NORTH CAROLINA COURT OF APPEALS REPORTS

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OF
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GERALD ARNOLD[1]

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RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

---

1. Appointed Chief Judge by Chief Justice James G. Exum, Jr. and took office 1 January 1993.
2. Elected Judge 3 November 1992 and took office 4 January 1993.
3. Elected Judge 3 November 1992 and took office 10 January 1993.
4. Appointed by Governor James B. Hunt and took office 26 February 1993.
5. Retired 31 December 1992.
6. Appointed Administrative Counsel by Chief Judge Gerald Arnold 1 January 1993.
7. Appointed Clerk by Chief Judge Gerald Arnold 1 January 1993.

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1. Elected and sworn in 11 December 1992.
2. Appointed and sworn in 31 December 1992 to replace David E. Reid, Jr. who died 27 December 1992.
3. Resigned and sworn in Court of Appeals 10 January 1993.

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	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

---

1. Appointed as Chief Judge and sworn in 7 December 1992 to replace Kenneth W. Turner who retired 6 December 1992.
2. Elected and sworn in 7 December 1992.
3. Appointed as Chief Judge and sworn in 1 December 1992 to replace Nicholas Long who retired 30 November 1992.
4. Elected and sworn in 7 December 1992.
5. Elected and sworn in 7 December 1992 to replace Allen W. Harrell who retired 30 November 1992.
6. Elected and sworn in 7 December 1992.

7. Elected and sworn in 7 December 1992 to replace Edmund Lowe who retired 30 November 1992.
8. Appointed and sworn in 1 September 1992 to replace L. Stanley Brown who retired 1 July 1992.
9. Elected and sworn in 7 December 1992 to replace William H. Scarborough who retired 30 November 1992.
10. Elected and sworn in 7 December 1992.
11. Appointed and sworn in as Chief Judge 7 December 1992 to replace Daniel J. Walton who resigned 6 December 1992.
12. Elected and sworn in 7 December 1992.
13. Elected and sworn in 7 December 1992.
14. Appointed and sworn in as Chief Judge 7 December 1992 to replace Thomas A. Hix who resigned 6 December 1992.
15. Elected and sworn in 7 December 1992.
16. Elected and sworn in 7 December 1992.

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ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

JUNIOR WILLIAM BENTLEY, PLAINTIFF v. NORTH CAROLINA INSURANCE GUARANTY ASSOCIATION, CORPORATE DEFENDANT, AND MATHESON INSURANCE AGENCY, INC., CORPORATE DEFENDANT, AND W. A. DEAL, INDIVIDUAL DEFENDANT, JOINTLY AND SEVERALLY

No. 9022SC1355

(Filed 21 July 1992)

1. Insurance § 43 (NCI4th)— bad faith refusal to settle by insurer—insurer insolvent—liability of Guaranty Association

Under the plain language of N.C.G.S. § 58-48-20(4), punitive damages cannot be recovered from the North Carolina Insurance Guaranty Association where plaintiff had filed a claim against Interstate, its insurer, and others, alleging a bad faith refusal to settle, negligence, and unfair or deceptive trade practices and the Guaranty Association was substituted as the real party in interest for Interstate. Moreover, since the Association is not liable for the torts of insolvent insurers and actions for unfair or deceptive practices sound partly in tort, no action will lie against the Association for an insolvent insurer's violation of the Unfair or Deceptive Trade Practices Act.

Am Jur 2d, Damages §§ 785 et seq.

Recoverability of punitive damages in action by insured against liability insurer for failure to settle claim against insured. 85 ALR3d 1211.

2. **Insurance § 815 (NCI4th)— fire insurance—appraisal clause—valid—no constitutional violation**

Neither an appraisal clause in a fire insurance policy nor the appraisal process as carried out deprived plaintiff of his property without due process. Every fire insurance policy written in North Carolina must conform to the provisions of the standard fire insurance policy provided by N.C.G.S. § 58-44-15; the North Carolina Supreme Court long ago upheld the validity of a similar appraisal clause; and the United States Supreme Court long ago upheld the constitutionality of a similar appraisal clause. Plaintiff does not show fraud, mistake, duress, or other evidence of wrongdoing in the appraisal process as applied to him.

Am Jur 2d, Insurance §§ 1680 et seq.

Necessity and sufficiency of notice of and hearing in proceedings before appraisers and arbitrators appointed to determine amount of loss. 25 ALR3d 680.

3. **Insurance § 815 (NCI4th)— fire insurance—appraisal clause—no deprivation of trial by jury**

Plaintiff's right to trial by jury was not abridged by an appraisal clause in a fire insurance policy. The North Carolina Supreme Court has repeatedly approved appraisal as a means of settling the single issue of amount of loss sustained by an insured.

Am Jur 2d, Insurance §§ 1680 et seq.

4. **Insurance § 75 (NCI4th)— insurance agent—settlement negotiations—insurer's bad faith refusal to settle—no liability of agent**

The trial court did not err by granting summary judgment in favor of an insurance agency and its employee on a claim of bad faith refusal to settle by the insurer where these defendants were not parties to the settlement negotiations, but the employee made several telephone calls on behalf of plaintiff in an attempt to learn the insurer's intentions and to urge the company to settle with plaintiff quickly. Once an agent

has procured an insurance contract, the agent is not a party to the contract and is not liable under it.

Am Jur 2d, Insurance §§ 133 et seq., 1399 et seq.

5. **Insurance § 73 (NCI4th)— fire insurance—recovery limited to actual cash value—negligence—summary judgment for agent proper**

Summary judgment was properly granted for an insurance agent on a negligence claim arising from a disputed fire insurance policy where, regardless of plaintiff's sincere belief as to the value of his property, and notwithstanding the stated face value of the policy, under the entire policy as written plaintiff could not recover more than the actual cash value of the property at the time of the loss. Assuming that plaintiff sustained a loss, under all the circumstances the negligence of defendants Deal and Matheson, if any, could not be the proximate cause.

Am Jur 2d, Insurance §§ 1500 et seq.

6. **Insurance § 75 (NCI4th)— fire insurance—recovery limited to actual cash value—fiduciary duty of agent—summary judgment for agent**

Summary judgment was properly entered for an insurance agent on a claim of breach of fiduciary duty arising from a disputed fire insurance policy where there was no evidence of an ongoing relationship between plaintiff and the agency or agent, no evidence that plaintiff requested further advice or sought assurances from defendant Deal about coverage under the policy after purchasing the policy, and no evidence that plaintiff sought to purchase additional insurance from these defendants. Deal explained to plaintiff that recovery under the policy would be based on actual cash value at the time of loss and that the policy was different from another policy of which plaintiff had some knowledge. Even viewed indulgently, plaintiff's evidence did not show any false assurance by defendant Deal as to the extent of coverage.

Am Jur 2d, Insurance §§ 128, 1500 et seq., 1622.

7. **Insurance § 75 (NCI4th)— fire insurance—bad faith refusal to settle—unfair or deceptive practice—agent not liable**

The trial court did not err by granting summary judgment for an insurance agent and agency on plaintiff's unfair or decep-

tive practices claim arising from a disputed fire insurance policy where defendants were not responsible for the insurer's bad faith refusal to settle.

Am Jur 2d, Insurance §§ 1399 et seq.

APPEAL by plaintiff from order entered 16 August 1990 by *Judge Samuel T. Currin* in ALEXANDER County Superior Court. Heard in the Court of Appeals 26 September 1991.

Edward Jennings for plaintiff-appellant.

Moore & Van Allen, by Joseph W. Eason, Christopher J. Blake, and Margaret A. Nowell, for defendant-appellee North Carolina Insurance Guaranty Association.

Yates, McLamb & Weyher, by R. Scott Brown, for defendant-appellee North Carolina Insurance Guaranty Association.

Kennedy Covington Lobdell & Hickman, by Wayne P. Huckel and Michelle C. Landers, for defendant-appellees Matheson Insurance Agency, Inc., and W.A. Deal.

PARKER, Judge.

Plaintiff appeals from summary judgment granted in favor of all defendants. On 2 August 1989 plaintiff filed a complaint against defendants Interstate Casualty Insurance Company, Inc. ("Interstate"), Matheson Insurance Agency, Inc., and W.A. Deal. Alleging fire loss under a dwelling policy, plaintiff's claims included (i) bad faith refusal to settle plaintiff's claim for loss, (ii) negligence and breach of fiduciary duty, and (iii) unfair or deceptive trade practices. Relief prayed for included compensatory damages in the amount of $65,000.00, punitive damages, treble damages, and prejudgment interest. By order of the trial court filed 1 August 1990, defendant North Carolina Insurance Guaranty Association ("the Association") was substituted as the real party in interest for Interstate.

On appeal, plaintiff presents two contentions. He contends granting summary judgment effected an impermissible taking of plaintiff's property under Article I, Section 19, of the North Carolina Constitution and deprived plaintiff of the right to trial by jury under Article I, Section 25. Plaintiff's second contention is that the court erred in granting summary judgment on his claims for

bad faith refusal to settle, negligence and breach of fiduciary duty, and unfair or deceptive trade practices. For reasons which follow, we affirm summary judgment for all defendants.

I.

[1] Defendant Association did not participate in any of the settlement negotiations at issue. On appeal defendant Association argues that as a matter of law, it cannot be held liable for the torts of an insolvent insurer. This is an issue of first impression requiring interpretation of General Statutes Chapter 58, Article 48. We find defendant's argument persuasive.

The Association was created by the Insurance Guaranty Association Act, N.C.G.S. §§ 58-48-1 through 58-48-100 (1991). According to the Act, "The purpose of [Article 48] is to provide a mechanism for the payment of covered claims under certain insurance policies . . . ." N.C.G.S. § 58-48-5 (1991). The Act provides in addition

> "Covered claim" means an unpaid claim, including one of unearned premiums, which is in excess of fifty dollars ($50.00) and arises out of and is within the coverage and not in excess of the applicable limits of an insurance policy to which this Article applies as issued by an insurer, if such insurer becomes an insolvent insurer after the effective date of this Article . . . . *"Covered claim" shall not include any amount awarded as punitive or exemplary damages* . . . .

N.C.G.S. § 58-48-20(4) (1991) (emphasis added). The Act provides further

> (a) The Association shall:
>
> (1) Be obligated to the extent of the covered claims existing prior to the determination of insolvency . . . . This obligation includes only the amount of each covered claim that is in excess of fifty dollars ($50.00) and is less than three hundred thousand dollars ($300,000). . . .
>
> (2) Be deemed the insurer to the extent of the Association's obligation on the covered claims and to such extent shall have all rights, duties, and obligations of the insolvent insurer as if the insurer had not become insolvent.

N.C.G.S. § 58-48-35 (1991).

Under the plain language of section 58-48-20(4), punitive damages cannot be recovered from the Association. Other jurisdictions have construed similar statutes to exclude claims based on bad faith of the insolvent insurer. The Florida First District Court of Appeal held that the Florida Insurance Guaranty Association ("FIGA") "is not liable for any amounts in excess of policy limits and is not vicariously liable for tortious acts of members' insurers." *Rivera v. Southern Am. Fire Ins. Co.*, 361 So. 2d 193, 194 (1978), *cert. denied*, 368 So. 2d 1372 (1979). The court so held even though the Florida statute did not specifically exclude punitive damages. Fla. Stat. Ann. § 631.57(1)(a)(3) (West 1984). Similarly, the Washington Court of Appeals rejected an argument that the Washington Insurance Guaranty Association "stepped into the shoes of" an insolvent insurer. Quoting statutory language the court said, "A covered claim is an 'unpaid claim . . . *which arises out of and is within the coverage* of an insurance policy to which [the Act] applies.' " The court held that since an action by an insured against his insurer for bad faith in handling a claim or suit sounds in tort, rather than contract, such an action could not constitute a covered claim. *Vaughn v. Vaughn*, 23 Wash. App. 527, 529-30, 597 P.2d 932, 934, *disc. rev. denied*, 92 Wash. 2d 1023 (1979) (not available on Westlaw). Other jurisdictions have also held insurance guaranty associations to be immune from suit arising from their own tortious conduct in settling claims after insolvency of an insurer. *Isaacson v. California Ins. Guar. Ass'n.*, 44 Cal. 3d 775, 750 P.2d 297, 244 Cal. Rptr. 655 (1988) (wherein insolvent's insureds sued California Insurance Guaranty Association for alleged bad faith in settling malpractice claim against insureds); *Florida Ins. Guar. Ass'n. v. Giordano*, 485 So. 2d 453 (1986) (wherein insolvent's insured sued FIGA based on the latter's rejection of settlement offer).

Punitive or exemplary damages may be recovered "in breach of contract actions that 'smack of tort because of the fraud and deceit involved' or those actions 'with substantial tort overtones emanating from the fraud and deceit.' " *Dailey v. Integon Ins. Corp.*, 75 N.C. App. 387, 394, 331 S.E.2d 148, 153 (quoting *Oestreicher v. Stores*, 290 N.C. 118, 136, 225 S.E.2d 797, 809 (1976)), *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985). There must be an identifiable tort and "the tortious conduct must be accompanied by or partake of some element of aggravation before punitive damages will be allowed." *Newton v. Insurance Co.*, 291 N.C. 105, 112, 229 S.E.2d 297, 301 (1976) (citing *Oestreicher*).

North Carolina cases permit recovery of punitive damages for breach of contract only for identifiable torts accompanied by aggravation. The plain language of Article 48 both speaks of contracts and precludes recovery of punitive damages. Finding the reasoning of the Florida and Washington courts to be persuasive, we hold the Association is not subject to vicarious liability for the tortious conduct of insolvent insurers.

"An action for unfair or deceptive acts or practices is 'the creation of . . . statute. It is, therefore, sui generis. It is neither wholly tortious nor wholly contractual in nature.'" *Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 230, 314 S.E.2d 582, 584 (quoting *Slaney v. Westwood Auto, Inc.*, 366 Mass. 688, 704, 322 N.E.2d 768, 779 (1975)), *disc. rev. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). Given that actions for unfair or deceptive practices sound partly in tort, because we have held the Association is not liable for the torts of insolvent insurers, we hold further that no action will lie against the Association for an insolvent insurer's violation of the Unfair or Deceptive Trade Practices Act.

Summary judgment "shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56(c) (1990). Since, as a matter of law, defendant Association was not vicariously liable for the torts or unfair practices of Interstate, we hold the trial court did not err in granting summary judgment for defendant Association on these claims.

[2] Plaintiff also contends the granting of summary judgment for the Association violated his rights under the North Carolina Constitution. Plaintiff argues that the inclusion of an appraisal clause in his insurance policy deprived him of his property without due process of law and, alternatively, that the appraisal process as carried out violated his right to due process. Plaintiff also argues the appraisal clause deprived him of the right to a jury trial. Since in following the statutory mandate to pay covered claims, defendant Association could pay claims settled through the appraisal process, we conclude plaintiff may properly raise as against defendant Association claims arising from alleged violations of constitutional rights. Nevertheless, we do not find plaintiff's arguments persuasive.

Every policy of fire insurance written in North Carolina must conform to the provisions of the standard fire insurance policy provided by statute. N.C.G.S. § 58-44-15 (1991). The Standard Policy provides

> **Appraisal** In case the insured and this Company shall fail to agree as to the actual cash value or the amount of loss, then, on the written demand of either, each shall select a competent and disinterested appraiser and notify the other of the appraiser selected within twenty days of such demand. The appraisers shall first select a competent and disinterested umpire; and failing for fifteen days to agree upon such umpire, then, on request of the insured or this Company, such umpire shall be selected by a judge of a court of record in the state in which the property covered is located. The appraisers shall then appraise the loss, stating separately actual cash value and loss to each item, and, failing to agree, shall submit their differences, only, to the umpire. An award in writing, so itemized, of any two when filed with this Company shall determine the amount of actual cash value and loss.

N.C.G.S. § 58-44-15 at lines 123-137 (1991). "[T]he statutory Standard Fire Insurance Policy is incorporated into every policy of fire insurance issued in North Carolina." *Star Varifoam Corp. v. Buffalo Reinsurance Co.*, 64 N.C. App. 306, 309, 307 S.E.2d 194, 195 (1983) (citations omitted), *disc. rev. denied*, 310 N.C. 154, 311 S.E.2d 294 (1984). The appraisal clause in plaintiff's policy was essentially the same as that in the statutory standard policy.

The North Carolina Supreme Court long ago upheld the validity of a similar appraisal clause, stating

> It is, we think, well settled that such a provision in a contract of insurance is not against public policy, and that it will be upheld by the courts, in so far as it provides for the submission to arbitration of the amount of loss or damage sustained by the [in]sured.

Mfg. Co. v. Assurance Co., 106 N.C. 28, 46-47, 10 S.E. 1057, 1058 (1890). *See also Green v. Insurance Co.*, 233 N.C. 321, 327, 64 S.E.2d 162, 166 (1951) (holding mortgagee bound by appraisal or arbitration had in good faith between mortgagor and insurance company); *Young v. Insurance Co.*, 207 N.C. 188, 192, 176 S.E. 271, 273 (1934) (stating that award for loss made upon proper procedure under fire in-

surance policy appraisal clause is presumed valid absent evidence of fraud, mistake, duress, or other impeaching circumstance); *Braddy v. Insurance Co.*, 115 N.C. 354, 355, 20 S.E. 477, 477 (1894) (stating, "[I]t is well settled that an agreement in a policy of insurance to submit to arbitrators the single question of the amount of loss by fire sustained by the person insured is not invalid.").

Turning to the more narrow question of whether the appraisal clause violated plaintiff's right to due process of law, the North Carolina Constitution provides, "No person shall be . . . in any manner deprived of his . . . property, but by the law of the land. No person shall be denied the equal protection of the laws . . . ." N.C. Const. art. I, § 19. "Law of the land" is synonymous with "due process of law" under the Fourteenth Amendment; and United States Supreme Court interpretations of the latter, though not binding, are highly persuasive in construing the former. *Watch Co. v. Brand Distributors and Watch Co. v. Motor Market*, 285 N.C. 467, 474, 206 S.E.2d 141, 146 (1974). The United States Supreme Court long ago upheld the constitutionality of a similar appraisal clause, stating

> [T]he arbitration clause has long been voluntarily inserted by insurers in fire policies, and . . . in the appraisal of the loss by arbitration, expert knowledge and prompt inspection of the damaged property may be availed of to an extent not ordinarily possible in the course of the more deliberate processes of a judicial proceeding. . . . Hence the requirement that disputes of this type arising under this special class of insurance contracts be submitted to arbitrators cannot be deemed to be a denial of either due process or equal protection of the laws.
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> . . . [T]he requirements of the 14th Amendment . . . are satisfied if the substitute remedy is substantial and efficient. We cannot say that the determination by arbitrators, chosen as provided by the present statute, of the single issue of the amount of loss under a fire insurance policy, reserving all other issues for trial in court, does not afford such a remedy, or that in this respect it falls short of due process . . . .

Hardware Dealers Mut. Fire Ins. Co. of Wisconsin v. Glidden Co., 284 U.S. 151, 159-60, 76 L. Ed. 214, 219-20 (1931). Since the appraisal clause in the case under review is similar to that in *Hardware Dealers*, we find the reasoning of that case persuasive. We hold

the clause did not deprive plaintiff of his right to due process under the North Carolina Constitution.

Plaintiff also contends the appraisal process as applied deprived him of the right to due process. He argues the appointment of the umpire was arbitrary and plaintiff did not receive a copy of the appraisal report until the day defendant Association filed its motion for summary judgment.

The validity of the appointment of an umpire by a judge may be adjudicated when the question is raised in a properly instituted civil action. *In re Roberts Co.*, 258 N.C. 184, 128 S.E.2d 137 (1962). Plaintiff, however, attempts to challenge validity of the appointment of the umpire by plaintiff's and Interstate's designated appraisers. The affidavit of plaintiff's appraiser, Billy Lynn Millsaps, indicates Millsaps agreed to the appointment of Paul W. Gadd as umpire. The affidavit of Larry G. Austin, Interstate's appraiser, shows he also agreed to the appointment of Gadd. According to Gadd's affidavit, on 24 February 1990, he and Millsaps agreed on an award of $33,000.00. Defendant Association's motion for summary judgment was not filed until 31 July 1990. Before this Court plaintiff does not show fraud, mistake, duress, or other evidence of wrongdoing in the appraisal process as applied to him. We conclude that under all the circumstances, plaintiff cannot challenge the validity of appointment of Gadd or timing of the report.

[3] We next consider whether plaintiff was deprived of his right to trial by jury. "In all controversies at law respecting property . . . trial by jury . . . shall remain sacred and inviolable." N.C. Const. art. I, § 25. Notwithstanding this provision, the North Carolina Supreme Court has repeatedly approved appraisal as a means of settling the single issue of amount of loss sustained by an insured. *E.g., Green v. Insurance Co.*, 233 N.C. 321, 64 S.E.2d 162 (1951). In general, there exists in North Carolina "a strong public policy favoring the settlement of disputes by arbitration." *Servomation Corp. v. Hickory Construction Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986). *Accord Johnston County v. R.N. Rouse & Co.*, 331 N.C. 88, 91, 414 S.E.2d 30, 32 (1992). Addressing the constitutionality of a mandatory binding arbitration clause in an automobile insurance policy, the Supreme Court of Delaware recently stated

> In arguing against enforcement of the arbitration clause, [plaintiffs] attempt to appeal to "the old judicial hostility to arbitration." . . . Over time . . . the judicial view of arbitration

> has evolved from hostility to eager acceptance. In part, this change has been fostered by a recognition of the efficiency and specialized expertise available in an arbitral forum. . . .
>
> . . . In short, the public policy of this state favors the resolution of disputes through arbitration.

Graham v. State Farm Mut. Automobile Ins. Co., 565 A.2d 908, 910-11 (1989) (quoting *Kulukundis Shipping Co. v. Amtorg Trading Corp.*, 126 F.2d 978, 985 (2d Cir. 1942)) (citations omitted). These words recall the United States Supreme Court's statement in *Hardware Dealers* that expert knowledge and prompt inspection of damaged property are not as readily available in the judicial forum. We find the reasoning of the Delaware court persuasive, and in light of the numerous North Carolina cases approving appraisal as a means of settling the single issue of amount of loss and strong policy favoring arbitration, we hold plaintiff's right under the North Carolina Constitution to trial by jury was not abridged by the appraisal clause.

For all the foregoing reasons, we conclude summary judgment was properly granted in favor of defendant Association.

II.

[4] We next consider whether the trial court erred in granting summary judgment in favor of defendants Matheson and Deal. The pleadings, depositions, exhibits, and affidavits before the trial court showed these defendants were not parties to the settlement negotiations between plaintiff and Interstate. Nevertheless, defendant Deal, as the employee of defendant Matheson, made several telephone calls on behalf of plaintiff in an attempt to find out what Interstate intended to do and to urge the company to settle quickly with plaintiff. Defendant Matheson's only involvement was through the acts of defendant Deal.

Plaintiff contends the court erred in granting summary judgment on his claim for bad faith refusal to settle plaintiff's claim under the policy. We disagree with this contention.

The North Carolina Supreme Court has held that once an agent has procured an insurance contract, the agent is not a party to the contract and is not liable under it "irrespective of any default in the performance thereof by the insurer and irrespective of the insured's lack of success in an action against such defaulting in-

surer." *Mayo v. Casualty Co.*, 282 N.C. 346, 354, 192 S.E.2d 828, 833 (1972). We conclude that defendants Matheson and Deal could not be held liable for any bad faith refusal to settle by Interstate.

[5] Plaintiff's next contention is that the court erred in granting summary judgment on his claim for negligence. Again we disagree.

"If an insurance agent . . . undertakes to procure for another insurance against a designated risk, the law imposes upon him the duty to use reasonable diligence to procure such insurance and holds him liable to the proposed insured for loss proximately caused by his negligent failure to do so." *Id.* at 353, 192 S.E.2d at 833. It follows that if defendants Matheson's and Deal's alleged negligence was not the proximate cause of plaintiff's loss, summary judgment could properly have been granted for these defendants. *See Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989) (stating movant meets burden of establishing lack of triable issue by proving essential element of opposing party's claim is nonexistent or showing through discovery that opposing party cannot produce evidence to support an essential element of its claim).

Plaintiff's argument is that on account of defendants' negligence he was unable to recover the value of his property. However, regardless of plaintiff's sincere belief as to the value of his property, and notwithstanding the stated face value of the policy, under the entire policy as written, plaintiff could not recover more than the actual cash value of the property at the time of loss.

North Carolina insurance law provides

> No insurance . . . agent shall knowingly issue any fire insurance policy . . . for an amount which, together with any existing insurance thereon, exceeds the fair value of the property . . . : Provided, any fire insurance company authorized to transact business in this State may, by appropriate riders or endorsements or otherwise, provide insurance indemnifying the insured for the difference between the actual value of the insured property at the time any loss or damage occurs, and the amount actually expended to repair, rebuild or replace . . . property . . . destroyed by fire . . . .

N.C.G.S. § 58-43-5 (1991). The North Carolina Rate Bureau is charged with promulgating rates for insurance against loss, including fire loss, to residential real property with not more than four housing

units located in North Carolina. N.C.G.S. § 58-36-1 (1991). The Bureau must maintain reasonable records of the policy or bond forms made or used by it. N.C.G.S. § 58-36-15(c) (1991). No policy form applying to insurance on risks covered by General Statutes Chapter 58, Article 36, including risk of loss by fire, may be issued for delivery unless filed by the Bureau with the Commissioner of Insurance and approved explicitly or through default as provided by statute. N.C.G.S. § 58-36-55 (1991).

The Rate Bureau's basic form dwelling policy, Form DP-1, includes the following loss settlement provision: "5. Loss Settlement. Covered property losses are settled at actual cash value at the time of loss but not exceeding the amount necessary to repair or replace the damaged property." A separate approved form, DP 00 62, entitled "Replacement Cost," begins with the following language, "For the premium charged for this policy, Policy Condition 5—Loss Settlement is amended to read as follows." Plaintiff's policy was a basic form dwelling policy; nothing of record shows the policy included an approved replacement cost rider or endorsement form.

Defendant Deal testified that regardless of what values he might have stated on the application for insurance, actual cash value at the time of loss, as determined by the appraisal process, would control the insured's recovery. Asked whether he explained actual cash value to plaintiff, Deal testified, "Well, you know, I don't know whether I ever made him understand that or not. I said, 'It is not like a policy like Steve [plaintiff's nephew] has . . . where we replace the house. It's based on what the actual cash value is at the time of loss.' " Deal testified further, "I think I basically told him down here in the office when we were trying to explain [it] to him. I said, 'Junior, you can basically insure this thing for anything you want to, but it is still only going to be worth so much at the time of loss under this policy.' "

Affidavits before the trial court showed that plaintiff's and Interstate's appraisers were unable to agree on an appraisal value of the fire loss. Plaintiff's appraiser, Millsaps, and umpire Gadd subsequently agreed on an award of $33,000.00 for the actual cash value of plaintiff's loss. Assuming arguendo that plaintiff sustained a loss, we conclude that under all the circumstances, negligence, if any, of defendants Deal and Matheson could not be the proximate cause thereof.

[6] Plaintiff also contends the trial court erred in granting summary judgment on plaintiff's claim for breach of fiduciary duty. Again we disagree.

"[T]here is a fiduciary duty on the part of the insurance agent to keep the insured correctly informed as to his insurance coverage." *R-Anell Homes v. Alexander & Alexander*, 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983). The duty arises where plaintiff shows a continuing relationship between agent and insured and a request for advice on some change or contemplated change in the insured's circumstances. In such a situation, the giving of false assurances concerning the extent of insurance coverage may constitute breach of fiduciary duty. *Id.* at 657-59, 303 S.E.2d at 576-77.

In the instant case, no evidence showed an ongoing relationship between plaintiff and defendant Matheson or Deal. No evidence showed that after purchasing the fire loss policy, plaintiff requested further advice or sought assurances from defendant Deal about coverage under the policy. There was no evidence that plaintiff sought to purchase additional insurance from these defendants.

Furthermore, this Court has stated,

> It is clearly not the duty of an insurer or its agent to inquire and inform an insured as to all parts of his policy:
>
>> We cannot approve the position that in the absence of a request it was the agent's legal duty to explain the meaning and effect of all the provisions in the policy, or that his failure to inquire . . . was a waiver of the requirement . . . . *Hardin v. Ins. Co.*, 189 N.C. 423, 427, 127 S.E. 353, 355 (1925).

Greenway v. Insurance Co., 35 N.C. App. 308, 314, 241 S.E.2d 339, 343 (1978).

Defendants' evidence showed defendant Deal explained to plaintiff that recovery under the policy would be based on actual cash value at time of loss and that the policy was different from another policy of which plaintiff had some knowledge. Under these circumstances, plaintiff had the burden of forecasting evidence of negligent false assurances by Deal as to the extent of insurance coverage. Plaintiff's evidence was that defendant Deal told plaintiff his house was covered for $65,000.00. Since, in the event of loss, plaintiff could not recover more than actual cash value, even viewed

indulgently, plaintiff's evidence did not show any false assurance by defendant Deal as to the extent of coverage. We conclude plaintiff failed to meet the burden of showing defendant Deal made negligent false assurances as to the extent of coverage.

[7] Finally plaintiff contends the trial court erred in granting summary judgment for defendants on plaintiff's unfair or deceptive trade practices claim. Again we disagree.

"Unfair or deceptive trade practices in the insurance industry are governed by N.C.G.S. § 58-54.4 [now § 58-63-15]." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 468, 343 S.E.2d 174, 179 (1986). A violation of this statute "as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1." *Id.* at 470, 343 S.E.2d at 179. Prohibited practices include "[c]ommitting or performing with such frequency as to indicate a general business practice any of the following: . . . Not attempting in good faith to effectuate prompt, fair and equitable settlements of claims in which liability has become reasonably clear." N.C.G.S. § 58-63-15(11)f (1991).

From our conclusion that defendants Matheson and Deal are not liable for the insurer's bad faith refusal to settle plaintiff's claim it follows that these defendants have no liability for the same conduct by the insurer if constituting unfair or deceptive practices under sections 58-63-15(11)f and 75-1.1. We note also that under the predecessor of section 58-63-15(11), the appellate courts repeatedly emphasized the necessity of allegations of engaging in prohibited acts with frequency so as to indicate a general business practice. *E.g., Beasley v. National Savings Life Ins. Co.*, 75 N.C. App. 104, 109, 330 S.E.2d 207, 210 (1985), *disc. rev. improvidently allowed*, 316 N.C. 372, 341 S.E.2d 338 (1986).

For all the foregoing reasons we hold the trial court did not err in granting summary judgment for defendants Matheson and Deal.

Affirmed.

Judges WELLS and WYNN concur.

IRA FOR THE BENEFIT OF PHILIP V. OPPENHEIMER, AND MORRIS I. KARPEN, PLAINTIFFS v. BRENNER COMPANIES, INC., ABE BRENNER, HERBERT BRENNER, GERTRUDE P. BRENNER, JOSEPH G. CLAUD, AND WACHOVIA BANK & TRUST COMPANY, N.A., AS PERSONAL REPRESENTATIVE OF THE ESTATE OF WADE M. GALLANT, JR., DEFENDANTS

No. 9021SC1124

(Filed 21 July 1992)

1. **Corporations § 160 (NCI4th)— freeze-out merger—price of shares—statutory appraisal**

A statutory appraisal is a dissenting shareholder's exclusive remedy when the shareholder's objection to a "freeze-out" merger is essentially a complaint regarding the price which he received for his shares. N.C.G.S. § 55-113 (1982).

Am Jur 2d, Corporations §§ 2574, 2576.

2. **Corporations § 160 (NCI4th)— freeze-out merger—claims for unfairness, breach of fiduciary duty, fraud—price of shares—summary judgment—statutory appraisal**

The trial court did not err in granting summary judgment for defendant corporate directors on plaintiff minority shareholders' claims alleging unfairness of a "freeze-out" merger, breach of fiduciary duty, and actual and constructive fraud where plaintiffs' forecast of evidence related only to the price paid for their shares and the valuation method. Accordingly, the essence of the disagreement between the parties, the price of the shares, would more appropriately be resolved in a statutory appraisal proceeding.

Am Jur 2d, Corporations §§ 2507 et seq.

Valuation of stock of dissenting stockholders in case of consolidation or merger of corporation, sale of its assets, or the like. 48 ALR3d 430.

3. **Corporations § 160 (NCI4th)— action contesting freeze-out merger—financial information—denial of discovery—consideration in statutory appraisal proceeding**

In an action contesting a "freeze-out" corporate merger, the trial court did not err in denying plaintiff minority shareholders' motions to compel discovery of the corporation's pre-merger and post-merger financial information where plain-

tiffs sought the pre-merger information to demonstrate the increased value of their stock and the post-merger information to show the stock's future value, since the requested information dealt with the value of the stock and should be considered in the statutory appraisal proceeding.

Am Jur 2d, Corporations §§ 2574, 2576.

APPEAL by plaintiffs from Order entered 12 July 1990 by *Judge William H. Freeman* in FORSYTH County Superior Court. Heard in the Court of Appeals 14 May 1991.

Clark & Wharton, by David M. Clark and B. Douglas Martin; and Lowey, Dannenberg, Bemporad & Selinger, P.C., by Richard C. Fooshee, for plaintiff appellants.

Womble Carlyle Sandridge & Rice, by William C. Raper and Timothy G. Barber. for defendant appellees.

COZORT, Judge.

Plaintiffs, minority shareholders of stock in defendant corporation, filed suit in superior court contesting the forced sale of the minority shareholders' stock, commonly referred to as a corporate "freeze-out." The trial court granted summary judgment in favor of defendant corporation and the company's majority shareholders. We find the principal issue raised by plaintiffs' claims concerns the value of the stock and that the statutory appraisal proceeding provided in N.C. Gen. Stat. Chapter 55 (now Chapter 55A) is plaintiffs' exclusive remedy. We affirm summary judgment for defendants.

Defendant Brenner Companies, Inc., ("Brenner") is a North Carolina public corporation in the business of processing and recycling metal, fabricating steel, and manufacturing commercial refuse containers. The remaining defendants acted as Brenner's Board of Directors ("Board") at the time when plaintiffs filed their lawsuit. The plaintiffs' suit resulted from events which occurred preceding and following a "cash out" of Brenner stock held by minority shareholders. The "cash out," commonly known as a "freeze-out" or "squeeze-out" merger, was orchestrated by defendants and began several years prior to 1988.

In 1978, Brenner's sale of its trash collection division resulted in a limited public market for its stock. Due to the limited public demand for its common stock, in 1979 Brenner implemented a repur-

chase program to acquire shares held by non-family shareholders in 1979. In November 1987, the Securities and Exchange Commission ("SEC") notified Brenner that the company could not repurchase additional stock without complying with federal regulations governing "going-private" transactions. Subsequent to the SEC's ruling, the Board decided in December 1987 to eliminate remaining public shareholders in a "freeze-out" merger to become completely private.

The Board enlisted the services of Interstate Securities Corporation ("Interstate") to provide a valuation of the company in March 1988. Interstate presented two valuation reports to defendants, one dated 18 April 1988, and another dated 11 May 1988. The April 18 report included three different valuation methods which priced Brenner's common stock between $15.93 and $19.12 per share. On 20 April 1988, three directors voted to set the merger stock price at the median of Interstate's valuation, or $17.50 per share. The Board then asked Interstate to complete a fairness study of the $17.50 price. Interstate reviewed the price by utilizing eight different valuation methods; none of the resulting figures exceeded the $17.50 price per share. On 11 May 1988, the Board approved the merger at $17.50 per share, nearly double the previous market price of the stock.

After learning of the merger, plaintiffs, as minority shareholders, believed the price of the stock to be "ridiculously low." As a result, plaintiffs filed this suit on 23 May 1988 alleging that defendants committed fraud and breach of fiduciary duty. Plaintiff Oppenheimer moved for a preliminary injunction to enjoin the merger on 11 October 1988; the motion was denied on 27 October 1988. The merger, approved by 92% of the minority shares, was completed thereafter. During discovery, plaintiffs filed motions to compel disclosure of Brenner's pre- and post-merger financial information; both motions were denied. Defendants filed a motion for summary judgment on 4 May 1990. The trial court granted defendants' motion for summary judgment on 12 July 1990. Plaintiffs appeal.

On appeal, plaintiffs argue five assignments of error. First, plaintiffs contend that a statutory appraisal is not their exclusive remedy to redress their dissatisfaction with the merger's stock price per minority share. In their second, third, and fourth assignments of error, plaintiffs contend summary judgment was improper because issues of material fact existed as to (1) the fairness

of the merger, (2) breach of fiduciary duty by defendants, and (3) commission by defendants of actual or constructive fraud, or both. Finally, plaintiffs contend that the trial court erred in denying plaintiffs' motions to compel discovery of Brenner's pre- and post-merger financial information. We affirm.

[1] We first address the issue presented concerning whether a statutory appraisal is plaintiffs' exclusive remedy to contest their right to receive fair value of the shares subject to the "freeze-out." Plaintiffs contend that a statutory appraisal is not their exclusive remedy to redress what the minority shareholders perceived to be as an inadequate price for their shares. The applicable statute in effect when plaintiffs filed their cause of action, N.C. Gen. Stat. § 55-113 (1982),[1] states:

> (b) . . . [A]ny shareholder of a corporation effecting a merger, consolidation or sale of assets for shares may give to the corporation, prior to or at the meeting of the shareholders to which the proposal of amendment, dissolution, merger, consolidation or sale of assets for shares is submitted to a vote, written notice that he objects to such proposal. Within 20 days after the date on which the vote was taken, such shareholder may, unless he voted in person or by proxy in favor of the proposal, make written demand on the corporation for payment of the fair value of his shares. Such demand shall state the number and class of shares owned by him. In addition to any other right he may have in law or equity, a shareholder giving such notice shall be entitled, if and when the amendment, dissolution, merger, consolidation or sale of assets for shares is effected, to be paid by the corporation the fair value of his shares, as of the day prior to the date on which the vote was taken, subject only to the surrender by him of the certificate representing his shares.
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1. On 1 July 1990, the North Carolina Corporation Act, codified in Chapter 55 of the General Statutes, became effective. Under the new Act, N.C. Gen. Stat. § 55-13-02 (1990) explains a shareholder's right to dissent. N.C. Gen. Stat. § 55-13-02(b) now establishes the exclusivity of a dissenting shareholder's remedy in challenging a corporation's actions. "The remedy is the exclusive remedy unless the transaction is 'unlawful' or 'fraudulent.' " *See* N.C. Gen. Stat. § 55-13-02 (1990), Official Comment 2, Exclusivity of Dissenters' Rights. Our decision today makes no effort to discuss the result of an application of new Chapter 55 to the facts in the case below.

> (d) If within 30 days after the date upon which the objecting shareholder becomes entitled to payment of his shares . . . the value of the shares is agreed upon between the shareholder and the corporation, payment therefor shall be made within 60 days after the agreement, . . .
>
> (e) If within the 30-day period mentioned in subsection (d) of this section the shareholder and the corporation do not agree as to the value of the shares the shareholder may, within 60 days after the expiration of the 30-day period, file a petition in the superior court of the county of the registered office of the corporation asking for the appointment by the clerk of three qualified and disinterested appraisers to appraise the fair value of the shares. . . . The award of the appraisers, or a majority of them, if no exceptions be filed thereto within 10 days after the award shall have been filed in court, shall be confirmed by the court, and when confirmed shall be final and conclusive, and the shareholder upon depositing the proper share certificates in court, shall be entitled to judgment against the corporation for the appraised value thereof as of the date prescribed in this section, together with interest thereon to the date of such confirmation. If either party files exceptions to such award within 10 days after the award shall have been filed in court, the case shall be transferred to the civil issue docket of the superior court for trial . . . .

We acknowledge that a statutory appraisal is *not* a dissenting shareholder's exclusive remedy when the shareholder has presented claims of breach of fiduciary duty, fraud, self-dealing, securities violations, or similar claims based on allegations other than solely the inadequacy of the stock price. *See Austell v. Smith*, 634 F.Supp. 326 (W.D.N.C.), *appeal dismissed*, 801 F.2d 393 (4th Cir. 1986); *Umstead v. Durham Hosiery Mills, Inc.*, 578 F.Supp. 342 (M.D.N.C. 1984). In both *Austell* and *Umstead*, the courts held that the statutory appraisal remedy was not exclusive where the plaintiffs alleged claims challenging corporate action in a "freeze-out" merger, and such claims were based on allegations other than just the inadequacy of price. *Austell*, 634 F.Supp. at 330; *Umstead*, 578 F.Supp. at 345. We also agree that a statutory appraisal remedy "may not be adequate [as] in certain cases, particularly where fraud, misrepresentation, self-dealing, deliberate waste of corporate assets, or gross and palpable overreaching are involved." *Weinberger v. UOP, Inc.*, 457 A.2d 701, 714 (Del. Supr. 1983). *See also Walk*

v. Baltimore & Ohio R.R., 847 F.2d 1100 (4th Cir. 1988), *vacated on other grounds*, 492 U.S. 914, 106 L.Ed.2d 583 (1989); *Rosenstein v. CMC Real Estate Corp.*, 168 Ill. App. 3d 92, 522 N.E.2d 221 (1988).

The issue of whether a statutory appraisal is a dissenting shareholder's exclusive remedy when the shareholder challenges *only* the fair value or price of the stock is one of first impression in our State. Consequently, we consider the law of other jurisdictions in arriving at our decision. In *Schloss Assoc. v. Chesapeake & Ohio Ry. Co.*, 73 Md. App. 727, 536 A.2d 147 (Md. Ct. Sp. App. 1988), the court determined that a remedy beyond the statutory appraisal procedure was not available where the shareholders' objection to a "freeze-out" merger was "essentially a complaint over price—the amount and how it was established—for which the statutory appraisal right is a wholly adequate remedy." *Schloss*, 73 Md. App. at 748, 536 A.2d at 158.

We find the court's rationale in *Schloss* persuasive. The court in *Schloss* determined that Md. Code Ann. Corp. & Ass'ns § 3-106(d), a statute similar to N.C. Gen. Stat. § 55-113, provided an exclusive remedy to shareholders when the shareholders' primary challenge concerned the fair price of the stock. The Maryland statute, like N.C. Gen. Stat. § 55-113, permits a dissenting minority shareholder to demand and receive payment of the fair value of his stock when a corporate merger has occurred. Md. Code Ann. Corp. & Ass'ns § 3-106(d) (1985). The *Schloss* court held the plaintiffs' allegations of fraud were entirely too general and concluded the dispute over the stock value could be resolved through the statutory appraisal process. We agree that a "remedy beyond the statutory procedure is not available where the shareholder's objection is essentially a complaint regarding the price which he received for his shares." *Stepak v. Schey*, 553 N.E.2d 1072, 1075 (Ohio 1990). Here, as in *Schloss*, the record indicates that plaintiffs' primary complaint concerning the merger dealt with the stock price. As will be discussed below, plaintiffs have not alleged sufficient facts to make out claims for unfairness of the merger, breach of fiduciary duty, and fraud separate and apart from the plaintiffs' concerns over price. Therefore, although "special, compelling circumstances may justify alternative relief in other freeze-out situations," *Schloss*, 73 Md. App. at 740, 536 A.2d at 154, we adopt the reasoning in *Schloss* and find in the present case that the statutory appraisal remedy in N.C. Gen. Stat. § 55-113 was the plaintiffs' exclusive remedy.

[2] Plaintiffs contend the trial court erred in granting summary judgment for defendants as to plaintiffs' claims alleging unfairness of the merger, breach of fiduciary duty, and actual and/or constructive fraud. Our standard of reviewing a trial court's ruling on summary judgment is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, indicate there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 412 S.E.2d 97 (1991), *disc. review denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). In order for the party opposing summary judgment to prevail, "once [the moving] party satisfies his burden in moving for summary judgment . . . [t]he opposing party must come forward with facts, not mere allegations, which controvert the facts set forth in the moving party's case." *Econo Travel Motor Hotel Corp. v. Taylor*, 301 N.C. 200, 204, 271 S.E.2d 54, 57 (1980). After careful review of the pleadings, depositions, affidavits, and other materials in the record, we conclude the trial court properly granted summary judgment for defendants as to plaintiffs' claims.

In essence, plaintiffs' complaint asks for compensatory and punitive damages based on one of the following theories: unfairness of the merger, breach of fiduciary duty, and actual and/or constructive fraud. First, plaintiffs contend the defendants "acted unfairly to the members of the class by appropriating for the Brenner family the assets of the Company, by eliminating the public shareholders of the Brenner Companies at an inadequate price and as a result of unfair dealing." There are two aspects of fairness, fair dealing and fair price. *Weinberger*, 457 A.2d at 711. Here, plaintiffs have only alleged facts questioning the fairness of price as being the basis for any unfair dealing. Plaintiffs' only allegations of dishonesty and bad faith are related to price. In fact, plaintiffs' individual depositions reveal the primary point of contention for the minority shareholders was price alone. This Court has determined that the inadequacy of price in and of itself does not support claims for oppression, artifice, fraud, or undue advantage. *Short v. Bryant*, 97 N.C. App. 327, 329, 388 S.E.2d 205, 206 (1990). Moreover, we believe that an unfair price alone does not render a merger suspect. Under the circumstances, because plaintiffs have not presented specific facts of misconduct to show a genuine issue of material fact, *Grad v. Kaasa*, 312 N.C. 310, 313, 321 S.E.2d

888, 890 (1984), summary judgment was properly granted as to plaintiffs' claim for unfairness of the merger.

Second, plaintiffs argue summary judgment was improper because material facts existed as to whether defendants breached their fiduciary duty to plaintiffs. Clearly, the officers and directors of a corporation owe a fiduciary duty to their shareholders. N.C. Gen. Stat. § 55-35 (1982). Plaintiffs raise several questions regarding the defendants' actions. However, each of plaintiffs' contentions may once again be traced to a dispute over the value of the minority shares—a question to be determined at a statutory appraisal proceeding. For example, plaintiffs contend that Interstate's valuation of the company was improperly conducted because the Board failed to provide Interstate with information sufficient to do an accurate valuation. The record indicates otherwise. The dispute over the method of valuation is a dispute over price and is better left to an appraisal action.

Plaintiffs additionally challenge the Board's lack of soliciting third-party buyers. The lack of soliciting third-party buyers does not render a merger suspect; it is only when a board fails to properly investigate the worth of the company that suspicion is aroused. *Smith v. Van Gorkum*, 488 A.2d 858, 873 (Del. Supr. 1985). In the present case, Brenner's actions did not indicate a failure to properly investigate the value of the company. Rather, Brenner hired an independent evaluator, Interstate, to study Brenner's worth and to subsequently direct a fairness study of the price per share of stock in relation to the merger and minority shareholders' interests. Plaintiffs also attack Interstate's use of tax assessments as indicators of Brenner's value. This allegation also has no merit. Interstate's use of tax assessments was not improper, since tax assessments are one aspect of assessing the company's property and Interstate employed the most current tax assessment available in its valuation.

Plaintiffs further allege that Interstate was engaged to conduct the fairness opinion only *after* the Board heard Interstate's opinion and had approved the merger. Plaintiffs' contentions again have no merit. The formal engagement letter with Interstate was signed on 3 May 1988. The fairness opinion was rendered 11 May 1988. The Board merely ratified the officers' actions in executing the 3 May contract at the 11 May meeting.

Plaintiffs finally argue that the non-family Board members breached their fiduciary duty to protect the minority shareholders by failing to investigate the validity of the Interstate reports as to the worth of Brenner stock. Once more, plaintiffs' complaint is grounded on the price received for minority shares. Summary judgment was proper for defendants on plaintiffs' allegations of breach of fiduciary duty.

Finally, plaintiffs contend that summary judgment was improper because issues of material fact were present as to whether defendants committed actual or constructive fraud or both. Plaintiffs claim that the "defendants concealed material facts from the public and made material misrepresentations of fact," by "engag[ing] in a plan and scheme to defraud" minority shareholders. The elements of fraud are: (1) false representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974). Plaintiffs point only to the proxy statements as evidence of the fraudulent misrepresentations. Representations in a proxy statement evidencing the opinion of a corporation constitute fraud if they meet all of the elements of fraud. Mere opinions will not support a claim of fraud. *Early v. Eley*, 243 N.C. 695, 698, 91 S.E.2d 919, 921 (1956). Because the proxy statement was issued on 8 September 1988, which was subsequent to the filing of plaintiffs' action, we look only to plaintiffs' amended complaint in reviewing their claims of fraud. The amended complaint shows that plaintiffs' claim for actual fraud was grounded only in their dissatisfaction with the price paid for their shares and with the valuation procedure. As we noted earlier, inadequate price alone will not support a claim for fraud. *Short*, 97 N.C. App. at 329, 388 S.E.2d at 206.

Plaintiffs also allege constructive fraud. "[C]onstructive fraud is established when proof is presented that a position of trust and confidence was taken advantage of to the hurt of the other." *Stilwell v. Walden*, 70 N.C. App. 543, 546, 320 S.E.2d 329, 331 (1984). Plaintiffs have presented no evidence to demonstrate any harm suffered by the shareholders other than the damage from the price they received for their minority shares. Therefore, plaintiffs' constructive fraud claim also must fail. In conclusion, plaintiffs have not presented facts to support any of their underlying theories for recovery other than that of a challenge to the stock value.

Accordingly, we find the essence of the disagreement between the parties, the price of the shares, would be more appropriately resolved in a statutory appraisal proceeding. For these reasons, the trial court correctly entered summary judgment for defendants.

[3] Plaintiffs' final assignment of error deals with the trial court's denial of two motions to compel discovery of Brenner's pre- and post-merger financial information. Plaintiffs argued the information was relevant on the issue of fair price, improper gain, and lack of good faith in causing the merger. The trial court denied the motions due to their irrelevancy. The post-merger financial information does not affect Interstate's findings made prior to the merger. However, N.C. Gen. Stat. § 55-113(b) (1982) provides for the valuation of a going business the day prior to the merger. Thus, on the surface it appears Brenner's pre-merger financial information is relevant. However, it is important only as to *price*. Since plaintiffs discuss only the use of the pre-merger information to demonstrate the increased value of the stock and the use of the post-merger information to show the stock's future value, these issues influencing the price should be determined in the statutory appraisal proceeding. The trial court did not err in denying the motions to compel.

To sum up, the trial court did not err in granting summary judgment in favor of the defendants because (1) a review of the materials submitted for summary judgment indicates the plaintiffs were primarily disputing the price received for their minority shares, the exclusive remedy for which lies in a statutory appraisal proceeding; (2) plaintiffs have not alleged specific facts to support their claims of unfairness of the merger, breach of fiduciary duty, and fraud; and (3) the information requested by the motions to compel also dealt with value of the stock and could be additionally considered in the appraisal proceeding.

The trial court's entry of summary judgment for defendants is

Affirmed.

Judges ORR and WYNN concur.

GEORGE L. PROCTOR, ADMINISTRATOR OF THE ESTATE OF JOYCE BATTS PROCTOR, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY AND BOBBY F. JONES, ADMINISTRATOR C.T.A. OF THE ESTATE OF WILLIAM GRAY EDWARDS, JR., DEFENDANTS

No. 917SC714

(Filed 21 July 1992)

1. **Insurance § 532 (NCI4th)— underinsured motorist coverage— interpolicy stacking before 1985 amendment of statute**

Plaintiff was entitled to engage in interpolicy stacking of underinsured motorist coverages under two automobile insurance policies covering plaintiff's decedent for an accident that killed plaintiff's decedent prior to the 1985 amendment to N.C.G.S. § 20-279.21(b)(4), which added an interpolicy stacking requirement, even though one policy contained language limiting the amount of coverage to the maximum of only one applicable policy, since interpolicy stacking was contemplated by the statute prior to 1985 and was only clarified by the 1985 amendment.

Am Jur 2d, Insurance § 1464.

2. **Insurance § 532 (NCI4th)— underinsured motorist coverage— intrapolicy stacking before 1985 amendment of statute**

Plaintiff was entitled to engage in intrapolicy stacking of underinsured motorist (UIM) coverages for each of three vehicles insured under a policy covering plaintiff's decedent at the time she was killed in an accident in 1984 even though the policy contains contrary language and N.C.G.S. § 20-279.21(b)(4) did not specifically provide for stacking of UIM coverages at that time, since intrapolicy stacking of UIM coverages was required by public policy prior to the 1985 amendment to the statute which allowed stacking.

Am Jur 2d, Insurance § 1464.

Judge GREENE dissenting.

APPEAL by defendant North Carolina Farm Bureau Mutual Insurance Company from Judgment entered 17 May 1991 by *Judge James R. Strickland* in EDGECOMBE County Superior Court. Heard in the Court of Appeals 13 May 1992.

Bridgers, Horton & Rountree, by Charles S. Rountree, for plaintiff appellee.

Poyner & Spruill, by George L. Simpson III, for North Carolina Farm Bureau Mutual Insurance Company, defendant appellant.

COZORT, Judge.

Defendant North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau") appeals from the trial court's entry of summary judgment for plaintiff which determined plaintiff was entitled to engage in both interpolicy and intrapolicy stacking of underinsured motorist ("UIM") coverage. Defendant argues the trial court improperly ordered stacking of the policies in the present case because the accident in question occurred prior to an amendment to N.C. Gen. Stat. § 20-279.21(b)(4) which now imposes an insurance stacking requirement. We disagree with defendant's contentions and thus affirm.

The facts of the case below are undisputed. The plaintiff's wife, Joyce Batts Proctor, was killed in an automobile accident on 27 September 1984 when another vehicle struck her automobile in her lane of travel. The driver of the other automobile, William Gray Edwards, Jr., also died as a result of the accident. Plaintiff's decedent was driving a van owned by Country Manor Antiques ("Country Manor"), a business partnership of which she was a partner. The wrongful death of Mrs. Proctor was caused by the negligence of Mr. Edwards. Edwards held an automobile liability insurance policy issued by State Farm Mutual Insurance Company ("State Farm") which provided liability coverage maximum limits for bodily injury or wrongful death of $25,000 per person and $50,000 per accident. State Farm paid one-third of its $50,000 limit to plaintiff and the remaining amount was paid to other injured parties. In addition, the Edwards estate paid plaintiff one-third of $10,000 to plaintiff. The payments exhausted all liability insurance proceeds and all assets of the Edwards estate available to satisfy any judgment that plaintiff could obtain for his wife's death.

The plaintiff's decedent was covered by two automobile insurance policies; both were issued by defendant Farm Bureau. One policy was a business policy issued to Country Manor. The Country Manor policy had maximum liability coverage limits for bodily injury or wrongful death of $100,000 per person and $300,000 per accident. The other policy was a personal policy held by plaintiff,

George L. Proctor. The Proctor policy listed Joyce Proctor as a family member and insured three vehicles belonging to the Proctors. Both the Country Manor policy and the Proctor policy recited that UIM coverage would not be provided unless the insured specifically requested it. However, neither plaintiff, plaintiff's decedent, nor Country Manor rejected UIM coverage. Defendant therefore conceded that UIM coverage was provided in both policies pursuant to N.C. Gen. Stat. § 20-279.21(b)(4), despite the fact that premiums had never been paid for such coverage.

The parties disagreed as to the appropriate amount of UIM coverage; consequently, plaintiff filed an action on 18 September 1986 with a claim against Farm Bureau pursuant to both the Country Manor and Proctor policies. The parties treated the claim as a declaratory judgment action to determine the coverage question and filed cross-motions for summary judgment. The motions at that point dealt solely with the Country Manor policy and made no mention of the Proctor policy. The trial court granted summary judgment for plaintiff and ordered Farm Bureau to pay plaintiff the sum of $75,000 (representing the $100,000 UIM limit, minus a credit for State Farm's $25,000 liability limit). Defendant Farm Bureau appealed; the trial court was affirmed in *Proctor v. North Carolina Farm Bureau Mut. Ins. Co.*, 90 N.C. App. 746, 370 S.E.2d 258 (1988) and in 324 N.C. 221, 376 S.E.2d 761 (1989).

Subsequent to the *Proctor* decision, plaintiff filed a motion for partial summary judgment in which he contended he was now permitted to stack the coverage for the three vehicles covered in the Proctor policy for an additional $300,000 in UIM coverage. Farm Bureau filed a cross-motion for partial summary judgment, contending that plaintiff could not engage in either interpolicy or intrapolicy stacking of UIM coverage. For purposes of the motion hearing only, the parties stipulated that the damages to the estate of Mrs. Proctor exceeded $400,000. The trial court granted plaintiff's motion and denied Farm Bureau's motion, holding that plaintiff was entitled to stack the coverage from the Proctor policy in both an interpolicy and intrapolicy manner providing an additional $300,000 in coverage. Defendant Farm Bureau filed timely notice of appeal. We affirm.

[1] The first issue we must decide is whether the trial court erred in permitting plaintiff to engage in interpolicy stacking by stacking the coverage from the Proctor policy onto the coverage

of the Country Manor policy. Farm Bureau contends that because the accident giving rise to the claim occurred prior to the enactment of the 1985 amendment to N.C. Gen. Stat. § 20-279.21(b)(4), which added an interpolicy stacking requirement, the insurance policy controls. At the time of the accident, the statute in effect provided:

> [Automobile liability insurance policies] shall . . . provide underinsured motorist coverage, to be used only with policies that are written at limits that exceed those prescribed by subdivision (2) of this section and that afford uninsured motorist coverage as provided by subdivision (3) of this subsection, but not to exceed the policy limits for automobile bodily injury liability as specified in the owner's policy.

N.C. Gen. Stat. § 20-279.21(b)(4) (1983). The Proctor policy included a provision relating to *uninsured* motorist ("UM") coverage which stated, "If this policy and any other auto insurance policy issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy." Farm Bureau contends this limitation applies to both UM and UIM coverage. However, we need not decide whether this qualifier applies to Joyce Proctor because the statute even prior to the 1985 amendment permits interpolicy stacking. In *Sproles v. Greene*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *aff'd in part, rev'd in part on other grounds*, 329 N.C. 603, 407 S.E.2d 497 (1991), we addressed the identical issue with respect to interpolicy stacking. The accident leading to the claims in *Sproles* occurred in 1984, prior to the 1985 revision of N.C. Gen. Stat. § 20-279.21(b)(4). The plaintiff in *Sproles* was an insured under two different policies providing UIM coverage. One of the policies was issued by Travelers Indemnity Insurance Company ("Travelers"), and the other was issued by United States Fidelity and Guaranty Company ("USF&G"). The USF&G policy included a provision identical to that in the case at bar which limited the amount of coverage to the maximum of only one applicable policy. This Court, striking USF&G's contention that plaintiff's recovery was limited, explained:

> This policy provision conflicts with G.S. 20-279.21(b)(4) and is therefore unenforceable. In addition to making the underinsured motorist coverage limits in an automobile policy the same as the liability limits, unless the policyholder rejects the coverage, *Proctor v. North Carolina Farm Bureau Mutual*

> *Insurance Company*, 324 N.C. 221, 376 S.E.2d 761 (1989), G.S. 20-279.21(b)(4) requires that multiple underinsured motorist coverage available to an innocently injured accident victim be stacked or aggregated. *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989). This statutory mandate would avail nothing if insurance carriers could limit an injured insured's recovery to the maximum amount due under one policy.

Sproles, 100 N.C. App. at 108, 394 S.E.2d at 698. Farm Bureau alleges this Court in *Sproles* inadvertently "overlooked the fact that the accident in question occurred in 1984, before the 1985 revision was enacted," since "the court's reference to a 'statutory mandate' for stacking . . . make[s] no sense." We find that *Sproles* served to recognize only what *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *reh'g denied*, 325 N.C. 437, 384 S.E.2d 546 (1989), voiced explicitly, that interpolicy stacking pursuant to N.C. Gen. Stat. § 20-279.21(b)(4) was contemplated prior to 1985, and was only clarified by the later amendment. *See, Proctor*, 324 N.C. at 224-25, 376 S.E.2d at 763-64. Our interpretation of the statute at the time of the accident "provide[s] the innocent victim with the fullest possible protection." *Id.* at 225, 376 S.E.2d at 764. For these reasons, we find the trial court did not err in allowing the interpolicy stacking between the Country Manor policy and the Proctor policy.

We note the amount of coverage provided by the Proctor policy is dictated by the *Proctor* case, which determined the Country Manor policy had UIM coverage equal to the liability policy covering the victim. *See also, Sproles*, 100 N.C. App. at 101, 394 S.E.2d at 694. As with the Country Manor policy, the plaintiff's decedent was a named insured and UIM coverage was not rejected. The maximum liability coverage for wrongful death was $100,000 per person and $300,000 per vehicle. The amount of UIM coverage with respect to the Proctor policy therefore equalled $100,000 as to Joyce Proctor.

[2] The above determination leads us to the second issue, whether the trial court erred in allowing plaintiff to stack coverage of three vehicles on an intrapolicy basis to total $300,000 in UIM coverage. The Proctor policy covered three vehicles; three separate premiums were paid. Farm Bureau again argues that neither the 1983 version of N.C. Gen. Stat. § 20-279.21(b)(4) nor the *Sutton* decision requires

intrapolicy stacking in the present case. The Proctor policy incorporated a limitation of liability in the section discussing UM coverage; Farm Bureau contends this limitation also applies to the unstated UIM coverage. The section provides:

> 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. Subject to this limit for "each person," the limit of bodily injury liability shown in the Declarations for "each accident" for Uninsured Motorists Coverage is our maximum limit of liability for all damages for bodily injury resulting from any one accident. . . . This is the most we will pay for bodily injury and **property damage** regardless of the number of:
>
> 1. **Covered persons**;
> 2. Claims made;
> 3. *Vehicles or premiums shown in the Declarations*; or
> 4. Vehicles involved in the accident.

(Emphasis added.) Farm Bureau argues the above provision controls the present case since the 1983 version of N.C. Gen. Stat. § 20-279.21(b)(4) does not impute a stacking requirement, and because the *Sutton* case was decided based solely on the 1985 amendment. We disagree.

In *Sutton*, our Supreme Court decided that N.C. Gen. Stat. § 20-279.21(b)(4) (1983 & Cum. Supp. 1988), required both interpolicy and intrapolicy UIM stacking despite insurance policy language to the contrary. The *Sutton* court in part relied upon the 1985 statutory amendment, however, other public policy reasons were cited as being the basis for allowing intrapolicy stacking of UIM coverage. Some of the public policies cited in *Sutton* are that stacking: (1) "enhances the injured party's potential for full recovery of all damages"; (2) "prevents the 'anomalous situation that an insured is better off—for purposes of the underinsured motorist coverage—if separate policies were purchased for each vehicle' "; (3) "gives the insured due consideration for the separate premiums paid for each UIM coverage within a policy"; and (4) "is consistent with our preexisting common law by which automobile insurance

policies have been construed to require intrapolicy stacking of medical payments coverage . . . ." *Sutton*, 325 N.C. at 267, 382 S.E.2d at 764 (citations omitted).

Furthermore, the reasoning applied in both the *Proctor* and *Sproles* cases reveals that intrapolicy stacking in the present case comports with current law. Based on *Sutton*, *Proctor*, and *Sproles*, we therefore conclude the plaintiff is permitted to stack the UIM coverages for the three vehicles listed in the Proctor policy. The total amount available to plaintiff pursuant to the Proctor policy is therefore $300,000. The judgment of the trial court is

Affirmed.

Judge PARKER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I disagree with the conclusion of the majority that the plaintiff is entitled to stack the underinsured coverage in the Farm Bureau policy issued to George Proctor (Proctor policy) with the underinsured coverage in the Farm Bureau policy issued to Country Manor Antiques (Country Manor policy). I also disagree with the majority that the plaintiff is entitled to stack the underinsured coverages on the three vehicles insured in the Proctor policy.

On 27 September 1984, the date of the accident, N.C.G.S. § 20-279.21(b)(4) was silent on the right of an insured or owner to stack multiple underinsurance coverages. The statute only required that insurance companies make available underinsurance coverage in an amount "not to exceed the policy limits for automobile bodily injury liability as specified in the owner's policy." N.C.G.S. § 20-279.21(b)(4) (1983). Underinsured coverage was not statutorily required. *Id.* Furthermore, the courts cannot, when a statute is silent on an issue, insert into the statute under the guise of sound public policy, language not contained therein. *State v. Camp*, 286 N.C. 148, 152, 209 S.E.2d 754, 757 (1974). Therefore, because underinsured motorists coverage was not mandated by statute and because the statute was silent on the stacking issue, whether stacking was permitted in 1984 is controlled by the policy of insurance. *Allis v. Nationwide Mut. Ins. Co.*, 88 N.C. App. 595, 597, 363 S.E.2d

880, 882 (1988). Our courts have consistently held that in the absence of a statute requiring otherwise, unambiguous policy language may prohibit stacking of insurance coverages. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 508-09, 246 S.E.2d 773, 779-80 (1978); *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 323-24, 335 S.E.2d 228, 232 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986).

Interpolicy Stacking

In the section of the Proctor policy relating to "uninsured" coverage, which includes "underinsured" coverage, the policy provides:

> If this policy and any other auto insurance issued to you apply to the same accident, the maximum limit of liability for your injuries under all the policies shall not exceed the highest applicable limit of liability under any one policy.

There is no dispute that both the Proctor and the Country Manor policies apply to the accident in question and thus provide underinsurance coverage to Joyce Batts Proctor (Mrs. Proctor). The issue in this case, under the terms of the Proctor policy, is whether the Country Manor policy was "any other auto insurance issued" to Mrs. Proctor. Because Mrs. Proctor was a partner in Country Manor Antiques, the owner of the Country Manor policy, that policy was issued to her. Therefore, under the plain language of the Proctor policy, plaintiff is not entitled to interpolicy stack the underinsured coverages under both the Proctor policy and the Country Manor policy.

Intrapolicy Stacking

The Proctor policy provides:

> The limit of bodily injury liability shown in the Declarations for "each person" for [uninsured and underinsured] 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 . . . [v]ehicles or premiums shown in the Declarations. . . .

This policy language, read in conjunction with the Declarations, provides that the underinsured limit of liability is $100,000, although the policy provided underinsurance coverage on three separate vehicles. Accordingly, the plaintiff is not entitled to stack the underin-

sured coverages on the three vehicles insured in the Proctor policy. *Cf. Hamilton*, 77 N.C. App. at 324, 335 S.E.2d at 232 (uninsured coverage stacking prohibited where policy contained clear language).

Plaintiff argues that prohibiting the stacking of underinsured coverages in this instance allows the insurance company to collect a premium in exchange for nothing. Although "it appears that the plaintiff is correct in this argument . . . it does not justify [the court] rewriting the policy." *Davidson v. United States Fidelity and Guar. Co.*, 78 N.C. App. 140, 143, 336 S.E.2d 709, 711, *aff'd per curiam*, 316 N.C. 551, 342 S.E.2d 523 (1986) (refusing to modify policy language where underinsurance motorist coverage was no benefit to insured). The issuance of such a policy of insurance may however justify an action by an insured against the insurance company and its agent for fraud, unfair and deceptive trade practice, and negligence. *See Davidson v. Knauff Ins. Agency*, 93 N.C. App. 20, 376 S.E.2d 488, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

I would therefore reverse the order of the trial court and remand for entry of summary judgment for defendant insurance company.

IN THE MATTER OF THE WILL OF JOHN R. JARVIS, DECEASED

No. 9124SC156

(Filed 21 July 1992)

1. **Wills § 24.1 (NCI3d)— caveat proceeding—directed verdict for propounders**

   The trial court may direct a verdict for propounders in a caveat proceeding at the close of all the evidence.

   Am Jur 2d, Trial §§ 463 et seq.

2. **Rules of Civil Procedure § 50.2 (NCI3d)— directed verdict—party with burden of proof**

   A directed verdict in favor of the party with the burden of proof on the substantive issues is appropriate only if the

credibility of the movant's evidence is manifest as a matter of law.

Am Jur 2d, Trial §§ 463 et seq.

3. **Wills § 20 (NCI3d)— caveat proceeding—due execution—directed verdict for propounders**

The trial court properly directed a verdict for propounders on the issue of due execution where the nonmovant caveators rendered propounders' evidence manifestly credible as a matter of law by admitting the basic facts upon which propounders' claim rested, and propounders' evidence showed that the attorney who prepared the will signed testator's full name to the will at testator's request; testator made his own mark (an X) in the spaces designated "His mark," with the attorney guiding the pen; and the attorney and his son signed the will as attesting witnesses.

Am Jur 2d, Trial §§ 463 et seq.; Wills §§ 210 et seq., 1021 et seq.

Validity of will signed by testator with the assistance of another. 98 ALR2d 824.

4. **Wills § 22 (NCI3d)— caveat proceeding—mental capacity—directed verdict for propounders**

The trial court properly directed a verdict for propounders on the issue of testator's mental capacity to make a will where only the natural objects of testator's bounty were devisees or legatees under the will, and the testimony of caveators' witnesses showed that, although testator was physically incapacitated from a stroke, he was mentally alert, knew his family, knew the nature and extent of his property, and knew what he wanted to leave to his survivors.

Am Jur 2d, Trial §§ 463 et seq.; Wills §§ 54 et seq., 960 et seq.

5. **Wills § 21.4 (NCI3d)— caveat proceeding—undue influence—directed verdict for propounders**

The trial court properly directed a verdict for propounders on the issue of undue influence where caveators failed to put

on any evidence that testator's will was overborne or any evidence as to the identity of the purported dominant influence.

Am Jur 2d, Trial §§ 463 et seq.; Wills §§ 389 et seq., 860 et seq.

APPEAL by caveators from judgment entered 20 December 1990 by *Judge Charles C. Lamm, Jr.*, in MADISON County Superior Court. Heard in the Court of Appeals 13 November 1991.

Roberts Stevens & Cogburn, P.A., by Max O. Cogburn, for caveator-appellants Kenneth R. Jarvis and James R. Jarvis.

Morris, Bell & Morris, P.A., by William C. Morris, Jr., for propounder-appellees Mozelle H. Jarvis and Jack M. Jarvis.

PARKER, Judge.

Caveators in this proceeding oppose probate of a paper writing dated 6 July 1977, purporting to be the Last Will and Testament of John R. Jarvis, on the grounds of improper execution under N.C.G.S. § 31-3.3, testator's mental incapacity and undue influence. Caveators are James R. Jarvis and Kenneth R. Jarvis, the two older sons of deceased. Propounders are the widow, Mozelle H. Jarvis, and the youngest son, Jack M. Jarvis, who still lived with his parents at the time of John's death in December 1986. The paper writing leaves John's entire estate to his wife, if she survives him.

Both propounders and caveators presented witnesses at the caveat proceeding. Caveators appeal from denial of their motion for directed verdict under Rule 50(a) of the North Carolina Rules of Civil Procedure, made at the close of propounders' evidence, on the ground that propounders failed to prove due execution of the paper writing. Caveators also appeal from grant of directed verdict in favor of propounders on the issues of due execution, mental capacity and undue influence.

[1] The question whether in a caveat proceeding a judge may decide, upon propounders' motion for directed verdict pursuant to N.C.G.S. § 1A-1, Rule 50(a), that caveators' evidence on a contested issue is legally insufficient to go to the jury has not been specifically addressed since enactment of the Rules of Civil Procedure in 1967. We hold that the trial court may direct a verdict for propounders in a caveat proceeding at the close of all evidence,

where appropriate; and the court in this case properly directed a verdict on the issues of due execution, mental capacity and undue influence.

The rule applicable in caveat proceedings was succinctly stated in *In re Will of Morrow*, 234 N.C. 365, 67 S.E.2d 279 (1951).

> The status of such a paper writing when drawn into question by a caveat must be determined by a jury's verdict. Neither the caveators nor the propounders can waive a jury trial nor submit the case upon an agreed statement of facts for determination by the court. The judge cannot upon an agreed statement of facts which is supplemented by his own findings upon evidence establish the validity of a will in solemn form without the intervention of a jury. A jury's verdict is absolutely indispensable upon the issues "will or no will."
>
> So exacting are the requirements of the law that neither the propounder nor the caveators can submit to a nonsuit, nor can a nonsuit be entered for any reason.

Id. at 368, 67 S.E.2d at 281 (citations omitted).

Numerous cases support the proposition that where there is a caveat, there can be no probate without a jury verdict. *In re Will of Redding*, 216 N.C. 497, 5 S.E.2d 544 (1939); *In re Will of Westfeldt*, 188 N.C. 702, 125 S.E. 531 (1924); *In re Will of Hinton*, 180 N.C. 206, 104 S.E. 341 (1920); *In re Will of Hodgin*, 10 N.C. App. 492, 179 S.E.2d 126 (1971). *Cf. In re Will of Ledford*, 176 N.C. 610, 97 S.E. 482 (1918). In certain cases, a peremptory instruction has been held appropriate on particular issues. *In re Will of Simmons*, 268 N.C. 278, 150 S.E.2d 439 (1966) (peremptory instruction for propounder where no evidence of undue influence); *In re Will of Perry*, 193 N.C. 397, 137 S.E. 145 (1927) (peremptory instruction for caveators where no evidence of testamentary intent); *In re Will of Bennett*, 180 N.C. 5, 103 S.E. 917 (1920) (same).

This body of very well settled law was reconsidered and modified in *In re Will of Mucci*, 287 N.C. 26, 213 S.E.2d 207 (1975), an appeal from a directed verdict in favor of caveators on the issue of testamentary disposition. The Court of Appeals reversed, holding that even though there was no evidence of testamentary intent, the issue whether the letter was a codicil had to be resolved by the jury on a peremptory instruction. *In re Will of Mucci*, 23 N.C.

App. 428, 209 S.E.2d 332 (1974). The Supreme Court, reversing the Court of Appeals, held:

> Where, as here, propounder fails to come forward with evidence from which a jury might find that there has been a testamentary disposition it is proper for the trial court under Rule 50 of the Rules of Civil Procedure to enter a directed verdict in favor of caveators and adjudge, as a matter of law, that there can be no probate.

Mucci, 287 N.C. at 36, 213 S.E.2d at 214. Moreover, *Mucci* approved entry of a directed verdict "[r]ather than direct[ing] or peremptorily instruct[ing] the jury to do what is essentially a mechanical act." *Id.* at 37, 213 S.E.2d at 214.

Hence *Mucci* makes clear that where no factual dispute exists and the paper writing purporting to be a will does not as a matter of law meet the criteria for testamentary disposition, probate is defeated, and the court may direct a verdict on that issue which ends the inquiry. The questions before this Court in the present case are whether the trial court may direct a verdict for propounders and admit the will to probate (i) on the issue of due execution where there is no factual dispute as to the manner in which the paper writing was executed and (ii) on the remaining issues when the caveators' evidence is insufficient as a matter of law to support a jury verdict.

The approach in *Mucci* is but an application of the standards under which a trial judge must decide a motion for directed verdict. In a civil jury trial a Rule 50 motion is the exclusive device for challenging the legal sufficiency of nonmovant's evidence to go to the jury. *Creasman v. Savings & Loan Assoc.*, 279 N.C. 361, 183 S.E.2d 115 (1971), *cert. denied*, 405 U.S. 977, 31 L.Ed.2d 252 (1972). The evidence of nonmovant must be considered in the light most favorable to him, giving nonmovant the benefit of all reasonable inferences that may be drawn from the evidence in his favor. *West v. Slick*, 313 N.C. 33, 326 S.E.2d 601 (1985). Any conflicts, inconsistencies or contradictions in the evidence are to be resolved in nonmovant's favor. *Rappaport v. Days Inn*, 296 N.C. 382, 250 S.E.2d 245 (1979).

[2] An even more specialized rule governs grant of directed verdict in favor of a party with the burden of proof. This rule dictates that a directed verdict in favor of the party with the burden of

proof on the substantive issues would only be appropriate if the credibility of movant's evidence is "manifest as a matter of law." *See Bank v. Burnette*, 297 N.C. 524, 536, 256 S.E.2d 388, 395 (1979). *Burnette* requires that the evidence supporting directed verdict for a movant with the burden of proof on an issue so clearly establish the fact in issue that no reasonable inferences to the contrary can be drawn. *Id.* "[W]hile credibility is generally for the jury, courts set the outer limits of it by preliminarily determining whether the jury is at liberty to disbelieve the evidence presented by movant." *Id.* at 538, 256 S.E.2d at 396.

[3] In a caveat proceeding propounders have the burden of proof on the issue of due execution. *In re Will of Morrow*, 234 N.C. 365, 67 S.E.2d 279 (1951). On the issue of due execution, we find directed verdict for propounders was proper in the present case in that caveators as nonmovants "establish[ed] proponent's case by admitting the truth of the basic facts upon which the claim of proponent" rested. *Burnette*, 297 N.C. at 537, 256 S.E.2d at 396. *Burnette* specifically states that such a situation renders movant's evidence manifestly credible as a matter of law. Caveators' sole attack on due execution of the paper writing was an alleged failure to have two attesting witnesses as required by N.C.G.S. § 31-3.3. Caveators argue that one of the two "attesting" witnesses also signed the name of the testator on the paper writing. In making this argument caveators have admitted, however, that two persons who represented themselves to have been attesting witnesses, and who both testified at the caveat proceeding, did in fact at least attempt to sign in that capacity. A further part of caveators' argument is the assertion that "John R. Jarvis did not sign" the paper writing but that his name was signed for him by one of the so-called attesting witnesses. Contrary to caveators' two interrelated arguments on the issue of formal execution, propounders' evidence showed that the paper writing had two attesting witnesses and the testator's own signature was present on the paper writing.

The paper writing was prepared by attorney Joseph Huff in late June or early July 1977. Huff testified that John and Mozelle Jarvis had come to his office for advice about making their Wills and he had suggested reciprocal Wills. Huff had prepared a prior Will for John Jarvis in 1972. As a result of a physically disabling stroke in 1970, John's communications with Huff were limited to saying "yes" or "no" and gesturing with his arms, head and shoulders. Huff testified that John had no difficulty understanding the lawyer's

advice in mid-1977 and that John had usually taken Huff's advice on other matters. Huff testified that John "could hear, he could do everything except talk." "[T]he only inability he had was to speak." During their meeting Huff also told John that Mozelle, who was younger than John and in apparent good health, was likely to outlive him. When Huff asked John if John wanted Mozelle to be "taken care of" in the Will, John very emphatically indicated that was his desire.

John and Mozelle returned to Huff's office on 6 July for the execution of the paper writing. Although John's right side had become paralyzed from the stroke seven years earlier, leaving him unable to write, he could do some walking by dragging his right foot and also managed steps with difficulty. Huff gave John a copy of the proposed Will to read through, which John did "for 20 or 30 minutes" in Huff's reception room, signaling Huff that he was finished by knocking on the office door. Huff testified that he did not show the paper writing to Mrs. Jarvis, although she had stayed with her husband as he silently read over the proposed Will. Upon his return to Huff's office and in response to Huff's leading questions, John indicated he had read the Will, it was as John intended and John was satisfied. Then Huff went over the Will "item by item" with John, reading it aloud and asking after every item if that was exactly what John wanted to do. Each time John said "yes."

In the presence of Huff and Huff's son, then a law student, the elder Huff asked John if he wanted them to attest to the Will. John said he did. In the witnesses' presence John published the paper writing as his Will. Huff asked if John would like Huff to sign John's full name, which Huff then did. Then John came around behind Huff to make his own mark (an "X"), using his non-paralyzed left hand, in the space designated "His mark" on each of the three pages of the paper writing. Huff and his son both saw John making his mark, with Huff guiding the pen.

> [John] held [the pen], I mean he actually, he just didn't touch it, he held it. I have had many Wills executed by a mark, anybody who has practiced law in this country has, and I think he had the firmest grip of anybody I have come across.

Huff testified he had been practicing law for fifty years. Huff and his son then signed as attesting witnesses at the end of the paper writing. Huff's son testified similarly to the elder Huff, including

the detail that John Jarvis himself had "made the actual mark" on each of the three pages.

This Court has recognized that the validity of an instrument is not affected by the testator's receiving "physical assistance in making his mark." *In re Will of King*, 80 N.C. App. 471, 476, 342 S.E.2d 394, 396, *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986). In sum, caveators put on no evidence of noncompliance with the formalities required by N.C.G.S. § 31-3.3. As the manifestly credible evidence showed both that John Jarvis "signed" a paper writing he published as his Will and that two witnesses present in the same room attested that signature, we overrule caveators' assignments of error based on the execution of the paper writing.

[4] On the issues of mental capacity and undue influence, caveators assign error to these conclusions in the trial court's judgment:

> 3) [T]here is no evidence sufficient to be considered by the jury that the said John R. Jarvis did not possess sufficient mental capacity to execute a valid last will and testament; and
>
> 4) [T]here is no evidence sufficient to be considered by the jury that John R. Jarvis' signature or execution of the said will was obtained by unlawful and undue influence exerted upon him[.]

On both these issues caveators had the burden of proof. *In re Will of Simmons*, 268 N.C. 278, 150 S.E.2d 439 (1966) (undue influence); *In re Will of Pridgen*, 249 N.C. 509, 107 S.E.2d 160, 75 A.L.R.2d 312 (1959) (lack of mental capacity).

Rather than meeting the burden of showing Jarvis' mental disability, caveators' own evidence supported the legal presumption that "every man possesses mental and testamentary capacity." *In re Staub's Will*, 172 N.C. 138, 141, 90 S.E. 119, 122 (1916).

> A person has sufficient mental capacity to make a will . . . if he (1) comprehends the natural objects of his bounty, (2) understands the kind, nature and extent of his property, (3) knows the manner in which he desires his act to take effect, and (4) realizes the effect his act will have upon his estate.

In re Will of Shute, 251 N.C. 697, 699, 111 S.E.2d 851, 853 (1960) (citations omitted). Caveators' evidence, discussed below, demonstrated the existence of Jarvis' mental capacity under the

factors detailed in *Shute* rather than establishing the lack thereof. For this reason the trial court did not err by deciding not to submit the issue of mental capacity to the jury.

First, caveators failed to point to any term in the paper writing itself suggesting that John Jarvis did not comprehend "the natural objects of his bounty" or the nature and kind of his property. His wife, who had been caring for John in his physically disabled condition for many years, takes John's entire estate under the terms of the Will. Had Mozelle predeceased John, the family home place and all lands on one side of an identified road were to go to son Jack and the rest of the real property, lying on the other side of said road, to sons James and Kenneth. Caveators admitted in their testimony that the land contingently devised to them was at least twenty-five acres.

Moreover, had Mozelle died first, Jack would have received certain specifically designated items from John's personal estate, with the residue given to James, Kenneth and Jack in equal shares. Mozelle is named executrix; in the event she died before John, Jack is named executor. The paper writing makes no bequests other than those here enumerated, except for contingent gifts to any deceased son's "lawful, living issue." John and Mozelle Jarvis had no other children. Hence, all the members of John's immediate family and only those persons, the natural objects of his bounty, are devisees or legatees under the paper writing.

Second, caveators presented four witnesses on the issue of mental capacity whose testimony so clearly establishes John's mental capacity under the *Shute* test that no reasonable inferences to the contrary could be drawn. *See Burnette*, 297 N.C. at 536, 256 S.E.2d at 395. Given that testimony, the presumption in favor of testator's mental capacity was, in effect, unrebutted and the trial court properly directed a verdict for propounders on this issue.

Caveators' first witness on alleged lack of mental capacity stated that he doubted John's capacity to understand "what [the Will] was" but then added "I just don't know." The same witness admitted that John knew what and where his property was, knew his wife and children, could hear and understand, and would have known what he wanted to leave to his survivors. Another witness, John's nephew, testified he did not "think [John] did have" the mental capacity to make a Will; but the same witness was also sure John knew his wife, sons and others and "supposed" John

also knew his property. Asked the basis of his opinion on lack of capacity, the nephew replied:

> A. Because he was like a kid, he didn't understand. How could you tell if he understood, he couldn't talk.
>
> Q. Okay. You tell me what he didn't understand?
>
> A. *I don't know what he didn't understand. I don't know what he did understand.*
>
> Q. Then you can't testify then of your own knowledge what his understanding was, can you?
>
> A. No, sir. I don't know . . . .

(Emphasis added.) Thus, both these witnesses were equivocal on the ultimate issue, lack of mental capacity; and both witnesses testified to the effect that John was mentally alert and knew his family, immediate and extended, and his property.

The other two witnesses were clearly not disinterested. Son Kenneth's mere opinion that his father lacked mental capacity was unsupported by evidence other than Kenneth's explanation: "I'm saying due to the stroke, yeah." However, Kenneth's testimony about the effects of that stroke went to the father's loss of physical abilities rather than any mental disabilities. Son James' opinion of mental incapacity was based on a single incident around 1975 when his father had expressed no interest in driving to a part of his property where James thought "the fence looked like it had been moved." On cross-examination James admitted his father knew the location of his property. Both sons testified that John knew the members of his family. None of this testimony supports any reasonable inference that John lacked the mental capacity to make a valid Will. The directed verdict in favor of propounders was, therefore, correct.

[5] Finally, we consider the assignment of error based on the court's failure to send the issue of undue influence to the jury.

> [U]ndue influence is a fraudulent, overreaching or dominant influence over the mind of another which induces him to execute a will . . . which he would not have executed otherwise. Or, to put it another way, it means the exercise of an improper influence over the mind and will of another to such an extent

that his professed act is not that of a free agent, but in reality is the act of the third person who procured the result.

In re Will of Franks, 231 N.C. 252, 260, 56 S.E.2d 668, 674-75 (1949). Caveators not only failed to put on any evidence that John's will was overborne, but they also failed to put on any evidence as to the identity of the purported dominant influence. Thus, there were no issues of credibility for a jury to resolve. *See, e.g.*, *In re Will of Simmons*, 268 N.C. 278, 150 S.E.2d 439 (1966). This final assignment of error is overruled.

For the foregoing reasons we affirm the judgment of the trial court.

Affirmed.

Judges GREENE and WYNN concur.

CHARLES VANCE BROOKS, IV v. LYNN G. BROOKS

No. 9128DC186

(Filed 21 July 1992)

1. Divorce and Separation § 456 (NCI4th)— child custody and support order—venue for modification—waiver of venue

Once a child custody and support order is entered by a court having subject matter jurisdiction and the parties remain the same, the proper venue for any modification of this decree pursuant to N.C.G.S. § 50-13.7 is the court entering the original decree. However, a waiver of venue occurs when a modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county.

Am Jur 2d, Divorce and Separation § 1007.

2. Divorce and Separation § 456 (NCI4th)— child custody and support—modification hearing—removal to proper county—plea in abatement

The demand that a child custody and support modification hearing be held in the proper county should be by a plea

in abatement based on the prior action pending, and this plea in abatement must be raised either in a pre-answer motion or set forth affirmatively in the answer.

Am Jur 2d, Divorce and Separation § 1005.

3. **Divorce and Separation § 456 (NCI4th)— child custody and support—modification hearing—waiver of venue**

Defendant waived her right to remove from Buncombe County to New Hanover County plaintiff's action for modification of a child custody and support order entered in New Hanover County when she failed to make her demand for removal by a plea in abatement either in a pre-answer motion or in the answer. Defendant's oral motion at trial, after the pleadings were complete, was ineffective to raise the removal issue.

Am Jur 2d, Divorce and Separation §§ 1004 et seq.

Judge PARKER dissenting.

APPEAL by plaintiff from order entered 31 October 1990 in BUNCOMBE County District Court by *Judge Robert L. Harrell.* Heard in the Court of Appeals 14 November 1991.

Brock, Drye & Aceto, P.A., by Michael W. Drye, for plaintiff-appellant.

No brief was filed for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order dated 31 October 1990, granting defendant's motion to dismiss for lack of subject matter jurisdiction pursuant to Rule 12(h)(3) of the North Carolina Rules of Civil Procedure.

Charles Brooks (Plaintiff) and Lynn Brooks (Defendant) were separated in July, 1986, and entered into a Separation Agreement (Agreement). The Agreement provided for, among other things, the terms of custody and support of their minor child, John Brooks, born 22 October 1982. According to the Agreement, Plaintiff and Defendant were to have joint custody of the child, with Plaintiff contributing $600.00 per month in child support. In 1987, Plaintiff instituted an absolute divorce action against Defendant in New

Hanover County District Court. In September, 1987, a final divorce decree, incorporating the terms of the Agreement, was granted.

Prior to and during the time of the separation and the divorce proceedings, both Plaintiff and Defendant were residents of New Hanover County. Subsequent to the final divorce decree, Plaintiff became a resident of Duplin County while Defendant and the child became residents of Buncombe County. In August, 1990, Plaintiff filed a civil action in Buncombe County, seeking a modification of the New Hanover County judgment. Plaintiff sought custody and support of the child, or, in the alternative, expanded visitation. Defendant filed no pre-answer motions, nor did she allege any affirmative defenses in her answer. At trial Defendant made an oral motion to dismiss for lack of subject matter jurisdiction. Finding that New Hanover County was the proper forum to consider the matter, and that Buncombe County lacked jurisdiction, Judge Robert L. Harrell granted Defendant's motion to dismiss. From this order Plaintiff appeals.

The issue is whether a custody and support modification motion is properly heard in some county other than the county where the original custody decree was entered.

When in compliance with the federal Parental Kidnapping Prevention Act, 28 U.S.C.S. § 1738A, and the Uniform Child Custody Jurisdiction Act, N.C.G.S. § 50A-3, subject matter jurisdiction for the trial of a child custody and support action is vested in the district courts of this State, N.C.G.S. § 7A-244 (1989); *Harris v. Harris*, 104 N.C. App. 574, 576, 580, 410 S.E.2d 527, 529, 531 (1991), and is not subject to waiver by the parties. N.C.G.S. § 1A-1, Rule 12(h)(3) (1990). Venue for these proceedings is controlled by N.C.G.S. § 50-13.5(f) and may be waived by any party. *Nello L. Teer Co. v. Hitchcock Corp.*, 235 N.C. 741, 744, 71 S.E.2d 54, 55 (1952) (venue is not jurisdictional and may be waived by any party). Waiver occurs when any action is filed in an improper county and there is not a timely demand that the trial be removed to the proper county. *Id.*

[1] Once custody and support are brought to issue there can be "no final judgment in that case, because the issue of custody and support remain *in fieri* until the children have become emancipated." *In re Holt*, 1 N.C. App. 108, 112, 160 S.E.2d 90, 93 (1968). Therefore, until the children are emancipated, the case in which custody and

support is originally determined remains pending and if the parties remain the same, this prior pending action "works an abatement of a subsequent action . . . in another court of the state having like jurisdiction." *Clark v. Craven Regional Medical Auth.*, 326 N.C. 15, 20, 387 S.E.2d 168, 171 (1990). Accordingly, once a child custody and support order is entered by a court having subject matter jurisdiction and the parties remain the same, the proper venue for any modification of this decree pursuant to N.C.G.S. § 50-13.7 is the court entering the original decree. *See Broyhill v. Broyhill*, 81 N.C. App. 147, 149, 343 S.E.2d 605, 606-07 (1986). However, waiver of venue occurs when a modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. *Snyder v. Snyder*, 18 N.C. App. 658, 660, 197 S.E.2d 802, 803-04 (1973); *see Clark*, 326 N.C. at 20, 387 S.E.2d at 171. In such event, the district court in the improper county appropriately adjudicates the modification request. *Id.*; N.C.G.S. § 7A-244 (1989).

[2] The demand that the modification hearing be held in the proper county takes the form of a plea in abatement based on the prior pending action. *See Powers v. Parisher*, 104 N.C. App. 400, 406, 409 S.E.2d 725, 729-30 (1991) (discussing applicability of plea in abatement in context of action for child support). A plea in abatement based on a prior pending action, although not specifically enumerated in Rule 12(b) of the Rules of Civil Procedure, is a preliminary motion of the type enumerated in Rule 12(b)(2)-(5) and the time for filing such motion is governed by that rule. *See* 5A Charles A. Wright & Arthur R. Miller, Federal Practice and Procedure: Civil 2d §§ 1360, 1394 (1990 & Supp. 1992); *Lehrer v. Edgecombe Mfg. Co.*, 13 N.C. App. 412, 414, 185 S.E.2d 727, 729 (1972). Furthermore, the defense is an affirmative defense and Rule 8(c) requires that such defenses be affirmatively set forth in the answer. N.C.G.S. § 1A-1, Rule 8(c) (1990); *Clark*, 326 N.C. at 20, 387 S.E.2d at 171. Therefore, a plea in abatement based on a prior pending action must be raised either in a pre-answer motion or set forth affirmatively in the answer. N.C.G.S. § 1A-1, Rule 12(h)(1) (1990); *Clark*, 326 N.C. at 20, 387 S.E.2d at 171. The failure to raise the defense in this manner constitutes a waiver of the defense. *Id.; Southgate v. Russ*, 52 N.C. App. 364, 366, 278 S.E.2d 313, 314 (1981); *see also Clark*, 326 at 20, 387 S.E.2d at 171; *McDowell v. Blythe Bros. Co.*, 236 N.C. 396, 399, 72 S.E.2d 860, 863 (1952).

[3] In the present action, plaintiff seeks modification of an earlier child custody and support order entered in New Hanover County. The child at issue is not emancipated and the parties to this action for modification are the same as the parties to the original action. Therefore, New Hanover County is the proper venue for the modification proceeding and the order entered in New Hanover County represents a prior pending action. Defendant, however, waived her right to remove the case from Buncombe County to New Hanover County when she did not make her demand for removal either in a pre-answer motion or in the answer. The defendant's oral motion made at trial, after the pleadings were complete, was not timely and therefore ineffective to raise the issue of the prior pending action. Accordingly, the trial court erred in dismissing the plaintiff's complaint. The order of dismissal is reversed and the matter is remanded to the District Court of Buncombe County for hearing on the plaintiff's request for modification of the 11 September 1987 order of custody and support entered in New Hanover County.

Reversed and remanded.

Judge WYNN concurs.

Judge PARKER dissents with separate opinion.

Judge PARKER dissenting.

I respectfully dissent. Plaintiff did not assign error on the basis of defendant's untimely plea in abatement, but rather in both his assignments plaintiff steadfastly asserted that his action is a new civil action over which the trial court had jurisdiction. "Each assignment of error shall, so far as practicable, be confined to a single issue of law; and shall state plainly, concisely and without argumentation the legal basis upon which error is assigned." N.C.R. App. P. 10(c)(1). Even though plaintiff had the benefit of an overnight recess to ferret out this issue, no suggestion was made before the trial court that defendant's motion to dismiss was untimely and that defendant had waived her right to pursue her motion by not raising it as a plea in abatement in her answer. Not until his brief filed in this Court did plaintiff mention plea in abatement or the untimeliness of defendant's objection. Accordingly, not having raised this basis to defeat defendant's motion to dismiss in

the court below or in his assignments of error, plaintiff, in my view, has waived any right to argue the untimeliness of defendant's motion before this Court.

Notwithstanding plaintiff's contention that his action was a new action, the prayer for relief in his complaint shows he desired a modification as to existing custody and support arrangements. "An order of a court of this State for support of a minor child may be modified . . . at any time, upon motion in the cause and a showing of changed circumstances by either party . . . ." N.C.G.S. § 50-13.7(a) (1987). Similarly, a court order for custody may be modified "upon motion in the cause." *Id.* If no order for custody or support exists, an action therefor may be brought as an independent civil action. N.C.G.S. § 50-13.5(b)(1) (Supp. 1991).

The latter statute also provides:

> Venue.—An action or proceeding in the courts of this State for custody and support of a minor child may be maintained in the county where the child resides or is physically present or in a county where a parent resides, *except as hereinafter provided.* If an action for . . . divorce . . . has been previously instituted in this State, until there has been a final judgment in such case, any action or proceeding for custody and support of the minor children of the marriage shall be joined with such action or be by motion in the cause in such action.

N.C.G.S. § 50-13.5(f) (Supp. 1991) (emphasis added). Construing this subsection, this Court said

> [A]fter final judgment in a previously instituted action between the parents, where custody and support has not been brought to issue or determined, the custody and support issue may be determined in an independent action in another court. . . . Of course, if the custody and support has been brought to issue or determined in the previously instituted action between the parents, there could be no final judgment in that case, because the issue of custody and support remains *in fieri* until the children have become emancipated. 27B C.J.S. 423; 27B C.J.S. 678.

In re Holt, 1 N.C. App. 108, 112, 160 S.E.2d 90, 93 (1968). This Court has also said of N.C.G.S. § 50-13.5(f) that it invokes "not only venue but actually jurisdiction." *Tate v. Tate*, 9 N.C. App. 681, 682, 177 S.E.2d 455, 456 (1970). A different statute requires

that in all divorce actions the complaint must state the name and age of any minor children of the marriage. N.C.G.S. § 50-8 (1987).

Nevertheless, jurisdiction over custody and support of a minor child does not necessarily " 'automatically become a concomitant of a divorce action and vest in th[e] court a continuing and exclusive jurisdiction to determine [these] matters.' " *Rhoney v. Sigmon*, 43 N.C. App. 11, 15, 257 S.E.2d 691, 694 (1979) (quoting 3 R. Lee, *North Carolina Family Law* § 222 (3d ed. 1963 & Supp. 1976)). Considering whether these matters had been brought to issue in an earlier action, the Court in *Rhoney* stated that on the record before it, no issue concerning custody or support was presented for determination by the court in the pleadings. The provisions in the judgment relating to custody and support "followed so exactly but in abbreviated form the more elaborate provisions of the prior separation agreement [as to indicate they] were contractual rather than decretal in nature." *Id.* at 17-18, 257 S.E.2d at 695. In deciding the matters had not been brought to issue or determined in the previous action, the Court found guidance in *Wilson v. Wilson*, 11 N.C. App. 397, 181 S.E.2d 190 (1971).

In *Wilson*, the parties' earlier judgment was silent as to child support and did not refer to any corresponding provision of their separation agreement. In holding custody and support had not been brought to issue or determined, the Court said, "The judgment refers to a separation agreement and an amended separation agreement but contains nothing by which any separation agreement could be identified as to date or content. *Certainly, the separation agreements referred to are not incorporated in the divorce judgment.*" *Id.* at 399, 181 S.E.2d at 191 (emphasis added).

It is generally agreed that

> [c]ontracts of parents respecting the custody and support of their children are not binding on the courts. . . . When the welfare of the child is involved, as in divorce cases, the parents cannot so bind themselves as to foreclose the court from an inquiry as to what that welfare requires. The court may, of course, recognize and enforce the agreement of the parents when, in its opinion, the agreement is for the best interest of the child.
>
> . . . .

> Where such agreement is conducive to the general welfare of the child, it will be respected, and it may be incorporated into the decree and enforced, although the power of the court subsequently to modify the decree as to the custody of the children is not thereby abridged.
>
> . . . .
>
> Courts retain a continuing power to modify orders for the custody and support of minor children. The orders may be changed upon a substantial change of circumstances. The power of the court is not affected by virtue of the fact that the decree incorporated a stipulation of the parents respecting custody. Provisions approved by the court in its decree are not contractual in nature but are in effect an adjudication of custody and support by the court.

2 R. Lee, *North Carolina Family Law* § 151 (4th ed. 1980).

In the present case, plaintiff alleged and defendant admitted that the parties' separation agreement, which dealt with custody and support of their minor child, was incorporated into their divorce judgment from the New Hanover court. Under *Wilson* and *Rhoney*, therefore, custody and support were brought to issue and determined. Under section 50-13.5(f), *Tate*, *Wilson* and *Rhoney*, custody and support became concomitant parts of the New Hanover court's jurisdiction over the parties' divorce action. Under section 50-13.5(f), *Tate*, and *Holt*, the issues of custody and support remained *in fieri* in the New Hanover court.

In *Broyhill v. Broyhill*, 81 N.C. App. 147, 343 S.E.2d 605 (1986), this Court considered the application of section 50-13.5(f) to a motion in the cause requesting a modification of child support. In that case, final judgments in the parties' divorce and child support actions were entered in 1976 in Buncombe County. Plaintiff, who was awarded custody of the parties' minor children, moved to Mecklenburg County but later filed in Buncombe County both a motion in the cause and a motion for change of venue to Mecklenburg. The trial court granted plaintiff's motion for change of venue. *Id.* at 148, 343 S.E.2d at 606.

On appeal defendant argued the trial court should not have transferred venue. This Court stated

> In cases dealing with custody and support of minor children there is no truly "final" judgment until the children are emancipated. *Kennedy v. Surratt*, 29 N.C. App. 404, 224 S.E.2d 215 (1976). Accordingly, the court of original venue was thought to retain that venue during the entire period of custody and support. The holding in *Tate* is that a party cannot seek modification of a child support order in a court other than that in which it was entered *where there has been no change of venue by the court. Tate* does not hold, however, and we find no authority which does hold, that the court which entered the order cannot transfer venue to another court for the convenience of witnesses and parties and the best interest of the child. In this age of increased mobility and frequent changes of residence, it is unrealistic to assume that divorced parents will always remain in the county in which their judgment of divorce was entered, or in which an order of custody and support was entered. For the convenience of witnesses and parties and because it may be in the best interests of justice and the parties, we hold that the court of original venue may, in its discretion, transfer the venue of an ongoing action for custody or support to a more appropriate county. Accordingly, the order of the trial court transferring venue in this motion in the cause from Buncombe County to Mecklenburg County is
>
> Affirmed.

Id. at 149, 343 S.E.2d at 606-607.

Under section 50-13.7(a), a party desiring modification of an existing custody or support order must file a motion in the cause. Under *Broyhill* a party desiring modification may file with the court of original jurisdiction and venue a motion in the cause and a motion for change of venue; whether to grant a change of venue is solely within the discretion of the court. As plaintiff did not file the required motions in the appropriate court, the trial court, in my view, did not err in dismissing the action.

The confusion created by *Snyder v. Snyder*, 18 N.C. App. 658, 197 S.E.2d 802 (1973), is manifest by the inconsistency in the two sentences of the last paragraph which read:

> "It is not a question of jurisdiction, *which cannot be waived* or conferred by consent, but it is a question of a prior pending action and this can be waived by failure to raise it. *Hawkins*

> *v. Hughes*, 87 N.C. 115 (1882). Under the statute, the District Court held in Wake County had jurisdiction and the *prior acquired jurisdiction* in Mecklenburg County *was waived* by the parties.

Id. at 660, 197 S.E.2d at 804 (emphasis added). The discussion of *Snyder* in *Rhoney* relied on by plaintiff is *dictum*, as the Court in *Rhoney* had already determined that custody of the child was not at issue in the divorce action in Burke County.

As a practical matter the procedure outlined in *Broyhill* is a salutary one. Some uniform procedure is necessary to assure that files containing orders modifying child custody provisions will not be located in clerks' offices across the state, thereby creating a real possibility that the judge before whom the matter is pending may not be made aware of a prior order. Since change in circumstances is the key factor in determining whether to modify child custody and support, access to the prior record is beneficial. Moreover, the potential for abuse by either party in child custody and support cases, which can sometimes become highly emotional, inflammatory situations, is readily apparent.

In view of the foregoing, I vote to affirm.

BRANCH BANKING AND TRUST COMPANY v. BENJAMIN E. THOMPSON AND GEORGIE C. THOMPSON

No. 913SC687

(Filed 21 July 1992)

1. **Guaranty § 17 (NCI4th); Uniform Commercial Code § 35 (NCI3d) — impairment of collateral — discharge defense — accommodation party**

The defense of discharge because of impairment of collateral provided in N.C.G.S. § 25-3-606(b)(1) is available to all parties who occupy the position of an accommodation party but is not available to non-accommodating makers or co-makers.

Am Jur 2d, Guaranty §§ 79-96.

What constitutes unjustifiable impairment of collateral, discharging parties to negotiable instrument, under UCC § 3-606(i)(6). 95 ALR3d 962.

2. Uniform Commercial Code § 33 (NCI3d)— signatures on note—co-makers rather than accommodation parties

Defendants executed a promissory note as co-makers and not as accommodation parties and were not entitled to assert the defense of discharge where their signatures appear on the lines reserved for co-makers; their signatures were not given or necessary for the purpose of aiding the two other signees of the note to obtain the loan but were part of a business venture for which the other signees had already secured the loan; and defendants entered the venture with the expectation of receiving profits.

Am Jur 2d, Bills and Notes §§ 109 et seq.

3. Fiduciaries § 1 (NCI4th)— bank's release of lots from deed of trust—no breach of fiduciary duty

Plaintiff bank did not breach a fiduciary duty to defendants by releasing certain lots from a deed of trust securing a promissory note executed by defendants where a mere debtor-creditor relationship existed between plaintiff and defendants, and the record does not reveal any facts suggesting that defendants reposed any sort of special confidence in plaintiff which would give rise to a fiduciary relationship.

Am Jur 2d, Banks §§ 303 et seq.

4. Unfair Competition § 1 (NCI3d)— bank's release of lots from deed of trust—breach of contract—no unfair trade practice

Plaintiff bank's alleged release of several subdivision lots from a deed of trust in violation of the terms of a promissory note and loan agreement executed by defendants did not constitute an unfair trade practice under N.C.G.S. § 75-1.1 where defendants failed to allege any aggravating circumstances beyond breach of contract which would support a claim for an unfair trade practice.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 696 et seq.

APPEAL by defendants from order entered 3 May 1991 in CARTERET County Superior Court by *Judge Quentin T. Sumner*. Heard in the Court of Appeals 12 May 1992.

Howard, From, Stallings & Hutson, P.A., by John N. Hutson, Jr. and T. Mercedes Oglukian, for plaintiff-appellee.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for defendant-appellants.

GREENE, Judge.

Defendants appeal from an order filed 3 May 1991 granting partial summary judgment in favor of plaintiff pursuant to Rule 56 of the Rules of Civil Procedure.

Defendant/appellants Dr. Benjamin E. Thompson and Georgie C. Thompson (Thompsons) are individuals residing in Forsyth County, North Carolina. Plaintiff/appellee Branch Banking and Trust Company (BB&T) is a corporation located in Carteret County, North Carolina.

Sometime prior to March, 1984, defendants Charles and Margaret Sledge (Sledges), together with George and Janette Aljouny, arranged to borrow $275,000 from BB&T to purchase and develop certain lots into a subdivision known as Riverside Estates in Carteret County, North Carolina (Development). Some months later, after consulting with Charles Sledge, BB&T, Billy Joe Shoaf, their personal accountant, and William Paul Baldridge, their personal banker, the Thompsons purchased George and Janette Aljouny's one-half interest in the Development.

A promissory note (Note) dated 2 March 1984 in favor of BB&T in the amount of $275,000 bears the signatures of the Thompsons and the Sledges. As security for the Note, a deed of trust on a tract of property in the Development was executed and delivered to BB&T.

BB&T claims that the Thompsons subsequently defaulted in their payments under the Note, and that BB&T accelerated the balance of principal and interest due in accordance with the terms of the loan agreement and the Note. BB&T brought suit in Carteret County against the Thompsons on 6 October 1989 seeking the balance due of $89,490.18 plus interest. The Thompsons alleged, in defense, that their signatures on the Note were forgeries, that BB&T negligently released its deed of trust on several of the lots within the development, and that BB&T breached its fiduciary duty to them; furthermore, the Thompsons counterclaimed that the acts

of BB&T constituted an unfair trade practice and sought treble damages therefrom.

On 8 April 1991, BB&T moved for summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure. After considering the arguments of counsel, affidavits submitted, and the deposition of Dr. Benjamin E. Thompson, Judge Quentin T. Sumner granted partial summary judgment for BB&T on the Thompsons' defenses of negligence and breach of fiduciary duty, and on the Thompsons' counterclaim for unfair trade practices; Judge Sumner, however, denied summary judgment on the Thompsons' claim that the signatures on the Note are forgeries. From the granting of partial summary judgment for BB&T, the Thompsons appeal. Although the appeal is interlocutory, the trial court certified, pursuant to Rule 54(b) of the Rules of Civil Procedure, that "there is no just reason" in delaying the appeal of the issues presented.

The issues presented are: (I) whether a co-maker on a note can avail himself of the defense of negligent release or impairment of collateral; (II) whether the Thompsons are co-makers on the Note; (III) whether there exists a fiduciary duty between a bank and its customers; and (IV) whether the acts of BB&T were such as to constitute unfair trade practices.

I

[1] The Thompsons first contend that partial summary judgment for BB&T was improper on their defense of negligent release of collateral. The Thompsons take the position that under N.C.G.S. § 25-3-606 they are discharged from liability on the Note since BB&T was allegedly negligent in releasing its deed of trust on several of the lots in the development. BB&T answers by asserting that the Thompsons signed the Note as co-makers and, as such, are primarily liable on the Note without the benefit of the defense of discharge. We agree with BB&T.

N.C. Gen. Stat. § 25-3-606, in pertinent part, provides:

> (1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
>
> . . . .

> (b) unjustifiably impairs any collateral for the instrument given by or on behalf of the party or any person against whom he has a right of recourse.

N.C.G.S. § 25-3-606(1)(b) (1986). A plain reading of the statute seems to indicate that "*any party* to the instrument" could be discharged, including makers, co-makers, sureties, etc.—in essence, any person appearing on the instrument. The Official Comment to N.C.G.S. § 25-3-606, however, provides that:

> 1. The words "any party to the instrument" remove an uncertainty arising under the original section. The suretyship defenses here provided are not limited to parties who are "secondarily liable," but are available to *any party who is in the position of a surety, having a right of recourse either on the instrument or dehors it, including an accommodation maker or acceptor known to the holder to be so.* [Emphasis added.]

Thus, the drafters of the provision appear to limit the defense of discharge to those who sign an instrument as an accommodation party (surety), a position which an ordinary, non-accommodating, maker or co-maker does not occupy.[1] *White & Summers, supra,* at 588; *El-Ce Storms Trust v. Svetahor,* 724 P.2d 704, 707 (Mont. 1986).

There is some disagreement among the states as to whether Section 3-606 is applicable to all parties to an instrument or only to those who occupy the position of sureties. Some jurisdictions take the position that all parties, including non-accommodating makers and co-makers, can avail themselves of the defense of discharge. *See, e.g., Crimmins v. Lowry,* 691 S.W.2d 582 (Tex. 1985); *Bishop v. United Missouri Bank of Carthage,* 647 S.W.2d 625 (Mo. App. 1983); *Southwest Florida Production Credit Ass'n v. Schirow,* 388 So. 2d 338 (Fla. Dist. Ct. App. 1980); *Rushton v. U.M. & M. Credit Corp.,* 434 S.W.2d 81 (Ark. 1968). However, a substantial majority of jurisdictions hold that only sureties are

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1. "Any party to a negotiable instrument may be a surety if he signs for the accommodation of another party." Restatement of Security § 82 cmt. k (1941 & Supp. 1991-92); *see also First Citizens Bank & Trust Co. v. Larson,* 22 N.C. App. 371, 376, 206 S.E.2d 775, 779, *cert. denied,* 286 N.C. 214, 209 S.E.2d 315 (1974) ("an accommodation party is always a surety"). This would also include makers and co-makers who sign for accommodation purposes. *See* James J. White & Robert S. Summers, Uniform Commercial Code § 13-16 (3d ed. 1988) (hereinafter *White & Summers*).

entitled to the defense of discharge.[2] *White & Summers* at § 13-16.

The Official Comment to N.C.G.S. § 25-3-606 states that the statute discharges "any party who is in the position of a surety, having a right of recourse . . . ." Non-accommodating makers and co-makers do not have a "right of recourse" on the instrument. *White & Summers* at § 13-16; *Unum, Inc.*, 658 F.2d at 304. Non-accommodating makers and co-makers, alike, are always primarily liable on the debt and only possess a right of contribution against co-makers. *White & Summers* at § 13-16; *see also El-Ce Storms Trust*, 724 P.2d at 707. Sureties, on the other hand, are only secondarily liable on the debt, and retain "a right of recourse on the instrument for the full amount owing if [they are] made to pay." *El-Ce Storms Trust*, 724 P.2d at 707; *see also Unum, Inc.*, 658 F.2d at 304; *White & Summers* at § 13-16. A surety or accommodation party "is not liable to the party accommodated, and if he pays the instrument, has a right of recourse on the instrument against such party." N.C.G.S. § 25-3-415(5) (1986). As the Fifth Circuit Court of Appeals stated:

> Fairness dictates that if the risk a surety has agreed to undertake is increased through impairment of the securing collateral by the person to whom payment is due, the surety should be discharged to the extent of the impairment.

Unum, Inc., 658 F.2d at 304-05.

The North Carolina cases which have addressed N.C.G.S. § 25-3-606 are consistent with this position. In *First Citizens Bank & Trust Co. v. Larson*, the Court of Appeals, citing to the Official Comment to N.C.G.S. § 25-3-606, held that the defense of discharge was available to "any party who is in the position of a surety," and then proceeded to apply the provision to an accommodation endorser. *Larson*, 22 N.C. App. at 376, 206 S.E.2d at 779. Furthermore, in *First American Savings Bank, FSB v. Adams*, 87 N.C.

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2. Including: *Schmukie v. Alvey*, 758 S.W.2d 31 (Ky. 1988); *El-Ce Storms Trust*, 724 P.2d at 707; *Citizens State Bank v. Richart*, 476 N.E.2d 383 (Ohio App. 1984); *Bank of New Jersey v. Pulini*, 476 A.2d 797 (N.J. Super. 1984); *Farmers State Bank of Oakley v. Cooper*, 608 P.2d 929 (Kan. 1980); *Smiley v. Wheeler*, 602 P.2d 209 (Okl. 1979); *Wohlhuter v. St. Charles Lumber & Fuel Co.*, 338 N.E.2d 179 (Ill.2d 1975); *Peoples Bank of Point Pleasant v. Pied Piper Retreat, Inc.*, 209 S.E.2d 573 (W.Va. 1974); *Oregon Bank v. Baardson*, 473 P.2d 1015 (Or. 1970); *United States v. Unum, Inc.*, 658 F.2d 300 (5th Cir. 1981).

App. 226, 360 S.E.2d 490 (1987), the defense of discharge was applied to guarantors.

Therefore, the defense of discharge provided in N.C.G.S. § 25-3-606 is available to all parties who occupy the position of an accommodation party and is not available to non-accommodating makers or co-makers.

II

[2] Although the issue of whether the Thompsons actually executed the Note has not yet been determined by the trial court, we assume for the purposes of evaluating this issue that the Note was indeed properly executed by the Thompsons and the Sledges. We therefore determine in what capacity the Thompsons executed the Note. Our courts have yet to address the factors to consider in determining whether a party to an instrument is an accommodation party. N.C. Gen. Stat. § 25-3-415 provides:

> (1) An accommodation party is one who signs the instrument in any capacity for the purpose of lending his name to another party to it.
>
> (2) When the instrument has been taken for value before it is due the accommodation party is liable in the capacity in which he has signed even though the taker knows of the accommodation.

N.C.G.S. § 25-3-415(1), (2) (1986). "Whether a person is an accommodation party is a question of intent." 6 Ronald A. Anderson, Uniform Commercial Code § 3-415:16, at 351 (3d ed. 1984) (hereinafter *Anderson*); Russell L. Wald, Annotation, *Who is Accommodation Party Under Uniform Commercial Code § 3-415*, 90 A.L.R.3d 342, 347 (1979). Where the intent of the parties does not appear on the face of the instrument, it must be ascertained in light of the surrounding facts and circumstances. Wald, *supra*, at 347; N.C.G.S. § 25-3-415(3) (1986) (except as against holders without notice, accommodation status may be established by parol evidence). In seeking to ascertain the intent of the parties, most courts have adopted some form of the "purpose" and "proceeds" tests. *See, e.g., Farmers State Bank of Oakley*, 608 P.2d at 934. Under the "purpose" test, inasmuch as an accommodation party must have signed the instrument "for the purpose of lending his name to another party to it," N.C.G.S. § 25-3-415(1) (1986), whether the creditor would have likely refused the primary maker "but for the supposed surety's

signature" is an important factor to consider. *White & Summers* at § 13-14. In other words, the accommodating party's signature must have been necessary for the primary maker to get the loan. *Id.; El-Ce Storms Trust*, 724 P.2d at 708. Under the "proceeds" test, the accommodating party cannot receive the primary benefits from the transaction,[3] *Anderson* at § 3-415:18, since this would be inconsistent with the party's status as a mere accommodation party. *White & Summers* at § 13-14. Other factors to consider are whether the party took place in negotiations prior to the transaction, *El-Ce Storms Trust*, 724 P.2d at 708, and the position of the party's signature on the face of the instrument itself. *White & Summers* at § 13-14.

Under the facts of this case, the Thompsons entered this transaction as co-makers, and not as accommodation parties. First, the Thompsons' signatures to the Note appear on the lines reserved for co-makers. Second, the record reveals that their signatures were not given for the purpose of, and were not necessary for, aiding the Sledges in obtaining the loan. Rather, the Thompsons viewed the transaction as a business venture for which the Sledges had already secured the loan. Third, the Thompsons entered the venture with the expectations of receiving profits. Dr. Thompson testified at his deposition that he and his wife entered the transaction expecting to share equally in both the debts and the profits with the Sledges. As co-makers, they cannot avail themselves of the defense of discharge, and dismissal of this defense was proper.

III

[3] The Thompsons next contend that summary judgment was improper with regard to their defense that in releasing their deed of trust on the lots, BB&T breached its fiduciary duty to the Thompsons. We disagree.

A fiduciary duty arises when "there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interests of the one reposing confidence." *Curl v. Key*, 311 N.C. 259, 264, 316 S.E.2d

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3. This is not to say that an accommodation party cannot receive *any* benefit from the instrument. Unlike under pre-Code law, a party who receives a benefit from the transaction does not lose status as an accommodation party, even if the benefit is received directly from the transaction. *Anderson* at § 3-415:17. An accommodation party simply cannot receive the *primary* benefit from the instrument. *Anderson* at § 3-415:18.

272, 275 (1984). However, an ordinary debtor-creditor relationship generally does not give rise to such a "special confidence": "[t]he mere existence of a debtor-creditor relationship between [the parties does] not create a fiduciary relationship." *United Virginia Bank v. Air-Lift Assocs., Inc.*, 79 N.C. App. 315, 322, 339 S.E.2d 90, 94 (1986) (applying Virginia law). *See also Wells v. North Carolina Nat'l Bank*, 44 N.C. App. 592, 596, 261 S.E.2d 296, 298 (1980) (holding that bank had no duty "to attend to details of plaintiff's [land] purchase other than the financial services it offered"). This is not to say, however, that a bank-customer relationship will never give rise to a fiduciary relationship given the proper circumstances. *See generally* 10 Am. Jur. 2d Banks §§ 303-307 (1963). Rather, parties to a contract do not thereby become each others' fiduciaries; they generally owe no special duty to one another beyond the terms of the contract and the duties set forth in the U.C.C. *Air-Lift*, 79 N.C. App. at 322, 339 S.E.2d at 94; *Kham & Nate's Shoes No. 2, Inc. v. First Bank of Whiting*, 908 F.2d 1351, 1357 (7th Cir. 1990).

Here, the record does not reveal that any kind of relationship existed between the Thompsons and BB&T beyond that of mere debtor-creditor. Although Dr. Thompson testified at his deposition that he and his wife based their decision to enter the venture in part on the representations of the officers of BB&T, he testified that he also consulted with, and relied upon the statements of, his personal banker, his personal accountant and Mr. Sledge (with whom they had previously entered several business transactions) prior to entering the transaction. The record does not reveal any facts suggesting that the Thompsons reposed any sort of special confidence in BB&T which would serve to give rise to a fiduciary relationship. Therefore, this portion of the Thompsons' defense was also properly dismissed.

IV

[4] Lastly, the Thompsons contend that summary judgment was improper with regard to their counterclaim that BB&T's release of the deed of trust on the lots allegedly in violation of the Note constituted an unfair and deceptive trade practice in violation of N.C.G.S. § 75-1.1 (1988). We disagree.

Under N.C.G.S. § 75-1.1, a trade practice is unfair if it "is immoral, unethical, oppressive, unscrupulous, or substantially injurious to customers." *Johnson v. Phoenix Mut. Life Ins. Co.*, 300 N.C. 247, 263, 266 S.E.2d 610, 621 (1980). A trade practice is decep-

tive if it "has the capacity or tendency to deceive." *Id.* at 265, 266 S.E.2d at 622. It is well recognized, however, that actions for unfair or deceptive trade practices are distinct from actions for breach of contract, *Lapierre v. Samco Dev. Corp.*, 103 N.C. App. 551, 559, 406 S.E.2d 646, 650 (1991), and that a mere breach of contract, even if intentional, is not sufficiently unfair or deceptive to sustain an action under N.C.G.S. § 75-1.1. *Mosley & Mosley Builders, Inc. v. Landin Ltd.*, 97 N.C. App. 511, 518, 389 S.E.2d 576, 580, *disc. rev. denied*, 326 N.C. 801, 393 S.E.2d 898 (1990); *Bartolomeo v. S.B. Thomas, Inc.*, 889 F.2d 530, 535 (4th Cir. 1989). We agree with the Fourth Circuit Court of Appeals which, in construing N.C.G.S. § 75-1.1, stated that "a plaintiff must show substantial aggravating circumstances attending the breach to recover under the Act, which allows for treble damages." *Bartolomeo*, 889 F.2d at 535.

It appears from the record and briefs of counsel that the gravamen of the Thompsons' counterclaim is that in releasing its deed of trust on several of the lots in the development, BB&T allegedly violated the terms of the Note and loan agreement, and has thus committed an unfair trade practice. The Thompsons fail to allege any acts beyond that of breach of contract, much less rising to the level of unfair or deceptive, which would sustain a claim for unfair trade practices. Therefore, the counterclaim was properly dismissed.

For the foregoing reasons, the order granting partial summary judgment is

Affirmed.

Judges PARKER and COZORT concur.

THOMAS D. JOHNSON v. THE NORTH CAROLINA DEPARTMENT OF TRANSPORTATION, A DEPARTMENT AND AGENCY OF THE STATE OF NORTH CAROLINA, JAMES HARRINGTON, SECRETARY

No. 9123DC691

(Filed 21 July 1992)

1. Limitation of Actions § 16 (NCI3d); Rules of Civil Procedure § 12.1 (NCI3d)— motion to dismiss—statute of limitations not asserted—consideration by court—consent of parties

The affirmative defense of the statute of limitations was before the trial court with the consent of both parties, and the failure to assert such defense in defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim was not fatal, where the record shows that plaintiff was not surprised by defendant's utilization of the limitations defense, plaintiff at no time objected to defendant's failure to allege the statute of limitations in the motion to dismiss, and the trial court considered the arguments of and authorities submitted by both parties relating to the limitations issue.

Am Jur 2d, Limitation of Actions §§ 422 et seq.

2. Master and Servant § 112 (NCI3d)— Fair Labor Standards Act—statute of limitations—state statute preempted

The two-year statute of limitations set forth in the federal Fair Labor Standards Act preempts the three-year statute of limitations provided in N.C.G.S. § 1-52(11) for recovery of any amount due pursuant to the Fair Labor Standards Act. Therefore, plaintiff's claim for compensation for overtime was barred by the federal statute of limitations where it was filed more than two years after the date the claim accrued.

Am Jur 2d, Limitation of Actions §§ 9 et seq.

3. Master and Servant § 112 (NCI3d)— Fair Labor Standards Act—pursuit of administrative remedies—statute of limitations not tolled

The federal statute of limitations for an action under the Fair Labor Standards Act is not tolled while the aggrieved party pursues administrative remedies.

Am Jur 2d, Limitation of Actions § 170.

4. Master and Servant § 9 (NCI3d)— compensation for overtime— State Wage and Hour Act—no action against DOT

The State Wage and Hour Act did not afford plaintiff a remedy against the Department of Transportation for overtime pay since N.C.G.S. § 95-25.14(d) expressly exempts "any State or local agency" from its overtime compensation provisions.

Am Jur 2d, Master and Servant § 76.

5. State § 12 (NCI3d)— compensation for overtime—State Personnel Act—failure to exhaust statutory remedies

Plaintiff was barred from pursuing his claim for overtime compensation under the State Personnel Act where he did not seek review of an administrative law judge's decision in superior court and thus failed to exhaust the remedies provided him by statute.

Am Jur 2d, Administrative Law §§ 595 et seq.

6. Master and Servant § 9 (NCI3d)— overtime wages—no action under N.C. Administrative Code

Provisions of the N.C. Administrative Code simply set forth agency guidelines and rules and do not confer any right of action in the courts for the payment of overtime wages.

Am Jur 2d, Statutes §§ 430 et seq.

APPEAL by plaintiff from order entered 10 April 1991 in ASHE County District Court by *Judge Samuel L. Osborne*. Heard in the Court of Appeals 12 May 1992.

Kilby, Hodges & Hurley, by John T. Kilby, for plaintiff-appellant.

Lacy H. Thornburg, Attorney General, by David R. Minges, Assistant Attorney General, for the State.

GREENE, Judge.

Plaintiff appeals from an order dated 10 April 1991, granting defendant's motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure.

Plaintiff Johnson was formerly employed by defendant North Carolina Department of Transportation (D.O.T.) as a Construction

Technician III (Project Supervisor). During the time between 12 May 1986 and 16 April 1987, plaintiff was assigned to a construction project on Highway 181 in Avery County. It was during this period that plaintiff claims he incurred 397.5 hours of overtime for which D.O.T. has failed to compensate him—a total of $7,014.15. Plaintiff retired in December, 1987.

On 4 January 1988, plaintiff submitted a letter to the Division Engineer requesting compensation for the aforementioned overtime. This request was, however, denied on 13 July 1988. Shortly thereafter plaintiff informed the Division Engineer of his intent to appeal, and was provided a hearing before the Employee Relations Committee on 9 May 1989. Based in part on the Committee's recommendation, James E. Harrington, Secretary of D.O.T., ultimately denied plaintiff's claim.

On 27 June 1989, plaintiff gave notice of his intent to appeal the Secretary's decision, and his Petition for Contested Case was forwarded to the Office of Administrative Hearings (OAH), accepted, and filed on 31 July 1989. The matter was assigned to Administrative Law Judge Genie Rogers on 11 August 1989. In September, 1989, plaintiff filed his Prehearing Statements and D.O.T. filed its Prehearing Statements including a Motion to Dismiss for Lack of Jurisdiction. No action was taken on the matter until 7 March 1990 at which point the matter was then assigned to Administrative Law Judge Brenda Becton. Following a pre-hearing telephone conference, D.O.T. amended and renewed its Motion to Dismiss. A hearing on the motion was held on 12 June 1990. On that same date, Administrative Law Judge Becton, relying primarily on *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 389 S.E.2d 35 (1990), determined that the OAH did not have subject matter jurisdiction over the dispute. A final decision dismissing plaintiff's case for lack of jurisdiction was filed on 22 June 1990.

Plaintiff did not seek judicial review of Administrative Law Judge Becton's decision in Superior Court pursuant to N.C.G.S. § 150B-43; rather, he filed an action against D.O.T. in Ashe County Civil District Court on 12 September 1990. Plaintiff claimed that under the Fair Labor Standards Act of 1938, 29 U.S.C.A. § 201 *et seq.* (1978 & Supp. 1992), the North Carolina Wage and Hour Act, N.C.G.S. § 95-25.1 *et seq.* (1989), the State Personnel Act, N.C.G.S. § 126-1 (1991), and the Administrative Rules of the Office of State Personnel, 25 N.C.A.C. 1D, §§ 1924-1951 (1989), he was

entitled to the denied overtime compensation. On 11 October 1990, prior to filing an answer, D.O.T. filed a motion to dismiss pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, alleging that the applicable statute of limitation had run, thus barring the action. After a hearing on the motion, Judge Samuel L. Osborne found that the action was indeed time-barred, and granted D.O.T.'s motion. The order was filed on 17 April 1991. From this order, plaintiff gave a timely notice of appeal.

