. Heard in the Court of Appeals 15 April 1992.

On 26 July 1986 Eric Henderson (Henderson) purchased a 1986 Lindy motor home. He financed the purchase through a "Consumer Credit Installment Sale Contract, Security Agreement, and Disclosure Statement" with Chrysler First Credit Corporation (First Credit). First Credit had possession of the certificate of title from the date it was issued until 13 April 1989. Henderson insured the motor home under a business insurance policy with North Carolina Farm Bureau Mutual Insurance Company (Farm Bureau). That policy was in effect between 25 July 1988 and 25 January 1989.

In August 1988 Henderson advertised the motor home for sale. Faroukh Hashemi (Hashemi) responded to the add. The two men met on 13 August 1988 and agreed that Hashemi would purchase the motor home and assume Henderson's loan with First Credit. Henderson gave Hashemi First Credit's phone number so that he could qualify to assume the loan. During the first week of September First Credit notified Henderson that Hashemi had been approved to assume the loan. First Credit also informed Henderson that he would receive a "Transfer Assignment and Agreement" (Transfer Agreement) which both he and Hashemi would be required to sign in the presence of a notary public. On 14 September 1988 the two men signed the Transfer Agreement in the presence of a notary public. After signing the Transfer Agreement, Henderson removed his North Carolina license tag from the motor home; gave the motor home keys to Hashemi; and delivered possession of the motor home to Hashemi. Hashemi then placed a Virginia license tag on the motor home. The signed Transfer Agreement was mailed to First Credit.

On 17 October 1988 Hashemi was driving the motor home when it was involved in a collision with a tractor trailer. Ayazi, a passenger in the motor home, was injured. At the time of the

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[106 N.C. App. 475 (1992)]

accident, Ayazi's mother, Parvane M. Hashemi-Ayazi, owned a motor vehicle liability policy issued by defendant Nationwide which provided both UM and UIM coverage. Ayazi was an insured under that policy. On 3 November 1988 Hashemi submitted an application for insurance to cover the motor home. In the application he stated that he was the registered owner of the motor home.

On 5 June 1990, Ayazi filed a personal injury action against both Hashemi and Henderson in Fairfax County, Virginia. Farm Bureau then filed this declaratory judgment action on 27 June 1990. Subsequently, Farm Bureau and Ayazi both made motions for summary judgment. On 21 March 1991 summary judgment was entered in favor of Ayazi holding that Hashemi was an insured under the Farm Bureau policy. Farm Bureau has since settled the personal injury suit brought by Ayazi.

Farm Bureau appeals.

*Willardson & Lipscomb, by William F. Lipscomb, for plaintiff-appellant Farm Bureau.*

*Eggers, Eggers & Eggers, by Rebecca Eggers-Gryder, for defendant-appellee Nationwide.*

EAGLES, Judge.

[1] Initially, we address Nationwide's contention that this appeal is moot. Nationwide argues that because Farm Bureau is the primary carrier Farm Bureau's settlement with Ayazi removes any issue for resolution from before this court. This argument overlooks the express purpose of Farm Bureau's appeal, determination of whether Farm Bureau is a responsible party. If we were to hold that Hashemi was not an insured under the Farm Bureau policy, Farm Bureau would have a claim against Nationwide based on equitable subrogation. *See, e.g., Jamestown Mut. Ins. Co. v. Nationwide Mut. Ins. Co.*, 277 N.C. 216, 176 S.E.2d 751 (1970). Accordingly, we hold that this appeal is not moot, and we address the appeal on its merits.

[2] Farm Bureau concedes that the policy Henderson had with them was in effect at the time of the 17 October 1988 accident; that the motor home was a "covered auto" under the policy; and that Henderson was insured under the policy. However, Farm Bureau argues that Faroukh Hashemi was not an insured under the policy. Thus, the issue here is whether Hashemi was insured under the

## N.C. FARM BUREAU MUT. INS. CO. v. AYAZI

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Farm Bureau policy. The Farm Bureau policy provides in pertinent part:

**D. WHO IS INSURED.**

\* \* \*

2. Anyone else is an **insured** while using with **your** permission a covered **auto you** own, hire or borrow except:

Because of Farm Bureau's above listed concessions and because Farm Bureau has abandoned its second assignment of error, that Henderson gave Hashemi permission to drive the motor home, pursuant to N.C.R. App. P. 28(b)(5), the remaining determinative issue is whether, for purposes of the Farm Bureau policy, Henderson was the owner of the motor home at the time of the accident. We hold that he was the owner of the motor home and accordingly affirm the trial court's decision.

*Jenkins v. Aetna Casualty and Surety Co.*, 324 N.C. 394, 378 S.E.2d 773 (1989) controls here. The facts of *Jenkins* were as follows: Patterson purchased an automobile from Junior for \$400 cash and took possession of the vehicle. No certificate of title was passed in the transaction. Several years later Patterson was driving the car when it was involved in an accident. A passenger in the car was injured; the passenger sued and obtained a judgment against Patterson. Patterson then brought suit against the defendant insurance company to satisfy the judgment. On appeal this court held that Patterson "owned" the vehicle because he acquired an equitable interest in the car by paying full price for the vehicle and by taking possession of it. *Jenkins v. Aetna Casualty and Surety Co.*, 91 N.C. App 388, 371 S.E.2d 761 (1988). On further appeal, however, the Supreme Court disagreed and reversed. The Supreme Court held:

N.C.G.S. § 20-72 requires proper execution of an assignment and delivery of the certificate of title before "legal" title and ownership pass. Applying the statutory definition of "owner," the statutory requirements for passing title and the statutory requirements for liability insurance, we have held that for purposes of tort law and liability insurance coverage, no ownership passes to the purchaser of a motor vehicle which requires registration until: (1) the owner executes, in the presence of a person authorized to administer oaths, an assignment and warranty of title on the reverse of the certificate of title,



## N.C. FARM BUREAU MUT. INS. CO. v. AYAZI

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including the name and address of the transferee; (2) there is an actual or constructive delivery of the motor vehicle; and (3) the duly assigned certificate of title is delivered to the transferee (or lienholder in secured transactions). (Citation and footnote omitted.)

\* \* \*

The evidence before the trial court in this case established that Patterson paid \$400 cash as the total price for the Camaro and took immediate possession of the vehicle, but he never received the certificate of title. There was no indication from the forecast of evidence presented to the trial court that the owner, Jerome Hall, ever properly executed an assignment of the certificate of title. Clearly, the parties to this transaction did not comply with the requirements of N.C.G.S. § 20-72(b) for the transfer of legal title and ownership. As this Court has construed the relevant statutory provisions, there had been no transfer of title and ownership of the Camaro to Patterson. Therefore, Patterson did not "own" the vehicle within the terms of the liability insurance policy.

*Jenkins*, 324 N.C. at 398-99, 378 S.E.2d at 776.

Here, Hashemi assumed the loan on the motor home and took immediate possession of the vehicle. However, the certificate of title was never executed in favor of Hashemi. Accordingly, under the *Jenkins* holding, for purposes of the Farm Bureau policy, Hashemi is not the owner of the motor home. Ownership remains with Henderson, and Farm Bureau is liable.

Notwithstanding *Jenkins*, Farm Bureau argues that this court should establish an exception to the three requirements quoted above and deem Hashemi to be the owner of the motor home. In support of this argument Farm Bureau cites *Ohio Casualty Insurance Co. v. Anderson*, 59 N.C. App. 621, 298 S.E.2d 56 (1982). Farm Bureau also argues that the lienholder, First Credit, held the certificate of title and that both Henderson and Hashemi executed the following power of attorney forms as part of the "Transfer Agreement."

I hereby appoint . . . Chrysler First Credit Corporation, as my attorney-in-fact, to apply for a certificate or duplicate certificate of title to, and to register; (and/or) to transfer title

## IN RE TYNER

[106 N.C. App. 480 (1992)]

or equity to; the vehicle . . . and for said purpose(s) to sign my name and do all things necessary to this appointment.

We recognize that *Anderson* established an exception to the three requirements listed above. However, we believe that *Anderson* is distinguishable from the instant case for the reasons stated in *Jenkins*. See *Jenkins*, 324 N.C. at 400, 378 S.E.2d at 777. Accordingly, we decline to establish another exception to the three requirements and we affirm the decision below. Our disposition of this appeal does not prejudice any cause of action Farm Bureau may have against First Credit.

Affirmed.

Judges ARNOLD and WELLS concur.

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IN RE: ANGELA LYNN TYNER

No. 9119DC506

(Filed 16 June 1992)

**1. Parent and Child § 1.5 (NCI3d)— termination of parental rights—letter from respondent—not an answer**

An order terminating parental rights was affirmed where respondent, incarcerated in Missouri, sent his attorney a letter denying the allegations of the petition which the attorney filed with the court. It could not be determined from the record when and for what purpose the letter was submitted to the court, and, because the appellate courts should not assume trial court error, the Court of Appeals could not assume that the letter was an answer.

**Am Jur 2d, Pleading § 125.**

**2. Parent and Child § 1.5 (NCI3d)— termination of parental rights—no answer—procedure**

An order terminating parental rights was affirmed where, despite the fact that respondent did not file a written answer to the petition, the trial court heard evidence, made findings of fact, and adjudicated the existence of a ground for ter-

## IN RE TYNER

[106 N.C. App. 480 (1992)]

minating the respondent's parental rights. The language of N.C.G.S. § 7A-289.28, which provides that the trial court shall issue an order terminating all parental and custodial rights of the respondent when a respondent does not file a written answer to a petition or does file a written answer but in an untimely fashion, must be construed to mean that in such situations the trial court may terminate the respondent's parental and custodial rights only if one or more grounds under N.C.G.S. § 7A-289.32 exist.

**Am Jur 2d, Parent and Child § 7.**

APPEAL by respondent from order entered 15 March 1991 in CABARRUS County District Court by *Judge Adam C. Grant, Jr.* Heard in the Court of Appeals 17 March 1992.

*Jeffrey D. Jones for petitioner-appellees.*

*James D. Foster for respondent-appellant.*

GREENE, Judge.

The respondent appeals from an order entered 15 March 1991 terminating the respondent's parental rights with regard to Angela Lynn Tyner.

The facts necessary to a resolution of the issue in this case are as follows: Angela Lynn Tyner (child) was born 9 August 1978 to Lynn Rayl (respondent) and Linda Lou Janice O'Neil (O'Neil). On 6 February 1985, O'Neil placed the child with William and Shirley Tyner (petitioners). The petitioners have had actual physical custody of the child since that date. On 6 March 1985, the petitioners filed a petition to adopt the child, and on 11 July 1986, the petitioners were granted custody, care, and control of the child. O'Neil consented to the adoption of the child by the petitioners.

On 3 October 1990, the petitioners filed a petition to terminate the respondent's parental rights with regard to the child. The petitioners alleged that the respondent's parental rights should be terminated for, among other things, the respondent's willful abandonment of the child for at least six consecutive months immediately preceding the filing of the petition. At the time of the petition, the respondent was incarcerated in a federal prison in Missouri. In early November, 1990, the respondent requested that an at-

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torney be appointed for him, and on 16 November 1990, the trial court appointed James D. Foster as the respondent's attorney.

On 15 March 1991, the petition came on for hearing at the Juvenile Session of the District Court for Cabarrus County, North Carolina. Because of his continued incarceration, the respondent did not attend the hearing. At some time either before or after the hearing, the respondent's attorney filed with the trial court a letter dated 28 January 1991 from the respondent to Mr. Foster. The trial court did not appoint a guardian ad litem for the child. After the hearing, the trial court found and concluded that the respondent had willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition and that the best interests of the child required that the respondent's parental rights be terminated. The trial court then terminated the respondent's parental rights.

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[1] The issue is whether the respondent's letter addressed to his attorney which the attorney filed with the trial court at sometime on the day of the hearing constituted an answer to the petition.

The respondent argues that the trial court erred in not appointing a guardian ad litem for the child when the respondent's attorney filed the respondent's letter with the trial court which allegedly denied material allegations of the petition. We disagree.

Assuming that the respondent's letter meets the requirements of N.C.G.S. § 7A-289.29(a) (1989 & Supp. 1991), the record does not indicate when the respondent's attorney filed the letter with the court nor does it indicate for what purpose the attorney filed the letter. According to the respondent's brief, his attorney filed the letter "immediately prior to the hearing on March 15, 1991" and filed the letter as an *answer*. To the contrary, the petitioners state in their brief that the trial court allowed the respondent's attorney to file the letter *after* the hearing on 15 March 1991 and only as *evidence* for the respondent, not as an answer. If the letter was filed after the hearing or was presented as evidence during or after the hearing, the letter was not an answer. N.C.G.S. § 7A-289.29(b) (1989 & Supp. 1991). Without engaging in raw speculation, it cannot be determined from this incomplete record when and for what purpose the respondent's attorney submitted the letter to the trial court. Therefore, because appellate courts should not assume trial court error when no error appears in the record,

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[106 N.C. App. 480 (1992)]

this Court cannot assume that the letter was an answer. *See State v. Alston*, 307 N.C. 321, 341, 298 S.E.2d 631, 645 (1983); *State v. Hedrick*, 289 N.C. 232, 234-35, 221 S.E.2d 350, 352 (1976) (appellate courts ordinarily will not consider matters discussed in briefs which are outside the record). On this record, because the respondent's letter cannot be regarded as an answer, the trial court was not required to appoint a guardian ad litem for the child. N.C.G.S. § 7A-289.29(c) (Supp. 1991) (trial court not required to appoint guardian ad litem for child unless answer is filed denying material allegation of petition). Any other construction of the procedural history of this case would impermissibly assume trial court error.

[2] The absence of an answer denying any of the material allegations of the petition, however, does not authorize the trial court to enter a "default type" order terminating the respondent's parental rights. *Cf. In re Curtis v. Curtis*, 104 N.C. App. 625, 627-28, 410 S.E.2d 917, 919 (1991) (Termination of Parental Rights Act does not provide summary proceeding to terminate parental rights). This is so because N.C.G.S. § 7A-289.28 (1989) requires the trial court to conduct a hearing on the petition to terminate the respondent's parental rights. The trial court must conduct this adjudicatory hearing pursuant to N.C.G.S. § 7A-289.30 (1989) which requires, among other things, the trial court to take evidence, find the facts based upon clear, cogent, and convincing evidence, and adjudicate "the existence or nonexistence of any of the circumstances set forth in G.S. 7A-289.32 which authorize the termination of parental rights of the respondent." N.C.G.S. § 7A-289.30(d), (e) (1989). If "circumstances authorizing termination of parental rights" are not found to exist, the trial court must dismiss the petition. N.C.G.S. § 7A-289.31(c) (1989). To construe N.C.G.S. § 7A-289.28 so as to allow a "default type" order terminating parental rights would require termination even when the facts do not support termination and thereby permit termination inconsistent with the best interests of the child. N.C.G.S. § 7A-289.22(2) (1989). Accordingly, the language of N.C.G.S. § 7A-289.28 which provides that the trial "court shall issue an order terminating all parental and custodial rights of the respondent" when a respondent does not file a written answer to a petition or does file a written answer but in an untimely fashion must be construed to mean that in such situations, the trial court "may" terminate the respondent's parental and custodial rights but only if one or more grounds for terminating his or her rights under N.C.G.S. § 7A-289.32 (1989) exist. *See In re Hardy*,

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[106 N.C. App. 484 (1992)]

294 N.C. 90, 97, 240 S.E.2d 367, 372 (1978) (legislative intent controls whether particular word in statute is mandatory or directory). This construction of N.C.G.S. § 7A-289.28 will protect the best interests of the child without violence to the statute, will give effect to all portions of the statute without creating mere surplusage, and will ensure that trial courts do not engage in summary determinations in termination of parental rights cases.

In this case, the trial court fully complied with the above procedure. Despite the fact that the respondent did not file a written answer to the petition, the trial court, nonetheless heard evidence, made findings of fact, and adjudicated the existence of a ground for terminating the respondent's parental rights. The respondent does not contest these findings and conclusions. Furthermore, we do not address the merits of the respondent's arguments concerning the trial court's alleged error in denying the respondent's motion for a continuance because the record does not indicate whether such motion was made or ruled upon. Accordingly, the trial court's order terminating the respondent's parental rights is

Affirmed.

Judges JOHNSON and COZORT concur.

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STATE OF NORTH CAROLINA v. JAMES B. PARKER

No. 9120SC380

(Filed 16 June 1992)

**1. Criminal Law § 903 (NCI4th)— refusal to read victim's testimony to jury—no denial of unanimous verdict**

Defendant was not denied his right to a unanimous verdict by the trial court's initial refusal to read the transcript of the victim's testimony to the jury after the foreman reported during deliberations that some jurors stated that they had difficulty understanding the victim's testimony where the trial court subsequently offered to have the victim's testimony read to the jury, this offer was rejected by the jury, and the jurors

## STATE v. PARKER

[106 N.C. App. 484 (1992)]

all responded affirmatively when the clerk asked the jury whether its verdict was unanimous.

**Am Jur 2d, Trial § 1688.****2. Constitutional Law § 374 (NCI4th)— first degree sexual offense— life imprisonment— not cruel and unusual punishment**

A sentence of life imprisonment imposed on defendant for first degree sexual offense does not constitute cruel and unusual punishment.

**Am Jur 2d, Criminal Law § 629.**

APPEAL by defendant from judgment entered 25 January 1991 by *Judge William H. Helms* in UNION County Superior Court. Heard in the Court of Appeals 16 January 1991.

Defendant was indicted and convicted of first degree kidnapping and first degree sexual offense. Defendant was sentenced to a term of forty years with the North Carolina Department of Correction for the kidnapping conviction and a consecutive life imprisonment term for the first degree sexual offense conviction. On the kidnapping charge, judgment was later arrested and the guilty verdict was set aside.

Recitation of the facts underlying the convictions is not necessary to disposition of this appeal. However, a brief discussion of the jury's deliberations is required. After deliberating for fifty-five (55) minutes, the jury returned to the courtroom and the following colloquy occurred:

THE COURT: I understand you have a question.

THE FOREMAN: Yes, sir. . . .

\* \* \*

THE FOREMAN: Could—could we have the transcript of [the victim]? Many of them said they could not understand him when he testified.

THE COURT: Approach the bench.

(Conference at the bench.)

THE COURT: A transcript is not available at this time. It would be necessary for the court reporter to do that, so

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[106 N.C. App. 484 (1992)]

I'm going to ask you to go back and resume your deliberations. If you have any further question along those same lines though, after deliberating further, if you will let me know, we will consider it further at that time. Go back to your jury room.

(The jury retires to the jury room.)

THE COURT: Any corrections or additions to those—

MR. HUFFMAN: No, Your Honor.

THE COURT: —comments to the jury?

MR. HUFFMAN: No, sir.

MR. WILLIAMS: Not from the State.

The jury returned to the jury room and a few moments later the jurors were excused for the evening. The next morning the following transpired.

(The verdict sheets are handed to the jury in the jury room at approximately 9:35 a.m.)

THE COURT: Let me see ya'll a minute.

(Conference at the bench.)

MR. HUFFMAN: Let me just observe for the record, I don't know if that's proper or not. Let them go ahead and have it. I don't think it could be much of an error, you know. If any—

THE COURT: Go bring Strong's Criminal Law, both volumes and see if anything is in there.

MR. HUFFMAN: For the record, Your Honor, the defendant would object to the reading.

THE COURT: Bring the jury back in.

(The jury returns to the courtroom at 10:05 a.m.)

THE COURT: Are you the foreman, ma'am?

THE FOREMAN: Yes.

THE COURT: All right. You informed me yesterday that some of you may have had some difficult [sic] hearing portions of the testimony of [the victim].

THE FOREMAN: Yes, sir.



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THE COURT: And overnight the court reporter has made a transcription of that testimony and if anyone is having trouble at this point recalling what his testimony was, we have that available.

THE FOREMAN: All right.

THE COURT: So the question is do you want to hear it again or not, or do all of you recall his testimony sufficiently to rule on the case.

THE FOREMAN: They say no.

THE COURT: All right. I didn't want any—any confusion about whether or not that would be made available because if you couldn't hear it we want to make absolutely certain that it was made available to you, and we have that. If you feel you do not need it, you're free to return to your jury room to deliberate. If any question arises or you have any problem with anything else, please let us know.

THE FOREMAN: Okay.

THE COURT: Thank you.

(The jury retires to the jury room at approximately 10:09 a.m.)

The jury later returned guilty verdicts against the defendant. Defendant appeals.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Norma S. Harrell, for the State.*

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

EAGLES, Judge.

## I

[1] Though at trial defendant objected to the reading of a part of the transcript, defendant now argues that the trial court erred by initially refusing to read the transcript of the victim's testimony to the jury after the jury began its deliberations. Specifically, the defendant now contends that the jury's verdict was not rendered by each of its twelve members. We disagree.

## STATE v. PARKER

[106 N.C. App. 484 (1992)]

This case is controlled by *State v. Jacobs*, 25 N.C. App. 500, 214 S.E.2d 254, *cert. denied*, 287 N.C. 666, 216 S.E.2d 909 (1975). In *Jacobs*, the jury returned from the jury room and the foreman asked the judge whether the jury could return a verdict when one of the jurors said that he had had "trouble hearing the testimony in th[e] case." *Id.* at 504, 214 S.E.2d at 257. The judge sent the jury back to the jury room with instructions to reach a unanimous verdict. *Id.* The jury later returned a verdict finding the defendant guilty of the crime charged. This Court held:

Defendant contends that the foregoing portions of the record demonstrate that in effect only eleven jurors decided this case and that he was thereby denied his constitutional right to have his case determined by a jury of twelve. We do not so read the record. On the contrary, whatever may have occurred in the jury room, the record makes clear that verdict as finally rendered was the unanimous verdict of all twelve jurors and that each assented thereto. Defendant's motion for mistrial was properly denied.

*Id.* at 505, 214 S.E.2d at 257.

Here, it is also clear that the jury's verdicts were unanimous. After the jury returned from the jury room and rendered its verdicts finding the defendant guilty of first degree kidnapping and first degree sexual offense, the clerk asked the jury whether the verdicts were unanimous. The transcript indicates the jurors responded affirmatively. The defendant did not have the jury individually polled and nothing in the record indicates that the verdicts reached were not agreed to by each of the jurors. This assignment is overruled.

## II

[2] Defendant next argues that his sentence to life imprisonment for committing first degree sexual offense violates his constitutional rights to be free from cruel and unusual punishment. "Our Supreme Court has rejected such an argument on many occasions." *State v. Davis*, 101 N.C. App. 12, 23, 398 S.E.2d 645, 652 (1990), *disc. review denied and appeal dismissed*, 328 N.C. 574, 403 S.E.2d 516 (1991). This assignment is also overruled.

No error.

Judges COZORT and ORR concur.

## DEPARTMENT OF TRANSPORTATION v. AUTEN

[106 N.C. App. 489 (1992)]

DEPARTMENT OF TRANSPORTATION, PLAINTIFF v. FRANK O. AUTEN,  
ET AL, DEFENDANTS

No. 9124SC678

(Filed 16 June 1992)

**Eminent Domain § 33 (NCI4th)— highway right of way— recording— not required before 1959**

The trial court did not err by holding that the Department of Transportation had a valid right of way across certain lots where the right of way was obtained in 1955 and not recorded. Under *Kaperonis v. North Carolina State Highway Commission*, 260 N.C. 587, DOT is not required by N.C.G.S. § 47-27 to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959.

**Am Jur 2d, Municipal Corporations § 532.**

APPEAL by defendant from order entered 1 April 1991 by Judge Charles C. Lamm, Jr., in WATAUGA County Superior Court. Heard in the Court of Appeals 11 May 1992.

On 18 February 1955 the State Highway and Public Works Commission, now the Department of Transportation (DOT), purchased a 100 foot right of way across lot 34 in Watauga County from Maurice Waddell, Sr. and Richard R. Pierce in preparation for the construction of N.C. Highway 105. On 29 September 1955 the Highway Commission purchased a 100 foot right of way across lots 31 and 32 from D. O. and Margaret N. Fugate. Neither right of way agreement was recorded.

In the late summer or early fall of 1986 Frank Auten, Dale Ward, Frank W. Petersilie, II, and John Winkler, Jr. agreed to form the 105 Ventures partnership. The partnership was created to purchase parcels of land along N.C. Highway 105 and combine them for development and resale. Wayne Smith agreed to help 105 Ventures finance the purchase in exchange for a one-half undivided interest in the properties. In the fall of 1986 Mr. Ward and Mr. Winkler, acting as trustees for the partnership, each acquired a parcel of land. One parcel consisted of lots 31 and 32; the other consisted of lot 34. Deeds for both parcels were recorded in November 1986.

## DEPARTMENT OF TRANSPORTATION v. AUTEN

[106 N.C. App. 489 (1992)]

On 18 July 1989 the DOT filed Complaints and Declarations of Taking and Notice of Deposit in a highway construction project to widen N.C. Highway 105. The defendants filed answers and denied plaintiff's claim to the 100 foot right of way. After an evidentiary hearing the trial court held that DOT had a valid 100 foot right of way. Defendants appeal.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General J. Bruce McKinney, for plaintiff-appellee.*

*Miller and Moseley, by Allen C. Moseley, for defendant-appellant.*

EAGLES, Judge.

Appellants argue, *inter alia*, that the trial court erred by holding that the DOT had a valid right of way across lots 31, 32 and 34. Specifically, appellant challenges the trial court's holding that prior to 1 July 1959 the DOT was not required to record right of way agreements. We agree with the trial court and affirm.

This case is controlled by *Kaperonis v. North Carolina State Highway Commission*, 260 N.C. 587, 133 S.E.2d 464 (1963). In *Kaperonis*, the Highway Commission obtained a 100 foot right of way in 1928 for the purpose of constructing Wilkinson Boulevard. Apparently, that right of way was not recorded. In 1962 the Highway Commission began and completed a project to widen the paved portions of Wilkinson Boulevard. The new construction was wholly within the 100 foot unrecorded right of way acquired in 1928. The adjacent landowners, however, claimed that the Highway Commission did not have title to the land because the prior right of way had not been recorded. Chief Justice Denny rejected this argument and wrote:

The appellants argue that the defendant has not established title to the right of way claimed because it has no deed of easement duly recorded. Be that as it may, it will be noted that Chapter 1244 of the Session Laws of 1959, amending G.S. 47-27, reads as follows: "From and after July 1, 1959 the provisions of this section shall apply to require the State Highway Commission to record as herein provided any deeds of easement, or any other agreements granting or conveying an interest in land which are executed on or after July 1, 1959,

STATE EX REL. UTILITIES COMM. v. CAROLINA UTILITY CUST. ASSN.

[106 N.C. App. 491 (1992)]

in the same manner and to the same extent that individuals, firms or corporations are required to record such easements.”

*Id.* at 600, 133 S.E.2d at 473. With the exception of a later amendment changing “State Highway Commission” to “Department of Transportation,” the portion of G.S. 47-27 quoted above has remained unchanged. We read *Kaperonis* to hold that G.S. 47-27 does not require the DOT to record deeds of easement or other agreements conveying interests in land executed prior to 1 July 1959.

We note that the appellant cites *Highway Commission v. Nuckles*, 271 N.C. 1, 155 S.E.2d 772 (1967) and *Highway Commission v. Wortman*, 4 N.C. App. 546, 167 S.E.2d 462 (1969) in support of his argument that no North Carolina court has addressed the issue of whether G.S. 47-27 required the DOT to record prior to 1 July 1959. Both cases expressly declined to address the issue raised here and were decided on other grounds.

We do not reach appellant’s remaining assignments.

Affirmed.

Judges ARNOLD and WELLS concur.

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STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION; NORTH CAROLINA NATURAL GAS CORPORATION (APPLICANT); AND PUBLIC STAFF—NORTH CAROLINA UTILITIES COMMISSION v. CAROLINA UTILITY CUSTOMERS ASSOCIATION, INC.

No. 9110UC168

(Filed 16 June 1992)

**Utilities Commission § 22 (NCI3d) — natural gas — increased cost of additional supplies — rate increase — necessity for general rate case**

The Utilities Commission was without authority to allow a natural gas utility to increase its rates pursuant to N.C.G.S. § 62-133(f) based on the increased cost of additional gas supplies since this matter should have been considered in a general rate case.

**Am Jur 2d, Public Utilities §§ 138, 321.**

STATE EX REL. UTILITIES COMM. v. CAROLINA UTILITY CUST. ASSN.

[106 N.C. App. 491 (1992)]

APPEAL by intervenor Carolina Utility Customers Association, Inc. from an order of the North Carolina Utilities Commission entered 31 October 1990. Heard in the Court of Appeals 13 November 1991.

*McCoy, Weaver, Wiggins, Cleveland & Raper, by Donald W. McCoy and Jeffrey N. Surlles, for applicant-appellee North Carolina Natural Gas Corporation.*

*Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Sam J. Ervin, IV, for intervenor-appellant.*

WELLS, Judge.

In an application dated 8 October 1990, North Carolina Natural Gas Corporation (hereinafter N.C.N.G.) applied to the North Carolina Utilities Commission (hereinafter the Commission) for permission to increase its rates to North Carolina customers. Carolina Utility Customers Association (hereinafter CUCA) was allowed to intervene, by order of the Commission dated 26 October 1990.

N.C.N.G.'s application was filed pursuant to N.C. Gen. Stat. § 62-133(f). In its application, N.C.N.G. represented that it had arranged to receive additional natural gas supplies from Trans-Continental Gas Pipeline Corporation (Transco), which would increase its overall cost of gas and requested permission to pass on this increased cost through various rate increases to its residential, commercial, and industrial customers.

CUCA, in its intervention, alleged that N.C.N.G.'s application should be considered only after a full evidentiary hearing in a general rate case proceeding under G.S. § 62-133(a) through (c). The Commission denied CUCA's request and allowed the proposed increases to go into effect.

For the same reasons stated in our opinion in *State of North Carolina ex rel. Utilities Commission et al v. Carolina Utility Customers Association, Inc. et al* (No. 911UC205, filed 19 May 1992), 106 N.C. App. 306, 416 S.E.2d 199 (1992), the Commission was without authority to allow the rate increase pursuant to the provisions of G.S. § 62-133(f). Therefore, the order of the Commission under appeal in this case must be and is

Reversed and vacated.

Judges EAGLES and WALKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION  
FILED 16 JUNE 1992

CARLTON v. CARLTON No. 9114DC594	Durham (88CVD3120)	Affirmed
COMBUSTION SYSTEMS SALES v. HARRELSON MECHANICAL CONTRACTORS No. 9118SC599	Guilford (88CVS8603)	No Error
CRUMPTON v. CRUMPTON No. 918DC467	Lenoir (89CVD257)	Affirmed in part & vacated & remanded in part
DRAKE v. MABE No. 9121SC1035	Forsyth (89CVS5844)	Affirmed
ELM ST. GALLERY v. THE BUSINESS HUB No. 9118DC381	Guilford (90CVD03127)	Affirmed
GERACI v. STATE RESIDENCE COMMITTEE OF U.N.C. No. 9118SC629	Guilford (90CVS11251)	Reversed
IN RE FORECLOSURE OF STEPPCHILD, INC. No. 915SC551	New Hanover (90SP87)	Affirmed
IN RE RIDDLE No. 9130DC705	Haywood (89CVD760) (89CVD761) (89CVD762)	Affirmed
JOHNSON v. SIMS No. 9121SC595	Forsyth (89CVS2283)	Reversed & Remanded
McGINNIS v. LENTZ No. 9119SC374	Cabarrus (90CVS01669)	Reversed
MURDOCK v. N.C. DEPT. OF CORRECTION No. 9110IC464	Ind. Comm. (TA-11390)	Affirmed
RAMSEY BROS., INC. v. JOHN M. CAMPBELL CO. No. 916DC726	Halifax (89CVD891)	Affirmed
STATE v. BELL No. 9116SC269	Robeson (89CRS021133) (89CRS020928)	No Error

STATE v. COLEMAN No. 9226SC85	Mecklenburg (90CRS77930) (90CRS90053)	No Error
STATE v. COWELL No. 9217SC49	Surry (91CRS2898)	No Error
STATE v. EFIRD No. 9220SC33	Union (90CRS8826)	No Error
STATE v. HOPPER No. 9227SC61	Cleveland (90CRS6526) (90CRS6527) (90CRS11695) (90CRS11696) (90CRS11697)	No Error
STATE v. LANGSTON No. 9129SC669	Henderson (90CRS6880) (90CRS6946) (90CRS6948)	No Error
STATE v. LEWIS No. 918SC455	Lenoir (90CRS826) (90CRS827)	No Error
STATE v. MOORE No. 9120SC1301	Union (91CRS438) (91CRS441)	No Error
STATE v. PRESSLEY No. 9116SC672	Scotland (88CRS2685) (88CRS2686) (88CRS4006)	No Error
STATE v. REID No. 9110SC540	Wake (89CRS57262) (89CRS57263)	No Error
STATE v. SIMMONS No. 913SC710	Pitt (90CRS11373) (90CRS11379) (90CRS11380) (90CRS7465)	No Error
STATE v. TAYLOR No. 9211SC37	Harnett (91CRS8946)	No Error
STATE v. WALKER No. 9225SC102	Caldwell (91CRS3110)	Remanded for resentencing
STATE ex rel. COBEY v. FREY No. 914SC515	Onslow (89CVS967)	Affirmed



STROUPE v. STROUPE No. 9121DC706	Forsyth (81CVD5173)	Affirmed
VANDERWALL v. PYATT No. 9118DC709	Guilford (89CVD7466)	Affirmed
WALKER v. WAKE COUNTY MENTAL HEALTH No. 9110SC496	Wake (90CVS5587)	Affirmed
WALTON v. SMITH No. 9110SC667	Wake (89CVS11939)	No Error
WILLIAMS v. OAKWOOD ACCEPTANCE CORP. No. 9127DC437	Gaston (89CVD3528)	Affirm the trial court's denial of sanctions
WYATTE v. FLAHERTY No. 9123SC350	Wilkes (90CVS461)	Reversed & Remanded

**LENZER v. FLAHERTY**

[106 N.C. App. 496 (1992)]

JEANNE M. LENZER v. DAVID T. FLAHERTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE DEPARTMENT OF HUMAN RESOURCES, PAUL T. KAYYE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVICES OF THE DEPARTMENT OF HUMAN RESOURCES, THOMAS MIRIELLO, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DEPUTY DIRECTOR FOR ALCOHOL AND DRUG ABUSE SERVICES OF THE DIVISION OF MENTAL HEALTH, MENTAL RETARDATION AND SUBSTANCE ABUSE SERVICES [OF THE DEPARTMENT OF HUMAN RESOURCES], DON CUMMINGS, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE DIVISION OF PERSONNEL [MANAGEMENT] SERVICES OF THE DEPARTMENT OF HUMAN RESOURCES, MICHAEL F. BYRNE, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS CHIEF OF THE EMPLOYEE RELATIONS SECTION OF THE DEPARTMENT OF HUMAN RESOURCES, ROBERT L. BAUCOM, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS DIRECTOR OF ARC-BUTNER, AND HARRIET M. HARMAN, INDIVIDUALLY AND IN HER OFFICIAL CAPACITY AS ASSISTANT DIRECTOR OF ARC-BUTNER

No. 9014SC230

(Filed 7 July 1992)

**1. Constitutional Law § 115 (NCI4th)— physician's assistant— statements about investigation of patient abuse— termination of employment— free speech rights— civil rights action**

The trial court erred in entering summary judgment for defendant State employees in their individual capacities in plaintiff's 42 U.S.C. § 1983 action for violation of her federal free speech rights where plaintiff was discharged as a physician's assistant at an alcohol rehabilitation center after she questioned the vigor of investigations into possible mistreatment of patients at the center; plaintiff's statements addressed a matter of public concern; the government's interest in institutional efficiency did not outweigh plaintiff's free speech interests; the conduct of defendants was not insulated by the doctrine of qualified immunity; and plaintiff's forecast of evidence made a prima facie showing that her protected speech played a motivating part in the termination of her employment.

**Am Jur 2d, Constitutional Law §§ 496 et seq.**

**First amendment protection for public hospital or health employees subjected to discharge, transfer or discipline because of speech. 107 ALR Fed 21.**

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**2. Conspiracy § 12 (NCI4th)— civil conspiracy—free speech rights—sufficient forecast of evidence**

The trial court erred in granting summary judgment for defendant State employees individually on plaintiff's claim for civil conspiracy to discharge plaintiff as a physician's assistant at an alcohol rehabilitation center for exercising her free speech rights in reporting possible patient abuse where her forecast of evidence supported her allegations that defendants had an implicit or explicit agreement to prevent the proper investigation of patient abuse at the center and to silence and discredit plaintiff by removing her from her supervising physicians' licenses in order to fire her for lacking the necessary credentials. Furthermore, even if the intra-corporate immunity doctrine were adopted by the Court of Appeals, this doctrine would not bar plaintiff's action for civil conspiracy because a genuine issue of material fact would still exist as to defendants' motives.

**Am Jur 2d, Constitutional Law §§ 496 et seq.**

**First amendment protection for public hospital or health employees subjected to discharge, transfer or discipline because of speech. 107 ALR Fed 21.**

**3. Master and Servant § 13 (NCI3d)— tortious interference with employment contract—sufficient forecast of evidence—qualified privilege of non-outsiders**

The trial court erred in granting summary judgment for defendant supervising physicians individually on the claim of plaintiff physician's assistant for tortious interference with her employment contract where plaintiff's forecast of evidence tended to show that she held a permanent position at an alcohol rehabilitation center with a State classification of Physician Extender II; defendants withdrew their supervision of plaintiff for the purpose of causing plaintiff to lose the certification required to maintain her position with the State; defendants were motivated by unlawful reasons rather than legitimate business interests; and withdrawal of supervision in fact caused the intended effect of plaintiff losing her employment, resulting in damage to plaintiff. Even if defendants are deemed to have the status of non-outsiders, plaintiff's forecast of evidence raises the issue of wrongful purpose which would defeat a non-

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outsider's qualified privilege to interfere with plaintiff's contract of employment.

**Am Jur 2d, Interference § 45.****4. Constitutional Law § 86 (NCI4th)— § 1983 claim—Secretary of DHR—official capacity—reinstatement to job**

The trial court erred in dismissing plaintiff's 42 U.S.C. § 1983 claim against the Secretary of DHR in his official capacity seeking reinstatement to her job since State officials acting in their official capacities are "persons" reachable under § 1983 when sued for prospective equitable relief.

**Am Jur 2d, Civil Rights § 17.****5. Constitutional Law § 86 (NCI4th)— § 1983 claims—State agents—official capacities—damages claims barred**

The trial court properly dismissed plaintiff's § 1983 claims for monetary damages against State officials and agents in their official capacities since they are not "persons" covered by § 1983 when the remedy sought is monetary damages.

**Am Jur 2d, Civil Rights § 17.****6. Constitutional Law § 115 (NCI4th)— free speech violation—State agents—individual capacities—no claim under N.C. Constitution**

A plaintiff has no direct claim under the N.C. Constitution against State agents sued in their individual capacities for alleged violations of her free speech rights.

**Am Jur 2d, Civil Rights § 17.****7. Master and Servant § 10.2 (NCI3d)— reporting of patient abuse—no statutory claim for retaliatory discharge**

While N.C.G.S. § 122C-66 requires reporting of known or suspected abuse of patients in facilities licensed under Chapter 122C, this statute does not create a cause of action for retaliatory discharge by an employee discharged for reporting suspected patient abuse.

**Am Jur 2d, Master and Servant § 60.**

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**8. Master and Servant § 10.2 (NCI3d)— wrongful discharge— free speech—report of patient abuse—public policy exception**

The discharge of an employee for exercising her free speech rights guaranteed by the N.C. Constitution or for reporting patient abuse pursuant to N.C.G.S. § 122C-66 gives rise to a cause of action for wrongful discharge under the public policy exception to the employment-at-will doctrine.

**Am Jur 2d, Master and Servant § 60.****9. Constitutional Law § 115 (NCI4th); State § 4.2 (NCI3d)— State officials— official capacities— sovereign immunity— free speech violation— other claims**

The trial court erred in holding that plaintiff's claims against State officials in their official capacities for violation of her free speech rights protected by the N.C. Constitution were barred by sovereign immunity. However, the trial court properly dismissed plaintiff's claims against State officials in their official capacities for civil conspiracy, wrongful discharge and tortious interference with contract on the ground that such claims were barred by sovereign immunity.

**Am Jur 2d, Constitutional Law § 282.**

APPEAL by plaintiff from orders entered 27 September 1989 and 16 October 1989 by *Judge Robert H. Hobgood* in DURHAM County Superior Court. Heard in the Court of Appeals 21 February 1991.

*Edelstein, Payne & Nelson, by M. Travis Payne, for plaintiff-appellant.*

*Christic Institute South, by P. Lewis Pitts, Jr., for plaintiff-appellant.*

*Attorney General Lacy H. Thornburg, by Senior Deputy Attorney General Ann Reed and Special Deputy Attorney General John R. Corne, for defendant-appellees.*

*Faison & Brown, by O. William Faison and Reginald B. Gillespie, Jr., for defendant-appellees Baucom and Harman.*

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PARKER, Judge.

In this action alleging unlawful separation from employment, plaintiff, a former physician's assistant ("PA") at the Alcohol Rehabilitation Center in Butner, North Carolina ("ARC"), predicates defendants' liability on violation of her free speech rights under the United States and North Carolina Constitutions, civil conspiracy, tortious interference with economic relations, wrongful discharge and harassment in violation of N.C.G.S. § 122C-66(b). N.C.G.S. § 122C-66 makes it a crime to knowingly injure mentally or emotionally disabled patients in State facilities and provides guidelines for the reporting of actual or suspected abuse or exploitation of such patients.

Plaintiff contends she was fired for reporting suspected patient abuse at the ARC to authorities in the State Bureau of Investigation ("SBI") and the State Department of Human Resources ("DHR") in Raleigh. Plaintiff sues six State employees, in both their individual and official capacities, for compensatory and punitive damages. She sues the Secretary of DHR in his official capacity only, seeking reinstatement and protection for other employees or patients reporting suspected abuse.

The six State employees ("defendant employees") held the following positions at the time of plaintiff's discharge: (i) Dr. Harman, Lenzer's primary supervisor, was a Physician III at the ARC; (ii) Dr. Baucom, plaintiff's backup supervisor, was director of the facility; (iii) Dr. Kaye was director of DHR's Division of Mental Health, Mental Retardation and Substance Abuse Services ("Division"); (iv) Miriello was deputy director for Alcohol and Drug Abuse Services in the Division; (v) Cummings was director of the DHR Division of Personnel Management Services; and (vi) Byrne was chief of the Employee Relations Section in Cummings' division. Defendant employees became involved with plaintiff under the following circumstances.

Plaintiff began working at the ARC in January 1983. In late January or early February 1985 one of plaintiff's co-workers, a male health care technician ("Attendant N"), allegedly told plaintiff he was having homosexual relations with a patient who had been discharged from the facility. Attendant N also told plaintiff these relations had occurred almost nightly while the patient was still a resident at the facility.

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Plaintiff reported this information about Attendant N to Dr. Harman, her immediate supervisor, and to Dr. Baucom. Dr. Baucom consulted the client advocate to determine whom to contact and how to proceed. The client advocate let plaintiff know her allegations were being investigated and Dr. Baucom would involve the SBI. Plaintiff also contacted the SBI on her own. According to plaintiff, the SBI indicated it was the appropriate agency to investigate plaintiff's dual concerns about patient exploitation and the operation of a male prostitution ring in Raleigh, to which she believed Attendant N might be referring ex-clients from the ARC.

Attendant N denied any misconduct when confronted on 8 March 1985. The patient also denied sexual relations with the attendant. Management gave Attendant N a warning for breaching confidentiality by giving out a male patient's name, without the patient's permission, as a referral to a modeling agency. Defendant Byrne explained the decision to give Attendant N a warning as follows.

[T]he reason that particular course of action was taken was due to the fact that neither the internal investigation of the allegations of his misconduct with patients, nor the SBI's investigation of the same incidents generated any substantial information sufficient to justify just cause for taking a more stringent kind of disciplinary action.

In late February 1986 a former patient phoned the ARC to complain of sexual exploitation in connection with the same attendant and a man introduced to the patient by Attendant N. The patient was readmitted to the ARC. Dr. Baucom again involved the client advocate, the SBI and public safety officers in interviews with patients and staff concerning this case. Plaintiff was questioned but had no first-hand knowledge of the case. In March 1986 Dr. Baucom sent defendants Miriello and Byrne written summaries of the status of these investigations, at Miriello's request. The record contains a handwritten statement by the victim in the 1986 case stating he had been threatened by Attendant N's friend, Attendant N had made sexual overtures to him, and Attendant N had told this patient about getting in trouble over having had sex with another patient until that patient had the "good sense" to remain silent. The 1986 victim confirmed these statements in a taped oral interview with Dr. Baucom.

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In March 1986 plaintiff reported her general concerns about this second case involving Attendant N directly to the SBI. In mid-April plaintiff also called Dr. Kayye, the director of the Division, and then spoke to Miriello, alleging that the ARC administration might be covering up such incidents and that she feared reprisal for her reporting possible cases of abuse. Plaintiff furnished a letter to Miriello at his request. Miriello shared that letter with Cummings and Byrne. A few days later Cummings told plaintiff, who called him on 21 April to say she was afraid of being disciplined for reporting to the SBI, that DHR was aware of the allegations and investigations at the ARC.

Dr. Kayye believed plaintiff was falsely accusing her supervisors of covering up abuse but recognized plaintiff felt she was being harassed on account of her allegations. The other physician at the ARC, Dr. Shaver, viewed plaintiff's allegations of cover-up seriously.

I admired [plaintiff's] sense of conscience and her concern, and I had no reason to distrust her personal evaluation of the situation. I admired her courage and her commitment to this kind of principle.

Dr. Shaver noticed that plaintiff's treatment by staff and supervisors changed after plaintiff began making these reports.

DHR employees held several meetings to discuss plaintiff's perceptions and allegations. By the end of April, Cummings and Byrne had reviewed plaintiff's personnel file. Finding no evidence of any progressive discipline in that file, Cummings and Byrne concluded plaintiff had not been subjected to retaliation. Dr. Kayye, Cummings and Byrne all understood that physicians could have PAs removed from their medical licenses. Dr. Kayye, in fact, strongly expressed his conviction that a physician needed to be comfortable with any medical personnel practicing on the physician's license.

On 12 May 1986 Dr. Baucom learned for the first time from Dr. Kayye of plaintiff's phone calls to DHR about the second case involving Attendant N. According to Dr. Baucom, Dr. Kayye told him that Baucom "needed to go ahead and get rid of" plaintiff but Dr. Kayye did not give a reason. The sworn testimony is also to the effect that Dr. Baucom and Miriello were shocked at Dr. Kayye's suggestion. According to Byrne, Dr. Kayye used even



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more colorful language, asking Dr. Baucom if he had yet fired that bitch or gotten the bitch off his medical license.

On 16 May Dr. Baucom, Byrne and Miriello met at the ARC to discuss the handling of plaintiff's allegations and plaintiff's job performance. At that meeting Dr. Baucom learned for the first time about plaintiff's contacts with the SBI, her written report to Miriello and her allegations that the administration was covering up abuse and that Dr. Harman had started holding non-disciplinary, supervisory sessions with plaintiff in order to harass plaintiff into keeping quiet. According to Dr. Baucom, the 16 May meeting focused "[p]retty much [on] what was appropriate action to take with regards to [Attendant N] and also in regards to [plaintiff]." At this meeting Byrne again mentioned a physician's option of withdrawing supervision from a PA. Dr. Baucom was aware that plaintiff had never received any formal discipline, as were the Raleigh officials. The meeting on 16 May lasted at least three hours.

As a result of that meeting, Dr. Baucom and Dr. Harman notified the State Board of Medical Examiners by letter on 19 May of their withdrawal of supervision from plaintiff, effective 20 May 1986. The letter stated no reason for the physicians' decision to withdraw supervision. Before 20 May DHR officials also informed the Secretary of DHR of the planned disposition of plaintiff's case. On 20 May Dr. Baucom and Dr. Harman met with plaintiff to inform her of the physicians' action with the State Board. At that meeting plaintiff admitted she no longer trusted her supervisors. Dr. Baucom informed plaintiff she was fired and had one hour to leave the premises. The same day Dr. Baucom informed Dr. Shaver that he and Dr. Harman could no longer supervise plaintiff on account of her insubordinate conduct in contacting SBI and DHR personnel in Raleigh.

Prior to her termination plaintiff had received consistently high annual performance ratings, including an appraisal of "very good" for 1985. Defendants do not dispute plaintiff's high level of competence in physical diagnosis and treatment. However, defendants point out that Dr. Harman complained to Byrne in mid-1985 about her difficulties in supervising plaintiff. According to Byrne, Dr. Harman consulted with him in May 1985 about plaintiff's tendencies to undertake tasks outside the scope of plaintiff's professional responsibilities. Byrne informed Dr. Harman that she had the option of writing up plaintiff's infractions. According to Dr. Harman's

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testimony, the problems with plaintiff confining herself to her medical role had come up as early as 1984. However, Dr. Harman did not begin putting her criticism of plaintiff's work, directed primarily at plaintiff's counseling of patients about childhood abuse, into writing until 25 February 1986. In their answers to plaintiff's complaint, Dr. Harman and Dr. Baucom both admit that "[p]laintiff's practices with regard to the areas criticized by [Dr.] Harman were not substantially different from the practices [plaintiff] had followed previously." Plaintiff received the first write-up in early March and a second write-up in early April 1986. Plaintiff's discharge followed on 20 May.

In plaintiff's subsequent administrative grievance procedure, DHR upheld her termination by letter from the DHR secretary dated 5 August 1986. DHR based its decision to affirm plaintiff's dismissal on section 9 of the *State Personnel Manual*: "Failure to maintain the required credentials [of a job in State service] is a basis for immediate dismissal without prior warning." The statutory and regulatory basis for this credentials requirement as it applies to plaintiff's case is not in dispute. In order to be registered with the State Board of Medical Examiners, plaintiff needed supervision by two licensed physicians, a primary supervisor and a backup. N.C.G.S. § 90-18(13)b; N.C. Admin. Code tit. 21, r. 32D.0001 & .0002 (December 1984) (repealed 1 June 1990, replaced by r. 32L.0001 & .0009). A PA lacks the minimum credentials to practice in this State if she has no supervising physicians. N.C.G.S. § 90-18.1(a); N.C. Admin. Code tit. 21, r. 32D.0002 (December 1984) (repealed 1 June 1990, replaced by r. 32L.0004(c)). In affirming plaintiff's termination, DHR also took the position that the grievance procedure did not permit inquiry into the physicians' reasons for removing plaintiff from their licenses.

Plaintiff filed this action on 15 May 1987. On 22 July 1987 all defendants moved for dismissal pursuant to Rule 12(b)(1), (2) and (6) of the North Carolina Rules of Civil Procedure and each thereafter filed a detailed answer. Following substantial discovery, on 30 June 1989 defendants moved for summary judgment and filed 24 exhibits with the trial court. Plaintiff opposed this motion with a 47-page summary of facts purportedly established by 28 exhibits accompanying plaintiff's response to the summary judgment motion. The parties' exhibits on appeal run to more than 1,700 pages and include affidavits, selected excerpts from voluminous depositions and extracts from personnel files of a number of ARC

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employees who were disciplined for a variety of personal and job-related problems by means less drastic than discharge. After hearing on the motions, the trial court took defendants' motions for dismissal and summary judgment under advisement and subsequently ruled against plaintiff on each of her claims.

The trial court's order and amended order explain the legal bases for the court's rulings in some detail. The trial judge found no genuine issues of material fact and granted summary judgment to defendant employees, in their individual capacity, on plaintiff's claim for damages under 42 U.S.C. section 1983, premised on alleged retaliation for exercise of her First Amendment rights, as well as on plaintiff's claims for civil conspiracy and tortious interference with contract. On plaintiff's section 1983 claim for monetary relief against defendant employees in their official capacity, the trial court ruled that dismissal was appropriate under Rule 12 of the North Carolina Rules of Civil Procedure in that the DHR employees were not "persons" under section 1983 and sovereign immunity barred such claims.

The trial court rested dismissal of four other claims against defendant employees in their official capacity on sovereign immunity as well: violation of plaintiff's rights under the State Constitution, violation of N.C.G.S. § 122C-66(b), wrongful discharge and civil conspiracy. The claim for tortious interference with contract, brought solely against plaintiff's supervising physicians, was also held barred by sovereign immunity as to the physicians' conduct in their official capacity. The court also dismissed the claim for injunctive relief against the secretary of DHR in his official capacity in light of the court's judgment against plaintiff as to all remaining defendants.

The trial court took a different approach to its dismissal of three claims brought against defendant employees individually. As to plaintiff's wrongful discharge claim, the court found that the allegations did "not fall within any exception to the employment-at-will doctrine," including the public policy exception urged by plaintiff. As to the State constitutional and N.C.G.S. § 122C-66(b) claims for monetary damages, the court ruled that "said claims are not cognizable in this State."

We affirm in part and reverse and remand in part. As discussed hereinafter, the trial court erred in granting summary judgment to defendant employees individually on plaintiff's claims for

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violation of section 1983, civil conspiracy and tortious interference with contract. The court also erred in dismissing the wrongful discharge claim against defendant employees in their individual capacity and in dismissing plaintiff's section 1983 claim for injunctive relief against defendant Flaherty in his official capacity. Dismissal of the section 1983 claims against the remaining defendants in their official capacity was correct. The court also properly dismissed plaintiff's State statutory and State constitutional claims against defendant employees individually. The court erred, however, in dismissing the State constitutional claim asserted against defendant employees in their official capacity. Finally, dismissal of the State statutory, wrongful discharge, civil conspiracy and tortious interference with contract claims against defendant employees in their official capacity was proper.<sup>1</sup>

## I. SUMMARY JUDGMENT

The summary judgment order relieved defendant employees of liability in their individual capacity for violation of plaintiff's federal constitutional rights and civil conspiracy. It also relieved Dr. Baucom and Dr. Harman of individual liability for tortious interference with contract. Summary judgment on these claims was error. Summary judgment is only appropriate where the parties' pleadings and discovery materials establish there is no genuine issue of material fact. *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 382 S.E.2d 836, cert. denied, 325 N.C. 546, 385 S.E.2d 498 (1989). Giving plaintiff as non-movant all favorable inferences that may reasonably be drawn from the evidence before the trial court, as we must, we find that each of these three claims raises controverted factual issues sufficient to withstand defendants' motion under N.C.G.S. § 1A-1, Rule 56(c).

A State official will be personally answerable for damages under section 1983 only where qualified immunity is not available to shield the official from liability for deprivation of federal rights. *Corum v. University of North Carolina*, 330 N.C. 761, 772, 413 S.E.2d 276, 283 (1992). To maintain her claim under section 1983,

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1. For organizational purposes, the legal issues in this opinion are discussed as they were disposed of in the trial court's orders, namely, by summary judgment or as Rule 12(b)(6) dismissals; however, nothing in this opinion is intended in any way to suggest a modification of that part of Rule 12(b) which provides that where "matters outside the pleading are presented to and not excluded by the court, the [Rule 12(b)(6)] motion shall be treated as one for summary judgment."

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plaintiff must first establish that the conduct was protected by showing that (i) the speech pertained to a matter of public concern and (ii) the public concern outweighed the governmental interest in efficient operations. *See Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708 (1983). The determination of whether the conduct is protected activity is a question of law. *Id.* at 148 n.7, 75 L.Ed.2d at 720 n.7.

[1] Defendants argue that summary judgment in their favor on plaintiff's section 1983 claim for violation of her federal free speech rights should be affirmed, in that (i) plaintiff's statements about a possible lack of vigor in investigating patient abuse at the ARC did not address a matter of public concern; (ii) even if plaintiff's speech touched an issue of public concern, the governmental interest in efficient institutional operations outweighed plaintiff's interest in making public comment; and (iii) even if plaintiff's interests were paramount, defendants were entitled to qualified immunity because their conduct was not clearly unlawful under existing precedent.

As to defendants' first argument, we cannot agree that plaintiff was speaking out for personal reasons unrelated to a matter of public concern when she questioned the vigor of investigations into possible mistreatment of patients at the ARC. Viewed in the light most favorable to plaintiff, the evidence is that plaintiff raised sincere concerns about patient abuse and that these concerns had some basis in fact. Evidence in the record suggests, for instance, that the ARC administration, knowing of an incident of sexual misconduct in 1983 between a male PA and a patient, sought to keep that information from going beyond the ARC. The record also reveals that Attendant N was treated somewhat indulgently despite his apparent guilt of sexual abuse of patients. About a month after plaintiff's discharge in May 1986, Attendant N received notice that he was terminated. One of the stated grounds was falsification of his employment application in 1975. When Attendant N challenged his firing, he was permitted to resign under a settlement guaranteeing him a neutral employment reference. Byrne's personal opinion was that Attendant N had been involved in sexual misconduct; and in Byrne's view Dr. Baucom had formed the same opinion. At her deposition Dr. Harman also testified that plaintiff's account of the 1985 conversation with Attendant N about his supposed sexual adventures with patients was credible. Finally, evidence in the record permits the inference that with the 1986 patient

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incident, the SBI was not immediately contacted by the ARC administration and the patient was assigned to Dr. Shaver rather than to plaintiff with instructions that the circumstances surrounding the patient's return not be written up in the patient's chart. This evidence does not support defendants' argument that plaintiff was making "false allegations of a cover up to create a whistleblower claim in the event of her discharge" for refusal to comply with Dr. Harman's instructions about how plaintiff was to do her job. Patient abuse in any form in government operated hospitals is a matter of public concern.

Next defendants argue that their interest in institutional efficiency outweighed any free speech interests plaintiff might have had. We agree that a public employer may have certain institutional interests that must be weighed against an employee's rights to speak out on a matter of public concern. *See, e.g., Connick v. Myers*, 461 U.S. 138, 75 L.Ed.2d 708 (1983); *Pickering v. Board of Education*, 391 U.S. 563, 20 L.Ed.2d 811 (1968) (discussing the balancing of competing employee and employer interests). However, defendants' exhibits in the record are insufficient to demonstrate as a matter of law, as defendants argue, that "[p]laintiff's continued employment with the ARC would inevitably have fostered disharmony and adversely affected discipline and morale in the work place, which would have impaired the efficiency of the institution." The record before us fails to support a reasonable apprehension that plaintiff's speech would damage staff morale or institutional efficiency. *See Jurgensen v. Fairfax County*, 745 F.2d 868, 879-80 (4th Cir. 1984).

Finally, defendants assert that their conduct is insulated from liability by the doctrine of qualified immunity. In general, qualified immunity protects government officials from personal liability for performing discretionary functions to the extent that such conduct does not violate "clearly established statutory or constitutional rights of which a reasonable person would have known." *Corum*, 330 N.C. at 772-73, 413 S.E.2d at 284 (quoting *Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396, 410 (1982)).

On the initial issue to be examined under the *Harlow* test—whether the specific right allegedly violated was "clearly established"—we conclude that public speech about suspected patient abuse in State facilities merits legal protection. This conclusion is fortified by the existence in this State of statutory provisions

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governing the reporting of such patient abuse. *See, e.g.*, N.C.G.S. § 122C-66. The second issue to be examined under the *Harlow* test is whether reasonable persons in defendants' position could have failed to appreciate that their conduct would violate the specific rights alleged by plaintiff. Applying this part of the *Harlow* test to the present case requires "factual determinations respecting [defendants'] conduct and its circumstances." *Collinson v. Gott*, 895 F.2d 994, 998 (4th Cir. 1990) (Phillips, J., concurring). Although an employer's "subjective beliefs about the legality of the demotion [or discharge] are irrelevant," *Corum*, 330 N.C. at 777, 413 S.E.2d at 286 (citing *Anderson v. Creighton*, 483 U.S. 635, 643, 97 L.Ed.2d 523, 532-33 (1987)), factual determinations about defendants' motives may also have to be made where motivation is an element of the cause of action.

[The] "purely 'objective' test cannot in the end avoid the necessity to inquire into official motive or intent or purpose when such states of mind are essential elements of the constitutional right allegedly violated."

. . . .

[w]here the defendant's subjective intent is an element of the plaintiff's claim and the defendant has moved for summary judgment based on a showing of the objective reasonableness of his actions, the plaintiff may avoid summary judgment only by pointing to specific evidence that the officials' actions were improperly motivated.

*Corum*, 330 N.C. at 773, 413 S.E.2d at 284-85 (quoting *Collinson v. Gott*, 895 F.2d 994, 1001-02 (4th Cir. 1990) (Phillips, J., concurring) (citations omitted).

In challenging an adverse employment decision for violation of constitutional rights, an employee establishes a prima facie case by showing that protected activity was a substantial or motivating factor in the employer's decision. *Mt. Healthy City Board of Ed. v. Doyle*, 429 U.S. 274, 50 L.Ed.2d 471 (1977). This prima facie showing shifts the burden to the employer to show, by a preponderance of the evidence, that the adverse decision would have been made in the absence of the protected activity. *Id.* In the present case plaintiff's forecast of evidence meets the prima facie threshold for showing that her protected speech played a motivating part in plaintiff's termination.

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Although evidence of retaliation in a case such as this one may often be completely circumstantial, the causal nexus between protected activity and retaliatory discharge must be something more than speculation. *Brooks v. Stroh Brewery Co.*, 95 N.C. App. 226, 237, 382 S.E.2d 874, 882, *disc. rev. denied*, 325 N.C. 704, 388 S.E.2d 449 (1989). Plaintiff's evidence on this record goes beyond speculation and conjecture and meets the quantum of sufficient specific evidence required by *Corum* in this type case. 330 N.C. at 778-79, 413 S.E.2d at 287. Therefore, defendants could only prevail at the summary judgment stage by showing, to counter plaintiff's prima facie case, that there is no genuine issue of fact as to the legitimacy of the reason motivating their decision regarding plaintiff. This showing is not made on the record now before this Court. Since defendants concede plaintiff's alleged deviation from ARC policies and protocols had long been tolerated without any disciplinary action, we cannot say plaintiff's discharge would have occurred notwithstanding the protected conduct at issue in this case. Defendants' longstanding tolerance of plaintiff's alleged insubordination throws into question the credibility of defendants' account of their motivation in firing plaintiff. If defendants' "motive was to suppress speech, one result is reached, while if the motive was to punish insubordination, another conclusion results." *Corum*, 330 N.C. at 777, 413 S.E.2d at 286. In the present case defendants' motives in having plaintiff's supervisors withdraw plaintiff from their medical licenses is a material, controverted issue of fact bearing on the question of whether defendants violated plaintiff's free speech rights under federal law. Under the *Harlow* test as discussed in *Corum*, then, defendants have not established their entitlement to summary judgment, as a matter of law, on the basis of the defense of qualified immunity. Accordingly, we reverse summary judgment in favor of defendants in their individual capacity on plaintiff's section 1983 claim and remand that claim to the trial court.

[2] We turn next to plaintiff's claim against defendants individually for monetary relief based on 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. In such a case, all of the conspirators are liable, jointly and several-



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ly, for the act of any one of them done in furtherance of the agreement.

*Fox v. Wilson*, 85 N.C. App. 292, 301, 354 S.E.2d 737, 743 (1987) (citations omitted). Plaintiff's allegations of civil conspiracy are that defendants had an implicit or explicit agreement (i) to silence and discredit plaintiff by removing her from her supervising physicians' licenses in order to fire her on the pretext that she lacked the necessary credentials and (ii) to prevent the proper investigation of patient abuse at the ARC. Pursuant to that agreement, plaintiff alleged, *inter alia*, defendants discharged plaintiff, forced one or more other employees who had knowledge of abuse to resign, permitted Attendant N to resign with a promise not to disclose to his prospective employers the allegations of sexual misconduct against him at the ARC, manipulated patients into withdrawing or moderating complaints of sexual exploitation and attempted to obtain false affidavits against plaintiff and other employees who were openly critical of administrative handling of sexual abuse complaints.

The evidence in the record is sufficient to raise more than a conjecture or suspicion as to the existence of an agreement to discharge plaintiff for exercise of her First Amendment rights in reporting potential patient abuse. See *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). As the record raises genuine issues of material fact with respect to this allegation and others relating to the proper investigation of patient abuse, summary judgment was improper.

Further, we do not agree with defendants' contention that this common law cause of action for civil conspiracy is barred as a matter of law by the intra-corporate immunity doctrine. Our research discloses no North Carolina case in which the doctrine has been adopted as a defense to civil conspiracy. Among the federal circuit courts, the authorities are split as to the application of the doctrine in actions arising under federal statutes, in particular 42 U.S.C. section 1985(3). See *Buschi v. Kervin*, 775 F.2d 1240, 1252 (4th Cir. 1985), and *Garza v. City of Omaha*, 814 F.2d 553, 556 (8th Cir. 1987). Moreover, even if we were to adopt the doctrine, on the evidence in this record, a genuine issue of material fact would still exist as to defendants' motive. As the court stated in *Buschi*,

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the doctrine is inapplicable "where the plaintiff has alleged that the corporate employees were dominated by personal motives or where their actions exceeded the bounds of their authority."

775 F.2d at 1252 (citation omitted). We, therefore, reverse that portion of the trial court's order granting summary judgment to defendant employees on plaintiff's civil conspiracy claim.

[3] We next address plaintiff's claim against Dr. Baucom and Dr. Harman individually for tortious interference with contract. In order to establish a claim for tortious interference with an existing contract, plaintiff needed to forecast evidence of the following elements:

First, that a valid contract existed between the plaintiff and a third person, conferring upon the plaintiff some contractual right against the third person. *Second*, that the outsider had knowledge of the plaintiff's contract with the third person. *Third*, that the outsider intentionally induced the third person not to perform his contract with the plaintiff. *Fourth*, that in so doing the outsider acted without justification. *Fifth*, that the outsider's act caused the plaintiff actual damages.

*Childress v. Abeles*, 240 N.C. 667, 674, 84 S.E.2d 176, 181-82 (1954) (citations omitted). Plaintiff's complaint and discovery documents give an evidentiary forecast, adequate to withstand defendants' motion for summary judgment, that the PA position she held at the ARC was a permanent position with a State classification of Physician Extender II; that defendants Baucom and Harman withdrew supervision from plaintiff for the purpose of causing her to lose the certification required for plaintiff to maintain her position with the State; that defendants were motivated by unlawful reasons rather than legitimate business interests; and that withdrawal of supervision in fact caused the intended effect of plaintiff losing her employment, resulting in damage to plaintiff. Under our case law plaintiff's cause of action for tortious interference with contract lies even though her employment contract was terminable at will. *Smith v. Ford Motor Co.*, 289 N.C. 71, 85, 221 S.E.2d 282, 290, 79 A.L.R.3d 651, 662 (1976); *Sides v. Duke University*, 74 N.C. App. 331, 345-48, 328 S.E.2d 818, 828-30, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985).

Defendants Baucom and Harman contend they cannot be liable for tortious interference with contract in that their supervisory

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status dictates they were not outsiders to plaintiff's employment contract. It is true that so-called "non-outsiders" often enjoy qualified immunity from liability for inducing their corporation or other entity to breach its contract with an employee. *See, e.g., Smith v. Ford Motor Co.*, 289 N.C. 71, 221 S.E.2d 282, 79 A.L.R.3d 651 (1976); *Wilson v. McClenny*, 262 N.C. 121, 136 S.E.2d 569 (1964) (considering corporate stockholders and directors, with interest in activities of corporation and duty to advise or direct such activities). However, even if defendants Baucom and Harman were deemed to have the status of non-outsiders, such status "is pertinent only to the question [of the] justification for [defendants'] action." *Smith*, 289 N.C. at 88, 221 S.E.2d at 292, 79 A.L.R.3d at 665. The qualified privilege of a non-outsider is lost if exercised for motives other than reasonable, good faith attempts to protect the non-outsider's interests in the contract interfered with. *Id.* at 91, 221 S.E.2d at 294, 79 A.L.R.3d at 668. Plaintiff's forecast of evidence raises precisely the issue of wrongful purpose, which purpose would defeat a non-outsider's qualified privilege to interfere. For the foregoing reasons, we reverse the order of the trial court granting summary judgment to defendants Baucom and Harman in their individual capacity on plaintiff's claim for tortious interference with contract.

**II. SECTION 1983 CLAIMS: OFFICIAL CAPACITY**

[4] The trial court erred in dismissing the section 1983 claim against defendant Flaherty in his official capacity. For purposes of a claim for prospective equitable relief from violation of federal constitutional law, State officials acting in their official capacity are "persons" reachable under section 1983. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14, 87 L.Ed.2d 114, 122 n.14 (1985). Neither sovereign immunity nor qualified immunity will bar such a claim. *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 283 (1992). Therefore, we reverse as to defendant Flaherty.

[5] However, State officials and agents are not "persons" covered by section 1983 when the remedy sought is monetary damages. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L.Ed.2d 45 (1989). Thus the trial court did not err in dismissing the section 1983 claims for monetary damages against all remaining defendants in their official capacity and we affirm that portion of the trial court's order.

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## III. RULE 12 DISMISSALS: INDIVIDUAL CAPACITY

[6] Finding no precedent for plaintiff's State constitutional claims, the trial court ruled these claims were not cognizable in North Carolina. Our Supreme Court has since recognized a direct cause of action for violation of an individual's protected speech rights under Article 1, Section 14 of the State Constitution. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992). However, *Corum* expressly held that State constitutional claims are not cognizable against State actors in their individual capacity. *Id.* at 788, 413 S.E.2d at 293. Therefore, we affirm the trial court's dismissal of plaintiff's State constitutional claims against defendant employees in their individual capacity.

[7] Plaintiff also seeks to bring a claim against defendant employees individually for monetary damages under N.C.G.S. § 122C-66(b). Plaintiff argues that the legislature has provided express protection against retaliatory discharge for State employees such as plaintiff by enacting the following provision.

An employee of a facility who . . . has knowledge of [pain or injury to a client caused by another employee or volunteer, "other than as a part of generally accepted medical or therapeutic procedure," N.C.G.S. § 122C-66(a),] . . . shall report the violation . . . to authorized personnel designated by the facility. No employee making a report may be threatened or harassed by any other employee or volunteer on account of the report. Violation of this subsection is a misdemeanor punishable by a fine, not to exceed five hundred dollars (\$500.00).

N.C.G.S. § 122C-66(b) (1985).

This statutory provision is criminal in nature and does not create the sweeping remedy urged by plaintiff. While N.C.G.S. § 122C-66 requires reporting of known or suspected abuse of patients in facilities subject to the licensing requirements of Chapter 122C such as the ARC, the language of this provision does not create a cause of action for retaliatory discharge against an employer by an employee discharged in retaliation for reporting suspected patient abuse. For this reason we affirm the dismissal of this claim.

[8] As to plaintiff's claim for wrongful discharge, the facts of this case fit within the public policy exception to the employment-at-will doctrine as that exception has recently been delineated by our Supreme Court. In *Amos v. Oakdale Knitting Co.*, 331 N.C.

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348, 353, 416 S.E.2d 166, 169 (1992), the Court declared that "at the very least public policy is violated when an employee is fired in contravention of express policy declarations contained in the North Carolina General Statutes." That observation, in our view, applies with equal force to rights guaranteed by the State Constitution such as plaintiff's free speech claim. Similarly, discharge resulting from a report made pursuant to N.C.G.S. § 122C-66 would give rise to a cause of action for wrongful discharge under the public policy exception to the at-will doctrine. Therefore, we reverse the dismissal of the wrongful discharge claim.

## IV. DISMISSAL OF OTHER CLAIMS: OFFICIAL CAPACITY

[9] *Corum* permits suit against State actors in their official capacity for violation of the free speech rights protected by the North Carolina Constitution. The trial court erred in holding such claims barred by sovereign immunity. *See Corum*, 330 N.C. at 785-86, 413 S.E.2d at 292. Under the standard reviewed in our earlier discussion of plaintiff's section 1983 claim against defendant employees in their individual capacity, the allegations of plaintiff's complaint state a cause of action for violation of plaintiff's free speech rights protected under the North Carolina Constitution. We, therefore, reverse the portion of the trial court's order dismissing the State constitutional claim against defendant employees in their official capacity.

On the other hand, the claim against defendant employees in their official capacity for violation of N.C.G.S. § 122C-66(b) was correctly dismissed on the ground that this statute creates no civil cause of action against an employer for retaliatory discharge, as we have already discussed. Dismissal of plaintiff's claims for civil conspiracy and wrongful discharge were likewise properly rested on the ground that such actions against defendant employees in their official capacity were barred by the doctrine of sovereign immunity. The trial court's dismissal of the claim against Dr. Baucom and Dr. Harman in their official capacity for tortious interference with contract was also correctly grounded on sovereign immunity. Accordingly, we affirm dismissal of these four claims.

In light of the foregoing discussion of plaintiff's claims, defendants' cross assignments of error premised on defendants' alternative motions are not well-founded and are overruled.

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Affirmed in part; reversed in part and remanded.

Judges JOHNSON and ORR concur.

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STATE OF NORTH CAROLINA v. GREGORY DONNELL MEBANE, DEFENDANT-  
APPELLANT, AND STATE OF NORTH CAROLINA v. FRED WRIGHT,  
DEFENDANT-APPELLANT

No. 9115SC288

(Filed 7 July 1992)

**1. Jury § 2.1 (NCI3d) — jury selection — additional jurors — only 4 of 50 summoned — cross section of community**

The trial court did not abuse its discretion and there was no plain error of constitutional proportions in a rape and kidnapping prosecution where it became apparent one morning during jury selection that there might not be enough jurors in the original pool to complete jury selection; the judge ordered the clerk to draw 50 additional names from the list of prospective jurors and directed the sheriff to serve as many summonses as possible by 4:00 p.m.; both the State and the defendants had passed 11 jurors by 4:00 p.m. and the jury pool was depleted; only four of the 50 supplemental jurors had been served and reported for jury duty; all were white males; defendants did not object to the continuing selection of jurors; and the one remaining jury seat was filled. N.C.G.S. § 9-11(b) neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served. Furthermore, there is no plain error of constitutional proportions because defendants challenge the result rather than the method of composition for the jury pool, and defendants present no evidence whatsoever of a systematic exclusion of any persons to make out a prima facie Sixth Amendment violation.

**Am Jur 2d, Jury § 159.**

**2. Jury § 7.14 (NCI3d) — jury selection — peremptory challenges — racial discrimination**

The trial court correctly found in a rape and kidnapping prosecution that the State had rebutted any inference of pur-

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poseful racial discrimination in its use of peremptory challenges during jury selection where excused jurors had convictions or were under investigation by the Alamance County Sheriff's Department, had relatives charged by Alamance County officials, knew witnesses, or expressed reservations about being able to return a guilty verdict.

**Am Jur 2d, Jury § 233.****3. Criminal Law § 481 (NCI4th) — jury selection — jurors discussing case — no error**

The trial court did not abuse its discretion in a rape and kidnapping prosecution by finding that two jurors had not discussed the case and by permitting them to serve as jurors where it was brought to the court's attention prior to impaneling that two of the jurors had allegedly discussed the case during a recess; defendant Mebane's girlfriend testified that she had overheard two jurors talking about the case and that one had said "They look guilty"; the court conducted a voir dire of both jurors; one admitted saying that this looked like a big case, but denied expressing an opinion as to the guilt of defendants; the other juror denied having had a conversation with any other juror concerning the case; and both jurors indicated that they could be completely fair and impartial about the case.

**Am Jur 2d, Jury § 294.****4. Criminal Law § 491 (NCI4th) — rape and kidnapping — jury view — denied — no error**

The trial court did not err in a rape and kidnapping prosecution by denying defendant Wright's motion for a jury view of the rape scene where both the State and defendant introduced several diagrams and photographs of the scene and a view of the scene was not necessary.

**Am Jur 2d, Trial § 259.****5. Evidence and Witnesses § 397 (NCI4th) — rape and kidnapping — subornation of perjury by defendant's father — irrelevant — admission not prejudicial error**

There was no prejudicial error in a rape and kidnapping prosecution where a State's witness testified that defendant Wright's father attempted to bribe her to testify falsely. The

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bribe was by the defendant's father and not the defendant, and therefore the evidence was of a collateral matter and irrelevant to guilt of the crimes charged, but the State did not focus on the testimony, the defense called two witnesses to refute the allegation, and the case did not turn on the improperly admitted evidence.

**Am Jur 2d, Evidence § 293.**

**Admissibility in criminal case as issue of defendant's guilt, evidence that third person has attempted to influence a witness not to testify or to testify falsely. 79 ALR3d 1156.**

**6. Evidence and Witnesses § 115 (NCI4th)— kidnapping and rape— suggestion of guilt of another man— introduction of the other man's timecard— no error**

The trial court did not err in a prosecution for kidnapping and rape by admitting the timecard of the victim's former boyfriend for the night of the crime where defendant had elicited testimony to suggest that the former boyfriend had either been the assailant or had had consensual intercourse with the victim that night. The timecard was relevant to demonstrate that the former boyfriend was working that night and could not have had sex with the victim, and was admissible under the business records exception to the hearsay rule. N.C.G.S. § 8C-1, Rules 401 and 803(6).

**Am Jur 2d, Evidence § 945.**

**7. Rape and Allied Offenses § 5 (NCI3d)— rape— evidence sufficient**

The trial court correctly denied defendants' motion to dismiss charges of first-degree rape where the victim testified to many acts of vaginal intercourse by defendants to which she did not consent, recounted threats by defendants to hurt her with a butcher knife unless she cooperated, and explained how the defendants held her arms and legs as each attempted vaginal intercourse and achieved some penetration. N.C.G.S. § 14-27.2.

**Am Jur 2d, Rape § 88.**

**8. Kidnapping § 1.2 (NCI3d)— kidnapping and rape— sufficiency of evidence of kidnapping**

The trial court did not err by denying defendant's motion to dismiss first-degree kidnapping charges in a prosecution



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for rape and kidnapping where the facts met the requirements of N.C.G.S. § 14-39(a) and N.C.G.S. § 14-39(b) in that the victim testified that defendant Mebane called her into the back bedroom where he locked the door and began fondling her; he later allowed codefendants Wright and Yellock to enter the room since she would not cooperate; defendant Wright blocked the door and defendant Yellock forced her against a window where he grabbed her arms; the men then dragged her down the hallway into the living room; and, when she wrestled herself away from them, defendant Mebane hurried to the front door and locked it.

**Am Jur 2d, Abduction and Kidnapping §§ 11 et seq.****9. Constitutional Law § 200 (NCI4th) — rape and kidnapping — no double jeopardy**

There was no double jeopardy violation in a rape and kidnapping prosecution where defendants failed to object on double jeopardy grounds to the trial court's acceptance of the verdicts and did not make a motion to arrest judgment on either conviction and, even if the Court of Appeals opted to review the issue, the record reflects a series of sexual assaults by defendants upon the victim as they took turns having intercourse with her. No double jeopardy arises if the trial court properly instructed the jury that the same sexual assault predicated the rape charge could not be used to convict the defendants of first-degree kidnapping, and it is presumed that the jury was properly instructed because the instructions were not included in the record on appeal.

**Am Jur 2d, Criminal Law § 277.**

APPEAL by defendants from Judgments entered 8 August 1990 by *Judge J. B. Allen, Jr.*, in ALAMANCE County Superior Court. Heard in the Court of Appeals 7 January 1992.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General George W. Boylan, for the State.*

*Loflin & Loflin, by Thomas F. Loflin, III, for defendant appellants.*

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COZORT, Judge.

Defendants Gregory Donnell Mebane and Frederick Wright were convicted of first-degree rape and first-degree kidnapping. Defendants jointly assert the trial court committed reversible error in its rulings relating to jury selection and to evidentiary issues raised at trial. Additionally, defendant Wright raises separately two issues for determination regarding his motion for a jury view of the rape scene and his challenge of testimony by a State's witness which tended to show his father had attempted to bribe the witness prior to trial. We conclude both defendants received a fair trial free from prejudicial error.

The State's evidence at trial tended to show the charges arose out of events which occurred on the evening of 28 July 1989 between the defendants; a third codefendant, Timothy Dion Yellock; and the victim. (Although the three defendants were tried jointly, defendant Yellock's appeal, No. 9115SC273, was not consolidated with the appeal of Mebane and Wright. Yellock's appeal is the subject of a separate opinion filed this same date.) The State's case rested primarily on testimony elicited from the victim. She testified that on 28 July 1989, Mebane and Yellock telephoned her and invited her to ride with them to Greensboro where they would pick up another girl. The victim, who was a casual acquaintance of both men, agreed. At approximately 6:00 p.m., Mebane and Yellock, along with defendant Wright, arrived at the victim's home. The victim told her mother she would return in an hour or so. When the four began heading toward Burlington rather than Greensboro, Mebane told the victim they needed to stop briefly at his home so he could change clothes. They stopped at an Amoco filling station near Interstate 85 where they purchased gas and beer. Upon arrival at Mebane's home, Mebane and Yellock retreated to the back of the house to refrigerate the beer. The victim and Wright sat down to watch television. Wright put a videocassette into the VCR; the movie was a pornographic film. Wright asked the victim, "You like that, don't you . . . ?" The victim responded by shrugging her shoulders and saying nothing.

After a few minutes, defendant Mebane yelled from the back of the house for the victim to "Come here. I want to talk to you about something." The victim walked into the bedroom where Mebane locked the door, and began making sexual advances toward her. When the victim told Mebane to stop kissing and touching her,

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he called to Yellock and unlocked the door. Yellock entered the room. Mebane then told Yellock, "She won't cooperate." The victim pleaded, "Just leave me alone. Don't touch me." She began backing up until she was against a window. Mebane and Yellock moved toward her. Wright, wearing only a shirt and his underwear, appeared from the hall and blocked the doorway. Yellock grabbed the victim, but she pushed him back. Yellock became angry, and Mebane told the victim, "If we wanted to rape you, we could. If we wanted to, we could overpower you." (The record shows the victim was 6'2½" tall and weighed approximately 186 pounds at the time of the incident). Although the victim begged the defendants to leave her alone, they took her by the arms and legs and dragged her into the living room. She broke away from them briefly, at which time Mebane locked the front door and Wright came into the room holding a butcher knife and said, "I'll bet she'll cooperate." Yellock and Mebane told the victim they would not let Wright harm her if she cooperated.

The victim told her assailants she was having her menstrual period, which Yellock confirmed by ripping the victim's blue jeans apart and checking her underwear. Wright said, "It don't matter; we have had sex with plenty of females with their period on." The men then threw the victim to the floor. Each defendant attempted to have vaginal intercourse with the victim three times. While one defendant was on top of the victim, the other two held the victim's arms and legs. Only Mebane could complete each act; the other two defendants achieved only partial penetration due to their failure to reach a full erection. Defendants attempted anal sex with the victim but were unsuccessful. At one point, Yellock inserted his penis into the victim's mouth. The three men left the victim lying on the floor when they went to the bathroom to shower. Later, the defendants made the victim promise she would not tell anyone what had happened or they would kill her. Defendants and the victim got back into the car and drove to Wright's house where he asked his father for some money. The defendants then took the victim to a nearby friend's house and left her.

The friend, Sophie Allen, testified that on the evening of 28 July 1989, the victim knocked on her door. The victim was crying and hysterical. She told Ms. Allen the defendants had raped her. Ms. Allen stated the victim smelled like beer and "sex." Ms. Allen and a friend named Antonio Hargrove drove the victim to the

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hospital. Mr. Hargrove corroborated Ms. Allen's testimony. Dean Ward, an investigator with the Alamance County Sheriff's Department, interviewed the victim at Ms. Allen's trailer prior to going to the hospital. He testified the victim had scratches and welts on her face. She told the officer the defendants had raped her. When Officer Ward arrested defendant Mebane the following morning, he observed scratches on Mebane's chest and noticed a butcher knife on a bedroom dresser.

Lee Ann Ball, a registered nurse at Alamance Memorial Hospital, performed procedures for sexual assault upon the victim on the evening of 28 July 1989. According to Ms. Ball, the victim had abrasions on her face and left arm. The victim sobbed quietly during the procedure. Dr. John F. Jones, the emergency room physician, conducted a pelvic examination on the victim. The victim's vagina appeared irritated and contained sperm. Tests showed the victim was infected with gonorrhea and chlamydia which could have been contracted earlier than 28 July 1989.

Evidence for the defendants included testimony from defendant Greg Mebane and from several witnesses who testified as to the victim's reputation for sexual promiscuity in the community. Defendant Mebane testified that prior to 28 July 1989, the victim had performed oral sex on him in his mother's car at the North Park Community Center while two others, Connell Williams and Nicky Harris were present. He stated the day before the incident the three men telephoned the victim and discussed having sexual intercourse with her. On 28 July, the defendants again called the victim and talked to her about having sex with them. She told the defendants to come and get her. The defendants picked up the victim at her home and drove to Mebane's house where they watched a pornographic video tape. Defendant Mebane told the court the victim kept requesting that they rewind the tape to watch certain scenes again. After awhile, Mebane asked the victim to come back to the bedroom with him. She complied. Mebane said the victim performed oral sex on him at that time. Mebane stated he and the victim then went into the living room where the victim began disrobing. After the parties removed their clothing, each of the three defendants had consensual vaginal intercourse twice with the victim. Everyone showered except the victim; the four left soon afterward. Mebane recalled they stopped at Fred Wright's house so he could get money from his father. The victim

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remained in the car. They drove the victim to Sophie Allen's trailer and left.

Eight witnesses, including two first cousins of the victim, testified for the defense concerning the victim's reputation in the community for habitual sexual activity. In summary, the testimony reflected that the victim liked to engage in group sexual intercourse with two or more men, had done so on a number of occasions, and had engaged in sex with at least one man in the presence of others on several occasions. This evidence was offered to show the victim consented to the sexual intercourse which occurred on the night of 28 July 1989. On cross-examination and rebuttal, the victim denied the witnesses' allegations. The victim did admit she had been expelled from Chowan College for having a male visitor in her dormitory room after visiting hours. She also stated she had had consensual sexual intercourse with a man named Thomas Leath during the summer of 1987.

Neither defendant Wright nor defendant Yellock testified. All defendants were convicted of first-degree rape and first-degree kidnapping and acquitted on the charge of first-degree sex offense.

[1] Both defendant Mebane and defendant Wright present three issues relating to jury selection. First, defendants argue the trial court committed reversible error by continuing the jury selection process to fill one remaining jury seat when the sheriff was able to serve only four jury subpoenas of the 50 additional names randomly drawn. During jury selection on the morning of 31 July 1990, it became apparent that there might not be enough potential jurors in the original jury pool to complete selection of the jury. The judge ordered the clerk to draw 50 additional names from the list of prospective jurors and directed the sheriff to serve as many jury summonses as possible by 4:00 p.m. When 4:00 p.m. arrived, both the State and the defendants had passed 11 jurors, and the jury pool was depleted. At that time, only four of the 50 supplemental jurors had been served and reported for jury duty. All were white males. The defendants did not object at trial to the continuing selection of the jurors, despite the fact that the defendants had exhausted all peremptory challenges before the new potential jurors' arrival. Technically, the defendants have failed to preserve this issue and have waived appellate review pursuant to Rule 10(b)(2) of the North Carolina Rules of Appellate Procedure. Defendants argue nonetheless that they were denied their constitu-

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tional guarantee of a jury pool drawn from a fair cross section of the community in violation of their rights to equal protection under the law. Defendants contend the trial court committed plain error. We do not agree.

N.C. Gen. Stat. § 9-11(b) (1986) provides, "The presiding judge may, in his discretion, at any time before or during a session direct that supplemental jurors or a special venire be selected from the jury list in the same manner as is provided for the selection of regular jurors." The defendants contend the trial judge abused his discretion by not waiting a reasonable period of time to allow for more than four summonses to be served. We find no abuse of discretion. The statute neither explicitly nor impliedly requires the judge to wait a certain amount of time so that a particular number of summonses can be served.

Furthermore, we find no plain error of constitutional proportions. First, the cases upon which defendants rely for their constitutional challenge are not applicable to the case below. Defendants cite the following cases to support their Fourteenth Amendment claims: *Whitus v. Georgia*, 385 U.S. 545, 17 L.Ed.2d 599 (1967); *Taylor v. Louisiana*, 419 U.S. 522, 42 L.Ed.2d 690 (1975); and *Duren v. Missouri*, 439 U.S. 357, 58 L.Ed.2d 579 (1979). These cases illustrate challenges of the *method* of selecting the *entire* jury pool for court sessions. Evidence in *Whitus*, *Taylor*, and *Duren* was presented to demonstrate equal protection violations because the jury selection schemes in force at the time of trial excluded jurors who were female or black. Our Supreme Court has stated with respect to a Fourteenth Amendment jury challenge: "The key to establishing a prima facie case of systematic exclusion is a statistical showing of underrepresentation plus a system of selection which allows the jury commission to exclude prospective jurors on account of race." *State v. Avery*, 299 N.C. 126, 133, 261 S.E.2d 803, 807-08 (1980). Defendants simply do not meet the burden articulated in *Avery*. Here, defendants do not challenge the *method* of how the jury pool was composed, but instead contest the *result* of this process.

Neither can defendants demonstrate how the judge's order violated the Sixth Amendment fair cross section requirement. In *Taylor*, the United States Supreme Court said, "[t]he selection of a petit jury from a representative cross section of the community is an essential component of the Sixth Amendment right to a jury trial." *Taylor*, 419 U.S. at 528, 42 L.Ed.2d at 697. In *Duren*, the

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Court held that to establish a prima facie violation of the fair cross section requirement a defendant must show that (1) the group alleged to be excluded is a distinctive group; (2) the representation of the group within the venire is not fair and reasonable with respect to the number of such persons in the community; and (3) the underrepresentation is due to systematic exclusion in the jury selection process. The defendants here make no comparable challenge to that in *Duren* and even admit that “it can be assumed the additional 50 names represented a fair cross section of the community by race and sex.” (Emphasis added). Defendants argue that since only four of those people were served in time to show up at 4 p.m., all fairness which N.C. Gen. Stat. § 9-11(b) was made to insure was emasculated. Defendants present no evidence whatsoever of a systematic exclusion of any persons to make out a prima facie Sixth Amendment violation under *Duren*. Again, defendants do not question the process, only its result. We therefore find the trial court’s procedure in selecting the final juror to have been entirely proper.

[2] Defendants next dispute the State’s use of its peremptory challenges to excuse black jurors. Defendants contend the State improperly excluded black members from the jury in violation of the principles articulated in *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986), and in *State v. Cofield*, 320 N.C. 297, 357 S.E.2d 622 (1987). The defendants bear “the burden of proving the existence of purposeful discrimination.” *State v. Sanders*, 95 N.C. App. 494, 498, 383 S.E.2d 409, 412, *disc. review denied*, 325 N.C. 712, 388 S.E.2d 470 (1989). Once a prima facie *Batson* case is shown, the State can rebut any inference of racial motivation by stating on the record “legitimate reasons which are clear and reasonably specific and related to the particular case to be tried which give a neutral explanation for challenging jurors of the cognizable group.” *State v. Jackson*, 322 N.C. 251, 254, 368 S.E.2d 838, 840 (1988), *cert. denied*, 490 U.S. 1110, 104 L.Ed.2d 1027 (1989). In *State v. Burge*, this Court found the State to have presented legitimate reasons for its exclusion of six minority jurors where “[t]wo had had brothers who had been charged with cocaine offenses; one knew two of defendant’s witnesses; two others knew defendant’s parents and one of his attorneys; and the last one knew defendant’s family and both of his attorneys.” *Burge*, 100 N.C. App. 671, 674, 397 S.E.2d 760, 761 (1990), *disc. review denied and appeal dismissed*, 328 N.C. 272, 400 S.E.2d 456 (1991). In the case below, the State

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used peremptory challenges to excuse seven black jurors. The trial court found the State to have rebutted any inference of purposeful discrimination by the State's recitation of the following reasons: One had been convicted of felonious breaking and entering some years earlier as the result of an investigation by the Alamance County Sheriff's Department; two had had first degree relatives charged with felonies by Alamance County officials; one had had a first degree relative who had been charged with DWI by Alamance County officials and additionally knew defense witnesses; one was subject to an ongoing investigation being conducted in part by State's witness Deputy Sheriff Dean Ward for selling alcoholic beverages without ABC permits; one knew two defense witnesses; and one knew the mother of a potential defense witness and expressed reservations about her ability to return a guilty verdict by stating she would "second-guess" her decision because life imprisonment was "too harsh" a sentence for rape. We agree with the trial court's decision that these reasons sufficiently rebutted any prima facie case of discrimination in jury selection.

[3] In the final issue relating to the jury, defendants contend the trial court committed prejudicial error in finding two jurors had not discussed the case and in permitting them to serve as jurors. Prior to impaneling the jury, it was brought to the court's attention that two of the jurors had allegedly discussed the case during a recess. Edie Lashanta McBroom, defendant Mebane's girlfriend, took the stand and testified she overheard two jurors, Mr. Massey and Mr. Moore, talking about the case outside the courthouse restroom. She testified she heard Mr. Massey comment [with reference to the defendants], "They look guilty." The court proceeded to conduct a voir dire examination of both jurors outside the presence of the rest of the jury. Mr. Massey denied having expressed an opinion as to the guilt or innocence of the defendants. He admitted saying, "This looks like it's going to be, you know, a pretty big case." Mr. Moore denied having had a conversation with any juror concerning the case. Both jurors also indicated they could be completely fair and impartial as to each defendant. The trial court made findings of fact that the jurors had not talked about the case and had not expressed opinions about the guilt or innocence of the defendants.

Defendants claim the trial court's failure to excuse the two jurors violated constitutional and statutory provisions. We find no error. Both the North Carolina and United States Constitutions



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guarantee an individual's right to a fair trial by an impartial jury. U.S. Const. amend. VI; N.C. Const. art. I § 24. Additionally, N.C. Gen. Stat. § 15A-1212(6) and (9) (1988), provide:

A challenge for cause to an individual juror may be made by any party on the ground that the juror:

\* \* \* \*

(6) Has formed or expressed an opinion as to the guilt or innocence of the defendant. It is improper for a party to elicit whether the opinion formed is favorable or adverse to the defendant.

\* \* \* \*

(9) For any other cause is unable to render a fair and impartial verdict.

Any removal of a potential juror for cause is a matter within the discretion of the trial court and is not reviewable except for an abuse of discretion. *State v. Kennedy*, 320 N.C. 20, 28, 357 S.E.2d 359, 364 (1987).

In the case below, the trial judge determined that the jurors had not discussed the case and had not formed an opinion as to the defendants' guilt or innocence. Moreover, notwithstanding a juror's opinion as to how the case should be decided, the juror may still serve if the court determines that the juror could "lay aside his impression or opinion and render a verdict based on the evidence presented in court." *Irvin v. Dowd*, 366 U.S. 717, 723, 6 L.Ed.2d 751, 756 (1961). *See also, State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983). The transcript from the present case indicates that when questioned by the trial judge, the jurors stated unequivocally they could be completely fair and impartial. Consequently, we find no abuse of discretion by the trial judge in failing to excuse the two jurors for cause.

[4] We turn now to the issues defendant Wright raises individually concerning the trial proceedings. Defendant Wright first contests the trial court's denial of his motion for a jury view of the rape scene. The decision to allow a motion for a jury view is within the sound discretion of the trial judge. *State v. Davis*, 86 N.C. App. 25, 32, 356 S.E.2d 607, 611 (1987). Defendant Wright argues the jury view would have assisted the jury in determining whether the victim's testimony as to the nature of the sex acts was credible.

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We find the judge did not abuse his discretion by denying the motion. At trial, both the State and defendants introduced several diagrams and photographs of the scene as illustrative testimony. A view of the scene was not necessary and would not have aided the jury over and above the evidence provided. Therefore, the trial judge's ruling on this motion will not be disturbed.

[5] Defendant Wright further contends the trial court committed reversible error in admitting into evidence against defendant Wright testimony from a State's witness tending to show defendant Wright's father attempted to bribe the witness to testify falsely. Defendant Mebane joins in this argument. On direct examination, State's witness Sophie Allen testified that sometime during the summer prior to trial she went to defendant Wright's attorney's office to discuss the case. While she was waiting in the hallway, defendant Wright's father, Mr. Fred Carlton Wright, Sr., asked Ms. Allen to "say that his son did not rape [the victim]." He then gave Ms. Allen \$100.00. Ms. Allen stated she told defendant Wright's counsel what had transpired and he told her "not to worry about it." The defendants objected generally to this testimony. The trial judge overruled the objection as to defendant Wright, and gave an instruction to the jury explaining they were not to consider the evidence against defendants Mebane and Yellock. Later, the trial court conducted a voir dire examination of defendant Wright's attorney, Mr. Craig T. Thompson. The trial judge then asked defendant Wright if he was satisfied with Mr. Thompson's representation in the matter and if he would allow Mr. Thompson to testify. In addition, the judge inquired whether defendants Mebane and Yellock objected to Mr. Thompson's testimony; neither objected. The State also had no objection. The trial court permitted Mr. Thompson to testify for the sole limited purpose of refuting Ms. Allen's testimony concerning what she had told the attorney about defendant Wright's father. Defendant Wright's father then testified about events which occurred on the night of 28 July 1989. He highlighted in detail the point in the evening when the four came to his house so his son could get some money, but he also discounted Ms. Allen's testimony tending to show he had bribed her to say his son had not committed rape.

Defendant Wright argues the admission of Sophie Allen's testimony caused him to suffer irreparable prejudice. Defendant Mebane contends that despite the judge's cautionary instruction, the admission of the evidence had a "trickle down" effect and

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the jury nevertheless improperly considered the evidence against him. Both defendants allege the admission of this evidence requires a new trial. We do not agree. Generally, evidence tending to show a defendant has attempted to induce a witness to testify falsely in his or her favor is relevant and admissible against the defendant. *State v. Minton*, 234 N.C. 716, 725, 68 S.E.2d 844, 850 (1952). In the case below, however, the purported bribe was made by defendant's father and not the defendant. We therefore acknowledge the evidence is testimony of a collateral matter and was irrelevant to prove the defendants' guilt of the crimes charged. We are not convinced, however, that the admission of the evidence necessitates a new trial.

A new trial will not be ordered automatically each time a court rules erroneously on the admissibility of evidence. *State v. Galloway*, 304 N.C. 485, 496, 284 S.E.2d 509, 516 (1981). The admission of irrelevant evidence will be treated as harmless error unless the defendant demonstrates he was so prejudiced by the erroneous admission that "a different result would have ensued if the evidence had been excluded." N.C. Gen. Stat. § 15A-1443(a) (1988); *State v. Harper*, 96 N.C. App. 36, 41, 384 S.E.2d 297, 300 (1989). In this case defendants have not met their burden of demonstrating that had the erroneously admitted testimony been excluded, a different result would likely have been reached. A careful review of the transcript discloses the insignificance of the alleged bribe in the trial proceedings as a whole. The State did not focus on the testimony, and the defense called two witnesses to refute the allegation. Furthermore, the case did not turn on the improperly admitted evidence, but rested instead primarily on the victim's testimony and the testimony of the several defense witnesses. Consequently, we find the admission of Sophie Allen's testimony relating to the alleged bribe to be harmless error.

[6] Next, both defendants contest the admission into evidence of John Pinnix's timecard for the pay period ending 29 July 1989. According to the victim, John Pinnix was her former boyfriend. She had not seen him for over a month prior to 28 July 1989 since they had "called it off." Defendants elicited testimony from various witnesses during the proceedings to suggest Mr. Pinnix had either been her assailant or had had consensual sexual intercourse with the victim that night. To explain Mr. Pinnix's whereabouts, the State offered into evidence his timecard which had been punched in at 2:52 p.m. and punched out at 11:10 p.m.

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on 28 July 1989. Defendants argue the timecard was improperly admitted into evidence. We disagree.

Generally all relevant evidence is admissible. N.C. Gen. Stat. § 8C-1, Rule 402 (1988). Evidence is relevant when it has "any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1988). The timecard of John Pinnix in the case below was relevant to demonstrate he was working and could not have had sex with the victim on the night in question. The timecard was admissible as an exception to the hearsay rule under N.C. Gen. Stat. § 8C-1, Rule 803(6) (1988) which exempts "business records." Business records are appropriately admitted into evidence when "a proper foundation . . . is laid by testimony of a witness who is familiar with the . . . records and the methods under which they were made so as to satisfy the court that the methods, the sources of information, and the time of preparation render such evidence trustworthy." *State v. Springer*, 283 N.C. 627, 636, 197 S.E.2d 530, 536 (1973). The record below indicates the proper foundation was laid to admit the timecard. The director of manufacturing of Pinnix's employer, who was "familiar with the timecard records and procedures in recording the time that employees work," described in detail the procedures used.

[7] The defendants next contend the trial court erred by not dismissing the first-degree rape and first-degree kidnapping charges for insufficiency of the evidence. The test 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). The trial court must consider all the evidence taken in the light most favorable to the State to determine whether substantial evidence exists. *State v. Perry*, 316 N.C. 87, 95, 340 S.E.2d 450, 456 (1986). Substantial evidence is "evidence from which any rational trier of fact could find the fact to be proved beyond a reasonable doubt." *State v. Sumpter*, 318 N.C. 102, 108, 347 S.E.2d 396, 399 (1986). 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).

The statute proscribing the offense of first-degree rape reads:

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(a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:

\* \* \* \*

(2) With another person by force and against the will of the other person, and:

a. Employs or displays a dangerous deadly weapon or an article which the other person reasonably believes to be a dangerous or deadly weapon; or

\* \* \* \*

c. The person commits the offense aided and abetted by one or more other persons.

N.C. Gen. Stat. § 14-27.2 (1986). The evidence in the present case is sufficient on first-degree rape. First, the victim testified to many acts of vaginal intercourse by the defendants to which she did not consent. She recounted the threats by the defendants to hurt her with a butcher knife, which was found at the scene, unless she "cooperated." Second, the victim explained how the defendants held her arms and legs as each attempted vaginal intercourse and achieved some penetration. Therefore, the trial court's denial of defendants' motion to dismiss the first-degree rape charges must be upheld.

[8] The kidnapping statute provides:

(a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person . . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:

\* \* \* \*

(2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or

\* \* \* \*

(b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously

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injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony.

N.C. Gen. Stat. § 14-39 (Cum. Supp. 1991). According to the North Carolina Supreme Court, it was not the Legislature's intent "to make a restraint which was an inherent, inevitable element of another felony, such as armed robbery or rape, a distinct offense of kidnapping thus permitting conviction and punishment for both crimes." *State v. Irwin*, 304 N.C. 93, 102, 282 S.E.2d 439, 446 (1981). It is true some restraint is inherent in the crime of rape. However, the restraint, confinement, and asportation of a rape victim may constitute kidnapping if it is a separate, complete act, independent of and apart from the rape. *State v. Walker*, 84 N.C. App. 540, 543, 353 S.E.2d 245, 247 (1987). For the kidnapping convictions to be upheld, the initial inquiry begins with subsection (a). We must determine whether there was substantial evidence that the defendants restrained or confined the victim separate and apart from any restraint necessary to accomplish the acts of rape. We conclude it does. The victim testified that defendant Mebane called her into the back bedroom where he locked the door and began fondling her. She stated he later allowed codefendants Wright and Yellock to enter the room since she would not "cooperate." Defendant Wright blocked the door, and defendant Yellock forced her against a window where he grabbed her arms. The men then dragged her down the hallway into the living room. When she wrestled herself away from them, defendant Mebane hurried to the front door and locked it. These facts meet the requirements of N.C. Gen. Stat. § 14-39(a) and are substantial evidence from which the jury could infer the victim was kidnapped. In addition, the evidence supports a verdict of kidnapping in the first degree pursuant to subsection (b). The facts in this case, as explained earlier, are evidence from which the jury could reasonably decide the victim was sexually assaulted pursuant to the statute. We thus determine the trial court committed no error in denying defendants' motion to dismiss the first-degree kidnapping charges.

[9] Finally, defendants argue the trial court should have arrested judgments on either the first-degree kidnapping or the first-degree rape convictions. Defendants failed to object on double jeopardy grounds to the trial court's acceptance of the verdicts, and they did not make a motion to arrest judgment on either conviction. Ordinarily, defendants would have forfeited any right to raise this issue on appeal. *State v. Dudley*, 319 N.C. 656, 659, 356 S.E.2d

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361, 364 (1987). In *Dudley*, the defendant failed to move to arrest judgment, on double jeopardy grounds, on his conviction of first-degree kidnapping, first-degree rape, or attempted rape. Our Supreme Court, however, chose to review the double jeopardy issue in *Dudley* pursuant to Rule 2 of the North Carolina Rules of Appellate Procedure despite the defendant's failure to object at trial. In *Dudley*, the defendant was convicted of two counts of first-degree rape and one count of first-degree kidnapping of one victim. *State v. Freeland*, 316 N.C. 13, 340 S.E.2d 35 (1986), holds that an individual may not be convicted of both sexual assault and kidnapping if the sexual assault has to be proved to form the basis of the kidnapping conviction. Based on *Freeland*, the *Dudley* court determined the defendant was entitled to have the judgment arrested as to one of the charges. *Dudley*, 319 N.C. at 660, 356 S.E.2d at 364.

Even if we opted to review the double jeopardy issue as the Court did in *Dudley*, we reach a different result here. The record below reflects a series of sexual assaults by defendants upon the victim as they took turns having intercourse with her. Each distinct act of forcible intercourse with a single victim constitutes a separate offense rather than one continuous sexual assault. *Id.* at 659, 356 S.E.2d at 363. If the trial court properly instructed the jury that the same sexual assault predicated the rape charge could not be used to convict the defendants of first-degree kidnapping, no double jeopardy situation arises. Defendants elected not to include in the record on appeal the trial court's instructions to the jury. Accordingly, we "presum[e] that the jury was properly instructed as to the law arising upon the evidence as required by G.S. § 1-180." *State v. Hedrick*, 289 N.C. 232, 234, 221 S.E.2d 350, 354 (1975). Defendants therefore cannot establish error on appeal.

After having reviewed all issues presented by defendants Mebane and Wright, we find

No error.

Judges EAGLES and ORR concur.

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STATE OF NORTH CAROLINA v. RONALD LYNN TAYLOR

STATE OF NORTH CAROLINA v. ELAINE MARIE FOSTER

No. 9110SC46

No. 9110SC51

(Filed 7 July 1992)

**1. Criminal Law § 375 (NCI4th)— appearance pro se— comments by court—no prejudicial error**

There was no prejudicial error from the trial court's remarks in a trespassing trial which arose from an abortion protest where defendants insisted on appearing *pro se*; the court's comment that he did not want anyone to feel railroaded did not constitute an impermissible expression of opinion; although the court's questions about honest belief and his admonition to tell the truth constituted an impermissible expression of opinion, the error was harmless; defendants' argument that prejudice arose from the cumulative effect of the remarks and questions was not persuasive; and the record made clear that the judge's goal throughout the trial was that defendants receive fair treatment by the judicial system.

**Am Jur 2d, Trial § 276.****2. Criminal Law § 385 (NCI4th)— appearance pro se— judge's admonition to defendant to tell the truth—questions of relevancy—no prejudicial error**

There was no prejudicial error in a trespassing prosecution arising from an abortion protest where the trial court admonished defendant Taylor outside the presence of the jury to tell the truth and nothing but the truth just before his direct examination began. The admonition, while couched in terms of truthfulness, addressed the question of relevancy of defendant's proposed testimony and, under all the circumstances, it cannot be said that the admonition to tell the whole truth had the effect of stifling the free presentation of competent testimony on any true issue in the case.

**Am Jur 2d, Trial § 276.**



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**3. Criminal Law § 367 (NCI4th)— appearance pro se—court's participation in State's case—no prejudicial error**

There was no prejudicial error in a trespassing prosecution arising from an abortion protest in which defendants appeared *pro se* where the trial court actively participated in the State's case, including the cross-examination of defendant Taylor. The State's evidence was clearly sufficient for the jury to find defendants guilty of the charge against them, and the refusal of the defense to stick to the issues on trial caused the trial court to play an unusually active role.

**Am Jur 2d, Trial § 274.**

APPEAL from judgments entered 25 July 1990 by *Judge George R. Greene* in WAKE County Superior Court. Heard in the Court of Appeals 8 October 1991.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Lehman, for the State.*

*Randall, Yaeger, Jervis, Hill & Anthony, by Robert B. Jervis, for defendant-appellants.*

PARKER, Judge.

On the morning of Saturday, 24 February 1990, defendants Taylor and Foster along with many other people went to the Fleming Center, a private clinic whose services include performing abortions, in Raleigh, North Carolina. Defendant Taylor went as a representative of Operation Save A Baby, a group which opposes abortion. Because of his conduct on the premises of the clinic, defendant Taylor was charged with trespass and resisting officers. He was convicted of second degree trespass in Wake County District Court on 5 April 1990. Charged only with trespass arising from her conduct at the clinic, defendant Foster also was convicted of second degree trespass on 5 April 1990. Both defendants gave notice of appeal and their cases were joined, with those of four other people convicted of the same offense, for trial *de novo* in Wake County Superior Court. All six defendants appeared *pro se*. On 24 July 1990 a jury found defendants Taylor and Foster guilty of second degree trespass; each was sentenced to a twenty-nine day term of imprisonment.

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Both defendants gave notice of appeal to this Court, and on 16 January 1991 their motions to consolidate their appeals were granted. Defendants made identical assignments of error and submitted identical briefs.

Defendants' three contentions on appeal address only the conduct of the trial judge. First defendants contend the judge erred by expressing an opinion on questions of fact to be decided by the jury. Defendants also contend the judge erred in admonishing defendant Taylor, out of the presence of the jury, to testify truthfully. Finally defendants contend the judge erred by participating in the State's presentation of its case in chief. We find these contentions without merit and hold defendants received a fair trial free of prejudicial error.

The relevant trespass statute provides:

(a) Offense.—A person commits the offense of second degree trespass if, without authorization, he enters or remains on premises of another:

- (1) After he has been notified not to enter or remain there by the owner, by a person in charge of the premises, by a lawful occupant, or by another authorized person; or
- (2) That are posted, in a manner reasonably likely to come to the attention of intruders, with notice not to enter the premises.

(b) Classification.—Second degree trespass is a misdemeanor punishable by imprisonment for up to 30 days, a fine of up to two hundred dollars (\$200.00), or both.

N.C.G.S. § 14-159.13 (Supp. 1991).

[1] Defendants first contend the trial judge erred by expressing opinions on questions of fact to be decided by the jury. We disagree.

During the direct examination of State's first witness, Officer J.T. Gilliam, who testified from written notes, defendants, by defendant Taylor, requested the opportunity to examine the notes. The judge stated, "If you wish to see his notes, I will make them available to you at the proper time." Before attempting to cross-examine Gilliam, defendant Taylor again asked for the notes. Defendants requested a five minute recess in which to review the

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notes; and the judge stated, "Take fifteen." Defendant Taylor queried, "Fifteen?" The judge replied

Sure. I want you to know what is in there.

Members of the jury, you may relax for fifteen minutes. Feel free to wander in the lobby and get a cup of coffee or whatever. The bottom line is I try to conduct a fair trial to both sides and I don't want anyone to feel they have ever been railroaded in my court. Court will be at ease.

Defendants argue these remarks clearly intimated the judge's opinion as to defendants' guilt and the merits of their defense. We do not find defendants' argument persuasive.

A trial judge must not, during any stage of a trial, express "any opinion in the presence of the jury on any question of fact to be decided by the jury." N.C.G.S. § 15A-1222 (1988). This statute has been construed to mean that a trial judge must not express any opinion as to the weight or credibility of any competent evidence presented before the jury. *State v. Harris*, 308 N.C. 159, 167, 301 S.E.2d 91, 97 (1983). Whether the opinion is expressed in the court's charge, in the examination of witnesses, in rulings on evidence, or in any other matter is immaterial. *State v. Alston*, 38 N.C. App. 219, 220, 247 S.E.2d 726, 727 (1978), *cert. denied*, 296 N.C. 586, 254 S.E.2d 30 (1979). Nevertheless, a new trial is not required if, considering the circumstances under which a remark was made, it could not have prejudiced the defendant's case. *State v. King*, 311 N.C. 603, 618, 320 S.E.2d 1, 11 (1984); *State v. Perry*, 231 N.C. 467, 471, 57 S.E.2d 774, 777 (1950). On review, all facts and attendant circumstances as shown by the record must be considered and remarks must be considered in context. *State v. Brady*, 299 N.C. 547, 560, 264 S.E.2d 66, 74 (1980); *State v. Lofton*, 66 N.C. App. 79, 85, 310 S.E.2d 633, 636 (1984). In light of the foregoing principles, the question for this Court is whether the challenged remarks constituted expression on any question of fact to be decided by the jury or, more narrowly, expression of opinion as to the weight or credibility of any competent evidence presented before the jury.

From context it is clear the court was deeply concerned that without legal counsel, defendants could not mount a proper defense to the charges against them. When defendants' case was called for trial, the judge began by asking the six defendants individually

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if they were prepared for trial. The judge specifically asked defendant Taylor if he had “ever been involved in any form of litigation in a formal courtroom other than this charge in your district court appearance?” Defendant responded, “Your Honor, is that a proper question to be answered?” The judge rejoined, “I am asking these questions to try to determine if you are perhaps competent to represent yourself in these proceedings. That is all.” The judge asked first defendant Taylor, then all the other defendants, including defendant Foster, “[D]o you feel comfortable representing yourself?” All defendants responded in the affirmative. The judge then stated, “I don’t feel comfortable with you representing yourselves but if you are ready for trial, we will proceed with trial.”

After giving preliminary instructions to the jury pool, the judge asked them to remember that the defendants had a right to proceed *pro se*. The judge assured the defendants, “I will assist you in your questions when I think it is appropriate, if that is acceptable to you?” Defendants indicated they would accept help. During jury selection, which took up more than two days, the judge expressed sympathy for the defendants’ philosophical and moral beliefs. In addition, he continued to express concern over defendants’ lack of legal counsel, offering to help them find an attorney and suggesting a specific attorney he knew was qualified. This concern is illustrated by the following statement made to the defendants:

Now, I am not asking you to use this lawyer to tell you what to do but merely to advise you procedurally so that you wouldn’t step into pitfalls or things that will be detrimental to you. I want you to get a fair trial. I don’t want you to be railroaded by the district attorney asking an improper question when I am sitting up here looking at something else and not paying attention and an answer comes out.

Even after the judge explained to defendants that they could accept the assistance of legal counsel and still proceed *pro se*, defendants insisted on proceeding without legal counsel.

On its face the challenged statement contained no intimation as to guilt or lack of merit in the defense. Viewing the statement in context and considering the facts and attendant circumstances, including the court’s numerous expressions of concern and offers of help, we conclude the statement did not constitute impermissible

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expression of opinion on the weight or credibility of competent evidence before the jury.

Defendants argue further that in their case in chief, the court made two direct attacks on the credibility of defendant Taylor during his direct examination. We agree but find the errors harmless.

The State presented overwhelming evidence against defendants. Witness after witness testified that defendants Foster and Taylor were part of a large group of people at the clinic, some of whom remained on public sidewalks nearby. Defendants Foster and Taylor, however, were on clinic property. Defendant Foster was in a group which blocked the porch and front door. Defendant Taylor went from the front to the back entrance to encourage people blocking the door there. Defendant Taylor returned to the front door and advised everyone to lock arms and sit down when police arrived. Both defendants were repeatedly asked to leave and finally told to leave or suffer arrest. Defendant Taylor was carried away from the front porch area by officers.

Before defendants' case in chief began, the judge several times expressed his intention to limit defendant Taylor's testimony to evidence contrary to that offered by the State. Defendant Foster showed the judge a list of questions she intended to ask defendant Taylor and the judge stated that since most of the questions were framed chiefly to permit defendant Taylor to express his beliefs on abortion, the judge intended to sustain every objection by the State. This was the context in which direct examination of defendant Taylor took place.

Before the jury, the following exchange occurred:

Q. [By defendant Foster] Mr. Taylor, you stated to me earlier in private that what you were doing at the Fleming Center that morning was not only [B]iblical but in your opinion legal. Could you explain what you mean by that?

A. Well, I know in the past President Re[a]gan . . . signed a proclamation . . . declaring the national sanctity of human life and he declared humanity to the unborn child and the fact that it was his proclamation that he signed I felt like that gave even though *Roe v. Wade* didn't address the issue of the unborn child but I feel like he was giving humanity to the unborn child and public law 96 or 97280, where again a proclamation declaring that the Bible is the word of God

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and that we are to be obedient to that and that being a public law, I felt like I was, you know, legally doing what I felt was correct.

Q. Earlier—

COURT: Hold on just a minute. Now, you just made that statement didn't you and you believed what you just said, don't you?

A. Yes, sir.

COURT: You honestly believe that?

A. I believe that President Re[a]gan did this.

COURT: Your interpretation of what President Re[a]gan did, do you honestly believe this gave you authority to do what you did here on the 24th of February?

A. In addition to the [B]iblical references and my understanding of the [C]onstitution that everybody has pursuit of life, liberty and the pursuit of happiness, yes, sir.

We agree with defendants that the judge's questions about belief and honest belief constituted a direct attack on the credibility of defendant Taylor.

Shortly after this exchange, the following colloquy took place:

Q. Why—from earlier testimony it showed that they carried you to the bus. Why didn't you get up and walk?

A. I think first of all that number one I don't think I had the opportunity because of the way that the events went.

COURT: Now, you told me you were going to tell the truth.

A. Your honor, I am going to tell the truth if you will allow me to continue.

COURT: Didn't the officer ask you to leave?

A. Your honor, may I complete the answer to the question?

COURT: Yes, sir, but I want to make sure we stay in step with each other.

A. The officer did ask me to leave.

COURT: Did you leave?

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A. I did not leave. As the officer pointed his finger at me and said him first, I don't know which officers it were that, you know, pulled me and lifted me up, but go back to your question that you asked me about why, you know, why I was carried. First of all, I was not asked to walk to the van. That's no problem. My second statement is I probably would not have walked to the van, that I probably if that had been asked of me, which it was not, I probably would have sat down at the doors. I was sitting down at the doors and I probably would have requested the officer to carry me and that may even come up with another question as to what was, you know, what was the purpose in carrying you, why didn't you walk to the van. It was not intended as an act of resisting arrest. The records that we keep basically say that the number of women that are turned away from an abortion clinic—

COURT: Here we go again. Now, I'm not going to allow it.

A. By staying at the door and again not b[eing] asked whether I want to walk or be carried, I would probably have been carried even if they had asked me to walk. That's a moot point. By being carried it takes the officers longer to process the arrest and gives our sidewalk counselors longer to talk to the women that are about to go into the clinic.

We agree with defendants that the judge's admonition to tell the truth also constituted a direct attack on the credibility of defendant Taylor.

The North Carolina Supreme Court has said

[T]he judge has no duty to caution a witness to testify truthfully. "Once a witness swears to give truthful answers, there is no requirement to ' . . . direct him to tell the truth.' It would render the sanctity of the oath quite meaningless to require admonition to adhere to it." *United States v. Winter*, 348 F.2d 204, 210 (2d Cir.) [*cert. denied*, 382 U.S. 955, 15 L.Ed.2d 360 (1965)].

*State v. Rhodes*, 290 N.C. 16, 24, 224 S.E.2d 631, 636 (1976).

We conclude that the trial court's questions about belief and honest belief and admonition to tell the truth in the presence of the jury invaded "the province of the jury, which is to assess the credibility of the witnesses and determine the facts from the

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evidence adduced. *State v. Canipe*, 240 N.C. 60, 81 S.E.2d 173 (1954); 7 Strong's N.C. Index 2d *Trial* § 18 (1968)." *State v. Rhodes*, 290 N.C. at 24, 224 S.E.2d at 636. Nevertheless, considering defendant Taylor's testimony in its entirety, we are unable to find that the questions and admonition, even though constituting impermissible expression of opinion, prejudiced defendants' case. Nothing in defendant Taylor's proposed or actual testimony tended to contradict the evidence against him. Instead, assuming *arguendo* that State's evidence left room for reasonable doubt as to his guilt, defendant Taylor's testimony established beyond all doubt that even if asked to leave only once, he did not leave and had no intention of leaving but intended instead to force the officers to carry him bodily away. Under these circumstances, the judge's questions and admonition could not prejudice defendant Taylor's case or that of defendant Foster.

In summary, the challenged remarks about railroading did not constitute impermissible expression of opinion. Although the judge's questions about belief and honest belief and his admonition to tell the truth constituted impermissible expression of opinion, the error was harmless. We are not persuaded by defendants' argument that prejudice arose from the cumulative effect of all the remarks and questions. Instead, the record makes clear that throughout the trial, the judge's goal was that defendants receive fair treatment by the judicial system. For all the foregoing reasons, defendants' first assignment of error is overruled.

[2] Defendants' second contention is that the judge's admonition to tell the whole truth and nothing but the truth, made to defendant Taylor outside the presence of the jury, constituted prejudicial error. Again we disagree.

Just before his direct examination began, defendant Taylor asked, "Your Honor, may I make a few comments to the [c]ourt before they examine me?" This request was denied. The trial court sent the jury out and cautioned defendant Taylor thus

COURT: Now, at this point, sir, and let me[,] if I can[,] get you to understand this, you are taking the witness stand in your own behalf?

A. That is correct.

. . . .



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COURT: At this point the State has clearly shown that you were on the premises of another and that you were asked to leave the premises and either by conduct or by conversation you refused to leave the premises after being requested to do so. In the opinion of this [c]ourt your testimony should be such as to show that the State's evidence was not as it was presented here, but was something else and that you weren't asked to leave or in fact you did leave or as you were attempting to leave in obedience to their request to leave that you were then arrested, something defensive to show it in a light other than that presented by the State. And as I said to you earlier now, I'm going to restrict as near as I possibly can the testimony in this case to the issue of trespass and I have not intended nor am I about now to allow the Superior Court of Wake County to be turned into a forum to advance the cause of pro life or no abortions. That's not what we're here for. We're here to determine if in fact you violated the North Carolina second degree trespass law. Now, what did you want to say to me in the presence of the jury? That's what I'm concerned about.

A. Well, originally . . . it was not my intention to take the stand.

COURT: And I'm wondering why you have at this point.

A. . . . I want to say that I think it is almost demanding of me to take the stand because of some misstatements that were made by . . . clinic personnel [and] police officers that really need correct[ing] and in my opinion the best way that I can correct those . . . is by taking the witness stand.

COURT: Is that important?

A. Yes, sir, it is very important.

COURT: Now, when I ask is that important I ask it in this light, were you on the premises?

A. Yes, sir.

COURT: Were you asked to leave?

A. That is a technical question that I would like to discuss. [T]he . . . officers . . . [as] I have been trying to say throughout [trial,] prior to my arrest, came up on the steps of the clinic and I don't remember his exact words but to the effect that

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you are trespassing and you will be arrested if you do not leave. Immediately after that I responded with sir, we have reason to believe that babies are going to be killed here this morning and I can't really express the expression on Lieutenant Turnage's face. It was—it wasn't anger. I can't articulate what his expression—it was not anger. It was not shock. It was not remorse but it was understanding but I have a job to do. But what I'm saying, Your Honor, before of course he did not respond at all.

COURT: But did you respond to his request is the question before the [c]ourt and jury.

A. Well, what happened is after I made my statement immediately he pointed to me and the officer to his left said he's first and so I don't believe that in the technical sense of the question—

COURT: You're kidding yourself.