The issues presented are: (I) whether the affirmative defense of statute of limitation may be raised by a motion to dismiss under Rule 12(b)(6); (II) whether the federal Fair Labor Standards Act of 1938 (F.L.S.A.) statute of limitation preempts North Carolina's F.L.S.A. statute of limitation; and (III) if so, whether the federal statute of limitation is tolled while an aggrieved party pursues administrative remedies.

I

[1] Plaintiff contends that the statute of limitation defense can be raised in a Rule 12(b)(6) motion to dismiss only if the complaint discloses on its face that the claim is time barred and only if the motion expressly asserts as a basis for the dismissal that the claim is barred by the statute of limitation. We agree in part with plaintiff.

Absent a showing of prejudice, an affirmative defense may be raised by a Rule 12(b)(6) motion to dismiss. *Cf. County of Rutherford v. Whitener*, 100 N.C. App. 70, 74, 394 S.E.2d 263, 265 (1990) (permitting affirmative defense to be raised in a motion for summary judgment). Nevertheless, where an affirmative defense is raised for the first time in a motion to dismiss under Rule 12(b)(6), "the motion must ordinarily refer expressly to the affirmative defense relied upon." *Cf. Dickens v. Puryear*, 302 N.C. 437, 443, 276 S.E.2d 325, 329 (1981) (motion for summary judgment must ordinarily refer expressly to the affirmative defense relied upon); N.C.G.S. § 1A-1, Rule 7(b)(1) (1990) (motions must state grounds and relief sought); N.C.G.S. § 1A-1, Rule 8(c) (1990) (affirmative defenses must be pled with sufficient particularity so as to give notice to court and parties). However, where the non-movant "has not been surprised and has full opportunity to argue and present evidence" on the affirmative defense, the failure of the motion to expressly refer to the affirmative defense will not bar considera-

tion of the defense by the trial court. *See Dickens, supra,* 302 N.C. at 443, 276 S.E.2d at 329 (failure to specifically allege defense of statute of limitation in a motion for summary judgment held not fatal to the motion). Once it is determined that the affirmative defense is properly before the trial court, dismissal under Rule 12(b)(6) on the grounds of the affirmative defense is proper if the complaint on its face reveals an "insurmountable bar" to recovery. *Johnson v. Bollinger,* 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987).

In the present action, D.O.T.'s motion to dismiss asserted as a basis for the motion, "that the complaint fails to state a claim for which relief can be granted." It did not contain any allegation that the claim was barred by the statute of limitation. However, the record does not reflect that plaintiff was "surprised" by D.O.T.'s utilization of the limitations defense. At the hearing, Judge Osborne, in reaching his decision, considered both the arguments of and authorities submitted by both parties relating to the limitations issue. Furthermore, the record does not reflect that plaintiff, at any time during the proceeding, objected to D.O.T.'s failure to specifically allege the statute of limitation in the motion. Therefore, the affirmative defense of statute of limitation was clearly before the trial court with the consent of both parties and the failure to assert the defense of statute of limitation in the motion was not fatal.

In determining whether the claims presented in the complaint are, on the face of the complaint, barred by the statute of limitation, we must first determine whether the state or federal statute of limitation applies. The federal statute provides that claims brought under the F.L.S.A. are governed by a two-year statute of limitation (three-year limitation if the underlying violation is willful). 29 U.S.C.A. § 255 (1985). The state statute provides that claims brought under the F.L.S.A. are governed by a three-year statute of limitation (regardless of whether the underlying violation is willful or not). N.C.G.S. § 1-52(11) (1983 & Supp. 1991).

II

[2] D.O.T. argues that the state statute is preempted by the federal statute and, therefore, the federal statute prevails. We agree. Acts of state legislatures which "interfere with, or are contrary to the law of Congress, made in pursuance of the constitution" must yield to the law of Congress. *Gibbons v. Ogden,* 22 U.S. (9 Wheat) 1, 210 (1824). Generally, however, courts will not infer preemption

unless it is the clear purpose of Congress. *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230, 91 L.Ed. 1447, 1459 (1947). The purpose of preemption may be discerned from an explicit or implicit congressional intent. *Cipollone v. Liggett Group, Inc.*, No. 90-1038, 1992 WL 138529, 7 (U.S. June 24, 1992). If a federal statute contains no explicit language of preemption, "state law is preempted if that law actually conflicts with federal law . . . or if federal law so thoroughly occupies a legislative field." *Id.* at 7 (citations omitted). Such an "actual conflict" exists "where compliance with both is a literal impossibility." Lawrence H. Tribe, American Constitutional Law § 6-26, at 481 (2d ed. 1988).

The F.L.S.A. was promulgated by Congress in 1938. 29 U.S.C.A. § 201 *et seq.* (1978 & Supp. 1992). In 1941 the United States Supreme Court held that the F.L.S.A. was a valid exercise of the power of Congress to regulate interstate commerce pursuant to the Commerce Clause of the federal Constitution. *United States v. Darby*, 312 U.S. 100, 85 L.Ed. 609 (1941); U.S. Const. art. I, § 8, cl. 3. In that the original F.L.S.A. did not contain any statute of limitation for the filing of claims brought under it, in 1945 North Carolina promulgated a state statute establishing a statute of limitation at three years. N.C.G.S. § 1-52(11) (1983 & Supp. 1991). In 1947 Congress amended the F.L.S.A. to include a two-year limitations period. 29 U.S.C.A. § 255 (1985).

Because the F.L.S.A. has been duly adopted by Congress and because it was enacted pursuant to the Commerce Clause of the federal Constitution, any state law promulgated in conflict with it must yield under the force of the Supremacy Clause. U.S. Const. art. VI, § 2. In that the state three-year statute of limitation directly conflicts with the federal two-year statute of limitation, the federal statute must prevail. Furthermore, the federal statute of limitation reflects a purpose and objective of Congress to establish a uniform, two-year limitations period governing all claims filed pursuant to the F.L.S.A. H.R. Rep. No. 7, 80th Cong., 1st Sess. 5 (1947). North Carolina's three-year statute of limitation, therefore, "stands as an obstacle to the accomplishment and execution" of this purpose and objective. *See Hines v. Davidowitz*, 312 U.S. 52, 67, 85 L.Ed. 581, 587 (1941).

Within the structure of the statute itself, Congress further revealed its intent that the federal act prevail against all state statutes. *See Cipollone, supra*, at 7 (congressional intent, an integral

part of preemption analysis, may be "implicitly contained in [a statute's] structure and purpose"). In Section 255, Congress distinguished between actions brought before 14 May 1947 (the date of enactment) and those brought after. 29 U.S.C.A. § 255 (1985). For causes of action accruing prior to that date, the action was to be governed by either the federal statute of limitation or the applicable state statute of limitations, whichever was shorter. 29 U.S.C.A. § 255(b), (c) (1985). For causes of action accruing after 14 May 1947, however, the action is to be governed by the federal two-year statute of limitation, and no mention is made of applying state limitations periods. 29 U.S.C.A. § 255(a) (1985). Furthermore, where Congress intended for the states to exercise some discretion as regards the F.L.S.A., it expressly stated as much. *See, e.g.*, 29 U.S.C.A. § 218 (1985) (savings clause allowing the state to require higher minimum wages and lower work weeks than those set by Congress).

For the foregoing reasons, N.C.G.S. § 1-52(11) is invalid under the force of the Supremacy Clause, and the federal two-year statute of limitation is the applicable statute. *Accord, Williams v. Speedster, Inc.*, 485 P.2d 728 (Col. 1971); *Kendall v. Keith Furnace Co.*, 162 F.2d 1002 (8th Cir. 1947); *Bartels v. Piel Brothers*, 74 F. Supp. 41 (E.D.N.Y. 1947).

There being no allegation of wilful misconduct, the complaint on its face reveals that plaintiff's claims are time-barred under the federal two-year statute of limitation. Under the F.L.S.A., the statute of limitation begins to accrue on the date of the alleged violation(s). *Unexcelled Chemical Corp. v. United States*, 345 U.S. 59, 97 L.Ed. 821 (1953). The plaintiff incurred the claimed overtime between 12 May 1986 and 16 April 1987. Therefore, plaintiff's cause of action began to accrue, and the statute of limitation began to run, at the latest, in April, 1987 (or the latest pay day thereafter). The complaint was not filed until 12 September 1990, more than two years after the date of the accrual of the action.

III

[3] The plaintiff, acknowledging that the complaint on its face shows that the claims were filed more than two years after their accrual, argues that the claims are not time barred because the pursuit of administrative remedies tolled the running of the statute of limitation. We disagree.

Under the F.L.S.A., only the filing of the complaint in a court will serve to toll the statute of limitation. 29 U.S.C.A. § 256 (1985) (action considered commenced when complaint is filed). Inasmuch as a civil action may be instituted directly against any employer (including a state agency), 29 U.S.C.A. § 216(b) (Supp. 1992), there is no obligation on the claimant to pursue any administrative remedy prior to resorting to the jurisdiction of the courts. *See* 29 U.S.C.A. § 201 *et seq.* (1978 & Supp. 1992). Accordingly, plaintiff's pursuit of administrative remedies did not toll the running of the statute of limitation. *Accord*, *Unexcelled*, *supra*, 345 U.S. at 65-66, 97 L.Ed. at 827-28; *O'Connell v. Champion Int'l Corp.*, 812 F.2d 393 (8th Cir. 1987); *Ott v. Midland-Ross Corp.*, 523 F.2d 1367 (6th Cir. 1975); *United States v. Winegar*, 254 F.2d 693 (10th Cir. 1958); *Smith v. H.B. Allsup & Sons, Inc.*, 718 F. Supp. 21 (S.D. Miss. 1989); *Erickson v. New York Law School*, 585 F. Supp. 209 (S.D.N.Y. 1984); *Aguilar v. Clayton*, 452 F. Supp. 896 (E.D. Okla. 1978). Therefore, plaintiff's claims are, on the face of the complaint, time-barred.

[4-6] We now turn to plaintiff's remaining claims. Plaintiff's claim that the State Wage and Hour Act, N.C.G.S. § 95-25.1 *et seq.*, affords him the remedy sought is unpersuasive inasmuch as the statute expressly exempts "any State or local agency" from its overtime compensation provisions. N.C.G.S. § 95-25.14(d) (1989). Plaintiff's claim that the State Personnel Act, N.C.G.S. § 126-1 *et seq.*, affords him the remedy sought is also unpersuasive. The State Personnel Act provides for administrative-type grievance procedures for violations of its provisions. N.C.G.S. § 126-34 (1991); *Batten, supra.* The statute further provides that judicial review of unfavorable decisions may be had in superior court. N.C.G.S. § 126-37 (1991). Where a statute provides for "an orderly procedure for an appeal to the superior court for review . . . this procedure is the exclusive means for obtaining judicial review," and a civil action is only proper after all administrative remedies have been exhausted. *State v. House of Raeford Farms*, 101 N.C. App. 433, 442, 400 S.E.2d 107, 113 (1991). Because plaintiff failed to seek review of Administrative Law Judge Becton's decision in superior court, he failed to exhaust the remedies provided by statute, and is therefore barred from pursuing this claim in court. Lastly, the applicable provisions of the N.C. Administrative Code do not provide plaintiff with the relief he seeks inasmuch as they simply set forth agency guidelines and rules, and do not confer any right

of action in the courts for the payment of overtime wages. *See* 25 N.C.A.C. 1D, §§ 1924-1951 (1989).

For the foregoing reasons, the trial court's order of dismissal is

Affirmed.

Judges PARKER and COZORT concur.

MARQUITA RAMIREZ-BARKER v. ALLEN MALLOY BARKER

No. 9115DC723

(Filed 21 July 1992)

1. **Divorce and Separation § 359 (NCI4th)— modification of child custody order**

Once the custody of a minor child is judicially determined, the order of the court cannot be altered until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child and (2) a change in custody is in the best interest of the child.

Am Jur 2d, Divorce and Separation §§ 997 et seq.

2. **Divorce and Separation § 365 (NCI4th)— modification of child custody—change in custodial parent's residence**

A change in a custodial parent's residence is not itself a substantial change in circumstances justifying a modification of a custody decree. If, however, the relocation is detrimental to the child's welfare, the change in residence of the custodial parent is a substantial change in circumstances and supports a modification of custody.

Am Jur 2d, Divorce and Separation § 1011.

3. **Divorce and Separation § 365 (NCI4th)— modification of child custody—change in custodial parent's residence**

If there is competent evidence that a proposed relocation of the custodial parent's residence will likely or probably adversely affect the welfare of the child, this evidence will support, in the event the move occurs, a finding of changed

circumstances, which would then necessitate a "best interest" analysis. If the evidence does not reveal any likely or probable adverse effect on the welfare of the child, the relocation of the child must be allowed and the noncustodial parent's visitation privileges modified.

Am Jur 2d, Divorce and Separation § 1011.

4. **Divorce and Separation § 365 (NCI4th)— change in custodial parent's residence—adverse effect on child's welfare**

The noncustodial father met his burden of showing that the proposed relocation of the mother and child to California would likely adversely affect the welfare of the child where there was evidence to support the trial court's finding that the child needed the input of both parents to the degree provided by the present custody-visitation arrangement because of the close relationship of the child with each parent and the "severe problems" of both parents.

Am Jur 2d, Divorce and Separation § 1011.

5. **Divorce and Separation § 365 (NCI4th)— change in custodial parent's residence—best interest of child—factors considered**

In exercising its discretion in determining the best interest of the child in a relocation case, factors appropriately considered by the trial court include, but are not limited to, the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the North Carolina courts; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent. The trial court did not abuse its discretion in this case in concluding that the proposed move of the mother and child to California was not in the best interest of the child.

Am Jur 2d, Divorce and Separation § 1011.

APPEAL by plaintiff from order entered 7 February 1991 in ORANGE County District Court by *Judge Stanley Peele*. Heard in the Court of Appeals 13 May 1992.

Levine, Stewart & Davis, by Donna Ambler Davis, for plaintiff-appellant.

Lunsford Long for defendant-appellee.

GREENE, Judge.

Plaintiff Marquita Ramirez-Barker (Mother) appeals from an order of the trial court filed 8 February 1991 denying her request for modification of child visitation privileges established in a court order filed 6 February 1988.

Mother and defendant, Allen Malloy Barker (Father), were married in 1975 and on 25 July 1979 their only child was born. In 1987 the parents separated. In the February 1988 order, the trial court granted sole and permanent custody of the child to Mother with extended visitation privileges to Father. The visitation periods included every other weekend, the child's birthday, major holidays on a rotating basis, every Wednesday evening after school until Thursday morning, and the summer vacation period. During the summer vacation period, Mother was entitled to visitation for two consecutive weeks and every other weekend. The order also provided for the method of transfer of custody. Father was to obtain the child from school and Mother was to obtain the child at Father's residence. Finally, the order required Mother to give Father sixty days notice of her intention to move from the Chapel Hill area.

Mother currently lives in Chapel Hill, where she is the head nurse of the Child's Psychiatric Institute at John Umstead Hospital in Butner, North Carolina. Father lives in Carrboro and is retired from the military. He is presently unemployed.

On 12 December 1990, Mother filed a motion requesting a change in the visitation schedule. In the motion, she alleged that she desired to move to California so that she and the child could be "close to where numerous members of [her] immediate family reside . . . [and that the move] would make the current visitation schedule . . . unreasonable." In response to this motion, Father, on 3 January 1991, filed a motion for change of custody. In this motion, Father requested that he be granted custody of the child or "in the alternative, for an Order preventing [Mother] from moving the minor child out of the State of North Carolina."

The motions were heard by District Judge Stanley Peele. The child was eleven years of age at the time of the hearing. Both parties testified and the trial judge talked with the child. Mother testified in part as follows:

> Q. Could you tell the Court why you want to move?
>
> A. For a number of reasons. Primarily, that's where—that's my home, that's where my family is. I want to do it not only for myself—I need to do it for myself, but as well as for [my child] and to give her the experience related to being with extended family.
>
> Q. Okay. And what extended family will [the child] have in California or does she have in California at this time?
>
> A. She has numerous cousins—first cousins right around her age, uncles and aunts, of course, my brothers and sisters, grandparents, grandfather and grandmother and a great—her great grandfather is also there.
>
> Q. You said that there are numerous cousins around her own age. About how many cousins are we talking about?
>
> A. I would say about nine cousins, boys and girls.
>
> Q. Okay. And does she have a relationship with any of these people now? Does she know her aunts and uncles and grandparents?
>
> A. She knows all of them.

Father testified in part that there existed extended family in North Carolina. Specifically, that he had three children by a previous marriage, now each in their early thirties. He testified that the child has a relationship with her two half-sisters and half-brother, especially his daughter who has a small child.

Other evidence reveals that the child was born in North Carolina and lived, before the separation, in the house now occupied by Father. The child has always attended the local public schools. At the time of the hearing, the child was "getting along well with students and with the teachers." The child expressed no preference with regard to the proposed move to California and expressed satisfaction with the current custody and visitation schedule. William B. Scarborough, a licensed practicing psychologist, performed a psychological evaluation on the child and interviewed both parents.

He was qualified and accepted by the court as an expert in the "field of children and family psychology." He testified in relevant part as follows:

> Q. In your opinion . . . based on your interactions with [the child] will [the child's] welfare be adversely affected if she moves to California with the mother?
>
> A. The term "adversely affect" is difficult. I don't—for instance, children move all the time and single families or children of single parents move all the time and we have no scientific evidence that those moves are—produce severe, severe problems in children. So I would have to answer adversely, probably not. It will be a difficult move . . . . [The child] will miss things. She also will have new opportunities. So, you know, it will be difficult. But I do not believe that it would adversely affect her to the point that there would be long lasting psychological harm.
>
> . . . .
>
> Q. And if [the child] were to remain in North Carolina with the father during the school year and she were to visit with her mother in California in the summertime . . . do you think that would have . . . an adverse effect on [the child]?
>
> A. . . . I think the situation that we have now works, it works well with [the child] being primarily with her mother. That seems to work but I do not have any evidence about what nine months with her father would be like.
>
> . . . .
>
> Q. . . . It certainly would not be your opinion to recommend that a move was necessary for her best interest, would it Dr. Scarborough?
>
> A. No, it would not. All things being equal and nothing—nobody wanting to change, to move her or have her stay, I would not just recommend that, you know, out of the blue, a move, no.

The trial court made the following pertinent findings of fact:

> 7. There is no showing that the mother's attempt to reunite with her family would necessarily have a positive impact on

the child as compared with the present situation and her relationship with her father and her relatives through him.

> 9. . . . These two parents have an abiding dislike for each other, have submitted to the court numerous times as to different conflicts, do not get along together, will not and cannot communicate together. Each of these parents has some very serious problems, the father does not realize he has problems, does not appear to be able to learn; however, his love for the child is such that the relationship between the two of them is extremely strong and his love for her causes him to make some good decisions about her and his conduct around her; and he clearly is invested in the child. The mother is taking better steps, she is getting counselling and trying to deal with some of her problems that way and is much more open to change and will be more honest in admitting her faults. She also has serious problems still, however, her condition has improved from her condition at the last hearing. At each hearing she appears to be stronger.
>
> 10. Therefore this child continues as in the last hearing to need the input of both the parents, and the present situation allows that to happen. . . . The child appears to be prospering under this arrangement.
>
> 11. Although the mother is making a sincere statement about her desires to see her relatives, there is no showing that this desire would be beneficial to the child.
>
> 12. . . . The child has a close bonding with the father, there are numbers of things in the household, including the animals, friends that are beneficial to her here, the school system is good, she is getting along well with students and with teachers and this may not continue in California.
>
> 15. Both of these parents have severe problems; and the miracle is that each parent is able to give this child good and positive things; and that each parent is able to help create a total environment where the activities of [the child] are balanced. Therefore if you lessen the impact of either parent, that will create an inbalance [sic] in the life of [the child].

Neither party argues that these findings are not supported by the evidence. The trial court concluded that it was not in the best interest of the child "to be uprooted from the present situation

in which she is blossoming." Based on this conclusion, the trial court entered the following order:

> NOW, THEREFORE, it is ORDERED that if the mother stays in Orange County, that the permanent custody order in this matter stay in force and effect without any change. If the mother decides to move to California, then at the time she moves to California, the custody arrangement shall change as follows: custody will then be joint custody with the situation reversed, that is the mother to have custody during the summer months and the father to have custody during the school year. However, as of the last day of school of 1993, full and complete custody of [the child] shall be awarded to or continued in the mother and she will be allowed to move or [to do] as she sees fit without coming back to court . . . subject however to summer visitation with the father. The proviso that the mother give the father sixty days notice of her intent to move remains in place.

The issue is whether a parent having sole and permanent custody of a child pursuant to a court order may relocate with the child to another area when the resulting interference with the noncustodial parent's visitation privileges will be detrimental to the child.

[1] Once the custody of a minor child is judicially determined, that order of the court cannot be altered until it is determined that (1) there has been a substantial change in circumstances affecting the welfare of the child, *Hamilton v. Hamilton*, 93 N.C. App. 639, 647, 379 S.E.2d 93, 97 (1989); N.C.G.S. § 50-13.7(a) (1987); and (2) a change in custody is in the best interest of the child. *Thomas v. Thomas*, 259 N.C. 461, 467, 130 S.E.2d 871, 875 (1963) (change in circumstances empowers trial judge to modify previous order of custody, if "deemed necessary . . . to further the welfare of the children"). If the party with the burden of proof does not show that there has been a substantial change in circumstances, the "best interest" question is not reached. *Black v. Black*, 560 P.2d 800, 801 (Ariz. 1977). In order for a change in circumstances to be substantial, "it must be shown that circumstances have so changed that the welfare of the child will be adversely affected unless the custody provision is modified." *Rothman v. Rothman*, 6 N.C. App. 401, 406, 170 S.E.2d 140, 144 (1969); *Pritchard v.*

Pritchard, 45 N.C. App. 189, 195, 262 S.E.2d 836, 839 (1980); *Wehlau v. Witek*, 75 N.C. App. 596, 599, 331 S.E.2d 223, 225 (1985); *Perdue v. Perdue*, 76 N.C. App. 600, 601, 334 S.E.2d 86, 87 (1985); *Gordon v. Gordon*, 46 N.C. App. 495, 499, 265 S.E.2d 425, 428 (1980); *Searl v. Searl*, 34 N.C. App. 583, 587, 239 S.E.2d 305, 308 (1977); *Spence v. Durham*, 283 N.C. 671, 687, 198 S.E.2d 537, 545 (1973), *cert. denied sub nom. Spence v. Spence*, 415 U.S. 918, 39 L.Ed.2d 473 (1974). The party seeking modification has the burden of showing the necessary change in circumstances. *Crosby v. Crosby*, 272 N.C. 235, 237, 158 S.E.2d 77, 79 (1967). However, there is no burden of proof on either party on the "best interest" question. *Cf. In re Shue*, 311 N.C. 586, 597, 319 S.E.2d 567, 574 (1984) (in dispositional hearings for abused and neglected children, neither parents nor Department of Social Services have burden of proving best interest of child). Although the parties have an obligation to provide the court with any pertinent evidence relating to the "best interest" question, the trial court has the ultimate responsibility of requiring production of any evidence that may be competent and relevant on the issue. The "best interest" question is thus more inquisitorial in nature than adversarial.

It is not necessary that adverse effects on the child manifest themselves before a court can alter custody. *See Perdue*, 76 N.C. App. at 601, 334 S.E.2d at 87 (permitting change in custody where evidence showed that child "will be adversely affected if custody is not changed"). It is sufficient if the changed circumstances show that the child will likely or probably be adversely affected. *See* Uniform Marriage and Divorce Act § 409(b)(3), 9A U.L.A. 628 (1987) (child must be seriously endangered before modification allowed). It is neither "necessary nor desirable to wait until the child is actually harmed to make a change" in custody. *Domigues v. Johnson*, 593 A.2d 1133, 1139 (Md. 1991). However, evidence of "speculation or conjecture that a detrimental change may take place sometime in the future" will not support a change in custody. *Wehlau*, 75 N.C. App. at 599, 331 S.E.2d at 225.

[2, 3] Turning to the specific question before us, a change in a custodial parent's residence is not itself a substantial change in circumstances justifying a modification of a custody decree. *Gordon*, 46 N.C. App. at 500, 265 S.E.2d at 428; *Kelly v. Kelly*, 77 N.C. App. 632, 636, 335 S.E.2d 780, 783 (1985); *O'Briant v. O'Briant*, 70 N.C. App. 360, 370, 320 S.E.2d 277, 284 (1984), *rev'd on other grounds*, 313 N.C. 432, 329 S.E.2d 370 (1985); *Searl*, 34 N.C. App.

at 587, 239 S.E.2d at 308. If, however, the relocation is detrimental to the child's welfare, the change in residence of the custodial parent is a substantial change in circumstances and supports a modification of custody. *Gordon*, 46 N.C. App. at 500, 265 S.E.2d at 428. Likewise, if there is competent evidence that a proposed relocation of the custodial parent's residence will likely or probably adversely affect the welfare of the child, this evidence will support, in the event the move occurs, a finding of changed circumstances, which would then necessitate a "best interest" analysis. If, however, the evidence does not reveal any likely or probable adverse effect on the welfare of the child, the relocation of the child must be allowed and the visitation privileges modified.

Adverse Effect

[4] In the present case, the trial court found that because of the close relationship between Father and the child and the close relationship between Mother and the child, and because of the "severe problems" of both parents, that the child needed the input of both parents to the degree provided by the current custody-visitation arrangement and that any change in that arrangement would be detrimental to the child. Although there is evidence to the contrary in the record, there is some competent evidence to support this finding and this Court is bound thereby. *Crosby*, 272 N.C. at 238, 158 S.E.2d at 80. Accordingly, Father has met his burden of showing that the proposed relocation of Mother and child to California would likely adversely affect the welfare of the child, and thus the "best interest" question was properly before the trial court.

We note that although it is not so as a matter of law, it will be a rare case where the child will not be adversely affected when a relocation of the custodial parent and child requires substantial alteration of a successful custody-visitation arrangement in which both parents have substantial contact with the child.

Best Interest

[5] The trial court concluded that the proposed move of Mother and child to California was not in the best interest of the child. In making the best interest decision, the trial court is vested with broad discretion and can be reversed only upon a showing of abuse of discretion. *In re Custody of Peal*, 305 N.C. 640, 645-46, 290 S.E.2d 664, 667 (1982). In exercising its discretion in determining

the best interest of the child in a relocation case, factors appropriately considered by the trial court include but are not limited to: the advantages of the relocation in terms of its capacity to improve the life of the child; the motives of the custodial parent in seeking the move; the likelihood that the custodial parent will comply with visitation orders when he or she is no longer subject to the jurisdiction of the courts of North Carolina; the integrity of the noncustodial parent in resisting the relocation; and the likelihood that a realistic visitation schedule can be arranged which will preserve and foster the parental relationship with the noncustodial parent. *See generally, D'Onofrio v. D'Onofrio*, 365 A.2d 27, 30 (N.J. Super. 1976). Although most relocations will present both advantages and disadvantages for the child, when the disadvantages are outweighed by the advantages, as determined and weighed by the trial court, the trial court is well within its discretion to permit the relocation.

The trial court has the unique opportunity to see and hear the parties, the witnesses, and the child. Although reasonable persons presented with the very difficult issue before the trial court could disagree, we are unable to say that the trial court abused its discretion.

Affirmed.

Judges PARKER and COZORT concur.

ROBIN H. WENDELL AND WIFE, BARBARA K. WENDELL, & ROBERT B. VOITLE AND WIFE, DOROTHY M. VOITLE, PLAINTIFFS v. WILLIAM F. LONG AND WIFE, BEVERLY W. LONG, & INVESTORS TITLE INSURANCE COMPANY, DEFENDANTS

No. 9115SC452

(Filed 21 July 1992)

Declaratory Judgment Actions § 15 (NCI4th)— intent to violate restrictive covenants—no justiciable controversy

Plaintiffs' complaint failed to allege a justiciable controversy sufficient to give the court jurisdiction under the Declaratory Judgment Act where they alleged that defendants divided a subdivision lot into two lots and filed a plat showing a "pro-

posed house site" on the western portion, that there is an existing dwelling on the eastern portion, and that defendants "intend to violate" the restrictive covenants applicable to their property by building a second dwelling thereon.

Am Jur 2d, Declaratory Judgments §§ 25 et seq.

Supreme Court's view as to what is a "case or controversy" within the meaning of Article III of the Federal Constitution or an "actual controversy" within the meaning of the Declaratory Judgment Act. 40 L. Ed. 2d 783.

Judge WALKER dissenting.

APPEAL by defendants from *Battle (F. Gordon), Judge.* Judgment entered 23 January 1991 in Superior Court, ORANGE County. Heard in the Court of Appeals 11 March 1992.

This is an action brought pursuant to the Declaratory Judgment Act, G.S. 1-253 *et seq.*, by plaintiffs, who are record owners of certain lots within the Rocky Ridge subdivision in Chapel Hill, North Carolina, "to enforce the restrictive covenants of the subdivision."

In their complaint, plaintiffs allege the following:

7. That Defendants were the owners of all of Lot 56, Rocky Ridge, and that in December 1988, Defendants subdivided Lot 56 into two (2) lots, this subdivision being platted and recorded in Book 51, page 157, Orange County Registry.

8. That the existing dwelling on Lot 56 is entirely on the eastern tract, designated as "Lot 1" on the aforesaid plat, which has been conveyed to a third party, David G. Martin, Jr.

9. That the western tract designated as "Lot 2" of the subdivision of Lot 56, Rocky Ridge, Plat Book 51, page 157, Orange County Registry, shows the location of a "proposed house site."

10. That the construction of a second house on Lot 56, Rocky Ridge, is a violation of the Restrictive Covenants of the Rocky Ridge Development.

16. That Defendants intend to violate the Restrictive Covenants applicable to Lot 56 and all of the subdivision known

> as Rocky Ridge Development by proposing to build or allow to be built a second dwelling on Lot 56.

Plaintiffs prayed that the court declare the restrictive covenants contained in the deeds to be valid and "order that neither Defendants, nor any subsequent owner of Lot 56, . . . in Rocky Ridge Development, build more than one dwelling house on such lot . . . ." A trial was held before the judge on 31 December 1990, and Judge Battle entered a judgment on 23 January 1991 making findings of fact and conclusions of law and ordering that ". . . not more than one dwelling house may be erected on Lot 56 . . . and Defendants and subsequent owners of Lot 56 are prohibited from building more than one dwelling house thereon." Defendants appealed.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by Jo Ann Ragazzo Woods, for plaintiff, appellees.

Maxwell & Hutson, P.A., by Alice Neece Moseley and Ruth A. McKinney, for defendant, appellants.

HEDRICK, Chief Judge.

Although neither party raises the question in their briefs, we *ex mero motu* consider whether plaintiffs have alleged in their complaint an actual justiciable controversy sufficient to give the superior court jurisdiction to determine this matter pursuant to the Declaratory Judgment Act.

The authority of our court to render declaratory judgments is set forth in G.S. 1-253 which provides in part:

> Courts of record within their respective jurisdictions shall have power to declare rights, status, and other legal relations, whether or not further relief is or could be claimed . . . .

Although not expressly provided by statute, courts have jurisdiction to render declaratory judgments only when the complaint demonstrates the existence of an actual controversy. *N.C. Farm Bureau Mut. Ins. Co. v. Warren*, 89 N.C. App. 148, 365 S.E.2d 216, *disc. review denied*, 322 N.C. 481, 370 S.E.2d 226 (1988); *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E.2d 25 (1986); *Gaston Bd. of Realtors v. Harrison*, 311 N.C. 230, 316 S.E.2d 59 (1984). To satisfy the jurisdictional requirement of an actual controversy, it must be shown in the complaint that litigation ap-

pears unavoidable. *N.C. Farm Bureau, supra; Gaston Bd. of Realtors, supra.* Mere apprehension or the mere threat of an action or suit is not enough. *Gaston Bd. of Realtors, supra.*

In the present case, plaintiffs' complaint affirmatively demonstrates that there is no actual controversy existing between the parties. In paragraph 9 of the complaint, plaintiffs, allege that a "proposed house site" is noted on the Plat Book description of defendants' property. They further allege in paragraph 16, that defendants, "intend to violate" the restrictive covenants applicable to their property. Plaintiffs do not allege that defendants have acted in violation of these covenants, but that they anticipate some future action to be taken by defendants which would result in a violation. "The courts of this state do not issue anticipatory judgments resolving controversies that have not arisen." *Bland v. City of Wilmington*, 10 N.C. App. 163, 164, 178 S.E.2d 25, 26 (1970), *rev'd on other grounds*, 278 N.C. 657, 180 S.E.2d 813 (1971).

Therefore, the superior court did not have jurisdiction to render a declaratory judgment in the present case. The judgment of the trial court is vacated, and the matter is remanded for entry of an order dismissing the action.

Vacated and remanded.

Judge ORR concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

G.S. 1-254 of the Declaratory Judgment Act provides:

> Any person interested under a deed, will, written contract or other writings constituting a contract . . . may have determined any question of construction or validity arising under the instrument . . . and obtain a declaration of rights, status, or other legal relations thereunder. A contract may be construed either before or after there has been a breach thereof.

Although the majority does not refer to this statute, I believe it is applicable to the facts of the case before us. I therefore respectfully dissent from the holding of the majority opinion which concludes that this action is interlocutory on the ground that there

is no justiciable controversy and which fails to recognize the pertinence of this statute.

Clearly, a justiciable controversy must exist in order to invoke the provisions of the Declaratory Judgment Act. *City of New Bern v. New Bern-Craven County Board of Education*, 328 N.C. 557, 402 S.E.2d 623 (1991); *Sharpe v. Park Newspapers of Lumberton*, 317 N.C. 579, 347 S.E.2d 25 (1986). A justiciable controversy exists where there is an actual controversy between parties having adverse interests in the matter in dispute. *Stevenson v. Parsons*, 96 N.C.App. 93, 384 S.E.2d 291 (1989), *disc. review denied*, 326 N.C. 366, 389 S.E.2d 819 (1990). This requirement has been interpreted to mean that litigation must appear unavoidable. *City of New Bern* at 560, 402 S.E.2d at 625; *Sharpe v. Park Newspapers of Lumberton, supra*. It is not necessary, however, for plaintiff to allege or prove that a traditional cause of action exists. *Id. See also Town of Emerald Isle v. State of North Carolina*, 320 N.C. 640, 360 S.E.2d 756 (1987).

In *Sharpe v. Park Newspapers of Lumberton, supra*, plaintiffs sought a declaratory judgment to determine the validity of anti-competitive provisions in a promissory note executed by defendant and accepted by plaintiffs for the sale of a newspaper. In determining whether a justiciable controversy existed so that a declaratory judgment action was proper, the Supreme Court noted that the only evidence regarding plaintiffs' intentions to compete with defendant consisted of plaintiffs' amended complaint and answers to interrogatories. The Court determined that no justiciable controversy existed because there was "no evidence of a *practical certainty* that the plaintiffs will compete with the defendant . . . or that they have the *intention* of doing so if the provisions in the note are declared invalid." *Id.* at 590, 347 S.E.2d at 32. (Emphasis added). This language was derived from *North Carolina Consumers Power, Inc. v. Duke Power Co.*, 285 N.C. 434, 451, 206 S.E.2d 178, 189, *reh'g denied*, 286 N.C. 547, --- S.E.2d --- (1974), *quoting* Borchard, *Declaratory Judgments* (2d ed. 1941) at page 60, in which it was asserted:

> The imminence and *practical certainty* of the act or event in issue, or the *intent*, capacity, and power to perform, create justiciability as clearly as the completed act or event, and is generally easily distinguishable from remote, *contingent*, and uncertain events that may never happen and upon which

it would be improper to pass as operative facts. (Emphasis changed).

The Court in *Sharpe* determined that the facts of that case did not cross the requisite threshold between a mere disagreement as to rights and an actual controversy. It was noted that plaintiffs had not competed with defendant in the area covered by the notes nor was it reasonably certain that plaintiffs intended to compete with defendants since plaintiffs merely expressed intentions to "explore the feasibility" or to "ascertain opportunities" for activities covered by the provisions. The Court also remarked that many factors including plaintiffs' health and financial ability, availability of personnel and public demand affected whether plaintiffs would actually engage in competitive activity.

Contrary to *Sharpe*, but according to the test set forth in *North Carolina Consumers Power*, I believe the facts of the instant case indicate "the imminence and practical certainty" that defendants will violate the restrictive covenants applicable to their property. Plaintiffs' complaint alleges that "[d]efendants intend to violate the Restrictive Covenants applicable to Lot 56 and all of the subdivision known as Rocky Ridge Development by proposing to build or allow to be built a second dwelling on Lot 56." Defendants answered admitting that it was their intention to sell Lot 2 of the subdivision of Lot 56 but denying all other allegations. The parties stipulated in the pre-trial order and the trial court found as fact:

> 8. In December 1988, Defendants William F. Long and Beverly W. Long recorded a plat subdividing Lot 56, Rocky Ridge Development into two lots, said plat being recorded in plat Book 51, at Page 157, Orange County Registry.
>
> 9. An existing dwelling house is on Lot 56, Rocky Ridge Development and is located on Lot 1 of the subdivision of Lot 56 in plat Book 51, at Page 157.
>
> 10. On Lot 2 of the subdivision of Lot 56 Rocky Ridge Development shown on plat Book 51, at Page 157, Orange County Registry, is a square with a notation "proposed house site."
>
> 11. In February 1990, Defendants William F. Long and wife, Beverly W. Long, sold Lot 2 of the subdivision of Lot 56 Rocky Ridge Development to Investors Title Insurance

> Company by Deed located in Deed Book 839, at Page 274, Orange County Registry.

The trial court then concluded:

> 6. Construction of a second dwelling house on Lot 56, Rocky Ridge Development as originally constituted is a violation of the valid and enforceable restrictive covenant.

It is my opinion that these facts and subsequent conclusion by the trial court evidence a practical certainty that defendants will build a second dwelling house on Lot 56 or that they manifest the intent of doing so if their property is not subject to the restrictive covenants. *See Sharpe v. Park Newspapers of Lumberton, supra.* Even though a permit has not yet been applied for and construction has not yet begun, Lot 56 has been subdivided, each subdivided lot is held by a different record owner, a dwelling house already exists on subdivision 1 of Lot 56, and subdivision 2 of Lot 56 appears in the Orange County Registry with the notation "proposed house site." From these affirmative actions one can reasonably conclude that defendant purchased this lot to build a dwelling house on subdivision 2 of Lot 56. The plaintiffs should not be required to wait until defendants have prepared a building plan, obtained a building permit and begun construction before obtaining a restraining order which would establish a "justiciable controversy." Thus, I conclude that a justiciable controversy exists and a declaratory judgment may be sought pursuant to G.S. 1-254 to determine the validity and enforceability of the restrictive covenants.

I also take exception to that portion of the majority opinion which states that "plaintiffs' complaint affirmatively demonstrates that there is no actual controversy existing between the parties," and which appears to be predominantly based on the ground that "[p]laintiffs *do not allege* that defendants have acted in violation of these covenants, but that they anticipate some future action to be taken by defendants which would result in a violation." (Emphasis added). In *Sharpe* our Supreme Court upheld as an accurate statement of the law, consistent with G.S. 1-254, language in *Carolina Power and Light Co. v. Iseley*, 203 N.C. 811, 820, 167 S.E.2d 56, 61 (1933), which stated that "[i]t is not required for purposes of jurisdiction that the plaintiff shall allege or show that his rights have been invaded or violated by the defendants, or that the defendants have incurred liability to him, prior to the commencement

of the action." When seeking a declaratory judgment, especially where G.S. 1-254 is at issue, plaintiffs are not required to plead that defendants have violated the covenants. It is sufficient for plaintiffs to allege that defendants intend to violate the restrictive covenants. *See Sharpe v. Park Newspapers of Lumberton, supra.* In *Newman Machine Co. v. Newman*, 2 N.C.App. 491, 494, 163 S.E.2d 279, 282 (1968), *rev'd on other grounds*, 275 N.C. 189, 166 S.E.2d 63 (1969), this Court has previously stated that:

> The essential distinction between an action for declaratory judgment and the usual action is that no actual wrong need have been committed or loss have occurred in order to sustain the declaratory judgment action.

It is my view, therefore, that the majority considered plaintiffs' complaint under the erroneous assumption that a justiciable controversy cannot exist where the complaint only asserts an "intent" to violate the restrictive covenants.

Furthermore, after having reviewed the record, I find that the trial court's findings of fact are supported by competent evidence and are consequently binding on appeal. *See Blackwell v. Butts*, 278 N.C. 615, 180 S.E.2d 835 (1971). Thus, I would affirm the trial court's judgment that Lot 56 is subject to a valid and enforceable restrictive covenant and that defendants and subsequent owners of the lot are prohibited from building more than one dwelling house thereon.

NANCY S. MACK v. DONALD T. MOORE, M.D., DONALD T. MOORE, M.D., P.A., ARTHUR VERNON STRINGER, M.D.

No. 9114SC715

(Filed 21 July 1992)

1. Appeal and Error § 130 (NCI4th)— sanctioning of attorney— immediate appeal by attorney

An attorney may properly appeal the trial court's imposition of Rule 11 sanctions where the sanctions run only against the attorney. Furthermore, an order imposing sanctions on counsel is immediately appealable.

Am Jur 2d, Trial §§ 118, 192 et seq.

2. **Attorneys at Law § 63 (NCI4th)— charging lien—withdrawal prior to settlement or judgment**

No right to an attorney's charging lien exists when an attorney working pursuant to a contingent fee agreement withdraws prior to settlement or judgment being entered in the case.

Am Jur 2d, Attorneys at Law §§ 324 et seq.

3. **Rules of Civil Procedure § 11 (NCI3d)— improper notice of charging lien—sanctions against attorney—legal sufficiency prong of Rule 11**

The trial court properly imposed sanctions upon an attorney for a violation of the legal sufficiency prong of Rule 11 by filing notice of a charging lien after she had withdrawn from her former client's case and before a settlement or judgment was entered since no reasonable person in the attorney's position, after reading and studying the North Carolina law on the issue, would have believed that she had the right to file such a lien, and the attorney made no argument that her notice of lien was warranted by a good faith extension of existing North Carolina law.

Am Jur 2d, Attorneys at Law §§ 324 et seq.; Trial § 118.

4. **Rules of Civil Procedure § 11 (NCI3d)— notice of charging lien—improper purpose—sanctions against attorney**

A strong inference of improper purpose, i.e., harassment of a former client and her present attorneys, was created by a former attorney's filing of a notice of a charging lien seeking recovery on the basis of quantum meruit plus a percentage of the judgment after she had withdrawn from the case out of anger because the client refused to accept a settlement offer. Therefore, the trial court properly imposed sanctions against the attorney for a violation of the improper purpose prong of Rule 11.

Am Jur 2d, Attorneys at Law §§ 324 et seq.; Trial § 118.

APPEAL by R. Marie Sides from order filed 24 April 1991 in DURHAM County Superior Court by *Judge Henry V. Barnette, Jr.* Heard in the Court of Appeals 13 May 1992.

Robert R. Seidel and R. Marie Sides for R. Marie Sides, appellant.

Glenn E. Gray for plaintiff-appellee.

GREENE, Judge.

Appellant appeals from an order filed 24 April 1991 striking appellant's notice of lien and sanctioning appellant pursuant to N.C.G.S. § 1A-1, Rule 11.

Appellant R. Marie Sides (Sides) is the former attorney of appellee Nancy Mack (Mack), the plaintiff in the underlying action. Sides entered into a contingent fee contract with Mack in January, 1987, pursuant to which Sides agreed to represent Mack in a medical malpractice action against the defendants named herein. In October, 1990, approximately four months prior to the trial date of the medical malpractice action, the attorney-client relationship between Sides and Mack began to deteriorate. According to Mack, Sides disagreed with Mack's decision to reject a $25,000 settlement offer from one of the defendants. Thereafter, Mack filed a grievance against Sides with the North Carolina State Bar alleging misconduct on the part of Sides. On 14 January 1991, the trial court granted Sides' motion to withdraw as Mack's counsel and continued the trial until July, 1991, in order to enable Mack to procure replacement counsel.

Mack hired replacement counsel to represent her in the medical malpractice action. Subsequently, Mack's new attorneys received a notice of lien from Sides in which Sides claimed a lien in the amount of "$75,550 as Quantum Meruit (hourly fee), plus a portion of the ultimate settlement or judgment to compensate her for taking the case on contingency . . . plus $143.74 as costs advanced in this case." On 7 March 1991, Mack filed a motion to strike the notice of lien and for sanctions pursuant to N.C.G.S. § 1A-1, Rule 11, alleging that the notice of lien filed by Sides had no legal foundation and was interposed to "harass the movant and prevent her from obtaining and retaining counsel to represent her in this action."

The trial court heard the motion on 18 April 1991. In addition to hearing oral argument from both Sides and Mack's attorneys, the trial court considered a memorandum of law presented by Mack's attorneys in support of Mack's motion for sanctions. The record indicates that Sides did not present any documents to the trial

court in opposition to the motion for sanctions, and, indeed, at oral argument before this Court it was apparent that Sides' sole argument before the trial court was that, contrary to Mack's contentions, existing law in North Carolina permitted Sides to properly file the notice of lien.

On 24 April 1991, the trial court filed an order striking Sides' notice of lien and sanctioning Sides in the amount of $2,125.00 (the amount expended by Mack's attorneys in opposing the notice of lien). In its order, the trial court found that no settlement or judgment had been entered into in the underlying action at the time that Sides filed her notice of lien, and that the excessive amount stated in Sides' notice of lien served to harass Mack and her attorneys and served to deter them from prosecuting Mack's claims. The court concluded that Sides' notice of lien violated both the legal sufficiency and improper purpose prongs of Rule 11. Sides appeals.

The issues presented are whether I) after making a reasonable inquiry into the existing law, an attorney's belief that she is entitled to assert an attorney's charging lien against a settlement or judgment in favor of a former client, despite the attorney's withdrawal from the case prior to settlement or entry of judgment, is reasonable; and II) a former attorney's filing of a notice of lien seeking recovery on the basis of both quantum meruit and a percentage of the judgment creates an inference of improper purpose under Rule 11.

[1] We note at the outset that Sides herself may properly appeal the trial court's imposition of Rule 11 sanctions since "where an award of sanctions runs only against the attorney, the attorney is the party in interest and must appeal in his or her name." *DeLuca v. Long Island Lighting Co.*, 862 F.2d 427, 429 (2d Cir. 1988). Furthermore, "an order imposing sanctions on counsel, or any other non-party to the underlying action, may immediately be appealed as a final order." Gregory P. Joseph, Sanctions: The Federal Law of Litigation Abuse § 17(F)(2) (1989 & Supp. 1992) (hereinafter *Joseph*).

I

Legal Sufficiency

Sides argues that the trial court erroneously concluded in its Rule 11 order that Sides is not permitted under the existing law

of North Carolina to recover fees through the use of an attorney's charging lien, and that therefore the court's order imposing sanctions against Sides based on her alleged violation of the legal sufficiency prong of the rule must be reversed. We disagree.

Under Rule 11, in addition to certifying that the pleading or paper is well grounded in fact and "not interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation," the signer also certifies that the pleading or paper is "warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law." N.C.G.S. § 1A-1, Rule 11(a) (1990). In determining whether sanctions are warranted under the legal sufficiency prong of the rule, the court must first determine the facial plausibility of the paper. *Bryson v. Sullivan*, 330 N.C. 644, 661, 412 S.E.2d 327, 336 (1992). If the paper is facially plausible, then the inquiry is complete, and sanctions are not proper. If the paper is not facially plausible, then the second issue is (1) whether the alleged offender undertook a reasonable inquiry into the law, and (2) whether, based upon the results of the inquiry, formed a reasonable belief that the paper was warranted by existing law, judged as of the time the paper was signed. If the court answers either prong of this second issue negatively, then Rule 11 sanctions are appropriate. *Id.* at 661-62, 412 S.E.2d at 336; *dePasquale v. O'Rahilly*, 102 N.C. App. 240, 246, 401 S.E.2d 827, 830 (1991), *overruled on other grounds*, *Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992).

[2] The well established law in North Carolina is that no right to an attorney's charging lien exists when an attorney working pursuant to a contingent fee agreement withdraws prior to settlement or judgment being entered in the case. *See Howell v. Howell*, 89 N.C. App. 115, 118, 365 S.E.2d 181, 183 (1988); *Clerk of Superior Court v. Guilford Builders Supply Co.*, 87 N.C. App. 386, 391, 361 S.E.2d 115, 118 (1987), *disc. rev. denied*, 321 N.C. 471, 364 S.E.2d 918 (1988); *Dillon v. Consolidated Delivery, Inc.*, 43 N.C. App. 395, 396, 258 S.E.2d 829, 830 (1979); *Covington v. Rhodes*, 38 N.C. App. 61, 67, 247 S.E.2d 305, 309 (1978), *disc. rev. denied*, 296 N.C. 410, 251 S.E.2d 468 (1979). This is so because

> [t]he charging lien is an equitable lien which gives an attorney the right to recover his fees 'from a fund recovered by his aid.' The charging lien attaches not to the cause of action, but to the judgment at the time it is rendered. At the time

> when [a former attorney's] purported charging lien . . . would . . . attach[ ], the time of judgment in favor of [the attorney's former client] . . . , the judgment [would not be] a fund recovered by the [attorney's] aid, as he [has withdrawn. The former attorney is] entitled to no interest in the fund. [Citations omitted.]

Howell, 89 N.C. App. at 118, 365 S.E.2d at 183 (quoting *Covington*, 38 N.C. App. at 67, 247 S.E.2d at 309). Under existing law, the former attorney's sole remedy is to institute an action for quantum meruit recovery of fees against the former client. *See Covington*, 38 N.C. App. at 64, 247 S.E.2d at 308-09 (discharged attorney can recover only the reasonable value of his services as of that date).

[3] We must first resolve whether Sides' notice of lien is facially plausible. The record establishes and the trial court found that at the time Sides filed the notice, she had withdrawn from Mack's case and that such withdrawal was prior to settlement or entry of judgment in the case. In other words, the notice of lien was filed by an attorney who had no right under existing law to such a lien and therefore the paper lacks facial plausibility.

Mack does not argue nor did the trial court find that Sides failed to conduct a reasonable inquiry into the law on attorney's charging liens in North Carolina. The record is silent on the matter. Thus, assuming a reasonable inquiry, the pivotal question is whether a reasonable person in Sides' position (i.e., an attorney), after having read and studied the applicable law as previously set forth in this opinion, would have concluded that she had the right to assert an attorney's charging lien under the circumstances of this case. The answer is no. Accordingly, the trial court's order imposing sanctions upon Sides for violation of the legal sufficiency prong of Rule 11 must be upheld. *See Turner v. Duke Univ.*, 325 N.C. 152, 165, 381 S.E.2d 706, 714 (1989) (trial court's decision to impose or not to impose sanctions reviewable *de novo* as a legal issue).

At the Rule 11 hearing, Sides made no argument that her notice of lien was warranted by a good faith extension of existing North Carolina law. As previously noted, Sides' sole argument below was that existing North Carolina law supported her filing of the notice of lien, despite the fact that she had withdrawn from representation of Mack. Therefore, as the issue was not raised, we do not address whether Sides is insulated from the imposition of Rule 11 sanctions because her notice of lien may have been warranted by a good faith extension of existing law.

II

Improper Purpose

[4] Sides argues that the record does not support the trial court's conclusion that she violated the improper purpose prong of Rule 11 by filing her notice of lien. We disagree.

Under Rule 11, an objective standard is used to determine whether a paper has been interposed for an improper purpose, with the burden on the movant to prove such improper purpose. *Bryson*, 330 N.C. at 656, 412 S.E.2d at 333. In this regard, the relevant inquiry is whether the existence of an improper purpose may be inferred from the alleged offender's objective behavior. *Joseph* at § 13(A). An improper purpose is "any purpose other than one to vindicate rights . . . or to put claims of right to a proper test." *Id.* at § 13(C) (Supp. 1992). For example, an improper purpose may be inferred from "the service or filing of excessive, successive, or repetitive [papers] . . . ," from "filing successive lawsuits despite the res judicata bar of earlier judgments," from "failing to serve the adversary with contested motions," from filing numerous dispositive motions when trial is imminent, from "the filing of meritless papers by counsel who have extensive experience in the pertinent area of law," from "filing suit with no factual basis for the purpose of 'fishing' for some evidence of liability," from "continuing to press an obviously meritless claim after being specifically advised of its meritlessness by a judge or magistrate," or from "filing papers containing 'scandalous, libellous, and impertinent matters' for the purpose of harassing a party or counsel." *Id.* In addition, improper purposes may be inferred from the noticing of witness depositions six days before trial, the attendance of which would require extensive travel and interfere with opposing counsel's final trial preparations. *Turner*, 325 N.C. at 171, 381 S.E.2d at 717.

However, just as the Rule 11 movant's subjective belief that a paper has been filed for an improper purpose is immaterial in determining whether an alleged offender's conduct is sanctionable, *Taylor v. Taylor Products, Inc.*, 105 N.C. App. 620, 632, 414 S.E.2d 568, 576-77 (1992), whether the conduct does in fact harass is also not relevant to the issue. *Joseph* at § 13(A). Rather, the dispositive question in the instant case is whether the filing of the notice of lien supports a strong inference of improper purpose on the part of Sides. *See id.* (strong inference of improper purpose re-

quired to support imposition of sanctions on this basis). While Sides' filing of the notice of lien after having withdrawn from Mack's case violated the legal sufficiency prong of the rule, in this case that itself does not support a strong inference of improper purpose. However, the totality of the circumstances does.

Sides' notice of lien asserted a right to recovery on the basis of quantum meruit *plus* a percentage of the judgment. Not even a validly asserted attorney's charging lien entitles the claimant to double recovery of his or her fees. In addition, the evidence before the trial court reveals that Sides withdrew from her representation of Mack out of anger at Mack for Mack's refusal to accept a settlement offer. In light of the obviously strained relationship between Sides and Mack, and because it is utterly unreasonable for an attorney, particularly one who has withdrawn from the case, to file an attorney's charging lien seeking recovery of fees based on both quantum meruit and a percentage of the judgment, there exists a strong inference of improper purpose by Sides, i.e., harassment of Mack and her attorneys, in filing the notice of lien. Accordingly, the trial court's imposition of Rule 11 sanctions based on Sides' alleged improper purpose in filing her notice of lien must be upheld.

For the foregoing reasons, the order of the trial court is

Affirmed.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. GARY DEAN PICKARD

No. 9217SC122

(Filed 21 July 1992)

1. Criminal Law § 1133 (NCI4th)— aggravating factors— inducement of others—evidence sufficient

The evidence was sufficient in a prosecution for burglary and larceny for the trial court to find the aggravating factor that defendant induced others to participate where Minor, a 16 year old at the time of trial, asked to use defendant's

telephone; defendant, a 24 year old adult, told him that defendant could hook his telephone to his neighbors' line while they were not at home; it is apparent that Minor and Tate had not considered burglary until defendant asked them if they wanted to break into the neighbors' residence; defendant also supplied the information that the neighbors, the Faynes, worked second shift and would not be home until at least 11:00 p.m.; and defendant's conduct "brought about," "caused," or "influenced" Minor to commit the offenses. N.C.G.S. § 15A-1340.4(a)(1)a.

Am Jur 2d, Burglary § 72.5; Criminal Law §§ 163 et seq.

2. **Criminal Law § 1185 (NCI4th)— aggravating factors—prior convictions—guilty pleas—validity of pleas**

The trial court did not err by using prior convictions to aggravate defendant's sentences for burglary and larceny where the State offered a certified copy of a consolidated judgment which had been entered pursuant to guilty pleas and which reflected that defendant was represented by retained counsel and had pled guilty freely, voluntarily, and understandingly. Although defendant asserted that the court could not consider these prior convictions because defendant testified that he had no recollection of being advised of his rights by the judge before entering his plea and the State could not produce more detailed court records, it is evident from the judgment and from defendant's testimony that he had been represented by and was satisfied with counsel, defendant stated at the sentencing hearing that he had pleaded guilty because he was guilty, and the State does not bear the burden of proving the validity of a guilty plea in a prior criminal matter where defendant had counsel at the time the guilty pleas were entered.

Am Jur 2d, Burglary § 63; Larceny § 153.

Adequacy of defense counsel's representation of criminal client regarding prior offenses and convictions. 14 ALR4th 227.

3. **Criminal Law § 263 (NCI4th)— burglary and larceny—continuance denied—prior testimony—lack of time to review transcript**

The trial court did not err in a prosecution for burglary and larceny by denying defendant's motion for a continuance

where defendant asserted that he did not receive a fair trial because he did not have the transcript of the prior trial of an accomplice and was unable to effectively cross-examine another accomplice concerning the accomplice's testimony in the prior trial. Defendant's mere intangible hope that something helpful to defendant may have turned up in the accomplice's testimony did not afford him a basis for delaying trial.

Am Jur 2d, Continuance §§ 65, 70, 107.

Admissions to prevent continuance sought to secure testimony of absent witness in criminal case. 9 ALR3d 1180.

4. **Criminal Law § 414 (NCI4th)— burglary and larceny—right to conclude argument**

The trial court did not err in a burglary and larceny prosecution by denying defendant's motion for final argument to the jury where defendant had offered evidence.

Am Jur 2d, Trial § 71.

APPEAL by defendant from judgments entered 28 June 1991 in CASWELL County Superior Court by *Judge Joseph R. John.* Heard in the Court of Appeals 19 June 1992.

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

Wishart, Norris, Henninger & Pittman, P.A., by D. Thomas Lambeth, Jr., and June K. Allison, for defendant-appellant.

WYNN, Judge.

Defendant was charged in a proper bill of indictment with second degree burglary and felonious larceny. The State's evidence presented at trial tends to show: On 2 January 1991, Michael Todd Minor and his half-brother, Harry Tate, went to visit defendant at his home at approximately 2:30 p.m. Minor was driving his 1968 Ford pickup truck which was lime green with primer spots on it. After eating dinner at defendant's home, Minor asked defendant if he could use the telephone. Defendant told Minor that his telephone was not hooked up but that defendant could take his telephone over to his next-door neighbors and "hook it up" to their box. Defendant stated that his neighbors, Joe and Vickie Fayne, were not at home because they worked second shift and

they would not get home until approximately 11:00 or 11:30 p.m. Minor, Tate, and defendant walked to the Fayne residence at approximately 8:30 p.m. Defendant began to "hook the phone up" and then he asked Tate and Minor if they wanted to break into the Faynes' home. Tate and Minor agreed. Either defendant or Tate kicked or pushed the door in and the three men went inside. The men took a VCR, a shotgun, a pistol, and some binoculars from the home and put them in Minor's truck which was parked at defendant's residence. Defendant and Tate went back to the Fayne residence and returned with a television, a radio, and a jewelry box. The two men put those items into the back of Minor's truck. The men then attempted to pick up some items, including jewelry and shotgun shells, which had fallen out into the yard as Tate and defendant were carrying things to Minor's truck. The men then got into Minor's truck and took the stolen items to Jimmy Baize's house and left the items on his porch. Tate thought that Baize might be able to sell the stolen property for them. Minor took defendant home at approximately 10:00 or 10:30 p.m. because defendant wanted to be home when the Faynes got home from work.

Vickie Fayne testified that on the day in question, she and her husband left for work between 2:15 and 2:25 p.m. As she was leaving, Vickie Fayne noticed two young men getting out of a lime green truck at defendant's home. She identified the men as Tate and Minor. Fayne further testified that she returned home at approximately 11:30 p.m. and realized that some items were missing from her home. She called her husband and then the sheriff's department. Officer Johnny Hodges, an employee of the Caswell County Sheriff's Department, arrived at the scene. Fayne told Hodges what items were missing, including her jewelry box. She also told him that the jewelry box contained various items of jewelry and some receipts for items that she had purchased. During his investigation, Hodges and another officer found a trail of jewelry and receipts which went diagonally across the yard toward defendant's residence. The trail of items ended in defendant's driveway approximately thirty or forty feet from the entrance to defendant's residence.

Defendant was convicted as charged and was sentenced to twenty-eight years imprisonment for the second degree burglary offense and nine years imprisonment for the larceny offense. Defendant appealed.

[1] Defendant first contends the trial court erred in finding as an aggravating factor that defendant induced others to participate in the burglary and larceny. He asserts that the evidence was not sufficient to support the finding of this aggravating factor because according to Minor's testimony, defendant merely "suggested" or "asked" Minor and Tate if they wanted to break into the Fayne residence.

The State bears the burden of persuasion on aggravating factors if it seeks a term greater than the presumptive. *State v. Jones*, 309 N.C. 214, 306 S.E.2d 451 (1983). The trial judge's finding of an aggravating factor must be supported by a preponderance of the evidence introduced at the sentencing hearing. N.C. Gen. Stat. § 15A-1340.4(a), (b) (1988); *State v. Ahearn*, 307 N.C. 584, 300 S.E.2d 689 (1983). Under N.C. Gen. Stat. § 15A-1340.4(a)(1)a, a sentencing judge may find as an aggravating factor that "[t]he defendant induced others to participate in the commission of the offense or occupied a position of leadership or dominance of other participants." In *State v. SanMiguel*, 74 N.C. App. 276, 328 S.E.2d 326 (1985), this Court stated:

> Induce is defined by Black's Law Dictionary . . . as "[t]o bring on or about, to affect, cause, to influence to an act or course of conduct, lead by persuasion or reasoning, incite by motives, prevail on." Webster's New Collegiate Dictionary . . . similarly defines induce as "to lead on: move by persuasion or influence," to "bring about by influence," and to "effect, cause."

Id. at 281, 328 S.E.2d at 330.

It is clear from the preponderance of the evidence presented in this case, that defendant induced Minor, a 16-year-old at the time of trial, and Tate to a course of conduct. Minor had merely asked to use defendant's telephone when defendant, a 24-year-old adult, told him that defendant could hook his telephone up to the Faynes' line while they were not at home. While Minor agreed to that plan, it is apparent that he and Tate had not considered burglary until defendant asked them if they wanted to break into the Fayne residence. Defendant also had supplied the information that the Faynes worked second shift and would not be home until at least 11:00 p.m. As such, defendant's conduct "brought about," "caused," or "influenced" Minor to commit the offenses. Thus, we hold that the trial court did not err in finding this aggravating factor. This assignment of error is without merit.

[2] Defendant next contends the trial court erred "in considering evidence of the defendant's prior convictions in sentencing and in finding that such convictions constituted an aggravating factor as such convictions were obtained upon defendant's pleas of guilty and the record does not reflect that such pleas were voluntary and knowing." At the sentencing hearing, the State offered a certified copy of a consolidated judgment suspending defendant's sentence for convictions of two counts of contributing to the delinquency of a minor, attempted breaking or entering a coin operated machine, and misdemeanor breaking or entering and larceny. This judgment was entered on 11 September 1984 pursuant to defendant's pleas of guilty. The judgment reflects that defendant was represented by retained counsel, Wade Harrison, and that defendant "freely, voluntarily, and understandingly pled guilty" to the offenses. Defendant asserts the trial court could not consider these prior convictions in aggravation of his sentence because defendant testified at the sentencing hearing that he had "no recollection of being advised of his rights by the judge before entering guilty pleas" and the State could not produce "more detailed court records" which would show that the trial judge "properly discharged his function . . . ." In an attempt to support his argument, defendant cites several cases dealing with a defendant's right to counsel, none of which are applicable to this case.

It is evident from the judgment entered on 11 September 1984 and from defendant's testimony at the sentencing hearing on 27 June 1991 that defendant was represented by and satisfied with counsel when he pled guilty to the prior offenses. Additionally, at the sentencing hearing, defendant stated, "I was guilty then and I plea bargained and took a lesser sentence because I done it." This Court in *State v. Smith*, 96 N.C. App. 235, 385 S.E.2d 349 (1989), *disc. review denied*, 326 N.C. 267, 389 S.E.2d 119 (1990), noted a distinction between a defendant's right to counsel and the right of a defendant to enter pleas knowingly and voluntarily. In *Smith*, the Court stated that under N.C. Gen. Stat. § 15A-980, where the defendant proves that a prior conviction was obtained in violation of a defendant's right to counsel, the trial judge must suppress the use of the prior conviction. However, the Court went on to hold that where the defendant had counsel at the time that the guilty pleas were entered, the State does not bear the burden of proving the validity of a plea of guilty in a prior criminal matter before the conviction may be used to impeach the defendant or

to aggravate his sentence. Thus, we conclude the trial court did not err in using the challenged prior convictions to aggravate defendant's sentence. This assignment of error is meritless.

[3] By his next assignment of error, defendant argues the trial court erred "in denying defendant's motion to continue because such failure prohibited defendant's counsel from fully preparing to impeach the testimony of the State's chief prosecuting witness and denied the defendant a fair trial." Prior to trial, defendant moved for a continuance based on the grounds that it was necessary for the preparation of defendant's trial to have a transcript from the trial of Harry Tate. Defendant specifically asserts that he did not receive a fair trial because he was unable to effectively cross-examine Todd Minor concerning Minor's prior testimony in the State's case against Harry Tate.

It is well established that a motion for a continuance, even when filed in a timely manner pursuant to N.C. Gen. Stat. § 15A-952 (1991), is ordinarily left to the sound discretion of the trial judge whose ruling thereon is not subject to review absent an abuse of such discretion. *State v. Branch*, 306 N.C. 101, 291 S.E.2d 653 (1982). However, it is equally well established that 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, 282 S.E.2d 430 (1981). Even where the motion raises a constitutional question, its denial is grounds for a new trial only upon a showing by the defendant that the denial was erroneous 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 (1982). "A continuance is proper if there is a belief that *material* evidence will come to light and such belief is reasonably grounded on known facts, but a mere intangible hope that something helpful to the litigant may possibly turn up affords no sufficient basis for delaying a trial." *State v. Pollock*, 56 N.C. App. 692, 693-94, 289 S.E.2d 588, 589, *disc. review denied and appeal dismissed*, 305 N.C. 590, 292 S.E.2d 573 (1982). A trial judge should not grant a continuance unless the reasons therefore are fully established. *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984). Therefore, an affidavit showing sufficient grounds should be filed in support of a motion to continue. *Id.*

In the present case, defendant did not support his motion with an affidavit. In his motion, he merely asserted that it was "necessary for the defendant's preparation and for the handling of his trial that he have a trial transcript from the Harry Tate trial." Prior to trial, defense counsel told the trial judge that he had seen the Tate transcript except for Minor's testimony. He also stated:

> We were here for the entire [Tate] trial. I have some notes from that trial, but my only problem is that, if he deviates from what I remember him saying, I have no way to verify that under oath without the transcript. There may be some discrepancies. I don't know. We would, Your Honor, for the record, renew the motion to continue on that basis.

Even assuming that the trial court erred in denying his motion for a continuance, we believe that defendant has failed to show any prejudicial error. Defendant's mere intangible hope that something helpful to defendant may have turned up in Minor's testimony did not afford him a basis for delaying trial. This assignment of error is overruled.

[4] Lastly, defendant contends the trial court erred "in denying the defendant's motion for final argument to the jury, such denial denying the defendant his constitutional right to due process of law and a fair trial." We disagree.

Where a defendant offers evidence at trial, the prosecution has a right to make the opening and closing argument to the jury. Superior and District Court Rule 10; *See also State v. Hinson*, 310 N.C. 245, 311 S.E.2d 256, *cert. denied*, 469 U.S. 839, 83 L.Ed.2d 78 (1984); *State v. Taylor*, 289 N.C. 223, 221 S.E.2d 359 (1976). This contention, like the others, is without merit.

Defendant had a fair trial free from prejudicial error.

No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

BRANDENBURG LAND COMPANY, A CORPORATION, PLAINTIFF v. CHAMPION INTERNATIONAL CORPORATION, A CORPORATION, DEFENDANT

No. 914SC727

(Filed 21 July 1992)

Costs § 40 (NCI4th) — documents supporting summary judgment — voluntary dismissal before trial calendared — expert witness fee

An expert's fee for the preparation of documents used to support defendant's motion for summary judgment may not be taxed as a cost to a plaintiff who takes a voluntary dismissal after the motion for summary judgment was filed but before the case was calendared for trial, since expert witness fees are not recognized as costs unless the expert has been subpoenaed. N.C.G.S. § 7A-314.

Am Jur 2d, Costs §§ 14 et seq., 65; Expert and Opinion Evidence § 25.

APPEAL by plaintiff from an order entered 18 April 1991 by *Judge J. Herbert Small* in JONES County Superior Court. Heard in the Court of Appeals 14 May 1992.

Henderson, Baxter & Alford, by B. Hunt Baxter, Jr., for plaintiff-appellant.

Ward and Smith, by Kenneth R. Wooten and Cheryl A. Marteney, for defendant-appellee.

LEWIS, Judge.

The issue in this case is whether an expert's fee for the preparation of documents used to support defendant's motion for summary judgment can be taxed as a cost to a plaintiff who takes a voluntary dismissal after the motion for summary judgment has been filed, but before calendaring.

On 12 April 1979, plaintiff filed suit against defendant to remove a cloud upon its title to four tracts of land claimed by both parties. For nearly twelve years, negotiations continued in an attempt to settle out of court. During this period, there were illnesses, deaths, and changes of counsel on both sides. In January 1991, negotiations broke down and defendant soon afterward filed a motion for summary judgment. In support of its motion for summary judgment,

defendant filed a voluminous affidavit prepared by an expert witness. The affidavit and accompanying text documented defendant's chain of title to its twenty-five tracts of land which are alleged to overlap the four tracts in question.

In this affidavit, defendant's expert, an attorney experienced in the examination and certification of real property titles, concluded that defendant or its predecessors-in-title acquired an estate, as defined by the North Carolina Real Property Marketable Title Act in each of the twenty-five tracts, more than thirty years prior to the date the action was filed. The expert's fee was $3000.00. Plaintiff took a voluntary dismissal without prejudice on 25 March 1991, before the case was calendared for trial. Defendant filed a motion for costs on 28 March 1991. On 18 April 1991, the trial court granted defendant's motion and taxed plaintiff with the expert's fee as part of the costs. Plaintiff appeals.

A plaintiff may take a voluntary dismissal at any time prior to resting his or her case. N.C.R. Civ. P. Rule 41(a)(1) (1990). "A plaintiff who dismisses an action or claim under section (a) of this rule shall be taxed with the *costs* of the action unless the action was brought in forma pauperis." N.C.R. Civ. P. Rule 41(d) (1990) (emphasis added). "At common law neither party recovered costs in a civil action and each party paid his own witnesses." *City of Charlotte v. McNeely*, 281 N.C. 684, 691, 190 S.E.2d 179, 185 (1972) (citation omitted). "The court's power to tax costs is entirely dependent upon statutory authorization." *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 658 (1972) (citing *McNeely*). "Since the right to tax costs did not exist at common law and costs are considered penal in their nature, '[s]tatutes relating to costs are *strictly construed.*' " *McNeely*, 281 N.C. at 692, 190 S.E.2d at 186 (citation omitted) (emphasis added). Costs are not granted upon " 'mere equitable or moral grounds.' " *Id.*, at 691, 190 S.E.2d at 185 (citation omitted).

The statutes governing the imposition of costs are N.C.G.S. §§ 6-20 and 7A-314. When not otherwise provided for by law, costs may be imposed in the discretion of the court. N.C.G.S. § 6-20 (1986). The decision to tax costs is not reviewable absent an abuse of discretion. *Chriscoe v. Chriscoe*, 268 N.C. 554, 151 S.E.2d 33 (1966). The statute specifically provides for witness fees:

> (a) A witness *under subpoena*, bound over, or recognized, . . ., shall be entitled to receive five dollars ($5.00) per day,

> or fraction thereof, during his attendance, which, . . ., must be certified to the clerk of superior court.
>
> (d) An expert witness, . . ., shall receive such compensation and allowances as the court, or the Judicial Standards Commission, in its discretion, may authorize. . . .
>
> (e) If more than two witnesses are *subpoenaed*, bound over, or recognized, to prove a single material fact, the expense of the additional witnesses shall be borne by the party issuing or requesting the *subpoena*.

N.C.G.S. § 7A-314 (1989) (emphases added).

Section (a)'s language "subpoenaed, bound over or recognized" is not read in the alternative. *Craven v. Chambers*, 56 N.C. App. 151, 287 S.E.2d 905 (1982), *overruled on other grounds*, *Johnson v. Ruark Obstetrics and Gynecology Assoc.*, 327 N.C. 283, 395 S.E.2d 85 (1990). Only witnesses who have been subpoenaed may be compensated. *State v. Johnson*, 282 N.C. 1, 27, 191 S.E.2d 641, 659 (1972). "Sections (a) and (d) must be considered together." *Id.* "Section (d) modifies Section (a) by permitting the court, in its discretion, to increase [expert witness'] compensation and allowances. The modification relates only to the amount of an expert witness' fee; *it does not abrogate the requirement that all witnesses must be subpoenaed before they are entitled to compensation.*" *Id.* at 27-28, 191 S.E.2d at 659 (emphasis added). Expert witness fees are "not generally recognized as costs" unless the expert has been subpoenaed. *Wade v. Wade*, 72 N.C. App. 372, 384, 325 S.E.2d 260, 271, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985) (citing *State v. Johnson*, 282 N.C. 1, 191 S.E.2d 641 (1972)) (the *Wade* court vacated the trial court's award of costs of appraisals incurred to prove the value of assets in an equitable distribution action because the witnesses had not been subpoenaed).

There is no case on point. All of the decisions reported refer to awards of costs after the case had been calendared for and indeed had gone to trial. Defendant argues that Rule 41(d) which is designed to " 'prevent vexatious suits made possible by the ease with which a plaintiff may dismiss [his suit],' " *Alsup v. Pitman*, 98 N.C. App. 389, 390, 390 S.E.2d 750, 751 (1990) (citation omitted), combined with the discretionary nature with which a trial judge may award costs, N.C.G.S. § 6-20, provide a statutory basis for taxing costs where plaintiff takes a voluntary dismissal prior to

trial. Defendant points also to precedent which permits the award of fees for experts who do not testify. *City of Charlotte v. McNeely*, 281 N.C. 684, 694, 190 S.E.2d 179, 187 (1972) ("expert witness fees can be taxed against an adverse party only when the testimony of the witness examined (or tendered) was (or would have been) material and competent").

Defendant cites *Henderson v. Williams*, 120 N.C. 339, 27 S.E. 30 (1897) for the proposition that the cost of witnesses who are "available and present and prepared to testify" may be taxed as costs when their testimony is rendered unnecessary by the plaintiff's voluntary dismissal. When *Henderson* was decided the law provided that the costs of witnesses could be taxed against the losing party if the witnesses were subpoenaed and examined or tendered. In *Henderson*, the trial court called the case and plaintiff took a voluntary nonsuit in open court. The clerk of court taxed plaintiff with the costs of defendant's witnesses. Plaintiff appealed the clerk's entry of costs because defendant's witnesses had not been sworn, examined or tendered. *Id.* at 340, 27 S.E. at 30. The trial court agreed and ordered that "no witnesses *subpoenaed* by the defendants [ ] be taxed against the plaintiff, except those who were sworn, examined or tendered." *Id.* (emphasis added). Our Supreme Court reversed because defendant "had *no opportunity* to swear, examine or tender his witnesses by reason of the nonsuit." *Id.* at 340-41, 27 S.E. at 30 (citation omitted) (emphasis added).

We assume, though the opinion does not so reflect, that defendant's witnesses in *Henderson* had been subpoenaed as the trial court order specifically denies an award of costs of unsubpoenaed witnesses. Further, our Supreme Court indicated that defendant's witnesses were "properly . . . present." *Henderson*, 120 N.C. at 340, 27 S.E. at 30. As such, the *Henderson* Court decided the significance of the "examined or tendered" requirement, not the issue at bar. It is clear that a good case exists here for the persuasive effects of the expert witness' affidavit. Considering that discovery procedures are increasingly important in legal proceedings, the Legislature may well reconsider the question. Query, would an expert subpoenaed for a deposition qualify under the circumstances of this case? Defendant's reliance upon *Henderson* is misplaced. We are bound by *State v. Johnson*.

Reversed.

Judges WYNN and WALKER concur.

SHEILA WESTINGHOUSE, ADMINISTRATRIX OF THE ESTATE OF STEVIE HICKSON v. ANGELA U. HAIR AND NATHANIEL GAINEY

No. 9212SC47

(Filed 21 July 1992)

Death § 26 (NCI4th)— wrongful death action—plaintiff later qualified as administratrix—statute of limitations—amended pleading—relation back

Where the original pleading in a wrongful death action instituted before the statute of limitations expired by a plaintiff who had not yet qualified as the administratrix of decedent's estate gave notice of the transactions and occurrences upon which the claim was based, and plaintiff qualified as administratrix after the statute of limitations had run, plaintiff was entitled under Rules 15(c) and 17(a) to amend her pleading to show that the action was instituted in her capacity as personal representative and to have the amendment relate back to the commencement of the action so that the claim was not time barred.

Am Jur 2d, Executors and Administrators §§ 1246 et seq.

Tolling or interruption of running of statute of limitations pending appointment of executor or administrator for tortfeasor in personal injury or death action. 47 ALR3d 179.

APPEAL by plaintiff from order entered 18 September 1991 in CUMBERLAND County Superior Court by *Judge William C. Gore, Jr.* Heard in the Court of Appeals 19 June 1992.

Barton & Lee, by C. Leon Lee, II and Cheri L. Siler, for plaintiff-appellant.

No brief filed by defendant, Angela U. Hair.

Anderson, Broadfoot, Johnson, Pittman & Lawrence, by Steven C. Lawrence, for defendant-appellee, Nathaniel Gainey.

WYNN, Judge.

Stevie Hickson was killed on 23 July 1989 when he was struck by an automobile. Mr. Waddell Hickson, Sr., (Mr. Hickson) subsequently was appointed personal representative of the estate of Stevie Hickson. On 12 April 1991, Mr. Hickson executed a power

of attorney giving Ms. Sheila H. Westinghouse (Ms. Westinghouse) the authority to "transact any and all business associated with the wrongful death of Stevie Hickson . . . ." On 22 July 1991, Mr. Hickson renounced his right to qualify as executor and administrator of the estate of Stevie Hickson and requested that Ms. Westinghouse be appointed administratrix of the estate. The next day, prior to receiving letters of administration, Ms. Westinghouse filed a wrongful death action captioned: "IN RE: STEVIE HICKSON Plaintiff v. ANGELA U. HAIR and NATHANIEL GAINEY Defendants." Two days later, letters of administration were issued to Ms. Westinghouse.

Defendant Nathaniel Gainey filed motions to dismiss the action on 4 September 1991, on the grounds the action was not brought by the personal representative within the two-year period of the applicable statute of limitations. Ms. Westinghouse then filed an amended complaint to reflect the bringing of the action by her in her representative capacity on 13 September 1991. The court dismissed the complaint against defendant Nathaniel Gainey on 18 September 1991. From this order, plaintiff appeals.

The question before us is whether the trial court erred by dismissing the complaint against defendant Gainey on the ground that the action was not properly brought in the name of the personal representative within the applicable statute of limitations.

An action for wrongful death is a creature of statute and only can be brought by the personal representative or collector of the decedent. N.C. Gen. Stat. § 28A-18-2(a) (1991); *Graves v. Welborn*, 260 N.C. 688, 133 S.E.2d 761 (1963). The plaintiff must both allege and prove that he has the capacity to sue. *Journigan v. Little River Ice Co.*, 233 N.C. 180, 63 S.E.2d 183 (1951). Moreover, the action must be instituted by the personal representative within two years after the death of the decedent. N.C. Gen. Stat. § 1-53(4) (1983).

For years North Carolina followed a minority rule that when a wrongful death action was not brought in a proper capacity, any attempt to remedy the defect subsequent to the running of the statute of limitations was ineffective to overcome the bar of the statute of limitations. *Burcl v. Hospital*, 306 N.C. 214, 293 S.E.2d 85 (1982). Our Supreme Court, however, in *Burcl*, changed this long-standing rule.

Burcl involved a wrongful death action brought by a person who had qualified as administrator of the estate in the State of Virginia but had not qualified as ancillary administrator in North Carolina at the time of commencement of the action, and who did not qualify as ancillary administrator until after the statute of limitations expired. The defendants moved to dismiss the action on the ground plaintiff lacked capacity or standing to prosecute the action. Plaintiff responded by qualifying as ancillary administrator and by moving to amend her pleading to show her ancillary qualification and to permit her showing of local qualification to relate back to the commencement of the action. The trial court allowed the motion to dismiss on the ground an amendment could not relate back to defeat the bar of the statute of limitations.

The Supreme Court reversed, relying upon Rules 15 and 17 of the North Carolina Rules of Civil Procedure. The Court noted that subsection (a) of Rule 15 permits a party to amend his pleading once as a matter of course at any time before a responsive pleading is served and subsection (d) of Rule 15 permits a party to supplement a pleading by setting forth transactions or occurrences or events which may have happened since the date of the original pleading. Rule 15(c) states that a claim asserted in an amended pleading is deemed to have been interposed at the time of the original pleading, unless the original pleading "does not give notice of the transactions, occurrences, or series of transactions or occurrences" alleged in the amended pleading. N.C.R. Civ. P. 15(c). Furthermore, Rule 17(a) provides in pertinent part:

> No action shall be dismissed on the ground that it is not prosecuted in the name of the real party in interest until a reasonable time has been allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder, or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest.

N.C.R. Civ. P. 17(a).

The Court stated in *Burcl*:

> It is at once apparent from the face of Rules 15(c) and 17(a) that they have changed our approach to the problems, respectively, of whether a given pleading relates back to the beginning of the action and how to deal with a claim brought by

> a party who has no capacity to sue. Whether an amendment to a pleading relates back under Rule 15(c) depends no longer on an analysis of whether it states a new cause of action; it depends, rather, on whether the original pleading gives "notice of the transactions, occurrences, or series of transactions or occurrences, to be proved pursuant to the amended pleading." . . . No longer is the real party in interest in a case precluded from being made the plaintiff after the statute of limitations has run on a claim timely filed by one who lacked the capacity to sue because he was not the real party in interest. Rather, under Rule 17(a), "a reasonable time [must be] allowed after objection for ratification of commencement of the action by, or joinder or substitution of, the real party in interest; and such ratification, joinder or substitution shall have the same effect as if the action had been commenced in the name of the real party in interest."

306 N.C. at 224-25, 293 S.E.2d at 91-92 (citations omitted).

Applying the foregoing guidelines to the present facts, where the original pleading gives sufficient notice of the transaction and occurrences upon which the claim is based, a supplemental pleading that merely changes the capacity in which the plaintiff sues relates back to the commencement of the action. *Id.* at 228, 293 S.E.2d at 94. In the instant case, the amended complaint was identical to the original pleading with the exception of the change of caption to reflect the bringing of the action in the capacity of personal representative. Defendant thus had notice of the transactions, occurrences, or series of transactions or occurrences to be proved. As the defendants in *Burcl*, defendant in this case is in no way prejudiced by allowing plaintiff to amend her pleading to show her capacity to sue and having it relate back to the date of the original pleading.

For the foregoing reasons, we reverse the order of the trial court and remand the matter for further proceedings.

Reversed and remanded.

Chief Judge HEDRICK and Judge JOHNSON concur.

FORSYTH MEMORIAL HOSPITAL, INC., A NORTH CAROLINA NONPROFIT CORPORATION, AND CAROLINA MEDICORP, INC., A NORTH CAROLINA NONPROFIT CORPORATION, PLAINTIFFS v. ARMSTRONG WORLD INDUSTRIES, INC., A PENNSYLVANIA CORPORATION, DEFENDANT

No. 9121SC305

(Filed 21 July 1992)

1. **Limitation of Actions § 4.2 (NCI3d)— manufacture and sale of asbestos floor coverings—statute of repose**

The statute of repose for a defective condition of an improvement to realty set forth in N.C.G.S. § 1-50(5), rather than that provided in N.C.G.S. § 1-50(6) for defective products, applied to plaintiffs' claims against defendant manufacturer for negligence and breach of warranty in producing and selling floor coverings containing asbestos that were used in the construction of a hospital.

Am Jur 2d, Limitation of Actions § 16; Products Liability §§ 921 et seq.

2. **Limitation of Actions § 4.2 (NCI3d)— manufacture and sale of asbestos floor coverings—negligence and breach of warranty—statute of repose**

Plaintiffs' claims for negligence and breach of warranty by defendant for manufacturing and selling to plaintiffs floor coverings containing asbestos that were used in the construction of a hospital were barred by the six-year statute of repose set forth in N.C.G.S. § 1-50(5) where plaintiffs alleged that floor tile and sheet vinyl flooring manufactured by defendant was purchased and installed in the hospital in 1976 and 1977, and plaintiffs did not file suit until 1990. Even if defendant continued to produce and sell similar floor coverings containing asbestos until 1983 as alleged by plaintiffs and a connection between defendant's 1983 activities and plaintiffs could be shown, the six-year statute of repose would still bar claims for negligence or breach of warranty occurring in 1983.

Am Jur 2d, Limitation of Actions § 16; Products Liability §§ 921 et seq.

3. Limitation of Actions § 4.2 (NCI3d)— manufacture and sale of asbestos floor coverings—willful and wanton negligence—statute of repose

The ten-year limitation of N.C.G.S. § 1-52(16) still applies when the six-year limitation of N.C.G.S. § 1-50(5) does not apply because of allegations of willful and wanton negligence in furnishing materials as set forth in N.C.G.S. § 1-50(5)(g). Therefore, plaintiffs' claim for willful and wanton negligence by defendants in furnishing to plaintiffs floor coverings containing asbestos is barred on its face where plaintiffs alleged that defendant furnished the asbestos floor coverings in 1976 and 1977; damages to plaintiffs' property did not become apparent and a claim did not accrue until 1989-90; and plaintiffs' cause of action thus accrued more than ten years from the last omission of defendant relating to plaintiffs.

Am Jur 2d, Limitation of Actions §§ 107 et seq.

APPEAL by plaintiffs from order entered 19 February 1991 by *Judge William Z. Wood, Jr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 7 January 1992.

On 30 August 1990 plaintiffs brought suit alleging the following: Floor tile and sheet vinyl flooring manufactured, sold and furnished by Armstrong World Industries, Inc. (Armstrong) was purchased and installed during construction of certain parts of Forsyth Memorial Hospital including an addition built in 1976 and 1977. Some of the flooring material contained asbestos. Plaintiffs discovered the asbestos during the winter of 1989-90 during the renovation of the Hospital's intensive care wing. Plaintiffs contend that Armstrong was negligent in producing, selling, and furnishing flooring materials containing asbestos and that Armstrong breached the implied warranty of merchantability and fitness for a particular purpose. Plaintiffs also alleged that Armstrong's actions were intentional and done with willful and wanton disregard to the rights of plaintiffs and others similarly situated. Plaintiffs sought compensatory and punitive damages. The trial court granted defendant's Rule 12(b)(6) motion to dismiss. From this order plaintiffs appeal.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by Michael W. Patrick, for plaintiff-appellants.

Hutchins, Tyndall, Doughton & Moore, by H. Lee Davis, Jr., and Thomas J. Doughton, for defendant-appellee.

EAGLES, Judge.

[1] On appeal plaintiffs contend that the superior court erred in granting defendant's Rule 12(b)(6) motion to dismiss. The issues we must decide are first which statute of repose is applicable to plaintiffs' claims and second whether the complaint reveals on its face that plaintiffs' claims are barred. We hold that G.S. 1-50(5) applies and that plaintiffs' claims are barred.

I.

Plaintiffs argue that G.S. 1-50(5) applies in this situation rather than G.S. 1-50(6). We agree. G.S. 1-50(6) provides:

> No action for the recovery of damages for personal injury, death or damage to property based upon or arising out of any alleged defect or any failure in relation to a product shall be brought more than six years after the date of initial purchase for use or consumption.

G.S. 1-50(5) provides in part:

> a. No action to recover damages based upon or arising out of the defective or unsafe condition of an improvement to real property shall be brought more than six years from the later of the specific last act or omission of the defendant giving rise to the cause of action or substantial completion of the improvement.
>
> b. For purposes of this subdivision, an action based upon or arising out of the defective or unsafe condition of an improvement to real property includes:
>
> . . .
>
> 5. Actions in contract or in tort or otherwise; . . . .

In *Trustees of Rowan Technical College v. J. Hyatt Hammond Associates, Inc.*, 313 N.C. 230, 238, 328 S.E.2d 274, 279 (1985), the Supreme Court said, "Where one of two statutes might apply to the same situation, the statute which deals more directly and specifically with the situation controls over the statute of more general applicability." While arguably either G.S. 1-50(5) or G.S. 1-50(6) might apply, G.S. 1-50(5) clearly applies more specifically to the situation here. Once the vinyl flooring was installed it became an improvement to real property.

[2] We note that plaintiffs alleged in their complaint that "[f]loor tile and sheet vinyl flooring manufactured, sold, and furnished by ARMSTRONG was purchased and installed during the construction of certain parts of the Hospital, including an addition added to the Hospital in 1976 and 1977." Because plaintiffs did not file suit until 1990, their breach of warranty and negligence claims are clearly barred by the six-year statute of repose found at G.S. 1-50(5). Plaintiffs also alleged that "ARMSTRONG continued to produce and sell similar flooring materials containing asbestos until 1983 long after it knew of the hazards presented by the presence of asbestos in such materials." The complaint fails to show any relationship between Armstrong's activities in 1983 and plaintiffs. Even if there was some connection, the six-year statute of repose would still operate as a bar to any alleged negligence or breach of warranty occurring in 1983.

II.

[3] Finally, we address plaintiffs' claim that defendant engaged in willful and wanton conduct. While G.S. 1-50(5) provides for a six-year statute of repose, subsection (e) provides in part:

> The limitation prescribed by this subdivision shall not be asserted as a defense by any person who shall have been guilty of . . . willful or wanton negligence in furnishing materials
> . . . .

Additionally, we note that G.S. 1-50(5)(g) provides: "The limitation prescribed by this subdivision shall apply to the exclusion of G.S. 1-15(c), G.S. 1-52(16) and G.S. 1-47(2)." The question we must address is whether G.S. 1-52(16) still applies when the six-year limitation of G.S. 1-50(5) does not apply because of allegations of willful and wanton negligence as set out in G.S. 1-50(5)(e). The plain language of G.S. 1-50(5)(g) says *the limitation* applies to the exclusion of G.S. 1-52(16). Because the limitation of G.S. 1-50(5) does not apply here, we hold that G.S. 1-52(16) is applicable. G.S. 1-52(16) provides:

> Unless otherwise provided by statute, for personal injury or physical damage to claimant's property, the cause of action, except in causes of actions referred to in G.S. 1-15(c), shall not accrue until bodily harm to the claimant or physical damage to his property becomes apparent or ought reasonably to have become apparent to the claimant, whichever event first occurs. *Provided that no cause of action shall accrue more than 10*

years from the last act or omission of the defendant giving rise to the cause of action.

(Emphasis added.) In their complaint plaintiffs allege that when Armstrong furnished the asbestos flooring to plaintiffs in 1976 and 1977, Armstrong knew of the dangers of asbestos. Accordingly, under G.S. 1-52(16), plaintiffs' cause of action could accrue no later than 1987. Here, plaintiffs' complaint reveals that the damage to plaintiffs' property did not become apparent and accrue until the fall and winter of 1989-90. As we noted earlier, plaintiffs' allegation that "ARMSTRONG continued to produce and sell similar flooring materials containing asbestos until 1983 long after it knew of the hazards presented by the presence of asbestos in such materials" fails to show any relationship between Armstrong's activities in 1983 and plaintiffs. Because the cause of action accrued in 1989-90, more than 10 years from the last act or omission of defendant relating to plaintiffs, plaintiffs' claim for willful and wanton conduct is barred on its face by G.S. 1-52(16).

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

Affirmed.

Judges COZORT and ORR concur.

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	)	ORDER AND JUDGMENT

No. 9019SC1309

(Filed 21 July 1992)

This Court in an opinion published 21 April 1992 directed respondents to show cause in writing why they should not be sanctioned under N.C.R. App. P. 34 and 35 for this appeal. Respondents had sought to appeal both the trial court's denial of a "Motion to Delay Judgment and Hold in Abeyance" and the imposition of $700.00 in sanctions for filing the motion.

Following review of the record in this appeal, respondents' show cause briefs submitted pursuant to Rule 34(d), and past appeals in this matter, the Court finds that:

(1) respondents argue in this appeal that the trial court lacks jurisdiction and exceeds its authority by entering any order whatsoever, despite this Court's repeated rejection of this argument. *Lowder v. All Star Mills*, 100 N.C. App. 322, 396 S.E.2d 95, *disc. review denied*, 327 N.C. 636, 398 S.E.2d 869 (1990);

(2) respondents had petitioned the North Carolina Supreme Court for discretionary review concerning *Malcolm M. Lowder v. All Star Mills*, Stanly Co. 79CVS015, which respondents contend provided a good faith basis for this appeal;

(3) respondents failed to dismiss their appeal in this action following denial of their petition for discretionary review on 6 November 1991. *Lowder v. All Star Mills, Inc.*, 330 N.C. 196, 412 S.E.2d 679 (1991) (No. 365P91); and

(4) this appeal is a continuation of a series of vexatious appeals, see *Lowder v. Doby*, 68 N.C. App. 491, 315 S.E.2d 517, *disc.*

review denied, 311 N.C. 759, 321 S.E.2d 138 (1984), based upon a variety of arguments which have been repeatedly rejected by the North Carolina appellate courts since *Lowder v. All Star Mills*, Inc., 301 N.C. 561, 273 S.E.2d 247 (1981), *appeal after remand*, 60 N.C. App. 275, 300 S.E.2d 230, *aff'd in part, rev'd in part*, 309 N.C. 695, 309 S.E.2d 193 (1983), *reh'g denied*, 310 N.C. 749, 319 S.E.2d 266 (1984). *Lowder v. All Star Mills, Inc.*, 104 N.C. App. 305, 409 S.E.2d 94, *review denied*, 330 N.C. 118, 409 S.E.2d 595, *cert. denied*, 330 N.C. 196, 412 S.E.2d 679 (1991).

Based upon these findings, we conclude that:

(1) this appeal was frivolous in that it was not well grounded in fact, nor warranted by existing law or a good faith argument for the extension, modification, or reversal of existing law;

(2) this appeal was taken and pursued for the purpose of causing needless increase in the cost of litigation and delaying compliance with the trial court's judgment and order; and

(3) this frivolous appeal merits sanctions.

IT IS HEREBY ORDERED, ADJUDGED AND DECREED that after ordering respondents to show cause in writing why a sanction should not be imposed in compliance with Rule 34(d), the following sanctions are imposed upon respondents jointly and severally:

(1) respondents' appeal is hereby dismissed;

(2) respondents shall pay to the Clerk of the Court of Appeals double costs. In addition to the $321.00 respondents have already paid, they shall pay $321.00 to the Clerk within ten days of this order;

(3) respondents shall pay to the Clerk of Montgomery County Superior Court for the use and benefit of the law firm of Moore & Van Allen reasonable attorneys' fees in the amount of $2,500.00 within thirty days of this order; and

(4) respondents shall within thirty days of the certifying of this Order and Judgment by the Clerk of the Court of Appeals pay in cash, or as may be satisfactory to the Clerk of Montgomery County Superior Court, a fine in the amount of $100,000.00 to the Clerk of Superior Court of Montgomery County, North Carolina.

Nothing in this Order and Judgment is intended to diminish, replace or interfere with the exercise of contempt powers by the Superior Court of Montgomery County to compel compliance with any or all previous orders of the Superior Court in this matter.

This Order and Judgment shall be recorded in the office of the Clerk of Superior Court, Montgomery County, North Carolina and shall be enforced by the contempt powers of the Superior Court of Montgomery County.

This the 21st day of July, 1992.

s/GERALD ARNOLD
For the Court

Judges LEWIS and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 21 JULY 1992

ARRINGTON v. CHEEK No. 9122DC703	Iredell (90CVD0096)	Affirmed
BOWLES v. MUNDAY No. 9122SC189	Alexander (89CVS74)	Affirmed
CHRISTIAN v. RIDDLE & MENDENHALL LOGGING CO. No. 9111SC85	Lee (90CVS284)	Affirmed
DUPLIN COUNTY D.S.S. v. LANIER No. 924DC119	Duplin (89CVD98)	Affirmed
JERNIGAN v. BEASLEY No. 9111SC152	Johnston (89CVS1767)	The money judgment against plaintiffs is reversed.
LYDA v. GROCE No. 9029SC1201	Henderson (90CVS827)	Affirmed
MABRY v. MABRY No. 9123DC58	Alleghany (90CVD74)	Reversed & remanded for further proceedings consistent with this opinion.
STATE v. BARNES No. 9218SC210	Guilford (91CRS27752)	Reversed
STATE v. DAVIS No. 9016SC1114	Robeson (89CRS4539) (89CRS4541) (89CRS4542)	The result of the appeal is: (1) Conspiracy to traffick in cocaine; no error in trial, remanded for resentencing; (2) Trafficking by sale and trafficking by delivery; judgment vacated and cause remanded.
STATE v. JOYNER No. 9222SC137	Iredell (90CRS16872)	No Error
STATE v. LEMLEY No. 9227SC56	Gaston (90CRS021501)	No Error

STATE v. MASSEY No. 9226SC118	Mecklenburg (91CRS25143) (91CRS45169) (91CRS45170)	No Error
STATE v. MATTHEWS No. 924SC97	Onslow (90CRS20280) (90CRS20281) (90CRS20291)	No Error
STATE v. McMILLIAN No. 925SC100	New Hanover (91CRS1096)	No Error

BILLY L. MOORE, W. JOHN LORDEON, DAVID C. BAILEY, AND BOBBY D. CORN, PLAINTIFFS v. CHARLES WYKLE, SCOTT HARROWER, WENDELL BEGLEY, GRACE BRAZIL, T. G. DEWEESE, VERNON DOVER, WILLIAM WARREN, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS MEMBERS OR FORMER MEMBERS OF THE BUNCOMBE COUNTY BOARD OF EDUCATION, V. E. YARBROUGH, INDIVIDUALLY AND IN HIS OFFICIAL CAPACITY AS SUPERINTENDENT OF BUNCOMBE COUNTY SCHOOLS, THE BUNCOMBE COUNTY BOARD OF EDUCATION, GENE RAINEY, JESSE LEDBETTER, TOM SOBOL, DORIS GIEZENTANNER, BILL STANLEY, INDIVIDUALLY AND IN THEIR OFFICIAL CAPACITIES AS BUNCOMBE COUNTY COMMISSIONERS, THE BUNCOMBE COUNTY BOARD OF COMMISSIONERS, DEFENDANTS

No. 9128SC250

(Filed 4 August 1992)

1. **Schools § 7.3 (NCI3d); Taxation § 12 (NCI3d)— board of education—county commissioners—diversion of school bond funds—insufficiency of complaint against members**

   Plaintiffs failed to state a claim against defendants as individuals and as members of a county board of education and a board of county commissioners where they alleged that defendants diverted school bond funds from school construction projects set forth in the bond resolution to the purchase of an administration and advanced education facility for the school system; plaintiffs did not allege that defendants acted corruptly or maliciously; and defendants did not act outside the scope of their duties as board members since the statutory limitation on the legal right to transfer or allocate funds from one project to another is exceeded only when a board uses funds derived from the sale of school bonds for non-school purposes, and all expenditures in this case were for school purposes.

   Am Jur 2d, Schools §§ 95, 96, 106, 107.

2. **Schools § 7.3 (NCI3d); Taxation § 12 (NCI3d)— diversion of school bond funds—insufficiency of complaint against superintendent**

   Plaintiffs stated no claim against defendant school superintendent based on the use of school bond funds for the purchase of a building from Square D for use as an administration facility where they did not allege that defendant was in a decision-making position as to acquisition of the Square

D building, and the complaint failed to allege with particularity any acts constituting fraud.

Am Jur 2d, Schools §§ 95, 96, 106, 107.

3. **Schools § 7.3 (NCI3d)— board of education—board of county commissioners—propriety of expenditure of school bond funds**

The trial court did not err in limiting its denial of motions to dismiss by defendant board of education and defendant board of county commissioners to the allegations relating to the propriety of the expenditure of school bond proceeds on the purchase and renovation of an administration building where the complaint did not include an allegation that monies from other sources of revenue were improperly diverted. A defense asserted in the answer of defendant board of education did not raise a claim that other monies were improperly applied and, in any event, plaintiffs could not rely on this defense to establish an additional claim against defendants.

Am Jur 2d, Schools §§ 95, 96, 106, 107.

4. **Schools § 6 (NCI3d)— proposed sale of school building—discretion of board of education—failure to state claim**

Plaintiffs' complaint failed to state a claim against defendant board of education concerning the proposed sale of a school building, even though the sale allegedly resulted from the board's improper purchase of an administration building with school bond funds, since the board's statutory discretion to determine that the school building was surplus property no longer needed for school purposes was not withdrawn by its actions with respect to the administration facility. N.C.G.S. § 115C-518(a).

Am Jur 2d, Schools §§ 50-52.

5. **Schools § 6 (NCI3d)— disposal of school property—preliminary injunction claim dismissed**

The trial court did not err in dismissing plaintiffs' claim for a preliminary injunction enjoining the disposal of school property where the complaint failed to allege facts showing irreparable harm and the underlying claim against defendants pertaining to the sale of the school property was dismissed.

Am Jur 2d, Schools §§ 50-52.

6. Injunctions § 37 (NCI4th)— preliminary injunction—verification of complaint not required

Verification of the complaint is not a condition for issuance of a preliminary injunction.

Am Jur 2d, Injunctions §§ 263, 265.

Appealability of order refusing to grant or dissolving temporary restraining order. 19 ALR3d 459.

APPEAL by plaintiffs from order entered 10 January 1991 by *Judge C. Walter Allen* in BUNCOMBE County Superior Court. Heard in the Court of Appeals 5 December 1991.

Lindsay and True, by Stephen P. Lindsay and William H. Leslie, for plaintiff-appellants.

Roberts Stevens & Cogburn, P.A., by Gwynn G. Radeker and Walter L. Currie, and Womble Carlyle Sandridge & Rice, by Jim D. Cooley and G. Michael Barnhill, for defendant-appellees Wykle, Harrower, Begley, Brazil, Deweese, Dover, Warren, Yarbrough, and The Buncombe County Board of Education.

Joe A. Connolly for defendant-appellees Rainey, Ledbetter, Sobol, Giezentanner, Stanley, and The Buncombe County Board of Commissioners.

PARKER, Judge.

Plaintiffs appeal from an order of partial dismissal pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. We affirm.

Plaintiffs' complaint, filed 19 October 1990, alleged in substance that defendants made unauthorized and unwarranted diversions of school bond proceeds to purposes other than those authorized by the official order of defendant Buncombe County Board of Commissioners ("Board of Commissioners") for a bond referendum approved by voters 22 September 1987. Relief prayed for included (i) a writ of mandamus requiring defendants to fulfill their legal duty of expending school bond proceeds in exact accordance with the bond resolution's stated purposes; (ii) a mandatory injunction for the same purpose; (iii) an injunction prohibiting defendants from confirming or otherwise permitting the sale of Biltmore School and adjacent property pending resolution of plaintiffs' action; (iv)

an independent audit and accounting of expenditures of all school bond proceeds; and (v) repayment by the individual defendants of the misappropriated monies and cessation of the use of property purchased therewith.

In December 1990, the individual defendant members of the Buncombe County Board of Education, Superintendent Yarbrough, and the Board of Education ("Board of Education defendants") moved to dismiss the complaint for failure to state a claim upon which relief could be granted. The individual defendant county commissioners and the Board of Commissioners filed a similar motion. Hearing of these motions was calendared for 17 December. On 14 December plaintiffs simultaneously moved to amend their complaint as of right and filed an amended complaint. The unverified amended complaint did not add any new claims against defendants; it incorporated by reference and attached copies of resolutions and minutes of the meetings of the two defendant boards. On 17 December the Board of Education defendants answered plaintiff's original complaint.

In light of plaintiffs' amended complaint, on 17 December the trial court offered to continue hearing of the motions to dismiss. The parties instead agreed to hearing of the motions to dismiss with respect to the amended complaint.

Factual allegations included that in June 1986 defendant Buncombe County Board of Education ("Board of Education") adopted a major capital construction needs resolution. The preamble stated the Board had previously identified twenty-two major construction projects totalling $51.3 million and needing immediate attention. These projects included constructing a new high school, replacing or adding onto other schools, and constructing or replacing buildings of the transportation department and administrative offices. The preamble also stated defendant Board had been requested to review its construction needs so that top priority needs could be addressed in a new county financing plan. Six proposed projects totalling $25 million were identified for inclusion in the new financing plan, "with said projects to be altered depending on community growth, project needs and cost at the time funding is made available." Defendant Board of Education resolved

2. That the six (6) proposed projects totalling $25 million delineated above are hereby identified by this Board for incorporation in Buncombe County's new financing plan; and

3. That this Board supports the Commissioners' proposal to fund needed major school construction projects from a new bond referendum and from [$.025] in ad valorem revenue being designated *only* for school construction by being appropriated to the School Capital Fund.

On 18 December 1986, defendant Board of Education adopted a revised major capital construction needs and bond referendum resolution. The preamble stated construction priorities had been re-evaluated based on occurrences of the previous six months. Defendant Board of Education resolved

2. That the eight (8) proposed projects totalling $26,500,000 delineated in the attachment are hereby identified by this Board for incorporation in a new bond referendum; and

3. That this Board hereby declares its support for a new 1987 bond referendum for public school construction and lends its support to the Buncombe County Commissioners in their efforts to provide adequate public school facilities.

On 25 March 1987 defendant Board of Education adopted a resolution revising the 18 December resolution. The preamble stated defendant Board of Commissioners had called for a bond referendum to be held 22 September 1987 and defendant Board of Education had continued "the process of re-evaluating the immediate Buncombe County school construction needs in order to address as many . . . needs within the same total dollars resulting in the [11 March 1987 list]." The preamble continued

> WHEREAS, it is the opinion of this Board that this revised March 11, 1987, listing of ten (10) school projects should be the priority projects proposed by this Board and identified as 1987 bond referendum projects and that the attached March 18, 1987, revised *Estimate Project Timetable* should be used by the administration in developing cash flow projections, even though project schedules can be altered depending on total county directions for issuing bonds.

This time defendant Board of Education resolved

1. That the attached March 11, 1987, *Recommended Priorities and Budget for School Bond Projects* is hereby adopted by this Board as those ten (10) school projects for incorpora-

tion in the 1987 bond referendum, in place of those identified on December 18, 1986; and

2. That the Buncombe County Commissioners are respectfully requested to accept this revised project listing which is within the same $26,500,000 total; and

3. That the Superintendent's Office is hereby instructed to utilize the March 18, 1987, revised *Estimated Project Timetable* for developing cash flow projections.

Again on 29 June 1987 defendant Board of Education adopted a resolution requesting defendant Board of Commissioners to provide additional school facilities. The preamble referred to the June and December 1986 and the March 1987 resolutions. This time defendant Board resolved

> Section 1. The Buncombe County Board of Education has determined and found as a fact that adequate school facilities are not now available . . . to comply with the requirements of Section 2 of Article IX of the Constitution of North Carolina for the maintenance of schools nine months in every year and that it is necessary . . . to provide additional school facilities . . . by erecting additional school buildings and other school plant facilities, remodeling, enlarging and reconstructing existing school buildings and other school plant facilities, and acquiring any necessary land and equipment therefor, the estimated cost of which is $26,250,000.

By Resolution No. 18788, adopted 30 June 1987, defendant Board of Commissioners made findings relating to a $54 million proposed bond issue and authorizing the submission of an application therefor with the Local Government Commission. The resolution reads in pertinent part:

> WHEREAS, by resolution dated June 29, 1987, the Buncombe County Board of Education cited their determination of, and found as a fact, that adequate school facilities are not now available . . . to comply with the requirement of Section 2 of Article IX of the Constitution of North Carolina for the maintenance of schools nine months in every year and that it is necessary . . . to provide additional school facilities by erecting additional school buildings and other school plant facilities; remodeling, enlarging, and

> reconstructing existing school buildings and other school plant facilities; and acquiring any necessary land and equipment therefor, the estimated cost of which is $26,500,000;

. . . .

NOW, THEREFORE, BE IT RESOLVED . . . :

> 3. That the bond application be submitted to the Local Government Commission addressing the bond issue as previously described and for the purposes outlined in this resolution.

On 7 July 1987 defendant Board of Commissioners ordered that Buncombe County was authorized to contract a debt not exceeding $32 million to provide funds "for erecting additional school buildings and other school plant facilities . . . and acquiring any necessary land and equipment therefor, in order to provide additional school facilities in said County." Defendant Board of Education's requested share of the bond sale proceeds was $26,250,000.00; a request was also made by the Asheville City Board of Education. As noted above, Buncombe County voters passed the bond referendum on 22 September 1987.

Minutes of the 20 October 1987 meeting of defendant Board of Education show consideration was given to an Education Center:

> 6. Education Center. The Education Center item on the Consent Agenda was pulled to the regular agenda. Bill McElrath addressed the Board pertaining to the need and plans for an Education Center. Mr. Warren moved that the Board approve the establishment of a Buncombe County Schools Education Center with funding sources totalling $122,800 for 1987-88 to be provided as outlined by Mr. McElrath and authorize the Superintendent to implement same. Mrs. Brazil seconded and the motion carried. (Report filed).

Defendant Board of Education's long-range plan dated 21 December 1987 showed the Education Center as project 25, with an estimated cost of $5 million.

The record shows that by the time of its 2 November 1988 meeting, defendant Board of Education had taken preliminary steps to purchase property known as the Square D facility:

3. PROPERTIES.

a. Square D Facility. The Board discussed this property with the attorney. Mrs. Brazil moved that the Board authorize the Vice-Chairman and the Secretary to execute and send the Option to Purchase and Memorandum of Option subject to the approval of the Board of Commissioners . . . and to further authorize such revisions to the Option and Memorandum of Option (other than the property to be purchased and the purchase price) as may be negotiated by the Superintendent and School Attorney. Mr. Harrower seconded and the motion carried. Mrs. Brazil was not present at the time the vote was taken.

At its 9 March 1989 meeting, defendant Board of Education adopted a resolution calling for acquisition of the Square D facility "to be used as an Advanced Education Center and to house the Administrative Offices, Maintenance Department and [C]entral [W]arehouse." At its 20 March 1989 meeting, defendant Board of Education adopted the following resolution:

RESOLUTION OF REQUEST FOR APPROVAL AND APPROPRIATION FOR THE BUNCOMBE COUNTY SCHOOLS ADVANCED EDUCATION CENTER

WHEREAS, the . . . Board of Education has determined that multiple long-range facility needs can be addressed by the acquisition of Square D Plant #2, which includes a gross building area of 122,593 square feet and approximately 65 acres, and

. . . .

WHEREAS, this property acquisition and renovation will have a major cost savings impact upon this Board's long-range building plan affecting nine (9) projects, and

WHEREAS, such action is necessary and prudent if this Board is to address the total Buncombe County facility needs, and

WHEREAS, this Board intends to dispose of surplus school properties and the present site of the Administrative Offices [Biltmore School], the proceeds of which could be utilized to reduce the impact of any delays in priority projects . . . and

WHEREAS, this acquisition, when renovations, improvements and additions are complete, will ultimately allow this Board to establish an appropriate county-wide Advanced Education Center for both advanced instructional and vocational classes; equalize high school curriculum offerings throughout Buncombe County and, when fully implemented, house all Administrative Offices, Maintenance Department, Central Warehouse and other support services in adequate areas, and

WHEREAS, it is the opinion of this Board that the acquisition of the Square D property identified should be obtained as soon as possible in order for the renovations and improvements currently being planned to proceed.

NOW, THEREFORE BE IT RESOLVED . . . :

1. That the Commissioners appropriate $5,000,000 from the School Capital Fund to be used to purchase, renovate and furnish said property . . . .

On 2 May 1989 defendant Board of Commissioners adopted Resolution 19314, appropriating $5 million for the Education Center. The resolution reads in pertinent part

WHEREAS, the Board of Education requests the total $5 million be funded from the Buncombe County School Capital fund; and

WHEREAS the County Finance Officer has advised the Board that such funds are available in the . . . Capital Fund to cover this appropriation with the caveat that certain expenditures, yet to be identified, now programmed in the School Capital Fund cash flow model will have to be offset from proceeds of the sale of property on the part of the . . . Board of Education and that such can reasonably be expected without delaying any programmed school construction through 1991 . . . .

Plaintiffs' complaint further alleges that in February 1990 defendant Board of Education adopted a resolution asking for a delay in two bond referendum projects. The purchase, renovation, and operation costs of the Square D facility made funds to complete the two projects unavailable. Plaintiffs alleged that "[b]y delaying

the two bond referendum projects, the New Owen High School could be completed and the others would be completed with monies obtained from the expected sale of [s]urplus [p]roperty including, but not limited to Venable School and/or Biltmore School."

After hearing the motions to dismiss, the trial court granted relief as follows:

1. The Amended Complaint fails to state a claim against the individual defendants Charles Wykle, Scott Harrower, Wendell Begley, Grace Brazil, T.G. Deweese, Vernon Dover and William Warren, individually and in their official capacities as members or former members of the Board of Education; V.E. Yarbrough, individually and in his official capacity as Superintendent . . . ; Gene Rainey, Jesse Ledbetter, Tom Sobol, Doris Giezentanner, and Bill Stanley, individually and in their official capacities as members of the Board of Commissioners[,] and the action is hereby dismissed as to those individual parties.

2. The Amended Complaint fails to state a claim as to the proposed sale of Biltmore School and its adjacent property and the provisions of the Amended Complaint [pertinent thereto] and any injunction of said sale are hereby dismissed.

3. The Amended Complaint is not verified and, therefore, cannot serve as a basis for any . . . preliminary injunctive relief requested . . . and all portions of the Amended Complaint requesting preliminary injunctive relief are therefore dismissed.

4. The motions to dismiss are denied as to [defendants] Board of Education and . . . Board of Commissioners as corporate public bodies but only to the extent that the allegations . . . relate to the propriety of the expenditure of bond proceeds on the Square D property.

[1] On appeal to this Court plaintiffs present four contentions. First plaintiffs contend the trial court erred in determining their amended complaint failed to state a claim against members or former members of defendant Board of Education, defendant Superintendent Yarbrough, and members of defendant Board of Commissioners in their individual and official capacities. We disagree.

Regarding personal liability of a public official, the North Carolina Supreme Court has said

> "It is settled law in this jurisdiction that a public official, engaged in the performance of governmental duties involving the exercise of judgment and discretion, may not be held personally liable for mere negligence in respect thereto. The rule in such cases is that an official may not be held liable *unless it be alleged and proved* that his act . . . was corrupt or malicious (cites omitted), or that he acted outside of and beyond the scope of his duties." (Emphasis added.) As long as a public officer lawfully exercises the judgment and discretion with which he is invested by virtue of his office, keeps within the scope of his official authority, and acts without malice or corruption, he is protected from liability. *Carpenter v. Atlanta & C.A.L. Ry.*, 184 N.C. 400, 406, 114 S.E. 693, 696 (1922).

Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976) (quoting *Smith v. Hefner*, 235 N.C. 1, 7, 68 S.E.2d 783, 787 (1952)).

The Local Government Finance Act provides in pertinent part:

> (b) The following directions and limitations shall bind the governing board in adopting the budget ordinance
>
> > (13) No appropriation of the proceeds of a bond issue may be made from the capital project fund account established to account for the proceeds of the bond issue except (i) for the purpose for which the bonds were issued, (ii) to the appropriate debt service fund, or (iii) to an account within a capital reserve fund consistent with the purposes for which the bonds were issued.

N.C.G.S. § 159-13 (Supp. 1991). The North Carolina Supreme Court, construing the predecessor of this statute, stated it

> "does not place a limitation upon the legal right to transfer or allocate funds from one project to another within the general purpose for which bonds were issued. The inhibition contained in the statute is to prevent funds obtained for one general purpose [from] being transferred and used for another general purpose. For example, the statute prohibits the use of funds derived from the sale of bonds to erect, repair and equip school buildings from being used to erect or repair a courthouse or a county home or similar project."

Dilday v. Board of Education, 267 N.C. 438, 449, 148 S.E.2d 513, 520 (1966) (quoting *Atkins v. McAden*, 229 N.C. 752, 756, 51 S.E.2d 484, 487 (1949)).

In *Dilday*, a county board of education adopted a resolution allocating funds for projects which included the construction of a new consolidated high school for white students only and improvements to two high schools for black students only in the same attendance area. After a public hearing on the proposed allocations, the county board of commissioners enacted a bond order authorizing the issuance of school bonds, and the voters approved a referendum therefor. Having determined that under the Federal Civil Rights Act of 1964, existing high schools for the two races in the attendance area had to be consolidated, the board of education enacted and submitted to the board of commissioners a resolution requesting approval to depart from the pre-referendum allocation by omitting improvements intended for the two high schools for black students and using the funds for an enlarged consolidated school for students of both races. The board of commissioners took no action on the resolution. The board of education adopted another resolution stating that consolidation of all high schools in the attendance area was required to effect compliance with Title VI of the Civil Rights Act of 1964 and that the board of commissioners, upon advice of the county attorney, had advised that the original bond order gave the board of education latitude to proceed with the construction of a central high school to replace the separate facilities. The board of commissioners then borrowed money on bond anticipation notes and spent it in part on the new consolidated high school and made plans to borrow more money. *Id.* at 442-45, 148 S.E.2d at 515-18.

In this context, the Court also addressed the roles of a county board of education and board of commissioners as to schools:

> The authority and duty to operate county schools is vested in the county board of education, which is required to provide adequate school buildings, suitably equipped. G.S. 115-35; G.S. 115-29. The board of education determines, in the first instance, what buildings require repairs, remodeling, or enlarging; whether new school houses are needed; and if so, where they shall be located. Such decisions are vested in the sound discretion of the board of education, and its actions with reference thereto cannot be restrained by the courts absent a manifest

> abuse of discretion or a disregard of law. *Feezor v. Siceloff*, 232 N.C. 563, 61 S.E.2d 714 [(1950)]; *Board of Education v. Lewis*, 231 N.C. 661, 58 S.E.2d 725 [(1950)]; *Waldrop v. Hodges*, 230 N.C. 370, 53 S.E.2d 263 [(1949)]; *Atkins v. McAden*, 229 N.C. 752, 51 S.E.2d 484 [(1949)].
>
> Each year the board of education surveys the needs of its school system with reference to buildings and equipment. By resolution it presents these needs, together with their costs, to the commissioners, who are "given a reasonable time to provide the funds which they, upon investigation, shall find to be necessary for providing their respective units with buildings suitably equipped. . . ." G.S. 115-129. It is the board of commissioners, therefore, which is charged with the duty of determining what expenditures shall be made for the erection, repairs, and equipment of school buildings in the county. *Johnson v. Marrow*, 228 N.C. 58, 44 S.E.2d 468 [(1947)]. However, as pointed out in *Atkins v. McAden*, *supra*, the commissioners' control over the expenditure of funds . . . does not interfere with the exclusive control of the schools . . . vested in the county board of education . . . . Having determined what expenditures are necessary and possible, and having provided the funds, the jurisdiction of the commissioners ends. The authority to execute the plans is in the board of education. *Parker v. Anson County*, 237 N.C. 78, 74 S.E.2d 338 [(1953)].

Dilday, 267 N.C. at 448-49, 148 S.E.2d at 519-20. Although Chapter 115, Elementary and Secondary Education, has been recodified as Chapter 115C, the roles and duties of boards of county commissioners or of education have not changed so as to alter the authority of *Dilday*.

The Court went on to specify how a transfer of funds from one project to another must be effected:

> 1. The board of education must, by resolution, request the reallocation of funds and apprise the county commissioners of the conditions which bring about the needs for the transfer.
>
> 2. The commissioners must then investigate the facts upon which the . . . request is made.
>
> 3. After making their investigation, the commissioners must, by resolution, record their findings upon their official

minutes and authorize or reject the proposed reallocation of funds.

If the commissioners find (1) that, since the bonds were authorized, conditions have so changed that the funds are no longer necessary for the original purpose, or that the proposed new project will eliminate the necessity for the originally-contemplated expenditure and better serve the educational interests of the district involved, or that the law will not permit the original purpose to be accomplished in the manner intended, and (2) that the total proposed expenditure for the changed purpose is not excessive, but is necessary in order to maintain the constitutional school term, the commissioners may then legally reallocate the funds in accordance with the request from the board of education. Without such affirmative findings, however, the commissioners have no authority to transfer funds previously allocated to another purpose. And, without authority from the commissioners, the county board of education itself has no power to reallocate the funds.

Here, defendant School Board has strictly followed the appropriate procedures in requesting . . . reallocation . . . . However, when it requested defendant Commissioners' approval of the transfer to Central High School of funds . . . allocated to the Beaufort County and Belhaven high schools, the Commissioners—without taking any official action and without making any entry whatever upon their minutes—orally advised the Board of Education . . . that "the bond order . . . has sufficient latitude to enable the Board of Education to apply the funds to school building construction according to needs."

The transfer which the School Board has requested involves no change in the purpose for which the school bonds were issued, *i.e.*, "to enable the County . . . to maintain public schools in [its] administrative unit for the nine months' school term prescribed by law." It does, however, involve a change in the method of accomplishing that purpose. *Prima facie*, the requested transfer would be entirely legal under ordinary circumstances . . . .

If the Commissioners approve the School Board's request for a transfer of funds, plaintiffs do not suggest that the voters

> . . . will have been dealt with unfairly in that tax funds are being misspent or diverted *from educational purposes.*
>
> . . . .
>
> Since defendant Board of County Commissioners has not acted upon defendant School Board's request that it approve a reallocation of the funds in question, the latter has no authority, acting alone, to make the reallocation. Until defendant Commissioners approve the request, defendant School Board may not proceed.

Dilday, 267 N.C. at 449-52, 148 S.E.2d at 520-23 (citations omitted).

Applying the principles set out above, we note first that in the case under review, plaintiffs did not specifically allege any acts corrupt, malicious, or outside the scope of duty by any individual member of either board. Instead, all the allegations are as to acts of the two boards *qua* boards.

A county board of education is a corporate body with a legal existence separate and apart from the existence of its members. N.C.G.S. § 115C-40 (1991); *see also McLaughlin v. Beasley*, 250 N.C. 221, 222, 108 S.E.2d 226, 227 (1959) (construing predecessor statute); *Kistler v. Board of Education*, 233 N.C. 400, 405, 64 S.E.2d 403, 406 (1951) (under predecessor statute, affirming trial court's sustaining of demurrer *ore tenus* by individual defendant members of board of education because they had "no authority to exercise any of the powers the plaintiff seeks to enjoin"); *Miller v. Henderson*, 71 N.C. App. 366, 370, 322 S.E.2d 594, 598 (1984) (construing section 115C-40, claims against defendants as individuals and members of board of education failed because the acts and omissions forming the basis for claims against them were those of the board as a corporate entity and not those of the individual members of the board). We conclude plaintiffs' claims against the individual members of the two boards must fail for similar reasons.

Moreover, under *Dilday*, the statutory limitation on the legal right to transfer or allocate funds from one project to another is exceeded only where a board uses funds derived from the sale of school bonds for non-school purposes. Since in the instant case all expenditures were for school purposes, we conclude the individual defendants, as members of the Board of Education or Board of Commissioners, were not acting outside the scope of their duties.

[2] Although plaintiffs alleged Superintendent Yarbrough's representations to both defendant boards "were grossly overstated" and "without foundation in fact," plaintiffs did not allege Superintendent Yarbrough was in a decision-making position as to acquisition of the Square D facility. As a matter of law, a superintendent does not vote on appropriations. *See, e.g.*, N.C.G.S. § 115C-35(a) (1991) (board of education consists of members elected by the voters; N.C.G.S. § 115C-271 (1991) (superintendent chosen by board of education); N.C.G.S. § 115C-276 (1991) (duties of superintendent); N.C.G.S. § 115C-427 (1991) (superintendent to prepare budget).

Moreover, we agree with the Board of Education defendants that to the extent the allegations purport to allege some form of fraud by Superintendent Yarbrough, they fail to state any claim. In all averments of fraud the circumstances constituting fraud must be stated with particularity. N.C.G.S. § 1A-1, Rule 9(b) (1990). "The pleader . . . must state with particularity the time, place and content of the false misrepresentation. 2A Moore's Federal Practice ¶ 9.03, at 1924-28 (2d ed. 1978)." *Coley v. Bank*, 41 N.C. App. 121, 125, 254 S.E.2d 217, 219 (1979) (affirming dismissal for failure to state a claim under Rule 12(b)(6)).

According to the North Carolina Supreme Court, dismissal under Rule 12(b)(6)

> is proper when one of the following three conditions is satisfied: (1) when the complaint on its face reveals that no law supports plaintiff's claim; (2) when the complaint on its face reveals the absence of fact sufficient to make a good claim; [or] (3) when some fact disclosed in the complaint necessarily defeats plaintiff's claim.

Jackson v. Bumgardner, 318 N.C. 172, 175, 347 S.E.2d 743, 745 (1986) (citation omitted). Applying these precepts, with respect to the individual members of the two boards, no law supports plaintiffs' claim. With respect to Superintendent Yarbrough, plaintiffs' complaint on its face reveals both that no law supports plaintiff's claim and an absence of facts sufficient to make a good claim. We, therefore, hold the trial court did not err in dismissing plaintiffs' claims against the individual defendant members of both boards and against Superintendent Yarbrough.

[3] Next plaintiffs contend the court erred in limiting denial of defendants' motion to dismiss to the allegations relating to the

propriety of expending school bond proceeds, as opposed to other funds, on purchase of the Square D property. We disagree.

The Public School Building Capital Fund is used to assist county governments in meeting public school building capital needs. N.C.G.S. § 115C-546.1 (1991). Monies in the fund must

> be used for capital outlay projects including the planning, construction, reconstruction, enlargement, improvement, repair, or renovation of public school buildings . . . . As used in this section, "public school buildings" includes only facilities for individual schools that are used for instructional and related purposes and does not include centralized administration, maintenance, or other facilities.

N.C.G.S. § 115C-546.2(b) (1991).