A. No, sir, I'm not.

COURT: I rule that you are. Who do you think is going to win this argument? He asked you to leave and instead of leaving you began some dialogue.

A. That is correct.

COURT: And that was a mistake. He gave you a lawful order based on North Carolina law and it was your duty to follow it or suffer the consequences. Now, all of this is said out of the presence of the jury but I want you to know where you are and what you are facing right now.

A. I understand.

COURT: Now, what you want that jury to speculate on or believe or disbelieve because the instructions I'm going to give them will be straight North Carolina law, I have denied you the defense of necessity, whether I'm right or wrong legally the higher courts can say if you elect to appeal it, but even at this point if you or any of the rest of you want to not take the stand and put on evidence I'll still afford you that right to protect you. I personally think it would be detrimental to you to take the stand but it's your right and perhaps I shouldn't say I think it would be detrimental . . . but I

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practiced law for almost 18 years and I have been a judge for 15 and a half and under the circumstances of this case I don't see how you can help yourself because when Mr. Spoon gets through cross examining you it's going to be pitiful, but your choice.

A. And I have decided to make testimony.

COURT: All right. But now I'm going to restrict your testimony to the facts in the case, whether or not you were trespassing, to the facts that day.

. . . .

COURT: Now, understand I'm not going to let you make superior court a forum [for] your protest. We're going to stick to this trial. . . .

A. Are you saying . . . I cannot tell . . . why I was there? . . .

COURT: . . . If you will tell the truth, the whole truth and nothing but the truth so help you God, I'll let you say what you want to. . . . [T]he truth I'm looking for, one, is this, were you on the premises sitting at the door of the clinic or standing or both, next, were you asked to leave, next, did you leave voluntarily and that's what is on trial here today and that's all that's on trial in this courtroom today. Abortion is not on trial in this courtroom today. I have said this before this trial started. I've said it several times during the trial and I'm going to say it again. This is a court of law and the law of the State of North Carolina is that if you go on someone else's premises or property and you are asked to leave by the owner, person in charge or person of authority and you refuse to do so you have violated the trespass law, second degree trespass. Now, that's what we're faced with and that's all we're faced with. Your views on abortion are not on trial in this courtroom today. That's it. Your views on abortion are not on trial in this courtroom today. It is not an issue in this case.

This passage represents only a small part of the lengthy dialogue between defendant Taylor and the court.

Relevant evidence is evidence tending "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

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the evidence." N.C.G.S. § 8C-1, Rule 401 (1988). The North Carolina Evidence Code also provides that the trial court "shall exercise reasonable control over the mode and order of interrogating witnesses and presenting evidence so as to (1) make the interrogation and presentation effective for the ascertainment of the truth, (2) avoid needless consumption of time, and (3) protect witnesses from harassment or undue embarrassment." N.C.G.S. § 8C-1, Rule 611 (1988). *See also State v. Rhodes*, 290 N.C. at 23, 224 S.E.2d at 635 (reiterating that presiding judge is given great discretionary power as to conduct of trial).

"Any intimation by the judge in the presence of the jury, however, that a witness had committed perjury would, of course . . . constitute reversible error." *Id.* at 23, 224 S.E.2d at 636. Whether a reference to perjury is "made in or out of the presence of the jury, 'error may be found in any remark of the judge . . . calculated to deprive the litigants . . . of the right to a full and free submission of their evidence upon the true issues involved to the unrestricted and uninfluenced deliberation of a jury . . .'" *Id.* (quoting Annotation, *Error—Statements as to Perjury*, 127 A.L.R. 1385 (1940)). To constitute reversible error, the judge's remarks must have "the effect of stifling the free presentation of competent, available testimony." *Id.* at 28, 224 S.E.2d at 638.

As the transcript portions quoted above show, the trial court understood the "true" or narrow issues in defendants' trial and attempted without success to help defendants to a similar understanding of the application of law to the facts of their case. The court had previously expressed concern that without legal counsel, defendants could not understand the legal issues in their case. The court tried repeatedly to explain to defendants what evidence could constitute evidence relevant to the charge against them and why certain testimony they wished to elicit from State's witnesses or present in their case in chief was irrelevant. Nevertheless, the record shows defendants could not or would not understand. In the face of such conduct, the court could do no more than maintain its zealous refusal to admit irrelevant evidence. The admonition to defendant Taylor, while couched in terms of truthfulness, addressed the question of relevancy of his proposed testimony. Under all the circumstances we cannot say the admonition to tell the whole truth had the effect of stifling the free presentation of competent testimony on any true issue in the case. Therefore, we overrule this assignment of error.

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[3] Defendants' final contention is that the trial court erred by its active participation in State's case in chief, including overbroad cross-examination of defendant Taylor. We disagree.

Even assuming the court erred, the question for this Court is whether the error was prejudicial to defendants' case. *State v. Staley*, 292 N.C. 160, 165, 232 S.E.2d 680, 684 (1977) (finding prejudicial error where trial court played unusually active interrogational role during presentation of State's evidence, asking altogether twenty-one questions during direct examination by the State, culminating in statement, "I think it's obvious what the facts are."). In the instant case, State's evidence was clearly sufficient for the jury to find defendants guilty of the charge against them. So far from contradicting State's evidence, defendants' evidence tended to confirm their guilt.

*Staley* suggests that where the trial court plays an unusually active interrogational role during presentation of State's evidence, the ultimate "question is not whether guilt may be spelt out of a record." 292 N.C. at 169, 232 S.E.2d at 686 (quoting *Bollenbach v. United States*, 326 U.S. 607, 614, 90 L.Ed. 350, 355 (1946)). Rather the question is whether the trial judge's involvement in the trial procedure and process prejudiced defendant's case by leaving the jury with an impression of the judge's opinion of the facts and of defendant's guilt such that in essence the defendant was tried by the judge, not by the jury. In the case under review the number and tenor of the questions asked by the court were nothing like those in *Staley*. Moreover, in *Staley*, the court was not faced with the refusal of the defense, in cross-examining State's witnesses and in presenting its case in chief, to stick to the issues on trial. In the instant case such refusal by defendants caused the trial court to play an unusually active role. Considering all the facts and circumstances, we are unable to find prejudice and, therefore, overrule this assignment of error.

No error.

Judges WELLS and WYNN concur.

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STATE OF NORTH CAROLINA v. RANDOLPH QUICK

No. 9018SC1346

(Filed 7 July 1992)

**1. Evidence and Witnesses § 1239 (NCI4th) — statement not result of interrogation — seized evidence not tainted**

Evidence found in a car defendant had borrowed and failed to return was not rendered inadmissible by a statement made by defendant before he was advised of his rights where an officer told defendant at his apartment that the police wanted to know where the car was located, defendant stated that he would take officers to the car, defendant was then advised of his rights, and defendant thereafter directed officers to the car, since the statement made by defendant before he was advised of his rights was made voluntarily and not in response to questions by the officers.

**Am Jur 2d, Search and Seizure § 46.**

**2. Evidence and Witnesses § 538 (NCI4th) — merchandise price tags — relevancy**

Merchandise price tags recovered from an automobile defendant borrowed and failed to return were relevant and admissible to prove charges of breaking or entering of a store, larceny and possession of stolen property where the co-owner of the store identified the tags as ones previously attached to store merchandise.

**Am Jur 2d, Burglary § 50.**

**3. Burglary and Unlawful Breakings § 119 (NCI4th) — breaking or entering, larceny, possession of stolen property — sufficiency of evidence**

The evidence was sufficient for submission to the jury on charges of breaking or entering of a store, larceny of merchandise therefrom, and possession of stolen property where it tended to show that defendant borrowed a car on 25 February and failed to return it; a sporting goods store was broken into the night of 26 February or the morning of 27 February and merchandise was taken therefrom; two granite rocks were found in the store; defendant led police to the missing car parked at a motel; a granite rock covered with glass fragments

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and merchandise price tags from the store were discovered in the car; and defendant had checked into the motel on the morning following the break-in and had left later that day.

**Am Jur 2d, Automobiles and Highway Traffic § 349.****4. Automobiles and Other Vehicles § 134 (NCI3d) – unauthorized use – sufficiency of evidence**

The evidence was sufficient to support defendant's conviction of unauthorized use of a vehicle where it tended to show that the owner of a car gave defendant permission to drive the car for the limited purpose of going to purchase beer and stopping to visit his sister and defendant never returned the car. N.C.G.S. § 14-72.2.

**Am Jur 2d, Automobiles and Highway Traffic § 349.****5. Burglary and Unlawful Breakings § 141 (NCI4th) – recently stolen property – instruction supported by evidence**

The evidence supported the trial court's instruction on the doctrine of possession of recently stolen property where it tended to show that price tags which had been attached to clothing stolen during a break-in of a store were found within two days after the crimes in a car defendant had borrowed and failed to return.

**Am Jur 2d, Burglary § 54.****6. Criminal Law § 1095 (NCI4th) – aggravating factor – prior conviction – statement by prosecutor – defendant's argument for concurrent sentence**

The trial court did not err in finding the aggravating factor of a prior conviction based upon the prosecutor's oral recitation of defendant's record where defendant contested only his parole status at a particular time and whether his new sentence should be concurrent with or at the expiration of an existing sentence, since defendant may not argue that a new sentence should be concurrent with his earlier sentence and then successfully argue that there is no earlier sentence.

**Am Jur 2d, Criminal Law § 535.**

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**7. Criminal Law § 1680 (NCI4th)— modification of sentence in term—consecutive rather than concurrent**

The trial court did not err by modifying defendant's sentence imposed during the same term to provide that the sentence would run at the expiration of any sentence then required to be served by defendant after the court received additional information in defendant's presence in open court.

**Am Jur 2d, Criminal Law § 580.**

APPEAL by defendant from Judgments entered 11 and 12 September 1990 by *Judge Preston Cornelius* in GUILFORD County Superior Court. Heard in the Court of Appeals 25 September 1991.

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Francis W. Crawley, for the State.*

*Assistant Public Defender Stanley Hammer for defendant appellant.*

COZORT, Judge.

Randolph Quick was convicted of felonious possession of stolen goods, felonious breaking and entering, felonious larceny, and the unauthorized use of a conveyance. Defendant received a total sentence of twelve years in prison. On appeal defendant challenges the following: (1) the trial court's denial of a motion to suppress a statement made by defendant; (2) the admission of evidence relating to certain merchandise price tags; (3) the trial court's denial of defendant's motion to dismiss all charges based on the insufficiency of the State's evidence; (4) the trial court's instruction to the jury on the doctrine of recent possession; (5) the trial court's finding as an aggravating factor that defendant had a prior conviction punishable by more than 60 days' confinement when the District Attorney did not tender certified copies of the prior convictions; and (6) the trial court's resentencing defendant on the day subsequent to his initial sentencing due to a misunderstanding about defendant's parole status. We find that defendant received a fair trial and sentencing free from prejudicial error.

The State's evidence presented at trial tended to show that, on the evening of 25 February 1990, defendant borrowed a 1975 Camaro automobile from Michael Golden so defendant could drive to a nearby store to purchase beer and then stop by his sister's



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house. Mr. Golden testified the defendant did not return with the car that evening or the following day. Mr. Golden reported the matter to the police, and on 27 February 1990, he filed a complaint against the defendant. A warrant was subsequently issued for defendant's arrest.

High Point Police Detective J. M. Long testified that, on 28 February 1990, he went to Randolph Quick's apartment. Defendant answered the door and Long informed him of the outstanding arrest warrant for the unauthorized use of a motor vehicle. Defendant invited Detective Long and his partner into the apartment. Defendant was extremely talkative. Detective Long told the defendant the police wanted to know where Mr. Golden's car was located. In response, defendant offered to take the officers to the car. Defendant was then advised of his rights. At defendant's direction, the police officers then drove to the Best Inn of America in Greensboro. The automobile was found unlocked and parked in a parking space in front of one of the motel rooms. The police performed an inventory search of the automobile which uncovered several plastic coat hangers, three or four price tags from sporting clothes, black gloves, a tire tool, some other price tags and a large granite rock covered with glass fragments. When the trunk was unlocked, the police discovered more coat hangers and price tags.

Sergeant A. C. Yow of the Guilford County Sheriff's Department testified he was assigned to investigate a break-in at Stewart Sporting Goods which occurred on 27 February 1990. The High Point Police Department had been alerted to this break-in; officers gave the price tags found in the Camaro to Sergeant Yow. Yow then displayed the tags to Jerry McCandless, the proprietor of Stewart Sporting Goods.

McCandless testified he was part owner of the sporting goods store. He stated that on 27 February 1990 he found the store's front door had been broken and some items had been removed. He noticed two granite rocks on the floor inside the store. Mr. McCandless identified the tags which were in police custody as price tags used by Stewart Sporting Goods. The tags were identified as originating from the store since the handwriting matched other tags remaining in the store, and because the cost codes on the recovered tags were unique to Stewart Sporting Goods.

The State offered the motel register to show that either defendant or someone posing as defendant checked into a room at

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6:28 a.m. on 27 February 1990, and checked out at 2:00 p.m. that same day. The defendant offered no evidence.

[1] Defendant first asserts on appeal that the trial court committed reversible error in denying defendant's motion to suppress the evidence found in Mr. Golden's automobile. Defendant argues the court should have suppressed the evidence gathered as a result of a statement he made to Detective Long and his partner when the officers first arrived at defendant's apartment. Prior to trial, the trial judge conducted a *voir dire* hearing to determine whether the statements given to police concerning the car's location and the evidence gathered from the automobile were admissible. It is well-settled that findings of fact made by a trial judge following a *voir dire* hearing on the voluntariness of a confession are conclusive on appeal if the findings are supported by competent evidence in the record. *State v. Jackson*, 308 N.C. 549, 569, 304 S.E.2d 134, 145 (1983), *vacated on other grounds*, 479 U.S. 1077, 94 L.Ed.2d 133 (1987). The trial court's conclusions of law based on the findings, however, are reviewable by the appellate court to determine whether they are supported by the facts. *State v. Thomas*, 310 N.C. 369, 376-77, 312 S.E.2d 458, 462 (1984). The reviewing court must examine the totality of the circumstances when determining whether the statement in question was made voluntarily. *Jackson*, 308 N.C. at 574, 304 S.E.2d at 148.

In the present case, the findings of fact indicate upon the arrival of the police, defendant invited the officers into his home. He was notified of the arrest warrant. Immediately, defendant told the officers that he had some information for them unrelated to the missing car. The officers said they wanted to know the location of Mr. Golden's car. The defendant stated he would "take [them] there." At that time, defendant never revealed the location of the car to the police. The officers then advised defendant of his rights. We agree with the trial court's conclusion that defendant's statement given before his rights were read to him was made voluntarily and not made in response to any questions asked by the officers. Furthermore, the statement is inconsequential. The trial court did not err in denying defendant's motion to suppress.

[2] Defendant next contests the admissibility of the merchandise price tags recovered from Mr. Golden's auto. Defendant contends the admission of the tags constituted prejudicial error because the tags could not be conclusively linked to the merchandise which

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was stolen. We disagree. All relevant evidence is 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). "Evidence is relevant if it has any logical tendency, however slight, to prove a fact in issue in the case." *State v. Wingard*, 317 N.C. 590, 597, 346 S.E.2d 638, 643 (1986). The merchandise tags introduced in this case were relevant to prove the charges of breaking and entering, larceny, and the possession of stolen goods. And, the tags were identified by the store's co-owner as being ones which had previously been attached to store merchandise. Since the evidence is relevant, and because defendant has failed to prove any prejudice pursuant to N.C. Gen. Stat. § 15A-1443(a) (1988), we find no error with respect to its admission.

[3] The defendant also asserts the trial court erred in denying defendant's motion to dismiss all charges relating to the stolen property. 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). When a motion to dismiss involves circumstantial evidence in a case:

[T]he court must decide whether a reasonable inference of the defendant's guilt may be drawn from the circumstances shown. If so the jury must then decide whether the facts establish beyond a reasonable doubt that the defendant is actually guilty.

*State v. Triplett*, 316 N.C. 1, 5, 340 S.E.2d 736, 739 (1986) (citation omitted).

The offense of felonious breaking and entering consists of the (1) breaking or entering (2) of any building (3) with the intent to commit larceny therein. *State v. Litchford*, 78 N.C. App. 722, 725, 338 S.E.2d 575, 577 (1986). Larceny requires that the defendant

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(1) take the property of another, (2) carry it away, (3) without the owner's consent, and (4) with the intent to deprive the owner of his property. *State v. Reeves*, 62 N.C. App. 219, 223, 302 S.E.2d 658, 660 (1983). Possession of stolen property occurs when one is in possession of personal property having a value greater than four hundred dollars (\$400.00) which has been stolen, the possessor knows or has reasonable grounds to know the property was stolen, and the possessor acts with a dishonest purpose. *State v. Martin*, 97 N.C. App. 19, 25, 387 S.E.2d 211, 214 (1990). The evidence in this case, both circumstantial and direct, is sufficient for a jury to draw a reasonable inference of the defendant's guilt. Defendant borrowed Mr. Golden's car on 25 February 1990, and did not return it. The sporting goods store was broken into either late in the evening on 26 February, or early in the morning on 27 February 1990. The defendant led the police to the car where price tags, plastic hangers, and a granite rock were discovered. The motel register revealed defendant had checked into a room on the morning following the robbery and had left later that day. The evidence presented by the State was sufficient to support a reasonable inference of guilt with respect to the stolen property offenses. We conclude the trial court did not err in denying defendant's motion to dismiss the charges.

[4] The defendant additionally contests the trial court's denial of defendant's motion to dismiss the unauthorized use of a conveyance charge. A person commits the offense of the unauthorized use of a conveyance if he takes or operates the motor-propelled conveyance of another without his express or implied permission. N.C. Gen. Stat. § 14-72.2 (1986). Defendant argues that since Mr. Golden originally gave him permission to use Golden's car and never specified when the car should be returned, the charge should have been dismissed. This argument is without merit. The evidence shows Mr. Golden gave defendant permission to drive the car for the limited purpose of going to purchase beer and stopping to visit his sister. Defendant never returned the car. The court therefore did not err in denying defendant's motion to dismiss the unauthorized use of a conveyance charge.

[5] Defendant next contends the trial court erred in instructing the jury on the doctrine of recent possession. For an inference to arise that certain property has been stolen, the State must prove: (1) the property was stolen, (2) the stolen property was subject to the defendant's control and to the exclusion of others

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though not necessarily found in defendant's hands or on his person so long as he had the power and intent to control the property; and, (3) the possession was recently after the larceny. *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981). It is not necessary that the stolen property actually be in the hands of the accused. It is sufficient if it is shown to be under his exclusive personal control. *State v. Foster*, 268 N.C. 480, 485, 151 S.E.2d 62, 67 (1966). In order to comply with N.C. Gen. Stat. § 15A-1232 (1988), the trial court has a duty to instruct on every substantial and essential feature of the case. *State v. Jones*, 300 N.C. 363, 365, 266 S.E.2d 586, 587 (1980). Therefore, with respect to the stolen property charges, the legal principle of possession of recently stolen property constituted a substantive feature which the court had a duty to discuss in its jury instructions. The facts taken in the light most favorable to the State supported an instruction on the recent possession of stolen property. We thus find no merit to defendant's contention.

In his last two assignments of error, defendant challenges the sentence imposed by the trial court. First, defendant contends the trial court erred in finding as an aggravating factor that defendant had a conviction for more than 60 days, when the finding was based only on the in-court statement of the District Attorney. Second, the defendant challenges the trial court's modification of the sentence to require that it run at the expiration of any sentence then being served by defendant. We find no error.

When the jury returned its verdicts of guilty on 12 September 1990, the State's attorney, Assistant District Attorney Richard Lyle, was in another courtroom handling another case. The trial court proceeded with sentencing, with another Assistant District Attorney, Mr. Cole, representing the State at defendant Quick's sentencing hearing. Defendant Quick was represented by Mr. Stanley Hammer, who had represented defendant at trial. The following transpired:

THE COURT: State wish to be heard?

MR. COLE: . . . I would like to inform the Court on January 29, 1990, Judge, the defendant was convicted of felonious breaking or entering and larceny and received a six-year sentence committed to the State Department of Corrections. That was to begin at the expiration of a three-year sentence that he was then serving, Judge. He's also been convicted August

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20 of '86 of larceny and got six months in that case, Your Honor. State would ask the Court to find aggravating circumstances as a result of his prior convictions.

MR. HAMMER: Your Honor, I apologize. I didn't realize we were dealing with the sentencing.

I would say, in terms of mitigating factors, for sentencing, I would submit to the Court that the defendant falls within having made an early confession in wrongdoing inasmuch as he led the police officers to the car and cooperated with them in that endeavor and was cooperative throughout. I think he should have the benefit of that mitigating factor.

With respect to the aggravating factors that Mr. Cole has referred to, I have not seen copies of those judgments. I can't stipulate to that.

THE COURT: Okay. If you'll stand up, Mr. Quick.

Anything you wish to say, sir?

THE DEFENDANT: No, sir.

THE COURT: . . . Judgment of the Court is he be imprisoned assigned to work under the supervision of the State Department of Correction for a period of ten years. Give him credit for any time spent in custody awaiting trial.

Court would find as an aggravating factor that defendant has a prior conviction punishable by more than 60 days' confinement. Find no mitigating factors. Find factor in aggravation outweighs any mitigating factors.

\* \* \* \*

MR. HAMMER: File an oral motion at this time in open court.

THE COURT: Okay. Notice of appeal was given in court. Set the usual appeal entry.

MR. HAMMER: Thank you.

The next day, 13 September 1990, Mr. Lyle, who had prosecuted the defendant, appeared in court to request that the judge modify the sentence of the preceding day to provide that it run

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at the expiration of the sentence then being served by defendant. The following transpired:

MR. LYLE: Your Honor, with the Court's permission, Mr. Randolph Quick was sentenced yesterday. There was some talk prior to his trial about his status at the time of arrest. As I understand—I was not here for the sentencing hearing, but, as I understand it, there was either no mention or some mention about his status at the time of the crimes that were alleged to have occurred and he was convicted of.

And, Your Honor, with the Court's permission, I have contacted the Department of Corrections. And based on the report that I got from them, I would ask the Court to reconsider, as far as the sentencing, not the actual sentence, but whether the Court would consider running that at the expiration of the sentence he's now serving.

Your Honor, this defendant was serving a sentence with the Department of Corrections when he was brought in to Guilford County Superior Court the week of January 29, 1990. On January 31, the date of the commitment, he received a six-year active sentence to run at the expiration of the sentence he was then serving.

According to the Department of Corrections, Your Honor, he was paroled on February 7th, they being unaware at that time that he had received a new sentence approximately a week before that.

On February the—excuse me. His parole was revoked based on an oral representation that he had received a new sentence. On February 23rd, Your Honor, the parole board rescinded his revocation to probation because he did not in their file have a copy of the commitment showing that he had received the six-year sentence.

I would point out to the Court, Your Honor, that that was two days before the first alleged incident in this matter. He had been released sometime after February 23rd on parole and his status was a two-day parolee at the time he committed the first offense that he was convicted for.

Subsequent to that time, Your Honor, according to them, he was again revoked. His parole was revoked on July 18,

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1990, and he's now serving six years which was the sentence in High Point handed down in January.

I would ask, Your Honor, based on the fact that he had been paroled only two days and was on parole to find that that was an additional aggravating factor in this case and that the Court consider running the 12-year sentence imposed yesterday at the expiration of the sentence he's now serving.

MR. HAMMER: Your Honor, first of all, I'm not sure of what the basis of Mr. Lyle's motion is. I really don't know, frankly, whether it's in the nature of a motion for appropriate relief or what. I haven't heard anything here today that would justify changing the sentence.

The prosecution has had several months with this case, they're well familiar with Mr. Quick's file, and they certainly could have come in here yesterday and made the same arguments. Of course, the arguments that they make today are not supported.

Mr. Lyle stands up and says that he has heard this and that from the parole commission, and I'm sure he called them, and I'm sure he did talk with them, but in view of all the conflict and question about the status of Mr. Quick's status in the correctional system, I think it would be inappropriate to enhance his sentence at this time based upon what somebody at the Department of Correction told Mr. Lyle on the telephone.

They told—he told you that they told him that they had made a mistake in terminating him originally. I don't know when they made the mistake. They might have made a mistake this morning.

The point is it seems to me that we had sentencing yesterday and that was the time to take care of all of this.

Second thing I would say, Your Honor, if Your Honor is going to hear the motion and act on it, is I fail to see how this can possibly inspire confidence in the judicial process. And I say this with all due respect to the Court on behalf of my client and myself. You've been more than fair, bent over backwards in this trial, and we appreciate this. And then for Mr. Quick to have to come back in the next day to be resentenced, it seems to me that this cannot inspire confidence



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in the judicial process of our correctional system, especially in view of the fact that Mr. Quick has a lawsuit against the district attorney and the correctional system and various officials.

THE COURT: Mr. Quick, anything you want to say?

THE DEFENDANT: Yes, Your Honor. With all respect to Mr. Lyle—and like my attorney said, I've been sentenced. And all those dates that Mr. Lyle gave, all that information is incorrect. I have documentation of everything that I've gone through within the last ten months. You know. And it's not fair.

But I'm not going to argue here today about it. You do whatever you want to do. But do the fair thing. Because it will all come out in the end. Thank you.

THE COURT: Well, I hope that they can get your situation straightened out as to what your actual status is with the Department of Correction.

According to the judgment yesterday, I was under the impression the evidence in the case was you had been released and you were visiting the person involved in the matter and had no knowledge that you were on parole or had—

THE DEFENDANT: I was not on parole, sir. Excuse me.

THE COURT: Well, maybe that's correct. And if it is, there will be no problem. But the Court—if, in fact, you are serving time, then the Court meant for the sentence to run at the expiration of any time you're presently serving. If you're not serving time, then it's simply the 12-year period the Court has indicated.

MR. COLE: Your Honor, I'd like to get in the record, Judge, when the jury came back yesterday—Your Honor well knows Mr. Lyle tried the case. When the jury came back yesterday, I was up here doing pleas. Mr. Lyle was down in juvenile court and could not get up here and Your Honor wanted to go ahead with sentencing procedure. I just read what record I had and told you about this six years, nine years, and three-year sentence he was currently serving. I did not know all the ins and outs about this parole release and him simply on parole. I didn't mislead the Court, Judge. I just didn't have all the facts Mr. Lyle had. I didn't try the case. I didn't have

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all the ins and outs Mr. Lyle just submitted and he wanted to be heard and couldn't be heard and we ask for the modification today.

THE COURT: Court intended, if he was in fact serving time in the Department of Correction it would run at the expiration, and the Court would modify the judgment to reflect that. But if he's not serving time, then it would be simply a 12-year sentence as the Court previously imposed.

[6] The defendant contends that the trial court erred by finding an aggravating factor where the only evidence of the defendant's record is the prosecution's oral recitation of defendant's record, and the defendant did not stipulate to the convictions recited by the prosecution. In *State v. Canady*, 330 N.C. 398, 410 S.E.2d 875 (1991), our Supreme Court considered a similar situation. There, the prosecution told the court that the defendant had prior convictions of felonious possession of marijuana, felonious possession of LSD, discharging a firearm into an occupied motor vehicle and escape from the Department of Corrections. *Id.* at 399, 410 S.E.2d at 876. The defendant's attorney responded, "[t]hese charges and convictions now against him are out of character and not consistent with what he's been involved in the past." *Id.*

Our Supreme Court held there was insufficient evidence to support the aggravating factor of prior record. The Court stated:

We do not feel that a defendant's silence while the prosecuting attorney makes a statement should support an inference that the defendant consented to the statement. Nor do we feel that the argument by the defendant's attorney, that the things with which he was charged in this case are not consistent with his past involvements, should be taken as a consent to the making of the statement by the prosecuting attorney. Rightly or wrongly, the court was considering the matters about which the prosecuting attorney had spoken and the defendant had the right to argue the matters without being held to have admitted them.

*Id.* at 400, 410 S.E.2d at 877.

We find the facts in this case distinguishable from *Canady* and thus reach a different result. The defendant's attorney refused to stipulate to the prior convictions on the first day of the sentencing proceedings. It is clear from the record of the second day's

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sentencing proceedings that, notwithstanding defense counsel's previous refusal to stipulate to the defendant's record, the only factual issues were the specific time sequence of the defendant's prior convictions and his parole status at the time of his arrest and conviction. We cannot read *Canady* to mean there is insufficient evidence of a prior conviction where, as here, the defendant contests only his parole status at a particular time and whether his new sentence should be concurrent with or at the expiration of an existing sentence. Surely the law is not such that a defendant can argue, on the one hand, that a new sentence should be concurrent with his earlier sentence, and then successfully argue, on the other hand, that there is no earlier sentence. We do not find the law in such a state. We find no error in the finding of the aggravating factor.

[7] We now turn to defendant's contention that the trial court erred by modifying defendant's sentence to provide that the sentence would run at the expiration of any sentence then required to be served by defendant. Until the expiration of the term, the orders and judgment of a court are *in fieri*, and the judge has the discretion to make modifications in them as he may deem to be appropriate for the administration of justice. *State v. Edmonds*, 19 N.C. App. 105, 106, 198 S.E.2d 27, 27 (1973). To this end, the trial judge may hear further evidence in open court, both as to the facts of the cases and as to the character and conduct of the defendant. *Id.* The trial court in this case received additional information in defendant's presence in open court. The trial judge stated his original judgment was based upon the impression that defendant was not presently subject to any other sentence, and if defendant was in fact subject to any sentences, the judge "meant for the sentence to run at expiration of any time [defendant is] presently serving." We find no error in the trial court's decision to modify the judgment to impose defendant's sentence at the expiration of his current sentence.

No error.

Judges ARNOLD and LEWIS concur.

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[106 N.C. App. 562 (1992)]

RICHARD HOWARD WORKMAN, PLAINTIFF v. NANCY ROBERTSON  
WORKMAN, DEFENDANT

No. 9010DC1079

(Filed 7 July 1992)

**1. Divorce and Separation § 168 (NCI4th)— equitable distribution—pension benefits—Seifert formula**

In an equitable distribution action involving pension benefits, there was no basis for rejecting the formula or reasoning in *Seifert v. Seifert*, 82 N.C. App. 329. Although N.C.G.S. § 50-20(b)(3)c was amended after *Seifert*, courts should not presume that the legislature intended a repeal by implication and the 1987 amendment did not change the portion of the statute scrutinized in *Seifert*.

**Am Jur 2d, Divorce and Separation § 905.**

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

**2. Divorce and Separation § 168 (NCI4th)— equitable distribution—pension benefits—not explicitly limited to 50%**

The trial court did not err in an equitable distribution action by failing to explicitly limit defendant's share of plaintiff's retirement benefit to 50% where defendant's percentage could only decrease. N.C.G.S. § 50-20(b)(3).

**Am Jur 2d, Divorce and Separation § 905.**

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

**3. Divorce and Separation § 168 (NCI4th)— equitable distribution—pension benefits—joint and survivor benefits**

The trial court did not err in an equitable distribution action by awarding defendant joint and survivor benefits and pre-retirement benefits where the provision that defendant shall not receive more upon plaintiff's death than during his lifetime implicitly fulfills the statutory requirement that the nonemployee spouse may not receive more than 50% of the benefits; the joint and survivor benefit plan could vest before

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plaintiff's death under plaintiff's plan; N.C.G.S. § 50-20(b)(3) (Cum. Supp. 1991) quite clearly includes survivor benefits; and the trial court's order reflects the plan's prohibition against the nonemployee spouse naming a beneficiary to receive any existing unpaid balance.

**Am Jur 2d, Divorce and Separation § 905.**

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

**4. Divorce and Separation § 168 (NCI4th) — equitable distribution — pension benefits — evidence**

The trial court did not err in an equitable distribution action involving retirement benefits by excluding the separation agreement because the method of division was in no way dependent upon the terms of the separation agreement; the court properly excluded evidence concerning defendant's education and ability to support herself because the parties had agreed to an equal division and such factors are to be considered only if the parties disagreed on whether the property is to be divided equally or unequally; the court properly excluded evidence of alimony payments because the court's sole task was to equitably distribute the husband's IBM benefits; and the trial court did not err by admitting letters from IBM concerning the proposed Qualified Domestic Relations Order where plaintiff's own expert testified that he used the letters in forming his opinion and in advising plaintiff's counsel based upon material in the letters. N.C.G.S. § 8C-1, Rules 401 and 705.

**Am Jur 2d, Divorce and Separation § 905.**

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

APPEAL by plaintiff from Order by *Judge Fred M. Morelock* entered 6 April 1990 in WAKE County Superior Court. Heard in the Court of Appeals 8 October 1991.

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*Womble Carlyle Sandridge & Rice, by Susan D. Crooks, for plaintiff appellant.*

*Tharrington, Smith & Hargrove, by Carlyn G. Poole; Wyrick, Robbins, Yates & Ponton, by Robert A. Ponton, Jr., for defendant appellee.*

COZORT, Judge.

Plaintiff-husband appeals from Qualified Domestic Relations Order (QDRO) dividing husband's pension benefits based upon the benefits accumulated during the marriage. We affirm.

Husband and wife were married 3 April 1965, separated on 1 July 1987, and divorced on 7 September 1988. The parties agreed to a division of all the marital property except for the husband's IBM pension and retirement benefits, survivor's benefits, and pre-retirement benefits. The parties agreed that wife was entitled to one-half of the marital portion. The parties further agreed to submit the disputed issues to the district court for resolution. On 6 April 1990 the district court entered a QDRO ordering the following:

1. As a part of the equitable distribution of the parties' marital property, defendant shall be entitled to an assignment of a part of plaintiff's retirement benefit plan to be calculated as follows:

(a) 22.25 years (representing the length of the parties' marriage until the date of their separation contemporaneous with plaintiff's IBM employment) divided by the total number of years of plaintiff's actual employment earning the pension and retirement benefits times 50%.

(b) The percentage set forth within paragraph (a) shall be applied to the total retirement benefit to be received by the plaintiff from the IBM Retirement Plan before any reduction for purchase of a joint and survivor annuity for any party other than the defendant. . . .

\* \* \* \*

2. Defendant shall receive directly from the IBM Retirement Plan a portion of the plaintiff's monthly retirement benefit based upon the percentage formula described in paragraph 1(a) above. Additionally, defendant shall participate in any improvements to and/or increases in the retirement benefit

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payments received by the plaintiff after the entry of this order. Defendant's entitlement to participate in these improvements and/or increases shall be based upon the formula set out in paragraph 1(a) above.

3. Defendant shall begin to receive the above percentage of plaintiff's retirement benefits at the time plaintiff begins to receive his retirement benefits.

4. In the event plaintiff dies prior to plaintiff beginning to receive retirement benefits *and* the plaintiff is survived by defendant, then the defendant shall be a beneficiary of the Plan's pre-retirement spouse protection option (PRSP) with benefits payable to the surviving spouse of the plaintiff. Defendant shall participate in this PRSP option only with respect to the portion of plaintiff's vested benefits earned during the marriage of the parties; the defendant to be treated as the plaintiff's surviving spouse for the purposes of Section 401(a)(11) and 417 of the Internal Revenue Code of 1986 as to the portion of vested benefits earned by the plaintiff during the marriage of the parties. Defendant shall receive that percentage (to the nearest whole percentage) of the benefits paid under the PRSP as determined by the formula set out in paragraph 1(a) above.

5. Defendant shall remain continuously covered by the joint and survivor annuity option of the plaintiff's Retirement Benefit Plan which option shall provide for continued monthly payments to the defendant in the event she is predeceased by the plaintiff *and* the plaintiff dies after be [*sic*] begins to receive retirement benefits under the Retirement Plan. For the purposes of the survivor annuity option the defendant shall be treated as a surviving spouse for the purposes of Section 401(a)(11) and Section 417 of the Internal Revenue Code of 1986 as to the portion of the vested retirement benefits earned by the plaintiff during the marriage of the parties and the plaintiff shall not be entitled to elect a joint and survivor annuity option for the benefit of the defendant which will result in the defendant receiving a lesser payment after the death of the plaintiff than she received before the death of the plaintiff. . . . The defendant shall receive that percentage (to the nearest whole percentage) of the benefits paid under the joint and survivor annuity determined by the formula as follows:

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22.25 years (representing the length of the parties' marriage until the date of their separation contemporaneous with the plaintiff's IBM employment) divided by a numeral representing the total period of plaintiff's actual employment with IBM earning pension and retirement benefits. In no event shall the benefit paid to the defendant following the death of the plaintiff exceed the amount which defendant was receiving during the period in which the plaintiff was alive and the defendant was receiving benefits pursuant to the IBM Retirement Plan as the alternate payee except for those plan improvements and/or increases to which defendant is entitled. The costs of this joint and survivor annuity protection to be maintained for the benefit of the defendant shall be calculated separately for the defendant based solely upon defendant's age. At the date of the entry of this order the defendant is 47 years old. . . .

6. Defendant shall not name a surviving beneficiary under the Plan; should defendant predecease plaintiff, her share of benefits under the Plan shall revert to plaintiff.

\* \* \* \*

8. Defendant is entitled to a portion of plaintiff's IBM Retirement Plan benefits in the manner described above provided that:

(a) Payment of said sum does not require the Plan to provide any type or form of benefit or any option not otherwise provided under the Plan.

(b) This order does not require the Plan to pay out more benefits to the payee than the participant is entitled to.

(c) This order does not require the Plan to pay any benefits already required to be paid to another alternate payee under a previous QDRO.

On appeal, plaintiff-husband presents three issues: (1) whether the QDRO violates N.C. Gen. Stat. § 50-20 (Cum. Supp. 1991) by granting defendant benefits in excess of those allowed by law, (2) whether the trial court erred in refusing to allow evidence of the parties' separation agreement, and (3) whether the trial



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court erred in admitting into evidence letters from the IBM plan administrator relating to draft QDROs.

[1] N.C. Gen. Stat. § 50-20(b)(1) (Cum. Supp. 1991) defines marital property to include “all vested pension, retirement, and other deferred compensation rights.” N.C. Gen. Stat. § 50-20(b)(3) provides:

The distributive award of vested pension, retirement, and other deferred compensation benefits may be made payable:

- a. As a lump sum by agreement;
- b. Over a period of time in fixed amounts by agreement;
- c. As a prorated portion of the benefits made to the designated recipient at the time the party against whom the award is made actually begins to receive the benefits;  
or
- d. By awarding a larger portion of other assets to the party not receiving the benefits, and a smaller share of other assets to the party entitled to receive the benefits.

. . . The award shall be determined using the proportion of time the marriage existed, (up to the date of separation of the parties), simultaneously with the employment which earned the vested pension, retirement, or deferred compensation benefit, to the total amount of time of employment. The award shall be based on the vested accrued benefit, as provided by the plan or fund, calculated as of the date of separation, and shall not include contributions, years of service or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation. No award shall exceed fifty percent (50%) of the benefits . . . .

*Id.* Prior to the 1987 amendment the statute provided in pertinent part:

The award shall be based upon the proportion of the amount of time the marriage existed, simultaneously with the employment which earned the vested pension or retirement rights to the total amount of time of employment. Said award shall not be based on contributions made after the separation, but

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shall include any growth on the amount of the pension or retirement account vested at the time of the separation.

N.C. Gen. Stat. § 50-20(b)(3) (1985).

In *Seifert v. Seifert*, 82 N.C. App. 329, 346 S.E.2d 504 (1986), *aff'd*, 319 N.C. 367, 354 S.E.2d 506 (1987), we addressed two methods for determining the division of pension and retirement benefits. Plaintiff-wife brought action for equitable distribution of marital property. Although both parties had vested pensions and retirement rights, the trial court considered only the division of the husband's pension and retirement benefits. The trial court first determined that, if the defendant had retired on the date of separation, he would have been entitled to receive 62.5% of his basic monthly pay. The trial court then determined that defendant had served in the United States Army for 24 years and 11 months, and for 22 years and 3 months of that time defendant was married to plaintiff. Next, the trial court determined that 87% of defendant's pension and retirement benefits were earned during the marriage. Taking the life expectancy of defendant and a rate of return of investment, the trial court calculated the present lump sum value of defendant's pension and retirement benefits. The trial court concluded that an equal division of the property would be equitable. In addition to the full amount of her vested pension, the trial court awarded plaintiff a lump sum as the present value of defendant's vested military pension to be distributed to plaintiff in monthly installments once defendant began receiving his retirement pay.

On appeal we reversed. We first discussed the advantages and disadvantages of the two primary methods of evaluating and distributing pension and retirement benefits—present discounted value method and fixed percentage method. Under the first method, the trial court must calculate “the present value of the vested pension, as of the date of separation . . . discounted for interest in the future and taking into account the employee spouse's life expectancy.” *Seifert*, 82 N.C. App. at 334, 346 S.E.2d at 506-07. The trial court must further calculate “the percentage of present value attributable to the marriage period . . . and the appropriate equitable share to which the nonemployee spouse is entitled.” *Id.* at 334, 346 S.E.2d at 507. Under the second method

the court should award to the nonemployee spouse a percentage of that portion of the pension benefits attributable to the

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marriage period. The portion attributable to the marriage is determined by multiplying the net pension benefits by a fraction, the numerator of the fraction being the total period of time the employee spouse was a participant in the plan within the marriage period (from date of marriage to date of separation) and the denominator being the total period of the employee spouse's participation in the plan.

*Id.* at 336, 346 S.E.2d at 508. We found the latter method consistent with N.C. Gen. Stat. § 50-20(b)(3) (1985), which prohibited the award from being based on contributions after separation and required that any growth on the amount of the pension or vested retirement account be included in the award. We noted that the fixed percentage method has the advantages of avoiding any risk of paying the nonemployee spouse for rights which did not mature, permitting the nonemployee spouse to share in increases in post-separation retirement benefits based in marital effort, and avoiding prolonged hearings with actuarial evidence and expert testimony. We did not order one method to the exclusion of the other; rather, we left the decision to the discretion of the trial courts. In the case before us, we found that the trial court "impermissibly utilized a present value in ordering a deferred payment," *Seifert*, 82 N.C. App. at 338, 346 S.E.2d at 509, which, "in effect, operated as a double reduction: plaintiff received a *discounted* value for immediate distribution but nevertheless was required to wait to receive payment until, if and when, the defendant reached retirement and began receiving benefits." *Id.* (emphasis in original). Upon this basis, we reversed and remanded.

On appeal, the North Carolina Supreme Court affirmed. The Court agreed with the majority of the Court of Appeals that N.C. Gen. Stat. § 50-20(b)(3) (1985) did not prohibit use of the present value method. The Court reiterated:

Under the fixed percentage method, deferral of payment is possible without unfairly reducing the value of the award. The present value of the pension or retirement benefits is not considered in determining the percentage to which the nonemployee spouse is entitled. Moreover, because the nonemployee spouse receives a percentage of the benefits actually paid to the employee spouse, the nonemployee spouse shares in any growth in the benefits. . . . *Yet, the formula gives the nonemployee spouse a percentage only of those*

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*benefits attributable to the period of the marriage, and that spouse does not share in benefits based on contributions made after the date of separation.*

*Seifert v. Seifert*, 319 N.C. 367, 370-71, 354 S.E.2d 506, 509 (emphasis added). Finally, the Court noted that the fixed percentage method does not “violate the mandate that the court must identify the marital property, ascertain its net value, and then equitably distribute it,” *Seifert*, 319 N.C. at 371, 354 S.E.2d at 509, because “valuation of these benefits, together with other marital property, is necessary to determine the percentage of these benefits that the nonemployee spouse is equitably entitled to receive.” *Id.*

Plaintiff challenges the trial court’s use of the *Seifert* formula on two grounds: (1) that the legislature intended to modify the *Seifert* decision by amending the language of N.C. Gen. Stat. § 50-20(b)(3); and (2) that the mechanical application of the *Seifert* formula works an injustice and awards defendant retirement benefits accruing to plaintiff after the date of separation based on his post-separation contributions, years of service, and compensation. We disagree. First, courts should not presume that the legislature intended a repeal by implication. *State v. Benton*, 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1979). Second, the 1987 amendment did not change the portion of the statute scrutinized in *Seifert*—N.C. Gen. Stat. § 50-20(b)(3)(c) (1985)—permitting benefits to be made payable “[a]s a prorated portion of benefits.” We find no inconsistency in the 1985 statutory language providing that “[s]aid award shall not be based on contributions made after the separation, but shall include any growth on the amount of the pension or retirement account vested at the time of the separation,” and the 1987 statutory language providing that “the award . . . shall not include contributions, years of service or compensation which may accrue after the date of separation. The award shall include gains and losses on the prorated portion of the benefit vested at the date of separation.” In both versions the award is based on the benefits vested at the time of separation and must include any “growth” or “gains and losses” arising out of the vested benefits. Neither version permits an award based on *contributions* after the date of separation. The *Seifert* formula includes only the benefits accumulated during the marriage. The denominator of the fraction, the total period of the employee spouse’s participation in the plan, is one component of the formula designed to reflect the “gains and losses” arising out of the vested benefit at the time of separa-

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tion. The award itself does not include "contributions, years of service or compensation which may accrue after the date of separation." Since the amended statute is consistent in pertinent part with the former statute, we find no basis for rejecting the formula or reasoning in *Seifert*. (We note that N.C. Gen. Stat. § 50-20 was amended again in the 1991 Session of the North Carolina General Assembly; however, the subsections at issue here were not changed. (1991 N.C. Session Laws 635)). Accordingly, plaintiff's first two arguments fail.

[2] Plaintiff also contends that the trial court awarded defendant benefits in excess of the 50% limit set forth in N.C. Gen. Stat. § 50-20(b)(3). First, plaintiff argues that the trial court's order does not limit defendant's retirement benefits award to 50%. We do not agree. The order provides in part that defendant "shall be entitled to an assignment of a part of plaintiff's retirement benefit plan" and "shall begin to receive the . . . percentage of plaintiff's retirement benefit at the time plaintiff begins to receive his retirement benefits." We agree with defendant that use of the fixed percentage formula prohibits defendant from receiving more than fifty percent of the retirement benefits. Defendant and plaintiff had been separated for three years prior to the entry of the QDRO. At that time, defendant's share of the pension benefit was 42.8%. This percentage is calculated by dividing 22.25 years (representing the length of the parties' marriage until the date of their separation contemporaneous with plaintiff's IBM employment) by 26, the total number of years of plaintiff's actual employment earning the pension and retirement benefits times 50%. The percentage is applied to plaintiff's "total retirement benefit," with no reduction for purchase of joint and survivor benefit. Since defendant's percentage can only decrease, the trial court did not err in failing to explicitly limit defendant's share to 50% in the order.

[3] Plaintiff further contends that the trial court improperly awarded defendant joint and survivor annuity benefits and pre-retirement benefits. The trial court ordered in pertinent part:

10. Defendant shall remain continuously covered by the joint and survivor annuity option of the plaintiff's Retirement Benefit Plan which option shall provide for continued monthly payments to the defendant in the event she is predeceased by the plaintiff *and* the plaintiff dies after he begins to receive retirement benefits under the Retirement Plan. . . . The plain-

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tiff shall not be entitled to elect a joint and survivor annuity option for the benefit of the defendant which will result in the defendant receiving a lesser payment after the death of the plaintiff than she received before the death of the plaintiff.

. . . .

. . . In no event shall the benefit paid to the defendant following the death of the plaintiff exceed the amount which the defendant was receiving during the period in which the plaintiff was alive and the defendant was receiving benefits pursuant to the IBM Retirement Plan as the alternate payee, except for those plan improvements and/or increases to which defendant is entitled. . . .

11. In the event plaintiff dies prior to plaintiff's beginning to receive retirement benefits *and* the plaintiff is survived by defendant, then the defendant shall be a beneficiary of the Plaintiff's pre-retirement spouse protection option (PRSP) with benefits payable to the surviving spouse of the plaintiff. Defendant shall participate in this PRSP option only with respect to the portion of plaintiff's vested benefits earned during the marriage of the parties . . . . (Emphasis in original.)

We find the trial court's order consistent with N.C. Gen. Stat. § 50-20 (Cum. Supp. 1991). With respect to joint and survivor benefits, the provision that defendant shall not receive more upon plaintiff's death than during his lifetime implicitly fulfills the statutory requirement that the nonemployee spouse may not receive more than 50% of the benefits. We disagree with plaintiff that the joint and survivor benefit could not vest until his death. Under the IBM Plan, if plaintiff had died on 1 July 1987 defendant would have received benefits under the PRSP option. Moreover, the statutory language quite clearly includes survivor benefits:

In the event the person receiving the award dies, the unpaid balance, if any, of the award shall pass to the beneficiaries of the recipient by will, if any, or by intestate succession. In the event the person against whom the award is made dies, the award to the recipient shall remain payable to the extent permitted by the pension or retirement system or deferred compensation plan or fund involved.

N.C. Gen. Stat. § 50-20(b)(3) (Cum. Supp. 1991). With respect to retirement benefits, the IBM Plan indicates that pre- and post-

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retirement benefits are available to former spouses of employees. The trial court's order reflects the IBM Plan's prohibition against the nonemployee spouse naming a beneficiary to receive any existing unpaid balance. We find no error in the trial court's awarding defendant joint and survivor benefits and pre-retirement benefits. Thus we reject plaintiff's argument.

[4] Plaintiff next assigns as error the trial court's exclusion of the parties' separation agreement and failure "to take into consideration the impact of relevant facts in the determination of an appropriate qualified domestic relations order." Plaintiff argues that in determining defendant's share of the IBM benefits the trial court should have taken into consideration the parties' intent in the separation agreement to provide defendant with decreasing income up to plaintiff's retirement. We disagree. In the divorce judgment, the trial court found:

[T]he parties have agree that a QDRO (qualified domestic relations order) shall be entered in this matter making a division of the marital portion of the IBM pension and retirement benefits, and the survivor's benefits and pre-retirement survivor's benefits, to which the Defendant may be entitled, if any. . . . This subsequent order shall further address whether the Defendant is entitled to any post-retirement or pre-retirement survivor's benefits from IBM and whether, if she is so entitled, there should be an adjustment to her one-half marital portion to reflect the entitlement to such benefits.

The district court undertook to determine defendant's share of the marital portion of the IBM benefits. In calculating defendant's share, the district court had no need to consider the separation agreement, since the method of division was in no way dependent upon the terms of the separation agreement. We find the trial court also properly excluded evidence concerning defendant's education and ability to support herself, because such factors are to be considered only if the parties disagreed whether the property is to be divided equally or unequally. *See Miller v. Miller*, 97 N.C. App. 77, 387 S.E.2d 181 (1990). Here, the parties agreed to an equal division.

Plaintiff contends that the trial court erred in excluding evidence of alimony payments because under the QDRO defendant will receive a double benefit since "defendant would receive her share of plaintiff's pension as a property division and another part of his pension

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as alimony." N.C. Gen. Stat. § 50-20(f) (Cum. Supp. 1991) states that "The court shall provide for an equitable distribution without regard to alimony for either party . . ." Here, the trial court's sole task was to equitably distribute husband's IBM benefits. We find the trial court properly excluded evidence of alimony payments.

Lastly, plaintiff contends that the trial court erred in admitting into evidence letters from IBM concerning proposed QDRO. Plaintiff's claim that the letters were irrelevant has no merit. Plaintiff's own expert testified that he used the letters in forming his opinion and that he advised plaintiff's counsel based upon material in the letters. We find the letters admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 401 (1988), defining relevant evidence to mean 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, and N.C. Gen. Stat. § 8C-1, Rule 705 (1988), requiring experts to disclose underlying facts and data for their opinions.

For the reasons set forth above, the trial court's order is

Affirmed.

Judges ARNOLD and LEWIS concur.

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IN THE MATTER OF: JEANETTE RAY QUEVEDO AND MARILYN DAWN  
QUEVEDO

No. 9122DC442

(Filed 7 July 1992)

**1. Parent and Child § 1.5 (NCI3d)— termination of parental rights— sufficiency of petition**

Allegations in a petition for termination of parental rights that respondent has neglected the child within the meaning of G.S. 7A-517(21) and that respondent has wilfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition do not comply with the requirement of N.C.G.S. § 7A-289.25(6) that the petition state "facts which are sufficient to warrant a determination" that



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grounds exist for termination, but the petition was sufficient to state a claim for termination where it incorporated an attached custody award which stated sufficient facts to warrant such a determination.

**Am Jur 2d, Parent and Child § 34.**

**Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.**

**2. Parent and Child § 1.5 (NCI3d)— termination of parental rights—incarcerated respondent—absence from hearing—due process**

The due process rights of a respondent incarcerated in Massachusetts were not violated by the trial court's denial of respondent's motion that he be provided transportation to a termination of parental rights hearing and that the hearing not be conducted in his absence when the three factors specified in *Mathews v. Eldridge*, 424 U.S. 319, are considered and balanced. The factor of the private interests affected by the proceeding weighs heavily in favor of a parent's presence at the hearing; the factor of the countervailing governmental interest supporting the use of the challenged procedure weighs in favor of the State where defendant is imprisoned in a distant state on an armed robbery conviction for which he received a sentence of nine to fifteen years; and the risk of error due to respondent's absence from the hearing is slight where respondent contended that his presence was required at the hearing so that he could present evidence and aid in the cross-examination of witnesses, and respondent's affidavit was admitted into evidence and his appointed counsel cross-examined the witnesses at the hearing.

**Am Jur 2d, Parent and Child § 34.**

**Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.**

**3. Parent and Child § 1.5 (NCI3d)— termination of parental rights—incarcerated respondent—funds for deposition**

When the respondent in a proceeding to terminate parental rights is incarcerated, it is the better practice for the

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court, upon motion by the respondent, to provide the funds necessary for depositing the incarcerated respondent. This deposition, combined with respondent's representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated respondent so as to reduce the risk of error attributable to his or her absence to a level consistent with due process.

**Am Jur 2d, Parent and Child § 34.**

**Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.**

**4. Parent and Child § 1.6 (NCI3d)— incarcerated father— termination of parental rights— sufficiency of findings**

The trial court's conclusions that the incarcerated father has neglected and abandoned his children and that the best interests of the children require that his parental rights be terminated were supported by the court's findings, including findings that the children have been in the custody of petitioners for over six years, that respondent father has not seen the children during this time, including a period of more than a year before his incarceration, and that respondent only attempted to contact the children by mail after the termination petition was filed.

**Am Jur 2d, Parent and Child § 34.**

**Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.**

**5. Parent and Child § 1.6 (NCI3d)— termination of parental rights— admission of guardian ad litem report— harmless error**

A guardian ad litem report based upon hearsay statements was erroneously admitted in a parental rights termination proceeding, but this error was harmless where information contained in the report was properly before the court from another witness.

**Am Jur 2d, Parent and Child § 34.**

**Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.**

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**6. Evidence and Witnesses § 2542 (NCI4th) — child witness — competency to testify**

The trial court did not err in finding that a ten-year-old child was competent to testify in a parental rights termination proceeding. Any inability she may have had to remember the events as they occurred with regard to respondent father went to the weight of her testimony, not to its admissibility or her competency.

**Am Jur 2d, Parent and Child § 34.**

**Validity and application of statute allowing endangered child to be temporarily removed from parental custody. 38 ALR4th 756.**

Judge GREENE concurring.

APPEAL by respondent Hector Quevedo from order entered 27 November 1990 by *Judge Samuel A. Cathey* in DAVIDSON County District Court. Heard in the Court of Appeals 10 March 1992.

Respondent appeals from the order terminating his parental rights in his two minor daughters. The original respondents in this action were Hector Quevedo and his wife, Debra. Debra has not appealed. The petitioners are the aunt and uncle of the two minor children.

On 12 January 1989, petitioners filed a petition to terminate the parental rights of both parents. Petitioners alleged that Hector had neglected the children and had wilfully abandoned the children for at least six consecutive months immediately preceding the filing of the petition. At the time of the hearing on 27 November 1990, Hector was serving a nine to fifteen year sentence in Massachusetts on an armed robbery conviction.

*Mills and Allen, by John A. Hauser, for respondent-appellant.*

*Snow & Skager, by Philip R. Skager, for petitioners-appellees.*

*Doris C. Gamblin for Guardian Ad-Litem.*

JOHNSON, Judge.

Appellant has failed to comply with Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure. Nevertheless, in our discretion we will hear his appeal. N.C.R. App. Pro. 2.

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## I.

[1] Prior to trial, respondent filed a motion for judgment on the pleadings pursuant to Rule 12(c) of the North Carolina Rules of Civil Procedure. N.C. Gen. Stat. § 1A-1, Rule 12(c) (1990). This motion was denied by the trial judge at the beginning of the hearing. On appeal, respondent contends that the trial court erred in failing to dismiss the petition. He argues that the petition contains insufficient facts to comply with N.C. Gen. Stat. § 7A-289.25(6), which requires that petitioners must state "facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist." We disagree.

Although respondent styled his motion as one for judgment on the pleadings pursuant to Rule 12(c), we will treat it as a Rule 12(b)(6) motion for failure to state a claim because (1) the basis for the motion is that the petition fails to state sufficient facts as required by N.C. Gen. Stat. § 7A-289.25(6) and (2) a motion is treated according to its substance and not its label. *Harrell v. Whisenant*, 53 N.C. App. 615, 281 S.E.2d 453 (1981), *disc. review denied*, 304 N.C. 726, 288 S.E.2d 380 (1982); *Williams v. New Hanover County Bd. of Education*, 104 N.C. App. 425, 409 S.E.2d 753 (1991). A Rule 12(b)(6) motion tests the legal sufficiency of a complaint. *Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970). The question on a motion to dismiss is whether, as a matter of law, and taking the allegations in the complaint as true, the allegations are sufficient to state a claim upon which relief may be granted under any legal theory. *Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 355 S.E.2d 838 (1987).

North Carolina General Statutes § 7A-289.25 (1989) requires that:

The petition [for termination of parental rights] shall . . . set forth such of the following facts as are known; and with respect to the facts which are unknown the petitioner shall so state:

(6) Facts which are sufficient to warrant a determination that one or more of the grounds for terminating parental rights exist.

Petitioners' verified petition for termination of parental rights contained the following allegations:

A. Said parent [Hector] has neglected the child within the meaning of G.S. 7A-517(21).

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B. Said parent has wilfully abandoned the child for at least six (6) consecutive months immediately preceding the filing of this petition.

We agree with respondent that petitioners' bare recitation in paragraphs A and B of the alleged statutory *grounds* for termination does not comply with the requirement in N.C. Gen. Stat. § 7A-289.25(6) that the petition state "*facts* which are sufficient to warrant a determination" that grounds exist to warrant termination. However, the petition incorporates an attached custody award, dated 8 August 1988, and the custody award states sufficient facts to warrant such a determination. Therefore, this assignment is overruled.

## II.

[2] Respondent next argues that his due process rights under the fifth and fourteenth amendments were violated. He contends that the trial court erred in proceeding with the hearing in his absence. Prior to the hearing, respondent timely filed a motion requesting that the court either provide for his transportation from the Massachusetts prison in which he was incarcerated or postpone the hearing until he could attend. This motion was denied. Respondent was permitted to submit affidavits for the court's consideration and he was represented by appointed counsel at the hearing. The issue is whether respondent's rights under the due process clause of the federal constitution were violated when his motion for transportation to the hearing was denied and the hearing to terminate his parental rights was allowed to proceed in his absence. We find that under the facts of this case respondent's due process rights were not violated.

This Court has recently stated the test to be applied when an incarcerated parent requests transportation to a termination hearing. In *In the Matter of Murphy*, 105 N.C. App. 651, 414 S.E.2d 396 (1992), this Court held that an incarcerated parent does not have an absolute right under the due process clause to be transported to a termination hearing but that the determination is one for the trial court to make, subject to review by the appellate courts, after balancing the three factors specified in *Mathews v. Eldridge*, 424 U.S. 319, 47 L.Ed.2d 18 (1976). Here, as in *Murphy*, "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." *Murphy*, 105 N.C.

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App. at 654, 414 S.E.2d at 398. In accord with *Murphy*, we will not remand this case to the trial court for this finding but will decide today whether respondent had a due process right to be at the termination hearing. *Id.*

The *Eldridge* factors to be weighed in determining what procedure is due in a termination case, consistent with the requirements of due process are: (1) the private interests affected by the proceeding, (2) the risk of error created by the State's chosen procedure, and (3) the countervailing governmental interest supporting use of the challenged procedure. *Murphy*, 105 N.C. App. at 653, 414 S.E.2d at 398, citing *Santosky v. Kramer*, 455 U.S. 745, 71 L.Ed.2d 599 (1982). We now discuss the three *Eldridge* factors and apply them to the facts of this case.

The first factor, the private interests affected by the proceeding, clearly weighs in favor of a parent's presence at the hearing. As the Court recognized in *Santosky*, a parent's interest in his child is more precious than any property right. "A parent's interest in the accuracy and justice of the decision to terminate his or her parental status is [ ] a commanding one." *Santosky*, 455 U.S. at 759, 71 L.Ed.2d at 610, quoting *Lassiter v. Dept. of Social Services*, 452 U.S. 18, 68 L.Ed.2d 640 (1981). Accord *Murphy*, 105 N.C. App. 651, 414 S.E.2d 396. Grounded as it is in the very existence of the child-parent relationship, it is difficult to imagine any circumstances which would lessen or increase the weight to be afforded this factor in the balancing in which we are engaged. This factor weighs in favor of respondent's presence.

The third *Eldridge* factor, the countervailing governmental interest supporting the use of the challenged procedure, includes several components, one of which is not adverse to the parent's interest. The State has a *parens patriae* interest in the welfare of the child, thus the State shares the parent's interest in an accurate and just decision; this decision, of necessity, is based upon the facts found at the termination hearing. The State also has a fiscal and administrative interest in reducing the costs and burdens associated with these hearings. Further, the State has an interest in the physical security of convicted persons who are being transported.