On a Rule 12(b)(6) motion to dismiss, "[t]he question for the court is whether, as a matter of law, the allegations of the complaint, treated as true, are sufficient to state a claim upon which relief may be granted under some legal theory, whether properly labeled or not." *Harris v. NCNB*, 85 N.C. App. 669, 670, 355 S.E.2d 838, 840 (1987). Although the allegations in the complaint are treated as true, "[u]nder the 'notice theory of pleading' a statement of claim is adequate if it gives sufficient notice of the claim asserted 'to enable the adverse party to answer and prepare for trial, to allow for the application of *res judicata*, and to show the type of case brought.'" *Sutton v. Duke*, 277 N.C. 94, 102, 176 S.E.2d 161, 165 (1970) (quoting 2A *Moore's Federal Practice* ¶ 8.13 (2d ed. 1968)).

As shown above, the essence of plaintiffs' complaint and amended complaint was that defendants made unauthorized and unwarranted diversions of school bond proceeds to purposes other than those authorized by the bond resolution, namely for purchase and renovation of the Square D facility. Neither complaint included an allegation that monies from other sources of revenue were improperly diverted. Plaintiffs argue that the following defense asserted in the answer of the Board of Education defendants raises a claim of misappropriation of revenues other than bond proceeds:

> EIGHTH FURTHER DEFENSE
>
> Under the provisions of Chapters 134 and 534 of the North Carolina Session Laws of the General Assembly of 1983

> . . . all proceeds from the sale of bonds pursuant to the September 22, 1987, bond referendum together with funds from prior bond referenda, 50% of revenues from the Buncombe County local sales tax, plus state sales taxes restricted for capital outlay expenditures, funds received from the State of North Carolina pursuant to the School Facilities Finance Act of 1987 ("ADM funds"), and revenues earned from the investment of the[se] funds while on deposit are placed in the School Capital Fund for appropriation by the Buncombe County Board of Commissioners. All requests by the Board of Education defendants for the expenditure of funds in connection with the acquisition and partial renovation of the Square D site have requested an appropriation from the School Capital Fund, there being no separate fund or account in which the proceeds from the sale of bonds pursuant to the September 22, 1987, bond referendum are segregated.

We are not convinced the defense raises a claim that other monies were improperly applied. Moreover, plaintiffs do not cite any authority for the proposition that upon defendants' motion for dismissal, the trial court could consider this defense to establish an additional claim by plaintiffs against defendants. Therefore, we conclude the trial court did not err in limiting denial of defendants' motions to dismiss to only the allegations relating to the propriety of the expenditure of school bond proceeds on the Square D facility. We agree with defendants that if plaintiffs desire to add a claim that defendants diverted sources of revenue other than school bond proceeds, plaintiffs should seek leave to amend under Rule 15(a).

[4] Plaintiffs also contend the court erred in determining their complaint failed to state a claim as to the proposed sale of Biltmore School and its adjacent property. Again we disagree.

The county board of education, not the board of commissioners, holds "all school property and [is] capable of . . . selling and transferring the same for school purposes." N.C.G.S. § 115C-40 (1991). When a board of education determines the use of any real property owned or held by it is unnecessary or undesirable for public school purposes, the board

> may dispose of such according to the procedures prescribed in General Statutes, Chapter 160A, Article 12, or any successor provisions thereto. Provided, when any real property to which the board holds title is no longer suitable or necessary for

public school purposes, the board of county commissioners . . . shall be afforded the first opportunity to obtain the property.

N.C.G.S. § 115C-518(a) (1991). Such decisions are within the sound discretion of a board of education and cannot be restrained by the courts absent a manifest abuse of discretion or a disregard of law. *See Dilday v. Board of Education*, 267 N.C. at 448, 148 S.E.2d at 520.

Applying this law to the case under review, no claim with respect to disposition of the Biltmore School property will lie against defendant Board of Commissioners. With respect to these defendants, therefore, the court did not err in dismissing the claim.

Proceeds of a board of education's sale of real property must be applied to reduce the county's bonded indebtedness for the school administrative unit or for capital outlay purposes. N.C.G.S. § 115C-518(a) (1991). "In all actions . . . against a local board of education, the order or action of the board shall be presumed to be correct and the burden of proof shall be on the complaining party to show the contrary." N.C.G.S. § 115C-44(b) (1991).

The Board of Education defendants argue dismissal was proper because plaintiffs' complaint lacked allegations that in disposing of the Biltmore School property, the board evinced a manifest abuse of discretion or disregard of law. Although the sale of the Biltmore School property may have resulted from the purchase of the Square D property, the Board of Education's statutory discretion to determine that the Biltmore School property was surplus property no longer needed for school purposes was not withdrawn by its actions with respect to the Square D facility.

[5] Finally plaintiffs contend the court erred in dismissing all their claims for preliminary injunctive relief. Under a fair reading of plaintiffs' prayer for relief, the only preliminary injunctive relief requested was the enjoining of the disposal of the Biltmore School property.

"A preliminary injunction . . . shall be issued . . . when it appears by the complaint that the plaintiff is entitled to the relief demanded, and this relief . . . consists in restraining the commission . . . of some act the commission . . . of which, during the litigation, would produce injury to the plaintiff . . . ." N.C.G.S. § 1-485 (1983). An applicant for injunctive relief must set out with particularity

facts supporting the allegation of irreparable harm, so that the court can decide for itself if such injury will occur. *Coble Dairy v. State ex rel. Milk Commission*, 58 N.C. App. 213, 214, 292 S.E.2d 750, 751 (1982).

Paragraph 21 of plaintiffs' verified complaint included an allegation that due to the wrongful diversion of school bond proceeds to non-referendum projects, defendants were without sufficient funds to complete the referendum projects. Paragraph 18 alleged that defendant Board of Education had adopted a resolution asking for a delay in two referendum projects because bond proceeds, depleted through expenditure on the Square D facility, were insufficient to complete the projects. While these allegations may have been sufficient to show with particularity irreparable harm resulting from the expenditure of bond monies for the purchase of the Square D facility, plaintiffs did not seek to enjoin that purchase. Hence, on its face the complaint did not show allegations sufficient to state a claim for injunctive relief.

[6] The court reached the right result in dismissing the claim for injunctive relief, but the stated reason that the complaint was not verified is misplaced. At a show cause hearing an unverified complaint could not be treated as an affidavit, but verification of a complaint is not a condition for issuance of a preliminary injunction under N.C.G.S. § 1A-1, Rule 65, or under Chapter 1, Article 37, of the North Carolina General Statutes. Moreover, the cause of action against defendants pertaining to the sale of Biltmore School having been dismissed, no basis for an injunction remained.

Affirmed.

Judges GREENE and WYNN concur.

BETTY TENN LAWRENCE v. LARRY EDWARD TISE

LARRY EDWARD TISE v. BETTY TENN LAWRENCE

No. 9128DC563

(Filed 4 August 1992)

1. **Divorce and Separation § 400 (NCI4th)— child support— determination of parent's income—real estate depreciation**

The findings were not sufficient in a child support action for the appellate court to determine whether the trial court had properly applied the Child Support Guidelines in determining the father's gross income. It was not clear whether the court considered real estate depreciation and, if so, whether the depreciation claimed was straight line or accelerated. Accelerated depreciation is expressly not allowed by the Guidelines as a deduction from a parent's income; as for straight line depreciation, the approach more consistent with the Guidelines is to allow the trial court the discretion to deduct the amount of straight line depreciation allowed by the Internal Revenue Code.

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

2. **Divorce and Separation § 401 (NCI4th)— child support— determination of parent's income—real estate income and losses**

There was no evidence in a child support action that the father was intentionally depressing his income from rental properties and no evidence that the property was held by the father as trustee for his sons by his prior marriage, which would prevent the deduction of losses from his income. Losses incurred by the father on rental properties due to ordinary and necessary expenses are deductible from the father's income; ordinary and necessary expenses include expenses for repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest, but not mortgage principal payments. Remand is necessary because the trial court treated mortgage principal payments as a deductible expense.

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

3. **Divorce and Separation § 400 (NCI4th)— child support—father's income—non-reimbursed expenses**

The trial court erred in a child support action by improperly considering the father's non-reimbursed employee expenses. Although the Guidelines permit the trial court to deduct ordinary and necessary expenses required for self-employment or business operation, there is no provision permitting an employee to deduct expenses incurred in his employment.

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

4. **Divorce and Separation § 392 (NCI4th)— child support—medical and dental expenses—apportionment between parents—discretion of trial court**

A child support order was remanded where the order required equal payment of uninsured medical and dental expenses on behalf of the child. Uninsured medical and dental expenses are to be apportioned between the parties in the discretion of the trial court; here, given the large disparity in the incomes of the parties in the instant case, an order requiring equal payment of uninsured medical and dental expenses incurred on behalf of the child is manifestly unsupported by reason.

Am Jur 2d, Divorce and Separation §§ 1035, 1040, 1042.

Excessiveness or adequacy of money awarded as child support. 27 ALR4th 864.

5. **Divorce and Separation § 397 (NCI4th)— child support—retroactive—based on Guidelines rather than actual expenditures—error**

The trial court erred in a child support action by basing the retroactive award on the Guidelines in effect at the time the expenses were incurred rather than on the actual expenditures.

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

6. **Divorce and Separation § 397 (NCI4th)— child support—medical insurance premiums—joint policy—no evidence of premium attributable to child**

The trial court did not err in a child support order by refusing to treat a portion of the medical insurance premiums

paid by the mother for a policy insuring herself and the child as an expenditure incurred on behalf of the child. Medical insurance premiums paid by a parent on behalf of a child are actual expenditures which must be considered in computing retroactive support, but there was no evidence in this case to support a finding on the portion of the premiums attributable only to coverage of the child.

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

7. **Divorce and Alimony § 397 (NCI4th)— retroactive child support—reasonable actual expenditures—child care and homemaker services**

The trial court erred when awarding retroactive child support by utilizing the Guidelines to determine the allocation of the retroactive obligation and not considering the custodial parent's child care and homemaker services. The trial court should consider any "indirect support" made by either parent for the child during the period in question.

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

8. **Divorce and Separation § 522 (NCI4th)— child support—attorney fees—good faith and ability to pay**

A trial court order denying the mother's request for attorney fees in a child support action was reversed where the action was properly characterized as one for custody and support because both the custody and support actions were before the court at the time the case was called for trial, even though the issue of custody was quickly settled; the evidence showed that the mother was an interested party acting in good faith; and the finding that the mother had the means to pay her attorney was not supported by the evidence. N.C.G.S. § 50-13.6.

Am Jur 2d, Divorce and Separation § 586.

APPEAL by plaintiff Betty Tenn Lawrence from order entered 30 November 1990 in BUNCOMBE County District Court by *Judge Robert L. Harrell.* Heard in the Court of Appeals 7 April 1992.

Betty Tenn Lawrence for plaintiff-appellant.

Gum & Hillier, P.A., by Ingrid Friesen, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from a child support order entered 30 November 1990.

Plaintiff Betty Tenn Lawrence (Mother) and defendant Larry Edward Tise (Father), who have never been married to each other, are the parents of William Zane Lawrence (the child), born 3 September 1988. Mother is forty-two years old. She is divorced and has no other children. Mother worked for the public library in Asheville prior to attending Duke University School of Law in 1980. After graduating from law school, Mother worked for three years as an associate at a New York City law firm. In 1986, she returned to Asheville, obtained her license to practice law in North Carolina, and began restoration and repair of a large house which serves as her residence as well as the law offices for her solo practice.

Father is forty-eight years old, divorced, and has two children from a former marriage, now ages twenty-three and eighteen. Father has a Ph.D. in history and is an historian and current director of the Benjamin Franklin National Memorial of the Franklin Institute in Philadelphia, Pennsylvania (the Franklin Institute).

Mother and Father met in 1975 and maintained a friendship for several years. In November, 1987, Father visited Mother at her home in Asheville. During this visit, the child was conceived. Mother informed Father of her pregnancy in late December, 1987. Thereafter, Mother and Father communicated about the pregnancy and Mother's options on several occasions. In February, 1988, Father for the first time denied paternity of the child and ceased communication with Mother. The child was born on 3 September 1988. Despite repeated requests from Mother, Father refused to visit the child or to provide support. Since the child's birth, Mother has operated a solo law practice out of her residence in order to remain at home with her son.

Mother filed an action to establish paternity and compel payment of child support on 12 June 1989. Father continued to deny paternity, and, in fact, denied having sexual intercourse with Mother. On 16 August 1990, after the results of court-ordered blood tests indicated a 99.99 percent probability of paternity, Father signed an affidavit of paternity and simultaneously filed a complaint for sole custody of the child, who was then twenty-three months old. On 16 August 1990, Mother and Father entered into a consent

order pursuant to which Father agreed to pay $575.00 per month as temporary child support until the child support matter could be heard and resolved. On 17 September 1990, Mother filed an answer and counterclaim seeking custody of the child and support.

Mother's original paternity and support action, Father's custody action, and Mother's counterclaim for custody and support were consolidated for evidentiary hearing and were heard on 22, 23, and 24 October, 1990. On 23 October 1990, Mother and Father executed a memorandum of judgment pursuant to which Mother was awarded sole custody of the child subject to reasonable and liberal visitation of Father. On 24 October 1990, the child support issues were resolved by the trial court. On 30 November 1990, the trial court signed a consent order covering custody and visitation in accordance with the 23 October 1990 memorandum of judgment. The court also signed an order awarding Mother retroactive child support in the amount of $10,248.30, reimbursement of medical expenses attributable to pregnancy and birth in the amount of $1,477.19, and payment of future child support in the amount of $483.00 per month, to be reduced to $463.00 per month upon presentation by Father of evidence of medical and dental insurance, and denying Mother's request for attorney's fees. From the latter order, Mother appeals.

The issues are whether the trial court I) may, pursuant to the North Carolina Child Support Guidelines, properly deduct when calculating a parent's monthly gross income: (A) straight line depreciation taken on investment rental property; (B) other losses from the operation of investment rental property; and (C) non-reimbursed employee expenses; II) abused its discretion in ordering that medical and dental expenses incurred on behalf of the child which are not covered by insurance be shared equally by the parties, rather than according to each parent's proportionate share of the basic child support obligation; III) erred in utilizing the North Carolina Child Support Guidelines to calculate retroactive child support; and IV) erred in denying Mother's request for attorney's fees pursuant to N.C.G.S. § 50-13.6.

I

Gross Income

The trial court concluded that Father's "monthly gross income" was "as shown in the child support obligation worksheet form at-

tached to this Order . . . ."[1] The attached worksheet reflects that Father's "monthly gross income" is $3605.00. The trial court used this amount to compute the monthly child support obligations of Mother and Father in accordance with the North Carolina Child Support Guidelines (Guidelines).[2]

The trial court made the following pertinent findings of fact in support of its conclusion regarding Father's monthly gross income:

> 36. That . . . [from 1 January 1990 through August 1990, Father] incurred net losses [from the operation of certain rental property owned by Father] as a result of payment of repairs, leasing fees, property management fees, mortgage payments, taxes and insurance . . . (but not depreciation) [in the amount of $8027.97].
>
> 38. That for the months of September, October, November, and December, 1990, [Father] estimates additional net losses as a result of [his rental properties] in the amount of $1500.00 . . . .
>
> 41. . . . That [Father's] current monthly salary [at the Franklin Institute] is $5208.33.
>
> 42. That [Father] estimates that he will have interest income for 1990 of approximately $1,500.00.
>
> 43. That [Father] estimates that he will have income from dividends for 1990 of approximately $244.62.
>
> 44. That [Father] has income in addition to his employment at the Franklin Institute as a result of his reputation and experience as an historian, and expects to receive approximately $500.00 income (after expenses) for 1990. . . .
>
> 45. That [Father] estimates that as a result of his employment at the Franklin Institute he will incur various expenses which

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1. Because the determination of "gross income" requires the "application of fixed rules of law," it is properly denominated a conclusion of law rather than a finding of fact. *See Quick v. Quick*, 305 N.C. 446, 452, 290 S.E.2d 653, 657-58 (1982).

2. The July, 1990 revision of the Guidelines was in effect at the time of the trial court's order in this case and is applicable to resolution of the issues discussed herein. However, with regard to the issues raised in this appeal, the most recent revision of the Guidelines (August, 1991) has not altered the July, 1990 version. Therefore, our use of "Guidelines" in this opinion references both the July, 1990 and August, 1991 versions of the Guidelines.

will not be reimbursed by the Franklin Institute, but which are directly related to his employment there, in the amount of approximately $5,000.00 to $7,000.00 for 1990, including memberships in various organizations, books, Christmas presents for his staff and entertainment expenses.

46. That during the year 1989 [Father] received a one time payment of six months wages as severance pay, as a result of his termination at the American Association of State and Local Historians, and as a result, his income from wages totalled $80,337.16 for that year.

47. That [Father's] interest income in 1989 totalled $3,999.83, and dividend income was $244.62 for the year 1989.

48. That during 1989, [Father] had net business income as an historian in the amount of $353.05, after deduction of expenses of $3,429.94.

49. That as a result of real estate investments during 1989, [Father] reported losses of $7,571.13 on his Federal Income Tax Return, of which $5,677.76 was reported as a loss due to depreciation.

50. That [Father] had unreimbursed employee expenses of $7,726.87 in 1989, as reported on his Federal Income Tax Return.

51. That during 1988, [Father] received wages and salary totalling $69,099.92, and interest income of $2,257.03, and dividend income of $219.63.

52. That during 1988 [Father] incurred losses as a result of his real estate investments in the amount of $11,424.22, as shown on his Federal Income Tax Return, of which $7,326.42 was reported as a loss due to depreciation.

53. That during 1988 [Father] incurred unreimbursed employee expenses of $11,133.58, as shown on his Federal Income Tax Return.

54. That during 1988 [Father] received net income as a result of his work as an historian in the amount of $1,069.83, after deductions totalling $2,364.20 as shown on his Federal Income Tax Return.

The foregoing findings indicate that the trial court considered in the computation of Father's monthly gross income Father's: (1)

wages and salaries for 1990, 1989, and 1988; (2) losses from real estate investments for 1990, 1989, and 1988; (3) interest income for 1990, 1989, and 1988; (4) dividend income for 1990, 1989, and 1988; (4) non-reimbursed employee expenses for 1990, 1989, and 1988; and (5) "severance pay" for 1989.

Mother argues that the trial court erred in computing Father's monthly gross income. Specifically, she contends that the trial court erred in deducting from Father's income: (1) depreciation taken by Father on rental properties; (2) other losses from the operation of the rental properties; and (3) non-reimbursed employee expenses.

Depreciation

[1] Mother argues that depreciation is a paper loss and does not represent any monies actually being spent by Father and thus should not be deducted from Father's income for the purpose of determining his monthly gross income.

The Guidelines define "income" as "actual gross income of the parent . . . ." "Gross income" includes "income from any source," including, among other things, salaries, wages, dividends, interest, and severance pay. In addition, the Guidelines define gross income from self-employment or operation of a business, including income from rent, as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." Specifically excluded from ordinary and necessary expenses is "the accelerated component of depreciation expenses . . . or any other business expense determined by the Court to be inappropriate for determining gross income for purposes of calculating child support." Thus, accelerated depreciation is expressly not allowed as a deduction from a parent's income.

With regard to straight line depreciation, the Guidelines are silent and there are no cases in North Carolina addressing its deductibility. Of the varied treatment given this issue among the jurisdictions, the approach more consistent with our Guidelines is to vest the trial court with the discretion to deduct from a parent's monthly gross income the amount of straight line depreciation allowed by the Internal Revenue Code. The Internal Revenue Code permits "a reasonable allowance for the exhaustion, wear, and tear" of certain property over its useful life. *See generally* I.R.C. §§ 167, 168 (1990); *see also In re Marriage of Gaer*, 476 N.W.2d 324, 328 (Iowa 1991) (straight line depreciation properly

deducted if necessary "to do justice between the parties"); North Carolina Child Support Guidelines (granting trial court discretion to disallow deductions deemed "inappropriate for determining gross income").

In the instant case, we are unable to ascertain how the trial court treated depreciation. Finding No. 36 indicates that the court did not consider any depreciation in computing defendant's rental property losses. In Finding Nos. 49 and 52, the trial court determined the amount of depreciation claimed by defendant on his income tax returns, but it is not clear whether the court considered the depreciation in computing defendant's monthly gross income. In any event, to the extent, if any, the trial court considered depreciation, the record does not reveal whether the depreciation claimed by defendant was straight line or accelerated. Thus, the findings in this regard are not sufficiently specific to indicate to this Court whether the trial court properly applied the Guidelines in computing Father's gross income, and remand is necessary. *See Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980) (findings must show steps used by trial court to reach conclusions).

Rental Property Losses

[2] Mother first argues that Father invested in certain non-income producing rental properties for the sole purpose of depressing his income in light of the instant litigation, and that therefore some reasonable rental value should be imputed to defendant. We agree that if the evidence supported a finding that Father is failing to make a good faith effort to obtain the best and highest rental income from the properties, then the trial court would be required to utilize the potential rather than the actual income from the operation of these rental properties in determining Father's monthly gross income. *See Robinson v. Robinson*, 10 N.C. App. 463, 468, 179 S.E.2d 144, 147 (1971). However, there is no evidence in the record that Father is intentionally depressing his income from the rental properties.

Mother next argues that, because the trial court found that Father purchased certain rental property "with the intention of meeting his obligations to pay for the college expenses" of Father's two sons from his former marriage, the income from the property is held in trust for the sons and thus the "trust," not Father, is entitled to claim the losses attributable to the property. Although we agree with Mother that losses from property held in trust

for another cannot be deducted from a parent's income in determining gross income under the Guidelines, there is no evidence in the instant case that the property is held by Father as trustee for his sons. Rather, the evidence reveals that the rental property is the personal investment of Father. The fact that Father purchased it with the intention of meeting his obligations to pay his sons' college expenses does not make it trust property.

Therefore, to the extent that the losses incurred by Father on the rental properties were due to "ordinary and necessary expenses," the losses are deductible from Father's income. *See* North Carolina Child Support Guidelines. "[O]rdinary and necessary expenses," although not specifically defined in the Guidelines, include expenses for repairs, property management and leasing fees, real estate taxes, insurance, and mortgage interest. Mortgage principal payments, however, are not an "ordinary and necessary expense" within the meaning of the Guidelines. Because the trial court, as revealed in Finding No. 36, treated mortgage principal payments as a deductible expense, remand is necessary.

Non-reimbursed Employee Expenses

[3] Mother argues that the trial court erred by deducting from Father's income the non-reimbursed expenses incurred by Father in his employment with the Franklin Institute.

Although the Guidelines permit the trial court to deduct "ordinary and necessary expenses required for self-employment or business operation," there is no provision permitting an employee to deduct expenses incurred in his employment. The Guidelines do provide, however, that "expense reimbursements or in-kind payments received by a parent in the course of employment . . . should be counted as income if they are significant and reduce personal living expenses." Because the trial court in Finding No. 45 improperly considered Father's non-reimbursed employee expenses with the Franklin Institute, remand is necessary.

On remand the trial court will make new findings on Father's monthly gross income based on the evidence in the record. In this regard, the court must determine Father's gross income as of the time the child support order was originally entered, not as of the time of remand nor on the basis of Father's average monthly gross income over the years preceding the original trial. *See Holt v. Holt*, 29 N.C. App. 124, 126, 223 S.E.2d 542, 544 (1976)

(court must set support based on parent's "present income"). Using the correct monthly gross income figure, the trial court will ascertain the presumptive amount of support in accordance with the Guidelines. In addition, because the trial court originally heard evidence and made findings relating to the reasonable needs of the child and the relative ability of each parent to provide support, the trial court may deviate from the presumptive amount if it determines that the presumptive amount "would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would otherwise be unjust or inappropriate." N.C.G.S. § 5013.4(c) (Supp. 1991); *Browne v. Browne*, 101 N.C. App. 617, 623, 400 S.E.2d 736, 740 (1991) (notice of request for deviation not required where parties introduce evidence on factors listed in Section 5013.4(c)).

II

Medical Expenses

[4] The trial court in its order required Father to obtain medical and dental insurance on the child, with Mother and Father to share equally any medical and dental expenses incurred on behalf of the child not covered by such insurance. Mother argues that the parties should share this expense in the same proportion as the "percentage share of income" shown on the Guidelines worksheet, that is, in the same proportion that the parties share the basic child support obligation. The trial court determined that Mother's share of the basic child support obligation was six percent, and Father's ninety-four percent.

The Guidelines do not provide a direct answer to the question presented. While the Guidelines state that the cost of professional counseling or psychiatric therapy for a child "shall be apportioned in the same manner as the basic child support obligation," there is no requirement that the cost of other "extraordinary expenses" be apportioned in any particular manner. *See* North Carolina Child Support Guidelines. We see no reason to treat the apportionment of ordinary medical and dental expenses not covered by insurance differently from the apportionment of these other "extraordinary expenses." Accordingly, uninsured medical and dental expenses are to be apportioned between the parties in the discretion of the trial court. In other words, any decision by the court in this regard must be upheld absent a showing that it is "manifestly unsupported by reason." *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d

829, 833 (1985). Given the large disparity in the incomes of the parties in the instant case, an order requiring equal payment of uninsured medical and dental expenses incurred on behalf of the child is "manifestly unsupported by reason" and therefore remand is necessary.

III

Retroactive Child Support

Mother argues that the trial court's order of retroactive child support is defective in several respects. First, she contends that the trial court erred by applying the Guidelines to determine the amount of Father's retroactive child support obligation. We agree.

[5] Retroactive child support is based on the non-custodial parent's share of the reasonable actual expenditures made by the custodial parent on behalf of the child. *Hicks v. Hicks*, 34 N.C. App. 128, 130, 237 S.E.2d 307, 309 (1977); *Tidwell v. Booker*, 290 N.C. 98, 116, 225 S.E.2d 816, 827 (1976). The amount of support which the non-custodial parent "should have paid" based on an application of the Guidelines is not the appropriate test of liability. *See Hicks*, 34 N.C. App. at 130, 237 S.E.2d at 309. A proper application of the Guidelines establishes the support necessary to meet the reasonable needs of the child. *See Browne*, 101 N.C. App. at 624, 400 S.E.2d at 740 (absent a request for deviation, support "consistent with the guidelines is conclusively presumed to be in such amount as to meet the reasonable needs of the child for health, education and maintenance"). The calculation of retroactive child support, on the other hand, focuses on the amount of monies actually expended by the custodial parent on the child. *Cohen v. Cohen*, 100 N.C. App. 334, 347, 396 S.E.2d 344, 351 (1990), *disc. rev. denied*, 328 N.C. 270, 400 S.E.2d 451 (1991). In the instant case, although the trial court made a finding on Mother's actual expenditures during the period for which retroactive support is sought, the court instead based the retroactive support award on the Guidelines in effect at the time the expenses were incurred by Mother. This was error requiring reversal of the order of retroactive support.

[6] Second, Mother argues that the trial court erred in refusing to treat a portion of the medical insurance premiums paid by Mother for an insurance policy insuring both Mother and child as an actual expenditure incurred on behalf of the child. We agree that medical insurance premiums paid by a parent on behalf of a child are actual

expenditures which must be considered in computing retroactive child support. *See* Helen Donigan, Calculating and Documenting Child Support Awards Under Washington Law, 26 Gonzaga L. Rev. 13, 40 n.174 (1990/91) (difference between cost for parent's individual coverage and cost if child is added serves as accurate reflection of amount of premium attributable to child). In this case, however, the failure of the trial court to treat a portion of Mother's premiums as an actual expenditure for the purposes of calculating retroactive support was not error because there is no evidence in the record to support a finding on the portion of the premiums for the joint policy attributable only to coverage of the child. In the absence of such evidence, the trial court could only speculate as to the child's share of the cost, and this it cannot do.

[7] Third, Mother argues that in determining Father's share of the reasonable actual expenditures made by Mother during the period for which retroactive child support is sought, the trial court must consider her child care and homemaker services rendered during this period. We agree. In determining the non-custodial parent's share of the custodial parent's reasonable actual expenditures in a retroactive support action, the trial court should consider the relative abilities of the parents to pay support (considering the estates, earnings, and the reasonable expenses of the parents) and any "indirect support" made by either parent for the child during the period in question. *Stanley v. Stanley*, 51 N.C. App. 172, 181, 275 S.E.2d 546, 552, *disc. rev. denied*, 303 N.C. 182, 280 S.E.2d 454, *cert. denied*, 454 U.S. 959, 70 L.Ed.2d 374 (1981); *Plott v. Plott*, 313 N.C. 63, 77, 326 S.E.2d 863, 871 (1985). One form of such "indirect support" is "child care and homemaker contributions" rendered by a parent. *Id.*; N.C.G.S. § 5013.4(c) (Supp. 1991). Because the trial court utilized the Guidelines to determine the allocation of the retroactive child support obligation, it did not consider the proper factors and therefore erred. On remand, Mother's award for retroactive child support is to be determined consistent with this opinion and for the period of 3 September 1988 through 31 August 1990.

IV

Attorney's Fees

[8] Mother contends that the trial court erred in denying her request for attorney's fees pursuant to N.C.G.S. § 5013.6. We agree.

The trial court found as a fact that Mother was "able to pay her own attorney" and ordered that she was "not entitled to reimbursement for her attorney fees . . . ." The evidence reveals that Mother incurred legal fees in connection with this action in the amount of $6741.00; that her monthly gross income is $215.00 and that her monthly expenses exceed her gross income; that she has $4000.00 in non-liquidable IRA's and $2600.00 in an IRA money market account; and that she owns a home which she purchased in 1986 for $50,000.00 which has a mortgage of $40,000.00, and an adjoining vacant lot with a tax value of $10,000.00.

Attorney's fees may be awarded by the trial court in an action for custody or in an action for custody and support to an interested party who, acting in good faith, has insufficient means to defray the expense of the suit. N.C.G.S. § 5013.6 (Supp. 1991). A party has insufficient means to defray the expense of the suit when he or she is "unable to employ adequate counsel in order to proceed as litigant to meet the other spouse as litigant in the suit." *Hudson v. Hudson*, 299 N.C. 465, 472, 263 S.E.2d 719, 724 (1980). If the action is one for support only, an additional finding must be made that "the party ordered to furnish support has refused to provide support which is adequate under the circumstances existing at the time of the institution of the action." *Id.* at 472-73, 263 S.E.2d at 724.

The instant action is properly characterized as one for "custody and support" because both the custody and support actions were before the trial court on 22 October 1990, the time the case was called for trial. This is so despite the fact that the parties "quickly settled" the issue of custody. *See Theokas v. Theokas*, 97 N.C. App. 626, 630, 389 S.E.2d 278, 280, *disc. rev. denied*, 327 N.C. 437, 395 S.E.2d 697 (1990). Accordingly, the question is whether Mother is an interested party acting in good faith and without sufficient funds to defray the expenses of the suit. The answer is yes.

Although the trial court did not make any findings or conclusions as to Mother's good faith, the evidence shows that she is an interested party acting in good faith. *See Cobb v. Cobb*, 79 N.C. App. 592, 597, 339 S.E.2d 825, 829 (1986) (better practice is to make such a finding but not fatal where evidence undisputed). Moreover, the trial court's finding that Mother has the means to pay her attorney is not supported by the evidence. Mother's income from her law practice is not sufficient to pay her legal expenses,

and she is not required to deplete her small estate in order to pay these expenses. *Id.* Accordingly, the order of the trial court denying Mother's request for attorney's fees is reversed and is remanded for entry of an order allowing such fees and in an amount consistent with the evidence in the record.

We have reviewed Mother's remaining assignments of error and find them to be either without merit or rendered moot by our treatment of the issues discussed herein. This case is remanded to the trial court for entry of a new order consistent with this opinion.

Reversed and remanded.

Judges PARKER and COZORT concur.

THEODORE H. SHEAR AND FRANCINE DURSO, TENANTS BY ENTIRETY; KEVIN AND ELIZABETH PIACENZA, TENANTS BY ENTIRETY; ALBERT AND CHRISTINE BENSHOFF, TENANTS BY ENTIRETY; AND TIMOTHY AND KAREN HUGHES, TENANTS BY ENTIRETY, PLAINTIFFS v. STEVENS BUILDING COMPANY, A N.C. CORPORATION, STEVENS BUILDING COMPANY, A N.C. GENERAL PARTNERSHIP, HELEN S. DENNING, INA S. CARTER, GENEVA S. MASSENGILL, DONALD A. STEVENS, OCTAVIA S. RIVENBARK, NORMA S. WILSON, KATHERINE S. WARD, WILLIAM E. STEVENS, JERRY H. STEVENS, AND HELEN G. STEVENS, DEFENDANTS

No. 9110SC666

(Filed 4 August 1992)

1. Dedication § 11 (NCI4th)— community lake—easement—reference to plat—representations—surrounding property

An easement to a lake and the surrounding property, located in a subdivision, was created where the developing corporation recorded a plat map with the register of deeds; the map sets out all of the subdivided lots for sale in the development and depicts streets, a playground, the lake, and the undeveloped property surrounding the lake; the deeds held by the original purchasers of homes in the subdivision reference this recorded plat map; the deeds held by plaintiffs reference this map; and, while selling and conveying in reference to the map alone creates an easement to the lake and surrounding property, oral representations and actions by defendants'

predecessors concerning the lake and the surrounding undeveloped property necessarily include the undeveloped areas around the lake in the scope of the easement. The trial court erred in its conclusion that the representations and actions by defendants' predecessor created only an easement to the lake.

Am Jur 2d, Dedication §§ 22-24.

Validity and construction of regulations as to subdivision maps or plats. 11 ALR2d 524.

2. **Easements § 42 (NCI4th)— subdivision lake—surrounding undeveloped property—water level lowered—development of surrounding property**

The trial court erred in a declaratory judgment action concerning a subdivision lake and its surrounding property by allowing defendants to maintain the water level represented on defendants' 1988 plat map and develop the surrounding area where the easement was created for the benefit of the subdivision landowners simultaneously with the development in the late 1960s; the easement was created by selling and conveying lots with reference to the plat map, making oral representations about the availability and permanency of the lake and the undeveloped land surrounding the lake, and using the landowners' opportunity to use these areas as an inducement to sell lots; it is only logical to conclude that the easement was both to the lake and to the undeveloped land as it existed in the late 1950s; and defendants now seek to develop a portion of the undeveloped land created by draining the lake in 1988. Allowing defendants to maintain the lake at its lower 1988 level, which they created by draining the lake, and allowing a portion of the surrounding land to be developed, would be an encroachment on the scope of the easement created at the time of the original development, and defendants are obligated to restore the lake to its original level and leave the surrounding land undeveloped.

Am Jur 2d, Easements and Licenses § 72.

3. **Easements § 42 (NCI4th)— subdivision lake—surrounding undeveloped property—cost of maintaining**

The trial court erred by ordering that the cost of maintaining a subdivision lake should be equally divided between the subdivision landowners and the developer and its successors

where the Court of Appeals held that the landowners were the holders of an appurtenant easement to the lake and surrounding undeveloped land. Subdivision landowners have the sole responsibility of bearing the cost of maintaining their easement, no agreement or intent to the contrary appearing.

Am Jur 2d, Easements and Licenses § 72.

APPEAL by defendants and cross-appeal by plaintiffs from judgment entered 21 February 1991 in WAKE County Superior Court by *Judge Donald W. Stephens*. Heard in the Court of Appeals 11 May 1992.

This case involves a dispute over approximately thirteen acres of land containing what is known as White Oak Lake (hereinafter the lake) and surrounding undeveloped property in the residential subdivision of Cardinal Hills in Raleigh, North Carolina. Plaintiffs filed suit seeking a declaratory judgment on their claim that the landowners in Cardinal Hills have an appurtenant easement by implied dedication for the use and enjoyment of the lake and the surrounding undeveloped land. Plaintiffs also seek to enjoin defendants from draining the lake and developing the property around the lake. The evidence presented by plaintiffs at trial tends to establish the following facts and circumstances.

Cardinal Hills subdivision began with the purchase of a tract of land in the late 1950's and early 1960's by the Stevens Building Company (hereinafter the Stevens Corporation), a North Carolina corporation controlled by Allen T. Stevens and owned by him and his wife, Helen. The man-made lake was present on the tract of land at the time it was purchased by the Stevens Corporation. The title to the lake and the surrounding undeveloped land was kept by the Stevens Corporation until its dissolution in 1988. In 1989, the title was transferred to the Stevens Building Company, a North Carolina general partnership and successor in interest to the Stevens Corporation. This partnership is comprised of the named defendants who are the heirs of Allen T. Stevens.

In 1957, the Stevens Corporation filed a plat map with the Wake County Register of Deeds Office which depicted the subdivision plan for Cardinal Hills. This plat map depicts approximately 300 subdivided lots for development. The map also depicts streets, the lake and undeveloped areas surrounding the lake. This undeveloped area includes a playground. The plat map does not

indicate that the lake is reserved for future development or otherwise is not to be considered a part of the Cardinal Hills development. Plaintiffs presented evidence that original purchasers of homes in Cardinal Hills were shown this plat map and were allowed to choose the sites for their homes from the map.

Plaintiffs also introduced copies of deeds from the Stevens Corporation to original purchasers of homes in Cardinal Hills. The land description in each of these deeds references the plat map of Cardinal Hills. The deeds held by plaintiffs also reference this map in their respective land descriptions. The deeds and accompanying restrictive covenants held by the original purchasers and plaintiffs neither contain any reference to an easement to the lake nor a restriction on the use of the lake.

Plaintiffs presented the testimony of individuals who purchased homes in Cardinal Hills soon after the creation of the subdivision. Plaintiffs' witnesses told of incidents where they were informed that the lake was for the use and enjoyment of the residents of Cardinal Hills. The witnesses consistently testified these representations were made by Allen Stevens, members of the Stevens family or representatives of the Stevens Corporation. Plaintiffs' witnesses further testified that it was a common practice for residents of Cardinal Hills to use the lake. They also testified that the use and enjoyment of the lake was never discouraged and continued until the Stevens Building Company put up no trespassing signs around the lake in the late 1980's.

Two of plaintiffs' witnesses testified they sought to purchase sections of undeveloped land around the lake from the Stevens Corporation. They stated their reasons to purchase additional land were to extend their property line to the lake and ensure their continued access to the lake. These individuals testified that Allen Stevens constantly assured them that further purchases were neither possible nor necessary. One witness testified that Allen Stevens' response to his purchase request was "Well, we'd love to let you have more land [referring to the undeveloped land around the lake] but we can't because that goes to the community, to the development."

These witnesses also related that Allen Stevens encouraged them to maintain the undeveloped area of the lake which adjoined their property. James Liles testified that Allen Stevens told him to use the undeveloped land "just as if it's your own property

. . . just be sure that you keep it open for the community." Further, Brown Whitehouse testified he was told by Bill Stevens, son of Allen Stevens, that "My daddy [Allen Stevens] said that that lake is for the use and benefit of the people that live in Cardinal Hills and that land will not be sold and there will never be houses built on that side of Ravenwood Drive." Ravenwood Drive curves around the lake in Cardinal Hills. The original plat map shows that homes would be constructed only on the opposite side of this street from the lake. The lakeside portion of Ravenwood Drive as well as the remaining area around the lake was not subdivided on the map.

Plaintiffs also presented several newspaper advertisements which the Stevens Corporation and its exclusive real estate agency, Connell Realty, ran in the News and Observer in the late 1950's and early 1960's. Several of these ads boast of Cardinal Hills being one of Raleigh's newest subdivisions situated on rolling land overlooking "one of Wake County's most beautiful lakes." Other advertisements indicate that various homes for sale by the Stevens Corporation were "lakefront" homes or homes "with a view of the lake." At least two of plaintiffs' witnesses testified that the lake was the only reason and/or the most important reason they purchased a home in Cardinal Hills.

Defendants' evidence presented at trial tends to mirror the historical facts concerning the development of Cardinal Hills. Defendants' evidence tends to establish that Allen Stevens intended to maintain the lake for the enjoyment of him and his wife while they were alive. Defendants presented evidence that Allen Stevens erected a fence around the portion of the lake shoreline behind his house. This fence was erected to prevent anyone from disturbing his wife while she fished in the lake. Further, Ina Carter, daughter of Allen Stevens, testified that her father's only wish concerning the lake was that nothing be done to it while her mother was able to enjoy it. Defendants presented testimony that residents of Cardinal Hills routinely asked permission to use the lake and often paid Allen Stevens to fish in the lake.

Defendants presented the testimony of James Seay who lived in Cardinal Hills from 1957 to 1965. Seay stated that he heard Allen Stevens tell a group of builders in 1957 that he owned the lake and surrounding land and that neither were part of the Cardinal Hills development. Defendants' witness Patricia Johnson

testified that she bought a home in Cardinal Hills in 1960. She stated that she was never informed of the lake and that no representations were made to her concerning the availability of the lake.

In 1988, defendants received notice that the earthen dam which created the lake was in disrepair. Stevens Building Company was informed by the Land Resources Division of the North Carolina Department of Natural Resources and Community Development that the dam would have to be repaired or eventually breached to allow the water to drain out of the lake. Stevens Building Company then wrote a letter to one of the present landowners in Cardinal Hills informing this individual of its intent to drain the lake. Thereafter, Stevens Building Company drained water off the lake to reduce it to its present level. Stevens Building Company filed a plat map in 1988 showing its intent to subdivide the undeveloped land surrounding the lake. This particular plat map shows approximately twenty-four (24) lots of land for homes to be built on existing undeveloped land as well as additional land derived from the draining of the lake. Thereafter, plaintiffs filed suit.

Defendants moved for an involuntary dismissal at the close of plaintiffs' evidence and again at the close of all the evidence. These motions were denied. The trial court entered judgment in favor of plaintiffs declaring that landowners in Cardinal Hills held an appurtenant easement to the lake. The trial court ordered that defendants were able to develop a portion of the land surrounding the lake and also ordered that other portions remain undeveloped in order to accommodate the appurtenant easement. The trial court further ordered that the lake level be maintained as it is represented on defendants' 1988 plat map, that the Cardinal Hills landowners be responsible for the cost of maintaining the easement and that all parties equally share the cost of maintaining the lake and dam. Defendants appeal and plaintiffs cross-appeal.

Poyner & Spruill, by H. Glenn Dunn and Timothy P. Sullivan, for plaintiff-appellees and cross-appellants.

Smith, Debnam, Hibbert & Pahl, by John W. Narron and Vickie Winn Martin, for defendant-appellants and cross-appellees.

WELLS, Judge.

Through their various assignments of error, plaintiffs and defendants argue that the trial court erred in declaring that Cardinal

Hills landowners have an appurtenant easement to the lake, that the parties equally share the cost of maintaining the lake and that defendants may develop a portion of the undeveloped property surrounding the lake. We hold that an appurtenant easement by implied dedication was created to the lake and surrounding undeveloped property for the benefit of Cardinal Hills landowners.

[1] Plaintiffs and defendants first assign error to the trial court's findings of fact and conclusions of law regarding the creation of an appurtenant easement to the lake. Plaintiffs contend the trial court erred in finding that representations and actions by defendants' predecessors only created an easement to the lake. Plaintiffs also assign error to the trial court's conclusion of law stating that an easement was created only to the lake. They contend the evidence shows the creation of an easement to the lake as well as the surrounding undeveloped property. Defendants, however, contend the trial court's findings and conclusions that an easement was created to the lake are not supported by the evidence.

It is well settled in this jurisdiction that when the trial court sits without a jury, the standard of review on appeal is whether there was competent evidence to support the trial court's findings of fact and whether its conclusions of law were proper in light of such facts. *Chemical Realty Corp. v. Home Fed'l Savings & Loan*, 84 N.C. App. 27, 351 S.E.2d 786 (1987). Findings of fact by the trial court in a non-jury trial have the force and effect of a jury verdict and are conclusive on appeal if there is evidence to support those findings. *Hunt v. Hunt*, 85 N.C. App. 484, 355 S.E.2d 519 (1987). A trial court's conclusions of law, however, are reviewable *de novo*. *Wright v. Auto Sales, Inc.*, 72 N.C. App. 449, 325 S.E.2d 493 (1985).

In the present case, the trial court made the following findings of fact relative to the creation of an easement to the lake:

> 4. In 1956, a Cardinal Hills subdivision plat map was recorded by the Stevens Corporation in the Wake County Registry in Book of Maps 1956 at page 75. A revised plat map was recorded in Book of Maps 1957 at page 47. Both maps depict at the same location within the subdivison a lake identified as "White Oak Lake" which is surrounded by an unsubdivided open area. The maps also depict another open area labeled "playground" adjacent to the Lake and surrounding undeveloped area. All deeds to lots in Cardinal Hills in evidence, including Plaintiffs'

deeds, refer to the revised plat map recorded in the Wake County Registry Book of Maps 1957 at [p]age 47.

. . .

6. Newspaper advertisements in the summer of 1956 by Connell Realty and Mortgage Company, the exclusive sales agent for Cardinal Hills at the time, and by the Stevens Corporation at various times in 1960 and 1961, used the presence of White Oak Lake to induce the sale of new homes in Cardinal Hills.

7. At various times during this period, Allen T. Stevens, William C. Upchurch, an agent of the Stevens Corporation, and Pete Frazier, an agent of Connell Realty and Mortgage Company, made oral representations to purchasers of lots in Cardinal Hills, prior to closing, that White Oak Lake would remain for the use and enjoyment of residents of Cardinal Hills.

8. The developer, Stevens Corporation, and its agents engaged in an overall pattern of marketing which held out White Oak Lake as an amenity to be used and enjoyed by all Cardinal Hills landowners.

9. The aforesaid representations made by Allen Stevens and agents of the Stevens Corporation that White Oak Lake was to be for the use and enjoyment of landowners in Cardinal Hills helped induce the initial purchase of various lots in Cardinal Hills.

Our review of the record in this case reveals that there is competent evidence to support these findings of fact. We are therefore bound by these findings to the extent they are supported by the evidence presented at trial. However, finding of fact number 4 states that the plat map recorded and used by the Stevens Corporation clearly depicts the lake as well as the surrounding undeveloped and unsubdivided property. Further, this finding states that all deeds to lots sold in Cardinal Hills, including those held by plaintiffs, reference this plat map. We believe this finding alone is sufficient to establish an easement to the lake and the undeveloped property as depicted on the plat map.

An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land. *Gibbs v. Wright*, 17 N.C. App. 495, 195 S.E.2d 40 (1973). It is well settled

in this jurisdiction that an easement may be created by dedication. This dedication may be either a formal or informal transfer and may be either implied or express. *Spaugh v. Charlotte*, 239 N.C. 149, 79 S.E.2d 748 (1953).

In *Realty Co. v. Hobbs*, 261 N.C. 414, 135 S.E.2d 30 (1964) our Supreme Court set out the applicable rules for the establishment of an appurtenant easement by the use of a plat map:

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks, and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. *Steadman v. Pinetops*, 251 N.C. 509, 112 S.E.2d 102; *Conrad v. Land Company*, 126 N.C. 776, 36 S.E. 282. It is said that such streets and parks are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. *Jackson v. Gastonia*, 246 N.C. 404, 98 S.E.2d 444. It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. *Irwin v. Charlotte*, 193 N.C. 109, 136 S.E. 368; *Todd v. White*, 246 N.C. 59, 97 S.E.2d 439. This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. *Hughes v. Clark*, 134 N.C. 457, 47 S.E. 462; *Conrad v. Land Co., supra*. Thus, a street, park or playground may not be reduced in size or put to any use which conflicts with the purpose for which it was dedicated. *Insurance Co. v. Carolina Beach*, 216 N.C. 778, 7 S.E.2d 13; *Conrad v. Land Co., supra*.

See also Hinson v. Smith, 89 N.C. App. 127, 365 S.E.2d 166, *disc. review denied*, 323 N.C. 365, 373 S.E.2d 545 (1988).

The record reveals that the Stevens Corporation recorded a plat map with the Wake County Register of Deeds Office in the mid-1950's. This map sets out all of the subdivided lots for sale in the Cardinal Hills development. The map also depicts streets, a playground, the lake and the undeveloped property surrounding the lake. The record further reveals that the deeds held by original

purchasers of homes in Cardinal Hills reference this recorded plat map. Further, the deeds held by plaintiffs reference this map.

The contents of this map, and the Stevens Corporation's selling and conveying in reference to this map, alone creates an easement to the lake and the surrounding property. We note further, however, that oral representations and actions by defendants' predecessors concerning the lake and the surrounding undeveloped property necessarily include the undeveloped areas around the lake in the scope of the easement. These representations and actions, along with the use of the plat map and its depiction of the lake and property, decidedly show an intent to create an easement to the lake and surrounding undeveloped property.

Our Supreme Court has stated that an "implied dedication is also one arising by operation of law from the acts of the owner. . . . [T]here can be no dedication unless there is present the intent to appropriate the land to public use. . . . The intent which the law means, however, is not a secret one, but is that which is expressed in the visible conduct and open acts of the owner. The public, as well as individuals, have a right to rely on the conduct of the owner as indicative of his intent." *Spaugh, supra.* The Court also stated in *Nicholas v. Furniture Co.*, 248 N.C. 462, 103 S.E.2d 837 (1958) that "the owner's intention to dedicate some particularly described land . . . may be manifested by his affirmative acts whereby the public use is invited and his subsequent acquiescence in such use, by his express assent to, or deliberate allowance of, the use, or merely by his acquiescence therein . . . ."

In the present case, defendants' predecessors further manifested their intent to dedicate the lake and surrounding undeveloped property by oral representations made before, during and after the sale of homes in Cardinal Hills. Plaintiffs presented evidence through the testimony of original purchasers of homes in Cardinal Hills that Allen Stevens encouraged landowners to care for the undeveloped area around the lake "just like it was their land" but only "just as long as it [the undeveloped land] was kept open for the community." Allen Stevens also refused to sell additional land to purchasers who wished to extend their property line to the lake. Stevens maintained that additional purchases would be neither possible nor necessary stating "Well, we'd love to let you have more land, but we can't because that land goes to the community, to the development."

Further, Bill Stevens, one of Allen Stevens' sons, represented that it was his father's intent that the lake and the surrounding undeveloped property remain in its natural state. Plaintiffs' witness, Brown Whitehouse, testified that Bill Stevens told him "My daddy [Allen Stevens] said that that lake is for the use and benefit of the people that live in Cardinal Hills and that land will not be sold . . . ." Plaintiffs also presented evidence that the lake and surrounding undeveloped land were often used by residents of Cardinal Hills for recreational purposes and that the use of the lake and land was never discouraged by the Stevens Corporation. In fact, the evidence shows that the use of the lake and land were often encouraged by Allen Stevens.

Finally, plaintiffs presented evidence that the Stevens Corporation and its exclusive real estate agent, Connell Realty, ran newspaper ads which stated that Cardinal Hills featured homesites on "one of Wake County's most beautiful lakes." The newspaper ads also indicated several homes had a "view of the lake" and that others were "lakefront" homes. This is additional evidence that Allen Stevens and the Stevens Corporation used the lake as an attraction to homebuyers.

Further, this practice along with the oral representations about the lake and undeveloped land, the encouragement of and acquiescence in the use of the lake and land, and, lastly, the depiction of the lake and undeveloped land on the plat map manifests the Stevens Corporation's intent to dedicate these areas to the Cardinal Hills landowners. In light of its findings of fact, the trial court erred in its conclusion that the representations and actions by defendants' predecessor created only an easement to the lake.

[2] Plaintiffs assign error to the trial court's declaration that defendants maintain the water level of the lake as represented on defendants' 1988 plat map and that defendants may develop a portion of the land surrounding the lake. They contend these allowances by the trial court infringe on the easement created in the lake and undeveloped land. We agree.

The easement for the benefit of the Cardinal Hills landowners was created simultaneously with the Cardinal Hills development in the late 1950's. The easement was created by (1) selling and conveying lots with reference to the plat map, (2) making oral representations about the availability and permanency of the lake and the undeveloped land surrounding the lake and (3) using the

landowners' opportunity to use these areas as an inducement to sell lots. Therefore, it is only logical to conclude that the easement was both to the lake and to the undeveloped land as it existed in the late 1950's.

A portion of the undeveloped land, which defendants now seek to develop, was created by the draining of the lake in 1988. Allowing defendants to maintain the lake at its lower 1988 level, a level which defendants created by draining the lake, and allowing a portion of the surrounding land to be developed, would be an encroachment on the scope of the easement which was created at the time of the original development. Therefore, defendants are obligated to restore the lake to its original level and to leave the surrounding land shown on the 1957 plat map as undeveloped in its original condition.

[3] Plaintiffs and defendants also assign error to the portion of the trial court's order which declares that the cost of maintaining the lake should be equally divided between the parties. Both parties contend that this declaration is neither supported by findings of fact nor conclusions of law. We agree. It is well established in this jurisdiction that ordinarily the owner of an easement or the person for whose benefit the easement exists is the party to be charged with its maintenance. *See Green v. Duke Power Co.*, 305 N.C. 603, 290 S.E.2d 593 (1982); and *Richardson v. Jennings*, 184 N.C. 559, 114 S.E. 821 (1922). No agreement or intent to the contrary appearing in this case, plaintiffs and the Cardinal Hills landowners, as holders of the appurtenant easement to the lake and surrounding undeveloped land, have the sole responsibility of bearing the cost of maintaining their easement. Therefore, the cost of maintaining the lake and the surrounding undeveloped land should be paid by the Cardinal Hills landowners.

For the reasons stated, the judgment of the trial court is vacated and this case is remanded to the trial court for entry of an appropriate judgment not inconsistent with this opinion.

Vacated and remanded.

Judges ARNOLD and EAGLES concur.

BEATRICE H. HOLLOWELL, PLAINTIFF v. JAMES RODNEY HOLLOWELL AND WIFE, KAY MUNROE HOLLOWELL; TERESA H. WILLIAMS AND HUSBAND, DAVID WILLIAMS; CATHY HOLLOWELL PEARCE AND HUSBAND, LESTER PEARCE; DEBRA JOAN HOLLOWELL (UNMARRIED), AND LOUISIANA-PACIFIC CORPORATION, DEFENDANTS

No. 918SC598

(Filed 4 August 1992)

Wills § 28.4 (NCI3d) — declaratory judgment — construction of will — determination of interests in land — partial summary judgment

The trial court correctly granted partial summary judgment for plaintiff in a declaratory judgment action to construe a will to determine the ownership interests in approximately 95 acres of land and to determine other rights and damages arising out of ownership of the land. Ed Langston left a will disposing of the land in equal portions to his nephews Milford Hollowell and Clarence Hollowell for their lives, then to their respective surviving issue per stirpes in fee simple, with the share of either nephew who died without issue going to the other nephew for life and then to his issue in fee simple, per stirpes; Milford Hollowell died with two surviving issue, Milford Edgar Hollowell and defendant James R. Hollowell; Milford Edgar Hollowell died testate with three issue by a prior marriage, defendants Teresa Hollowell Williams, Cathy Hollowell Pearce, and Debra Joan Hollowell; Milford Edgar Hollowell was also survived by his second wife, plaintiff Beatrice Hollowell; Milford Edgar Hollowell's will left all of his property to his second wife; Clarence Hollowell subsequently died without issue; defendants, apparently believing that they held all the interest in the land in question, partitioned the property and conveyed the parcels to one another; the individual defendants subsequently conveyed an interest in the standing timber and pulpwood on the property; and plaintiff brought this action, claiming an ownership interest in the property and damages against the timber company.

Am Jur 2d, Wills § 1040.

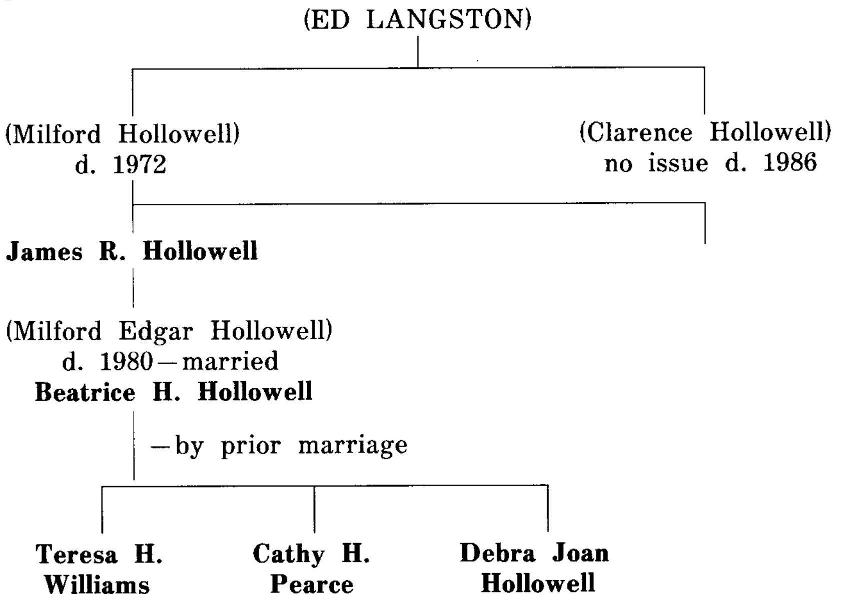
APPEAL by plaintiff and defendants from judgment entered 24 April 1991 in WAYNE County Superior Court by *Judge W. Russell Duke, Jr.* Heard in the Court of Appeals 13 April 1992.

Plaintiff instituted this action seeking a construction of the Last Will and Testament of Ed Langston by declaratory judgment to determine the ownership interests in approximately 95 acres of land. Plaintiff also sought to determine other rights and damages arising out of the ownership of the land in question.

Ed Langston (hereinafter testator) died testate on 30 May 1948 and left a Last Will and Testament (hereinafter the Langston Will) which provided for the disposition of his estate, which included 95 acres of land whose ownership plaintiff sought to have determined. The pertinent provisions of the Langston Will are as follows:

> 2. I give and devise all of my lands, wherever situated, in equal portions to my nephews, Milford Hollowell and Clarence Hollowell, for and during the term of their natural lives, and upon their deaths I give and devise their respective shares thereof in fee simple to their respective issue, who survive them, *per stirpes.*
>
> If either of my said two nephews shall die without issue surviving him the share of such deceased shall go to the other of my said two nephews for life and then to his issue in fee simple, *per stirpes.*

The Langston-Hollowell "family tree" for the purposes of this action appears to be as follows:



Milford Hollowell died in 1972 with two surviving issue—Milford Edgar Hollowell and James R. Hollowell. Milford Edgar Hollowell then died testate on 29 February 1980 survived by three issue, defendants Teresa Hollowell Williams, Cathy Hollowell Pearce and Debra Joan Hollowell. He was also survived by his second wife, plaintiff Beatrice H. Hollowell. The Will of Milford Edgar Hollowell includes the following pertinent language regarding the distribution of his estate:

> SECOND: I give, devise and bequeath all of my property, be it real, personal or mixed, of whatever type and wheresoever situated, to my beloved wife, BEATRICE HOLLOWELL, to have and to hold the same absolutely and forever.

On 26 July 1986 Clarence Hollowell died intestate, leaving no issue. Apparently believing that they held all the interest in the land in question, the individual defendants James R. Hollowell, Teresa Hollowell Williams, Cathy Hollowell Pearce and Debra Joan

Hollowell partitioned the property in question into five parcels of land and conveyed the parcels to one another by division deeds. Plaintiff received no conveyance in these transactions.

On 17 December 1987, the individual defendants conveyed an interest in all the standing timber and pulpwood on the property in question by timber deed to B & C Logging, Inc., a North Carolina corporation. B & C Logging, Inc. assigned their interest under this deed to defendant Louisiana-Pacific Corporation on 15 February 1988.

Plaintiff alleged that the death of Clarence Hollowell and the applicable language of the Langston Will created the following division of ownership interests in the property in question:

James Rodney Hollowell—½ undivided interest.

Teresa Hollowell Williams—1/12 undivided interest.

Cathy Hollowell Pearce—1/12 undivided interest.

Debra Joan Hollowell—1/12 undivided interest.

Beatrice H. Hollowell—¼ undivided interest.

Plaintiff alleged in the alternative that the same language of the Langston Will provided for a one-half executory interest to vest and become present estates in James Rodney Hollowell and Milford Edgar Hollowell, children of Milford Hollowell, if Clarence Hollowell died without issue. Plaintiff alleges this executory interest was created upon the death of Milford Hollowell on 20 May 1972, vested upon the death of Clarence Hollowell on 26 July 1986 and established the following division of ownership interests in the property:

James Rodney Hollowell—½ undivided interest.

Beatrice H. Hollowell—½ undivided interest.

Plaintiff also alleged a cause of action against defendant Louisiana-Pacific Corporation under G.S. § 1-539.1 maintaining that the defendant corporation trespassed upon the property in question because she, as an owner of interest in the land, did not join in the conveying of the timber deed or the assignment of that deed. She alleged that the defendant corporation cut and removed timber from the property without her consent. She further alleged that she is entitled to recover from Louisiana-Pacific one-quarter of the double value of the cut timber as allowed by statute.

On 2 April 1991, the individual defendants filed an answer and counterclaim. The individual defendants generally denied plaintiff's claims and sought in their counterclaim a declaratory judgment and decree to construe the Langston Will. The individual defendants alleged that only they hold ownership interests in the property in question because the specific language of paragraph 4 in the Langston Will (1) prevented the vesting of any interest in the land in question until the life estates of Milford and Clarence Hollowell expired upon both of their deaths and (2) devised ownership interest by distribution *per stirpes* in the survivors of Milford and Clarence Hollowell.

Plaintiff and the individual defendants stipulated that this action be suspended as to defendant Louisiana-Pacific Corporation and that the defendant corporation file pleadings as it deemed appropriate only if it was determined that plaintiff held an ownership interest in the property.

Plaintiff and the individual defendants made motions for summary judgment and these motions came on for hearing on 24 April 1991. The trial court issued an order granting partial summary judgment in favor of plaintiff and denying defendants' motion for summary judgment. The trial court also set aside the division deeds executed by the individual defendants and ordered the distribution of the ownership interests in the 95 acres of land in the following manner:

James Rodney Hollowell—½ undivided interest.

Beatrice H. Hollowell—¼ undivided interest.

Teresa Hollowell Williams—1/12 undivided interest.

Cathy Hollowell Pearce—1/12 undivided interest.

Debra Joan Hollowell—1/12 undivided interest.

The trial court reserved plaintiff's claims for damages against the defendant Louisiana-Pacific Corporation for later determination. Plaintiff and individual defendants appeal.

Everett, Wood, Womble, Finan & Riddle, by J. Darby Wood and Jonathan S. Williams, for plaintiff.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for defendants.

WELLS, Judge.

We first note that this appeal is before us on partial summary judgment. Pursuant to the provisions of G.S. § 1A-1, Rule 54, the trial court certified this judgment for immediate appeal.

A party may resort to the courts for the construction of a will when there are doubts as to a testator's intent and the terms of a will are not set out in clear, unequivocal and unambiguous language. *Pittman v. Thomas*, 307 N.C. 485, 299 S.E.2d 207 (1983). It is well settled in this jurisdiction that the responsibility to interpret or construe a will is solely that of the courts. *Wachovia Bank and Trust Co. v. Wolfe*, 243 N.C. 469, 91 S.E.2d 246 (1956). In this case, the alternative interpretations asserted by plaintiff and the individual defendants of the language found in the Langston Will require judicial construction of this will.

It is the duty of the trial court to utilize established rules of construction when it is called upon to interpret ambiguous provisions of a will. *Thornhill v. Riegg*, 95 N.C. App. 532, 383 S.E.2d 447 (1989). One of the fundamental rules of the construction of wills is that the intent of the testator is the polar star which must guide the courts in the interpretation of wills. *Barnes v. Evans*, 102 N.C. App. 428, 402 S.E.2d 164 (1991). The language used by the testator and the sense in which that language is used is the prime source of information available to the courts in determining the testator's intent. *Ladd v. Estate of Kellenberger*, 314 N.C. 477, 334 S.E.2d 751 (1985).

The provisions of the Langston Will which control the distribution of the land in question contain language of which the meaning is well established in the construction of wills. The language "in equal portions" and "their respective shares" in the devise of land to Milford and Clarence Hollowell connotes the creation of a tenancy in common. *See Dearman v. Bruns*, 11 N.C. App. 564, 181 S.E.2d 809, *cert. denied*, 279 N.C. 394, 183 S.E.2d 241 (1971) (language "share equally" in devise to husband and wife created tenancy in common) and *Mewborn v. Mewborn*, 239 N.C. 284, 79 S.E.2d 398 (1954) (language "equally divided" in devise to testator's sons created tenancy in common). A tenancy in common gives each tenant "a separate undivided interest in the land in his own right and each has an equal right to possession." *Webster's Real Estate Law in North Carolina*, § 110 (1990).

The phrase "for and during the term of their natural lives" indicates an intent to create life estates. This Court stated in *Brinkley v. Day*, 88 N.C. App. 101, 362 S.E.2d 587 (1987) that the phrase "to have a home as long as he lives" created a life estate. *See also Owen v. Gates*, 241 N.C. 407, 85 S.E.2d 340 (1955) (phrase "to hold and have in her lifetime" created life estate).

It is clear that the language found in these provisions of the Langston Will manifests an intent to create a tenancy in common between Milford and Clarence Hollowell, and that Milford and Clarence Hollowell were to be life tenants with each having a right to an undivided one-half interest in the land in question for their lifetime. The creation of these interests supports the conclusion that testator intended for Milford and Clarence Hollowell to hold separate shares which would pass individually upon the death of each life tenant.

The Langston Will also uses the language "their *respective* shares" and "their *respective* issue" in the provisions controlling the distribution of the land in question. This language is evidence of a continuation of the independent nature of the interests found in the tenancy in common held by Milford and Clarence Hollowell. It is apparent that the Langston Will represents an intent to have these interests pass independently of each other upon the death of the life tenant, one interest to pass through the line of Milford Hollowell upon his death and the other interest to pass through the line of Clarence Hollowell upon his death.

The one-half undivided interest held by Milford Hollowell passed to his surviving issue *per stirpes* upon his death in 1971. This distribution gave Milford Edgar Hollowell and James Rodney Hollowell each a one-quarter fee simple absolute interest in the land in question. Milford Edgar Hollowell and James Rodney Hollowell could then convey, devise or otherwise dispose of their respective interests as they desired. Milford Edgar Hollowell devised his one-quarter interest to his wife. Therefore, we hold that plaintiff possesses a one-quarter interest in fee simple pursuant to her husband's will and that individual defendant James Rodney Hollowell possesses a one-quarter interest from his father, Milford Hollowell.

Plaintiff also contends that her late husband held a contingent remainder in Clarence Hollowell's one-half interest; that this contingent remainder was devised to her by operation of her husband's

will, and that consequently, the death of Clarence Hollowell without issue requires distribution *per stirpes* of this interest and gives plaintiff an additional one-quarter interest in the land in question. We disagree.

The clause of the Langston Will in question directs that upon the death of Clarence Hollowell without issue his one-half interest is to be distributed to Milford Hollowell for life and then to the issue of Milford Hollowell. Such language has traditionally been interpreted to be a gift over first to the life tenant and then to the issue of the life tenant as a class. *See Lawson v. Lawson*, 267 N.C. 643, 148 S.E.2d 546 (1966) and *Strickland v. Jackson*, 259 N.C. 81, 130 S.E.2d 22 (1963). *See also Tunnell v. Berry*, 73 N.C. App. 222, 326 S.E.2d 288 (1985).

Gift over provisions such as these raise two issues: (1) at what time does the contingent limitation take effect and (2) when are the takers of the contingency determined? G.S. § 41-1 (1990) is instructive on the first of these issues and provides in part:

> Every contingent limitation in any deed or will, made to depend upon the dying of any person without heir or heirs of the body, or without issue or issues of the body, or without children, or offspring, or descendant, or other relative, *shall be held and interpreted a limitation to take effect when such person dies not having* such heir, or issue, or child, or offspring, or descendant, or other relative (as the case may be) *living at the time of his death, or born to him within ten lunar months thereafter*, ... (Emphasis added.)

The purpose of G.S. § 41-1 is to sustain the contingent interest created by the testator and ensure that the interest will pass in possession when and if the contingency occurs, even if the occurence is after the death of the testator. *White v. Alexander*, 290 N.C. 75, 224 S.E.2d 617 (1976). Therefore, when the contingency is fulfilled the limitation is deemed to take effect.

In the survivorship context, our courts have generally interpreted the term "issue" to include all lineal descendants. *See Poindexter v. Trust Co.*, 258 N.C. 371, 128 S.E.2d 867 (1963), *Cannon v. Baker*, 252 N.C. 111, 113 S.E.2d 44 (1960). Thus, in the case now before us, the term or word "issue" must be interpreted to include defendants Teresa Williams, Cathy Pearce and Debra Hollowell.

The triggering event for the passage or vesting of the contingent remainder in this case is the death of each of the two life tenants. *See Strickland, supra.* When Clarence Hollowell died without issue surviving, his interest passed *per stirpes* to defendants James Hollowell, Teresa Williams, Cathy Pearce and Debra Hollowell.

Summary judgment in a declaratory judgment action is appropriate when there is no genuine issue of material fact and either party is entitled to judgment as a matter of law. *Janus Theatres of Burlington v. Aragon*, 104 N.C. App. 534, 410 S.E.2d 218 (1991). Our review of this case reveals that the trial court appropriately determined that there are no genuine issues of material fact to be resolved. Upon the undisputed facts in this case, the trial court correctly ordered the distribution of the property at issue, and we therefore affirm the judgment below.

Affirmed.

Judges ARNOLD and EAGLES concur.

BORG-WARNER ACCEPTANCE CORPORATION, PLAINTIFF v. HUGH W. JOHNSTON AND WIFE, AUDREY S. JOHNSTON, DEFENDANTS

No. 9126SC511

(Filed 4 August 1992)

1. Rules of Civil Procedure § 15.1 (NCI3d)— motion to amend answer—denied—not abuse of discretion

The trial court did not abuse its discretion by denying defendants' motion to amend their answer to allege bad faith by plaintiff where defendants had no right to amend their answer as a matter of course nor did they have the consent of plaintiff; granting defendants' motion was within the discretion of the court; and the court noted that the complaint was filed on 16 January 1987, the motion for summary judgment was filed on 21 December 1988, partial summary judgment was entered on 13 April 1989, the Court of Appeals affirmed the partial summary judgment on 20 March 1990, and the

motion to amend the answer was made on the first day of trial, 30 July 1990. N.C.G.S. § 1A-1, Rule 15(a).

Am Jur 2d, Pleading §§ 306-317.

Timeliness of amendment to pleadings made by leave of court under Federal Rule of Civil Procedure 15(a). 4 ALR Fed 123.

2. **Trial § 5 (NCI3d)— action on guaranty—defendants not denied fair trial**

The trial court did not deny defendants a fair trial on an action arising from the sale of property under a lease guaranty due to an exhibit being taken into the jury room, a request for rule numbers to support defendants' objections, the quashing of two subpoenas, the exclusion of certain evidence relating to the value of real estate and property tax assessments, and the exclusion of evidence from the voir dire examination of a witness. Defendants' complaints about the exhibit and the rule numbers are not supported by the record; defendants' complaint about the subpoenas is so nebulous as to be meaningless on appeal; the exclusion of certain offers of proof was not improper as the evidence included values for the real property and property taxes and was only indirectly related to the value of the personal property; and the excluded evidence from a witness was irrelevant, confusing and misleading. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Trial §§ 192, 193.

3. **Trial § 47 (NCI3d)— judgment n.o.v.—denied—no error**

There was no error in the denial of a motion for a judgment n.o.v. in an action arising from the sale of property under a lease guaranty where the trial was limited to the fair market value of the property and damages, and the alleged bad faith, fraud and deceit of plaintiff was not an issue for trial, was not alleged by defendants until they attempted to amend their answer, and the trial court correctly denied the motion to amend.

Am Jur 2d, Judgments §§ 106-108.

4. Guaranty § 20 (NCI4th)— sale of property—damages—agreement as lease rather than security agreement

The trial court did not err in an action arising from the sale of property under a lease guaranty by allowing the jury to compute damages based on the theory that the agreements were leases instead of security agreements. Contrary to defendants' assertion, N.C.G.S. § 25-9-203(4) does not make an article 9 transaction subject to N.C.G.S. § 24-1.1. Moreover, defendants are liable for the full amount of the lease payments upon default under the express terms of the guaranty.

Am Jur 2d, Guaranty §§ 70, 71, 115-124.

5. Appeal and Error § 147 (NCI4th)— instructions—objection—not sufficient to preserve issue

Defendants' contention that the trial court erred in failing to give instructions as requested and failing to submit certain issues was not before the appellate court where defendants' objection to the trial court failed to state distinctly that to which they objected and the grounds for the objection. N.C.R. App. Pro. 10(b)(2).

Am Jur 2d, Appeal and Error § 553.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporaneous objection at trial. 76 ALR Fed 619.

6. Judges, Justices, and Magistrates § 2 (NCI4th)— post-judgment motions—not heard by trial judge—no error

There was no error where defendants' post-trial motions were heard by a judge other than the trial judge. There is no requirement or implication in N.C.G.S. § 1A-1, Rule 63 that the judge who heard the case must have become incapacitated before a different judge can rule on post-trial motions.

Am Jur 2d, Judges § 26.

Power of successor or substituted judge, in civil case, to render decision or enter judgment on testimony heard by predecessor. 22 ALR3d 922.

7. **Evidence and Witnesses § 2598 (NCI4th)— post-trial motion—affidavit of juror—properly struck**

An affidavit of a juror stating that a verdict included interest was properly struck under N.C.G.S. § 8C-1, Rule 606(b).

Am Jur 2d, Witnesses § 280.

Competency of juror as witness, under Rule 606(b) of Federal Rules of Evidence, upon inquiry into validity of verdict or indictment. 65 ALR Fed 835.

8. **Appeal and Error § 156 (NCI4th)— introduction of exhibit—no objection at trial—objection waived**

Defendants waived any objection to the introduction as an exhibit of an accounting statement showing delinquency charges by not objecting to the testimony which the statement illustrated. N.C.R. App. Pro. 10(b)(1).

Am Jur 2d, Appeal and Error § 562.

9. **Guaranty § 20 (NCI4th)— guaranty of lease—sale of property—instruction on damages**

There was no error in an action arising from the sale of property under a guaranty of a lease agreement by allowing the jury to consider evidence of interest without requiring them to separate the interest from the principal in their verdict where the jury was instructed that they should consider the amount of money, if any, due plaintiff under the lease at the time of the default and that they should deduct from that the fair market value of the personal property and the amount, if any, by which plaintiff could have mitigated its damages.

Am Jur 2d, Guaranty §§ 115-124.

APPEAL by defendants from jury verdict entered 3 August 1990 by *Judge Robert M. Burroughs* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 17 March 1992.

DeLaney and Sellers, P.A., by Timothy G. Sellers and Charles E. Lyons, for plaintiff-appellee.

Hugh W. Johnston, for defendants-appellants and Smith Debnam Hibbert & Pahl, by Jack P. Gulley, for defendant-appellant Audrey S. Johnston.

JOHNSON, Judge.

This case is before us now for the second time. The facts are set out in the previous opinion, *Borg-Warner Acceptance Corp. v. Johnston*, 97 N.C. App. 575, 389 S.E.2d 429 (1990), and will be repeated here only as necessary to understand the arguments.

Briefly, defendants (guarantors) unconditionally guaranteed two equipment lease agreements made in 1983 between Borg-Warner Acceptance Corporation (Borg-Warner) (lessor) and The Raleigh Inn, Inc. (formerly the Royal Villa, Inc.) (lessee). The Raleigh Inn defaulted on the lease payments in 1986. Borg-Warner foreclosed on the real property securing the leases, sold it to P.S. Investment Company, Inc., and sued the defendants to recover on their guaranty of the lease payments. Borg-Warner sold the personal property, which was the subject matter of the equipment lease agreements, to P.S. Investment Co. for $10.00.

Prior to trial, plaintiff filed a motion for summary judgment. The trial court granted plaintiff's motion, finding that defendants were liable on the guaranty and leaving two issues for trial: (1) the fair market value of the personal property sold to P.S. Investment Company and (2) the amount of money damages, if any, to which plaintiff was entitled as a result of defendants' breach of the guaranty agreement. Defendants appealed from the summary judgment and this Court affirmed. *Borg-Warner*, 97 N.C. App. 575, 389 S.E.2d 429. Following trial, the jury returned a verdict for plaintiff in the amount of $585,137.45. Defendants appeal from the jury verdict.

[1] Defendants bring forth thirteen assignments of error. Defendants first contend that the trial court erred in denying their motion to amend their answer so as to allege bad faith on the part of the plaintiff. We disagree.

In situations where a party has no right to amend because of the time limitation in Rule 15(a), an amendment may yet be made by leave of court or by written consent of the adverse party. N.C. Gen. Stat. § 1A-1, Rule 15(a) (1990). Where the granting or denial of a motion to amend is within the discretion of the trial court, it will not be overturned absent an abuse of discretion. An abuse of discretion occurs when the trial court's ruling is so arbitrary that it could not have been the result of a reasoned decision. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985).

In this case, defendants had no right to amend their answer as a matter of course nor did they have the consent of the plaintiff. The granting of defendants' motion was within the discretion of the trial court. The court denied the motion as being untimely after noting that the complaint was filed 16 January 1987, the motion for summary judgment was filed 21 December 1988, partial summary judgment was entered 13 April 1989, the Court of Appeals decision affirming the partial summary judgment was entered 20 March 1990 and the motion to amend the answer was made on the first day of trial, 30 July 1990. We find no abuse of discretion under these facts.

[2] Defendants next contend that the trial court conducted the trial so as to deny them a fair and impartial trial. Defendants complain that the trial court permitted plaintiff a very wide latitude but that the court consistently ruled against them. Defendant complains of an exhibit being taken into the jury room, the trial court's request for rule numbers to support defendants' objections, the court's quashing of two subpoenas, the exclusion of certain evidence relating to the value of real estate and property tax assessments, and the exclusion of evidence from the *voir dire* examination of witness Mattocks. We find this assignment to be without merit.

Defendants' complaints about the exhibit and the rule numbers are not supported by the record. Defendants' complaint about the subpoenas is so nebulous as to be meaningless on appeal. The trial court's exclusion of certain offers of proof was not improper as this evidence included values for the real property and property taxes and was only indirectly related to the value of the personal property. Its admission would have been confusing and misleading to the jury. We find it was properly excluded under Evidence Rule 403. N.C. Gen. Stat. § 1A-1, Rule 403. Witness Mattock's evidence was also properly excluded under Rule 403. The issue at trial was the fair market value of the personal property and damages due plaintiff from defendants' breach of the guaranty agreement. Mattock's testimony was not relevant on these issues and would tend to confuse and mislead the jury. This assignment of error is overruled.

[3] Defendants next allege that the trial court erred in denying their motion for a directed verdict and for judgment notwithstanding the verdict. Defendants allege that the evidence clearly estab-

lished that plaintiff acted in bad faith, fraudulently and deceitfully. We disagree.

We need not discuss the standard of review of a denial of a motion for directed verdict or JNOV. The trial of this case was limited to two issues—the fair market value of the personal property and damages. The alleged bad faith, fraud and deceit of the plaintiff was not an issue for trial and was not even alleged by defendants until they attempted to amend their answer. The trial court denied defendants' motion to amend and we have affirmed that above. This assignment of error is overruled.

[4] Defendants next allege that the trial court erred in not adhering to the law of the case and allowing the jury to compute damages based on the theory that the agreements between Borg-Warner and Raleigh Inn were leases instead of security agreements. Defendants contend that the law of the case was established in the first appeal when this Court held that "the parties did intend for the leases to act as security. Accordingly, Article 9 applies to these agreements." *Borg-Warner*, 97 N.C. App. at 581, 389 S.E.2d at 433. Thus, defendants contend, since the agreements were "security agreements," N.C. Gen. Stat. § 24-1.1 (1991) applies. This statute, they allege, prohibits Borg-Warner from charging interest on funds not disbursed and in accelerating the balance of the loan due. We disagree.

First, we note that defendants misread N.C. Gen. Stat. § 25-9-203(4) (1991 Cum. Supp.). This section states in pertinent part:

> A transaction, although subject to this article [9], is also subject to . . . G.S. 24-1 and 24-2, . . . and in the case of conflict between the provisions of this article and any such statute, the provisions of such statute control.

Thus, contrary to defendants' assertion, this statute does not make an article 9 transaction subject to N.C. Gen. Stat. § 24-1.1.

Secondly, we find that the defendants are liable for the full amount of the lease payments upon default under the express terms of the guaranty which states:

> . . . Guarantor does hereby unconditionally guarantee to Lessor . . . (a) the full and prompt payment when due, whether by acceleration or otherwise, with such interest as may accrue thereon . . . of [the Equipment Leases] made by Lessee payable

> to the order of Lessor . . ., (b) the full and prompt payment and performance of any and all obligations of Lessee to Lessor under the terms of [the Deed of Trust], (c) the full and prompt payment and performance of any and all other obligations of Lessee to Lessor under any other documents or instruments now or hereafter evidencing, securing or otherwise relating to the indebtedness evidenced by the Lease[.] Guarantor does hereby agree that if the Lease is not paid by Lessee in accordance with its terms, or if any and all sums which are now or may hereafter become due from Lessee to Lessor under the Lease Documents are not paid by Lessee in accordance with their terms, Guarantor will immediately make such payments.

This assignment is overruled.

[5] Defendants next contend that the trial court erred in failing to give instructions as requested and failing to submit issues which reflected the application of article 9. We disagree.

Defendants timely submitted proposed jury instructions to the trial court. These proposed instructions covered: A. issues, B. burden of proof, C. issue of amount owed, D. damages, E. mitigation, F. personal property valuation, H. [sic] expert witnesses. Before the jury was charged, plaintiff requested an instruction concerning blank instruments. Defendants objected on the grounds that the evidence was conflicting about the transaction. Following the jury charge, the trial court inquired of both parties whether they had any objections to the instructions. Defendants replied that they objected "only to the extent that the instructions requested yesterday were not given."

Under our Rules of Appellate Procedure,

> [a] party may not assign as error any portion of the jury charge or omission therefrom unless he objects thereto before the jury retires to consider its verdict, stating distinctly that to which he objects and the grounds of his objection[.]

N.C.R. App. Pro. 10(b)(2). The purpose of this rule is to encourage the parties to inform the court of errors in the instructions so that corrections can be made before the jury begins its deliberations, thereby eliminating the necessity of a new trial. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983); *State v. Freeman*, 295 N.C. 210, 244 S.E.2d 680 (1978).

We find that defendants' objection does not comply with the requirements of Rule 10(b)(2) so as to preserve this issue on appeal. Their objection to the trial court utterly failed to state distinctly that to which they objected and the grounds for the objection. Thus, this issue is not before us on appeal. N.C.R. App. Pro. 10(a) and 10(b)(2).

[6] Defendants next contend that the trial court erred in having their post-judgment motions ruled upon by another judge.

The trial judge in this case was Judge Robert Burroughs. Following the jury verdict and the filing of the judgment, defendants filed four post-trial motions. These motions were heard by another superior court judge and were denied. Defendants contend that the order denying their post-trial motions is a nullity because under Rule 63, the trial judge must hear the post-trial motions unless he is under a disability. N.C. Gen. Stat. § 1A-1, Rule 63 (1990). We disagree.

We find nothing in Rule 63 which prohibits a judge who did not hear the case from ruling on post-trial motions which of necessity are made after a verdict has been reached and a judgment has been entered. Rule 63 anticipates a situation where a trial judge performs his role to the point that a verdict is returned or findings of fact and conclusions of law are filed but then is unable to perform the ministerial functions which follow. *See* N.C. Gen. Stat. § 1A-1, Rule 63, Commentary; *In re Whisnant*, 71 N.C. App. 439, 322 S.E.2d 434 (1984) (the function of a substitute judge is ministerial rather than judicial). As explained in *Girard Trust Bank v. Easton*, 12 N.C. App. 153, 182 S.E.2d 645, *cert. denied*, 279 N.C. 393, 183 S.E.2d 245 (1971):

> Rule 63 does not contemplate that a substitute judge, who did not hear the witnesses and participate in the trial, may nevertheless participate in the decision making process. It contemplates only that he may perform such acts as are necessary under our rules of procedure to effectuate a decision already made.

Id. at 155, 182 S.E.2d at 646. Rule 63 neither requires nor implies that before a different judge can rule on post-trial motions, the judge who heard the case must have become incapacitated. This assignment of error is overruled.

[7] Defendants next assign error to the court's striking of an affidavit of a juror stating that the verdict included interest. This affidavit was attached to defendants' motion for a new trial and amendment of judgment and was stricken on plaintiff's motion. We find no error. This affidavit was properly struck under N.C. Gen. Stat. § 8C-1, Rule 606(b) (1988). *State v. Rosier*, 322 N.C. 826, 370 S.E.2d 359 (1988).

[8] By their tenth Assignment of Error defendants contend that the trial court erred in admitting plaintiff's exhibit #6 into evidence. Plaintiff's exhibit #6 is an account summary showing the scheduled lease payments, taxes paid, actual payments made up to the time of default, arrearages, various credits to Royal Villa, and delinquency charges and includes the relevant dates when payments were made or from which delinquency charges were calculated. The exhibit was tendered at the beginning of Mattock's testimony and was used to illustrate plaintiff's contention as to the amount due on the guaranty. On appeal, defendants contend that the admission of evidence of the 18% delinquency charge was extremely prejudicial to their case, warranting a new trial. We disagree.

Plaintiff's exhibit #6 was admitted without objection by defendants. Witness Mattock used it to illustrate the financial transactions which occurred under the lease agreements from the beginning of the lease period up to the day of trial. Defendants did not object to the exhibit or to any testimony of witness Mattock regarding the calculations and sums included in the exhibit. They did not object to witness Mattock's testimony regarding the 18% delinquency charges, their computation or their application under the facts of the case. Defendants have therefore waived any objection to the introduction of this exhibit. N.C.R. App. Pro. 10(b)(1). This assignment of error is overruled.

[9] Defendants further contend that it was error for the trial court to allow the jury to consider evidence of interest without requiring them to separate the interest from the principal in their verdict. We disagree.

The jury was instructed that they should determine the amount of money, if any, that was due Borg-Warner under the leases with Royal Villa at the time of default on 30 November 1986 and that they should deduct from that amount (a) the fair market value of the personal property as of 26 or 27 January 1988, and (b) the amount, if any, that Borg-Warner could have mitigated its

damages. The jury was thus not instructed, either explicitly or implicitly, to compute interest. This contention has no merit.

Defendants have argued four other assignments of error but have cited no authority in their arguments. These assignments are deemed abandoned. N.C.R. App. Pro. 28(b)(5).

Affirmed.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. EARL CARTER CLARK, JR.

No. 9225SC91

(Filed 4 August 1992)

1. **Evidence and Witnesses § 2303 (NCI4th)— manslaughter and assault—self-defense—psychological testimony—excluded—no error**

The trial court did not abuse its discretion in a prosecution in which defendant was convicted of voluntary manslaughter, assault, and misdemeanor breaking and entering by excluding the testimony of a clinical psychologist that defendant suffered from three diagnosable psychological conditions at the time of the offenses. Although defendant argued that the testimony was relevant and admissible on the issue of self-defense as to the reasonableness of defendant's belief that it was necessary to use deadly force, the psychologist testified on voir dire that he could not render a specific diagnosis regarding the impact of a blow to a head with a baseball bat, that only the depersonalization disorder constituted a formally recognized diagnosis, and that defendant's symptoms were the same as those an ordinary person experiences. The trial court could thus properly find that the probative value of the evidence was weak and that it would not be of significant assistance to the jury.

Am Jur 2d, Expert and Opinion Evidence §§ 193, 194, 362.

2. Evidence and Witnesses § 959 (NCI4th)— manslaughter—statements by deceased—state of mind exception—relationship between victim and defendant

The trial court did not err in a prosecution in which defendant was convicted of manslaughter, assault, and misdemeanor breaking or entering by admitting testimony of the deceased's brother regarding statements made to him by the deceased. The court did not admit the statements under the catchall exceptions without the required full inquiry, but under N.C.G.S. § 8C-1, Rule 803(3) as a statement of the declarant's then existing state of mind, showing the mental condition of decedent as one of passivity as well as an intent not to meet defendant.

Am Jur 2d, Evidence §§ 708-721.

Exception to hearsay rule, under Rule 803(3) of Federal Rules of Evidence, with respect to statement of declarant's mental, emotional, or physical condition. 75 ALR Fed 170.

3. Homicide § 86 (NCI4th)— manslaughter—instruction on self-defense—no plain error

There was no plain error in a homicide prosecution where defendant contended that the court erred by instructing the jury that defendant would be guilty if he was the aggressor even though there was no evidence that defendant was the aggressor, but defendant did not object to the instruction and did not carry the burden of showing plain error.

Am Jur 2d, Homicide §§ 145, 146.

Status of rules as to burden and quantum of proof to show self-defense. 43 ALR3d 221.

4. Assault and Battery § 116 (NCI4th)— assault with a deadly weapon with intent to kill—assault by pointing a gun as lesser offense—instruction refused

The trial court did not err by refusing defendant's requested instruction on assault by pointing a gun as a lesser offense of assault with a deadly weapon with intent to kill where the uncontroverted evidence showed that defendant did more than merely point the gun, he brought the pistol within six inches of the resident's stomach and pulled the trigger in the midst of a struggle, but the gun did not discharge,

although it had discharged earlier during the course of the same struggle.

Am Jur 2d, Trial §§ 1427-1435.

5. **Criminal Law § 1081 (NCI4th)— sentencing—one aggravating factor outweighing six mitigating factors—no abuse of discretion**

The trial court did not abuse its discretion when sentencing defendant for assault and manslaughter by finding that one aggravating factor outweighed six mitigating factors. The weighing of aggravating and mitigating factors is not a simple matter of mathematics and the balance struck by the sentencing judge will not be disturbed on appeal if there is any support in the record for the judge's determination.

Am Jur 2d, Criminal Law §§ 598, 599.

6. **Criminal Law § 1086 (NCI4th)— sentencing—multiple convictions joined for sentencing—findings not tailored to convictions—error**

The trial court erred in its findings when sentencing defendant for manslaughter, assault with a deadly weapon with intent to kill, assault with a deadly weapon with intent to kill inflicting serious injury, and misdemeanor breaking and entering. The trial court did not need to find an aggravating factor for the misdemeanor, but doing so was superfluous and not prejudicial. As to the assault convictions, it is difficult to determine the aggravating factor applied to the conviction for assault with a deadly weapon with intent to kill inflicting serious injury, but it appears that the court erroneously applied the contemporaneous conviction of assault with a deadly weapon with intent to kill. Additionally, the trial court did not make written findings nor indicate at the sentencing hearing the aggravating factor being applied to the assault with a deadly weapon with intent to kill.

Am Jur 2d, Criminal Law §§ 551, 552.

APPEAL by defendant from judgments entered 1 August 1991 in CATAWBA County Superior Court by *Judge Chase B. Saunders*. Heard in the Court of Appeals 29 June 1992.

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

Isenhower, Wood, Cilley & Killian, P.A., by Mark L. Killian, for defendant-appellant.

WYNN, Judge.

Defendant was charged by indictments with first degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, first degree burglary, and assault with a deadly weapon with intent to kill.

The State's evidence tended to show that defendant shot and killed his estranged wife's boyfriend with a .357 magnum pistol, shot and wounded his wife's brother with the same pistol, forced his way into an apartment where his wife had taken refuge, and pulled the trigger of the pistol at one of the residents of the apartment, but the gun did not discharge.

Defendant asserted that the shootings were in self-defense because the deceased had picked up a baseball bat and threatened to knock defendant's "brains out" if defendant took the wife and her child with him.

Defendant was found guilty of voluntary manslaughter, assault with a deadly weapon with intent to kill, assault with a deadly weapon with intent to kill inflicting serious injury, and misdemeanor breaking and entering. He was sentenced to the maximum prison terms for each offense.

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[1] Defendant contends the trial court erred by excluding the testimony of a clinical psychologist that defendant suffered from three diagnosable psychological conditions at the time of the offenses: (1) child abuse syndrome; (2) acute depersonalization reaction; and (3) impaired mental faculties caused by a blow to the jaw with a baseball bat. Defendant argues that the testimony was relevant and admissible on the issue of self-defense as to the reasonableness of defendant's belief that it was necessary to use deadly force in order to save himself from death or great bodily harm.

A trial court may exclude expert testimony if it determines that the probative value of the evidence, even if relevant, is substantially outweighed by the danger of unfair prejudice, confusion of

the issues, or misleading the jury. *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985). The determination of the admissibility of expert testimony is within the discretion of the trial judge, who has wide latitude. *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). During *voir dire* on the admissibility of his testimony, the psychologist conceded that he could not render a specific diagnosis regarding the impact of the blow to the head with a baseball bat and that only the depersonalization disorder constituted a formally recognized diagnosis. The psychologist testified that defendant's symptoms were the same as what an ordinary person experiences. The trial court thus properly could find the probative value of the evidence was weak and that it would not be of significant assistance to the jury. We conclude the trial court did not abuse its discretion in excluding this evidence.

[2] Defendant further contends the trial court erred by admitting testimony of the deceased's brother regarding statements made to him by the deceased. He argues that the court should not have admitted these hearsay statements because the court failed to make the full inquiry required by the catchall exceptions of Rules 803(24) and 804(b)(5) of the Rules of Evidence. The court, however, did not admit the testimony under the catchall exceptions, but under Rule 803(3) as a statement of the declarant's then existing state of mind as showing the mental condition of the decedent as one of passivity, as well as an intent not to meet the defendant. Such testimony is admissible under the state-of-mind exception to the hearsay rule to show the relationship between the victim and the defendant. *See State v. Lynch*, 327 N.C. 210, 393 S.E.2d 811 (1990). This assignment of error is overruled.

[3] Defendant next contends that the trial court erred by instructing the jury on the principle of self-defense, specifically that defendant would be guilty of voluntary manslaughter if he was the aggressor. He argues that this instruction was error because there is no evidence in the record that defendant was the aggressor. Defendant, however, did not object to this instruction and therefore must show plain error. *State v. Odom*, 307 N.C. 655, 300 S.E.2d 375 (1983). In such instances, the burden is on the defendant to show that plain error exists. He has not carried this burden.

[4] Defendant also assigns error to the trial court's refusal of his request for an instruction on the offense of assault by pointing a gun as a lesser offense of the charge of assault with a deadly

weapon with intent to kill. He argues submission of this instruction was required by uncontroverted evidence that defendant pointed the pistol at the resident of the apartment where his wife took refuge.

Submission of a lesser included offense is required when and only when there is evidence from which the jury could find the defendant committed the lesser offense. *State v. Hall*, 305 N.C. 77, 286 S.E.2d 552 (1982), *overruled on other grounds* by *State v. Diaz*, 317 N.C. 545, 346 S.E.2d 488 (1986). The court is not required to submit the lesser offense if the State's evidence is positive as to each element of the crime charged and there is no conflicting evidence as to any element. *Id.* at 84, 286 S.E.2d at 556. The court also is not required to submit the lesser offense when there is merely a possibility the jury might accept the State's uncontradicted evidence in part and reject it in part. *State v. Hicks*, 241 N.C. 156, 84 S.E.2d 545 (1954). Here, the uncontroverted evidence shows that defendant did more than merely point the gun—he brought the pistol within six inches of the resident's stomach and pulled the trigger in the midst of a struggle with the resident, but the gun did not discharge. This occurred after the gun had discharged during the course of the same struggle. The court therefore properly declined to submit the requested instruction.

[5] Finally, the defendant assigns error to his sentencing. As the sole factor in aggravation of each conviction, the trial court found that defendant had a record of prior convictions punishable by more than sixty days confinement. The trial court found the same six statutory factors in mitigation of each conviction. It determined that the aggravating factor outweighed the mitigating factors.

Defendant contends the trial court abused its discretion by finding the aggravating factor outweighed the six mitigating factors. We disagree. The weighing of aggravating and mitigating factors is not a simple matter of mathematics, and the balance struck by the sentencing judge will not be disturbed on appeal if there is any support in the record for the judge's determination. *State v. Davis*, 58 N.C. App. 330, 293 S.E.2d 658, *disc. rev. denied*, 306 N.C. 745, 295 S.E.2d 482 (1982). We do not find an abuse of discretion.

[6] Defendant next contends the court erred by failing to tailor its findings of aggravating and mitigating factors to each offense. We agree. The relevant statute, N.C. Gen. Stat. § 15A-1340.4(b), states:

> If the judge imposes a prison term for a *felony* that differs from the presumptive term provided in subsection (f). . . the judge must specifically list in the record each matter in aggravation or mitigation that he finds proved by a preponderance of the evidence.

N.C. Gen. Stat. § 15A-1340.4(b) (1991) (emphasis added).

In *State v. Ahearn*, our Supreme Court held that:

> in every case in which the sentencing judge is required to make findings in aggravation and mitigation to support a sentence which varies from the presumptive term, each offense, whether consolidated for hearing or not, must be treated separately, and separately supported by findings tailored to the individual offense and applicable only to that offense.

State v. Ahearn, 307 N.C. 584, 598, 300 S.E.2d 689, 698 (1983).

In the instant case, the defendant was convicted of three felonies: voluntary manslaughter, assault with a deadly weapon with intent to kill inflicting serious injury, and assault with a deadly weapon with intent to kill. The only aggravating factors found by the trial court were the defendant's prior convictions of forcible trespass and damage to real property. The defendant received the maximum term for all three felonies.

At the sentencing hearing the trial court stated that it would apply the aggravating and mitigating factors as follows:

> Let the record reflect the Court will accept the mitigating factor as tendered with respect to all counts; will apply the aggravating factors as follows: In the breaking or entering and the voluntary manslaughter count, *damage to real property*; in the assault with a deadly weapon with intent to kill inflicting serious injury count, *forcible trespass*, and assault with a deadly weapon with intent to kill count; balancing the aggravating and the mitigating factors, find that the aggravating factor outweighs the mitigating and will impose the following judgment. . . .

(Emphasis added).

The trial court did not need to find an aggravating factor for the breaking and entering count since the defendant was convicted of a misdemeanor which is not subject to N.C. Gen. Stat.

§ 15A-1340.4(b). The finding of an aggravating factor for the misdemeanor conviction, therefore, was superfluous and non-prejudicial error. The extent of punishment for misdemeanors is referred to the discretion of the trial court and its sentence may not be interfered with by the appellate court, except in cases of manifest and gross abuse. *State v. Miller*, 94 N.C. 901 (1886). We find no such abuse.

In regards to the three felony convictions, the record indicates the trial court separately considered all mitigating and aggravating factors in sentencing the defendant for the voluntary manslaughter conviction. It is unclear, however, which aggravating factor was applied to the assault with a deadly weapon with intent to kill conviction inflicting serious injury and assault with a deadly weapon with intent to kill convictions.

Before imposing a prison term other than the presumptive sentence, the trial court must consider all aggravating and mitigating factors supported by a preponderance of the evidence. *State v. Parker*, 315 N.C. 249, 258, 337 S.E.2d 497, 502 (1985). Since the trial court did not fill out separate aggravating and mitigating factor form sheets for the two assault convictions, we must examine the transcript of the sentencing hearing to determine whether the trial court made proper findings supporting both convictions. *Cf. State v. Hall*, 81 N.C. App. 650, 652, 344 S.E.2d 811, 813, *cert. dismissed*, 318 N.C. 510, 349 S.E.2d 868 (1986) (holding the failure to fill out two aggravating and mitigating factor form sheets is ministerial oversight rather than judicial error when the transcript of the sentencing hearing shows the trial judge made and listed findings supporting the validity of both judgments).

Based upon the transcript, it is difficult to determine what aggravating factor the trial court applied to the assault with a deadly weapon with intent to kill inflicting serious injury conviction. It appears the trial court applied *two* aggravating factors: the defendant's prior conviction of forcible trespass and his contemporaneous conviction of assault with a deadly weapon with intent to kill. This was error. "[A] conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial by a contemporaneous conviction of a crime actually joined by or acts which form the gravamen of these convictions." *State v. Hayes*, 323 N.C. 306, 312, 372 S.E.2d 704, 707-708 (1988).

In addition, the trial court did not make written findings nor indicate at the sentencing hearing what aggravating factor was being applied to the assault with a deadly weapon with intent to kill count. This also was error. Since the trial court did not properly indicate what aggravating factor was being applied to the two assault convictions, they must be remanded for resentencing. *State v. Ahearn*, 307 N.C. at 602, 300 S.E.2d at 701.

In summary, we hold:

In Case Number 90 CRS 17802: Count 1—charge of assault with a deadly weapon with intent to kill inflicting serious injury—Sentence Vacated and case remanded for resentencing.

Count 2—charge of misdemeanor breaking and entering—No error.

Count 3—charge of assault with a deadly weapon with intent to kill—Sentence Vacated and case remanded for resentencing.

In Case Number 90 CRS 17803—charge of voluntary manslaughter—No error.

Chief Judge HEDRICK and Judge JOHNSON concur.

CYNTHIA FORD, PETITIONER-APPELLEE v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, RESPONDENT-APPELLANT

No. 919SC590

(Filed 4 August 1992)

Administrative Law and Procedure § 44 (NCI4th)— administrative law judge—recommended decision not adopted—findings and conclusion by agency—no error

There was no error in the appeal of a sediment control fine where the administrative law judge made findings of fact and conclusions of law and recommended that no penalty be assessed, the action was referred to the Secretary of the Department for final agency decision, and the Secretary selectively

adopted and rejected findings in the recommended decision, adopted some conclusions of law and rejected others, made his own conclusions of law, adopted part of the recommended decision, and rejected part of the decision. The Department's order explains why it changed the findings of fact and explains that different conclusions must be drawn on the facts as found by it, and the Court of Appeals reluctantly agreed that the Department's order met the spirit of the legislative mandates. N.C.G.S. § 150B-51.

Am Jur 2d, Administrative Law §§ 434-440.

APPEAL by North Carolina Department of Environment, Health and Natural Resources (hereinafter the Department) from order entered 11 March 1991 in PERSON County Superior Court by *Judge Henry W. Hight, Jr.* Heard in the Court of Appeals 13 April 1992.

Petitioner-appellee Cynthia Ford (hereinafter Ford) was fined by the Department for alleged violations of G.S. § 113A-64, the North Carolina Sedimentation Pollution Control Act (hereinafter the Act). The record reveals the following facts and circumstances.

Ford, along with her husband, planned to build a roller skating rink in Roxboro, North Carolina. Ford purchased the land on which she intended to build the rink and then secured the necessary local permits. Ford began construction of the rink on or about 28 May 1986. The construction site was inspected by a representative of the North Carolina Department of Natural Resources and Community Development (hereinafter NRCD), the predecessor of the Department on 30 May 1986. Ford was told of several actions which she had to perform regarding the development of the rink. She was also informed of the requirements of the Act.

The construction site was inspected numerous times between 30 May 1986 and 14 June 1986. On 14 June 1986, Ford received a notice of violation of the Act from John Holley, regional engineer of the Land Quality Section for the Raleigh region of NRCD. The notice of violation stated the following reasons for violations of the Act:

(1) The erosion and sedimentation control plan submitted by Ford was inadequate.

(2) Land-disturbing activity on the construction site had been carried down to a nearby creek bordering the project

without the installation of a necessary buffer zone to protect the creek.

(3) Sedimentation and erosion control devices had not been installed increasing the potential for off-site sedimentation.

(4) Failure to take all reasonable measures to protect public and private property from damage by land-disturbing activity.

Ford was also informed that new construction at the site could not begin until the violations had been remedied.

The construction site was continually inspected following the notice of violation until August 1987. Each inspection revealed alleged continued violations of the requirements of the Act. Ford was found to be in constant violation of the requirement of an adequate sedimentation and erosion control plan for the construction site. On 31 August 1987, Ford was assessed a civil penalty by the Director of the Division of Land Resources of NRCD. This penalty was in the amount of forty dollars ($40.00) per day for violations of the Act for a 431 day period beginning 14 June 1986 and ending 17 August 1987. The total penalty assessed against Ford was seventeen thousand two hundred forty dollars ($17,240.00).

Ford appealed the civil penalty assessment by filing a Petition for Administrative Hearing with the Office of Administrative Hearings (hereinafter OAH) on 30 September 1987. On 25 November 1987, Ford's husband made a special appearance through counsel to contest NRCD's proposed amendment to the August civil penalty assessment to include Mr. Ford as a person against whom the penalty could be assessed. NRCD filed a motion to amend the civil penalty on 17 December 1987 which was approved on 11 January 1988. Mr. Ford appealed the civil penalty assessment by filing a Petition for Administrative Hearing before OAH on 13 January 1988.

On 18-19 April 1988, a hearing was held before an Administrative Law Judge (hereinafter ALJ) to determine whether Ford or her husband violated the Act and, if so, whether the civil penalty assessed was appropriate. On 10 February 1989, the ALJ issued a recommended decision pursuant to G.S. § 150B-34 which included findings of fact, conclusions of law and a recommended decision that no penalty be assessed against Ford or her husband.

This action was referred to the Secretary of the Department by the OAH for final agency decision on 5 June 1989 who, in turn, issued a Final Agency Decision on 30 November 1989. In his final decision, the Secretary adopted and rejected, selectively, findings of facts set out in the recommended decision of the ALJ. The Secretary further adopted the ALJ's conclusions of law pertaining to Ford's husband and rejected the ALJ's conclusions of law pertaining to Ford. The Secretary finally made his own conclusions of law, adopted part of the ALJ's recommended decision by declining to assess a civil penalty against Ford's husband and rejected part of the ALJ's recommended decision by assessing an eight thousand six hundred and twenty dollar ($8,620.00) civil penalty against Ford for violations of the Act.

Ford appealed the final agency decision by filing a Petition for Judicial Review on 27 December 1989 in Person County Superior Court. This petition came on for hearing on 18 February 1991. The trial court reversed the Final Agency Decision and adopted the ALJ's recommended decision on the grounds that the Secretary failed to state specific reasons why he did not adopt the ALJ's conclusions of law and recommended decision. The Department appeals.

Ramsey, Galloway & Abell, by Julie A. Abell, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kathryn Jones Cooper, for respondent-appellant.

WELLS, Judge.

The Department assigns error to the trial court's findings and conclusion that the Final Agency Decision did not state specific reasons for not adopting the ALJ's conclusions of law and recommended decision. The Department further assigns as error the trial court's conclusion of law that further judicial review pursuant to G.S. § 150B-51(b) was not required because it failed to state specific reasons why it did not adopt the ALJ's recommended decision.

This case presents a troubling question of legislative policy and intent in the area of administrative law. Prior to 1985, it was the usual practice for administrative agencies of state government to hear and determine their own contested cases. Our General

Assembly, after careful study and discussion, determined that the system needed change. There is no better way to put it than to go directly to the statutory enactments which implemented a new approach to the resolution of contested cases found in the pertinent sections of Article 60 of Chapter 7A of our General Statutes:

Article 60

Office of Administrative Hearings

§ 7A-750. Creation; status; purpose.

There is created an Office of Administrative Hearings. The Office of Administrative Hearings is an independent, quasi-judicial agency under Article III, Sec. 11 of the Constitution and, in accordance with Article IV, Sec. 3 of the Constitution, has such judicial powers as may be reasonably necessary as an incident to the accomplishment of the purpose for which it is created. The Office of Administrative Hearings is established to provide a source of independent hearing officers to preside in administrative cases and thereby prevent the commingling of legislative, executive, and judicial functions in the administrative process. It shall also maintain dockets and records of contested cases and shall codify and publish all administrative rules.

§ 7A-751. Agency head; powers and duties.

The head of the Office of Administrative Hearings is the Chief Administrative Law Judge. He shall serve as Director and have the powers and duties conferred on him by this Chapter and the Constitution and the laws of this State. . . .

§ 7A-752. Chief Administrative Law Judge; appointments; vacancy.

The Chief Administrative Law Judge of the Office of Administrative Hearings shall be appointed by the Chief Justice for a term of office of four years. . . .

The Chief Administrative Law Judge shall designate one administrative law judge as senior administrative law judge. The senior administrative law judge may perform the duties of Chief Administrative Law Judge if the Chief

Administrative Law Judge is absent or unable to serve temporarily for any reason.

§ 7A-753. Additional administrative law judges; appointments; specialization.

The Chief Administrative Law Judge shall appoint additional administrative law judges to serve in the Office of Administrative Hearings in such numbers as the General Assembly provides. No person shall be appointed or designated an administrative law judge except as provided in this Article.

The Chief Administrative Law Judge may designate certain administrative law judges as having the experience and expertise to preside at specific types of contested cases and assign only these designated administrative law judges to preside at those cases.

§ 7A-754. Qualifications; standards of conduct; removal.

Only persons duly authorized to practice law in the General Court of Justice shall be eligible for appointment as the Director and chief administrative law judge or as an administrative law judge in the Office of Administrative Hearings. Neither the chief administrative law judge nor any administrative law judge may engage in the private practice of law as defined in G.S. 84-2.1 while in office; violation of this provision shall be grounds for removal.

. . .

Having thus provided for the establishment of this "independent" scheme of hearing and determining contested cases, the Legislature amended the Administrative Procedure Code to reflect and emphasize its policy set out in Chapter 7A. We turn to those pertinent provisions of Chapter 150B to make that point.

In summary, under the new method of hearing and determining contested cases, as found in G.S. § 150B, sections 24 through 33, ALJs have been given many of the powers and duties generally regarded as necessary to the independent function of our courts of justice.

We now turn to the manner in which the Legislature has emphasized the primary function of ALJs to hear and determine contested cases.

§ 150B-34. Recommended decision or order of administrative law judge.

(a) Except as provided in G.S. 150B-36(c), in each contested case the administrative law judge shall make a recommended decision or order that contains findings of fact and conclusions of law.

Further emphasizing the decision-making role of ALJs, we refer to the pertinent contents of G.S. § 150B-36(b):

> A final decision or order in a contested case shall be made by the agency in writing after review of the official record as defined in G.S. 150B-37(a) and shall include findings of fact and conclusions of law. If the agency does not adopt the administrative law judge's recommended decision as its final decision, the agency shall state in its decision or order the specific reasons why it did not adopt the administrative law judge's recommended decision. The agency may consider only the official record prepared pursuant to G.S. 150B-37 in making a final decision or order, and the final decision or order shall be supported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31.

The mandate expressed in section 36(b) is then carried through to the judicial review process:

§ 150B-51. Scope of review.

(a) Initial Determination in Certain Cases.—In reviewing a final decision in a contested case in which an administrative law judge made a recommended decision, the court shall make two initial determinations. First, the court shall determine whether the agency heard new evidence after receiving the recommended decision. If the court determines that the agency heard new evidence, the court shall reverse the decision or remand the case to the agency to enter a decision in accordance with the evidence in the official record. Second, *if the agency did not adopt the recommended decision, the court shall determine whether the agency's decision states the specific reasons why the agency did not adopt the recommended decision. If the court determines that the agency did not state specific reasons why it did not adopt a recommended decision, the court shall reverse the decision or remand the*

case to the agency to enter the specific reasons. (Emphasis added.)

Despite having thus developed a new system of administrative hearing, emphasizing the independent role and function of ALJs, the Legislature has continued to give the interested agency the duty and responsibility to enter final decisions, either adopting the ALJ's recommended decision, or, in the alternative, entering its own order. *See* G.S. § 150B-36. Thus, the interested agency still has the authority to make its own findings of fact, conclusions of law and decision. The tension between the role and function of the independent hearing ALJ and the interested agency is clearly demonstrated in this case. The Department simply viewed the record of evidence differently from the ALJ, rejected many of the ALJ's findings of fact, substituted its own, and on those grounds drew different conclusions of law—all leading to its rejection of the ALJ's recommended decision. The bottom-line difference is that in its version of the facts, the agency found Mrs. Ford's violations to be willful. Then, even though it found the "danger" to be "not substantial," it saw fit to levy a heavy fine indeed—$8,620.00.

The Department's order explains why it changed the findings of fact. Then, its order explains that on the facts as found by it, different conclusions of law must be drawn. We reluctantly agree that the Department's order meets the spirit of the mandates we have spoken to in this opinion. Now this case must go back to the Superior Court, where that Court must once again resolve Mrs. Ford's appeal. *See* G.S. § 150B-51. This case therefore further illustrates that the present system of resolving contested cases carries with it the inherent risk of inefficient, if not wasteful, use of judicial resources. It is certainly not inconceivable that when the trial court resolves this case once again, the case may return to this Court.

In this case, where we are presented with one narrow question, the Department has filed a record on appeal totaling 303 pages, most of which is not pertinent to the question before us. We therefore order that the Department be charged with the entire cost in this Court associated with the record.

For the reasons stated, the order of the court below is reversed and this case is remanded for further appropriate proceedings.

Reversed and remanded.

Judges ARNOLD and EAGLES concur.

STATE OF NORTH CAROLINA v. SAM DAWSON SLUKA, SR., AND WILLIAM RANDOLPH LEWIS, DEFENDANTS

No. 916SC1018

(Filed 4 August 1992)

1. **Burglary and Unlawful Breakings § 85 (NCI4th)— felonious breaking or entering—evidence sufficient**

The trial court did not err by denying defendants' motions to dismiss for insufficient evidence a prosecution for feloniously breaking or entering a hog house/roost where the evidence, though circumstantial, was sufficient for the jury to infer that defendants, acting in concert, entered the hog house/roost with the intent to commit larceny.

Am Jur 2d, Burglary §§ 24, 45, 66-68.

2. **Larceny § 7.8 (NCI3d)— felonious larceny—evidence sufficient**

There was sufficient evidence in a prosecution for felonious larceny of tools and fowl to permit the jury to find that the defendants took property belonging to Lee without his consent, carried it away from where it was stored or had roosted with the intent to deprive Lee of the property permanently, and the property was taken pursuant to a breaking or entering.

Am Jur 2d, Larceny §§ 155-163.

3. **Larceny § 7.4 (NCI4th)— doctrine of recent possession—evidence sufficient**

The trial court did not err in a prosecution for felonious larceny and felonious breaking or entering by instructing the jury on the doctrine of recent possession where there was sufficient evidence to show that defendant Lewis had joint possession of the stolen property with defendant Sluka, with whom Lewis had acted in concert in committing the offenses.

Am Jur 2d, Larceny § 162.

4. **Appeal and Error § 147 (NCI4th)— instructions—failure to object—not addressed on appeal**

Defendants failed to preserve their right to present on appeal an argument regarding an instruction where they failed to object to the wording of the instruction at trial even though they were given the opportunity to do so. N.C.R. App. P. 10(b)(2).

Am Jur 2d, Appeal and Error § 545.

5. **Criminal Law § 365 (NCI4th)— breaking and entering and larceny—no expression of opinion by the court**

There was no improper expression of opinion by the trial court in a prosecution for breaking or entering and larceny.

Am Jur 2d, Trial § 272.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused. 34 ALR3d 1313.

6. **Evidence and Witnesses § 1362 (NCI4th)— finding of no probable cause in district court—motion in limine to prohibit mention**

There was no prejudicial error in a prosecution for breaking or entering and larceny where the trial court granted the State's motion in limine to prohibit defense counsel from mentioning that no probable cause was found when the cases were heard in district court.

Am Jur 2d, Criminal Law § 413.

APPEAL by defendants from judgments entered 13 March 1991 by *Judge Cy A. Grant, Sr.* in NORTHAMPTON County Superior Court. Heard in the Court of Appeals 11 May 1992.

Defendants were both convicted of felonious breaking or entering and felonious larceny. Each received a three year active sentence for the breaking or entering, and a suspended sentence for the larceny. From the judgments entered, defendants appeal.

Attorney General Lacy H. Thornburg, by Assistant Attorney General V. Lori Fuller, for the State.

Donnie R. Taylor for defendant-appellant Sluka.

A. Jackson Warmack, Jr. for defendant-appellant Lewis.

LEWIS, Judge.

Defendants first assign as error the denial of their motions to dismiss made at the close of the evidence. The question for the trial court upon a motion to dismiss is whether there is substantial evidence of each essential element of the offense charged and of the defendant's being the perpetrator of the offense. *State v. Malloy*, 309 N.C. 176, 305 S.E.2d 718 (1983); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982). If such evidence has been presented, the motion is properly denied. *Earnhardt*, 307 N.C. at 62, 296 S.E.2d at 652. In determining the sufficiency of the evidence to take the case to the jury, the court must view all the evidence in the light most favorable to the State, must give the State the benefit of every reasonable inference that may be drawn therefrom, and is not to take into consideration the defendant's evidence unless it is favorable to the State. *Id.*

The evidence here, so viewed, shows the following: On 31 March 1990, Irvin Moody, Jr., who was looking for someone from whom he could purchase some chickens and turkeys, was introduced to defendant Sluka. During their conversation, Sluka regretted that he was unable to accommodate Moody and expressed his own interest in purchasing some peacocks and guineas. Moody said he knew someone who might be willing to part with such fowl, and agreed to introduce Sluka to a Mr. Lee the next day. As agreed, on 1 April 1990, Moody met Sluka, who was accompanied by the defendant Lewis, and the three men went to the hog house where Lee kept his birds. Finding no one at the hog house, the men went to Lee's home, located a mile or two away. There, they spoke with Lee's son who told them that his father was away at an auction. Thereafter, Moody and Sluka both purchased some turkeys from still another purveyor of fowl in the area and went their separate ways.

On a rainy 2 April 1990, shortly before 11:00 p.m., Jesse Coker and his wife, who live across the highway from the Lee hog house, heard what sounded like a truck in the vicinity of the hog house. They looked across the road and observed a truck being driven up the road to the hog house. The truck stopped short of the hog house and its lights went out. The Cokers did not recognize the truck as belonging to Lee and called Lee at his house to tell him about the truck. Lee sprang from his repose, grasped his handgun and flew to his hog house, arriving within "five or ten minutes."

As Lee approached the hog house, which he did not lock, he saw a truck with its lights off backed up to the front door of the hog house. Defendant Sluka, who was in the driver's seat of the truck, started driving towards Lee's vehicle but did not turn the truck's lights on until he was about 100 feet away from the hog house. The defendants in their truck approached Lee, in his vehicle. When the two vehicles met, facing each other, Lee recognized Sluka and Lewis as the men in the truck. Lee backed down the path to a point where the two vehicles could pass each other. Lee had a flashlight shining on the truck. Sluka told Lee that they were trying to get to Virginia but were lost. Lee gave them directions. As they spoke, Lee noticed that the defendant Lewis, who was in the passenger seat of the truck, was soaking wet and that Sluka was also wet but less so. The rain had been falling heavily all that evening. As Sluka's truck began to roll past him, Lee beamed his flashlight into the back of the truck and recognized personal property, which he kept inside and around his hog house. He yelled for Sluka and Lewis to stop but they paid no heed to his plea. Lee turned around and followed the truck out of the hog house path and onto the highway; he pulled in front of the truck, and stopped so as to block the truck from proceeding further.

Lee stepped out of his vehicle and holding his pistol by his side told Sluka and Lewis that the items in the back of the truck belonged to him. Sluka argued with him, claiming that the property was his. Lee then called for Mr. Coker to come out. When Mr. Coker failed to respond, Lee fired his pistol into the air, whereupon Mr. Coker, rifle in hand, rushed out of his house. Mr. Coker came over to assist Lee, and Mrs. Coker called the sheriff. Sluka and Lee continued to argue over who owned the property which was in the back of Sluka's truck. Coker told Lewis that he had better tell the truth if he did not want to go to jail, at which point Lewis admitted that the property belonged to Lee. The officers arrived shortly thereafter and began investigating the matter. Lee returned to his hog house and found numerous items missing from the building and the surrounding area, including four Bantam chickens, ten guineas, and various tools, among other things. All of the items missing from the hog house were found either inside or in the back of Sluka's truck. Lee also found wet foot tracks on the cement inside his hog house and footprints on crates in the area inside the building where the chickens and guineas roosted on rafters about seven feet off the ground.

At trial, Sluka presented evidence, including his own testimony, to show that the items in the back of the truck belonged to him and to show that he had a good reputation in his community. Lewis did not testify.

[1] Defendants contend the evidence was insufficient to go to the jury, particularly because it did not show that there was a breaking or entering of the hog house/roost by either defendant. Referring to the fact that there were wet footprints in the hog house, and personal property found in the back of defendants' truck which happened to be missing from the hog house, defendants argue that the evidence is "wholly circumstantial." This position is hardly persuasive.

To support a conviction for felonious breaking or entering under N.C.G.S. § 14-54(a) (1986), there must be substantial evidence of each of the following elements of the offense: (1) the breaking or entering; (2) of any building; (3) with the intent to commit a felony or larceny therein. *State v. Walton*, 90 N.C. App. 532, 369 S.E.2d 101 (1988). Neither this statute nor *Walton* requires that the evidence be direct; rather, the evidence must be substantial. It is well-established in the appellate courts of this State that jurors may rely on circumstantial evidence to the same degree as they rely on direct evidence. *State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984). The law makes no distinction between the weight to be given to either direct or circumstantial evidence. *Id.* Rather, "the law requires only that the jury shall be fully satisfied of the truth of the charge." *Id.* at 29, 310 S.E.2d at 603 (quoting *State v. Adams*, 138 N.C. 688, 695, 50 S.E. 765, 767 (1905)). We find the evidence here sufficient to permit the jury to infer that the defendants, acting in concert, entered Lee's hog house/roost with the intent to commit larceny, and therefore sufficient to withstand defendants' motions to dismiss the charge of breaking or entering.

[2] Apropos the sufficiency of the evidence of larceny, again, the defendants' contention that the evidence was insufficient to go to the jury is without merit. To support a conviction for larceny under N.C.G.S. § 14-72 (1986), there must be substantial evidence showing that the defendant: (1) took the property of another; (2) carried it away; (3) without the owner's consent; and (4) with the intent to deprive the owner of his property permanently. *State v. Reeves*, 62 N.C. App. 219, 302 S.E.2d 658 (1983). The crime

of larceny is a felony without regard to the value of the property stolen if it is committed pursuant to a breaking or entering. N.C.G.S. § 14-72(b)(2). Sufficient evidence was presented here to permit the jury to find that the defendants took property belonging to Lee without his consent; carried it away from where it was stored or had roosted, with the intent to deprive Lee of the property permanently; and that the property was taken pursuant to a breaking or entering. Bantam chickens and guineas do not voluntarily fly from their roost in the middle of the night into a pickup truck even if it is ostensibly headed for "Virginia." Accordingly, we find the evidence sufficient to support the convictions and find that the trial court properly denied the motions to dismiss.

[3] Defendants next assign as error the court's instructing the jury on the doctrine of recent possession. They contend that the evidence did not support the instruction because there was: (1) no evidence of a breaking or entering of the hog house; and (2) no evidence that Lewis had actual or constructive possession of the allegedly stolen property. We find this contention meritless.

As stated previously herein, the jury was presented with sufficient evidence to permit its finding that there was a breaking or entering of the hog house. With respect to Lewis's possession of the stolen property, we note that the possession required to support an inference or presumption of guilt under this doctrine need not be a sole possession but may be joint possession. *State v. Maines*, 301 N.C. 669, 273 S.E.2d 289 (1981). As our Supreme Court explained in *Maines*:

> For the inference to arise where more than one person has access to the property in question, the evidence must show the person accused of the theft had complete dominion, which might be shared with others, over the property or other evidence which sufficiently connects the accused person to the crime or a joint possession of coconspirators or persons acting in concert in which case the possession of one criminal accomplice would be the possession of all.

Id. at 675, 273 S.E.2d at 294. *See also State v. Walker*, 86 N.C. App. 336, 357 S.E.2d 384 (1987), *aff'd*, 321 N.C. 593, 364 S.E.2d 141 (1988), and *State v. Frazier*, 268 N.C. 249, 150 S.E.2d 431 (1966). The evidence here was sufficient to show that Lewis had joint possession of the stolen property with Sluka with whom Lewis

acted in concert in committing the offenses. Both were wet. This assignment of error will not fly.

[4] Pursuant to this same assignment of error, defendants argue that the court erred in the instruction given on this doctrine. Defendants failed to object to the wording of the instruction after it was given even though they were given an opportunity to do so; therefore, they have failed to preserve their right to present this argument on appeal and we will not address it. *See* N.C.R. App. P. 10(b)(2).

[5] Defendants next argue that the court prejudicially erred in expressing an opinion on the credibility of certain witnesses and on the evidence by its questions, rulings, and remarks made during the trial.

> The judge should be the embodiment of even and exact justice. He should at all times be on the alert, lest, in an unguarded moment, something be incautiously said or done to shake the wavering balance which, as a minister of justice, he is supposed, figuratively speaking, to hold in his hands. Every suitor is entitled by the law to have his cause considered with the 'cold neutrality of the impartial judge' and the equally unbiased mind of a properly instructed jury.

State v. McBryde, 270 N.C. 776, 778, 155 S.E.2d 266, 268 (1967), (quoting *Withers v. Lane*, 144 N.C. 184, 56 S.E. 855 (1907)). We have thoroughly examined the trial transcript and found no improper expression of opinion by the court—no incautious word or act to shake the wavering balance, and no prejudicial error as claimed by defendants. We therefore reject this argument.

[6] Lastly, defendants argue that the trial court erred by allowing the State's motion *in limine* to prohibit defense counsel from mentioning at trial that no probable cause was found when the cases were heard in district court. The State made the motion on the ground that the district court heard only a portion of the State's case and therefore mention of the district court's finding would be prejudicial and misleading. Assuming *arguendo* that the court erred by allowing the motion, such error clearly was not sufficiently prejudicial to entitle defendants to a new trial given the overwhelming evidence presented against them. *See* N.C.G.S. § 15A-1443 (1988).

Defendants received a fair trial free of prejudicial error.

No error.

Judges COZORT and WALKER concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY v. CHARLES EDWARD WALTON, REBECCA L. WALTON, GLENDA H. SMITH, HOWARD GLENN SMITH, AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 9110SC524

(Filed 4 August 1992)

1. **Insurance § 561 (NCI4th)— vehicle purchased by husband—not replacement vehicle under wife's policy**

A stationwagon purchased by the named insured's husband did not constitute a replacement vehicle covered by the wife's policy at the time of an accident where it was not purchased by the husband during the policy period for which coverage is claimed but was purchased during the previous policy period. The stationwagon was not acquired during the policy period in question merely because the policy in force at the time of the accident was a renewal policy.

Am Jur 2d, Automobile Insurance § 234.

Construction and application of "automatic insurance" or "newly acquired vehicle" clause ("replacement," and "blanket," or "fleet" provisions) contained in automobile liability policy. 39 ALR4th 229.

2. **Insurance § 571 (NCI4th)— wife's automobile policy—vehicle available for husband's regular use—exclusion of husband from coverage**

The husband was excluded from coverage under the wife's automobile liability policy while he was driving a noncovered vehicle which was available for his regular use.

Am Jur 2d, Automobile Insurance § 244.

When is automobile furnished or available for regular use within "drive other car" coverage of automobile liability policy. 8 ALR4th 387.

APPEAL by defendant from judgment entered 17 January 1991 in WAKE County Superior Court by *Judge Donald W. Stephens.* Heard in the Court of Appeals 18 March 1992.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Kari Lynn Russwurm, for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for defendant-appellant Nationwide Mutual Insurance Company.

WYNN, Judge.

Glenda Smith, who is married to Howard Smith, was the owner of a 1976 LTD Ford and a 1978 Ford Thunderbird. Prior to May of 1986, both Howard and Glenda drove the 1976 LTD Ford, but Howard was the primary driver. Both cars were insured by North Carolina Farm Bureau Mutual Insurance Company (hereinafter "Farm Bureau") pursuant to an automobile liability policy issued to Glenda.

In May of 1986, the motor of the 1976 LTD Ford was destroyed, and Glenda purchased a 1986 Pontiac Grand Prix, which she owned and drove. The 1986 Pontiac was added to the Farm Bureau policy. Howard then began driving the 1978 Ford Thunderbird back and forth to work.

Howard subsequently purchased a 1971 Ford Stationwagon from a man in Virginia in June of 1986. Howard's uncle arranged for the sale and then drove the vehicle from Virginia to the Smith home. Howard applied for a North Carolina title to the 1971 Ford that same month and received title in August of 1986. Howard did not notify Farm Bureau about the 1971 Ford nor did he obtain insurance from another insurer.

After deciding that the 1978 Thunderbird was not reliable, Howard took the license plate off the 1976 Ford LTD and put it on the 1971 Stationwagon. On 18 December 1986, while operating the 1971 Ford Stationwagon, Howard was involved in an automobile accident with Charles and Rebecca Walton. The automobiles listed in the Declarations of the Farm Bureau policy on the date of the accident were the 1986 Pontiac Grand Prix, the 1978 Ford Thunderbird, and the 1976 Ford LTD.

The Waltons filed suit against the Smiths, for damages sustained as a result of the accident. Farm Bureau provided a defense

for the Smiths under a reservation of rights. On 7 November 1990, a judgment was entered against Howard Smith in favor of Charles Walton for $20,000 and in favor of Rebecca Walton for $150,000.

On 2 August 1990, Farm Bureau filed this action, seeking a declaration that it was under no obligation to provide either a defense or coverage to the Smiths for the Waltons' claims. Farm Bureau made a motion for summary judgment which the trial court granted. It is from this judgment that Nationwide Mutual Insurance Company, which provided uninsured motorists coverage for the Waltons, appealed.

The sole issue presented for our review is whether the trial court erred in ruling as a matter of law that the 1971 Ford Stationwagon operated by Howard Smith at the time of the accident was not covered by the Farm Bureau policy. For the reasons which follow, we affirm the trial court's decision.

When reviewing an insurance policy, this Court must examine the contract as a whole and effectuate the intent of the parties. *Blake v. St. Paul Fire & Marine Ins. Co.*, 38 N.C. App. 555, 557, 248 S.E.2d 388, 390 (1978). Provisions "which extend coverage must be construed liberally so as to provide coverage," *State Capital Ins. Co. v. Nationwide Mutual Ins. Co.*, 318 N.C. 534, 538, 350 S.E.2d 66, 68 (1986), while provisions which exclude coverage "are to be construed strictly so as to provide the coverage," *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 355, 172 S.E.2d 518, 523 (1970). Any ambiguities in the contract of insurance are resolved in favor of the insured. *Duke v. Mutual Life Ins. Co.*, 286 N.C. 244, 247, 210 S.E.2d 187, 189 (1974).

Covered Automobile

[1] Appellant first contends that the 1971 Ford Stationwagon became a "covered auto" under the Farm Bureau policy at the time that Howard Smith became its owner. We disagree.

The provisions of the Farm Bureau policy pertinent to this issue are as follows:

Throughout this policy, "you" and "your" refer to:

1. The "named insured" shown in the Declarations; and
2. The spouse if a resident of the same household.

. . .

> **"Your covered auto"** means:
>
> 1. Any vehicle shown in the Declarations.
> 2. Any of the following types of vehicles on the date you become owner:
>   a. a private passenger auto; or
>   b. a pickup, panel truck or van, not used in any business or occupation other than farming or ranching.
>
> If the vehicle you acquire replaces one shown in the Declarations, it will have the same coverage as the vehicle it replaced.
>
> If the vehicle you acquire is in addition to any shown in the Declarations, it will have the broadest coverage we now provide for any vehicle shown in the Declarations, if you:
>
> a. acquire the vehicle during the policy period; and
> b. ask us to insure it:
>   (1) during the policy period; or
>   (2) within 30 days after you become the owner.

It is clear from the language of the policy that Howard falls within the definition of "you" because he was the spouse of Glenda, the named insured, and a resident of the same household. Therefore, since the Smiths did not list the 1971 Stationwagon in the Declarations nor did they ask Farm Bureau to insure it as an additional auto, the Stationwagon must qualify as a replacement vehicle to gain coverage as a covered auto.

Under the law of this State, the term "replacement vehicle" is a term of art in an insurance contract. A "replacement vehicle is one the ownership of which has been acquired after the issuance of the policy and during the policy period, and it must replace the car described in the policy, which must be disposed of or be incapable of further service at the time of the replacement." *State Farm Mutual Auto. Ins. Co. v. Shaffer*, 250 N.C. 45, 52, 108 S.E.2d 49, 54 (1959). *Accord Young v. State Farm Mutual Auto. Ins. Co.*, 18 N.C. App. 702, 198 S.E.2d 54, *cert. denied*, 284 N.C. 125, 199 S.E.2d 664 (1973).

In the case before this Court, the 1971 Ford Stationwagon was not acquired during the policy period. Howard purchased the Stationwagon in June of 1986. The policy period at issue, however,

began on 4 October 1986. We are not swayed by appellant's arguments that the Stationwagon was acquired during the policy period because the policy in force at the time of the accident was a renewal policy. In *Government Emp. Ins. Co. v. Reilly*, 51 Md. App. 208, 441 A.2d 1139 (1982), the Maryland Court of Appeals rejected the same argument for the following reasons:

> The unambiguous meaning of the "policy period" during which the vehicle is required to have been acquired as a condition of coverage is the policy period during which coverage is claimed. If that were not so, applying the reasoning of the court, an entire fleet of simultaneously acquired vehicles would be subject to coverage by describing one only, so long as the insured "intended *eventually*" to replace it, *e.g.*, in the eventuality that the owner incurred an accident while driving one of the undescribed vehicles.

Id. at 214-15, 441 A.2d at 1442. For the foregoing reasons, we find that the 1971 Ford Stationwagon was not a replacement vehicle, and, therefore, was not a covered auto under the Farm Bureau policy.

Exclusions

[2] Appellant next contends that Howard Smith is a covered person under the Farm Bureau policy and is not within any of the exclusions. Appellant asserts that since the Farm Bureau insuring agreement provides that it will pay damages "for which any **covered person** becomes legally responsible because of an auto accident," Farm Bureau is liable even if the 1971 Ford Stationwagon was not a covered vehicle. We disagree.

The exclusions under the policy provide, in relevant part,

> B. We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> 1. Any vehicle, other than **your covered auto**, which is:
>
>   a. owned by you; or
>
>   b. furnished for your regular use.
>
> 2. Any vehicle, other than **your covered auto**, which is:
>
>   a. owned by any **family member**; or
>
>   b. furnished for the regular use of any **family member**.

> However, this exclusion does not apply to your maintenance or use of any vehicle which is:
>
> a. owned by a **family member**; or
>
> b. furnished for the regular use of a **family member**.

In *Kruger v. State Farm Mut. Auto. Ins. Co.*, 102 N.C. App. 788, 403 S.E.2d 571 (1991), this Court considered a case similar to the instant case. William and Rebecca Grady were married on 23 November 1985. Rebecca owned a car which was covered by an insurance policy issued by State Farm. William also owned a car prior to marriage, and it was not listed as a covered vehicle on Rebecca's policy. William subsequently collided with a motorcyle and was sued by the driver of the motorcycle, which resulted in a judgment against William. The driver of the motorcyle then filed suit against State Farm, seeking to obtain a determination that State Farm was obligated to provide coverage for William. After deciding that William's car was not a covered auto under the State Farm policy, this Court examined the following State Farm policy exclusions:

> We do not provide Liability Coverage for the ownership, maintenance or use of:
>
> 1. Any vehicle, other than **your covered auto**, which is:
>
> a. owned by you; or
>
> b. furnished for your regular use.
>
> 2. Any vehicle, other than **your covered auto**, which is:
>
> a. owned by any **family member**; or
>
> b. furnished for the regular use of any **family member.**

Id. at 791, 403 S.E.2d at 573. The *Kruger* Court held that the policy exclusions applied and denied coverage for William. *Id.* at 792, 403 S.E.2d at 573.

We find that the decision in *Kruger* is applicable to the case at bar because the pertinent provisions of exclusion in the State Farm policy in *Kruger* and the Farm Bureau policy are identical. The exclusions contained in these policies are common and serve the important purpose of providing coverage for the infrequent or casual use of automobiles not listed in the Declarations, while excluding coverage for automobiles available for the regular use

of family members. *See Whaley v. Great American Ins. Co.*, 259 N.C. 545, 552, 131 S.E.2d 491, 496 (1963). If automobile insurance policies did not contain these limitations, an insured simply could list one vehicle in the Declarations and receive insurance coverage for any number of household vehicles. As such, we conclude that exclusion B. of the Farm Bureau policy applies to Howard Smith's 1971 Ford Stationwagon which was not a covered vehicle and was available for the regular use of Howard Smith.

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

The decision of the trial court is,

Affirmed.

Judges ARNOLD and LEWIS concur.

CATAWBA COUNTY HORSEMEN'S ASSOCIATION, INC. (FORMERLY CIRCLE "J" SADDLE CLUB, INC.), PLAINTIFF v. HAROLD E. DEAL, ELBERTA R. GRAGG TEAGUE AND OPTIMIST CLUB OF ST. STEPHENS, DEFENDANTS

No. 9125SC659

(Filed 4 August 1992)

Deeds § 20 (NCI4th)— inactive non-profit organization—transfer of land—validity of deed—authority to execute—hand drawn seal

The trial court properly granted summary judgment for plaintiff in an action challenging the transfer of real property by an inactive non-profit organization where defendant offered, in opposition to plaintiff's motion for summary judgment, an affidavit relating that inquiries had been made of a caretaker and others but that no one could recount who the officers of plaintiff were or had been. That evidence was not competent to overcome plaintiff's motion for summary judgment and did not set forth specific facts showing the existence of a genuine issue for trial. Additionally, summary judgment was proper on the ground that the deed purporting to transfer the property was void ab initio because the people executing the deed,

the last recorded president and secretary of plaintiff, were not president and secretary at the time the deed was executed. Moreover, the corporate seal, which was clearly hand drawn, did not fall within the definition and intended meaning of N.C.G.S. § 55A-26.2(c).

Am Jur 2d, Deeds §§ 105-108, 110-115.

APPEAL by defendant Optimist Club of St. Stephens from order entered 25 March 1991 by *Judge Forrest A. Ferrell* in CATAWBA County Superior Court. Heard in the Court of Appeals 16 April 1992.

Plaintiff owned a tract of land by deed recorded in February 1968 in Deed Book 907, page 662 in the Office of the Register of Deeds of Catawba County. The property was used primarily for horse shows. Defendant Optimist Club of St. Stephens has a clubhouse and several baseball fields which are used for its youth programs and which lie adjacent to the land which is the subject matter of this action. Desiring additional land for its baseball fields and youth programs, defendant inquired as to the status of plaintiff organization and the land.

Defendant presented the affidavit of Bill Dellinger who stated that Max Townsend, who lived on the land and acted as caretaker, told defendant that plaintiff organization was not active and that it was becoming difficult for him to look after the property. According to Dellinger, Townsend also stated that he did not know who the current officers of plaintiff were. In an attempt to ascertain the identity of the current officers and directors, defendant researched plaintiff's records in the Catawba County Register of Deeds and discovered the last officers of record were Harold E. Deal, President, and Elberta R. Gragg (now Elberta Gragg Teague), Secretary.

Plaintiff submitted the affidavits of Harold Deal and Elberta Gragg Teague, the deed which purportedly transferred the property from plaintiff to defendant Optimist Club, and the minutes of the meetings of plaintiff organization from 11 January 1972 through 15 May 1990. These minutes indicate that meetings were held every year except 1988 and a board of directors was duly elected. Neither Mr. Deal nor Ms. Teague had been an officer or director since 1972, and their respective affidavits stated that they ceased being involved in plaintiff organization in 1978. Plaintiff's minutes of meetings also showed Max Townsend as vice-president in 1975,

as president in all years from 1976 until 1990, and Betty Townsend as secretary of plaintiff organization. Defendant did not challenge these minutes.

On 26 August 1989 a special meeting of plaintiff was held whereby Mr. Deal and Ms. Teague were purportedly authorized to execute a deed transferring the property to defendant on plaintiff's behalf. The minutes of this meeting indicated it was attended by Harold Deal, Elberta Gragg Teague, Kenneth Huffman, and Joe E. Huffman. There was no evidence that either Kenneth or Joe Huffman had previously ever attended a meeting of plaintiff organization or held a position as an officer or director.

On 29 August 1989 the deed conveying the subject property to defendant was executed and recorded. The deed was signed by Harold Deal as president and acknowledged by Elberta Gragg as secretary. While the deed recites that a valuable consideration was paid by the grantee, there is no evidence any money was paid. Additionally, no notary was present when the deed was signed. On 5 September 1989 Max Townsend attended defendant's board of directors' meeting and released the keys to the buildings on the subject property to defendant. Defendant gave Mr. Townsend a one year lease to remain on the property at no rent if he would continue to act as caretaker. Over the course of the following year, defendant expended approximately $25,000 for improvements to the land.

After learning of the conveyance, members of plaintiff organization held a meeting on 15 May 1990, during which they elected new officers and filled four vacancies on the board of directors. Shortly thereafter a board of directors meeting was held whereby the new president, officers, and board of directors were authorized to secure the services of an attorney to represent them and to demand that the property be reconveyed to the corporation and returned to its condition prior to transfer.

This action was initiated on 30 August 1990 upon defendant's failure to reconvey and restore plaintiff's property. Defendant counterclaimed. Subsequently, plaintiff's motion for summary judgment was granted and defendant's counterclaim was dismissed. Defendant now appeals.

J. Carroll Abernethy, Jr. for plaintiff appellee.

Robbins and Hamby, P.A., by Donald T. Robbins and Dale L. Hamby, for defendant appellant.

WALKER, Judge.

Defendant argues: (1) the trial court committed reversible error in granting plaintiff's motion for summary judgment because a genuine issue of material fact existed; (2) the trial court did not view the pleadings, discovery, affidavits and other papers submitted in the light most favorable to defendant when granting plaintiff's motion for summary judgment; and (3) the trial court erred in granting plaintiff's motion for summary judgment because it did not consider G.S. 55A-26.2(c). We find it expedient to consolidate these issues and to address solely the question of whether the trial court properly granted plaintiff's motion for summary judgment.

Rule 56 of the North Carolina Rules of Civil Procedure provides that summary judgment will 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." The movant has the burden of establishing a lack of any triable fact. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992); *Pembee Mfg. Corp. v. Cape Fear Constr. Co.*, 313 N.C. 488, 329 S.E.2d 350 (1985).

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Roumillat v. Simplistic Enterprises, Inc. at 63, 414 S.E.2d at 342, *quoting Collingwood v. G. E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989). In order to satisfy this burden "an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial." G.S. 1A-1, Rule 56(e). However, the trial court must draw all inferences of fact against the movant and

in favor of the nonmovant. *Collingwood v. G. E. Real Estate Equities* at 66, 376 S.E.2d at 427.

In opposition to plaintiff's motion for summary judgment defendant proffered, in addition to Bill Dellinger's affidavit, a copy of the Articles of Amendment to plaintiff's charter naming Harold Deal as president and Elberta Gragg as secretary, and the minutes of the special meeting called by "President Harold Deal" on 26 August 1989 purporting to authorize the conveyance. The relevant portions of Mr. Dellinger's affidavit stated that he had made several inquiries of Max Townsend and unnamed former members of plaintiff organization but that no one could recount who the officers of plaintiff were or had been. This evidence was not competent to overcome plaintiff's motion for summary judgment, however, and did not set forth specific facts showing the existence of a genuine issue for trial pursuant to Rule 56. We therefore agree with the trial court that summary judgment was proper. *See Speck v. North Carolina Dairy Foundation, Inc.*, 311 N.C. 679, 319 S.E.2d 139 (1984); *Morgan v. Musselwhite*, 101 N.C.App. 390, 399 S.E.2d 151, *disc. review denied*, 329 N.C. 498, 407 S.E.2d 536 (1991).

Additionally, we find summary judgment to have been proper on the ground that the deed of 14 August 1989 was void *ab initio*. Defendant contends in its brief that plaintiff is a non-profit organization governed by Chapter 55A of the North Carolina General Statutes. Plaintiff does not dispute this assertion. The relevant statute, G.S. 55A-43, thereby provides:

> (b) [The] sale, lease, exchange or other disposition of all, or substantially all, the property and assets of a corporation may be made upon such terms and conditions and for such consideration. . . as may be authorized in the following manner:
>
> (1) Where there are members having voting rights, the board of directors shall adopt a resolution recommending such sale, lease, exchange or other disposition and directing that it be submitted to a vote at a meeting of members having voting rights.
>
> (2) Where there are no members, or no members having voting rights, a sale, lease exchange or other disposition of all, or substantially all, the property and assets of a corporation shall be authorized upon receiving the vote of a majority of the directors in office.

Defendant argues it duly acquired the subject property since Mr. Deal and Ms. Teague, the last recorded president and secretary of plaintiff, signed the deed transferring the property to defendant in their capacities as president and secretary after notice of a special meeting was given. We cannot agree with defendant and uphold the transaction as having been authorized by the board of directors or members of plaintiff organization since at the time the deed was executed Mr. Deal was not president and Ms. Teague was not secretary, as is evidenced by the corporate minutes. Thus, Mr. Deal and Ms. Teague signed the deed without the authorization necessary under G.S. 55A-43 to effectuate the conveyance of the corporate real property and the deed was void *ab initio*.

Insofar as a corporate seal was affixed to the deed, defendant argues it has established a *prima facie* case entitling it to a jury determination on the merits and summary judgment was improper. *M. B. Haynes Electric Corp. v. Justice Aero Co.*, 263 N.C. 437, 139 S.E.2d 682 (1965); *Staples v. Carter*, 5 N.C.App. 264, 168 S.E.2d 240 (1969). G.S. 55A-26.2 states in pertinent part:

> (c) Deeds . . . and other instruments purporting to be executed, heretofore or hereafter, by a corporation, foreign or domestic, and bearing a seal which purports to be the corporate seal, setting forth the name of the corporation engraved, lithographed, printed, stamped, impressed upon, or otherwise affixed to the instrument, are prima facie evidence that the seal is the duly adopted corporate seal of the corporation, that it has been affixed as such by a person duly authorized to do so, that such instrument was duly executed and signed by persons who were officers or agents of the corporation acting by authority duly given by the board of directors, that any such instrument is the act of the corporation, and shall be admissible in evidence without further proof of execution.

We cannot conclude that the corporate seal in question, which was clearly hand-drawn, falls within the definition and intended meaning of G.S. 55A-26.2(c). For the foregoing reasons, the trial court properly granted summary judgment for the plaintiff and dismissed defendant's counterclaim.

Affirmed.

Judges LEWIS and WYNN concur.

CANDY CALVIN BODY, INDIVIDUALLY AND AS GUARDIAN FOR CALEB BODY, PLAINTIFFS v. DEBRA VARNER AND RONALD G. BODY, DEFENDANTS

No. 9110SC693

(Filed 4 August 1992)

Evidence and Witnesses § 1017 (NCI4th)— automobile accident—adverse deposition testimony by party—binding

Summary judgment was properly granted for defendant Ronald Body in an automobile accident case where deposition testimony by plaintiff Candy Body unequivocally repudiated any claim for negligence against that defendant. While the general rule is that adverse deposition testimony is evidentiary in nature, and thus subject to contradiction by other testimony and other witnesses, this testimony is unequivocal and unambiguous in its repudiation of the complaint's second cause of action, amounts to a judicial admission, and is conclusively binding on plaintiffs. There is no legal basis to distinguish the case from *Cogdill v. Scates*, 290 N.C. 31.

Am Jur 2d, Evidence §§ 615, 616.

APPEAL by plaintiffs from summary judgment order dismissing the plaintiffs' claims for damages against defendant Body. This order was entered 18 April 1991 by *Judge Jack A. Thompson* in WAKE County Superior Court. Heard in the Court of Appeals 12 May 1992.

Chocklett & Currin, by Gregory P. Chocklett, for plaintiffs-appellants.

Law Offices of Robert E. Smith, by Robert E. Smith, for defendant-appellee Ronald G. Body.

LEWIS, Judge.

Plaintiff Candy Body brought this action in Wake County Superior Court in her individual capacity and as guardian for her minor son, Caleb, to recover damages resulting from an automobile accident. Defendant Ronald G. Body, Candy Body's husband, moved for and was granted a summary judgment in the negligence suit. Plaintiffs appeal the order of summary judgment.

On 14 February 1989, plaintiffs Candy and Caleb Body were passengers in a Toyota automobile driven by defendant Ronald Body. The Body vehicle was traveling westbound on Highway 97 heading towards Raleigh. The vehicle immediately ahead of the Body car and also traveling in a westerly direction on Highway 97 was a Dodge Caravan operated by defendant Debra Varner. Plaintiff Candy Body testified at her deposition that she first noticed the Varner vehicle when it was approximately a half a mile ahead, and she noticed the vehicle was moving at a "slow pace."

Plaintiff Body deposed that defendant Ronald Body momentarily slowed down behind the Varner vehicle, and "when she [Varner] did not accelerate, then that's when he [defendant Body] moved over to pass." However, as the Body automobile was passing in the left lane, Varner attempted to make a left turn into her driveway. The two vehicles collided.

Plaintiffs alleged negligence against the drivers of both vehicles. Plaintiffs allege that defendant Varner was negligent by, among other actions, turning without first signaling or otherwise giving warning of her intent to do so, in violation of N.C.G.S. § 20-154 (1989). Plaintiffs' second cause of action in their complaint alleges defendant Body negligently operated his vehicle when he: failed to keep a proper lookout and keep his vehicle under proper control; operated his vehicle at a speed greater than reasonable and prudent under the circumstances pursuant to N.C.G.S. § 20-141(a) (1989); operated his vehicle without due caution and circumspection and at a speed and in a manner so as to endanger persons and property in violation of N.C.G.S. § 20-140(b) (1989); failed to decrease the speed of his vehicle in order to avoid a collision in violation of N.C.G.S. § 20-141(m) (1989); passed a vehicle when it was not reasonably safe to do so, in violation of N.C.G.S. § 20-150 (1989); failed to operate his vehicle on the proper half of the roadway in violation of N.C.G.S. § 20-146 (1989); and generally failed to exercise due care in the operation of his vehicle.

Plaintiffs contend that the defendants were concurrently negligent and that the concurrent negligence was the direct and proximate cause of the collision and the injuries sustained therefrom. Upon his motion, the lower court granted summary judgment in favor of defendant Body.

As a threshold consideration, we note that in negligence cases, the issues " 'are ordinarily not susceptible of summary adjudication

because application of the prudent man test, or any other applicable standard of care, is generally for the jury.' " *McFetters v. McFetters*, 98 N.C. App. 187, 191, 390 S.E.2d 348, 350, *disc. rev. denied*, 327 N.C. 140, 394 S.E.2d 177 (1990) (quoting *Taylor v. Walker*, 320 N.C. 729, 734, 360 S.E.2d 796, 799 (1987)).

During cross-examination on deposition, defendant Body's attorney asked plaintiff Candy Body if there was "anything about Mr. Body's driving that caused you any concern?" She responded in the negative. She also testified that defendant Body's driving was "normal." Defendant Varner's attorney queried plaintiff Body, "What could Mr. Body have done to avoid the accident?," to which she answered:

> To be honest with you, I don't know. I mean once he moved into the passing lane he couldn't have gone back into the other lane because she was there turning. He couldn't have gone to the left because there was a ditch. We tried to stop, that was the only thing we could do. So in my opinion he did everything he could do to avoid it.

Later, plaintiff Body was asked by defendant Varner's attorney:

> What is the basis for your allegations in your lawsuit, that [defendant Body] failed to keep a proper lookout, that he . . . failed to keep his vehicle under proper control, that he operated at a greater speed than was reasonably prudent, that he operated his vehicle without due caution and circumspection and at a speed in the manner as to endanger personal property. Do you have any evidence to support those allegations?

Plaintiff Body responded, "No."

Defendant Varner's attorney also elicited the following testimony from plaintiff Body:

> Q. So under the circumstances is it your opinion that he [defendant Body] was driving too fast for the conditions as he was passing?
>
> A. No.
>
> Q. As far as you know was he keeping a proper lookout?
>
> A. Yes.

Q. Did he ever lose control of the car at any time before the accident?

A. No.

Q. Was the area where he was passing, was it a passing zone?

A. Yes, it was.

Q. Was it unsafe for him to pass at the time he started passing?

A. In my opinion, no. There were no oncoming cars. . . .

Q. Did he signal his intent to pass before he actually started his passing movement?

A. Yes.

Q. How did he do that?

A. He turned on the left turn signal.

Plaintiff Body even testified that had defendant Body blown his horn, "he would have . . . made some noise, but we would have still hit the van." When asked point-blank whether plaintiff Body had any evidence to support the allegations of negligence on the part of her husband, she answered simply, "No."

The question at issue is to what extent and under what circumstances is a party bound by her own adverse testimony. Defendant Body contends that the above statements completely absolve him of all liability in the accident. The trial court agreed, and we affirm. We hold that plaintiffs are bound by these statements voluntarily made and sworn to by plaintiff Body because the statements unequivocally repudiate any claim for negligence they held against that defendant and cited in their complaint's second cause of action.

This Court first addressed this question in a 1975 case, *Cogdill v. Scates*, 26 N.C. App. 382, 216 S.E.2d 428 (1975), *aff'd*, 290 N.C. 31, 224 S.E.2d 604 (1976). In *Cogdill*, plaintiff had been a passenger in a car driven by her husband. The car crashed head-on with another automobile, and plaintiff brought actions for damages against both drivers. In her verified complaint, plaintiff alleged various reasons why her husband had been negligent. However, at trial, plaintiff testified that her husband was " 'not negligent, in any way, as far as this accident was concerned.' " *Id.* at 384, 216 S.E.2d at 429.

Our Supreme Court, in affirming *Cogdill*, discussed three approaches courts have taken when deciding to what extent a party is bound by his own adverse testimony in the trial of his case. *Cogdill v. Scates*, 290 N.C. 31, 41-42, 224 S.E.2d 604, 610 (1976). The first position treats adverse testimony by a party as essentially an evidentiary admission. Under this view, the testimony, once elicited, is subject to contradiction by other testimony and other witnesses. *Id.* at 41, 224 S.E.2d at 610 (citing McCormick, *Handbook of the Law of Evidence* § 266 (2d ed. 1972)).

The second basic approach treats these statements as " 'not conclusive against contradiction except when he testifies unequivocally to matters in his peculiar knowledge.' " *Id.* The third approach treats the adverse testimony as a judicial admission, conclusive and binding against the party. *Id.*

The Court in *Cogdill* did not adopt any of the approaches. Instead, given the facts of the case, the court found it dispositive that plaintiff's testimony was "deliberate, unequivocal and repeated. . . . Her statements were diametrically opposed to the essential allegations of her complaint and destroyed the theory upon which she had brought her action for damages." *Id.* at 431, 224 S.E.2d at 611. The directed verdict was affirmed in favor of the defendant.

In *Woods v. Smith*, 297 N.C. 363, 255 S.E.2d 174 (1979), the Supreme Court reversed the summary judgment because it held that deposition testimony of the plaintiff, which gave some indication that defendant was not negligent, was distinguishable from the trial testimony in *Cogdill*. The Court found that plaintiff's testimony in *Woods* demonstrated merely a "continuing *uncertainty*" as to defendant's liability in the negligence action, *id.* at 372, 255 S.E.2d at 180 (emphasis original), and that plaintiff's deposition statements were "equivocal, uncertain, and inconsistent, and [the] narrow holding in *Cogdill* does not apply." *Id.* at 373, 255 S.E.2d at 181.

The court went on to adopt the first approach articulated in *Cogdill*.

> Under this approach a party's statements, given in a deposition or at trial of the case, are to be treated as evidential admissions rather than as judicial admissions. . . .
>
> . . . .

> Thus, when a party gives adverse testimony in a deposition or at trial, that testimony should not, in most instances, be conclusively binding on him. . . . Two exceptions to this general rule should be noted, however. First, when a party gives unequivocal, adverse testimony under factual circumstances such as were present in *Cogdill*, his statements should be treated as binding judicial admissions rather than as evidential admissions.

Id. at 373-74, 255 S.E.2d at 181. The second exception noted by the Court is not applicable to the case at bar.

While recognizing the general rule of adverse testimony as being evidentiary in nature, we hold that, under the facts of this case, the application of the first exception, as stated above, is clearly appropriate. Upon careful review of plaintiff Candy Body's deposition testimony, we conclude that her statements unequivocally repudiated the allegations raised in their complaint as concerns defendant Body.

We find this testimony unequivocal and unambiguous in its repudiation of the complaint's second cause of action. We find no legal basis to distinguish this case from *Cogdill*. These statements amounted to a judicial admission and are conclusively binding on plaintiffs. We affirm the award of summary judgment in favor of defendant Body.

Affirmed.

Judges WYNN and WALKER concur.

THOMCO REALTY, INC., PLAINTIFF v. T. ROY HELMS AND MARGIE T. HELMS, DEFENDANTS

No. 9120DC653

(Filed 4 August 1992)

Brokers and Factors § 47 (NCI4th)— real estate commission—existence of contract—summary judgment for plaintiff

The trial court properly granted summary judgment for plaintiff realty company in an action to recover a sales commis-

sion where defendants argued that a handwritten document, executed after the original listing expired, was patently ambiguous and created no contractual obligation. The agreement clearly provided that plaintiff would receive a commission of ten percent of the sale price; the agreement specifies the time of payment; and mutual assent is evidenced by the signatures of defendants. Any ambiguities were only latent and extrinsic evidence was admissible to explain and clarify its terms. The extrinsic evidence admitted establishes that the loan referred to in the agreement was the financing arrangement of the sales price and that the parties agreed that plaintiff was to receive a ten percent real estate sales commission in the amount of $6,500.

Am Jur 2d, Brokers §§ 248, 251-253.

APPEAL by defendants from judgment entered 15 April 1991 by *Judge Kenneth W. Honeycutt* in UNION County District Court. Heard in the Court of Appeals 16 April 1992.

Plaintiff, a realty company, brought this action against defendants to recover a real estate sales commission in the amount of $6,500. The pleadings, affidavits and depositions before the trial court tend to show that on 31 July 1984, J. Hoyle Helms (now deceased, husband of defendant Margie T. Helms), and defendant T. Roy Helms signed an exclusive listing contract with plaintiff. The terms of this agreement provided that plaintiff had the exclusive right to sell defendants' real property located in Union County and if plaintiff procured a buyer, it would receive a ten percent commission from the sale. This listing contract ultimately expired on 30 June 1985; however, defendants expressed their desire for plaintiff to continue searching for a buyer.

During late 1984 or early 1985, William M. Ivey (Ivey) expressed an interest in purchasing the property. He signed a contract to purchase the property, however, he was unable to obtain the requisite financing. During late summer of 1985, Mr. Ivey and defendants came to an agreement on the purchase price of $65,000 for the property and defendants took two $32,500 promissory notes in payment thereof.

On 3 September 1985, Ivey and defendants signed a handwritten document which plaintiff contends was a contract whereby

defendants agreed to pay plaintiff a real estate sales commission in the amount of $6,500 when the promissory notes were paid off.

In August 1988, pursuant to a demand made, the two promissory notes were paid in full. After learning of the discharge of the promissory notes, plaintiff demanded payment of their real estate sales commission from defendants. Defendants refused to pay and plaintiff instituted the present action. After reviewing the pleadings, affidavits and depositions, the trial court granted plaintiff's motion for summary judgment. By terms of this judgment, defendants were ordered to pay $6,500 plus interest.

Perry and Bundy, by H. Ligon Bundy, for plaintiff appellee.

Cecil M. Curtis for defendant appellants.

WALKER, Judge.

Defendants now argue that the handwritten document dated 3 September 1985 was patently ambiguous, creating no contractual relations between plaintiff and defendant. Therefore, defendants contend the trial court erred when it considered materials from affidavits and depositions to explain any ambiguities and entered summary judgment for plaintiff pursuant to the terms of this document. We disagree and uphold the decision of the trial court.

Summary judgment should be rendered only when the pleadings, depositions, answers to interrogatories, admissions, and affidavits disclose no genuine issue of material fact entitling the moving party to judgment as a matter of law. *Town of West Jefferson v. Edwards*, 74 N.C.App. 377, 329 S.E.2d 407 (1985). If an issue of material fact exists, then the trial court should not grant summary judgment. The party moving for summary judgment has the burden of establishing the absence of any triable issue of fact. *Brawley v. Brawley*, 87 N.C.App. 545, 361 S.E.2d 759 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988).

In the present case, the document in controversy provides:

9-3-85

Pay off entire loan 5 yrs from date (9-3-90).

Thomco Realty to receive 10% commission of $6,500. Payable 10% of payments received by Mr. James Hoyle Helms & Mr.

T. Roy Helms. When loan is re-financed & paid off the total balance will be due.

S/J. Hoyle Helms Seal

S/Margie T. Helms Seal

S/T. Roy Helms Seal

S/William M. Ivey Seal

Witness: S/Anne O. Helms

1st Payment of $500 due 11-1-85 to be made payable as follows: T. Roy Helms $225.00; James Hoyle Helms $225.00; Thomco Realty $50.00. All payments will be divided same way.

Defendants contend that this document is not a contract because the terms are too vague and the document fails to show any consideration given by plaintiff.

The law generally does not dictate the terms of a contract. The law does require that before a valid and enforceable contract can exist, there must be mutual agreement between the parties upon the terms of the contract. *Brawley v. Brawley*, 87 N.C.App. 545, 361 S.E.2d 759 (1987), *disc. review denied*, 321 N.C. 471, 364 S.E.2d 918 (1988). This requirement means that the terms of the parties' agreement must be definite or capable of being made definite. However, a written agreement will not be held unenforceable because of uncertainty if the intent of the parties can be determined from the language used, construed with reference to the circumstances surrounding the making of the contract thereby reducing the terms to a reasonable certainty. *Id.* If only a latent ambiguity exists, then such evidence as preliminary negotiations and surrounding circumstances may be considered in order to clarify the terms and determine what the parties intended. *Emerson v. Carras*, 33 N.C.App. 91, 234 S.E.2d 642 (1977). Latent ambiguities arise when there is confusion as to how to apply the words of an instrument to the object or subject which they describe. *Id.* While an instrument containing a latent ambiguity is still enforceable (if extrinsic evidence exists to clarify the ambiguity), a patently ambiguous instrument is void. *Williamson v. Miller*, 231 N.C. 722, 58 S.E.2d 743 (1950). Patent ambiguities arise when "the uncertainty as to the meaning of a contract is so great as to prevent the giving

of any legal remedy, direct or indirect." *Id.* at 728, 58 S.E.2d at 747. These severe defects cannot be cured by matters outside the instrument. *Brooks v. Hackney*, 329 N.C. 166, 404 S.E.2d 854 (1991).

Here, after the listing contract expired, Mr. Ivey agreed on 3 September 1985 to purchase the property for $65,000 and the parties executed the handwritten document which is in controversy. In reviewing this document, we conclude the parties entered into an agreement for the payment of a commission owed to plaintiff. This agreement, as did the prior listing contract, clearly provided that plaintiff would receive a commission in the amount of ten percent of the sale price. The plaintiff's commission is in the amount of $6,500 which is ten percent of the sale price of $65,000. Contrary to defendants' contentions, the fact that plaintiff was involved in the sale of the property to Ivey and is now owed a "commission" establishes that plaintiff is entitled to compensation. The agreement also specifies the time of payment: "when loan is re-financed & paid off the total balance will be due." Furthermore, an essential contractual term, mutual assent, is evidenced by the signatures of defendants. As our discussion illustrates, the agreement contained all relevant contractual terms. Therefore any ambiguities in this contract were only latent in nature and extrinsic evidence was admissible to explain and clarify the contract's terms.

The trial court considered several affidavits and depositions which plaintiff offered in support of its motion for summary judgment. Defendants offered no affidavits or anything else in response to plaintiff's motion or in support of their motion for summary judgment. The burden of establishing a lack of any triable issue is characterized as follows:

> The movant may meet this burden by proving that an essential element of the opposing party's claim is nonexistent, or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim or cannot surmount an affirmative defense which would bar the claim.

Roumillat v. Simplistic Enterprises, Inc., 331 N.C. 57, 63, 414 S.E.2d 339, 342 (1992), *quoting Collingwood v. G. E. Real Estate Equities, Inc.*, 324 N.C. 63, 66, 376 S.E.2d 425, 427 (1989). Plaintiff has met its burden under *Roumillat*. While the loan referred to in the handwritten contract is not defined, the extrinsic evidence admitted clarifies this point. As the affidavits and depositions show, the

$65,000 purchase price was financed by the defendants who took two $32,500 promissory notes in payment. Clearly the term "loan" in the handwritten contract refers to this financing arrangement of the $65,000 sales price. The extrinsic evidence admitted also establishes the parties agreed plaintiff was to receive a ten percent real estate sales commission in the amount of $6,500. Of particular relevance is the following excerpt from the deposition of defendant T. Roy Helms:

> Q. When you signed this document that's marked Plaintiff's Exhibit Number 2 [the document in controversy], was it your understanding that Thomco Realty was to receive a commission of ten percent of what you received for helping you sell the property?
>
> . . . .
>
> A. Yeah.
>
> Q. That was your understanding?
>
> A. Yeah.

The 3 September 1985 handwritten agreement coupled with the properly admitted extrinsic evidence discloses that plaintiff is owed a real estate sales commission in the amount of $6,500. Accordingly, we hold that plaintiff has carried its burden of establishing the absence of any triable issue of fact and therefore the judgment of the trial court granting plaintiff's motion for summary judgment is

Affirmed.

Judges LEWIS and WYNN concur.

PAUL RAY WHITESIDE, PLAINTIFF v. LAWYERS SURETY CORPORATION, DEFENDANT

No. 9112SC454

(Filed 4 August 1992)

Principal and Surety § 2 (NCI4th)— surety bond—underlying judgment—identity of principal—issue of fact—summary judgment improper

The trial court erred by granting summary judgment for plaintiff in an action on a surety bond where plaintiff obtained a judgment against "Terry West d/b/a Jets Auto Sales" and the motor vehicle dealer surety bond was issued to "Jets Car Care Center, Inc. DBA Jets Auto Sales." Whether the corporation covered by the surety bond is the same as the entity which sold the car to plaintiff and which plaintiff originally sued was a disputed issue of fact.

Am Jur 2d, Agency § 359.

Imputation of knowledge of agent acting for both parties to transaction. 4 ALR3d 224.

APPEAL by defendant from a judgment entered 28 March 1991 by *Judge Coy E. Brewer, Jr.* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 11 March 1992.

In August 1989 plaintiff purchased a 1978 Datsun 280Z from Jets Auto Sales (Jets Auto). At that time a salesman for Jets Auto told plaintiff that the car was in great condition, needed only minor repairs, and had mileage of 56,307 miles. Plaintiff paid $2000.00 for the car plus expenses for taxes, tags, and insurance. By November 1989 plaintiff had discovered that in fact the car was in need of extensive repairs and had actual mileage in excess of 164,642 miles.

On 29 March 1990, plaintiff filed suit against Terry West d/b/a Jets Auto Sales in Cumberland County District Court. In his complaint, plaintiff sought actual damages in the amount of $3,286.20, treble damages pursuant to N.C. Gen. Stat. § 75-16, and attorney fees pursuant to N.C. Gen. Stat. § 75-16.1. Terry West d/b/a Jets Auto Sales did not respond to plaintiff's complaint. On 26 June 1990, judgment was entered against Jets Auto Sales. Plaintiff was awarded $3,286.20 in actual damages, $9,858.60 in treble damages,

and $3,286.20 in attorney fees. Jets Auto Sales has refused to pay the judgment.

Defendant in the present case is an insurance corporation which has been licensed to do business in North Carolina pursuant to N.C. Gen. Stat. § 58-16-1 (former section 58-149 recodified in 1989). Jets Car Care Center d/b/a Jets Auto Sales obtained a surety bond from defendant pursuant to the provisions set out in N.C. Gen. Stat. § 20-288(e). In September 1990 plaintiff filed a complaint against defendant for recovery under a surety contract made between Terry West d/b/a Jets Auto Sales and defendant. Defendant filed a motion to dismiss. Plaintiff filed a motion for summary judgment. From the trial court's grant of plaintiff's motion and denial of defendant's motion, defendant appeals.

Boose & McSwain, by Michael C. Boose, for plaintiff-appellee.

Moore & Van Allen, by E. K. Powe and William E. Freeman; and Blackwell, Strickland & Luedeke, by Jeffrey R. Luedeke, for defendant-appellant.

ORR, Judge.

The first issue on appeal is whether summary judgment in favor of plaintiff was properly granted. Defendant contends that summary judgment was improper because the evidence presented did not support the trial court's finding and conclusion that the entity against whom the default judgment was obtained in district court, namely Terry West d/b/a Jets Auto Sales, is the same entity which obtained a surety bond from defendant. Defendant contends that the surety contract it issued was to Jets Car Care Center, Inc., and because Jets Car Care Center, Inc. was not named in the underlying lawsuit the trial court lacked jurisdiction to enter summary judgment in plaintiff's favor based on the underlying judgment.

Defendant concedes that it entered into a motor vehicle dealer bond with Jets Car Care Center, Inc. d/b/a Jets Auto Sales and that Jets Car Care Center, Inc. was a North Carolina Corporation engaged in business in Cumberland County, North Carolina. The record reveals that an assumed name certificate showing that Jets Car Care Center, Inc. operated under the assumed name of Jets Auto Sales was duly recorded with the Cumberland County Register

of Deeds. The surety bond issued to Jets Car Care, Inc. DBA Jets Auto Sales contains the following terms:

> [Lawyers Surety Corporation] as Surety, are [sic] held and firmly bound unto the people of the State of North Carolina to indemnify any person who may be aggrieved by fraud, fraudulent representation or violation by said Principal, salesmen, or representatives acting for such Principal within the scope of the employment of such salesmen or representatives of any of the provisions of Article 12, Chapter 20 of the North Carolina General Statutes. . . .

We find no requirement in the bond that a separate judgment must first be obtained against the principal in order for the surety's obligation to arise. Therefore, in our view, the underlying district court judgment does not raise a jurisdictional issue nor does it control the outcome of this matter. Rather what appears from the record is that there exists a genuine issue of material fact as to whether a salesman or representative acting for the principal defrauded the plaintiff. Despite the trial court's finding to the contrary, whether Jets Car Care Center, Inc. and Jets Auto Sales are the same legal entity and whether a representative or salesmen of the principal on the bond defrauded plaintiff are disputed issues of material fact.

The summary judgment order entered in this case sets out findings of fact and, on the basis of those findings, makes conclusions of law. We have repeatedly stated that it is not a part of the function of the court on a motion for summary judgment to make findings of fact and conclusions of law. *Capps v. City of Raleigh*, 35 N.C. App. 290, 241 S.E.2d 527 (1978). ". . . [F]inding the facts in a judgment entered on a motion for summary judgment presupposes that facts are in dispute." *Id.* at 292, 241 S.E.2d at 528. "If findings of fact are necessary to resolve an issue as to a material fact, summary judgment is improper." *Wachovia Bank & Trust Co. v. Peace Broadcasting Corp.*, 32 N.C. App. 655, 233 S.E.2d 687, *disc. review denied*, 292 N.C. 734, 235 S.E.2d 788 (1977), *citing Leasing, Inc. v. Dan-Cleve Corp.*, 31 N.C. App. 634, 230 S.E.2d 559 (1976). However, when the stated findings constitute a summary of material facts not at issue and which form the basis of the trial court's judgment or which the the trial court thinks justify entry of judgment, then their inclusion does not constitute error. *Id.* at 658, 233 S.E.2d at 689.

Our review of the findings reveals that rather than constituting a summary of material facts not at issue, the findings attempt to resolve disputed issues of material fact. In order to enter summary judgment against defendant based on the underlying district court judgment, the trial court found that a surety contract was made between Jets Auto Sales and defendant. However, defendant has consistently denied that it executed a surety contract with "Terry West d/b/a Jets Auto Sales"—the defendant in the underlying action. Plaintiff's request for admission that defendant had a surety bond with Terry West d/b/a Jets Auto Sales, Inc. was specifically denied by defendant. Likewise, in response to plaintiff's amended request for admission, defendant denied the existence of a surety bond with Jets Auto Sales, Inc. and that Terry West was an agent and employee of Jets Auto Sales, Inc. The actual motor vehicle dealer surety bond is issued to "Jets Car Care Center, Inc. DBA Jets Auto Sales" as principal. Whether the corporation covered by the surety bond is the same as the entity which sold the car to plaintiff and which plaintiff originally sued in district court was obviously a disputed fact. Furthermore, whether or not the corporate defendant is the same as the entity which sold the car to plaintiff is clearly an issue of material fact; therefore, it was error to include a finding on that issue in the judgment.

In determining whether summary judgment is appropriate, the court's function is not to decide the truth of issues raised by pleadings and other materials, but to determine whether any genuine issue of material fact exists that requires adjudication. *Avriett v. Avriett*, 88 N.C. App. 506, 363 S.E.2d 875, *aff'd*, 322 N.C. 468, 368 S.E.2d 377 (1988). Summary judgment may not be used to resolve disputed factual issues which are material to the disposition of the action. *Robertson v. Hartman*, 90 N.C. App. 250, 368 S.E.2d 199 (1988).

Under the terms of the bond, plaintiff is required to show that the principal or a salesman or representative of the principal "[practiced] fraud . . . on him or made a fraudulent representation to him . . ." and that plaintiff was damaged. If, upon further adjudication, plaintiff prevails in proving that Jets Car Care Center, Inc. d/b/a Jets Auto Sales, as principal, or a salesman or representative of the bonded entity committed fraud against the plaintiff, then the defendant surety would be responsible for damages.

We therefore reverse the grant of summary judgment and remand this case for determination of the issues delineated above.

Reversed and remanded.

Chief Judge HEDRICK and Judge WALKER concur.

HARLEYSVILLE INSURANCE COMPANY v. WILLIAM POOLE AND BARBARA POOLE

No. 9118SC652

(Filed 4 August 1992)

Insurance § 514 (NCI4th)— uninsured motorist insurance—intrapolicy stacking prohibited by policy

Intrapolicy stacking of uninsured motorist coverages is not required by N.C.G.S. § 20-279.21(b)(3). Therefore, intrapolicy stacking of uninsured motorist coverages on two automobiles covered by insureds' policy was controlled by the language of the insurance policy and was prohibited where the policy provided that liability was limited to $50,000 per person and $100,000 per accident "regardless of the number of . . . [v]ehicles or premiums shown in the Declarations."

Am Jur 2d, Automobile Insurance § 326.

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

APPEAL by plaintiff from judgment entered 26 April 1991 in GUILFORD County Superior Court by *Judge Howard R. Greeson, Jr.* Heard in the Court of Appeals 15 April 1992.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and Douglas E. Wright, for plaintiff-appellant.

Bretzmann, Bruner & Aldridge, by Raymond A. Bretzmann, for defendant-appellants.

GREENE, Judge.

Harleysville Insurance Company (Insurance Company) appeals from the entry of summary judgment for William Poole and Barbara Poole.

On 22 February 1990, Insurance Company issued to William and Barbara Poole (Insureds) a personal automobile policy. The policy of insurance insured two vehicles, a 1986 Ford and a 1981 Chevrolet, and on the Declaration page of the policy provided uninsured (UM) and underinsured (UIM) coverage of $50,000 for each person and $100,000 for each accident. There was a $32.00 premium charged for the UM/UIM coverage, or $16.00 for each vehicle. The policy of insurance contained in the UM/UIM section of the policy included the following "Limit of Liability" provision:

> 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**, including damages for care, loss of services or death, sustained by any one person in any one auto accident.
>
> Subject to this limit for each person, the limit of bodily injury liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of liability for all damages for **bodily injury** resulting from any one accident. The limit of property damage liability shown in the Declarations for each accident for Uninsured Motorists Coverage is our maximum limit of liability or all damages to all property resulting from any one accident. This is the most we will pay for **bodily injury** and **property damage** regardless of the number of:
>
> 1. **Insureds**;
> 2. Claims made;
> 3. Vehicles or premiums shown in the Declarations; or
> 4. Vehicles involved in the accident.

On 21 June 1990, while the above policy was in effect, Barbara Poole was operating the 1986 Ford automobile which was occupied by William Poole. The Ford was involved in an accident with a vehicle operated by Donna K. English. Insureds contend that the accident was the fault of Donna English and that her vehicle was

uninsured as defined by N.C.G.S. § 20-279.21(b)(3). Insureds filed a claim with Insurance Company for injuries they sustained in the accident, claiming that they were entitled to "stack" the uninsured coverage for a total limit of liability in the amount of $100,000 per person and $200,000 per accident.

Insurance Company filed a complaint seeking a declaratory judgment that "stacking" of the uninsured coverages was not required by statute and in fact prohibited by the language of the policy. Both parties moved for summary judgment and the trial court granted summary judgment for Insureds ordering that "the policy of insurance . . . affords [Insureds] uninsured motorist coverage in the amount of One Hundred Thousand Dollars ($100,000)."

The issues presented are whether (I) the statutes in North Carolina require intrapolicy "stacking" of uninsured coverage; and (II) if not, whether the policy of insurance permitted such stacking.

I

N.C.G.S. § 20-279.21(b)(3), the North Carolina statute governing uninsured motorists insurance, is silent on the issue of stacking, either interpolicy or intrapolicy. *See* N.C.G.S. § 20-279.21(b)(3) (1991). Furthermore, the stacking language of N.C.G.S. § 20-279.21(b)(4) is not incorporated into N.C.G.S. § 20-279.21(b)(3). *See id.* Our courts have construed N.C.G.S. § 20-279.21(b)(3) as requiring interpolicy stacking "where [uninsured] coverage is provided by two or more policies, each providing the mandatory minimum coverage." *Government Employees Ins. Co. v. Herndon*, 79 N.C. App. 365, 367, 339 S.E.2d 472, 473 (1986); *Moore v. Hartford Fire Ins. Co. Group*, 270 N.C. 532, 543, 155 S.E.2d 128, 136 (1967). To the extent the coverage provided by multiple liability policies "exceeds the mandatory minimum coverage required by the statute," stacking is governed by the insurance contract. *Government*, 79 N.C. App. at 367, 339 S.E.2d at 473. In *Hamilton v. Travelers Indem. Co.*, 77 N.C. App. 318, 324, 335 S.E.2d 228, 232 (1985), this Court held that intrapolicy stacking is not required by N.C.G.S. § 20-279.21(b)(3) and is therefore controlled by unambiguous policy language.

Insureds argue that *Hamilton* "was incorrectly decided and was implicitly overruled" by *Sutton v. Aetna Insurance*, 325 N.C. 259, 382 S.E.2d 759 (1989). We disagree. *Sutton* held that N.C.G.S. § 20-279.21(b)(4) entitled Sherry S. Sutton, a named insured, to

stack underinsured motorist coverages, both interpolicy and intrapolicy, and that policy language to the contrary was invalid. *Id.* at 265, 382 S.E.2d at 763. *Sutton* did not explicitly or implicitly overrule either *Moore*, *Government*, or *Hamilton*. Furthermore, we read the holding in *Sutton* as applicable only to underinsured coverages. We do not read *Sutton* as holding that N.C.G.S. § 20-279.21(b)(3) requires the stacking of uninsured motorist coverages. Accordingly, *Hamilton* remains valid law binding on this Court, and intrapolicy stacking of uninsured motorist coverage is controlled by the language of the policy of insurance.

II

The policy of insurance issued to Insureds is unambiguous stating that the limit of liability is that reflected on the Declarations page "regardless of the number of . . . [v]ehicles or premiums shown in the Declarations." The limits of liability shown on the Declarations page is $50,000 for each person and $100,000 for each accident. Accordingly, the order of the trial court must be reversed and remanded for entry of summary judgment for Insurance Company.

Reversed and remanded.

Judges PARKER and COZORT concur.

STATE OF NORTH CAROLINA v. MARCUS CORBET HELMS

No. 9126SC1241

(Filed 4 August 1992)

1. Larceny § 7.2 (NCI3d) — stolen pay telephone — value — evidence sufficient

The trial court correctly denied defendant's motion to dismiss a charge of felonious larceny where defendant was charged with stealing a public pay telephone containing $162.20 and a wall unit enclosure and there was no evidence of market value, but evidence was presented that the telephone and enclosure were not common articles having a market value and that the replacement value exceeded $1500. A jury may

infer the market value of stolen property from evidence of replacement cost where the stolen property is not commonly traded and has no ascertainable market value.

Am Jur 2d, Larceny §§ 159, 174.

2. **Larceny § 8.3 (NCI3d)— stolen pay telephone—value—instructions**

The trial court did not err in a prosecution for felonious larceny of a public telephone by refusing defendant's request that the jury be instructed that the worth of the stolen property be determined by reference to its fair market value where the testimony at trial disclosed that this was not a common article susceptible to market valuation and the jury was instructed on non-felonious larceny.

Am Jur 2d, Larceny §§ 159, 174.

APPEAL by defendant from judgment entered 16 July 1991 by *Judge Marvin K. Gray* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 20 April 1992.

Defendant was charged with felonious larceny of a pay telephone, the property of Southern Bell, such property having a value in excess of $400, in violation of G.S. 14-72(a). Evidence presented at trial tends to show the following: On 14 January 1991 at about 5:15 a.m., Officer J. T. Taylor of the Charlotte Police Department saw defendant standing next to the open trunk of a car parked at a Fast Fare convenience store. Defendant, who was wearing gloves, saw Taylor and immediately slammed the trunk, jumped into the car, and drove away. Taylor pursued defendant for about three miles before losing him. Defendant was later apprehended and a search of his car revealed a public pay telephone and a wall unit enclosure. The telephone contained $165.20.

Dean Demmery, Assistant Manager of Public Communications for Southern Bell, testified that the cost of replacing the telephone and enclosure would be $1,542. He further testified that he could not state a market value of the stolen property. Robert Mohr, Staff Manager of the Claims Department at Southern Bell, testified that he was not aware of a market or market value for the stolen property.

The trial court instructed the jury on both felonious and nonfelonious larceny. The jury found defendant guilty of felonious larceny and he was sentenced to eight years in prison.

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

Public Defender Isabel Scott Day, by Assistant Public Defender Ron D. Everhart, for defendant appellant.

WALKER, Judge.

[1] In his first assignment of error, defendant argues the trial court erred by denying his motion to dismiss the charge of felonious larceny. Defendant contends that the State produced insufficient evidence that the stolen property had a fair market value over $400. We disagree.

In reviewing the denial of a motion to dismiss, the evidence presented at trial must be examined in the light most favorable to the State to determine if there is substantial evidence of every essential element of the offense. *State v. McKinnon*, 306 N.C. 288, 293 S.E.2d 118 (1982). Substantial evidence is evidence that a reasonable person would consider sufficient to support the conclusion that the essential element exists. *Id.*

An essential element of felonious larceny is that the property stolen is worth more than $400. G.S. 14-72(a). In proving the value of stolen property, evidence of "market value" is generally utilized. *State v. Dees*, 14 N.C.App. 110, 187 S.E.2d 433 (1972). "[I]n the case of common articles having market value, the courts . . . have declared the proper criterion to be the price which the subject of the larceny would bring in open market." *Id.* at 112, 187 S.E.2d at 435, *quoting* 50 Am. Jur. 2d *Larceny* Sec. 45, pp. 209-211. Our Supreme Court has indicated that replacement cost can be used as evidence of the market value of stolen property. In *State v. Morris*, 318 N.C. 643, 350 S.E.2d 91 (1986), the Court addressed replacement cost evidence, along with evidence of the age and condition of stolen tools, where there was no evidence of market value. "We believe that the jury could have inferred from this evidence that the fair market value of the tools was less than their replacement cost, and also that it might well have concluded that this value was not more than $400." *Id.* at 646, 350 S.E.2d at 93.

In light of the holding in *Morris*, we hold that where stolen property is not commonly traded and has no ascertainable market value, a jury may infer the market value of the stolen property from evidence of the replacement cost. In the present case, there was no evidence of "market value" of the stolen property with the exception of the $165.20 contained in the telephone. However, evidence was presented that the telephone and enclosure were not common articles having a market value and that the replacement cost of the items exceeded $1,500. This evidence, along with evidence of the $165.20 contained in the telephone, was sufficient to allow the jury to determine that the value of the stolen property was greater than $400.

[2] In his last assignment of error, defendant contends that the trial court erred when it refused his request that the jury be instructed that the worth of the stolen property be determined by reference to its "fair market value." Instead of giving the requested instruction, the trial court instructed that an essential element of felonious larceny is that "the property was worth more than $400." When instructing the jury, the trial court has the duty to declare and explain the law arising on the evidence. *State v. Corn*, 307 N.C. 79, 296 S.E.2d 261 (1982).

Defendant is correct that the term "value" as used in G.S. 14-72(a) refers to fair market value, not replacement cost. *State v. Morris, supra.* Here, however, the jury was required to determine if the value of a used pay telephone (which contained $165.20) exceeded $400. Except for the money in the telephone, the testimony at trial disclosed that this was not a common article which was susceptible to market valuation. Other jurisdictions have held that where the stolen property has a unique or restricted use and there is no ascertainable market value, replacement cost may be considered in determining value. *See State v. Day*, 293 A.2d 331 (Maine 1972); *People v. Renfro*, 250 Cal.App.2d 921, 58 Cal. Rptr. 832 (1967); *State v. Randle*, 2 Ariz.App. 569, 410 P.2d 687 (1966); *Clark v. State*, 149 Tex.Crim. 537, 197 S.W.2d 111 (1946). Since the telephone was not susceptible to market valuation and because the jury also received an instruction on non-felonious larceny, we find that the instruction given was proper.

No error.

Chief Judge HEDRICK and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. ARTHUR MONROE STALLINGS

No. 9118SC29

(Filed 18 August 1992)

1. **Indictment, Information, and Criminal Pleadings § 42 (NCI4th) — oral statements of prosecutor — not bill of particulars — no fatal variance — evidence not outside bill of particulars**

There was no bill of particulars in a sexual offense case because statements made by the prosecutor during a hearing on defendant's motion for a bill of particulars did not constitute a bill of particulars and the trial court denied the motion. Therefore, there was no merit to defendant's contention that there was a fatal variance between the court's charge and the bill of particulars and that evidence of cunnilingus was inadmissible as outside the scope of the bill of particulars.

Am Jur 2d, Indictments and Informations § 170.

2. **Indictment, Information, and Criminal Pleadings § 43 (NCI4th) — denial of bill of particulars**

The trial court did not err in the denial of defendant's motion for a bill of particulars in a sexual offense case where there was no showing that lack of the information requested by defendant impaired his defense.

Am Jur 2d, Indictments and Informations §§ 159-162.

Right of accused to bill of particulars. 5 ALR2d 444.

3. **Evidence and Witnesses § 2142 (NCI4th) — lay witness — consistency of victim's statements**

Testimony by a child victim advocate that a child rape and sexual offense victim had never told her anything different from what she told on the witness stand was admissible on the issue of the victim's credibility and to corroborate the victim's testimony where the witness first testified about the statements the victim had made to her prior to trial.

Am Jur 2d, Rape § 68.

4. **Evidence and Witnesses § 2341 (NCI4th)— child sexual abuse accommodation syndrome—admission for substantive purposes—harmless error**

The trial court erred in permitting a pediatrician to testify that a rape and sexual offense victim was suffering from child sexual abuse accommodation syndrome without limiting the jury's consideration of such testimony to corroborative purposes. However, the admission of this testimony for substantive purposes was not prejudicial error in light of the overwhelming evidence of defendant's guilt, including medical and physical evidence of penetration and testimony of four witnesses in addition to that of the victim.

Am Jur 2d, Appeal and Error §§ 778, 786; Rape § 68.

5. **Constitutional Law § 374 (NCI4th)— first degree sexual offense—life sentence—not cruel and unusual punishment**

A life sentence for first degree sexual offense is not cruel and unusual punishment.

Am Jur 2d, Criminal Law § 604.

Length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

APPEAL by defendant from Judgments entered by *Judge James M. Long* on 22 August 1990 in GUILFORD County Superior Court. Heard in the Court of Appeals 8 October 1991.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Isham B. Hudson, Jr., for the State.

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

COZORT, Judge.

Defendant was indicted initially on 19 February 1990 for first-degree sexual offense. On 23 March 1990 defendant moved for a bill of particulars. On 21 May 1990 a superceding indictment charged defendant with first-degree sexual offense and first-degree rape. A jury found defendant guilty of both charges and the trial court sentenced him to life imprisonment. Defendant appeals the judgment. We find no error.

The State introduced the following evidence: In 1989, the victim was a ten-year-old girl living with her mother, her stepfather, and two siblings. One Friday in December 1989 the victim and her mother were watching a television program involving sex abuse which prompted the victim to tell her mother that "Pop's been messing with me—doing things that married men and women do." Mrs. Stallings called Gwen Burns at the Department of Social Services. Ms. Burns told Mrs. Stallings not to "push the issue" and that she and Detective Patricia Neal would speak to the victim the following Monday. On Monday Ms. Burns and Detective Neal spoke to the victim at school about the alleged abuse. In the interview, the victim stated that defendant began sexually abusing her during the summer of 1989 and that she had not spoken about it because she was scared. Specifically, the victim testified at trial that sometime after school ended in May or June defendant took her into his room, shut and locked the door, and took off their clothes. The victim then described the act of sexual intercourse. She also stated that defendant had "licked her where she peed at." Afterwards, she returned to the living room to watch television, but did not tell anyone what happened because she was afraid and defendant told her that they would both be in trouble if she told anyone.

The victim also described another incident which occurred in Mebane in November 1989. She stated that while she and defendant were walking in the woods near her grandmother's house that he told her to sit beside him and then he stuck his finger in her "front part." She further stated that her mother had noticed blood on her panties. The victim's testimony was corroborated by several witnesses, including her mother, her grandmother, Detective Neal, and Kathy Kitchen, a victim's advocate.

Defendant introduced the following evidence: Defendant denied that he had taken the victim into the bedroom, shut and locked the door, and had sexual intercourse with her. He also denied assaulting the victim in the woods at her grandmother's house. According to defendant, his wife was unfaithful to him and angry with him because he had exposed her as a police informer. He further testified that on the morning of his arrest, his wife laughed and said, "Didn't I tell you I'd get you?" He stated that he had taken the victim in the bedroom during the time period in question, but for the sole purpose of spanking her for taking some of his art work to school and lying about it. A witness for the defense

testified that in his opinion the defendant was a truthful person, but Mrs. Stallings was not.

Defendant presents six issues on appeal: (1) whether the trial court erred in denying defendant's motion to dismiss; (2) whether the trial court erred in admitting evidence of cunnilingus; (3) whether the trial court erred in denying defendant's motion for a bill of particulars; (4) whether the trial court erred in allowing witness Kitchen to testify to the consistency in the victim's statements; (5) whether the trial court erred in allowing witness Sharpless to testify that the victim suffered from Child Sexual Abuse Accommodation Syndrome (CSAAS); and, (6) whether the trial court erred in entering judgment against defendant for first-degree sexual offense. Defendant has abandoned the remaining assignments of error pursuant to N.C.R. App. P. 28(b)(5).

[1] In his first assignment of error, defendant argues that the trial court erred in denying his motion to dismiss because (1) there was a fatal discrepancy between the bill of particulars and the charge, and (2) the evidence of cunnilingus was inadmissible as outside the scope of the bill of particulars. In his second assignment of error, defendant again asserts that the evidence of cunnilingus is inadmissible as outside the scope of the bill of particulars. We disagree.

On 19 February 1990 defendant was indicted for a first-degree sexual offense which allegedly occurred between 1 February and 28 February 1989. On 23 March 1990 defendant made a motion for a bill of particulars. On 21 May 1990 in a superceding indictment defendant was charged with first-degree sexual offense and first-degree rape occurring sometime between 31 May and 5 July 1989. At the hearing defendant argued that he was entitled to know the specific sex act constituting the first-degree sexual offense. Reviewing the 21 May 1990 indictment, the trial court noted the indictment was statutorily proper and consistent with case law. At that point, counsel for the State indicated that the location of the offense was in Guilford County at the child's home. In response to defendant's inquiry about the specific sex act, State's counsel responded:

> I think the Court is exactly right in what you've told him. He is not entitled to that. I'll check the victim's statement and try and be more specific. . . .

> Your Honor, the victim referred to the use of his finger in her bottom part, and I would submit that is sufficient enough for defendant to go to trial.

The trial court then stated, "Now, the motion then will be—beyond the information supplied here in open court, Mr. Lind, is denied." The trial court entered a written order denying the motion. At trial defendant made a motion to dismiss at the close of State's evidence on the basis that there was insufficient evidence to support the elements of the alleged offenses. The trial court reviewed the earlier order denying the motion for a bill of particulars and ruled that

> since there has been no specification of particulars of what sex act is involved, the Court will deny the motion to dismiss the first-degree sex offense and submit that theory, at least under the current evidence, cunnilingus, on a theory of cunnilingus, and will submit the first-degree rape issue on the theory of vaginal intercourse with a minor under 13 years of age.

N.C. Gen. Stat. § 15A-925(a)(b)(c) (1988) provides that, upon motion by defendant, the trial court may order the State to file a bill of particulars setting forth factual information relating to the charge but not contained in the pleading, if necessary for the defendant to adequately prepare or conduct his defense. N.C. Gen. Stat. § 15A-925(d) requires that "[t]he bill of particulars must be filed with the court and must recite every item of information required in the order. A copy must be served upon the defendant, or his attorney." The purpose of a bill of particulars is to put the defendant on notice of the specific charges and acts which are to be resolved at trial. *State v. Johnson*, 30 N.C. App. 376, 377, 226 S.E.2d 876, 878, *disc. review denied*, 291 N.C. 177, 229 S.E.2d 691 (1976). The defendant must show that the information requested is necessary to conduct the defense. *State v. Easterling*, 300 N.C. 594, 601, 268 S.E.2d 800, 805 (1980).

We find that the information provided by the State at the hearing did not constitute a bill of particulars. The statute requires the court to order the State to file a bill of particulars with the court and to serve the defendant with a copy of the bill. Here, instead of ordering the State to file a bill of particulars, the court denied the motion. The plain language of the statute indicates that a bill of particulars must be in writing in order to be *filed* or *served*. The statute also provides that the defendant is entitled

to information necessary for his defense. Defendant made no showing that the information requested was necessary for his defense. We find that the exchange in court did not satisfy the statutory requirements for a bill of particulars. Since we find that there was no bill of particulars, defendant's argument that there was a fatal variance between the charge and the indictment is without merit. Likewise, defendant's argument that evidence of cunnilingus was inadmissible as outside the scope of the bill of particulars must fail.

[2] In his third assignment of error, defendant argues that the trial court erred in denying the motion for a bill of particulars. A motion for a bill of particulars is within the sound discretion of the trial court, and we will reverse only upon a showing of palpable and gross abuse of that discretion. *State v. Young*, 312 N.C. 669, 325 S.E.2d 181 (1985). A denial of a motion for a bill of particulars may be reversed "when it clearly appears . . . that the lack of timely access to the requested information significantly impaired defendant's preparation and conduct of his case." *Easterling*, 300 N.C. at 601, 268 S.E.2d at 805. There was no showing that lack of the evidence requested by defendant impaired his defense. As held in *State v. Edwards*, 305 N.C. 378, 380, 289 S.E.2d 360, 362 (1982), short form indictments for first-degree rape and first-degree sexual offense satisfy the statutory requirements and provide defendant adequate notice of the alleged offenses. Since defendant has shown no impairment of his defense, we find no error in the denial of the motion for a bill of particulars.

[3] In his fourth assignment of error, defendant contends that the trial court erred in allowing Kathy Kitchen, a child victim advocate, to testify as to the consistency of the victim's testimony at trial and previous statements made during interviews. On direct examination, Ms. Kitchen testified to what the victim told her about the alleged abuse. On cross-examination defense counsel questioned Ms. Kitchen about her conversations with the victim prior to the trial and during the trial. The following occurred on re-direct:

> Q During those periods of time, did she ever tell you anything different from what she told on the witness stand?
>
> MR. LIND: Objection to that question.
>
> THE COURT: Overruled.
>
> A No.

Defendant argues that, although Ms. Kitchen was not formally tendered as an expert, her opinion as to the consistency of the victim's statements invaded the province of the jury. We disagree.

Ms. Kitchen testified as a lay witness. Although Ms. Kitchen may have been qualified to testify as an expert witness, the State did not tender her as an expert, and the trial court did not accept her as such either explicitly or implicitly. *See State v. Greime*, 97 N.C. App. 409, 388 S.E.2d 594 (1990); *Cato Equipment Co., Inc. v. Matthews*, 91 N.C. App. 546, 372 S.E.2d 872 (1988). N.C. Gen. Stat. § 8C-1, Rule 701 (1988) provides that a lay witness may testify "in the form of opinions or inferences . . . limited to those opinions or inferences which are (a) rationally based on the perception of the witness and (b) helpful to a clear understanding of his testimony or the determination of a fact in issue." Here, Ms. Kitchen's testimony was simply that the victim never changed her story. It was admissible for the determination of a fact in issue the victim's credibility.

The testimony was also admissible as corroboration of the victim's testimony. Prior consistent statements of a witness are admissible to corroborate the testimony of that witness if the statements in fact corroborate the testimony. *State v. Holden*, 321 N.C. 125, 143, 362 S.E.2d 513, 526 (1987), *cert. denied*, 486 U.S. 1061, 100 L.Ed.2d 935 (1988). "The fact that a witness made a prior consistent statement is admissible as evidence tending to strengthen the witness' credibility." *State v. Cox*, 303 N.C. 75, 83, 277 S.E.2d 376, 381 (1981). Prior consistent statements are admissible even when there has been no impeachment. *State v. Martin*, 309 N.C. 465, 476, 308 S.E.2d 277, 284 (1983).

Defendant relies upon *State v. Norman*, 76 N.C. App. 623, 334 S.E.2d 247, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 863 (1985) to support his argument that Ms. Kitchen could not properly testify to the consistency of the victim's statements. In *Norman*, we found prejudicial error, stating that

> [w]itness Kirkman was not asked to relate to the jury what Patillo had said to him, only to give his opinion as to whether whatever was said by Patillo before trial was "essentially what he testified to." In our opinion, this carries the liberality of the consistent statement rule too far. At the least, Officer Kirkman should have been put to the test of recalling for the jury what Patillo had told him before trial before giving

> his opinion as to whether Patillo had been consistent in his pre-trial statements and trial testimony.

Id. at 627, 334 S.E.2d at 250. *Norman* is distinguishable from the issue in the case at bar. The key distinction is that Ms. Kitchen first testified to the statements the victim made to her in the previous meetings. After recalling for the jury what the victim told her before trial, Ms. Kitchen then responded in a short form manner that the victim's trial testimony was consistent with her previous statements. We note also that the trial court instructed the jury three times to consider the testimony offered by Ms. Kitchen only in determining the victim's truthfulness. Ms. Kitchen did not testify as to the victim's truthfulness, but rather as to the consistency in her statements. We find no error in the admission of Ms. Kitchen's testimony.

[4] In his fifth assignment of error, defendant contends that the trial court erred in permitting Dr. Sharpless, a pediatrician, to testify that the victim was suffering from CSAAS. We agree. Specifically, Dr. Sharpless testified:

> Q. What was her demeanor throughout the time that you were talking to her?
>
> A. It was very sad and somewhat agitated. She had a very flat affect, seemed quite depressed.
>
> Q. And based upon her testimony and her flat affect, were you able to form an opinion satisfactory to yourself as to what, if any, syndromes she was suffering from?
>
> * * * *
>
> A. Yes. It was my opinion that she was suffering from the sexual abused accommodation syndrome, which is an emotional syndrome that children often show when they're involved in sexual abuse.

CSAAS consists of five categories of behavior exemplified by children who are victims of sexual abuse: (1) secrecy; (2) helplessness; (3) entrapment and accommodation; (4) delayed, conflicted, and unconvincing disclosure; and, (5) retraction. John E. B. Myers, et al., Expert Testimony in Child Sexual Abuse Litigation, 68 Nebraska Law Review 1, 66-67 (1989). The syndrome is not a diagnostic tool for determining whether sexual abuse has occurred. *Id.* at 67. Rather,

the syndrome is founded on the premise that abuse has occurred and identifies behavior typical of sexually abused children. *Id.*

In *State v. Hall*, 330 N.C. 808, 823, 412 S.E.2d 883, 890 (1992), the North Carolina Supreme Court held that evidence of post traumatic stress syndrome and conversion disorder was inadmissible as substantive evidence to show rape had in fact occurred, but was admissible for corroborative purposes. The Court first concluded that both disorders were sufficiently recognized in the medical community to be the subject of expert testimony by virtue of their inclusion in the American Psychiatric Association Diagnostic and Statistical Manual of Mental Disorder (3d ed. rev. 1987). Although the proper subject of expert testimony, the Court specified two problems in admitting syndrome testimony for substantive purposes.

> First, the psychiatric procedures used in developing the diagnosis are designed for therapeutic purposes and are not reliable as fact-finding tools to determine whether a rape has in fact occurred. Second, the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact-finding devices. In excluding rape trauma syndrome evidence, the California Supreme Court has stated that:
>
>> [A]s a rule, rape counselors do not probe inconsistencies in their clients' descriptions of the facts of the incident, nor do they conduct independent investigations to determine whether other evidence corroborates or contradicts their clients' renditions. Because their function is to help their clients deal with the trauma they are experiencing, the historical accuracy of the clients' descriptions of the details of the traumatizing events is not vital in their task. To our knowledge, all of the studies that have been conducted in this field to date have analyzed data that have been gathered through this counseling process and, as far as we are aware, none of the studies has attempted independently to verify the "truth" of the clients' recollections or to determine the legal implication of the clients' factual accounts.
>
> *People v. Bledsoe*, 36 Cal. 3d 236, 250, 681 P.2d 291, 300, 203 Cal. Rptr. 450, 459 (1984). The *Bledsoe* court also expressed its concern that rape trauma syndrome "does not consist of

> a relatively narrow set of criteria or symptoms whose presence demonstrates that the client or patient has been raped; rather, . . . it is an 'umbrella' concept, reflecting the broad range of emotional trauma experienced by clients of rape counselors." *Id.* at 250, 681 P.2d at 301, 203 Cal. Rptr. at 460. It is this lack of critical inquiry into the factual accuracy of complainant's story that renders this evidence's probative value slight, and its helpfulness to the jury minimal. Thus, the demand of Evidence Rule 702 that the special knowledge of the expert "assist the trier of fact to understand the evidence or to determine a fact in issue" is hardly met.
>
> . . . In those cases where post-traumatic stress syndrome evidence is admitted to prove sexual abuse has in fact occurred, we believe the potential for prejudice against the defendant looms large because of that aura of special reliability and trustworthiness often surrounding scientific or medical evidence. Thus, on balance, evidence that a prosecuting witness is suffering from post-traumatic stress syndrome should not be admitted for the substantive purpose of proving that a rape has in fact occurred.

Id. at 820-21, 412 S.E.2d at 889. The Court, however, concluded that the evidence could be introduced for corroborative purposes if the prosecution shows relevance to issues in dispute, the trial court tests the evidence in light of N.C. Gen. Stat. § 8C-1, Rule 403 and N.C. Gen. Stat. § 8C-1, Rule 702 (1988), and gives a limiting instruction. Citing *People v. Taylor*, 75 N.Y.2d 277, 552 N.E.2d 131, 552 N.Y.S.2d 883 (1990) in which the New York Court of Appeals permitted rape trauma syndrome testimony to explain the victim's initial unwillingness to report defendant as her attacker, the North Carolina Supreme Court adopted the reasoning that admissibility of rape syndrome testimony is dependent upon the purpose for which it is offered. The Court reasoned that, if the alleged victim testifies at trial, the jury has the opportunity to assess her credibility. Testimony concerning rape trauma syndrome, however, may be useful to the jury in explaining the victim's post assault behavior and dispel misconceptions and is therefore admissible for limited purposes. The Court concluded that the same evidentiary approach should be used in determining the admissibility of evidence on conversion disorders. *Hall*, 330 N.C. at 822, 412 S.E.2d at 890.

Following the reasoning set forth in *Hall*, we conclude that evidence of CSAAS was improperly admitted in the case at bar. We first note that the record is void of any evidence whether the syndrome has been generally accepted in the medical field. Assuming, without deciding, that CSAAS is the proper subject of expert testimony, we encounter the same two difficulties with CSAAS as our Supreme Court did with rape trauma syndrome and conversion disorder. First, CSAAS is not designed to determine whether a child has been abused, but rather assumes abuse has occurred. Second, "the potential for prejudice looms large because the jury may accord too much weight to expert opinions stating medical conclusions which were drawn from diagnostic methods having limited merit as fact-finding devices." Since there was no limiting instruction, the jury was permitted to consider Dr. Sharpless' testimony for both substantive *and* corroborative purposes, which was error.

Pursuant to N.C. Gen. Stat. § 15A-1443(a) (1988), defendant has the burden of proving that had the error not occurred, there is a reasonable possibility that a different result would have been reached at trial. Excluding the inadmissible testimony on CSAAS, there is overwhelming evidence of defendant's guilt. The victim's account was supported by the medical and physical evidence of penetration and the testimony of four other witnesses. Accordingly, we find no prejudicial error.

[5] In his final assignment of error, defendant argues the trial court erred in imposing a life sentence for the first-degree sexual offense. Defendant's punishment is not cruel and unusual. *See State v. Joyce*, 97 N.C. App. 464, 389 S.E.2d 136 (1990); *State v. Sellars*, 52 N.C. App. 380, 278 S.E.2d 907, *disc. review denied and appeal dismissed*, 304 N.C. 200, 285 S.E.2d 108 (1981).

For the reasons set forth above, we find

No error.

Judges ARNOLD and LEWIS concur.

DONALD R. CANADY, SR., AND CONNIE H. CANADY, PLAINTIFFS v. OSCAR MANN, GAINES R. JOHNSON, WILLIAM J. BRINN, JR. AND CAROLINA LAKES CORPORATION, DEFENDANTS

No. 9112SC690

(Filed 18 August 1992)

1. Cancellation and Rescission of Instruments § 22 (NCI4th)— rescission of contract—failure to allege special damages—fraud and breach of contract actions barred

Plaintiff vendees' actions for fraud and breach of contract arising from the sale of resort property were barred by their rescission of the contract of sale where they alleged fraud but failed to plead special damages. Plaintiffs' allegations that their damages consisted of the loss of (1) use of specific and unique property, (2) use of the purchase money, (3) interest the purchase money could have earned, and (4) appreciated value of the property, *i.e.*, the benefit of the bargain, pertained only to general and not special damages.

Am Jur 2d, Cancellation of Instruments § 66; Damages § 831.

2. Accord and Satisfaction § 8 (NCI4th)— check given as payment in full—unilateral attempt to alter terms—negotiation of check

Plaintiff vendees' claims for fraud and breach of contract arising from the sale of resort property were barred by the doctrine of accord and satisfaction where defendants offered plaintiffs a check for the amount of the purchase price plus interest and closing costs; the check contained language that it was in full and final settlement of all claims; defendants also presented plaintiffs with a release; the female plaintiff marked out the settlement language on the check and refused to sign the release; and plaintiffs thereafter negotiated the check. Plaintiffs' unilateral attempt to alter the terms upon which defendants offered the check was ineffective, and their negotiation of the check tendered as payment in full of a disputed claim established an accord and satisfaction.

Am Jur 2d, Accord and Satisfaction §§ 18-23, 44.

Modern status of rule that acceptance of check purporting to be final settlement of disputed amount constitutes accord and satisfaction. 42 ALR4th 12.

3. Fraud, Deceit, and Misrepresentation § 38 (NCI4th)— fraud claim—intent—summary judgment improper

Summary judgment was improperly entered for defendant sales manager on plaintiffs' claim for fraud in the sale of resort property where plaintiffs' affidavit alleged that the two lots conveyed to plaintiffs were not the ones they intended to purchase but were unsuitable for building, and that the designations for these lots were intentionally changed with an intent to deceive plaintiffs.

Am Jur 2d, Fraud and Deceit §§ 481-486; Summary Judgment §§ 35-36.

4. Contracts § 115 (NCI4th)— breach of contract—nonparty not liable

A defendant who was not a party to a contract could not be held liable for breach of the contract.

Am Jur 2d, Contracts § 421.

5. Unfair Competition § 1 (NCI3d)— sale of resort property—unfair practices—actual injury

Plaintiffs' forecast of evidence raised a genuine issue of material fact in an action for unfair and deceptive practices by defendants in (1) fraudulently inducing plaintiffs to purchase lots in a resort community which were unsuitable for building, (2) convincing plaintiffs that the lots were good bargains because they had been owned by a now bankrupt company, and (3) representing that new golf courses, lakes and other amenities were to be built in the community. Although plaintiffs had regained their purchase price plus interest and closing costs from defendants, a jury could find that plaintiffs' actual injury consisted of the loss of use of the specific and unique property and the loss of the appreciated value of the property.

Am Jur 2d, Summary Judgment § 27.

APPEAL by plaintiffs from Order by *Judge Giles R. Clark* in CUMBERLAND County Superior Court entered 1 April 1991. Heard in the Court of Appeals 12 May 1992.

Campbell & Leslie, by Pamela S. Leslie; and Rose, Ray, Winfrey & O'Connor, by Ronald E. Winfrey, for plaintiff appellants.

Brown, Robbins, May, Pate, Rich, Scarborough & Burke, by D.T. Scarborough III, for defendant appellees, Carolina Lakes Corporation and William J. Brinn, Jr.

COZORT, Judge.

Plaintiff appellants Donald R. Canady, Sr., and Connie H. Canady (Canadys) appeal an Order granting summary judgment for all defendants. We affirm in part and reverse in part.

In March 1987 the Canadys were invited to visit Carolina Lakes, a resort development community. The Canadys accepted this invitation and upon arrival they were assigned to salesman Oscar N. Mann. Defendant Mann toured the property with the Canadys and attempted to sell them land within the subdivision. Mr. Mann showed the Canadys four specific pieces of property labeled 1H, 2H, 3H and 4H. In describing these properties, Mr. Mann led the Canadys to believe that lots 1H and 2H were good investments and suitable for building. However, he informed them that the properties labeled 3H and 4H were wet and not suitable for building. Further, Mann said that lots 1H and 2H were especially good bargains because they were formerly owned by a now bankrupt company, McLean Trucking, and that if purchased the lots could be resold in a few months for at least $5,000.00 more per lot. The Canadys agreed to purchase lot 2H and subsequently decided to buy lot 1H as well. The contracts to purchase were signed 11 April and 13 April 1987 respectively, and the deeds were delivered and recorded in June 1987.

After receiving the deeds the Canadys took numerous friends and relatives to view the property and discuss future building plans. In December 1987 the Canadys decided to sell one of their lots. They contacted the sales office at Carolina Lakes for assistance and discovered Mr. Mann no longer worked there. Instead, Mr. Billy Batten attempted to assist them. In the ensuing conversation the Canadys revealed a price at which they were willing to sell the lot. In response Mr. Batten stated the lots would probably not sell for such a price because they were wet and unsuitable for building purposes. After several conversations and trips to Carolina Lakes the Canadys discovered that they had not purchased the lots they had intended to purchase, *i.e.*, the ones defendant

Mann referred to as good investments, but had instead purchased the adjoining lots considered unsuitable for building. The lots they had intended to purchase were now labeled 3H and 4H. Following this discovery the Canadys had discussions with defendants, Gaines Johnson, Director of Sales, and William Brinn, President of Carolina Lakes. Mr. Brinn offered to the Canadys a complete refund of all monies invested, plus interest, in exchange for return of the deeds to lots 1H and 2H. On the back of the refund check, Carolina Lakes included language that the check was in final settlement of all claims. In an attempt to accept the check without releasing the defendants from future claims, Connie H. Canady marked out all words pertaining to settlement, in the presence of Mr. Brinn, and then accepted the check. Plaintiffs also refused to sign the release offered by defendant Brinn.

On 10 April 1990 plaintiffs filed an action accompanied by a Civil Summons with an Order Extending Time to File Complaint. On 30 April 1990 the complaint was filed alleging breach of contract, fraud, and unfair and deceptive trade practices. The defendant Mann was served by publication and failed to answer. Defendant Johnson filed an answer on 25 September 1990, denying the essential allegations of the complaint. Defendants Brinn and Carolina Lakes jointly filed an answer on 2 July 1990, denying the essential elements of the complaint and affirmatively asserting the defenses of election of remedies, accord and satisfaction, and compromise and settlement. Subsequently, defendants Johnson, Brinn, and Carolina Lakes filed motions for summary judgment, and these motions were heard 1 April 1991. On 3 April 1991 an Order was issued granting summary judgment for all defendants on all causes of actions. Plaintiffs filed Notice of Appeal on 30 April 1991.

On appeal plaintiffs argue that the trial court erred in granting summary judgment to all defendants. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990) states that summary judgment "[s]hall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." "[A]n issue is material if the facts alleged are such as to constitute a legal defense or are of such nature as to affect the result of the action, or if the resolution of the issue is so essential that the party against whom it is resolved may not prevail." *Kessing v. Mortgage Corp.*, 278 N.C. 523, 534, 180 S.E.2d 823, 830 (1971). To successfully

carry a motion for summary judgment the moving party must establish that no genuine issue of material fact exists. *Gore v. Hill*, 52 N.C. App. 620, 621-22, 279 S.E.2d 102, 104, *disc. review denied*, 303 N.C. 710, 283 S.E.2d 136 (1981). A party may do so by " 'proving that an essential element of the opposing party's claim is nonexistent or by showing through discovery that the opposing party cannot produce evidence to support an essential element of his claim.' " *Moore v. Fieldcrest Mills, Inc.*, 296 N.C. 467, 470, 251 S.E.2d 419, 421 (1979). If the moving party successfully presents evidence to dispel the presence of an essential element of a claim, the opposing party may not rest upon the allegations or denials in his pleadings. Instead, he must affirmatively take steps to show that there is a genuine issue for trial. If the opposing party cannot or fails to do so, summary judgment is to be entered. N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990).

We first address the breach of contract and fraud claims against Brinn and Carolina Lakes. The record reveals that defendant Brinn presented plaintiffs a check with language indicating a full and final settlement. The plaintiffs obliterated the settlement language and accepted the check. Plaintiffs, after receipt of the check, returned the deed to properties 1H and 2H. Plaintiffs contend that rescission of the contract did not fully compensate for the losses suffered and plaintiffs are therefore entitled to seek damages for breach of contract and fraud. Defendants counter by asserting the affirmative defenses of election of remedies and accord and satisfaction.

[1] First, we consider the election of remedies defense. "The purpose of the doctrine of election of remedies is not to prevent recourse to any remedy, but to prevent double redress for a single wrong." *Smith v. Gulf Oil Corp.*, 239 N.C. 360, 368, 79 S.E.2d 880, 885 (1954). In *Kee v. Dillingham*, 229 N.C. 262, 265, 49 S.E.2d 510, 512 (1948), the North Carolina Supreme Court stated:

> Ordinarily a suit for rescission of a contract may not be joined with an action for its breach or damages for fraud, but where special damages have been sustained as the result of the fraud practiced, rescission of the contract will not bar a recovery for damages. The rule is, if rescission of the contract does not place the injured party *in statu quo*, as where he has suffered damages which cancellation of the contract cannot repair, there is no principle of law which prevents him from

> maintaining his action for damages caused by the other party's fraud. (Citation omitted.)

Special damages are "[t]hose which are the actual, but not the necessary, result of the injury complained of, and which in fact follow it as a natural and proximate consequence in the particular case, that is, by reason of special circumstances or conditions." Black's Law Dictionary, (4th ed. 1951) p. 469. " '[G]eneral damages are such as might accrue to any person similarly injured, while special damages are such as did in fact accrue to the particular individual by reason of the particular circumstances of the case.' " *Penner v. Elliott*, 225 N.C. 33, 35, 33 S.E.2d 124, 126 (1945) (quoting Black's Law Dictionary, 2d Ed., pp. 314-15).

In the case below, since plaintiffs rescinded the contract, they cannot now sue for damages arising from its breach unless they have alleged fraud and pled special damages. Although plaintiffs alleged fraud, they failed to plead special damages. Specifically, plaintiffs alleged damages consisting of the loss of (1) use of specific and unique property, (2) use of purchase money, (3) interest the purchase money could have earned, and (4) appreciated value of the property, *i.e.*, the benefit of the bargain. We find that plaintiffs' damages are in the nature of general damages, rather than special damages. Accordingly, plaintiffs' actions for fraud and breach of contract are barred and summary judgment is appropriate for defendants on those claims.

[2] We note also that plaintiffs' claims were barred by the doctrine of accord and satisfaction.

> "An 'accord' is an agreement whereby one of the parties undertakes to give or perform, and the other to accept, in satisfaction of a claim, liquidated or in dispute, and arising either from contract or tort, something other than or different from what he is, or considered himself entitled to; and a 'satisfaction' is the execution or performance, of such agreement."

Sharpe v. Nationwide Mut. Fire Ins. Co., 62 N.C. App. 564, 565, 302 S.E.2d 893, 894, *cert. denied*, 309 N.C. 823, 310 S.E.2d 353 (1983) (quoting *Allgood v. Trust Co.*, 242 N.C. 506, 515, 88 S.E.2d 825, 830-31 (1955)). "The cashing of a check tendered in full payment of a disputed claim establishes an accord and satisfaction as a matter of law. . . . [T]he claim is extinguished, regardless of any disclaimers which may be communicated by the payee." *Id.* at 566,

302 S.E.2d at 894 (citation omitted). If a party accepts and negotiates a draft, any attempts to alter its terms are ineffective. *Id.* The draft must be accepted on the terms offered by the payor or not at all. *Id.*

Defendants offered plaintiffs a check for the amount of the purchase price plus interest and closing costs. On the check, defendants stated that the check was in full and final settlement of all claims. Defendants also presented plaintiffs with a release. Mrs. Canady marked out the settlement language on the check and refused to sign the release, but plaintiffs accepted and negotiated the draft. Plaintiffs' unilateral attempt to alter the terms upon which defendants offered the check was ineffective. The cashing of the check tendered as payment in full of a disputed claim established an accord and satisfaction. Therefore, summary judgment was appropriate as to the breach of contract and fraud claims.

We now address the breach of contract and fraud claims against defendant Johnson. Unlike defendants Brinn and Carolina Lakes, defendant Johnson did not affirmatively plead election of remedies or accord and satisfaction. Therefore, those defenses are unavailable to him. Accordingly, we must now consider the breach of contract and fraud claims to determine whether summary judgment was appropriate.

[3] First, we consider the plaintiffs' allegations of fraud. The essential elements of fraud are: "(1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974).

> The existence of fraud necessarily involves a question concerning the existence of a fraudulent intent on the part of the party accused of such fraud. The intent of a party is a state of mind generally within the exclusive knowledge of that party and, by necessity, must be proved by circumstantial evidence. Summary judgment is generally inappropriate under such circumstances.

Girard Trust Bank v. Belk, 41 N.C. App. 328, 339, 255 S.E.2d 430, 437, *disc. review denied*, 298 N.C. 293, 259 S.E.2d 299 (1979). In his deposition, defendant Johnson denied that he intended to deceive plaintiffs. Once defendant denied an essential element of

the fraud claim, plaintiffs then had the duty to show the presence of a material fact. We find plaintiffs' affidavit, incorporating the allegations of the complaint, sufficient to raise a genuine issue of material fact as to Johnson's intent. Plaintiffs alleged that the intentional mismarking of the lots constituted definite and specific misrepresentations which were known to be false by all defendants and made with the intent to deceive. Therefore, summary judgment for defendant Johnson on the fraud claim must be reversed.

[4] As to the breach of contract claim against defendant Johnson, we find summary judgment was correctly granted. Since defendant Johnson was not a party to the contract, as a matter of law he cannot be held liable for any breach that may have occurred.

Defendant Mann did not respond to any of the pleadings served upon him by the plaintiffs. It follows that he may not be granted a motion for summary judgment on any of the claims before us. However, there is some ambiguity in the record as to whether the trial court intended to grant summary judgment to this defendant. The three parties who responded to plaintiffs' allegations, Johnson, Brinn, and Carolina Lakes, made motions for summary judgment. The trial court's order grants summary judgment to all defendants. Assuming that the trial court's order does grant summary judgment to defendant Mann, that order is reversed as to all three claims as to Mann.

[5] Finally, we address the unfair and deceptive trade practices claim against all defendants. N.C. Gen. Stat. § 75-1.1(a) (1988) states in relevant part: "Unfair methods of competition in or affecting commerce, and unfair or deceptive acts or practices in or affecting commerce, are declared unlawful." "[A]n action for unfair or deceptive acts or practices is a distinct action apart from fraud, breach of contract, or breach of warranty." *Bernard v. Cent. Carolina Truck Sales*, 68 N.C. App. 228, 232, 314 S.E.2d 582, 585, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). Since "[t]he legislation creating [an action for unfair and deceptive trade practices] expanded existing common law remedies . . . traditional common law defenses . . . are not relevant . . . ." *Concrete Service Corp. v. Investors Group*, 79 N.C. App. 678, 685, 340 S.E.2d 755, 760, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). A party may assert claims for fraud, breach of contract, and unfair and deceptive trade practice claims, but may only recover on one claim. *See Wilder v. Hodges*, 80 N.C. App. 333, 334, 342 S.E.2d 57, 58 (1986); *Marshall*

v. Miller, 47 N.C. App. 530, 542, 268 S.E.2d 97, 103, *modified and aff'd*, 302 N.C. 539, 276 S.E.2d 397 (1981).

In order to prevail under this statute plaintiffs must prove: (1) defendant committed an unfair or deceptive act or practice, (2) that the action in question was in or affecting commerce, (3) that said act proximately caused actual injury to plaintiff. *Spartan Leasing Inc. v. Pollard*, 101 N.C. App. 450, 460, 400 S.E.2d 476, 480 (1991). Plaintiffs do not have to prove fraud, bad faith, or intentional deception, *Myers v. Liberty Lincoln-Mercury, Inc.*, 89 N.C. App. 335, 336-37, 365 S.E.2d 663, 664 (1988), but proof of fraud necessarily constitutes a violation of the statute. *Hardy v. Toler*, 288 N.C. 303, 309, 218 S.E.2d 342, 346, *modified and aff'd*, 288 N.C. 303, 218 S.E.2d 342 (1975). In determining whether a representation is deceptive, its effect on the average consumer is considered. *Opsahl v. Pinehurst*, 81 N.C. App. 56, 69, 344 S.E.2d 68, 76 (1986). Conduct is unfair or deceptive if it has the capacity or tendency to deceive. The Act does not precisely define the term unfair or deceptive trade practices, and neither is such a definition possible. Rather the surrounding facts of the transaction and the impact on the marketplace determine if the transaction is unfair or deceptive, and this determination is a question of law for the court. *Id.*

As to whether conduct is in or affecting commerce, N.C. Gen. Stat. § 75-1.1(b) provides that " 'commerce' includes all business activities, however denominated . . . ." A person engaged in the business of selling residential real estate may commit an act affecting commerce within the meaning of the statute. *See Wilder v. Squires*, 68 N.C. App. 310, 313-14, 315 S.E.2d 63, 65-66, *cert. denied*, 311 N.C. 769, 321 S.E.2d 158 (1984).

The statute also requires plaintiffs to suffer "actual injury," but does not define the term. In *Bernard*, 68 N.C. App. at 232-33, 314 S.E.2d at 585, this Court stated that "[s]ince the remedy [of treble damages authorized in N.C. Gen. Stat. § 75-16] was created partly because [the remedies for fraud, breach of contract, or breach of warranty] often were ineffective, it would be illogical to hold that only those methods of measuring damages could be used." The Court further stated "[t]he measure of damages used should further the purpose of awarding damages, which is 'to restore the victim to his original condition, to give back to him that which was lost as far as it may be done by compensation in money.' "

Id. at 233, 314 S.E.2d at 585 (quoting *Phillips v. Chesson*, 231 N.C. 566, 571, 58 S.E.2d 343, 347 (1950)).

Plaintiffs alleged that defendants committed unfair and deceptive trade practices by (1) inducing them to visit Carolina Lakes and fraudulently inducing them to purchase lots unsuitable for building, (2) convincing them that the lots would appreciate rapidly in value because of McLean Trucking Company's bankruptcy, and (3) representing that new golf courses, lakes, and other amenities were to be built on the properties. In addition to their affidavit incorporating the allegations of the complaint, plaintiffs submitted the affidavit of James Hayter, a former sales agent of Carolina Lakes, and the depositions of defendants Brinn, Johnson, and Mann. In his deposition, defendant Brinn stated that defendant Johnson would submit marketing concepts to him for approval. Defendant Brinn further stated that he signed the on-lot inspection for the lots purchased by plaintiffs. In his deposition, defendant Johnson stated that it was his responsibility to review the sales at Carolina Lakes, but he did not always do so. Reviewing the pleadings, affidavits, and depositions, we find plaintiffs presented sufficient evidence of unfair and deceptive trade practices to raise a genuine issue of material fact.

Specifically, regarding the element of actual injury, we note that plaintiff alleged injuries consisting of (1) loss of specific and unique property, (2) loss of use of the purchase money and closing costs, (3) loss of interest the purchase price and the closing costs could have earned, and (4) the appreciated value of property, *i.e.*, loss of the benefit of the bargain. Although plaintiffs regained the purchase price plus interest and closing costs, a jury could find that plaintiffs' "actual injury" also consisted of the loss of use of the specific and unique property and the loss of the appreciated value of the property. Summary judgment for all defendants on the claim of unfair and deceptive trade practices must be reversed.

Affirmed in part; reversed in part.

Judges PARKER and GREENE concur.

HOUSEHOLD FINANCE CORPORATION, PLAINTIFF v. WILLIAM C. ELLIS, DEFENDANT

No. 9121DC493

(Filed 18 August 1992)

1. Execution and Enforcement of Judgments § 35 (NCI4th)—exemption—waiver—applicable only to particular execution

N.C.G.S. § 1C-1603(a)(4) requires that no execution be issued until a Notice to Designate Exemptions has been served; any waiver applies only to the particular execution issued. Requiring a debtor to forever waive his rights for failure to respond to a single notice contradicts the spirit of the entire statutory section on exemptions and applicable case law.

Am Jur 2d, Exemptions §§ 326, 336.

2. Execution and Enforcement of Judgments § 35 (NCI4th)—exemptions—20 day period for claiming—unconstitutional

N.C.G.S. § 1C-1601(c) and § 1C-1603(e)(2) are unconstitutional as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served. Article X, Section 1, of the North Carolina Constitution allows for exemption from "sale under execution or other final process" and our Supreme Court has repeatedly interpreted this to mean that the exemptions can be claimed until the moment the money from the sale is applied to the debt to be paid. The people are deemed to have approved the judicial construction given this provision when they ratified the newly-revised constitution in 1970 without making substantial changes in Article X, Section 1.

Am Jur 2d, Exemptions §§ 308, 309.

APPEAL by defendant from order entered 28 February 1991 by *Judge Margaret L. Sharpe* in FORSYTH County District Court. Heard in the Court of Appeals 16 March 1992.

On 3 February 1989, the plaintiff, Household Finance Company (HFC), obtained a valid judgment in the amount of $1,500 against the defendant, William C. Ellis, in the Small Claims Division of Forsyth County District Court. Pursuant to N.C. Gen. Stat. § 1C-1603(a)(4), the defendant was served with Notice to Designate

Exempt Property on 27 February 1989. The defendant had 20 days to respond to this notice by filing a claim for exempt property or requesting a hearing before the court as provided in N.C. Gen. Stat. § 1C-1603(e)(2), and failed to do so.

On 28 March 1989, an execution was issued to collect the amount due on the judgment, but because an agreement to satisfy the debt was worked out between the parties, the execution was returned on 7 April 1989. The agreement failed, and a second execution was issued 13 March 1990, but it, too, was returned at the plaintiff's request on 14 June 1990 when a second agreement was reached. The defendant subsequently filed a motion to claim exempt property on 21 June 1990. On June 26, after the second agreement failed, a third execution was issued and was returned 26 September 1990 for failure to locate property to satisfy the debt. A fourth execution was issued on 8 October 1990 which reflected a payment made by Ellis of $369.40 and was returned unsatisfied on 7 January 1991 with a notation that the defendant was avoiding service.

The defendant filed a Motion to Excuse Waiver of Exemptions in the Forsyth County District Court pursuant to N.C. Gen. Stat. § 1C-1601(c)(3) and his motion also included an assertion that the defendant still retained his right to constitutional exemptions under Article X because they were never waived. The plaintiff claimed that all exemptions were waived when the defendant failed to respond to the original Notice to Designate Exempt Property.

The case was heard in Forsyth County District Court on 25 February 1991. On 28 February 1991, Judge Sharpe entered an order finding that by failing to claim his exemptions within 20 days of notice, under N.C. Gen. Stat. § 1C-1601 he had waived these rights and also that the defendant had failed to show the grounds of mistake, surprise or excusable neglect required for the granting of the defendant's motion to excuse waiver of exemptions.

From this order, the defendant appeals.

Lambe & Lauver, P.A., by Robert A. Lauver, for plaintiff-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Joanna B. George and Ellen W. Gerber, for defendant-appellant.

ORR, Judge.

The defendant raises two issues on appeal: 1) whether a Notice to Designate Exemptions is required before each execution is issued or whether a single notice before the first execution satisfies N.C. Gen. Stat. § 1C-1601 and § 1C-1603 and 2) whether the plaintiff waived his state constitutional exemptions provided in Article X, section 7 pursuant to N.C. Gen. Stat. § 1C-1601 and § 1C-1603. For the reasons set forth below, we reverse the district court.

I.

Notice to Designate Exemptions

[1] The first issue is whether a Notice to Designate Exemptions under N.C. Gen. Stat. § 1C-1603(a)(4) is required before each execution or whether a single notice before the first execution is sufficient. We hold that notice is required before each execution.

N.C. Gen. Stat. § 1C-1603(a)(4) states:

> After judgment, except as provided in G.S. 1C-1603(a)(3) or when exemptions have already been designated, the clerk may not issue an execution or writ of possession unless notice from the court has been served upon the judgment debtor advising him of his rights.

According to N.C. Gen. Stat. § 1C-1603(e)(2), the judgment debtor has 20 days from "notice to designate" to file a motion to designate exempt property and a schedule of assets with the clerk or to request a hearing before the clerk. If he fails to do either of the above, "the judgment debtor has waived the exemptions." N.C. Gen. Stat. § 1C-1603(e)(2) (1987).

Also applicable is Section 1C-1601(c)(3) which states:

> The exemptions provided in this Article and in Sections 1 and 2 of Article X of the North Carolina Constitution, cannot be waived except by: . . .
>
> > Failure to assert the exemption after notice to do so pursuant to G.S. 1C-1603. The clerk or district court judge may relieve such a waiver made by reason of mistake, surprise, or excusable neglect, to the extent that the rights of innocent third parties are not affected.

Under N.C. Gen. Stat. § 1-47 a judgment has a life of ten years, but an execution has a limited life that begins the day of issuance and terminates 90 days later. N.C. Gen. Stat. § 1-310 (1983). The execution may not issue until ten days after entry of judgment, but must be returned within 90 days. *Id.* The first execution in the present case was issued on 28 March 1989 and expired 26 June 1989. The defendant was properly served with a notice to designate exempt property before this execution issued and the defendant failed to respond to it within 20 days. The validity of this waiver is therefore not in question. However, subsequent executions each with a life of 90 days were issued without additional notice to the defendant.

The defendant contends the waiver from the first execution did not survive the expiration of that execution. The statutory language speaks of "an execution" and it also states that the exemptions are "waived," but does not directly address the question of whether this waiver is permanent. N.C. Gen. Stat. § 1C-1603(a)(4), (e)(2) (1987).

The policy of the statutory and constitutional exemptions is to protect the debtor "not from destitution but only from loss of the property due to sale under final process for the collection of any debt." *Montford v. Grohman*, 36 N.C. App. 733, 736, 245 S.E.2d 219, 222, *dismissed*, 295 N.C. 551, 248 S.E.2d 727 (1978). In *Comm'r. of Banks v. Yelverton*, 204 N.C. 441, 168 S.E. 505 (1933), the plaintiff held a valid judgment against the defendant, Paul Yelverton, for $3,650. The defendant had no property which was subject to seizure and sale under execution, but he was receiving payments of $300 monthly from various insurance policies due to his permanent and total disability. The plaintiff petitioned the court to have a receiver appointed to collect the disability payments and apply them to the judgment. The defendant had claimed his exemptions under Article X, section 7 of the Constitution which states that "[t]he husband may insure his own life for the sole use and benefit of his wife and children, . . . free from all the claims of the representatives of her husband, or any of his creditors." N.C. Const. art. X, § 7, rewritten as art. X, § 5 (1984). The defendant argued that he should be allowed to renew his exemptions from time to time in order to constantly keep the exemption limit of personal property. The court, relying on *Dean v. King*, 35 N.C. 20 (1851), held that:

> the allotment should be made from time to time, and as often as the debtor might be pressed with executions; the policy being to enable the debtor not only to have the exemptions allotted to him once, but to keep them about him all the time, for the comfort and support of himself and family.

Yelverton, 204 N.C. at 447, 168 S.E. at 508.

In construing exemption statutes, the general rule is outlined in *Elmwood v. Elmwood*, 295 N.C. 168, 244 S.E.2d 668 (1978). There the defendant's ex-wife was seeking to garnish his United States Marine Corps retirement benefits for payment of an earlier maintenance and support order. N.C. Gen. Stat. § 1-362 provided for an exemption from execution of earnings of a debtor for personal services within 60 days preceding an order of seizure when it appears these earnings are needed for use of a family supported by debtor's labor. Our Supreme Court stated:

> The humane and beneficent provisions of the law in regard to exemptions, being remedial in their nature. . . should always receive a liberal construction so as to embrace all persons coming fairly within their scope.

Elmwood, 295 N.C. at 185, 244 S.E.2d at 678 (quoting *Goodwin v. Claytor*, 137 N.C. 225, 49 S.E. 173 (1904)). Therefore, provisions which restrict a debtor's access to his exemptions should be construed narrowly. Debtors are generally allowed a great deal of flexibility in claiming and maintaining their exemptions. *See, e.g.*, *Yelverton*, 204 N.C. 441, 168 S.E. 505 (1933).

Similarly, in *Campbell v. White*, 95 N.C. 344 (1886), the plaintiff had caused an execution to be issued against the defendant to satisfy a judgment order against him. The defendant claimed his personal property exemptions under Article X, section 1 of the North Carolina Constitution. The issue was whether choses in action were allowed to constitute part of the defendant's exemptions so that he could claim up to the $500 limit. The court found for the defendant and held that there is "a continual mandate to the officer to leave so much of the debtor's personal estate untouched for his use, and of course, the diminution . . . must be replenished with other, if the debtor has such, up to the prescribed limits." *Campbell*, 95 N.C. at 345.

All three of these cases demonstrate the policy of flexibility adopted by our Supreme Court in adjusting exemption allotments

to enable the debtor to take full advantage of his exemption rights. Given this policy of flexibility demonstrated by the statute itself and the case law, we conclude that the legislature did not intend to limit a debtor's ability to claim exemptions as plaintiff contends. Requiring a debtor to forever waive his rights for failure to respond to a single notice contradicts the spirit of the entire statutory section on exemptions and applicable case law.

We therefore hold that the statute requires that no execution be issued until a Notice to Designate Exemptions has been served and any waiver applies only to the particular execution issued.

II.

Constitutional Exemptions

[2] The next issue the defendant raises is whether the constitutional exemptions granted in Article X of the North Carolina Constitution are subject to waiver under N.C. Gen. Stat. § 1C-1601(c) and § 1C-1603(e)(2). We hold that the provisions of § 1C-1601 and § 1C-1603 are unconstitutional as applied to the constitutional exemptions.

Article X, Section 1 of the North Carolina Constitution states:

> The personal property of any resident of this State, to a value fixed by the General Assembly but not less than $500, to be selected by the resident, is exempted from sale under execution or other final process of any court, issued for the collection of any debt.

N.C. Gen. Stat. § 1C-1603 states that the exemptions, both statutory and constitutional, may be waived for failure to assert the exemption by filing a motion to designate exemptions or requesting a hearing within 20 days after notice to do so. N.C. Gen. Stat. § 1C-1603(e)(2). Generally, an act of the legislature is valid unless the constitution prohibits such an act. *Moore v. Knightdale Bd. of Elections*, 331 N.C. 1, 413 S.E.2d 541 (1992).

The general rule for waivers is that a defendant may "waive a constitutional as well as a statutory provision made for his benefit. . . . And this may be done by express consent, by failure to assert it in apt time or by conduct inconsistent with a purpose to insist upon it." *Cameron v. McDonald*, 216 N.C. 712, 715, 6 S.E.2d 497, 499 (1940). The issue here is not whether the statutory exemptions can ever be waived, because they are clearly subject to waiver,

but whether the defendant waived his constitutional exemptions by failing to assert them in "apt time." Under Article X, Section 1, the debtor can assert the right to exemptions any time before "sale under execution or other final process."

Our Supreme Court has adopted the rule that if a constitutional provision has received a "settled judicial construction, and is afterward incorporated into a new or revised Constitution, it will be presumed to have been retained with a knowledge of the previous construction, and the courts will feel bound to adhere to it." *Williamson v. City of High Point*, 213 N.C. 96, 105, 195 S.E. 90, 95 (1938) (quoting 12 C.J. Constitutional Law § 69).

Our Supreme Court interpreted "final process" under Article X, Section 1 to be "the order of the court directing the payment of the money." *Befarrah v. Spell*, 178 N.C. 231, 233, 100 S.E. 321, 322 (1919); *see also Crow v. Morgan*, 210 N.C. 153, 155-56, 185 S.E. 668, 670 (1936); *Chemical Co. v. Sloan*, 136 N.C. 122, 48 S.E. 577 (1904). In *Chemical Co.*, the court in interpreting "final process" held that:

> It is only when the property is about to be subjected to the payment of a debt by final process that the last opportunity is left to the defendant to claim his exemption. At any time before this stage of the proceeding is reached, he may make his demand and become entitled to an allotment of the exemption.

Chemical Co., 136 N.C. at 123, 48 S.E. at 577. *See also Gardner v. McConnaughey*, 157 N.C. 481, 73 S.E. 125 (1911); *Shepherd v. Murrill*, 90 N.C. 208 (1884); *Gamble v. Rhyne*, 80 N.C. 183 (1879).

In *Shepherd*, the plaintiff was the debtor in a prior case where a judgment was ordered against him and an execution was issued for the collection of his debt. The defendant sheriff informed the plaintiff of the execution but the plaintiff refused to pay it. The next day the sheriff levied upon and took the plaintiff's bale of cotton to sell in satisfaction of the debt. The plaintiff failed to assert his right to his constitutional exemptions until the day of the sale. The sheriff told plaintiff that "it was too late" to claim his exemptions and proceeded to sell the cotton. The defendant argued that the plaintiff should have requested his exemptions "at the time of levy or within a reasonable time thereafter, before the day of sale" and that by not doing so, he had waived his

exemptions. *Id.* at 209. The court disagreed and held that "no provision in terms or effect, [that] makes it imperative on the execution debtor to demand the appraisement and laying off of the exempted property; nor is there anything in the nature of the demand . . . that renders it necessary that it shall be made before the day of sale." *Id.* at 210. The court advocated a liberal construction of the personal property exemption statute to the end that the debtor have "all reasonable opportunity for the assertion of the right." *Id.*

In the case before us, Article X, Section 1 allows for exemption from "sale under execution or other final process" and our Supreme Court has repeatedly interpreted this to mean that the exemptions can be claimed until the moment the money from the sale is applied to the debt to be paid. *See, e.g., Chemical Co., Befarrah,* and *Crow.* All of these interpretations occurred prior to 1970 when a complete editorial revision of the North Carolina Constitution took place and was ratified by the voters on 3 November 1970. Thus, applying the Supreme Court's rule concerning well-settled constructions, the people are deemed to have approved of the judicial construction given this provision when they ratified the newly-revised constitution in 1970 without making substantial changes in Article X, Section 1. Therefore, we hold that N.C. Gen. Stat. § 1C-1601(c) and § 1C-1603(e)(2), as they attempt to limit the claiming of constitutional exemptions to 20 days after notice to designate is served, are unconstitutional.

Since the parties failed to argue the issue of the trial court's denial of the defendant's Motion to Excuse Waiver pursuant to N.C. Gen. Stat. § 1C-1601(c)(3) in their briefs, we deem this issue abandoned under Rule 28(b)(5) and do not address this issue.

Judgment is reversed.

Chief Judge HEDRICK and Judge WALKER concur.

SALLY SILVERING v. EDWARD VITO

No. 9120DC408

(Filed 18 August 1992)

1. Divorce and Separation § 566 (NCI4th)— foreign child support order—registration under URESA—substantial compliance with statute

Plaintiff substantially complied with the requirements of N.C.G.S. § 52A-29 for registration of a Florida judgment for child support arrearages under URESA, although she failed to attach to her petition a copy of the Florida Reciprocal Enforcement of Support Act and a list of states where the Florida order is registered, where the pleadings contained an allegation that the last legal proceeding in this cause was the Florida proceeding granting judgment in arrears of a specified amount on 1 April 1988. Furthermore, plaintiff's failure to attach a description of the obligor's property subject to execution did not require dismissal of the petition but merely limited the enforcement remedies available to plaintiff.

Am Jur 2d, Desertion and Nonsupport §§ 148-149.

2. Divorce and Separation § 566 (NCI4th)— foreign child support order—notice of registration

Although defendant did not receive notice from the clerk of the registration of a foreign child support judgment as provided in N.C.G.S. § 52A-29, defendant's due process rights were not violated where a civil summons and the URESA petition were served upon defendant eight days after the URESA petition was filed, and defendant thus received actual notice of the pending litigation.

Am Jur 2d, Desertion and Nonsupport §§ 129, 148.

3. Divorce and Separation § 567 (NCI4th)— child support arrearages—foreign judgment—full enforcement

Where defendant father's child support arrearages were reduced to judgment by a Florida court, plaintiff mother is entitled to full enforcement of that judgment in North Carolina for a period of ten years after its entry and is not limited by N.C.G.S. § 1-47(1) to recovery of arrearages which accrued within ten years prior to the filing of the URESA petition.

Am Jur 2d, Desertion and Nonsupport § 149.

Judge GREENE concurring in the result.

APPEAL by defendant from judgment entered 18 January 1991 by *Judge Susan C. Taylor* in MOORE County District Court. Heard in the Court of Appeals 20 February 1992.

Alan W. Greene for defendant-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Bertha Fields, for plaintiff-appellee.

JOHNSON, Judge.

Plaintiff-appellee, Sally Silvering, filed a petition pursuant to the Uniform Reciprocal Enforcement of Support Act (URESA), seeking $16,062.50 in arrearages which accrued under a California order for support, and was reduced to judgment in a URESA proceeding in the State of Florida on 1 April 1988.

The trial court made the following findings of fact:

1. That the Respondent was present in Court and represented by Attorney Alan Greene;

2. That on or about April 1, 1988, the Petitioner filed a URESA action in the State of Florida which was heard before the Honorable James R. Stewart, Jr., Circuit Court Judge of the Fifteenth Judicial Circuit of Florida;

3. That the Honorable Judge Stewart issued an order on April 1, 1988 finding that Respondent Edward Vito was present in Court and was represented by Joel N. Weissman, Esquire, and that Petitioner Silvering and the State of Florida were represented by Don Pickett, Esquire; that the Order further found arrearages in payment of child support in the amount of $16,062.50 through February, 1983 and ordered the Respondent to pay said arrearages upon a schedule which was set by the Court; said Order is incorporated herein in its entirety by reference;

4. That the Respondent changed his residence to North Carolina and presently resides in Moore County, North Carolina; that the Petitioner presently resides in the State of California;

5. That on or about July 10, 1989, the Petitioner filed a Complaint for Reciprocal Enforcement of Support which was transmitted to the State of North Carolina;

6. That a hearing was held on Petitioner's Complaint before the undersigned;

7. That Respondent testified at the present hearing and presented no evidence of any payment made since February, 1983.

The trial court concluded as a matter of law:

1. That this matter is properly before this Court;

2. That the State of North Carolina is bound by the full faith and credit clause of the United States Constitution to enforce the Child Support Order of the State of Florida;

3. That the Order of the Court for the Fifteenth Judicial Circuit of the State of Florida must be enforced by the Courts of the State of North Carolina.

The court ordered defendant-appellant to pay $16,062.50 in arrearages.

On appeal, defendant brings forth two assignments of error. Defendant first contends that the trial court erred in denying his motion to dismiss. More specifically, he argues that the statutory requirements of North Carolina Gen. Stat. §§ 52A-29 and 52A-30 (1984) were not met. We disagree.

North Carolina General Statutes § 52A-29 provides that:

An obligee seeking to register a foreign support order in a court of this State shall transmit to the clerk of court (i) three certified copies of the order with all modifications thereof, (ii) one copy of the reciprocal enforcement of support act of the state in which the order was made, and (iii) a statement verified and signed by the obligee, showing the post-office address of the obligee, the last known place of residence and post-office address of the obligor, the amount of support remaining unpaid, a description and the location of any property of the obligor available upon execution, and a list of the states in which the order is registered. Upon receipt of these documents, the clerk of the court, without payment of a filing fee or other cost to the obligee, shall file them in the Registry

> of Foreign Support Orders. The filing constitutes registration under this Chapter.
>
> Promptly upon registration, the clerk of the court shall send by certified or registered mail to the obligor at the address given a notice of the registration with a copy of the registered support order, and the post-office address of the obligee. He shall also docket the case and notify the prosecuting attorney of his action.

North Carolina General Statutes § 52A-30(a) provides that:

> (a) Upon registration, the registered foreign support order shall be treated in the same manner as a support order issued by the court of this State. It has the same effect and is subject to the same procedures, defenses, and proceedings for reopening, vacating or staying as a support order of this State and may be enforced and satisfied in like manner.
>
> (b) The obligor has twenty days after the mailing of notice of the registration in which to petition the court to vacate the registration or for other relief. If he does not so petition, the registered support order is confirmed.

[1] Defendant argues that the record indicates that the copies of the Florida decree were not properly certified and that there is no indication that three copies of the decree were attached to the URESA petition; that a copy of the reciprocal enforcement act of the State of Florida was not included in the URESA petition; that the URESA petition contains no description of the respondent's property subject to execution, and no list of the states in which the Florida decree is registered; and that the record is devoid of any evidence that proper notice of registration was given to defendant-appellant.

The record does show, however, that three copies of a certification or order were attached to the URESA petition and forwarded to the Moore County Clerk of Court. Defendant correctly states that a copy of the Reciprocal Enforcement Act of the State of Florida was not included. Defendant also correctly states that the petition did not contain a description of defendant's property or a list of states where the Florida order is registered. The failure to describe the obligor's property does not warrant dismissal of an action; it merely limits the enforcement remedies available to the obligee. Likewise, the failure of plaintiff-appellee to list other

states where the decree is registered does not warrant a dismissal since the pleadings contain an allegation that the last legal proceeding in this cause was in the Florida proceeding granting judgment in arrears of $16,062.50 on 1 April 1988. We find that plaintiff-appellee substantially complied with the requirements of the statute, and that the registration was proper.

[2] Defendant-appellant further contends that he was not given proper notice of registration pursuant to N.C. Gen. Stat. § 52A-29. The parties stipulated to this fact. The record discloses, however, that a civil summons and the URESA petition were served upon defendant on 11 October 1990, eight days after the URESA petition was filed. Therefore, the defendant received actual notice of the pending litigation within the 20 days prescribed by N.C. Gen. Stat. § 52A-29. The record also shows that defendant was given an opportunity to challenge the URESA action and to be heard prior to the entry of the order. *See* defendant's 18 January 1991 motion to dismiss which did not mention lack of proper notice; *see also* defendant's brief filed in district court, failing to challenge the enforcement of the URESA action or to request modification of the Florida decree. We do not believe that defendant's due process rights were abridged. *See Allsup v. Allsup*, 323 N.C. 603, 374 S.E.2d 237 (1988). Although defendant did not receive notice of registration from the clerk, he did have actual notice of the registration. Accordingly, we are unwilling to reverse the trial court's holding on the basis that defendant did not receive proper notice pursuant to N.C. Gen. Stat. § 52A-29.

[3] Defendant next argues that if the support order is properly registered and enforceable in this State, plaintiff is entitled to recover only those arrearages accruing after 3 October 1980, or within the 10 year statute of limitations provided by N.C. Gen. Stat. § 1-47 (1983). We disagree based on the premise that "an existing final judgment rendered upon the merits, without fraud or collusion, by a court of competent jurisdiction, is conclusive of rights, questions, and facts in issue, as to parties and their privies, in all other actions in the same or any other judicial tribunal of concurrent jurisdiction." *Cannon v. Cannon*, 223 N.C. 664, 669, 28 S.E.2d 240, 243 (1943).

In *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980), where the plaintiff moved to North Carolina and registered an Arizona judgment for arrearages, this Court held that "a final

judgment [is] entitled to full faith and credit [citation omitted] and is conclusive on the amount owed by defendant[.]" *Id.* at 350, 271 S.E.2d at 587. The *Fleming* Court also opined that "[u]nder the full faith and credit clause of the Constitution of the United States, a judgment rendered by the court of one State is, in the courts of another State of the Union, binding and conclusive as to the merits adjudicated. It is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based." *Id.*

North Carolina General Statutes § 1-47(1), the statute which defendant argues prevents plaintiff's full recovery, states that the prescribed period for the commencement of actions "[u]pon a judgment or decree of any court of the United States, or of any state or territory thereof, from the date of its rendition," is ten years. In the case *sub judice*, the application of this statute does not prevent recovery of the full amount entered by the trial court. Enforcement of periodic sums of support arrearages due under a support order which became due more than ten years before the institution of an action for judicial determination of the amount due are barred by the ten year statute of limitations. *Lindsey v. Lindsey*, 34 N.C. App. 201, 203, 237 S.E.2d 561, 563 (1977). Once the amount of arrearages is reduced to judgment, however, as occurred when the Florida court entered its order, that judgment is entitled to full enforcement in North Carolina for a period of ten years after its entry. *Arrington v. Arrington*, 127 N.C. 190, 197, 37 S.E. 212, 214 (1900).

Defendant cites *Stephens v. Hamrick*, 86 N.C. App. 556, 358 S.E.2d 547 (1987), to support his argument that recovery should be limited to those arrearages accruing after 3 October 1980. *Stephens*, however, can be distinguished from the case at bar because in *Stephens*, the arrearages due under the South Carolina order of support had not been reduced to judgment. Here, the arrearages due under the California order of support were reduced to judgment in Florida. Accordingly, the judgment entered by the State of Florida is entitled to full faith and credit, as it was entered 11 April 1988, within two years of the filing of the action in North Carolina.

Defendant's contention that he is not responsible for payment of arrearages after his children reached the age of eighteen is

an issue that he should have raised in the Florida court. The decision of the trial court is

Affirmed.

Judge COZORT concurs.

Judge GREENE concurs in the result by separate opinion.

Judge GREENE concurring in the result.

I disagree with the majority that there was a registration in North Carolina of the Florida "Support Arrearages" order (Florida order). There was never any request by the petitioner, Sally Silvering (Silvering), pursuant to N.C.G.S. § 52A-29 to register the Florida order in North Carolina, the essential information required by N.C.G.S. § 52A-29 for registration of a foreign support order was not filed with the clerk of court, and the Florida order was never filed by the clerk in the "Registry of Foreign Support Orders." Therefore, Edward H. Vito (Vito) never received from the clerk of court, as required by N.C.G.S. § 52A-29, "a notice of the registration with a copy of the registered support order. . . ." N.C.G.S. § 52A-29 (1984). Accordingly, the requirements of N.C.G.S. § 52A-29 and -30 were not met and the Florida order was not registered.

The failure to comply with N.C.G.S. § 52A-29 and -30, however, is not fatal to Silvering's claim. The registration of the Florida order was an option, not a requirement. N.C.G.S. § 52A-25 (1984); N.C.G.S. § 52A-4 (1984) (remedies provided in the Uniform Reciprocal Enforcement of Support Act are in addition to other remedies). She was not precluded from filing her petition for support, as she did, under the provisions of N.C.G.S. § 52A-10, and requesting that the trial court recognize the Florida order pursuant to the Full Faith and Credit Clause of the United States Constitution. *See* N.C.G.S. § 52A-10 (1984). The Florida order is entitled to full faith and credit if the Florida court had jurisdiction over the subject matter and the person of Vito, Vito was given notice and an opportunity to be heard in the Florida proceeding, and the order was final and not subject to modification. *Boozer v. Wellman*, 80 N.C. App. 673, 676, 343 S.E.2d 540, 542 (1986); *Sistare v. Sistare*, 218 U.S. 1, 54 L.Ed. 905 (1910) (sister states not bound to honor modifiable decrees); *Lockman v. Lockman*, 220 N.C. 95, 99, 16 S.E.2d 670, 672 (1941); *Fleming v. Fleming*, 49 N.C.App. 345, 350, 271 S.E.2d

584, 587 (1980) (full faith and credit not required if order of support can be modified by state entering order). Vito makes no argument that the Florida order was entered without jurisdiction and it is therefore presumed that the court had jurisdiction. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 526, 146 S.E.2d 397, 400 (1966) (jurisdiction is presumed unless contrary is shown). The record also reflects that Vito was present in the Florida courts and given an opportunity to present evidence prior to the entry of the order establishing the arrearages. Nor does Vito contend that the Florida order was subject to modification. Accordingly, the trial court correctly gave full faith and credit to the Florida decree.

I agree with the majority that the Florida order is entitled to full enforcement in North Carolina and that no portion of the Florida order is barred by the ten-year statute of limitations. When arrearages are judicially determined in another state and that order is entitled to full faith and credit, that order is entitled to full enforcement in North Carolina for a period of ten years after its entry in the other state. *See Arrington v. Arrington*, 127 N.C. 190, 197, 37 S.E. 212, 214 (1900) (N.C.G.S. § 1-47 applies to foreign judgments). The Florida order which determined the arrearages is, as discussed above, entitled to full faith and credit, and because the North Carolina action was filed within ten years of the date of the entry of the Florida order, plaintiff is entitled to a judgment in the full amount of the arrearages as determined in the Florida order.

I also agree with the majority that the defendant's failure to raise in the Florida courts the issue of entitlement to arrearages accruing after the children reached eighteen, bars defendant from raising that issue in this proceeding.