Although the cost to the State of transporting an incarcerated parent might in certain circumstances be a consideration, normally it will not. The State routinely transports prisoners to be witnesses

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in criminal trials, both within the state and from without. Given the paramount interest of the incarcerated parent in a termination case where he stands to lose forever any connection with his child, the weight to be given this cost factor should be no more than that taken into consideration when the State decides to transport a prisoner for its own benefit. The security component of the State's interest would require a consideration of the escape potential, thus the criminal record and the charge on which respondent was convicted, the length of the sentence remaining and the distance and method of transport would need to be taken into account.

In the case *sub judice*, the respondent was imprisoned in Massachusetts on an armed robbery conviction. He was serving a nine to fifteen year sentence which he began in October 1986. The record does not indicate respondent's expected release date in relation to the hearing date. Under the facts of this case, this factor would weigh in favor of the State and would tend to balance out the first factor.

The second *Eldridge* factor, the risk of error created by the State's chosen procedure, attempts, in the context of a termination case, to measure the risk that an incarcerated parent's rights will be terminated where, if he were present at the hearing, a different result would obtain. Thus the type of evidence which the respondent wishes to present and whether that evidence can be sufficiently presented by counsel or by other means is determinative. *Murphy* is of no assistance in this regard. In *Murphy*, the incarcerated respondent's only stated reason for being present was so that he could contest the sexual assault convictions for which he was incarcerated. His counsel could offer no viable argument as to any risk of error caused by the respondent's absence. The trial court held that these convictions were *res judicata* and denied his request for transportation. This Court found that there was no indication in the record of any risk of error and affirmed. The proper resolution of this issue in the case *sub judice* is more difficult.

Respondent argues here as he did before the trial judge that his presence was required at the hearing so that he could present evidence and aid in the cross-examination of witnesses. The record reflects that after respondent's motion for transportation to the hearing was denied, his counsel moved the court for funds to transport him to Massachusetts for the purpose of taking his client's deposition. This motion was also denied. The court did allow re-

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spondent to submit an affidavit. In his affidavit, respondent states that he has not spoken to nor seen his daughters since May 1984. He explains that this happened when his wife left with the children without telling him where the children were but that he thought they were all right. He was then imprisoned after being convicted of crimes he never would have committed had he been with his wife. He states that he made numerous attempts to write to the children, the last five times by certified mail. He states that he sent money but the checks were not cashed. Respondent's affidavit was admitted into evidence and his appointed counsel cross-examined the witnesses at the hearing.

We find that under the facts of this case, the risk of error due to respondent's absence from the hearing was slight.

Balancing all three *Eldridge* factors, we find that respondent's due process rights were not violated by the court's denial of his request for transportation.

[3] We note that the use of depositions is allowed in civil cases where a witness is unable to attend because of age, illness, infirmity or imprisonment. N.C. Gen. Stat. § 1A-1, Rule 32(4). Therefore, when an incarcerated parent is denied transportation to the hearing in contested termination cases, the better practice is for the court, when so moved, to provide the funds necessary for the deposing of the incarcerated parent. The parent's deposition, combined with representation by counsel at the hearing, will ordinarily provide sufficient participation by the incarcerated parent so as to reduce the risk of error attributable to his absence to a level consistent with due process.

## III. and IV.

[4] Respondent next contends that the court erred in concluding that he had neglected and abandoned the children.

Under N.C. Gen. Stat. § 7A-289.32(2) the court may terminate parental rights upon a finding that the parent has "neglected [the] child within the meaning of G.S. § 7A-517(21)." A neglected child is one who "does not receive proper care, supervision, or discipline from his parent [ ] or who has been abandoned[.]" A separate ground for terminating parental rights is that "the parent has willfully abandoned the child for at least six consecutive months immediately preceding the filing of the petition." N.C. Gen. Stat. § 7A-289.32(8).



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At the hearing, the judge found the following pertinent facts, to which respondent does not except:

5. Both minor children have been in the actual physical custody of [ ] Petitioners since September 21, 1984.

9. Petitioner Peggy J. Taylor is forty-four (44) years old, has lived at the same address for the last fourteen (14) years, and has been a resident of Davidson County, North Carolina, for thirty-five (35) years. Respondent[ ] Hector Quevedo [has] been aware of said Petitioner's address. Said Petitioner is not employed outside of the home.

10. Petitioners received physical custody of both of the minor children on September 21, 1984. On September 24, 1984, Deborah Quevedo and Peggy J. Taylor went to an attorney's office in Davidson County and signed a notarized agreement awarding custody of the two minor children to Peggy J. Taylor.

11. Said minor children have lived continuously with Petitioners since September 21, 1984, and are presently residing with them.

13. Said minor children have not seen their natural father, Hector Quevedo, since several months prior to September 21, 1984, which period of time is more than one (1) year in duration even prior to said Respondent's incarceration on October 24, 1986, in the State of Massachusetts.

14. Hector Quevedo abandoned said minor children prior to his incarceration and has also neglected said juveniles both prior to and subsequent to his incarceration in that he has not provided either of the children with the proper care, supervision, or discipline expected of a parent.

15. Hector Quevedo [has] not seen said minor children from the years 1984 through the date of the hearing[.] Prior to the filing of the Petition of Termination of Parental Rights, Hector [has not] provided any cards, gifts, letters, telephone calls or child support payments since the time that said children have been in Petitioner's custody.

16. After the Petition to Terminate Parental Rights was filed, Hector Quevedo made three attempts to communicate in writing with the minor children, but after the first letter was read to the children, they exhibited a severe emotional reaction to such a letter, including signs of post traumatic stress disorder,

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that Petitioners refused to receive two subsequent mailings from Hector Quevedo, presumably which letters were for the minor children.

18. Hector Quevedo, immediately prior to the date of this hearing and for the last period of over six (6) years, ha[s] shown a complete failure to provide for the personal contact, love, and affection that is part of a normal parent-child relationship.

19. Hector Quevedo ha[s] not provided any care, supervision, discipline or love and affection for said children for more than one (1) year prior to the hearing.

Based on these findings, the court concluded that Hector had abandoned and neglected the children and that it was in their best interests that Hector's parental rights be terminated.

Respondent does not object to the findings of facts as found by the trial judge. They are therefore binding on this Court on appeal. The question is whether the findings of fact support the conclusion that respondent has neglected and abandoned the children. We find that they do.

## V.

[5] Respondent next contends that it was error for the court to admit the guardian ad litem report into evidence at the adjudicatory hearing because the report and its conclusions were based upon hearsay statements.

The guardian did not testify at trial. The report was admitted into evidence over the objection of the respondent. Respondent did not examine the guardian although she was available at the hearing.

We find that the admission of the report, although error, was harmless. The report does not contain any information which was not properly before the court from another witness.

## VI.

[6] Respondent next contends that the court erred in allowing the older of the two children, then 10 years old, to testify in that her testimony was incompetent and highly prejudicial. We disagree.

The trial judge and the attorneys questioned the witness as to her recognition of the importance of telling the truth and the

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judge held that she was competent to testify. Any inability she may have had to remember the events as they occurred with regard to her father goes to the weight of her testimony, not to its admissibility or her competency. This argument has no merit.

## VII.

Finally, respondent contends that the court erred in entering the termination order without making sufficient findings of fact to support the order. Respondent makes no argument and cites no authority. This assignment of error is deemed abandoned. Rule 28(b)(5), North Carolina Rules of Appellate Procedure.

Affirmed.

Judge COZORT concurs.

Judge GREENE concurs with separate opinion.

Judge GREENE concurring.

I fully concur with the majority and write separately only to emphasize the appropriateness of the court's use of the Rules of Civil Procedure in the context of the Termination of Parental Rights Act, Chapter 7A, Article 24B of the General Statutes (Act).

Unless the provisions of the Act explicitly or implicitly provide otherwise, the Rules of Civil Procedure apply to termination of parental rights cases. N.C.G.S. § 7A-193 (1989) (unless otherwise provided, Rules of Civil Procedure apply "in the district court division of the General Court of Justice"); *In re Moore*, 306 N.C. 394, 400, 293 S.E.2d 127, 130-31 (1982) (applying N.C.G.S. § 1A-1, Rule 58 to determine time of entry of order in termination of parental rights case), *appeal dismissed*, 459 U.S. 1139, 74 L.Ed.2d 987 (1983); *In re Clark*, 303 N.C. 592, 598 n.3, 281 S.E.2d 47, 52 n.3 (1981) (proceedings to terminate parental rights are either civil actions or special proceedings, both of which are governed by the Rules of Civil Procedure unless a different procedure is prescribed by statute); *In re Manus*, 82 N.C. App. 340, 344, 346 S.E.2d 289, 292 (1986) (applying N.C.G.S. § 1A-1, Rule 17(a) in determining that respondent was not entitled to dismissal of petition because of alleged erroneous designation of petitioner); *In re Allen*, 58 N.C. App. 322, 329-30, 293 S.E.2d 607, 612 (1982) (analyzing trial court's

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entry of written order under N.C.G.S. § 1A-1, Rule 58); *In re Peirce*, 53 N.C. App. 373, 388-89, 281 S.E.2d 198, 207-08 (1981) (analyzing validity of trial court's amendment to its judgment terminating parental rights under N.C.G.S. § 1A-1, Rule 60(a)).

The Act implicitly prohibits judgments on the pleadings, default judgments, and summary judgments. This is so because N.C.G.S. § 7A-289.28 (1989) requires the trial court to conduct a hearing on the petition to terminate the respondent's parental rights, *In re Tyner*, 106 N.C. App. 480, 483, 417 S.E.2d 260, 261 (1992), thus precluding the use of Rule 12(c) (judgment on the pleadings), Rule 55 (default judgment) and Rule 56 (summary judgment). The Act also implicitly prohibits counterclaims by respondents. *Peirce*, 53 N.C. App. at 380, 281 S.E.2d at 203. Other provisions of the Rules of Civil Procedure including Rule 12(b)(6), however, apply to the Act.

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D. WAYNE BROOKS AND WIFE, KATHLEEN C. BROOKS, PLAINTIFFS v. ELLA M. GIESEY, SARA MEADOWS, JOHN ALEXANDER MEADOWS, SUE L. MEADOWS AND HOPIE E. BEAMAN, DEFENDANTS

No. 913SC163

(Filed 7 July 1992)

**1. Rules of Civil Procedure § 11 (NCI3d) — Rule 11 sanctions — litigation begun before current Rule — continued after effective date — imposition of sanctions error**

The trial court erred by imposing sanctions under N.C.G.S. § 1A-1, Rule 11 based on the complaint where the complaint was filed before the effective date of the current Rule 11, even though papers were filed and the litigation continued beyond that date.

**Am Jur 2d, Federal Practice and Procedure § 1216.**

**2. Costs § 36 (NCI4th) — nonjusticiable case — attorney's fees as costs — motion filed after appeal — jurisdiction**

The trial court had jurisdiction to enter an order under N.C.G.S. § 6-21.5 requiring payment of attorney fees where the motion seeking payment was filed more than a year after summary judgment and more than a month after the judgment was affirmed on appeal. Under a statute such as N.C.G.S.

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§ 6-21.5, which contains a prevailing party requirement, the parties should not be required to litigate fees when the appeal could moot the issue, and the trial court is divested of jurisdiction upon filing of a notice of appeal. N.C.G.S. § 1-294.

**Am Jur 2d, Federal Practice and Procedure § 182.****3. Costs § 36 (NCI4th)— nonjusticiable case—attorney's fees as costs—no error**

The trial court did not err by ordering plaintiffs to pay attorney fees under N.C.G.S. § 6-21.5 where summary judgment for defendants had been affirmed on appeal with the comment that the facts presented by plaintiffs did not give rise to an enforceable claim under any theory known to law and the trial court subsequently concluded that plaintiffs had presented no justiciable issue of fact or law. The Court noted that it is unfortunate that clients who presumably know nothing about the law can be sanctioned for factual and legal deficiencies under N.C.G.S. § 6-21.5, which does not contain the same limitations as Rule 11.

**Am Jur 2d, Federal Practice and Procedure § 182.****4. Discovery and Depositions § 54 (NCI4th)— failure to admit matters later proven—attorney fees granted—no abuse of discretion**

The trial court did not abuse its discretion by awarding attorney fees under N.C.G.S. § 1A-1, Rule 37(a) for failure to admit matters later proven where the plaintiffs contended that they had not conducted discovery at the time they were required to admit or deny, but the trial court listed in its order a number of requests for admission which were denied by appellants for no valid reason, stated that the appellees ultimately established the matters denied, and included a detailed list of expenses incurred in establishing the matters denied.

**Am Jur 2d, Federal Practice and Procedure § 182.**

Judge GREENE concurring in part and dissenting in part.

APPEAL by plaintiffs from orders entered 27 July 1990 in CRAVEN County Superior Court by *Judge James D. Llewellyn*. Heard in the Court of Appeals 3 December 1991.

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*David P. Voerman, P.A., by David P. Voerman, for appellant,  
David P. Voerman.*

*Glover and Petersen, P.A., by James R. Glover, for plaintiffs-  
appellants, D. Wayne Brooks and Kathleen C. Brooks.*

*Ward and Smith, P.A., by Donalt J. Eglinton, for defendants-  
appellees.*

WYNN, Judge.

During 1981 and 1982, Sara Meadows, John Alexander Meadows, and Sue Meadows (the "Meadows") subdivided the land they had inherited in Craven County into a residential subdivision known as Bellefern Subdivision. Sara Meadows engaged an independent engineer and surveyor, Darrel Daniels, to lay out and map the development, and an independent general contractor, Clement and Johnson, to grade and pave the roads and dig the ditches.

On 1 April 1982, after the surveyor and general contractor completed their work and the subdivision maps and restrictive covenants were recorded, the Meadows began selling lots. They contracted to sell Lot 10 on 6 June 1983 to defendant Beaman, an independent building contractor. This lot is lower than the lots on each side of it, and, at the back, there is a small swale or depression. On 24 June 1983, plaintiffs, after walking over the lot, contracted with Beaman in writing to purchase the lot and build a house on the lot. On 12 April 1984, the house was completed and, Beaman conveyed the lot to plaintiffs by warranty deed. During the period from July to September 1984, plaintiffs stated that they became aware of the drainage problem on the lot. They expressed their dissatisfaction and asked Beaman and Sara Meadows to correct the problem. Sara Meadows contacted Clement and Johnson to examine the property. The contractors later, at no cost to plaintiffs, did some grading and filling across the back of the lot, but the problem was not alleviated and water continued to stand at the back of the lot following a heavy rain.

Plaintiffs filed a complaint against defendants on 4 December 1986, alleging that they had suffered economic loss in connection with their property based on the following theories: (1) breach of warranty; (2) fraud; (3) negligent design and construction of the drainage facilities; (4) creation of an easement; (5) trespass; (6) nuisance; and (7) unfair and deceptive trade practices. The trial

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court entered an order granting summary judgment in favor of and awarding costs to the defendants. This Court, on 6 June 1989, affirmed the trial court's order. Subsequently, several motions regarding costs and sanctions were considered by the trial court, which resulted in an award for defendants of \$3,200 in attorney's fees under Rule 37, \$15,532.99 under N.C. Gen. Stat. § 6-21.5, and attorney's fees of \$12,622.90 against the plaintiffs and their attorney under Rule 11. The trial court entered the three judgments and orders for fees contemporaneously as alternative means for awarding defendants the same costs. The court also ordered that any sum paid to defendants to satisfy any of the judgments and orders would satisfy each separate judgment and order to the extent payment is remitted. It is from these costs and sanctions that plaintiffs and their attorney now appeal.

## I.

[1] Appellants contend that the trial court erred in ordering them to pay attorney's fees as Rule 11 sanctions. They argue that the trial court cannot sanction them for a complaint filed prior to the effective date of the current Rule 11, 1 January 1987. The trial court concluded that, because plaintiffs or their attorney filed papers subsequent to that date, the litigation effectively was continued beyond 1 January 1987. We disagree with the trial court's conclusion.

At the time the complaint at issue was filed, 4 December 1986, Rule 11(a) required only that the attorney sign the pleading certifying that he "has read the pleading; that to the best of his knowledge, information, and belief there is good ground to support it; and that it is not interposed for delay." Under the amended version of Rule 11(a), however, the signature of an attorney or party serves as a certification of good faith. In *Kohn v. Mug-A-Bug*, 94 N.C. App. 594, 380 S.E.2d 548 (1989), *overruled on other grounds*, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992), this Court determined that even if "plaintiffs filed the complaint against [defendants] without making reasonable inquiry as to either the facts or law of this case, attorney's fees could not have been awarded to defendants under the provisions of Rule 11(a)" because plaintiffs filed their complaint on 23 October 1986. *Id.* at 597, 380 S.E.2d at 550. *Accord In re Williamson*, 91 N.C. App. 668, 373 S.E.2d 317 (1988).

In the instant case, the trial judge, in his Rule 11 order, stated that the defendants "are entitled to recover, pursuant to Rule

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11, from the Plaintiffs and their attorney of record, David P. Voerman, Esquire, jointly and severally, as a cost incurred in connection with the defense of the claims asserted in the Plaintiffs' Complaint and pursued after April 14, 1987. . . ." We find that the trial court erred in ordering Rule 11 sanctions against appellants and their attorney based on appellants' complaint because the complaint was filed before the enactment of the current Rule 11. Accordingly, we reverse the trial court's Rule 11 order.

## II.

[2] In their second assignment of error, appellants contend that the trial court had no jurisdiction to order them to pay attorney's fees under N.C. Gen. Stat. § 6-21.5 (1986), when the motion seeking such payment was filed more than a year after summary judgment was entered for the defendants and more than a month after the judgment was affirmed on appeal. They further argue that even if there was jurisdiction to enter the order to pay attorney's fees under section 6-21.5, the order was erroneous. We disagree.

Section 6-21.5 deals with attorney's fees in nonjusticiable cases and provides, in pertinent part,

In any civil action or special proceeding the court, upon motion of the prevailing party, may award a reasonable attorney's fee to the prevailing party if the court finds that there was a complete absence of a justiciable issue of either law or fact raised by the losing party in any pleading. The filing of a general denial or the granting of any preliminary motion, such as a motion for judgment on the pleadings pursuant to G.S. 1A-1, Rule 12, a motion to dismiss pursuant to G.S. 1A-1, Rule 12(b)(6), a motion for a directed verdict pursuant to G.S. 1A-1, Rule 50, or a motion for summary judgment pursuant to G.S. 1A-1, Rule 56, is not in itself a sufficient reason for the court to award attorney's fees, but may be evidence to support the court's decision to make such an award. A party who advances a claim or defense supported by a good faith argument for an extension, modification, or reversal of law may not be required under this section to pay attorney's fees.

N.C. Gen. Stat. § 6-21.5 (1986).

Under a statute such as section 6-21.5, which contains a "prevailing party" requirement, the parties should not be required to litigate fees when the appeal could moot the issue. Furthermore, upon



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filing of a notice of appeal, a trial court in North Carolina is divested of jurisdiction with regard to all matters embraced within or affected by the judgment which is the subject of the appeal. N.C. Gen. Stat. § 1-294 (1983). We, therefore, overrule appellants' jurisdictional argument.

[3] Because we find that the trial court had jurisdiction to enter the order, we next must determine whether the trial court's order was erroneous. Section 6-21.5 "requires review of all relevant pleadings and documents in determining whether attorneys' fees should be awarded." *Bryson v. Sullivan*, 330 N.C. 644, 660, 412 S.E.2d 327, 335 (1992). Compare *Sunamerica Financial Corp. v. Bonham*, 328 N.C. 254, 257 n.1, 400 S.E.2d 435, 437 n.1 (1991) (A violation of Rule 11 occurs when the paper is filed. *Cooter & Gell v. Hartmarx Corp.*, 496 U.S. 384, 395, 110 L.Ed.2d 359, 375 (1990)). Only losing parties and not their attorneys can be sanctioned under section 6-21.5. *Bryson*, 330 N.C. at 665-66, 412 S.E.2d at 338-39. In *Sprouse v. North River Ins. Co.*, 81 N.C. App. 311, 326, 344 S.E.2d 555, 565, *disc. review denied*, 318 N.C. 284, 348 S.E.2d 344 (1986), this Court stated the following:

A "justiciable" issue is not defined by our statutes or case law. A "justiciable controversy" is a real and present one, not merely an apprehension or threat of suit or difference of opinion. Presumably, a "justiciable controversy" involves "justiciable issues," thus those which are real and present, as opposed to imagined or fanciful. "Complete absence of a justiciable issue" suggests that it must conclusively appear that such issues are absent even giving the losing party's pleadings the indulgent treatment which they receive on motions for summary judgment or to dismiss.

*Id.* (citations omitted). *Accord Bryson*, 330 N.C. at 665, 412 S.E.2d at 338; *Sunamerica*, 328 N.C. at 257, 400 S.E.2d at 437.

When granting defendants' motion under section 6-21.5, the trial court made the following relevant conclusions of law:

8. None of the claims asserted by the Plaintiffs in their Complaint seeking to recover from the Defendants on any theory presents any justiciable issue of fact or law.

9. The entry of the Order on April 25, 1988 granting summary judgment in favor of the Defendants against the Plaintiffs with respect to all claims asserted by the Plaintiffs in their

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Complaint and the affirmation of this Order by unanimous opinion filed on June 6, 1989 by the Court of Appeals lend support to the conclusion that none of the claims asserted by the Plaintiffs in their Complaint presents any justiciable issue of fact or law.

Furthermore, in the earlier appeal of this case, this Court, in an unpublished opinion, held that the facts presented by appellants did "not give rise to an enforceable claim against the appellees under any theory known to our law."

It should be noted that under Rule 11, "a represented party may rely on his attorney's advice as to the legal sufficiency of his claims" and only "will be held responsible if his evident purpose is to harass, persecute, otherwise vex his opponents, or cause them unnecessary cost or delay." *Bryson*, 330 N.C. at 663, 412 S.E.2d at 337. In our opinion, it is unfortunate that under section 6-21.5, which does not contain the same limitations, clients who presumably know nothing about the law can be sanctioned for factual and legal deficiencies. Based on the foregoing, however, we are constrained to conclude that appellants' assignment of error is without merit.

## III.

[4] Finally, appellants contend that the conclusion of law in the order requiring them to pay for 32 hours of time for appellees' attorney under Rule 37(a) is not supported by findings of fact or the evidence in the record. They argue that, at the time that they were required to admit or deny, they had not conducted discovery to gather information regarding the matters they were requested to admit. We disagree.

The choice of sanctions under Rule 37 is within the trial court's discretion and will not be overturned on appeal absent a showing of abuse of that discretion. *Roane-Barker v. Southeastern Hospital Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990), *disc. review denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). The trial court sanctioned appellants because of their failure to admit under N.C.R. Civ. P. 37(c), which provides:

*Expenses on failure to admit.*—If a party fails to admit the genuineness of any document or the truth of any matter as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or

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the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (i) the request was held objectionable pursuant to Rule 36(a), or (ii) the admission sought was of no substantial importance, or (iii) the party failing to admit had reasonable ground to believe that he might prevail on the matter, or (iv) there was other good reason for the failure to admit.

N.C. Gen. Stat. § 1A-1, Rule 37(c) (1990).

We find that the trial court did not abuse its discretion. In the Rule 37 order, the trial judge listed a number of requests for admission which were denied by appellants for no valid reason. The trial judge also stated that the appellees ultimately established, by affidavit, deposition, and motion to strike, the matters denied by appellants. Furthermore, the order contained a detailed list of the expenses incurred in establishing the matters denied. We, therefore, overrule appellants' assignment of error.

## IV.

The trial court's Rule 37 order and Section 6-21.5 order are affirmed, and the Rule 11 order is reversed.

Judge PARKER concurs.

Judge GREENE concurs in part and dissents in part in a separate opinion.

Judge GREENE concurring in part and dissenting in part.

## Rule 11

I agree with the majority that the trial court was without authority pursuant to the legal and factual sufficiency prongs of Rule 11 to impose as a sanction for filing the complaint that the plaintiffs and their attorney pay the defendants' attorney's fees. Whether the complaint complies with the legal and factual sufficiency prongs of Rule 11 is determined "as of the time it was signed," *Bryson v. Sullivan*, 330 N.C. 644, 657, 412 S.E.2d 327, 333 (1992), and is not affected by subsequently occurring events. Therefore, because on 4 December 1986, the date the complaint was signed and filed, Rule 11 did not authorize an award of attorney's fees

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as a sanction for violation of the Rule, *Kohn v. Mug-A-Bug*, 94 N.C. App. 594, 597, 380 S.E.2d 548, 550 (1989), the continued prosecution of the action beyond 1 January 1987 (effective date of amended Rule 11 permitting award of attorney's fees) did not authorize such an award based on a violation of the legal or factual sufficiency prongs of Rule 11. However, the plaintiffs' and their attorney's continued prosecution of meritless claims after 1 January 1987 could support an attorney's fee sanction under either the improper purpose prong of Rule 11 or "pursuant to the inherent power of the court." *Bryson*, 330 N.C. at 658, 412 S.E.2d at 334; *see also Chambers v. NASCO, Inc.*, --- U.S. ---, ---, 115 L.Ed.2d 27, 45 (1991) (trial court has inherent power to "assess attorney's fees when a party has 'acted in bad faith, vexatiously, wantonly, or for oppressive reasons'").

Judge Llewellyn concluded that the plaintiffs and their attorney with an improper purpose signed and filed documents after 1 January 1987. More specifically, Judge Llewellyn determined that the papers and documents "were interposed for the improper purpose of attempting to circumvent a summary adjudication adverse to the [p]laintiffs with respect to unwarranted claims . . . thereby causing unnecessary delay and needless increase in the cost to the Defendants of defending these claims." Although this conclusion supports the order of sanctions, the order cannot be affirmed because the record does not reflect that plaintiffs were given any notice that sanctions were sought on the grounds of improper purpose. "[D]ue 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. . . ." *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 629, 414 S.E.2d 568, 575 (1992). The record reflects that defendants gave written notice only that they were seeking Rule 11 sanctions "upon Plaintiffs and counsel for the Plaintiffs for filing this action which fails to assert any claim supported by fact and law . . . ." Furthermore, the record does not reflect any advance notice from the trial court that it was considering imposition of sanctions under the improper purpose prong of Rule 11 or pursuant to its inherent powers. *See Chambers*, --- U.S. at ---, 115 L.Ed.2d at 48 (trial court must comply with due process when invoking inherent power); N.C.G.S. § 1A-1, Rule 11 (1990) (trial court may on its own initiative impose sanctions). Having given notice of their intention to seek sanctions under the factual and legal sufficiency prongs of Rule 11, and no notice

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having been given by the trial court to the contrary, defendants cannot now seek to sustain an order supported only under the improper purpose prong of Rule 11. Accordingly, I agree with the majority that the trial court's Rule 11 order must be reversed.

## N.C.G.S. § 6-21.5

I agree with the majority that the trial court was not without jurisdiction to order the payment of attorney's fees pursuant to N.C.G.S. § 6-21.5. Under Rule 11, sanctions "may be imposed years after a judgment on the merits," *Chambers*, --- U.S. at ---, 115 L.Ed.2d at 52, and I see no bases for requiring a different rule for the imposition of attorney's fees under N.C.G.S. § 6-21.5.

However, I disagree with the majority that under N.C.G.S. § 6-21.5 "clients who presumably know nothing about the law can be sanctioned for factual and legal deficiencies." There are two prerequisites to an award of attorney's fees under N.C.G.S. § 6-21.5. First, the court must determine that the pleading contains no "justiciable issue of law or fact." Second, the court must determine that the plaintiff should reasonably have been aware, at the time the complaint was filed, that the pleading contained no justiciable issue of law or fact or that the plaintiff persisted in litigating the case "after the point where [he] should reasonably have become aware that the pleading [he] filed no longer contained a justiciable issue." *Bryson*, 330 N.C. at 665, 412 S.E.2d at 338 (affirming denial of attorney's fees where plaintiffs' claims rendered nonjusticiable); see also *Sunamerica Fin. Corp. v. Bonham*, 328 N.C. 254, 258, 400 S.E.2d 435, 438 (1991). Assuming that the complaint in this case did not contain justiciable issues of law or fact, the order nevertheless cannot be sustained because the trial court made no findings or conclusions on whether these plaintiffs should reasonably have been aware of these deficiencies at the time the complaint was filed or persisted in litigating the case after a point where they should have been aware of its deficiencies. I therefore would reverse the order of the trial court requiring the plaintiffs to pay attorney's fees pursuant to N.C.G.S. § 6-21.5.

## Rule 37

I agree with the majority and for the reasons asserted in the opinion that the trial court did not err in awarding attorney's fees pursuant to Rule 37.

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[106 N.C. App. 596 (1992)]

STATE OF NORTH CAROLINA v. HERMAN LESLIE DAVIS, DEFENDANT

No. 914SC606

(Filed 7 July 1992)

**1. Constitutional Law § 180 (NCI4th)— acquittal of kidnapping boy—hung jury on charges involving girl—retrial—double jeopardy—collateral estoppel**

Where defendant was acquitted in his first trial for second degree kidnapping of a boy, and the jury was unable to agree on charges of first degree kidnapping of a girl arising from the same incident, attempted first degree rape of the girl, and taking indecent liberties with the girl, defendant cannot complain that the doctrines of double jeopardy and collateral estoppel prohibited his retrial on the charge of kidnapping the girl where defendant was acquitted of that charge in his second trial. Furthermore, neither double jeopardy nor collateral estoppel prohibited defendant's retrial on the attempted rape and indecent liberties charges since a retrial following a "hung jury" does not violate the double jeopardy clause, those crimes do not require proof of the same elements as the kidnapping charges, and no issue of ultimate fact as to attempted rape or indecent liberties was determined by a final judgment in the first trial.

**Am Jur 2d, Criminal Law § 303.**

**Propriety of court's dismissing indictment or prosecution because of failure of jury to agree after successive trials. 4 ALR4th 1274.**

**2. Evidence and Witnesses § 2333 (NCI4th)— school psychologist—qualification as expert**

A school psychologist was qualified to testify as an expert in a kidnapping, attempted rape and indecent liberties trial where the evidence showed that she has a masters degree in clinical psychology and is a licensed psychological associate; she has been employed five years as a school psychologist; and she has worked with adult and child victims of incest, rape and molestation.

**Am Jur 2d, Expert and Opinion Evidence § 56.**

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**3. Evidence and Witnesses § 2337 (NCI4th) — expert testimony — credibility of child victim — absence of prejudice**

Even if a school psychologist's testimony concerning notes she had written after sessions with the child victim of attempted rape and indecent liberties constituted inadmissible expert testimony on the credibility of the victim, the admission of such testimony was not prejudicial error where the State's case against defendant did not hinge upon the victim's credibility.

**Am Jur 2d, Expert and Opinion Evidence § 26.**

**4. Evidence and Witnesses § 2327 (NCI4th) — PTSD testimony — failure to give limiting instruction — harmless error**

The trial court erred in admitting expert opinion testimony that an attempted rape and indecent liberties victim suffers from PTSD without giving an instruction limiting the jury's consideration of this testimony to corroborative purposes. However, this error was not prejudicial where there was strong and convincing testimony from the victim's brother which corroborated the victim's testimony.

**Am Jur 2d, Expert and Opinion Evidence § 33.**

**5. Evidence and Witnesses § 670 (NCI4th) — limiting objections — allowance of continuing objection**

The trial court did not improperly limit defense counsel's objections to the prosecutor's cross-examination of a witness where the trial court granted defendant a continuing objection.

**Am Jur 2d, Evidence § 267.**

**6. Evidence and Witnesses § 265 (NCI4th) — defendant's reputation for truthfulness — admissibility**

Two police officers were properly permitted to testify about defendant's reputation for truthfulness, which was at issue because defendant's testimony contradicted that of the State's two chief witnesses.

**Am Jur 2d, Evidence § 346.**

**7. Evidence and Witnesses § 2540 (NCI4th) — intellectually limited children — competency to testify**

Two children were not incompetent to testify because they were intellectually limited where both children stated

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that they knew the difference between truth and falsehood and both swore to tell the truth. N.C.G.S. § 8C-1, Rule 601(b).

**Am Jur 2d, Witnesses § 210.**

**Witnesses; child competency statutes. 60 ALR4th 369.**

APPEAL by defendant from judgment entered 15 October 1990 by *Judge Henry L. Stevens, III*, in SAMPSON County Superior Court. Heard in the Court of Appeals 19 February 1992.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.*

*Mitchell & Ratliff, by Ernest E. Ratliff, for the defendant-appellant.*

LEWIS, Judge.

Defendant was convicted by a jury of one count of taking indecent liberties with a minor, and one count of attempted first degree rape. Defendant was acquitted, at two separate trials, of two counts of kidnapping. The trial court sentenced defendant to active prison terms for his convictions. Defendant appeals the judgments.

The evidence at trial tended to show that on the afternoon of 23 January 1990, two young children, one a nine year old female and the second her eleven year old male cousin, were walking around in Clinton, visiting and passing by various establishments. After the children left a local convenience store, the defendant grabbed both of them and pulled them behind the store. The defendant told the girl in graphic and vulgar language that he intended to have sexual relations with her. The defendant then proceeded to unzip and place his hand inside the female child's pants; he then fondled the girl's private parts. The boy kicked the defendant and fled; the girl bit defendant on the hand and made her escape. She told her mother what had happened and later identified the defendant as her attacker.

Defendant was first brought to trial in June 1990. The jury acquitted him of second degree kidnapping of the boy; the jury was unable to agree on the other charges of first degree kidnapping of the girl, attempted first degree rape of the girl, and taking indecent liberties with a minor as to the girl. Defendant's second



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trial on these three charges commenced on 15 October 1990, resulting in his conviction on all but the remaining kidnapping charge as to the girl, of which he was acquitted.

[1] Defendant first asserts that the trial court erred by not dismissing the charges for which he was tried at the second trial because of the constitutional doctrines of double jeopardy and collateral estoppel. Defendant contends that all charges against him arose out of a single occurrence; specifically, that testimony showed that defendant grabbed both children *at the same time* and pulled them *at the same time* behind the store. Thus, defendant reasons, the State has violated his Fifth Amendment right to avoid double jeopardy by trying him for kidnapping the girl when for this offense it had to prove the same conduct for which he was tried and acquitted for kidnapping the boy. *See Grady v. Corbin*, 495 U.S. 508, 109 L.Ed. 2d 548, 110 S. Ct. 2084 (1990).

The United States Supreme Court, in *Blockburger v. United States*, 284 U.S. 299, 76 L.Ed. 306, 52 S. Ct. 180 (1932), held that the Fifth Amendment prohibits successive prosecutions for the same criminal act under more than one criminal statute when proof of only one set of facts would suffice for all. In *Grady*, the Court held that subsequent prosecutions were prohibited if to establish "an essential element of an offense charged in that prosecution, the government will prove conduct that constitutes an offense for which the defendant has already been prosecuted." *Grady*, 495 U.S. at 510, 109 L.Ed. 2d at 557. We hold that defendant's second trial did not violate these principles.

First, defendant was charged with two separate counts of kidnapping, one as to the boy, the other as to the girl. Defendant was acquitted of both. After the outcome of the first trial, no more charges against defendant with relation to the boy remained. In the second trial, the kidnapping charge was relative to the *girl*, and defendant was acquitted of this charge as well. Defendant has nothing left to complain about with respect to the kidnapping charges.

The offenses of attempted first degree rape and taking indecent liberties with children do not require proof of the same elements as were necessary in the kidnapping charges. Or, as our Supreme Court long ago put it, "One cannot be put twice in jeopardy for the *same offense*. When some indispensable element in one charge is not required to be shown in the other, they are not the same

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offense." *State v. Hooker*, 145 N.C. 581, 584, 59 S.E. 866, 867 (1907) (emphasis in original); see also *State v. Edwards*, 310 N.C. 142, 310 S.E.2d 610 (1984).

As to the other charges, the jury was unable to agree on a verdict, and a mistrial resulted. The United States Supreme Court has "constantly adhered to the rule that a retrial following a 'hung jury' does not violate the Double Jeopardy Clause." *Richardson v. United States*, 468 U.S. 317, 324, 82 L.Ed. 2d 242, 250, 104 S. Ct. 3081 (1984). This rule is applicable here.

As a final point in defendant's first assignment of error, we address his collateral estoppel argument. Defendant contends that the United States Supreme Court case of *Ashe v. Swenson*, 397 U.S. 436, 25 L.Ed. 2d 469, 90 S. Ct. 1189 (1970) controls. There the doctrine of collateral estoppel was held to be a part of the double jeopardy clause. In *Ashe*, armed and masked people robbed six men as the men played poker. The defendant was charged with seven separate offenses stemming from the robbery but was acquitted in a trial for the robbery of one of the poker players. He was then brought to trial again for robbing a second poker player, and was found guilty. The Supreme Court held that the second trial, wherein the State relitigated the issue of whether the defendant was the perpetrator of the crimes, was unconstitutional under the federal rule of collateral estoppel. Defendant in the present case asserts that *Ashe* controls here. However, for the same reasons that we reject defendant's double jeopardy claim, we reject his collateral estoppel claim.

According to our Supreme Court, "Under the doctrine of collateral estoppel, an *issue* of ultimate fact, once determined by a valid and final judgment, cannot again be litigated between the same parties in any future lawsuit." *State v. Edwards*, 310 N.C. 142, 145, 310 S.E.2d 610, 613 (1984) (emphasis in original). As we have already noted, defendant's second trial resulted in an acquittal for kidnapping the girl. We see nothing about which the defendant can complain. The "ultimate issue" determined was not as to the other charges. The jury found that the State had not proved the allegations of kidnapping beyond a reasonable doubt. Apropos the other charges, we again note that no issue of ultimate fact as to attempted rape or indecent liberties was determined by a "valid and final judgment" in the first trial. The jury was hung; *Richardson*, not *Ashe*, controls and the protections of the

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double jeopardy clause and collateral estoppel are inapplicable. We overrule defendant's first assignment of error.

Defendant next assigns as error the trial court's permitting the young male victim to testify at defendant's second trial. Defendant argues that this was doubly error because it violated the principles of double jeopardy and collateral estoppel, and also because it was unduly prejudicial under N.C.G.S. § 8C-1, Rule 403 (1988). We find none of these arguments persuasive, particularly since the boy's testimony was used as eyewitness evidence of what occurred on 23 January 1990.

We reject defendant's double jeopardy and collateral estoppel argument for the reasons stated above. As for defendant's argument that the boy's testimony was unduly prejudicial, we note that the exclusion of evidence is a matter left to the sound discretion of the trial judge. *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990). Defendant offers no real support for his contention that this evidence was unduly prejudicial; he does list other alleged child sex abusers, and maintains that the boy's testimony unfairly links defendant to them and to the "most sensitive subject in jurisprudence today." We hold that under Rule 403, the eyewitness testimony of the boy was relevant and its probative value outweighs any possible prejudice.

[2] Defendant's next assignment of error concerns the testimony of a Ms. Walters, a school psychologist. Defendant contends that this witness was not qualified to testify as an expert, that her testimony improperly commented on the credibility of the complaining witness, and that the testimony was unduly prejudicial. Under N.C.G.S. § 8C-1, Rule 702 (1988), for her testimony to be admissible as expert testimony, the witness must be qualified by "knowledge, skill, experience, training, or education." North Carolina case law requires only that the expert be better qualified than the jury as to the subject at hand, with the testimony being "helpful" to the jury. *State v. Huang*, 99 N.C. App. 658, 663, 394 S.E.2d 279, 282, *disc. rev. denied*, 327 N.C. 639, 399 S.E.2d 127 (1990). Whether the witness qualifies as an expert is exclusively within the trial judge's discretion, *id.*, (citation omitted), "and is not to be reversed on appeal absent a complete lack of evidence to support his ruling." *State v. Howard*, 78 N.C. App. 262, 270, 337 S.E.2d 598, 603 (1985), *disc. rev. denied*, 316 N.C. 198, 341 S.E.2d 581 (1986).

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The evidence shows that Ms. Walters has a masters degree in clinical psychology, and is a licensed psychological associate. During *voir dire* examination, Ms. Walters testified that she had been employed for five years as the school psychologist in Clinton City, North Carolina, and in her practice has worked with adult and child survivors of incest, rape, and molestation. Given her education and experience, Ms. Walters was well qualified to testify as an expert, and her testimony was properly admitted as expert testimony. *Id.* at 270, 337 S.E.2d at 604.

[3] Defendant further contends that Ms. Walters' testimony, which included her reading aloud notes which she had written after sessions with the victim, constituted inadmissible expert testimony on the credibility of the complaining witness. While it is true that in North Carolina expert testimony on the credibility of a witness is inadmissible, *see, e.g., State v. Hall*, 98 N.C. App. 1, 11, 390 S.E.2d 169, 174 (1990), *rev'd on other grounds*, 330 N.C. 808, 412 S.E.2d 883 (1992); N.C.G.S. § 8C-1, Rules 405(a), 608 (1988), the defendant must show prejudicial error. Defendant has shown no prejudicial error here. "Our courts have found prejudicial error when the State's case against the defendant hinged almost entirely on the credibility of the victim." *Hall*, 98 N.C. App. at 11, 390 S.E.2d at 174 (citations omitted). That is not the situation here.

[4] We find it necessary to address the content of Ms. Walters' testimony. Ms. Walters testified on direct examination that she was familiar with post-traumatic stress disorder [PTSD] as a medical condition. She went on to explain the disorder, its causes and symptoms. She was asked by counsel whether in her opinion the victim in this case suffers from PTSD, to which Ms. Walters responded "Yes." Counsel then asked Ms. Walters if she was aware of symptoms and characteristics typically exhibited by sexually abused children. Ms. Walters answered affirmatively, then proceeded to testify that she believed the victim exhibited symptoms consistent with the behavior of sexually abused children. Defense counsel made repeated objections to this line of testimony. The trial court allowed the testimony, and gave no limiting instruction.

The defendant relies on a recent Supreme Court decision, *State v. Hall*, 330 N.C. 808, 412 S.E.2d 883 (1992), to argue that this testimony was admitted in error. Expert testimony relating to PTSD is admissible evidence in North Carolina. *Id.* at 819, 412 S.E.2d at 889; *State v. Jones*, 105 N.C. App. 576, 414 S.E.2d 360

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(1992). However, our Supreme Court has held that the admissibility of this evidence is not unlimited. *Hall*, 330 N.C. at 821, 412 S.E.2d at 890.

The Supreme Court recognizes that testimony that a victim suffers from or has symptoms consistent with PTSD has substantial potential for prejudice against the defendant. *Id.* This evidence, then, will be admitted only for certain corroborative purposes. *Id.* Permissible uses for testimony that a person suffers from PTSD include assisting in corroborating the victim's story, explaining delays in reporting the crime, or refuting a defense of consent. *Id.* at 822, 412 S.E.2d at 891. If the probative value of the evidence outweighs the risk of prejudice under N.C.G.S. § 8C-1, Rule 403, the evidence may be admitted. However,

[i]f admitted, the trial judge should take pains to 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.*

The case at bar is similar to a recent decision by this Court, *State v. Jones*, 105 N.C. App. 576, 414 S.E.2d 360 (1992). In that case, like this one, the trial court failed to give a limiting instruction to the jury to use the evidence for any particular purpose. Therefore, this Court concluded that, because a limiting instruction was absent and because the law at the time of the case permitted it, the evidence was admitted for substantive purposes. *Id.* at 580-81, 414 S.E.2d at 363; *see also State v. Hall*, 98 N.C. App. 1, 390 S.E.2d 169 (1990), *rev'd*, 330 N.C. 808, 412 S.E.2d 883 (1992). Given the Supreme Court's *Hall* decision, this Court held the unlimited admission of the evidence to be in error. *Jones*, 105 N.C. App. at 581, 414 S.E.2d at 363. In this case, we hold as well that the unlimited admission of Ms. Walters' testimony concerning the victim's symptoms of PTSD was in error as no limiting instruction was given. However, not every creek which rises overflows.

We next examine whether the error was prejudicial. According to N.C.G.S. § 15A-1443 (1988), a defendant is prejudiced by errors "when there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial." *See State v. Martin*, 322 N.C. 229, 238-39, 367 S.E.2d

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618, 624 (1988). In *Jones*, this Court held the error to be prejudicial, because there was a "reasonable possibility that had the trial court not admitted [the counselor's] testimony for substantive purposes, a different result would have been reached at the defendant's trial." *Jones*, 105 N.C. App. at 581, 414 S.E.2d at 363.

We distinguish this case from *Jones*. Here we have strong and convincing eyewitness evidence that corroborates the testimony of the victim. Here, the State's primary evidence consisted of the victim's and the boy's testimony, and the corroborative testimony of a police officer, a detective, and the psychologist, Ms. Walters. The boy, who was eleven at the time the alleged incident occurred, testified that he heard defendant say he was going to have sexual intercourse with the female child, and he saw the defendant unzip the girl's pants, place his hands within, and "rub" her privates. Given this strong testimony, we do not find the admission of Ms. Walters' testimony to be prejudicial error.

[5] Defendant's next assignment of error concerns the trial court's limiting counsel's objections to questions asked on cross-examination. Defendant argues that the basis for counsel's objections was that the trial court permitted the prosecution to inquire into defendant's prior bad acts. However, the record reflects that defendant takes issue with the trial judge's limiting counsel's frequent objections. It is significant, however, that in so doing, the trial court granted defendant a continuing objection. It appears to this Court that the trial court was simply attempting to provide for the orderly examination and cross-examination of witnesses, which is entirely within the judge's sound discretion. *State v. Albert*, 312 N.C. 567, 324 S.E.2d 233 (1985). We overrule this assignment of error.

[6] Next defendant assigns as error the trial court's admitting testimony by police officers as to defendant's character and reputation. Defendant asserts that this testimony was no more than an "attempt to persuade the jury that the defendant was a bad guy and ought to be punished," and therefore was improperly admitted. Our review of the record and transcript, however, fails to substantiate defendant's theory. The testimony of which defendant complains consisted of brief, rather straightforward testimony of two separate police officers. These officers were merely asked to testify as to the defendant's reputation for truthfulness, which was at issue because his own testimony contradicted the children's testimony. We find no error in admitting this evidence.

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[7] Finally, defendant asserts that the trial court's allowing the children to testify constituted reversible error. Defendant relies on Rule 601(b) which states:

A person is disqualified to testify as a witness when the court determines that he is . . . incapable of understanding the duty of a witness to tell the truth.

N.C.G.S. § 8C-1, Rule 601(b) (1988). Because both children are intellectually limited, defendant maintains that they are incompetent and therefore should have been disqualified as witnesses.

Defendant misapplies Rule 601(b). Rule 601(b) does not ask how bright, how young, or how old a witness is. Instead, the question is: does the witness have the capacity to understand the difference between telling the truth and lying? *See, e.g., State v. Everett*, 98 N.C. App. 23, 26-27, 390 S.E.2d 160 (1990), *rev'd on other grounds*, 328 N.C. 72, 399 S.E.2d 305 (1991). Moreover, it is not necessary for a witness to understand the obligation to tell the truth from a religious point of view. *State v. Hicks*, 319 N.C. 84, 352 S.E.2d 424 (1987). Our Supreme Court, in *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986), upheld the trial court's finding that a twelve year-old, mildly retarded boy was competent to testify in a sexual assault case because the trial court, after observing the child's demeanor and responses, found that "[h]is answers to questions demonstrated . . . an understanding of the importance of telling the truth." *Id.* at 767, 340 S.E.2d at 354.

In this case, both minor witnesses were asked in *voir dire* whether they knew the difference between truth and falsehood. Both answered affirmatively, and both swore to tell the truth. Because the competency of a witness rests in the sound discretion of the trial judge, given his observation of that witness, we find no error or abuse of discretion in permitting the minor witnesses to testify. *State v. Turner*, 268 N.C. 225, 150 S.E.2d 406 (1966).

Defendant had a fair trial, free of prejudicial error.

No error.

Judges ARNOLD and WYNN concur.

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WILLIAM C. SCOTT, SR., PLAINTIFF v. JANE MAYO SCOTT, DEFENDANT

No. 9115DC258

(Filed 7 July 1992)

**1. Divorce and Separation § 68 (NCI4th)— divorce— incurable insanity— finding that mentally ill defendant not insane— no error**

The trial court did not err in a divorce action by finding and concluding that defendant was not incurably insane where plaintiff had filed for a divorce based on one year's separation; defendant asserted incurable insanity as an affirmative defense; the evidence clearly demonstrated defendant's incurable mental illness; and the evidence before the court in its totality showed that defendant, although mentally ill, usually understands what she is engaged in doing and the nature and consequences of her acts.

**Am Jur 2d, Divorce and Separation § 88.**

**Insanity as substantive ground for divorce or separation.**  
**24 ALR2d 873.**

**2. Evidence and Witnesses § 2630 (NCI4th)— divorce— insanity of spouse— opinion of attorneys— admissible**

There was no prejudicial error in a divorce action in which defendant claimed to be incurably insane where the court admitted testimony from two attorneys who had represented defendant in matters other than the divorce. It is the substance of the attorney-client communication that is protected and not the fact that there have been communications or the attorney's observations of the client's physical characteristics such as demeanor, bearing, sobriety or dress. The attorneys here also testified to the substance of several communications made by defendant to them in the course of their legal representation of her; nevertheless, given the evidence properly admitted on the issue of defendant's mental state, the error was not prejudicial.

**Am Jur 2d, Witnesses § 402.**



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APPEAL by defendant from judgment entered 16 October 1990 by *Judge James Kent Washburn* in ALAMANCE County District Court. Heard in the Court of Appeals 6 January 1992.

Plaintiff-husband and defendant-wife were married in 1956. Four children were born of the marriage and all have reached their majority. The parties separated on 17 December 1988 and on 10 April 1990, plaintiff filed for absolute divorce, based on a year's separation pursuant to N.C. Gen. Stat. § 50-6, and for equitable distribution of the marital property. Defendant answered and counterclaimed for temporary and permanent alimony, counsel fees and equitable distribution. On 11 July 1990, defendant filed an amended answer alleging that she suffered from an incurable mental illness. She moved to dismiss the divorce complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the North Carolina Rules of Civil Procedure and asserted N.C. Gen. Stat. § 50-5.1 as an affirmative defense. On 6 August 1990, plaintiff filed a reply admitting that defendant has suffered from mental illness, including bipolar disorder and alcoholism, and that these illnesses were the reason for the separation of the parties.

At trial, the testimony tended to show that the parties had been married for thirty-two years and that defendant had been treated continuously for mental illness since 1968. Her diagnoses at various times included paranoid schizophrenia, manic depressive (or bipolar) disorder and schizo-affective disorder. During the twenty-three years preceding plaintiff's filing, defendant was admitted to hospitals at least eighteen times for treatment of her mental illness. The periods of hospitalization lasted from two to ten weeks. Her mental illness was accompanied and complicated by alcohol abuse. All of her hospitalizations were voluntary, but several times she went only because her doctor told her that if she didn't, he would commit her himself. She was never involuntarily committed, diagnosed as "insane" or adjudicated incompetent.

Plaintiff-husband testified that during their marriage defendant kept the house clean, paid the house bills, arranged for painters and plumbers to maintain the house, raised the four children and entertained friends at home. He testified that she bought her own clothes and kept herself well-dressed and clean. When she was not in the hospital, she had her ups and downs, but she was usually able to manage the household on a normal basis. Whenever she failed to take her medicine or drank alcohol, it would lead to trou-

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ble. On cross, plaintiff also admitted that defendant suffered from tremendous mood swings wherein she would go from being euphoric to being severely depressed and that plaintiff never knew what to expect when he got home from work, that she had become depressed to the point of threatening or actually attempting suicide, that she was a spendthrift and often went on spending sprees when the parties could least afford it, and that in periods of rage she had destroyed or damaged personal property within the home and had physically abused and assaulted the plaintiff during these moments of rage.

Two attorneys testified on order of the court as to interviews they conducted with defendant concerning other legal matters and their observations of defendant's conduct and demeanor.

Two psychiatrists testified for defendant. A third psychiatrist testified by affidavit. The psychiatric testimony was to the effect that defendant suffers from an incurable mental illness consisting of three components: a schizophrenic or delusional component that is a thought disorder, a manic component that is a judgment disorder, and a depressive component that is a mood disorder. These disorders can be treated with medication but defendant will never be cured. Defendant's mental condition is very labile and she needs continuous psychiatric supervision to adjust her medications. One psychiatrist described defendant's life as "tormented," another described her as being "very ill." Defendant did not testify.

On 5 September 1990, the trial court entered an order denying defendant's motion to dismiss and entered judgment granting plaintiff an absolute divorce based on one year's separation. The trial judge made the following pertinent finding of fact and conclusion of law in the dismissal order:

FINDINGS OF FACT

3. Over the last twenty-two years, the defendant has been voluntarily hospitalized for short periods of time on numerous occasions at Alamance Memorial Hospital and North Carolina Memorial Hospital for treatment of mental illness. The defendant has continually suffered from incurable mental illness but a majority of the time, her mental illness has been controllable with medication and the defendant has been able to function in normal daily situations such as maintaining a household, paying bills and handling financial matters, hosting social func-

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tions, shopping, maintaining her driver's license and operating a motor vehicle. The defendant has never been involuntarily committed nor adjudicated incompetent or incurably insane.

CONCLUSIONS OF LAW

(2) The defendant has failed to prove by the greater weight of the evidence that she is incurably insane within the meaning and purpose of North Carolina G.S. 50-5.1.

*Wyatt Early Harris Wheeler & Hauser, by A. Doyle Early, Jr., for plaintiff-appellee.*

*Womble Carlyle Sandridge & Rice, by Susan D. Crooks, Carole S. Gailor and Susan S. McFarlane, for defendant-appellant.*

JOHNSON, Judge.

[1] Defendant first contends that the trial court erred in granting plaintiff a divorce based on a year's separation. N.C. Gen. Stat. § 50-6. Defendant argues that she suffers from an incurable mental illness and therefore the exclusive means by which plaintiff can obtain a divorce is pursuant to N.C. Gen. Stat. § 50-5.1, which requires a three year separation. Plaintiff contends that N.C. Gen. Stat. § 50-5.1 does not apply because defendant, even though mentally ill, is not "incurably insane" as required by statute. The issue is whether the trial judge erred in concluding that defendant is not "incurably insane" as contemplated by N.C. Gen. Stat. § 50-5.1. We find that under the facts of this case the trial court did not err.

Two statutes govern divorce in this state. North Carolina General Statutes § 50-6 (1987) allows the granting of an absolute divorce after a one year separation. North Carolina General Statutes § 50-5.1 (1987) [formerly N.C. Gen. Stat. § 50-5(6)] governs absolute divorce in situations where one spouse is incurably insane. This statute is the exclusive remedy where the parties have separated by reason of the incurable insanity of the defendant. *Lawson v. Bennett*, 240 N.C. 52, 58, 81 S.E.2d 162, 167 (1954); *Moody v. Moody*, 253 N.C. 752, 756, 117 S.E.2d 724, 726 (1961). Section 50-5.1 states in pertinent part:

In all cases where a husband and wife have lived separate and apart for three consecutive years, without cohabitation, and are still so living separate and apart by reason of the incurable insanity of one of them, the court may grant a decree

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of absolute divorce upon the petition of the sane spouse: . . . Provided further, the evidence shall show that the insane spouse is suffering from incurable insanity, and has been confined or examined for three consecutive years next preceding the bringing of the action in an institution for the care and treatment of the mentally disordered or, if not so confined, has been examined at least three years preceding the institution of the action for divorce and then found to be incurably insane as hereinafter provided.

The statute then goes on to specify the methods by which the spouse's insanity may be proved and specifically states which treating professionals can provide such proof. It also provides that when the insane defendant has insufficient income to provide for his or her own care and maintenance, the court shall require the plaintiff to provide for care and maintenance for the defendant's lifetime. The statute does not define the term "incurable insanity."

In *Lawson*, 240 N.C. 52, 81 S.E.2d 162, plaintiff-husband filed for divorce pursuant to N.C. Gen. Stat. § 50-6, alleging a two [now one] year separation. Defendant alleged by way of defense that she was mentally incompetent at the time of the separation and at the time that she signed a deed of separation. The Supreme Court stated the issue to be whether a spouse can maintain an action for divorce under N.C. Gen. Stat. § 50-6 when the other spouse, here the wife, "has suffered impairment of mind to such an extent that she does not have sufficient mental capacity to understand what she is engaged in doing, and the nature and consequences of her act." *Id.* at 57, 81 S.E.2d at 166. In *Lawson*, the jury found that the wife did not have this requisite mental capacity. The Court held that this finding prevented the granting of a divorce under N.C. Gen. Stat. § 50-6 and that N.C. Gen. Stat. § 50-5(6) [now N.C. Gen. Stat. § 50-5.1] was the exclusive remedy. *See also Moody*, 253 N.C. 752, 756, 117 S.E.2d 724, 727 (where the Court said in *dictum*: "[T]o bar an action for divorce based on two [now one] years separation, the mental impairment must be to such extent that defendant does not understand what he or she is engaged in doing, and the nature and consequences of the act," citing *Lawson*, 240 N.C. 52, 81 S.E.2d 162).

The question in the case *sub judice* is whether the defendant presented sufficient evidence to support her contention that she is "incurably insane," that is, that she is so mentally impaired

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that she does not understand what she is engaged in doing and the nature and consequences of her acts. We find that the evidence clearly demonstrates defendant's mental illness and that her illness is incurable. Her illness, however, does not rise to the level of "insanity." It is uncontested that defendant has never been involuntarily admitted to a mental hospital and has never been adjudicated incompetent or insane. The testimony from her psychiatrists and husband was to the effect that when she is on medication she can function fairly normally but that she requires periodic hospitalization to adjust her medications. The two attorneys testified that in their dealings with defendant she responded appropriately to their questions and appeared to understand the subject matter of their conversations and what she was signing. The evidence before the court in its totality shows that defendant, although mentally ill, usually understands what she is engaged in doing and the nature and consequences of her acts. We find that the findings of fact are supported by the evidence and the conclusion of law is supported by the findings. This assignment of error is overruled.

**[2]** Defendant next contends that the trial judge erred in ordering two attorneys to testify over defendant's objection that their testimony violated the attorney-client privilege. Defendant contends that she was prejudiced by this error because the trial judge apparently based a portion of his findings of fact on the testimony.

The two attorneys did not represent defendant at the divorce hearing. Attorney Burgin represented defendant's interests in a business transaction and met with her once at the hospital for the purpose of having her sign some documents concerning the refinancing of plaintiff's business. He testified, under order of the trial court, as to his conversation with defendant and to his conclusion that she seemed to understand that the documents she was signing were a deed of trust and an indemnification agreement and that the purpose of his representation was to see that she was protected. Attorney Messick was appointed by the clerk of court to be defendant's guardian ad litem following the filing by defendant's son of an incompetency petition pursuant to Chapter 35A. This petition was later voluntarily dismissed prior to any hearing being held. Attorney Messick testified, under order of the court, that he had several telephone conversations and two meetings with defendant, one at defendant's home and one in his office. Attorney Messick testified as to his observations of the defendant,

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her person and her home, and his discussion with her as to her need for a guardian, her medical history, her medications, about what a competency hearing entailed and about who would be a suitable general guardian should she be found to be incompetent. Defendant objected to the testimony of both attorneys.

It is an established rule of the common law that confidential communications made to an attorney in his professional capacity by his client are privileged, and the attorney cannot be compelled to testify to them unless his client consents.

But the mere fact the evidence relates to communications between attorney and client alone does not require its exclusion. Only confidential communications are protected. If it appears by extraneous evidence or from the nature of a transaction or communication that they were not regarded as confidential . . . or that they were made for the purpose of being conveyed by the attorney to others, they are stripped of the idea of a confidential disclosure and are not privileged. (Citations omitted).

*Dobias v. White*, 240 N.C. 680, 684-85, 83 S.E.2d 785, 788 (1954) (citations omitted). It is the substance of the communication that is protected and not the fact that there have been communications or the attorney's observations of the client's physical characteristics such as his demeanor, bearing, sobriety or dress. *United States v. Kendrick*, 331 F.2d 110, (4th Cir. 1964). See generally 1 *Brandis on North Carolina Evidence* § 62 (3rd ed. 1988).

[T]he "essence" of the privilege is the protection of what was "expressly made confidential" or should have been "reasonably assume[d] . . . by the attorney as so intended." In determining whether it was to be reasonably "assume[d] that confidentiality was intended," it is the unquestioned rule that the mere relationship of attorney-client does not warrant a presumption of confidentiality.

*In Re Grand Jury Proceedings (John Doe)*, 727 F.2d 1352, 1356 (4th Cir. 1984). The privilege must be strictly construed. *Id.* at 1355. The burden is on the proponent of the privilege to demonstrate that the privilege should be applied. *United States v. (Under Seal)*, 748 F.2d 871 (4th Cir. 1984). The attorney-client privilege is rooted in the common law and must be distinguished from the various privileges created by statute, some of which specifically state that

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they may be waived by the court "if disclosure is necessary to a proper administration of justice." See North Carolina General Statutes, Chapter 8, article 7.

We find that the trial court erred in "waiving" the attorney-client privilege to the extent that it received testimony from the attorneys regarding confidential communications. The bulk of the ordered testimony concerned the attorney's observations regarding defendant's demeanor, dress, behavior and understanding. Observations such as this by an attorney of his client do not fall within the protection of the privilege and are admissible. *But see Kendrick*, 331 U.S. 110, 115 (Sobeloff, C.J., and Bell, J., concurring specially) (lawyer's observations inextricably intertwined with communications therefore it cannot be said that the attorney's testimony was confined to nonconfidential matters). Our review of the transcript, however, reveals that the attorneys also testified to the substance of several communications made by the defendant to them in the course of their legal representation of her. These communications clearly fall within the category of "confidential communications." The privilege to decline to reveal confidential communications lies with the client and may not be "waived" by the trial court or the attorney. Plaintiff's argument that defendant waived her attorney-client privilege by putting her mental health at issue is meritless. Although we find error in the admission of the attorneys' testimony to the extent that it included confidential communications between the attorneys and the defendant, we find that under the facts of this case it was harmless error. Attorney Burgin's testimony regarding defendant's responses to his inquiries concerning the deed of trust and indemnification agreement was substantively irrelevant to this proceeding. Much of Attorney Messick's testimony regarding defendant's health was put before the court later by her physicians and was in fact the basis of her case.