TAMMY CARPENTER, PETITIONER-APPELLEE v. N.C. DEPT. OF HUMAN RESOURCES, RESPONDENT-APPELLANT

No. 9118SC349

(Filed 18 August 1992)

Social Security and Public Welfare § 1 (NCI3d)— food stamps—income—exclusion of HUD utility reimbursements

Monthly utility reimbursement payments received by petitioner pursuant to a HUD housing assistance program should be excluded from income for the purpose of calculating petitioner's food stamp benefits.

Am Jur 2d, Welfare Laws §§ 26-27.

What constitutes income, under 7 USCS sec. 2014(d), (k), for purposes of determining eligibility for food stamps. 102 ALR Fed 160.

APPEAL by respondent from an order entered 19 January 1991 by *Judge A. Leon Stanback, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 14 January 1992.

Petitioner lives in housing which is subsidized under Section 8 of the United States Housing Act, 42 U.S.C. § 1437F. The Section 8 program is administered by the Department of Housing and Urban Development (HUD). Under the HUD program, petitioner's rent is fully subsidized, and she receives a monthly utility reimbursement check from the landlord for utility bills paid directly by her to the utilities. In calculating petitioner's income to determine the amount of food stamp benefits she is eligible to receive, the Guilford County Department of Social Services includes the utility reimbursement check as income.

In April 1990 petitioner requested an appeal pursuant to N.C. Gen. Stat. § 108A-79(a) in order to challenge the Guilford County Department of Social Services' (county DSS) practice of including her utility reimbursement payments she received under the Housing Act, 42 U.S.C. § 1437 *et seq.* as income in calculating her food stamp benefits. A hearing was held before J. McRay Harward, Hearing Officer, on 19 July 1990. The hearing officer upheld the county DSS practice of including HUD utility reimbursement checks in computing food stamp benefits. Pursuant to N.C. Gen. Stat. § 108A-79(k), petitioner then sought judicial review of the agency

decision in Guilford County Superior Court. The trial court reversed the decision of the state hearing officer and held that Section 6187.76G of the North Carolina Department of Human Resources Food Stamp Certification Manual violated 7 U.S.C. 2014(d)(11) in that it fails to list utility rebates as a payment or allowance made for the purpose of energy assistance. From that order, respondent appeals.

Attorney General Lacy H. Thornburg, by Associate Attorney General Marilyn A. Bair, for respondent-appellant.

Central Carolina Legal Services, Inc., by Stanley B. Sprague and Sorien Schmidt, for petitioner-appellee.

ORR, Judge.

This case involves the interpretation of a federal regulation by a state agency. The Secretary of Agriculture has interpreted the regulation; however, Federal courts which have reviewed this issue are in disagreement as to whether the interpretation is reasonable and based on a permissible construction of the statute. The State has chosen to follow the Secretary's interpretation of the regulation which is challenged by petitioner.

In its simplest form, the issue on appeal is whether utility reimbursement payments authorized under Section 8 of the Housing Act should be excluded as income for the purpose of calculating food stamp benefits. Respondent contends that the Secretary of Agriculture (Secretary) has correctly interpreted 7 U.S.C. § 2014(d)(11) so that these Section 8 utility reimbursements should not be excluded. Respondent further contends that the State, in administering the Food Stamp Act, must adhere to the regulation and policy promulgated by the Secretary. Therefore, the State Food Stamp Manual reflecting the Secretary's policy does not violate 7 U.S.C. § 2014(d)(11).

Standard of Review

It is well settled that when a court reviews an agency's interpretation of a statute it administers, the court should defer to the agency's interpretation of the statute. This is so as long as the agency's interpretation is reasonable and based on a permissible construction of the statute. *See, e.g., West v. Bowen*, 879 F.2d 1122 (3d Cir. 1989); *see also Wheller v. Heckler*, 787 F.2d 101, 104 (3d Cir. 1986) (deference accorded the Secretary's construction as

long as it is reasonable and not arbitrary and capricious); *Pennsylvania v. United States*, 752 F.2d 795, 798 (3d Cir. 1984) (reviewing court must uphold agency's interpretation if it is reasonable, even if court believes some other policy preferable). In reviewing the agency's construction of the statute, the court must ask two questions:

> First . . . is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress. If, however, the court determines Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction of the statute, as would be necessary in the absence of an administrative interpretation. Rather, if the statute is silent or ambiguous with respect to the specific issue, the question for the court is whether the agency's answer is based on a permissible construction of the statute.

Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 842-43, 104 S.Ct. 2778, 2781-82, 81 L.Ed.2d 694, 702-03 (1984).

The Food Stamp Act

The statute being interpreted in this case is 7 U.S.C. § 2011 *et seq.*, commonly referred to as The Food Stamp Act. The Food Stamp Act established a federally funded, state administered program to assist eligible individuals with the purchase of food. Participants receive coupons to use in purchasing food. Household income for purposes of the food stamp program includes "all income from whatever source" subject to certain exemptions and deductions which are found in 7 U.S.C. § 2014(d).

The Housing Act

Under the Housing Act, 42 U.S.C. § 1437, *et seq.*, housing assistance programs are operated by Public Housing Authorities under contract with the Department of Housing and Urban Development (HUD) to remedy "the unsafe and unsanitary housing conditions and the acute shortage of decent, safe, and sanitary dwellings for families of low income. . . ." 42 U.S.C. § 1437. The programs include low-rent public housing projects and various rental assistance programs in which tenants lease property from private landlords

with their rent being subsidized by HUD. The Section 8 housing assistance payment program, in which petitioner participates, provides assistance payments for residents renting units from private landlords and other non-governmental entities. 42 U.S.C. § 1437f.

In either case, the rent which may be charged for a unit can amount to no more than 30% of a resident's adjusted gross income. 42 U.S.C. § 1437a(a)(1); 24 C.F.R. §§ 813.107 and 913.107. All housing costs, including utilities, are covered by the rent charged. 24 C.F.R. §§ 882.105(a) (Section 8), 965.472 (public housing). *See also* 42 U.S.C. § 1437f(c)(1) (rent under Section 8 includes "utilities and all maintenance and management charges"). The HUD definition of utilities includes "electricity, gas, heating, fuel, water and sewerage services, and trash and garbage collection." 24 C.F.R. § 965.472.

Section 8 tenants are required by the landlord to pay their utility bills directly to the utility companies. To determine the amount of a tenant's utilities, the landlord determines a community-wide utility allowance (UA) for each size apartment. In order to comply with the 30% cap, the landlord credits the resident with the amount of the UA for his unit, regardless of the amount of the actual utility bill. This reduces the resident's rental obligation to the landlord. In cases such as petitioner's, where the resident's income and rental obligation are exceeded by the UA, the landlord must pay the tenant what is known as a "utility reimbursement." 24 C.F.R. 813.102 (1989).

At issue here is whether the utility reimbursement, which in this case is in the form of a check made out to petitioner, is properly exempted from gross monthly income for the purpose of calculating the food stamp benefit. As previously stated, while several federal courts have addressed this question with no ultimate resolution reached, the decisions reflect a split of authority regarding whether the Secretary has reasonably construed 7 U.S.C. § 2014(d)(11) as not excluding from income utility reimbursements such as petitioner receives. *See, e.g., West*, 879 F.2d 1122 (holding Secretary's construction unreasonable), *but cf. Larry v. Yamauchi*, 753 F. Supp. 784 (1990) (affirming Secretary's construction that HUD utility reimbursements are properly included as income for purposes of calculating food stamp benefit). The statute exempts from income

> any payments or allowances made for the purpose of providing energy assistance (A) under any Federal law, or (B) under

> any State or local laws, designated by the State or local legislative body authorizing such payments or allowances as energy assistance. . . .

Respondent, relying on *Larry*, 753 F. Supp. 784, argues that the plain language of the statute does not include HUD section 8 utility payments such as petitioner receives because the exclusion "clearly limits the exclusion to payments or allowances for energy costs as opposed to *non*-energy costs." *Larry* at 792. Even if Section 8 utility payments were limited to energy costs, respondent argues that the legislative history of the energy exclusion demonstrates that utility payments provided under the Housing Act are "not the type of payments which Congress intended to exclude when it enacted [the] provision." Respondent takes the position that only those payments that are specifically designated to offset increases in the cost of energy are to be excluded. *See Larry* at 796.

Based on our review of the statutory language and legislative history, however, we find the reasoning of the *West* court persuasive on the issue and hold that utility reimbursements are properly excluded from income used to calculate petitioner's food stamp benefit. In *West*, the Third Circuit U.S. Court of Appeals pointed out that the primary sponsor of the energy exclusion stated:

> All Federal payments for the purpose of providing energy assistance would continue to be excluded as income, whether or not specifically designated for energy assistance. It is the purpose for which they are given and not their label that governs.

West at 1131, *citing* 127 Cong. Rec. H9878 (December 16, 1981). Furthermore, while Federal programs enacted to address the increasing cost of energy were the impetus for creating the energy exemption, the statutory language and legislative history demonstrate that Congress did not intend to restrict the exemption for new energy programs only. *Id.* at 1131. Additional support for this position is found in the amendment of the Food Stamp Act's energy exemption by way of the Hunger Prevention Act of 1988. The purpose of the amendment, which changed the order of the language of the energy exemption, was

> . . . to clarify that USDA and local agencies do not need to conduct an inquiry into the purpose of a federal statute before excluding federal "payments for the purpose of energy

assistance." The law as written could be read to require this analysis.

The crucial question should be whether the purpose of the payment is energy assistance, not whether the statute, as a whole is primarily for energy assistance or includes other human services as well. . . .

Id. at 1131 *citing* S. Rep. 100-397 (June 25, 1988) at 28, 29, *reprinted in* 1988 United States Code, Congressional and Admin. News. 2239 at 2266, 2267.

Like the court in *West*, we conclude that it was the intent of Congress that all payments for energy assistance be excluded from income when calculating food stamp benefits. To the extent that Section 6187.7G of the North Carolina Department of Human Resources Food Stamp Certification Manual fails to include utility reimbursements as excluded income, it violates 7 U.S.C. § 2014(d)(11). The decision of the trial court is

Affirmed.

Judges EAGLES and COZORT concur.

TRANSALL, INC., PLAINTIFF v. PROTECTIVE INSURANCE COMPANY, DEFENDANT

No. 9121SC310

(Filed 18 August 1992)

Master and Servant § 80 (NCI3d)— workers' compensation rates—retrospective adjustment—construction of policy—summary judgment improper

A genuine issue of material fact was presented as to whether the retrospective adjustment of plaintiff's premiums for workers' compensation insurance based on claims and loss experience was to be calculated for each year of a three-year period or was to be calculated only once for the entire three-year period.

Am Jur 2d, Summary Judgment § 27; Workers' Compensation § 467.

APPEAL by plaintiff from order entered 4 January 1991 by *Judge Steve Allen* in FORSYTH County Superior Court. Heard in the Court of Appeals 7 January 1992.

Plaintiff Transall, Inc. ("Transall"), a freight hauling company, brought this declaratory judgment action 20 July 1990 seeking a determination as to its rights and liabilities pursuant to three workers compensation policies issued by defendant Protective Insurance Company ("Protective").

The basic source of the controversy between the parties does not pertain to insurance coverage. Instead the issue arises out of conflicting interpretations and understandings of the provision determining how policy premiums were to be calculated. Both Transall and Protective moved for summary judgment. On 4 January 1992, the trial court denied Transall's motion for summary judgment and entered summary judgment in favor of Protective resulting in an unpaid amount due of $370,190 from Transall.

From this order, plaintiff appeals.

Smith Helms Mulliss & Moore, by J. Donald Cowan, Jr. and Terrill L. Johnson, for plaintiff-appellant.

Petree Stockton & Robinson, by James H. Kelly, Jr. and Kenneth S. Broun, for defendant-appellee.

ORR, Judge.

Transall appeals the trial court's entry of summary judgment in favor of Protective. For the reasons below, we reverse the order of the trial court.

Transall purchased three one-year insurance policies from Protective. Protective issued a workers compensation insurance policy, Policy No. RWC 8135, to Transall effective 1 October 1984 to 11 October 1985. The policy contained an endorsement entitled "RETROSPECTIVE PREMIUM ENDORSEMENT RATING OPTION V—THREE YEAR PLAN" which states in pertinent part:

> This endorsement is added to Part Five (Premium) because you chose to have the cost of the insurance rated retrospectively by Rating Option V. This endorsement explains the rating plan and how the retrospective premium will be determined.

> This endorsement . . . determines the retrospective premium for the insurance provided during the rating plan period by this policy, any policy listed in the Schedule, and the renewals of each. The rating plan period is the three year period beginning with the effective date of this endorsement.

The endorsement further provides:

> Insurance policies listed in the Schedule will be combined with this policy to calculate the retrospective premium . . . . If this endorsement applies to more than one policy or state, the standard premium will be the sum of the standard premiums for each policy and state.

The endorsement provides for premium calculation as follows:

> We will calculate the retrospective premium using all loss information we have as of a date six months after the rating period ends and annually thereafter . . . . We may make interim calculations of the retrospective premium for the first year and the first two years of the rating plan period. We will use all loss information we have as of a date six months after the end of these periods.

The "APPLICATION FOR APPROVAL OF PROPOSED RETROSPECTIVE RATING VALUES—RATING OPTION V" states that the term of the plan is three years.

Protective then issued Policy No. RWC 8178 with effective dates of 11 October 1985 to 11 October 1986. The information page of the policy states that it is a "renewal" of Policy No. RWC 8135. The policy contains a retrospective premium endorsement short form which states that "[t]he premium for this policy will be determined by the retrospective premium endorsement forming a part of policy number: RWC 8135." Protective then issued Policy No. RWC 8203 effective 11 October 1986 to 11 October 1987. The information page of the policy states that it is a "renewal" of Policy No. RWC 8178. The policy also contains a retrospective premium endorsement short form with the same language as in Policy No. RWC 8178.

* * *

"[S]ummary judgment is appropriate in a declaratory judgment action where there is no genuine issue as to any material fact and either party is entitled to a judgment as a matter of law."

Threatte v. Threatte, 59 N.C. App. 292, 294, 296 S.E.2d 521, 523 (1982), *disc. review allowed*, 307 N.C. 582, 299 S.E.2d 650, *review improvidently granted*, 308 N.C. 384, 302 S.E.2d 226 (1983). 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).

The retrospective premium endorsement provides for adjustment of the premiums due under the policy based on claims and loss experience. The purpose of a retrospective premium endorsement is

> to make the premium more closely reflect the actual loss and cost experience of the insured averaging out such experience over an extended period, usually three years. When the policy is issued, an estimated standard premium is set. This premium is only an estimate and normally does not represent the final premium although it may be relevant to the computation of that premium. Maximum and minimum premiums are also usually set. The final premium is based on several factors, including the insured's actual incurred losses. Computation based on the whole period is proper.

14 J. Appleman, *Insurance Law and Practice* § 7849.25 at 136-37 (1985).

In its complaint, Transall alleges that the proper construction and its understanding of the retrospective premium endorsements are that the "calculations are to be performed on each policy individually, and that the three policies are not to be combined in calculating the retrospective premium." In its answer, Protective contends that the "proper construction of the Retrospective Premium arrangement . . . calls for a calculation of the Retrospective Premiums due over a three year period based upon the combined experience for the three years. . . ."

"Insurance contracts are construed according to the intent of the parties, and in the absence of ambiguity, we construe them by the plain, ordinary and accepted meaning of the language used." *Integon General Ins. Corp. v. Universal Underwriters Ins. Co.*, 100 N.C. App. 64, 68, 394 S.E.2d 209, 211 (1990). "[A] contract of insurance should be given that construction which a reasonable

person in the position of the insured would have understood it to mean. . . ." *Grant v. Emmco Ins. Co.*, 295 N.C. 39, 43, 243 S.E.2d 894, 897 (1978). "It is a general rule of contract law that the intent of the parties, where not clear from the contract, may be inferred from their actions." *Branch Banking & Trust Co. v. Kenyon Investment Corp.*, 76 N.C. App. 1, 9, 332 S.E.2d 186, 192, *disc. review allowed*, 314 N.C. 662, 335 S.E.2d 902 (1985), *appeal withdrawn*, 316 N.C. 192, 341 S.E.2d 587 (1986).

Here the endorsement to the original policy, Policy No. RWC 8135, is entitled "RETROSPECTIVE PREMIUM ENDORSEMENT RATING OPTION V—THREE YEAR PLAN." The application states that the term of the plan is three years, and Transall concedes that it purchased insurance on a three year plan.

The endorsement to the original policy states that "[it determines the retrospective premium for the insurance provided during the rating plan period by this policy, any policy listed in the Schedule, and the renewals of each." Here no policy is listed. However, Policy No. RWC 8178 is a "renewal" of Policy No. RWC 8135 and Policy No. RWC 8203 is a "renewal" of Policy No. RWC 8178. The endorsement further provides for calculations and states that interim calculations may be made for the first year and the first two years of the rating plan period.

Transall contends the retrospective premium endorsement is unclear. Protective, however, relies on the policy's provision which states that "the rating plan period is the *3 year period* beginning with the effective date of this endorsement" (emphasis added), on the provision providing for "interim" calculations, and on the short form endorsements governing calculations for the two renewals. However, although there is reference to a three year period (and Transall concedes that it purchased insurance based on a three year plan), there is no reference to a combined adjustment, as Protective argues, in the original policy or short form endorsements. The short form endorsements merely state that the premiums "will be determined by the retrospective premium endorsement forming a part of Policy No. RWC 8135." Moreover, Transall argues that Protective's interpretation would defeat the Maximum Retrospective Premium calculated for each policy in the invoices.

In addition, Protective in fact did make calculations each year which is evidenced by a letter to Transall from Wayne Wittry, an account executive for Protective, which showed that during

the three year period Protective calculated the retrospective premium separately for each policy. Transall offered the affidavit of Thomas Clarke, who was responsible for supervising these insurance policies. His affidavit stated that "[a]t no time has plaintiff Transall ever agreed to allow defendant Protective to combine the maximum retrospective premiums and loss experiences of policy numbers RWC 8135, 8178, 8203, and at no time has Transall understood that the policies were intended to convey such authority to Protective." The affidavit of John E. Mitchell, a senior underwriter for Protective, stated that Policy No. 8135 "was subject to a Retrospective Premium Endorsement, said premium to be calculated pursuant to a three year plan. This three year rating plan period established a contract for insurance which covered a three year period." The affidavit of Lowell T. Gratigny, an account executive with Protective, stated that the "premium . . . would be on a one-year retrospective program basis, and the premium for Transall would be based upon a three-year retrospective plan."

While the interpretation of an insurance policy is a matter of law to be determined by the court, *Tyler v. Nationwide Mut. Ins. Co.*, 101 N.C. App. 713, 401 S.E.2d 80 (1991), and any ambiguity is to be resolved in favor of the insured since the contract was prepared by the insurer, *id.*, we decline to uphold summary judgment in this case. Here coverage was contracted for and provided. Protective has made a demand for payment based on its contentions as to how the premium was to be calculated. Transall has objected to the method of calculation and demanded Protective adjust its invoices accordingly. In our opinion, a genuine issue of material fact is raised as to how the premium to be charged was to be calculated, and a trier of fact should determine the premium amount due. Therefore, the trial court erred in granting summary judgment.

Reversed.

Judges EAGLES and COZORT concur.

JOHN DONNELLY, JR., PLAINTIFF/APPELLEE v. GUILFORD COUNTY, JOHN V. WITHERSPOON, AND LOUIS BECHTEL, DEFENDANTS/APPELLANTS

No. 9018SC1331

(Filed 18 August 1992)

Appeal and Error § 91 (NCI4th)— employment termination—jury verdict on two issues—appeal interlocutory

An appeal from a jury verdict in an action arising from the termination of a social worker was interlocutory and was dismissed where no substantial right would be affected if immediate appeal was not permitted in that the jury awarded plaintiff one dollar in damages, so that plaintiff has no statutory right to appeal pursuant to N.C.G.S. §§ 1-277 or 7A-27; the trial judgment is not final as to all claims in that plaintiff alleged violations of his state and federal constitutional rights and prayed for a preliminary injunction and equitable relief including reinstatement, promotion, compensatory pay, compensatory and punitive damages, and attorney's fees, and the jury addressed only the issues of whether plaintiff had waived his right to a post-termination hearing and the amount of monetary damages to which he was entitled; and, since the judgment on the verdict did not resolve all of the claims, the appeal from that judgment and from the order denying defendants' motion for judgment n.o.v. is interlocutory. N.C.G.S. § 1A-1, Rule 54(b).

Am Jur 2d, Appeal and Error § 62.

APPEAL by defendants from Judgment entered 6 November 1990 by *Judge Harold R. Greeson, Jr.* in GUILFORD County Superior Court. Heard in the Court of Appeals 24 September 1991.

Elliot & Pishko, P.A., by Robert M. Elliot, for plaintiff appellee.

Guilford County Attorney's Office, by Deputy County Attorneys J. Edwin Pons and Gregory L. Gorham, for defendant appellants.

COZORT, Judge.

Plaintiff was employed as a social worker with the Guilford County Department of Social Services (Guilford County DSS) from November 1972 to August 1987. On 7 July 1987, plaintiff was placed

on administrative leave for alleged insubordination and disruption of work. The director of the Guilford County DSS met with plaintiff on 3 August 1987, at which time plaintiff was confronted with the charges against him and permitted the opportunity to reply. The director of DSS sent plaintiff a letter terminating his employment as of 14 August 1987. Pursuant to the Guilford County Personnel Regulations, plaintiff filed notice of his intent to contest the termination decision within the appropriate time limit. On 31 August 1987, plaintiff retained an attorney who sent a letter to the County Attorney requesting a copy of the grievance procedure, documents from plaintiff's personnel file, and agreeing to discuss a date for the hearing. On 18 September, after returning from an extended out-of-town stay, plaintiff discovered one letter informing him that he would forfeit his right to appeal if he did not respond by "Wednesday, September 9 at 5:00" and one letter informing him that his right to appeal had been waived and his termination was final. Plaintiff retained new counsel who informed the County Attorney that plaintiff had not received either of the letters and requested a copy of the grievance procedure and informal discovery before the hearing. Plaintiff did not receive a response from the County and did not receive a post-termination hearing.

On 8 December 1988, plaintiff brought suit against defendants alleging violations of state and federal constitutional rights, defamation, and intentional infliction of emotional harm, and praying for relief of preliminary injunction, equitable relief, including, but not limited to, reinstatement, promotion, and compensatory pay, compensatory and punitive damages, and attorneys' fees. Prior to trial, plaintiff filed a voluntary dismissal of the defamation and intentional distress claims against all defendants. Beginning 25 April 1990, the case was tried before a jury. Two issues were submitted to the jury: (1) whether plaintiff waived his constitutional rights to a post-termination hearing, and (2) the amount of damages plaintiff was entitled to recover. Defendants appeal from judgment on the jury verdict awarding the plaintiff $1.00 nominal damages and the order of the trial court denying defendants' Motion for Judgment Notwithstanding the Verdict. We dismiss the appeal.

If there is no right to appeal, an appellate court has the duty of dismissing the appeal on its own motion. *Waters v. Personnel, Inc.*, 294 N.C. 200, 201, 240 S.E.2d 338, 340 (1978). A party has a right to appeal from a final judgment "which disposes of the cause as to all the parties, leaving nothing to be judicially deter-

mined between them in the trial court." *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381, *reh'g denied*, 232 N.C. 744, 59 S.E.2d 429 (1950). *See also* N.C. Gen. Stat. § 7A-27 (1989). A party may appeal from an interlocutory judgment, "one made during the pendency of an action, which does not dispose of the case," *Veazey*, 231 N.C. at 362, 57 S.E.2d at 381, only in limited circumstances.

There are three statutory provisions permitting appeal of interlocutory judgments: N.C. Gen. Stat. § 1-277 (1983), § 7A-27(d) (1989), and N.C. Gen. Stat. § 1A-1, Rule 54(b) (1990). Rule 54(b) provides in pertinent part:

> *Judgment upon multiple claims or involving multiple parties.*— When more than one claim for relief is presented in an action, . . . the court may enter a final judgment as to one or more but fewer than all of the claims or parties only if there is no just reason for delay and it is so determined in the judgment. Such judgment shall then be subject to review by appeal or as otherwise provided by these rules or other statutes. In the absence of entry of such a final judgment, any order or other form of decision, however designated, which adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties shall not terminate the action as to any of the claims or parties and shall not then be subject to review either by appeal or otherwise except as expressly provided by these rules or other statutes.

Id.

N.C. Gen. Stat. § 1-277, entitled "Appeal from superior or district court judge," and N.C. Gen. Stat. § 7A-27, entitled "Appeals of right from the courts of the trial divisions," contain in pertinent part virtually the same language. Section 1-277(a) provides:

> An appeal may be taken from every judicial order or determination of a judge of a superior or district court, upon or involving a matter of law or legal inference, . . . which affects a substantial right claimed in any action or proceeding; or which in effect determines the action, and prevents a judgment from which an appeal might be taken; or discontinues the action, or grants or refuses a new trial.

In *Equitable Leasing Corp. v. Myers*, 46 N.C. App. 162, 265 S.E.2d 240 (1980), we approved the following method of analysis to determine whether a case is appealable:

> Where the right to appeal is conferred by statute, *i.e.*, where a substantial right of the parties would be affected if immediate appeal were not permitted under G.S. 1-277 or G.S. 7A-27, the judgment is appealable whether it is final or interlocutory in nature. Where there is no such statutory right to appeal, the next question is whether the judgment is in effect final as to all of the claims and parties. If so, the judgment is immediately appealable. If not, the next question must be whether the specific action of the trial court from which appeal is taken is final or interlocutory. If the court's action is interlocutory, no appeal will lie whether or not certified for appeal by the trial court. If the action is final as to fewer than all claims or the rights and liabilities of fewer than all parties, but has not been certified for appeal by the trial court under Rule 54(b), no appeal will lie. On the other hand, an appeal from such a final judgment or order will be allowed if it is properly certified under the Rule.

Id. at 168-69, 265 S.E.2d at 245, *appeal dismissed*, 301 N.C. 92 (1980). Applying this analysis to the case at bar, we find that the appeal is not properly before us.

First, we must determine whether a substantial right would be affected if immediate appeal is not permitted. In determining whether a substantial right is affected "a two-part test has developed—the right itself must be substantial and the deprivation of that substantial right must potentially work injury to plaintiff if not corrected before appeal from final judgment." *Goldston v. American Motors Corp.*, 326 N.C. 723, 726, 392 S.E.2d 735, 736 (1990). The jury awarded plaintiff $1.00 nominal damages. Although a money judgment may involve a substantial right, *see Wachovia Realty Investments v. Housing, Inc.*, 292 N.C. 93, 232 S.E.2d 667 (1977), we do not find that payment of the $1.00 will "potentially work injury to plaintiff if not corrected before appeal from the final judgment." Therefore, plaintiff does not have a statutory right to appeal pursuant to N.C. Gen. Stat. §§ 1-277 or 7A-27.

Second, we must determine whether the appeal is in effect final as to all of the claims and parties. Here, plaintiff alleged violations of his state and federal constitutional rights and prayed

for relief of preliminary injunction, equitable relief, including reinstatement, promotion and compensatory pay, compensatory and punitive damages, and attorneys' fees. The jury addressed only two issues—whether plaintiff waived his right to a post-termination hearing and the amount of money damages plaintiff was entitled to recover. The issues of preliminary injunction, reinstatement, promotion, compensatory pay, and attorneys' fees remain unresolved. The judgment is not in effect final as to all the claims.

Third, we must determine whether the specific action of the trial court from which appeal is taken is final or interlocutory. Defendants appeal from the judgment on the jury verdict and from the order denying defendants' Motion for Judgment Notwithstanding the Verdict. Since the judgment on the jury verdict did not resolve all the claims, the appeal is interlocutory. Therefore, no appeal will lie.

For all the above reasons, defendants' appeal must be

Dismissed.

Judges ARNOLD and LEWIS concur.

H. C. KIRKHART, PLAINTIFF v. THOMAS A. SAIEED, MARILYN SAIEED, AND SAIEED CONSTRUCTION COMPANY, INC., DEFENDANTS

No. 9110SC507

(Filed 18 August 1992)

Discovery and Depositions § 41 (NCI4th)— fraudulent conveyance of assets—discovery of documents—motion to compel denied—abuse of discretion

The trial court abused its discretion in an action by a creditor alleging fraudulent conveyance of stock by denying plaintiff's motion to compel production of documents and granting summary judgment for defendants where plaintiff requested documents within the possession, custody, or control of defendants that are relevant to the case and reasonably calculated to lead to admissible evidence; plaintiff's requests were relevant to the issue of the value of the stock, the intent of defend-

ants in making the transfer, and defendants' ability to pay their debts; the trial court made no finding of dilatory tactics and the Court of Appeals found no dilatory tactics; and plaintiff was prejudiced by the trial court granting summary judgment prior to the completion of discovery because plaintiff did not have access to the documents necessary to establish his case by the time of the hearing. N.C.G.S. § 1A-1, Rule 34.

Am Jur 2d, Depositions and Discovery §§ 249, 254, 256.

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 17 March 1992.

Shipman & Lea, by Jennifer L. Umbaugh, for plaintiff appellant.

Mark C. Kirby for defendant appellees.

COZORT, Judge.

On 10 April 1989 plaintiff obtained judgment against defendants Thomas and Marilyn Saieed as guarantors on a defaulted promissory note. After learning that defendants Saieed had transferred 25,176 shares of stock in Saieed Construction Company (Company) back to the Company for the sum of $10.00, plaintiff then filed the present action for fraudulent conveyance of assets. On 9 March 1990 plaintiff served a Request for Documents. Defendants filed a motion for protective order on 6 July, responded to some of plaintiff's requests, and objected to others. On 6 August 1990 defendants moved for summary judgment. Plaintiff filed a motion to compel discovery on 16 August 1990. At a 27 February 1991 hearing on the motions, plaintiff moved for a continuance on the basis that there were outstanding discovery requests, an outstanding motion to compel production of documents, and the information sought in discovery was critical to plaintiff's response to defendants' motion for summary judgment. The trial court denied plaintiff's motions to continue and to compel, and granted defendants' motion for summary judgment. Plaintiff appeals. We reverse.

Plaintiff argues on appeal that the trial court erred in (1) granting defendants' motion for summary judgment and (2) denying plaintiff's motion to compel discovery. To decide these issues we must first review the nature of plaintiff's claim.

N.C. Gen. Stat. § 39-15 (1984) prohibits debtors from fraudulently conveying their assets to avoid creditors. A creditor is entitled to protection from fraudulent transfers even though a debtor transfers the assets prior to the creditor obtaining judgment against the debtor. *Nytco Leasing, Inc. v. Southeastern Motels*, 40 N.C. App. 120, 133, 252 S.E.2d 826, 833 (1979). In *Aman v. Walker*, 165 N.C. 224, 81 S.E. 162 (1914), the North Carolina Supreme Court set forth the principles governing fraudulent conveyances as follows:

> (1) If the conveyance is voluntary, and the grantor retains property fully sufficient and available to pay his debts then existing, and there is no actual intent to defraud, the conveyance is valid.
>
> (2) If the conveyance is voluntary, and the grantor did not retain property fully sufficient and available to pay his debts then existing, it is invalid as to creditors; but it cannot be impeached by subsequent creditors without proof of the existence of a debt at the time of its execution, which is unpaid, and when this is established and the conveyance avoided, subsequent creditors are let in and the property is subjected to the payment of creditors generally.
>
> (3) If the conveyance is voluntary and made with the actual intent upon the part of the grantor to defraud creditors, it is void, although this fraudulent intent is not participated in by the grantee, and although property sufficient and available to pay existing debts is retained.
>
> (4) If the conveyance is upon a valuable consideration *and made with the actual intent to defraud creditors upon the part of the grantor alone, not participated in by the grantee* and of which intent he had no notice, it is valid.
>
> (5) If the conveyance is upon a valuable consideration, but made with the actual intent to defraud creditors on the part of the *grantor*, participated in by the *grantee* or of which he he [*sic*] has notice, it is void.

165 N.C. at 227, 81 S.E. at 164 (emphasis in original). To sustain a claim under principles (2) and (3) plaintiff must present evidence of the voluntary nature of the transfer of the stock. "[A] conveyance is voluntary when it is not for value, *i.e.*, when the purchaser does not pay a reasonably fair price such as would indicate unfair dealing and be suggestive of fraud." *Nytco*, 40 N.C. App. at 128,

252 S.E.2d at 832. In addition to a showing of voluntariness, principle (2) requires plaintiff to present evidence that the defendants did not retain sufficient assets to pay their debts existing at the time of the transfer; principle (3) requires plaintiff to present evidence of defendants' intent to defraud creditors. Principles (4) and (5) also require plaintiff to present evidence of defendants' intent. Principle (5) further demands evidence of the Company's participation in or notice of the defendants' fraud.

Plaintiff argues that the key issues to his case are:

> (1) The value of the Corporate stock at the time of the transfer;
>
> (2) The financial condition of the Corporation as it relates to the worth of the stock;
>
> (3) The financial condition of Thomas and Marilyn Saieed on July 16, 1988 when they transferred the stock; and
>
> (4) The intent of Thomas and Marilyn Saieed in transferring this stock.

On 9 March 1990 plaintiff served on defendants a request for documents including (1) copies of 1986, 1987, and 1989 tax returns for the Company; (2) the Company's 1987-1990 financial statements used to secure construction projects; (3) list of any and all jobs the Company was involved in, including contract amount; (4) list of all jobs completed by the Company in 1987-1990 and contract amount; (5) copies of corporate by-laws, Articles of Incorporation, and any amendments of the Company; (6) copies of all bank statements of the Company from 1987-1990; (7) copies of all bank statements of defendants Saieed from 1987-1990; and (8) a listing of all assets, equipment and inventory currently owned by the Company. Four months later, defendants sent plaintiff a 1986 tax return with all figures redacted, and a 1987 depreciation and amortization schedule with all figures redacted. Defendants objected to the other requests and filed a motion for a protective order. Defendants later reconsidered their position and offered plaintiff additional information on 19 December 1990. Even the additional documents, however, did not fully satisfy plaintiff's request. The trial court never ruled on defendants' motion, but denied plaintiff's motion to compel.

N.C. Gen. Stat. § 1A-1, Rule 34 (1990) provides in pertinent part

> (a) *Scope.*—Any party may serve on any other party a request (i) to produce and permit the party making the request . . . any designated documents . . . which constitute or contain matters within the scope of Rule 26(b) and which are in the possession, custody or control of the party upon whom the request is served . . . .

N.C. Gen. Stat. § 1A-1, Rule 26(b) (1990) provides that parties may obtain discovery regarding any unprivileged matter relevant to the pending action and reasonably calculated to lead to the discovery of admissible evidence. Rule 34 further provides that unless the court states otherwise, a defendant has forty-five days after being served to respond or specifically object to the request. If defendant fails to respond, upon reasonable notice to all other parties, the serving party may move for a motion to compel discovery pursuant to N.C. Gen. Stat. § 1A-1, Rule 37(a) (1990). N.C. Gen. Stat. § 1A-1, Rule 34. N.C. Gen. Stat. § 1A-1, Rule 37(a)(3) (1990) provides that "an evasive or incomplete answer is to be treated as a failure to answer."

Plaintiff contends, and we agree, that the documents requested are discoverable pursuant to Rule 34. Plaintiff, a party, has requested documents within the possession, custody, or control of defendants, that are relevant to the case and reasonably calculated to lead to admissible evidence. Plaintiff's requests are relevant to the issue of the value of the stock, the intent of the defendants in making the transfer, and defendants' ability to pay their debts. Although orders regarding discovery are within the discretion of the trial court, *Dworsky v. Travelers Insurance Co.*, 49 N.C. App. 446, 448, 271 S.E.2d 522, 523 (1980), we conclude that the trial court abused its discretion in denying plaintiff's motion to compel production of such relevant documents.

"Ordinarily it is error for a court to hear and rule on a motion for summary judgment when discovery procedures, which might lead to the production of evidence relevant to the motion, are still pending and the party seeking discovery has not been dilatory in doing so." *Conover v. Newton*, 297 N.C. 506, 512, 256 S.E.2d 216, 220 (1979). Although the defendants argue that plaintiff was dilatory in seeking discovery, the trial court made no such finding and we find no dilatory tactics. Since plaintiff did not have access to the documents necessary to establish his case by the time of

the hearing, we find that plaintiff was prejudiced by the trial court granting summary judgment prior to the completion of discovery.

Therefore, the Judgment below granting summary judgment to defendants and the Order below denying plaintiff's motion to compel are reversed and the cause remanded for further proceedings.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

NAN WOOD HALL, PLAINTIFF v. WAYNE OSCAR HALL, DEFENDANT

No. 9125DC529

(Filed 18 August 1992)

1. Divorce and Separation § 392.1[1] (NCI4th)— child support—guidelines—not followed—error

The trial court erred in a child support action by entering an order for an amount greater than the presumptive amount without reference to the child support guidelines where the order was entered on 18 July 1990. The presumptive guidelines cover orders entered after 1 July 1990. N.C.G.S. § 50-13.4(c1) (Cum. Supp. 1989).

Am Jur 2d, Divorce and Separation § 1018.

2. Divorce and Separation § 162 (NCI4th)— equitable distribution—memorandum of judgment—foreclosure expenses—reimbursement

The trial court did not err in a domestic action by ordering defendant to pay plaintiff $2,500 expended by plaintiff in warding off a foreclosure action against some of the marital property where the parties had entered into a memorandum of judgment. Although defendant contended that the court's actions amounted to a modification of an interspousal consent judgment, the memorandum was loosely worded and it was within the court's discretion to interpret the phrase "contingent

1. New section pending publication of 1993 supplement.

upon satisfactory financial arrangements being made [regarding] division of marital debts" as including the reimbursement of financing charges incurred by plaintiff.

Am Jur 2d, Divorce and Separation § 817.

APPEAL by defendant from Order entered 18 July 1990 by *Judge Robert E. Hodges* in CATAWBA County District Court. Heard in the Court of Appeals 18 March 1992.

Tate, Young, Morphis, Bach & Farthing, by Thomas C. Morphis, for plaintiff appellee.

Lewis E. Waddell, Jr., for defendant appellant.

COZORT, Judge.

Plaintiff-wife and defendant-husband were married on 5 December 1975. They had two children during the course of the marriage, David George Clark Hall, born 22 February 1978, and Jason Conrad Hall, born 1 February 1980. The parties separated and have been subsequently divorced. Prior to the divorce, substantial litigation occurred involving child custody, child visitation, child support, temporary and permanent alimony, and equitable distribution. Defendant appeals the final judgment entered on 18 July 1990 which addresses child custody, child support, and equitable distribution. Defendant presents the following issues on appeal: (1) whether the trial court erred in ordering defendant to pay child support in excess of the presumptive child support guidelines; and (2) whether the trial court erred in ordering defendant to reimburse plaintiff for sums expended to defend a foreclosure action, when a memorandum of judgment entered on 6 July 1989 did not explicitly contemplate such a payment. We reverse the trial court's judgment as to child support and affirm the trial court's decision that defendant should pay plaintiff the amount ordered to recoup expenses incurred by defending the foreclosure.

[1] On 1 October 1989, the advisory child support guidelines prescribed by the Conference of Chief District Court Judges became presumptive. *See* N.C. Gen. Stat. § 50-13.4(c1) (Cum. Supp. 1989). The presumptive guidelines covered orders entered after 1 July 1990. *Id.* The order in the case below was entered on 18 July 1990 and thus was subject to the presumptive guidelines. The order, however, makes no reference to the child support guidelines. In-

stead, defendant is ordered to pay an amount greater than the amount established by the guidelines. This Court has stated in a similar case:

> It is apparent that the trial court did not apply the presumptive guidelines in this case. The guidelines are not mentioned in the order, neither does the order make reference to any of the factors used to vary a support payment from the presumptive amounts. Failure to follow the guidelines requires that the order be reversed.

Greer v. Greer, 101 N.C. App. 351, 354, 399 S.E.2d 399, 401 (1991). As in *Greer*, we reverse the trial court's order as to child support for failure to follow the presumptive child support guidelines and remand for a determination of child support in accordance with the guidelines.

[2] The other issue in this case concerns the trial court's order directing defendant to pay plaintiff $2,500.00, money expended by plaintiff to ward off a foreclosure action on some of the marital property. The parties entered into a Memorandum of Judgment on 6 July 1989. Attached to the Memorandum of Judgment was an Exhibit "A," which stated the "[p]arties agree to a distribution of marital property as follows contingent upon satisfactory financial arrangements being made [regarding] division of marital debts." At the time of the entry of the Memorandum of Judgment, a foreclosure action was pending against some of the marital property. The question of foreclosure expenses was not addressed in the Memorandum of Judgment. In its order, the trial court approved the Memorandum of Judgment and directed defendant to pay $2,500.00 in costs to reimburse plaintiff for expenses incurred to defend the foreclosure. Defendant argues the trial court's actions amounted to a "modification of an interspousal consent judgment." We disagree. We acknowledge the Memorandum of Judgment was loosely worded. However, it was within the trial court's discretion to interpret the phrase "contingent upon satisfactory financial arrangements being made [regarding] division of marital debts," as including the reimbursement of financing charges incurred by plaintiff. Since the court considered the reimbursement with regard to the Memorandum of Judgment and determined the payment would achieve equity between the parties, we find no abuse of discretion. The trial court's order is

Affirmed in part, reversed in part, and remanded for determination of child support.

Judges JOHNSON and GREENE concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 4 AUGUST 1992

Case	County	Disposition
BUYCE v. CITY OF SALUDA No. 9129SC80	Polk (89CVS137)	Affirmed
CHATEAU CONSTRUCTION CORP. v. HINTON No. 9110SC359	Wake (89CVS02703)	Appeal Dismissed
DONLEVY v. SALLS No. 9126DC286	Mecklenburg (90CVD909)	Affirmed
IN RE WOODS No. 9115DC379	Alamance (90J53)	Affirmed
LUCAS v. WINSTON No. 9128DC1127	Buncombe (90CVD323)	Affirmed
MILLS v. N.C. DEPT. OF CORRECTION No. 926SC196	Halifax (88CVS882)	Dismissed
MITCHELL v. PIEDMONT PUBLISHING CO. No. 9221SC82	Forsyth (90CVS3385)	Affirmed
MOO-CHIC FARM, INC. v. BUIE No. 9122SC215	Davidson (89CVS5611)	No Error
NCNB NATIONAL BANK v. LYNN No. 9218SC138	Guilford (91CVS3470)	Affirmed
PARKER v. VANCE No. 9224DC224	Avery (90CVD268)	Affirmed
STATE v. BAIOCCHI No. 9129SC322	Henderson (90CRS841) (90CRS842)	No Error
STATE v. CAMPBELL No. 9125SC182	Caldwell (90CRS1926) (90CRS1927) (90CRS1928)	No Error
STATE v. GOODE No. 9210SC209	Wake (90CRS57304)	No Error
STATE v. GREER No. 9221SC226	Forsyth (90CR33683)	No Error

STATE v. LIVINGSTON No. 9225SC172	Caldwell (90CRS3972)	No Error
STATE v. MOODY No. 927SC250	Edgecombe (91CRS8087)	No Error
STATE v. ROLLINS No. 9126SC261	Mecklenburg (90CRS22480) (90CRS22484) (90CRS32248) (90CRS32251) (90CRS32254)	Reversed & remanded for arrest of judgment on one count of felony hit & run driving. No error as to the remaining convictions or judgments
STATE v. SMITH No. 9116SC373	Robeson (90CRS964) (90CRS965)	Affirmed
STATE v. WORLEY No. 9229SC189	Transylvania (91CRS1268) (91CRS1269)	No Error
U. S. PACKAGING, INC. v. BRADLEY No. 9118SC111	Guilford (87CVS7167)	In summary: Defendant Bradley's appeal is dismissed. As to the judgment & orders that are the subject of plaintiffs' & third party defendant Hall's appeal, the 8 July 1988 order is affirmed; 14 March 1990 order is affirmed; 1 June 1990 judgment is affirmed in part; modified & remanded in part; & reversed in part; 25 July 1990 *nunc pro tunc* 28 June 1990 order is affirmed in part & reversed in part; 27 July 1990 order is affirmed.

VANCE COUNTY ex rel. BURWELL v. LEWIS No. 919DC119	Vance (88CVD963)	No Error

FILED 18 AUGUST 1992

FORTESCUE v. PILGRIM No. 9129SC352	Henderson (90CVS204)	Affirmed
JOHNSON v. N.C. DEPT. OF TRANSPORTATION No. 9010IC982	Ind. Comm. (TA-9137)	Affirmed
JUSTICE v. PORTER No. 9121DC651	Forsyth (89CVD1764)	Reversed & remanded
LATHAM v. PASTOR No. 911SC696	Pasquotank (90CVS434)	Appeal Dismissed
MOOSE v. MOOSE No. 9122DC318	Iredell (88CVD3)	Reversed & remanded
RAMSEY v. RAMSEY No. 914DC347	Onslow (89CVD1182) (90CVD2080)	Affirmed in part, reversed in part & remanded for further proceedings
STATE v. LINDSAY No. 914SC708	Jones (90CRS218) (90CRS219) (90CRS222) (90CRS627)	No Error
WERK v. FAROUCHE, INC. No. 9114SC610	Durham (90CVS4692)	Reversed & remanded

STATE OF NORTH CAROLINA v. DAVID CRUMMY, WILLIAM THOMAS McGHEE AND BERDO I. PIERCE

No. 915SC716

(Filed 1 September 1992)

1. Jury § 5 (NCI3d)— venirepersons—ex parte communications—excused from service—no error

There was no error in a narcotics prosecution where venirepersons were excused from jury service after *ex parte* communications with court personnel where the judge expressed concern that those who had been added to the venire would not have sufficient time to get their affairs in order. The substance of what transpired was subsequently placed on the record and defendant was given the opportunity to be heard.

Am Jur 2d, Jury §§ 267, 269.

2. Criminal Law § 476 (NCI4th)— jury selection—deputies' conversation overheard—special venire denied—no error

The trial court did not err in a narcotics prosecution by denying defendants' motion for a special venire or by failing to inquire into possible jury taint where a prospective juror reported to the court that she had overheard a hallway conversation between courtroom deputies which she felt was intimidating. That juror was peremptorily excused and stated that she did not discuss the conversation with anyone, defendants proffered no evidence to show that any impanelled juror overheard the conversation or was prejudiced or intimidated thereby, no juror approached the court with information that he or she had overheard these remarks or otherwise been threatened or intimidated, and each repeatedly answered that he or she could be fair and impartial.

Am Jur 2d, Jury §§ 267, 269.

3. Criminal Law § 912 (NCI4th)— jury poll—juror response—no error

There was no error in a narcotics prosecution where the defendants contended that a juror failed to confirm her verdict when polled in that her response was almost inaudible and that she appeared reluctant and required assistance by other members of the jury in standing and answering questions,

but the record shows the juror affirmed her verdict by answering yes to each question during polling and there was no evidence that she was intimidated by other members of the jury when reaching her verdict or that she did not freely assent to the verdict.

Am Jur 2d, Trial §§ 1766, 1770.

Juror's reluctant, equivocal, or conditional assent to verdict, on polling, as ground for mistrial or new trial in criminal case. 25 ALR3d 1149.

4. Criminal Law § 380 (NCI4th) — objections by defense counsel — admonishment by judge — no abuse of discretion

The trial court did not abuse its discretion in a narcotics prosecution where the court granted defense counsel a continuing objection to a line of questioning, reiterated that point several times, then, when counsel continued to object on the same grounds, commented in the presence of the jury that defense counsel was interrupting and diverting the jury's attention and admonished defense counsel outside the presence of the jury. Defendants failed to show that they were prejudiced by the comments in the presence of the jury or the admonitions outside the presence of the jury, although the Court of Appeals disapproved of the language used by the court in the admonitions and found it unjustifiable under the circumstances. There is nothing in the record to indicate that counsel was intimidated, ineffective, or otherwise unable to adequately represent defendants as a result of the remarks.

Am Jur 2d, Trial §§ 709, 713.

5. Criminal Law § 475 (NCI4th) — narcotics — receipt of extraneous information by juror during deliberations — no evidentiary hearing — no error

The trial court did not abuse its discretion in a narcotics prosecution by not holding an evidentiary hearing where a juror told a court official and a news reporter after the trial that she had heard about a shooting incident which occurred during deliberations, that she was not sure whether the incident involved one of the defendants or his brother, that she was intimidated by the report of the shooting, and there was evidence that the juror had spoken with one of the State's

witnesses by telephone during deliberations. By her own admission, the report of the shooting incident did not influence the juror's deliberations, she unequivocally reaffirmed her verdict when polled, and the court made plenary findings of fact and clearly stated the applicable law.

Am Jur 2d, Trial §§ 1608, 1612.

6. **Jury § 7.14 (NCI3d)— narcotics—peremptory challenges—not racially motivated**

The trial court did not err in a narcotics prosecution by finding that the prosecutor's peremptory challenges were not racially motivated where the State's showing of criminal history, knowledge of the defendant or a member of defendant's family, inability to understand legal rules, and a history of unemployment were sufficient to rebut any showing of a *prima facie* case under *Batson.*

Am Jur 2d, Jury §§ 267, 271, 284.

Use of peremptory challenge to exclude from jury persons belonging to a class or race. 79 ALR3d 14.

7. **Jury § 7.6 (NCI3d)— narcotics—challenges for cause—no opportunity to rehabilitate jurors—no error**

The trial court did not err in a narcotics prosecution by refusing to allow defendants to ask rehabilitative questions to jurors excused for cause after stating that they could not be fair and impartial. The jurors were excused for cause on sufficient grounds and defendants made no showing that further questioning would likely have produced different answers.

Am Jur 2d, Jury §§ 201, 221, 222.

8. **Narcotics § 4 (NCI3d)— trafficking in cocaine—amount and identity of controlled substance—evidence sufficient**

There was sufficient evidence in a prosecution for trafficking in cocaine as to the amount and identity of the controlled substance where there was no stipulation and no physical evidence, and the only evidence of the weight and nature of the substance was the uncorroborated testimony of persons involved in the conspiracy who were testifying under agreement with the State.

Am Jur 2d, Evidence §§ 1153, 1155, 1156.

9. Grand Jury § 17 (NCI4th)— grand jury documents—motion to disclose refused—no error

The trial court did not err in a narcotics prosecution by refusing to allow defendants to inspect investigative grand jury documents where defendants contended that the documents were necessary to determine whether each grand juror heard all of the evidence and concurred in the decision to return the indictment, and that the trial court erred by ruling that such information could not be disclosed as a matter of law when the court could have exercised its discretion under N.C.G.S. § 15A-623(h). However, N.C.G.S. § 15A-622(h), which specifically states that the contents of the petition and affidavit shall not be disclosed, is more specific and pertinent to the facts of this case and is the controlling statute. Moreover, there is no indication in the record that the court reached the conclusion that defendants were not entitled to the documents under the mistaken conclusion that it was required to so hold as a matter of law.

Am Jur 2d, Grand Jury § 39.

Accused's right to inspection of minutes of state grand jury. 20 ALR3d 7.

10. Criminal Law § 448 (NCI4th)— narcotics trafficking—argument concerning presence of children—not prejudicial

The argument of a prosecutor in a narcotics prosecution that children had been present and could smell the odor when defendants cooked cocaine into crack was a reasonable inference from the evidence and was not so grossly improper as to require intervention *ex mero motu.*

Am Jur 2d, Trial § 632.

11. Criminal Law § 76 (NCI4th)— narcotics—change of venue for pretrial publicity—denied

The trial court did not abuse its discretion by denying defendants' motion for a change of venue or a special venire due to pretrial publicity in a narcotics prosecution where defendants made no showing that the pretrial publicity was so pervasive and inflammatory that it was reasonably likely that they could not receive a fair trial.

Am Jur 2d, Venue §§ 378, 389.

Pretrial publicity in criminal case as ground for change of venue. 33 ALR3d 17.

12. Criminal Law § 923 (NCI4th)— verdict—guilty of trafficking by transportation—instruction on trafficking by possession—lapsus linguae

There was no error in a narcotics prosecution in accepting a verdict of guilty of trafficking in cocaine by transportation even though the instructions referred to trafficking in cocaine by possession where the court grouped the charges and instructed on trafficking in cocaine by possession as it related to each defendant, then instructed on trafficking by manufacturing and then on trafficking by transportation, and it is clear from the transcript that the court simply mistakenly used the word "possession" in one instance when it meant "transportation"; the court advised the jury at the end of the instruction that the charge was trafficking by transportation; and the verdict sheet recited the charge as trafficking by transportation. Moreover, defense counsel did not timely object and may not object on appeal.

Am Jur 2d, Trial §§ 1126, 1127, 1138.

13. Criminal Law § 321 (NCI4th)— cocaine trafficking—joinder—no error

The trial court did not abuse its discretion by denying defendant Pierce's motion to sever where three defendants were charged with several cocaine trafficking offenses. The multiple charges of trafficking in cocaine through possession, manufacturing, and transportation, and conspiracy are within the purview of N.C.G.S. § 15A-926(b)(2)b. Moreover, defendant Pierce has failed to satisfy his burden of showing that he was deprived of a fair trial and prejudiced as a result of the joinder.

Am Jur 2d, Trial § 158.

Right of defendants in prosecution for criminal conspiracy to separate trials. 82 ALR3d 366.

APPEAL by defendants from judgments entered 12 April 1990 by *Judge Henry L. Stevens, III* in NEW HANOVER County Superior Court. Heard in the Court of Appeals 15 July 1992.

The State's witness Chris Moore testified that he began selling cocaine for defendant Crummy in the spring of 1987 under an agreement that he would keep $5 from every sale of 1/4 gram of cocaine at $25, and would profit $10 from a sale of 1/2 gram at $50. At one point, however, Crummy told Moore he could give the proceeds from the sales to defendant McGhee, which Moore estimated he did approximately twenty times. Per this relationship, Moore went with Crummy to New York to purchase drugs in June or July, August, September, and October 1987. The October trip, which was similar to previous trips, was depicted as follows:

Prior to leaving town, Moore saw approximately $40,000 wrapped in $1,000 stacks in Crummy's room. Moore, Crummy, and Keith Richardson counted the money and put it inside Crummy's tote bag. They picked up Lionel Boney and James Thomas and left for New York in Crummy's brother's car.

Upon reaching New York the men went to Paulette Tyson's apartment. Moore, Crummy and Boney then took the money to a nearby store operated by a man named Jose. Moore, Crummy and Jose went into the back room and Crummy told Jose he wanted one and one-half kilograms. Jose gave them what appeared to be one and one-half kilograms of cocaine but he only weighed out one-half of a kilogram. Thereafter, Crummy gave money to purchase bus tickets to Moore and Boney, who carried the cocaine from New York to Washington, D.C. Crummy and Thomas drove the car and the four men met in Washington, D.C. and drove back to Wilmington together.

Moore stated that upon returning to Wilmington, Crummy, Moore, defendant Pierce, Abraham Levine, Tom Richardson, Leonard Hawes, and Keith Richardson went to Bridgette Richardson's house to cook the cocaine. Crummy and Levine cooked the cocaine while the others tore aluminum foil and cut plastic bags. The cooked crack was wrapped in the foil and the powder cocaine was placed in plastic bags. The cocaine was packaged in fifty bags of 1/2 grams of cocaine powder and fifty bags of 1/2 grams of crack.

Moore testified to other trips including one in November 1987 in which he went to New York with George Porter, James Murphy, defendant McGhee and his wife, Elizabeth McGhee in McGhee's car without Crummy. McGhee put approximately $48,000 in Moore's bag which was put in the trunk of the car. Once in New York, Moore exchanged $42,000 for two kilograms of cocaine with Jose.

Moore, Murphy, and Porter then took the drugs to Fayetteville by bus, where they were met by Crummy. Upon arrival in Wilmington, Crummy, Moore, and Richardson went to Bridgette Richardson's house and cooked half of the cocaine.

Moore further testified that Pierce was on one of the trips at either the end of November or the beginning of December and that he was present at the cooking session at the end of the November trip. Evidence was offered concerning a similar trip to New York in December 1987 in which Moore, Crummy, and Pierce participated and where Crummy bought two kilograms of cocaine. In early January 1988 Crummy, Moore, Moore's wife, and Connie Devane went to Alexandria, Virginia where Crummy and Moore again bought two kilograms of cocaine from Jose for $42,000. Upon returning to Wilmington the drugs were cooked with Pierce's help at Anita Richardson's apartment and then distributed. Moore stated that similar trips to Alexandria were taken at the end of January, twice in February, and in March. Following the January and March trips the cocaine was cooked at Janet Parker's apartment. Additional trips to New York were taken in March and May 1988.

In June 1988 Moore, Crummy's wife, and Stephanie Bridges went to New York at Crummy's request. Airline tickets were purchased for the three of them with Crummy's money. Once in New York, Moore called Crummy from Paulette Tyson's apartment to tell him they had arrived. Moore and Paulette bought two kilograms of cocaine for $42,000 from Jose and then went back to Paulette's apartment. Crummy instructed Moore to return with the cocaine so he and Bridges took a bus the next day. Crummy and others picked Moore and Bridges up in Fayetteville and drove them back to Wilmington. Upon returning to Wilmington, Moore, Crummy, Keith Richardson and others went to Junior Keaton's apartment to cook the cocaine. There was substantial other evidence at trial from a total of twenty-three witnesses aside from law enforcement officers, including the testimony of named participants, which corroborated Moore's testimony.

At trial, defendant McGhee was charged with one count of conspiracy to traffic in cocaine of 400 grams or more and trafficking in cocaine by possession. Defendant Pierce was charged with one count of conspiracy to traffic in cocaine of 400 grams or more and twenty-one counts of trafficking in cocaine by possession, manufacture and transportation. Defendant Crummy was charged

with one count of conspiracy to traffic in cocaine of 400 grams or more and fifty-two counts of trafficking in cocaine by possession, manufacture and transportation. The three defendants pled not guilty and the cases were joined for trial.

McGhee was convicted of conspiracy to traffic in cocaine of 400 grams or more and received a thirty-five year sentence and a $250,000 fine. Pierce was found guilty of trafficking in cocaine by transportation and guilty of conspiracy to traffic in cocaine of 400 grams or more. He received two consecutive thirty-five year sentences and was fined $500,000. The jury convicted Crummy of conspiracy to traffic in cocaine, two counts of trafficking by possession, two counts of trafficking by manufacture, and three counts of trafficking by transportation. He was sentenced to eight consecutive terms of thirty-five years each and fined $2,000,000. A fourth defendant, Abraham Levine, was found not guilty of conspiracy to traffic in 400 grams or more of cocaine, trafficking in cocaine by possession, and trafficking in cocaine by manufacturing.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Ellen B. Scouten, for the State.

Nora Henry Hargrove for defendant appellants.

WALKER, Judge.

Defendants bring forth twelve assignments of error for this Court to consider on appeal. Defendant Pierce proffers two additional objections. In light of the magnitude and complex nature of this case, we find it prudent to address each contention separately.

I

[1] Defendants first argue the trial court erred when it excused venirepersons on the basis of *ex parte* communications. The trial court instructed the Jury Intake Officer and Deputy Clerk that they were to discuss with the venirepersons any problems they may have in sitting on the jury. The Jury Intake Officer and Deputy Clerk were then to use their discretion and to dismiss any prospective juror if appropriate. Subsequently, a college student, a teacher, and two other persons were excused. Although the teacher was black neither the Officer nor the Clerk could recall the race of the other venirepersons who were excused. The trial court found that neither the State nor the defendants had any vested interest in these prospective jurors.

The court indicated to counsel that the motivation for the delegation of this responsibility was to help those experiencing hardship who had recently been added to the venire and was not to discriminate against any jurors because of their race. The court expressed concern that those persons being added to the venire would not have sufficient time to get their affairs in order, since the order under which they were subpoenaed to appear was signed only two weeks earlier. In this regard the court found that:

> [I]nasmuch as the Court commutes some 65 miles away he left the Jury Intake Officer and the Clerk with the responsibility to relieve pressures created by emergencies if in the opinion of the Clerk and Intake Officer that it was an emergency or could work a hardship for these people, as they had little or no notice and the Court wanting to do the humane thing, wanting to give latitude in that respect, treating everybody alike whether they were black, yellow, red or white or whatever and that's the way it was done and that there is no showing here that there was any knowledge or indication or desire by anyone to excuse anybody because of race or sex or whatever, but only to help those people that expressed a hardship and the Court's desire to be humane and help them with their own problem and let them go back to their own business or whatever rather than having to sit here in this jury.

Defendants contend that these actions by the trial court deprived them of their right to be present at every stage of the proceeding as guaranteed by Article I, Section 23 of the North Carolina Constitution and the Sixth Amendment of the United States Constitution. *State v. Smith*, 326 N.C. 792, 392 S.E.2d 362 (1990). Defendants argue they were also denied the Sixth Amendment right to the assistance of counsel in criminal prosecutions because venirepersons were questioned and excused outside the presence of counsel. Furthermore, defendants submit that the trial court's actions violated G.S. 9-15(a) which provides in part that:

> The court, and any party to an action, or his counsel of record shall be allowed, in selecting the jury, to make direct oral inquiry of any prospective juror as to the fitness and competency of any person to serve as a juror.

"Every violation of a constitutional right is not prejudicial. Some constitutional errors are deemed harmless in the setting of a particular case, . . . where the appellate court can declare a

belief that it was harmless beyond a reasonable doubt." *State v. Taylor*, 280 N.C. 273, 280, 185 S.E.2d 677, 682 (1972); *State v. Payne*, 320 N.C. 138, 357 S.E.2d 612 (1987); *See also* G.S. 15A-1443. Thus far, whether or not such *ex parte* examinations of venirepersons constitutes prejudicial error has been addressed by our Supreme Court primarily in capital cases, which defendants now rely upon for support. In *State v. Cole*, 331 N.C. 272, 415 S.E.2d 716 (1992), however, the Court addressed this question where the defendant was charged with first-degree murder and second-degree murder.

The pertinent facts of *Cole* indicated that a jury panel was present for the trial of cases during the week commencing 17 July 1989. Before selecting a grand jury and a grand jury foreman, the court considered excuses from prospective jurors by questioning them individually at the bench and off the record. Neither the defendant nor his attorney was present at the bench. The record did not reflect the contents of these discussions but indicates the court said, "I've excused those or deferred those that seemed appropriate." Subsequently, on Tuesday, 19 July 1989, the defendant's case was called for trial and jury selection began. The following day a second pool of prospective jurors reported for duty and were questioned individually at the bench concerning requests to be excused or deferred from service. Neither the defendant nor his counsel was present at the bench during these conferences and the record does not reveal the substantive nature of these discussions. As a result, however, the court excused some of these prospective jurors.

The Court held it was not error for the court to excuse prospective jurors following the unrecorded bench conferences on 17 July 1989 because the defendant's trial had not commenced at that time. "The jurors were not excused at a stage of the defendant's trial and the defendant did not have the right to be present at the conferences." *Id.* at 275, 415 S.E.2d at 717. On the contrary, it was error to excuse prospective jurors pursuant to the unrecorded bench conferences on 19 July 1989 because "[t]he defendant's trial had commenced at that time and he had an unwaivable right to be present at all stages of the trial." *Id.* We note that in the instant case defendants have not established whether the prospective jurors were excused before or after the commencement of defendants' trial. Additionally, we note that the trial court in *Cole* failed to disclose on the record the substance of the bench conversations regarding why the prospective jurors were excused.

In the recent case *State v. Johnston*, 331 N.C. 680, 417 S.E.2d 228 (1992) our Supreme Court held that a new trial was warranted where numerous prospective jurors were excused after private unrecorded bench conferences in a capital case. The Court asserted that the State had failed to satisfy its burden of showing that the exclusion of these defendants from the private conversations was "harmless beyond a reasonable doubt." Without determining the applicability of this burden of proof in the case before us, we conclude that *Johnston* is not dispositive.

In rendering its decision, the *Johnston* Court noted that the record was devoid of evidence as to why the prospective jurors were excused. The Court also stated that it was unable to ascertain whether the errors were harmless beyond a reasonable doubt because the record failed to reveal the substantive nature of these conversations. On the contrary, in the instant case the Jury Intake Officer and the Clerk stated that the reasons for excusing venirepersons were hardship or health, and the court reconstructed these events, placed them on the record, and stated its approval. Upon inquiry by the court, the Jury Intake Officer narrated the sequence of events involving the excusal of prospective jurors, and the Clerk corroborated these statements by way of response to questions from the court and the prosecutor. Although defendants offered a broad objection to the procedure followed with respect to the excusing of these prospective jurors, they voiced no objections regarding the inquiry of the Jury Intake Officer and the Clerk, declined the opportunity to further examine the Clerk, and turned down the court's offer "to be heard in any manner whatsoever." In this regard we find *State v. Ali*, 329 N.C. 394, 407 S.E.2d 183 (1991) to be instructive. Here, as in *Ali*, the substance of what transpired was subsequently placed on the record and the defendant was given the opportunity to be heard. Following the rationale and holding of *Ali*, we cannot conclude that defendants in the instant case were prejudiced by the trial court's actions and overrule this assignment of error.

II

[2] Defendants argue the trial court erred in failing to inquire about possible jury taint resulting from a conversation of the courtroom deputies and in failing to grant defendants' motion for a special venire. There was evidence that during jury selection a previously passed juror appeared in court with her attorney and

reported the following sequence of events: After having been called as a juror and having received the first preliminary instructions from the court not to discuss the case with anyone, the juror overheard some courtroom deputies in the hall talking to each other about the case. The juror said the deputies mentioned something about the bullet proof vest being hot and that the judge's life had been threatened. One of the deputies stated, "I would like to see one of them pull my gun." It was the juror's impression that the deputies did not appreciate the need for extra security caused by the character of the four defendants, who were described as "scudbags" or the like. Later the juror heard another deputy say he was upset with some woman and that he knew where she worked. He also stated that he was going to follow her home from work and write her as many tickets as possible and that she "better not have a dirty license tag."

The juror said that she did not know if any of the other jurors overheard these conversations but that she was the first person in a line to go back into the courtroom and the deputies were approximately three feet from her when they made the comments. The juror stated that she was unable to disregard the statements and felt so intimidated by them that it would have been almost impossible for her to have been an impartial juror. She never mentioned the conversations to any other jurors.

Defendants contend the trial court erred in failing to inquire as to whether any of the other jurors overheard the deputies' remarks and in failing to grant their motions for severance and change of venue and for a special venire. We disagree. The juror who overheard the deputies' comments was peremptorily excused and did not serve as a juror. She stated that she did not discuss what she had heard with anyone. Defendants have proffered no evidence to show that any impanelled juror overheard the conversation or was prejudiced or intimidated thereby. No juror approached the court with information that he or she had overheard these remarks or otherwise felt threatened or intimidated and each repeatedly answered that he or she could be fair and impartial.

A ruling on a motion for a new trial based upon misconduct affecting a jury's deliberation is within the sound discretion of the trial court and it will not be disturbed on appeal unless the ruling is clearly erroneous or a manifest abuse of discretion. *State v. Bailey*, 307 N.C. 110, 296 S.E.2d 287 (1982); *State v. Johnson*,

295 N.C. 227, 244 S.E.2d 391 (1978). In light of the facts and circumstances surrounding this sequence of events, we cannot conclude the trial court erred in failing to conduct further inquiry into the matter or in failing to grant defendants' motions for special venire or severance and change of venue. This assignment of error is overruled.

III

[3] Defendants' third assignment of error asserts that defendants were denied the right to a unanimous jury verdict because Juror Bowden failed to confirm her verdict when polled. They contend that Juror Bowden's verdict was almost inaudible and that she appeared reluctant and required assistance by other members of the jury in standing and answering the questions. Defendants thereby argue the trial court erred in refusing to inquire further of Juror Bowden's verdict and in failing to grant defendants' motion to impeach the verdict.

The record shows that Juror Bowden affirmed her verdict by answering "Yes" to each question posed to her concerning her verdict during the polling of the jury. There was no evidence that she was intimidated by other members of the jury when reaching her verdict or that she did not freely assent to her verdict. Thus, this assignment of error is without merit.

IV and V

[4] Defendants profess the trial court impermissibly expressed an opinion when it admonished defense counsel in the presence of the jury and that it deprived defendants of effective representation of counsel and due process when it threatened counsel with disciplinary and contempt proceedings if there were continued objections. During the direct examination of the State's witness Chris Moore, defense counsel objected to a question asked of the witness on the grounds that it was leading. The court replied, "Objection is overruled. Under Rule 611, Counselor, I am going to permit the State as well as counsel on cross-examination, whatever it is, to develope [sic] the subject of the testimony." However, defense counsel immediately objected to the next question on the same grounds. The court then stated, "I will give you a continuing objection but you are interrupting now. It diverts the jury's attention. I will give you a continuing objection, sir." Defense counsel failed to heed the trial court's admonition and continued to object to

the questioning on the grounds that it was leading. At that point the trial court stated, "Objection is overruled on the same ground, Counselor. I have already told you about it now. I have given you a continuing objection." When defense counsel again objected the trial court asked counsel if he wished to be heard, to which counsel responded affirmatively. Subsequently, the jury was excused and counsel was allowed to argue his objections to the manner of questioning. After hearing arguments from both sides, the court commented outside the presence of the jury:

> Now, firstly, I don't hink [sic] the questions, that he is leading him. As a matter of fact, I am certain in my mind that they are not and I have ruled on that, Counselor and, but to protect your interest I have given you a continuing objection to these things and I have ruled and I am running this court and I will continue to run it and if I need any help from anybody then I will ask for it, but don't anybody dare to encrouch [sic] upon my territory. If you do I am going to tell you at the outset somebody is going to get hurt. That means that a law license could be in jeopardy and their backside could be in jail; so I make no threats; I make no comments; I am just telling all of you—I know you are under a lot of pressure, but watch it.

Defendants submit that the court's statements in the presence of the jury belittled counsel and expressed an opinion that counsel was interrupting the court's business, which affected counsel's credibility with the jury. Defendants correctly note that it is impermissible for a judge to express an opinion, either explicitly or implicitly, at any time during the course of the trial. G.S. 15A-1222. *See also State v. Staley*, 292 N.C. 160, 232 S.E.2d 680 (1977). We do not conclude the court's remarks constituted prejudicial error necessitating a new trial, however. G.S. Sec. 8C-1, Rule 611(a) gives the trial court discretion with regard to the examination of witnesses. In this case the court granted defense counsel a continuing objection to the line of questioning, and reiterated this point several times, but counsel continued to object on the same grounds. We cannot determine that the trial court abused its discretion in this regard and defendants have failed to show that they were prejudiced thereby. *See State v. Weeks*, 322 N.C. 152, 367 S.E.2d 895 (1988).

We find this case to be distinguishable from *State v. Lynch*, 279 N.C. 1, 181 S.E.2d 561 (1971), which is relied upon by defend-

ants. In *Lynch* the Supreme Court found prejudicial error where the trial court gave a blanket instruction to the court reporter to overrule any objection made by defendant's counsel. This action implied there was no possible merit to *any* objection by counsel. In the instant case the trial court admonished counsel with respect to objections made on the *single ground* that the questions were leading because counsel had already been given a continuing objection in this regard. Moreover, counsel was allowed to be heard on his objections outside the presence of the jury, whereas in *Lynch* the court never gave counsel the opportunity to be heard and never ruled on his objections.

Defendants also assign as error the court's admonitions to counsel outside the presence of the jury, which they argue had a chilling effect and diminished their right to effective representation of counsel. Although we disapprove of this language by the court and find it to be unjustifiable under the circumstances, defendants have failed to show that they were prejudiced by the comments. The court's reprimand occurred outside the presence of the jury and the record indicates the case was vigorously tried. Defendants' counsel continued to make objections and argue evidentiary matters. There is nothing in the record to indicate that counsel was intimidated, ineffective, or otherwise unable to adequately represent defendants as a result of the remarks.

VI

[5] Defendants next contend that the trial court erred in not holding an evidentiary hearing to determine if Juror Bowden received extraneous information during jury deliberations. Approximately ten or twelve days after the trial had concluded, Juror Bowden told a court official and a news reporter that she had heard about a shooting incident which occurred during the jury's deliberations, but she was not sure whether it involved defendant Crummy or his brother. The juror stated she was intimidated by the report of the shooting. There was also evidence that Juror Bowden spoke with one of the State's witnesses by telephone during her deliberations. Counsel subsequently made a Motion for Appropriate Relief and asked for an evidentiary hearing to determine the validity of these allegations, which was denied.

The court, in its order denying the Motion for Appropriate Relief, found:

> 3. That the alleged remarks made by the former juror to the newspaper were made in an interview at the juror's home after she had been discharged from jury duty for almost two weeks and returned to her community in a locale frequented by co-defendants where, under the existing circumstance, intimidation, coercion, reward or threat is a possibility. That such remarks made to the newspaper, or to a bailiff by the juror, were not sworn statements but are lacking in credibility [and] were inconsistent with her sworn statement as a juror at the time of poll in open court to the clerk.
>
> 4. That the verdict itself belies intimidation as each count was returned and considered separately and considered by the jury, in that, three of the defendants were found guilty and not guilty on separate charges and [the] fourth defendant completely exonerated, the Court finds and concludes that these jurors carefully considered each charge against each defendant for more than 20 hours before deciding upon and returning a truthful verdict as it found the facts to be from the evidence and the law given them by the court.

After reciting the relevant statutes and case law on this issue the court concluded:

> 4. That the statements allegedly made by the former juror, Mrs. Mary Bowden to a bailiff or to the newspaper are as a matter of law insufficient to overturn the verdict in these cases, or had no effect on her deliberations as a juror nor upon her decision-making process as indicated by her in the press release. The remarks of Mrs. Bowden as to extraneous information are not prejudicial either in fact or in law.

As defendants correctly point out in their briefs, the trial court's determination on the question of juror misconduct will be reversed only where there is an abuse of discretion. *State v. Bailey, supra.* The trial court is in a better position to investigate any allegations of misconduct, question witnesses and make appropriate findings. *State v. Drake*, 31 N.C.App. 187, 229 S.E.2d 51 (1976). In the case before us the trial court made plenary findings of fact and clearly stated the applicable law. By her own admission the report of the shooting incident did not influence her deliberations and she unequivocally reaffirmed her verdict when polled. Consequently, we cannot conclude that the trial court abused its discretion in denying the motion and therefore overrule this assign-

ment of error. We agree with the trial court that no evidentiary hearing was necessary as the allegations only presented a question of law.

VII

[6] Defendants argue the trial court erred in finding the prosecutor's peremptory excusals were not racially motivated. Specifically, they contend that during jury *voir dire* the prosecutor violated the mandate of *Batson v. Kentucky*, 476 U.S. 79, 90 L.Ed.2d 69 (1986) by using his peremptory challenges in a way that discriminated against five potential black jurors and the black defendants. The trial court found that defendants had not made a *prima facie* case, pursuant to *Batson*, that the prosecutor's peremptory challenges were not racially motivated. Alternatively, the court stated that even if a *prima facie* showing were made, the State successfully rebutted it through its articulation of racially neutral criteria for selection.

The State explained that Juror Vaught was unemployed and had a worthless check conviction. Juror Franks indicated that she had known and worked with defendant Crummy's aunt for the past fifteen years and that she knew four of the State's witnesses. Her brother had been convicted of drug violations in the past year. Additionally, she felt the State's burden of proof was beyond *all* doubt. Juror Brown also felt the State's burden of proof was beyond all doubt. Juror Williams knew two of the State's witnesses and defendant Pierce's sister. He believed drugs should be an individual choice and had been convicted of driving without a license. He also believed the State's burden of proof was beyond all doubt. Juror Hatcher indicated that he had known a member of defendant McGhee's family for two or three years and had talked to or had some other contact with him within the last month. He has a relative who has used cocaine but he has not admonished that relative in this regard.

Defendants also submit that the criteria enunciated by the prosecutor were disparately applied to excuse black jurors. They assert that the prosecutor passed other jurors who misunderstood the State's burden of proof and who believed the use of narcotics was an individual choice. One juror was also a separated mother of three children, one of whom was seriously ill, and would not be paid while serving as a juror. In making this argument we find that:

> Defendant[s'] approach . . . involves finding a single factor among the several articulated by the prosecutor as to each challenged prospective juror and matching it to a passed juror who exhibited that same factor. This approach fails to address the factors as a totality which when considered together provide an image of a juror considered in the case undesirable by the State.

State v. Porter, 326 N.C. 489, 501, 391 S.E.2d 144, 152-153 (1990).

Without addressing the question of whether defendants established a *prima facie* case under *Batson*, we hold that the State's showing was sufficient to rebut it. Our Supreme Court noted in *Porter* that a juror's criminal history is a sufficiently racially neutral reason to challenge him, and that other neutral grounds for excusing a juror include the juror's knowledge of the defendant or a member of defendant's family, the juror's inability to understand legal rules, and a juror's history of unemployment. Deference must be afforded the trial court in a *Batson* challenge. Thus, we cannot conclude the trial court in the instant case erred or abused its discretion in finding the peremptory challenges were not racially motivated, and we overrule this assignment of error.

VIII

[7] Defendants further complain that the trial court erred in refusing to allow defendants to pose rehabilitative questions to four jurors who were excused for cause after stating they could not be fair and impartial. Defendants argue they should have been allowed to question the jurors as to whether or not they could set aside their personal feelings and render a decision based on the evidence as it was their position that the prosecutor was systematically excluding blacks.

Juror Myers stated that she learned of the case through television and newspapers. She had discussed the case with her neighbors and admitted to having "a lot of opinions" about the case. She also acknowledged that she had formed or expressed an opinion as to the guilt or innocence of the defendants. Juror Waddell stated he could not be fair and impartial because he had known the defendants for years, even though he had never spoken with them. Juror Davis said he had known defendant Crummy's uncle for approximately thirty-five years and that he did not think he could be fair and impartial. Additionally, Juror Hamby stated that she had

known two witnesses for the State most of her life and that she did not feel she could be fair and impartial.

Defendants rely upon *Irvin v. Dowd*, 366 U.S. 717, 6 L.Ed.2d 751 (1961) and *State v. Corbett*, 309 N.C. 382, 307 S.E.2d 139 (1983) as support for their argument that "[t]he mere existence, without more, of a preconceived notion as to the guilt or innocence of an accused, is insufficient to rebut the presumption of a prospective juror's impartiality, [and] [i]t is sufficient if a juror can lay aside the impression or opinion and render a verdict based on the evidence presented in court." G.S. 15A-1212 provides, however, that a challenge for cause is proper if the juror:

> (6) Has formed or expressed an opinion as to the guilt or innocence of the defendant.
>
> . . . .
>
> (9) For any other cause is unable to render a fair and impartial verdict.

We conclude these prospective jurors were thereby excused for cause on sufficient grounds.

Our Supreme Court has found no error in capital cases where the trial court refused to allow defendant an opportunity to rehabilitate witnesses excused for cause. *See State v. Reese*, 319 N.C. 110, 353 S.E.2d 352 (1987); *State v. McNeil*, 324 N.C. 33, 375 S.E.2d 909 (1989). It has stated:

> When challenges for cause are supported by prospective jurors' answers to questions propounded by the prosecutor and by the court, the court does not abuse its discretion, at least in the absence of a showing that further questioning by defendant would likely have produced different answers, by refusing to allow the defendant to question the juror challenged.

State v. Reese at 120-121, 353 S.E.2d at 358, *quoting State v. Oliver*, 302 N.C. 28, 274 S.E.2d 183 (1981). Although the case before us is non-capital, we find the foregoing rule to be applicable. Thus, the trial court did not err in denying defendants' requests to rehabilitate the challenged jurors because defendants have made no showing that further questioning would likely have produced different answers and the challenges were supported by the jurors' answers.

IX

[8] Pursuant to G.S. 90-95(h)(3)(c) defendants were charged with trafficking in cocaine of 400 grams or more. They contend the evidence was insufficient as to the amount and identity of the controlled substance because the only evidence of the weights and nature of the substance was the uncorroborated testimony of persons involved in the conspiracy, who were testifying under agreement with the State and would receive a lesser sentence in exchange for their testimony. There was no stipulation and no physical evidence so defendants were unable to examine and confront the substance.

In *State v. Norman*, 76 N.C.App. 623, 334 S.E.2d 247, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 863 (1985), this Court found there was sufficient evidence to establish a conspiracy to violate G.S. 90-95(h)(3)(c) even though no physical evidence was seized. Evidence that defendant told a third party that she knew a source who could supply him with a kilo of cocaine and that the third party and defendant "arrived" at a price of $55,000 for a kilo was sufficient to support defendant's conviction under the statute.

In the instant case, Lionel Boney testified to having seen defendant Crummy with a gym bag containing two kilograms of cocaine during a trip to New York in October 1987. He described the cocaine as being in a block approximately twelve inches long and four inches wide. Katy Shannon stated that she had accompanied defendant Crummy to New York in 1987 and had seen him with some cocaine and used her hands to relate its physical size to the jury. Connie Devane testified that she saw defendant Crummy and Chris Moore with a grocery bag containing a great deal of money in stacks bound by rubber bands while with them at the Hampton Inn in Alexandria, Virginia. She claimed she later saw a white substance believed to be cocaine in a bag described as being the height of a piece of paper. Additionally, Keith Richardson testified to cooking cocaine in the presence of defendant Crummy and Chris Moore and described it as being in a block approximately four or five inches long, two inches wide and two inches high. We conclude that this testimony as to the weight and the nature of the substance is sufficient to support a conviction under G.S. 90-95(h)(3)(c) as to all defendants, even absent physical evidence. This assignment of error is overruled.

X

[9] Further error is assigned to the trial court's refusal to allow defendants to inspect the investigative grand jury documents on the grounds it violates defendants' right to due process, right to present a defense and right of confrontation. We address this contention without deciding whether defendant Pierce would be barred from making this argument under N.C. Rules of Appellate Procedure, Rule 10(b)(1).

Prior to trial defendants made a motion to quash the indictments on the grounds the grand jury operated outside its scope and indicted defendants without hearing all the evidence, and the prosecutor was guilty of misconduct. Defendants also requested a copy of the affidavit and petition filed by the District Attorney requesting the convening of the investigative grand jury. Following a hearing, the trial court denied the motion to quash and denied defendants copies of the affidavit and petition. Among its findings of fact the court found:

> 8. That the Defendants offered no evidence or legal arguments to support their demand for Investigative Grand Jury Petitions, Affidavits, Transcripts, Subpoenas and other documents; that the Court finds as a fact that the State has in the interest of Justice provided Defendants all Investigative Grand Jury testimony and under the provisions of North Carolina General Statute 15A-622(h) and 15A-623(h) the information Defendants seek cannot be disclosed.

The court also concluded that defendants were not entitled to the Investigative Grand Jury documents as a matter of law.

Defendants submit the documents are necessary in order to determine whether each of the grand jurors heard all of the evidence and then concurred in the decision to return an indictment. They contend the papers will verify the legal sufficiency of the grand jury proceedings and should be released since there is no longer a need for secrecy. Furthermore, defendants argue that G.S. 15A-623(h) allows the trial court, in its discretion, to disclose grand jury proceedings where it is deemed essential to protect defendants' constitutional rights. Here, however, they contend the court ruled that such information could not be disclosed as a matter of law when in fact the court could have chosen to exercise its discretion, and that such a mistaken ruling constitutes reversible

error. *Lemons v. Old Hickory Council, Boy Scouts of America, Inc.*, 322 N.C. 271, 367 S.E.2d 655, *reh'g denied*, 322 N.C. 610, 370 S.E.2d 247 (1988); *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987). We cannot agree.

G.S. 15A-622(h) specifically states, "The contents of the petition and the affidavit shall not be disclosed." Insofar as it is more specific and pertinent to the facts of this case, we find it to be the controlling statute. G.S. 15A-623(h) is not relevant because defendants have not argued an intent to use these documents to impeach a witness's testimony nor shown such disclosure to be essential in order to protect their constitutional rights.

Moreover, we do not find *Lemons* to be dispositive in the instant case. There, the trial court mistakenly concluded it was without authority to extend the time for service of the alias summons and therefore denied plaintiff's motion. The Supreme Court reversed on the ground that the trial court rendered its decision under the mistaken impression that it was required to do so as a matter of law, when in fact it had discretion. In the case before us, however, the trial court made findings in support of its conclusion that defendants were not entitled to the documents. Although the court concluded that defendants were not entitled to the documents as a matter of law, there is no indication in the record that the court reached this conclusion under the mistaken belief that it was required to so hold as a matter of law. Thus, for the foregoing reasons this assignment of error is overruled.

XI

[10] Defendants also assign as error the trial court's failure to strike *ex mero motu* the prosecutor's closing argument to the jury on the ground that it was improper. The district attorney argued:

> You remember when they [defendants] said they went to Bridgette's house to cook up. Remember what Boorock said. He said, "My little nephew was there." Do you remember when they were at Janice [sic] Parker's house to cook up? "My three year old son was there." You remember when they went to Nickie's house. Nickie's children were there. David Crummy had a house with kids. Why didn't he go to his own house and cook up? Why not? And they smoked crack while they were there laced in reefer. These apartments in Dove Meadows and Creekwood, they are not big apartments. You

> take a three year old kid and put him in a back room with these four or five guys in the kitchen cooking up crack, I wonder what those kids smelled. . . . I venture to say you don't know. Very few people in this courtroom know what it smells like to cook up cocaine, but somewhere in this city there are kids, specific kids that have been talked about, not by name, that know what it smells like to cook up cocaine.
>
> * * * *
>
> How many of these kids, Janice [sic] Parker's kids, Nickie's kids, Bridgette's kids, how many of those other kids in that apartment complex when they get older, how many of them will remember the smell of cocaine cooking up? Being smoked with pot. While your house, your only place is being used to cook up crack? I don't know. That is some of the hidden cost and we will pay for it for years to come, all of us.

Defendants contend they are entitled to a new trial on the ground that these remarks were nothing more than an inflammatory appeal to the jury's prejudice and their protective feelings for children.

At trial, defendants did not object to the portions of the argument to which they now assign error. For this reason, our review on appeal is limited to a determination of whether the argument was so grossly improper that the trial court's failure to intervene *ex mero motu* constituted an abuse of discretion. *State v. Holden*, 321 N.C. 125, 362 S.E.2d 513 (1987), *cert. denied, Holden v. North Carolina*, 486 U.S. 1061, 100 L.Ed.2d 935 (1988).

Counsel is allowed wide latitude in his argument to the jury and may argue the law, the facts in evidence, and all reasonable inferences which may be drawn from them. *State v. Monk*, 286 N.C. 509, 212 S.E.2d 125 (1975). In the instant case, there was evidence in the record that children were present in Bridgette Richardson's apartment and Anita Richardson's apartment when the crack cocaine was being cooked. Although the trial transcripts fail to reveal a statement similar to the one attributed to Janet Parker, she did testify that her children lived with her, and there was evidence that defendants used her apartment on several occasions for the purpose of cooking cocaine. She also stated:

> I turned them away because I was going with . . . Lennon Hawes, and he objected to me letting them come in from the beginning. See, it was like they don't go do it in their own

house. You have children to think about. They don't do it in their house. Don't let them come to your house.

It is a reasonable inference from the evidence, then, that these children could have smelled the cocaine as it was cooking. We cannot say that the prosecutor's argument was so grossly improper as to require *ex mero motu* intervention by the trial court, and we overrule this assignment of error.

XII

[11] Defendants argue that the trial court committed reversible error in failing to grant their motions for change of venue or special venire, in light of the inordinate amount of publicity which surrounded these cases. They acknowledge, however, that in order to be entitled to a new trial on these grounds, they must proffer evidence that jurors had prior knowledge about the case, that peremptory challenges were exhausted, and that a juror objectionable to defendant sat on the jury. *State v. Dobbins*, 306 N.C. 342, 293 S.E.2d 162 (1982). Although defendants have failed to make the requisite showings they rely on *State v. Jerrett*, 309 N.C. 239, 307 S.E.2d 339 (1983) for the proposition that a showing of identifiable prejudice is not required under certain circumstances. We do not find *Jerrett* to be controlling in this case.

In *Jerrett* defendant was not required to show identifiable prejudice in support of his motion for change of venue because the totality of the circumstances showed that there was such a probability that prejudice would result, that defendant would be denied due process if venue were not changed. At the pretrial hearing the defendant presented the testimony of several attorneys, a magistrate, and a deputy sheriff who expressed opinions that it would be extremely difficult to select a jury comprised of individuals who had not heard about the case, and that due to the publicity, potential jurors had likely formed preconceived opinions concerning defendant's guilt. The jury *voir dire*, which was conducted after the denial of defendant's motion that the jury be individually selected, revealed that many potential jurors knew the victim or potential State's witnesses. A number of prospective jurors stated that they had already formed opinions in the case or felt that they could not give the defendant a fair trial. Additionally, the Court found it significant that "the crime occurred in a small, rural and closely-knit county where the entire county was, in effect, a neighborhood." *Id.* at 256, 307 S.E.2d at 348.

Contrary to *Jerrett*, defendants in the instant case have failed to present any evidence that the pretrial publicity "infected [the community] with prejudice" against them. *Id.* at 258, 307 S.E.2d at 349. They have made no showing that the pretrial publicity was so pervasive and inflammatory that it was reasonably likely that they could not receive a fair trial in a county such as New Hanover. In *Jerrett* the facts indicated that the pretrial publicity generated much discussion about the case among county residents and that many of the prospective jurors had heard about the case, formulated some opinion as to defendant's guilt, and knew the victim or the State's witnesses. Insofar as these facts and circumstances are not present in the case before us we do not find *Jerrett* to be dispositive. We also cannot conclude from the totality of circumstances in the instant case that there was such a probability of irreversible prejudice that the trial court's failure to grant defendant's motions for change of venue or special venire constituted a denial of due process. In this regard, a motion for a change of venue is within the trial court's discretion and, finding no abuse of discretion, we do not now disturb this ruling on appeal. *Id.*

XIII

[12] Defendant Pierce submits the trial court erred in accepting a guilty verdict for the crime of trafficking in cocaine by transportation since the jury instructions referenced the crime of trafficking in cocaine by possession. He argues that since the verdict was not responsive to the issue submitted, it should be vacated.

Instructions to the jury must be read in their entirety and taken in context. *See State v. Alston*, 294 N.C. 577, 243 S.E.2d 354 (1978). In this case the trial court grouped the charges and instructed on trafficking in cocaine by possession as it related to each defendant so charged. The court next instructed on trafficking in cocaine by manufacturing and then trafficking in cocaine by transportation with regard to each defendant. It is clear from the transcript that the court simply mistakenly used the word "possession" in one instance when it meant "transportation." Having read the jury instructions in its entirety, we cannot conclude this one *lapsus linguae* amounts to reversible error. We note that at the end of the instruction the trial court further advised the jury that the charge was trafficking in cocaine by transportation. The possible verdict sheet concerning defendant Pierce which was submit-

ted to the jury also recited the charge as "trafficking in cocaine by transporting 400 grams or more of it from Washington, D.C., to Wilmington, North Carolina, in Early December, 1987." We therefore find the instructions were sufficiently clear on the charge of trafficking in cocaine by transportation and defendant has failed to present any evidence that the jury misunderstood the charge or was otherwise confused. Furthermore, counsel for defendant Pierce did not timely object to any portion of the jury instructions and therefore is barred from now objecting on appeal. Rule 10(c)(2), N.C. Rules of Appellate Procedure.

XIV

[13] Lastly, defendant Pierce contends the trial court erred in denying his motion for severance from the trial of Crummy and McGhee. He argues that joinder was improper because the bulk of the trial centered on Crummy's activities and offenses which inhibited the jury's separate consideration of defendant Pierce's guilt or innocence and resulted in the jury essentially rubber-stamping a verdict against him.

G.S. 15A-926(b)(2)b provides that joinder is proper where the offenses charged are part of a common plan or scheme, part of the same act or transaction or were so closely connected in time, place and occasion that it would be difficult to separate proof of one charge from proof of the others. Clearly, the multiple charges of trafficking in cocaine through possession, manufacturing, and transportation, and the conspiracy are within the purview of the statute.

A trial court's ruling on joinder or severance is within the court's discretion and will not be disturbed on appeal absent a showing of abuse of discretion. *State v. Short*, 322 N.C. 783, 370 S.E.2d 351 (1988). We find no abuse of discretion in the instant case. Additionally, defendant Pierce has failed to satisfy his burden by showing he was deprived of a fair trial and prejudiced as a result of the joinder. *Id.* Consequently, we overrule this assignment of error.

No error.

Judges LEWIS and WYNN concur.

KRON MEDICAL CORPORATION, PLAINTIFF v. COLLIER COBB & ASSOCIATES, INC., AND JACK SMITH, DEFENDANTS

No. 9115SC262

(Filed 1 September 1992)

1. **Unfair Competition § 1 (NCI3d)— unfair insurance practice—private remedy—role of jury and judge**

In an action seeking a private remedy under N.C.G.S. § 75-16 for an unfair trade practice by a violation of the unfair insurance practice statute, N.C.G.S. § 58-63-15(1), it is ordinarily for the jury to determine the facts and for the court, based on the jury's findings, to determine as a matter of law whether the defendant engaged in an unfair or deceptive insurance practice constituting an unfair or deceptive trade practice.

Am Jur 2d, Consumer and Borrower Protection § 302; Insurance § 2031.

2. **Unfair Competition § 1 (NCI3d)— failure to disclose information—unfair insurance practice**

A failure to disclose information may be tantamount to a misrepresentation and thus an unfair or deceptive insurance practice in violation of N.C.G.S. § 58-63-15(1).

Am Jur 2d, Consumer and Borrower Protection § 298.

3. **Unfair Competition § 1 (NCI3d)— unfair trade practice—unfair insurance practice—unrefundable premium—failure to disclose**

The trial court erred in entering judgment n.o.v. for defendant broker and defendant agent on plaintiff's unfair trade practice claim based on a violation of the unfair insurance practice statute where defendants had a fiduciary duty to plaintiff, and the jury found that defendants knew or should have known that plaintiff believed that the rate structure for a medical malpractice policy procured for plaintiff by defendants included a "deposit premium" which was partially refundable if actual coverage used was less than projected coverage and that defendants failed to explain to plaintiff that no portion of the premium was refundable. Defendants' silence when they had a duty to speak and knowledge of plaintiff's misunderstanding constituted an unfair or deceptive insurance practice.

Am Jur 2d, Consumer and Borrower Protection §§ 296, 298; Insurance § 138.

4. **Insurance § 943 (NCI4th)— failure to inquire about policy language—contributory negligence—instructions—education and business experience**

In an action against an insurance agent and broker for negligence in the procurement of a medical malpractice insurance policy for plaintiff corporation, the trial court did not err in instructing the jury that it could consider the education and business and professional experience of plaintiff's agent in determining whether he was contributorily negligent in failing to inquire of defendants concerning policy language where the trial court repeatedly emphasized that the standard of care was ordinary care and specifically charged the jury not to hold plaintiff's agent to a higher standard simply because he was a physician.

Am Jur 2d, Insurance § 2030.

APPEAL by plaintiff from orders entered 2 August 1990 and 10 September 1990 by *Judge D. B. Herring, Jr.*, in ORANGE County Superior Court. Heard in the Court of Appeals 7 January 1992.

Long & Long, by Lunsford Long, for plaintiff-appellant.

Moore & Van Allen, by Laura B. Luger, E.K. Powe, and N.A. Ciompi, for defendant-appellees.

PARKER, Judge.

In this civil action, plaintiff appeals from the entry of judgment notwithstanding the verdict and denial of its motion for a new trial. Plaintiff's complaint and amended complaint alleged claims for negligence, breach of contract, and unfair or deceptive insurance practices constituting unfair or deceptive trade practices pursuant to N.C.G.S. § 75-1.1.

Plaintiff's claims arose from defendants' procurement of medical malpractice insurance policies for plaintiff. Plaintiff's only allegations as to damages were that it had overpaid premiums plus sales tax in the amount of (i) $68,817.00 for the policy year 1985-86 and (ii) $107,521.05 for the policy year 1986-87. Defendants filed answers denying liability as to all claims and raising the defenses of plain-

tiff's (i) contributory negligence as against the negligence claim and (ii) failure to minimize damages as against the breach of contract claim.

After a four day trial, the jury (i) found for defendants on the negligence claim; (ii) found defendants breached the contract but plaintiff failed to mitigate damages; (iii) answered the special interrogatories on the unfair or deceptive trade practices claim in favor of plaintiff; and (iv) awarded $107,521.00 in damages. In its judgment on the verdict for plaintiff, the trial court found that the acts as found by the jury constituted unfair or deceptive acts within the meaning of N.C.G.S. § 75-1.1. The court concluded as follows:

> 1) The acts and omissions of the Defendants were in and affected commerce, as stipulated by the parties.
>
> 2) The business of the Plaintiff was injured by reason of such acts and omissions . . . of Defendants, as found by the Jury.
>
> 3) Said acts, conduct, and practices [constitute] violations of N.C. Gen. Stat. § 75-1.1.
>
> 4) The actions of Defendants . . . as found by the Jury, are unfair, deceptive, violative of public policy, and substantially injurious to Plaintiff.
>
> 5) As a matter of law, the damages returned by the Jury should be trebled pursuant to N.C. Gen. Stat. § 75-16.

Defendants moved in timely fashion both for entry of judgment notwithstanding the verdict for plaintiff or to amend the judgment and alternatively for a new trial. After a hearing on 23 July 1990, by order entered 2 August 1990 the trial court granted defendants' motions for judgment notwithstanding the verdict and to amend the judgment. The trial court did not rule on defendants' motion for a new trial. The order states as follows:

> 3. The following judgment is hereby entered in place of the judgment herein vacated:
>
>> Defendants' actions as found by the jury in answers to issues [relating to unfair or deceptive insurance practices] are not unfair and deceptive acts or practices as

> a matter of law within the meaning of N.C. Gen. Stat. [§§ 58-63-15(1) or 75-1.1].

On 2 August 1990 plaintiff moved both to amend this new ("second") judgment and for a new trial. As grounds for a new trial plaintiff alleged "error of law occurring at the trial and objected to by Plaintiff in connection with the submission of the issue of and instructions on the defenses of contributory negligence and avoidable consequences." By order entered 10 September 1990 the trial court denied plaintiff's motions.

Plaintiff gave notice of appeal from entry of the second judgment and from denial of the motions to amend or for a new trial. Plaintiff's notice of appeal was filed 13 September 1990, more than thirty days from entry of the second judgment. However, as the filing of plaintiff's motion for a new trial tolled the time for taking appeal from the second judgment, *see* N.C.R. App. P. 3(c)(4), plaintiff has given timely notice of appeal to this Court.

Plaintiff has brought forward four assignments of error in its brief. These assignments of error are grouped under two contentions. Plaintiff first contends the trial court erred in entering judgment notwithstanding the verdict, because the verdict, in light of the stipulations of the parties and of other facts, established that the defendants had committed an unfair trade practice in violation of N.C.G.S. § 75-1.1 and plaintiff had been damaged thereby. For reasons which follow, we agree that the court erred in entering judgment notwithstanding the verdict for plaintiff and reverse as to this issue only.

North Carolina insurance law provides as follows:

> The purpose of this Article [63] is to regulate trade practices in the business of insurance . . . by defining, or providing for the determination of, all such practices in this State which constitute unfair methods of competition or unfair or deceptive acts o[r] practices and by prohibiting the trade practices so defined or determined.

N.C.G.S. § 58-63-1 (1991). Defendants argue that the word "all" in this statute means that no unfair or deceptive insurance practices can exist other than those specifically defined in N.C.G.S. § 58-63-15 or determined pursuant to N.C.G.S. § 58-63-40, and that the conduct of defendants in this action is not proscribed by any provision of N.C.G.S. § 58-63-15.

Among practices expressly defined to be unfair or deceptive is "[m]aking . . . or causing to be made . . . any . . . statement misrepresenting the terms of any policy issued or to be issued or the benefits or advantages promised thereby." N.C.G.S. § 58-63-15(1) (1991). The predecessor to this section, section 58-54.4(1), cited in plaintiff's complaint, did not differ in its language. A violation of section 58-63-15(1) "as a matter of law constitutes an unfair or deceptive trade practice in violation of N.C.G.S. § 75-1.1." *Pearce v. American Defender Life Ins. Co.*, 316 N.C. 461, 470, 343 S.E.2d 174, 179 (1986) (construing section 58-54.4). The relationship between the insurance statute and the more general unfair or deceptive trade practices statutes is that the latter provide a remedy in the nature of a private action for the former. *Id.* (stating that insurance commissioner's enforcement is not the exclusive remedy for unfair trade practices in the insurance industry, as section 75-16 authorizes a private cause of action and "mandates the automatic assessment of treble damages once a violation of section 75-1.1 is shown."). In the present case the question then is whether defendant Smith made or caused to be made a statement misrepresenting the terms of the policies of insurance issued to plaintiff.

Evidence at trial showed plaintiff is a North Carolina corporation engaged in providing physicians' and surgeons' *locum tenens* services throughout the United States. Plaintiff's president and founder, Dr. Alan Kronhaus, was a pioneer of the concept of temporary replacements for doctors in rural areas. Dr. Kronhaus testified that medical malpractice insurance was the lifeblood of his business; but when he began the business, the only malpractice insurance available was location specific. Nevertheless, for the policy year 18 November 1982 through November 1983, Dr. Kronhaus was able to purchase from a broker other than defendant Cobb malpractice insurance covering many states. The policy's declarations page showed the premium amount was $30,060.00. Among endorsements listed was "4. Premium and Audit Endorsement, Schedule of Positions and Rates." This endorsement read in pertinent part

> Upon expiration of this policy, the Insured shall furnish to [the underwriter] a statement of the Insured's actual total premium base as specified herein for the policy period. The actual earned premium shall be computed thereon at the premium rate specified herein. If the actual, earned premium is more than the deposit premium the Insured shall pay the difference to the Company; if less, the Company shall refund

> the difference to the Insured except that the Company shall be entitled to the minimum premium as stated in the Declarations.

The word "minimum" did not appear on the declarations page.

Dr. Kronhaus testified his understanding of the endorsement was that it rendered the policy an "audit" policy under which plaintiff paid only for insurance actually used. Calculation of the annual premium, also known as a deposit premium, was based on plaintiff's projections as to how much malpractice insurance would be needed. George Sheppard, senior vice president for defendant Cobb, testified he believed the endorsement provided for a refund, but defendant Smith testified "minimum premium" meant there could be no refund. Smith testified further that he told Dr. Kronhaus the 1982-83 policy carried a minimum premium with no possibility of refund. Plaintiff's expert witness testified the policy provided for refunds. Defendant's expert witness testified that the policy provided for refunds or was ambiguous.

For the 1982-83 policy year and for several years thereafter, actual insurance used exceeded plaintiff's projections and purchases. The demand for plaintiff's services was increasing and plaintiff's sales and recruiting efforts were successful. In July 1983 Dr. Kronhaus began to discuss with George Sheppard and defendant Smith plaintiff's malpractice insurance needs for the policy year 1983-84. Dr. Kronhaus testified he furnished a copy of the 1982-83 policy and emphasized in discussions with Sheppard and defendant Smith that the audit feature, or "refundability," was of great importance to plaintiff. By contrast, defendant Smith testified Dr. Kronhaus neither emphasized nor requested refundability.

Plaintiff's 1983-84 policy, purchased through defendant Cobb, did not include a premium and audit endorsement. Instead, on its declarations page, the 1983-84 policy described the $80,769.00 premium as "Minimum & Deposit." Defendant Smith testified that in meetings with Dr. Kronhaus, it was explained to him that the premium amount was a minimum amount, adjustable only upward, in the event plaintiff used more insurance than the deposit covered. Since 1983-84 was a year in which plaintiff's business experienced growth, plaintiff used more insurance than it had purchased and paid an additional premium.

Similarly, plaintiff's 1984-85 policy, purchased through defendant Cobb, did not include a premium and audit endorsement. On its declarations page, this policy described the $201,631.00 premium as "minimum + deposit." Attachments described included "5. Schedule of Rates." The schedule of rates endorsement included the following language:

> In consideration of the premium paid, it is hereby understood and agreed that the following rates per position will be used for the quarterly reports from the Named Insured. The premium generated by the quarterly reports will be applied against the minimum and deposit premium as indicated in Item 8 of the Declarations, PREMIUM FOR POLICY PERIOD and any excess quarterly premium will be billed.

The six positions set forth described physicians practicing different kinds of medicine. Position 1, rated at $1,339.00 annually, included physicians performing no surgery or obstetrical procedures. Position 6, rated at $10,895.00 annually, included obstetricians and gynecologists and thoracic, vascular, orthopaedic, and neurosurgeons. The required quarterly reports were prepared in plaintiff's accounting department and sent to defendant Cobb to be forwarded to the underwriter. The underwriter converted plaintiff's figures into dollar amounts and sent these back to defendant Smith and plaintiff. Although the 1984-85 premium was more than double that for the previous year, plaintiff's business continued to grow, and thus plaintiff paid an additional premium of $2,100.00 for that policy year.

Neither the 1985-86 nor the 1986-87 policy purchased through defendant Cobb included a premium and audit endorsement. The premium for the former policy was $369,562.00; for the latter the premium was $765,379.00. Each policy's declarations page described the premium as "Minimum + deposit." Each policy included a schedule of rates endorsement similar to that of the 1984-85 policy as quoted above. At no time did Dr. Kronhaus question defendant Smith about the meaning of "minimum & deposit" or "minimum + deposit."

The policy year 1985-86 was the first year in which plaintiff projected more activity than it used. In December 1986, after the close of the policy year in November, Clarence Lane, plaintiff's controller, sent a final quarterly report to defendant Cobb. Dr. Kronhaus testified Lane called defendant Smith in January 1987

to ask when a premium refund would be forthcoming. Lane testified that when he first telephoned defendant Smith in December 1986, Smith stated he would check with the underwriter about a refund. Later in December, Lane telephoned again. Smith said the underwriter had not responded, but he would check again. Lane testified that when he telephoned defendant Smith a third time in January 1987, Smith again said the underwriter had not responded. Later Lane learned that defendant Smith had told Dr. Kronhaus no refund was possible.

By contrast, Smith testified he remembered Lane telephoned him either in early 1987 or March of that year and Smith's response was he would check to see if defendant Cobb had received the underwriter's audit results of the 1985-86 policy year. Since he had never dealt with Lane, defendant Smith called on Dr. Kronhaus in mid-April 1987 to explain that no refund would be forthcoming. Because of Dr. Kronhaus' angry response, defendant Smith travelled to Chicago to attempt to negotiate with the underwriter for a refund. Smith requested that the underwriter "consider amending the minimum and deposit requirement to a lower amount such as 80 percent, etc., under the current policy 11-18-86 to '87." The underwriter declined to make any amendment for either the 1986-87 or the 1985-86 policy.

Upon this and other evidence as to plaintiff's unfair or deceptive insurance practices claim, the jury answered the special interrogatories as follows:

> 3. Did Defendants do one or more of the following:
>
> A. Describe the rate structure to Plaintiff as being one which included a "deposit premium" from which refunds of premiums would be paid if actual coverage used was found to be less than projected coverage?
>
> ANSWER: No
>
> B. Fail to explain to Plaintiff that the rate structure did not include a "deposit premium" from which refunds of premium would be paid if actual coverage used was found to be less than projected coverage?
>
> ANSWER: Yes

C. Know or have reason to believe that Plaintiff believed the rate structure included a "deposit premium" from which refunds of premium would be paid if actual coverage used was found to be less than projected coverage, yet [fail] to correct Plaintiff's belief?

ANSWER: YES

4. Was the Plaintiff injured or damaged as a proximate result of Defendant's conduct?

ANSWER: YES

8. In what amount, if any, has Plaintiff been injured or damaged?

ANSWER: $107,521.00

The jury's finding on damages is within a few cents of the amount allegedly overpaid for the policy year 1986-87.

[1] In actions under sections 75-1.1 and 75-16, "it is ordinarily for the jury to determine the facts, and based on the jury's findings, the court must then determine as a matter of law whether the defendant engaged in unfair or deceptive acts or practices in the conduct of trade or commerce." *La Notte, Inc. v. New Way Gourmet, Inc.*, 83 N.C. App. 480, 485, 350 S.E.2d 889, 892 (1986), *cert. denied and appeal dismissed*, 319 N.C. 459, 354 S.E.2d 888 (1987). Since section 75-16 provides the private remedy for section 58-63-15(1), it follows that in cases arising under the insurance statute but seeking the private remedy, the functions of the jury and court are as described in *La Notte.*

[2] Plaintiff argues that under section 58-63-15(1), a failure to disclose information may be tantamount to a misrepresentation and thus an unfair or deceptive practice in violation of the statute. We agree.

"In some circumstances concealment or nondisclosure may be considered as a positive misrepresentation and serve as a basis for actionable fraud." *Rosenthal v. Perkins*, 42 N.C. App. 449, 452, 257 S.E.2d 63, 66 (1979). Describing such circumstances the North Carolina Supreme Court has said

Where there is a duty to speak, fraud can be practiced by silence as well as by a positive misrepresentation.

> "Silence, in order to be an actionable fraud, must relate to a material matter known to the party and which it is his legal duty to communicate to the other contracting party, whether the duty arises from a relation of trust, from confidence, inequality of condition and knowledge, or other attendant circumstances. [T]he silence must, under the conditions existing, amount to fraud, because it amounts to an affirmation that a state of things exists which does not, and the uninformed party is deprived to the same extent that he would have been by positive assertion." 23 Am. Jur., *Fraud and Deceit*, Section 77.

Setzer v. Insurance Co., 257 N.C. 396, 399, 126 S.E.2d 135, 137 (1962) (citations omitted).

With respect to the relationship between insurer and insured, this Court has stated

> A fiduciary relationship exists "where there has been a special confidence reposed in one who in equity and good conscience is bound to act in good faith and with due regard to the interest of the one reposing confidence." *Abbitt v. Gregory*, 201 N.C. 577, 598, 160 S.E. 896, 906 (1931). We have often held that an insurance agent is the insured's fiduciary with respect to procuring insurance and advising him as to the scope of his coverage. *E.g., R-Anell Homes, Inc. v. Alexander & Alexander, Inc.*, 62 N.C. App. 653, 659, 303 S.E.2d 573, 577 (1983) (insurance agent has fiduciary duty to keep insured informed about coverage); *see also Gaston-Lincoln Transit v. Maryland Cas. Co.*, 285 N.C. 541, 551, 206 S.E.2d 155, 161 (1974) (plaintiff may rely upon assumption that policy renewed upon same terms and conditions as earlier policy).

Davidson v. Knauff Ins. Agency, 93 N.C. App. 20, 32-33, 376 S.E.2d 488, 496, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). The Court stated further

> [O]ffering underinsurance coverage to an insured is a tacit representation that the coverage offered has some value. As we have held with respect to [the insurer, the agent's] renewal of plaintiff's minimum limits underinsurance—without disclosing its true value—is evidence of an unfair trade practice which would at the least tend to deceive the average consumer about the extent of his coverage.

Id. (citing N.C.G.S. §§ 75-1.1, 58-54.4(1)).

[3] In the instant case, plaintiff did not allege fraud but did allege the existence of a fiduciary duty on the part of defendants by virtue of their roles as agent or broker. Before this Court defendants do not argue plaintiff failed to prove the existence of such a relationship giving rise to a fiduciary duty. The jury found, as plaintiff alleged, that defendants (i) failed to inform plaintiff that the policies did not contain a deposit premium from which refunds would be paid and (ii) knew or should have known plaintiff believed policies brokered by defendant Cobb provided for refunds, yet took no action to explain the meaning of the policy premium provisions or correct plaintiff's misunderstanding. Defendants, having a duty to speak and knowledge of plaintiff's misunderstanding, remained silent and thus misrepresented the terms of plaintiff's policy. Under these circumstances the failure to speak was a statement as deceptive as a false or inaccurate written or oral comment. Even though plaintiff did not allege fraud, this omission does not preclude plaintiff from establishing a claim for unfair or deceptive trade practices. As the Court stated in *Pearce v. American Defender Life Ins. Co.*, 316 N.C. at 470, 343 S.E.2d at 180 "[T]o make out a claim under section 58-54.4 as augmented by section 75-1.1, [plaintiff had to] show only some—but not all—of the same elements essential to making out a cause of action in fraud."

The verdict of the jury upon conflicting evidence is conclusive. *Braswell v. Purser*, 282 N.C. 388, 394, 193 S.E.2d 90, 94 (1972). The jury's findings having effectively brought plaintiff's case within section 58-63-15(1), we conclude the trial court erred in granting judgment notwithstanding the verdict for plaintiff on the claim of unfair or deceptive insurance practices.

[4] Plaintiff's second and final contention is that the trial court erred in denying plaintiff's motion for a new trial. Before this Court plaintiff argues that in its charge on the standard of care for contributory negligence, the trial court erred in instructing that the jury could consider various factors in determining the ability of Dr. Kronhaus, as agent of plaintiff-insured, to exercise the duty of due care. By its objection at the charge conference, plaintiff preserved this error for appellate review. *Wall v. Stout*, 310 N.C. 184, 189, 311 S.E.2d 571, 575 (1984).

The due care required in fixing responsibility for negligence is the rule of the prudent person. The standard is always that care which a reasonably prudent person should exercise under the

same or similar circumstances. *Butler v. Allen*, 233 N.C. 484, 486, 64 S.E.2d 561, 563 (1951). "[T]he quantity of care required to meet the standard must be determined by the circumstances in which plaintiff and defendant were placed with respect to each other. And whether defendant exercised . . . ordinary care . . . is to be judged by the jury in the light of the attendant facts and circumstances." *Rea v. Simowitz*, 225 N.C. 575, 580, 35 S.E.2d 871, 875, 162 A.L.R. 999 (1945). Recognizing that insurance policies may be complex and difficult for the average insured person to comprehend, this Court has said an insured's education, which included both undergraduate and graduate degrees from universities, and ample experience in business were facts from which a jury could find the insured contributorially negligent in failing to read an insurance policy. *Kirk v. R. Stanford Webb Agency, Inc.*, 75 N.C. App. 148, 151, 330 S.E.2d 262, 264, *disc. rev. denied*, 314 N.C. 541, 335 S.E.2d 18 (1985).

In the instant case the court instructed as follows:

> Here, the negligence refers to a party's conduct. And negligence is simply a lack of ordinary care. The law imposes a duty upon every person to use ordinary care to protect himself . . . from injury or damage. A breach of that duty is called negligence, and such a breach occurs when a person or organization acting through an agent fails to use ordinary care to protect itself . . . from injury or damage. Ordinary care means that degree of care which a reasonable and prudent person would use under the same or similar circumstances. I emphasize that the test to be applied is ordinary care. That is, what a reasonable and prudent person would do under the same or [similar] circumstances. So you should not hold . . . Dr. Kronhaus in this case to a higher test than you would anyone else simply because he may have a medical degree and be a doctor of medicine.
>
> Here the defendants . . . contend that Kron Medical Corporation was negligent as follows: That Al[an] Kronhaus acting on behalf of Kron Medical breached his duty to use ordinary care in that he repeatedly failed to inquire of his broker concerning plain and unambiguous language of premium nonrefundability in the relevant insurance policies which he contends was inconsistent with his understanding that the premium was refundable.

> In considering whether . . . the plaintiff Kron Medical Corporation acting through its agent, Dr. Kronhaus, breached the duty of due care in the examination, understanding or inquiry regarding its policies, you may consider [his] age and education and business background, business and professional experience and positions and jobs held and any other factors which you may find reasonable in determining the ability of Dr. Kronhaus acting for Kron Medical Corporation to exercise the duty of due care. Nevertheless, ordinary care is all that is required, that is[,] that degree of care which the ordinary, prudent person would exercise under the same or similar attendant circumstances.

Reading the instruction in its entirety, as we must, *Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967), we are unable to find error. Under *Kirk*, Dr. Kronhaus' education and business experience were attendant facts the jury could consider. Nevertheless, the trial court repeatedly emphasized that the standard of care was ordinary care and specifically charged the jury not to hold Dr. Kronhaus to a higher standard simply because he was a physician. We, therefore, conclude the court did not err in instructing the jury as to contributory negligence.

The judgment for defendants notwithstanding the verdict for plaintiff is reversed; the denial of plaintiff's motion for new trial is affirmed.

Judges ARNOLD and WALKER concur.

MAINTENANCE EQUIPMENT COMPANY, INC., A NORTH CAROLINA CORPORATION, AND DIXIE RENTAL COMPANY OF CHARLOTTE, INC., A NORTH CAROLINA CORPORATION, PLAINTIFFS v. GODLEY BUILDERS, A NORTH CAROLINA CORPORATION, MCWHIRTER GRADING CO., A NORTH CAROLINA CORPORATION AND WILLIAM C. GODLEY, INDIVIDUALLY, DEFENDANTS

No. 9126SC458

(Filed 1 September 1992)

1. Trespass § 7 (NCI3d)— plaintiff's interest in land—lease—directed verdict properly denied

The trial court properly denied defendant's motion for a directed verdict in a trespass action where defendant con-

tended that plaintiff merely held a license, but the agreement, although entitled "license agreement," grants plaintiff the right to occupy and use the property, plaintiff paid annual rent and actively utilized the premises for business purposes to the exclusion of everyone else from 1971 until defendants encroached upon the property in 1985, plaintiff complained to defendants when the grading began and showed defendants the agreement and the boundary lines, and the grading continued. A jury could find that plaintiff, by its use and occupancy, was in possession of the subject property it rented from Southern Railway; furthermore, prior decisions recognize that persons who hold the same caliber of possession as plaintiff can maintain actions for interference with their possessory interests.

Am Jur 2d, Trespass §§ 37, 38.

2. **Trial § 10.1 (NCI3d)— judge's comments to counsel—cumulative effect—not prejudicial**

The cumulative effect of the trial court's comments to defense counsel, made during the course of a four day trespass trial, was not prejudicial where the comments were intended to keep the trial moving, keep counsel from pursuing certain specific lines of questioning, or were the basis for ruling on the admissibility of evidence.

Am Jur 2d, Trial § 303.

3. **Trespass § 1 (NCI3d)— plaintiff's ownership interest—licensing agreement—lawful actual possession**

The trial court did not err in a trespass action by not instructing the jury that plaintiff would not have been in lawful actual possession and could not recover if the licensing agreement under which plaintiff occupied the property failed to describe the property. The evidence showed that plaintiff had been in possession and paying rent for fifteen years; plaintiff showed defendants the licensing agreement and the boundary lines of the property when defendants began grading; there is nothing in the record to indicate the license agreement misled defendants into believing plaintiff was not in possession of the property; and any failure of the written agreement between plaintiff and the landowner would not have

conclusively decided the question of whether plaintiff possessed the subject property.

Am Jur 2d, Trespass §§ 37, 38.

4. Trespass § 8 (NCI3d)— grading—punitive damages—evidence sufficient

There was sufficient evidence to support an award of punitive damages in a trespass action arising from grading of adjacent property where the jury could find that defendants knew that plaintiff was in possession of the subject property; plaintiff requested defendant to discontinue the grading operations; defendants refused plaintiff's request to "put it back like it was" and pay for damages after the land was graded; and defendant Godley stated that under the same circumstances he would follow the same course of action.

Am Jur 2d, Trespass § 150.

5. Trespass § 8 (NCI3d)— grading—punitive damages—instruction—no error

The trial court did not err in its instructions on punitive damages in a trespass action arising from grading adjacent property. The court's instructions essentially incorporate defendants' requests and sufficiently include language previously approved by our courts.

Am Jur 2d, Damages §§ 994, 995.

6. Trespass § 8.1 (NCI3d)— grading—special damages—instruction—no error

The trial court did not err in its instruction on special damages in a trespass action arising from grading adjacent property where there was evidence of a rental value from which the jury could find special damages and the court instructed the jury that plaintiff was entitled to special damages if it was proved by the greater weight of the evidence that such damages did occur and were the proximate result of defendant's wrongful conduct.

Am Jur 2d, Damages §§ 961, 994, 1016.

7. Trespass § 8 (NCI3d)— grading—punitive damages—not excessive

The trial court did not abuse its discretion by not awarding defendants a new trial in a trespass action arising from

grading by defendants of property adjacent to plaintiff's property where defendant alleged that the punitive damages award was excessive.

Am Jur 2d, Damages §§ 1027, 1033.

Excessiveness or inadequacy of punitive damages in cases not involving personal injury or death. 35 ALR4th 538.

8. **Trespass § 6 (NCI3d)— grading of adjacent property—documents disclosing permission of landowner-lessor—excluded**

The trial court did not err in a trespass action by refusing to admit several documents disclosing that defendants had permission from Southern Railway, which owned the property, to perform grading work on land leased by plaintiff. Defendants contended that this evidence was relevant to punitive damages because they could not have willfully, wantonly or recklessly trespassed if they had the landowner's permission. However, the evidence did not show that Southern Railway had the authority to give permission on behalf of plaintiff for defendants to grade or otherwise encroach upon the subject property, and permission given by a third party does not ordinarily lessen the egregious nature of the trespasser's conduct or diminish the harm to the person in actual or constructive possession of the property.

Am Jur 2d, Trespass §§ 75, 150.

9. **Trespass § 6 (NCI3d)— grading of adjacent property—lost or damaged personal property—evidence of value**

The trial court did not err in a trespass action arising from grading adjacent property by allowing plaintiff's witnesses to testify about the value of damaged or lost personal property. Plaintiff's former president and his son, the current president, testified that they had operated the business for a number of years upon the subject property and that they were personally acquainted with each item of property missing after defendants bulldozed dirt onto the premises. This furnished ample foundation upon which to base opinions as to the fair market value of the missing personal property.

Am Jur 2d, Damages §§ 876, 877, 957.

APPEAL by defendants Godley Builders and William C. Godley from judgment entered 18 January 1991 by *Judge James U. Downs* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 11 March 1992.

Plaintiffs brought this action to recover damages for trespass. The evidence presented at trial indicates that on 1 March 1971, Maintenance Equipment Company, Inc. (plaintiff) entered into a written license agreement with the Southern Railway Company, whereby Southern Railway granted plaintiff the right to occupy and use a 1,000 foot x 70 foot parcel of land (subject property). Since then plaintiff made annual rental payments of $350 to Southern Railway and used the land for various purposes in connection with its business.

In the early 1980's, William Godley and Godley Builders (defendants) purchased a parcel of land (the Godley property) adjacent to the subject property. Defendants planned to build an office complex on their property. After consulting the Mecklenburg County Building Inspector, it was determined that the existing grade on the western side of the Godley property was too steep and therefore construction would not be allowed. This steep grade formed the boundary between defendants' property and the subject property, and defendants determined that in order to have the required lateral support, they needed to slope the existing grade.

In mid-April, 1985, defendant Godley employed McWhirter Grading Co. (defendant) to bulldoze and grade the western boundary of the Godley property and in doing so dirt was bulldozed onto the subject property. According to defendants, this property was covered with trash and debris and "a total eyesore." Also, defendants have consistently maintained that they had permission from Southern Railway to perform the grading on the subject property. Plaintiffs offered evidence which tended to show that on numerous occasions they requested defendants to discontinue the bulldozing operations because defendants were encroaching upon the subject property, but in spite of these requests, defendants continued the grading. After the grading was completed plaintiff Maintenance Equipment Company was no longer able to use the subject property. In addition, plaintiffs offered evidence that certain items of personal property were either damaged or destroyed by the bulldozing activity.

At the close of plaintiffs' evidence, plaintiffs' claim against defendant McWhirter Grading Company was dismissed. Upon the issues submitted, the jury found that defendants trespassed upon the property in the possession of plaintiff Maintenance Equipment Company and awarded it $4,550 in compensatory damages and $175,000 in punitive damages. However, the jury found defendants did not trespass against plaintiff Dixie Rental Company.

Cecil Curtis, and Wade and Wade, by J. J. Wade, Jr. and James H. Wade, for plaintiff appellee.

Dean & Gibson, by Rodney Dean and Suzanne Baldwin Leitner, for defendant appellants Godley Builders and William C. Godley.

WALKER, Judge.

At the outset, we note this appeal concerns only plaintiff Maintenance Equipment Company and defendants Godley Builders and William C. Godley since plaintiff Dixie Rental Company did not appeal and the trial court's dismissal of the claim against McWhirter Grading Company was not appealed.

[1] Defendants assign as error the denial of its motion for a directed verdict at the end of plaintiffs' case and at the end of all the evidence. In ruling on the motion the judge must consider the evidence in the light most favorable to the non-moving party and give him the benefit of every reasonable inference to be drawn in his favor. *Summey v. Cauthen*, 283 N.C. 640, 197 S.E.2d 549 (1973). A directed verdict should be granted only where the evidence, construed in the light most favorable to plaintiff, is insufficient to support a verdict for the plaintiff. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). In reviewing all the evidence in the light most favorable to plaintiff, we agree the trial court properly allowed the jury to decide the issues of trespass, actual damages and punitive damages.

In order to prevail in a trespass action, plaintiff must show (1) plaintiff was in actual or constructive possession of the property; (2) unauthorized entry by the defendant; and (3) damage to the plaintiff from the trespass. *Kuykendall v. Turner*, 61 N.C.App. 638, 301 S.E.2d 715 (1983). Defendants assert that plaintiff merely held a license, and therefore could not maintain an action for trespass since it was not in actual or constructive possession of the land in question.

While a license gives the holder the right to do certain specific acts on the land, it creates no substantial interest in the land and is usually revocable at will. However, if an agreement grants an interest in or a right to use and occupy the land, it creates an interest which is more than a mere license. *Brinkley v. Day*, 88 N.C.App. 101, 362 S.E.2d 587 (1987). In the present case, although the agreement between plaintiff and Southern Railway is entitled a "license agreement," it grants plaintiff the right to "occupy and use" the subject property. Evidence also disclosed that plaintiff paid annual rent and actively utilized the premises for business purposes (to the exclusion of everyone else) from 1971 until defendants encroached upon the property in 1985. Further, plaintiff complained to defendants when the grading began and showed defendants the license agreement and the boundary lines, but the grading and dumping of dirt continued on the subject property, resulting in certain items of plaintiff's personal property being covered up or otherwise disposed of. We conclude a jury could find plaintiff, by its use and occupancy, was in possession of the subject property it rented from Southern Railway. The jury was therefore entitled to find that defendants trespassed since "[t]he civil action of trespass to land protects the possessory interest in land from unpermitted physical entry." *Majebe v. North Carolina Board of Medical Examiners*, 106 N.C.App. 253, 261, 416 S.E.2d 404, 408 (1992). Furthermore, prior decisions in North Carolina recognize that persons who hold the same caliber of possession as plaintiff can maintain actions for interference with their possessory interests. *Kent v. Humphries*, 303 N.C. 675, 281 S.E.2d 43 (1981); *Lee v. Stewart*, 218 N.C. 287, 10 S.E.2d 804 (1940); *Smith v. Fortiscue*, 48 N.C. 65 (1855); *Hendrix v. Guin*, 42 N.C.App. 36, 255 S.E.2d 604 (1979); *Academy of Dance Arts, Inc. v. Bates*, 1 N.C.App. 333, 161 S.E.2d 762 (1968).