We are cognizant of the rule that in a bench trial, the trial judge will be presumed to know the law and will disregard irrelevant or inadmissible evidence. Apparently, in this case, the trial judge ordered the attorneys to testify under the mistaken notion that because defendant had put on psychiatric evidence she had waived all privileges with regard to any evidence about her mental state, including the attorney-client privilege. Thus, we must assume that the trial judge improperly considered these confidential communications.

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Nevertheless, given the evidence properly admitted on the issue of defendant's mental state, we do not believe that this error was prejudicial or that it warrants reversing the granting of the absolute divorce.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

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N. E. FOY AND RUTH CAROLYN FOY v. ROBERT N. HUNTER, JR., ADMINISTRATOR OF THE ESTATE OF FORREST WILLIAM WHISNANT

No. 9118SC649

(Filed 7 July 1992)

**1. Rules of Civil Procedure § 41.2 (NCI3d)— dismissal for failure to prosecute—findings unsupported by evidence**

The trial court erred in dismissing plaintiffs' action with prejudice under Rule 41(b) based on plaintiffs' failure to prosecute their action where the evidence did not support the trial court's findings that plaintiffs had failed to assist or cooperate with their attorneys and that they had not been diligent in prosecuting their action. N.C.G.S. § 1A-1, Rule 41(b).

**Am Jur 2d, Dismissal, Discontinuance, and Nonsuit § 50.**

**Dismissal of civil action for want of prosecution as res judicata. 54 ALR2d 473.**

**Judicial qualification of provision of FRCP 41(b) that dismissal for want of prosecution operates as adjudication upon the merits. 5 ALR Fed 897.**

**2. Rules of Civil Procedure § 8.1 (NCI3d)— negligence action—improper pleading of damages sought—dismissal with prejudice—failure to consider other sanctions**

Although plaintiffs violated Rule 8(a)(2) by specifically demanding \$176,000 in damages in a negligence action and dismissal was within the discretion of the trial court, the court erred in dismissing the action with prejudice without making



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findings and conclusions indicating that it had first considered less drastic sanctions and determined that they would not suffice.

**Am Jur 2d, Dismissal, Discontinuance, and Nonsuit  
§§ 41 et seq.**

APPEAL by plaintiffs from order entered 7 February 1991 in GUILFORD County Superior Court by *Judge W. Douglas Albright*. Heard in the Court of Appeals 15 April 1992.

*James W. Workman, Jr., and E. Raymond Alexander, Jr., for plaintiff-appellants.*

*Henson Henson Bayliss & Sue, by Perry C. Henson and A. Robinson Hassell, for defendant-appellee.*

GREENE, Judge.

The plaintiffs appeal from an order entered 7 February 1991 in which the trial court granted the defendant's motion for involuntary dismissal under N.C.G.S. § 1A-1, Rule 41(b) (Rule 41(b)).

On 4 October 1984, the plaintiffs were injured in an automobile accident in Greensboro, North Carolina, due to the alleged negligence of Forrest Whisnant (Whisnant). On 30 September 1987, the plaintiffs filed an unverified complaint against Whisnant in the District Court Division of Cabarrus County, North Carolina. At the time of the accident and the filing of the complaint, the plaintiffs resided in Cabarrus County, and Whisnant resided in Guilford County, North Carolina. In the complaint, N.E. Foy sought damages in the amount of \$88,000 for personal injuries and property damage, and Ruth Foy sought damages in the amount of \$88,000 for personal injuries.

Whisnant filed an answer on 9 November 1987 in which he denied negligence on his part and made various motions. Whisnant moved for involuntary dismissal of the plaintiffs' complaint under Rule 41(b) on the grounds that the plaintiffs had violated N.C.G.S. § 1A-1, Rule 8(a)(2) (Rule 8(a)(2)) by specifically demanding \$176,000 in damages in a negligence action. Rule 8(a)(2) provides that "[i]n all negligence actions . . . wherein the matter in controversy exceeds the sum or value of ten thousand dollars (\$10,000), the pleading shall not state the demand for monetary relief, but shall state that the relief demanded is for damages incurred or to be incurred in excess of ten thousand dollars (\$10,000)." Furthermore, because

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the plaintiffs brought their action in the district court, Whisnant moved to dismiss the complaint with prejudice, and in the alternative, to transfer the action to Cabarrus County Superior Court. See N.C.G.S. § 1A-1, Rule 12(b)(3) (motion to dismiss for improper division); N.C.G.S. § 7A-240 (as a general rule, superior and district courts possess concurrent jurisdiction "of all justiciable matters of a civil nature"); N.C.G.S. § 7A-243 (superior court is proper division for trials of civil actions where amount in controversy exceeds \$10,000); N.C.G.S. § 7A-258 (motion to transfer to proper division).

On 19 July 1988, Whisnant died from health problems unrelated to his accident with the plaintiffs. The plaintiffs did not learn of Whisnant's death until 17 August 1989 when Whisnant's attorney informed the plaintiffs' attorney of the death. On 21 November 1989, Whisnant's attorney filed a motion to dismiss under N.C.G.S. § 1A-1, Rule 25 (Rule 25) alleging that the plaintiffs' action had abated because the plaintiffs had not presented their claims to Whisnant's personal representative and had not requested substitution of the personal representative for Whisnant. Furthermore, Whisnant's attorney moved for dismissal under Rule 41(b) for the plaintiffs' alleged failure to prosecute their claims. According to the record, the plaintiffs had not engaged in any discovery upon Whisnant nor had they taken any further action with regard to their claims since filing their complaint. On 27 November 1989, the plaintiffs filed a motion under Rule 25(a) to substitute Robert N. Hunter, Jr. (defendant) as the defendant in the action in place of Whisnant. According to the motion, the defendant was appointed to administer Whisnant's estate in November, 1989. Before that date, no one had been appointed to administer the estate. The trial court allowed the plaintiffs' Rule 25(a) motion on 7 February 1990.

On approximately 7 February 1990, the defendant moved to transfer the plaintiffs' action from the Cabarrus County District Court to the Guilford County Superior Court. In a motion filed 7 February 1990, the plaintiffs' attorney, William Alexander, requested that he be allowed to withdraw as attorney of record for the plaintiffs and that Raymond Alexander be substituted in his place. The basis for the motion was that William Alexander's practice was located in Cabarrus County while Raymond Alexander's practice was located in Guilford County. By order filed 7 February 1990, the trial court granted this motion, and on 9 February 1990,

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the trial court transferred the plaintiffs' action to the Guilford County Superior Court.

At some time in late 1990, the action was placed upon the Non-Jury Administrative Civil Session calendar for the week of 31 December 1990 for the purpose of setting a trial date. The action was scheduled to be heard at 12:00 p.m. on 4 January 1991. Nothing in the record indicates that the plaintiffs were notified of or knew of the hearing. When the case came on for hearing, the defendant's attorney appeared but the plaintiffs and their attorney did not. The defendant requested and the trial court set 3 June 1991 as the trial date. The defendant also requested orally that the action be placed on the Motion Non-Jury Civil Session calendar for the week of 4 February 1991 because he planned to make another motion for involuntary dismissal under Rule 41(b). The trial court granted the defendant's calendar request.

On 10 January 1991, the defendant filed a Rule 41(b) motion for involuntary dismissal for the plaintiffs' alleged failure to prosecute their claims and to comply with the Rules of Civil Procedure. The motion came on for hearing on 4 February 1991. Nothing in the record indicates that the plaintiffs were notified of or knew of the hearing. Neither the plaintiffs nor their attorney appeared at the 10:00 a.m. calendar call. According to the plaintiffs, their attorney did not appear because he was answering the calendar call for a criminal case in superior court. At approximately 2:00 p.m., however, the plaintiffs' attorney appeared for hearing on the defendant's motion. The trial court granted the plaintiffs a hearing on the motion and ordered the hearing set for 7 February 1991. The parties' attorneys appeared at the hearing, and after the hearing, the trial court filed its order granting the defendant's Rule 41(b) motion and dismissed the complaint with prejudice.<sup>1</sup> Although a transcript of this hearing was apparently made, the transcript has not been included as a part of the record on appeal. The plaintiffs gave notice of appeal on 12 February 1991, and on 16 April 1991, they filed in the trial court a motion under N.C.G.S. § 1A-1, Rule 60(b)(1) (Rule 60(b)(1)) for relief from the order of involuntary dismissal entered 7 February 1991. The trial court denied this motion on 10 June 1991. The record does not reflect that the plain-

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1. Although the trial court did not specify that the dismissal was with prejudice, the failure of the order to specify otherwise operated "as an adjudication on the merits." N.C.G.S. § 1A-1, Rule 41(b) (1990).

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tiffs gave notice of appeal from the trial court's denial of their Rule 60(b)(1) motion.

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The dispositive issue is whether the trial court erred in dismissing the plaintiffs' action under either N.C.G.S. § 1A-1, Rule 41(b) or N.C.G.S. § 1A-1, Rule 8(a)(2).

Under Rule 41(b), a trial court may enter sanctions for failure to prosecute *only* where the plaintiff or his attorney "manifests an intention to thwart the progress of the action to its conclusion" or "fails to progress the action towards its conclusion" by engaging in some delaying tactic. *Green v. Eure*, 18 N.C. App. 671, 672, 197 S.E.2d 599, 601 (1973); *Jones v. Stone*, 52 N.C. App. 502, 505, 279 S.E.2d 13, 15, *disc. rev. denied*, 304 N.C. 195, 285 S.E.2d 99 (1981); *see also Smith v. Quinn*, 324 N.C. 316, 318-19, 378 S.E.2d 28, 30-31 (1989) (trial court did not err in dismissing plaintiff's action where plaintiff's attorney violated Rule of Civil Procedure for purposes of delay and gaining unfair advantage). Whether a plaintiff or his attorney has manifested an intent to thwart the progress of an action or has engaged in some delaying tactic may be inferred from the facts surrounding the delay in the prosecution of the case. *Green*, 18 N.C. App. at 672, 197 S.E.2d at 600-01; *see also Link v. Wabash R.R. Co.*, 370 U.S. 626, 633, 8 L.Ed.2d 734, 739-40 (1962) (petitioner's deliberate dilatory conduct reasonably inferred from facts including "drawn-out history of the litigation"). Furthermore, a trial court may enter sanctions when the plaintiff or his attorney violates a rule of civil procedure or a court order. *Harris v. Maready*, 311 N.C. 536, 551, 319 S.E.2d 912, 922 (1984) (Rule 8(a)(2)); *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 420, 378 S.E.2d 196, 200 (1989) (court order). The sanctions may be entered against either the represented party or the attorney, even when the attorney is solely responsible for the delay or violation. *See Smith*, 324 N.C. at 318-19, 378 S.E.2d at 30-31; *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 674-75, 360 S.E.2d 772, 776 (1987) (trial court properly sanctioned plaintiff for plaintiff's attorney's violation of court order); *cf. Turner v. Duke Univ.*, 101 N.C. App. 276, 280-81, 399 S.E.2d 402, 405, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 552 (1991) (attorney committed acts giving rise to sanction). The lack of misconduct by a represented party, however, can mitigate against the use of severe sanctions against that party.

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This case concerns an order of involuntary dismissal with prejudice based on the plaintiffs' alleged failure to prosecute their action and based on an alleged failure to comply with the Rules of Civil Procedure.

## Failure To Prosecute

[1] Although the trial court made no finding as to whether the plaintiffs or their attorney had manifested an intent to thwart the progress of their action or had engaged in some delaying tactic, the trial court found that the *plaintiffs* had not assisted or cooperated with their attorneys and had not been diligent in prosecuting their action and concluded that the plaintiffs had failed to prosecute their action. Assuming *arguendo* that these findings support the conclusion, the evidence in the record does not support these findings. Nothing in the record indicates that the plaintiffs failed to assist or cooperate with their attorneys or that they were not diligent in prosecuting their action, and therefore, the entry of sanctions against either the plaintiffs or their attorney may not be upheld on the ground of the *plaintiffs'* failure to prosecute. We do not consider whether the plaintiffs' *attorneys* failed to prosecute the action because the trial court did not make any findings on the issue.

## Demand for Excessive Monetary Relief

[2] The trial court also found that the plaintiffs' unverified complaint demanded \$176,000 in damages and concluded that there had been a violation of Rule 8(a)(2) because of this demand in the plaintiffs' negligence action. The evidence supports this finding which in turn supports the conclusion that the complaint violated Rule 8(a)(2). *Harris*, 311 N.C. at 550, 319 S.E.2d at 921 (violation of Rule 8(a)(2)). Although dismissal under Rule 8(a)(2) is within the discretion of the trial court, when the rule is violated such sanction "may not be imposed mechanically." *See Rivenbark*, 93 N.C. App. at 420, 378 S.E.2d at 200. Because the drastic sanction of dismissal "is not always the best sanction available to the trial court and is certainly not the only sanction available," dismissal "is to be applied only when the trial court determines that less drastic sanctions will not suffice." *Harris*, 311 N.C. at 551, 319 S.E.2d at 922; *Rivenbark*, 93 N.C. App. at 420-21, 378 S.E.2d at 200-01 (failure to comply with court order); *see also* W. Brian Howell, *Shuford North Carolina Civil Practice and Procedure* § 8-3 (4th ed. 1992) (dismissal not the only sanction available to "adequately

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enforce the purpose" of Rule 8(a)(2) ). Less drastic sanctions include: (1) striking the offending portion of the pleading; (2) imposition of fines, costs (including attorney fees) or damages against the represented party or his counsel; (3) court ordered attorney disciplinary measures, including admonition, reprimand, censure, or suspension; (4) informing the North Carolina State Bar of the conduct of the attorney; and (5) dismissal without prejudice. See generally *Daniels*, 320 N.C. at 674, 360 S.E.2d at 776 (discussing inherent power of the court); *Chambers v. NASCO, Inc.*, --- U.S. ---, ---, 115 L.Ed.2d 27, 44-46 (1991) (discussing inherent power of the court); see also Rules, Regulations and Organization of the North Carolina State Bar, Article IX, § 2-C(2) (court has "inherent authority to take disciplinary action against attorneys").

Before dismissing an action with prejudice, the trial court must make findings and conclusions which indicate that it has considered these less drastic sanctions. *Rivenbark*, 93 N.C. App. at 421, 378 S.E.2d at 201. If the trial court undertakes this analysis, its resulting order will be reversed on appeal only for an abuse of discretion. *Miller v. Ferree*, 84 N.C. App. 135, 137, 351 S.E.2d 845, 847 (1987) (no abuse of discretion where trial court considered sanctions less severe than dismissal without prejudice, determined that they were inappropriate, and dismissed the action without prejudice).

The record shows that the trial court dismissed the plaintiffs' action with prejudice without assessing the appropriateness of sanctions less severe than dismissal with prejudice. Accordingly, we reverse the dismissal of the complaint and the denial of the plaintiffs' Rule 60(b)(1) motion and remand for reconsideration of an appropriate sanction for violation of Rule 8(a)(2).

Reversed and remanded.

Judges PARKER and COZORT concur.

## STEPP v. SUMMEY OUTDOOR ADVERTISING, INC.

[106 N.C. App. 621 (1992)]

LAWRENCE E. STEPP, PLAINTIFF v. SUMMEY OUTDOOR ADVERTISING, INC.,  
AND BOYD L. HYDER, DEFENDANT

SUMMEY OUTDOOR ADVERTISING, INC., PLAINTIFF v. BOYD L. HYDER,  
DEFENDANT

No. 9129SC480

(Filed 7 July 1992)

**Landlord and Tenant § 6.1 (NCI3d) — lease of land for billboard — zoning ordinance changes — nonconforming sign — amount of rent**

The trial court partially erred by granting summary judgment for plaintiff in an action arising from the lease of land by plaintiff to defendant for construction of a billboard. The agreement called for the lease of a 2,400 square foot portion of a lot for 10 years at an annual rent of \$800 for the first five years and \$1,000 for the next five years, and specifically provided that the lessee could terminate the lease if the erection or maintenance of signs on the premises was prohibited or necessary building permits were not obtained by the lessor (plaintiff) or were revoked. Defendant (lessee) obtained a permit for a 672 square foot double-faced billboard, but plaintiff shortly thereafter learned that the sign could not be built on a lot of less than 10,000 square feet and that the presence of a sign would prevent the erection of another building on the lot. The lease was then amended to provide for the lease of 10,000 square feet at \$3,300, but also provided that the lease would revert to 2,400 feet at \$800 per year if the ordinance was amended to allow signs on 2,400 square foot areas. The billboard was erected and defendant began making payments. The zoning ordinance was subsequently amended to reduce the maximum permissible sign size to 380 square feet, so that the billboard was nonconforming, as it had been under the previous size limit of 600 square feet. The ordinance which prohibited the coexistence of a building and a sign on a 10,000 square foot lot was amended and defendant unilaterally took the position that this amendment triggered the reversion clause in the lease and began paying rent on 2,400 square feet at \$800 per year. Plaintiff was informed by the City that the sign was nonconforming and that it would prevent a building being placed on the remainder of the lot. Plaintiff then brought this action claiming rent due based on 10,000 square feet and

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damages resulting from interference with his use of the property by the presence of the nonconforming sign. Summary judgment was improperly granted for plaintiff on the rent issue because the amendment to the ordinance triggered the reversion clause in the amended lease, but summary judgment was properly granted for plaintiff on his cause of action for interference with his use of the property arising from the presence of the nonconforming sign. The amount of damages is a jury question.

**Am Jur 2d, Landlord and Tenant § 998.**

APPEAL by defendant Summey Outdoor Advertising, Inc. from order entered 11 February 1991 by *Judge Loto G. Caviness* in HENDERSON County Superior Court. Heard in the Court of Appeals 6 January 1992.

This case concerns a dispute over the amount of rent due from the lease of land upon which a billboard was constructed and the damages, if any, due the lessor from the refusal of the lessee to either remove the billboard or bring it into conformance with the local zoning ordinance.

On 26 February 1983, defendant Summey Outdoor Advertising, Inc., (Summey) entered into a written agreement with Carla H. Lyda for the lease of a 40 foot x 60 foot portion (hereinafter the 2,400 square foot portion) of a lot located in Hendersonville, North Carolina. The lease was for 10 years beginning 1 May 1983 at an annual rent of \$800.00 for the first five years, then \$1,000.00 per year for the next five years. The lease explicitly provided for the erection of a billboard on the 2,400 square foot portion. It also provided, in pertinent part:

If at any time the erection . . . or maintenance of its signs on the demised premises is prohibited by any law, ordinance or authority, or building permits are either not obtained or revoked, or if such activity becomes unprofitable within the sole judgment of Lessee, Lessee may terminate this lease by giving Lessor thirty (30) days advance notice of such termination.

. . .

This lease subject to Lessor being able to obtain necessary building permits.



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Neither Lessee nor Lessor is bound by any stipulation, representation or agreement not printed or written in this lease.

On 1 March 1983, Summey applied for a permit to erect a 672 square foot double-faced billboard on the leased property. The permit was granted. Shortly thereafter, plaintiff Stepp (Mrs. Lyda's son and agent) and Summey were informed that pursuant to the zoning ordinance, the sign could not be built on a lot less than 10,000 square feet and that the presence of a sign (a "structure" under the ordinance) would prevent the erection of any other building on the lot. In response to this information, the parties amended the lease. The 9 May amendment expressly incorporates the 26 February lease and reads in pertinent part:

(1) Lease 10,000 square feet at rate of 33 per square foot instead of 2,400 square feet (\$3,300.00 instead of \$800.00).

(2) The Lease reverts to 2,400 square feet (at \$800.00 per year) if City of Hendersonville Zoning Ordinance is amended so as to allow billboard signs on 2,400 square feet areas (with a prorata adjustment of rents paid or due upon the revision of this Lease to 2,400 square feet).

Defendant Summey then constructed a 672 square foot double-sided billboard on the designated 2,400 square foot portion of the lot and began making payments consistent with the rental of the whole 10,000 square foot lot as per the amended lease.

On 5 April 1984, the City amended its zoning ordinance to reduce the maximum permissible size of outdoor signs to 380 square feet from 600 square feet. The billboard was nonconforming under this amended ordinance, as it had also been under the prior ordinance. On 7 November 1985, the ordinance prohibiting the co-existence of a building and a sign (a sign being a "structure") on a 10,000 square foot lot was amended by removing the words "or structure." Summey unilaterally took the position that this amendment triggered the reversion clause in paragraph 2 of the amended lease such that Summey was now liable for rent on only 2,400 square feet, and not 10,000 square feet. Therefore, beginning 7 November 1985 Summey paid rent on the basis of 2,400 square feet at \$800.00 per year.

On 8 December 1985, Mrs. Lyda died and plaintiff Stepp became the sole owner of the lot and the lease-holder. In March 1986, Stepp wrote to Summey to demand payment on the basis of 10,000

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square feet and to request that all further payments or correspondence be directed to him as Mrs. Lyda's successor. In this letter, Stepp informed Summey that he now held the deed to the lot in question.

At some point, Stepp inquired of the City whether he could erect a building on that portion of the lot not associated with the sign (i.e. on the "remainder" of the lot). By letter dated 11 June 1986, Stepp was informed by the City inspection department that due to the 5 April 1984 change in the zoning ordinance regulating the maximum size of billboards, the sign on his lot had become nonconforming and that the presence of a nonconforming sign on the lot would prevent a building from being placed on the remainder. Beginning in December 1987, Stepp wrote to Summey to demand past due rental payments based on 10,000 square feet and the removal of the sign for breach of contract by either failing to pay the full amount due or under the "renegotiation" provision in the lease "if property is sold." Summey responded and denied breach of contract.

On 4 March 1988, Stepp conveyed the property to Hyder, retaining the right to receive the rent until 1 May 1988.

On 13 December 1988, Stepp sued Summey alleging (1) rent owed in the amount of \$7,425.00 and (2) damages resulting from the interference with plaintiff's use of the property by the presence of the nonconforming sign.

Both plaintiff Stepp and defendant Summey moved for summary judgment. By order entered 11 February 1991, Judge Caviness granted summary judgment in favor of plaintiff on the rent issue and ordered defendant Summey to pay \$7,425.00, which represented the difference between \$800.00 per year paid and \$3300.00 per year owed from 7 November 1985 through April 1988. The court granted partial summary judgment for plaintiff on his second cause of action, finding Summey liable for its refusal to remove or bring into conformance its nonconforming sign, and leaving for the jury the amount of damages. The court denied defendant's motion for summary judgment. Defendant Summey appeals.

*Atkins & Craven, by Lee Atkins and Susan S. Craven, for plaintiff-appellee.*

*Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Allan R. Tarleton, for defendant-appellant Summey Outdoor Advertising, Inc.*

## STEPP v. SUMMEY OUTDOOR ADVERTISING, INC.

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JOHNSON, Judge.

The rules bearing on summary judgment have been stated too often to bear repeating. Suffice it to say that summary judgment is proper when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. *Kessing v. National Mortg. Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971); *Raritan River Steel Co. v. Cherry, Bekaert & Holland*, 101 N.C. App. 1, 398 S.E.2d 889 (1990).

Defendant contends that the trial court erred in granting summary judgment to plaintiff on his claims for past-due rent and for damages resulting from his inability to use the remainder of the lot due to the presence of the nonconforming sign. We agree. The summary judgments in favor of plaintiff on his first and second cause of action cannot stand at the very least because they are fatally inconsistent: defendant cannot on the one hand be liable for rent on the whole 10,000 square foot lot for the whole period at issue and on the other hand also be liable for damages due to plaintiff's inability to use the remainder of the lot during a portion of that same period.

The questions before us are: (1) whether under paragraph 2 of the amendment, defendant is only liable for rent on 2,400 square feet beginning on 7 November 1985, the effective date of the revised ordinance, and (2) if so, whether its refusal to remove the sign or to conform it to the requirements of the City ordinance regarding size makes it liable to plaintiff for damages resulting from that refusal. We conclude that the 7 November 1985 amendment to the ordinance triggered the clause in the amendment to the lease making defendant liable for rent on only 2,400 square feet for the remainder of the lease term. We further conclude that under the terms of the contract, defendant was required to maintain its sign in conformity with the local ordinances so that defendant is liable for damages to plaintiff which derive from its failure to do so.

Under the terms of the amended lease, the parties agreed that defendant would lease 10,000 square feet at \$3300.00 per year until such time as the "City of Hendersonville Zoning Ordinance is amended so as to allow billboard signs on 2,400 square feet areas" at which time "the lease reverts to 2,400 square feet (at \$800.00 per year)[.]" Plaintiff does not challenge defendant's contention that the 7 November 1985 amendment to the zoning ordinance changed the existing ordinance to allow a building and a sign to

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co-exist on a 10,000 square foot lot. Plaintiff contends instead that because parties may not contract to commit an unlawful act, the lease must be construed as including the condition that the size of the leased premises would not decrease to 2,400 square feet unless the sign met any condition required by the zoning ordinance for a sign to exist on 2,400 square feet. The evidence suggests that even when it was first constructed, the sign was larger than allowed by the then existing ordinance. The evidence conclusively shows that after the 5 April 1984 amendment to the sign size ordinance, the sign was larger than allowed by the ordinance. Plaintiff's argument, however, is misplaced.

The general rule is that an agreement which violates a constitutional statute or municipal ordinance is illegal and void. However, there is also ample authority that the statutory imposition of a penalty, without more, will not invariably avoid a contract which contravenes a statute or ordinance when the agreement or contract is not immoral or criminal in itself. In such cases the Courts may examine the language and purposes of the statute, as well as the effects of avoiding contracts in violation thereof, and restrict the penalty for violation solely to that expressed within the statute itself. (Citations omitted.)

*Financial Services v. Capitol Funds*, 288 N.C. 122, 128, 217 S.E.2d 551, 556 (1975) (violation by seller of ordinance making it a misdemeanor to describe land in deed by reference to subdivision plat which has not been approved and recorded does not render a conveyance of land illegal on ground that seller did not obtain approval of subdivision plat as required by ordinance). In *Hines v. Norcott*, 176 N.C. 123, 96 S.E. 899 (1918), plaintiff-lessor sued to collect rent on certain commercial buildings under a lease. Defendant contended that the lease was illegal and void because the lessor did not connect the leased buildings to a municipal sewer system in violation of an ordinance which required the hook-up and made it illegal to maintain and use surface and dry privies. The Court held that the violation did not make the lease illegal and unenforceable.

The imposition of a penalty for not doing an act which is required to be done may, of itself, render the doing of the same illegal; but still if, upon a fair construction of the statute, it appears to have been the intention of the legislative body to confine the punishment or forfeiture to the penalty pre-

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scribed for a violation of it, that intention will be enforced. And the same may be said as to the prohibition of an act, but it does not follow in either case that the illegal act will vitiate a contract which is connected with it only incidentally because it relates to property affected, in some degree, by the statute or ordinance prohibiting or enjoining the act and annexing a penalty for its violation.

*Id.* at 128, 96 S.E. at 901. We do not believe the legislature intended that a lessee's construction of a billboard in violation of a billboard size ordinance should have the effect of making the lease, which is connected to the prohibited act only incidentally, illegal and void, nor do we find any basis for plaintiff's contention that because defendant violated the size ordinance from the very beginning, the lease is valid and enforceable but must be construed as not reverting to 2,400 square feet when the ordinance was amended.

We find that the express language of the contract required defendant to conform his sign to the ordinance. The original lease, signed 26 February 1983, contemplated the lease of a 40 foot x 60 foot portion of a larger lot. This agreement provided that *lessee* could terminate the lease if at any time the erection or maintenance of the sign was prohibited or a building permit could not be obtained. This agreement also provided: "This lease subject to *Lessor* being able to obtain necessary building permits." (Our emphasis.) This instrument was later amended to provide for the lease of 10,000 square feet, the whole lot, to revert to 2,400 square feet if the ordinance was amended to allow the existence of a billboard and a building on the remainder of the 10,000 square foot lot. The general rule is that "statutes and ordinances enacted subsequent to the execution of a contract, which add burdens or impair the obligations of the contract, may not be deemed to be a part of the agreement unless the language of the agreement clearly indicates this to have been the intention of the parties." 17A Am. Jur. 2d *Contracts* § 382 (1991).

We find that the lease clearly indicates the intention of the parties that defendant would conform its sign to the applicable ordinances. We find this because (1) the contract contains a clause which expressly states that the lease is subject to the lessor being able to obtain necessary building permits, (2) when the original instrument which included this clause was signed, it was for the lease of only a portion of a larger lot, (3) the lease was amended

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to include the whole 10,000 square foot lot only when it was learned that the billboard and a building could not co-exist on the same lot, and (4) the amendment provided for a reduction in area leased and rent due, only when the ordinance prohibiting a sign and a building on the same lot was amended "so as to allow billboard signs on 2,400 square feet." Construing the lease as not requiring defendant to conform its sign to the various ordinances so that plaintiff "could obtain necessary building permits" would utterly nullify the express clause in the original instrument and would defeat the intent of the parties as revealed by the amendment of the original instrument and their inclusion of the reversion clause in paragraph 2.

Our interpretation of the contract leads us to the following conclusion. From the period 1 May 1983 to 7 November 1985, defendant owed (and did in fact pay) rent on 10,000 square feet as per the amended lease. The amendment to the sign size ordinance on 5 April 1984 had no immediate significance to rent payments since defendant was at that time paying rent on the whole 10,000 square foot lot. The 7 November 1985 amendment which allowed the co-existence of a sign and a building on a 10,000 square foot lot triggered the reversion clause in the amended lease so that from this time on defendant owed (and did in fact pay) rent on only 2,400 square feet. Therefore, defendant is not liable for any rent and the granting of summary judgment in favor of plaintiff on his first cause of action is reversed. Beginning 7 November 1985, defendant became liable under the contract for damages due to the presence of its nonconforming sign. However, damages, if any, can only accrue from the time that plaintiff first demanded that Summey remove its sign or conform it. The amount of damages is a jury question. Summary judgment in favor of plaintiff on his second cause of action is affirmed.

Affirmed in part, reversed in part and remanded.

Chief Judge HEDRICK and Judge WYNN concur.

WATSON INSURANCE AGENCY, INC. v. PRICE MECHANICAL, INC.

[106 N.C. App. 629 (1992)]

WATSON INSURANCE AGENCY, INC., PLAINTIFF v. PRICE MECHANICAL, INC., DEFENDANT AND THIRD PARTY PLAINTIFF v. THE AETNA CASUALTY AND SURETY COMPANY, THIRD PARTY DEFENDANT

No. 9127SC360

(Filed 7 July 1992)

**1. Insurance § 2 (NCI3d) – policies procured – premiums paid by agent – action against insured – summary judgment**

The trial court erred by granting summary judgment for plaintiff in an action by plaintiff insurance agent to recover premiums paid by it on behalf of defendant Price where there was a genuine issue of material fact as to whether the contract was terminated at some time prior to the cancellation of the policies and whether the damages sought by plaintiff occurred before such notice of termination.

**Am Jur 2d, Insurance § 2051.**

**2. Insurance § 2 (NCI3d) – negligent failure to process claims properly – summary judgment for agent – no error**

The trial court did not err in an action between an insurance agent and an insured by granting summary judgment for the agent on defendant insured's counterclaim for negligent failure to process insurance claims properly where the court considered affidavits, pleadings, discovery, arguments of counsel and memoranda, so that the 12(b)(6) motion was converted to a motion for summary judgment, and there was no genuine issue of material fact.

**Am Jur 2d, Insurance § 2051.**

Judge COZORT concurring in part and dissenting in part.

APPEAL by defendant and third party plaintiff from orders entered 14 and 22 January 1991 by *Judge Robert E. Gaines* and order entered 7 November 1990 by *Judge Robert W. Kirby* in GASTON County Superior Court. Heard in the Court of Appeals 11 February 1992.

Watson Insurance Agency, Inc. ("Watson") brought this action 13 July 1990 seeking recovery of \$12,607.02 owed by Price Mechanical, Inc. ("Price"). Price filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure for failure

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to state a claim upon which relief can be granted; pursuant to Rule 12(b)(7), for failure to join a necessary party; pursuant to Rule 17, for failure to prosecute in the name of the real party in interest, and in the alternative, for summary judgment pursuant to Rule 56. Watson filed an amended complaint 30 October 1990. On 7 November 1990, the trial court found and concluded that Watson had stated a claim upon which relief could be granted, that there was sufficient evidence from which the jury could rule for Watson and that summary judgment should be denied, and that Watson was the "proper party to bring the suit as it was suing for its own benefit and not as agent. . . ."

On 28 November 1990, Price filed an answer, counterclaim, and third party complaint against Aetna Casualty and Surety Company ("Aetna") denying liability to plaintiff for the payment of premiums, raising the affirmative defense of failure of consideration and counterclaims, and setting forth various claims against the third party defendant for failure to pay claims.

On 6 December 1990, Watson filed a motion to dismiss Price's counterclaims pursuant to Rule 12(b)(6) and a motion for summary judgment. On 27 December 1990, Aetna filed motions to dismiss pursuant to Rules 12(b)(6) and 14 and for sanctions pursuant to Rule 11. Price filed motions to continue and for sanctions pursuant to Rule 11 against Aetna.

On 14 January 1991, the trial court denied Price's motion to continue and for sanctions, dismissed the third party complaint on the grounds that it failed to state a claim upon which relief could be granted, struck the outstanding discovery notices, and entered summary judgment in favor of Watson.

From these orders, Price appeals.

*R. Locke Bell for plaintiff-appellee.*

*Malcolm B. McSpadden for defendant/third party plaintiff-appellant.*

*Underwood, Kinsey, Warren & Tucker, P.A., by C. Ralph Kinsey, Jr. and Frank W. Snapp, for third party defendant-appellee.*

ORR, Judge.

The issue on appeal is whether the trial court erred in granting summary judgment in favor of Watson. For the reasons below,



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we reverse in part and affirm in part the judgment of the trial court.

[1] Price first contends that the trial court erred in failing to grant its motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(6) (1990), and in the alternative, by failing to grant summary judgment in its favor. "Where matters outside the pleadings are presented to and not excluded by the court on a motion to dismiss for failure to state a claim, the motion shall be treated as one for summary judgment under Rule 56." *DeArmon v. B. Mears Corp.*, 312 N.C. 749, 758, 325 S.E.2d 223, 229 (1985). The denial of a motion for summary judgment is an non-appealable interlocutory order. *Id.* at 788, 325 S.E.2d at 230.

However, Price also contends that the trial court erred in granting summary judgment for Watson when "numerous triable issues of fact were raised by the defendant and while requests for discovery were outstanding and made within a reasonable time of the filing of the answer." "Review of summary judgment on appeal is limited to whether the trial court's conclusions are correct as to the questions of whether there is a genuine issue of material fact and whether the movant is entitled to judgment." *Vernon v. Barrow*, 95 N.C. App. 642, 643, 383 S.E.2d 441, 442 (1989). Summary judgment is proper if "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Gregory v. Perdue, Inc.*, 47 N.C. App. 655, 267 S.E.2d 584 (1980). "[T]he trial court must determine if there is a triable material issue of fact, viewing all evidence presented in the light most favorable to the nonmoving party." *Waddle v. Sparks*, 100 N.C. App. 129, 131, 394 S.E.2d 683, 685 (1990), *aff'd in part and rev'd in part on other grounds*, 331 N.C. 73, 414 S.E.2d 22 (1992). The party moving for summary judgment has the burden of showing that there is no genuine issue as to any material fact. *Walker v. Durham Life Ins. Co.*, 90 N.C. App. 191, 368 S.E.2d 43 (1988). "Once the movant shows that no genuine issues of fact exist, the burden shifts to the nonmovant to set forth specific facts showing that genuine issues of fact remain for trial." *Id.* at 193, 368 S.E.2d at 45.

In its brief Price argues that "this is a claim that the Plaintiff is subrogated to the rights of the insurance companies for amounts

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it has paid on behalf of the Defendant” and that there are genuine issues of material fact surrounding this subrogation claim. However, this contention is not supported by the record.

In 1987 Price requested that Watson obtain business and personal insurance. Watson arranged for insurance through Aetna. In 1988 Price became dissatisfied with Aetna because of disputes involving claims and informed Watson of its dissatisfaction. Thereafter, Price’s accounts became delinquent, but Watson continued the policies. In its amended complaint, Watson alleged that Price requested that Watson procure insurance coverage and renewals for Price which Watson procured, that Watson forwarded insurance premiums to insurance companies, that Watson was obligated to forward the premiums whether or not it had received the premiums from Price, and that Price is indebted to Watson for sums paid by Watson for insurance for the benefit of Price. According to the deposition of Thomas Watson, president of Watson, Price never suggested that the policies be canceled.

In its answer, Price alleged that it engaged Watson to obtain insurance but did not agree “to provide remuneration itself to Watson for insurance coverage.” Price further alleged that in the summer of 1989 it moved its personal insurance from Watson and Aetna and discussed with Watson the outstanding claims pending with Aetna. Price also alleged that following 15 August 1989 it did not authorize Watson to provide coverage with Aetna, and that there was never any agreement obligating Price to pay premiums to Watson or for Watson to obligate itself on behalf of Price. Keith Price, president of Price, stated in his affidavit that Price never entered any contract or agreement rendering it liable to Watson for any payments and that it never agreed to pay premiums to Watson.

Although the above evidence shows that Price entered into an agreement with Watson whereby Watson would procure insurance coverage for Price, there is a genuine issue of material fact as to whether the contract was terminated at some time prior to the cancellation of the policies and whether the damages sought by Watson occurred before such notice of termination. “[A] contract of indefinite duration may be terminated by either party on giving reasonable notice.” *East Coast Development Corp. v. Alderman-250 Corp.*, 30 N.C. App. 598, 603, 228 S.E.2d 72, 77 (1976). The record before us is not clear as to exactly when payments by Watson

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were made or when Price said to terminate coverage. There thus appears to be a genuine issue of material fact. Price alleged and Watson apparently denied that as of 15 August 1989 Watson was not authorized to provide insurance for Price with Aetna. Thus the trial court erred in granting summary judgment.

[2] Price also argues that the trial court erred in dismissing its counterclaims against Watson. Price alleged that Watson undertook to process certain claims submitted by Price but negligently failed to process the claims properly. A motion to dismiss pursuant to Rule 12(b)(6) is "converted to a Rule 56 motion for summary judgment when matters outside the pleadings are presented to and not excluded by the court." *Stanback v. Stanback*, 297 N.C. 181, 205, 254 S.E.2d 611, 627 (1979); N.C. Gen. Stat. § 1A-1, Rule 12(b). In ruling on the motion, the trial court considered affidavits, the pleadings, discovery, arguments of counsel, and memoranda. Thus, even though the counterclaim states a claim upon which relief may be granted, the motion is converted to a motion for summary judgment. Summary judgment is properly granted where "the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c). Here there is no genuine issue of material fact, and therefore the trial court did not err in granting summary judgment in favor of Watson.

We have reviewed Price's remaining assignments of error and determined that they are without merit.

Reversed in part and affirmed in part.

Judge EAGLES concurs.

Judge COZORT concurs in part and dissents in part.

Judge COZORT dissenting.

I concur with that portion of the majority opinion that finds the trial court erred in granting summary judgment in favor of plaintiff Watson on its claim against defendant Price. I do not agree with the majority's conclusion that plaintiff Watson was entitled to summary judgment as to defendant Price's counterclaim

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against Watson, and I dissent from that portion of the majority's opinion.

In its counterclaim defendant Price alleged:

41. That Watson undertook to process the claims made by Price in all of the above-described claims and, Price, is informed and believes and therefore alleges that, in the alternative to the foregoing, that Watson did on numerous occasions negligently fail to properly process the claims submitted by Price and, in the event, Aetna is found to have properly denied claims by Price as a result of the failure of Watson to properly process said claims and to that extent Price is entitled to recovery from Watson for its damages aforesaid[.]

Plaintiff Watson did not file an answer to defendant Price's counterclaim. Instead, plaintiff filed only a motion to dismiss the counterclaim, alleging that the counterclaim failed to state a claim upon which relief can be granted. In its judgment granting summary judgment for Watson, the trial court stated that it had considered affidavits, pleadings and all discovery conducted. In our review of those documents, I find nothing which would indicate that plaintiff Watson denied the allegation made in defendant Price's counterclaim. In her deposition, Carolyn Greene, the branch manager of Watson Insurance, testified that it was the practice of defendant Watson to take the claims for their insureds, such as Price, and submit them to the company. She further testified that it was the duty of Watson Insurance to "protect and try to advance our insureds and help them out all we can."

In his deposition, Thomas C. Watson, apparently the owner of the plaintiff insurance agency, made reference to a disputed claim filed by Price with Aetna. And, while Watson avers that he tried to assist Price in that claim filed with Aetna, he never denies the specific allegations made by Price in his verified counterclaim.

Thus, if any party is entitled to summary judgment on Price's counterclaim, it would be defendant Price because plaintiff Watson has never denied the allegations made by Price and has never presented any evidence contrary to the verified allegations made by defendant Price in the counterclaim. I find that the correct ruling for the trial court would be to find that the Price counterclaim does state a claim for relief and that plaintiff Watson's motion

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under Rule 12(b)(6) should be denied. It was simply too early for the trial court to try to convert that motion to a motion for summary judgment. I vote to reverse summary judgment for Watson on defendant Price's counterclaim and to remand the counterclaim to the trial court for further proceedings.

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JACQUELINE HARRINGTON GARDNER, ADMINISTRATRIX OF THE ESTATE OF SETH CAMPBELL GARDNER, JACQUELINE HARRINGTON GARDNER, INDIVIDUALLY, PLAINTIFFS v. BENJAMIN A. GARDNER, DEFENDANT

No. 913SC675

(Filed 7 July 1992)

**Damages § 21 (NCI4th); Negligence § 1.1 (NCI3d)— emotional distress—negligent infliction—close proximity not required**

Plaintiff need not be in close proximity to the negligent act in order to recover for negligent infliction of emotional distress, and the foreseeability requirement for such an action was satisfied where plaintiff saw her mortally injured child at the hospital soon after the accident.

**Am Jur 2d, Negligence § 488.**

**Immediacy of observation of injury as affecting right to recover damages for shock or mental anguish from witnessing injury to another. 5 ALR4th 833.**

Judge EAGLES dissenting.

APPEAL by plaintiff from partial summary judgment entered 31 May 1991 in PITT County Superior Court by *Judge W. Russell Duke, Jr.* Heard in the Court of Appeals 11 May 1992.

In her complaint, plaintiff set out two claims for relief: (1) in her capacity as administratrix, for the wrongful death of her minor son, Seth Campbell Gardner; and (2) in her individual capacity, for negligent infliction of emotional distress.

Defendant answered and, *inter alia*, moved to dismiss plaintiff's second claim for failure to state a claim upon which relief can be granted. Discovery ensued, and when defendant's motion to dismiss according to Rule 12(b)(6) of the N.C. Rules of Civil

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Procedure came on for hearing, the trial court, having considered matters outside the pleadings, treated defendant's motion as one for summary judgment and dismissed plaintiff's second claim. Pursuant to Rule 54(b) of the N.C. Rules of Civil Procedure, the trial court certified defendant's partial summary judgment for immediate appeal.

The undisputed facts pertinent to plaintiff's second claim are as follows. On 18 August 1990, plaintiff and her thirteen-year-old son, Seth, resided in Greenville, North Carolina. Early that morning, Seth was riding as a passenger in a motor vehicle being driven by defendant, his father, when the truck ran into a bridge abutment on a rural road near Greenville. Upon hearing about the accident and that Seth was being taken to a local hospital, plaintiff went immediately to the hospital emergency room. About five minutes later, a local rescue squad arrived at the hospital and brought Seth into the emergency room. Seth was prone on a stretcher, all but his hands and feet being covered. The rescue personnel were applying resuscitative efforts. Plaintiff waited at the hospital but did not see Seth again until after he died later that day. For purposes of the motion for summary judgment, it was stipulated by the parties that Seth died as a result of the negligence of defendant and that plaintiff suffered severe emotional distress as a result of the accident and death of her son.

*Gaskins & Gaskins, P.A., by Herman E. Gaskins, Jr., for plaintiff-appellant.*

*Baker, Jenkins & Jones, P.A., by Ronald G. Baker and Roswald B. Daly, Jr., for defendant-appellee.*

*Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto, for North Carolina Association of Defense Attorneys, amicus curiae.*

WELLS, Judge.

We begin and close our review of this appeal, as we must, by revisiting *Johnson v. Ruark Obstetrics*, 89 N.C. App. 154, 365 S.E.2d 909 (1988), *modified and affirmed*, 327 N.C. 283, 395 S.E.2d 85 (1990).

In *Ruark*, plaintiff mother and father's claim for severe emotional distress were grounded in the events surrounding the death of their full-term child immediately before delivery. The case came to this Court on appeal from the trial court's order allowing defend-

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ant's N.C. Rules of Civil Procedure 12(b)(6) motion for failure to state a claim. After a careful and lengthy analysis of the facts in that case and what we considered to be the applicable law, we reversed, holding that the Johnsons had stated valid claims for severe emotional distress arising out of the negligence of the defendants. Our opinion, of course, speaks for itself.

Our Supreme Court then heard this case on discretionary review and, in a lengthy opinion, reviewed the law of North Carolina on claims for negligent infliction of emotional distress. The Court rejected much of the reasoning of this Court, but for its own reasons as set out in the majority opinion, held that the Johnsons had stated valid claims. There were two dissents from the majority opinion, one of which is of particular significance because it tells us in careful detail what the *Ruark* majority did not do. The elements of the wrong set out in the majority opinion in *Ruark* may be summarized as follows. Any doubt as to whether North Carolina law allows recovery for negligent infliction of purely emotional or mental injury has been put to rest. Neither a physical impact, a physical injury, nor a subsequent physical manifestation of emotional distress is an element of the tort of negligent infliction of emotional distress.

A defendant's negligent act toward one person may proximately and foreseeably cause emotional distress to another person and justify his recovering damages, depending upon their relationship and other factors present in the case.

A plaintiff may recover for severe emotional distress arising from concern for another person if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of the defendant's negligence.

In such cases, the term "severe emotional distress" means any severe and disabling emotional or mental disorder or condition which may be generally recognized and diagnosed by professionals trained to do so.

After clearly setting out the elements of the wrong, the Court provided guidance on the question of foreseeability in such cases. Recognizing that foreseeability is at the threshold of proximate cause, we look to established precedent to further guide us in our resolution of this question. In *Ruark*, the Court restated the foreseeability rule stated in *Azzolino v. Dingfelder*, 315 N.C. 103,

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111, 337 S.E.2d 528, 534 (1985). "Under traditional theories of tort law, defendants are liable for all of the reasonably foreseeable results of their negligent acts or omissions." 327 N.C. 306.

We find further guidance in the statements of the Court in *Hairston v. Alexander Tank & Equipment Co.*, 310 N.C. 227, 311 S.E.2d 559 (1984), where the Court, in summary, stated that proximate cause is a cause which produced the plaintiff's injuries, 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." 310 N.C. 233. "[The] test of foreseeability does not require that [a] defendant should have been able to foresee the injury in the precise form in which it actually occurred." 310 N.C. 233, 234.

With these generally well-established principles in mind, we look to the further *guidance* the *Ruark* court provided as to the element of foreseeability in cases of this kind. *Factors to be considered* on the question of foreseeability in such cases include the plaintiff's proximity to the negligent act, whether the plaintiff personally observed the negligent act, and the relationship between the plaintiff and the other person for whose welfare the plaintiff was concerned. (Emphasis supplied.) 327 N.C. 305.

Questions of foreseeability and proximate cause must be determined under all the facts presented and should be resolved on a case-by-case basis. 327 N.C. 305.

The negligence of the defendant and the injury to the plaintiff have been stipulated. The dispositive question before the trial court, and to be resolved by us, is that of foreseeability.

The trial court, in this case, having reviewed the *Ruark* guidelines, adopted a "close proximity" *requirement* for foreseeability, and that is what defendant contends we should affirm. Perhaps the best answer to that argument is to be found in Justice Meyer's lengthy dissent in *Ruark*, where he makes it clear that he was unable to persuade a majority in *Ruark* to adopt a close proximity requirement.

As we perceive the close proximity requirement as it has been adopted and followed in other jurisdictions, *see* Meyer's dissent in *Ruark*, a plaintiff in cases such as the one now before us must have been in such close proximity to the injury-producing event as to experience a sensory perception of the event and its "on



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the scene" manifestation; *i.e.*, be at the scene, or arrive promptly thereafter.

We are of the opinion, and so hold, that the proximity factor established in *Ruark* is not that narrow. In common experience, a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than that of a parent who is actually exposed to the scene of the accident.

Thus, we hold that the defendant, in this case, could have reasonably foreseen that his negligence might be a direct and proximate cause of the plaintiff's emotional distress.

The relationship factor—parent and child—is, of course, answered in *Ruark* in plaintiff's favor.

For the reasons stated, the judgment of the trial court must be and is

Reversed.

Judge ARNOLD concurs.

Judge EAGLES dissents.

Judge EAGLES dissenting.

I respectfully dissent. The majority opinion here is based on the premise that because the majority in *Ruark* chose not to set out specific limits on foreseeability, we should infer that the Court intended no further limitation. I think this position is flawed. *Ruark* was not a case whose facts raised a question about the limits of the proximity requirement. *Ruark* involved the parent/child relationship and parents who were in close proximity to and *observed* many of the events surrounding the death of the fetus and the stillbirth.

Here, plaintiff did not observe the negligent act of defendant and was not in close proximity to the negligent act. She was in fact several miles away when the accident occurred. Although *Ruark* does not specifically set limits on proximity, nothing in the Supreme

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Court's opinion prevents this Court from announcing a limit when facts are presented which raise the question. *Gardner v. Gardner* is such a case. Plaintiff has failed to establish sufficient proximity to satisfy the foreseeability requirements of *Ruark*, and I would affirm the judgment of the trial court.

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MAURICE J. WORRELL, PETITIONER-APPELLEE v. N.C. DEPARTMENT OF  
STATE TREASURER, RETIREMENT SYSTEMS DIVISION, RESPONDENT-  
APPELLANT

No. 9128SC479

(Filed 7 July 1992)

**Pensions § 1 (NCI3d)— State employee—purchase of credit for  
military service—time in Local System—statute of limitations  
for reduced purchase rate**

The trial court erred by reversing a final agency decision by the Board of Trustees of the Retirement System where petitioner was a contributing member of the North Carolina Local Government Employees' Retirement System from 1 October 1973 to 31 October 1977; petitioner then changed employment and became a member of the Teachers' and State Employees' Retirement System on 1 November 1977; his accumulated contribution and membership service credits in the Local System were transferred to the State System at his request on 19 March 1990; petitioner asked and was told by his supervisor that he had to be a member of the State System for ten years to purchase credits for his military service; respondent received petitioner's request to purchase credits for military service on 14 November 1988; petitioner was informed that he would have to pay full actuarial cost for the purchase because more than three years had passed since he first became eligible to make the purchase; and the trial court held that the term "membership service" does not include credits for service in the Local System that have been transferred to the State System. The controlling statute is N.C.G.S. § 135-18.1 which, when read in conjunction with N.C.G.S. § 135-1(14), clearly includes as membership service credits transferred from the Local System to the State System, so that this petitioner's credits from the Local System should be considered when

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determining whether the statute of limitations has run on purchasing military service credits at a reduced rate.

**Am Jur 2d, Pensions and Retirement Funds § 1645.**

Judge COZORT dissenting.

APPEAL by defendant from order entered 8 February 1991 by *Judge Robert D. Lewis* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 12 March 1992.

Petitioner filed a petition for a contested case hearing in the Office of Administrative Hearings on 25 July 1989, seeking to purchase service credits in the Teachers' and State Employees' Retirement System of North Carolina for his military service credits at the reduced rate provided in N.C. Gen. Stat. § 135-4(f)(6). On 30 March 1990, Administrative Law Judge Fred Gilbert Morrison, Jr. recommended that petitioner be allowed to purchase his military service credit at the reduced rate.

On 26 July 1990, this contested case was heard by the Board of Trustees of the Retirement System at its regular meeting. The chairman of the Board, Harlan E. Boyles, issued a final agency decision on 3 August 1990, determining that the recommended decision was an erroneous and improper application of relevant law, failed to consider relevant provisions of law and should not be adopted. Petitioner filed for judicial review in Buncombe County Superior Court where Judge Robert D. Lewis entered an order reversing the final agency decision.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Alexander McC. Peters, for defendant-appellant.*

*Talmage Penland for plaintiff-appellee.*

JOHNSON, Judge.

Petitioner-appellee, Maurice Worrell, became a contributing member of the North Carolina Local Governmental Employees' Retirement System (hereinafter Local System), on 1 October 1973 as a result of employment with the Pender County Sheriff's Department. On 31 October 1977, petitioner left employment with Pender County and on 1 November 1977 became employed by the North Carolina Employment Security Commission. As a result of his employment with the Commission, petitioner became a member of the

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Teachers' and State Employees' Retirement System of North Carolina (hereinafter State System). At petitioner's request, his accumulated contribution and membership service credits in the Local System were transferred to the State System on 19 March 1980, pursuant to N.C. Gen. Stat. § 135-18.1 (1990).

After becoming employed by the Commission, petitioner asked his supervisor when he would be eligible to purchase credits for military service pursuant to N.C. Gen. Stat. § 135-4(f)(6) (now repealed but with inchoate rights preserved). Petitioner's supervisor informed him that he had to be a member of the State System for ten years before he would be eligible to purchase the service credits.

On 14 November 1988, respondent received petitioner's request to purchase service credits for military service rendered by him from 14 August 1967 through 14 May 1971. Petitioner was informed that pursuant to N.C. Gen. Stat. § 135-4(m), he would have to pay full actuarial cost for the purchase because more than three years had lapsed since he first became eligible to make the purchase.

By Assignments of Error One and Two, the appellant contends that the trial court erred by holding that, for the purpose of determining when the three year limitation on purchasing military service credit at a reduced rate expires, the term "membership service" does not include service credits for service in the Local System that have been transferred to the State System. More specifically, the appellant contends that petitioner's service in the Local System, dating 1 October 1973 through 31 October 1977, should be deemed membership service and added to petitioner's six years of service in the State System, for the purpose of determining when ten years of membership service had been rendered and the three year limitation on purchasing credits at a reduced rate had expired.

Appellant argues that petitioner was eligible to purchase military credits at a reduced rate on 1 October 1983 (having rendered four years of local service and six years of State service, amounting to ten years of membership service) and had three years thereafter, or until 1 October 1986, to purchase the credits at the reduced rate. Because petitioner made the request to purchase the credits at the reduced rate in November of 1988, which appellant states was well beyond the three year limitation, appellant contends that petitioner must pay full actuarial cost for the credits.

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Petitioner-appellee argues that the service credit in the Local System, although transferred to the State System, should not be considered in determining when the three years for purchasing credits at a reduced rate expires. Petitioner contends that he was not eligible to purchase credits until 1 November 1987, ten years after he had become a member of the State System, and that he had three years thereafter to purchase the credits at the reduced rate. We find petitioner's argument unpersuasive.

North Carolina General Statute § 135-4(f)(6), which allows the purchase of military credits at a reduced rate, states:

Notwithstanding any other provision of this Chapter, *teachers and other State employees not otherwise allowed service credit for service in the armed forces of the United States may, upon completion of 10 years of membership service, purchase such service credit by paying in a total lump sum an amount, based on the compensation the member earned when he first entered membership and the employee contribution rate at the time, with sufficient interest added thereto so as to equal one half the cost of allowing such service, plus a fee to cover expense of handling payment to be determined by the Board of Trustees and assessed the member at the time of payment[.]* (Emphasis added.)

North Carolina General Statute § 135-18.1(a) states that:

[a]ny person who becomes a member of this Retirement System on or after July 1, 1951, shall be entitled prior to his retirement to transfer to this Retirement System his credits for membership and prior service in the local system: Provided, the actual transfer of employment is made while his account in the local system is active and such person shall request the local system to transfer his accumulated contributions, interest, and service credits to this Retirement System[.]

In the case *sub judice*, petitioner-appellee became a member of the State System after 1 July 1951; therefore, N.C. Gen. Stat. § 135-18.1(a) allows his membership service in the Local System to be transferred to the State System. In addition, N.C. Gen. Stat. § 135-18.1(b) states that:

[t]he accumulated contributions withdrawn from the local system and deposited in the Retirement System . . . shall be deemed, for the purpose of computing any benefits subsequently payable

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from the annuity savings fund, to be regular contributions made on the date of such deposit.

We are of the opinion that the General Assembly, in adopting N.C. Gen. Stat. § 135-18.1(b), intended that transferred service credits be treated as "membership service" and retain the same character they held in the Local System. North Carolina General Statute § 135-18.1(c) supports our opinion. The statute states that:

[u]pon the deposit in this Retirement System of the accumulated contributions previously withdrawn from the local system the Board of Trustees of this Retirement System shall request the Board of Trustees of the local system to certify to the period of membership service credit, [local creditable service], . . . as of the date of termination of membership in the local system. *Credit shall be allowed in this System for the service so certified in determining the member's credited service, [credible service under the State System.]* (Emphasis added.)

N.C. Gen. Stat. § 135-18.1(c). We come to this conclusion in spite of the restrictive definition of membership service set out in N.C. Gen. Stat. § 135-1(14) (defining "membership service" as "service as a teacher or State employee rendered while a member of the Retirement System"). See *In re Hardy*, 294 N.C. 90, 95, 240 S.E.2d 367, 371 (1978) ("If a strict literal interpretation of the language of a statute contravenes the manifest purpose of the Legislature, the reason and purpose of the law should control and the strict letter thereof should be disregarded.").

It is a well established rule of statutory construction that when interpreting a statute, the intent of the legislature controls. *Id.*; *Housing Authority v. Farabee*, 284 N.C. 242, 200 S.E.2d 12 (1973). It is also well established that two statutes concerning the same subject matter must be read so as to give effect to each, *Jackson v. Board of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969), and that if one statute deals with a subject in a "minute and definite way," and another deals with the same matter in more "general and comprehensive terms," the specific statute will control in the specific situation. *Food Stores v. Board of Alcoholic Control*, 268 N.C. 624, 628-29, 151 S.E.2d 582, 586 (1966).

The definition of "membership service," set out in N.C. Gen. Stat. § 135-1(14), is broad and general. North Carolina General Statute § 135-18.1, however, covers the specific matter of transfer-

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ring credits from the Local System to the State System. Thus, the controlling statute in the case *sub judice* is N.C. General Statute § 135-18.1 which, when read in conjunction with N.C. Gen. Stat. § 135-1(14), must clearly include, as membership service, service credits transferred from the Local System to the State System. Once credible local service is certified to the State System, the service becomes membership service in the State Retirement System. Accordingly, we hold that when petitioner transferred his credits from the Local System, his service was certified to the State System for membership service credits, and that such credits should be considered when determining whether the statute of limitations has run on purchasing military credits at a reduced rate.

Therefore, petitioner was eligible to purchase military credits at a reduced rate on 1 October 1983, having rendered four years of service in the Local System and six years of service in the State System. Pursuant to N.C. Gen. Stat. § 135-4(m), petitioner then had three years, or until 1 October 1986, in which to purchase the military credits at the reduced rate. Petitioner sought to purchase the credits in November of 1988, well beyond the statutory time limit. The decision of the trial court is

Reversed.

Judge GREENE concurs.

Judge COZORT dissents.

Judge COZORT dissenting.

I disagree with the majority's conclusion that respondent's service credits transferred from the Local System to the State System constitute "membership service" which must be included when evaluating respondent's eligibility to purchase military credits at a reduced rate. I base my opinion on the plain meaning of the statutory provisions which apply in the case below.

N.C. Gen. Stat. § 135-4(m) (1990) imposes a three-year time limitation "after the member first becomes eligible" for any "member" who chooses to purchase the credits at a discounted price. An individual is entitled to purchase such credits upon completion of ten years of membership service. N.C. Gen. Stat. § 135-4(7) (1990). An examination of the terms "member" and "membership service"

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indicates that petitioner should not have been precluded from purchasing his military credits at the lower rate on the basis of failing to make a timely request. "Member" includes "any teacher or State employee included in the membership of the System as provided in G.S. 135-3 and 135-4." N.C. Gen. Stat. § 135-1(13) (Cum. Supp. 1991). "Membership service" is defined as "service as a teacher or State employee rendered while a member of the Retirement System." N.C. Gen. Stat. § 135-1(14) (Cum. Supp. 1991). Finally, "Retirement System" means "the Teachers' and State Employees' Retirement System of North Carolina as defined in G.S. 135-2." N.C. Gen. Stat. § 135-1(22) (Cum. Supp. 1991). These terms, placed within the context of N.C. Gen. Stat. § 135-4(m) (1990), indicate that a consideration of local retirement system credits in determining the time limit for purchasing the discounted credits was excluded from the provision. No mention of local retirement credits is present anywhere in the statute. Had the legislature intended to include local retirement system credits in the calculation, then an appropriate provision could have been written into the statute.

I agree with the trial court that petitioner was not eligible until November 1987 to purchase the military credits at a reduced rate and that his request in November 1988 was timely. I vote to affirm the lower court's judgment, and I respectfully dissent.