[2] Defendants next contend the trial court made improper comments to defense counsel in the presence of the jury thereby prejudicing defendants' case. In North Carolina, the trial court is not permitted to express his opinion on the facts to be proven. *Brown v. Scism*, 50 N.C.App. 619, 274 S.E.2d 897, *disc. review denied*, 302 N.C. 396, 276 S.E.2d 919 (1981); *Greer v. Whittington*, 251 N.C. 630, 111 S.E.2d 912 (1960). Furthermore, the trial court "must abstain from conduct or language which tends to discredit or prejudice any litigant." *McNeill v. Durham County ABC Board*, 322 N.C. 425, 429, 368 S.E.2d 619, 622, *reh'g denied*, 322 N.C. 838,

371 S.E.2d 278 (1988). If a question exists as to the propriety of the trial court's comments, it must be determined what the cumulative effect such comments had upon the jury. *State v. Frazier*, 278 N.C. 458, 180 S.E.2d 128 (1971); *Russell v. Town of Morehead City*, 90 N.C.App. 675, 370 S.E.2d 56 (1988). In some cases, such as *McNeill v. Durham County ABC Board, supra*, cited by defendants, the cumulative effect of the trial court's comments may warrant a new trial. In *McNeill*, the Supreme Court found the trial judge had made some thirty-seven remarks or commentaries to defense counsel, jurors and witnesses and these remarks were so disparaging in their effect that they prejudiced the defendants' right to a fair and impartial trial. However, not every comment from the bench creates reversible error. The trial court may admonish counsel not to pursue a specific line of questioning, *Brenner v. Little Red School House, Ltd.*, 59 N.C.App. 68, 295 S.E.2d 607 (1982), *disc. review denied*, 307 N.C. 468, 299 S.E.2d 220 (1983), and it may stop examination of a witness if such examination is futile. *Greer v. Whittington, supra.*

Here, we note that several comments cited by defendants were directed to counsel for defendant McWhirter Grading Company. As McWhirter is not involved in this appeal, defendants have failed to show how prejudice resulted from these comments. Our review of the other comments reveals that they were intended to keep the trial moving, to keep counsel from pursuing certain specific lines of questioning, or were the basis for a ruling on the admissibility of evidence. Additionally, before the jury retired, the trial court instructed:

> Members of the Jury, you will not use any of the Court's rulings, conduct or comments during the course of the trial to aid you in the course of finding facts or not finding facts or believing evidence or not believing the evidence. That was not the Court's function. That's not my function and you are not to glean anything from that to assist you in the course of the commission that you are about to embark on.

While we specifically do not approve of several of the trial court's comments, we cannot say the cumulative effect of these comments, which were made in the context of a four day trial, resulted in sufficient prejudice to constitute reversible error.

[3] In their next assignment of error, defendants contend the trial court erred in instructing the jury regarding the significance

of the licensing agreement between plaintiff and Southern Railway. Defendants assert the trial court should have instructed the jury that if it found the licensing agreement failed to describe the property on which plaintiff claimed defendants trespassed, then plaintiff could not recover since it would not have been in "lawful actual possession." Here, the evidence disclosed plaintiff had been in actual possession of the subject property for fifteen years and had been paying rent to Southern Railway throughout this period. Furthermore, when defendants began grading, plaintiffs showed defendants the license agreement and the boundary lines of the subject property. There is nothing in the record to indicate the license agreement misled defendants into believing plaintiff was not in possession of the subject property. Our Supreme Court has recognized that even where a tenant enters into possession under an invalid written lease and pays rent to the landlord, the tenant still has a possessory interest sufficient to maintain a claim for nuisance. *Kent v. Humphries*, 303 N.C. 675, 281 S.E.2d 43 (1981). Since trespass also concerns the tortious interference with a lawful possessor's property interests, we find *Kent v. Humphries, supra* to be instructive. Therefore, the trial court properly denied defendants' requested instruction since any failure of the written agreement between Southern Railway and plaintiff would not have conclusively decided the question of whether plaintiff possessed the subject property.

[4] Defendants further say there was insufficient evidence to support an award of punitive damages. A jury may award punitive damages if the trespass was committed under circumstances of aggravation or resulted from malicious conduct on the part of the defendant. "While punitive damages are not recoverable as a matter of right, sometimes they are justified as additional punishment for intentional acts which are wanton, wilful, and in reckless disregard of a plaintiff's rights." *Woody v. Catawba Valley Broadcasting Co.*, 272 N.C. 459, 463, 158 S.E.2d 578, 582 (1968). In the present case, from evidence produced at trial a jury could find that defendants knew plaintiff was in possession of the subject property; that plaintiff requested defendant to discontinue the grading operations; that after the land was graded, defendants refused plaintiff's request to "put it back like it was" and pay for damages; and that defendant Godley stated under the same circumstances he would follow the same course of action. In viewing all the evidence, we agree with

the trial court that it was sufficient to support an award of punitive damages.

[5] Defendants also contend that the trial court erred by failing to give the following instruction to the jury on punitive damages:

> [T]hat Defendants inflicted an injury to the Plaintiffs in a malicious, wanton, and reckless manner. Defendants' conduct must have been actual, malicious or wanton, displaying a spirit of mischief toward the Plaintiffs.
>
> Both whether to award punitive damages and the amount rests in the sound discretion of the jury. The amount must not be excessively disproportionate to the circumstances of rudeness, insult or indignity present in this case.

The court's instruction on punitive damages included the following:

> Upon a showing of willful or wanton conduct, whether to award punitive damages and within reasonable limits, the amount to be awarded is a matter within your sound discretion.
>
> In deciding whether to award punitive damages and, if so, what amount you will award, you will be guided by the need or the lack of need to punish and make an example of the defendants, given their respective circumstances and the nature of the conduct involved.

In reviewing all of the court's instructions on punitive damages, we find they essentially incorporate defendants' requests and sufficiently include language previously approved by our Courts. Therefore, we conclude the trial court did not err. N.C.P.I., Civil 810.01; *Blackwood v. Cates*, 297 N.C. 163, 254 S.E.2d 7 (1979); *Binder v. General Motors Acceptance Corp.*, 222 N.C. 512, 23 S.E.2d 894 (1943).

[6] Defendants next say the trial court erred in two respects when instructing on special damages. According to defendants there was no evidence of the rental value of the property upon which to base an award of special damages. This argument is without merit since the license agreement, which defendants stipulated was admissible, disclosed an annual rent of $350. We agree with plaintiff that this provided evidence of the rental value from which the jury could award special damages. Defendants further contend the trial court erroneously stated plaintiff was "entitled to special damages" and therefore failed to properly place the burden of

proof upon plaintiff. We find no merit in this argument since the trial court properly instructed "[plaintiff] is also entitled to special damages . . . [i]f it's proved by the greater weight of the evidence that such damages did occur and were the proximate result of the defendant's wrongful conduct . . . ."

Defendants next assert the trial court erred in denying their motion for judgment not withstanding the verdict (JNOV), or in the alternative, their motion for a new trial. A motion for JNOV is essentially a renewal of an earlier motion for a directed verdict; therefore the trial court uses the same standards for evaluating both motions. *Barnes v. Ford Motor Co.*, 95 N.C.App. 367, 382 S.E.2d 842 (1989). As we have already determined the trial court properly denied defendants' motion for a directed verdict, we conclude the trial court did not err by denying the motion for JNOV.

[7] In support of its motion for a new trial pursuant to Rule 59, N.C. Rules of Civil Procedure, defendants contend that the award of punitive damages was clearly excessive as compared to the amount of compensatory damages. Under Rule 59 a new trial may be granted if there exists "excessive damages . . . appearing to have been given under the influence of passion or prejudice." However, the trial court's discretionary denial of a new trial may be reversed only if a manifest abuse of discretion is shown. In *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982), it was said:

> It has been long settled in our jurisdiction that an appellate court's review of a trial judge's discretionary ruling either granting or denying a motion to set aside a verdict and order a new trial is strictly limited to the determination of whether the record affirmatively demonstrates a manifest abuse of discretion by the judge.

The Court also said:

> Due to their active participation in the trial, their first-hand acquaintance with the evidence presented, their observances of the parties, the witnesses, the jurors and the attorneys involved, and their knowledge of various other attendant circumstances, presiding judges have the superior advantage in best determining what justice requires in a certain case.

Id. at 487, 290 S.E.2d at 605. Therefore, the presiding judge here had the superior advantage to make the best determination of

what justice required in this case. Since punitive damages are awarded above and beyond actual damages and intended to punish, the jury is allowed to consider the circumstances of defendants' conduct and financial position when setting the award. *Carawan v. Tate*, 53 N.C.App. 161, 280 S.E.2d 528 (1981), *modified and aff'd*, 304 N.C. 696, 286 S.E.2d 99 (1982). In regard to the amount of punitive damages awarded, this "rests in the sound discretion of the jury although the amount assessed is not to be excessively disproportionate to the circumstances of contumely and indignity present in the case." *Id.* at 165, 280 S.E.2d at 531. The jury's discretion in awarding punitive damages must be exercised "within reasonable constraints" in order to satisfy due process. *Pacific Mutual Life Insurance Co. v. Haslip*, 499 U.S. ---, 113 L.Ed.2d 1 (1991). The trial court did not abuse its discretion in denying defendants' motion for a new trial.

[8] In their next assignment of error, defendants contend the trial court erred by refusing to admit several documents disclosing defendants had permission from Southern Railway to perform the grading work. According to defendants, this evidence was relevant to the issue of punitive damages because if defendants had the landowner's permission to perform the grading, then they could not have willfully, wantonly or recklessly trespassed. However, defendants' argument is misdirected. The court allowed into evidence defendants' exhibits 98, 99 and 100, less an excised portion of exhibit 100, concerning a reference to a conversation between defendant Godley and C. L. Oliver of Southern Railway. While these documents clearly established that Southern Railway had no objection to defendants grading the subject property, neither this evidence nor defendants' exhibits 96 and 97, which were excluded, show that Southern Railway had the authority to give permission on behalf of plaintiff for defendants to grade and otherwise encroach upon the subject property. The consent of the landlord will not relieve a wrongdoer from liability for trespass. *See Weinman v. De Palma*, 232 U.S. 571, 58 L.Ed. 733 (1914). The tenant has a right to possess the premises and can therefore maintain an action for trespass, irrespective of the landlord's consent. *See Hendrix v. Guin*, 42 N.C.App. 36, 255 S.E.2d 604 (1979). As discussed previously, the license agreement between plaintiff and Southern Railway allowed the jury to conclude plaintiff was in either actual or constructive possession of the land. Therefore, the fact that plaintiff's landlord, Southern Railway, consented to the grading had no bear-

ing upon the question of whether or not defendants trespassed against plaintiff.

We also note defendants were not prejudiced by exclusion of these documents in relation to plaintiff's claim for punitive damages. Permission of the landowner is not determinative upon the question of punitive damages to be awarded a tenant. In awarding punitive damages for trespass, the focus is upon the egregious nature of the wrong committed against the party in actual or constructive possession of the premises. *Hendrix v. Guin, supra.* Permission given by a third party does not ordinarily lesson the egregious nature of the trespasser's conduct or diminish the harm to the person in actual or constructive possession of the property. *See Lee v. Stewart*, 218 N.C. 287, 10 S.E.2d 804 (1940); *see also Huling v. Henderson*, 161 Pa. 553, 29 A. 276 (1894).

[9] In their final assignment of error, defendants contend the trial court erred in allowing plaintiff to offer evidence that was irrelevant and inadmissible hearsay. Specifically, defendants complain that plaintiff's witnesses should not have been permitted to testify as to the value of personal property claimed to be either lost or damaged by defendants' grading. "[A] non-expert witness who has knowledge of value gained from experience, information, and observation may give his opinion of the value of personal property." *Williams v. Hyatt Chrysler-Plymouth, Inc.*, 48 N.C.App. 308, 317, 269 S.E.2d 184, 190, *disc. review denied*, 301 N.C. 406, 273 S.E.2d 451 (1980). In the present case plaintiff's former president, E. D. Keaton, and his son, Danny, who was president at the time of trial, testified they had operated the business for a number of years upon the subject property. They further testified they were personally acquainted with each item of property missing after defendants bulldozed dirt onto the premises. This testimony furnished ample foundation upon which to base the opinions of these witnesses as to the fair market value of the missing personal property. Therefore, the trial court did not err in admitting this testimony. We have carefully examined each of defendants' other contentions and they are overruled.

No error.

Chief Judge HEDRICK and Judge ORR concur.

RONALD GRAY BERRIER, ADMINISTRATOR OF THE ESTATE OF CHRISTY PAIGE BERRIER, PLAINTIFF v. GARY WAYNE THRIFT, II, DEFENDANT

No. 9122SC253

(Filed 1 September 1992)

1. **Appeal and Error § 114 (NCI4th)— motion to dismiss—failure to state claim—denial not appealable after judgment on merits**

An unsuccessful movant for a dismissal under Rule 12(b)(6) for failure to state a claim may not seek review of the denial of such motion on appeal from judgment on the merits against him.

Am Jur 2d, Appeal and Error § 105.

Appellate review at instance of plaintiff who has requested, induced, or consented to dismissal or nonsuit. 23 ALR2d 664.

2. **Automobiles and Other Vehicles § 563 (NCI4th); Damages § 131 (NCI4th)— intoxicated driver—willful and wanton negligence—punitive damages**

The evidence in a wrongful death action was sufficient to support the jury's verdict finding willful and wanton negligence by defendant and awarding punitive damages to plaintiff where it tended to show that defendant insisted on driving decedent's car and decedent was a passenger in her car at the time of the accident; decedent was killed when the car failed to negotiate a curve; defendant had consumed ten cans of beer within the two to three hours prior to driving decedent's car but failed to tell any of the passengers about his excessive consumption of alcohol; defendant's blood alcohol level was 0.184 two hours after the accident; and defendant was aware that alcohol impairs a driver's reaction time and that his driving a car after drinking posed a risk.

Am Jur 2d, Damages §§ 750, 764; Death § 259.

Intoxication of automobile driver as basis for awarding punitive damages. 65 ALR3d 656.

3. **Appeal and Error § 343 (NCI4th)— failure to instruct—waiver of objection**

Defendant waived his objection to the trial court's failure to instruct the jury on gross contributory negligence where

he made no request that the court give such an instruction at either of the two charge conferences or when given the opportunity to object to the jury instructions before the jury retired to consider its verdict. Furthermore, the evidence did not require an instruction on gross contributory negligence. Appellate Rule 10(b)(2).

Am Jur 2d, Trial §§ 1081, 1087.

4. **Trial § 46 (NCI3d)— punitive damages—impeachment of jury verdict—juror affidavits inadmissible**

The trial court properly refused to permit defendant to impeach a verdict awarding punitive damages in a wrongful death action by the affidavits of three jurors that the jury foreman misinformed the jurors during deliberations that punitive damages were only a "statement" of what decedent's life was worth rather than a collectible money judgment and that the jury would not have awarded punitive damages if the jurors had known punitive damages had anything more than symbolic value since the contents of the affidavits do not fall within the exception set forth in N.C.G.S. § 8C-1, Rule 606(b) for extraneous prejudicial information.

Am Jur 2d, Trial § 1902.

Competency of jurors' statements or affidavits to show that they never agreed to purported verdict. 40 ALR2d 1119.

APPEAL by defendant from judgment entered 7 June 1990 and order entered 30 August 1990 by *Judge F. Fetzer Mills* in DAVIDSON County Superior Court. Heard in the Court of Appeals 5 December 1991.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter and Ellen M. Gregg, for plaintiff-appellee.

Brinkley, Walser, McGirt, Miller, Smith & Coles, by Charles H. McGirt and Stephen W. Coles, for defendant-appellant.

PARKER, Judge.

This wrongful death action arising out of a single car collision was brought pursuant to N.C.G.S. § 28A-18-2 by the administrator of decedent Christy Paige Berrier's estate. The jury found that defendant was negligent, decedent was contributorily negligent but

defendant was grossly negligent. The estate was awarded $50,000.00 in compensatory damages and $250,000.00 in punitive damages. Defendant appeals the punitive damage award on three grounds: (i) trial and submission to the jury of the issue of wilful, wanton or gross negligence, making it error as well for the trial court to have submitted the issue of punitive damages to the jury; (ii) failure of the trial court, in the alternative, to submit the issue of gross contributory negligence to the jury, in that decedent was allegedly negligent to the same degree as defendant; and (iii) abuse of discretion in the judge's denial of defendant's motion for new trial based on juror affidavits about what occurred in the jury room during deliberations. Finding no error, we affirm the judgment of the trial court.

At trial the evidence showed that the Volkswagen Super Beetle involved in the accident was owned by decedent's father, but was being driven by defendant at the time of the collision. Defendant was negotiating a curve on a country road at night when he lost control of the car which ran off the road and rolled down a steep embankment. Decedent was thrown from the front passenger seat of the car and died at the scene. Defendant and the three passengers in the rear seat of the vehicle survived without permanent physical injury. Tests showed that defendant's blood alcohol level two hours after the accident was 0.184. Decedent's blood alcohol level was 0.04.

Among plaintiff's six witnesses were two of the rear-seat passengers. The witnesses for the defense were defendant, the third surviving passenger and a State trooper who had investigated the accident scene. All the passengers testified that they noticed nothing unusual about defendant or his driving up to the time of the accident.

Defendant testified he volunteered to drive decedent's car because she did not ordinarily drink and he "didn't want her to get in any trouble" for violating her parents' rules against drinking. Decedent had had no more than one or two glasses of wine and seemed her normal self, according to the testimony of other witnesses. Decedent's initial response to defendant's offer to drive was to remind him she was not supposed to let anyone else drive her car. The evidence was in conflict, however, over whether defendant continued to pressure decedent to let him drive or whether, instead, she failed to make any further protest after informing

him she did not want him to drive. Unknown to decedent and the other passengers, defendant had had eight cans of beer within two hours of dropping in on decedent and her friends at a cookout and had also had "some" alcohol while hunting earlier that day. Those at the supper only saw defendant finish a beer he brought with him and then drink a second.

Defendant also testified that he volunteered to drive because "I was basically used to drinking. Most weekends I drink a lot and I didn't feel like [decedent] was used to drinking much." Defendant testified that he knew he had been drinking and felt the effects of the alcohol but still did not feel he should not drive. He conceded, though, that he lost control of decedent's car and that alcohol impairment contributed to the accident in that his "reactions were probably slow, slower than usual."

Defendant testified he had pled guilty to driving while impaired, pursuant to N.C.G.S. § 20-138.1, and also pled guilty to misdemeanor death by motor vehicle, pursuant to N.C.G.S. § 20-141.4(a2). During cross-examination defendant further admitted knowledge that alcohol impairs anyone's ability to drive, that driving while impaired is a crime, that he had alcohol in his system when he drove decedent's car and that there was a risk associated with his driving a car the night of the fatal accident.

The State trooper testified he could tell that defendant was somewhat impaired, having observed at the hospital "a definite odor of alcohol as [defendant] spoke," "very blood shot" eyes and slow, labored speech. The trooper had been surprised at defendant's high alcohol blood level of 0.184, however, as defendant had not seemed "that drunk" at the scene. At trial the trooper gave his opinion that, in general, a blood alcohol level of 0.10 or above noticeably affects people.

[1] Defendant first assigns error to the trial court's denial of his motions to dismiss plaintiff's claim for gross, wilful and wanton negligence under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure and to strike the prayer for punitive damages. These motions were denied at the pretrial conference. An unsuccessful movant under Rule 12(b)(6) may not seek review of denial of such motion on appeal from judgment on the merits against him. *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 682-83, 340 S.E.2d 755, 758-59, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986). Therefore, we overrule this assignment of error.

Defendant assigns error as well to the trial court's denial of his motions for directed verdict and judgment notwithstanding the verdict on the issues of gross negligence and punitive damages. Defendant argues that the trial evidence did not support a finding of gross negligence and hence the punitive damage award had no foundation as a matter of law.

The trial court instructed the jury on punitive damages as follows.

> [T]he burden of proof is on the Plaintiff Ronald Gray Berrier. This means that the Plaintiff must prove by the greater weight of the evidence that the conduct of [Defendant] was aggravated, that is, that his negligence, if any, was gross, willful or wanton. I charge you that punitive damages may never be awarded as a matter of right. They may only be awarded when the jury finds that the conduct of the Defendant is so outrageous as to justify punishing him or making an example of him. In a case of alleged negligence, punitive damages may be awarded upon the showing that the negligence was gross, willful or wanton. Negligence is gross, willful or wanton when the wrongdoer acts with a conscious and intentional disregard of and indifference to the rights and safety of others. Upon a showing of gross, willful or wanton negligence, whether to award punitive damages, and within reasonable limits, the amount to be awarded are matters within the sound discretion of the jury.

This instruction properly presents the law of this State. *Hinson v. Dawson*, 244 N.C. 23, 28, 92 S.E.2d 393, 397, 62 A.L.R.2d 806, 811 (1956) (gross negligence is "conscious and intentional disregard of and indifference to the rights and safety of others").

In *Huff v. Chrismon*, 68 N.C. App. 525, 531, 315 S.E.2d 711, 714, *disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 134 (1984), this Court ruled that the doctrine of punitive damages against impaired drivers applies "in certain situations without regard to the drivers' motives or intent." *Accord Ivey v. Rose*, 94 N.C. App. 773, 776, 381 S.E.2d 476, 478 (1989) ("act of driving while impaired is a *wanton* act"). *Huff* derived its rationale from *Focht v. Rabada*, 217 Pa. Super. 35, 268 A.2d 157 (1970), in which the court held impaired driving could be "outrageous conduct" or "a reckless indifference to the interests of others" in appropriate circumstances. *Huff*, 68 N.C. App. at 532, 315 S.E.2d at 715.

[2] In considering defendant's motions for directed verdict and judgment notwithstanding the verdict on these issues, the trial court was required to

> view all the evidence that supports the non-movant's claim as being true and that evidence must be considered in the light most favorable to the non-movant, giving to the non-movant the benefit of every reasonable inference that may legitimately be drawn from the evidence with contradictions, conflicts, and inconsistencies being resolved in the non-movant's favor.

Bryant v. Nationwide Mut. Fire Ins. Co., 313 N.C. 362, 369, 329 S.E.2d 333, 337-38 (1985). Applying the law to the facts in the present case, we find the evidence of gross negligence in this case was sufficient to go to the jury. "If the facts are such that reasonable men could differ upon whether the negligence amounted to willful and wanton conduct, the question is generally preserved for the jury to resolve." *Siders v. Gibbs*, 39 N.C. App. 183, 186, 249 S.E.2d 858, 860 (1978). *See also Boyd v. L.G. DeWitt Trucking Co.*, 103 N.C. App. 396, 401-403, 405 S.E.2d 914, 918-19, *disc. rev. denied*, 330 N.C. 193, 412 S.E.2d 53 (1991).

On its facts this case is distinguishable from *Brake v. Harper*, 8 N.C. App. 327, 174 S.E.2d 74, *cert. denied*, 276 N.C. 727 (1970), in which an investigating officer's opinion about the driver's intoxication was supported in the record by nothing more than the officer's memory that the breathalyzer reading was below 0.10. Similarly, in *Howard v. Parker*, 95 N.C. App. 361, 382 S.E.2d 808 (1989), the allegations of intoxication without more would have been the sole basis for the jury's punitive damage award. In the present case defendant, by his own admissions at trial, had started drinking early on the day of the accident and consumed ten cans of beer within the two or three hours just prior to driving decedent's car. Two hours after the accident defendant's blood alcohol level was 0.184. A breathalyzer reading of 0.10 constitutes legal impairment in North Carolina. N.C.G.S. § 20-138.1(a)(2).

Moreover, defendant was aware that alcohol impairs a driver's reaction time and that his driving a car that night posed a risk. In this case, then, the chemical evidence and the personal observations by the State trooper were amplified by evidence of defendant's awareness of the consequences of driving while impaired, of his deliberate decision in the face of such knowledge to com-

mandeer control of decedent's car—without telling any of the four passengers about his excessive consumption of alcohol—and of his actual inability to keep the car under control. That evidence was sufficient for the jury to infer a reckless disregard for the rights and safety of others. For these reasons we overrule the assignments of error based on the sufficiency of the evidence of gross negligence.

[3] Next defendant contends that the trial court erred in failing to instruct the jury on gross contributory negligence. We note that defendant pled gross contributory negligence as a defense in his answer but made no request that the court give such an instruction, at either of the two charge conferences or when given the opportunity to object to the jury instructions before the jury retired to consider its verdict. Under these circumstances, defendant has waived this objection under North Carolina Rule of Appellate Procedure 10(b)(2). We also find that the evidence in this case raised no issue of decedent's gross contributory negligence and, therefore, the evidence triggered no obligation in the trial judge to instruct the jury on this issue as a substantive feature of the case. *See Millis Construction Co. v. Fairfield Sapphire Valley*, 86 N.C. App. 506, 509, 358 S.E.2d 566, 568 (1987). Accordingly, we overrule the assignment of error based on an omission from the jury instructions.

[4] Finally, defendant argues that he deserves a new trial on the ground that the jury's punitive damage award was a mistake. According to three juror affidavits submitted to the trial judge along with an affidavit of the assistant clerk of court, the foreman misled the jury during deliberations by misinforming the jurors that punitive damages were a "statement" of what decedent's life was worth rather than a collectible money judgment. The affiants averred that had the jury known punitive damages had anything more than symbolic value, the jury would not have awarded any punitive damages. Based on these juror statements, defendant argues the trial court had knowledge of an irregularity during deliberations and jury misconduct, which went uncorrected. As explained below, the trial court is prohibited from considering such statements and this assignment of error is without merit.

In the present case the jury had been discharged and was filling out information for the clerk when one juror asked the clerk if the jury's $250,000.00 award was collectible. She replied that it was indeed a money judgment; the jurors grew upset and told

her the foreman had said otherwise. Almost immediately thereafter, defendant raised the issue of possible juror confusion by making a motion to reconvene the jury. The judge and defense counsel had the following colloquy.

> MR. MCGIRT: You were aware immediately after the jury was discharged they were in your office and brought to your attention they did not understand what the last issue was, that it was not a monetary issue that they had been given information in there that all of that was just telling the family what the value of the human life was, it was for a judgment that was not collectable, if it had been, they would not have signed it or agreed to it. These jurors went to your office and brought this to your attention.
>
> THE COURT: No, no, no. I walked in there to get my coat to go eat lunch. The jury was in there talking amongst themselves. They were talking to the clerk. They wanted to know the effect of the fifth issue [punitive damages].
>
> MR. MCGIRT: Right.
>
> THE COURT: I said it was collectable. Nobody came and reported anything to me. I walked into my chambers where unbeknownst to me they were in there. . . . And nobody came to me and reported anything to me. I want to get that straight.

The judge then refused to inquire into the jury's verdict, telling defense counsel that jurors could not impeach their own verdict and he would not listen to them "tell what went on in the jury room." The trial court reiterated this position at the later hearing on defendant's motion for new trial: "I just want to get it clear that I don't believe it is proper for me to consider these affidavits about what the jurors say went on in the jury room."

We find no error in the trial court's interpretation of N.C.G.S. § 8C-1, Rule 606(b), which states:

> (b) *Inquiry into validity of verdict or indictment.*—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 concerning his mental processes in connection therewith, except that a

> juror may testify on the question whether extraneous prejudicial information was improperly brought to the jury's attention or whether any outside influence was improperly brought to bear upon any juror. 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.

N.C.G.S. § 8C-1, Rule 606(b) (1988). The Commentary to Rule 606 explains:

> The mental operations and emotional reactions of jurors in arriving at a given result would, if allowed as a subject of inquiry, place every verdict at the mercy of jurors and invite tampering and harassment. *** The authorities are in virtually complete accord in excluding the evidence. *** As to matters other than mental operations and emotional reactions of jurors, substantial authority refuses to allow a juror to disclose irregularities which occur in the jury room, but allows his testimony as to irregularities occurring outside and allows outsiders to testify as to occurrences both inside and out. . . . [T]he central focus has been upon insulation in the manner in which the jury reached its verdict, and this protection extends to each of the components of deliberation, including arguments, statements, discussions, mental and emotional reactions, votes, and any other feature of the process. Thus testimony or affidavits of jurors have been held incompetent to show . . . misinterpretation of instructions, *Farmers Coop. Elev. Ass'n v. Strand*, [382 F.2d 224, 230 (8th Cir.), *cert. denied*, 389 U.S. 1014, 19 L.Ed.2d 659 (1967)]; mistake in returning verdict, *United States v. Chereton*, 309 F.2d 197 (6th Cir. 1962). . . .
>
> The exclusion is intended to encompass testimony about mental processes and testimony about any matter or statement occurring during the deliberations, except that testimony of either of these two types can be admitted if it relates to extraneous prejudicial information or improper outside influence.

N.C.G.S. § 8C-1, Rule 606 Commentary (1988).

Under our cases construing Rule 606(b), the contents of the affidavits in this case do not fall within the exception for extraneous prejudicial information. The Supreme Court has observed:

> [E]xtraneous information [means] information dealing with the defendant or the case which is being tried, which information reaches a juror without being introduced into evidence. It does not include information which a juror has gained in his experience which does not deal with the defendant or the case being tried. The other matters contained in the affidavits, that votes were changed because of the foreman's statements, that the foreman would not let a juror send a note to the judge, and that some of the jurors did not think the defendant was guilty dealt with deliberations in the jury room. A juror may not impeach a verdict by testifying to [such matters].

State v. Rosier, 322 N.C. 826, 832-33, 370 S.E.2d 359, 363 (1988). In a subsequent case, *State v. Quesinberry*, 325 N.C. 125, 133-35, 381 S.E.2d 681, 687 (1989), *cert. granted and judgment vacated in light of McKoy*, 494 U.S. 1022, 108 L.Ed.2d 603 (1990), *death sentence vacated and remanded for new sentencing*, 328 N.C. 288, 401 S.E.2d 632 (1991), the Court reviewed federal cases distinguishing between "external" influences on jurors, evidence of which may be used to attack a verdict, and "internal" influences on a verdict, which do not fall within the exceptions to Rule 606(b). In *Quesinberry* the Court held that juror consideration during deliberations of the possibility of defendant's parole was an "internal" influence. The Court noted that information about parole eligibility was "general information" rather than information dealing with "this particular defendant" and that the jurors' information did not come from any outside source but was, rather, an "idea," "belief" or "impression." *Id.* at 135, 381 S.E.2d at 688. "Allowing jurors to impeach their verdict by revealing their 'ideas' and 'beliefs' influencing their verdict is not supported by case law, nor is it sound public policy." *Id.* at 136, 381 S.E.2d at 688.

Rosier and *Quesinberry* thus reflect the deeply entrenched rule that intrajury influences on a verdict, also known as matters that inhere in the verdict, cannot be inquired into. *Accord McClain v. Otis Elevator Co.*, 106 N.C. App. 45, 415 S.E.2d 78 (1992); *see also Virgin Islands v. Gereau*, 523 F.2d 140, 149-50 (3d Cir. 1975), *cert. denied*, 424 U.S. 917, 47 L.Ed.2d 323 (1976); *Kendall v. Whataburger, Inc.*, 759 S.W.2d 751 (Tex. App. 1988) (jurors incompetent to testify about a matter occurring within the jury room even though one juror, a paralegal, had influenced the voting of other jurors). Matters inhering in a verdict "include 'a juror not assenting to the verdict, a juror misunderstanding the instructions of the

court, a juror being unduly influenced by the statements of his fellow-jurors, or a juror being mistaken in his calculations or judgments.' " L. Hardwick & B. Ware, *Juror Misconduct, Law and Litigation* § 6.04, at 6-109 (1990) (quoting *Parker v. State*, 336 So. 2d 426, 427 (Fla. Dist. Ct. App.), *appeal dismissed and cert. denied*, 341 So. 2d 292 (Fla. 1976)).

As the information allegedly received by the jurors in the present case did not concern either the defendant or the case being tried, but was rather information about the foreman's belief or impression about the impact of punitive damage awards, the trial court correctly refused to consider the juror affidavits under Rule 606(b). Therefore, we overrule this final assignment of error.

Affirmed.

Judges GREENE and WYNN concur.

ELIZABETH ANN SCHULTZ v. GERALD FAYE SCHULTZ

No. 911DC694

(Filed 1 September 1992)

1. Divorce and Separation § 36 (NCI4th) — resumption of marital relations — sufficiency of evidence

The parties resumed marital relations as a matter of law within the meaning of N.C.G.S. § 52-10.2 (1991), and defendant husband's duty under a consent judgment to pay alimony to plaintiff wife in the future ended at the time of the reconciliation, where the undisputed evidence showed: defendant husband moved back into the former marital home with the wife and stayed there for four months; defendant kept his automobile at the home, lived in the home continuously, moved his belongings into the home, mowed the lawn, and kept his animals at the home; and after defendant's return, plaintiff wife did his laundry, went shopping, dined in restaurants and worked in the yard with him, filed a joint tax return with him, and engaged in sexual relations with defendant for at least two to three months after his return. The parties held themselves out as husband and wife as a matter of law, and the trial

court erred in examining the mutual intent of the parties in determining whether they had resumed marital relations.

Am Jur 2d, Divorce and Separation § 684.

Reconciliation as affecting decree for limited divorce, separation, alimony, separate maintenance, or spousal support. 36 ALR4th 502.

2. Divorce and Separation §§ 301, 333 (NCI4th)— reconciliation— past due alimony—civil contempt

The trial court did not err in holding defendant husband in civil contempt for failure to pay alimony required by a consent judgment up until the time of reconciliation of the parties where the trial court found that defendant's failure to pay was willful and without just cause based upon defendant's stipulation that he had the means and ability to comply with the consent judgment but failed to make alimony payments because he felt plaintiff wife did not deserve the money. Although defendant's obligation to pay future alimony ended at the time of reconciliation, his duty to pay alimony up to the date of reconciliation remained enforceable through the court's contempt power.

Am Jur 2d, Divorce and Separation §§ 684, 798.

Reconciliation as affecting decree for limited divorce, separation, alimony, separate maintenance, or spousal support. 36 ALR4th 502.

APPEAL by defendant from order entered 31 January 1991 in PASQUOTANK County District Court by *Judge Grafton G. Beaman*. Heard in the Court of Appeals 12 May 1992.

D. Keith Teague, P.A., by D. Keith Teague, for plaintiff-appellee.

Trimpi & Nash, by John G. Trimpi, for defendant-appellant.

WYNN, Judge.

On 2 March 1984, plaintiff and defendant entered into a consent judgment, which required defendant to transfer the marital home in Elizabeth City to plaintiff, to make the mortgage payments, and to pay plaintiff $400 per month for alimony. Defendant complied with the consent judgment insofar as he conveyed the house to

plaintiff and paid the mortgage payments, but he made only the first payment of $400.

Plaintiff and defendant lived apart from 1984, until about 11 June 1990, when defendant, with plaintiff's consent, moved back into the home. Nearly four months after defendant's return, plaintiff asked him to leave the house, but he refused. Shortly thereafter, defendant filed a motion in the cause to modify the consent judgment, contending that because the parties had reconciled, the judgment was void. Plaintiff responded by moving in the cause and obtaining from the trial court a show cause order for contempt based upon defendant's failure to pay the $400 per month alimony under the consent judgment. From the trial judge's determination that the parties had not reconciled and the finding that defendant was in civil contempt, defendant appeals to this Court.

I.

[1] Appellant assigns error to the trial court's determination that the parties did not reconcile. The trial judge made the following finding of fact:

> 16. Although there was an intent on behalf of the defendant to reconcile, the plaintiff intended to reconcile only on the condition that the defendant would change his actions and personality traits which had originally caused the discord between the parties. The evidence shows that the defendant did not change his behavior, and that there were problems from the day that the defendant returned until the present. There was no mutual intent to establish a permanent reconciliation. Rather, there was a conditional intent on behalf of the plaintiff, and that condition has not been fulfilled. Consequently, no reconciliation occurred.

Based on this finding of fact, the trial judge concluded that "[b]ecause there was no mutual intent to effect a permanent reconciliation, the parties did not reconcile in June of 1990, and are not reconciled at the present time."

The statute which governs this issue is N.C. Gen. Stat. § 52-10.2 (1991),

> "Resumption of marital relations" shall be defined as voluntary renewal of the husband and wife relationship, as shown by the totality of the circumstances. Isolated incidents of sexual

> intercourse between the parties shall not constitute resumption of marital relations.

Id. Section 52-10.2 overruled *Murphy v. Murphy*, 295 N.C. 390, 245 S.E.2d 693 (1978), in which our Supreme Court determined that casual or isolated instances of sexual intercourse between separated spouses constituted a reconciliation. *See Higgins v. Higgins*, 321 N.C. 482, 486, 364 S.E.2d 426, 429, *reh'g denied*, 322 N.C. 116, 367 S.E.2d 911 (1988). The apparent result of the legislature's enactment of section 52-10.2 was to reinstate those cases which did not rely upon the *Murphy* decision.

There are two lines of cases regarding the resumption of marital relations: those which present the question of whether the parties hold themselves out as man and wife as a matter of law, and those involving conflicting evidence such that mutual intent becomes an essential element. *See Hand v. Hand*, 46 N.C. App. 82, 86-87, 264 S.E.2d 597, 599, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980) (distinguishing the two lines of cases). In the opinion of this Court, these two lines of cases establish two alternative methods by which a trial court may find that separated spouses have reconciled. The first method, represented by *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976), requires the presence of substantial objective indicia of cohabitation as man and wife. When such evidence exists, the trial court may find that the parties have reconciled as a matter of law. The second method, on the other hand, exemplified by the *Hand* decision, involves conflicting evidence; the subjective mutual intent of the parties, therefore, becomes an essential element.

In *Adamee*, our Supreme Court considered whether the parties had held themselves out as man and wife as a matter of law. In that case, Mrs. Adamee submitted affidavits which tended to show that several months after executing a separation agreement and consent judgment, she returned to the marital home. The evidence further showed:

> [T]hey occupied one bedroom and one bed; that in March 1974 Adamee paid to her attorney the balance that she owed him for representing her in the suit against Adamee; that the respective attorneys for Adamee and Mrs. Adamee, who had been appointed commissioners in the consent judgment to sell the parties' jointly owned property at public auction and divide the proceeds equally between them were instructed that the

> parties no longer desired a sale, and no sale was made; that Adamee told friends he and his wife had worked out their problems and were planning an early retirement in order to open an antique shop in Alabama; that the month before his death Adamee had instructed a friend in Alabama to proceed with attempts to purchase a certain piece of property for himself and wife jointly; that they had had problems but they had been settled.

Id. at 390, 230 S.E.2d at 544-45.

In deciding whether the parties had reconciled, our Supreme Court analogized resumption of marital relations in the context of terminating a separation agreement to the statutory one-year separation requirement as grounds for divorce. *See* N.C. Gen. Stat. § 50-6 (1987) (incorporating the language of N.C. Gen. Stat. § 52-10.2). The *Adamee* Court stated the following:

> Separation as grounds for divorce "implies living apart for the entire period in such manner that those who come in contact with them may see that the husband and wife are not living together. For the purpose of obtaining a divorce under . . . G.S. 50-6, separation may not be predicated upon evidence which shows that during the period the parties have held themselves out as husband and wife living together, nor when the association between them has been of such character as to induce others who observe them to regard them as living together in the ordinary acceptation of that descriptive phrase. . . . Separation means cessation of cohabitation, and cohabitation means living together as man and wife, though not necessarily implying sexual relations. Cohabitation includes other marital responsibilities and duties."

Adamee, 291 N.C. at 391-92, 230 S.E.2d at 545-46 (quoting *Young v. Young*, 225 N.C. 340, 344, 34 S.E.2d 154, 157 (1945)). *Accord Newton v. Williams*, 25 N.C. App. 527, 214 S.E.2d 285 (1975). In conclusion, the Court stated that, as a matter of law, separated spouses who resume living together in the marital home and "hold themselves out as man and wife," regardless of whether they also resume sexual relations, have reconciled. *Adamee*, 291 N.C. at 392-93, 230 S.E.2d at 546. *See Hall v. Hall*, 88 N.C. App. 297, 363 S.E.2d 189 (1987) (discussing date of separation).

The Supreme Court's decision in *Adamee* was applied by this Court in *Tuttle v. Tuttle*, 36 N.C. App. 635, 244 S.E.2d 447 (1978). In *Tuttle*, the evidence showed that defendant visited plaintiff's home during the Christmas holidays to spend time with the children. At no time did the parties have sexual relations. Based in part on *Adamee*, this Court determined that the trial court's finding that the parties had resumed marital relations was erroneous and ordered a new trial. *Id.* at 637-38, 244 S.E.2d at 448. "Where there is no cohabitation nor any intent to resume the marital relationship, interruption of the statutory period should not be found (absent some other extenuating circumstances) from the mere fact of social contact between the parties." *Id.* at 636-37, 244 S.E.2d at 448.

Likewise, in *Ledford v. Ledford*, 49 N.C. App. 226, 271 S.E.2d 393 (1980), the evidence indicated that plaintiff drove around town with defendant on a few occasions; drove to Georgia with defendant on two occasions; approximately twice a month, plaintiff visited defendant at their former marital home and cleaned up and cooked while there; went to restaurants with defendant on three occasions; set up a Christmas tree in the former marital home during December of 1978; attended church with defendant one time and, while leaving church, failed to protest when defendant referred to her as his wife; and slept with defendant on 29 December 1977, but did not engage in sexual activity. *Id.* at 230-31, 271 S.E.2d at 397. This Court concluded that "[i]n light of the nature of these activities and their relative infrequency over an extended period of time, we see no way they could reasonably induce others to regard the parties as living together." *Id.* at 231-32, 271 S.E.2d at 397. *See Dudley v. Dudley*, 225 N.C. 83, 86, 33 S.E.2d 489, 491 (1945) (separation implies living apart such that the neighbors may see that the husband and wife no longer live together).

The second line of cases involves situations in which the facts are in dispute, and the trial court must consider the subjective intent of the parties. In *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597, *disc. review denied*, 300 N.C. 556, 270 S.E.2d 107 (1980), defendant's evidence showed the following:

> The parties executed their separation agreement on 19 October 1978. On or about 1 December 1978, the parties resumed their marital relations for one week. Thereafter, they lived separate and apart until 8 March 1979, when they lived together in their trailer until 23 March 1979. During this period,

> they had sexual intercourse, went to church together on one occasion, and went shopping for an automobile. Some nights, he slept with plaintiff; on other nights, he slept on the couch.

Id. at 84, 264 S.E.2d at 598. Plaintiff's evidence showed the following:

> [A]fter 1 December 1978, she resided with her parents in Winston-Salem until the baby was born. She went back to live in the trailer at defendant's suggestion. Defendant came by to see the baby one day when the baby was sick; he agreed to help with the baby who was up a lot at night. On several occasions, defendant stayed until 11:00 p.m., and it was not too big a change for defendant to sleep there, and defendant moved back into the trailer. Defendant was making his [alimony] payments while he was in the trailer. He slept on the couch every night, and they did not have sexual relations. At no time did she tell defendant she would take him back as her husband. They ate their meals in the trailer. They took turns caring for the child, and on one occasion, they went to church together.

Id. at 85, 264 S.E.2d at 598. The Court differentiated *Hand* from *Adamee* by noting that while the language of *Adamee* indicates "that the actual intention of the parties to resume their marital cohabitation is not relevant to determining a resumption of the marital relationship," *id.* at 86, 264 S.E.2d at 599, when the evidence is conflicting, " '[t]he issue of the parties' mutual intent is an essential element in deciding whether the parties were reconciled and resumed cohabitation . . . . *Id.* at 87, 264 S.E.2d at 599 (quoting *Newton v. Williams*, 25 N.C. App. 527, 532, 214 S.E.2d 285, 288 (1975)). The *Hand* Court recognized and approved the distinction between cases in which the facts are not in dispute and the issue of reconciliation would be determined as a matter of law and those cases in which the facts are in dispute and mutual intent would control. The Court affirmed the trial court's decision because there were disputed facts involved, and the trial judge resolved them in favor of finding no resumption of marital relations. *Id.* at 87, 264 S.E.2d at 600.

Following *Hand*, a question of disputed facts again was presented to this Court in *Camp v. Camp*, 75 N.C. App. 498, 331 S.E.2d 163, *disc. review denied*, 314 N.C. 663, 335 S.E.2d 493 (1985). There, plaintiff testified that defendant moved into the former marital home for ten days while he was looking for a job; plaintiff had

agreed to allow him to stay based on representations that his girlfriend was returning to California and that he was being evicted from his trailer court; plaintiff was in Atlanta for three of the ten days; defendant did not have sexual relations with plaintiff, sleep in the same bedroom, or move any personal effects other than a change of clothes into the house; defendant never visited friends, attended social events, or ate meals with plaintiff during the ten days; defendant did not represent himself to have resumed the marital relationship with plaintiff; and defendant did not return to the residence after moving out. *Id.* at 500, 331 S.E.2d at 164. Defendant, on the other hand, testified that he returned to the former marital home at plaintiff's request, that the parties slept in the same bed, and that they had sexual intercourse three times. *Id.* at 500, 331 S.E.2d at 164. The *Camp* Court stated that because the evidence was conflicting, the issue of mutual intent was an essential element in deciding whether the parties had resumed cohabitation, and the trial court correctly resolved the disputed facts in favor of finding no resumption of marital relations. *Id.* at 503-04, 331 S.E.2d at 166.

In the case at bar, the undisputed evidence presented to the trial court showed, among other things, that on his return, defendant kept his automobile at the residence; lived in the residence continuously; moved his belongings into the house; paid the utility bills and other joint bills; mowed the lawn, and kept his animals at the house. The evidence further showed that after defendant's return, plaintiff did defendant's laundry; went shopping with him; dined at restaurants with him; worked in the yard with him; filed a joint tax return with him and engaged in sexual relations with the defendant about once a week for at least two or three months after his return. We conclude that this case involves a question of law arising from undisputed facts; consequently, it falls within the first line of cases represented by *Adamee*. When the parties objectively have held themselves out as man and wife and the evidence is not conflicting, we need not consider the subjective intent of the parties. Based on the foregoing, we find that the trial court erred in examining the mutual intent of the parties, and we hold, as a matter of law, that the parties resumed marital relations under N.C. Gen. Stat. § 52-10.2.

II.

[2] Appellant further assigns error to the trial court's order holding him in contempt and ordering him to pay alimony arrearages. Ap-

pellant argues that the order was erroneous because the 2 March 1984 consent judgment was voided when the parties resumed the marital relationship.

Under North Carolina law, resumption of the marital relationship voids the executory portions of an order or separation agreement. *In re Estate of Adamee*, 291 N.C. 386, 230 S.E.2d 541 (1976); *O'Hara v. O'Hara*, 46 N.C. App. 819, 266 S.E.2d 59 (1980); *Hand v. Hand*, 46 N.C. App. 82, 264 S.E.2d 597 (1980). A reconciliation, however, does not invalidate executed provisions of an order or agreement, which this Court has defined as follows:

> An "executory contract" is one in which a party binds himself to do or not to do a particular thing *in the future*. When all future performances have occurred and there is no outstanding promise calling for fulfillment by either party, the contract is no longer "executory," but is "executed." Thus when our cases speak of the "executory provisions" of a separation agreement, they are referring to those provisions which require a spouse to do some future act in accordance with the terms of the agreement . . . .

Whitt v. Whitt, 32 N.C. App. 125, 129-30, 230 S.E.2d 793, 796 (1977) (citations omitted). *See Case v. Case*, 73 N.C. App. 76, 325 S.E.2d 661, *disc. review denied*, 313 N.C. 597, 330 S.E.2d 606 (1985). Furthermore, even if a separation follows a reconciliation, the original order or agreement is not revived. *Hand*, 46 N.C. App. at 85, 264 S.E.2d at 599.

In the case at bar, when the parties resumed marital relations, appellant's obligations to pay alimony in the future ceased. *See* 2 Robert E. Lee, *North Carolina Family Law* § 200, at 515 (4th ed. 1980) (Periodic alimony payments "by their very nature remain executory from period to period and may be abrogated upon reconciliation."); *Potts v. Potts*, 24 N.C. App. 673, 211 S.E.2d 815 (1975) (same). His duty under the consent judgment to pay alimony up to the date of reconciliation, however, as an executed portion of the consent judgment, remained enforceable through the court's contempt power. We find that *Harris v. Harris*, 307 N.C. 684, 300 S.E.2d 369 (1983), is persuasive on this point, even though it arose in the context of a Rule 60 motion. The *Harris* Court held that "a court may hold a party in contempt for past violations of an order and at the same time relieve the party of the prospective applicability of that order." *Id.* at 687-88, 300 S.E.2d at 372. We

likewise hold that the trial court may find that a provision of a consent judgment is no longer valid, while holding a party in contempt for past violations of the consent judgment.

As the record indicates, defendant stipulated that from 1984 until the present time, he had the means and ability to comply with the consent judgment, but failed to make payments because he felt plaintiff did not deserve the money. The trial court concluded that defendant's refusal to make the alimony payments was wilful and without just cause. Accordingly, we find that the trial court did not err in holding appellant in civil contempt for any past due alimony. We reverse and remand this case, however, to the trial court with instructions that defendant may purge himself of contempt by paying all arrears which accumulated up until the time the parties reconciled.

The decision of the trial court is,

Reversed in part on finding of no resumption of marital relations and affirmed in part on finding of civil contempt.

Judges LEWIS and WALKER concur.

EDDIE RAY CRUMP v. BOARD OF EDUCATION OF THE HICKORY ADMINISTRATIVE SCHOOL UNIT, WILLIAM PITTS

No. 9125SC432

(Filed 1 September 1992)

1. Appeal and Error § 515 (NCI4th) — remand for damage award against board rather than individuals — motion for supplemental relief — jurisdiction of trial court

The trial court did not err by finding that it had no jurisdiction to hear appellant's motion for supplemental relief where the case had been remanded by the Supreme Court to the trial court to award damages against the defendant board rather than the individual defendants, plaintiff appellant made a supplemental motion on remand in which he sought reinstatement, back pay, payment for lost insurance premiums and contributions to the State Retirement System, front pay, and

attorney's fees, the court denied plaintiff's motion for supplemental relief, and plaintiff appealed. The language in the Supreme Court opinion clearly restricted the jurisdiction of the trial court on remand to the act of modifying the jury verdict, and any affirmative relief granted by the trial court would have been outside its jurisdiction.

Am Jur 2d, Appeal and Error §§ 964, 965.

2. **Appeal and Error § 556 (NCI4th)— remand for modification of damage award—further proceedings—law of the case**

The trial court did not err in its determination that further proceedings were barred by previous decisions of the Court of Appeals and the Supreme Court where a judgment for plaintiff had been remanded for a damage award against defendant board rather than the individual defendants and plaintiff moved for supplemental relief in the trial court on remand. Plaintiff's supplemental motion was barred by previous decisions because it was based upon his termination by the board, which was affirmed and made final in those decisions.

Am Jur 2d, Appeal and Error §§ 964, 965.

3. **Costs § 27 (NCI4th)— 42 U.S.C. § 1988—attorney fees denied—no reason stated—error**

The trial court erred by failing to award attorney fees under 42 U.S.C. § 1988 without stating a reason. A trial court may award attorney's fees to a prevailing party in its discretion under 42 U.S.C. 1988, but the cases interpreting the statute limit the discretion very narrowly. Plaintiffs are entitled to such fees and costs, without regard to the exact form of relief awarded, if they are the prevailing parties as to a significant issue and if there are no special circumstances rendering the award unjust. The trial court here did not indicate whether special circumstances existed which rendered the award of fees unjust.

Am Jur 2d, Costs § 79.

APPEAL by plaintiff from order entered 30 October 1990 in BURKE County Superior Court by *Judge Claude S. Sitton.* Heard in the Court of Appeals 10 March 1992.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John W. Gresham, for plaintiff-appellant.

Mitchell, Blackwell, Mitchell & Smith, P.A., by W. Harold Mitchell, and Sigmon, Clark and Mackie, by E. Fielding Clark, II, for defendants-appellants.

WYNN, Judge.

Mr. Crump served as a driver's education instructor and coach at Hickory High School for nine years. The school superintendent notified Crump in the spring of 1984, that he was recommending his termination based on immorality, neglect of duty, failure to fulfill the duties and responsibilities of a teacher, and insubordination. On 7 June 1984, after receiving testimony from thirteen witnesses, the Board of Education voted to dismiss Crump for insubordination and immorality.

After his dismissal by the Board of Education, Crump sought review of the Board's actions. He also brought a complaint against the Board, alleging that the Board had violated his due process rights under both the North Carolina and federal constitutions in failing to provide him with a neutral, unbiased hearing. The complaint alleged a direct cause of action under the state constitution and under 42 U.S.C. § 1983 and sought a jury trial.

Defendants made a motion under Rule 42(b) to sever the hearing on the petition for administrative review from the trial on the complaint, which the court granted. At the hearing on the petition, the trial court took no testimony, but it did hear arguments based on the record of the proceedings before the Board. Applying the whole record test, the trial court affirmed the Board's decision. This Court also affirmed the Board's decision by reviewing the administrative record and determining that there was evidence to support the termination on grounds of insubordination. *Crump v. Board of Education*, 79 N.C. App. 372, 339 S.E.2d 483, *disc. review denied*, 317 N.C. 333, 346 S.E.2d 137 (1986) (hereinafter "*Crump I*").

Regarding Crump's claim that the Board denied him a fair and impartial hearing, the jury found in favor of Crump and awarded him $78,000 in compensatory damages. The defendants made a motion for judgment notwithstanding the verdict, which was denied by the trial court. Defendants then appealed to this Court,

and we affirmed the decision of the trial court. *Crump v. Board of Education*, 93 N.C. App. 168, 378 S.E.2d 32 (1989) (hereinafter "*Crump II*"). Judge Wells dissented in part on the question of jury instructions, and defendants appealed this single issue. Our Supreme Court affirmed this Court's decision on the single member bias instruction, but it remanded the case to the trial court to modify the award. *Crump v. Board of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990) (hereinafter "*Crump II SC*"). The trial court was directed to award damages against the defendant board rather than the individual defendants.

On remand, Crump made a supplemental motion in which he sought reinstatement, back pay, payment for lost insurance premiums and contributions to the State Retirement System, front pay, and attorney's fees. The trial court denied Crump's motion for supplemental relief. Crump then appealed to this Court.

I.

[1] Appellant contends that the trial court erred in denying his supplemental motion for declaratory and equitable relief wherein he requested back pay, front pay, reinstatement, and attorney's fees. He argues that the trial court erroneously determined that the Supreme Court's remand in *Crump II SC* restricted its authority to that of merely entering a new judgment taxing the compensatory damages and costs to the Board and not to the other defendants individually. He further assigns as error the trial court's conclusion that, based on the decisions of *Crump I* and *Crump II SC*, further proceedings in the trial court were "barred by the doctrines of issue preclusion, *res judicata*, equitable estoppel and the mandate rule of the doctrine of the law of the case." For the reasons which follow, we find appellant's contentions to be without merit.

The law of this State is clear with regard to the trial court's authority upon remand. In *D & W, Inc. v. Charlotte*, 268 N.C. 720, 152 S.E.2d 199 (1966), our Supreme Court noted that,

> In our judicial system the Superior Court is a court subordinate to the Supreme Court. Upon appeal our mandate is binding upon it and must be strictly followed without variation or departure. No judgment other than that directed or permitted by the appellate court may be entered. "Otherwise, litigation

> would never be ended, and the supreme tribunal of the state would be shorn of authority over inferior tribunals."

Id. at 722-23, 152 S.E.2d at 202 (quoting *Collins v. Simms*, 257 N.C. 1, 11, 125 S.E.2d 298, 306 (1962)). *Accord Lea Co. v. North Carolina Bd. of Transportation*, 323 N.C. 697, 374 S.E.2d 866 (1989).

In the instant case, our Supreme Court, in *Crump II SC*, affirmed the jury award of $78,000 in compensatory damages to appellant on his 42 U.S.C. § 1983 claim. The Supreme Court also remanded the case for the limited purpose of amending the judgment:

> [T]he trial court's judgment in this case indicated that those damages were to be recovered from the "defendants," but indicated that the "defendant" was to pay the costs. By his complaint, the plaintiff sought compensatory damages only from the defendant Board, and not from the individual defendants. The plaintiff sought only punitive damages from the individual defendants. The jury having returned its verdict awarding only compensatory damages, but no punitive damages, the trial court's judgment should have ordered that the damages and costs be recovered only from the defendant Board and not from the other defendants individually. This case is remanded to the Court of Appeals for its further remand to the Superior Court, Catawba County, with instructions that the judgment be modified and amended accordingly. Except as modified in this regard, the decision of the Court of Appeals affirming the judgment of the trial court is affirmed.

Id. at 625-26, 392 S.E.2d at 591. This language from *Crump II SC* clearly restricts the jurisdiction of the trial court on remand to the act of modifying the jury verdict. Any affirmative relief granted by the trial court would have been outside of its jurisdiction. The trial court recognized the limits of its jurisdiction in its order denying appellant's motion:

> The court having reviewed the plaintiff's Supplemental Motion is a part of the records of this case, is of the opinion that this court has no jurisdiction to hear the matters contained in Paragraphs 1, 2, 3, 4 and 6 of the Motion. . . . [T]he trial court is precluded from making any general declaration that all of the defendants' actions were unlawful. The court therefore finds that the Supreme Court of North Carolina has restricted

> this court's authority to that of entering an amended judgment . . . .

Accordingly, we find that the trial court did not err in determining that it had no jurisdiction to hear appellant's motion.

[2] Appellant also contests the trial court's determination that further proceedings were barred by issue preclusion, *res judicata*, equitable estoppel, and the law of the case. It is well-settled law in North Carolina that a decision of the appellate courts on a prior appeal of the case constitutes the law of the case, both in subsequent proceedings in the trial court and in subsequent appeals. *See NCNB v. Virginia Carolina Builders*, 307 N.C. 563, 566, 299 S.E.2d 629, 631 (1983). Furthermore, "a final judgment, rendered on the merits, by a court of competent jurisdiction, is conclusive of rights, questions and facts in issue, as to the parties and privies in all other actions involving the same matter." *Bryant v. Shields*, 220 N.C. 628, 634, 18 S.E.2d 157, 161 (1942).

In the instant case, the trial court, when denying the appellant's request for relief, stated,

> The court further finds that Plaintiff's request for reinstatement, back pay, payment for lost insurance premiums and contributions to the State Retirement System, and front pay, have already been litigated and resolved against him . . . . The court finds that further proceedings on the matter by this court are barred by the doctrines of issue preclusion, *res judicata*, equitable estoppel and the mandate rule of the doctrine of the law of the case.

In *Crump I*, this Court affirmed the Superior Court's finding on judicial review of the Board's decision that the Board's termination of appellant was supported by substantial evidence. *Crump I*, 79 N.C. App. at 378-79, 339 S.E.2d at 487. Additionally, in *Crump II SC*, the Supreme Court stated that the issue of appellant's termination was final: "Crump appealed . . . to the Court of Appeals, which affirmed the Superior Court in [*Crump I*]. Thus, the Board's decision to dismiss Crump has been made final and is not before us on this appeal." *Crump II SC*, 326 N.C. at 607-08, 392 S.E.2d at 580-81. Based on the foregoing, we find that the trial court did not err in concluding that appellant's supplemental motion, because it was based upon his termination, was barred by previous decisions of this Court and our Supreme Court.

II.

[3] The appellant next contends that the trial court erred as a matter of law in denying his motion for attorney's fees. He argues that the trial court's discretion is limited when denying attorney's fees under 42 U.S.C. § 1988 (1991), and that the trial court committed error by stating no reason for its failure to award the fees. We agree.

Under 42 U.S.C. § 1988, a trial court, in its discretion, may award attorney's fees to a prevailing party in any action under sections 1981, 1982, 1983, 1985, and 1986. The language of 42 U.S.C. § 1988 indicates that the decision to award fees is solely within the trial court's discretion. The cases interpreting this statute, however, limit this discretion very narrowly when a prevailing party plaintiff seeks such attorney's fees. *See Blanchard v. Bergeron*, 489 U.S. 87, 103 L.Ed. 2d 67 (1989); *Chesny v. Marek*, 720 F.2d 474 (7th Cir. 1983), *rev'd on other grounds*, 473 U.S. 1, 87 L.Ed. 2d 1 (1985); *Monroe v. County Board of Education*, 583 F.2d 263 (6th Cir. 1978). In *Wallace v. King*, 650 F.2d 529, 531 (4th Cir. 1981), the Fourth Circuit Court of Appeals stated the following standard: "Plaintiffs are entitled to such fees and costs, without regard to the exact form of relief awarded, if they are the prevailing parties as to a significant issue and if there are no special circumstances rendering the award unjust." This special circumstances exception referred to by the *Wallace* Court, however, is very narrow. Courts have allowed for the exception, for example, when the defendants were powerless to prevent the injury to plaintiff and actually made unsuccessful efforts to redress the injury. *Jones v. Orange Housing Authority*, 559 F. Supp. 1379 (D.C. N.J. 1983). *Accord Martin v. Heckler*, 733 F.2d 1499 (11th Cir. 1984).

In the instant case, Judge Sitton denied appellant's request for attorney's fees by stating the following: "ATTORNEY'S FEES. That the court in its discretion declines to award plaintiff counsel fees and costs in this matter." The transcript of the hearing indicates that the trial judge heard lengthy arguments from all parties on this issue, but chose to deny appellant's motion. The trial judge did not indicate whether special circumstances existed which rendered the award of fees unjust. We reverse and remand this case on the issue of attorney's fees and direct the trial judge to award reasonable attorney's fees unless special circumstances exist that render such an award unjust.

The decision of the trial court is affirmed as to the denial of appellant's supplemental motion and reversed and remanded as to the denial of appellant's motion for attorney's fees pursuant to 42 U.S.C. § 1988.

Judges ARNOLD and LEWIS concur.

JOSEPH F. COBB v. MARY F. COBB

No. 916DC393

(Filed 1 September 1992)

1. **Divorce and Separation § 149 (NCI4th)— equitable distribution—joint account—checks for living expenses after separation—advances on share of marital estate**

The trial court did not err in determining that checks totalling $45,457 written by the husband to the wife from their joint checking account for her living expenses after the date of separation were advances on the wife's share of the marital estate rather than gifts where there was never any alimony or child support order, the checking account was characterized as a marital asset, and there was no evidence that the husband wanted to make a gift of these payments to the wife. N.C.G.S. § 50-20(b)(2).

Am Jur 2d, Divorce and Separation § 931; Gifts § 2.

2. **Divorce and Separation § 123 (NCI4th)— equitable distribution—future value of growing timber—not marital property or distributional factor**

The future value of timber growing on marital property which will not mature until the year 2007 should not be considered either as marital property or as a distributional factor for purposes of equitable distribution.

Am Jur 2d, Divorce and Separation §§ 866, 878, 897.

Divorce property distribution: treatment and method of valuation of future interest in real estate or trust property not realized during marriage. 62 ALR4th 107.

3. **Divorce and Separation § 143 (NCI4th)— equitable distribution—equal division—presumption—distributional factors**

While there is a presumption under the law of this State that an equal division of marital property is equitable, the finding of a single distributional factor by the trial court under N.C.G.S. § 50-20(c)(1)-(12) may support an unequal division.

Am Jur 2d, Divorce and Separation §§ 915, 930.

4. **Divorce and Separation § 161 (NCI4th)— equitable distribution—unequal division**

The trial court did not err in ordering an unequal distribution of marital property where the trial court found the presence of a number of distributional factors, including the husband's payment of property taxes, interest, insurance and repairs on marital property over a period of three years after the parties separated.

Am Jur 2d, Divorce and Separation §§ 915, 930.

APPEAL by defendant from order entered 10 December 1990 in BERTIE County District Court by *Judge J. D. Riddick, III.* Heard in the Court of Appeals 18 February 1992.

Pritchette, Cooke & Burch, by Lloyd C. Smith, Jr., Lars P. Simonsen, and Stephanie B. Irvine, for plaintiff-appellee.

Ward and Smith, P.A., by J. Randall Hiner and Bonnie J. Refinski-Knight, for defendant-appellant.

WYNN, Judge.

Plaintiff and defendant were married on 30 April 1965. Two children were born of the marriage, and both were emancipated adults under no disability at the time of trial. Plaintiff sought an absolute divorce which was granted on 25 May 1989, and an order for equitable distribution was entered on 10 September 1990. From this order of equitable distribution, defendant, Mary Cobb, appealed. Additional facts will be discussed as necessary for a proper resolution of the issues raised on appeal.

I.

[1] Appellant first excepts to the trial court's determination that monies totalling $45,457, paid by the appellee to appellant after

the date of separation, were advances on appellant's share of the marital estate. The trial judge found as fact that since the date of separation, appellee wrote a number of checks to appellant for her living expenses from the parties' joint checking account. These payments, totalling $45,457, were in addition to sums appellee paid for child support. Appellant argues that the trial court committed reversible error because there was no written agreement regarding the payments and because the trial court failed to inquire into the parties' understanding as to whether the checks constituted advances on her part of the marital estate. We disagree.

Appellant relies upon *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985) and *Holder v. Holder*, 87 N.C. App. 578, 361 S.E.2d 891 (1987), to support her first assignment of error. In *McIntosh*, this Court stated the following:

> Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. If . . . oral stipulations are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into. It should appear that the court read the terms of the stipulations to the parties; that the parties understood the legal effects of their agreement and the terms of the agreement and agreed to abide by those terms of their own free will.

McIntosh, 74 N.C. App. at 556, 328 S.E.2d at 602. *See Holder*, 87 N.C. App. at 582, 361 S.E.2d at 894 (holding that the trial court erred in failing to consider the parties' oral division of personal property in its equitable distribution order). We find that the cases relied upon by appellant are inapposite to the facts of the case at bar since appellee did not attempt to prove a binding agreement between the parties regarding the $45,457, and the trial court did make sufficient findings of fact.

Instead, the case before us involves the trial court's determination that checks given from one spouse to another following separation from marital funds are advances rather than gifts. Under N.C. Gen. Stat. § 50-20(b)(2), "property acquired by gift from the other spouse during the course of the marriage shall be considered separate property only if such an intention is stated in the conveyance." As noted by one commentator, section 20(b)(2) "appears to create a presumption that can only be overcome by a 'statement' of a

contrary intent 'in the conveyance.' " Sally Sharp, *The Partnership Ideal: The Development of Equitable Distribution in North Carolina*, 65 N.C.L. Rev. 195, 224 (1987). *See Manes v. Harrison-Manes*, 79 N.C. App. 170, 338 S.E.2d 815 (1986); *Loeb v. Loeb*, 72 N.C. App. 205, 324 S.E.2d 33, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985).

In the instant case, the trial court treated the $45,457 paid to appellant as a distributional factor under N.C. Gen. Stat. § 50-20(c)(11) or (12). There was never an order of alimony pendente lite, permanent alimony, or child support, and the checking account was characterized as a marital asset. Furthermore, there is no evidence that appellee wanted to make a gift of these payments to appellant. As stated above, interspousal gifts under N.C. Gen. Stat. § 50-20(b)(2), do not become the separate property of the recipient spouse, unless the donor expresses the intention to make a gift. We find this rule applicable to an even greater extent after the parties have separated. We further note, as a matter of public policy, that if we do not allow trial courts to consider such payments as distributional factors, then the spouse with possession of marital property during the period between separation and the order of equitable distribution may seek to hold this marital property exclusively. The trial court, therefore, did not err in characterizing the $45,457 as an advance.

II.

[2] Appellant also assigns error to the trial court's failure to include the future value of timber on the Phelps Farm as marital property. The evidence presented at trial tended to show that 130 acres of timber were planted on the Phelps Farm during 1972. Appellant presented evidence indicating that the timber would be clearcut in the year 2007, with projected earnings of up to $174,300. Whether the future value of timber, which is planted but will not mature until some years in the future, should be considered for the purposes of equitable distribution is a question of first impression for this Court. For the reasons which follow, we find appellant's contentions to be without merit.

Appellant first argues that the future value of timber on land that is marital property becomes vested during marriage and is subject to equitable distribution in the same manner as deferred compensation. Under N.C. Gen. Stat. § 50-20(b)(1) (1991), pensions, retirement and other deferred compensation rights, for example, may be marital property if vested. Alternatively, "[o]ptions which

are not exercisable as of the date of separation and which may be lost as a result of events occurring thereafter and are, therefore not vested, should be treated as a separate property of the spouse for whom they may, depending upon circumstances, vest at some time in the future." *Hall v. Hall*, 88 N.C. App. 297, 307, 363 S.E.2d 189, 196 (1987).

In the case at bar, we find that the future value of the timber is more analogous to an option which may be lost as a result of future events, as described in *Hall*. Appellee may never realize the future value of the timber if, for example, the trees are destroyed by fire or insects, or if appellee decides to sell the property or to not cut the trees at all. Because we determine that characterizing growing trees as a vested property right is far too speculative, we overrule appellant's assignment of error.

Appellant next asserts that the future value of timber, like passive, post-separation appreciation, is a distributional factor to be considered in equitable distribution. The law governing passive appreciation is well-established in this State. While marital property is valued as of the date of the parties' separation, where there is evidence of active or passive appreciation of marital assets after that date, the court must consider such appreciation as a factor under subdivision (c)(11a) or (12), respectively. *Mishler v. Mishler*, 90 N.C. App. 72, 367 S.E.2d 385, *disc. review denied*, 323 N.C. 174, 373 S.E.2d 111 (1988). Passive appreciation of marital property, however, is limited to appreciation between the date of separation and the date of the order for equitable distribution. *Truesdale v. Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512 (1988); *Siefert v. Seifert*, 319 N.C. App. 376, 354 S.E.2d 506, *reh'g denied*, 319 N.C. 678, 356 S.E.2d 790 (1987).

The trial judge, in the instant case, included the actual value of the land and timber at the date of separation. Because neither party presented evidence of appreciation, if any, between the time of separation and the order for equitable distribution, the trial judge was not required to find the presence of this distributional factor. *See Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990). The only evidence presented by appellant showed that the passive increase in the value of the timber, if left uncut until the year 2007, would be equal to approximately $174,300. Post-separation appreciation, however, only refers to that which accumulates to the date of the order for equitable distribution, not

fifteen years in the future. If the rule allowed otherwise, parties would attempt to project the future value of any number of items of marital property, and the equitable distribution trial would become overwhelmingly complicated. We, therefore, overrule appellant's assignment of error.

III.

[3] Appellant further contends that the trial court abused its discretion when it determined that an equal distribution would be equitable but then proceeded to consider post-separation factors which resulted in an unequal distribution. She argues that, once a trial court determines that an equal division is equitable, it is not entitled to examine the distributional factors listed in section 50-20(c) and divide the assets unequally. We disagree.

Section 50-20(c) provides as follows:

> There shall be an equal division by using net value of marital property unless the court determines that an equal division is not equitable. If the court determines that an equal division is not equitable, the court shall divide the marital property equitably.

N.C. Gen. Stat. § 50-20(c) (1991). While there is a presumption under the law of this State that an equal division is equitable, *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985), the finding of a single distributional factor by the trial court under N.C. Gen. Stat. § 50-20(c)(1) to (12) may support an unequal division. *Andrews v. Andrews*, 79 N.C. App. 228, 338 S.E.2d 809, *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986).

[4] The trial court stated the following conclusion of law in its equitable distribution order:

> The Court has not ordered an equitable equal distribution of the net marital estate as of the date of separation because of the period of time from the date of separation on March 20th, 1987, to the date of judgment on September 10th, 1990, but has instead attempted an approximately equal division of the net marital estate after considering and setting forth the facts above and considering them to be factors properly considered under N.C.G.S. Section 50-20(c) (1)-(12).

A careful examination of the record shows that the trial court found the presence of a number of distributional factors. These

factors included appellee's payment of property taxes, interest, insurance, and repairs on marital property over a period of three years. Based on the foregoing, we find that the trial court did not err in ordering an unequal distribution of marital property.

IV.

Finally, appellee argues that this Court should amend the trial court's judgment because it contains various mathematical errors. Appellee, however, failed to submit a notice of appeal or assert cross-assignments of error. Because appellee has not complied with the Rules of Appellate Procedure, this Court does not have the jurisdiction to consider appellee's arguments. *See Tiryakian v. Tiryakian*, 91 N.C. App. 128, 137, 370 S.E.2d 852, 857 (1988).

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

The decision of the trial court is,

Affirmed.

Judges ARNOLD and LEWIS concur.

STATE OF NORTH CAROLINA v. MICHAEL GRADY MOORE, DEFENDANT

No. 911SC333

(Filed 15 September 1992)

1. **Appeal and Error § 147 (NCI4th)— no necessity for formal exceptions—issue preserved on appeal**

In a prosecution of defendant for involuntary manslaughter, neither the Rules of Appellate Procedure nor the Criminal Procedure Act requires a party to except after the trial court has ruled adversely to that party on an objection *or* motion. Defendant's motion in limine was sufficient to preserve for appellate review the trial court's alleged error in allowing evidence that the victim was eight and one-half months pregnant, even though defendant did not make formal exceptions.

Am Jur 2d, Appeal and Error § 558; Trial § 485.

2. Evidence and Witnesses § 190 (NCI4th)— misdemeanor death by vehicle—evidence of victim's pregnancy—admission not error

In a prosecution of defendant for involuntary manslaughter while driving under the influence of alcohol, the trial court did not err in allowing evidence that the victim was eight and one-half months pregnant, since the evidence was relevant to the defense of unavoidable accident and misadventure, as a pregnant woman near term is not able to move as quickly or as agilely as a woman who is not pregnant; evidence of pregnancy was not of such an inflammatory nature as to cause the jury to make its decision on an improper basis; and even if the evidence was irrelevant, defendant failed to show that, absent the admission of the evidence of the victim's pregnancy, the jury would have reached a different result. N.C.G.S. § 8C-1, Rule 401.

Am Jur 2d, Evidence §§ 251, 260.

3. Evidence and Witnesses § 2366 (NCI4th)— expert testimony—improper limiting instruction—no prejudicial error

Though the trial court in a prosecution for a misdemeanor death by vehicle erred in instructing the jury to consider the testimony of an expert in transportation engineering and accident reconstruction solely on the issue of proximate cause, defendant failed to show a reasonable possibility that the result of the trial would have been different if the error had not occurred. N.C.G.S. § 8C-1, Rules 702 and 704.

Am Jur 2d, Evidence § 263.

4. Automobiles and Other Vehicles § 797 (NCI4th)— involuntary manslaughter while driving under the influence of alcohol—sufficiency of evidence

In a prosecution of defendant for involuntary manslaughter while driving under the influence of alcohol, the trial court properly denied defendant's motion to dismiss where the evidence tended to show that defendant was driving his mini-van at night at 55 m.p.h. on a paved portion of a highway under construction and not open to the public; he struck and killed the victim; defendant told investigating officers and testified at trial that he had consumed beer and wine prior to the accident; two investigating officers were of the opinion that defendant was impaired; defendant did not know in which

lane he was driving when he struck the victim; defendant's expert testified that the victim should have been visible at a distance of 150 feet with defendant traveling with his headlights on low beam; and defendant testified that he did not see the victim and made no attempt to stop his vehicle or swerve to avoid hitting her.

Am Jur 2d, Automobiles and Highway Traffic §§ 330, 344.

Alcohol-related vehicular homicide: nature and elements of offense. 64 ALR4th 166.

5. Automobiles and Other Vehicles § 789 (NCI4th)— involuntary manslaughter prosecution—lesser offense of misdemeanor death by motor vehicle—submission proper

In a prosecution of defendant for involuntary manslaughter, the trial court did not err in submitting the charge of misdemeanor death by motor vehicle, since a reasonable person could conclude from the evidence that defendant failed to exercise due care to avoid striking the pedestrian victim in violation of N.C.G.S. § 20-174(e) and failed to operate his vehicle at a speed which was reasonable and prudent under the circumstances in violation of N.C.G.S. § 20-141(a), that defendant unintentionally caused the death of the victim while engaged in the violation of either statute, and that such violation proximately caused the death.

Am Jur 2d, Automobiles and Highway Traffic § 342.

What amounts to negligence within meaning of statutes penalizing negligent homicide by operation of motor vehicle. 20 ALR3d 473.

6. Automobiles and Other Vehicles §§ 78, 786 (NCI4th)— misdemeanor death by motor vehicle—sentence to maximum active term—surrender of driver's license—proper sentence

Where defendant was convicted of misdemeanor death by motor vehicle, the trial court did not err in imposing the maximum two-year sentence suspended on the conditions that defendant serve 120 days' active term and surrender his driver's license for five years, since the trial court was not required to find factors in aggravation and mitigation before imposing sentence, N.C.G.S. § 20-141.4(a2)(b), and surrender of defendant's driver's license was a reasonable condition of probation

directly related to and growing out of the offense for which defendant was convicted. N.C.G.S. § 15A-1343(b1)(4).

Am Jur 2d, Automobiles and Highway Traffic § 342.

APPEAL by defendant from Judgment entered 30 November 1990 by *Judge Thomas S. Watts* in CURRITUCK County Superior Court. Heard in the Court of Appeals 14 January 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

D. Keith Teague, P.A., by D. Keith Teague, for defendant appellant.

COZORT, Judge.

On 9 July 1990, defendant Michael Grady Moore was indicted for involuntary manslaughter for the death of a pedestrian in a motor vehicle accident. On 30 November 1990, a jury found defendant guilty of misdemeanor death by motor vehicle. Judge Thomas S. Watts imposed a two-year suspended sentence conditional on service of a 120-day active term and surrender of defendant's driver's license for five years. From the conviction and sentence, defendant appeals. We find no error.

At trial, the State presented evidence that, in June 1990, Highway 158 in Currituck County was being widened from two lanes to five lanes. On 8 June 1990, at approximately 10:00 p.m. defendant was driving north in a van in the outermost right lane, which was closed to traffic. Defendant's vehicle struck Elizabeth Rene Speight who was walking on the newly constructed roadway. The impact damaged the vehicle's hood and windshield directly in front of the driver's seat. Immediately after the impact, defendant stopped his vehicle on the side of the road. Highway Patrol Trooper W. M. Long arrived at the scene of the accident. Trooper Long identified defendant as the driver of the damaged vehicle and asked defendant to accompany him to the patrol car. During the initial encounter, Trooper Long noticed defendant smelled strongly of alcohol. While defendant waited in the car, Trooper Long investigated the accident scene. Highway Patrol Trooper A. C. Joyner arrived on the scene shortly after Officer Long and assisted in the investigation.

Upon his return to the patrol car, Trooper Long questioned defendant about the accident. Defendant stated that he did not know which lane he was driving in when he struck Ms. Speight and that "[s]he was just right in front of me." Defendant told Officer Long that he had consumed two beers prior to the accident, but that he had not had any alcohol since the accident. Trooper Long observed that defendant was confused about what happened in the accident, his face was flushed, his eyes were glassy, his speech slurred, and his sentences unfinished. Based upon his observations and the results of a Gaze Nystagmus test, requiring the defendant to follow the tip of an ink pen with his eyes without moving his head, Trooper Long formed the opinion that defendant was impaired. At 11:45 p.m. Trooper Long arrested defendant and transported him to the highway patrol station. Once at the highway patrol station, defendant refused to submit to a breathalyzer test and other psycho-physical tests. Trooper Joyner observed defendant at the patrol station, noting that his eyes were watery and bloodshot, his speech slow and deliberate, and that he smelled strongly of alcohol. From his observations and based on his training, Trooper Joyner concluded defendant was impaired by alcohol.

Defendant presented evidence that he believed the portion of highway upon which he was traveling was open to traffic and that he had traveled through six intersections in that lane prior to striking Ms. Speight. Defendant testified that he consumed three beers and a small amount of wine earlier that evening, but did not have any difficulties operating his vehicle while driving. As he was driving down the center of the lane, he struck an object which he believed to be a person. He stopped his car and observed Ms. Speight lying on the shoulder of the road. Defendant's accident reconstruction expert testified that Ms. Speight would have been visible approximately 150 feet away from defendant's vehicle with the headlights on low beam. Traveling at 55 m.p.h. defendant could not have stopped his vehicle after Ms. Speight first became visible in time to avoid striking her whether or not he was impaired. He further testified as to the manner in which the newly constructed lane was partitioned off from the roadway in use by orange and white barrels set three hundred feet apart. In his opinion, the traffic control devices were inadequate to serve their function.

On appeal defendant contends the trial court erred in: (1) denying defendant's motion in limine to suppress evidence of the victim's pregnancy at the time of the accident, (2) limiting the testimony

of the accident reconstruction witness to the issue of proximate cause, (3) denying defendant's motion to dismiss, (4) submitting the charge of misdemeanor death by vehicle, (5) instructing the jury on the provisions of N.C. Gen. Stat. § 20-174(e) as a basis for the charge of misdemeanor death by vehicle, (6) instructing the jury on the provisions of N.C. Gen. Stat. § 20-141(a) as a basis for the charge of misdemeanor death by vehicle, (7) denying defendant's motion for appropriate relief, (8) imposing the maximum sentence, and (9) signing and entering the judgment.

In his first assignment of error, defendant argues that the trial court erred in denying his motion in limine to suppress evidence that the victim was 8½ months pregnant at the time of the accident. Defendant contends the evidence is irrelevant to the essential elements of involuntary manslaughter and to his defense of unavoidable accident. The State counters that the evidence is relevant to whether defendant could see the victim. The State further argues that we should apply a "plain error" analysis since defendant failed to properly preserve the right to appeal by not objecting to the introduction of the evidence at trial. We address the procedural issue first.

North Carolina Appellate Rules of Procedure Rule 10(b)(1) (1992) provides:

> (b) **Preserving Questions for Appellate Review.**
>
> (1) **General.** 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. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection *or* motion. Any such question which was properly preserved for review by action of counsel taken during the course of proceedings in the trial tribunal by objection noted or which by rule or law was deemed preserved or taken without any such action, may be made the basis of an assignment of error in the record on appeal.

(Emphasis added). N.C. Gen. Stat. § 15A-1446(a) (1988) provides:

> (a) Except as provided in subsection (d), error may not be asserted upon appellate review unless the error has been brought to the attention of the trial court by appropriate and timely objection *or* motion. No particular form is required in order to preserve the right to assert the alleged error upon appeal if the motion or objection clearly presented the alleged error to the trial court. Formal exceptions are not required, but when evidence is excluded a record must be made . . . in order to assert upon appeal error in the exclusion of that evidence.

(Emphasis added). Analyzing the language of Rule 10 and § 15A-1446(a), we note the use of the disjunctive term "or," implying equivalency of objections and motions. Both the Rule and the statute require a party desiring to preserve an issue for appellate review to make a timely "objection *or* motion." (Emphasis added.) Rule 10 makes no mention of formal exceptions and only requires the trial court to rule on the request, objection or motion. N.C. Gen. Stat. § 15A-1446 specifically states that "[f]ormal exceptions are not required." The Official Commentary to § 15A-1446 states:

> The steps to be taken in the trial level have evolved over the years from the original purpose, which was in effect a statement of "charges" against the judge for making an error, into what is now recognized as a need simply to bring the matter to the attention of the trial judge sufficiently to permit him to correct the error. Thus, the Rules of Civil Procedure in G.S. 1A-1, Rule 46, and the appellate rules (N.C. Appellate Rules, Rule 10 (b) make clear that formal "exceptions" are unnecessary and that no particular extra steps need be taken if an appropriate and timely objection has been made clear to the trial judge, at some time sufficiently close to the occurrence of the error to permit its correction. . . .
>
> Subsection (a) of this section is similar in basic import to G.S. 1A-1, Rule 46, of the Rules of Civil Procedure. It provides essentially that any timely objection or motion is sufficient and no particular formality is required to preserve the right to assert an alleged error upon appeal if that has been done.

[1] Thus, we conclude neither our Appellate Rules nor the Criminal Procedure Act require a party to except after the trial court has ruled adversely to that party on an objection or motion. We are aware of *State v. McDougall*, 308 N.C. 1, 9, 301 S.E.2d 308, 314,

cert. denied, 464 U.S. 865, 78 L.Ed.2d 173 (1983), in which the North Carolina Supreme Court concluded that, if the trial court denies defendant's motion to suppress after voir dire, defendant must renew his objection before the jury if he failed to except to the adverse ruling at the end of voir dire. *McDougall* is not controlling in the case at bar since it was decided prior to the 1989 amendment to North Carolina Appellate Rule 10 deleting the requirement for formal exceptions. Although referring to N.C. Gen. Stat. § 15A-1446(b), providing that a defendant waives the right to assert error on appeal if there is no timely motion or objection, the *McDougall* Court made no reference to Rule 10 or § 15A-1446(a). Reviewing the 1983 versions of Rule 10 and § 15A-1446(a), we note a conflict between the rule, requiring formal exceptions, and the statute stating the opposite. In case of conflict, the Appellate Rules control. *See State v. Bennett*, 308 N.C. 530, 535, 302 S.E.2d 786, 790 (1983). Although the reasoning is not reflected in the opinion, the Court must have concluded that formal exception to the adverse ruling at the end of voir dire was mandated by Rule 10 despite language to the contrary in N.C. Gen. Stat. § 15A-1446(a). Thus, the Court's decision flowed logically from the Rules. Currently, however, our Appellate Rules do not specifically require formal exceptions and no longer mandate exceptions upon a denial of a motion in limine. We thus find the defendant's motion in limine was sufficient to preserve this issue for appellate review.

[2] Addressing the substantive issue, defendant contends evidence of the victim's pregnancy was irrelevant under N.C. Gen. Stat. § 8C-1, Rule 401 (1988), defining relevant evidence as "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." Therefore, defendant argues, the irrelevant evidence is inadmissible under N.C. Gen. Stat. § 8C-1, Rule 402. Admission of irrelevant evidence is harmless error, unless defendant meets the burden of showing that he was prejudiced by the admission of the evidence. *State v. Alston*, 307 N.C. 321, 339, 298 S.E.2d 631, 644 (1983). To show prejudice, defendant must prove "there is a reasonable possibility that, had the error in question not been committed, a different result would have been reached at the trial out of which the appeal arises." N.C. Gen. Stat. § 15A-1443(a) (1988).

Defendant further argues that even if relevant, evidence of the pregnancy should have been excluded because its probative

value was substantially outweighed by the danger of unfair prejudice. *See* N.C. Gen. Stat. § 8C-1, Rule 403 (1988). "[A]n undue tendency to suggest decision on an improper basis, commonly, though not necessarily, as an emotional one," is considered "unfair prejudice." Commentary to N.C. Gen. Stat. § 8C-1, Rule 403. The admission or exclusion of evidence under Rule 403 is within the sound discretion of the trial court, "and his ruling may be reversed for an abuse of discretion only upon a showing that it 'was so arbitrary that it could not have been the result of a reasoned decision.'" *State v. Mason*, 315 N.C. 724, 731, 340 S.E.2d 430, 435 (1986) (quoting *State v. Thompson*, 314 N.C. 618, 626, 336 S.E.2d 78, 82 (1985)).

The trial court determined that evidence of the victim's pregnancy was relevant to the defense of unavoidable accident and misadventure, since a pregnant woman near term is not able to move as quickly or agilely as a woman who is not pregnant. We find no error in that ruling. Furthermore, we do not find an abuse of discretion in the admission of the evidence. We do not believe evidence of pregnancy is of such an inflammatory nature as to cause the jury to make its decision on an improper basis. We also note that, even if the evidence was irrelevant, the defendant has failed to show that absent the admission of the victim's pregnancy, the jury would have reached a different result. As we discuss below, there is substantial evidence to support a conviction for misdemeanor manslaughter.

[3] In his second assignment of error, defendant contends the trial court erred in limiting the testimony of the accident reconstruction expert solely to the issue of proximate cause. Defendant argues that the jury should have been permitted to consider the evidence substantively in deciding whether the accident was unavoidable and whether he violated traffic laws supporting the misdemeanor death by vehicle charge. Defendant relies upon N.C. Gen. Stat. § 8C-1, Rule 702 and Rule 704 (1988). Rule 702 provides:

> If scientific, technical or other specialized knowledge will assist the trier of fact to understand the evidence or to determine a fact in issue, a witness qualified as an expert by knowledge, skill, experience, training, or education, may testify thereto in the form of an opinion.

Rule 704 permits an expert to present opinion testimony embracing the ultimate issue at trial.

Mr. Williford was tendered and accepted by the trial court as an expert in the fields of transportation engineering and accident reconstruction. After voir dire, the trial court instructed the jury to consider Mr. Williford's testimony solely on the issue of proximate cause. Although the trial court properly admitted the testimony on the issue of proximate cause, *see State v. Harrington*, 260 N.C. 663, 133 S.E.2d 452 (1963), we can find no basis for the instruction limiting the evidence solely to the issue of proximate cause. Mr. Williford's testimony would have provided some assistance to the jury in determining whether defendant was violating any traffic laws serving as the basis for the misdemeanor death by vehicle charge. We do not find, however, that defendant has shown a reasonable possibility that the result of the trial would have been different if the error had not occurred.

[4] In his third assignment of error, defendant argues the trial court erred in denying his motion to dismiss. Upon 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." *State v. Locklear*, 322 N.C. 349, 358, 368 S.E.2d 377, 382 (1988). If there is substantial evidence to support the charge against the defendant, the charge must be submitted to the jury. *Id.* "Substantial evidence is such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). Giving every reasonable inference to the State, we conclude there was substantial evidence for the case to go to the jury on the charge of involuntary manslaughter while driving under the influence of alcohol. The charge of involuntary manslaughter required the State to prove (1) defendant was driving a motor vehicle, (2) on a highway, (3) under the influence of an impairing substance causing appreciable impairment of his normal mental and bodily functions, and (4) his impaired driving proximately but unintentionally caused the death of Ms. Speight. *See State v. Williams*, 90 N.C. App. 614, 621, 369 S.E.2d 832, 837, *disc. review denied*, 323 N.C. 369, 373 S.E.2d 555 (1988); N.C. Gen. Stat. §§ 20-138.1 and 20-141.4 (1989).

The evidence showed that while driving his mini-van at 55 m.p.h. on a paved portion of Highway 158 under construction in Currituck County, defendant struck and killed Ms. Speight. Defendant told Trooper Long at the scene that he had consumed two beers prior to the accident. Defendant later testified that he had

consumed three beers and some wine prior to the accident. After speaking to defendant and conducting field sobriety tests, Trooper Long determined that defendant was impaired and placed him under arrest. Officer Joyner assisted in the accident investigation, observed defendant at the highway patrol station, and formed the opinion that defendant was impaired by alcohol. Defendant told Trooper Long that he did not know in which lane he was driving when he struck the victim. Defendant's expert testified that the victim should have been visible at a distance of 150 feet with defendant traveling with his headlights on low beam. Defendant testified that he did not see the victim and made no attempt to stop his vehicle or swerve to avoid hitting her. From the evidence, the jury could reasonably conclude that the defendant had committed involuntary manslaughter. Therefore, we find the trial court properly denied the motion to dismiss.

[5] We consider defendant's next three assignments of error concurrently. Defendant contends the trial court erred in submitting the charge of misdemeanor death by motor vehicle, N.C. Gen. Stat. § 20-141.4(a2) (1989), and instructing the jury on the provisions of N.C. Gen. Stat. § 20-174(e) (1989) and N.C. Gen. Stat. § 20-141(a) (1989) as bases for the charge of misdemeanor death by motor vehicle. We note initially that misdemeanor death by vehicle is a lesser included offense of involuntary manslaughter. *State v. Lackey*, 71 N.C. App. 581, 583, 323 S.E.2d 32, 34 (1984). N.C. Gen. Stat. § 20-141.4(a2) provides:

> A person commits the offense of misdemeanor death by vehicle if he unintentionally causes the death of another person while engaged in the violation of any State law or local ordinance applying to the operation or use of a vehicle or to the regulation of traffic, other than impaired driving under G.S. 20-138.1, and commission of that violation is the proximate cause of the death.

The provisions of § 20-174(e) and § 20-141(a) are set forth below.

"The purposes of the trial judge's charge to the jury are to clarify the issues, eliminate extraneous matters and declare and explain the law arising on the evidence." *State v. Cousin*, 292 N.C. 461, 464, 233 S.E.2d 554, 556 (1977). In deciding whether a particular instruction is mandated by the evidence, the trial "court must consider whether there is any evidence in the record which might convince a rational trier of fact to convict defendant of the offense."

State v. Moore, 75 N.C. App. 543, 546, 331 S.E.2d 251, 253, *disc. review denied*, 315 N.C. 188, 337 S.E.2d 862 (1985).

Addressing violations of the underlying traffic offenses first, we conclude there was sufficient evidence to convince a rational trier of fact that defendant violated either § 20-171(e) or § 20-141(a) or both. N.C. Gen. Stat. § 20-174(e) requires "every driver of a vehicle [to] exercise due care to avoid colliding with any pedestrian upon any roadway, and [to] give warning by sounding the horn when necessary." Due care requires a motorist to "operate his vehicle at a reasonable rate of speed, keep a lookout for persons on or near the highway, decrease his speed when any special hazard exists with respect to pedestrians, and, if the circumstances warrant, he must give warning of his approach by sounding his horn." *Morris v. Minix*, 4 N.C. App. 634, 637, 167 S.E.2d 494, 496-97 (1969). We find that a reasonable person could conclude from the evidence as set forth above that defendant failed to exercise due care as required by § 20-174(e).

The evidence also supports a conclusion that a reasonable person could find that defendant violated § 20-141(a), providing "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." Although defendant testified that he was traveling at 55 m.p.h., such speed may not be considered reasonable under the circumstances. *State v. Grissom*, 17 N.C. App. 374, 375, 194 S.E.2d 227, 228, *cert. denied*, 283 N.C. 258, 195 S.E.2d 691 (1973). The jury must decide whether defendant's speed was "reasonable and prudent under the conditions" which existed at the time of the accident. *Peterson v. Taylor*, 10 N.C. App. 297, 301, 178 S.E.2d 227, 229 (1971). The trial court instructed the jury to consider

> the hour of day or night, the lighting conditions, the weather conditions, the extent of other traffic, the nature and width of the roadway, the progress or status of any road construction project in the area, and any other circumstances shown to exist at that time at the scene.

Defendant argues that the trial court improperly permitted the jury to consider Mr. Williford's expert testimony to support a finding of excessive speed under § 20-141(a), after instructing the jury to consider the testimony solely for the issue of proximate cause. Although the trial court did state in the charge conference

that "it could be argued based on the testimony of Mr. Williford that a speed of fifty-five miles per hour by any average driver under those conditions would be greater than was reasonable and prudent under the circumstances," the jury did not hear the trial court's statement. Excluding Mr. Williford's testimony, there was ample evidence presented by Trooper Long, the State's medical expert, and defendant as to the construction area, the accident scene, and defendant's speed. From the remaining evidence, a reasonable person could conclude defendant was traveling "at a speed greater than is reasonable and prudent under the circumstances." We find no error in the instruction on § 20-141(a).

Accordingly, we find no error in the submission of the misdemeanor death by motor vehicle charge as defined in § 20-141.4(a2) since there was sufficient evidence to convince a rational trier of fact that defendant unintentionally caused the death of Ms. Speight while engaged in the violation of either § 20-174(e) or § 20-141(a), or both, and that such violation(s) proximately caused the death of Ms. Speight.

In his seventh assignment of error, defendant contends the trial court erred in denying his motion for appropriate relief. It is within the sound discretion of the trial court to grant or deny motions for appropriate relief. Absent a clear showing of abuse, we will not reverse the trial court's decision. *State v. Bates*, 313 N.C. 580, 583, 330 S.E.2d 200, 202 (1985). Based upon the evidence as set forth above, we find no abuse of discretion. Therefore, defendant's motion was properly denied.

[6] Defendant next assigns as error the trial court's imposition of the maximum two-year sentence suspended on the conditions that defendant serve 120 days' active term and surrender his driver's license for five years. Specifically, defendant first argues that the trial court did not consider his lack of criminal record when imposing the maximum sentence and maximum active term. Second, defendant argues that the trial court required him to surrender his license for five years rather than one year for the sole purpose of making his punishment more severe. The trial court abused its discretion, defendant contends, because the punishment is not rationally related to his rehabilitation.

Addressing defendant's first argument, § 20-141.4(a2)(b) specifically provides that "[m]isdemeanor death by vehicle is a misdemeanor punishable by a fine of not more than five hundred dollars

($500.00), imprisonment for not more than two years, or both, in the discretion of the court." Unlike sentencing after a conviction for impaired driving under N.C. Gen. Stat. § 20-138.1, the trial court is not required to find factors in aggravation and mitigation before imposing sentence after a conviction for misdemeanor death by motor vehicle. "'A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.'" *State v. Lane*, 39 N.C. App. 33, 38, 249 S.E.2d 449, 452-53 (1978) (quoting *State v. Pope*, 257 N.C. 326, 335, 126 S.E.2d 126, 133 (1962)). The trial court imposed sentence as authorized by statute. We find no abuse of discretion or other reason to justify resentencing.

As to defendant's second contention regarding sentencing, N.C. Gen. Stat. § 15A-1343(a) (Cum. Supp. 1991) states: "The court may impose conditions of probation reasonably necessary to insure that the defendant will lead a law-abiding life or to assist him to do so." N.C. Gen. Stat. § 15A-1343(b1)(4) (Cum. Supp. 1991) permits the trial court to order a defendant to submit his license for a period of time specified by the court as a special condition of probation. Defendant was convicted of misdemeanor death by motor vehicle based upon violation of state traffic law(s). Surrender of defendant's driver's license is a condition "directly related to and [growing] out of the offense for which [he] was convicted and [is] consistent with proper punishment for the crime." *See State v. Simpson*, 25 N.C. App. 176, 180, 212 S.E.2d 566, 569, *cert. denied*, 287 N.C. 263, 214 S.E.2d 436 (1975) (citations omitted). Defendant's argument is without merit.

Defendant's remaining assignment of error that the trial court erred in signing and entering the judgment has been completely addressed in our discussion above.

For the reasons set forth above, we find

No error.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. CLARENCE J. HUNTER AND JOE McCRAY

No. 9112SC717

(Filed 15 September 1992)

1. Searches and Seizures § 12 (NCI3d)— illegally parked car— officer's stop of defendant not pretextual—subsequent search within scope of stop

An officer's initial stop of defendant was not pretextual where defendant parked his car in a rest area in a driveway reserved for trucks, and the officer testified that it was his practice to issue a warning ticket for illegal parking. Furthermore, the officer's subsequent investigation after issuing the warning ticket did not exceed the scope of the stop where the officer asked defendant questions about the other occupants of the car in order to confirm defendant's identity; defendant gave the officer conflicting information about the car's occupants; and the questions were legitimate in light of the fact that the rental contract which defendant produced was in the name of another person.

Am Jur 2d, Searches and Seizures § 90.

2. Searches and Seizures § 18 (NCI3d)— search of vehicle— consent given by driver

There was no merit to defendant's contention that he did not consent to the search of his automobile where defendant signed a consent to search form; the trooper did not threaten or otherwise force defendant to sign the form; and defendant never withdrew his consent to search the automobile.

Am Jur 2d, Searches and Seizures §§ 47, 100.

3. Narcotics § 4.3 (NCI3d)— possession of cocaine in vehicle— sufficiency of evidence of actual or constructive possession

In a prosecution of defendant for possession of and trafficking in cocaine, the evidence was sufficient to show that defendant either actually or constructively possessed the cocaine where it tended to show that defendant was sitting in the driver's seat of the automobile where the cocaine was found and had possession of the vehicle's rental agreement, even though it was not in his name; a folded pharmaceutical receipt with defendant's fingerprints on it was found on the

console of the automobile, and it contained cocaine; and a portable radio found on the floor of the backseat concealed several plastic bags which contained crack cocaine and one bag which contained cocaine hydrochloride.

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

Conviction of possession of illicit drugs found in automobile of which defendant was not sole occupant. 57 ALR3d 1319.

4. **Narcotics § 1.3 (NCI3d)— trafficking in cocaine by possession—possession of cocaine—two convictions—double jeopardy**

Defendant could not properly be convicted of trafficking in cocaine by possession and possession of cocaine, since this was violative of his right against double jeopardy.

Am Jur 2d, Criminal Law § 279.

5. **Searches and Seizures § 15 (NCI3d)— passenger in vehicle—no standing to challenge search**

Defendant had no standing to challenge the search of a radio seized from a vehicle in which he was a passenger where defendant specifically denied having any possessory or proprietary interest in the radio from which cocaine was seized.

Am Jur 2d, Evidence § 418.

6. **Evidence and Witnesses § 1214 (NCI4th)— hearsay statements of nontestifying codefendant—defendant's right to confront witnesses not denied**

There was no merit to defendant's contention that the trial court erred in admitting certain hearsay statements of the nontestifying codefendant because the admission of these statements violated his Sixth Amendment right to confront the witnesses against him, since defendant did not object to some of the statements at the time they were made; defendant did object to some of the investigating officer's testimony but failed to state any constitutional grounds for the objection and thus waived his right to appeal these issues; the statements involved here were not "powerfully incriminating"; and the trial court gave a limiting instruction with regard to the statements.

Am Jur 2d, Criminal Law § 956.

7. **Evidence and Witnesses § 294 (NCI4th) — search of tote bag — evidence of other offense — evidence properly admitted**

In a prosecution for trafficking in cocaine, the trial court did not err in admitting evidence found inside a tote bag, though that included evidence that defendant had been issued a traffic citation in another state, since the evidence was admissible to show that defendant exercised control or had possession of the tote bag, and the evidence was thus admitted for a proper purpose within N.C.G.S. § 8C-1, Rule 404(b).

Am Jur 2d, Evidence § 260.

APPEAL by defendants from judgment entered 10 January 1991 in CUMBERLAND County Superior Court by *Judge E. Lynn Johnson.* Heard in the Court of Appeals 9 April 1992.

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

Harris, Mitchell, Hancox and VanStory, by Ronnie Mitchell, for defendant-appellant Clarence J. Hunter.

James R. Parish for defendant-appellant Joe McCray.

WYNN, Judge.

This appeal arises as a result of a traffic stop where a North Carolina State Trooper ("Trooper Lowry") came upon the two defendants asleep in a car parked at a rest stop off interstate 95 ("I-95"). Upon approaching the vehicle, Trooper Lowry informed the driver of the car, Clarence Hunter, that he was illegally parked and asked for his driver's license and the vehicle registration. Defendant Hunter provided his Florida driver's license and the rental agreement for the vehicle. Trooper Lowry then asked Hunter to sit in the patrol car for the purpose of issuing him a warning ticket. Immediately after issuing the ticket, Trooper Lowry asked Hunter whether he would consent to a search of the vehicle. Hunter agreed and signed a consent form. Trooper Lowry then radioed other highway patrol officers for assistance in the search. Trooper Lowry found drug paraphernalia, including triple beam scales, zip lock baggies and one sided razor blades in a search of the trunk. Also within the trunk, Trooper Lowry opened a bag in which he found more zip lock baggies, pharmaceutical receipts, and a traffic citation issued to Hunter in Florida. Within the vehicle, Sergeant

Ralph Price found a pharmaceutical receipt with cocaine folded inside, and a traffic citation issued to defendant McCray in Georgia. Trooper Lowry found a radio lying in the floor of the backseat. He searched the radio and found crack cocaine and cocaine hydrochloride inside. Each defendant was placed under arrest.

Both defendants were charged with trafficking in a controlled substance by possession, trafficking in a controlled substance by transportation, possession with intent to sell and deliver a controlled substance and possession of drug paraphernalia. Prior to trial, both defendant Hunter and McCray filed motions to suppress the evidence found in the search. Defendant McCray's motion was denied on the ground that he lacked standing to challenge the search. Defendant Hunter's motion was denied because the trial court concluded that Hunter consented to the search. Both defendants were convicted on all charges and sentenced to fifteen years on the trafficking in cocaine by transportation charge and twenty years on the remaining charges. It is from these convictions that the defendants appeal.

Defendant Hunter's Appeal

Defendant Hunter has three assignments of error within this appeal. He first contends the trial court erred by denying his motion to suppress evidence found in the warrantless search of the automobile because the initial stop by Trooper Lowry was pretextual. He also assigns error to the trial court's denial of his motion to dismiss all charges on grounds of insufficient evidence. Hunter further contends the trial court's instruction to the jury on constructive possession was erroneous.

We first address the denial of the defendant Hunter's motion to suppress evidence. Hunter asserts the traffic stop was pretextual and Trooper Lowry's actual purpose was to search the defendant for illegal drugs because he matched a "drug courier profile." He argues that even if the stop was valid, Trooper Lowry's subsequent investigation exceeded the scope of the search. He also contends no intelligent or voluntary consent to search the automobile was given.

[1] A stop is invalid if it seeks to use a "pretext concealing an investigatory motive" on the part of the police. *State v. Phifer*, 297 N.C. 216, 223, 254 S.E.2d 586, 589 (1979) (quoting *South Dakota*

v. Opperman, 428 U.S. 364, 49 L.Ed.2d 1000 (1976)). If the investigatory search is invalid, then the evidence seized as a result of the warrantless stop is inadmissible under the "exclusionary rule" both according to the federal constitution and the North Carolina Constitution. *Terry v. Ohio*, 392 U.S. 1, 20 L.Ed.2d 889 (1968), *State v. Carter*, 322 N.C 709, 370 S.E.2d 553 (1988). An officer, however, does not need probable cause to investigate a potential traffic offense, but instead is governed by the reasonableness standards of the Fourth Amendment. *State v. Aubin*, 100 N.C. App. 628, 631, 397 S.E.2d 653, 655 (1990), *rev. denied*, 328 N.C. 334, 402 S.E.2d 433, *cert. denied*, 112 S.Ct. 134, 116 L.Ed.2d 101 (1991). This Court set out the guidelines for such stops in *State v. Morocco*, 99 N.C. App. 421, 427, 393 S.E.2d 545, 548 (1990):

> A police officer may conduct a brief investigative stop of a vehicle where justified by specific, articulable facts which give rise to a reasonable suspicion of illegal conduct. However, police may not make *Terry*-stops based on the pretext of a minor traffic violation.
>
> In determining the traffic stop was pretextual, the trial court should look at what a reasonable officer *would* do rather than what an officer *could* do.

Id. (Citations omitted).

Applied to the instant case, the question is whether a reasonable officer would have stopped the defendant for being illegally parked in a rest area, not whether an officer could have done so.

The trial court made findings of fact and conclusions of law on this issue, and we are bound by the findings if they are supported by competent evidence. *State v. Crews*, 286 N.C. 41, 45, 209 S.E.2d 462, 465 (1974), *cert. denied*, 421 U.S. 987, 44 L.Ed.2d 477 (1975). In determining whether a stop was pretextual, however, we are not bound by the trial court's conclusion. *See State v. Davis*, 305 N.C. 400, 410, 290 S.E.2d 574, 583 (1982). The trial court found that Trooper Lowry observed the defendant's automobile "in the truck parking area hindering the flow of traffic," and that Trooper Lowry advised the defendant he was illegally parked and issued a warning ticket for improper parking. The trial court then concluded "the brief detention for the issuance of the warning ticket was lawful and reasonable in all respects under the circumstances then existing." Trooper Lowry testified that he ob-

served the defendant parked in the driveway reserved for trucks and that it was his practice to issue a warning ticket for illegal parking. These findings are in our opinion supported in the record by competent evidence. Furthermore, we find that the trial court's findings support its conclusion that the subject search was not pretextual.

The defendant also argues that the subsequent investigation by Trooper Lowry after issuing the warning ticket exceeded the scope of the stop. "The scope of the detention must be carefully tailored to its underlying justification." *Florida v. Royer*, 460 U.S. 491, 500, 75 L.Ed.2d 229, 238 (1983). However, "the officer may ask the detainee a moderate number of questions to determine his identity and to try to obtain information confirming or dispelling the officer's suspicions." *Berkemer v. McCarty*, 468 U.S. 420, 439, 82 L.Ed.2d 317, 334 (1984).

The findings show that Trooper Lowry stopped the defendant for illegal parking and questioned the defendant about the other two occupants in the automobile. The defendant first told Trooper Lowry that the girl in the vehicle was a cousin and the man in the back was her brother but then later said the girl was actually his girlfriend and the man was not a relative. The rental agreement the defendant presented was in the name of Anthony Gilkes who was not present in the vehicle. We find that questions asked by Trooper Lowry about the other occupants of the vehicle were legitimately aimed at confirming the defendant's identity particularly in light of the rental contract being in the name of another person. Trooper Lowry then issued a warning ticket to the defendant and asked him if he would sign a consent to search form allowing Trooper Lowry to search the automobile and all luggage. We conclude that Trooper Lowry's initial investigation was reasonably related to the purpose of issuing a warning ticket for illegal parking and that asking for permission to search the defendant's vehicle did not exceed the permissible scope of his investigation.

[2] The defendant next contends that he did not consent to the search of his automobile. When, as here, the State seeks to rely upon defendant's consent to support the validity of a search, it has the burden of proving that the consent was voluntary. *State v. Hunt*, 37 N.C. App. 315, 321, 246 S.E.2d 159, 163 (1978); *Schneckcloth v. Bustamonte*, 412 U.S. 218, 36 L.Ed.2d 854 (1973). Voluntariness is a question of fact to be determined from all of

the surrounding circumstances. *State v. Williams*, 314 N.C. 337, 344, 333 S.E.2d 708, 714 (1985). We are bound by the trial court's findings of fact which are supported by competent evidence. *Id.* at 345, 333 S.E.2d at 715. The trial court's conclusions of law, however, are reviewable on appeal. *Id.* at 346, 333 S.E.2d at 715.

The record indicates and the trial court found that the defendant signed a consent to search form and that Trooper Lowry did not threaten or otherwise force the defendant to sign the form. These findings are supported by competent evidence. The record further supports the trial court's finding that the defendant never withdrew his consent to search the automobile. We hold that these findings support the trial court's conclusion that the defendant voluntarily, knowingly, and intelligently consented to the search of the automobile. We, therefore, conclude the defendant's motion to suppress the evidence found in the search was properly denied.

[3] The defendant next argues the trial court erred in denying his motion to dismiss on the ground the evidence was insufficient to prove the defendant either actually or constructively possessed the cocaine. We disagree.

In ruling upon a motion to dismiss the trial court must examine the evidence "in the light most favorable to the State, and the State is entitled to every reasonable inference which can be drawn from the evidence presented; all contradictions and discrepancies are resolved in the State's favor." *State v. Morris*, 102 N.C. App. 541, 544, 402 S.E.2d 845, 847 (1991). The trial court must determine as a question of law whether the State has offered substantial evidence of the defendant's guilt on every essential element of the crime charged. *State v. Cox*, 303 N.C. 75, 87, 277 S.E.2d 376, 384 (1981). " 'Substantial evidence' is that amount of relevant evidence that a reasonable mind might accept as adequate to support a conclusion." *Id.*

A defendant has possession of a controlled substance when he has both the power and intent to control its disposition or use. *State v. Summers*, 15 N.C. App. 282, 283, 189 S.E.2d 807, 808, *cert. denied*, 281 N.C. 762, 191 S.E.2d 359 (1972). Possession may be either actual or constructive. *State v. Crouch*, 15 N.C. App. 172, 174, 189 S.E.2d 763, 764, *cert. denied*, 281 N.C. 760, 191 S.E.2d 357 (1972). Constructive possession exists when there is no actual personal dominion over the controlled substance, but there is an intent and capability to maintain control and dominion

over it. *State v. Spencer*, 281 N.C. 121, 129, 187 S.E.2d 779, 784 (1972). "An inference of constructive possession can also arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found." *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 886 (1984). In addition, a defendant's power to control the automobile where a controlled substance was found is enough to give rise to the inference of knowledge and possession sufficient to go to the jury. *Id.*

In the instant case, the evidence tended to show the defendant was sitting in the driver's seat of the automobile and had possession of the vehicle's rental agreement, even though it was not in his name. In addition, a folded pharmaceutical receipt on the console of the automobile contained cocaine. The fingerprints of both defendants were found on the receipt. A portable radio was found on the floor of the backseat. A search of the radio revealed several plastic bags containing crack cocaine and one bag containing cocaine hydrochloride. We conclude there was sufficient evidence to show the defendant had control of the automobile. Furthermore, the defendant's control of the premises where the controlled substance was found was sufficient to require submission of the issue of possession to the jury. *Dow*, 70 N.C. App. at 85, 318 S.E.2d at 886. This assignment of error is therefore overruled.

[4] The defendant next assigns error to the charge of N.C. Gen. Stat. § 90-95(h)(3)(b) (1990 & Supp. 1991) trafficking by possession of at least 200 grams but less than 400 grams (that amount found within the radio) for which he was sentenced to fifteen years. The defendant was also convicted of N.C. Gen. Stat. § 90-95(h)(3)(b), trafficking in cocaine by transportation of at least 200 grams but less than 400 grams; N.C. Gen. Stat. § 90-95(a), misdemeanor possession of cocaine (that amount found as residue on the pharmacy receipt); and N.C. Gen. Stat. § 90-113.22, possession of drug paraphernalia. These charges were consolidated for trial and he was sentenced to 20 years. He contends that he may not be convicted of misdemeanor possession of cocaine and trafficking by possession because this is violative of his right against double jeopardy. We agree.

In *State v. Sanderson*, 60 N.C. App. 604, 300 S.E.2d 9, *disc. review denied*, 308 N.C. 679, 304 S.E.2d 759 (1983), the defendants, among other charges, were found guilty of possession of marijuana with intent to sell; manufacturing marijuana and trafficking by

possession. They argued that a conviction under N.C. Gen. Stat. § 90-95(a) is a lesser included offense of N.C. Gen. Stat. § 90-95(h)(1) and conviction for the greater and lesser offense would place the defendants in double jeopardy. This Court agreed and held that,

> Manufacturing or possession under G.S. 90-95(a) does not require proof of any additional facts beyond those required under G.S. 90-95(h)(1), therefore convictions under both statutes violate defendants' protection against double jeopardy, and the convictions for the lesser included offenses should be vacated.

Sanderson, 60 N.C. App. at 610, 300 S.E.2d at 14.

We find, and the State concedes as much, that the judgment for the lesser included offense of misdemeanor possession of cocaine should be arrested and that the defendant's sentence for the greater included offense of trafficking by possession should be vacated and remanded for a new sentencing hearing. We have reviewed the defendant's remaining assignments of error and find them to be without merit.

Defendant McCray's Appeal

[5] Defendant McCray has several assignments of error within this appeal. Initially, he contends that the trial court erred in denying his motion to suppress the cocaine found within the radio and the residual cocaine found on the pharmacy receipt in his name on the basis that he had no standing to challenge the search. We disagree. In order for a defendant to challenge a search, he has the burden of proving that he has standing to object to the search and seizure. *State v. Taylor*, 298 N.C. 405, 415, 259 S.E.2d 502, 508 (1979). However, when a defendant fails to assert a property or possessory interest in the property searched, or a showing of circumstances giving rise to a reasonable expectation of privacy in the premises searched, he fails in his burden of proving standing. *State v. Jones*, 299 N.C. 298, 306, 261 S.E.2d 860, 865 (1980). Even when grounds exist to challenge the search and seizure, the defendant may not do so where he has failed to establish his standing to object. *Id.*

The record indicates that defendant, through his counsel, denied having any possessory or proprietary interest in the radio from which the cocaine was seized. During the hearing on the suppression of evidence, counsel for McCray stated unequivocally that the defendant was "not making any possessory interest in the

radio." Therefore, without a possessory or proprietary interest in the radio, the defendant lacks standing to challenge the items found within the radio. This assignment of error is overruled.

[6] Next, defendant McCray assigns error to the admission of certain hearsay statements of the non-testifying co-defendant, Hunter, because the admission of these statements violated his Sixth Amendment right to confront the witnesses against him. This issue was addressed in *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476 (1968), where the confession of non-testifying co-defendant, Evans, inculpating another defendant, Bruton, was admissible to the extent that it related to Evans' guilt. However, the Court ruled that the confession was inadmissible hearsay in determining the guilt or innocence of Bruton.

In the instant case, Trooper Lowry testified that defendant Hunter, at the time of the search, told him that McCray had driven the car earlier that day and was issued a speeding citation in Georgia. The record indicates that McCray did not object to these statements at the time they were made. Trooper Lowry also testified that he found a pharmacy receipt that contained cocaine residue on the console of the car, which is where the defendant would have been sitting if he had driven the car. The defendant did object to testimony relating to where the pharmacy receipt was found in the automobile, but failed to state any constitutional grounds for the objection. According to Rule 10(b) of the N.C.R. App. P., when an objection fails to state constitutional grounds, the defendant has waived his right to appeal these issues.

Moreover, the objection to the statements of Trooper Lowry in relation to the pharmacy receipt, are not the type of statements contemplated by *Bruton*. The *Bruton* court held that where powerfully incriminating extrajudicial statements of a co-defendant, who stands accused side-by-side with the defendant are deliberately spread before the jury in a joint trial, this is the context in which there is a risk that the jury will not, or cannot, follow the instructions of a trial judge to disregard the information. *Bruton*, 391 U.S. at 135-36, 20 L.Ed.2d at 485. In the instant case, the statements, as discussed previously, were not "powerfully incriminating." Furthermore, the trial court issued an instruction that the evidence was to be admitted only for the purpose of demonstrating the factual relationship between where the item was located and where

the driver was sitting. Thus, this assignment of error is also overruled.

[7] Defendant McCray next assigns error to the admittance of evidence found within a tote bag, including an appointment book bearing the defendant's name, zip lock baggies and a traffic citation issued to him in Georgia because the items were inadmissible under Rule 404(b). It is the State's contention that the evidence found within the tote bag was admitted for the purposes of showing that the defendant was in control of the tote bag and the drug paraphernalia found within the bag, and that he had been in control of the vehicle. N.C. Gen. Stat. § 8C-1, Rule 404(b) (1986) allows the admission:

> Evidence of other crimes, wrongs, or acts is . . . . admissible for . . . *proof of motive, opportunity, intent, preparation,* plan, knowledge, identity, or absence of mistake, entrapment or accident.

Id.

Recently, this Court in *State v. Coffey*, 326 N.C. 268, 389 S.E.2d 48 (1990), held that "evidence of other offenses is admissible so long as it is relevant to any fact or issue other than the character of the accused." *Id.* at 278, 389 S.E.2d at 54 (quoting *State v. Weaver*, 318 N.C. 400, 403, 348 S.E.2d 791, 793 (1986)). Rule 404(b) is a general rule of inclusion for relevant evidence of other crimes, wrongs, or acts by a defendant, subject to but one exception requiring its exclusion if its only probative value is to show that the defendant had the propensity or disposition to commit an offense of the nature of the crime charged. *Coffey*, 326 N.C. at 278-79, 389 S.E.2d at 54.

In this situation, the evidence of the speeding citation, appointment book and zip lock baggies were offered for admission to show that the defendant exercised control or had possession of the tote bag and the trial court allowed its admission for "establishing identity and possession." As such, this evidence was admitted for a proper purpose within Rule 404(b), and the admission of the citation was also proper as being relevant to any other fact or issue. *See id.* Therefore, this assignment of error is overruled.

Finally, defendant McCray assigns error to being convicted both of possession of cocaine and trafficking by possession because this violates his right against double jeopardy. For the reasons

stated in defendant Hunter's opinion above, we agree. Therefore, the judgment for defendant McCray's conviction with regard to the lesser included offense of misdemeanor possession of cocaine should be arrested and the defendant's sentence for the greater included offense of trafficking by possession must be vacated and remanded for a new sentencing hearing. Because of our disposition of this issue, we need not address defendant McCray's final assignment of error.

In summary, we hold:

With respect to defendant Hunter:

In case number 89 CRS 27657, judgment is arrested as to count 3; and, the consolidated sentence entered for counts 1, 3, and 4 is vacated and the remaining counts of 1 and 4 are remanded for resentencing.

In case number 89 CRS 27657, count 2 — No error.

With respect to defendant McCray:

In case number 89 CRS 27660, judgment is arrested as to count 3; and, the consolidated sentence entered for counts 1, 3, and 4 is vacated and the remaining counts of 1 and 4 are remanded for resentencing.

In case number 89 CRS 27660, count 2 — No error.

Judges LEWIS and WALKER concur.

CONSTANCE M. MITCHELL v. JACKIE GOLDEN AND OBERIA BECK GOLDEN

No. 9121SC724

(Filed 15 September 1992)

1. Rules of Civil Procedure § 56.4 (NCI3d)— summary judgment— no issue of fact created by affidavit—affidavit and deposition not inconsistent

In an action for interference with an easement and trespass, the trial court properly considered plaintiff's affidavit in opposition to defendants' motion for summary judgment, since

plaintiff's affidavit was not inconsistent with her deposition testimony but in fact corroborated a portion of her testimony, and plaintiff therefore did not create an issue of fact by contradicting in her affidavit her prior sworn testimony.

Am Jur 2d, Summary Judgment §§ 20, 35.

2. **Easements § 62 (NCI4th)— prescriptive easement—directed verdict for defendants properly denied**

The trial court did not err in denying defendants' motion for directed verdict as to plaintiff's claim of easement by prescription where the evidence tended to show that plaintiff kept the road in question passable by repairing and maintaining it; plaintiff used the road continuously for more than twenty years; permission to use the road had neither been sought nor given; the use had been open and notorious such that the true owner had notice of the claim; and there was substantial identity of easement claimed throughout the twenty-year period.

Am Jur 2d, Easements and Licenses § 49.

Acquisition by user or prescription of right of way over uninclosed land. 46 ALR2d 1140.

Judge WYNN dissenting.

APPEAL by defendants from judgment entered 31 December 1990 by *Judge James A. Beaty, Jr.* in FORSYTH County Superior Court. Heard in the Court of Appeals 14 May 1992.

This action involves a roadway which runs from Edwards Road to plaintiff's house and extends across defendants' property. Since the facts of this case are in dispute, we find it necessary to recite each party's version.

Defendants recount the facts as follows: Around 1918 William Beck, the grandfather of defendant Oberia Beck Golden and the great-grandfather of defendant Jackie Golden, owned the property on which defendants now reside. In or around that same year, Mr. Beck opened a road on his property which branched off of Edwards Road and authorized his neighbors, the Mitchell family, to use this roadway. Defendant Jackie Golden and another witness testified that since 1966 they had observed the state of North Carolina placing gravel on the road. In 1982 defendants noticed

heavy traffic using the roadway to reach plaintiff's house during all hours of the day and night. This traffic was almost constant and many of these visitors rode by defendants' home cursing and yelling. After consulting with the Sheriff and their attorney, defendants decided to close the roadway, and in 1983 informed plaintiff's son that his family would no longer have permission to use defendants' roadway. In 1987, after plaintiff and her family continued to use the roadway, defendants put trees across the road in an attempt to close it. At no time did plaintiff ever put them on notice that she was asserting a claim of right over the roadway. After the road was closed, plaintiff acquired permission from her brother-in-law to cross his property in order to reach her house.

Plaintiff's account of the facts sets forth the following: In 1901 the heirs of W. M. Kiser divided the Kiser lands and transferred title to the husbands of the four Kiser daughters. Henry L. Mitchell, husband of Mary Kiser Mitchell, and William Beck, husband of Emily Kiser Beck, received two of the divided tracts. The roadway which is the subject of this action ran through the Beck and Mitchell tracts. Plaintiff and her husband moved onto this land in 1951. Lillie Mitchell, who was then the owner of the Mitchell tract originally conveyed to Henry L. Mitchell, deeded three acres from this tract to plaintiff and her husband in 1958. In September 1969 Lillie Mitchell gave plaintiff and her husband a written deed of easement which purportedly conveyed an easement over the present roadway leading from Edwards Road to plaintiff's property. This roadway is and always has been the sole means of ingress and egress for plaintiff and her predecessors in title. On 25 June 1987 defendants cut several large trees on their property causing them to fall across the roadway and preventing plaintiff's use of the road.

Plaintiff filed this action against defendants for interference with an easement and trespass. Defendants counterclaimed for trespass and nuisance. Defendants moved for summary judgment and plaintiff replied to the motion, whereupon the trial court ordered on 31 December 1990 that summary judgment be granted on plaintiff's claim for a deed of easement but denied on plaintiff's claim for an easement by prescription and color of title. Defendants moved for a directed verdict at the close of plaintiff's evidence which was denied as to the claim of easement by prescription but allowed on the claim of trespass. The jury found in favor of plaintiff on the issue of easement by prescription and judgment was entered

permanently enjoining defendants from interfering with plaintiff's use of the roadway.

Beverly R. Mitchell for plaintiff appellee.

Kennedy, Kennedy, Kennedy and Kennedy, by Harvey L. Kennedy, Harold L. Kennedy, Jr. and Harold L. Kennedy, III, for defendant appellants.

WALKER, Judge.

Defendants present two arguments to this Court on appeal: (1) the trial court erred in failing to exclude Constance Mitchell's affidavit and in denying defendants' motion for summary judgment; and (2) the trial court erred in failing to grant defendants' motion for a directed verdict.

[1] Defendants first contend that plaintiff admitted in her deposition that prior to 1987 her use of the roadway had not been hostile or adverse and that she never claimed the roadway as her own. They argue that because of this admission, summary judgment should have been granted in their favor, and also that in response to defendants' motion for summary judgment, plaintiff contradicted this sworn testimony by filing an affidavit which stated:

> 7. That this property has been serviced by a gravel roadway which has been the sole means of ingress and egress for as long as I have lived there, and *we have put gravel on it and kept it passable.* (Emphasis added.)

Defendants hereby excepted to the trial court's consideration of the affidavit on the ground that it was contrary to plaintiff's prior admission in her deposition.

This Court has previously considered the question of "whether a party opposing a motion for summary judgment by filing an affidavit contradicting his prior sworn testimony has 'set forth specific facts showing that there is a genuine issue for trial' " and determined that "a party should not be allowed to create an issue of fact in this manner." *Wachovia Mortgage Co. v. Autry-Barker-Spurrier Real Estate, Inc.*, 39 N.C.App 1, 9, 249 S.E.2d 727, 732 (1978), *aff'd*, 297 N.C. 696, 256 S.E.2d 688 (1979). We do not find plaintiff's affidavit to be inconsistent with her deposition testimony, but in fact it corroborated a portion of her testimony in which she stated that she "put rock" on the roadway. We therefore hold

that the trial court properly considered plaintiff's affidavit in opposition to defendants' motion for summary judgment.

Rule 56, N.C. Rules of Civil Procedure, provides that 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 . . . [a] party is entitled to a judgment as a matter of law." Defendants are thereby entitled to summary judgment if they establish either the nonexistence of an essential element of plaintiff's claim or show that plaintiff could not produce evidence of an essential element of her claim. *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992).

Insofar as plaintiff claims an easement by prescription she must prove by the greater weight of the evidence that: (1) the use is adverse, hostile or under claim of right; (2) the use has been open and notorious such that the true owner had notice of the claim; (3) the use has been continuous and uninterrupted for a period of at least twenty years; and (4) there is substantial identity of easement claimed throughout the twenty year period. *Potts v. Burnette*, 301 N.C. 663, 273 S.E.2d 285 (1981); *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974); *Johnson v. Stanley*, 96 N.C.App. 72, 384 S.E.2d 577 (1989). In opposition to defendants' motion for summary judgment, plaintiff's evidence included her affidavit and the affidavits of Larson Mitchell, Robert Solomon, and Joseph E. Franklin, a registered surveyor. Having determined that plaintiff's affidavit does not contradict her deposition testimony and was properly admitted, we find the evidence presented creates an issue of fact as to whether plaintiff's use of the roadway was adverse, hostile or under claim of right. The trial court correctly denied defendants' motion for summary judgment.

[2] Defendants next assign error to the trial court's failure to grant their motion for a directed verdict. They argue that plaintiff failed to establish a *prima facie* case of an easement by prescription because her own testimony indicated her use of the land was neither hostile nor adverse for the requisite period of time, and therefore a directed verdict was appropriate. *Hong v. George Goodyear Co.*, 63 N.C.App. 741, 306 S.E.2d 157 (1983). In answer to defendants' questioning, plaintiff testified at trial:

Q. You never told the Goldens that you were making any type of claim of right to the use of that roadway prior to filing this lawsuit, did you?

A. That's the only way I have to get to my house.

THE COURT: Ma'am, answer his question; you may explain if you need to.

. . . .

Q. Did you ever go to the Goldens and make an offer to purchase an easement or right to go across their property?

A. No.

Q. Did you ever put up any sign on the Golden road indicating any claim of right to that roadway?

A. No.

Q. Would it be true to say that you never did anything to put the Goldens on notice that you were asserting a claim of right into that roadway, did you?

A. No.

Defendants allege this testimony constitutes an admission that plaintiff never put defendants on notice that she was asserting a claim of right, which is dispositive of the issue of hostile use. They also contend that plaintiff's evidence only showed that she put gravel on the roadway on two occasions, in 1951 or 1956 and in 1987, and which fails to establish twenty years of continuous adverse use, since prior to 1958 the land upon which plaintiff seeks to claim an easement by prescription was owned by Lillie Mitchell and there is no evidence to support a theory of tacking. Defendants submit that any graveling done prior to 1958 is thereby inconsequential.

We note that "[t]he law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears." *Dickinson v. Pake* at 580, 201 S.E.2d at 900. (Citations omitted.) *See also Potts v. Burnette, supra; Delk v. Hill*, 89 N.C.App. 83, 365 S.E.2d 218, *disc. review denied*, 322 N.C. 605, 370 S.E.2d 244 (1988). Therefore, in order to establish an easement by prescription, "[t]here must be some evidence accompanying the user which tends to show that the use is hostile in

character and tends to repel the inference that it is permissive and with the owner's consent." *Dickinson v. Pake* at 581, 201 S.E.2d at 900. However, the rule in this regard, which was originally stated in *Dulin v. Faires*, 266 N.C. 257, 260-261, 145 S.E.2d 873, 875 (1966), and quoted with approval in *Dickinson v. Pake*, prescribes that:

> To establish that the use is "hostile" rather than permissive, "it is not necessary to show that there was a heated controversy, or a manifestation of ill will, or that the claimant was in any sense an enemy of the owner of the servient estate." [Citation omitted.] A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under claim of right.

See also Concerned Citizens v. State ex rel. Rhodes, 329 N.C. 37, 404 S.E.2d 677 (1991).

Our Supreme Court has held the evidence was sufficient to show that the use was not permissive, and to overcome a motion for a directed verdict, where the evidence established that plaintiffs did the slight maintenance required to keep the road passable; plaintiffs used the road for over twenty years as if they had a right to it; and permission to use the road had neither been given nor sought. *Dickinson v. Pake, supra; Potts v. Burnette, supra.* This Court has opined that a genuine issue of material fact exists as to whether the use was sufficiently adverse, hostile, or under claim of right where plaintiff's evidence indicates that "plaintiff and his predecessors have maintained and repaired the old road and the new road at great expense." *Delk v. Hill* at 87, 365 S.E.2d at 220. *See also Oshita v. Hill*, 65 N.C.App. 326, 308 S.E.2d 923 (1983).

In the instant case plaintiff testified that in 1951 she moved into a log house on her property which had previously been occupied by her husband's grandfather, Henry Mitchell. Subsequently, the log house burned and her current residence was built. She stated the roadway has been used to reach her home and property since 1951 and that her husband, along with her sons and brother-in-law, repaired and maintained the road to keep it passable over the years. Plaintiff also testified she never had any discussion with defendants concerning the roadway and that she never asked defendants for permission to use the roadway because she had a right to use it.

Thelma Mitchell, Worth Mitchell, and Latisha Mitchell all testified to their use of the road over the years and corroborated plaintiff's testimony concerning repairs and maintenance to the roadway. None of these witnesses testified that they ever asked defendants' permission either to use the road or to maintain it.

When ruling on a motion for a directed verdict, the trial court must consider the evidence in the light most favorable to the nonmovant. *Air Traffic Conference of America v. Marina Travel, Inc.*, 69 N.C.App. 179, 316 S.E.2d 642 (1984). Pursuant to this standard, the foregoing testimony indicates that plaintiff kept the road passable by repairing and maintaining it; plaintiff used the road continuously for more than twenty years; and permission to use the road had neither been sought nor given. This evidence is sufficient to show that the use was adverse, hostile, or under claim of right. *See Dickinson v. Pake, supra; Potts v. Burnette, supra.* There was also evidence that: the use had been open and notorious such that the true owner had notice of the claim; the use had been continuous and uninterrupted for a period of at least twenty years; and there was substantial identity of easement claimed throughout the twenty year period. We conclude that the evidence, when viewed in a light most favorable to plaintiff, is sufficient to withstand defendants' motion for a directed verdict. Defendants did not object to the court's instructions to the jury. Obviously the jury was persuaded that the long and continuous use of this road, under such circumstances as would give notice that the use was being made under a claim of right, was such as to entitle plaintiff to a prescriptive easement so that there could be continued use of this roadway by plaintiff. Therefore, the trial court did not err in denying defendants' motion for a directed verdict.

No error.

Judge LEWIS concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent because in my opinion the trial court erred in not granting the defendant's motion for a directed verdict. The evidence viewed in the light most favorable to the nonmoving party, the plaintiff in the case at bar, does not support a finding

that the use of the roadway in question was hostile, adverse or under a claim of right. *Air Traffic Conference of Am. v. Marina Travel, Inc.*, 69 N.C. App. 179, 316 S.E.2d 642 (1984) (stating the standard for granting a directed verdict). Absent such a finding, the plaintiff failed to make out a *prima facie* case for a prescriptive easement.

As the majority notes, "[t]he law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears." *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974). In order to rebut the presumption of permissive use, evidence must be presented that establishes a hostile use. *Id.* at 581, 201 S.E.2d at 900. Following this same reasoning, evidence of an express grant of permission should act to render such permission irrebuttable.

In the case at bar, permission to use the right of way in question was granted expressly by the grandfather of defendant Oberia Beck Golden and great-grandfather of defendant Jackie Golden to the family of the plaintiff, Constance Mitchell, in 1918. An express grant of permission never passed directly from the defendants to the plaintiff, but it is illogical to conclude that renewed grants of permission are necessary where the land has passed, as it has done here, from generation to generation within the same families. The fact that the title to each tract of land involved has changed hands within the respective families should not act to withdraw permission to use the roadway and make subsequent use adverse, hostile or under a claim of right.

Even if the 1918 grant of permission did not extend to the plaintiff, the evidence does not support a hostile use of the roadway. In order for a use to be considered hostile, "[t]here must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent." *Id.* No such evidence has been offered by the plaintiff. Constance Mitchell admits that she neither sought permission to use the roadway nor did the defendants object to her use. This "is tantamount to an assertion that [she] used the roadway in silence. 'Neither law nor logic can confer upon a silent use a greater probative value than that inherent in a mere use.' The mere use of a way over another's land cannot ripen into an easement by prescription no matter how long it may be continued." *Godfrey v. Van Harris Realty, Inc.*,

72 N.C. App. 466, 469-70, 325 S.E.2d 27, 29 (1985) (quoting *Henry v. Farlow*, 238 N.C. 542, 544, 78 S.E.2d 244, 246 (1953)).

The majority applies the plaintiff's maintenance of the roadway to elevate her position from that of a mere user to that of an owner of an easement by prescription. The plaintiff's testimony, however, shows that such maintenance consisted of putting gravel on the roadway on three separate occasions: 1951, 1956, and 1986. The plaintiff did not own the land to which the roadway leads until 1958 and the graveling done in 1951 and 1956 was done on behalf of her mother-in-law, Lillie Mitchell, who made no adverse claim of right to the roadway. The one isolated incident of graveling in 1986 is not sufficient to establish the continuous adverse use necessary for an easement by prescription. *See Orange Grocery Co. v. CPHC Investors*, 63 N.C. App. 136, 304 S.E.2d 259 (1983) (defining a hostile use as "a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right"). Moreover, the testimony of members of the plaintiff's family regarding repair work done by them on the roadway does not rebut the presumption of permissive use. It appears that the family dug trenches along the edges of the roadway and placed leaves, sawdust, or gravel over the roadway so that their automobiles would not become stuck. This slight maintenance is consistent with a permissive use of the roadway under the present circumstances. The plaintiff's family did not maintain the roadway exclusively, and, in fact, the main graveling of the roadway was done by the State of North Carolina.

The majority relies on the *Dickinson* and *Potts v. Burnett*, 301 N.C. 663, 273 S.E.2d 285 (1981), cases to find that the aforementioned maintenance by the plaintiff's family members constitutes use that is hostile, adverse or under a claim of right. In both *Dickinson* and *Potts*, as in the case at bar, the plaintiffs neither asked for permission to use the roadway nor were they told they could not. The plaintiffs in *Dickinson*, however, believed they owned the roadway and began using it before the defendant acquired title to the servient estate. 284 N.C. at 584, 201 S.E.2d at 902. The *Potts* Court relied on *Dickinson* to find a prescriptive easement, noting that "[a]lthough there was no evidence that plaintiffs thought they owned the road, there was abundant evidence that plaintiffs considered their use of the road to be a *right* and not a privilege." 301 N.C. at 668, 273 S.E.2d at 289 (emphasis in original). Despite the assertion by the plaintiff that she had

a right to use the roadway, the relationship of the parties in the case at bar allows for no error of ownership, nor is there an abundance of evidence to support a finding that the plaintiff considered her use of the road to be a right beyond that quasi-right associated with permissive use.

For the foregoing reasons, I respectfully dissent.

STEVE HALPRIN, PLAINTIFF v. FORD MOTOR COMPANY, DEFENDANT

No. 9121SC316

(Filed 15 September 1992)

1. Uniform Commercial Code § 11 (NCI3d)— sale of pickup truck—breach of express warranties—buyer's notice to local seller

In an action for breach of express and implied warranties on a Ford Motor Company pickup truck, plaintiff satisfied the notice requirement in N.C.G.S. § 25-2-607(3)(a), which is ordinarily a condition precedent to a buyer's recovery for breach of warranty under the Code, since, by the language in its warranty booklet, Ford designated the selling dealership as its representative for the purposes of honoring the limited express warranty issued by Ford to plaintiff; express language in the warranty booklet made notice to Ford unnecessary; plaintiff repeatedly dealt with a number of personnel at his authorized dealership, none of whom adequately diagnosed or addressed the defective conditions in his truck; Ford had notice of the alleged warranty defect by virtue of plaintiff's phone call to and pursuit of his claim with Ford's Consumer Appeals Board in Charlotte; and plaintiff was not required to give Ford unlimited opportunities to honor its warranty.

Am Jur 2d, Sales §§ 1254, 1255.

Sufficiency and timeliness of buyer's notice under UCC § 2-607 of seller's breach of warranty. 93 ALR3d 363.

2. Uniform Commercial Code § 11 (NCI3d)— breach of warranty—notice to immediate seller or remote manufacturer—no ruling by Court

The Court of Appeals specifically declines to rule on the question as to whether a buyer who seeks to recover for breach

of warranty must, pursuant to N.C.G.S. § 25-2-607(3)(a), give notice to the remote manufacturer as opposed to the immediate seller.

Am Jur 2d, Sales § 1260.

Necessity that buyer of goods give notice of breach of warranty to manufacturer under UCC § 2-607, requiring notice to seller of breach. 24 ALR4th 277.

APPEAL by plaintiff from judgment entered 25 October 1990 by *Judge J.B. Allen, Jr.*, in FORSYTH County Superior Court. Heard in the Court of Appeals 14 January 1992.

Thomas G. Taylor for plaintiff-appellant.

Office of the General Counsel of Ford Motor Company, by Gary L. Hayden, and Maupin, Taylor, Ellis & Adams, P.A., by M. Keith Kapp and Daniel K. Bryson, for defendant-appellee.

PARKER, Judge.

Plaintiff consumer appeals from summary judgment in favor of defendant manufacturer on plaintiff's claims for breach of express and implied warranties on a Ford Motor Company ("Ford") F-150 pickup truck. In his amended complaint in this action, filed 10 January 1990, plaintiff alleged defendant was unable, after a reasonable number of attempts, to conform the truck to Ford's express warranty and that defendant failed to arrange for repair or correction of persistent defects. According to plaintiff, he returned the truck to his selling Ford dealership on five occasions within the one-year warranty period for correction of problems with alignment, braking and poor gas mileage; and the attempted repairs were unsuccessful. The truck had not yet been driven 5,000 miles during the first four of these repair visits. Plaintiff also alleged material misrepresentation by dealership personnel—alleged by plaintiff to be agents of Ford—concerning items covered by express warranties, unfair or deceptive trade practices, breach of the implied warranties of merchantability and fitness for a particular purpose, and wilful or reckless disregard "to the rights and safety of the plaintiff."

Plaintiff prayed damages in the amount of the difference between the truck's purchase price and its actual value at the time of sale, plus consequential damages and treble damages under

N.C.G.S. § 75-16 or, in the alternative, punitive damages. Plaintiff's warranty claims are governed by the Sales Article of the Uniform Commercial Code, N.C.G.S. §§ 25-2-101 *et seq.* ("the Code"), rather than the New Motor Vehicle Warranties Act, N.C.G.S. §§ 20-351 *et seq.* The Warranties Act did not become effective until October 1987 and did not apply retroactively to the 1 April 1987 date of purchase for plaintiff's truck. *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 401 S.E.2d 85, *disc. rev. denied*, 329 N.C. 267, 404 S.E.2d 867 (1991).

Ford's answer to the amended complaint averred, *inter alia*, that the dealership which sold and serviced plaintiff's truck was an authorized, independent dealer for Ford but not Ford's agent; plaintiff's acceptance of the truck waived all remedies against Ford "except the right to enforce the express limited warranty contained in the warranty facts booklet"; plaintiff's actions with respect to his truck were not in compliance with the condition precedent to Ford's warranty obligation that plaintiff return his truck to an authorized Ford dealer for repairs; Ford "at all times fulfilled all of the terms and conditions of the warranty obligations which it may have had to plaintiff"; and plaintiff's misuse, abuse or neglect of the truck was "the sole cause of any defect complained of." On 4 September 1990 plaintiff took a voluntary dismissal of his fraud and unfair or deceptive trade practices claims, without prejudice.

Ford's discovery in the case included two sets of interrogatories, two requests for production of documents and the taking of plaintiff's deposition on 2 October 1990. Based on the pleadings, plaintiff's answers to the interrogatories and his deposition, on 8 October 1990 Ford filed a motion for summary judgment and dismissal of plaintiff's remaining claims with prejudice. The trial court granted summary judgment in Ford's favor.

Summary judgment is appropriate if the moving party establishes the lack of any triable issue of material fact and entitlement to judgment as a matter of law. N.C.R. Civ. P. 56(c); *Collingwood v. G.E. Real Estate Equities*, 324 N.C. 63, 376 S.E.2d 425 (1989).

On appeal plaintiff argues his claims for breach of warranties were improperly dismissed, in that he gave Ford ample opportunity to repair the vehicle and the technicians at plaintiff's authorized Ford dealership, Cloverdale Ford in Winston-Salem, North Carolina, failed to repair the defective conditions on his truck. We agree

that the trial court erred with respect to plaintiff's claims for breach of express warranty and the implied warranty of merchantability. Accordingly, we reverse and remand those claims. We affirm as to the remaining claims for breach of the implied warranty of fitness for a particular purpose and for punitive damages.

[1, 2] The dispositive question is whether plaintiff satisfied the notice requirement in N.C.G.S. § 25-2-607(3)(a), which is ordinarily a condition precedent to a buyer's recovery for breach of warranty under the Code. *See, e.g., Maybank v. Kresge Co.*, 302 N.C. 129, 133, 273 S.E.2d 681, 683 (1981). We conclude plaintiff demonstrated that he complied both with "his own obligations under [the warranty] and that he has taken the steps required by Article 2." *Stutts v. Green Ford, Inc.*, 47 N.C. App. 503, 511, 267 S.E.2d 919, 924 (1980).

Defendant argues that under N.C.G.S. § 25-2-607(3), plaintiff was required and failed to notify Ford the manufacturer of any claim for breach of warranty. We address this issue only to note that the jurisdictions are split as to whether this notice provision of the Code requires notice to the remote manufacturer.

When North Carolina originally adopted the Code in 1965, a seller was defined simply as "a person who sells or contracts to sell goods." N.C.G.S. § 25-2-103(d) (Replacement 1965). Effective 23 June 1983 an amendment to this provision explicitly defined motor vehicle manufacturers to be sellers as well, with respect to buyers of their products to whom manufacturers make express warranties, "notwithstanding any lack of privity" between the purchaser of a vehicle and its manufacturer, "for purposes of all rights and remedies available to buyers" under the Code. N.C.G.S. § 25-2-103(d) (Cum. Supp. 1985). Under N.C.G.S. § 25-2-607(3)(a), which has remained unchanged since 1965, once a buyer accepts a seller's tender, he must notify the seller of an alleged breach of warranty within a reasonable time of discovery of any defect and allow the seller opportunity to remedy said defect.

The majority of courts in other jurisdictions that have construed this notice provision in the Code have held that buyers need notify only their immediate sellers. *Cooley v. Big Horn Harvestore Systems, Inc.*, 813 P.2d 736, 741 (Colo. 1991) (section 2-607(3)(a) does not require notice to remote manufacturer as condition precedent to bringing suit for breach of manufacturer's warranty of product); *Firestone Tire & Rubber Co. v. Cannon*, 295 Md. 528, 456 A.2d 930 (1983), *aff'g* 53 Md. App. 106, 452 A.2d 192

(1982) (notice to immediate seller constitutes sufficient notice to manufacturer); *Goldstein v. G.D. Searle & Co.*, 62 Ill. App. 3d 344, 19 Ill. Dec. 208, 378 N.E.2d 1083 (1978); *Carson v. Chevron Chemical Co.*, 6 Kan. App. 2d 776, 785, 635 P.2d 1248, 1256, 24 A.L.R.4th 258, 269 (1981) (in ordinary buyer-seller transaction, section 2-607(3)(a) requires notice of breach only to immediate seller); *Church of the Nativity v. Watpro, Inc.*, 474 N.W.2d 605, 609-610 (Minn. App. 1991) (notice need go only to immediate seller and not to others in distribution chain); *Ragland Mills, Inc. v. General Motors Corp.*, 763 S.W.2d 357 (Mo. App. 1989) (in general, buyer required to give notice of breach of warranty only to immediate seller); *Seaside Resorts, Inc. v. Club Car, Inc.*, 416 S.E.2d 655, 663 (S.C. Ct. App. 1992) (interpreting N.C.G.S. § 25-2-607(3)(a) to require "a retail buyer to notify only the retail seller who tendered the goods to him, not wholesalers, distributors, manufacturers, or others who sold the goods further up the chain of commerce"); *Vintage Homes, Inc. v. Coldiron*, 585 S.W.2d 886, 888 (Tex. Civ. App. 1979) (section 2-607 notice is between buyer and immediate seller); *Tomczuk v. Town of Cheshire*, 26 Conn. Supp. 219, 222, 217 A.2d 71, 73 (1965) (seller in section 2-607 "obviously refers to the person who made the immediate sale"); *contra Redfield v. Mead, Johnson & Co.*, 266 Or. 273, 512 P.2d 776 (1973); *Western Equipment Co., Inc. v. Sheridan Iron Works, Inc.*, 605 P.2d 806, 810-11 (Wyo. 1980) (even with abolition of privity requirement, notice to manufacturer is still required); *Morrow v. New Moon Homes, Inc.*, 548 P.2d 279, 292 (Alaska 1976) (same) (dictum); *but see Shooshanian v. Wagner*, 672 P.2d 455, 463 (Alaska 1983) (filing of complaint constitutes effective notice to manufacturer, in that "[a] consumer unfamiliar with commercial practices should not be barred from pursuing a meritorious claim because he was unaware of the need to notify a remote seller of breach before bringing suit"). As the facts of the case under review make a ruling on this question unnecessary, we specifically decline to decide this legal issue.

Even if it be assumed that notice to Ford was required, we find that by the language in its warranty booklet Ford designated the selling dealership as its representative for the purposes of honoring the limited express warranty issued by Ford to plaintiff. Upon purchasing his truck plaintiff received a brochure containing Ford's limited warranty

> that your selling dealer will repair, replace, or adjust all parts (except tires) that are found to be defective in factory-supplied materials or workmanship. The defects must occur under normal use of the vehicle during the warranty coverage period.

In the section titled "A Quick Summary" of the warranty package, Ford's booklet informs consumers that there are three aspects to "How the warranty coverage works," namely "Where to go for warranty service," "What you must pay" and "When you need towing." "Where to go" instructs the Ford owner that "[t]he dealer who sold you the car or light truck will perform your warranty repairs." Several pages later Ford repeats this information under the boldface rubric "Who repairs a covered defect—and how? The dealer who sold you the car or light truck will repair all covered defects."

In the more detailed section called "How to Deal with Warranty Problems," Ford outlines the "first steps to take" as follows.

> Your satisfaction is important to Ford Motor Company and to your dealer. Normally, warranty matters concerning your car or light truck will be resolved by your dealer's Sales or Service Departments. Ford recommends that you take these steps:
>
> 1. First talk with your dealer's Service Manager or Sales Manager. Most warranty problems will be resolved at this level. However, if the matter is not resolved to your satisfaction, you should consider steps 2 and 3.
>
> 2. Discuss the problem with the owner or General Manager of the dealership.
>
> 3. If you still cannot come to an agreement, contact the Ford Parts and Service District Office in your area. These offices are listed in your Owner Guide, with their addresses and phone numbers.
>
> 4. If you do not get a solution that satisfies you when you follow steps 1, 2, and 3, you may contact the Ford Consumer Appeals Board. It is recommended but **not** required for warranty matters that, before you contact the Board, you first discuss the matter with dealership management and with the Ford Parts and Service Division District Office closest to you.

We note that the thrust of Ford's advice to new car and truck owners is to try to resolve warranty problems at the dealership level. This advice is consistent with the terms of Ford's express warranty that "your selling dealer will repair, replace, or adjust all parts . . . that are found to be defective." The evidence at the summary judgment hearing in the present case was that plaintiff had repeatedly dealt with a number of personnel at his authorized dealership, none of whom adequately diagnosed or addressed the defective conditions in his truck. We note, too, that Ford merely recommends that consumers "consider" its step 3, contacting a Ford regional office, and that Ford explicitly states it is "*not* required for warranty matters" that a consumer do so before contacting Ford's Consumer Appeals Board. In our view, the express language in Ford's warranty booklet makes notice to Ford unnecessary. The manufacturer cannot misdirect the uninformed consumer and then take legal refuge in the Code. Under Ford's procedure, the purchaser is required to take his car to the dealership and under such a scheme the dealer's attempts to make repairs afford Ford reasonable opportunity to cure warranty problems. *See also Ventura v. Ford Motor Corp.*, 180 N.J. Super. 45, 433 A.2d 801 (App. Div. 1981).

Moreover, based on the evidence in this record, Ford had notice of the alleged warranty defect. Plaintiff stated that he telephoned a toll-free Ford number in Charlotte, North Carolina, when plaintiff and his dealership were unable to resolve plaintiff's problems. In answer to defendant's interrogatories, plaintiff explained:

> When I complained to Ford headquarters using its 800 number, their response was that they had talked to the dealership and the defect was repaired which also was incorrect.

Ford's Consumer Appeals Board ("Board") for North Carolina transactions is in Charlotte. The toll-free number for the Board is provided in Ford's Warranty Information Booklet in the section on dealing with warranty problems. No other telephone number for Ford is provided in that section of the booklet.

Plaintiff then pursued a claim, at no cost to him, with the Board in Charlotte. That Board is an independent review board consisting of three consumer representatives, a Ford dealer and a Lincoln-Mercury dealer. The two dealers act only as non-voting advisors on the Board. In Ford's arbitration process the dissatisfied

consumer, the dealer and Ford all submit statements to the Board, which reaches its decision by simple majority vote. On 13 February 1989 the Board determined plaintiff's truck was within company specifications and sent plaintiff a letter denying his claim. Plaintiff brought his original action against Ford a little more than three months later.

In support of its argument that this Court should affirm summary judgment in its favor, Ford contends that "the undisputed evidence showed that Plaintiff had not notified Ford timely of the alleged breach and had not given Ford any opportunity to comply with its obligations under the warranties." We find no such "undisputed evidence" of lack of notice in the record.

> The notification which saves the buyer's rights . . . need only be such as informs the seller that the transaction is claimed to involve a breach, and thus opens the way for normal settlement through negotiation.

N.C.G.S. § 25-2-607 Official Comment 4 (1986). In fact, Ford concedes on appeal that Ford received "notice . . . of the alleged breach of its warranty on this truck . . . when Plaintiff filed an application to the [Consumer Appeals Board]" and Ford sent out a representative to test the truck in early 1989. Such notice opened the way for informal settlement of plaintiff's warranty claims, as contemplated by the Code, well in advance of plaintiff's filing this lawsuit. Thus we find evidence that Ford itself was given the actual opportunity—had it wished to do so—to diagnose and correct the truck's problems before plaintiff elected to take legal action against Ford. For all the foregoing reasons, plaintiff's evidence established genuine issues of fact with respect to Ford's breach of its express warranty that the selling dealer would repair defects and its breach of the implied warranty of merchantability.

Ford additionally argues on appeal that summary judgment was appropriate in that plaintiff received information at the end of 1989, more than half a year after filing his original complaint, that the alignment and brake problems were repairable and thereafter refused to have the repairs performed. Plaintiff's refusal is no impediment to his claim for breach of express warranty against Ford.

> A manufacturer or other warrantor may be liable for breach of warranty when it repeatedly fails within a reasonable time

> to correct a defect as promised. A party seeking to recover for breach of a limited warranty is not required to give the warrantor unlimited opportunities to attempt to bring the item into compliance with the warranty.

Stutts v. Green Ford, Inc., 47 N.C. App. at 511-12, 267 S.E.2d at 924 (citations omitted). Repairability *per se* is not the issue in this case; rather, the question is whether Ford performed its warranty obligations and, if not, what remedy plaintiff is owed.

Plaintiff's evidence did, however, fail to create a genuine issue as to Ford's breach of the implied warranty of fitness for a particular purpose under N.C.G.S. § 25-2-315, in that plaintiff used his truck only for general everyday purposes. In addition, plaintiff's allegations do not identify any tortious conduct by Ford that would subject defendant to liability for punitive damages. *See, e.g., Barnes v. Ford Motor Co.*, 95 N.C. App. 367, 382 S.E.2d 842 (1989). Accordingly, we affirm the dismissal of those claims.

Affirmed in part; reversed and remanded in part.

Judges ARNOLD and WALKER concur.

FRANK H. CHRISTENSEN, PLAINTIFF v. CHERYL D. CHRISTENSEN, DEFENDANT

No. 9115DC701

(Filed 15 September 1992)

1. Divorce and Separation § 135 (NCI4th)— equitable distribution—witness's valuation based on nonexistent circumstance—court's reliance on valuation on remand—no error

The trial court in an equitable distribution proceeding did not err in relying on a witness's written appraisals when valuing the parties' assets and effectuating distribution, even though the Court of Appeals in an earlier opinion determined that the witness had based his valuation partly on a circumstance not in existence at the time of separation, since the trial court could properly find that the nonexistent circumstance was not

a factor considered by the witness when he compiled his written analysis, and the Court's prior opinion did not unconditionally prohibit the use of the witness's valuations.

Am Jur 2d, Divorce and Separation §§ 937, 942.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 135 (NCI4th)— equitable distribution—court's adoption of witness's valuations—no double recovery for plaintiff**

Plaintiff did not receive a double recovery in an equitable distribution proceeding when the trial court adopted the valuations of the parties' assets by a particular witness, since there was no evidence that the witness included the monies in question in his valuation of one of the assets.

Am Jur 2d, Divorce and Separation § 937.

3. **Divorce and Separation § 135 (NCI4th)— equitable distribution—appraisals of marital assets—choice of appraisal discretionary with court**

The trial court in an equitable distribution proceeding was not required to utilize appraisals of the parties' assets by one witness over those of another, and it was within the court's discretion to determine which appraisals were reliable.

Am Jur 2d, Divorce and Separation § 937.

4. **Divorce and Separation § 135 (NCI4th)— equitable distribution—no reliance on witness's valuation—no error**

There was no merit to defendant's contention that the trial court erred by relying upon a witness's incompetent valuation of marital assets where there was no evidence that the court relied upon the valuation in question.

Am Jur 2d, Divorce and Separation § 937.

APPEAL by defendant from judgment entered 6 March 1991 by *Judge Patricia Hunt* in ORANGE County District Court. Heard in the Court of Appeals on 12 May 1992.

Plaintiff and defendant were married on 23 July 1979, separated on 19 July 1985, and divorced on 29 December 1986. In May 1981 the parties established CDC Associates, a limited partnership, with CDC Management Corporation as the general partner. Defendant

was the sole owner of CDC Management. CDC Associates thereby leased certain real estate from Duke University in order to build an athletic club. CDC Associates financed the facility, MetroSport, and as a part of the financial arrangement the parties and defendant's parents personally guaranteed payment on a $1,000,000 loan obtained by CDC Associates.

Defendant's evidence tended to show that her work on behalf of CDC Associates and CDC Management was her primary occupation during construction of MetroSport, and after its completion she acted in a managerial capacity pursuant to the limited partnership agreement between CDC Associates and CDC Management. Under this contract CDC Management was to provide management services for MetroSport in exchange for a management fee of $36,000 per year. Following the parties' separation on 19 July 1985 defendant moved to Roxboro, North Carolina, but continued to perform her duties as general partner and manager of MetroSport on a daily basis. In early 1987 she moved to Pittsburgh, Pennsylvania but returned to Durham one to three times per month in order to fulfill her duties as general partner and to supervise the club's operation and the utilization of partnership assets.

Plaintiff's evidence established, however, that defendant was frequently absent and did not supervise the day to day operations of the facility with any regularity, such that it was necessary to employ additional personnel. Furthermore, although the contract with CDC Management stated the amount of the fee to be paid, it did not set forth any required duties or responsibilities for CDC Management.

The parties stipulated to an equal distribution of their marital property. A judgment of equitable distribution was signed on 28 March 1989 and initially entered in Orange County District Court on 7 April 1989. On 17 April 1989 defendant filed motions for additional findings of fact, a new trial and relief from judgment. These motions were denied.

Defendant appealed the equitable distribution judgment and the order denying her motions. This Court affirmed in part but vacated Finding of Fact 12(g) of the court's order, "and all conclusions of law and portions of the order based upon it," on the ground that it was not supported by competent evidence in the record. *Christensen v. Christensen*, 101 N.C.App. 47, 398 S.E.2d 634 (1990). The case was thereby remanded to the trial court "for a finding

based on competent evidence in the record, for conclusions of law based upon the new finding, and for a new order." Subsequently, the trial court entered a second equitable distribution judgment on 6 March 1991, to which defendant now takes exception.

Tharrington, Smith & Hargrove, by Carlyn G. Poole, and Boxley, Bolton & Garber, by J. Mac Boxley, for plaintiff appellee.

Moore & Van Allen, by Edward L. Embree, III and Kevin M. Capalbo, and Porter, Steel, Humphreys & Porter, by W. Travis Porter, for defendant appellant.

WALKER, Judge.

Defendant asserts thirteen assignments of error on appeal. Of the arguments brought forward in her brief, defendant contends (1) the trial court's amended Finding of Fact 12(g), including the valuation of CDC Management and CDC Associates, was erroneously based on the written valuation report of Dr. J. Finley Lee; (2) that by adopting the valuations of Dr. Lee plaintiff received a double recovery; (3) the trial court erred by refusing to revalue CDC Management and CDC Associates based upon competent evidence and the testimony of Dr. Carl Beusman and Ray Jennings; and (4) the court erred by relying upon the valuation of CDC Management and CDC Associates by Gordon Christensen.

[1] In Finding of Fact 12(g) of its initial order the trial court relied upon the opinion and written appraisals of Dr. Lee in assigning a value to the parties' marital interest in CDC Management and CDC Associates. This Court concluded, however, that:

> Dr. Lee considered the defendant's out-of-state residency, a fact not in existence at the time of separation, in arriving at the value of CDC Management, a marital asset. A valuation based upon circumstances not in existence at the date of separation is incompetent evidence for establishing the value for CDC Management. The trial court relied upon this incompetent evidence as demonstrated by finding of fact number 12(g).

Christensen v. Christensen, 101 N.C.App. at 55, 398 S.E.2d at 639. Therefore, with regard to the Equitable Distribution judgment, our Court held that:

> [W]e vacate this finding of fact [12(g)] and all conclusions of law and portions of the order based upon it and remand this

> case to the trial court for a finding based on competent evidence in the record, for conclusions of law based upon the new finding, and for a new order. If there is no competent evidence in the record to support a finding of the valuation of CDC Management, the trial court under these circumstances is required to accept additional evidence for this limited purpose.

Id. at 55-56, 398 S.E.2d at 639. Defendant now takes exception to Finding of Fact No. 12(g) of the trial court's present order since this finding is premised upon Dr. Lee's written appraisals. She argues that Dr. Lee's valuation of CDC Management and CDC Associates was determined to be incompetent by this Court because it was based upon post-separation events, so that the trial court's reliance on Dr. Lee's written appraisals in revised Finding of Fact 12(g) is erroneous.

While Dr. Lee's testimony did reflect his knowledge that defendant was an absentee manager residing in Pittsburgh, we find no reference in his written report to defendant's residency, thereby permitting the trial court to find that defendant's residency was not a factor considered by Dr. Lee when compiling his written analysis. Instead, Dr. Lee stated in this memorandum that "The office and utility expenses shown are assumed to be discretionary since presumably all management services could be performed on the premises of the limited partnership at no cost to the corporation," suggesting that his analysis assumed that defendant kept an office at the sports club in Durham.

We do not construe the prior opinion of this Court as prohibiting unconditionally the use of Dr. Lee's valuations, but only any incompetent evidence founded upon the mistaken belief that defendant resided in Pittsburgh. Although Finding of Fact 12(g) is substantially similar to the finding which was vacated by this Court, the trial court, in relying upon Dr. Lee's appraisals in its 6 March 1991 order, expressly stated:

> Dr. Lee's written appraisals . . . are themselves sufficient, competent evidence of the valuation of CDC Management Corporation as determined by this court and were based on a date of separation (July 19, 1985) valuation. These appraisals make no mention or consideration of Defendant's residency. The Court has disregarded any testimony offered during the trial concerning Defendant's residency after the date of separation.

> The appraisal of CDC Management Corporation includes an assumption that the general partner could have maintained offices at the club and that virtually no services were required from CDC Management Corporation. This assumption was confirmed by the testimony of other witnesses.

Since the trial court disregarded Dr. Lee's testimony concerning defendant's residency, we cannot hold it was erroneous as a matter of law to utilize his written appraisals when valuing the parties' assets and effectuating distribution. "If the record on appeal contains competent evidence which supports the trial court's findings of fact, the trial court is rebuttably presumed to have relied upon it and disregarded any incompetent evidence." *Christensen v. Christensen*, 101 N.C.App. at 55, 398 S.E.2d at 639, *citing Best v. Best*, 81 N.C.App. 337, 344 S.E.2d 363 (1986).

Defendant argues that it is impossible to distinguish Dr. Lee's written valuation report from his testimony since his written valuations and oral testimony yielded identical values for CDC Management and CDC Associates, and the values assigned to CDC Management and CDC Associates under Finding of Fact 12(g) were the same as the values found by the trial court in its initial order. Additionally, defendant submits that Dr. Lee's repeated references to his written report in his oral testimony indicated his testimony was merely a reiteration of his written memorandum and therefore should be deemed incompetent evidence based upon post-separation events.

Although the numerical values assigned to CDC Management and CDC Associates were substantially the same as those in the trial court's initial order, this similarity does not establish as a matter of law that the trial court's second order was based upon the incompetent evidence that defendant resided out-of-state. The trial court stated in Finding of Fact 12(g) of the present order that the appraisal of CDC Management was premised on the "assumption that the general partner could have maintained offices at the club and that virtually no services were required from CDC Management." Defendant has failed to show that the value assigned to CDC Management, as measured by capitalization of net cash flow, would be varied depending upon whether she resided in Pittsburgh, Pennsylvania or Roxboro, North Carolina.

Furthermore, we are not convinced from our review of the record that Dr. Lee's oral testimony evidenced that his written

report was prepared under the mistaken belief that defendant resided out-of-state. His statement that defendant lived 500 miles away was made in response to questions regarding whether defendant was paid an annual management salary of $36,000 per year pursuant to the partnership agreement, and was offered as support for his position that this fee could not appropriately be considered a salary. Dr. Lee's written appraisal asserted that "[t]his expense appears to be more akin to a dividend since it is fixed and is not affected by the quantity or quality of services received from the general partner," and was based upon his interpretation of the partnership agreement and defendant's responsibilities and duties thereunder. He made reference in his testimony to the fact that defendant resided 500 miles away as evidence which merely bolstered his position that this expense was discretionary and should be treated as a dividend. Additionally, the court considered the testimony of Dr. Larry Crane, a limited partner in CDC Associates, and found that defendant "did not give such an amount of time to the operation and supervision of the athletic club to consider the $36,000.00 annual fee as salary." Thus, we conclude that Finding of Fact 12(g) now before us, including the valuation of CDC Management and CDC Associates, is supported by competent evidence in the record and is consequently binding upon us on appeal. *See Johnson v. Johnson*, 78 N.C.App. 787, 338 S.E.2d 567 (1986).

[2] Defendant next contends that since the trial court adopted the valuations of Dr. Lee plaintiff received a double recovery, because defendant's management salary was included in the marital estate twice, directly and indirectly as a capital asset of CDC Management Corporation. Defendant submits that Dr. Lee's conclusion that the payments she received with regard to CDC Management constituted a dividend guaranteed for forty years rather than a salary resulted in the trial court's classification of defendant's post-separation earnings as a marital asset. The court then credited plaintiff's share of the marital estate with one-half of defendant's salary from the date of separation until the summer of 1988, which amounted to $45,000. The court also ordered that, pending sale of the club and the management contract, plaintiff and defendant would each receive fifty percent (50%) per year of the $36,000 management fee effective from the date of the Equitable Distribution trial. Additionally, defendant asserts that the court attributed defendant's post-separation salary as the sole component of the value of CDC Management based on Dr. Lee's testimony, since CDC Management's value

was based on defendant's receipt of $36,000 annually for a six year period spanning from the date of separation until July 1991. Thus, defendant argues that because of its reliance on Dr. Lee's appraisals, the trial court included her management salary both in the marital estate and as part of the CDC Management valuation.

The trial court clearly included the management contract in the marital estate, as was stated in Finding of Fact No. 19:

> The Court finds that Defendant has received to the exclusion of Plaintiff total payments of $90,000.00 in regard to the parties' marital asset in CDC Management Corporation (which has the management contract in regard to MetroSport athletic club) from the date of the parties' separation until the summer of 1988, and that Plaintiff is entitled to a credit of one-half of this marital asset in the amount of $45,000.00. The Court finds that these payments were made pursuant to the parties' contractual right to receive $36,000.00 per year, and which amount did not constitute salary to Defendant.

Thereafter the court ordered that:

> Pending sale of the club and the management contract, the parties will receive the following percentage of their $36,000.00 annual management fee: Plaintiff to receive fifty percent (50%) per year, and Defendant to receive fifty percent (50%) per year effective from the date of the Equitable Distribution Trial.

We cannot conclude that this distribution grants plaintiff a double recovery since we find no evidence that the management fees subsequent to the date of separation were incorporated into Dr. Lee's valuation of CDC Management. Finding of Fact 12(g) states that the net fair market value of CDC Management was determined by Dr. Lee as of the date of the parties' separation. Although the court found this marital asset included the management contract with CDC Associates, there is no evidence that any future payments pursuant to the contract were considered when ascertaining CDC Management's value. Payments under the contract after the date of separation were considered by the court separately and, after determining they did not constitute a salary to defendant, were then included in the marital estate. This assignment of error is thereby overruled.

[3] Defendant next submits that the trial court erred by refusing to revalue CDC Management and CDC Associates based on the

testimony of Dr. Carl Beusman and Ray Jennings. She contends that these two experts offered the only competent evidence as to the value of CDC Management and CDC Associates and should have been relied upon by the trial court on remand, as opposed to its erroneous consideration of Dr. Lee's testimony which had been determined to be incompetent evidence. We disagree.

Both of these witnesses were allowed to testify concerning their respective valuations of CDC Management and CDC Associates. Although the court did not adopt these values it did consider Dr. Beusman's and Mr. Jennings' testimony, as is evidenced in Finding of Fact 12(g). Defendant cites no authority in support of her position that the trial court should have utilized these appraisals and we find no abuse of the court's discretion in its decision to rely upon Dr. Lee's valuations. The trial court, as finder of fact, is in the unique position of hearing the evidence, evaluating its significance, and determining its applicability and relevance to the case. Thus, we decline to disturb the trial court's ruling on appeal.

[4] Additionally, defendant asserts the trial court erred by relying upon Gordon Christensen's valuation of CDC Management and CDC Associates because his appraisal was based on an incorrect assumption as to actual monies received by defendant for her management of MetroSport. Defendant argues that Mr. Christensen's valuation was thereby incompetent evidence. Defendant's contention is without merit as there is no evidence that the court relied upon Mr. Christensen's valuations when ascertaining the fair market value of CDC Management and CDC Associates and entering its order of equitable distribution. The court's sole reference in its order simply notes that Mr. Christensen valued CDC Management at the time of the parties' separation and that his opinion was based on CDC Management's receipt of the guaranteed annual fee of $36,000.00.

The distribution of marital property is within the sound discretion of the trial court. G.S. 50-20(c); *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). In this regard, an order of equitable distribution must be accorded great deference and will be reversed only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *Andrews v. Andrews*, 79 N.C.App. 228, 338 S.E.2d 809, *disc. review denied*, 316 N.C. 730, 345 S.E.2d 385 (1986). Having reviewed the record, we find

no abuse of discretion in the trial court's distribution of marital property in the instant case.

Affirmed.

Judges LEWIS and WYNN concur.

S.E.T.A. UNC-CH, INC., PETITIONER-APPELLANT v. WILLIAM D. HUFFINES, M.D., CHAIRMAN OF THE INSTITUTIONAL ANIMAL CARE AND USE COMMITTEE OF THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL, RESPONDENT-APPELLEE

No. 9110SC718

(Filed 15 September 1992)

1. **Costs § 37 (NCI4th)— compelling disclosure of public records—award of attorney fees—findings required**

Before a trial judge can exercise statutory discretion under either N.C.G.S. § 6-19.1 or § 6-19.2 and award attorney fees to a party in a proceeding to compel disclosure of public records, the party moving for attorney fees must be a "prevailing party"; the court must find that the agency acted without substantial justification; and the court must find that there are no special circumstances making a fee award unjust.

Am Jur 2d, Records and Recording Laws § 31.

2. **Costs § 37 (NCI4th)— compelling disclosure of public records—substantial justification for withholding—test for substantial justification**

Pursuant to N.C.G.S. § 6-19.2 allowing an award of attorney fees in a proceeding to compel disclosure of public records if the agency acted without substantial justification, the test for substantial justification is not whether the court on appeal ultimately upheld respondent's reasons for resisting public disclosure of the requested documents as correct, but, rather, whether respondent's reluctance to disclose was justified to a degree that could satisfy a reasonable person under the existing law and facts known to, or reasonably believed by, respondent at the time respondent refused to make disclosure.

Am Jur 2d, Records and Recording Laws § 19.

What constitutes legitimate research justifying inspection of state or local public records not open to inspection by general public. 40 ALR4th 333.

3. **Costs § 37 (NCI4th) — compelling disclosure of public records — existence of substantial justification for withholding**

Respondent had substantial justification for denying petitioner access to records of laboratory protocols where the Attorney General was of the opinion that the matters at issue in this case were undisclosable personnel records; respondent was of the opinion that disclosure would violate the researchers' free speech and due process rights under the First and Fourteenth Amendments as well as their rights to trade secret protection under federal and state statutes; sixteen affidavits from eminent scientific researchers in support of respondent's position were filed with the trial court; and these affidavits raised concerns about personal safety of the researchers and their families, university ability to attract and retain researchers if laboratory experiments were disrupted by animal rights activists, premature exposure of novel ideas and methods which might be stolen by others, and the threat to researchers' proprietary rights in patentable work.

Am Jur 2d, Records and Recording Laws § 19.

What constitutes legitimate research justifying inspection of state or local public records not open to inspection by general public. 40 ALR4th 333.

APPEAL by petitioner from order entered 23 April 1991 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 13 May 1992.

Tharrington, Smith & Hargrove, by Douglas A. Ruley, and M. Alexander Charns, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Chief Deputy Attorney General Andrew A. Vanore, Jr., and Special Deputy Attorney General Charles M. Hensey, for respondent-appellee.

PARKER, Judge.

Petitioner appeals from the trial court's determination that petitioner is not entitled to attorney's fees pursuant to N.C.G.S.

§ 6-19.2. Petitioner's amended motion requests reimbursement under N.C.G.S. § 6-19.2 in the amount of $32,356.53 for litigation expenses incurred in petitioner's action to compel respondent to disclose certain documents as required by N.C.G.S. §§ 132-1 *et seq.*, the Public Records Act. The four documents at issue describe proposed laboratory research on animal subjects at the Chapel Hill campus of the University of North Carolina.

In petitioner's prior appeal from a trial court judgment shielding these documents from disclosure, this Court held that respondent was required to disclose most of the contents of the applications for approval of laboratory animal protocols. *S.E.T.A. UNC-CH v. Huffines*, 101 N.C. App. 292, 399 S.E.2d 340 (1991). In particular, the Court held that (i) the applications at issue in the case did not contain trade secrets, contrary to the lower court's conclusion that the materials had federal and State statutory trade secrets protection; (ii) the First Amendment did not create a qualified academic privilege against disclosure of confidential records, under the authority of *University of Pennsylvania v. EEOC*, 493 U.S. 182, 107 L.Ed.2d 571 (1990), a U.S. Supreme Court decision announced 9 January 1990, several weeks after the lower court's judgment in the present case; but (iii) public policy did protect the privacy interests of scientific researchers and their staff members in personal and professional information such as their names, telephone numbers, addresses, experience and departmental affiliations. Consistent with the resolution of the prior appeal, the trial court ordered respondent to disclose the requested documents with personal information redacted.

[1] N.C.G.S. § 6-19.2 provides as follows:

> In any civil action in which a party successfully compels the disclosure of public records pursuant to G.S. 132-9 or other appropriate provisions of law, the court may, in its discretion, allow the prevailing party to recover reasonable attorney's fees to be taxed as court costs against the appropriate agency if:
>
> (1) The court finds that the agency acted without substantial justification in denying access to the public records; and
>
> (2) The court finds that there are no special circumstances that would make the award of attorney's fees unjust.

N.C.G.S. § 6-19.2 (1986). Both N.C.G.S. § 6-19.2 and N.C.G.S. § 6-19.1, a closely analogous provision governing attorney's fees for private litigants who successfully appeal from or defend against agency action, give the trial court discretionary power to order a fee award once the court determines, as a matter of law, "that certain criteria are present." *Tay v. Flaherty*, 100 N.C. App. 51, 57, 394 S.E.2d 217, 220, *disc. rev. denied*, 327 N.C. 643, 399 S.E.2d 132 (1990) (interpreting N.C.G.S. § 6-19.1); *see also N.C. Press Assoc., Inc. v. Spangler*, 94 N.C. App. 694, 381 S.E.2d 187, *disc. rev. denied*, 325 N.C. 709, 388 S.E.2d 461 (1989) (interpreting N.C.G.S. § 6-19.2).

Three criteria must exist before a trial judge can exercise statutory discretion under either N.C.G.S. § 6-19.1 or § 6-19.2. First, the party moving for attorney's fees must be a "prevailing party." *See, e.g., House v. Hillhaven, Inc.*, 105 N.C. App. 191, 412 S.E.2d 893, *disc. rev. denied*, 331 N.C. 284, 417 S.E.2d 251 (1992). Second, the court must find that the agency acted without substantial justification; and finally the court must find there are no special circumstances making a fee award unjust. *N.C. Press Assoc., Inc. v. Spangler*, 94 N.C. App. at 696, 381 S.E.2d at 189.

In the present case the trial court found both that petitioner was the prevailing party and also that no special circumstances would make a fee award unjust. These two findings are not challenged on appeal. However, the trial court also found and concluded that it could not award fees "when the evidence of record, as a matter of law, fails to demonstrate that the agency acted *without substantial justification* in denying access to the public records." Under our case law, the burden is on an agency to set out sufficient facts and legal theories to show substantial justification for non-disclosure. *Id.* at 698, 381 S.E.2d at 190. Finding the agency had made such a showing in this case, the trial court said it had to "reluctantly" rule it was precluded from making a discretionary fee award.

[2] On appeal petitioner argues that it is entitled to attorney's fees on the ground that none of respondent's proffered justifications for refusing petitioner access to the protocols had any reasonable basis in fact or law. We disagree. The test for substantial justification is not whether this Court ultimately upheld respondent's reasons for resisting public disclosure of the requested documents as correct but, rather, whether respondent's reluctance to disclose was " 'justified to a degree that could satisfy a reasonable person' "

under the existing law and facts known to, or reasonably believed by, respondent at the time respondent refused to make disclosure. *Tay v. Flaherty*, 100 N.C. App. at 56, 394 S.E.2d at 219-20 (quoting *Pierce v. Underwood*, 487 U.S. 552, 565, 101 L.Ed.2d 490, 504-505 (1988)). We find such reasonable basis under the facts of the present case.

[3] In *Pierce* the Court observed that "substantially justified" did not connote "justified to a high degree" but, rather, "justified in substance or in the main" or for the most part. 487 U.S. at 565, 101 L.Ed.2d at 504. The Court specifically rejected an analysis that would require "substantial justification" to meet the criteria of substantial correctness or reasonable justification: "[A] position can be justified even though it is not correct, and we believe it can be substantially (i.e., for the most part) justified if a reasonable person could think it correct. . . ." *Id.* at 566 n.2, 101 L.Ed.2d at 505 n.2. Applying these criteria to the present case, we hold the trial court correctly concluded, as a matter of law, that respondent had shown substantial justification for nondisclosure. Accordingly, the trial court properly determined that it could not exercise its discretion under N.C.G.S. § 6-19.2 and we affirm the trial court's denial of petitioner's motion for attorney's fees.

Before petitioner instituted its court action, it informally requested access to a number of different categories of records in respondent's possession. Respondent disclosed some materials and not others, on the ground that the latter group of documents did not come within the Public Records Act. Respondent subsequently explained to petitioner, by letter dated 17 April 1989, that the Attorney General was of the opinion that the laboratory protocols at issue in this case were undisclosable personnel records.

Petitioner waited until 9 October 1989 to file its judicial application for access to the undisclosed documents. Effective 8 June 1989 the Public Records Act had been amended to recognize an exemption for trade secrets. N.C.G.S. § 132-1.2 (1990). Respondent asserted, in response to the judicial petition, that disclosure would violate the researchers' free speech and due process rights under the First and Fourteenth Amendments as well as their rights to trade secret protection under federal and State statutes. Sixteen affidavits from eminent scientific researchers in support of respondent's position were filed with the trial court. These affidavits expressed a number of realistic, overlapping concerns, including fears

about (i) personal and family safety should animal researchers' names and projects be made public, (ii) university ability to attract and retain top-flight researchers if laboratory experiments were disrupted by animal rights activists, uninformed adverse publicity and inadvertent or intentional misappropriation of original ideas, (iii) premature exposure of novel ideas and methods, which might then be stolen by others before the research was even conducted and the results of that research published by the persons who originated the ideas and methods, (iv) the chilling effect on researchers' willingness to propose valuable experiments using primates and other animals closely related to man for fear of reprisals and harassment by animal rights groups, and (v) the threat to researchers' proprietary rights in patentable work. One affiant, contrasting the preferred private nature of applications for animal protocols and the mandatory public access to unpatentable ideas and methods in subsequent federal grant applications, stated he considered public disclosure at the latter, funding stage to be a "quid pro quo which I gladly give for the sake of getting public support."

As to respondent's assertion of First Amendment rights, we hold that "a reasonable person could think [such protection] correct." *Pierce v. Underwood*, 487 U.S. at 566 n.2, 101 L.Ed.2d at 505 n.2. While this Court in the prior appeal considered itself bound by 1990 U.S. Supreme Court precedent to reject academic freedom as a barrier to disclosure under the Public Records Act, *University of Pennsylvania v. EEOC*, 493 U.S. 182, 107 L.Ed.2d 571 (1990), it was certainly not clear in 1989, when respondent asserted this justification for nondisclosure, that an argument for such an extension of the law of qualified academic privilege was unreasonable. "Although the meaning of constitutional academic freedom remains ambiguous, the Supreme Court has clearly recognized it as an unenumerated first amendment right . . . ." David M. Rabban, *A Functional Analysis of "Individual" and "Institutional" Academic Freedom under the First Amendment*, Law & Contemp. Probs., Summer 1990, at 227, 300. However, "it would still be quite incorrect to suggest that the protection of academic freedom is now reasonably secure. Assuredly it is not." William W. Van Alstyne, *Academic Freedom and the First Amendment in the Supreme Court of the United States: An Unhurried Historical Review*, Law & Contemp. Probs., Summer 1990, at 79, 153. *See, e.g., Shelton v. Tucker*, 364 U.S. 479, 5 L.Ed.2d 231 (1960) (State statute forcing comprehensive disclosure was overbroad on First Amendment

grounds where teachers might be intimidated or risk covert retaliatory use of the disclosed information); *see also Dow Chemical Co. v. Allen*, 672 F.2d 1262 (7th Cir. 1982).

Petitioner also argues that respondent's invocation of trade secrets protection had no reasonable basis in fact or law. In support of this argument, petitioner cites this Court's observations in the prior appeal that the blank application forms were very "general in nature" and that petitioner had obtained the much more detailed federal grant applications for these same projects. The blank forms do not predict, however, what information will be supplied by a researcher for a particular project and neither trade secrets nor patentable ideas are disclosable, as a matter of law, under the federal Freedom of Information Act ("FOIA") or our Public Records Act. In fact, this Court specifically recognized in the prior appeal the protection from public disclosure accorded such information.

> Portions of the federal applications may not be made public if the procedures therein could be patented. That is a valid basis for excluding information and we recognize it as such. No one has contended that any part of the four "applications" before us contains patentable ideas or procedures. If subsequent applications on the state level in North Carolina contain material which could be patented, that will surely be made clear to the court having cognizance.

S.E.T.A. UNC-CH v. Huffines, 101 N.C. App. at 296, 399 S.E.2d at 343.

Petitioner contends that its access under FOIA to the researchers' more detailed grant applications renders respondent's invocation of trade secrets protection virtually frivolous. Petitioner further contends that the trade secrets exemption was not available when respondent initially denied petitioner's request for disclosure, that none of respondent's affidavits point to a single trade secret in the requested documents, and that the applications describe processes and plans lacking in the necessary element of independent commercial value. However, this Court did not take the position in the prior appeal that respondent's argument bordered on the frivolous, but instead the Court was responding to respondent's contention that "*all* of the information contained in the applications constitutes confidential trade secrets." *Id.* The Court's *in camera* examination of the four applications at issue here revealed only that, as to "the questions relating to research objectives and justifica-

tions," these particular applications did not contain trade secrets. *Id.* at 297, 399 S.E.2d at 343. Petitioner would, however, have been blocked from securing access to trade secrets, had the researchers actually included such information, whether or not petitioner had obtained other parts of the grant applications under FOIA, as this Court intimated in the previous appeal.

Moreover, the affidavits submitted to the trial court were not intended to provide descriptions of any particular research project within petitioner's request, but rather to state researchers' objections to automatic public access to preliminary applications containing their intellectual property and to describe individual researchers' experiences at the Chapel Hill campus with animal rights activists. While affiants do not mention trade secrets *per se*, they do allege certain proprietary rights, for instance, in their "insights, ideas and approaches" (Exhibit C), and they raise the issue of patentability (Exhibits D, M and N) and associated jeopardy should patentable procedures be disclosed. As discussed above, these concerns were both reasonable in fact and valid in law.

Finally, respondent's public policy argument on behalf of the privacy interests of researchers provided additional justification for respondent's position; and, indeed, this Court upheld that ground in the prior appeal. *Id.* at 296, 399 S.E.2d at 343.

For the foregoing reasons we affirm the trial court's order.

Affirmed.

Judges COZORT and GREENE concur.

IN THE MATTER OF: TIMOTHY BELK, RESPONDENT, WSOC TELEVISION, INC., INTERVENOR/PETITIONER v. STATE OF NORTH CAROLINA, EX REL., ATTORNEY GENERAL; CHARLOTTE-MECKLENBURG HOSPITAL AUTHORITY; THE CHILDREN'S LAW CENTER; MECKLENBURG COUNTY AREA MENTAL HEALTH, DEVELOPMENTAL DISABILITIES AND SUBSTANCE ABUSE AUTHORITY; AND MENTAL HEALTH ASSOCIATION OF MECKLENBURG COUNTY, INC., INTERVENOR/RESPONDENT

No. 9126DC517

(Filed 15 September 1992)

1. **Incompetent Persons § 20 (NCI4th)— civil commitment proceedings—openness—no presumption of openness created by U. S. Constitution**

U.S. Supreme Court decisions cited by appellant to support its contention that the First and Fourteenth Amendments of the U. S. Constitution create a presumption that court proceedings should be open are inapplicable to civil commitment proceedings; moreover, even if civil trials have traditionally been open to the public, North Carolina's civil commitment process can be distinguished from the traditional civil trial since prior to 1973 the commitment procedure did not require formal judicial hearings.

Am Jur 2d, Trial § 205.

Propriety of exclusion of press or other media representatives from civil trial. 79 ALR3d 401.

2. **Incompetent Persons § 20 (NCI4th)— involuntary commitment proceedings closed—statutes not unconstitutional**

North Carolina's involuntary commitment statutes are not unconstitutional because the hearing is not open to the public, since the proceedings for involuntary commitment are by nature informal and closed to the public, as their purpose is to protect one subjected to the proceedings from additional trauma.

Am Jur 2d, Incompetent Persons §§ 8, 15.

3. **Incompetent Persons § 20 (NCI4th)— civil commitment proceedings—no State constitutional right to openness**

Article I, § 18 of the North Carolina Constitution does not create a constitutional right on the part of the press and public to attend civil commitment proceedings.

Am Jur 2d, Trial § 205.

4. **Courts § 107 (NCI4th); Constitutional Law § 128 (NCI4th)— no open courts presumption under North Carolina Constitution**

Article I, § 24 of the North Carolina Constitution does not support appellant's contention that there exists a constitutional open courts presumption in all cases, since § 24 applies specifically to a criminal proceeding only.

Am Jur 2d, Trial § 205.

5. **Statutes § 5.8 (NCI3d)— involuntary commitment statutes— specificity of statute prevails over generality of other statute**

Inasmuch as N.C.G.S. Chapter 122C addresses specifically the procedure for involuntary commitment hearings and speaks specifically to the right to view records from a commitment hearing, its provisions control over the general language of N.C.G.S. §§ 7A-109, 190 and 191 regarding the right to view public records.

Am Jur 2d, Records and Recording Laws § 19.

APPEAL by intervenor/petitioner from order entered 20 March 1991 in MECKLENBURG County District Court by *Judge Stanley Brown.* Heard in the Court of Appeals 18 March 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David M. Parker and Associate Attorney General Michelle B. McPherson, for the State intervenor/respondent-appellee.

Children's Law Center, by Anne Morgan Sanders, Helen R. Bradford, and Marjorie L. Foley, for intervenor/respondent-appellee.

Waggoner, Hamrick, Hasty, Monteith, Kratt and McDonnell, by John H. Hasty, for intervenor/petitioner-appellant.

WYNN, Judge.

This appeal arises as the result of action taken by WSOC, a television station in Charlotte, North Carolina, to attend the commitment hearing of Timothy Belk ("Belk").

Apparently, after Belk began exhibiting violent and hallucinatory behavior, family members asked the Shiloh True Light Church of Mint Hill, North Carolina ("Church") for help in controlling him. The Church responded by confining Belk in a wire cage. Subsequently, several reporters with WSOC investigated and reported

in a television broadcast the story about Belk. Upon returning to do a follow-up story, they found that Belk had been taken from the Church and was being held at the Mecklenburg County Mental Health Center.

Belk's family members, upset that Belk had been taken by Mecklenburg County officials against his will, informed WSOC on or about 7 September 1990, that a hearing was to be held in Mecklenburg County District Court on 12 September 1990, to determine whether Belk should be committed to a state hospital. On 11 September 1990, the trial court allowed WSOC, the Children's Law Center, Charlotte Mecklenburg Hospital and the Mecklenburg County Area Mental Health Authority to intervene for the purpose of being heard on a motion in the cause on the question of whether the hearing and Belk's medical records should be open to the public. On 22 February 1991, the Honorable L. Stanley Brown denied the motion to open the proceedings to the public. WSOC appeals from this determination.

The appellant, WSOC, assigns error to the trial court's determination that the hearing and medical records of Belk should remain closed to the public. Appellant argues that N.C. Gen. Stat. §§ 122C-251 to 271 (1989), which provide for involuntary commitment proceedings, are unconstitutional as they violate the right of public access to the courts as guaranteed by the First and Fourteenth Amendments of the United States Constitution and the North Carolina Constitution.

In challenging the constitutionality of a statute, the burden of proof lies with the challenger. *Smith v. Wilkins*, 75 N.C. App. 483, 485, 331 S.E.2d 159, 161 (1985). Furthermore, statutes must be upheld unless their unconstitutionality clearly, positively, and unmistakably appears. *Vinson v. Chappell*, 3 N.C. App. 348, 350, 164 S.E.2d 631, 632 (1968), *aff'd*, 275 N.C. 234, 166 S.E.2d 686 (1969).

United States Constitution

[1] Initially, the appellant contends the First and Fourteenth amendments of the United States Constitution create a presumption that court proceedings should be open. In support of this contention, it cites *Richmond Newspapers, Inc. v. Virginia*, 448 U.S. 555, 65 L. Ed. 2d 973 (1980) and *Globe Newspaper Co. v. Superior Court*,

457 U.S. 596, 73 L. Ed. 2d 248 (1982). Both cases are distinguishable from the case at hand.

In *Richmond*, the United States Supreme Court considered the narrow issue of whether the public and press had a constitutional right to attend criminal trials. Although the Court held the public had a guaranteed right under the First and Fourteenth Amendments of the United States Constitution to attend a criminal trial, the Court specifically noted that the right of the public and the press to attend civil trials was not before the Court and as such, its holding was only applicable to a criminal proceeding. *Richmond*, 448 U.S. at 580 n.17, 65 L. Ed. 2d at 992 n.17. Since a commitment hearing is a civil rather than a criminal proceeding, *In re Underwood*, 38 N.C. App. 344, 347, 247 S.E.2d 778, 780 (1978), *Richmond* is not controlling authority in this case.

Globe is cited by the appellant for the proposition that "the state of North Carolina may [not] mandatorily close an entire category of judicial proceedings without conducting a case by case analysis of the requirements for closure as mandated by the Supreme Court of the United States." In *Globe*, the Court held that a state statute which requires the mandatory exclusion of the public from the courtroom during the testimony of a minor victim in a sex-offense trial violated the First Amendment. 457 U.S. at 602, 73 L.Ed.2d at 254. However, the application of *Globe* is as limited as the application of *Richmond* since the Court did not address the exclusion of the public from a civil trial. Indeed, Justice O'Connor emphasizing this limitation wrote in a concurring opinion that:

> Richmond Newspapers rests upon our long history of open criminal trials and the special value, for both public and accused, of that openness. As the plurality opinion in Richmond Newspapers stresses, "it would be difficult to single out any aspect of government of higher concern and importance to the people than the manner in which criminal trials are conducted." Thus, I interpret neither Richmond Newspapers nor the Court's decision today to carry any implications outside the context of criminal trials.

Globe, 457 U.S. at 611, 73 L.Ed.2d at 260 (O'Connor, J., concurring) (citations omitted). Like *Richmond*, the *Globe* decision is not applicable to civil commitment hearings.

The appellant nonetheless urges this Court to consider a footnote in *Gannett Co. v. DePasquale*, 443 U.S. 368, 61 L.Ed.2d 608 (1979), to support the proposition that the First Amendment's guarantee of public access to criminal proceedings applies with equal force to civil proceedings. The footnote in *Gannett* acknowledges that civil trials have traditionally been open to the public. *Gannett*, 443 U.S. at 386, 61 L.Ed.2d at 625, n.15. We are disinclined to make such an application in this case and therefore specifically hold that the holdings in *Richmond* and *Globe* are inapplicable to civil commitment proceedings. Moreover, North Carolina's civil commitment process can be distinguished from the traditional civil trial since prior to 1973 the commitment procedure did not require formal judicial hearings. *See* Robert D. Miller and Paul B. Fiddleman, *Involuntary Civil Commitment in North Carolina: The Result of the 1979 Statutory Changes*, 60 N.C. L. Rev. 986, 993 (1982).

[2] We note further that the constitutionality of North Carolina's commitment statutes was ruled on by the United States District Court in *French v. Blackburn*, 428 F. Supp. 1351 (M.D.N.C. 1977), *aff'd*, 443 U.S. 901, 61 L. Ed. 2d 869 (1979). In *French*, the plaintiff brought suit contending that the North Carolina commitment statute was unconstitutional because his hearing had not been opened to the public. The district court held that the proceedings for involuntary commitment by nature, was informal and closed to the public. "This privacy and informality, which are obviously legislated for the purpose of protecting one subjected to the proceedings from suffering additional trauma, would be totally lost if a jury were present. Indeed the persons subjected to such a proceeding may not be capable of dealing with a full-blown adversary process." *Id.* at 1361-62. Moreover, the district court stated that N.C. Gen. Stat. § 122C has humanitarian purposes and involves a "deprivation of liberty, the very purpose of that deprivation is not solely to protect society but also has as a purpose the protection, treatment, and aid of an individual who cannot or will not protect himself." *Id.* at 1354. The purpose of an involuntary commitment hearing is to render a service that cannot be accomplished in a jail or other penal facility but in an institution where treatment and medication are available. *Id.* at 1355. Although the involuntary commitment statutes have been amended since the *French* decision, the old and new statutes essentially set out the same procedures for involuntary commitment, *see Sumblin v. Craven County Hospital*

Corp., 86 N.C. App. 358, 357 S.E.2d 376 (1987). Accordingly, we find the rationale in *French* dispositive of this issue.

North Carolina Constitution

[3] The appellant next argues that Article I, §§ 18 and 24 of the North Carolina Constitution support its contention that there exists a constitutional open courts presumption in all cases. Article I, § 18 states: "All courts shall be open; every person for an injury done him in his lands, goods, person, or reputation shall have remedy by due course of law . . . ." This section has been interpreted as providing a guarantee "to those who suffer injury to their persons, property, or reputation, the right to seek redress therefor in the courts of this state." *Bolick v. American Barmag Corp.*, 54 N.C. App. 589, 593, 284 S.E.2d 188, 191 (1981), *modified and aff'd*, 306 N.C. 364, 293 S.E.2d 415 (1982). Section 18 was considered by our Supreme Court in *In Re Nowell*, 293 N.C. 235, 237 S.E.2d 246 (1977), wherein a district court judge was censured for accepting guilty pleas and entering judgments outside the courtroom when court was not in session and neither the defendants nor their counsel were present and without notice to the prosecutor. It was in this context that the Court observed that "[t]he trial and disposition of criminal cases is the public's business and ought to be conducted in public in open court." *Id.* at 249, 237 S.E.2d at 255 (citations omitted). Thus, the application of *Nowell*, as in the previously mentioned federal cases, was limited to the context of a criminal trial setting. We conclude that Article I, § 18 does not create a constitutional right on the part of the press and public to attend civil commitment proceedings.

[4] The appellant next contends that Article I, § 24 supports its proposition that the public has a right to attend civil commitment proceedings. Section 24 provides, "[n]o person shall be convicted of any crime but by the unanimous verdict of a jury in open court." Section 24 is directed to an "open court" proceeding during a criminal conviction only, and in light of this clear limitation, we likewise conclude that it is not applicable to civil proceedings.

Statutory Right

[5] Appellant next argues that N.C. Gen. Stat. §§ 7A-109, 7A-190 and 7A-191 (1989) create a presumptive right, on the part of the public, to view all records and attend commitment proceedings. Section 109 provides that, "[e]xcept as prohibited by law, these

records shall be open to the inspection of the public during regular office hours, and shall include civil actions. . . ." Sections 190 and 191 provide that the district courts shall be deemed always open for the disposition of matters, and always will be conducted in open court. North Carolina General Statutes Chapter 122C governs commitment hearings and records. N.C. Gen. Stat. § 122C-224.3(d) (1989) provides that hearings shall be closed to the public unless the attorney requests otherwise. The records from the proceedings are protected, but this protection is not absolute. Section 122C-54(d) provides:

> Any individual seeking confidential information contained in the court files or the court records of a proceeding made pursuant to Article 5 of this Chapter may file a written motion in the cause setting out why the information is needed. A district court judge may issue an order to disclose the confidential information sought . . . if he finds that it is in the best interest of the individual admitted or committed or of the public to have the information disclosed.

Id. § 122C-54(d).

While sections 109, 190 and 191 speak generally to the right to view public records, Chapter 122C speaks specifically to the right to view records from a commitment hearing. The rules of statutory construction dictate that when two statutes concern the same subject matter they must be construed in harmony with one another. *Charlotte City Coach Lines, Inc. v. Brotherhood of Railroad Trainmen*, 254 N.C. 60, 68, 118 S.E.2d 37, 43 (1961). However, where one statute is specific and the other is general, the specific provision must be taken as intended to constitute an exception to the general provision, because the legislature is not to be presumed to have intended a conflict. *See State ex rel. Utilities Commission v. Lumbee River Electric Membership Corp.*, 275 N.C. 250, 260, 166 S.E.2d 663, 670 (1969). Inasmuch as Chapter 122C addresses specifically the procedure for commitment hearings, we find that its provisions control over the general language of sections 109, 190 and 191. Finally, in passing we note that the appellant television station sought to expose Belk to its viewing audience because it considered his mental illness, violent behavior and confinement in a wire cage to be "newsworthy." Apparently, the fragility of Belk's mental condition was not the appellant's concern in seeking to publicly air his hearing, hence its primary purpose for seeking access to

the hearing and records was to be a conduit for information. While we concede that the public may have some interest in Belk's hearing, N.C. Gen. Stat. § 122C affords the mentally ill a measure of dignity by granting the trial court the discretion to deny access to those whose interest in the commitment proceedings is purely self-serving. The appellant has failed to show an explicit constitutional right of access to commitment proceedings and has presented no authority establishing that right. In absence of a plain and unmistakable constitutional violation, this Court must give deference to the legislature and follow the presumption that an act of the legislature is constitutional. *State ex rel. Martin v. Preston*, 325 N.C. 438, 448, 385 S.E.2d 473, 478 (1989). Therefore, the statutory limitations on public access to civil commitment proceedings and documents must be upheld. We have considered the appellant's other assignments of error and find them to be without merit. For the foregoing reasons, the decision of the trial court is,

Affirmed.

Judges ARNOLD and LEWIS concur.

CHARLES ERNEST RYLES, JR., PLAINTIFF v. DURHAM COUNTY HOSPITAL CORPORATION, INC., TRADING AS DURHAM COUNTY GENERAL HOSPITAL, DEFENDANT

No. 9114SC382

(Filed 15 September 1992)

Master and Servant § 49.1 (NCI3d)— workers' compensation—apprentice employee—tort claim properly dismissed

Plaintiff was an apprentice employee of defendant hospital within the meaning of the Workers' Compensation Act, and his sole remedy for injuries received in a fall in the hospital is under the Act, where plaintiff was a student at Durham Technical Institute who worked at defendant hospital as a respiratory therapist; plaintiff was not paid monetarily but instead received the benefits of acquiring the practical skills required in accomplishing the tasks a respiratory therapist must perform; and in turn, defendant hospital received the

same benefit it would receive from one of its regular employees. N.C.G.S. § 97-10.1.

Am Jur 2d, Workers' Compensation § 116.

APPEAL by plaintiff from Order entered 1 April 1991 by *Judge Anthony M. Brannon* in DURHAM County Superior Court. Heard in the Court of Appeals 12 February 1992.

Hayes Hofler & Associates, P.A., by R. Hayes Hofler and Laurel E. Solomon, for plaintiff appellant.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr., and Carolyn Sprinthall Knaut, for defendant appellee.

COZORT, Judge.

Plaintiff Charles Ryles brought a tort action against defendant Durham County Hospital Corporation, Inc., seeking to recover damages for an injury he sustained from a slip and fall at Durham County General Hospital ("Hospital"). Defendant averred in its answer that plaintiff was injured while working at the hospital as part of an on-the-job training program through Durham Technical Institute. Defendant claimed the plaintiff's action was barred by the exclusive remedy provisions of N.C. Gen. Stat. § 97-10.1, the Workers' Compensation Act, and filed a motion to dismiss for lack of subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and Rule 12(h)(3) (1990). During the course of the motion hearing, the trial judge converted the motion to dismiss into a motion for summary judgment. The trial court entered an order granting summary judgment for defendant. We affirm.

The pleadings, depositions, and other materials in the record demonstrate that plaintiff began studying respiratory therapy at Durham Technical Institute ("DTI") in September of 1986. The respiratory therapy training program at DTI was a two-year program divided into halves. The first year involved classroom work where students attended science courses and received laboratory instruction. The second year of the program included an apprenticeship at affiliated area hospitals such as defendant's hospital. The apprenticeship program was created by contractual agreement between DTI and the defendant in order to allow program participants to apply their classroom knowledge in a hospital setting. The DTI program required each apprentice to work eight-hour

shifts three days a week at the hospital. These shifts were the same length as regular employee shifts. The students spent the remaining two days of the week attending classroom lectures and learning advanced laboratory procedures at DTI. The apprentices achieved the skills of a regular respiratory therapist by observing and by then performing the procedures. A hospital therapist would demonstrate a procedure and then supervise the apprentice who would perform the same procedure on a patient. While at the hospital, participants in the program were expected to master the skills needed to become respiratory therapists, including oxygen delivery, aerosol therapy, patient assessments, incentive spirometry, patient evaluations, and patient intubation. Patients were billed by the hospital for the same amount regardless of whether procedures were performed by an apprentice or by a regularly employed respiratory therapist.

Program participants were not reimbursed for their work by the hospital. They were required to provide their own lab coats and to wear tags identifying themselves as students. The hospital did not provide reserved parking spaces for the participants; they parked in visitors' spaces. While at work, the apprentices were required to follow the rules and regulations required of all hospital employees and could be dismissed from the program for infractions. Program participants were not required, however, to attend safety meetings which were mandatory for permanent hospital employees. DTI's policy with respect to the respiratory therapy clinical program provided:

> If injured during clinical rotations at the clinical affiliate, you are advised to seek medical assistance or care at the affiliate's emergency room. The student is fully responsible and liable for ALL charges and fees resultant from the delivery of medical care. It is advised that the student maintain health and accident insurance coverage for protection. Durham Technical Institute and the clinical affiliates maintain no liability for injury of [*sic*] illness occurrring [*sic*] during clinical rotations.

When plaintiff arrived for his morning shift on 30 September 1987, he slipped in a puddle of water just inside the second level entrance of the hospital, fell down, and sustained physical injury. He brought a tort action against defendant to recover damages. Defendant filed a motion to dismiss plaintiff's claim for lack of

subject matter jurisdiction pursuant to N.C. Gen. Stat. § 1A-1, Rules 12(b)(1) and 12(h)(3). Defendant contended plaintiff's sole remedy existed pursuant to N.C. Gen. Stat. § 97-10.1 (1991) under the Workers' Compensation Act (the "Act"). The trial court agreed and granted summary judgment for defendant.

Although defendant's original motion was to dismiss, where matters outside the pleadings are before the court, a motion to dismiss may be treated as a motion for summary judgment. *Deans v. Layton*, 89 N.C. App. 358, 362, 366 S.E.2d 560, 563, *disc. review denied*, 322 N.C. 834, 371 S.E.2d 276 (1988). Our standard for reviewing a summary judgment motion is whether the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits, if any, demonstrate there is no genuine issue as to a material fact and that the moving party is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990); *Meadows v. Cigar Supply Co.*, 91 N.C. App. 404, 406, 371 S.E.2d 765, 766 (1988). "Every court necessarily has the inherent judicial power to inquire into, hear and determine questions of its own jurisdiction, whether of law or fact, the decision of which is necessary to determine the questions of its jurisdiction." *Lemmerman v. Williams Oil Co.*, 318 N.C. 577, 580, 350 S.E.2d 83, 86, *reh'g denied*, 318 N.C. 704, 351 S.E.2d 736 (1986).

According to N.C. Gen. Stat. § 97-2(2) (1991), an "employee" for purposes of the Act "means every person engaged in an employment under any appointment or contract of hire or apprenticeship, express or implied, oral or written." In the case below, the trial court found the plaintiff to be an "apprentice" of the defendant as a matter of law and as such, the plaintiff's sole civil remedy was through a workers' compensation claim. On two other occasions, this Court has upheld the dismissal of tort claims brought by plaintiffs who were found to be apprentices and thus within the scope of the Act. First, in *Wright v. Wilson Memorial Hosp.*, 30 N.C. App. 91, 226 S.E.2d 225, *disc. review denied*, 290 N.C. 668, 228 S.E.2d 459 (1976), this Court decided that as a matter of law, a participant in a laboratory assistantship program was acting as an "apprentice" undergoing on-the-job training and was considered an employee subject to the provisions of the Act. The facts in the present case bear a striking resemblance to those in *Wright*. In *Wright*, Holding Technical Institute, (now Wake Technical Institute) contracted with Wilson Memorial Hospital, Inc., to permit students to receive on-the-job training at the hospital.

The participants in the lab technician program worked 40 hours per week, received hands-on training, laundry privileges, and room and board. The lab technician students, as in the case at bar, did not receive salaries but were required to abide by hospital rules and regulations adopted for regular employees. *Id.* at 92, 226 S.E.2d at 226. In upholding the trial court's entry of summary judgment for the defendant hospital, the Court in *Wright* stated:

> The job status of apprentice medical-related personnel is highly problematic and usually must be determined not only on a case-by-case basis but also with special regard to relevant statutory provisions. Though possibly and seemingly incongruous, a lab technician trainee could be considered a student for some purposes and an employee for others. . . . [W]e are concerned with coverage under the Workmen's Compensation Act of trainees who learn primarily from work in a hospital affiliated with a technical school the practical and technical skills required for employment in their training specialty. We find these trainees not to be primarily students, but rather to be apprenticeship employees within the meaning of the Workmen's Compensation Act.

Id. at 93, 226 S.E.2d at 226-27.

In forming its conclusion, the Court in *Wright* relied in part on *Galligan v. St. Vincent's Hosp.*, 28 A.D.2d 592, 279 N.Y.S.2d 886 (1967). In *Galligan*, a lower New York court determined that a student nurse injured while on the job at defendant hospital was an apprentice for purposes of New York's Workers' Compensation Act. *Galligan*, 279 N.Y.S.2d at 889. The *Galligan* court found the student nurse had been

> rendering a service to the hospital for its pecuniary gain at the time of the accident, under circumstances that made her status similar to that of an apprentice. An apprentice renders services to a master in a trade for the purpose of learning the trade, receiving no remuneration outside of his board and lodging, although the master receives payment for the services rendered by the apprentice.

Id.

The facts in the present case are comparable to those in *Wright* and *Galligan*. No facts in the present case add a legally significant impact which would vary the result found in the above cases. As

in the other cases, the plaintiff was not paid monetarily, but instead received the benefits of acquiring the practical skills required in accomplishing the tasks a respiratory therapist must perform. In turn, the defendant's hospital received the same benefit it would receive from one of its regular employees. The trainees were expected to follow the same general rules and regulations governing regular employees. Placing emphasis on the fact that plaintiff had to wear a name tag designating him as a "student" or that he was forced to use "visitor" parking spaces does not lessen the primary focus of an apprenticeship, as contemplated by the Act. This focus is more importantly the mutual benefit derived by the parties from the apprenticeship relationship. This theory was more recently articulated in *Sutton v. Ward*, 92 N.C. App. 215, 374 S.E.2d 277 (1988). In *Sutton*, the Court held that the plaintiff, a participant in a federally funded CETA program, was an "apprentice" for purposes of the Act. The plaintiff was injured while riding on a county garbage truck. The *Sutton* Court made its determination that the plaintiff qualified as an employee for workers' compensation purposes because the plaintiff was under contract for hire which allowed the employer to exercise control over plaintiff while he worked, and because of the plaintiff's status as an apprentice. *Id.* at 217-18, 374 S.E.2d at 279-80. The Court acknowledged the dictionary definition of an apprentice as "one who is learning by practical experience," and emphasized the mutual benefits arising from the plaintiff's labor. *Id.* at 218, 374 S.E.2d at 280. Further, the Court explained that the "[p]laintiff received training to enable him to better compete in the job market." *Id.* The reasoning in *Sutton* bolsters the trial court's conclusion in the case at bar. Plaintiff stated in his deposition:

> [In the fourth quarter] we are basically doing a little more therapy ourselves but being proctored the whole time with somebody standing right over us watching us and also on Mondays and Fridays still taking our classes.
>
> * * * *
>
> Well, basically we were, as they say, "senior students" and we were allowed to do more. The hospitals were hiring us then. Like Durham County hired several of our classmates and Duke hired me to do general care and U.N.C. Chapel Hill hired a couple to work over there and do general care for them in OT rounds. We were more or less—we had gotten

> through—we knew enough now that we could actually be performing in a hospital.

Therefore, we are of the opinion that while plaintiff may have been a student at DTI, when he entered the hospital to perform respiratory therapy, his status changed to apprentice, making him subject to the Workers' Compensation Act.

Plaintiff maintains that he was specifically not covered by the defendant's hospital workers' compensation policy and therefore has no other remedy than through a civil action. We find no evidence in the record indicating the truth of this allegation. The record does reflect that the program supervisor was unsure about the applicability of workers' compensation to the respiratory therapist program participants. Furthermore, even assuming plaintiff was excluded from coverage under the hospital's policy, the employer's lack of workers' compensation insurance does not bar an employee's remedy through workers' compensation. *Ashe v. Barnes*, 255 N.C. 310, 121 S.E.2d 549 (1961). An employer must pay benefits to its employees, whether the employer has the necessary insurance, is self-insured, or has no insurance at all. N.C. Gen. Stat. § 97-95 (1991). An employee not covered by a workers' compensation policy has recourse pursuant to statute:

> As to every employer subject to the provisions of this Article who shall fail or neglect to keep in effect a policy of insurance against compensation liability arising hereunder with some insurance carrier as provided in G.S. 97-93, or who shall fail to qualify as a self-insurer as provided in the Article, in addition to other penalties provided by this Article, such employer shall be liable in a civil action which may be instituted by the claimant for all such compensation as may be awarded by the Industrial Commission in a proceeding properly instituted before said Commission . . . .

Id. Once the award is rendered by the Industrial Commission, the employee may bring a civil action to enforce the award. *Ashe*, 255 N.C. at 315, 121 S.E.2d at 552.

In summary, the trial court lacked subject matter jurisdiction to hear this case and properly granted summary judgment for defendant. Plaintiff must pursue the appropriate remedy through a workers' compensation claim. The trial court's order of summary judgment for defendant is

Affirmed.

Judges EAGLES and ORR concur.

JOHN G. BASHFORD, PETITIONER v. NORTH CAROLINA LICENSING BOARD FOR GENERAL CONTRACTORS, RESPONDENT

No. 9110SC656

(Filed 15 September 1992)

1. **Administrative Law § 67 (NCI4th)— review of final agency decision—interpretation of statutory term—de novo review proper**

The Court of Appeals could employ a *de novo* rather than a "whole record" review of a final decision by respondent board suspending petitioner's general contractor's license for gross negligence, since the issue on appeal was whether respondent board erred in interpreting the term "gross negligence."

Am Jur 2d, Administrative Law §§ 656, 697.

2. **Contractors § 10 (NCI4th)— general contractor—revocation of license for violation of building code—no gross negligence**

"Gross negligence" on the part of a general contractor for which respondent may revoke his license requires more than a violation of the building code; rather, gross negligence is wanton conduct done with conscious or reckless disregard for the rights and safety of others. In this case where petitioner installed a steel angle support in violation of the building code, there was no evidence of any wanton disregard for the safety of others or a thoughtless disregard for the consequences of his action nor any indication of danger to persons or property, and the trial court therefore erred in finding petitioner grossly negligent.

Am Jur 2d, Building and Construction Contracts § 130.

APPEAL by both parties from a consent order entered 3 April 1991 by *Judge Narley L. Cashwell* in WAKE County Superior Court and appeal by respondent from an order entered 14 February 1990

by *Judge I. Beverly Lake, Jr.* in WAKE County Superior Court. Heard in the Court of Appeals on 12 May 1992.

Shipman & Lea, by Gary K. Shipman, for petitioner.

Bailey & Dixon, by Carson Carmichael, III and Rodney B. Davis, for respondent-appellee.

Bailey & Dixon, by Carson Carmichael, III and Ann L. Johnston, for respondent-cross appellant.

LEWIS, Judge.

Petitioner-Bashford is a general contractor who contracted with the Parkers to build a house in Raleigh utilizing a set of plans prepared by an independent design firm. Petitioner had never performed the type of masonry work required by the plans. According to the North Carolina State Building Code (Code), masonry must be supported by either steel, concrete, or masonry. Petitioner took the plans, which specified steel, to North Carolina Steel (NCS) to have the appropriate steel angle fashioned to support the nonstructural masonry veneer on the gable over the garage. The angle NCS proffered was thicker than the Code mandated, but it permitted only one lag screw per stud rather than the Code's required two per stud. Unable to insert two lag screws per stud, the framing contractor used an alternative method called "per-line blocking" to install the angle. This method entailed laying steel on the roof and blocking "down the rafters on the roof and fasten[ing] the lag bolts into the blocking, as opposed to the studs."

On 8 July 1987, a Raleigh City Building Inspector inspected the frame work and the steel angle installation. Petitioner testified that the steel angle was inspected prior to being covered by the brick veneer and that it passed inspection. A certificate of occupancy was issued and the Parkers moved into the house under a rental agreement at the end of August 1987. The Parkers refused to close upon the house until petitioner completed the work on their punch list. After the submission of several punch lists, a closing date was set for 7 October 1987. Upon failure to complete certain finish work, the Parkers filed suit against petitioner and again refused to close on the house.

The Parkers submitted multiple complaints to the Raleigh City Building Inspector's office. When that office's efforts failed to yield relief, the Parkers filed a complaint against the Raleigh Inspector's

Office with the state. As a result, a code consultant for the North Carolina Department of Insurance inspected the Parkers' residence on 8 September 1988 and determined that "the steel angle and the masonry above are probably supported on the wood roof structure" which is in violation of the Code. By consent order filed 14 November 1988, the Parkers agreed to purchase the house for the contract price of $162,000.00 plus interest from 29 August 1987. The Parkers and Bashford agreed to "waive, release and quitclaim any and all claims that may presently exist between them concerning the house and real property in question and their relationship concerning said property." Closing took place on 28 November 1988.

On 5 May 1989, the North Carolina Licensing Board for General Contractors (Board) issued a Notice of Hearing which alleged that petitioner was grossly negligent, incompetent or had committed misconduct in the practice of general contracting pursuant to N.C.G.S. § 87-11(a), by constructing a residence for the Parkers which did not properly support the brick veneer on the gable over the garage. The evidence presented at the hearing tended to show that the steel angle support did not meet Code. Several witnesses testified that there was no evidence of structural failure in the area of the support. A Code consultant gave his opinion that despite the lack of visible damage, the support was unsafe. A structural engineer for the North Carolina Department of Transportation testified that the brick veneer was adequately supported. The final decision, issued 7 July 1989, found petitioner to be grossly negligent for violating the Code with regard to the steel angle masonry support. The Board suspended petitioner's general contractor's license for six months to begin upon completion of contracts in hand. The imposition of this sanction was itself suspended and petitioner was placed on probation for one year on the condition that he fix the defects in the Parkers' house.

Petitioner appealed the final agency decision to the Wake County Superior Court pursuant to N.C.G.S. § 150B-45. The trial court found that the provisions of the settlement of the Parkers' suit against petitioner precluded the Board from conditioning a suspension of sanctions upon completion of remedial work upon the Parkers' residence. By judgment signed 14 February 1990, the trial court affirmed the Board's finding petitioner grossly negligent, but reversed and remanded on the issue of sanctions. The trial court remanded the case to the Board for the "imposition of appropriate sanctions not to exceed a six-months active suspension of peti-

tioner's license." Both parties appealed to this Court; the appeal and cross appeal were dismissed. Upon remand, the Board issued a final decision, 10 December 1990, in which it suspended petitioner's license for six months and placed him on probation for six months following the suspension. By consent order the trial court affirmed the final agency decision. By appeal and cross appeal both parties seek review in this Court.

Petitioner appeals the suspension of his general contractor's license arguing that he was not grossly negligent. The Board appeals the trial court's judgment signed 14 February 1990. The Board argued that the settlement of the suit between the Parkers and petitioner did not preclude the Board's ability to condition the suspension of an active sanction on the completion of remedial work on the Parkers' residence. Because we find for petitioner on the issue of gross negligence, it necessarily follows that the question of sanctions are no longer an issue to be decided in this case. Therefore, the only issue to be discussed will be that of whether there is sufficient evidence to find petitioner grossly negligent in the practice of general contracting.

[1] First, we address the appropriate standard of review. Petitioner argues for a *de novo* review, while the Board argues for a "whole record" review. The Board is an agency subject to the Administrative Procedures Act, Chapter 150B. According to N.C.G.S. § 150B-51(b) the review of a final agency decision is a "whole record test." *In re Appeal of K-Mart Corp.*, 319 N.C. 378, 380, 354 S.E.2d 468, 469 (1987). The reviewing court is "bound by the findings of the [agency] if they are supported by competent, material, and substantial evidence in view of the entire record as submitted." *Id.* (citation omitted). However:

> [w]hen the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review. (Citations omitted). Although the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference by appellate courts, those interpretations are not binding.

Savings and Loan League v. Credit Union Comm., 302 N.C. 458, 465, 276 S.E.2d 404, 409-10 (1981).

[2] Essentially, the propriety of the Board's action turns upon the meaning accorded the term "gross negligence" in the governing statute N.C.G.S. § 87-11(a). The statute provides

> The Board shall have the power to revoke the certificate of license of any general contractor licensed hereunder who is found guilty of any fraud or deceit in obtaining a license, or *gross negligence*, incompetency or misconduct in the practice of his profession, or willful violation of any provisions of this Article. . . .

N.C.G.S. § 87-11(a) (emphasis added). We note that "gross negligence" is not defined within N.C.G.S. § 87-11. Though violations of the building code have been held to constitute "negligence *per se,*" *Sullivan v. Smith*, 56 N.C. App. 525, 527, 289 S.E.2d 870, 871, *disc. rev. denied*, 306 N.C. 392, 294 S.E.2d 220 (1982) (citations omitted), case law does not address the circumstances necessary to elevate mere negligence, within the administrative decisionmaking process, to that of gross negligence. Further, the Board, which is required to "adopt and publish guidelines, . . ., governing the suspension and revocation of licenses" has not presented evidence to show that it has defined gross negligence. N.C.G.S. § 87-11(b).

The Board argues that the courts should defer to it and permit it to define gross negligence. According to the Board "what constitutes gross negligence in this context is essentially a fact-finding process calling for application of the Board's expertise." Petitioner argues that we should utilize statutory interpretation to define the term gross negligence in N.C.G.S. § 87-11. Petitioner urges this Court to engraft upon the statute at issue the common law definition of gross negligence, as developed in tort law.

We find petitioner's argument persuasive. Statutes should be interpreted according to the "common law as it was understood at the time of the enactment of the statute." *In re Banks*, 295 N.C. 236, 240, 244 S.E.2d 386, 389 (1978) (citation omitted). In *Cole v. Duke Power Co.*, 81 N.C. App. 213, 344 S.E.2d 130, *disc. rev. denied*, 318 N.C. 281, 347 S.E.2d 462 (1986) another panel of this Court affirmed the following jury instruction as a correct statement of the law:

> Ordinary negligence is the lack of reasonable care. Gross negligence is an extreme departure from the ordinary standard

> of conduct. It is very great danger. It is negligence materially greater than ordinary negligence. The difference is one of degree.
>
> Gross negligence is negligence of an aggravated character and a gross failure to exercise reasonable care.
>
> *The term implies a thoughtless disregard of consequences without exerting any effort to avoid it.*
>
> Gross negligence means a greater absence of reasonable care than is implied by the term, ordinary negligence.

Id. at 219, 344 S.E.2d at 133-34 (emphasis original). The Board puts forth the definition of gross negligence found in *Bullins v. Schmidt*, 322 N.C. 580, 369 S.E.2d 601 (1988): "wanton conduct done with conscious or reckless disregard for the rights and safety of others." *Id.* at 583, 369 S.E.2d at 603 (citations omitted).

The Board argues that petitioner was grossly negligent because his installation of the steel angle support, despite its violation of the Code, demonstrated a disregard for the safety of others. We disagree. From the above, it appears that more than a violation of the building code is required to reach the somewhat elevated level of gross negligence. The Board's findings of fact and our review of the record reveal only a violation of the Code. There is no evidence of a wanton disregard for the safety of others or a thoughtless disregard for the consequences of his actions nor any indication of danger to persons or property. Without such evidence of gross negligence, the Board's decision is reversed.

The portion of the trial court order which affirmed the Board's finding petitioner grossly negligent is reversed. The portion of the trial court order which remanded the case for imposition of alternative sanctions is vacated.

Reversed in part and vacated in part.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA v. AL KAREEM FLOWE

No. 9226SC352

(Filed 15 September 1992)

1. Criminal Law § 499 (NCI4th)— defendant's statement taken into jury room over objection—error not prejudicial

The trial court's error in allowing, over defendant's objection, the jury's request to view defendant's statement during deliberations was not prejudicial, since the statement was read to the jury in its entirety by the investigating officer, and portions of it were reread by the assistant district attorney; the victim positively identified defendant; defendant himself testified that he had a gun, pointed it at the victim, and told him to "give it up"; and a reasonable possibility therefore did not exist that denial of the jury's request would have resulted in a different outcome. N.C.G.S. § 15A-1233(b).

Am Jur 2d, Trial § 1672.

Permitting documents or tape recordings containing confessions of guilt or incriminating admissions to be taken into jury room in criminal case. 37 ALR3d 238.

2. Criminal Law § 1102 (NCI4th)— sentence—nonstatutory aggravating factor found—factor not sought by State—no error

The trial court did not err by finding a nonstatutory aggravating factor, despite the fact that the State did not request the trial court to do so.

Am Jur 2d, Criminal Law § 598.

APPEAL by defendant from judgment entered 12 December 1991 by *Judge Forrest A. Ferrell* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 4 September 1992.

Attorney General Lacy H. Thornburg, by Associate Attorney General Deborah L. McSwain, for the State.

Goodman, Carr, Nixon & Laughrun, by George V. Laughrun, II, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 12 December 1991, which judgment is based on a jury verdict convicting defendant of attempted robbery with a dangerous weapon, N.C.G.S. § 14-87 (1986).

The State's evidence tends to show that on 21 August 1991, defendant and two other men were riding in a Nissan automobile with defendant driving. They approached Darren Morgan (Morgan), who had just finished work and was waiting by the side of the road for his father (Mr. Morgan) to pick him up. Defendant pointed a gun at Morgan and demanded that Morgan give up his money. Morgan refused and defendant told him to give him a necklace Morgan was wearing. Morgan again refused. Defendant began unlocking his door, and Morgan pulled out his wallet to show defendant that it was empty.

At this time, Mr. Morgan pulled up in his truck behind defendant and defendant turned to look. When his back was turned, Morgan ran, yelling to Mr. Morgan to get the license number of the Nissan because the occupants were trying to rob him. Defendant drove away, and Morgan got into the truck with his father and began pursuing defendant. During the course of the chase, defendant's two passengers fired three shots, at least one of which was fired in the direction of Mr. Morgan's truck. The Morgans gave up the chase and reported defendant's license tag number to police.

Police went to defendant's residence where defendant and his companions were found. A gun was found on one of the men, and the three were taken to a gas station where the Morgans identified defendant as the driver of the car. Defendant was interviewed by Detective Don Rock (Detective Rock). Defendant signed a juvenile waiver of rights and a statement corresponding to the above facts, which was read to the jury by Detective Rock and admitted into evidence at trial. In addition, the court, over defendant's objection, granted the jury's request to take defendant's handwritten statement into the jury room during deliberations.

Defendant testified on his own behalf, and, in addition, presented the testimony of two witnesses. The jury convicted defendant of attempted robbery with a dangerous weapon.

At sentencing, defendant presented evidence of certain mitigating sentencing factors to the trial court. The State offered

no evidence at the sentencing hearing. The trial court found all of the statutory mitigating sentencing factors proffered by defendant. The court also found *sua sponte* the following non-statutory aggravating factor:

> After the commission of the crime charged, for which the defendant was convicted, and after the victim, Morgan, had fled the scene of the attempted robbery, the defendant and two of his accomplices fled the scene of the attempted robbery by means of a motor vehicle. The victim and others gave pursuit by motor vehicle. Two persons in the defendant's vehicle fired a hand gun at the victim in the vehicle he was occupying.
>
> The same constitutes assault with a deadly weapon or assault by pointing a gun. The defendant acted in concert with two others in the commission of this assault, which was a separate and independent act, apart from the attempted armed robbery charged in this case, which constitutes an aggravating factor.

The trial court determined that the aggravating factor outweighed the mitigating factors, and sentenced defendant to eighteen years active imprisonment, a term in excess of the presumptive term. Defendant appeals.

The issues presented are whether I) the trial court committed prejudicial error by permitting the jury to take defendant's written statement into the jury room during deliberations; and II) the trial court committed prejudicial error in finding a non-statutory aggravating sentencing factor which was not advocated by the State at defendant's sentencing hearing.

I

[1] Defendant argues that the trial court's granting of the jury's request to view defendant's statement during deliberations constitutes prejudicial error.

North Carolina Gen. Stat. § 15A-1233(b) provides in pertinent part that "[u]pon request by the jury and with consent of all parties, the judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence." N.C.G.S. § 15A-1233(b) (1988). The above statute has been construed to require the agreement of all parties to allow

a jury to examine an exhibit in the jury room. *State v. Barnett*, 307 N.C. 608, 300 S.E.2d 340 (1983). In the instant case, it is undisputed that upon the jury's request for defendant's statement, the trial court permitted the document to be taken into the jury room over defendant's objection. To do so was error by the court.

In order for this error to warrant reversing defendant's conviction, however, defendant is required to show that, absent the court's error, "there is a reasonable possibility that . . . a different result would have been reached at trial." N.C.G.S. § 15A-1443(a) (1988); *State v. Huffstetler*, 312 N.C. 92, 114, 322 S.E.2d 110, 124 (1984), *cert. denied*, 471 U.S. 1009, 85 L. Ed. 2d 169 (1985). Defendant has failed to meet this burden. During the trial, the statement in question was read to the jury in its entirety by Detective Rock, and portions of the statement were reread by the Assistant District Attorney. In addition to the statement, evidence presented against defendant included the testimony of the victim who positively identified defendant, the testimony of the officer who interviewed defendant on the night of the incident to whom defendant dictated the statement, and defendant's own testimony wherein he admitted having the gun, pointing it at the victim, telling the victim to "give it up," being followed by the victim, and that his passengers shot at the men following them. In light of this evidence of defendant's guilt, a reasonable possibility does not exist that a ruling by the trial court denying the jury's request to view defendant's statement during deliberations would have resulted in a different outcome. This assignment of error is, therefore, overruled.

II

[2] Defendant argues that the trial court's finding of a non-statutory aggravating factor which was not offered by the State at the sentencing hearing constitutes reversible error. Defendant does not contend that the factor itself is insupportable, but instead argues that the court should not be allowed to find factors in aggravation which are not sought by the State.

In sentencing a defendant, the trial court is required to consider the statutory list of aggravating and mitigating factors before imposing a sentence other than the presumptive one for the particular offense. *State v. Parker*, 315 N.C. 249, 255, 337 S.E.2d 497, 501 (1985). The trial court may, in its discretion, consider non-statutory aggravating factors which are reasonably related to the purposes of sentencing and supported by a preponderance of the

evidence in the case in determining whether to increase the presumptive term. N.C.G.S. § 15A-1340.4(a) (1988); *State v. Taylor*, 322 N.C. 280, 287, 367 S.E.2d 664, 668 (1988); *see also State v. Holden*, 321 N.C. 689, 697, 365 S.E.2d 626, 630 (1988) (consideration of non-statutory factors is a matter within the sound discretion of the trial judge). However, the trial court *must* consider all circumstances that are both transactionally related to the offense and reasonably related to the purposes of sentencing, provided that they are not essential to the establishment of elements of the offense. *State v. Melton*, 307 N.C. 370, 378, 298 S.E.2d 673, 679 (1983); *State v. Teague*, 60 N.C. App. 755, 757, 300 S.E.2d 7, 8 (1983); *see also State v. Josey*, 328 N.C. 697, 700-01, 403 S.E.2d 479, 481 (1991). This is so regardless of whether such factors are specifically listed under Section 15A-1340.4(a)(1), *see Melton*, 307 N.C. at 376, 298 S.E.2d at 678 (premeditation and deliberation required to be considered by trial court as non-statutory aggravating factor where they were reasonably related to purposes of sentencing and transactionally related to the offense), and regardless of whether the State specifically requests a finding in this regard. *See* J. Weissman, *Sentencing Due Process: Evolving Constitutional Principles*, 18 Wake Forest L. Rev. 523, 533-34 (1982) (sentencing hearings are primarily inquisitorial proceedings which "advance an investigatory, proactive focus"); *cf. State v. Smith*, 41 N.C. App. 600, 602, 255 S.E.2d 210, 212 (1979) (pursuant to N.C.G.S. § 15A-1334, trial court free at sentencing hearing to call witnesses on its own initiative).

In determining the existence of aggravating factors, the trial court may rely on evidence presented at the sentencing hearing, *see* N.C.G.S. § 15A-1334(b) (1988) (setting forth requirements of sentencing hearings), or, when a defendant pleads guilty, on the circumstances surrounding the offense, including factual allegations contained in the indictment or other criminal process, despite the fact that the State fails to present evidence at sentencing. *See State v. Lloyd*, 89 N.C. App. 630, 637, 366 S.E.2d 912, 917 (1988), *disc. rev. denied*, 322 N.C. 483, 370 S.E.2d 231 (1988); *State v. Thompson*, 314 N.C. 618, 623-25, 336 S.E.2d 78, 81-82 (1985) (where indictment listed the value of items, State's failure to produce evidence of value of items stolen did not preclude trial court from finding as an aggravating factor that the offense involved taking of property of great monetary value). Likewise, when a defendant does not plead guilty, but is found guilty after a trial, the trial court in sentencing the defendant may rely on circumstances brought

out at trial and supported by a preponderance of the evidence in determining the existence of aggravating factors, even though the State does not present evidence of such circumstances at the sentencing hearing. *See State v. Rios*, 322 N.C. 596, 598, 369 S.E.2d 576, 577-78 (1988) (upholding trial court's finding of aggravating sentencing factor which was based solely on evidence presented at defendant's trial); *Taylor*, 322 N.C. at 287, 367 S.E.2d at 668.

An application of the foregoing principles to the instant case reveals that the trial court did not err by finding the non-statutory aggravating factor in question. The State presented uncontradicted evidence at defendant's trial that passengers in defendant's car fired shots at the victim and his father as they chased defendant in Mr. Morgan's truck. Because this circumstance occurred during defendant's attempt to flee the scene of the attempted robbery, it is transactionally related to the offense of which defendant was convicted, yet is not an essential element of the offense. In addition, consideration of this circumstance is reasonably related to the sentencing purpose of "impos[ing] a punishment commensurate with the injury the offense has caused, taking into account factors that may . . . increase the offender's culpability." N.C.G.S. § 15A-1340.3 (1988). Thus, under *Melton* and *Teague*, the trial court properly considered this evidence in determining the existence of any aggravating sentencing factors, despite the fact that the State did not request the trial court to do so.

No error.

Judge ARNOLD concurs.

Judge PARKER concurs in the result only.

ALBERT B. SMALL, PLAINTIFF v. SHELBY H. SMALL, DEFENDANT AND THIRD-PARTY PLAINTIFF v. ALJO ENTERPRISES, INC., THIRD-PARTY DEFENDANT

No. 9126DC739

(Filed 15 September 1992)

Trial § 58 (NCI3d)— attempted division of marital property—no final judgment—proceeding remanded

In a proceeding which attempted a division of the parties' properties, the findings of fact and conclusions of law set forth in the judgment of the district court did not finally resolve the issues raised; therefore, the judgment is vacated and the cause remanded to the district court, and the parties are admonished to closely examine and clarify the claims being put before the court for redress and to carefully consider the remedies available.

Am Jur 2d, Divorce and Separation §§ 864 et seq.

APPEAL by all parties from *Cantrell (Daphene L.), Judge.* Judgment entered 19 March 1991 in District Court, MECKLENBURG County. Heard in the Court of Appeals 24 August 1992.

Plaintiff Albert Small filed a complaint on 6 March 1987 for absolute divorce based upon the continuous separation of the parties for one year. Defendant Shelby Small filed an answer wherein she joined in plaintiff's request for an absolute divorce and counterclaimed against plaintiff for equitable distribution and alimony. As an alternative to her claim for equitable distribution, defendant requested that the court divide certain real and personal property acquired by the parties during the marriage pursuant to the terms of various contracts between plaintiff and defendant, and between defendant and the third-party defendant Aljo Enterprises, Inc. (hereinafter "Aljo"), a corporation wholly owned by plaintiff. Along with her answer, defendant filed a third-party complaint to bring Aljo into the lawsuit.

Plaintiff responded to defendant's counterclaims by denying defendant's right to equitable distribution and alimony due to the various agreements between the parties wherein defendant had waived all such marital rights. Plaintiff agreed however that defendant was entitled to certain property pursuant to the contracts

set forth by defendant, and plaintiff requested that the court determine the interests of each party in the various properties. Third-party defendant Aljo answered by also admitting that defendant was entitled to some interest in certain real properties titled in the name of the corporation and requested that the court determine the "appropriate division" of these properties pursuant to the contracts between the parties.

An absolute divorce was granted by the trial court on 13 April 1987. Defendant's counterclaims for equitable distribution and alimony were denied by summary judgment which was upheld on appeal by this Court. *Small v. Small*, 93 N.C. App. 614, 379 S.E.2d 273, *disc. review denied*, 325 N.C. 273, 384 S.E.2d 519 (1989). On 27 November 1990, all counterclaims of the defendant came on for trial before Judge Daphene L. Cantrell who heard the matter without a jury.

The evidence presented at trial tends to show that on 11 August 1978 defendant and Aljo entered into a joint venture agreement wherein Aljo agreed to purchase in its name certain real property in Mecklenburg County, identified as Lot 57 in section 42 Lake Wylie Recreation Lots. This particular piece of property came to be known as "Seclusion #1." Defendant paid $6,000 of her personal funds towards the purchase of the property and Aljo invested the remainder of the purchase price. The contract specified that defendant and Aljo would continue to invest funds into the maintenance and management of the property and that both would be entitled to share in any rental or sale proceeds from Seclusion #1 in proportion to their respective capital contributions. On 4 September 1985, defendant and Aljo executed a "Ratification of Contract" which purported to "ratify and confirm" the terms of the original joint venture agreement between these parties. Both defendant and Aljo agree that, at the time of trial, the joint venture also owned various other assets along with the deed to Seclusion #1 and that those other assets would also be subject to the division provisions of the joint venture agreement.

On 30 October 1980, plaintiff and defendant entered into a "Post-Nuptial Contract" wherein both parties relinquished all marital rights in the property of the other and agreed that, in the event of divorce, all real and personal property jointly acquired by the parties during the course of the marriage would be divided between them "in accordance with the relative percentages of ownership

of each party therein as established by the books and records of the parties." Plaintiff and defendant thereafter entered into two "Separation Agreements," one being executed on 4 September 1985 and the other on 12 September 1985. The terms of each agreement are identical and specify that, despite the separation of plaintiff and defendant, the terms of the Post-Nuptial agreement remained in "full force and effect."

These separation agreements also identified the property which plaintiff and defendant considered to be jointly acquired property which would be divided upon divorce in accordance with the terms of the Post-Nuptial Contract. Those properties identified included a lease of a lot on Lake Wylie known as 19226 Hennepin Avenue, a lease of a lot on Lake Wylie known as 17513 Due West Drive, lot 56 on Lake Wylie known as "Seclusion #2," and "certain furniture, furnishings, appliances, equipment and other personal property."

During the trial, both plaintiff and defendant presented the testimony of accountants who offered to the court conflicting opinions concerning the percentage of ownership attributable to plaintiff, defendant and Aljo in Seclusion #1, Seclusion #2, and the two leased properties based upon the respective capital contributions of each "reflected in the books and records" of the parties. The court further heard evidence concerning a Promissory Note in the amount of $11,000 executed by plaintiff in favor of defendant on 3 October 1980 which, by its terms, became due and payable in full upon divorce of the parties.

Upon conclusion of the evidence the trial court made extensive findings of fact concerning the accounts of each party and reached similarly extensive conclusions of law. The court then entered a judgment which declared that, as of a date 60 days following the date of the divorce between the parties, Aljo owned 72.63% of Seclusion #1 and defendant owned 27.37% of that property, that plaintiff owned 58.06% of Seclusion #2 and defendant owned 41.94% of that property, and that plaintiff owned 63.14% and 83.13% respectively of the two leased lots, leaving defendant with 36.85% and 16.87%. The court ordered that rental proceeds earned by the various properties since the date 60 days following the divorce of the parties be divided in accordance with those percentages. The judgment further ordered that the promissory note executed by plaintiff in favor of defendant be reduced to $5,000 to reflect

an amount given by plaintiff to defendant following the separation of the parties relating to the purchase of an automobile by defendant.

The judgment of the trial court does not establish a value for any of the properties subject to the agreements between the parties nor does it make a division of any asset. All parties appealed the order, assigning as error various aspects of the court's accounting of the respective capital contributions as well as the dates upon which the court chose to determine the percentages of ownership.

William G. Robinson, for plaintiff and third-party defendant, appellees, cross-appellant.

Joe T. Millsaps, and Cecil M. Curtis, for defendant and third-party plaintiff, appellant, cross-appellee.

HEDRICK, Chief Judge.

In *Paradise Lost* John Milton described Hell as "confusion worst confounded." This proceeding, we dare not call it a case or a cause, has confused and confounded the parties, the lawyers and the trial judge. Now it confounds us. Despite the obviously well intentioned efforts of the trial lawyers and the trial court, the focus of this legal proceeding has become lost within the complex details of the financial affairs of the parties. The judgment itself as well as the errors assigned thereto by the parties on appeal reflects the loss of direction by all involved.

In a trial without a jury, it is the duty of the trial judge to resolve all issues raised by the pleadings and the evidence by making findings of fact and drawing therefrom conclusions of law upon which to base a final order or judgment. G.S. § 1A-1, Rule 52. *See Rosenthal's Bootery, Inc. v. Shavitz*, 48 N.C. App. 170, 268 S.E.2d 250 (1980); *Associates, Inc. v. Myerly & Equipment Co. v. Myerly*, 29 N.C. App. 85, 223 S.E.2d 545, *disc. review denied and appeal dismissed*, 290 N.C. 94, 225 S.E.2d 323 (1976). When all issues are not so resolved by the trial court, this Court has no option other than to vacate the order and remand the cause to the trial court for completion. *See Rosenthal's Bootery v. Shavitz*, 48 N.C. App. at 173, 268 S.E.2d at 251; *Davis v. Enterprises and Davis v. Mobile Homes*, 23 N.C. App. 581, 209 S.E.2d 824 (1976).

The difficulty in this proceeding is determining what issues, if any, are raised by defendant's counterclaims, the responses of

plaintiff and the third-party defendant, and the evidence presented at trial. Defendant alleges an interest in various items of personal property set forth in the pleading and also in various improved and unimproved parcels of real estate titled in the name of the corporation or in the name of plaintiff. Defendant thereafter prayed the court for "a division of all assets belonging to the parties under a theory of contract." Plaintiff prayed the court "[t]hat the interest of the Plaintiff and Defendant be first determined according to the separation agreement and the post[-] nuptial agreement," and Aljo requested "only that the appropriate division be determined in accordance with the contract made and entered into between the Third[-] party Plaintiff and the Third[-] party Defendant."

The evidence presented at trial, however, attempted only to demonstrate each party's contention as to defendant's percentage of ownership of the parcels of real property based upon her capital contributions throughout the years of the marriage between plaintiff and defendant. The judgment reflects only the evidence presented. The trial court struggled to comprehend the accountings of the expert testimony and the result of that struggle was simply the court's declaration of the various percentages of personal funds expended by defendant in relation to those expended by plaintiff during the course of the marriage. There was no effort by the trial court to finally determine any issue between these parties. There was no determination of value or of possessory rights, and there was no division of assets either in kind or by required purchase. There simply is no final order or judgment presented for our review.

We cannot and we will not undertake to try this case for the parties. We cannot and we will not attempt to resolve on appeal that which is properly resolved in the trial court both prior to an actual trial of the cause and during such trial. Upon remand, we admonish the parties to closely examine and clarify the claims being put before the court for redress and to carefully consider the remedies available.

As we find that the findings of fact and conclusions of law set forth in the judgment of the District Court do not finally resolve the issues raised in this cause, the judgment is vacated and the cause remanded to the District Court for further proceedings in accordance with the laws of this State.

Vacated and remanded.

Judges LEWIS and WYNN concur.

F. AUBREY THACKER, JR. v. PATTY H. THACKER

No. 9121DC732

(Filed 15 September 1992)

1. **Divorce and Separation § 175 (NCI4th)— consent judgment—division of marital assets—agreement made without benefit of counsel—no grounds to set aside under Rule 60(b)**

The trial court properly concluded that the parties' consent order was valid and enforceable and should not be vacated or set aside pursuant to N.C.G.S. § 1A-1, Rule 60(b), though the order was entered into by defendant without benefit of legal counsel, defendant was ignorant of her rights pursuant to the equitable distribution laws of this state, and the order awarded plaintiff a significantly larger portion of the marital assets, since there was no evidence of mutual mistake or fraud on the part of plaintiff, and there was no showing of extraordinary circumstances or that justice demanded relief.

Am Jur 2d, Divorce and Separation § 836.

2. **Divorce and Separation § 175 (NCI4th)— consent judgment—no requirement that judge determine parties' understanding of terms**

There was no merit to defendant's argument that the trial court erred by failing to conclude that a consent judgment was void or irregular due to the failure of the judge who entered the consent order to require both plaintiff and defendant to participate in a voir dire by the court regarding their understanding of the terms of the agreement.

Am Jur 2d, Divorce and Separation § 836.

APPEAL by defendant from *Keiger (R. Kason), Judge.* Order entered 3 June 1991 in District Court, FORSYTH County. Heard in the Court of Appeals 24 August 1992.

Plaintiff instituted this civil action on 3 July 1990 requesting a divorce from bed and board from defendant, possession of the marital homeplace, an equitable distribution of marital property, and a restraining order directing defendant not to dissipate the marital assets of the parties. Defendant did not retain counsel and did not file an answer to plaintiff's complaint. On 20 August 1990, a consent judgment signed by both parties was entered by the trial court. The judgment provided for a full distribution of the parties' marital assets and liabilities. Pursuant to the terms of the consent order, defendant also executed several other documents, including a quitclaim deed transferring all of her interest in the marital homeplace to plaintiff.

Defendant filed a motion pursuant to G.S. § 1A-1, Rule 60(b) on 23 January 1991 requesting that the consent judgment signed by the parties be set aside. Defendant filed an amendment to that motion on 12 March 1991. In support of her motion, defendant alleged that she was "without the benefit of counsel or knowledge of the applicable law" at the time she signed the judgment, that the trial court improperly failed to examine the parties in open court as to their understanding of the judgment prior to its entry of the order, that the judgment was "patently unfair and inequitable," and that plaintiff had fraudulently induced her to sign the document by stating to her "we will work things out and we will get back together, but we still have to get these papers done to keep from going to court." Defendant contends that she would not have signed the consent order had it not been for plaintiff's misrepresentations to her of his intentions concerning their separation.

Upon the hearing of defendant's motion, the trial court made extensive findings of fact and concluded that defendant had failed to show that the consent order was entered due to the mutual mistake of the parties or due to fraud or misrepresentation by plaintiff. The court ruled that the judgment "should not be vacated or set aside pursuant to Rule 60(b)."

Greeson, Grace & Gatto, by Joseph J. Gatto, for plaintiff, appellee.

Morrow, Alexander, Tash, Long & Black, by John F. Morrow, and Clifton R. Long, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first contends the trial court erred "when it concluded that the only grounds available to defendant under a Rule 60(b) motion to obtain relief from a consent judgment were mutual mistake or fraud." Defendant does not argue that the trial court erroneously concluded that the facts set forth in her motion do not support a claim of mutual mistake or fraud on the part of plaintiff. It is clear that no claim of mutual mistake or fraud can be supported by the circumstances of this case. Rather, defendant simply argues that the trial court misinterpreted the rule of law relating to relief from consent judgments.

This assignment of error by defendant has no merit. Regardless of the accuracy of the language of this particular conclusion of the court, it is obvious that the statement was irrelevant to the court's decision. The judgment properly concluded that the consent order "is valid and enforceable and should not be vacated or set aside pursuant to Rule 60(b)." The court properly found that defendant's motion presents no facts justifying relief pursuant to any of the six subparts to Rule 60(b).

Absent a showing of fraud, mutual mistake or a lack of consent, attacks on consent judgments are controlled by Rule 60(b)(6). *State ex rel. Envir. Mgmt. Comm. v. House of Reaford Farms*, 101 N.C. App. 433, 447, 400 S.E.2d 107, 116, *disc. review denied*, 328 N.C. 576, 403 S.E.2d 521 (1991); *In re Will of Baity*, 65 N.C. App. 364, 367, 309 S.E.2d 515, 518 (1983), *cert. denied*, 311 N.C. 401, 319 S.E.2d 266 (1984). Defendant seems to argue that Rule 60(b)(6) should provide her relief from this consent order due to the fact she was not represented by counsel at the time the order was executed, she was ignorant of her rights pursuant to the equitable distribution laws of this State, and the resulting consent order awarded plaintiff a significantly larger portion of the marital assets. Defendant however cites no authority in support of her contention that such circumstances justify Rule 60(b)(6) relief.

Although section (6) of Rule 60(b) has often been termed "a vast reservoir of equitable power," *Anderson Trucking v. Keyway*, 94 N.C. App. 36, 40, 379 S.E.2d 665, 667 (1989); *Sides v. Reid*, 35 N.C. App. 235, 237, 241 S.E.2d 110, 112 (1978), a court cannot set aside a judgment pursuant to this rule without a showing (1) that extraordinary circumstances exist and (2) that justice demands relief. *Howell v. Howell*, 321 N.C. 87, 91, 361 S.E.2d 585, 588 (1987);

State ex rel. Envir. Mgmt. Comm. v. House of Reaford, 101 N.C. App. at 448, 400 S.E.2d at 117; *Anderson Trucking v. Keyway*, 94 N.C. App. at 42, 379 S.E.2d at 669; *Equipment Co. v. Albertson*, 35 N.C. App. 144, 147, 240 S.E.2d 499, 501 (1978); *Sides v. Reid*, 35 N.C. App. at 238, 241 S.E.2d at 112. Further, the remedy provided by Rule 60(b)(6) is equitable in nature and is directed to the discretion of the trial judge. *Kennedy v. Starr*, 62 N.C. App. 182, 186, 302 S.E.2d 497, 499-500, *disc. review denied*, 309 N.C. 321, 307 S.E.2d 164 (1983). This Court will not disturb such a discretionary ruling without a showing of an abuse of that discretion. *Id.*; *Worthington v. Bynum*, 305 N.C. 478, 486-487, 290 S.E.2d 599, 604-605 (1982).

Defendant fails to allege "extraordinary circumstances" and makes no effort to argue abuse of discretion by the trial court. This Court has held on numerous occasions that a lack of counsel and/or an ignorance of the law does not amount to "extraordinary circumstances" without some showing that the lack of counsel or ignorance was due to reasons beyond control of the party seeking relief. *See Wilson v. Wilson*, 98 N.C. App. 230, 390 S.E.2d 354 (1990); *Equipment Co. v. Albertson*, 35 N.C. App. at 147, 240 S.E.2d at 502 (1978); *Sides v. Reid*, 35 N.C. App. at 238, 241 S.E.2d at 112; *Vaglio v. Town & Campus Int., Inc.*, 71 N.C. App. 250, 256, 322 S.E.2d 3, 7 (1984); *Anderson Trucking v. Keyway*, 94 N.C. App. at 43, 379 S.E.2d at 669. Further, a finding that plaintiff received a greater percentage of the marital assets pursuant to the consent judgment would not otherwise be sufficient to render the agreement invalid, *see In re Johnson*, 277 N.C. 688, 696, 178 S.E.2d 470, 475 (1971), and defendant cannot invoke the broad language of Rule 60(b)(6) simply to obtain relief to which she is otherwise not entitled. *See Norton v. Sawyer*, 30 N.C. App. 420, 227 S.E.2d 148, *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976); *Draughon v. Draughon*, 94 N.C. App. 597, 380 S.E.2d 547 (1989).

Defendant next contends that the trial court failed to resolve all issues raised in her motion in violation of Rule 52(a) of the North Carolina Rules of Civil Procedure. Defendant sets forth no argument in her brief concerning this alleged error. She merely refers us to her argument relating to the first issue. We will therefore also refer to our response to the first issue set out above. Defendant's motion fails to set forth a claim for relief pursuant to any subsection of Rule (60)(b) and the trial court properly and specifically so concluded.

[2] Finally, defendant argues that the trial court erred by failing to conclude that the consent judgment was void or irregular due to the failure of the judge who entered the consent order to require both plaintiff and defendant to participate in a *voir dire* by the court regarding their understanding of the terms of the agreement. Defendant cites this Court's opinion in *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), as support for her contention that the trial court's failure to make such an inquiry of the parties renders the judgment void.

We see no relevance of the holding in *McIntosh* to this case. Specifically, this Court stated in *McIntosh* that:

> Any agreement entered into by parties regarding the distribution of their marital property should be reduced to writing, duly executed and acknowledged. If, as in the case *sub judice*, oral stipulations are not reduced to writing it must affirmatively appear in the record that the trial court made contemporaneous inquiries of the parties at the time the stipulations were entered into.

74 N.C. App. at 556, 328 S.E.2d at 602. The judgment at issue herein was duly executed and acknowledged by both parties. Neither *McIntosh* nor any other decision by this Court supports defendant's contention that a trial judge must undertake to independently ascertain the extent to which parties to a properly executed consent judgment understood the agreement upon which they placed their signatures.

The order of the trial court denying defendant's motion pursuant to Rule 60(b) is affirmed.

Affirmed.

Judges LEWIS and WYNN concur.

LEON A. LILLY v. JEANNINE A. LILLY

No. 9228DC344

(Filed 15 September 1992)

1. **Divorce and Separation § 130 (NCI4th)— insurance settlement—wife's separate property**

The trial court did not err in finding that a $25,000 insurance settlement was defendant wife's separate property where there was competent evidence in the record indicating that defendant suffered no economic loss in her employment and that the settlement was compensation only for her pain and suffering.

Am Jur 2d, Divorce and Separation § 913.

2. **Divorce and Separation § 125 (NCI4th)— separate property deposited in joint account—no expressly stated intention—property not marital**

There was no merit to plaintiff husband's contention that a $25,000 insurance settlement which was originally the separate property of the wife became marital property when defendant wife deposited it into the parties' joint checking account, since the deposit did not constitute an expressly stated intention that the property be considered marital. N.C.G.S. § 50-20(b)(2).

Am Jur 2d, Divorce and Separation § 890.

APPEAL by plaintiff from judgment entered 6 November 1991 by *Judge Gary S. Cash* in BUNCOMBE County District Court. Heard in the Court of Appeals 4 September 1992.

DeVere C. Lentz & Associates, by John M. Olesiuk, for plaintiff-appellant.

John E. Shackelford for defendant-appellee.

GREENE, Judge.

Plaintiff (Husband) appeals from an equitable distribution judgment entered 6 November 1991.

The evidence before this Court reveals that the parties were married on 24 May 1975 and separated on 10 July 1989. On 28 August 1987, prior to the separation of the parties, defendant (Wife)

was involved in an automobile accident in which she sustained serious injuries. Wife settled a personal injury claim with the tortfeasor's insurance company and received checks in the amount of $23,000.00 and $2,000.00 for "bodily injury," which she deposited into one of the parties' two joint checking accounts on 26 January 1988. Husband testified that "as well as I recall, [the checks were] made out to both of us." Wife, however, "[couldn't] say for sure" whether the checks were payable to her alone or to Wife and Husband jointly. Wife testified that she "thought that [the $25,000.00 settlement] was money that was from [sic] my pain and suffering." She further testified that she knew of no other expenses that were represented by the $25,000.00 "because we had an additional $5,000.00 coming from Aetna that—and $1,780.00 of that was paid to reimburse the insurance company for medical bills, so the total compensation was $30,000.00 from the two insurance companies, and the total medical was $1,785.00." Wife also stated that she lost no wages as a result of the accident. On 10 July 1989, Wife withdrew $28,000.00 from the joint account in which she had deposited the settlement proceeds.

After hearing the evidence, the trial court made the following finding:

> That prior to the separation of the parties, [Wife] was involved in a motor vehicle accident and was paid the sum of $25,000.00 and said amount was deposited in the joint account used by [Husband] and [Wife] and that [Wife] did remove from said account on July 10, 1989, the sum of $28,000.00, $25,000.00 of which was her separate property as it was proceeds from bodily injury, and there was no economic loss from said accident.