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THE COUNTY OF LANCASTER, SOUTH CAROLINA; THE COUNTY OF UNION, NORTH CAROLINA; ROSA POTTS OSBORNE; ROBERT BARR; SAM ARDREY AND WIFE, JANIE M. ARDREY; LAVINIA A. KELL; MARGIE K. BOYLSTON; TUCKER I. JOHNSON AND WIFE, ANGELUS R. JOHNSON, PLAINTIFFS v. MECKLENBURG COUNTY, NORTH CAROLINA; THE BOARD OF COUNTY COMMISSIONERS OF MECKLENBURG COUNTY, NORTH CAROLINA. TO WIT: CARLA DUPUY, ROD AUTREY, BARBARA LOCKWOOD, ROBERT L. WALTON, PETER KEBER, JOHN G. BLACKMON, AND KENNETH L. ANDREWS; AND ROBERT L. BRANDON, ZONING ADMINISTRATOR OF MECKLENBURG COUNTY, NORTH CAROLINA, DEFENDANTS

No. 9126SC206

(Filed 7 July 1992)

**1. Municipal Corporations § 30.1 (NCI3d)— zoning—special use permits—delegation of authority to zoning administrator**

County commissioners could properly delegate their authority to a zoning administrator to issue special use zoning



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permits under N.C.G.S. § 153A-340 and could allow the zoning administrator to issue permits for “uses by right subject to special requirements.”

**Am Jur 2d, Zoning and Planning § 62.**

**Attack on validity of zoning statute on ground of improper delegation of authority to board or officer. 58 ALR2d 1083.**

**2. Municipal Corporations § 30.6 (NCI3d)— zoning—sanitary landfills—due process**

A county’s zoning ordinance governing sanitary landfills meets the requirements of due process where it provides for review of permit applications by a zoning administrator, an unbiased administrative official, and the decisions of the zoning administrator are then subject to *de novo* review by a zoning board of adjustment, an independent, quasi-judicial body.

**Am Jur 2d, Zoning and Planning § 62.**

**Attack on validity of zoning statute on ground of improper delegation of authority to board or officer. 58 ALR2d 1083.**

APPEAL by defendants from judgment dated 17 January 1991, and orders dated 17 January 1991 and 18 January 1991 by *Judge Shirley L. Fulton* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 3 December 1991.

On 4 November 1985, the Mecklenburg County Board of Commissioners granted Mecklenburg County a special use permit to use a tract of land for a sanitary landfill. On 3 August 1988 the Superior Court of Mecklenburg County declared the County’s landfill zoning ordinance unconstitutional in that it violated the due process clause of the 14th Amendment because the County was judging its own permit applications. No appeal was taken from this 1988 judgment.

In 1989 Mecklenburg County amended its zoning ordinance to provide that a landfill may be located in *any* zoning district if certain listed conditions were met. In December 1989 Mecklenburg County reapplied for a permit. In January 1990 appellees brought a declaratory judgment action pursuant to G.S. 1-253 and Rule 57 of the Rules of Civil Procedure to determine the validity and constitutionality of the 1989 ordinance. On 17 January 1991 the Superior Court declared the 1989 ordinance unconstitutional

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on the grounds that (1) the Mecklenburg County Commissioners "have no legislative authority to delegate their duty under [G.S.] 153A-340 to issue special use zoning permits" and (2) the ordinance "does not provide the fundamental constitutional right of due process by a fair, unbiased tribunal and allows Mecklenburg County to be judge of its own zoning applications in violation of the due process clause of the 14th Amendment of the United States Constitution." Defendants appeal.

*Wagoner, Hamrick, Hasty, Monteith, Kratt & McDonnell, by John H. Hasty, for plaintiff-appellees.*

*Sanford L. Steelman, Jr., for plaintiff-appellee Union County, North Carolina.*

*Ruff, Bond, Cobb, Wade & McNair, by James O. Cobb, for defendant-appellants.*

*Smith Helms Mulliss & Moore, by H. Landis Wade, Jr., for defendant-appellant Robert L. Brandon.*

EAGLES, Judge.

On appeal defendants contend that the trial court erred by failing to recognize that (1) a fundamental difference exists between zoning permits and special use or conditional use permits; (2) the Mecklenburg County Board of Commissioners has exclusive authority to determine which uses will be permitted on a zoning district by zoning district basis; and (3) the matters presented in the complaint may be presented only in the manner prescribed by G.S. 153A-345. We agree in part and reverse the judgment of the superior court.

The ordinance at issue is Mecklenburg County zoning ordinance 3124, which provides:

Sanitary landfills are permitted in all districts in Mecklenburg County subject to the development standards listed below. The establishment and operation of any landfill must comply with Solid Waste Management Rules of the State of North Carolina and the "Regulations Governing the Storage, Collection, Transporting and Disposal of Garbage and Refuse in Mecklenburg County" as adopted by the Mecklenburg County Board of Commissioners under authority granted by the General Statutes of North Carolina.

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Subsections 3124.1 through 3124.6 define "sanitary landfill," set out a procedure for reclamation of the proposed site, set forth yardage and screening requirements, specify permissible hours of operation, and regulate access. All documentation supporting the application must be submitted to the Zoning Administrator who with the assistance of the Mecklenburg County Director of Engineering must assure that the application complies with the ordinance and regulations referred to in section 3124. Subsection 3124.7 provides that the Mecklenburg County Building Standards Department must notify all affected property owners advising them of the proposed development and when and where the plans may be inspected. The Zoning Administrator is also required to post a notice at the site stating that rezoning for the proposed use has been requested and stating where additional information may be obtained. After notices are mailed, the Zoning Administrator must wait at least 15 days and consider all comments on the application before deciding whether to issue a permit for the proposed use. Once the Zoning Administrator makes a decision, he has 5 days to notify affected property owners and anyone who commented on the proposed use. Any person aggrieved by the Zoning Administrator's decision is entitled to an appeal *de novo* to the Board of Adjustment pursuant to G.S. 153A-345(b).

First, we address defendants' contentions that the trial court erred (1) in failing to recognize a difference between the new procedures found in the 1989 amendments and special use permits and (2) in failing to recognize the exclusive authority of the Mecklenburg County Board of Commissioners to determine on a zoning district by zoning district basis which uses will be permitted.

[1] We find it unnecessary to reach defendants' first argument. Even if the permit issued was a special or conditional use permit, the Mecklenburg County Board of Commissioners has authority to delegate their authority to the zoning administrator to issue special use zoning permits under G.S. 153A-340. We find nothing in the enabling statute, G.S. 153A-340, or our case law that prohibits the County from delegating its authority to the zoning administrator. G.S. 153A-340 provides in part: "The regulations *may* also provide that the board of adjustment or the board of commissioners *may* issue special use permits or conditional use permits in the classes of cases or situations and in accordance with the principles, conditions, safeguards, and procedures specified." (Emphasis added.) In our view, nothing in this statutory language prevents the County

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from delegating its authority to the zoning administrator to issue special use permits. Additionally, G.S. 153A-345(a) provides: "A county may designate a planning agency to perform any or all of the duties of a board of adjustment in addition to its other duties." The Supreme Court has said:

When a statute, or ordinance, provides that a type of structure may not be erected in a specified area, except that such structure may be erected therein when certain conditions exist, one has a right, under the statute or ordinance, to erect such structure upon a showing that the specified conditions do exist. The legislative body may confer upon an administrative officer, or board, the authority to determine whether the specified conditions do, in fact, exist and may require a permit from such officer, or board to be issued when he or it so determines, as a further condition precedent to the right to erect such structure in such area. Such permit is not one for a variance or departure from the statute or ordinance, but is the recognition of a right established by the statute or ordinance itself. Consequently, the delegation to such officer, or board, of authority to make such determination as to the existence or non-existence of the specified conditions is not a delegation of the legislative power to make law.

*Jackson v. Guilford County Board of Adjustment*, 275 N.C. 155, 165, 166 S.E.2d 78, 85 (1969).

The same logic that permits the County Commissioners to delegate authority to the zoning administrator to issue special use permits also supports our decision that the Commissioners have authority to allow the zoning administrator to issue permits for "uses by right subject to special requirements." On that basis we hold that County Commissioners have authority to allow the zoning administrator to issue permits for "uses by right subject to special requirements."

Defendants next contend that the trial court erred in failing to recognize that the matters in the complaint pertaining to the zoning administrator's alleged bias in dealing with the County's application may be presented only in the manner established by G.S. 153A-345. G.S. 153A-345 subjects decisions of the zoning administrator to complete *de novo* review by the Board of Adjustment. Defendants argue that any alleged bias on the part of the zoning administrator may be challenged only before the Board of

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Adjustment. We disagree. Plaintiffs here challenge the process and asked the court to rule on the validity and constitutionality of the ordinance under which the zoning administrator acted. They do not challenge whether the zoning administrator's decision was proper.

[2] However, in our view the ordinance at issue does not violate due process. We note that in *Mize v. Mecklenburg County*, 80 N.C. App. 279, 341 S.E.2d 767 (1986), this Court said:

[T]he Board of Adjustment is an independent, quasi-judicial body whose decisions cannot be reviewed or reversed by the Board of Commissioners or the [county] manager. Further, we note that instances may arise where the position of the Board of Adjustment and the County of Mecklenburg may be adverse. The focus of the review under G.S. 153A-345(e) is on the decision of the Zoning Board of Adjustment. While the County delegates to the Board the authority to hear appeals of zoning cases, once the delegation has occurred the County has no power to influence the decisions of the Board.

*Id.* at 282-83, 341 S.E.2d at 769 (citations omitted). Plaintiffs contend that "[t]he opportunity for a later *de novo* hearing is of no constitutional relevance when an impartial tribunal is not first provided." They cite *Ward v. Village of Monroeville*, 409 U.S. 57, 93 S.Ct. 80, 34 L.Ed.2d 267 (1972). This is not a case where an impartial tribunal was not first provided. The cases plaintiffs cite are distinguishable from the instant case in that in those cases the initial tribunal had a direct stake in the outcome of the proceedings. Here, the allegations are simply that the zoning administrator is a county employee. That fact standing alone does not require the conclusion that he is biased in favor of the county. We note that generally

[t]he same considerations which have led to the development of rules as to disqualification of judicial officers for bias or prejudice, based on personal interest or the like, have been generally recognized as applicable to administrative officials as well, insofar as they act in a judicial or quasi-judicial capacity. . . . Broadly, it may be said that to disqualify such an officer, there must be some clear showing of a rather direct, personal, and concrete interest in the outcome of the particular proceedings, other than the general interest of all members

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of the community in seeing that the general objects of the zoning regulations are implemented.

Annotation, Disqualification for Bias or Interest of Administrative Officer Sitting in Zoning Proceeding, 10 A.L.R.3d 694, 696 (1966).

In our view, Mecklenburg County Ordinance 3124 meets the requirements of due process because it provides for review of permit applications by the zoning administrator, an unbiased administrative official. The decisions of the zoning administrator are then subject to *de novo* review by the Board of Adjustment, an independent, quasi-judicial body. *Mize v. Mecklenburg County*, 80 N.C. App. 279, 341 S.E.2d 767 (1986).

For the reasons stated, we reverse the judgment of the trial court and remand to superior court for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges JOHNSON and ORR concur.

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IN THE MATTER OF: NOEY HAYES, III, JASON LYNN HAYES, AND  
KIMBERLY ANN HAYES

No. 9122DC662

(Filed 7 July 1992)

**Rules of Civil Procedure § 58 (NC13d) — entry of judgment — timely appeal**

Appellant's appeal was timely filed where the Department of Social Services' petition to terminate appellant's custody and visitation rights for his three natural children was granted; appellant was subsequently charged with the rape of his step-daughter and acquitted; appellant filed a Rule 60 motion for review and a hearing *de novo* of the earlier proceedings in which D.S.S. was given custody of the three children; the trial court stated in open court on 14 January 1991 that the Rule 60 motion was not timely filed and directed the attorney for D.S.S. to prepare the order; appeal was made on 12 February; the order was signed on 14 March; and the District Court

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held that the notice of appeal was untimely. The three paragraphs of N.C.G.S. § 1A-1, Rule 58 do not apply because the court instructed the attorney to draft the order, there is no indication that the trial court expressly directed the clerk to make a notation of the judgment and the parties have stipulated that there was no written entry of the court's ruling in the official minutes; and the court clearly rendered a decision in open court. Under the factors in *Stachlowski v. Stach*, 328 N.C. 276, the announcement in open court was not clearly identifiable as the time judgment was entered; fair notice concerns dictate that entry of judgment occurred when the court signed the order; and the rendering of the judgment in open court was not final.

**Am Jur 2d, Appeal and Error § 303.**

APPEAL by appellant-father, Noey G. Hayes, Jr. (also referred to as "Noey G. Hayes, II"), from order dismissing his appeal entered 17 May 1991 by *Judge Robert W. Johnson* in IREDELL County District Court. Heard in the Court of Appeals 16 April 1992.

*Pope, McMillan, Gourley, Kutteh & Parker, by Christopher M. Collier, for the appellee, Iredell County Department of Social Services.*

*Tate & Minor, by Steven G. Tate, for the appellee, Guardian Ad Litem.*

*Law Offices of Harrell Powell, Jr., by Harrell Powell, Jr. and J. Clark Fischer, for the appellant, Noey G. Hayes, Jr.*

LEWIS, Judge.

The question before us concerns the timeliness of an appeal according to Rule 58, N.C.G.S. § 1A-1, Rule 58 (1990).

The case before us has a somewhat convoluted history. On 10 October 1989, the Department of Social Services ("D.S.S.") petitioned the Iredell County District Court to terminate appellant's custody and visitation rights for his three natural children, which was granted. The children were placed in the custody of D.S.S. and it appears to this Court that they remain there. Subsequently, the appellant was charged with the rape of his stepdaughter. Following a trial in Iredell County Superior Court, the jury acquitted the appellant of this charge.

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Appellant then filed, on 1 November 1990, a Rule 60(b) motion, asking the District Court for review and a hearing *de novo* of the earlier proceedings in which D.S.S. was given legal custody of appellant's three children. The trial court denied the motion on 14 January 1991, holding the Rule 60(b) motion to be untimely. The sole question before us concerns the timeliness of appellant's appeal of the order dismissing his Rule 60(b) motion.

On 14 January 1991, in open court, the trial court stated, "I will find that the Rule 60 Motion in this matter is not timely filed." The trial court directed the attorney for D.S.S.:

Mr. Collier, I would ask that you prepare the Order in this matter making appropriate findings of fact based on the evidence that was introduced and based on the file that was introduced in evidence today, and send me a copy of the Order as well as a copy to Mr. Powell prior to my signing it.

The attorney for appellant made exceptions for the record, after which the court then again stated, "I am ruling that this motion which is before me today, which is your motion, is not filed in a timely manner." Appellant's attorney responded, "All right. That clears that up for us. Thank you."

Under N.C.G.S. § 7A-666 (1989), appellant had ten days in which to file notice of appeal. If the "entry" was made simultaneously with the "rendering" of the order in open court on 14 January 1991, then appellant must have filed his notice of appeal by the 24th of January. Instead, appeal was made on 12 February 1991, nearly a month later.

However, if the "entry" was made when the order was finally signed, on 14 March 1991, then the appeal, though early, was certainly not late and therefore proper. The District Court dismissed the appellant's appeal, holding the notice of appeal to be untimely. We now review the District Court's order of dismissal.

The parties have stipulated that on 14 January 1991, the trial court, when ruling on the Rule 60(b) motion, "either rendered or entered judgment," and that the "Clerk made no written entry in the day's minutes of the Judge's ruling." This Court is asked to decide what the trial court did on 14 January 1991; did it "render" or "enter" its order?



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Our Courts have distinguished between judgments “rendered” and judgments “entered.” *Kirby Bldg. Sys., Inc. v. McNeil*, 327 N.C. 234, 393 S.E.2d 827 (1990), *reh’g denied*, 328 N.C. 275, 400 S.E.2d 453 (1991). “To render judgment means to ‘pronounce, state, declare, or announce’ judgment.” *Id.* at 239, 393 S.E.2d at 830 (citing Black’s Law Dictionary 1165 (rev. 5th ed. 1979)). The Supreme Court has indicated that the most common way to render judgment is to announce it orally, usually in open court. *Id.* at 240, 393 S.E.2d at 830. It is clear that in the present case, the trial court rendered its decision in open court by stating: “I will find that the Rule 60 Motion in this matter is not timely filed.” However, we must now examine whether the order was also *entered* in open court.

Rule 58 governs our inquiry. Rule 58 provides:

Subject to the provisions of Rule 54(b): Upon a jury verdict that a party shall recover only a sum certain or costs or that all relief shall be denied or upon a decision by the judge in open court to like effect, the clerk, in the absence of any contrary direction by the judge, shall make a notation in his minutes of such verdict or decision and such notation shall constitute the entry of judgment for the purposes of these rules. The clerk shall forthwith prepare, sign, and file the judgment without awaiting any direction by the judge.

In other cases where judgment is rendered in open court, the clerk shall make a notation in his minutes as the judge may direct and such notation shall constitute the entry of judgment for the purposes of these rules. The judge shall approve the form of the judgment and direct its prompt preparation and filing.

In cases where judgment is not rendered in open court, entry of judgment for the purposes of these rules shall be deemed complete when an order for the entry of judgment is received by the clerk from the judge, the judgment is filed and the clerk mails notice of its filing to all parties. The clerk’s notation on the judgment of the time of mailing shall be prima facie evidence of mailing and the time thereof.

N.C.G.S. § 1A-1, Rule 58 (1990).

In the present case there was no entry of judgment on 14 January 1991 under the Rule’s first paragraph. Rule 58’s first two

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paragraphs apply when there is a judgment rendered in open court. In paragraph one, after the rendering of judgment, the clerk is to make a notation in the court minutes unless the judge directs to the contrary. An instruction by the court that the prevailing party's attorney is to draft the order is a contrary direction. *Reed v. Abrahamson*, 331 N.C. 249, 255, 415 S.E.2d 549, 552 (1992); *Stachlowski v. Stach*, 328 N.C. 276, 283, 401 S.E.2d 638, 641 (1991); see also *Cobb v. Rocky Mount Bd. of Educ.*, 102 N.C. App. 681, 683, 403 S.E.2d 538, 540 (1991), *aff'd per curiam*, 331 N.C. 280, 415 S.E.2d 554 (1992). In this case, the trial judge did just that when she asked Mr. Collier to prepare an order. Therefore, "[b]ecause of the trial court's contrary direction, the automatic entry provisions of paragraph one do not operate to determine when entry of judgment occurred." *Reed*, 331 N.C. at 257, 415 S.E.2d at 553.

The situation contemplated in paragraph two is likewise inapplicable here. Under the second paragraph, which applies when a judgment has been rendered in open court, the "entry of judgment occurs . . . only if the court *expressly* directs the clerk to make a notation. Upon such an *affirmative* direction and a notation entered in response to such direction, entry of judgment occurs." *Id.* at 257 n.2, 415 S.E.2d at 553 n.2 (emphasis original). We have here no indication that the trial court expressly directed the clerk to make a notation of the judgment. Further, the parties have stipulated that there was in fact no written entry of the court's ruling in the day's official minutes. We conclude that entry of judgment did not occur on 14 January 1991 pursuant to paragraph two of Rule 58. See *Stachlowski*, 328 N.C. at 280, 401 S.E.2d at 641.

Paragraph three contemplates the situation where the court does not render the judgment in open court. N.C.G.S. § 1A-1, Rule 58; see, e.g., *Stachlowski*, 328 N.C. at 281, 401 S.E.2d at 641. Clearly the trial court "rendered" a decision on 14 January 1991 in open court, thereby making paragraph three inapplicable here.

Since none of the three paragraphs of Rule 58 applies here, leaving us peering through a glass, darkly, we look to the *Stachlowski* case for illumination. The relevant factors in the three part analysis articulated in *Stachlowski* are: "(1) an easily identifiable point at which entry occurred, such that (2) the parties have fair notice of the court's judgment and the time thereof, and that (3) the matters for adjudication have been finally and completely resolved

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so that the case is suitable for appellate review.” *Stachlowski*, 328 N.C. at 287, 401 S.E.2d at 645.

In the case at bar, the announcement in open court of the judgment is not *clearly identifiable* as the time judgment was entered. See *Cobb*, 102 N.C. App. at 684, 403 S.E.2d at 540, *aff’d per curiam*, 331 N.C. 280, 415 S.E.2d 554 (1992). The court did not direct the clerk to enter the judgment in the minutes, but instead directed the prevailing party’s counsel to prepare the written order. See *id.* However, by contrast, “[t]he date of signing of the judgment provided an easily identifiable point at which entry occurred.” *Reed*, 331 N.C. at 258, 415 S.E.2d at 554.

As for whether the parties got fair notice of the court’s judgment, we note the Supreme Court’s warning that “when the judge makes a contrary direction, such as requesting one of the parties to draft the order or judgment, the likelihood of fair notice to both parties may be jeopardized.” *Stachlowski*, 328 N.C. at 283, 401 S.E.2d at 643. This is so, the Court reasoned, because it would be impractical for the losing party to give notice of appeal and to begin preparing the record on appeal without the benefit of a written order which is to include findings of fact. *Id.*

In this case, there are competing factors in the fair notice analysis. First, the appellees make much of the fact that appellant’s counsel’s reply to the court after she, for the second time, announced her ruling was, “All right. That clears that up for us. Thank you.” Further, the court made findings of fact when ruling on the timeliness of the Rule 60(b) motion, most of which were directly incorporated into the order subsequently signed by the judge.

On the other hand, however, the fact that the court made a contrary direction by instructing the prevailing party’s counsel to prepare the order must weigh heavily in our analysis, given the Supreme Court’s express concern that this type of direction may jeopardize fair notice. Further, while it is true the court did make and announce some findings of fact, the court also quite clearly directed counsel to make his own “appropriate findings of fact based on the evidence that was introduced.” The attorney did so, and in fact added several findings of fact to those the judge stated in open court. We conclude, then, after weighing these factors, that “[f]air notice concerns would dictate that entry of judgment occurred when the court adopted the draft order and

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proposed findings” and signed the order. *Stachlowski*, 328 N.C. at 284, 401 S.E.2d at 643.

Finally, we address the finality issue. We are of the opinion that the rendering of the judgment in open court was not final. This Court came to the same conclusion in *Cobb* because the findings of fact and conclusions of law were not set forth in final form until the court signed the order. *Cobb*, 102 N.C. App. at 684, 403 S.E.2d at 541. That case was recently affirmed in a *per curiam* decision by the Supreme Court. 331 N.C. 280, 415 S.E.2d 554 (1992). The Supreme Court also, in *Reed*, reasoned that at the time of the signing of the judgment, it was *clear* that “the matters for adjudication . . . had been finally and completely resolved.” *Reed*, 331 N.C. at 258, 415 S.E.2d at 554.

Narrowly, under the facts of this case, we hold that the judgment was “entered” on the date the trial judge signed the order. We therefore hold that the appellant’s appeal was timely made. We reverse and remand.

Reversed and remanded.

Judges WYNN and WALKER concur.

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CLARA MAY LACKEY, PLAINTIFF EMPLOYEE v. R. L. STOWE MILLS, INC.,  
EMPLOYER DEFENDANT AND SELF-INSURED (HEWITT, COLEMAN & ASSOCIATES),  
CARRIER; DEFENDANT(S)

No. 9110IC475

(Filed 7 July 1992)

**Master and Servant § 68 (NCI3d) – byssinosis – disability – retained earning capacity**

The Industrial Commission erred by finding that plaintiff was incapable of returning to her pre-disability employment, concluding that she suffered from an occupational disease, and limiting her award to scheduled benefits under N.C.G.S. § 97-29 for permanent injury to her lungs because plaintiff was required to prove a loss of wage earning capacity to be entitled to total incapacity benefits under N.C.G.S. § 97-31(24). Evidence that plaintiff could not have obtained her pre-disability

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employment should she have sought such work, coupled with the facts that she was 65 years old when she left plaintiff's employ; that she had worked in cotton textile mills since age 18, at least 35 years; and that she has an eighth-grade education meets plaintiff's burden of proving that her wage earning capacity has been impaired by injury. Defendants presented no evidence that plaintiff retains wage earning capacity; therefore, the finding that she retained wage earning ability is unsupported by evidence.

**Am Jur 2d, Workmen's Compensation § 347.**

APPEAL by plaintiff from opinion and award filed 18 December 1990 by the North Carolina Industrial Commission. Heard in the Court of Appeals 12 March 1992.

*Lore & McClearen, by F. Scott Templeton, for plaintiff-appellant.*

*Maupin Taylor Ellis & Adams, P.A., by Steven M. Rudisill and Jack S. Holmes, for defendants-appellees.*

JOHNSON, Judge.

Plaintiff filed a worker's compensation claim on 9 November 1988. Testimony was heard before Industrial Commissioner Morgan S. Chapman on 19 October 1989. Subsequent to the hearing, medical testimony was submitted to the hearing officer by depositions and stipulated records. On 13 March 1990, the deputy commissioner filed an opinion and award granting plaintiff scheduled benefits under N.C. Gen. Stat. § 97-13, but denying plaintiff wage loss benefits under N.C. Gen. Stat. §§ 97-29 or 97-30. Plaintiff appealed that decision to the full Industrial Commission. On 18 December 1990, the Industrial Commission summarily affirmed the lower opinion and award. Plaintiff's counsel received the opinion and award on 19 February 1991, and filed notice of appeal on 20 February 1991.

On 3 April 1991, defendants moved to dismiss plaintiff's appeal for failure to timely file. Commissioner J. Randolph Ward denied defendants' motion to dismiss. Defendants now appeal the denial of their motion to dismiss. Although this Court recognizes that notice of appeal was given after the thirty-day time period prescribed by the Rules of Appellate Procedure, we view this appeal as a writ of certiorari pursuant to Rule 21(a)(1). N.C.R. App. P. 21(a)(1).

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Clara Lackey, who was born in 1923, began working in cotton textile mills in 1942, and except for the years of 1956-67, she worked in cotton mills until 1988. During her employment in the mills, plaintiff was exposed to respirable cotton dust. When plaintiff's pulmonary function levels were first tested by defendants in 1980, plaintiff's test results were below acceptable levels. Plaintiff was required to sign an agreement that her permanent employment would be conditioned on the applicant satisfactorily passing specified medical tests which were designed to detect medical conditions that may be aggravated by exposure to certain environments of the work area. In spite of plaintiff's unacceptable pulmonary test results, she remained employed by defendant employer until 1988, when she quit because of breathing problems. Plaintiff testified that she "couldn't take the cotton [dust] any longer."

Plaintiff was diagnosed as having chronic obstructive pulmonary disease and byssinosis by Dr. David E. Shanks and Dr. Ted R. Kunstling in 1989. Seven years prior to those diagnoses, plaintiff had been seen by Dr. T. Reginald Harris at defendant employer's request. After his evaluation, Dr. Harris specifically stated that "[s]hould [the plaintiff] develop acute response to her work environment by a decrease in ventilation, or should she develop symptoms associated with her work environment . . . then she should wear a ventilator . . . or should be transferred to a lower [cotton] dust area." In the years following Dr. Harris' evaluation, plaintiff's pulmonary function tests by or for defendants consistently showed impaired respiratory function and reactivity to her work environment. Plaintiff continued to work as a winder until she was transferred to weekend janitorial duty in 1986.

The Industrial Commission found that plaintiff "is unable to work in a cotton textile mill because of the environment, and she is unable to perform strenuous activity as a result of her lung disease." The Commission found and concluded that plaintiff was entitled to \$15,000 under the scheduled provisions of N.C. Gen. Stat. § 97-31(24) for permanent injury to her lungs.

The Commission also found that plaintiff "has not intended to work" since leaving work in 1988, and that she "retains earning capacity." The Commission further stated that "[h]er actual earning capacity cannot be determined because, having retired, she has made no effort to obtain employment." The Commission concluded that "[p]laintiff has the burden of proving the fact of her disability

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and its degree. Having not met that burden, she is not entitled to compensation for permanent disability." The Commission cited N.C. Gen. Stat. §§ 97-29 thru 97-31 and *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982) to support its position.

Plaintiff's sole assignment of error is that the Commission erred in its findings and conclusions regarding plaintiff's capacity to earn wages, and in its resulting award. The Commission found that Ms. Lackey is incapable of returning to her pre-disability employment and concluded that she suffers from an occupational disease. The Commission also ruled, however, that for plaintiff to be entitled to total incapacity benefits under N.C. Gen. Stat. § 97-29, she was required to prove a loss of wage earning capacity. Therefore, the Commission limited plaintiff's award to scheduled benefits under N.C. Gen. Stat. § 97-31(24) for permanent injury to her lungs.

It is well established that the Industrial Commission's findings of fact are binding on appeal when supported by competent evidence. *See Cody v. Snider Lumber Co.*, 328 N.C. 67, 399 S.E.2d 104 (1991); *see also Vause v. Equipment Co.*, 233 N.C. 88, 63 S.E.2d 173 (1951). It is also well established that findings of fact made by the Commission under a misapprehension of applicable law are not binding upon a reviewing court. *Mills v. Mills*, 68 N.C. App. 151, 158, 314 S.E.2d 833, 838 (1984); *McGill v. Lumberton*, 215 N.C. 752, 3 S.E.2d 324 (1939); N.C. Gen. Stat. § 97-86 (1985). In the instant case, plaintiff argues that there is no evidence to support a finding that she retains any earning capacity. We agree.

In *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 444, 342 S.E.2d 798, 809 (1986), our Supreme Court held:

In order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment. An unsuccessful attempt to obtain employment is, certainly, evidence of disability. Where, however, an employee's effort to obtain employment would be futile because of age, inexperience, lack of education or other preexisting factors, the employee should not be precluded from compensation for failing to engage in the meaningless exercise of seeking a job which does not exist.

Defendant's employees' testimony reveals that had plaintiff been a prospective employee looking for work, she could not have obtained work at defendant's mills. Jerry Hooper, defendant's plant

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manager, testified that as early as 1982, plaintiff was not passing the pulmonary functions tests. Clifton Logsdon, defendant's personnel manager, testified that a prospective employee who could not pass the pulmonary functions tests "would not be hired." Thus, plaintiff could not have obtained her pre-disability employment should she have sought such work. This evidence coupled with the facts that plaintiff was 65 years old when she left defendant's employ; that since age 18 she had worked in cotton textile mills for at least 35 years; and that plaintiff has an eighth-grade education, meets plaintiff's burden of proving that her wage earning capacity has been impaired by injury.

Our Supreme Court stated in *Peoples*, 316 N.C. at 441, 342 S.E.2d at 808, that "where occupational lung disease incapacitates an employee from all but sedentary employment, and because of the employee's age, limited education or work experience no sedentary employment for which the employee is qualified exists, the employee is entitled to compensation for total disability." See *Rutledge v. Tultex Corp.*, 308 N.C. 85, 301 S.E.2d 359 (1983); see also *Mabe v. Granite Corp.*, 15 N.C. App. 253, 189 S.E.2d 804 (1972) (evidence sufficient to support compensation award for total disability where lung disease rendered worker capable of performing only sedentary work for which worker's job training and skills did not qualify worker).

After plaintiff meets her initial burden, the burden then shifts to defendants who must show that plaintiff is employable. "[B]efore it can be determined that this plaintiff is employable and can earn wages it must be established, not merely that jobs are available or that the average job seeker can get one, but that [the plaintiff] can obtain a job taking into account his specific limitations." *Bridges v. Linn-Corriher Corp.*, 90 N.C. App. 397, 400-01, 368 S.E.2d 388, 391, *disc. review denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). This Court, in *Kennedy v. Duke Univ. Med. Center*, 101 N.C. App. 24, 32-33, 398 S.E.2d 677, 682 (1990), stated that:

*Bridges* did not change the long-standing rule that the claimant has the initial burden of proving that his/her wage earning capacity has been impaired by injury. Rather, *Bridges* stands for the proposition that once the claimant meets this initial burden, the defendant who claims that the plaintiff is capable of earning wages must come forward with evidence to show not only that suitable jobs are available, but also that plaintiff



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is capable of getting one, taking into account both physical and vocational limitations.

In the case *sub judice*, defendants presented no evidence that plaintiff retains wage earning capacity; therefore, the Commission's finding that plaintiff retained wage earning ability is unsupported by evidence and is not binding on appeal.

The Commission's reliance on *Hilliard* is misplaced. The *Peoples* Court explained that *Hilliard* simply stands for the proposition that "[i]n order to prove disability, the employee need not prove he unsuccessfully sought employment if the employee proves he is unable to obtain employment." 316 N.C. at 443, 342 S.E.2d at 809.

Once disability is proven, "there is a presumption that it continues until 'the employee returns to work at wages equal to those he was receiving at the time the injury occurred.'" *Watson v. Winston-Salem Transit Authority*, 92 N.C. App. 473, 476, 374 S.E.2d 483, 485 (1988), quoting, *Watkins v. Motor Lines*, 279 N.C. 132, 137, 181 S.E.2d 588, 592 (1971). Because plaintiff has met the initial burden of showing injury to her wage earning capacity, and defendants offered no evidence showing that plaintiff retains wage earning capacity, the proper remedy is an ongoing award of disability benefits for total incapacity under N.C. Gen. Stat. § 97-29. The Commission's finding that plaintiff retains earning capacity is unsupported by the evidence; therefore, the finding is not binding on appeal. Accordingly, the decision of the Industrial Commission is reversed and remanded to the full Commission for entry of award consistent with this opinion.

Reversed and remanded.

Judges COZORT and GREENE concur.

DARRELL NIX, PETITIONER v. DEPARTMENT OF ADMINISTRATION,  
RESPONDENT

No. 9110SC500

(Filed 7 July 1992)

**State § 12 (NCI3d)— state employee— termination— no notice of  
right to appeal**

An action by a terminated state employee seeking reinstatement, back pay, and restoration of benefits was remanded where the letter that informed petitioner that his employment would be terminated failed to inform petitioner of his right to appeal, although the letter gave a sufficiently specific statement of reasons for the termination and, although respondent should have provided petitioner with three warnings before action was taken, the warnings were adequate given the circumstances and the holding in *Leiphart v. North Carolina School of the Arts*, 80 N.C. App. 339. Even though respondent contended that notification of appeal rights was not necessary because petitioner was not dismissed but accepted disability retirement, given the unambiguous language of the letter, it is reasonable to conclude that petitioner was indeed terminated by the letter and that he applied for disability retirement only because he felt he had no other option. Since petitioner applied for and received disability retirement for 28 months and was employed by the Department of Revenue approximately 13 months after his dismissal, the Superior Court was to determine on remand the injury petitioner suffered and whether the injury merits back pay and reinstatement.

**Am Jur 2d, Public Officers and Employees § 282.**

APPEAL by petitioner from judgment entered 22 February 1991 in WAKE County Superior Court by *Judge Robert L. Farmer*. Heard in the Court of Appeals 17 March 1992.

*Genevieve C. Sims for petitioner-appellant.*

*Attorney General Lacy H. Thornburg, by Special Deputy Attorney General T. Buie Costen, for respondent-appellee.*

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[106 N.C. App. 664 (1992)]

LEWIS, Judge.

In this case, we review the 1986 dismissal of petitioner, a permanent State employee. Petitioner originally brought this action to the Office of State Personnel, requesting a hearing before an Administrative Law Judge and seeking reinstatement to his former or an equivalent position, back pay, and restoration of benefits. The recommended decision of the Administrative Law Judge was in petitioner's favor. The State Personnel Commission declined to fully adopt the recommended decision, and in its decision and order found for respondent. Upon the Superior Court's affirmation of the decision and order, petitioner appealed to this Court.

Petitioner was employed as a Management Engineer by the North Carolina Department of Administration ["DOA"] from 1 October 1980 until 31 August 1986. In 1984, petitioner began receiving psychiatric treatment for profound and severe depression, and was hospitalized at Holly Hill Hospital for a period of over one month in the fall of that year.

Apparently, petitioner's condition was such that he was unable, during 1985 and 1986, to function at full capacity in his job, and in fact petitioner does not have a clear memory of those years. He continued to receive medical treatment, and was prescribed medication to treat the depression. In January of 1986, petitioner was assigned to a "project commensurate with his position" in an effort to accommodate his diminished work capacity. In May 1986 petitioner was hospitalized again at Holly Hill for a series of electric shock treatments, which temporarily improved his condition.

In August 1986 petitioner was hospitalized for treatment, this time at Duke University Hospital. Against the advice of doctors, petitioner left the hospital on 8 August, fearing for his job should he remain away any longer. On 26 August, petitioner was readmitted at Holly Hill for profound depression. Given his condition and his frequent hospitalization, petitioner experienced difficulty meeting the demands of his job. For that reason, petitioner's supervisor gave him an oral warning on 27 June 1986. On 9 July 1986 petitioner received from his supervisor a written warning. This written warning noted petitioner's inability since November 1984 to fulfill satisfactorily the responsibilities of his position. The letter also indicated that petitioner's job performance was to be monitored

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until 15 September 1986, at which time petitioner was to be reevaluated. Petitioner did not make it until 15 September, however.

While petitioner was at Holly Hill receiving treatment, he received a letter from his supervisor dated 28 August 1986. This letter informed petitioner that his employment "will be terminated on September 15, 1986," to be actually effective 31 August. The letter did not inform petitioner of his right to appeal his dismissal. It did, however, "encourage" him to consider disability retirement. On 8 September 1986, petitioner did in fact complete and sign the application for said disability retirement benefits. Petitioner then received disability retirement benefits for twenty-eight months and began work at the North Carolina Department of Revenue in September 1987.

We are asked to decide, given the foregoing facts, whether the respondent properly complied with N.C.G.S. § 126-35 (1991). We hold that respondent did not.

Because petitioner was a permanent State employee, it is well-settled that he enjoyed a "property interest of continued employment created by state law and protected by the Due Process Clause of the United States Constitution." *Leiphart v. North Carolina Sch. of the Arts*, 80 N.C. App. 339, 348, 342 S.E.2d 914, 921, cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986), (citing *Board of Regents v. Roth*, 408 U.S. 564, 33 L.Ed. 2d 548, 92 S. Ct. 2701 (1972) and *Faulkner v. North Carolina Dep't of Corrections*, 428 F. Supp. 100 (W.D.N.C. 1977)). As a consequence, respondent could not rightfully take away this interest without first complying with appropriate procedural safeguards. *Leiphart*, 80 N.C. App. at 348-49, 342 S.E.2d at 921. These procedural safeguards include adequate notice pursuant to N.C.G.S. § 126-35.

Under N.C.G.S. § 126-35, a permanent employee may be discharged for "just cause," but only after he is "furnished with a statement in writing setting forth . . . the specific acts or omissions that are the reasons for the disciplinary action and the employee's appeal rights." N.C.G.S. § 126-35. Regulations adopted in connection with this statutory provision require a permanent employee be given three administrative warnings and a pre-dismissal conference before being dismissed for unsatisfactory job performance. 25 N.C. A. C. 1J.0605, .0606 (1991); see also *Jones v. Department of Human Resources*, 300 N.C. 687, 690-91, 268 S.E.2d 500, 502-03 (1980).

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Petitioner argues that DOA failed to comply with the statutory requirements in several ways. First, petitioner received only two warnings prior to the 28 August 1986 letter which terminated his employment. Second, the 28 August 1986 letter itself was inadequate in that it lacked the requisite specificity in stating the reasons for his dismissal. Third, the letter did not inform him of his right to appeal.

As a threshold matter, we note that the statutory provisions of N.C.G.S. § 126-35 apply in this instance. Even if the action precipitating this lawsuit were not disciplinary in nature, as respondent argues, it is clear that the action was taken "in response to the vicissitudes of a department's personnel needs." *Batten v. North Carolina Dep't of Correction*, 326 N.C. 338, 345, 389 S.E.2d 35, 40 (1990). Therefore, the procedures outlined in N.C.G.S. § 126-35 are applicable.

We find an earlier decision of this Court to be dispositive of petitioner's first claim and instructive on his second. In *Leiphart v. North Carolina Sch. of the Arts*, 80 N.C. App. 339, 342 S.E.2d 914, cert. denied, 318 N.C. 507, 349 S.E.2d 862 (1986), we held that notice given *simultaneously* with disciplinary action is sufficient so long as the employee is also provided with a written statement of the reasons for his discharge. *Id.* at 351, 342 S.E.2d at 922.

In this case, respondent's 28 August 1986 letter stated that petitioner was being terminated because he "had not been performing at the level expected by [his] position classification," and because there had been no "marked improvement" since the oral and the written warnings of earlier that year. The 9 July 1986 warning letter had stated that petitioner had been "unable to satisfactorily fulfill the overall responsibilities required in [his] current position." The 28 August 1986 letter also mentioned as a reason for his termination that petitioner had exhausted his vacation and sick leave as of 31 August 1986. We find this to be a sufficiently specific statement of reasons under *Leiphart*, particularly since petitioner was already on notice due to the previous two warnings that he was not performing at the expected level.

As a technical matter, respondent should have provided petitioner with three warnings *before* action was taken. However, given the circumstances and in light of the holding in *Leiphart*, we nonetheless conclude that the warnings were adequate. We hold

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that the 28 August 1986 letter constituted notice filed simultaneously with departmental action because it clearly enumerated the reasons for the action. *Leiphart*, 80 N.C. App. at 351, 342 S.E.2d at 922-23.

Petitioner also asserts that the 28 August 1986 letter was inadequate because it failed to inform him of his right of appeal. The statute clearly states that "the employee shall, before the action is taken, be furnished with a statement in writing setting forth . . . the employee's appeal rights." N.C.G.S. § 126-35. This Court has held that N.C.G.S. § 126-35 "establishes a condition precedent that the employer must fulfill before disciplinary action against an employee may be taken." *Luck v. Employment Sec. Comm'n*, 50 N.C. App. 192, 194, 272 S.E.2d 607, 608 (1980). In fact, this requirement of notification of right to appeal is constitutionally mandated under the due process provisions of the United States and North Carolina constitutions. *Id.*

Respondent DOA argues that this notification of appeal rights was not necessary because "[p]etitioner was not dismissed, either directly or indirectly. Petitioner separated from state government through the mechanism of accepting disability retirement." In other words, the argument goes, petitioner did not get fired, he quit. To this argument, we respond: to take disability retirement after you are told you will be terminated on a specific date is hardly a voluntary career change.

To this Court's reading, the 28 August letter clearly states that petitioner's employment was being "terminated on September 15, 1986" and actually effective 31 August because he "had not been performing at the level expected by [his] position classification." It does not nurture credibility for respondent to argue now that petitioner resigned when he signed the application for disability retirement. Petitioner applied for disability on 8 September 1986, eleven days after the date of respondent's letter. Given the unambiguous language of the letter, we think it is reasonable to conclude that petitioner was indeed terminated by the letter, and he applied for disability retirement only because he felt he had no other option available to him. We do not believe that petitioner voluntarily resigned from his position.

Finally, petitioner argues that the State Personnel Commission's decision is not supported by substantial evidence in view of the entire record. We find this argument to be without merit. The petitioner did not object to any of the findings of fact as

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set out in the Administrative Law Judge's recommended decision, adopted in their entirety by the State Personnel Commission and the Superior Court. When faced with a similar argument in a recent case, this Court found that "[s]ince neither party objected to the findings adopted by the Commission, the superior court could reasonably assume that the Commission had properly resolved these conflicts, and that the findings in each case accurately and properly reflected the whole record." *Walker v. North Carolina Dep't of Human Resources*, 100 N.C. App. 498, 503, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991).

Because DOA did not comply with the requirement that petitioner be notified of his right to appeal, we reverse and remand this issue to the Superior Court with instructions to adopt an appropriate remedy to compensate for DOA's error. We believe this case raises certain equitable concerns. Even though DOA did not strictly comply with well-established notice requirements, we are also cognizant of the fact that petitioner applied for and received disability retirement for a period of twenty-eight months. Furthermore, in September 1987, approximately thirteen months after his dismissal, petitioner was employed by the Department of Revenue. Under these facts, we leave it to the Superior Court on remand to determine what injury petitioner suffered, and whether the injury merits reinstatement and back pay as petitioner contends.

Reversed and remanded.

Judges ARNOLD and WYNN concur.

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STATESVILLE MEDICAL GROUP, P.A., A NORTH CAROLINA PROFESSIONAL ASSOCIATION, PLAINTIFF v. RICHARD A. DICKEY, M.D., DEFENDANT v. DAVID R. HENDRY, THIRD-PARTY DEFENDANT

No. 9122SC686

(Filed 7 July 1992)

**Master and Servant § 11.1 (NCI3d) — covenant not to compete — endocrinologist — violation of public policy**

A covenant not to compete in an employment contract prohibiting defendant endocrinologist from practicing medicine

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in Iredell County for two years from the date of his termination of employment with plaintiff medical group is unenforceable as a matter of law because enforcement of the covenant would create a substantial question of potential harm to the public where defendant is the only endocrinologist living and practicing in Iredell County; enforcement of the covenant will grant plaintiff a monopoly on endocrinology services for two years in the county through its contract with a Charlotte clinic for an endocrinologist to hold office hours in Iredell County at least one-half day a week and for same day consultation with other endocrinologists of the clinic; enforcement of the covenant would substantially impede patients' access to their physician of choice and impair their ease of access to second opinions; and patients in Iredell County will have the option of patronizing plaintiff or traveling either to Charlotte or Winston-Salem, both approximately forty-five minutes from Statesville, to receive endocrinology services. Therefore, the trial court erred in granting a preliminary injunction enforcing the covenant not to compete.

**Am Jur 2d, Master and Servant § 106.**

APPEAL by defendant from Order of *Judge Preston Cornelius* entered 14 January 1991 in IREDELL County Superior Court. Heard in the Court of Appeals 12 May 1992.

*Pope, McMillian, Gourley, Kutteh & Parker, by William P. Pope, for plaintiff appellee.*

*Vannoy, Colvard, Triplett, Freeman & McLean, by J. Gary Vannoy and Anthony R. Triplett; and James H. Early, Jr., for defendant appellant.*

COZORT, Judge.

Plaintiff appellee, Statesville Medical Group, P.A., ("Medical Group") instituted an action to have a covenant not to compete clause enforced against defendant appellant, Dr. Richard A. Dickey. Plaintiff was successful in obtaining a preliminary injunction, and defendant appeals. We reverse.

On 8 April 1983 defendant signed an employment contract with plaintiff. The contract contained a covenant against competition prohibiting defendant from practicing medicine or any business



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competing with the Medical Group for a two-year period in Iredell County from the date of his voluntary or involuntary termination. The defendant and the plaintiff were unable to maintain amicable relations, and on 14 June 1990 defendant submitted his voluntary resignation. The Medical Group's Board of Directors approached defendant in an attempt to convince him to withdraw his resignation. On 23 July 1990 defendant conditionally agreed to withdraw his resignation if the Board made several requested changes in office and accounting procedures. After the Board's failure to implement changes, on 20 September 1990 defendant submitted a second written notice stating that he would not withdraw his earlier resignation and that his termination would occur on 14 December 1990. The Board accepted this resignation but interpreted the six-month notice requirement as running from 27 September 1990, the date of its acceptance of defendant's second notice of resignation. Defendant concluded, however, that his relationship with the Medical Group terminated six months from his original letter of resignation. He opened a practice in Iredell County on 15 December 1990. After defendant's departure, the Medical Group contracted with Nalle Clinic ("Clinic") located in Charlotte for the services of an endocrinologist to practice in Statesville on a need basis and at least one-half day a week. The contract also provided for same-day consultation with any one of the other four or five endocrinologists in the Clinic.

On 18 December 1990 the Medical Group sought and was granted a temporary restraining order prohibiting defendant from practicing medicine in Iredell County. On 14 January 1991, the superior court issued a preliminary injunction, concluding that there would be no substantial risk of public harm by enforcement of the covenant, that plaintiff had shown a likelihood of success on the merits, and that plaintiff would sustain irreparable harm by non-enforcement of the covenant.

On appeal, defendant argues: (1) that the trial court erred in granting the plaintiff's request for a preliminary injunction because enforcement of the covenant would create a substantial question of potential harm to the public; and (2) that the trial court erred in granting the preliminary injunction because plaintiff sought an equitable remedy with unclean hands.

We initially address defendant's first assignment of error. In *Iredell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 373

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S.E.2d 449, *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1988), this Court set forth the law governing preliminary injunctions and the enforceability of covenants not to compete:

A preliminary injunction is an extraordinary measure, to be issued by the court, in the exercise of its sound discretion, only when plaintiff satisfies a two-pronged test: (1) that plaintiff is able to show *likelihood* of success on the merits and (2) that plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the court's opinion issuance is necessary for the protection of a plaintiff's rights during the course of litigation.

*Id.* at 24-25, 373 S.E.2d at 451 (citing *Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977)). "To be enforceable, a covenant not to compete must be (1) in writing, (2) entered into at the time and as part of the contract of employment, (3) based upon reasonable consideration, (4) reasonable both as to time and territory, and (5) not against public policy." *Id.* at 26, 373 S.E.2d at 452 (citing *A.E.P. Industries, Inc. v. McClure*, 308 N.C. 393, 402-03, 302 S.E.2d 754, 760 (1983)).

On appeal of a preliminary injunction the standard of review is *de novo*. "[A]n appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Industries*, 308 N.C. at 402, 302 S.E.2d at 760. We do not determine whether the covenant is in fact enforceable, but rather we must review the evidence presented to the trial court and determine whether plaintiff has met its burden of showing likelihood of success on the merits. *Petrozza*, 92 N.C. App. at 26-27, 373 S.E.2d at 452.

After reviewing the evidence we agree with the trial court's findings that the covenant was part of a written employment contract signed by both parties, based on reasonable consideration, and reasonable as to time and territory restrictions. Therefore, the first four elements of enforceability have been satisfied.

We do not agree that the covenant satisfies the fifth element of enforceability. We find the evidence establishes that enforcement of the covenant is against public policy. In *Petrozza* this Court presented the test for determining whether a covenant violates public policy:

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If ordering the covenantor to honor his contractual obligation would create a substantial question of potential harm to the public health, then the public interests outweighs the contract interests of the covenantee, and the court will refuse to enforce the covenant. But if ordering the covenantor to honor his agreement will merely inconvenience the public without causing substantial harm, then the covenantee is entitled to have his contract enforced.

*Petrozza*, 92 N.C. App. at 27-28, 373 S.E.2d at 453 (citations omitted). To determine the risk of substantial harm to the public this Court has considered the following factors: the shortage of specialists in the field in the restricted area, the impact of plaintiff establishing a monopoly of endocrinology practice in the area, including the impact on fees in the future and the availability of a doctor at all times for emergencies, and the public interest in having a choice in the selection of a physician. *Id.* at 30-31, 373 S.E.2d at 454-55.

In support of the motion for preliminary injunction, plaintiff submitted twenty-four affidavits signed by physicians. The affidavits included the following: (1) a description of the nature of endocrinology practice; (2) a statement that there is no procedure unique to the subspecialty of endocrinology which is not performed on a regular, routine, and appropriate basis by numerous other physicians practicing in both hospitals in Statesville; (3) a statement that there are rare endocrine illnesses which are non-emergent; (4) a statement that the nature of the specialty requires a large population; other towns the size of Statesville do not have a practicing endocrinologist; the population of Statesville is not sufficient to support a full-time endocrinologist; and (5) a statement that the quality of health care will not suffer if Statesville does not have an endocrinologist especially if the Medical Group hires an endocrinologist for part-time work.

The defendant submitted sixteen affidavits signed by physicians stating that Dr. Dickey is the only practicing endocrinologist in the area, and there is a strong need for at least two practicing endocrinologists because (1) availability of a second opinion of an endocrinologist without whose diagnosis patients could face, and have faced, life-threatening situations; (2) patient reluctance to travel more than forty miles to see an endocrinologist; (3) the public has a strong interest in choice between doctors; and (4) the patient has a strong interest in not having the confidential relationship

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with a doctor involuntarily terminated. The affidavits further stated that

[w]hether two or more endocrinologists could be *fully employed* has no bearing on the strong need for the Statesville community to have *access* to at least two endocrinologists in the event of an emergency, or for the purposes of a choice of physicians, or for the purposes of retaining the professional and competent services of Dr. Dickey. Access, even to two endocrinologists providing only part-time endocrinology services, would alleviate an otherwise potentially substantial and unnecessary health risk to the public, and would provide at least some choice of physician. (Emphasis in original.)

In addition, defendant submitted an affidavit from the Chief Executive Officer of Iredell Memorial Hospital stating that "Dr. Dickey's loss would require that we undertake the difficult, expensive, and time-consuming task of recruiting or assisting other physicians in recruiting one or more endocrinology practitioners to replace Dr. Dickey. . . . His loss would be a serious one."

Although the parties disagree as to the impact of losing defendant's services, considering the factors set forth in *Petrozza* and the evidence presented in the affidavits, we find that enforcing the covenant would grant plaintiff a monopoly for two years, substantially impede patients' access to their physician of choice, and impair their ease of access to second opinions. The affidavits show that defendant is the only endocrinologist living and practicing in Iredell County. If the defendant is enjoined from practicing, the Medical Group will have a monopoly on endocrinology services in Iredell County. Plaintiff has contracted with Nalle Clinic for an endocrinologist to hold office hours in Statesville at least one-half day a week and on a need basis, and for same day consultation with other doctors of the Clinic. The Clinic, however, is located in Charlotte, approximately forty-five minutes away from Statesville. The distance between the two locations may very well impact on the availability of a doctor at all times for an emergency. Since the Medical Group will offer the only endocrinology services in the county, there will be no fee competition. Patients in Iredell County will have the option of patronizing the Medical Group or traveling to Charlotte or Winston-Salem, also approximately forty-five minutes away from Statesville, to receive treatment from a subspecialist. Patients who cannot or do not desire to travel are

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left with no choice of physician but the one practicing on a contract basis with the Medical Group. We hold that since enforcing the covenant would create a substantial question of potential harm to the public health, the covenant not to compete is unenforceable as a matter of law. Accordingly, we further hold that plaintiff has failed to meet its burden of showing likelihood of success on the merits at trial and the preliminary injunction cannot stand.

Our conclusions on the first issue preclude the need of a discussion of the second issue. The trial court's order granting a preliminary injunction is

Reversed.

Judges PARKER and GREENE concur.

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PENNY LYNN HILL, FOR HERSELF AND ON BEHALF OF ALL OTHER PERSONS SIMILARLY SITUATED, PLAINTIFFS-APPELLANTS v. LOUIS BECHTEL, IN HIS OFFICIAL CAPACITY AS DIRECTOR OF THE GUILFORD COUNTY DEPARTMENT OF SOCIAL SERVICES, AND JOHN HAMRICK, IN HIS OFFICIAL CAPACITY AS CHAIRMAN OF THE BOARD OF THE DEPARTMENT OF SOCIAL SERVICES OF GUILFORD COUNTY, A CORPORATION, AND THE N.C. DEPARTMENT OF HUMAN RESOURCES, DEFENDANTS-APPELLEES

No. 9018SC1242

(Filed 7 July 1992)

**Social Security and Public Welfare § 1 (NCI3d)— food stamps— denial of expedited processing— written notice**

A food stamp worker's determination that a food stamp applicant was ineligible for expedited processing of her application constituted a "denial" of expedited processing, and federal regulations impliedly require written notice of the denial of expedited processing so that the applicant may choose to exercise the right to an agency conference if the applicant so desires.

**Am Jur 2d, Welfare Laws § 26.**

APPEAL by plaintiffs from Order entered 3 October 1990 by *Judge I. Beverly Lake, Jr.*, in GUILFORD County Superior Court. Heard in the Court of Appeals 6 June 1991.

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*Central Carolina Legal Services, by Stanley B. Sprague and Sorien K. Schmidt, for plaintiff appellants.*

*County Attorney Jonathan V. Maxwell and Deputy County Attorney Lynne G. Schiftan for Louis Bechtel and John Hamrick, defendant appellees.*

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Robert J. Blum, for North Carolina Department of Human Resources, respondent appellee.*

COZORT, Judge.

On 18 April 1990, plaintiff Penny Lynn Hill applied for food stamps at the High Point office of the Guilford County Department of Social Services ("DSS"). Ms. Hill stated in her application that she had no property and only \$3.00 cash on hand, that her only source of income was \$50.00 per week child support paid to her by her estranged husband, and that her monthly apartment rent was \$139.00 per month.

The food stamp worker determined that plaintiff was eligible for food stamps and began the processing of plaintiff's application through regular channels. Processing is usually completed within 25 days. The food stamp worker screened the application to determine whether plaintiff was eligible for expedited service, which would reduce processing time to five days. The worker did not inform plaintiff, either orally or in writing, that she had been screened for expedited servicing and was deemed ineligible for the accelerated process.

On 7 May 1990, plaintiff filed a suit against the Director of the Guilford County DSS and the Chairman of the Board of the DSS of Guilford County. Plaintiff requested an injunction directing defendants to process plaintiff's application immediately. She also requested an injunction directing defendants to establish policies to send written notices to all food stamp applicants who are denied expedited processing. She further asked that the action be treated as a class action.

The next day plaintiff requested and received a conference at the DSS. She provided additional information to the agency about her food stamp application, notifying the agency that the \$50.00 per week child support referred to in her application was the amount ordered by the court; her estranged husband seldom

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paid her. Based on this additional information, the agency determined that plaintiff was entitled to expedited processing. Plaintiff began receiving food stamps on 10 May 1990.

On 22 June 1990, plaintiff amended her complaint to add the North Carolina Department of Human Resources as a defendant. After responsive pleadings were filed by all defendants, plaintiff filed a motion for summary judgment on 29 August 1990 and, on 5 September 1990, a motion to certify the class of plaintiffs. Defendants moved to dismiss the action. All motions came on for hearing at the 1 October 1990 Session of Guilford County Superior Court. After considering affidavits and other discovery matters, the trial court treated defendants' motions to dismiss as motions for summary judgment and granted summary judgment for all defendants, dismissing the action in its entirety. Plaintiffs appeal. For reasons which follow, we reverse.

In urging us to overturn the trial court's decision, plaintiff argues: (1) the food stamp worker's determination that plaintiff was ineligible for expedited processing constituted a "denial" of expedited processing; (2) federal regulations "imply" written notification of a denial of expedited processing and the right to an agency hearing; (3) "due process" requires notification of the right to an agency conference in this case; and (4) the trial court should have certified the class action. We agree with plaintiff's first two contentions.

The applicable federal regulations are found at 7 C.F.R. § 273 (1992). These regulations specifically detail each state's duty in complying with the Federal Food Stamp Act of 1964. Section 273.15(a) provides:

(a) *Availability of hearings.* Except as provided in § 271.7(f), each State agency shall provide a fair hearing to any household aggrieved by any action of the State agency which affects the participation of the household in the Program.

Section 273.15(d) provides:

(d) *Agency conferences.* (1) The State agency shall offer agency conferences to households which wish to contest a denial of expedited service under the procedures in § 273.2(i). The State agency may also offer agency conferences to households adversely affected by an agency action. The State agency shall advise households that use of an agency conference is optional

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and that it shall in no way delay or replace the fair hearing process. The agency conferences may be attended by the eligibility supervisor and/or the agency director, and by the household and/or its representative. An agency conference may lead to an informal resolution of the dispute. However, a fair hearing must still be held unless the household makes a written withdrawal of its request for a hearing.

(2) An agency conference for households contesting a denial of expedited service shall be scheduled within 2 working days, unless the household requests that it be scheduled later or states that it does not wish to have an agency conference.

\* \* \* \*

Section 273.15(f) states:

(f) *Notification of right to request hearing.* At the time of application, each household shall be informed in writing of its right to a hearing, of the method by which a hearing may be requested, and that its case may be presented by a household member or a representative, such as a legal counsel, a relative, a friend or other spokesperson. In addition, at any time the household expresses to the State agency that it disagrees with a State agency action, it shall be reminded of the right to request a fair hearing. If there is an individual or organization available that provides free legal representation, the household shall also be informed of the availability of that service.

Plaintiff concedes that these regulations do not expressly provide that the State must notify an applicant that he or she has been denied expedited processing. Plaintiff asks the court to “imply” that such a notice requirement exists and cites *Harley v. Lyng*, 653 F. Supp. 266 (E.D. Pa. 1986). We find the reasoning in *Harley* applicable here. In *Harley*, the Pennsylvania Department of Public Welfare (“DPW”) had responded to large numbers of applications for food stamps by setting a maximum number of applications which would be considered in a day, setting arbitrary cut-off times, requiring prearranged appointments, requiring some applicants to take applications home and mail them in, and a host of other practices which denied applicants’ rights to food stamps and to expedited processing. *Id.* at 270-72. To remedy these problems, the court ordered, among other things, that the DPW must ensure that



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food stamp applicants are advised when they are denied expedited issuance, to allow applicants to decide whether they wish to request an informal agency conference, an administrative fair hearing, or both, and food stamp offices offer to hold informal agency conferences within two (2) working days with supervisory staff and applicants where applicants wish to contest the denial of expedited issuance. (7 C.F.R. 273.15(d).)

*Id.* at 282.

We find the court's reasoning in *Harley* persuasive. All the evidence below indicates that the regulations were technically followed and that the decisions made were correct, based on the information provided. Nonetheless, we find the regulations "imply" a requirement of written notice to those applicants denied expedited service.

As established by 7 C.F.R. § 273.15(i)(2), all applications are to be screened when filed to determine whether the household is eligible for expedited service. To be eligible for expedited service, the household must fall within one of four categories:

(i) Households with less than \$150 in monthly gross income, as computed in § 273.10 provided their liquid resources (i.e., cash on hand, checking or savings accounts, savings certificates, and lump sum payments as specified in § 273.9(c)(8) ) do not exceed \$100;

(ii) Migrant or seasonal farmworker households who are destitute as defined in § 273.10(e)(3) provided their liquid resources (i.e., cash on hand, checking or savings accounts, savings certificates, and lump sum payments as specified in § 273.9(c)(8) ) do not exceed \$100;

(iii) Eligible households in which all members are "homeless individuals" as defined in § 271.2; or

(iv) Eligible households whose combined monthly gross income and liquid resources are less than the household's monthly rent or mortgage, and utilities.

7 C.F.R. § 273.2(i)(1) (1992). Plaintiff stated in her 18 April 1990 application that she received \$50.00 per week child support, more than \$150.00 gross income per month. Plaintiff thus was not eligible for expedited service under subsection (i), nor was plaintiff eligible under any of the other subsections. When plaintiff supplemented

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her application with information that she did not actually receive \$50 per month, she was immediately declared eligible for expedited servicing. We cannot distinguish between "ineligibility" and "denial." The plain meaning of both "ineligible" and "denial" is that of negative qualification. We thus interpret an "ineligible" applicant to be a "denied" applicant.

Next we address whether written notice of the denial of expedited service is required by the regulations. We read the regulations as requiring written notice of denials of expedited service, in addition to complete denials of food stamp applications. Section 273.15(d) provides an agency conference to all households who wish to contest a denial of expedited service. While this section does not detail how notice is to be given, section 273.10(g)(ii) provides:

(ii) *Notice of denial.* If the application is denied, the State agency shall provide the household with written notice explaining the basis for the denial, the household's right to request a fair hearing, the telephone number of the food stamp office, . . . and, if possible, the name of the person to contact for additional information.

7 C.F.R. § 273.15(f) (1992). Furthermore, section 273.15(f) provides that at the time of application, each household shall be informed in writing of its right to request a hearing any time that household disagrees with a state agency action. Sections 273.15(d), 273.10(g)(ii), and 273.15(f) taken together provide to a household denied expedited service the right to a hearing and the right to receive notice of denial of the application. It is illogical to provide an applicant who has been denied expedited service the right to an agency conference, and yet not provide some way of notifying the applicant that he or she had been denied. Our position mirrors the rationale employed by the court in *Harley*. See also, *Robertson v. Jackson*, 766 F. Supp. 470, 477 (E.D. Va. 1991). We thus interpret these regulations to require written notice of the denial of expedited service so that the applicant may choose to exercise the right to an agency conference if the applicant so wishes.

The process does not require more from the state than the procedures currently in force. Presently, when an applicant applies for food stamps, a caseworker makes a preliminary decision as to whether that applicant is entitled to expedited service. The appropriate response is then marked on the application. Should the caseworker decide the applicant is not entitled to expedited

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service, the caseworker merely must give the applicant a copy of the application with the “ineligible” box marked and with appropriate boxes checked detailing the reason(s) applicant did not qualify for expedited service. The applicant then may request any applicable conference or hearing.

We hold that the trial court erred by failing to grant plaintiff’s request for an order directing defendants to provide written notice of a denial of expedited processing and the right to a conference within two working days of such denial. The case is remanded for entry of an appropriate order. With our having decided this issue in plaintiff’s favor, we need not address plaintiff’s other arguments.

Reversed and remanded.

Judges ORR and WYNN concur.

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JAMES W. WATSON, PLAINTIFF v. AMERICAN NATIONAL FIRE INSURANCE  
COMPANY, DEFENDANT

No. 906SC1325

(Filed 7 July 1992)

**1. Rules of Civil Procedure § 12 (NCI3d); Insurance § 69.3 (NCI3d)— motion for judgment on the pleadings—denial of knowledge of UIM rejection—denial on information and belief of issues of fact**

The trial court erred in an action arising from an underinsured motorist (UIM) claim by granting plaintiff’s motion for judgment on the pleadings where defendant’s answer that it had no knowledge or information that plaintiff had rejected UIM coverage was a legal impossibility, but defendant’s denials on the basis of lack of information or belief of factual matters were sufficient to raise the matters to the level of factual issues and preclude judgment on the pleadings.

**Am Jur 2d, Pleading § 232.**

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[106 N.C. App. 681 (1992)]

**2. Insurance § 69 (NCI3d) — UIM coverage — interpolicy stacking — fleet onto nonfleet policies**

The trial court erred by allowing interpolicy stacking of commercial fleet UIM coverage onto a private nonfleet UIM policy. Although interpolicy stacking is permitted to provide the innocent victim of an inadequately insured driver with an additional source of recovery, allowing stacking of a victim's fleet policy onto the nonfleet policy of the insured-tortfeasor is a result contemplated neither by the insurer when it wrote the fleet policy nor the legislature when it wrote the statute. N.C.G.S. § 58-40-10; N.C.G.S. § 20-279.21(b)(4).

**Am Jur 2d, Automobile Insurance § 329.**

**Combined or "stacking" uninsured motorist coverages provided in fleet policy. 25 ALR4th 986.**

APPEAL by defendant from judgment on the pleadings and declaratory judgment granted by *Judge Cy A. Grant* in BERTIE County Superior Court on 29 October 1990. Heard in the Court of Appeals 18 September 1991.

*Pritchett, Cooke and Burch, by William W. Pritchett, Jr., Lars P. Simonsen and David J. Irvine, Jr., for plaintiff-appellee.*

*Haywood, Denny, Miller, Johnson, Sessoms and Patrick, by George W. Miller and Robert E. Levin, for defendant-appellant.*

LEWIS, Judge.

On 17 February 1989, the plaintiff was involved in a motor vehicle accident with Clyde Lee. The accident occurred while the plaintiff was driving his mother's 1984 Cadillac automobile on Highway 13 in Hertford County, North Carolina. The plaintiff filed a complaint against Clyde Lee on 25 September 1989 alleging severe and permanent injuries.

At the time of the accident, Clyde Lee was insured by Nationwide Insurance Companies with liability coverage in the amount of \$100,000.00 per person and \$300,000.00 per accident. On 31 October 1989, Nationwide settled the plaintiff's claim for the limits of Clyde Lee's policy (\$100,000.00).

The plaintiff's damages exceeded his settlement with Nationwide under Clyde Lee's policy so he made a claim for under in-

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insurance coverage (UIM) on his own business insurance policy written by American National Fire Insurance Company, the defendant. The defendant denies that this policy provides under insurance coverage. On 29 October 1990, the trial court granted the plaintiff's motion for judgment on the pleadings, and awarded all coverage in the amount of \$10,000,000.00. The defendant appeals.

[1] The appellant argues that the trial court erred in holding that the dispositive issues and material facts of this case are not in dispute by granting the plaintiff's motion for judgment on the pleadings. Judgment on the pleadings is not favored by the law, and a non-movant's pleadings will be liberally construed. *Edwards v. Edwards*, 261 N.C. 445, 135 S.E.2d 18 (1964).

*Ragsdale v. Kennedy*, 286 N.C. 130, 209 S.E.2d 494 (1974) articulates the position of this State's courts in determining whether a motion for judgment on the pleadings should be granted. This case reflects the rarity with which the appellate courts embrace the motion.

In *Ragsdale*, the Supreme Court defined the function of Rule 12(c) of the North Carolina Rules of Civil Procedure as being to dispose of baseless claims or defenses when the formal pleadings reveal their lack of merit. *Id.* at 137, 209 S.E.2d at 499. A motion for judgment on the pleadings is the proper procedure when all the material allegations of fact are admitted in the pleadings and only questions of law remain. *Id.* Furthermore, the movant is held to a strict standard and must show that no material issue of fact exists and that he is clearly entitled to judgment. *Id.* All allegations in the non-movant's pleadings, except conclusions of law, legally impossible facts, and matters not admissible in evidence at the trial are deemed admitted by the movant for the purpose of the motion. *Id.*

The appellee contends that the appellant's denial that the plaintiff never rejected under insurance motorist coverage constitutes a legally impossible fact, as contemplated by *Ragsdale*, 286 N.C. at 137, 209 S.E.2d at 499, since UIM coverage is automatic unless the insured expressly rejects such coverage. The appellee argues that since N.C.G.S. § 20-279.21(b)(4) (1991) requires that a rejection of UIM coverage be "in writing . . . on a form promulgated by the North Carolina Rate Bureau and approved by the Commissioner of Insurance," the appellant's answer that it had no knowledge or information that the plaintiff rejected UIM coverage and sub-

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sequent denial constitute an admission; had the plaintiff rejected the UIM coverage, the appellant would have a written record of that rejection. The appellee further maintains that, with the disposal of that factual issue as a legally impossible fact, no other material facts were in dispute.

The appellee is correct in calling the appellant's answer to paragraph 21 of the pleadings legally impossible; if the plaintiff had rejected the automatic UIM coverage, he could only have done so as stipulated in N.C.G.S. § 20-279.21(b)(4). The appellant would have to know of the rejection if it occurred. It would be written and would certainly have been reflected in the policy issued to plaintiff. For the appellant to claim a lack of knowledge concerning something about which he could not have been ignorant is not only disingenuous but legally impossible.

As to the appellee's argument that no other material facts were in dispute, one must view the entire pleadings. In addition to its denial of paragraph 21, the defendant-appellant denied paragraphs 6, 7, 8, 9, 15, 19, 22, 23, 24, 27, 28, 29, 30, 31 and 32. Paragraphs 6-9 of the complaint refer to the facts of the accident, to which the appellant responds that it has no knowledge sufficient to form a belief, and therefore denies. Finally, paragraphs 24 and 27-32 make reference to the plaintiff's damages, to which the appellant responds in the same manner. These denials are to factual matters. In *Campbell v. Trust Co.*, 214 N.C. 680, 200 S.E.2d 392 (1939), the Supreme Court held that a denial on information and belief is sufficient to preclude judgment on the pleadings in favor of the plaintiff. Though this case was decided before the Rules of Civil Procedure, the "motion operates substantially the same as under the code system before adoption of the new rules." *Ragsdale*, at 136, 209 S.E.2d at 499. Consistent with the holding in *Campbell*, the appellant's denials on the basis of lack of information or belief of factual matters are sufficient to raise the matters to the level of factual issues, precluding judgment on the pleadings in favor of the plaintiff. The trial court erred in granting the plaintiff's motion for judgment on the pleadings.

[2] The appellant argues next that the trial court erred in affording the plaintiff UIM coverage on his own policy in the amount of \$5,000,000.00 per vehicle, for a total of \$10,000,000.00. The threshold question, before even considering the amount of coverage to which the plaintiff may be entitled, is whether the plaintiff could stack

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his own policy and that of Clyde Lee's; i.e., whether inter-policy stacking was proper in this situation.

The appellee relies on *Crowder v. N.C. Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 340 S.E.2d 127, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986), in its argument that "coverage extends to those insured even though not in the covered vehicle at the time of injury," *id.* at 553, 340 S.E.2d at 129, and on N.C.G.S. § 20-279.21(b)(4) which provides that when a policy affording uninsured motorist coverage is written at limits which exceed the statutorily required minimum coverage, such policy shall "provide under insured motorist coverage . . . in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy." In short, when all other liability insurance has been exhausted and the injured party's damages exceed the limits of that policy, the statute will allow UIM coverage under the injured party's own policy of insurance. N.C.G.S. § 20-279.21(b)(4). While both *Crowder* and N.C.G.S. § 20-279.21(b)(4) are pertinent to the present case, *Crowder* is careful to limit its holding to "the particular circumstances of this case." *Id.* at 553, 340 S.E.2d at 129. In *Crowder*, the policy under which the plaintiff sought and was awarded UIM coverage was for a 1978 Dodge van, a private nonfleet passenger motor vehicle. The appellant here contends that the plaintiff's policy is a commercial or "Businesspro" policy covering his two buses, and not a private nonfleet passenger motor vehicle policy.

The Motor Vehicle Safety and Financial Responsibility Act of 1953, as amended, expressly limits the applicability of the statute to nonfleet private passenger motor vehicles: ". . . this paragraph shall apply only to nonfleet private passenger motor vehicles insurance as defined in G.S. §§ 58-40-15(a) and (10)." N.C.G.S. § 20-279.21(b)(4). The applicable statute at the time defines private passenger motor vehicles as:

- (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 pick-up body, a delivery sedan or a panel truck that is owned by an individual or by husband

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and wife or individuals 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 copartnership or corporation shall be considered owned by an individual for purposes of this Article.

N.C.G.S. § 58-40-10 (1990). The plaintiff's buses do not qualify as nonfleet private passenger motor vehicles as defined by N.C.G.S. § 58-40-10 (1990).

The appellant argues further that the plaintiff's policy covering his two buses is a fleet policy as defined in *Sutton v. Aetna Casualty & Sur. Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). In *Sutton*, the Supreme Court defined a fleet policy as ". . . a single policy designed to provide coverage for a multiple and changing number of motor vehicles used in an insured's business." *Id.* at 266, 382 S.E.2d at 763. Although the appellee's policy lists only two specific vehicles, it does provide for additional buses to be added to the policy. Therefore, the appellee's policy is a fleet policy under *Sutton* and excluded from inter-policy stacking, since the stacking provisions of N.C.G.S. § 20-279.21(b)(4) cover only nonfleet private passenger motor vehicle insurance. *Aetna Casualty and Sur. Co. v. Fields*, 105 N.C. App. 563, 414 S.E.2d 69 (1992). We recognize that inter-policy stacking is permitted so as to provide the innocent victim of an inadequately insured driver with an additional source of recovery; however, to allow stacking of a victim's fleet policy onto the nonfleet policy of the insured-tortfeasor is a result contemplated neither by the insurer when it wrote the fleet policy nor the legislature when it wrote the statute. We therefore hold that under N.C.G.S. § 20-279.21(b)(4) fleet policies may not be stacked onto nonfleet policies.

Since we find that the court erred in allowing inter-policy stacking, we decline to comment on the intra-policy stacking and the amount of coverage allowable under the policy.

Reversed and remanded.

Judges COZORT and ORR concur.



## STATE v. BAKER

[106 N.C. App. 687 (1992)]

STATE OF NORTH CAROLINA v. ALLISON BAKER, DEFENDANT/APPELLANT

No. 9114SC702

(Filed 7 July 1992)

**Evidence and Witnesses § 2330 (NCI4th)— indecent liberties— touching—evidence of penetration—irrelevant and prejudicial**

There was prejudicial error in a prosecution for taking indecent liberties with a child where the child testified that defendant had rubbed her private part on the outside of her clothing and the court admitted expert testimony and illustrative photographs indicating that the victim had been penetrated. That evidence was not relevant and was prejudicial in that it made the victim's allegation more plausible.

**Am Jur 2d, Evidence § 260.**

APPEAL by defendant from judgment entered 21 February 1991 by *Judge A. M. Brannon* in DURHAM County Superior Court. Heard in the Court of Appeals 8 April 1992.

Defendant was indicted and convicted of taking indecent liberties with a child. He was sentenced to five years imprisonment with the North Carolina Department of Correction. The sentence was suspended and defendant was placed on five years supervised probation.

The victim is an eight year old girl. Because of her youth and the nature of the offense charged, we refer to her here only as the "victim."

Briefly stated, the State's evidence tends to show the following: When the victim was in kindergarten and first grade, she rode to school on a school bus which her mother drove. The two would leave their home around 5:00 a.m. and would stop at a convenience store (Four Points) so that her mother could get some coffee before picking up other children. Four Points is a small store with interior dimensions of approximately thirty feet by thirty feet. Usually, when the victim and her mother arrived at Four Points, there were several people in the store, including the defendant. Routinely, the victim's mother would walk over to the coffee machine, get some coffee and walk to the cash register. While her mother got coffee, the victim was free to roam the store, and often played

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with the defendant, a forty-five year old man at the time of the trial.

On 12 February 1990 the victim told her mother that the defendant had "messed with [her] private part." The victim's mother told her husband. The next morning she made an appointment to have the victim examined at UNC Memorial Hospital in Chapel Hill. The morning after the examination, the victim's mother called the Durham County Sheriff's Department and reported the incident. The victim was also taken to see a psychologist.

At trial the victim testified that she often played with the defendant in the Four Points store, and that she sometimes sat on his lap. She also testified that on "more than one" occasion while she was in kindergarten and first grade the defendant "rubbed [her] private part" with his hand while she was seated on his lap. The victim testified that she always had her clothes on but the defendant used his hand and "felt under [the victim's] skirt, but not inside [her] panties."

At trial, several expert witnesses (Dr. Desmond Runyan, Janet Hadler, and Dr. Bonnie Gregory) testified for the State concerning the alleged sexual abuse of the victim. Dr. Runyan, an expert in the field of pediatrics and child sexual abuse testified that he examined the victim. During his examination, Dr. Runyan performed a colposcopic examination of the victim. That examination revealed that the victim's vaginal opening was six millimeters and that her hymen was irregular, notched and changed in shape. Dr. Runyan testified that in his opinion, this evidence indicated that the victim had been penetrated. Photographs taken during the colposcopic examination were introduced into evidence to illustrate Dr. Runyan's testimony.

Ms. Hadler, a social work clinical specialist then working as a consultant to the statewide Child Medical Evaluation Program, testified as an expert in the field of child sexual abuse. She testified that she interviewed the victim prior to Dr. Runyan's examination. Ms. Hadler used anatomically correct dolls to elicit information from the victim concerning the alleged sexual abuse. The victim used a doll and told Ms. Hadler that the defendant rubbed his hand on the outside of her panties. Ms. Hadler also testified that the physical examination performed by Dr. Runyan "indicated that more happened in terms of the exact sexual contact than what

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[the victim] was telling [her]." The examination "indicated that [the victim] had actually been penetrat[ed]."

The defendant testified at trial. He denied molesting the victim and specifically denied placing his hands on or near the victim's "private parts."

From judgment entered, defendant appeals.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie L. Bateman, for the State.*

*Cheshire, Parker, Hughes & Manning, by George B. Currin, for defendant-appellant.*

EAGLES, Judge.

Defendant argues *inter alia* that the trial court erred to his prejudice by allowing evidence to be admitted which indicated that the victim had been sexually penetrated. Based on controlling precedent, we agree.

Initially, we note that the State argues that the defendant waived this argument by failing to properly object at trial. However, because we find this evidence was highly prejudicial here and that it affected substantial rights of the defendant, we hold that the interests of justice require us to review its admission for possible error. N.C.R. Evid. 103(d); *see, e.g., State v. Fearing*, 315 N.C. 167, 172, 337 S.E.2d 551, 554 (1985).

Our decision is controlled by our Supreme Court's holding in *State v. Ollis*, 318 N.C. 370, 348 S.E.2d 777 (1986). In *Ollis*, the defendant was convicted of first-degree rape and first-degree sexual offense (cunnilingus) involving a female child, who was ten years old at the time of trial. *Id.* at 371, 348 S.E.2d at 777-78. During the trial a physician who examined the victim was allowed to testify concerning physical findings he made during his examination of the victim. *Id.* at 375, 348 S.E.2d at 780-81. Those findings tended to establish that the victim had been sexually penetrated. On appeal the defendant argued *inter alia* that he was prejudiced by admission of this evidence because the trial court denied his request to cross-examine the victim about her being raped by another man. *Id.* at 374, 348 S.E.2d at 780. While the trial court did allow other witnesses to testify that the victim had said that she had been raped by two men, the trial judge limited the jury's considera-

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tion of their testimony to corroboration of the victim. *Id.* at 375, 348 S.E.2d at 780. No substantive evidence of the rape by the second man was admitted. *Id.* After determining that the trial court erred by not allowing the defendant to present evidence of the other rape because it would tend to explain the physician's findings, the Supreme Court addressed the penetration evidence as it related to the defendant's conviction for first-degree sexual offense. The Court explained:

Although the evidence of an alternative source of the physical condition possibly resulting from rape was irrelevant to the sexual offense charge, we also are not convinced that under the circumstances its exclusion was harmless. *If the sexual offense charge had been tried separately, the physician's testimony would not have been relevant*, and the evidence regarding rape of the victim by another man as an alternative explanation for the victim's physical condition also would have been irrelevant. Because the two offenses were tried together, however, the enhancing character of the doctor's evidence, appearing as it did to corroborate the victim's testimony that she was penetrated, in turn enhanced the credibility of the witness regarding a second sexual offense by the defendant. For that reason we also find that the error was prejudicial to the defendant's defense against the charge of first-degree sexual offense.

*Id.* at 377-78, 348 S.E.2d at 782 (emphasis added). The Court reversed both convictions and ordered a new trial. *Id.* at 378, 348 S.E.2d at 782.

In the instant case, as in *Ollis*, the defendant was charged with an offense which may involve sexual penetration, but does not require sexual penetration. See *State v. Slone*, 76 N.C. App. 628, 334 S.E.2d 78 (1985) (defendant guilty of taking indecent liberties where he rubbed the victim's genitalia); *State v. Allen*, 92 N.C. App. 168, 374 S.E.2d 119 (1988), *cert. denied*, 324 N.C. 544, 380 S.E.2d 772 (1989) (defendant guilty of taking indecent liberties where he penetrated the victim's genitalia); and *State v. DeLeonardo*, 315 N.C. 762, 340 S.E.2d 350 (1986) (acts constituting sexual offense include: cunnilingus, fellatio, analingus, anal intercourse, and any penetration, however slight, by any object into the genital or anal opening of another person's body). Likewise, here as in *Ollis*, the acts testified to by the victim and allegedly committed by the

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[106 N.C. App. 691 (1992)]

defendant did not include sexual penetration. Rather, here the victim testified only that the defendant “rubbed [her] private part” on the “[o]utside” of her clothing. Accordingly, under the holding of *Ollis*, the penetration testimony of Dr. Runyan and Ms. Hadler, as well as the photographs of the victim’s genitalia which tended to show that the victim had been penetrated, were not relevant to the crime the defendant allegedly committed. Moreover, we believe that the penetration evidence impermissibly expanded and enhanced the victim’s testimony. The introduction of irrelevant evidence of a second uncharged sexual offense made more plausible the victim’s allegation that the defendant had taken an indecent liberty with her by touching her private parts. Based on the record before us, we are unable to hold that the jury would not have had a reasonable doubt as to the defendant’s guilt if this irrelevant evidence had not been admitted.

We do not reach defendant’s remaining assignments because they are not likely to arise on remand.

Reversed and remanded for a new trial.

Judges ARNOLD and WELLS concur.

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OPHELIA DAWSON v. ALLSTATE INSURANCE COMPANY

No. 9110SC433

(Filed 7 July 1992)

**Rules of Civil Procedure § 41.2 (NCI3d) — failure to state claim — dismissal — adjudication upon merits**

A dismissal of plaintiff’s initial complaint for failure to state a claim operated as an adjudication upon the merits in the absence of a contrary specification in the order of dismissal, and the trial court should have allowed defendant’s motion to dismiss plaintiff’s refiled complaint. N.C.G.S. § 1A-1, Rules 12(b)(6) and 41(b).

**Am Jur 2d, Judgments § 495.**

Judge WYNN concurring.

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APPEAL by plaintiff from order entered 27 February 1991 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 10 March 1992.

Defendant filed a motion for summary judgment. The trial court granted the motion and dismissed plaintiff's claim. From this judgment plaintiff appeals.

*Nathaniel Currie for plaintiff appellant.*

*Law Offices of Robert E. Smith, by Robert E. Smith, for defendant appellee.*

ARNOLD, Judge.

There is a cross assignment of error which is dispositive of this case. Defendant correctly argues that the trial court erred in denying its motion to dismiss plaintiff's refiled complaint. Plaintiff's initial complaint was dismissed for failure to state a claim. See N.C.R. Civ. P. 12(b)(6). "Unless the court in its order for dismissal otherwise specifies," a dismissal for failure to state a claim "operates as an adjudication upon the merits." N.C.R. Civ. P. 41(b). Therefore, we hold defendant's motion to dismiss plaintiff's refiled complaint should have been allowed.

For the reasons stated, judgment is vacated and the matter is remanded for entry of order dismissing the refiled complaint.

Vacated and remanded.

Judge LEWIS concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring.

I agree with the majority's statement of the law but write separately to point out the problematic relationship between N.C.R. Civ. Pro. 12(b)(6) and N.C.R. Civ. Pro. 41(b).

The plaintiff's initial complaint was dismissed for failure to state a claim under N.C.R. Civ. Pro. 12(b)(6). Dismissal under Rule 12(b)(6) is only proper in three instances: "(1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint reveals on its face that some fact essential to plain-

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tiff's claim is missing; and (3) when some fact disclosed in the complaint defeats the plaintiff's claim." *Schloss Outdoor Advertising Co. v. City of Charlotte*, 50 N.C. App. 150, 152, 272 S.E.2d 920, 922 (1980). A motion to dismiss under Rule 12(b)(6) "generally tests the legal sufficiency of the complaint: Has the pleader given notice of such facts as will, if true, support a claim for relief under some legal theory. *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758, cert. denied, 317 N.C. 33, 346 S.E.2d 137 (1986).

In *Concrete Service Corp.*, this Court stated that a Rule 12(b)(6) matter does not present the merits, but instead presents a question of whether the merits may be reached. *Id.* at 681, 340 S.E.2d at 758. Nonetheless, even though a 12(b)(6) dismissal does not address the merits of the complaint, it qualifies as an involuntary dismissal under Rule 41(b). *Johnson v. Bollinger*, 86 N.C. App. 1, 356 S.E.2d 378 (1987). And, with certain exceptions, an involuntary dismissal under Rule 41(b) "operates as an adjudication on the merits and ends the lawsuit." *Whedon v. Whedon*, 313 N.C. 200, 210, 328 S.E.2d 437, 443 (1985). It should be noted that the trial judge has the discretion under Rule 41(b) to determine whether or not the dismissal shall operate as an adjudication upon the merits. *Johnson*, 86 N.C. App. at 8, 356 S.E.2d at 383. Thus, unless the trial judge specifies the dismissal for failure to state a claim is dismissed without prejudice, the plaintiff is barred by *res judicata* from refileing the claim and must instead appeal the 12(b)(6) dismissal.

In *Whedon*, our Supreme Court explained the reasons for the rule that an involuntary dismissal operates as an adjudication of the merits as follows:

Under previous law, a compulsory nonsuit allowed the plaintiff to have an automatic second chance on his claim. Too often this right resulted in the unnecessary crowding of court dockets and harassing of defendants with claims that did not deserve a second chance. Rule 41(b) allows the court to dispose of such a claim in final fashion, while at the same time protecting those parties who can demonstrate that they should be afforded another opportunity to produce sufficient evidence.

*Whedon*, 313 N.C. at 212, 328 S.E.2d at 444 (quoting W. Shuford, *North Carolina Civil Practice and Procedure*, § 41.3). See also

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*Cline v. Teich*, 92 N.C. App. 257, 264, 374 S.E.2d 462, 466 (1988) (A 12(b)(6) dismissal "bars subsequent relitigation of the same claim.")

Under Fed. R. Civ. P. 12(b)(6), which is essentially identical to the North Carolina rule, a complaint only should be dismissed if "it appears beyond doubt that a plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson*, 355 U.S. 41, 45-46, 2 L.Ed.2d 80, 84 (1957). The effect of a dismissal under Federal Rule 12(b)(6) is essentially the same as it is under the North Carolina Rule. In *Federated Department Stores, Inc. v. Moite*, 452 U.S. 394, 399, 69 L.Ed.2d 103, 109 (1981), the United States Supreme Court stated that "dismissal for failure to state a claim under . . . [Rule] 12(b)(6) is a 'judgment on the merits.'" The Court explained:

Whether the complaint states a cause of action on which relief could be granted is a question of law and just as issues of fact it must be decided after and not before the court has assumed jurisdiction over the controversy. If the court does later exercise its jurisdiction to determine that the allegations in the complaint do not state a ground for relief, then dismissal of the case would be on the merits, not for want of jurisdiction.

*Id.* (quoting *Bell v. Hood*, 327 U.S. 678, 682, 90 L.Ed.2d 939, 943 (1946)).

This conclusion that a 12(b)(6) dismissal acts as *res judicata* has been questioned by legal scholars:

[I]t is doubtful that Rule 12(b)(6) normally should dispose of more than the question whether a particular statement constitutes a claim for relief. A court that thinks it convenient to test the merits under a preliminary motion should do so by converting the motion to dismiss into one for summary judgment since this is the procedural device specifically designed to test the merits of the claim in advance of trial. Unless this has been done, application of *res judicata* seems to be a dubious path to follow. Furthermore, there is the possibility that plaintiff may not realize that more than his formal statement of the claim is being contested on a given Rule 12(b)(6) motion and may not prepare himself to defend the substantive merits of his claim. A dismissal followed by the invocation of *res judicata* would be particularly harsh in this situation. Thus, the court must be especially sensitive to assure



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the pleader adequate notice of the nature of the challenge. Moreover, the application of the policy of freely granting leave to amend will avoid prejudice to unwary or unprepared pleaders.

5A Wright & Miller, *Federal Practice and Procedure*, § 1357 (1990). Further, it has been pointed out that since a 12(b)(6) motion is limited to the content of the complaint, holding that a 12(b)(6) dismissal is *res judicata* effectively denies the plaintiff an opportunity to have the merits of his claim heard. *Rambur v. Diehl Lumber Co.*, 394 P.2d 745 (Montana, 1964). Moreover, the determination that the holding that a 12(b)(6) dismissal for failure to state a claim acts as an adjudication on the merits is contrary to the purpose behind notice pleadings which is to resolve controversies on the merits rather than pleading technicalities. See generally *Smith v. City of Charlotte*, 79 N.C. App. 517, 339 S.E.2d 844 (1986).

Notwithstanding the fact that a Rule 12(b)(6) motion does not present the merits, the law is well-settled that in the absence of contrary indication by the trial judge, a Rule 12(b)(6) dismissal operates as an adjudication on the merits under Rule 41(b). Due to this interplay between 12(b)(6) and 41(b), wary parties when confronted with the dismissal of their case under 12(b)(6) should request that the trial judge enter the dismissal without prejudice so that the dismissal does not act as an adjudication on the merits. In most instances, the policy behind the notice theory of our Rules of Civil Procedure would be better implemented by the trial judge granting such a request.

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STATE OF NORTH CAROLINA v. THEODORE LANG, JR.

No. 923SC77

(Filed 7 July 1992)

**1. False Pretenses, Cheats, and Related Offenses § 18 (NCI4th) — false pretense—value received by defendant—agent for corporation**

The evidence in a prosecution for obtaining property by false pretense was sufficient for the jury to find that defendant received value from the victim, although the victim's payments were made to a corporation and all stock in the corporation

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was owned by defendant's wife and children, where it tended to show that defendant was the president of the corporation and was responsible for and entered into a boat construction contract with the victim on behalf of the corporation. An agent obtaining anything of value for a corporation by false pretense is subject to conviction along with the corporation.

**Am Jur 2d, False Pretenses § 9.**

**Criminal liability of corporation for extortion, false pretenses, or similar offenses. 49 ALR3d 820.**

**2. False Pretenses, Cheats, and Related Offenses § 22 (NCI4th) — false pretense — intent to defraud — sufficiency of evidence**

The evidence in a prosecution for obtaining property by false pretense was sufficient for the jury to find an intent to defraud by defendant where it tended to show that defendant, who was building a boat for the victim, requested and received from the victim money for engines which were never purchased; defendant represented to the victim that the engines would be delivered within ten days when he had not ordered them; and defendant informed the victim six months later that the engines had been delivered and stored although they had not been purchased and were not in his possession. It was reasonable for the jury to infer from this evidence that defendant never intended to purchase the engines.

**Am Jur 2d, False Pretenses § 9.**

**Criminal liability of corporations for extortion, false pretenses, or similar offenses. 49 ALR3d 820.**

**3. Corporations § 5 (NCI4th) — false pretense — corporate agent — criminal liability**

A corporate agent obtaining something of value for the corporation by false pretense is not required to own stock in the corporation in order to be subject to prosecution along with the corporation for false pretense.

**Am Jur 2d, False Pretenses § 9.**

**Criminal liability of corporation for extortion, false pretenses, or similar offenses. 49 ALR3d 820.**

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**4. Evidence and Witnesses §§ 733, 1113 (NCI4th)— affidavit of indigency—self-incrimination—right to counsel—admission of party opponent**

The admission of defendant's affidavit of indigency in a prosecution for obtaining property by false pretense did not force defendant to choose between his right to counsel and his right against self-incrimination. Furthermore, the affidavit of indigency was admissible under the Rule 801(d)(A) exception to the hearsay rule for an admission of a party opponent.

**Am Jur 2d, Affidavits § 30.**

APPEAL by defendant from judgment entered 9 August 1991 by *Judge J. Milton Read, Jr.*, in CARTERET County Superior Court. Heard in the Court of Appeals 1 June 1992.

Defendant was convicted of one count of obtaining property by false pretense, was sentenced to three years imprisonment suspended, and was placed on supervised probation for five years. In addition, defendant was required to complete 75 hours of community service and to pay fines and restitution totaling \$6,600. Upon completion of community service and the payment of fines, defendant's probation is to be unsupervised. Defendant appeals.

Evidence presented by the State tends to show that defendant was president and treasurer of NML Boatbuilders, Inc., Lang Yachts, a business located in Carteret County. In August 1984, Leonard Dricks entered into a contract with defendant's business wherein defendant agreed to build Dricks a boat with a total cost to Dricks of \$65,000. Pursuant to the contract executed by defendant as president of NML Boatbuilders, Inc., Lang Yachts, Dricks was to make a series of payments corresponding to the progress made towards completion of the project.

On 29 September 1986, defendant wrote to Dricks that the engines for the boat were ready to be shipped and would require a payment of \$6,500. Dricks forwarded a check in that amount to defendant. Approximately one month later, defendant represented to Dricks that the engines would be delivered within the next ten days. When Dricks visited defendant's shop in April 1987, defendant told him the engines were being kept in storage until they were ready to be installed on the boat because they were sensitive to the dirt and dust in the shop. At that time defendant

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supplied Dricks with the serial numbers of the engines he had obtained. Testimony was entered that although in November 1986 defendant had asked the supplier to hold the engines in question for 30 to 60 days, the engines had never been purchased by defendant or delivered to his business. The engines with the serial numbers quoted by defendant to Dricks had been held for the requested time period, but then were sold by the supplier to other customers.

Defendant offered evidence that he had ordered the engines, and that work had continuously progressed on Dricks' boat. Defendant also offered evidence that he was not a shareholder in the company, but that all stock is owned by defendant's wife and six children.

*Attorney General Lacy H. Thornburg, by Assistant Attorney General Alexander McC. Peters, for the State.*

*David P. Voerman for defendant-appellant.*

JOHNSON, Judge.

Defendant presents three arguments on appeal. First, defendant contends the court erred by denying his motion for nonsuit on the grounds that the State failed to present sufficient evidence of each element of the crime charged. We disagree.

The elements of obtaining property by false pretense are that the defendant (1) obtained or attempted to obtain value from another, (2) by a false representation of a past or subsisting fact or of a future fulfillment or event, (3) which was intended and calculated to deceive, and (4) which does, in fact, deceive. *State v. Cronin*, 299 N.C. 229, 262 S.E.2d 277 (1980). To withstand a motion for nonsuit, the State must have presented substantial evidence of each of these essential elements, or of a lesser included offense. *State v. Workman*, 309 N.C. 594, 308 S.E.2d 264 (1983). All the evidence must be reviewed in a light most favorable to the State, with all discrepancies and inconsistencies being resolved in favor of the State. *State v. Smith*, 291 N.C. 505, 231 S.E.2d 663 (1977).

[1] Defendant first argues that he did not receive anything of value from Dricks, as all payments were made to the business. Defendant also points to the fact that all the stock in the business was owned by his wife and children, contending this further shields him from the charge of obtaining anything of value from Dricks. This argument is without merit. Defendant was the president of

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the business, and was responsible for and did in fact enter into the contract with Dricks on behalf of the business. It is well established that an agent obtaining anything of value for a corporation by false pretense is subject to conviction along with the corporation. *State v. Louchheim*, 36 N.C. App. 271, 244 S.E.2d 195 (1978), *aff'd*, 296 N.C. 314, 250 S.E.2d 630, *cert. denied*, 444 U.S. 836 (1979). We find, therefore, sufficient evidence was presented of the first element of the offense.

[2] Defendant next maintains the State failed to show he had the requisite intent to cheat and defraud Dricks at the time of the representation. Defendant argues that at most he is guilty of breach of contract which does not establish the intent to defraud. *Cronin*, 299 N.C. at 229, 262 S.E.2d at 277. We disagree.

Evidence was presented that defendant requested and received the money for engines which were never purchased. Defendant then represented to Dricks that the engines would be delivered within ten days when he had not ordered them. Finally, when Dricks visited the shop approximately six months later, defendant informed him that the engines had been delivered and were being stored, though they had not been purchased and were not in his possession. From these facts it is reasonable for the jury to infer that defendant never intended to purchase the engines. Nothing more is required to defeat the motion for nonsuit on this ground.

Finally, in support of this argument, defendant contends again that evidence of the nonfulfillment of a contractual agreement, standing alone, is not sufficient to show intent to defraud. For the reasons discussed above, we find this argument to be without merit.

[3] By his next assignment of error, defendant contends the court improperly instructed the jury that defendant could be charged along with the corporation. Defendant argues the evidence was not sufficient to warrant piercing the corporate veil because there was no evidence that he was a primary stockholder in the company. As discussed above, an agent obtaining anything of value for a corporation by false pretense is subject to conviction along with the corporation. *Louchheim*, 36 N.C. App. at 271, 244 S.E.2d at 195. In addition to *Louchheim*, defendant relies on *State v. Earnest*, 64 N.C. App. 162, 306 S.E.2d 560 (1983), *disc. review denied*, 310 N.C. 746, 315 S.E.2d 705 (1984), in which the agent who was convicted of embezzlement was also a major stockholder in the com-

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pany for which he acted. Defendant maintains that the facts of these cases indicate an intent by the courts to make share ownership a requirement for the application of the rule permitting the prosecution of the agent. We disagree. None of the cases relied on by defendant make lack of share ownership a protective shield for a corporate agent. We decline to extend the rulings in these cases to include this requirement.

[4] In his final argument, defendant contends the court improperly admitted his affidavit of indigency because the document is hearsay, and the admission violated his right against self-incrimination, his right to counsel, and his right not to testify against himself. There is no merit to this argument.

First, defendant argues that because he was required to execute the document in question in order to qualify for counsel, he has been forced to “choose” between his right to counsel and his right against self-incrimination. It is noted that the document was entered into evidence without an objection that defendant’s right against self-incrimination was being violated. Accordingly, defendant may be deemed to have waived that right at trial. See *State v. Thomas*, 284 N.C. 212, 200 S.E.2d 3 (1973). It is also noted that defendant was represented at trial and so may not complain that the admission of the affidavit deprived him of his right to representation.

Defendant next argues the affidavit was inadmissible hearsay. This is incorrect. N.C. Gen. Stat. § 8C-1, Rule 801(d)(A) (1990) permits a statement if it is offered against a party and is that party’s own statement. The Rule clearly applies in this case. Further, defendant made no objection upon the document’s admission on the grounds of hearsay. Finally, defendant has not shown any prejudice resulting from the admission of the affidavit, or that the outcome of his trial would have been different absent the admission of the document. Under these circumstances, we can find no error by the court in admitting the affidavit.

For these reasons, we find defendant received a fair trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge WYNN concur.

**BERKMAN v. BERKMAN**

[106 N.C. App. 701 (1992)]

DAVID BRUCE BERKMAN v. TAMMY LYNN BERKMAN

No. 9126DC556

(Filed 7 July 1992)

**1. Appeal and Error § 107 (NCI4th)— temporary custody order— no immediate appeal**

A temporary child custody order is interlocutory and not immediately appealable.

**Am Jur 2d, Appeal and Error § 136.**

**2. Appeal and Error § 113 (NCI4th)— denial of motion to dismiss—failure to comply with Rule 4—no immediate appeal**

The denial of a motion to dismiss pursuant to Rule 41(b) challenging personal jurisdiction for failure to comply with the procedures set forth in Rule 4 is not immediately appealable.

**Am Jur 2d, Appeal and Error § 86.**

**3. Appeal and Error § 113 (NCI4th)— denial of motion to dismiss—failure to prosecute—no immediate appeal**

The denial of defendant's motion under Rule 41(b) to dismiss on the ground that plaintiff's alleged noncompliance with rules pertaining to service of summons and the issuance of an alias and pluries summons within a certain time period constituted a failure to prosecute was not immediately appealable.

**Am Jur 2d, Appeal and Error § 86.**

APPEAL by defendant from Order entered 13 July 1990 and 14 January 1991 by *Judge Marilyn R. Bissell* in MECKLENBURG County District Court. Heard in the Court of Appeals 7 April 1992.

*Ellis M. Bragg for plaintiff appellee.*

*Richard F. Harris, III, for defendant appellant.*

COZORT, Judge.

Defendant-wife and plaintiff-husband divorced in 1985 in Arizona. Defendant was awarded custody of the minor child. On 18 June 1990 plaintiff filed suit in Mecklenburg County District Court seeking custody of the child. The sheriff attempted to serve defendant on 29 June 1990, but was informed that defendant had moved

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[106 N.C. App. 701 (1992)]

to Mexico. Defendant did not appear at the custody hearing on 9 July 1990. The district court granted temporary custody to plaintiff on 13 July 1990. On 8 November 1990 defendant filed motions to dismiss the action pursuant to N.C. Gen. Stat. § 1A-1, Rule 4(e) and N.C. Gen. Stat. § 1A-1, Rule 41(b) and to vacate the temporary custody order. On 26 and 28 November 1990 the district court heard arguments on defendant's motions. On 14 January 1991 the district court denied the motions, ordering that the 13 July 1990 temporary custody order remain in effect pending further orders of the court. On 8 March 1991, defendant filed notice of appeal from the 14 January 1991 Order and the 13 July 1990 Order on 8 March 1991. We dismiss the appeals.

[1] Defendant's appeals from the 13 July 1990 Order and the portion of the 14 January 1991 Order continuing in effect the 13 July 1990 Order must be dismissed as interlocutory. A temporary child custody order is interlocutory and "does not affect any substantial right . . . which cannot be protected by timely appeal from the trial court's ultimate disposition of the entire controversy on the merits." *Dunlap v. Dunlap*, 81 N.C. App. 675, 676, 344 S.E.2d 806, 807 (1986). We note also that defendant's appeal from the 13 July 1990 Order is subject to dismissal for defendant's failure to timely file notice of appeal as required by N.C.R. App. P. 3(c).

[2] Defendant's appeal from the denial of her motion to dismiss for lack of personal jurisdiction is also premature. Specifically, defendant argues that she was not served with process as required by Rule 4 and the action was discontinued pursuant to Rule 4(e) because there was no endorsement to the original summons and no issuance of alias and pluries summons within 90 days. N.C. Gen. Stat. § 1A-1, Rule 41(b) (1990) provides in pertinent part: "For failure of the plaintiff to prosecute or to comply with these rules or any order of court, a defendant may move for dismissal of an action or of any claim therein against him." The denial of defendant's motion to dismiss pursuant to Rule 41(b) for failure to comply with the rules and failure to prosecute is not a final determination of the action. *See Cox v. Cox*, 246 N.C. 528, 98 S.E.2d 879 (1957). N.C. Gen. Stat. § 1-277(b) (1983) provides that "[a]ny interested party shall have the right of immediate appeal from an adverse ruling as to the jurisdiction of the court over the person or property of the defendant . . ." In *Love v. Moore*, 305 N.C. 575, 581, 291 S.E.2d 141, 146 (1982), the North Carolina Supreme Court held that "the right of immediate appeal of an



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[106 N.C. App. 701 (1992)]

adverse ruling as to jurisdiction over the person, under [N.C. Gen. Stat. § 1-277(b)], is limited to rulings on 'minimum contacts' questions, the subject matter of Rule 12(b)(2)." The Court reasoned that

[a]llowing an immediate appeal only for "minimum contacts" jurisdictional questions precludes premature appeals to the appellate courts about issues of technical defects which can be fully and adequately considered on an appeal from final judgment, while ensuring that parties who have less than "minimum contacts" with this state will never be forced to trial against their wishes.

*Id.* Although *Love* specifically addresses a motion to dismiss under N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) for lack of jurisdiction over the person, the principle is equally applicable to a motion pursuant to Rule 41(b) challenging personal jurisdiction for failure to comply with the procedures set forth in Rule 4. Therefore, we find defendant's appeal from the motion to dismiss for failure to comply with Rule 4 does not fall within the provisions of § 1-277(b) allowing immediate appeal of interlocutory orders.

[3] We further find that defendant's related, but distinct, claim that the action should be dismissed pursuant to Rule 41(b) for failure to prosecute must be dismissed as interlocutory. Defendant's failure to prosecute argument does not go directly to the issue of whether the court had personal jurisdiction, but rather whether the plaintiff's non-compliance with the rules requiring the service of summons and the issuance of alias and pluries summons within certain time periods constituted failure to prosecute the action. Since the failure to prosecute claim is distinct from the lack of jurisdiction claim, N.C. Gen. Stat. § 1-277(b) does not operate to allow immediate review of the interlocutory ruling.

Defendant's motion to vacate the 13 July 1990 Order is essentially a restatement of her motion to dismiss and is likewise interlocutory. Defendant challenges the factual basis for the issuance of the temporary custody order and the sufficiency of the service of process. As discussed above, defendant may not immediately appeal on these grounds.

Dismissed.

Judges PARKER and GREENE concur.

## STATE v. YELLOCK

[106 N.C. App. 704 (1992)]

STATE OF NORTH CAROLINA v. TIMOTHY DION YELLOCK, DEFENDANT/  
APPELLANT

No. 9115SC273

(Filed 7 July 1992)

APPEAL by defendant from Judgments entered 8 August 1990 by *Judge J. B. Allen, Jr.*, in ALAMANCE County Superior Court. Heard in the Court of Appeals 9 January 1992.

*Attorney General Lacy H. Thornburg, by Associate Attorney General W. W. Finlator, Jr., for the State.*

*Douglas R. Hoy for defendant appellant.*

COZORT, Judge.

Defendant Timothy Dion Yellock was convicted of first-degree rape and first-degree kidnapping. The court entered judgments sentencing defendant to concurrent terms of life imprisonment for first-degree rape and 12 years for first-degree kidnapping. Defendant appealed and alleged the following: (1) the trial court erred in continuing the jury selection process to fill one remaining jury seat when the sheriff was able to serve only four jury subpoenas of the 50 additional names randomly drawn; (2) the trial court erred in permitting the State to use its peremptory challenges to excuse black jurors; (3) the trial court committed prejudicial error in finding two jurors had not discussed the case and in permitting them to serve as jurors; (4) the trial court erred in admitting into evidence a timecard of the victim's ex-boyfriend; and (5) the trial court erred in refusing to dismiss the first-degree rape and first-degree kidnapping charges for insufficiency of the evidence.

The facts of this case and evidence presented at trial are explained fully in *State v. Mebane* and *State v. Wright*, No. 9115SC288 (filed this same date). In the *Mebane* and *Wright* opinion, we addressed the identical issues defendant Yellock raises in this appeal. We found no prejudicial error as to *Mebane* and *Wright* in that case, and we apply the same reasoning to the issues in the present case. Therefore, for the reasons stated in *State v. Mebane*, No. 9115SC288, (filed this date), we find

No error.

Judges EAGLES and ORR concur.

CASES REPORTED WITHOUT PUBLISHED OPINION  
FILED 7 JULY 1992

ABLE OUTDOOR, INC. v. HARRELSON No. 9110SC712	Wake (90CVS07308)	Dismissed
CLAIRE'S NATURAL COSMETICS, INC. v. J. RICHARD HILL MANAGEMENT CO. No. 9118SC644	Guilford (90CVS297)	Affirmed
ENSLEY v. WHITNEY No. 912SC1061	Beaufort (89CVS183)	Affirmed
ESTATE OF COLSTON v. WESTERN-SOUTHERN LIFE ASSURANCE CO. No. 9120SC326	Union (90CVS0651)	Dismissed
GOOLSBY v. NEWKIEK No. 919DC1073	Vance (89CVD377)	Reversed and Remanded
GRAY v. FEDERAL KEMPER LIFE ASSURANCE CO. No. 913SC1114	Craven (91CVS772)	Affirmed
HANLIN v. DUNN No. 9118SC624	Guilford (90CVS9839)	Affirmed
HELMS v. HOLLENBECK No. 9126SC1077	Mecklenburg (89CVS3614)	Dismissed
HICKS v. GILLESPIE No. 9117SC1126	Surry (90CVS247)	Affirmed
HUANG v. HUMENICK No. 9010SC1208	Wake (89CVS7076)	Affirmed
JOHNSON v. STANDARD SUNCO, INC. No. 9110IC711	Ind. Comm. (033019)	Reversed and Remanded
KOHN v. MUG-A-BUG No. 9114SC588	Durham (89CVS1720)	No Error
LENZER v. FLAHERTY No. 8914SC1154	Durham (87CVS1390)	Dismissed
MARTIN v. SHERRILL No. 9225SC43	Catawba (90CVS553)	Vacated
REVELS v. THOMAS No. 9220SC1	Moore (89CVS522)	Affirmed

SEARLES v. SEARLES No. 9129DC395	Transylvania (88CVD152)	Reversed and Remanded
SNOTHERLY v. COUNTY OF GUILFORD No. 9118SC539	Guilford (89CVS5720)	Affirmed
STALLINGS v. STALLINGS No. 9111DC1112	Johnston (89CVD1314)	Affirmed
STATE v. BAILEY No. 9126SC1177	Mecklenburg (91CRS11574) (91CRS11575) (91CRS29382)	No Error
STATE v. BIGGS No. 911SC1124	Chowan (91CRS25)	No Error
STATE v. BRANCH No. 918SC1203	Lenoir (91CRS1873) (91CRS4040)	No Error
STATE v. BROOKS No. 9119SC1093	Randolph (90CRS14721) (90CRS14722)	No Error
STATE v. FLEMING No. 9122SC1148	Davidson (90CRS1948)	Affirmed
STATE v. HARVEY No. 9118SC1099	Guilford (90CRS16052) (91CRS3476)	Affirmed
STATE v. HEATH No. 9113SC1113	Bladen (91CRS3211)	Affirmed
STATE v. HORTON No. 9227SC164	Cleveland (91CRS2316)	No Error
STATE v. MALONE No. 9117SC1033	Stokes (89CRS3436)	No Error
STATE v. OXNER No. 9120SC1168	Union (90CRS6692) (90CRS6693)	No Error
STATE v. PARKS No. 9122SC1115	Iredell (90CRS15929) (90CRS15930)	No Error
STATE v. PHIPPS No. 914SC640	Duplin (90CRS3728) (90CRS3729) (90CRS3730)	No Error

STATE v. ROGERS No. 925SC103	New Hanover (91CRS3618) (91CRS3619) (91CRS3620) (91CRS3621) et al.	Affirmed
STATE v. SCALES No. 9118SC412	Guilford (90CRS38939)	No Error
STATE v. SOLOMON No. 9221SC93	Forsyth (90CRS50634)	Affirmed
STATE v. STINSON No. 9227SC173	Gaston (91CRS012488) (91CRS012489) (91CRS012490) (91CRS013084)	Affirmed
STATE v. TABORN No. 9114SC1183	Durham (90CRS22723)	No Error
STATE v. TOWNSEND No. 9111SC1311	Harnett (90CRS12601)	No Error
STATE v. TYSON No. 9112SC1108	Cumberland (89CRS5564)	No Error
STATE v. YELVERTON No. 9110SC1145	Wake (89CRS83784) (89CRS83785) (89CRS83787)	No Error
STOUT v. HOLLERS No. 9119SC463	Montgomery (89CVS565)	Affirmed
YOUNGER v. KIMBER No. 9115SC671	Alamance (89CVS479)	Affirmed



# **ANALYTICAL INDEX**



# **WORD AND PHRASE INDEX**





# ANALYTICAL INDEX

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**ABANDONED, LOST, AND ESCHEATED PROPERTY****§ 15 (NCI4th). Property held in the ordinary course of business**

Layaway payments made by retail customers who failed to complete the purchases but who did not request a refund of their payments became abandoned property subject to escheat to the State after they had been held by the retailer for more than five years. *Rose's Stores, Inc. v. Boyles*, 263.

**APPEAL AND ERROR****§ 99 (NCI4th). Appealability of order denying motion to amend pleadings**

The denial of a motion to amend pleadings did not affect a substantial right and was interlocutory but the appeal was treated as a motion for certiorari and allowed. *Hoots v. Pryor*, 397.

**§ 107 (NCI4th). Appealability of orders relating to child custody; paternity**

An appeal from a contempt order was not interlocutory where defendant refused to take blood tests to establish paternity in a nonsupport action. *State v. Mauney*, 26.

A temporary child custody order is interlocutory and not immediately appealable. *Berkman v. Berkman*, 701.

**§ 111 (NCI4th). Appealability of orders denying motion to dismiss generally**

The denial of a Rule 12(b)(6) motion to dismiss for failure to state a claim is interlocutory and not immediately appealable. *Perkins v. CCH Computax, Inc.*, 210.

**§ 113 (NCI4th). Appealability orders denying motion to dismiss based on process and service**

The denial of a motion to dismiss challenging personal jurisdiction for failure to comply with the procedures set forth in Rule 4 is not immediately appealable. *Berkman v. Berkman*, 701.

The denial of defendant's motion to dismiss on the ground that plaintiff's alleged noncompliance with rules pertaining to service of summons and the issuance of an alias and pluries summons constituted a failure to prosecute was not immediately appealable. *Ibid.*

**§ 114 (NCI4th). Appealability of motions based on failure to state claim; failure to join necessary party**

An appeal from an order granting 12(b)(6) dismissals was interlocutory because it did not dispose of a claim against a third defendant, but was reviewable under the substantial right exception due to the possibility of inconsistent verdicts. *Hoots v. Pryor*, 397.

**§ 124 (NCI4th). Appealability of arbitration orders**

The trial court's preliminary order enjoining arbitration is a nonappealable interlocutory order where the court has not yet summarily determined the issue of whether the parties have entered into an enforceable contract providing for arbitration. *Lee County Bd. of Education v. Adams Electrical, Inc.*, 139.

**§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion**

It is not sufficient to simply file a pretrial motion in limine to exclude evidence which the trial judge has not heard; the movant must make at least a general objection when the evidence is offered at trial. *Beaver v. Hampton*, 172.

**APPEAL AND ERROR — Continued****§ 175 (NCI4th). Mootness of other particular questions**

An appeal was not moot in a declaratory judgment action arising from a motor home accident where the controversy with the injured party had been settled but plaintiff insurer could still have a claim based on equitable subrogation. *N.C. Farm Bureau Mut. Ins. Co. v. Ayazi*, 475.

**§ 203 (NCI4th). Generally; notice of appeal**

Service of notice of appeal was sufficient where the insurance carrier contended that its counsel did not represent the named defendants at trial and that any notice given to the counsel was not sufficient to serve defendants. *Beaver v. Hampton*, 172.

**§ 411 (NCI4th). Presumptions on matters omitted from record; miscellaneous matters**

The appellate court is precluded from addressing alleged error in the prosecutor's closing argument where defendant failed to provide a transcript of the argument in question. *State v. Ussery*, 371.

**§ 418 (NCI4th). Assignments of error omitted from brief; abandonment**

An argument concerning interpretation of a child support order was deemed abandoned where the appellate court could find no error in the trial court's interpretation and plaintiff did not cite authority leading to a contrary finding. *McDonald v. Taylor*, 18.

An issue not argued in the brief is deemed abandoned. *Perkins v. CCH Computax, Inc.*, 210.

Claims which were not argued in plaintiff's brief were abandoned. *Howell v. Town of Carolina Beach*, 410.

**§ 510 (NCI4th). Frivolous appeals in appellate division**

Respondents' appeal is frivolous where they have again raised the jurisdiction issue which repeatedly has been rejected by the Court of Appeals, and respondents are directed to show cause as to why this appeal should not be dismissed and why they should not be taxed for all reasonable expenses and costs. *Lowder v. Lowder*, 145.

**ATTORNEYS AT LAW****§ 39 (NCI4th). Withdrawal from case; requirement of timely notice; avoidance of continuance of case**

Defendant was not prejudiced by the trial court's decision permitting defendant's co-counsel to withdraw without prior notice to defendant on the second day of the trial where defendant's lead counsel remained in the case. *Snover v. Grabenstein*, 453.

The trial court did not err in denying defendant's motion for a continuance when defendant's co-counsel was permitted to withdraw without notice to defendant on the second day of the trial. *Ibid.*

**AUTOMOBILES AND OTHER VEHICLES****§ 134 (NCI3d). Driving without consent of owner; unlawful taking**

The evidence was sufficient to support defendant's conviction of unauthorized use of a vehicle where the owner gave defendant permission to drive the car for limited purposes and defendant never returned the car. *State v. Quick*, 548.

**BASTARDS****§ 5.1 (NCI3d). Blood tests**

The trial court had no authority to enter an order in an action for divorce from bed and board and child custody requiring plaintiff to submit to a blood grouping test to establish his paternity of the child where the pleadings clearly show that there is no issue as to paternity. *Harwell v. Harwell*, 389.

**BROKERS AND FACTORS****§ 26 (NCI4th). Entitlement to commission upon procuring prospective purchaser**

Defendant, a licensed real estate broker, was entitled to a commission based on a "letter of registration" signed by plaintiff's general manager in which plaintiff agreed to pay defendant a commission of 4% of the gross rental in the event that a lease was signed between a named prospect and plaintiff where the evidence showed that the prospect subsequently entered into a lease with plaintiff. *Koger Properties, Inc. v. Lowe*, 387.

**BURGLARY AND UNLAWFUL BREAKINGS****§ 68 (NCI4th). Sufficiency of evidence of breaking**

The State's evidence of a breaking by entering through a previously closed window was sufficient to support defendant's conviction of first degree burglary. *State v. Shaw*, 433.

**§ 119 (NCI4th). Breaking and entering and larceny of business premises**

The evidence was sufficient for submission to the jury on charges of breaking or entering of a store, larceny of merchandise therefrom, and possession of stolen property. *State v. Quick*, 548.

**§ 141 (NCI4th). Presumption from possession of recently stolen property**

The trial court's instruction on the doctrine of possession of recently stolen property was supported by evidence that price tags which had been attached to clothing stolen during a store break-in were found within two days after the crimes in a car defendant had borrowed and failed to return. *State v. Quick*, 548.

**§ 165 (NCI4th). Misdemeanor breaking or entering as lesser included offense of first degree burglary; instruction not required**

The trial court in a first degree burglary prosecution properly refused to instruct the jury on the lesser included offense of misdemeanor breaking or entering. *State v. Shaw*, 433.

**CONSPIRACY****§ 12 (NCI4th). Sufficiency of evidence as to specific civil conspiracies**

Summary judgment was properly granted for an auctioneer in a civil conspiracy action arising from the sale of an entire tract of land, rather than an auction of lots, where soliciting and receiving bids for the entire tract may have been beyond the scope of the auctioneer's contractual authority and to his personal benefit but did not show an overt act necessary to prove participation in a conspiracy. *Colvard v. Francis*, 277.

The trial court did not err by granting summary judgment for a banker in a civil conspiracy action arising from the sale of land where the evidence asserted

**CONSPIRACY – Continued**

against the banker concerned his professional and social position and there was no overt act which evidences a conspiracy. *Ibid.*

The trial court erred in granting summary judgment for defendant State employees individually on plaintiff's claim for civil conspiracy to discharge plaintiff as a physician's assistant at an alcohol rehabilitation center for exercising her free speech rights in reporting possible patient abuse. *Lenzer v. Flaherty*, 496.

**§ 44 (NCI4th). Conviction and sentencing generally**

Defendant could properly be convicted only for a single conspiracy to commit a series of armed robberies, and three of the four conspiracy convictions against defendant must be vacated and the case remanded for entry of a single judgment on one count of conspiracy. *State v. Wilson*, 342.

**CONSTITUTIONAL LAW****§ 86 (NCI4th). State and federal aspects of discrimination**

The trial court erred in dismissing plaintiff's 42 U.S.C. § 1983 claim against the Secretary of DHR in his official capacity seeking reinstatement to her job since State officials acting in their official capacities are "persons" reachable under § 1983 when sued for prospective equitable relief. *Lenzer v. Flaherty*, 496.

The trial court properly dismissed plaintiff's § 1983 claims for monetary damages against State officials in their official capacities since they are not "persons" covered by § 1983 when the remedy sought is monetary damages. *Ibid.*

**§ 105 (NCI4th). Property rights or interests protected by due process**

Summary judgment was improperly granted for defendants on plaintiff's due process claim arising from the termination of his employment where a personnel manual was also a town ordinance. *Howell v. Town of Carolina Beach*, 410.

**§ 115 (NCI4th). Right of free speech and press generally**

Summary judgment was improperly granted for defendants in an action in which plaintiff alleged that he was terminated as a police officer because he wrote a memo documenting the poor condition of the police department's firearms and because he campaigned against the mayor and a councilwoman. *Howell v. Town of Carolina Beach*, 410.

The trial court erred in entering summary judgment for defendant State employees in their individual capacities in plaintiff's 42 U.S.C. § 1983 action for violation of her federal free speech rights where plaintiff was discharged as a physician's assistant at an alcohol rehabilitation center after she questioned the vigor of investigations into possible mistreatment of patients at the center. *Lenzer v. Flaherty*, 496.

A plaintiff has no direct claim under the N.C. Constitution against State agents sued in their individual capacities for alleged violations of free speech rights. *Ibid.*

The trial court erred in holding that plaintiff's claims against State officials in their official capacities for violation of her free speech rights protected by the N.C. Constitution were barred by sovereign immunity. *Ibid.*

**§ 180 (NCI4th). Former jeopardy; miscellaneous charges**

Where defendant was acquitted in his first trial for second degree kidnapping of a boy, and the jury was unable to agree on charges of first degree kidnapping

**CONSTITUTIONAL LAW — Continued**

of a girl arising from the same incident, attempted rape of the girl, and taking indecent liberties with the girl, defendant cannot complain that double jeopardy and collateral estoppel prohibited his retrial on the charge of kidnapping the girl where defendant was acquitted of that charge in his second trial, and neither double jeopardy nor collateral estoppel prohibited defendant's retrial on the attempted rape and indecent liberties charges. *State v. Davis*, 596.

**§ 200 (NCI4th). Former jeopardy; kidnapping and rape**

There was no double jeopardy violation in a rape and murder prosecution where defendants failed to object on double jeopardy grounds to the trial court's acceptance of the verdicts and did not make a motion to arrest judgment on either conviction and the record reflects a series of sexual assaults by defendants upon the victim. *State v. Mebane*, 516.

**§ 248 (NCI4th). Discovery; production of witnesses' statements or reports**

The trial court did not err by denying defendants' motion for appropriate relief where they had made a general request for exculpatory evidence, the prosecution failed to disclose certain evidence until the fourth trial, and the material was not so material that there was a reasonable possibility that the result of the trial would have been different had it been disclosed. *State v. Pakulski*, 444.

**§ 255 (NCI4th). Right to fair and public trial; law enforcement officers' investigation**

A defendant in a driving while impaired prosecution was not denied his state or federal due process rights by the State's failure to take and preserve an additional breath sample for independent testing by defendant or to produce the control and test ampules for defendant's examination. *State v. Jones*, 214.

**§ 361 (NCI4th). Nontestimonial disclosures by defendant; blood tests**

Neither an order directing defendant to submit to blood tests in a prosecution for willful refusal to support an illegitimate child nor G.S. 8-50.1 violates defendant's constitutional rights to due process and to be free from unreasonable searches and seizures of his person. *State v. Mauney*, 26.

**§ 374 (NCI4th). Cruel and unusual punishment; life imprisonment generally**

A sentence of life imprisonment imposed on defendant for first degree sexual offense does not constitute cruel and unusual punishment. *State v. Parker*, 484.

**CONTEMPT OF COURT****§ 25 (NCI4th). Generally; sufficiency of notice**

The trial court had jurisdiction to hold defendant in civil contempt for his refusal to submit to blood tests in a prosecution for willful failure to support his illegitimate child where defendant had at least constructive notice of the order. *State v. Mauney*, 26.

**§ 39 (NCI4th). Generally; right to appeal**

The State's motion to dismiss defendant's appeal was denied where defendant was charged with willfully neglecting or refusing to provide adequate support or maintenance for his illegitimate child, refused to submit to blood tests as ordered, was found to be in "Indirect Civil Contempt," and appealed to the Court of Appeals. *State v. Mauney*, 26.

**CONTRACTORS****§ 42 (NCI4th). Payments to subcontractors generally**

In an action arising from a change in roofing materials for which the contractor refused to pay the subcontractor, the trial court's instruction on the subcontractor's contributory negligence failed to adequately set forth the relevant standard of care and there was prejudicial error in not instructing the jury on contract and quantum meruit. *Shields v. Metric Constructors, Inc.*, 365.

**CONTRACTS****§ 11 (NCI3d). Contracts affecting municipal corporations or public funds**

The language of G.S. 143-128(b) concerning the lowest responsible bidder or bidders is construed to be an abbreviated reference to the general award standard set out in G.S. 143-129, and the evidence supported the trial court's finding that the letting of a municipal contract to build a pumping station to the second lowest bidder was not an abuse of discretion. *Kinsey Contracting Co. v. City of Fayetteville*, 283.

**§ 116 (NCI4th). Third-party beneficiaries in general**

The trial court correctly granted a 12(b)(6) dismissal for the landowner and gas company where a plaintiff injured while riding in a four wheel drive vehicle on a gas pipeline easement alleged that he was a third party beneficiary of the contract granting the gas company the easement. *Hoots v. Pryor*, 397.

**CORPORATIONS****§ 5 (NCI4th). Application of alter ego or instrumentality doctrine**

A corporate agent obtaining something of value for the corporation by false pretense is not required to own stock in the corporation in order to be subject to prosecution along with the corporation for false pretense. *State v. Lang*, 695.

**§ 113 (NCI4th). Availability of shareholders' names in advance of meetings**

Where the record reveals that defendant corporation has not obtained a nonobjecting beneficial owners list, defendant has an obligation to disclose to plaintiff shareholder only the names of nonobjecting beneficial owners who have filed nominee certificates with the defendant. *Parsons v. Jefferson-Pilot Corp.*, 307.

**§ 151 (NCI4th). Actions to inspect corporate books and records generally**

Plaintiff, a shareholder of a public corporation, had no right under G.S. 55-16-02(b)(2) or the common law to inspect the accounting records of the corporation. *Parsons v. Jefferson-Pilot Corp.*, 307.

Plaintiff shareholder was entitled under G.S. 55-16-02(a) and (e)(4) to inspect the minutes of all shareholders' meetings for the three years preceding her demand and the records of all shareholder actions taken without meetings for the three years preceding her demand without meeting the requirements of G.S. 55-16-02(c). *Ibid.*

Plaintiff shareholder stated a proper purpose for demanding to inspect corporate records within the purview of G.S. 55-16-02(c)(1) where she stated that her purpose was to determine possible mismanagement of the corporation or improper use of corporate property. *Ibid.*

Plaintiff shareholder described her purpose for seeking to inspect corporate records with reasonable particularity where she stated that her purpose was to



**CORPORATIONS – Continued**

determine possible mismanagement of the corporation or improper use of corporate property, and she described the records with reasonable particularity where she designated all records of any final action taken by the board of directors or by a committee of the board of directors, the minutes of any meeting of the shareholders, and the records of action taken by the shareholders without a meeting. *Ibid.*

Where it appears that many corporate records sought to be inspected by plaintiff shareholder have no connection to plaintiff's proper purpose of determining mismanagement and improper use of corporate property, plaintiff's action to compel disclosure of the records is remanded to the trial court for an in camera examination of the desired records to determine which records are directly connected with plaintiff's purpose. *Ibid.*

**COSTS****§ 36 (NCI4th). Nonjusticiable cases**

The trial court had jurisdiction to enter an order requiring payment of attorney fees under G.S. 6-21.5 where the motion seeking payment was filed more than a year after summary judgment and more than a month after the judgment was affirmed on appeal. *Brooks v. Giesey*, 586.

The trial court did not err by ordering plaintiffs to pay attorney fees under G.S. 6-21.5 where summary judgment for defendants had been affirmed on appeal with the comment that the facts presented by plaintiffs did not give rise to an enforceable claim under any theory known to law and the trial court subsequently concluded that plaintiffs had presented no justiciable issue of fact or law. *Ibid.*

**COURTS****§ 74 (NCI4th). Superior court jurisdiction to review rulings of another superior court judge generally**

The trial court erred by granting summary judgment for defendant in a divorce action on the issue of whether G.S. 50-5.1 provided the exclusive remedy for plaintiff where another judge, in ruling on defendant's motion to dismiss, had held that the statute did not apply. *Madry v. Madry*, 34.

**CRIMINAL LAW****§ 109.1 (NCI4th). Information subject to disclosure by defendant; other matters**

The trial court did not err in requiring defendant to furnish a list of his potential witnesses to the State prior to voir dire. *State v. Ussery*, 371.

**§ 261 (NCI4th). Continuance; insufficient time to prepare defense generally**

The trial court did not abuse its discretion in a prosecution for kidnapping two deputies and possession of a stolen firearm by denying defense counsel's motion for a continuance on the ground that he had not had sufficient time to prepare and defendant's motion for a continuance after he discharged his attorney and elected to represent himself. *State v. Bunch*, 128.

**§ 367 (NCI4th). Expression of opinion during trial; test for prejudice**

There was no prejudicial error in a trespassing prosecution arising from an abortion protest in which defendants appeared pro se where the trial court actively participated in the State's case, including cross-examination of one defendant. *State v. Taylor*, 534.

## CRIMINAL LAW — Continued

**§ 375 (NCI4th). Conduct and duties of judge; miscellaneous comments and actions during trial**

There was no prejudicial error in a trespassing trial arising from an abortion protest where defendants insisted on appearing pro se and the court's comment that he did not want anyone to feel railroaded did not constitute an impermissible expression of opinion, and the court's questions about honest belief and his admonition to tell the truth were not prejudicial. *State v. Taylor*, 534.

**§ 385 (NCI4th). Instructions and admonitions to witnesses to be truthful**

There was no prejudicial error in a trespassing prosecution arising from an abortion protest where the trial court admonished a defendant outside the presence of the jury to tell the truth and nothing but the truth just before his direct examination began. *State v. Taylor*, 534.

**§ 481 (NCI4th). Communications between jurors**

The trial court did not abuse its discretion in a rape and kidnapping prosecution by finding that two jurors had not discussed the case and by permitting them to serve as jurors. *State v. Mebane*, 516.

**§ 491 (NCI4th). Permitting the jury to view scene or evidence out of court generally**

The trial court did not err in a rape and kidnapping prosecution by denying a motion for a jury view of the scene. *State v. Mebane*, 516.

**§ 903 (NCI4th). Unanimity of verdict**

Defendant was not denied his right to a unanimous verdict by the trial court's initial refusal to read the transcript of the victim's testimony to the jury after the foreman reported during deliberations that some jurors stated that they had difficulty understanding the victim's testimony. *State v. Parker*, 484.

**§ 912 (NCI4th). Polling the jury**

The trial court did not err in a robbery prosecution by denying defendant's request to poll the jury to determine the evidence on which the defendant was found guilty. *State v. Hedgecoe*, 157.

**§ 951 (NCI4th). Motion for post-trial relief; hearing generally**

The trial court did not err in denying defendant's motion for a new trial without a hearing where only a question of law was presented as to whether the court had properly excluded certain evidence. *State v. Holden*, 244.

**§ 1095 (NCI4th). Proof of aggravating factors; mere assertion by prosecutor**

The trial court did not err in finding the aggravating factor of a prior conviction based upon the prosecutor's oral recitation of defendant's record where defendant argued that a new sentence should be concurrent with his earlier sentence. *State v. Quick*, 548.

**§ 1118 (NCI4th). Nonstatutory aggravating factors; community hazards**

Although the trial court did not formally find as a nonstatutory aggravating factor for burglary and kidnapping that the victim, like any other citizen, is entitled to peace of mind and body in her home, defendant is entitled to a new sentencing hearing where the trial judge's comments indicate that he improperly considered this factor in imposing sentences greater than the presumptive terms. *State v. Shaw*, 433.

## CRIMINAL LAW — Continued

**§ 1680 (NCI4th). Modification and correction of judgment or sentence by court in term**

The trial court did not err by modifying defendant's sentence imposed during the same term to provide that it would run consecutively to a sentence then being served. *State v. Quick*, 548.

**§ 1684 (NCI4th). Resentence after appeal or collateral attack generally**

The trial court did not violate G.S. 15A-1335 by imposing life sentences for armed robbery to run consecutively with all previously imposed sentences where the trial court was for the first time imposing life sentences after the armed robbery convictions had been upheld and felony murder convictions set aside. *State v. Pakulski*, 444.

## DAMAGES

**§ 21 (NCI4th). Mental and emotional anguish and suffering**

Plaintiff need not be in close proximity to the negligent act in order to recover for negligent infliction of emotional distress. *Gardner v. Gardner*, 635.

## DECLARATORY JUDGMENT ACTIONS

**§ 7 (NCI4th). Requirement of actual justiciable controversy**

The trial court properly granted summary judgment for defendants on plaintiffs' action for declaratory relief regarding a criminal investigation of an acupuncturist for practicing medicine without a license where the trial court determined that there was no controversy appropriate for a declaratory judgment. *Majebe v. North Carolina Board of Medical Examiners*, 253.

## DEEDS

**§ 25 (NCI4th). Acknowledgment in deeds affecting married person's title**

The trial court erred by concluding that statutes were unconstitutional in an action to set aside a 1962 deed from a husband and wife by entireties to the husband alone which did not contain the certification then required by statute. *Dunn v. Pate*, 56.

**§ 51 (NCI4th). Other specific reservations or exceptions**

The trial court correctly concluded that conveyances to defendants pursuant to a reservation were ineffective where the reservation/exception allowed life tenants to convey "certain lots which may from time to time be designated by them." *Amerson v. Lancaster*, 51.

**§ 67 (NCI4th). Restrictive covenants in subdivisions generally**

The trial court erred by determining as a matter of law that a restrictive covenant provision requiring property owners to submit written construction plans for approval by the Architectural Control Committee was arbitrary and capricious and therefore invalid. *Christopher Properties, Inc. v. Postell*, 180.

**§ 77 (NCI4th). Enforcement of restrictive covenants generally**

There was a genuine issue of material fact in an action to enforce residential restrictive covenants against defendants' above ground pool and deck. *Christopher Properties, Inc. v. Postell*, 180.

**DISCOVERY AND DEPOSITIONS****§ 54 (NCI4th). Fees and expenses to prove unadmitted document of fact**

The trial court did not abuse its discretion by awarding attorney fees for failure to admit matters later proven where plaintiffs contended that they had not conducted discovery at the time they were required to admit or deny. *Brooks v. Giesey*, 586.

**DIVORCE AND SEPARATION****§ 68 (NCI4th). Institutional confinement; proof of incurable insanity**

The trial court did not err in a divorce action by finding and concluding that defendant was not incurably insane where the evidence clearly demonstrated defendant's incurable mental illness. *Scott v. Scott*, 606.

**§ 125 (NCI4th). Equitable distribution; property acquired in exchange for separate property**

The trial court erred in an equitable distribution action by classifying gold coins as marital property where the coins were acquired in exchange for separate property and no contrary intention was expressed in the conveyance. *Haywood v. Haywood*, 91.

**§ 136 (NCI4th). Equitable distribution; measure of value**

The trial court did not err in an equitable distribution action by finding the value of the marital home at the date of distribution where there was evidence to support the finding and it was not argued that the court distributed the home on that basis. *Haywood v. Haywood*, 91.

**§ 148 (NCI4th). Equitable distribution; postseparation payments on marital debts**

The trial court must consider post separation mortgage payments as a distributional factor as opposed to giving defendant a credit for those payments. *Haywood v. Haywood*, 91.

**§ 152 (NCI4th). Equitable distribution; contributions to spouse's education or career**

The trial court erred by failing to make the required finding regarding defendant's master's degree in economics and business. *Haywood v. Haywood*, 91.

**§ 158 (NCI4th). Equitable distribution; other distribution factors**

The trial court erred in an equitable distribution action by failing to make findings regarding plaintiff's personal debts and medical problems. *Haywood v. Haywood*, 91.

**§ 168 (NCI4th). Equitable distribution; pension, retirement, or deferred compensation benefits; determination of award**

The trial court did not err in an equitable distribution action involving pension benefits by failing to limit defendant's share of plaintiff's retirement benefit to 50%, by awarding defendant joint and survivor benefits and pre-retirement benefits, or by excluding the separation agreement. *Workman v. Workman*, 562.

**§ 176 (NCI4th). Equitable distribution; necessity for written findings of fact**

The trial court erred in an equitable distribution action by failing to make the required finding demonstrating that the court considered evidence rebutting the presumption of a gift to the marital estate. *Haywood v. Haywood*, 91.

## DIVORCE AND SEPARATION — Continued

**§ 188 (NCI4th). Effect of divorce decree; care and maintenance of insane spouse**

The trial court did not err by dismissing plaintiff's complaint for lifetime support where plaintiff asserted that she is incurably insane due to severe brain damage and that she is entitled to permanent support from defendant, but did not include a claim for divorce. *Melton v. Madry*, 83.

**§ 385 (NCI4th). Child support in general**

The trial court did not abuse its discretion by denying a continuance in a child support action where plaintiff had not filed a financial affidavit. *McDonald v. Taylor*, 18.

**§ 395 (NCI4th). Child's needs generally**

A consent order requiring each party to pay one half of a child's medical expenses included expenses for psychological services, even though psychologists cannot practice medicine. *McDonald v. Taylor*, 18.

**§ 402 (NCI4th). Parents' ability to support child; sufficiency of findings**

The trial court erred by imputing income to plaintiff in a child support action; the Child Support Guidelines do not alter the trial court's duty to make specific findings of fact as to the parties' income, estates, present reasonable expenses, and ability to pay. *McDonald v. Taylor*, 18.

## EMINENT DOMAIN

**§ 20 (NCI4th). Discretion of condemning agency in choosing route or site**

There was no abuse of discretion in the taking of property by a municipality to realign an intersection where three members of the city council were employed by financial institutions in direct competition with defendant. *City of Albemarle v. Security Bank and Trust Co.*, 75.

**§ 33 (NCI4th). Amount of land taken**

The trial court did not err by holding that the Department of Transportation had a valid right of way across certain lots where the right of way was obtained in 1955 and not recorded. *Department of Transportation v. Auten*, 489.

**§ 235 (NCI4th). Necessary parties**

The trial court did not err by denying defendant's motion to dismiss for failure to join DOT as a necessary party in an action by a municipality to acquire property to realign two intersections. *City of Albemarle v. Security Bank and Trust Co.*, 75.

**§ 242 (NCI4th). Jury instructions; just compensation**

The trial court in an action to condemn a flight easement properly refused to instruct the jury that further compensable takings may occur upon increases in operations. *City of Statesville v. Cloaninger*, 10.

## ESTOPPEL

**§ 3 (NCI4th). Estoppel against governmental unit**

Since a resolution appropriating ABC revenue to a county board of education was outside the authority of a town council, the town council cannot be estopped from terminating payments in accordance with the resolution without prior notice. *Watauga County Bd. of Education v. Town of Boone*, 270.

**ESTOPPEL — Continued****§ 13 (NCI4th). Equitable estoppel; conduct of party to be estopped generally**

Defendant plastic surgeon was not equitably estopped to rely on the statute of limitations as a defense to plaintiff's malpractice action by his letters to plaintiff indicating that there was no urgency about removing a surgical drain left in plaintiff's body during plastic surgery. *Hensell v. Winslow*, 285.

**EVIDENCE AND WITNESSES****§ 115 (NCI4th). Evidence incriminating persons other than accused; evidence of motive and opportunity**

The trial court did not err in a prosecution for kidnapping and rape by admitting the time card of the victim's former boyfriend for the night of the crime. *State v. Mebane*, 516.

**§ 123 (NCI4th). When evidence of sexual behavior is relevant generally**

Evidence that someone else may have abused the child rape victim in 1986 was irrelevant and not admissible under Rule 412(b)(2) to show that defendant did not abuse her in 1989. *State v. Holden*, 244.

**§ 218 (NCI4th). Subsequent remedial measures**

In an action to recover for injuries received by plaintiff when she fell while exiting an elevator which had allegedly dropped below the level of the hallway, evidence that defendant replaced a worn leveling brush in the elevator following plaintiff's accident was rendered inadmissible by Rule of Evidence 407. *McClain v. Otis Elevator Co.*, 45.

**§ 265 (NCI4th). Testimony as to reputation**

Two police officers were properly permitted to testify about defendant's reputation for truthfulness which was at issue in the trial. *State v. Davis*, 596.

**§ 300 (NCI4th). Remoteness in time of other crimes or acts, generally**

Evidence of defendant's 1975 conviction of armed robbery was sufficiently similar to the crimes charged and not too remote to be admissible in defendant's trial for six 1988 robberies for the purpose of showing modus operandi, motive and identity. *State v. Wilson*, 342.

**§ 397 (NCI4th). Perjury; subornation of perjury**

There was no prejudicial error in a rape and kidnapping prosecution where a State's witness testified that a defendant's father had attempted to bribe her to testify falsely. *State v. Mebane*, 516.

**§ 538 (NCI4th). Evidence relating to burglary, breaking or entering, or larceny**

Merchandise price tags recovered from an automobile defendant borrowed and failed to return were relevant and admissible to prove charges of breaking or entering of a store, larceny and possession of stolen property. *State v. Quick*, 548.

**§ 572 (NCI4th). Facts relating to eminent domain; condemnation and inverse condemnation actions**

In an action to condemn a flight easement over defendants' property for a municipal airport, an exhibit forecasting activity for the airport from 1978 to 2008 by types of aircraft and frequency of use was admissible on the issue of damages suffered by the property owners. *City of Statesville v. Cloaninger*, 10.

## EVIDENCE AND WITNESSES — Continued

**§ 572.1 (NCI4th). Value of condemned property**

The trial court in an action to condemn a flight easement properly permitted two expert witnesses to testify as to the fair market value of the landowners' property before the taking based on a capitalization of income approach. *City of Statesville v. Cloaninger*, 10.

**§ 670 (NCI4th). Objection to specified line of questioning**

The trial court did not improperly limit defense counsel's objections to the prosecutor's cross-examination of a witness where the court granted defendant a continuing objection. *State v. Davis*, 596.

**§ 733 (NCI4th). Statements by indigent defendant**

The admission of defendant's affidavit of indigency in a prosecution for obtaining property by false pretense did not force defendant to choose between his right to counsel and his right against self-incrimination and was admissible under the exception to the hearsay rule for an admission of a party opponent. *State v. Lang*, 695.

**§ 977 (NCI4th). Residual exception to hearsay rule, generally**

A six-year-old rape victim's statements to an officer and a counselor naming the defendant as her abuser possessed circumstantial guarantees of trustworthiness so as to support the trial court's admission of the statements under the Rule 803(24) residual exception to the hearsay rule, and the trial judge's statement in the transcript of the in camera hearing that the child "did not seem to understand the consequences of not telling the truth," standing alone, was insufficient to overcome the circumstantial indicia of reliability properly found by the trial judge in his order. *State v. Holden*, 244.

**§ 980 (NCI4th). Residual exception to hearsay rule; effect of lack of findings concerning requirements of exception**

The trial court erred in admitting statements by two children to a social worker and two day care workers under the residual exception to the hearsay rule without making the findings and conclusions required by *State v. Deanes*, 323 N.C. 508. *In re Gallinato*, 376.

**§ 1113 (NCI4th). Admissions by party opponent generally**

An affidavit of indigency was admissible under the Rule 801(d)(A) exception to the hearsay rule for an admission of a party opponent. *State v. Lang*, 695.

**§ 1239 (NCI4th). Custodial interrogation; statements made during general investigation at defendant's home**

Evidence found in a car defendant had borrowed and failed to return was not rendered inadmissible by a statement made by defendant at his apartment before he was advised of his rights that he would take officers to the missing car since the statement was made by defendant voluntarily and not in response to questions by the officers. *State v. Quick*, 548.

**§ 1724 (NCI4th). Videotapes; what constitutes proper authentication or foundation**

A proper foundation was laid for the admission for illustrative purposes of a videotape of an airplane flying over property condemned for a flight easement. *City of Statesville v. Cloaninger*, 10.

**EVIDENCE AND WITNESSES — Continued****§ 2146 (NCI4th). Opinion testimony by lay persons; description or characterization of occurrence or transaction**

An officer's testimony in a burglary trial that "it appeared just by looking over there there had indeed been a break-in" at the victim's home constituted inadmissible opinion evidence but was harmless error. *State v. Shaw*, 433.

**§ 2171 (NCI4th). Basis for expert's opinion; necessity to disclose facts underlying conclusion**

In an action to recover for injuries received by plaintiff while exiting a hospital elevator which had allegedly dropped below the level of the hallway, cross-examination of defendant's expert witness about entries in the hospital service records concerning prior and subsequent reports of leveling problems in other hospital elevators was not admissible to attack the basis of the witness's opinion that the elevator in question was operating properly on the date of plaintiff's accident and was correctly excluded as irrelevant. *McClain v. Otis Elevator Co.*, 45.

**§ 2185 (NCI4th). Redirect testimony**

In an indecent liberties prosecution in which the court ruled that a social worker's testimony concerning four treatment sessions with the child was inadmissible for failure to comply with discovery, defendant's cross-examination of the witness did not cover new matter so as to permit the witness to state on redirect his opinion derived from these sessions that the child suffered from PTSD. *State v. Quarg*, 106.

**§ 2327 (NCI4th). Post Traumatic Stress Disorder**

The trial court erred in admitting expert opinion testimony that an attempted rape and indecent liberties victim suffers from PTSD without giving an instruction limiting the jury's consideration of this testimony to corroborative purposes. *State v. Davis*, 596.

**§ 2330 (NCI4th). Child abuse; testimony relating to physical examination of the alleged victim**

There was prejudicial error in a prosecution for taking indecent liberties with a child where the child testified that defendant had rubbed her private part on the outside of her clothing and the court admitted expert testimony and illustrative photographs indicating that the victim had been penetrated. *State v. Baker*, 687.

**§ 2333 (NCI4th). Qualification of particular witnesses as experts in child sexual abuse**

A school psychologist was qualified to testify as an expert in a kidnapping, attempted rape and indecent liberties trial. *State v. Davis*, 596.

**§ 2337 (NCI4th). Credibility of child victims**

Even if a school psychologist's testimony concerning notes she had written after sessions with the child victim of attempted rape and indecent liberties constituted inadmissible expert testimony on the credibility of the victim, such testimony was not prejudicial error where the State's case did not hinge upon the victim's credibility. *State v. Davis*, 596.

**§ 2342 (NCI4th). Sexual abuse of children; Post-Traumatic Stress Disorder**

The trial court erred in admitting expert testimony that an indecent liberties victim suffered from PTSD without an instruction that this testimony could be considered only for corroborative purposes. *State v. Quarg*, 106.



## EVIDENCE AND WITNESSES — Continued

**§ 2540 (NCI4th). Competency of children to testify; understanding of duty to tell the truth**

Two children were not incompetent to testify because they were intellectually limited where they stated that they knew the difference between truth and falsehood and swore to tell the truth. *State v. Davis*, 596.

**§ 2542 (NCI4th). Competency of children to testify; age of child**

A ten-year-old child was competent to testify in a parental rights termination proceeding since any inability she may have had to remember the events as they occurred with regard to respondent father went only to the weight of her testimony. *In re Quevedo*, 574.

**§ 2630 (NCI4th). Attorney-client privilege; opinion as to capacity of client**

There was no prejudicial error in a divorce action in which defendant claimed to be incurably insane where the court admitted testimony from two attorneys who had represented defendant in matters other than the divorce. *Scott v. Scott*, 606.

## FALSE PRETENSES, CHEATS, AND RELATED OFFENSES

**§ 18 (NCI4th). Sufficiency of evidence generally**

The evidence in a prosecution for obtaining property by false pretense was sufficient for the jury to find that defendant received value from the victim although the victim's payments were made to a corporation and all stock in the corporation was owned by defendant's wife and children. *State v. Lang*, 695.

**§ 22 (NCI4th). Intent to cheat or defraud**

The evidence was sufficient for the jury to find an intent to defraud by defendant where it tended to show that defendant, who was building a boat for the victim, requested and received from the victim money for engines which defendant never intended to purchase. *State v. Lang*, 695.

## INSURANCE

**§ 2 (NCI3d). Authority of brokers and agents generally**

There was sufficient evidence for the jury to find that a receptionist sitting at the front desk of defendant insurance agency had the authority to bind the agency in a contract to procure homeowners insurance for plaintiff. *Olvera v. Charles Z. Flack Agency*, 193.

The trial court erred by granting summary judgment for plaintiff in an action by plaintiff insurance agent to recover premiums paid by it on behalf of defendant, but did not err by granting summary judgment for plaintiff on defendant's counterclaim for negligent failure to process insurance claims properly. *Watson Insurance Agency, Inc. v. Price Mechanical, Inc.*, 629.

**§ 2.3 (NCI3d). Liability of broker or agent for failure to procure insurance; actions for breach of contract**

Plaintiff's evidence was sufficient for the jury on the issue of defendant insurance agency's breach of contract to procure homeowners insurance for plaintiff and on issues of negligence by defendant agency and contributory negligence by plaintiff. *Olvera v. Charles Z. Flack Agency*, 193.

## INSURANCE — Continued

**§ 69 (NCI3d). Protection against injury by uninsured or underinsured motorists generally**

A person listed as a named driver in an automobile insurance policy but who is not an owner of the policy may stack the underinsured motorist coverage on each of two vehicles when the single policy insures both vehicles. *Bailey v. Nationwide Mutual Ins. Co.*, 225.

The trial court properly allowed intrapolicy stacking of underinsured motorist coverage by a named individual not the owner of the policy. *Davis v. Nationwide Mutual Ins. Co.*, 221.

The trial court erred by allowing interpolicy stacking of commercial fleet UIM coverage onto a private nonfleet UIM policy. *Watson v. American National Fire Insurance Co.*, 629.

**§ 91 (NCI3d). Persons whose injuries are covered or excepted generally; spouse of insured**

Farm Bureau was liable for damages to a passenger injured in a motor home accident where Farm Bureau insured the seller of the motor home, the credit company holding title did not transfer the title certificate even though the buyer took possession of the motor home and assumed the loan payments, and the passenger was injured while the buyer was driving the motor home. *N.C. Farm Bureau Mut. Ins. Co. v. Ayazi*, 475.

**§ 92.1 (NCI3d). Garage liability insurance**

A dealer's garage liability policy provided primary coverage and the driver's family automobile policy provided secondary coverage for an accident involving a loaner car being used while a truck purchased from the dealer was being repaired. *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 465.

**§ 149 (NCI3d). General liability insurance**

A go-cart is not a "motor vehicle" but is a "motorized land conveyance" within the meaning of an exclusionary clause of a homeowners insurance policy, and an exception to this exclusionary clause did not apply where the accident in question occurred on a public street and not on an insured location. *State Automobile Mutual Ins. Co. v. Hoyle*, 199.

The laws of North Carolina govern the construction of a general liability insurance policy where the policy application was not taken in North Carolina but the policy insured an interest in North Carolina. Moreover, punitive damages were included in the general liability coverage for damages because of bodily injury and an exclusion for fines or penalties was not construed to determine whether punitive damages were included. The insurer should have inserted a single provision eliminating punitive damages if it had so intended. *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 357.

## JUDGES

**§ 5 (NCI3d). Disqualification of judges**

There was no merit to defendants' contentions that the trial judge should have recused himself because a defense attorney testified that he had heard the judge say "Why don't you just plead the slimy sons-of-bitches guilty?" *State v. Pakulski*, 444.

**JUDGMENTS****§ 55 (NCI3d). Right to interest**

The trial court erred in an action arising from an automobile collision by not awarding prejudgment interest on the full amount of the judgment from the time of the filing. *Beaver v. Hampton*, 172.

**JURY****§ 2.1 (NCI3d). Grounds for special venire; discretion of trial court in granting motion**

The trial court did not abuse its discretion and there was no plain error of constitutional proportions where it became apparent during jury selection that there might not be enough jurors in the original pool to complete jury selection; the judge ordered the clerk to draw 50 additional names and directed the sheriff to serve as many as possible by 4:00 p.m.; only four of the fifty were served and reported, and all were white males; defendant did not object to the continuing selection of jurors; and the one remaining seat was filled. *State v. Mebane*, 516.

**§ 7.14 (NCI3d). Peremptory challenges; manner, mode and time of exercising challenge**

The trial court correctly found that the State had rebutted any inference of purposeful racial discrimination in its use of peremptory challenges. *State v. Mebane*, 516.

**KIDNAPPING****§ 1.2 (NCI3d). Sufficiency of evidence**

The trial court properly denied defendant's motion to dismiss kidnapping charges where the indictments alleged that the kidnapping was for the purpose of holding the victims hostage and the evidence was sufficient to support a finding that defendant confined or restrained the officers as security for prevention of his arrest. *State v. Bunch*, 128.

The evidence was sufficient to support the trial court's submission of a kidnapping charge to the jury on the theory that defendant's purpose for unlawfully restraining the victim was to facilitate flight after having committed first degree burglary. *State v. Shaw*, 433.

The trial court did not err by denying defendant's motion to dismiss first-degree kidnapping charges in a prosecution for rape and kidnapping. *State v. Mebane*, 516.

**LABORERS' AND MATERIALMEN'S LIENS****§ 8 (NCI3d). Enforcement of lien generally**

The trial court correctly set aside the sale of a stolen and recovered BMW because a special proceeding does not replace the statutory public or private sale requirement. *In re Ernie's Tire Sales & Service v. Riggs*, 460.

**LANDLORD AND TENANT****§ 6.1 (NCI3d). Premises demised; appurtenances and easements**

The trial court partially erred by granting summary judgment for plaintiff on the claim for rent due in an action arising from the lease of land by plaintiff

**LANDLORD AND TENANT — Continued**

for the construction of a billboard, but properly granted summary judgment for plaintiff on the claim for interference with use of his property arising from the presence of the nonconforming sign. *Stepp v. Summey Outdoor Advertising, Inc.*, 621.

**LIMITATION OF ACTIONS****§ 4.1 (NCI3d). Accrual of tort cause of action**

The trial judge properly concluded that the applicable limitation period was three years where the action was not based on an air conditioner being defective, but on the defective unit causing a fire which resulted in damage to the house. *Hanover Insurance Co. v. Amana Refrigeration, Inc.*, 79.

**§ 12 (NCI3d). Commencement of proceedings generally; discontinuance**

An order by the trial judge that plaintiff could recommence its action within one year of the date of the original dismissal for improper service did not have the force of extending the limitations period. *Hanover Insurance Co. v. Amana Refrigeration, Inc.*, 79.

**§ 16 (NCI3d). Mode or manner of raising defense of the statute**

The defendants in a challenge to a zoning ordinance could not raise the statute of limitations by affidavit at the summary judgment hearing. *Frizzelle v. Harnett County*, 234.

**MALICIOUS PROSECUTION****§ 11 (NCI3d). Proof of existence of probable cause generally**

The mere issuing of a check which is returned due to insufficient funds or lack of credit, without more, is not evidence from which the requisite knowledge can be inferred. *Semones v. Southern Bell Telephone & Telegraph Co.*, 334.

**MASTER AND SERVANT****§ 10.2 (NCI3d). Actions for wrongful discharge**

Summary judgment was properly granted for defendants on a breach of employment contract claim where plaintiff did not show that a personnel manual was expressly included within his contract or that the manual provided for discharge only for cause, and properly granted on the wrongful discharge claim where the manual was not part of the employment contract and plaintiff did not allege facts within an exception to the employment at will doctrine. *Howell v. Town of Carolina Beach*, 410.

G.S. 122C-66 does not create a cause of action for retaliatory discharge by an employee discharged for reporting suspected patient abuse. *Lenzer v. Flaherty*, 496.

The discharge of an employee for exercising her free speech rights guaranteed by the N. C. Constitution or for reporting patient abuse pursuant to G.S. 122C-66 gives rise to a cause of action for wrongful discharge under the public policy exception to the employment-at-will doctrine. *Ibid.*

**§ 11.1 (NCI3d). Competition with former employer; covenants not to compete**

A covenant not to compete in an employment contract prohibiting defendant endocrinologist from practicing medicine in Iredell County for two years from the date of his termination of employment with plaintiff medical group is unen-

**MASTER AND SERVANT — Continued**

forceable as a matter of law because enforcement of the covenant would create a substantial question of potential harm to the public. *Statesville Medical Group v. Dickey*, 669.

**§ 13 (NC13d). Interference with contract of employment by third persons**

The trial court erred in granting summary judgment for defendant supervising physicians individually on the claim of plaintiff physician's assistant for tortious interference with her contract of employment at an alcohol rehabilitation center. Even if defendants are deemed to have the status of non-outsiders, plaintiff's forecast of evidence raises the issue of wrongful purpose which would defeat a non-outsider's qualified privilege to interfere with plaintiff's contract of employment. *Lenzer v. Flaherty*, 496.

**§ 19 (NC13d). Liability of contractee or main contractor to employees of independent contractor**

In an action to recover for the death of an independent contractor's employee in a trench cave-in, plaintiffs' complaint was sufficient to state a claim against defendant landowner for breach of a nondelegable duty of care arising from an inherently dangerous activity. *Dunleavy v. Yates Construction Co.*, 146.

**§ 21 (NC13d). Liability of contractee for injuries to third persons**

North Carolina law does not recognize claims of an injured employee of an unqualified independent contractor against a party for its negligent selection or retention of the independent contractor. *Dunleavy v. Yates Construction Co.*, 146.

**§ 68 (NC13d). Workers' compensation; occupational diseases**

The Industrial Commission erred by finding that plaintiff was incapable of returning to her pre-disability employment, concluding that she suffered from an occupational disease, and limiting her award because she retained wage earning capacity. *Lackey v. R. L. Stowe Mills*, 658.

**§ 69 (NC13d). Workers' compensation; amount of recovery generally**

A workers' compensation plaintiff was entitled to compensation for total disability even though part of plaintiff's total disability was caused by non-work-related maladies and even though he was offered a light duty position. Moreover, defendant was not entitled to apportionment of the award. *Errante v. Cumberland County Solid Waste Management*, 114.

**§ 75 (NC13d). Workers' compensation; medical and hospital expenses**

An Industrial Commission opinion denying workers' compensation for back surgery was remanded where the Commission found that the surgery was not authorized, but did not make findings as to whether approval for any of that doctor's treatment was sought within a reasonable time. *Braswell v. Pitt County Mem. Hosp.*, 1.

In a case decided under the pre-1991 amendment to G.S. 97-25, the Industrial Commission erred by denying a workers' compensation plaintiff medical expenses for back surgery where there was no evidence to support the finding that surgery would not give plaintiff relief. *Simon v. Triangle Materials, Inc.*, 39.

An Industrial Commission award to a workers' compensation plaintiff of reasonable and necessary medical expenses was remanded for modification to provide expressly for plaintiff's medical expenses to include only those expenses incurred as a result of plaintiff's compensable injuries. *Errante v. Cumberland County Solid Waste Management*, 114.

**MASTER AND SERVANT — Continued****§ 87 (NCI3d). Claim under Compensation Act as precluding common-law action**

The decision in *Woodson v. Rowland*, 329 N.C. 330, will be applied retroactively by the Court of Appeals. *Dunleavy v. Yates Construction Co.*, 146.

In an action to recover for the death of a corporate contractor's employee in a trench cave-in, the "substantial certainty" test set forth in *Woodson v. Rowland* applies to the corporate employer; it also applies to the president and vice-president of the corporate employer in their individual capacities if, at the time of the trenching, these corporate officers were acting in furtherance of the corporate business. *Ibid.*

**§ 89.1 (NCI3d). Remedies against fellow employee**

The potential liability of the foreman of an employee killed in a trench cave-in was as a co-employee and was governed by the willful, wanton and reckless negligence standard. *Dunleavy v. Yates Construction Co.*, 146.

In an action to recover for an employee's death in a trench cave-in, defendant foreman's forecast of evidence was sufficient to show that his conduct was not willful, wanton and reckless, and summary judgment was properly entered for this defendant. *Ibid.*

**§ 94.3 (NCI3d). Rehearing and review by Commission**

The decision of the full Commission indicates on its face that plaintiff was not afforded the review on appeal from the hearing commissioner to which he was entitled under G.S. 97-85. *Faircloth v. N.C. Dept. of Transportation*, 303.

**§ 96.5 (NCI3d). Workers' compensation; specific instances where findings are conclusive or sufficient**

The evidence supported the Industrial Commission's finding that a workers' compensation plaintiff had stopped working due to pain and that plaintiff was entitled to compensation for permanent and total disability. *Errante v. Cumberland County Solid Waste Management*, 114.

The evidence supported the Industrial Commission's determination that plaintiff did not suffer any injury by accident when the dump truck he was backing at five miles per hour struck another vehicle. *Faircloth v. N.C. Dept. of Transportation*, 303.

**§ 96.6 (NCI3d). Workers' compensation; scope of review; review of findings in general**

An Industrial Commission opinion denying workers' compensation for back surgery was remanded for a hearing on maximum medical improvement where the Commission's findings were not based upon sufficient competent evidence. *Braswell v. Pitt County Mem. Hosp.*, 1.

**MORTGAGES AND DEEDS OF TRUST****§ 9 (NCI3d). Release of part of land from mortgage lien**

A lender was not negligent in giving the borrower an unrecorded deed releasing one lot from a deed of trust and thus did not lose the priority of its lien for other lots covered by the deed of trust when the borrower altered the release deed to include three additional lots, recorded the deed, and sold one of the additional lots to an innocent purchaser who placed a deed of trust on such lot. *First Financial Savings Bank v. Sledge*, 87.

**MUNICIPAL CORPORATIONS****§ 12.3 (NCI3d). Waiver of governmental immunity**

The trial court properly granted defendant's motion to dismiss an action arising from the removal of automobiles and a mobile home by municipal employees where defendant's insurance excluded these acts by these employees. *Combs v. Town of Belhaven*, 71.

**§ 30.1 (NCI3d). Delegation of zoning power to board or official**

County commissioners could properly delegate their authority to a zoning administrator to issue special use zoning permits. *County of Lancaster v. Mecklenburg County*, 646.

**§ 30.6 (NCI3d). Special permits and variances**

The trial court properly granted summary judgment for defendants where the uncontradicted forecast of evidence establishes as a matter of law that defendants made substantial expenditures for the operation of a quarry in good faith and in reliance upon the special use permit previously granted by the Zoning Board. *Cardwell v. Smith*, 187.

A county zoning ordinance governing sanitary landfills meets the requirements of due process where it provides for review of permit applications by a zoning administrator, whose decisions are subject to de novo review by a zoning board of adjustment. *County of Lancaster v. Mecklenburg County*, 646.

**§ 30.20 (NCI3d). Procedure for enactment or amendment of zoning ordinances**

Summary judgment was properly granted for defendant county in a challenge to a zoning notice based upon the map and notice. *Frizzelle v. Harnett County*, 234.

**§ 31.2 (NCI3d). Scope and extent of judicial review**

The trial court erred in reversing a board of adjustment's decision that proposed structures were rooming houses rather than duplexes constituting dwelling units within the meaning of a town development ordinance where the court made no findings of fact to support this conclusion or to show that the board's decision was arbitrary or an abuse of discretion. *Capricorn Equity Corp. v. Town of Chapel Hill Bd. of Adjustment*, 134.

**§ 38 (NCI3d). Power of municipality to appropriate, expend, and allocate revenue**

Even if a resolution by the Boone Town Council that 18% of the profits from the Boone ABC Store should be paid to the Watauga County Board of Education constituted a contract with the Town of Blowing Rock and the Watauga County Board of Education, the contract is void and unenforceable because it is outside the statutory authority of a town council to appropriate money to a county board of education. *Watauga County Bd. of Education v. Town of Boone*, 270.

**NARCOTICS****§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient**

The evidence in a prosecution for the possession and sale of cocaine within 300 feet of school property was sufficient to show that the offenses occurred within 300 feet of the legal boundary of a school based upon testimony by a school principal and a school superintendent. *State v. Ussery*, 371.

## NARCOTICS — Continued

**§ 4.1 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was insufficient**

The trial court erred by failing to grant defendant's motions to dismiss the charge of possession of drug paraphernalia; the mere possession of the needle and syringe fails to establish the crucial element of possession with intent to use the syringe in connection with controlled substances. *State v. Hedgecoe*, 157.

**§ 5 (NCI3d). Verdict and punishment**

Defendant could properly be convicted of two separate offenses of sale of cocaine within 300 feet of school property where an undercover agent made two purchases of cocaine from defendant within a short period of time. *State v. Ussery*, 371.

## NEGLIGENCE

**§ 1.1 (NCI3d). Elements of actionable negligence**

Plaintiff need not be in close proximity to the negligent act in order to recover for negligent infliction of emotional distress. *Gardner v. Gardner*, 635.

**§ 47 (NCI3d). Negligence in condition or use of lands and buildings in general**

The trial court correctly granted a 12(b)(6) dismissal for the landowner and the gas company where plaintiff was injured when the four wheel drive vehicle in which he was riding overturned on land on which the gas company owned an easement for construction of a gas pipeline. *Hoots v. Pryor*, 397.

## PARENT AND CHILD

**§ 1.5 (NCI3d). Procedure for termination of parental rights; right to counsel**

An order terminating parental rights was affirmed where the time and purpose for filing a letter from respondent to the court could not be determined from the record, so that the letter could not be assumed to be an answer, and the trial court as required heard evidence, made findings of fact, and adjudicated the existence of a ground for termination. *In re Tymer*, 480.

Allegations in a petition for termination of parental rights that respondent has neglected the child and has willfully abandoned the child did not comply with a statutory requirement that the petition state "facts which are sufficient to warrant a determination" that grounds exist for termination, but the petition sufficiently stated a claim for termination where it incorporated an attached custody award which stated sufficient facts to warrant such a determination. *In re Quevedo*, 574.

The due process rights of a respondent incarcerated in Massachusetts were not violated by the trial court's denial of respondent's motion that he be provided transportation to a termination of parental rights hearing and that the hearing not be conducted in his absence. *Ibid.*

When the respondent in a proceeding to terminate parental rights is incarcerated, it is the better practice for the court, upon motion by the respondent, to provide the funds necessary for deposing the incarcerated respondent. *Ibid.*

**§ 1.6 (NCI3d). Competency and sufficiency of evidence**

The trial court's conclusions that the incarcerated father has neglected and abandoned his children and that the best interests of the children require that his parental rights be terminated were supported by the court's findings. *In re Quevedo*, 574.



**PARENT AND CHILD — Continued**

A guardian ad litem report based upon hearsay statements was erroneously admitted in a parental rights termination proceeding, but this error was harmless. *Ibid.*

**PENSIONS****§ 1 (NCI3d). Generally**

The Administrative Law Judge correctly concluded that petitioner should be allowed to purchase credit in the Consolidated Judicial Retirement System for military service at the reduced rate unrestricted by the three year limitation. *Osborne v. Consolidated Judicial Retirement System*, 299.

The trial court erred by reversing a final agency decision by the Board of Trustees of the Retirement System where petitioner was a contributing member of the Local Government Employees' Retirement System; changed employment, became a member of the Teachers' and State Employees' Retirement System and transferred his local credits; attempted to purchase credits for his military service; and found that he would have to pay full actuarial cost because his local service counted toward the statute of limitations on purchasing credit at a reduced rate. *Worrell v. N.C. Dept. of State Treasurer*, 640.

**PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS****§ 1 (NCI3d). Licensing and regulation generally; what constitutes practicing medicine and prosecutions for practicing without license**

The trial court properly granted summary judgment for defendants on plaintiffs' action for declaratory relief regarding a criminal investigation of an acupuncturist and naturopath for practicing medicine without a license where the trial court determined that plaintiffs had failed to forecast an actual controversy. *Majebe v. North Carolina Board of Medical Examiners*, 253.

The trial court did not err by granting summary judgment for defendants on the issue of 42 U.S.C. 1983 violations in an action for declaratory relief regarding an investigation for practicing medicine without a license. There is no protected privacy right to practice unorthodox medical treatment. *Ibid.*

The trial court properly granted summary judgment for defendants in an action for declaratory relief from a criminal investigation for practicing medicine without a license where plaintiffs contended that the applicable statutes were selectively enforced. *Ibid.*

**§ 13 (NCI3d). Limitations of action for malpractice or assault**

Plaintiff "discovered" the presence of a foreign object left in her body during plastic surgery within the meaning of G.S. 1-15(c) when she was informed by her chiropractor on 21 March 1989 that an x-ray revealed an unusual object in her abdomen which might be a drain left from her plastic surgery, and plaintiff's action commenced against the plastic surgeon on 21 May 1990 was barred by the one-year statute of limitations of G.S. 1-15(c) for malpractice actions relating to foreign objects left inside the body. *Hensell v. Winslow*, 285.

A plastic surgeon's letters to a patient pertaining to the need to remove a surgical drain left in the patient's body during surgery five years earlier did not constitute a continued course of treatment for statute of limitations purposes. *Ibid.*

## PLEADING

**§ 32 (NCI3d). Amendment of pleadings; right to amend; discretion of court to allow amendment**

The trial court did not err by denying plaintiffs' motion to amend their complaint as to two of three defendants where another judge had previously granted a 12(b)(6) dismissal as to those two defendants. *Hoots v. Pryor*, 397.

## PRIVACY

**§ 1 (NCI3d). Generally**

The trial court did not err by dismissing plaintiffs' invasion of privacy claims based on seizure of records and their right to obtain treatment by acupuncture; North Carolina has recognized no fundamental right to receive unorthodox medical treatment and regulation of the medical profession is a legitimate exercise of the police power. *Majebe v. North Carolina Board of Medical Examiners*, 253.

## PROCESS

**§ 18 (NCI3d). Nature and requisites of cause of action**

The trial court properly granted summary judgment for defendant on an abuse of process claim arising from a worthless check prosecution where plaintiff presented no meritorious evidence of an improper act after issuance of process. *Semones v. Southern Bell Telephone & Telegraph Co.*, 334.

## RAPE AND ALLIED OFFENSES

**§ 5 (NCI3d). Sufficiency of evidence and nonsuit**

The trial court correctly denied defendants' motion to dismiss charges of first-degree rape. *State v. Mebane*, 516.

**§ 19 (NCI3d). Taking indecent liberties with child**

A seven-year-old indecent liberties victim's uncertainty of the dates on which the alleged offenses occurred went only to the weight of her testimony and did not require dismissal of the charges for insufficient evidence. *State v. Quarg*, 106.

## RECEIVING STOLEN GOODS

**§ 5.1 (NCI3d). Particular cases; evidence sufficient**

The State presented sufficient evidence in a prosecution for possession of stolen property to show that defendant knew or had reasonable grounds to believe that a pistol he possessed was stolen. *State v. Wilson*, 342.

## ROBBERY

**§ 5.3 (NCI3d). Instructions relating to common law robbery**

The trial court did not err by denying defendant's motion to amend jury instructions on common law robbery regarding robbing the victim of personal property to conform to language in the indictment referring to robbery of jewelry. *State v. Hedgcock*, 157.

**ROBBERY — Continued****§ 5.4 (NCI3d). Instructions on lesser included offenses and degrees**

The trial court did not err by denying defendant's motion to instruct the jury on the crimes of assault with a deadly weapon and simple assault as lesser included offenses of common law robbery. *State v. Hedgcock*, 157.

**§ 6.1 (NCI3d). Sentence**

The trial judge did not err by imposing active sentences for armed robbery where there were originally convictions for felony murder, those convictions were overturned but the underlying felonies specifically upheld, and the State eventually elected to pray judgment on those convictions rather than retry defendants for murder. *State v. Pakulski*, 444.

There was no prejudicial error in a delay of five and one-half years between convictions for armed robbery and the imposition of life sentences. *Ibid.*

**RULES OF CIVIL PROCEDURE****§ 3 (NCI3d). Commencement of action**

The trial court erred by finding that plaintiff had failed to comply with Rule 3 in an action in which the complaint was served eight months after summons was served. *Lusk v. Crawford Paint Co.*, 292.

**§ 4 (NCI3d). Process**

The sixty day savings provision against the statute of limitations found in G.S. 1A-1, Rule 4(j)(2) was not applicable where service by registered mail was attempted with the wrong registered agent. *Hanover Insurance Co. v. Amana Refrigeration, Inc.*, 79.

The trial court erred by finding that plaintiff had failed to comply with Rule 4 in an action in which the complaint was served eight months after the summons was served. *Lusk v. Crawford Paint Co.*, 292.

**§ 8.1 (NCI3d). General rules of pleadings; complaint**

Although plaintiffs violated Rule 8(a)(2) by specifically demanding \$176,000 in damages in a negligence action, the court erred in dismissing the action with prejudice without making findings and conclusions indicating that it had first considered less drastic sanctions. *Foy v. Hunter*, 614.

**§ 11 (NCI3d). Signing and verification of pleadings; sanctions**

There was ample evidence in the record from which a trial judge could conclude, when imposing Rule 11 sanctions, that plaintiff did in fact institute an action against GMAC; plaintiff's contention that GMAC was included as a party to give it notice as a lienholder bordered on the frivolous; and the court did not err by ruling on defendant's motion for sanctions despite a voluntary dismissal by another judge. *Lassiter v. N.C. Farm Bureau Mut. Ins. Co.*, 66.

The trial court erred by imposing sanctions based on a complaint filed before the effective date of the current Rule 11. *Brooks v. Giesey*, 586.

The trial court erred in concluding that plaintiff's complaint and motion for a preliminary injunction could not have been interposed for an improper purpose so as to permit Rule 11 sanctions because they met the factual and legal sufficiency prongs of Rule 11. *Parsons v. Jefferson-Pilot Corp.*, 307.

## RULES OF CIVIL PROCEDURE — Continued

**§ 12 (NCI3d). Defenses and objections**

The trial court erred by granting judgment on the pleadings where defendant's answer was a legal impossibility but defendant's denials on lack of information or belief were sufficient to raise the matters to the level of factual issues. *Watson v. American National Fire Insurance Co.*, 629.

**§ 12.1 (NCI3d). When and how defenses and objections presented**

Motions under Rule 12(c) are pretrial motions requiring a review of the pleadings and cannot be employed to test the validity of post-trial motions. *Scott v. Scott*, 379.

**§ 15.1 (NCI3d). Discretion of court to grant amendment**

The trial court erred by denying defendant's motion to amend her pleadings to assert the affirmative defense that she was incurably insane. *Madry v. Madry*, 34.

**§ 24 (NCI3d). Intervention**

Purchasers of canceled extended automobile service contracts guaranteed by defendant insurer were not entitled to intervene as a matter of right or permissively in a proceeding to liquidate defendant. *State ex rel. Long v. Interstate Casualty Ins. Co.*, 491.

**§ 41.2 (NCI3d). Dismissal in particular cases**

The trial court erred in dismissing plaintiffs' action with prejudice under Rule 41(b) based on plaintiffs' failure to prosecute their action where the evidence did not support the court's findings that plaintiffs had failed to assist or cooperate with their attorneys. *Foy v. Hunter*, 614.

A dismissal of plaintiff's initial complaint for failure to state a claim operated as an adjudication upon the merits in the absence of a contrary specification in the order of dismissal, and the trial court should have dismissed plaintiff's refiled complaint. *Dawson v. Allstate Insurance Co.*, 691.

**§ 55 (NCI3d). Default**

The trial court erred in entering summary judgment for plaintiffs in their action to recover for the wrongful cutting of timber because their action was not for a "sum certain." *Grant v. Cox*, 122.

**§ 55.1 (NCI3d). Setting aside default**

Defendants were not entitled to have an entry of default set aside on the ground of excusable neglect where defendants contended that their failure to answer the complaint within thirty days after service of the first summons was excusable because the deputy serving a second summons on them told the individual defendant's mother that defendants had thirty days after service to respond. *Grant v. Cox*, 122.

**§ 58 (NCI3d). Entry of judgment**

Appellant's appeal was timely filed where notice of appeal was given more than 10 days after the court announced a ruling in open court, but before the written order was signed. *In re Hayes*, 652.

**§ 59 (NCI3d). New trials; amendment of judgments**

The trial court did not abuse its discretion in an action arising from an automobile collision by denying plaintiff's motion for a new trial on the grounds that the

**RULES OF CIVIL PROCEDURE — Continued**

award was inadequate and given under the influence of passion or prejudice. *Beaver v. Hampton*, 172.

**§ 60 (NCI3d). Relief from judgment or order**

A motion labeled as a Rule 60 motion for relief was in substance a motion to amend the judgment under Rule 59 and was made well beyond the limit of 10 days from entry of judgment. *Scott v. Scott*, 379.

**SALES****§ 5 (NCI3d). Express warranties**

The Magnuson-Moss Warranty Act applied to the sale of a used car by defendant dealer to plaintiff consumer. *Ismael v. Goodman Toyota*, 421.

**§ 17 (NCI3d). Breach of warranty; sufficiency of evidence, nonsuit, and directed verdict**

The trial court did not err by granting summary judgment for the seller of a freezer door on breach of warranty claims after plaintiff became trapped in the freezer while doing volunteer work at church. *Crews v. W. A. Brown & Son*, 324.

**§ 17.2 (NCI3d). Cases involving warranties of merchantability and fitness for particular purpose**

The trial court erred by finding that the manufacturer breached the implied warranty of merchantability and an implied warranty of fitness for a particular purpose as to windows and doors installed on a house on Figure Eight Island. *Gregory v. Atrium Door and Window Co.*, 142.

**§ 22 (NCI3d). Actions for personal injuries based upon negligence; defective goods or materials; manufacturer's liability**

The trial court did not err by granting summary judgment for defendant on a products liability claim where plaintiff became trapped in a walk-in freezer sold by defendant. *Crews v. W. A. Brown & Son*, 324.

**SEARCHES AND SEIZURES****§ 12 (NCI3d). "Stop and frisk" procedures**

A seizure of defendant occurred within the meaning of the Fourth Amendment when an officer began to pat him down while simultaneously asking him questions. *State v. Fleming*, 165.

An officer did not have a reasonable articulable suspicion that defendant was engaged in criminal activity and thus had no right to "stop and frisk" defendant when the officer observed defendant and a companion standing between two buildings in a housing project at 12:10 a.m., and cocaine discovered on defendant's person as a result of this unlawful seizure of defendant was not admissible in evidence. *Ibid.*

**§ 19 (NCI3d). Validity of warrant in general**

In an action in which plaintiffs sought declaratory relief from a criminal investigation for practicing medicine without a license, plaintiff acupuncturist's right to be free from unreasonable searches and seizures was not violated where her clinic was searched pursuant to a warrant based on an SBI agent's affidavit. *Majebe v. North Carolina Board of Medical Examiners*, 253.

## SOCIAL SECURITY AND PUBLIC WELFARE

### § 1 (NCI3d). Generally

Federal regulations impliedly require written notice of the denial of expedited processing of an application for food stamps. *Hill v. Bechtel*, 675.

## STATE

### § 4.2 (NCI3d). Particular actions against the State; sovereign immunity

Plaintiff's claims against State officials in their official capacities for civil conspiracy, wrongful discharge and tortious interference with contract were barred by sovereign immunity. *Lenzer v. Flaherty*, 496.

### § 12 (NCI3d). State Personnel Commission authority and actions

Where a correctional officer was placed on leave without pay status, and the Department of Correction received a "return to work" notice from the officer's doctor at least thirty days before expiration of the leave stating that she was ready to return to light duty, full-time work with certain restrictions, the Department of Correction was required to reinstate her and could discharge her only upon a finding of just cause pursuant to G.S. 126-35 after the procedures required by that statute and the regulations implementing that statute had been followed. *Harding v. N.C. Dept. of Correction*, 350.

An action by a terminated state employee seeking reinstatement, back pay, and restoration of benefits was remanded where the letter that informed petitioner that his employment would be terminated failed to inform petitioner of his right to appeal. *Nix v. Dept. of Administration*, 664.

## TAXATION

### § 25.9 (NCI3d). Ad valorem tax proceedings; county boards of equalization and review

Taxpayers timely applied for present use value assessment of their farm when they filed their application within thirty days of the date on a notice from the county board of equalization and review that the value of turkey houses on their farm had been reduced. *In re Appeal of Johnson*, 61.

## TRESPASS

### § 1 (NCI3d). Definition; elements

The trial court did not err by granting summary judgment for an SBI agent who conducted a search pursuant to a warrant in a declaratory judgment action arising from a criminal investigation of an acupuncturist for practicing medicine without a license. *Majebe v. North Carolina Board of Medical Examiners*, 253.

## TRESPASS TO TRY TITLE

### § 4 (NCI3d). Sufficiency of evidence and nonsuit

The trial court did not err in adjudging that plaintiff and petitioners are the owners of disputed land based on findings that plaintiff is the record owner of the disputed property in one action, that petitioners established a record marketable chain of title to the disputed property in the second action, and that petitioners and their predecessors in title have possessed the disputed property under color of title for more than seven years. *Snover v. Grabenstein*, 453.

**TRIAL****§ 46 (NCI3d). Impeaching the verdict**

The affidavits of two jurors purportedly showing that the jury disregarded the evidence and the trial court's instructions were incompetent to support plaintiff's Rule 59 motion for a new trial. *McClain v. Otis Elevator Co.*, 45.

**UNFAIR COMPETITION****§ 1 (NCI3d). Unfair trade practices in general**

The trial court did not err by granting summary judgment for defendant auctioneer on an unfair practices claim arising from the sale of land where plaintiff claimed that the auctioneer's unfair and deceptive act was the soliciting and receiving of bids for the entire 180 acre tract when the auction contract was for a maximum of 100 acres. *Colvard v. Francis*, 277.

The trial court did not err by granting summary judgment for a bank and a banker on an unfair practices claim for promising a loan and then failing to make the loan. *Ibid.*

**UNIFORM COMMERCIAL CODE****§ 10 (NCI3d). Warranties in general**

The Magnuson-Moss Warranty Act applied to the sale of a used car by defendant dealer to plaintiff consumer. *Ismael v. Goodman Toyota*, 421.

The trial court erred in concluding that warranty obligations for a used car sold to plaintiff by defendant dealer were the responsibility of the administrator of a service contract entered by plaintiff and defendant. *Ibid.*

**§ 13 (NCI3d). Implied warranty of merchantability; particular cases**

An implied warranty of merchantability arises upon the sale of a used car by a dealer. *Ismael v. Goodman Toyota*, 421.

The Magnuson-Moss Warranty Act prohibited defendant dealer from disclaiming an implied warranty of merchantability by an "as is" sale of a used car to plaintiff where plaintiff and defendant, at the time of the sale, entered into a written service contract for repair of the car. *Ibid.*

Plaintiff's evidence was sufficient to entitle him to recover for breach of the implied warranty of merchantability of a used car sold to him by defendant dealer. *Ibid.*

**UTILITIES COMMISSION****§ 22 (NCI3d). Power to change rates**

A Utilities Commission order which partially allowed a requested natural gas rate increase under G.S. 62-133(f) was reversed where the rate changes were not of the nature of those to be allowed under that statute and must be considered in a general rate case. *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 218.

The Utilities Commission was without authority to allow a natural gas utility to increase its rates pursuant to G.S. 62-133(f) based on the increased cost of additional gas supplies. *State ex rel. Utilities Comm. v. Carolina Utility Cust. Assn.*, 460.

## VENUE

**§ 1 (NCI3d). Definition and nature of venue**

A forum selection clause in a contract providing that any action relating to the contract shall only be instituted in Los Angeles County, California, was invalid and of no effect. *Perkins v. CCH Computax, Inc.*, 210.

## WILLS

**§ 66 (NCI3d). Lapsed legacies**

Where testatrix had both the knowledge and the ability to prevent the lapse of gifts to parties in her will who would not otherwise be eligible to share in her estate, and there was no sufficiently clear language of substitution for these devisees, there was no testamentary intent to prevent the lapse of such gifts. *In re Will of Hubner*, 204.

**§ 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. *In re Will of Hubner*, 204.



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