Based on this finding of fact, the trial judge concluded that the "$25,000.00 proceeds of the automobile accident . . . are the separate property of [Wife]." Husband appeals.

The issues presented are whether I) the trial court's finding that no economic loss resulted from Wife's accident and that therefore the $25,000.00 insurance settlement constitutes her separate property is supported by competent evidence; and II) the settlement became marital property by virtue of Wife's depositing the proceeds into the parties' joint bank account.

I

[1] Husband argues that the trial court erred in finding that the $25,000.00 insurance settlement is Wife's separate property. According to Husband, the settlement is marital property. Wife contends that the money is her separate property.

The party claiming that property is marital has the burden of proving beyond a preponderance of the evidence that the property

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

Haywood v. Haywood, 106 N.C. App. 91, 97, 415 S.E.2d 565, 569, *disc. rev. denied*, 331 N.C. 553, 418 S.E.2d 666 (1992) (citations omitted). If the party meets this burden, then "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 . . . ." *Id.*

In the instant case, Husband testified that the $25,000.00 in insurance proceeds was acquired by both spouses on 26 January 1988, while the parties were married and before their separation on 10 July 1989. Husband's evidence also established that the proceeds were "presently owned" since the money was still in the parties' joint account on the date of separation. *See Talent v. Talent*, 76 N.C. App. 545, 553, 334 S.E.2d 256, 261-62 (1985) ($68,000 in savings accounts and certificates of deposit was "presently owned" under Section 50-20(b)(1) since it was owned by the parties on the date of separation). Wife testified that she suffered no lost wages as a result of her injuries, that her medical expenses were covered in a separate payment from Aetna, and that the $25,000.00 settlement was compensation solely for her pain and suffering.

Although, based on his evidence, Husband technically met his burden of proving that the insurance proceeds were marital property, the characterization of a spouse's personal injury settlement as marital or separate property depends on what the award was intended to replace. *Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986).

> The portion of an award representing compensation for non-economic loss—i.e., personal suffering and disability—is the

> separate property of the injured spouse; the portion of an award representing compensation for economic loss—i.e., lost wages, loss of earning capacity during the marriage, and medical and hospital expenses paid out of marital funds—is marital property.

Id. at 447-48, 346 S.E.2d at 436 (citations omitted). In addition, any part of an award compensating a non-injured spouse for loss of consortium is the separate property of the non-injured spouse. *Id.* at 452-53, 346 S.E.2d at 439. Because Wife's evidence established that the $25,000.00 settlement represented compensation for pain and suffering, Wife met her burden of proving that the proceeds were her separate property. The trial court made a finding consistent with Wife's evidence and allocated the settlement in accordance with *Johnson*. There is competent evidence in the record indicating that Wife suffered no economic loss in her employment and that the settlement was compensation only for her pain and suffering, and therefore we are bound by the trial court's finding. *See Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986) (appellate court bound by trial court's findings of fact if there is any competent evidence in the record to support them). Therefore, Husband's assignment of error in this regard is overruled.

II

[2] Husband argues that even if the $25,000.00 insurance settlement was originally the separate property of Wife, it was "transmuted into marital property" as a result of Wife's having deposited it into the parties' joint checking account.

Under N.C.G.S. § 50-20(b)(2), "property 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." N.C.G.S. § 50-20(b)(2) (1987 & Supp. 1991). Wife's evidence established that the $25,000.00 insurance settlement was her separate property and that she did not intend for it to be marital property. The fact that she deposited and kept the settlement proceeds in the parties' joint account does not, pursuant to the requirements of Section 50-20(b)(2), constitute an expressly stated intention that the property be considered marital. *See Haywood*, 106 N.C. App. at 98, 415 S.E.2d at 570 (fact that husband stored coins, which were his separate property, in joint safety deposit box was not an express "contrary

intention in the conveyance that the coins be considered to be marital property").

Because competent evidence exists to support the trial court's finding that the insurance settlement did not compensate Wife for economic loss and is therefore Wife's separate property, and because Wife met her burden of proving that, although her settlement was deposited in the parties' joint account, it remained her separate property, the judgment of the trial court is

Affirmed.

Judges ARNOLD and PARKER concur.

CASES REPORTED WITHOUT PUBLISHED OPINION
FILED 1 SEPTEMBER 1992

DICKENS v. R TRIPLE J PARTNERSHIP No. 9110DC1194	Wake (89CVD6376)	Reversed & remanded
FOULKS v. FAYETTEVILLE PUBLISHING CO. No. 9212SC231	Cumberland (90CVS1523)	Affirmed
HELMS v. HOLLENBECK No. 9126SC1077	Mecklenburg (89CVS3614)	Dismissed without prejudice
IN RE HALL No. 9219DC296	Randolph (88J182) (88J183)	Affirmed
KETNER v. DOMINO'S PIZZA No. 9226SC371	Mecklenburg (91CVS15560)	Affirmed
PHILLIPS v. PHILLIPS No. 9127DC407	Gaston (89CVD1549)	Affirmed
RICKS v. FLANIGAN No. 918SC698	Wayne (89CVS2354)	Affirmed
STATE v. ATTAWAY No. 9218SC274	Guilford (91CRS20522) (91CRS48551)	No Error
STATE v. BLACKWELL No. 9218SC396	Guilford (91CRS44207)	Affirmed
STATE v. BOBBITT No. 926SC378	Halifax (90CRS6648) (90CRS6649)	No Error
STATE v. FEIMSTER No. 9223SC292	Yadkin (91CRS672)	No Error
STATE v. FOUST No. 9218SC294	Guilford (82CRS40222) (82CRS40223)	No Error
STATE v. HAIRSTON No. 9221SC235	Forsyth (90CRS40269)	No Error
STATE v. HAYES No. 9210SC204	Wake (90CRS2135) (90CRS2136) (90CRS2137) (90CRS42117) (90CRS42118)	Affirmed

	(90CRS42119) (90CRS42120) (90CRS42121) (90CRS46984) (90CRS46985) (90CRS46986) (90CRS58706) (90CRS58709) (90CRS60360) (90CRS64814) (90CRS64815) (90CRS64816) (90CRS81773) (90CRS81776) (90CRS81777)	
STATE v. HILL No. 925SC174	New Hanover (90CRS22294)	No Error
STATE v. JONES No. 9218SC313	Guilford (91CRS3512) (91CRS20036)	No Error
STATE v. McCULLOUGH No. 9226SC332	Mecklenburg (91CRS73831)	No Error
STATE v. MINTON No. 9222SC132	Alexander (90CRS1909) (90CRS1910)	No Error
STATE v. PLEMMONS No. 9227SC233	Gaston (91CRS006662) (91CRS007466)	Sentences are vacated & remanded for resentencing
STATE v. STREET No. 9215SC215	Alamance (91CRS18005) (91CRS18006)	No Error
STATE v. STRICKLAND No. 9211SC192	Johnston (91CRS217) (91CRS218)	No Error
STATE v. TUFT No. 9127SC436	Cleveland (89CRS5898)	No error as to conviction. Reversed & remanded for resentencing only.
STATE v. VICKERS No. 9123SC655	Yadkin (90CRS2151) (90CRS2152) (90CRS2153) (90CRS2154) (90CRS2689)	No Error

STATE v. WATKINS No. 9221SC194	Forsyth (89CRS3151)	No Error
STATE v. WILKES No. 9221SC242	Forsyth (91CRS20459)	Affirmed
SULLIVAN v. OLIVER No. 9222SC281	Iredell (90CVS1061)	No Error

FILED 15 SEPTEMBER 1992

ASHLAND OIL v. SANFORD RED STAR OIL CO. No. 9111SC363	Lee (88CVS1020)	Summary judgment affirmed; award of attorney's fees reversed
GREEN v. ONSLOW COUNTY BD. OF COMMISSIONERS No. 914SC369	Onslow (90CVS2009)	Affirmed
GRIFFIN v. McCANDLESS No. 912SC654	Martin (88CVS34)	No prejudicial error
HARDEN DISTRIBUTORS v. R. W. FROOKIES, INC. No. 9118SC481	Guilford (89CVS8654)	Affirmed
IN RE WILL OF CANOY No. 9119SC566	Randolph (89E330)	Affirmed in part & reversed as to the Rule 11 sanctions
LUCK v. N.C. DEPT. OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES No. 9120SC741	Moore (89CVS980)	Affirmed
PARKS v. PARKS No. 9118DC84	Guilford (89CVD3856)	Plaintiff's appeal—affirmed Defendant's appeal—affirmed
ROCHELLE REALTY AND AUCTION CO. v. DAY No. 916DC575	Halifax (90CVD596)	Affirmed
SMITH v. SMITH No. 918DC623	Wayne (85CVD543)	We affirm as to defendant Chadwick Brian Smith. As to defendant Cornelius Wayne Smith, vacated

		and remanded. As to plaintiff Gatsy N. Smith, vacated and remanded
STATE v. BLUE No. 9216SC269	Robeson (90CRS22606)	No Error
STATE v. BROWN No. 9221SC446	Forsyth (91CRS37883)	No Error
STATE v. ELLISON No. 9226SC415	Mecklenburg (91CRS46888) (91CRS46892)	No Error
STATE v. FLOWERS No. 9226SC307	Mecklenburg (91CRS36744)	No Error
STATE v. HOLMAN No. 9115SC665	Alamance (90CRS21502) (90CRS21504) (90CRS21505)	New Trial
STATE v. HOWARD No. 9226SC534	Mecklenburg (92CRS17387)	No Error
STATE v. LASSITER No. 9219SC381	Randolph (91CRS0171)	No Error
STATE v. LEWIS No. 9221SC361	Forsyth (91CRS21915)	No Error
STATE v. LINEBERGER No. 9227SC57	Gaston (91CRS003519) (91CRS003521) (91CRS003525)	No Error
WRIGHT v. WRIGHT No. 9130DC334	Haywood (89CVD410)	Reversed & remanded

FRANK A. LUMSDEN AND WIFE, FRANCES B. LUMSDEN v. RICHARD M. LAWING AND WIFE, ANN B. LAWING

No. 915SC137

(Filed 6 October 1992)

1. **Appeal and Error § 340 (NCI4th)— broadside assignment of error—failure to comply with Rules of Appellate Procedure—merits not considered by court on appeal**

Defendants lost the right to challenge any variance between the complaint and the judgment where they did not state separate assignments of error confined to a single issue of law but instead made one broadside assignment of error which did not state the basis upon which error was assigned and did not identify which findings of fact were not supported by the evidence. Appellate Rules 10(c)(1) and 28(b)(5).

Am Jur 2d, Appeal and Error §§ 648, 654, 658.

2. **Sales § 6.4 (NCI3d)— house on lot unsuitable for septic system—exception to rule of caveat emptor—implied warranty of restrictive covenants.**

The trial court did not err in finding that plaintiffs purchased a house and lot from defendants without knowledge that the lot was unsuitable for a septic tank or on-site sewage system; five months later the ground adjacent to the septic tank began caving in and water and sand began bubbling out of the ground; plaintiffs then learned that the county health department initially determined the lot to be unsuitable for a septic tank; two experts then concluded that the lot was unsuitable for a septic tank; the deed of conveyance restricted use of the lot to single-family dwellings; and plaintiffs began experiencing problems with the septic tank system well within the implied warranty time period. Furthermore, the court properly concluded that the property was subject to an implied warranty that it would be suitable for use as a single-family residence as set forth in the restrictive covenants; the property could not be used for a single-family residence since the lot could not support a septic tank; defendants breached the implied warranty arising out of the restrictive covenants; and plaintiffs were entitled to rescission of the contract and restitution.

Am Jur 2d, Vendor and Purchaser §§ 335, 542.

Liability of vendor of existing structure for property damage sustained by purchaser after transfer. 18 ALR4th 1168.

3. Sales § 19 (NCI3d)— rescission of contract to purchase house— damages—mortgage interest and insurance premiums

In an action to rescind a contract for the purchase of a house based on defendants' breach of an implied warranty arising out of restrictive covenants where the trial court found for plaintiffs and rescinded the contract, plaintiffs were entitled not only to the full purchase price, interest, ad valorem taxes, and expenses advanced in repair of the septic tank, but also to sums expended on mortgage interest and insurance premiums, since defendant builders were on notice of the risk involved, had superior knowledge of whether the house was suitable for habitation, and were in a better position to evaluate and guard against the financial risk posed by a defective septic system, and it would be unjust to require plaintiffs to absorb the costs of the mortgage interest and insurance premiums and pay reasonable rental value for use of the house during their occupancy.

Am Jur 2d, Vendor and Purchaser §§ 493, 542.

4. Sales § 19 (NCI3d)— rescission of contract to purchase house— plaintiffs obligated to pay rental value—insufficient evidence to establish value

In an action for rescission of a contract to purchase a house where plaintiffs prevailed, plaintifs were obligated to pay the reasonable rental value of the premises during their occupancy; however, the evidence was insufficient to support the trial court's finding of the reasonable rental value of $600, based on testimony of plaintiffs' "normal" use of the dwelling and the mortgage payment of $604.

Am Jur 2d, Vendor and Purchaser § 573.

APPEAL by defendants and cross appeal by plaintiffs from judgment entered 24 August 1990 as modified by order entered 31 October 1990 by *Judge Ernest B. Fullwood* in NEW HANOVER County Superior Court. Heard in the Court of Appeals in Wilmington on 16 October 1991.

Shipman & Lea, by Gary K. Shipman, for plaintiff appellants-appellees.

Easley & Bain, P.A., by Roy C. Bain, for defendant appellants-appellees.

COZORT, Judge.

Defendants constructed a house in Wilmington, North Carolina on a lot unsuitable for a septic tank system. Plaintiffs purchased the house from defendants in March 1987. In August 1987, plaintiffs began experiencing problems with the septic tank and contacted defendants for assistance. Defendants denied any responsibility for the system. On 14 April 1988, plaintiffs filed suit in New Hanover Superior Court alleging misrepresentation and breach of the implied warranty of workmanlike construction and praying for rescission of the contract, restitution, and money damages. On 24 August 1990, the trial court entered an order rescinding the contract and awarding plaintiffs the full purchase price, together with interest, ad valorem taxes, and expenses advanced in an attempt to repair the septic system, less the reasonable rental value of the premises. On 31 October 1990, the trial court modified the judgment and ordered plaintiffs to pay interest at the legal rate from March 1987 on the reasonable rental value of the property. Both parties appeal from the judgment, and plaintiffs appeal from the order. We affirm in part and remand for further proceedings as to the rental value of the premises.

In 1986, the developer of the Greenbriar Subdivision in New Hanover County applied for a septic tank permit from the New Hanover County Health Department (NHCHD). The NHCHD determined that the lot was unsuitable for installation of a residential septic system, denied the request for a permit, and suggested certain modifications to the property which might make the site "provisionally suitable." On 8 August 1986, defendant Ann B. Lawing applied for a septic system permit. The NHCHD again classified the lot as "unsuitable" and required drainage modification and the addition of fill material before any septic system could be installed. Defendants undertook the modifications and installed a septic system. In early January 1987, the NHCHD inspected the septic system and certified that the required modifications had been made and issued a certificate to the defendants. Defendants then constructed a single-family dwelling on the property.

In either January or February 1987 plaintiffs looked at the house and lot, but defendants made no mention of the modifications. A reasonable inspection of the lot would not have revealed that the lot was unsuitable for a septic system. Plaintiffs signed a contract to purchase on 10 February 1987, moved into the house on 21 March 1987, and closed on 1 April 1987. At closing, plaintiffs received a Deed of conveyance subject to restrictive covenants which limited the use of lots to single-family residences. At the time of closing, there was no evidence of septic system failure.

During the month of April 1987, plaintiffs noticed a hole in the sidewalk located near the area of the septic system installation. Plaintiffs repeatedly refilled the hole with rock and sand, but their efforts to permanently fill the hole failed. In August 1987 plaintiffs noticed the ground adjacent to the septic tank caving in and sand and water bubbling out of the ground. Plaintiffs contacted both the individual who installed the system and NHCHD. On 15 September 1987, representatives of NHCHD inspected the property and noted that the system had not been constructed in accordance with the plan filed with NHCHD. Plaintiffs then learned for the first time that NHCHD had initially determined the lot to be unsuitable for a septic system and had later changed the classification to provisionally suitable. After defendants disclaimed any responsibility for the tank, plaintiffs installed an additional septic tank line to remedy the problem. The additional line failed by December 1987. As a result of the failure of the septic system, raw sewage bubbled up in plaintiffs' front yard.

In February 1988 representatives of NHCHD inspected the property and determined that the soil conditions might prevent the septic system from operating properly. Plaintiffs' problems with the septic system continued throughout 1988, although plaintiffs did not make unusual use of the house or consume extraordinary amounts of water. In January 1989, Diane Harvell, the environmental health director of the NHCHD, inspected the property and determined that the soil conditions could make the property unsuitable for a septic tank system. At trial, Ms. Harvell testified that the lot currently was unsuitable for a septic tank system. In March 1989, plaintiffs hired Joseph Hill, Jr., a professional engineer with a specialty in sanitary engineering to inspect the property. Mr. Hill concluded that the lot was not suitable for a septic tank system in 1987 or at the time of the trial.

The trial court made the following conclusions of law:

> 1. That this Court has jurisdiction over the parties and the subject matter of this proceeding.
>
> 2. That the property conveyed by the Defendants to the Plaintiffs was made subject to certain restrictive covenants restricting its use to single-family, residential use.
>
> 3. That at the time of the conveyance by the Defendants to the Plaintiffs, the property was subject to an implied warranty that this property could be used by the Plaintiffs, or by any subsequent grantees, for the specific purpose to which its use was limited by the restrictive covenants, referenced above.
>
> 4. That the property cannot now be properly used by the Plaintiffs, or by any subsequent grantees, for single-family residential purposes because of the inability of the property to support a septic tank or on-site sewage disposal system.
>
> 5. That the Defendants breached the implied warranty which arose out of said restrictive covenants.
>
> 6. That the Plaintiffs are entitled to rescind the contract of purchase with the Defendants, and recover, by way of restitution, the full purchase price, together with interest, ad valorem taxes, and expenses advanced in an attempt to repair the septic system, less the reasonable rental value of the premises.

The trial court then ordered defendants to pay plaintiffs the sum of $99,519.00 plus interest, ad valorem taxes of $1,824.64, repair costs of $325.00, less the reasonable rental value of $600.00 per month from March of 1987, provided that plaintiffs reconvey the property to defendants. The trial court later modified the judgment and ordered plaintiffs to pay interest from March 1987 on the reasonable rental value of the property.

Defendants raise one issue on appeal: whether the trial court erred in finding a breach of implied warranty and awarding plaintiffs rescission of the contract and restitution. Plaintiffs raise two issues on appeal: (1) whether the trial court erred in failing to award sums expended by plaintiffs for interest on their mortgage and hazard insurance premiums from March 1987 through 1990; and (2) whether the trial court erred in finding and crediting the

sums awarded plaintiffs with the "reasonable rental value" of the property from 1987.

We address defendants' assignment of error first. Defendants argue that the trial court's findings of fact and conclusions of law are inconsistent with the claims alleged in plaintiffs' complaint. Pointing to *Hartley v. Ballou*, 286 N.C. 51, 209 S.E.2d 776 (1974) and *Hinson v. Jefferson*, 287 N.C. 422, 215 S.E.2d 102 (1975), defendants argue that there are two theories of implied warranty which relax the general rule of *caveat emptor*. According to defendants, *Hartley* recognizes an implied warranty of workmanlike construction when a builder-vendor sells a house to a vendee. *Hinson* recognizes a second implied warranty which arises out of restrictive covenants requiring the property to be used for single-family dwellings. If the property is unsuitable for a single-family dwelling, there is a breach of the restrictive covenant and breach of the implied warranty. Defendants argue that in the complaint plaintiffs alleged breach of the implied warranty of workmanlike construction found in *Hartley* and not breach of restrictive covenants found in *Hinson*. As reflected in the findings of fact and conclusions of law, the trial court based its decision on the breach of the implied warranty arising out of the restrictive covenants. Defendants conclude that since plaintiffs did not allege breach of the implied warranty arising out of the restrictive covenants, the variance in the complaint, evidence received, and judgment require us to remand the case for a trial de novo.

[1] We will not address the merits since defendants have failed to comply with our Rules of Appellate Procedure and have lost the right to challenge any variance between the complaint and the judgment. N.C.R. App. P. 10(c)(1) provides in part that each assignment of error, so far as practicable, shall be confined to a single issue of law and shall state the legal basis upon which the error is assigned. N.C.R. App. P. 28(b)(5) provides in part that assignments of error not set forth in the brief, not argued, and not supported by authority will be deemed abandoned. Failure to comply with these provisions results in a waiver of the right to challenge the sufficiency of the evidence to support particular findings of fact. *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 684, 340 S.E.2d 755, 760, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

Defendants make the following single broadsided assignment of error.

> The Court's signing and entry of judgment in this case on grounds that error of law appears on the face of the record, the evidence does not support the facts found by the Court and the facts do not support the judgment entered.

Defendants' assignment of error does not set forth "plainly and concisely and without argumentation the basis upon which error is assigned." Defendants do not identify which findings of fact are not supported by the evidence. "A single assignment generally challenging the sufficiency of the evidence to support numerous findings of fact, as here, is broadside and ineffective." *Wade v. Wade*, 72 N.C. App. 372, 375-76, 325 S.E.2d 260, 266, *disc. review denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). It is well settled that broadside appeals do not preserve the right to challenge particular findings of fact. *See, e.g., Concrete*, 79 N.C. at 684, 340 S.E.2d at 760; *Wade*, 72 N.C. App. at 376, 325 S.E.2d at 266. Moreover, defendants have failed to advance any argument in their brief challenging the sufficiency of the evidence to support the findings of fact or conclusions of law based thereon. Accordingly, we need only consider whether the findings of fact support the conclusions of law and the conclusions support the judgment. *Id.*

In *Hinson* plaintiff purchased a lot from defendants. In preparing to construct a residence on the property, plaintiff discovered that the lot would not support a septic tank or on-site sewage disposal system. Plaintiff brought suit against defendants for rescission of the purchase contract and restitution. Refusing to apply the doctrine of mutual mistake, the North Carolina Supreme Court recognized instead an exception to the rule of *caveat emptor* based on implied warranty of restrictive covenants. In 1974, the Court had approved the relaxation of the rule of *caveat emptor* by recognizing an implied warranty of workmanlike construction in the sale of a recently completed home by the builder-vendor to the vendee. *Hartley*, 286 N.C. at 62, 209 S.E.2d at 783. Relying upon the "basic and underlying principle of *Hartley* . . . that in some situations the rigid common law maxim of *caveat emptor* is inequitable," the *Hinson* Court held

> that where a grantor conveys land subject to restrictive covenants that limit its use to the construction of a single-family dwelling, and, due to subsequent disclosures, both un-

> known to and not reasonably discoverable by the grantee before or at the time of conveyance, the property cannot be used by the grantee, or by any subsequent grantees through mesne conveyances, for the specific purpose to which its use is limited by the restrictive covenants, the grantor breaches an implied warranty arising out of said restrictive covenants.

Hinson, 287 N.C. at 435, 215 S.E.2d at 111. The trial court ordered rescission of the contract and awarded plaintiff "full restitution of the purchase price; provided that she execute and deliver a deed reconveying the subject lot to defendants." *Id.* at 436, 215 S.E.2d at 111.

In *George v. Veach*, 67 N.C. App. 674, 313 S.E.2d 920 (1984), the facts were strikingly similar to the case at bar. Plaintiffs there purchased from defendant-builder a house and lot with a septic tank system. A few months after plaintiffs occupied the house, the septic tank system failed. Plaintiffs brought suit for breach of implied warranty and unfair or deceptive trade practices. The plaintiffs presented evidence that the lot was unsuitable for a septic tank system because of the poor soil conditions. The county health department inspected the property and informed the defendant-builder that the lot was unsuitable for development. After the builder expressed his dissatisfaction with the finding, a state soil specialist conducted a further inspection. After the additional inspection the county health department official approved the lot on the condition that the lot be modified by a soil transplant. There was conflicting evidence whether the state soil specialist actually approved the soil transplant modification. Evidence was presented that the permit was issued in spite of the negative recommendation of the state expert and only after the builder expressed his displeasure. Additional evidence showed that the septic tank line had been placed in the wrong area and a drain had been improperly installed. At the close of plaintiffs' evidence the trial court directed verdict for defendant on all claims.

On appeal, we reversed, relying on *Hartley* and *Hinson* to conclude that the implied warranty does apply to the septic tank system itself. We also rejected defendant's contention that his reliance upon the approval of the county health department absolved him of liability for any breach of implied warranty. Following the principles of strict liability, we noted that "fault . . . is not a prerequisite to liability under the doctrine of implied warranty.

The initial vendee need only show that the house was not constructed in a workmanlike manner or was not habitable." *George*, 67 N.C. App. at 677-78, 313 S.E.2d at 923 (citation omitted). After reviewing the evidence, we concluded that

> [a]s between defendant-builder and plaintiff-buyers, then, the equities favor plaintiff-buyers, since defendant-builder apparently had some notice of the risk involved.
>
> Further, by virtue of superior knowledge, skill, and experience in the construction of houses, a builder-vendor is generally better positioned than the purchaser to know whether a house is suitable for habitation. He also is better positioned to evaluate and guard against the financial risk posed by a defective septic system, and to absorb and spread across the market of home purchasers the loss therefrom. In terms of risk distribution analysis, he is the preferred or "least cost" risk bearer. Finally, he is in a superior position to develop or utilize technology to prevent such defects; and as one commentator has noted, "the major pockets of strict liability in the law" derive from "cases where the potential victims . . . are not in a good position to make adjustments that might in the long run reduce or eliminate risk." R. Prosser, *Economic Analysis of Law* 140-41 (2d ed. 1977).

Id. at 679-80, 313 S.E.2d at 923-24. Finally, we noted that plaintiff met the burden of showing a septic tank system failure within the implied warranty determined by a standard of reasonableness. It was for the jury to decide whether the implied warranty extended for the six-month period. In concluding that the evidence was sufficient to go to the jury, we reasoned that "our Supreme Court's decisions in *Hartley* and *Hinson*, the equities of the situation, and the policy considerations which underlie the implied warranty doctrine, combine to dictate this result." *Id.* at 680, 313 S.E.2d at 924.

[2] In the case at bar, the trial court found that plaintiffs purchased the house and lot from the defendants without knowledge that the lot was unsuitable for a septic tank or on-site sewage system. A reasonable inspection by plaintiffs would not have disclosed that the lot was unsuitable for a septic tank. Five months after plaintiffs occupied the house, the ground adjacent to the septic tank began caving in and water and sand began bubbling out of the ground. Plaintiffs then learned that NHCHD initially determined the lot to be unsuitable for a septic tank. After plaintiffs

experienced problems, two experts concluded that the lot was unsuitable for a septic tank. The trial court further found that the deed of conveyance restricted the use of the lot to single-family dwellings. Plaintiffs began experiencing problems with the septic tank system well within the implied warranty time period. Based upon the findings of fact, the trial court properly concluded (1) that the property was subject to an implied warranty that it would be suitable for use as a single-family residence as set forth in the restrictive covenants; (2) that the property could not be used for a single-family residence since the lot could not support a septic tank; (3) that the defendants breached the implied warranty arising out of the restrictive covenants; and (4) plaintiffs were entitled to rescission of the contract and restitution. Defendants' assignment of error is overruled.

[3] We now turn our attention to plaintiffs' two assignments of error. Plaintiffs argue that the trial court erred in failing to award sums expended by plaintiffs for interest on the mortgage and hazard insurance premiums for 1987-1990, and in reducing plaintiffs' award by the reasonable rental value of the premises.

A rescission implies the entire abrogation and undoing of the contract from the beginning. *Brannock v. Fletcher*, 271 N.C. 65, 74, 155 S.E.2d 532, 542 (1967). "A plaintiff may not sue for the rescission of a contract and its breach at the same time. The one is in disaffirmance of the contract; the other in its affirmance." *Troitino v. Goodman*, 225 N.C. 406, 415, 35 S.E.2d 277, 283 (1945) (citation omitted). Accordingly, in the case of rescission ordinarily a party may not seek damages arising out of the breach of contract such as benefit of the bargain and special damages. *Kee v. Dillingham*, 229 N.C. 262, 265-66, 49 S.E.2d 510, 512 (1948); *Opsahl v. Pinehurst, Inc.*, 81 N.C. App. 56, 70, 344 S.E.2d 68, 77 (1986). A party may recover special damages, however, in the case of rescission of a contract due to fraud. *Id.* In the case at bar the trial court dismissed plaintiffs' claim for fraud. We are left then with the question of appropriate damages for breach of the implied warranty arising out of restrictive covenants.

Defendants argue that requiring payment to plaintiffs of the sums expended on interest and the insurance premiums would be counter to the principles of restitution since defendants did not receive nor benefit from those amounts. Defendants point to *Gilbert v. West*, 211 N.C. 465, 466, 190 S.E. 727, 728 (1937), in which the

North Carolina Supreme Court stated: "When a court in the exercise of its equitable jurisdiction cancels a contract or deed, it should seek to place the parties *in statu quo*, as nearly as this can be done, for while one party to the contract or deed may have been wronged by the other, the court does not undertake by its judgment to punish the wrongdoer."

We agree that in placing the parties "*in statu quo*" the purpose is not to punish the breaching party. We also acknowledge that a breach of implied warranty is not dependent upon a finding of seller's fault. *See George*, 67 N.C. App. 674, 313 S.E.2d 920. Nonetheless, the equities of the present case, require us to find that as between the seller and the buyer, the seller should be responsible for the sums expended by the buyer on mortgage interest and insurance premiums. In *Hinson*, we recognize that in some situations strict application of the common law rule of *caveat emptor* would result in an inequitable result. We found such a situation in *George*.

Although *George* did not address the issue of damages arising out of the breach of the implied warranty, similar reasoning supports our conclusion that the defendant-builder should bear the loss incurred as a result of his breach. A strict application of the rules of restitution would create an inequitable result. The evidence shows that upon the developer's request for a septic tank permit, the NHCHD initially classified the lot as unsuitable for installation of a septic tank system in June 1986. The site evaluation, however, included modifications that the applicant could make in order to make the lot provisionally suitable. Defendants purchased the lot from the developer and applied for a septic tank permit. NHCHD again classified the lot as unsuitable and suggested certain modifications to make the lot suitable. Defendants made modifications to the lot and installed a septic tank system. In January 1987, the NHCHD inspected the system and certified that the system met the requirements of the permit. Plaintiffs visited the property in January or February of 1987 and signed a contract to purchase on 10 February 1987. Defendants did not inform plaintiffs of the various classifications of the NHCHD and the modifications made to the lot. When plaintiffs began experiencing problems with the system within five months after moving in, they contacted NHCHD and the subcontractor who had installed the system. On 15 September 1987, representatives of the NHCHD inspected the property and noted that the system had not been constructed in accordance

with the plan filed with NHCHD. Plaintiffs then obtained copies of the previous classifications and learned of the initial unsuitable classification. Plaintiffs contacted defendants who denied any responsibility and refused to absorb any of the cost expended in installing an additional line in an attempt to remedy the problem. In December 1987 the additional line failed. In February 1988 representatives of NHCHD conducted another inspection and determined that the lot was unable to absorb water thereby causing failure of the septic tank system. Throughout 1988 plaintiffs experienced problems with the system. In 1989, two experts, one hired by plaintiffs and one a representative of NHCHD, concluded that the lot could not support a septic tank system.

As in *George*, the equities favor plaintiff-buyers since defendant-builders were on notice of the risk involved, had superior knowledge of whether the house was suitable for habitation, and were in a better position to evaluate and guard against the financial risk posed by a defective septic system. One of the primary goals of equity is to do justice between the parties. Under the facts of this case, it is unjust to allow plaintiffs to absorb the costs of the mortgage interest and insurance premiums and pay reasonable rental value for use of the house during their occupancy. Therefore, we find in addition to the full purchase price, interest, ad valorem taxes, and expenses advanced in repair of the septic tank, plaintiffs are also entitled to the sums expended on mortgage interest and insurance premiums.

[4] We agree with defendants that plaintiffs are obligated to pay the reasonable rental value of the premises during plaintiffs' occupancy. *See Brannock*, 271 N.C. at 75, 155 S.E.2d at 542. We are unpersuaded, however, by defendants' argument that there was sufficient evidence to support the trial court's finding of the reasonable rental value of $600.00 based upon testimony of plaintiffs' "normal" use of the dwelling and the mortgage payment of $604.00. A mortgage payment is not necessarily a reliable indicator of rental value since such payments are dependent upon the amount of down payment, the interest rate, and the length of the mortgage. We remand for the taking of additional evidence on this issue.

Accordingly, the judgment below is

Affirmed in part; remanded for further proceedings.

Judges ARNOLD and LEWIS concur.

IN RE: APPLICATION OF THE CITY OF RALEIGH (PARKS AND RECREATION DEPARTMENT)

JEFFREY BEHRINGER AND WIFE, KATHY BEHRINGER; AND DAVID BURNETT AND WIFE, DONNA BURNETT, PETITIONERS-APPELLANTS v. THE CITY OF RALEIGH, RESPONDENT-APPELLEE

No. 9110SC440

(Filed 6 October 1992)

1. Municipal Corporations § 30.6 (NCI3d)— outdoor amphitheater —nearby properties protected from noise—sufficiency of evidence to support finding

Evidence was sufficient to support the city council's finding that properties near an outdoor amphitheater would be protected from sound amplification when the evidence tended to show that seating and orientation of seating was placed to minimize sound amplification and lighting to nearby properties; certain safeguards were installed to protect the sound, including eight-inch thick concrete walls, double overhead doors, and six-inch thick acoustical insulation; and statistical data with regard to expected noise and its dissipation supported the finding.

Am Jur 2d, Buildings § 8.

2. Municipal Corporations § 30.6 (NCI3d)— outdoor amphitheater —no substantial adverse effect on surrounding properties— sufficiency of evidence to support finding

Applicants for a permit to build an outdoor amphitheater presented substantial evidence to support the conclusion that the facility and activities conducted would not have a substantial adverse effect on the surrounding properties where such evidence tended to show that the facility was separated from surrounding properties by an interstate highway, city park property, a floodplain/wetlands area, vacant properties, and two sixty-foot buffer zones which were to be planted to city landscape ordinance standards; additional parking spaces had been purchased to accommodate the additional traffic; development would not have a major impact on a floodway and flood fringe area in the park; the stage was situated to minimize sound amplification in the area; there was an extremely concentrated effort to preserve the natural vegetation on the

site; and a traffic study concluded that the proposed amphitheater site was a good location which was well served by the existing roadway infrastructure.

Am Jur 2d, Buildings § 8.

3. **Municipal Corporations § 30.6 (NCI3d)— outdoor amphitheater —no substantial reduction of value in neighboring property— sufficiency of evidence to support finding**

Evidence was sufficient to support the city council's conclusion that an outdoor amphitheater facility would not substantially reduce the value of the property in the surrounding neighborhood.

Am Jur 2d, Buildings § 8.

4. **Municipal Corporations § 30.21 (NCI3d)— special use permit— notice and opportunity to be heard—due process afforded petitioners and public**

Respondent city council afforded petitioners notice and an opportunity to be heard in the process of issuing a permit for the building of an outdoor amphitheater where a notice of public hearing was published on 22 September 1990; an evidentiary hearing was held on 2 October 1990 and held open until 16 October 1990; at the hearings the council heard testimony from all persons desiring to testify; and representatives from Parks and Recreation, the city planning director, and a representative of the project sponsor met with citizens on 8 October 1990.

Am Jur 2d, Buildings § 8.

5. **Municipal Corporations § 30.21 (NCI3d)— special use permit— enthusiastic city council members at hearing—no showing of bias**

The mere fact that a decision maker enters a hearing with knowledge of the subject matter of the hearing does not lead necessarily to the conclusion that the decision maker's mind is closed to evidence and set as to the final result. In this case although the record reflected the city council's enthusiasm for an outdoor amphitheater, their pre-hearing "participation" did not reflect impermissible bias on the part of the city council in the permit process.

Am Jur 2d, Buildings § 8.

APPEAL by petitioners from judgment and order entered 28 December 1990 by *Judge Howard E. Manning, Jr.*, in WAKE County Superior Court. Heard in the Court of Appeals 10 March 1992.

Andrew W. Olsen for petitioner appellants.

Associate City Attorney Elizabeth C. Murphy for respondent appellee.

COZORT, Judge.

On 17 September 1990 the City of Raleigh Parks and Recreation Department (applicant) filed an application for a special use permit to construct an outdoor amphitheater in Walnut Creek Park. On 2 October 1990 the Raleigh City Council (Council) held a public hearing to consider the application. The hearing was continued until 16 October 1990 at which time the Council issued the special use permit. Petitioners are citizens who own property adjacent to or in close proximity to the amphitheater. Petitioners filed a petition for certiorari in superior court. The request was granted on 6 December 1990. The matter was heard on 17 December 1990 and the judgment and order of Judge Howard E. Manning, Jr., affirming the action of the Council was filed on 28 December 1990. Petitioners appeal. We affirm.

N.C. Gen. Stat. § 160A-381 (1987) authorizes the Council to issue special use permits and provides for superior court review of the Council's decision. In reviewing the Council's decision, both the superior court, sitting as an appellate court, and this Court are required to:

(1) [Review] the record for errors in law,

(2) [Insure] that procedures specified by law in both statute and ordinance are followed,

(3) [Insure] that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

(4) [Insure] that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

(5) [Insure] that decisions are not arbitrary and capricious.

Coastal Ready-Mix v. Board of Commissioners, 299 N.C. 620, 626, 265 S.E.2d 379, 383 (1980). In determining the sufficiency of the evidence to support the Council's decision, we apply the whole record test which requires the examination of all competent evidence to determine if the Council's decision is based upon substantial evidence. *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion" and "is more than a scintilla or a permissible inference." *Lackey v. Dep't of Human Resources*, 306 N.C. 231, 238, 293 S.E.2d 171, 176 (1982). "[T]he court may not consider the evidence which in and of itself justifies the Board's result, without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn." *Thompson v. Wake County Bd. of Educ.*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

On 19 June 1990 the Council adopted Raleigh City Code § 10-2072(m) which provided, in part:

> *Outdoor stadium, outdoor theaters, outdoor race tracks, of more than two hundred and fifty seats.* Following an evidentiary hearing conducted under the procedures contained in section 10-2094(d), outdoor stadiums, outdoor theaters, outdoor race tracks, and outdoor amphitheaters of more than two hundred fifty (250) seats shall be allowed . . . after the City Council finds that the evidence presented at the hearing establishes each of the following:
>
> 1. That the facility and activities requested to be conducted therein will not have a substantial adverse impact on surrounding properties including without limitation, stormwater, dust, smoke or vibration; and
>
> 2. That the practical limits of public facilities and services such as stormwater, water and sewer lines, streets, fire, public safety, and trash collection are considered and respected; and
>
> 3. That traffic generated to and from the site will not create unsafe or inefficient parking, loading, vehicular, and pedestrian circulation with consideration, among other things, to: the physical character of roads, the classification of roads, accident experience near the site, traffic volumes existing

and projected from approved site plans and subdivisions, interference with any other driveway, response time of nearby emergency services such as fire and hospital; and

4. That visual separation or barriers are provided which lessen the perceived height and bulk of proposed structures as seen from nearby residential neighborhoods; and

5. That nearby properties are protected from sound amplification and lighting; and

6. That the facility and the activities conducted therein will not substantially reduce the value of property in the neighborhood; and

7. That off-street parking in accordance with 10-2061 *et seq.* is provided in the amount of one space for every five (5) seats or every five (5) persons in designated capacity of assembly place; and

8. That the site is not located in a primary watershed protection area.

On 16 October 1990, the Council concluded that the proposed amphitheater met all the above requirements and issued the special use permit. The superior court concluded that there was substantial evidence to support the Council's decision that each of the conditions had been met.

On appeal petitioners argue the trial court erred in finding that (1) there was sufficient evidence to support the Council's finding that the nearby properties would be protected from sound amplification and lighting; (2) there was sufficient evidence to support the Council's finding that the facility would not substantially reduce the value of the property in the neighborhood; (3) there was sufficient evidence to support the Council's finding that the facility would not have a substantial adverse impact on the surrounding properties; (4) that due process was afforded to petitioners and the public in connection with the special use permit process; and (5) that the special use permit for the amphitheater was issued pursuant to law where no representative of the area outside the City was present on a planning agency making a recommendation or decision.

[1] First, petitioners argue that the applicant did not present competent, material, or substantial evidence that the nearby

residences would be protected from sound amplification and lighting. Respondent counters that the evidence presented by Planning Director George Chapman, by architect Abe Sustaita, and in the sworn application was competent, material, and substantial evidence to support the Council's conclusions. The application states: "The siting and orientation of the facility will protect nearby properties from sound amplification and lighting." Although the statement in the application is conclusory and of no evidentiary value, we find the other evidence sufficient to support the Council's conclusion.

We first note that the record presented the evidence in summary fashion, rather than a verbatim transcript. The summary presentation made review difficult; use of a verbatim transcript of the testimony would facilitate appellate review of questions regarding the sufficiency of the evidence.

Planning Director Chapman presented the conclusions of the City Staff that the site plan met all required conditions for approval with the exceptions of conditions 1, 5, and 6 set forth in § 10-2072(m). As to those conditions, Staff recommended the Council take into account the testimony in the evidentiary hearing. Specifically as to lighting and sound, Staff also noted that

> Lighting for the facility will not exceed .4 footcandles. Details of lighting height have not been determined at this time.
>
> * * * *
>
> Seating and oriention [*sic*] of seating is placed to minimize amplification and lightng [*sic*] to to [*sic*] nearby properties. There are several residential properties located south of the site on both sides of Holloway Drive, approximately 600 feet from the amphitheater and 200 feet from the nearest parking.

Architect Abe Sustaita testified

> they have taken into consideration some of the issues including environmental issues. He stated sound will be contained pointing out they have oriented the facility so that the broadcast will be away from the residents. He stated the nearest residential unit is approximately 6,000 linear feet away. He stated they have investigated the prospect of what would happen when the sound leaves the facility. He stated they believe this facility is exempt from the noise ordinance, however they are putting in safeguards to protect the sound including 8-inch

thick concrete walls, double overhead doors, 6-inch thick acoustical insulation, etc. He indicated sound to the rear of the facility is hardly audible in the rest of the park.

In addition to the above testimony, the Council also considered the following evidence presented at an 8 October 1990 meeting as summarized in an interoffice memorandum:

> The typical level of sound for rock music as indicated by an independent acoustical study prepared for PACE is 110 decibels (dB(A)) at the mixing console approximately 70 to 100 feet from the stage. Due to the eight (8) inch thick concrete walls which comprise the stage, the sound levels are rapidly dissipated to the rear (south) of the stage. Due to the northwest orientation of the stage the sound will travel approximately 2,000 feet to the beltline which is the northern boundary of the property. These distances will reduce the sound levels. The grassed sloped seating area slopes upward resulting in additional rductions [*sic*] of the sound levels to the northwest. A chart from *Site Planning* by Kevin Lynch was discussed to compare decible [*sic*] levels with common sources and perceptions of sound. . . . Comparing the chart of sounds with the levels which are projected for the amphitheatre decible [*sic*] levels at the southern property line should be in the range of ordinary conversation or slightly above and levels at Rockwood and Providence Road (Green Valley subdivision) would be substantially below this level.

Several citizens expressed their concern about the sound control, the level of decibels expected from the amphitheater, and the lack of statistical data concerning the decibel levels. Taking into account both the evidence supporting and contradicting the Council's decision, we conclude that applicants presented substantial evidence to support the conclusion that the nearby properties would be protected from sound amplification and light.

[2] Next, petitioners argue there was insufficient competent, material, and substantial evidence to support the Council's conclusion that the amphitheater would not have a substantial adverse impact on the surrounding properties. Respondent counters that the application, the minutes of the evidentiary hearing, and the traffic study support the Council's conclusion. Applicant states in the application:

> It is anticipated that this project will have no substantial adverse impact on surrounding properties. The amphitheatre has been sited and oriented in order to minimize visual and acoustical impacts to adjoining properties. Sound from the stage area will be projected to the northwest toward the Beltline. The facility is separated from residential properties to the north by the Beltline and existing City park property, a distance of approximately 1.2 miles. The stage structure will consist of solid masonry construction with a solid membrane roof system which will minimize sound projection to the south. In addition, a buffer yard of 60 feet in width will be provided along the southern boundary and will be planted to City of Raleigh Landscape Ordinance standards. The facility will be buffered to the east by an extensive floodplain/wetlands area adjacent to Walnut Creek. The adjoining properties to the west of the facility are vacant. A buffer yard of 60 feet in width will be provided along the western boundary and will be planted to City of Raleigh Landscape Ordinance standards.

In addition to the previously summarized testimony presented by architect Abe Sustaita, landscape architect Jimmy Thiem testified that additional parking spaces had been purchased to accommodate the additional traffic; development of the property took into account a floodway and flood fringe area in the park, and the development would not have a major impact on those areas; the proposed location was the best considering the wetlands, elevation, and sewer service; there had been an extremely concentrated effort to preserve the natural vegetation on the site; and additional buffering along the southern and western property had been added. Applicant also presented a traffic study which concluded that "the proposed amphitheater site is a good location which is well-served by the existing roadway infrastructure." Taking into account both the evidence supporting and contradicting the Council's decision, we conclude that applicants presented substantial evidence to support the conclusion that the facility and activities conducted would not have a substantial adverse effect on the surrounding properties.

[3] Petitioners further argue that applicants failed to present sufficient evidence to support the Council's conclusion that the facility would not substantially reduce the value of the property in the surrounding neighborhood. Respondent answers that the evidence presented in the application, and the evidence concerning the traffic, buffers and landscaping, light, water and sewer lines, streets,

public safety, trash collection, and visual separation from nearby properties is sufficient to support the Council's conclusion. Respondent further argues that since the evidence supports the conclusion that the facility would not cause substantial adverse impact to the surrounding properties, the evidence also supports the conclusion that the facility would not cause any decrease in the value of the property in the neighborhood. We note again the conclusory nature of the statement in the application that "[t]he construction of this facility will not reduce the value of the property in the neighborhood." We find, however, after reviewing the whole record, that there is sufficient evidence to support the Council's conclusion that the facility would not substantially reduce the value of the property in the surrounding neighborhood.

[4] Next, petitioners argue that the trial court erred in finding that due process was afforded to petitioners and the public in connection with the permit process. Specifically, petitioners first argue that the Council members were prejudicially biased for the project and considered information outside the hearing process without stating the source of their information or making the information available for cross-examination. As examples, petitioners point to statements made by two Council members after the end of the hearing but prior to the Council vote. Second, petitioners argue that the Council's participation and identification with the project, the City ordinance resting the decision concerning the special use permit application solely on the Council without recommendation from the Planning Commission or Board of Adjustment, the short notice given the neighborhood members, and the scarcity of evidence on key issues reflects a denial of due process.

Due process of law requires notice and the right to be heard before an unbiased and impartial decision maker. *See Crump v. Bd. of Educ. of Hickory Administrative School Unit*, 326 N.C. 603, 392 S.E.2d 579 (1990).

> Bias has been defined as "a predisposition to decide a cause or an issue in a certain way, which does not leave the mind perfectly open to conviction," Black's Law Dictionary 147 (5th ed. 1979), or as "a sort of emotion constituting untrustworthy partiality." 10 C.J.S. *Bias* (1955 & Supp. 1989) (footnote omitted). "Some sort of commitment is necessary for disqualification [due to bias], even though it is less than an irrevocable one." 3 Davis, *Administrative Law Treatise* 2d § 19:4 at 385

> (1980). Bias can refer to preconceptions about facts, policy or law; a person, group or object; or a personal interest in the outcome of some determination. *See id.* ch. 19.

Id. at 615, 392 S.E.2d at 585. In *Crump*, a case involving review of a school board decision, the trial court properly instructed the jury as follows:

> To prove impermissible bias of the hearing body the plaintiff must show or prove by its greater weight more than the fact that a board member or members had some knowledge of some fact or facts concerning a charge or charges against a teacher. Mere familiarity with a fact or facts or charge or charges does not automatically disqualify a board member as a decision maker.
>
> . . . .
>
> To find impermissible bias you, the jury, must find by the greater weight of the evidence that the mind of a board member was predetermined and was fixed and not susceptible to change prior to the deliberating process of the hearing board, and that the decision was not based solely upon evidence during the hearing.

Id. at 616, 392 S.E.2d at 585-86. The distinction between pre-hearing knowledge and bias is key. *Id.* at 616, 392 S.E.2d at 586. The mere fact that a decision maker enters a hearing with knowledge of the subject matter of the hearing does not lead necessarily to the conclusion that the decision maker's mind is closed to evidence and set as to the final result. *Id.* at 617, 392 S.E.2d at 586. If, however,

> there be facts within the special knowledge of the [decision makers] or acquired by their personal inspection of the premises, they are properly considered. However, they must be revealed at the public hearing and made a part of the record so that the applicant will have an opportunity to meet them by evidence or argument and the reviewing court may judge their competency and materiality.

Humble Oil & Refining Co. v. Bd. of Aldermen of the Town of Chapel Hill, 284 N.C. 458, 468, 202 S.E.2d 129, 136 (1974).

We find no violation of petitioners' due process rights. Raleigh City Code § 10-2094(d) (1989) provides in part that

(d) The following procedure is required for any quasijudicial evidentiary hearing arising under this chapter:

* * * *

2. Public notice by publishing or advertising notice of the hearing in a newspaper of general circulation in the city at least once and at least seven (7) days nor more than twenty-five (25) days before the date fixed for the hearing.

3. The city will make a reasonable attempt to notify by general mail all owners of property which is the subject of the action, the applicant, and all property owners immediately adjacent to or directly opposite the street from the subject property. . . .

4. The city will make a reasonable attempt to post a sign or signs on the subject property . . . .

5. Consideration of present physical conditions on the premises and in the vicinity.

The above provisions help insure that due process is afforded all interested parties. The record contains the notice of public hearing published 22 September 1990 and the notice of public hearing mailed to adjacent property owners. An evidentiary hearing was held on 2 October 1990 and held open until 16 October 1990. At the hearings, the Council heard testimony from all persons desiring to testify. Although the record does not reflect any cross-examination in the traditional sense by citizens, the Council is required only to provide the opportunity for persons to cross-examine witnesses. The record does not reflect that the Council denied any request to cross-examine witnesses presenting evidence in support of the project. In addition to the hearings on 2 and 16 October, the Parks and Recreation Director, another representative from Parks and Recreation, the City Planning Director, and a representative of the project sponsor met with citizens on 8 October 1990. We find that the Council complied with the above stated requirements and provided petitioners with notice and the opportunity to be heard.

[5] Having found that petitioners had notice and the opportunity to be heard, we turn our attention to the asserted bias of the individual council members. First we address the statements of Councillors Anne Franklin and Mary C. Cates. The transcript summary provides:

> Ms. Franklin indicated she was hearing concerns different than what she had heard expressed before. She stated the people in the community would be subjected to the actual content or language of these concerts. *She stated she has been assured that the sound would not reach into the neighborhood.* She questioned if the City sets any type parameters as it relates to hearing the content and/or language of the concerts. . . . *Ms. Cates pointed out she recently attended a neighborhood meeting on sound barriers around the Beltline and they were using 67 decimal [sic] level.* (Emphasis added)

After reviewing the context of Councillor Franklin's statement, we cannot conclude that her mind was closed to the evidence and her vote predetermined. Moreover, as respondent argues, the statement may have been prompted by the evidence presented during the hearing process. Although Councillor Cates' statement may be considered "a fact within the special knowledge of a member" which should have been introduced during the body of the hearing, we also conclude that her statement does not indicate impermissible bias on her part.

We next address the alleged bias of the Council members who participated in the planning of the project. The record reflects that prior to the special use permit hearing, the Planning Commission recommended approval of the outdoor stadium ordinance and the Real Estate Committee recommended approval of the developer's plan to develop the project. The Council adopted an ordinance in connection with financing the cost of the amphitheater, approved the proposed operating agreement and development management agreement, adopted a resolution to notify the public of the intent to lease land, and authorized notice to be placed in the newspaper. The record contains no other indication of the participation by Council members in the project except as necessary to perform the above duties.

The superior court addressed petitioners' claims of Council bias stating in part:

> Had the pre-planning process and careful thought not gone into the project, the City would be in court subjected to an attack and claims of lack of planning and irresponsible actions. To disqualify the members of the City Council on claims of pre-hearing bias because of previous knowledge or participation in the planning process of a municipal venture, such as

the amphitheater, would gut and destroy the orderly and logical planning process which is now present in the City of Raleigh and other local governments.

Although the record reflects the Council's enthusiasm for the project, we do not find that pre-hearing "participation" reflects impermissible bias on the part of the Council. The Council functioned as authorized by law. We find no denial of due process.

Finally, petitioners contend the special use permit was issued in disregard of N.C. Gen. Stat. § 160A-362 (1987) because there was no representation on the Planning Agency and Board of Adjustment by residents of the extraterritorial area directly adjacent to the project site. This issue was not raised by petitioner before the superior court. Our rules do not provide for issues to be raised here for the first time. N.C.R. App. P. 10(b). This argument is dismissed.

The judgment of the trial court is

Affirmed.

Judges JOHNSON and GREENE concur.

THOMAS E. DEBNAM, PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF CORRECTION, RESPONDENT-APPELLEE

No. 9110SC512

(Filed 6 October 1992)

1. Administrative Law and Procedure § 65 (NCI4th)— State Personnel Commission—superior court review—scope of appellate review

In an appeal from a Personnel Commission decision, the scope of appellate review of a superior court decision is the same as in other civil cases: first, the exceptions and assignments of error to the superior court decision; second, whether the trial court committed any errors of law in applying the review standards set forth in N.C.G.S. § 150B-51.

Am Jur 2d, Administrative Law § 730.

2. Constitutional Law § 354 (NCI4th)— administrative investigation—applicability of Fifth Amendment

An administrative law judge correctly concluded that petitioner's right against self-incrimination was violated where petitioner, an assistant superintendent of the Gates County Prison Unit, was interviewed concerning an incident involving two inmates and a ring; petitioner asked during the interview about the possibility of criminal charges being brought against him; the officials conducting the interview replied that they had been directed to conduct an administrative investigation and that the area administrator was angry and would take further action; petitioner answered questions at that interview but refused to answer questions at a subsequent interview, expressing concern that he might be criminally prosecuted; the officials responded that they were investigating management problems but did not inform petitioner that his statements could not be used against him in later criminal proceedings; and petitioner was eventually dismissed for his failure to cooperate in an internal investigation. A state employee subject to administrative investigation must be advised that the questions will relate specifically and narrowly to the performance of official duties; that the answers cannot be used against the employee in any subsequent criminal prosecution; and that the penalty for refusal is dismissal. In the absence of such advice, no penalties can be imposed on the employee for refusing to answer the questions.

Am Jur 2d, Criminal Law § 703.

Supreme Court's views regarding proceedings to which Fifth Amendment's privilege against self-incrimination applies. 65 L. Ed. 2d 1306.

Judge GREENE concurring.

APPEAL by petitioner from order entered 8 February 1991 by *Judge Donald W. Stephens* in WAKE County Superior Court. Heard in the Court of Appeals 17 March 1992.

R. Bradley Miller for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie L. Bateman and Associate Attorney General Anne J. Brown, for respondent appellee.

COZORT, Judge.

Petitioner appeals from order of the superior court affirming the decision of the State Personnel Commission that petitioner was properly discharged for personal misconduct and that his discharge did not violate his constitutional right against self-incrimination. We reverse.

Petitioner was employed in January 1982 as Assistant-Superintendent of the Gates County Prison Unit. On 10 September 1985 two officials from the respondent Department of Correction Regional Office interviewed petitioner concerning an incident involving two inmates and a ring. During the interview, petitioner asked the officials about the possibility of criminal charges being brought against him as a result of the ring incident. The officials replied that they had been directed to conduct an administrative investigation and that the Eastern Area Administrator, James Varner, was very angry about the situation and would take further action. Petitioner answered questions about the ring incident for approximately one hour. After the interview, petitioner sought legal representation, but none of the lawyers he contacted agreed to accept the case. One attorney told petitioner not to answer any questions until the Department informed him whether they intended to bring criminal charges based on the ring incident.

On 19 September 1985 District Manager Robert Lewis, Administrative Services Manager George Pollock, and James Varner conducted additional interviews of all the Gates County Prison Unit staff, including petitioner. During the interview, petitioner expressed concern that he might be criminally prosecuted for the ring incident and stated that he did not want to answer any questions until he was given a written decision regarding the ring incident. The three managers told petitioner they were investigating management problems, not the ring incident. After leaving the interview temporarily to telephone a friend whom he believed might be able to assist him, petitioner returned to the interview room and refused to answer questions. Mr. Varner informed petitioner that he could be dismissed for failing to cooperate with an internal investigation. Petitioner still refused to respond to any questions. Mr. Varner then suspended petitioner for his failure to cooperate with an internal investigation. On 8 October the respondent Department of Correction dismissed petitioner, citing his failure to cooperate as one of the reasons for the dismissal.

On 27 March 1986 petitioner appealed his dismissal to the North Carolina Office of State Personnel. In a proposed decision dated 25 January 1989, Administrative Law Judge Angela R. Bryant concluded that the Department had substantive just cause for dismissal because the Department had proved petitioner allowed two inmates to work on his personal car and truck. Judge Bryant also concluded, however, that petitioner was entitled to back pay because the Department committed procedural violations by failing to give petitioner a proper predismissal conference wherein petitioner would have received specific written reasons for his dismissal. Judge Bryant further concluded that certain allegations against petitioner involved possible criminal violations, that the Department had pursued criminal charges against other employees arising from allegations in personnel cases, and that the Department's efforts to compel answers from petitioner violated petitioner's right to protect himself against self-incrimination. Judge Bryant recommended that petitioner receive back pay covering the period from 19 September 1985 to 11 December 1987.

The State Personnel Commission adopted many of Judge Bryant's findings and conclusions; however, the Commission declined to adopt those dealing with the procedural violations and petitioner's right against self-incrimination. Instead, the Commission issued a decision finding and concluding there were no procedural violations and no violation of petitioner's right against self-incrimination. The Commission ordered that respondent's dismissal of petitioner be upheld as being for just cause.

Petitioner filed in Wake County Superior Court a petition for judicial review challenging the Commission's conclusions on both the procedural issues and the Fifth Amendment issue. Superior Court Judge Donald W. Stephens affirmed the Commission on both issues. On the Fifth Amendment issue, the trial court held:

> From the record it appears that both the Petitioner and the Administrative Law Judge erroneously concluded that Petitioner, as an Assistant Superintendent of the Gates County Prison Unit who was the subject of an internal mismanagement investigation by the Department *which also included conduct that could have created a potential for criminal charges*, was somehow shielded by the Constitution when he refused to answer job-related questions and was subsequently suspended and dismissed for such failure to cooperate and for other miscon-

duct. Clearly, an internal Departmental investigation into mismanagement at the Gates Prison Unit was a matter in which the Petitioner had no right to refuse to cooperate; he was required to answer all appropriate questions, *even those which may have incriminated him regarding criminal misconduct*, so long as he was not required to waive any 5th Amendment protections at subsequent criminal proceedings. In essence, the law provides to all public employees automatic "use" immunity that excludes statements which they are required to make during internal administrative investigations from use by prosecutors as evidence against them at any subsequent criminal proceeding. *The law does not require any form of warning to any such employee regarding his rights or obligations.* A government employer may lawfully require a public employee to answer potentially incriminating questions about the performance of his duties under threat of dismissal. A refusal to answer or otherwise cooperate can constitute just cause for dismissal. Likewise, incriminating answers given by a cooperating employee can form the basis for dismissal. However, neither lack of cooperation nor incriminating statements can form the basis of any subsequent criminal prosecution. Any public employee who refuses to answer appropriate questions regarding his job performance does so at the risk of employment termination. Petitioner in this case accepted that risk by his refusal to cooperate with a proper internal Departmental administrative investigation and was, therefore, subject to lawful termination.

The record in this case clearly shows that the Petitioner refused to answer questions from the beginning of the internal investigation on the basis of a defective 5th Amendment claim. This refusal standing alone was sufficient to support his suspension and subsequent discharge. (Emphasis added.)

Petitioner filed a timely notice of appeal. In his sole assignment of error, petitioner challenges the trial court's conclusions on the Fifth Amendment issue only, thereby abandoning any challenge to the trial court's rulings on the alleged procedural violations. The appeal before us, then, applies only to the trial court's ruling on the Fifth Amendment issue.

[1] The superior court's standard of review is governed by N.C. Gen. Stat. § 150B-51(b) (1991) which provides in pertinent part:

> [The court] may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

The scope of our appellate review of the superior court decision is the same as in other civil cases. First, we consider the exceptions and assignments of error to the superior court decision. *Watson v. N.C. Real Estate Commission*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987), *cert. denied*, 321 N.C. 746, 365 S.E.2d 296 (1988). Second, we determine whether the trial court committed any errors of law in applying the review standards set forth in § 150B-51. *In re Kozy*, 91 N.C. App. 342, 344, 371 S.E.2d 778, 780 (1988), *disc. review denied*, 323 N.C. 704, 377 S.E.2d 225 (1989).

[2] The sole issue on this appeal is whether petitioner's dismissal for refusing to cooperate in an internal investigation violated his Fifth Amendment right against self-incrimination. Petitioner and the respondent Department agree that when a government agency requires an employee to make statements during an internal investigation, upon threat of losing his job, the statements may not be used against the employee in any subsequent criminal proceeding. *See Garrity v. New Jersey*, 385 U.S. 493, 499, 17 L.Ed.2d 562, 567 (1967). Petitioner here contends that he must be informed of this rule of law and his rights during his questioning. The Department contends that the employee does not have to be told of his rights. There are no cases on point in North Carolina; we turn to the cases in other jurisdictions.

In *United States v. Devitt*, 499 F.2d 135 (7th Cir. 1974), *cert. denied*, 421 U.S. 975, 44 L.Ed.2d 466 (1975), the United States

Court of Appeals for the Seventh Circuit adopted a rule requiring an agency to inform an employee that compelled information may not be used against the employee in subsequent criminal proceedings. In that case the employee, a police officer, was directed by his superiors to testify before a grand jury under the threat that his refusal to testify would result in disciplinary proceedings against him. The court stated: "Nor may disciplinary action be taken against the witness for his refusal to testify, unless he is first advised that, consistent with the holding in *Garrity*, evidence obtained as a result of his testimony will not be used against him in subsequent criminal proceedings." *Id.* at 141. (citations omitted). The court went on to hold that the police officer was not entitled to any relief in that case because he was attempting to have the rule extended to false statements he made before the grand jury. Summarizing the law, the court stated:

> *Garrity* provides the witness with adequate protection against the government's use, in subsequent criminal proceedings, of information obtained as a result of his testimony, where his refusal to testify would form the basis for disciplinary action against him. *Gardner* [*Gardner v. Broderick*, 392 U.S. 273, 20 L.Ed.2d 1082 (1968)] and *Sanitation Men* [*Uniformed Sanitation Men Ass'n, Inc. v. Commissioner of Sanitation*, 392 U.S. 280, 20 L.Ed.2d 1089 (1968)] provide the witness with a shield against such disciplinary action based upon his refusal to testify, in cases in which he refuses to do so, believing that his testimony or the fruits thereof can be used against him in subsequent criminal proceedings.

Id. at 142.

In *Matt v. Larocca*, 524 N.Y.S.2d 180, 518 N.E.2d 1172 (1987), *cert. denied*, 486 U.S. 1007, 100 L.Ed.2d 197 (1988), the New York Court of Appeals, that state's highest court, was faced with the question of whether the requirement that a grand jury witness be advised that his answers could not be used against him in subsequent criminal proceedings should be extended to civil proceedings convened to investigate disciplinary charges of work-related misconduct. The court declined to extend the rule, relying on its perception of the distinctions between a grand jury proceeding and a disciplinary proceeding:

> Petitioner did not appear before a Grand Jury investigating criminal charges; rather, his appearance was at a civil pro-

ceeding convened to investigate disciplinary charges of work-related misconduct. He was neither requested to waive his privilege against self-incrimination, nor was he faced with a possible criminal contempt conviction for refusing to testify; he stood only to be dismissed from his employment on charges of insubordination should he refuse to answer the questions posed by his employer. These questions specifically related to the performance of petitioner's official duties: wrongfully permitting an employee to be paid for time spent doing outside work for private individuals; approving time sheets he knew to be inaccurate; and allowing his subordinates to use State-owned materials and equipment for their personal benefit. . . . Indeed, the immunity protecting petitioner flows directly from the Constitution, and neither the Commissioner, nor counsel representing the Commissioner at the investigatory proceeding, had the power either to confer the immunity or to define or alter its breadth.

These critical distinctions persuade us that . . . the State was not obligated to inform petitioner that immunity attached before ordering him to answer questions. As the Commissioner's representative at the investigatory proceeding did not have the power to confer immunity, or to modify the immunity to which petitioner was entitled, there is no basis for concluding that he nonetheless had an affirmative obligation to inform petitioner of the automatic attachment of immunity. It is true that the State is required to inform a witness appearing before a Grand Jury of the fact that immunity will be received, even though, under current law, such witnesses are conferred transactional immunity automatically by operation of law (*see*, CPL 190.40; *People v. Rappaport*, 47 N.Y.2d 308, 313, 418 N.Y.S.2d 306, 391 N.E.2d 1284, *supra*). The consequences, however, of refusing to testify before a Grand Jury—criminal prosecution for contempt—are more serious than those of refusing to answer questions in a Public Officers Law § 61 proceeding—dismissal from public employment. Furthermore, a witness testifying before a Grand Jury ordinarily does not have a right to have an attorney present, which is a crucial factor underlying the State's obligation to inform the witness of the immunity conferred in the Grand Jury context. On the other hand, in this civil proceeding petitioner was assisted and advised by counsel present throughout the hearing, a situa-

> tion which does not implicate the danger faced by a witness testifying before a Grand Jury, who does not have immediate access to counsel, of unwittingly forfeiting its privilege against self-incrimination.
>
> We conclude therefore that insofar as petitioner was not requested to waive his right to immunity before answering questions specifically, directly and narrowly relating to his official duties, his dismissal did not violate fundamental fairness or his privilege against self-incrimination.

Id. at 184, 518 N.E.2d at 1176.

We do not concur with the New York court's conclusion that the consequences of refusing to answer questions in a disciplinary proceeding are so less serious than a grand jury proceeding that the employee does not have to be informed of his rights under the law. Rather, we conclude that a person's right to be free from self-incrimination under the Fifth Amendment to the United States Constitution is so basic, so fundamental, that the government is required to fully inform the person of that right in both grand jury and disciplinary proceedings. This rule is especially appropriate in a case such as the one below, where the employee did not have counsel present at the questioning, and the governmental agency, according to the uncontroverted findings of the administrative law judge, had pursued criminal charges against other employees arising from allegations in personnel cases.

We find support for this conclusion from North Carolina statutes and cases in similar instances. For example, N.C. Gen. Stat. § 126-35 (1991) requires that no permanent employee of the state may be discharged, suspended or demoted for disciplinary reasons unless he is furnished with a written statement setting forth the specific acts setting forth the reasons for the action and *the employee's appeals rights under the statute.*

In *Warren v. City of Asheville*, 74 N.C. App. 402, 328 S.E.2d 859, *disc. review denied*, 314 N.C. 336, 333 S.E.2d 496 (1985), we faced the issue of whether a police officer could be dismissed for refusing to take a polygraph examination. Upon the police officer's refusal to submit to an examination, the Chief of Police terminated the officer's employment with the City of Asheville. The Asheville Civil Service Board affirmed the firing, and the officer appealed for a trial de novo in superior court. At trial, the jury concluded

that the officer was fired without justification, and the trial court ordered his reinstatement with full back pay and benefits. The City appealed.

We affirmed, holding in pertinent part that an officer may be discharged from his employment upon his refusal to submit to a polygraph examination only if the officer is informed of the following: "(1) that the questions will relate specifically and narrowly to the performance of official duties; (2) that the answer cannot be used against the officer in any subsequent criminal prosecution; and (3) that the penalty for refusal is dismissal." *Id.* at 408, 328 S.E.2d at 863. We concluded that since the questions to be asked there were not specifically and narrowly related to plaintiff's official duties and the charge under investigation, plaintiff was entitled as a matter of law to refuse to take the polygraph examination. Therefore, the jury's verdict was supported by the evidence.

We find the Fifth Amendment principles requiring the warnings set out in *Warren* are equally applicable in the context of this case. We hold that a state employee subject to administrative investigation must be advised (1) that the questions will relate specifically and narrowly to the performance of official duties; (2) that the answers cannot be used against the employee in any subsequent criminal prosecution; and (3) that the penalty for refusal is dismissal. In the absence of such advice, no penalties can be imposed on the employee for refusing to answer the questions.

The record below shows that petitioner asked for reassurance that he would not be criminally prosecuted for his statements concerning the ring incident. The prison officials responded that they were investigating management problems; however, they did not inform him that his statements could not be used against him in later criminal proceedings. Rather, the officials informed petitioner only that he could be fired for refusing to answer questions.

The administrative law judge correctly concluded that petitioner's right against self-incrimination was violated. The State Personnel Commission and the superior court erred by concluding to the contrary. The superior court's order must be reversed, and the cause must be remanded to superior court for entry of an order reversing the State Personnel Commission and directing the Commission to adopt the proposed order of the administrative law judge.

Reversed and remanded.

Judge JOHNSON concurs.

Judge GREENE concurs with a separate opinion.

Judge GREENE concurring.

I do not agree with the majority that this Court must, in reviewing an order of the superior court affirming or reversing a decision of an administrative agency, "determine whether the trial court committed any errors of law in applying the review standards set forth in N.C.G.S. § 150B-51." Instead the standard of review for an appellate court is "the same . . . utilized by superior courts." *Jarrett v. N.C. Dept. of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991). That is whether the decision of the administrative agency, not the order of the trial court, should be reversed because it is

(1) In violation of constitutional provisions;

(2) In excess of the statutory authority or jurisdiction of the agency;

(3) Made upon unlawful procedure;

(4) Affected by other error of law;

(5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51(b) (1987). Although appellate review "is limited to assignments of error to the superior court's order, this [C]ourt is not required to accord any particular deference to the superior court's findings and conclusions concerning the [agency's] actions." *Watson v. N.C. Real Estate Comm'n*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987). Otherwise, I fully concur with the majority.

PERRY-GRIFFIN FOUNDATION, A NORTH CAROLINA CORPORATION, PLAINTIFF v. JIMMIE PROCTOR, JOSEPH ANTHONY WETHERINGTON, JR., RAYNORWOOD, INC., A CORPORATION OF NORTH CAROLINA, BILL MORRIS, MIKE WOODARD, AND FREDDIE PRICE, DEFENDANTS

No. 913SC535

(Filed 6 October 1992)

1. Trespass § 8.2 (NCI3d)— wrongful cutting of timber—damages doubled before credits subtracted

The trial court erred in failing to double damages for defendant's unlawful cutting of timber from plaintiff's lands. Any credit to defendant for proceeds recovered by plaintiff and for the value of timber left on the ground at the tract should have been deducted after the damages were doubled. N.C.G.S. § 1-539.1(a).

Am Jur 2d, Logs and Timber § 135.

2. Rules of Civil Procedure § 59 (NCI3d)— new trial improperly awarded—no grounds advanced by defendant as basis—abuse of discretion

In an action for trespass and for damages resulting from defendant's unlawful cutting of plaintiff's timber, the trial court erred in granting defendant a new trial on his counterclaim that plaintiff breached its contractual obligation to put forth its best efforts to facilitate the sale of the property in question to defendant, since the basis for the trial court's order was not grounded on reasons advanced by defendant for making the motion, and the trial court's order was an abuse of discretion. N.C.G.S. § 1A-1, Rule 59.

Am Jur 2d, New Trial §§ 36, 551.

APPEAL by plaintiff from judgment and order entered 3 January 1991 by *Judge I. Beverly Lake, Jr.*, in PAMLICO County Superior Court. Heard in the Court of Appeals 7 April 1992.

Henderson, Baxter & Alford, P.A., by David S. Henderson, for plaintiff appellant.

Barrington, Herndon & Raisig, P.A., by Carl A. Barrington, Jr., and Cheryl C. Garcia, for Jimmie Proctor, defendant appellee.

COZORT, Judge.

Plaintiff brought an action against defendants for trespass on land and for damages resulting from defendants' unlawful cutting of plaintiff's timber. One defendant counterclaimed for breach of contract alleging failure on the part of plaintiff to use its best efforts to facilitate the sale of the timberland in question pursuant to an option contract. The trial court submitted nine issues to the jury. The jury's verdict was favorable to the plaintiff, finding that defendant Proctor trespassed upon plaintiff's land and cut timber valued at about $20,000.00. Defendant Proctor moved for judgment notwithstanding the verdict, which was denied, and for a new trial, which was also denied. Plaintiff moved the trial court to double the timber damages; the court reserved ruling on plaintiff's motion. Defendant Proctor later moved the trial court to reconsider the denial of his motion for a new trial. Six months later, the trial court ruled that previous recoveries of plaintiff against defendant must be deducted from the timber damages verdict amount before the verdict was doubled. The trial court found the credits to be $20,140.00, leaving no damages to double. The trial court also entered an order granting defendant's motion for a new trial on its counterclaim. On appeal, plaintiff makes the following contentions: (1) the trial court erred by refusing to allow plaintiff to recover double damages pursuant to N.C. Gen. Stat. § 1-539.1 for the unlawful cutting of timber; and (2) the trial court erred in granting defendant Proctor's motion for a new trial as to his counterclaim. We agree with plaintiff and reverse.

Plaintiff Perry-Griffin Foundation ("Foundation") is a non-profit charitable North Carolina corporation created by the will of Clare G. Perry, who died in 1965. The will provided for the establishment of a charitable trust to fund the construction of a home for elderly ladies with "limited means." Other units were to be built as funding became available. The Foundation was also to award a $10,000.00 college scholarship loan to "worthy students." The will placed the following limitation on the Foundation's power to fulfill the trust's purposes: "No real estate is to be sold, however, it may be leased at the discretion of the directors, provided however, the timber may be sold at the discretion of the directors." Despite the Foundation's income from its rental properties, timberlands, and stocks and bonds, the corporation was unable to generate sufficient funds necessary to construct the ladies' home and to fund the college scholarship. Consequently, on 16 July 1987, the Foundation entered

into an option contract with defendant Proctor to acquire all of the Foundation's timberlands. The lands were to be sold for $2,200,000.00 to be paid in yearly installments plus interest. A memorandum signed by the parties indicated the sale of the timberlands was contingent "upon the Court's authorizing and empowering the Foundation to sell and convey said property." The memorandum additionally stated, that "[n]othing herein shall be construed to relieve the Foundation from putting forth its best efforts to facilitate the sale of said property to Proctor and to carry out the terms and conditions of the Option Contract attached hereto."

The Foundation subsequently brought a *cy pres* action pursuant to N.C. Gen. Stat. § 36A-53(a) (1991). The Foundation requested the court to allow the trustees "to permit the sale of its assets, including real estate," and to allow other changes in the administration of the trust. As required by N.C. Gen. Stat. § 36A-53(a), the Attorney General was notified and made a party to the action; defendant Proctor intervened as a party plaintiff. The *cy pres* action was heard on 5 February 1988. The court concluded: (1) the restraint on alienation of land in Ms. Perry's will was not void against public policy; (2) the purposes of the trust had become impossible or at least impracticable to fulfill because the inability to sell or convey any real estate prevented the trust from generating sufficient income to pay for the objects of the trust; and (3) the doctrine of *cy pres* should be invoked pursuant to N.C. Gen. Stat. § 36A-53 to order an administration of the trust as nearly as possible to fulfill the manifested general charitable intention of the testatrix. The court then provided

> the sale of real assets be made first from the sale of rental property, and only so much thereof as is necessary to effect the purposes of the charitable trust; and that if the sale of such rental property is insufficient to meet the needs and purposes of the trust, then so much of the timber lands as is necessary to accomplish the said ends of the trust.

Intervenor-plaintiff Proctor appealed the judgment to the Court of Appeals. On 2 May 1989, this Court in an unpublished opinion affirmed the trial court's judgment. *Perry-Griffin Foundation v. Thornburg*, 93 N.C. App. 790, 379 S.E.2d 114 (1989). Discretionary review to the North Carolina Supreme Court was denied on 6

September 1989. *Perry-Griffin Foundation v. Thornburg*, 325 N.C. 272, 384 S.E.2d 518 (1989).

While the *cy pres* action was pending in early December 1987, defendant Proctor contacted the Foundation's attorney and expressed a desire to cut some timber on the property under the option. The attorney explained he would present the request to the trustees; the board never reached a decision as to the request. On or about 7 December 1987, the defendants began cutting timber on plaintiff's lands without its knowledge, consent, or authority. The present action was instituted on 13 December 1987, to restrain the unlawful cutting and to recover damages double the amount of the unlawfully cut timber pursuant to N.C. Gen. Stat. § 1-539.1 (1983). Defendants Proctor and Wetherington filed three counterclaims; two were dismissed. The third counterclaim alleged that the court in the *cy pres* action failed to authorize the sale of plaintiff's timberlands to Proctor because plaintiff did not effectively appeal the judgment to the Court of Appeals. Defendant alleged the Foundation's actions thereby breached the option contract which imposed an obligation on the Foundation to use its "best efforts" to secure a judgment allowing the Foundation to sell the land. Defendant Wetherington took a voluntary dismissal as to the third counterclaim, leaving only defendant Proctor asserting the counterclaim.

Following trial on the issues, the jury returned a verdict which established: (1) defendant Proctor was a trespasser on plaintiff's property; (2) Proctor cut and removed timber from plaintiff's property; (3) the value of the unlawfully cut timber totalled $22,000.00; (4) plaintiff did not breach its duty to put forth its best efforts to facilitate the sale of the property to Proctor; (5) Proctor failed to substantially perform his obligations arising out of the option contract; and (6) Proctor sustained zero damages. In open court, defendant Proctor made a motion for a new trial and a motion for judgment notwithstanding the verdict. The trial judge denied both of defendant's motions and reserved ruling on plaintiff's motion to double the $22,000.00 value assigned to the timber. Several months later, on 31 December 1990, the trial judge signed a judgment which denied plaintiff's motion to double the timber value, finding that credits to defendant left no damages to double. The trial judge then entered a separate order granting defendant Proctor's motion for a new trial on his third counterclaim. Plaintiff appealed.

[1] We first consider whether the trial court erred in failing to double the damages for the unlawful cutting of timber pursuant to N.C. Gen. Stat. § 1-539.1(a) (1983), which reads:

> Any person, firm or corporation not being the bona fide owner thereof or agent of the owner who shall without the consent and permission of the bona fide owner enter upon the land of another and injure, cut or remove any valuable wood, timber, shrub or tree therefrom, shall be liable to the owner of said land for double the value of such wood, timber, shrubs or trees so injured, cut or removed.

Here, we find the trial judge erred by refusing to instruct the jury to award double damages and by subsequently failing to order double damages. The phrase "shall be liable" in the statutory provision provides that double damages must be ordered when the requirements of the statute are met. The plain language of the statute indicates that an award of double damages is not within the judge's discretion. We have previously upheld the entry of judgments in an amount double to what the jury determined the value of the unlawfully cut timber. *See, i.e., Tyson v. Winstead*, 15 N.C. App. 585, 190 S.E.2d 281 (1972); *Dawson v. Sugg*, 32 N.C. App. 650, 233 S.E.2d 639 (1977). Furthermore, a comparison of N.C. Gen. Stat. § 1-539.1 to N.C. Gen. Stat. § 75-16 (1988) supports our conclusion. The mandatory award of double damages pursuant to N.C. Gen. Stat. § 1-539.1 is similar to treble damages automatically assessed pursuant to N.C. Gen. Stat. § 75-16 in cases involving unfair and deceptive trade practices. Our Supreme Court has discussed the mandatory nature of treble damages in the latter cases: "absent statutory language making trebling discretionary with the trial judge, we must conclude that the legislature intended trebling of any damages assessed to be automatic once a violation is shown." *Marshall v. Miller*, 302 N.C. 539, 547, 276 S.E.2d 397, 402 (1981). Similarly, the $22,000.00 amount assigned to the value of the cut timber should have been doubled to equal a $44,000.00 judgment against defendant Proctor. Because plaintiff has stipulated that defendant be allowed a credit for proceeds recovered by plaintiff and for the value of timber left on the ground at the tract, defendant is entitled to a credit from the $44,000.00 judgment in the amount of $20,140.00.

[2] We next determine whether the trial court erred in granting defendant a new trial on his counterclaim. Defendant's counterclaim

asserts the Foundation breached "its contractual obligation to put forth 'its best efforts to facilitate the sale of said property' to Proctor and to carry out the terms and conditions of the option contract" by (1) presenting evidence to the trial court hindering the sale of said property to Proctor which was inconsistent with carrying out the terms and conditions of the option contract; (2) colluding with others having interests opposed to the sale of the property; (3) failing to cooperate during the appeal from the decision of the trial court in the *cy pres* action which declined to approve the sale of the property to Proctor; and (4) refusing to ask the trial court for an order to enable the Foundation to honor its agreement with Proctor after the Court of Appeals affirmed the trial court's decision. Defendant's counterclaim centers on the Foundation's conduct at the initial bench trial which adjudicated the *cy pres* issue and determined the Foundation would not be permitted to sell the timberland until the Foundation had sold all rental property in its possession. At the second trial, which is the subject of this appeal, defendant called Mr. A.D. Ward, an expert in real estate contract law and civil litigation, to render an opinion that the Foundation was not diligent in facilitating the sale to Proctor and in carrying out the terms and conditions of the option contract in good faith. Mr. Ward's testimony included in pertinent part:

> It is my professional opinion that the Foundation breached its duty to put forth its best efforts to facilitate the sale of the property contract. The Foundation terminated its effort to have the contract approved in my opinion after, or when it put Sam Hughes on the stand at the February 5th hearing .... It is my opinion that the effort put forth by the Foundation really was designed to kill the contract.
>
> ... The will provides that no real estate shall be sold, which is a restraint on alienation of real property. The Supreme Court of North Carolina has held that with respect to charitable trust [*sic*] such as this, it is not void; but, of course, the Court has held that that can be waived and that was the purpose of the lawsuit.

The remainder of Ward's testimony discloses that he testified in depth as to the doctrine of *cy pres* and to the proceedings which occurred prior to and at the 5 February 1988 hearing. Plaintiff then called a rebuttal witness, Mr. George W. Boylan, an attorney with the Attorney General's office, to rebut defendant's evidence.

Mr. Boylan rebutted Ward's testimony, stating that the Foundation had used its best efforts at the *cy pres* hearing. It is Boylan's testimony which serves as the basis for the trial court's decision granting defendant a new trial as to his counterclaim.

As an initial matter, we note that defendant's motion for a new trial was improperly identified as a motion pursuant to N.C. Gen. Stat. § 1A-1, Rule 60 (1990), rather than pursuant to N.C. Gen. Stat. § 1A-1, Rule 59 (1990). However, it is clear from the trial court's order that the motion for a new trial was treated as having been made pursuant to Rule 59, despite the improper designation. Therefore, we examine the trial court's order for a new trial by applying the standards applicable to a Rule 59 motion. Our scope of review of a trial court's ruling either granting or denying a motion to order a new trial is strictly limited to the determination of whether the cold record demonstrates a manifest abuse of discretion. *Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). A trial judge's order granting a new trial may be reversed on appeal only in circumstances where an abuse of discretion is clearly shown. *Id.* In the case below, the defendant's request for a new trial was made "on the basis that this Defendant was not afforded an opportunity to depose George Boylan prior to trial and adequately prepare for his cross-examination, resulting in unfair surprise and prejudice to said Defendant." The trial judge denied defendant's original motion made on 7 June 1990; however, the trial court granted defendant's motion to reconsider defendant's demand for a new trial made on 18 June 1990. The trial court, in granting the motion, stated, "the Court is of the opinion that the testimony of George Boylan exceeded the limitations prescribed by the Court with respect to new matter which had not been alleged in the pleadings; and the Court is of the opinion that the motion for a new trial on defendant's third Counterclaim should be allowed." We find the trial court's order granting a new trial to be the product of an abuse of discretion.

First, the basis for the trial court's order was not grounded on reasons advanced by defendant for making the motion. Rather, it appears to be structured independently on what the trial judge perceived to be error. Furthermore, an examination of the reasons articulated for the new trial reveals the trial court's order was an abuse of discretion. At trial, the defendant objected to Boylan's rebuttal testimony, contending Boylan was not listed on the pretrial

order as one of the witnesses to be called by plaintiff. Nevertheless, the trial court permitted Boylan to testify, noting:

> The Court will further allow an opinion from Mr. Boylan if he is so qualified with respect to the efforts put forth by the foundation on the appeal from Judge Reid's Order to the Court of Appeals. The Court will not entertain or allow an opinion as to whether the Foundation was or was not diligent in its efforts in supporting the sale overall or the contract overall or whether the Foundation or the plaintiff was or did or did not act in good faith overall.
>
> [T]he Court is going to allow this because Mr. Boylan has been a participate [*sic*] in this cy pray [*sic*] action as represented of the Attorney General throughout the course of the previous cy pray [*sic*] action.

Boylan's testimony which is the source of contention reads:

> A. My opinion is that the Foundation did not breech [*sic*] its duty to exercise its best efforts? [*sic*]
>
> [I]t was my opinion initially that it was simply a real impossibility for the Foundation to ever get Court Approval. Ms. Perry had left her property in Trust wit [*sic*] a specific request that no real estate was to be sold or whether it could be leased and timber harvested. The law in North Carolina is and has been for some time that those types of restraints and alienation are legal. Therefore, in my opinion it was impossible for the Foundation to get Court approval for the sell [*sic*] of property, because it would be in violation in the then current law of North Carolina that would up hold [*sic*] such type of restraints.

We do not find the above testimony included "new matters" outside the scope of limitation set by the trial judge for Boylan's testimony. Even assuming *arguendo* the testimony ventured outside the boundaries set by the trial judge, we do not find the testimony constituted error which would justify a new trial. Defendant's witness testified about the law, and the *cy pres* action, and Boylan's testimony served only to rebut a matter already before the jury. The trial judge's order granting defendant a new trial on defendant's counterclaim is therefore reversed.

The cause is thus remanded for the entry of an order granting plaintiff's motion to double the timber damages before the defendant's credits are deducted from the damages.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

ROXIE KEEL v. H & V INCORPORATED D/B/A ACE ONE HOUR CLEANING

No. 9110IC770

(Filed 6 October 1992)

1. **Master and Servant § 68 (NCI3d) — workers' compensation — plaintiff's exposure to fumes — occupational disease — physician's medical opinion — sufficiency of evidence**

A physician's medical opinion was sufficient evidence to support the Industrial Commission's finding of fact that plaintiff suffered from an occupational disease where the evidence revealed that the physician's medical opinion was based upon personal examination and testing of plaintiff, an assessment of the circumstantial evidence surrounding the onset and development of the disease, and articles on solvent-induced lung injury; furthermore, the evidence was not insufficient because the physician did not know the quantity or quality of plaintiff's exposure to PCE while she worked for defendant cleaners, since the degree of exposure does not need to be measured during a claimant's employment, and any evaluation of the workplace for the agent in question after claimant's departure would not quantify claimant's exposure.

Am Jur 2d, Workers' Compensation § 597.

Workmen's compensation: use of medical books or treatises as independent evidence. 17 ALR3d 993.

2. **Master and Servant § 93.2 (NCI3d) — workers' compensation — additional evidence taken by Commission — subsequent exclusion discretionary**

Where the decision to take additional evidence is discretionary in nature and neither party has put forth good cause

for such evidence to be considered, the Industrial Commission may decide to exclude evidence which it has previously seen fit to hear.

Am Jur 2d, Workers' Compensation § 564.

APPEAL by defendant from Opinion and Award of the North Carolina Industrial Commission filed 20 December 1990. Heard in the Court of Appeals 26 August 1992.

Plaintiff filed this workers' compensation claim on 5 March 1987, alleging an occupational disease caused by exposure to perchloroethylene fumes emanating from the dry cleaning solution used in the workplace. The deputy commissioner determined that plaintiff's total disability was "due to causes and conditions which are characteristic of and peculiar to her particular trade, occupation or employment" and awarded compensation under § 97-53(13). The Full Commission adopted the decision of the deputy commissioner. Defendant appeals. We affirm.

Taft, Taft & Haigler, by Robin E. Hudson, for plaintiff-appellee.

Colombo, Kitchin & Johnson, by W. Walton Kitchin, Jr., for defendant-appellant.

LEWIS, Judge.

The evidence before the Commission tended to establish the following:

Plaintiff-employee, Roxie Keel, is a 42 year old woman (she was 36 years old at the time of initial diagnosis) with a tenth grade education who worked for defendant dry cleaner from October 1985 until June 1986. For the first three months, plaintiff washed, pressed and removed spots. In January 1986 she began operating a dry-cleaning machine. During the required maintenance of the machine, plaintiff was regularly exposed to perchloroethylene (PCE), a chemical component of the dry-cleaning solution, while cleaning the filters. Plaintiff contended that contact with the fumes of the dry-cleaning solution caused eye irritation and tears, dizziness, perspiration, coughing and later, shortness of breath. The fumes were so strong that on occasion plaintiff was forced to sit down. By June 1986 plaintiff's shortness of breath became so pronounced that she left the job.

Plaintiff was treated by her family physician until November 1986 when she was referred to a pulmonary specialist, Dr. Albert Driver. Dr. Driver diagnosed plaintiff's condition as interstitial pulmonary fibrosis which he attributed to her exposure to fumes in the workplace. An industrial hygienist, at Dr. Driver's request, tested defendant's dry-cleaning premises on 12 November 1986. He found airborne concentrations of PCE that were "only 7% of the recommended exposure limits" and determined that there were "no recognized significant health hazards." The hygienist testified via deposition that the "[p]otential health effects associated with perchloroethylene are basically irritation of the eyes and upper respiratory system, central nervous system depression, and possible liver/kidney damage." He stated that human studies revealed no response to seven hours continuous exposure to PCE in concentrations of 100 parts per million. The hygienist speculated that prior occupational exposure might have contributed to plaintiff's illness, though no evidence of such exposure was present.

Dr. Driver examined plaintiff and was unable to find signs of any causative agent except chemical exposure, nor were symptoms of other causative agents documented in plaintiff's old medical records. A chest x-ray taken in 1982 was "entirely normal." As a progressive disease, evidence of interstitial fibrosis would have shown up on x-ray or through other symptoms had the disease pre-dated plaintiff's employment with defendant. Dr. Driver specifically excluded plaintiff's history of smoking as a causative factor. He stated that plaintiff did not attribute her illness to work related chemical exposure, but named PCE in answer to specific questions regarding her exposure to chemical fumes in the workplace.

Due to the strong "circumstantial or . . . chronologic[al] association" between the evolution of plaintiff's symptoms and her employment, Dr. Driver testified: "there's a reasonable certainty in my mind that the occupational exposure to fumes in the work place were significant factors in the development of interstitial fibrosis." Dr. Driver pointed to three case reports in the literature which, though not linking PCE to interstitial fibrosis, did report studies "where these solvents ha[d] been injurious to the lungs and, I, I see no reasons why these chemicals could not have affected this particular patient." As plaintiff has experienced minimal improvement in her condition, Dr. Driver testified that plaintiff is "almost totally impaired" and is unable to "perform any physical exertion."

Prior to her employment with defendant, plaintiff had held various jobs including four and one-half years in the dry cleaning industry, but had never operated a dry cleaning machine and had never encountered significant respiratory problems. Plaintiff is unable to perform her former jobs or any other job which would require physical exertion. She is without the education or the training to perform other types of work. Plaintiff has been unemployed since leaving defendant's business in June of 1986.

"For an injury or death to be compensable under our Workmen's [now Workers'] Compensation Act it must be either the result of an 'accident arising out of and in the course of the employment' or an 'occupational disease.'" *Booker v. Duke Medical Center*, 297 N.C. 458, 465, 256 S.E.2d 189, 194 (1979). "A disease is an occupational disease compensable under N.C. Gen. Stat. 97-53(13) if claimant's employment exposed him "to a greater risk of contracting this disease than members of the public generally, . . ." and such exposure "significantly contributed to, or was a significant causal factor in, the disease's development." *Gay v. J. P. Stevens & Co. Inc.*, 79 N.C. App. 324, 330, 339 S.E.2d 490, 494 (1986) (citing *Rutledge v. Tultex Corp.*, 308 N.C. 85, 101, 301 S.E.2d 359, 369-70 (1983)). Workplace exposure is a significant factor if without the exposure "the disease would not have developed to such an extent that it caused the physical disability which resulted in claimant's incapacity for work." *Id.* (citing *Rutledge*, 308 N.C. at 102, 301 S.E.2d at 370). The significance of exposure may be determined by medical evidence as well as "(1) the nature and extent of claimant's occupational exposure, (2) the presence or absence of other non-work-related exposures and components which contributed to the disease's development, and (3) correlations between claimant's work history and the development of the disease." *Id.* at 331, 339 S.E.2d at 494 (citing *Rutledge*, 308 N.C. at 105, 301 S.E.2d at 370). Claimant has the burden of proof, but, "if the occupational exposure in question is such that it augments the disease process to any degree, however slight, the employer is liable." *Id.* (citing *Rutledge*, 308 N.C. at 89, 301 S.E.2d at 362); *see also*, *Hansel v. Sherman Textiles*, 304 N.C. 44, 53, 283 S.E.2d 101, 106 (1981) (where the claimant has non-occupational infirmities, the Commission should consider whether the occupation accelerated or aggravated the condition and contributed to claimant's disablement.) "In addition, the substance to which plaintiff was last injuriously exposed need not be in a substance known to cause the disease." *Gay*, 79 N.C. App. at 330-31,

339 S.E.2d at 494 (citing *Caulder v. Waverly Mills*, 314 N.C. 70, 74, 331 S.E.2d 646, 649 (1985)).

"Where the Commission awards compensation for disablement due to an occupational disease encompassed by G.S. 97-53(13), the opinion and award must contain findings as to the characteristics, symptoms and manifestations of the disease from which the plaintiff suffers, as well as a conclusion of law as to whether the disease falls within the statutory provision." *Hansel*, 304 N.C. at 54, 283 S.E.2d at 106-07. Review of Industrial Commission decisions is limited to a determination of " 'whether there was competent evidence before the Commission to support its findings and . . . whether such findings support its legal conclusions.' (Citation omitted.) This Court cannot substitute its judgment for that of the Commission." *Gay*, 79 N.C. App. at 325, 339 S.E.2d at 491. Findings of fact, when supported by competent evidence, are conclusive on appeal. *Id.*

[1] Defendant contends that the Commission erred in two respects. First, defendant argues that the evidence was insufficient to support the Commission's findings of fact and conclusions of law because the only evidence presented on causation was that of a single physician whose "opinion was grounded in speculation and not in medical facts." Defendant asserts that Dr. Driver's opinion on causation was based upon faulty information because he (1) did not know the quantity or quality of plaintiff's exposure to PCE, (2) assumed that plaintiff had been employed with defendant since September 1984, instead of November 1985, (3) failed to consider the material fact that plaintiff had previously worked in the cleaning industry, (4) based determination of causation in part on plaintiff's assertion that PCE contributed to her illness, (5) lacked experience in treating other patients with PCE lung injuries, and (6) relied upon a research of the literature to attribute PCE exposure to interstitial fibrosis. Also, defendant contends that in light of the hygienist's findings of low concentrations of airborne PCE at Ace Dry Cleaning premises, causation is attenuated at best.

We disagree. Circumstantial evidence of the causal connection between the occupation and the disease is sufficient. *Booker*, 297 N.C. at 476, 256 S.E.2d at 200. Medical opinions given may be based either on " 'personal knowledge or observation or on information supplied him by others, including the patient. . . .' " *Id.* at 479, 256 S.E.2d at 202 (citation omitted). Absolute medical certainty is not required.

Defendant correctly asserts that there are no findings of fact with regard to the quantity of PCE at defendant's dry-cleaning establishment. Our Supreme Court rejected the requirement that an employee quantify the degree of exposure to the harmful agent during his employment. *Gay*, 79 N.C. App. at 333-34, 339 S.E.2d at 495-96 (citing *McCuiston v. Addressograph-Multigraph Corp.*, 308 N.C. 665, 668, 303 S.E.2d 795, 797 (1983)). Any evaluation of the workplace for the agent in question after claimant's departure, as here, would not quantify claimant's exposure, but would merely "guesstimate" it. Since the degree of exposure does not need to be measured during claimant's employment, it should not need to be quantified in findings of fact, either. The evidence reveals that Dr. Driver's medical opinion was based upon personal examination and testing of plaintiff and an assessment of the circumstantial evidence surrounding the onset and development of the disease as well as the articles on solvent-induced lung injury. We find that Dr. Driver's medical opinion is sufficient evidence to support the Commission's finding of fact that plaintiff suffered from an occupational disease.

[2] Second, defendant contends that the Commission erred in excluding additional evidence which it had solicited *sua sponte*. Upon defendant's appeal of the deputy commissioner's award, the Full Commission issued an order, filed 7 February 1990, which required plaintiff to submit to examination by a Dr. Kunstling.

By letter dated 17 January 1991, the Commission informed defendant's counsel that the 7 February 1990 order "set out the procedure in unmistakable terms. It was not a request to negotiate the composition of the record. It offered both parties the opportunity to depose the doctor within a specified period, and neither did." The letter indicated that the Commission believed the February order reopening the evidence was "improvidently entered" and that the appeal should be decided "on the record as the parties made it, with full opportunity to present any pertinent evidence, at the hearing before the Deputy Commissioner."

Again, we disagree with defendant's argument. The statute controlling the receipt of additional evidence on appeal provides:

> [i]f application is made to the Commission within 15 days from the date when notice of the award shall have been given, the full Commission shall review the award, and *if good ground be shown* therefor, reconsider the evidence, *receive further*

> *evidence*, rehear the parties or their representatives, and if proper, amend the award.

N.C.G.S. § 97-85 (1991) (emphasis added). The powers granted the Commission to review the award and to receive additional evidence are "plenary powers to be exercised in the sound discretion of the Commission." *Lynch v. M.B. Kahn Constr. Co.*, 41 N.C. App. 127, 130, 254 S.E.2d 236, 238, *disc. rev. denied*, 298 N.C. 298, 259 S.E.2d 914 (1979). Whether such good ground has been shown is discretionary and "will not be reviewed on appeal absent a showing of manifest abuse of discretion." *Id.* at 131, 254 S.E.2d at 238. "In exercising its discretion, the Commission is not directed to make specific findings of fact." *Chisholm v. Diamond Condominium Constr. Co.*, 83 N.C. App. 14, 20, 348 S.E.2d 596, 600 (1986), *disc. rev. denied*, 319 N.C. 103, 353 S.E.2d 106 (1987).

The party against whom an award has been made does not have "a substantive right to require the Full Commission to hear new or additional testimony. It may, and should, do so if the due administration of justice requires." *Tindall v. American Furniture Co.*, 216 N.C. 306, 311, 4 S.E.2d 894, 897 (1939). Upon appeal from a deputy commissioner's award, the Commission may "receive further evidence regardless of whether it was newly discovered evidence." *Lynch*, 41 N.C. App. at 130, 254 S.E.2d at 238. The deputy commissioner's findings of fact are not conclusive; only the Full Commission's findings of fact are conclusive. *Hobgood v. Anchor Motor Freight*, 68 N.C. App. 783, 785, 316 S.E.2d 86, 87 (1984). The Commission may "weigh the evidence [presented to the deputy commissioner] and make its own determination as to the weight and credibility of the evidence." *Id.* The Commission may strike the deputy commissioner's findings of fact even if no exception was taken to the findings.

From these legal principles, we determine that it was within the Commission's power to ask for additional evidence, here additional medical evidence. It follows that if it was within the Commission's discretion to ask for this evidence, it was also within its power to exclude such evidence. The defendant does not so state, but implies that it was misled by the Commission and, therefore, prejudiced in the process. Viewing the totality of the circumstances, we disagree with the implication. Here, both parties were able to present evidence to the deputy commissioner. The testimony included that of a physician, an industrial hygienist, one of the

owners of defendant dry-cleaner, and plaintiff. Defendant could have presented an additional medical or expert opinion on causation to the deputy commissioner. Defendant did not do so and cannot now be heard to complain. *See* N.C.G.S. § 97-27(a) (1991). Defendant also had an opportunity to present additional evidence on appeal to the Full Commission if defendant were able to show good cause, but did not. We find that the Commission did not err when it chose not to consider Dr. Kunstling's response. Where the decision to take additional evidence is discretionary in nature and neither party has put forth good cause for such evidence to be considered, the Commission may decide to exclude evidence which it has previously seen fit to hear.

Affirmed.

Chief Judge HEDRICK and Judge WYNN concur.

NORTH CAROLINA STATE BAR v. EDWARD DANIELS NELSON

No. 9110NCSB789

(Filed 6 October 1992)

1. **Attorneys at Law § 86 (NCI4th)— attorney discipline—judicial review—standard of proof**

The record in an appeal from a hearing before the Disciplinary Hearing Commission of the North Carolina State Bar (DHC) contained substantial evidence to support contested findings of fact. The task of the Court of Appeals is not to replace DHC's judgment with its own, but to apply the whole record test and determine whether DHC's findings are properly supported by the record even though the Court might have reached a different result had the matter been before it de novo.

Am Jur 2d, Attorneys at Law § 95.

2. **Attorneys at Law § 86 (NCI4th)— attorney discipline—authority to determine nature of firm**

Although an attorney appealing an Order of Discipline from the Disciplinary Hearing Commission of the N. C. State Bar (DHC) contended that the DHC lacked authority to deter-

mine whether the firm was a partnership or a professional association, the Court of Appeals was not required to address that question because the appellant could not have had a reasonable good faith belief that he was entitled to additional sums over his salary under either interpretation.

Am Jur 2d, Attorneys at Law § 95.

3. **Attorneys at Law § 85 (NCI4th)— attorney discipline—check wrongfully retained—conclusion supported by findings**

The findings of the Disciplinary Hearing Commission of the N.C. State Bar (DHC) were sufficient to support the conclusion that an attorney was not acting upon the advice of counsel when he retained and deposited a check into his personal account and that he did not have a reasonable good faith belief that he had a legitimate claim to any of the funds.

Am Jur 2d, Attorneys at Law § 95.

4. **Attorneys at Law § 68 (NCI4th)— attorney discipline—nine month suspension—no abuse of discretion**

The Disciplinary Hearing Commission of the North Carolina State Bar (DHC) did not abuse its discretion by suspending an attorney from the practice of law for nine months where the attorney had withdrawn from a firm and deposited a check from a client in his personal account. Although the attorney contended that neither the DHC nor the State Bar were the proper parties to have heard the case and that the State Bar should not have involved itself in an intra-partnership accounting dispute, the DHC specifically concluded that the attorney engaged in dishonest conduct by retaining the check without a reasonable good faith belief that he was entitled to any funds from the firm. The discipline imposed was within statutory limits. N.C.G.S. § 84-28(b),(c).

Am Jur 2d, Attorneys at Law §§ 29, 31.

APPEAL by defendant from order filed 23 January 1991 by Chairman John Shaw before the Disciplinary Hearing Commission of the North Carolina State Bar. Heard in the Court of Appeals 27 August 1992.

In June 1983 the appellant began practicing law with the New Bern law firm of Beaman, Kellum & Stallings (firm). The Disciplinary

Hearing Commission (DHC) found that at the time the appellant was hired, the firm was organized as a professional association and all stock was held by Norman Kellum and Joseph Stallings. During the summer of 1984 Kellum and Stallings met with the appellant to discuss the possibility of the appellant becoming an owner in the firm. Appellant's account of what transpired there differed substantially from separate testimony given by Kellum, Stallings and Bill Hollows, an associate with the firm.

Stallings testified that in June of 1984 Hollows approached him and said that he and the appellant would like to meet with Stallings and Kellum at the end of the day. Stallings agreed and the four men had a brief meeting later that evening. Kellum, Stallings and Hollows each testified that Hollows was present and began the meeting by stating that he and the appellant wished to talk about becoming part owners in the firm. Kellum and Stallings voiced no objection to the idea of Hollows and the appellant becoming owners, but said they would need to discuss it further. Stallings said he would draft some documents for purposes of discussion and get back with the appellant and Hollows. The men also discussed the possibility of changing the firm's name. Upon conclusion of the meeting Kellum, Stallings and Hollows each believed that Hollows and the appellant remained employees of the firm.

Stallings further testified that in late fall of 1984 appellant asked Stallings how the paperwork was coming along. Stallings told the appellant that he had turned the responsibility for drafting the necessary documents over to Hollows and that the matter was in Hollows' hands. Hollows testified that the appellant asked him on more than one occasion whether any of the paperwork had been prepared. Hollows responded each time that the paperwork had not been prepared. Stallings also testified that sometime later he and Kellum met to discuss raising appellant's salary. After discussing the proposed raise with the appellant, appellant's annual salary was increased from $40,000 per year to $48,000 per year.

Appellant testified that one morning in late May or early June of 1984 he received a phone call from Stallings asking him to meet with Stallings and Kellum. He agreed. At the meeting appellant testified that Stallings said that he and Kellum had decided to make the appellant a partner. Accordingly, appellant testified that they agreed that the appellant would receive shares in the firm and an increase in salary from $40,000 per year to $48,000 per

year. Stallings agreed to do the necessary paperwork and appellant assumed that he had been made a partner in the firm. According to appellant, Hollows was not present at that meeting but was present at another meeting between Kellum, Stallings and himself. At that subsequent meeting the four discussed changing the name of the firm. Appellant testified that Kellum said he was not opposed to changing the name of the firm as long as Beaman was kept the first name in the firm name. Stallings did not voice any objection.

The appellant also testified that after his first meeting with Kellum and Stallings he placed an ad in the *News and Observer* announcing his addition to the firm as a partner. He did this because he wanted it announced and he thought it would be good for the firm's business. He did not think he needed the approval of Kellum and Stallings because, in his view, he had already been made a partner. The firm paid for the ad. No meeting was ever called to discuss the ad and no reprimand or disciplinary measures were taken against appellant for submitting the ad to the newspaper.

In the fall of 1984 Kellum also changed the firm's name in the yellow pages of the local telephone book by adding the names of Hollows and the appellant. Kellum authorized the change "[b]ecause [he] thought the work, the paperwork would be done, and those guys would own some shares, have their name on the door, make them work better, feel a part of it." The following year, Kellum had the appellant's name deleted from the listing.

In the fall of 1986 appellant began working on a rate case for the North Carolina Department of Insurance which required him to spend time in Raleigh, rather than at the firm offices in New Bern. During this same period of time Stallings and Kellum became dissatisfied with the appellant's work largely because they felt that the appellant was devoting too much time to the rate case and neglecting his other cases.

On 22 April 1987 the appellant tendered his resignation to Kellum and left the firm to practice in Raleigh. On 11 May 1987 appellant submitted a bill to the North Carolina Department of Insurance for work he performed in the rate case between 30 December 1986 and 30 April 1987. On 21 May 1987 the Department of Insurance issued a check to the plaintiff in the amount of $38,646.62. The appellant received the check during May. He did not inform the firm that he had billed the Department of Insurance or received the check. Rather, he deposited the check into a personal account.

Appellant testified that he retained the funds upon advice of two separate attorneys, Jim Mills and Robert Bode, as an offset for funds he thought the firm owed him. In June of 1987, Kellum and Stallings found out that the Department of Insurance had issued the check to the appellant.

In September of 1987 the appellant filed a suit against the firm and against Kellum and Stallings individually in which he alleged *inter alia* that he had been made a partner and that the firm owed him money. The appellant and the firm entered into a settlement agreement and release effective 23 March 1989 which provided that the appellant could retain all but $12,500 of the Department of Insurance check and that the firm would pay the appellant $4,387.31 in full settlement of all claims the appellant might have.

On 13 December 1989 appellant received a summons and complaint from the DHC of the North Carolina State Bar. After a full hearing, the Commission made the following findings of fact which are contested by appellant:

> 17. Prior to his departure from the firm, Nelson never made any statements to Hollows, Stallings or Kellum which indicated that Nelson thought he had been made an owner or partner in the firm.
>
> 22. Neither Stallings nor Kellum ever promised that Nelson's compensation was or would be based on some portion of fees brought into the firm. Neither Stallings nor Kellum ever promised that Nelson would be entitled to bonuses or any additional compensation other than his annual salary.
>
> 24. Prior to his departure from the firm, Nelson never made any statements to Kellum, Hollows, Stallings or to the firm bookkeeper which indicated that Nelson thought he was entitled to any additional sums of money beyond his usual salary.
>
> 35. Nelson did not have a reasonable, good faith belief that he was a partner in the firm or that he was entitled to additional sums of money at the time he billed the Department of Insurance and received and retained the $38,646.62 check.
>
> 40. Defendant's Ex. B contains a list of legal matters pending when Nelson left B, K & S in April 1987. Defendant's

> Ex. G contains a list of fees which Nelson alleged he was due from B, K & S. Nelson did not deliver either exhibit or any copies thereof to Kellum or Stallings at any time prior to instituting the civil action in September 1987.

The DHC also made findings that the appellant acted improperly while handling personal injury cases for Ms. Margaret Slipsager and Mr. Clarence Dewberry. The DHC then concluded:

> 1. By retaining the $38,646.62 Department of Insurance Company check when he did not have a reasonable, good faith belief that he had a legitimate claim to any funds from B, K & S, Nelson engaged in conduct involving dishonesty, in violation of Rule 1.2(C).
>
> 2. By failing to file a notice of claim or lawsuit on Ms. Slipsager's behalf in a timely fashion, Nelson neglected a legal matter entrusted to him in violation of Rule 6(B)(3) and DR 6-101(A)(3) and prejudiced a client in violation of Rule 7.1(A)(3) and DR 7-101(A)(3).
>
> 3. By failing to respond to Ms. Slipsager's requests for information respecting her case, Nelson failed to communicate adequately with a client, in violation of Rule 6(B)(1).
>
> 4. By failing to file a notice of claim or lawsuit on Dewberry's behalf in a timely fashion, Nelson neglected a legal matter in violation of Rule 6(B)(3) and DR 6-101(A)(3).
>
> 5. By falsely assuring Dewberry that a claim had been filed on his behalf and that negotiations were underway respecting Dewberry's claim, Nelson engaged in conduct involving dishonesty, fraud, deceit or misrepresentation, in violation of Rule 1.2(C) and DR 1-102(A)(4) and engaged in conduct adversely reflecting on his fitness to practice, in violation of DR 1-102(A)(6).

Accordingly, the Commission entered an Order of Discipline which *inter alia* suspended the appellant from practicing law for nine months. Appellant appeals.

Carolin Bakewell for the plaintiff-appellee.

Cheshire, Parker, Hughes & Manning, by Joseph B. Cheshire, V, and Alan M. Schneider, for the defendant-appellant.

EAGLES, Judge.

I

Initially, we note that appellant raised seventeen assignments of error on appeal. However, appellant failed to support assignments 1, 3, 8, 9, 10, 12, 13, 14, 15 or 16 with reason, argument or authority. Accordingly, those assignments have been abandoned. N.C.R. App. Pro. 28(b)(5).

II

[1] Appellant argues that findings of fact numbers 17, 22, 24, 35 and 40 made by the DHC are not supported by clear, cogent and convincing evidence drawn from the whole record. We disagree and affirm.

The standard of proof and the standard for judicial review for attorney discipline cases is set out in *North Carolina State Bar v. Whitted*, 82 N.C. App. 531, 347 S.E.2d 60 (1986), *affirmed*, 319 N.C. 398, 354 S.E.2d 501 (1987).

> The standard of proof in attorney discipline and disbarment proceedings is one of "clear, cogent and convincing" evidence. Rules of the North Carolina State Bar, Art IX, Sec. 14(18). *See In re Palmer*, 296 N.C. 638, 647-48, 252 S.E.2d 784, 789-90 (1979) (adopting standard); *N.C. State Bar v. Sheffield*, 73 N.C. App. 349, 354, 326 S.E.2d 320, 323, *cert. denied*, 314 N.C. 117, 332 S.E.2d 482, *cert. denied*, --- U.S. ---, 88 L.Ed.2d 338, 106 S.Ct. 385 (1985). "Clear, cogent and convincing describes an evidentiary standard stricter than the preponderance of the evidence, but less stringent than proof beyond a reasonable doubt. . . . It has been defined as 'evidence which should fully convince.'" *Sheffield, supra* (citations omitted).
>
> The standard for judicial review of attorney discipline cases is the "whole record" test. *N.C. State Bar v. DuMont*, 304 N.C. 627, 642, 286 S.E.2d 89, 98 (1982). "Under the whole record test there must be substantial evidence to support the findings, conclusions and result. . . . The evidence is substantial if, when considered as a whole, it is such that a reasonable person might accept as adequate to support a conclusion." *Id.* at 643, 286 S.E.2d at 98-99.

* * *

> "The 'whole record' test does not allow the reviewing court to replace the [Committee's] judgment as between two reasonably conflicting views, even though the court could justifiably have reached a different result had the matter been before it *de novo.*" *Thompson v. Board of Education*, 292 N.C. 406, 410, 233 S.E.2d 538, 541 (1977).

Whitted, 82 N.C. App. at 536, 347 S.E.2d at 63 (1986).

On appeal the appellant, both in his brief and during oral argument, highlighted evidence in the record which tends to establish facts contra to those found by the DHC. However, this Court's task is not to replace the DHC's judgment with our own. *Id.* Rather, our task is to determine whether after applying the whole record test, the DHC's findings are properly supported by the record even though we might have reached a different result had the matter been before us *de novo*. We hold that the record before us contains substantial evidence to support the contested findings of fact. Accordingly, we find no error.

[2] Appellant also argues that the DHC lacked authority to determine whether the firm was a partnership or a professional association. We are not required to address this question. If the firm was a partnership, the DHC found that the appellant had no reasonable good faith belief that he was a partner. If the firm was a professional association, the DHC found that neither Kellum nor Stallings ever promised the appellant that his compensation would be based on a portion of the fees he brought into the firm, nor did they ever promise him a bonus or additional compensation above his annual salary. Under either interpretation the appellant, according to the DHC's findings, could not have had a reasonable good faith belief that he was entitled to additional sums over his salary. This argument is overruled.

III

[3] Appellant next argues that the DHC wrongfully concluded that appellant acted dishonestly by retaining the Department of Insurance check without a reasonable good faith belief that he had a legitimate claim to any of the funds. We disagree.

Appellant first argues that he acted pursuant to a good faith belief that he was entitled to additional sums from the firm when he retained the Department of Insurance check. This argument

is essentially a restatement of the argument addressed under heading II *supra* and we disagree for the reasons stated there.

Appellant next argues that he acted reasonably because he acted in conformity with the advice of counsel. However, the DHC made the following findings of fact: On 11 May 1987 appellant billed the Department of Insurance, which issued a check to the appellant on 21 May 1987. Appellant did not inform the firm that he had billed the Department of Insurance or that he had received the check. The DHC also found that the appellant first sought the advice of legal counsel, James Mills, in late June or early July, and that appellant did not seek the counsel of Bob Bode until September 1987. We note that the back of the check indicates that the appellant negotiated the check on 21 May 1987. DHC's findings are sufficient to support the conclusion that the appellant was not acting upon the advice of counsel when he retained and deposited the Department of Insurance check into his personal account. Accordingly, this argument fails.

IV

[4] In his final assignment, appellant argues that the DHC abused its discretion by suspending the appellant from the practice of law for nine months. We disagree.

Appellant contends that "neither the North Carolina State Bar nor the Disciplinary Hearing Commission were the proper parties to bring or hear this case under the authority granted it in Chapter 84 of the General Statutes of North Carolina and the Rules and Regulations of the North Carolina State Bar." According to the appellant, "[t]here is no rule in the Code of Professional Responsibility or the North Carolina Rules of Professional Conduct that governs accounting procedures for law firm funds and under no circumstances should the State Bar have involved itself in an intra-partnership accounting dispute." In support of its argument appellant cites *Matter of Rice*, 99 Wash. 2d 275, 661 P.2d 591 (1983). During oral argument, however, the appellant conceded that whenever there is a question of dishonesty, beyond the rudimentary need for an accounting to resolve internal law firm disputes, the DHC has jurisdiction to hear matters involving internal law firm disputes. Here, the DHC specifically concluded that the appellant engaged in dishonest conduct by retaining the Department of Insurance check without a reasonable good faith belief that he was entitled to any funds from the firm. This assignment is without merit.

Finally, appellant argues that the DHC abused its discretion by suspending him from the practice of law for nine months. "The discipline imposed was within the statutory limits. N.C. Gen. Stat. 84-28(b),(c). This Court [has] stated that 'so long as the punishment imposed is within the limits allowed by the statute this Court does not have the authority to modify or change it.'" *Whitted*, 82 N.C. App. at 539-40, 347 S.E.2d at 65 (quoting *N.C. State Bar v. Wilson*, 74 N.C. App. 777, 784, 330 S.E.2d 280, 284 (1985). This assignment is likewise without merit and therefore overruled.

Affirmed.

Judges JOHNSON and PARKER concur.

INSTITUTION FOOD HOUSE, INC. v. CIRCUS HALL OF CREAM, INC., D/B/A CIRCUS HALL OF CREAM NO. 5, AND WAYNE'S ASSOCIATES, INC.

No. 9125DC752

(Filed 6 October 1992)

1. Accounts § 14 (NCI4th); Corporations § 103 (NCI4th)— action to recover on account—authority of vice-president of corporation to sign credit application

In an action to recover on an account, the evidence was sufficient to support the trial court's finding that the vice-president and secretary of defendant corporation had apparent authority to sign a credit application on behalf of defendant corporation, since the vice-president was the general manager of the restaurant; she supervised food operations, the ordering of merchandise, and all employees; the vice-president's husband, who was the president, advised her that plaintiff would be the basic food supplier and he advised her to sign the credit application; the vice-president's act of signing the credit application for the purchase of food supplies was usual and necessary to transact the business she was employed to transact; and the application was signed in the ordinary course of business and was not unreasonable.

Am Jur 2d, Agency § 78; Corporations §§ 1526, 1529, 1542.

2. Costs § 33 (NCI4th)— formal credit agreement—attorney's fees for debt collection—proper award

Where there was a formal credit agreement which provided for reasonable attorney's fees for the collection of past due debts, and the trial court had before it pleadings, depositions, and interrogatories which enabled it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed, the attorney's fees provision was legally enforceable, and the court's award was proper. N.C.G.S. § 6-21.2(2).

Am Jur 2d, Contracts §§ 300, 411; Damages § 611.

APPEAL by defendant from judgment entered 14 March 1991 by *Judge Nancy L. Einstein*, in CATAWBA County District Court. Heard in the Court of Appeals 25 August 1992.

Gaither, Gorham & Crone, by J. Samuel Gorham, III, for plaintiff-appellee.

Lewis E. Waddell, Jr. for defendant-appellant.

JOHNSON, Judge.

Plaintiff initiated this suit on 15 November 1989, seeking to recover upon an account which plaintiff alleged one or both defendants owed plaintiff the sum of $25,075.15, plus interest at the maximum legal rate from 21 July 1988. Plaintiff further sought to enforce the Attorney's Fee Provision of the credit application pursuant to N.C. Gen. Stat. § 6-21.2(5) (1986).

On 1 February 1990, Defendant-Wayne's Associates, Inc., answered plaintiff's complaint, specifically denying that it had done any business at Circus Hall of Cream, located on Highway 64/70 in Hickory, North Carolina. Wayne's Associates asserted that it owed plaintiff nothing, and that it was a separate corporate entity. The trial court entered a judgment awarding plaintiff $25,075.15, plus interest from the filing of the action, and attorney's fees in the amount of $3,761.27. Defendant filed timely notice of appeal.

Plaintiff-appellee, Institution Food House, Inc., is a wholesale distributor of groceries and related items to restaurants and institutions. On approximately 28 March 1984, plaintiff-appellee received an account authorization and credit application to open an account

for Circus Hall of Cream #5, located on Highway 64/70, Hickory, North Carolina. The application provided that the bills should be sent to Circus Hall of Cream #5, c/o Wayne's Associates, P.O. Box 5035, Hickory, NC 28601.

The credit application provided spaces for corporate, partnership, or proprietorship status. The corporate box was checked, and the following information given:

> Corporation name and address:
>
> Wayne's Associates, Inc., P. O. Box 5035, Hickory, N.C. 28601
>
> *Officers' names and addresses:*
>
> President—Wayne O. Hall, 934 19th Ave. N.W., Hickory, N.C.
>
> Vice President—Nan W. Hall, 934 19th Ave. N.W., Hickory, N.C.
>
> Secretary/Treasurer—Nan W. Hall, 934 19th Ave., N.W., Hickory, N.C.

Also on the front page of the application was the following paragraph:

> I certify that this information is correct. The applicant shall be responsible for and shall reimburse IFH for all costs and expenses (including reasonable attorney's fees) incurred by IFH in connection with the collection of past due accounts. I understand the credit terms and will accordingly remit any balance due.

At the bottom of the page appeared the signature, "Nan W. Hall," situated on a line immediately above the words: "Authorized Signature (officer, partner, manager, etc.)."

The back of the application indicated that the trade name used for registration with the Sales and Use Tax Division was Wayne's Associates, Inc. and that the owner was Wayne O. Hall. The back was signed by Ms. Hall, who identified herself as the vice-president.

Wayne's Associates, Inc. was incorporated in 1968, with Wayne O. Hall as its president and general manager. Mr. Hall has operated ice cream shops, called Circus Hall of Cream, and sold ice cream equipment through Wayne's Associates since 1968. From 1975 through 1989, Nan W. Hall was vice-president and secretary of Wayne's Associates. She became a shareholder on 15 August 1985,

but later transferred her stock back to Mr. Hall as a result of a divorce proceeding.

Circus Hall of Cream #5 at the Highway 64/70 location opened for business in April of 1984. In July of 1984, it was incorporated as Circus Hall of Cream, Inc. Minutes of the first meeting of the board of directors reflect that Wayne's Associates, Inc. transferred certain assets to Circus Hall of Cream, Inc. on 30 June 1984, and that Circus Hall of Cream, Inc. assumed certain liabilities from Wayne's Associates, Inc. The difference between the value of assets transferred and the liabilities assumed, $75,000, was paid to Wayne's Associates, Inc. in the form of capital stock.

No notice was given to appellee of the assumption of corporate status. All checks received by appellee for merchandise sold to the Circus Hall of Cream Store located at Highway 64/70, before and after July, 1984, were embossed "Circus Hall of Cream," without any indication of incorporation.

Between 14 January 1988 and 15 August 1988, $25,075.15 in merchandise was sold and delivered by Institution Food House to the Circus Hall of Cream located on Highway 64/70. The account name on the statement was "Circus Hall of Cream." Plaintiff-appellee has not been paid for the merchandise delivered.

[1] On appeal, defendant first argues that the trial court erred in finding as fact that in her capacity as vice-president and secretary of Wayne's Associates, Inc. and as manager of the 64/70 store, Nan W. Hall had the apparent authority to execute a credit authorization as an agent for Wayne's Associates, Inc., and that Wayne's Associates, Inc. ratified the contract.

Rule 52 of the North Carolina Rules of Civil Procedure, N.C. Gen. Stat. § 1A-1, Rule 52 (1990), provides in pertinent part:

> (a) *Findings.*
>
> (1) In all actions tried upon the facts without a jury or with an advisory jury, the Court shall find the facts specially and state separately its conclusions of law thereon and direct the entry of the appropriate judgment.
>
> . . .
>
> (c) *Review on appeal.*—When findings of fact are made in actions tried by the court without a jury, the question of the

> sufficiency of the evidence to support the findings may be raised on appeal whether or not the party raising the question has made in the trial court an objection to such findings or has made a motion to amend them or a motion for judgment, or a request for specific findings.

This Court held in *General Specialties Co. v. Teer Co.*, 41 N.C. App. 273, 275, 254 S.E.2d 658, 660 (1979), that "[w]here the trial judge sits as the trier of facts, his findings of fact are conclusive on appeal when supported by competent evidence. This is true even though there may be evidence in the record to the contrary which could sustain findings to the contrary." The ruling of the trial court will not be disturbed on appeal "if there [is] any evidence to support the judgment." *Whitaker v. Earnhardt*, 289 N.C. 260, 265, 221 S.E.2d 316, 320 (1976).

Appellant's exception to the finding that Nan W. Hall had the apparent authority to execute the credit application as agent of Wayne's Associates, Inc. is not well-founded. A principal is bound by his agent's contract "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." *Foote & Davies, Inc. v. Arnold Craven, Inc.*, 72 N.C. App. 591, 595, 324 S.E.2d 889, 892 (1985). "Apparent authority includes authority to do whatever is usual or necessary to transact the business an agent is employed to transact." *Id.* Apparent authority is determined by the unique facts of each case. *Id.* at 595, 324 S.E.2d at 893. Facts to be considered include "the ordinary course of business, the nature and reasonableness of the contract, the officer negotiating it, the size of the corporation, and the number of shareholders." *Id.*

Defendant-appellant contends that whether Nan Hall had apparent authority to bind the corporation is a question of fact for the jury because the evidence is conflicting. As stated above, however, if there is any competent evidence to support the trial judge's finding, it will not be disturbed on appeal. *See Whitaker*, 289 N.C. 260, 221 S.E.2d 316. In the case at bar, we find sufficient evidence in the record to support the finding that Nan Hall had the apparent authority to sign the credit application. We also note that in the instant case, different logical and reasonable inferences

may not be drawn from the evidence presented, and that the question of apparent authority was one for the court.

Evidence presented at trial showed that Ms. Hall's signature is at the bottom of and on the back of the credit application; that she was the general manager of the restaurant and would remain so until another manager was hired; and that Mr. Hall, Ms. Hall's husband, also president of Wayne's Associates, Inc., never told her there were things she could not do as vice-president of Wayne's Associates. The evidence also showed that Ms. Hall spent twelve hours a day in the restaurant for six months, beginning early in April of 1984. Thereafter, she spent ten hours a day, seven days a week, in the restaurant. Ms. Hall supervised the food operations, the ordering of merchandise, all of the employees, and "everything that was done." Ms. Hall stated that Mr. Hall informed her that Institution Food House, Inc. would be the basic supplier of food. Ms. Hall also testified that Mr. Hall advised her to sign the credit application.

Under the facts of this case, Ms. Hall's act of signing the credit application for the purchase of food supplies was usual and necessary to transact the business she was employed to transact. The application was signed in the ordinary course of business and was not unreasonable. Because the evidence in the record supports the trial judge's finding that Ms. Hall had the apparent authority to sign the credit application, we uphold the trial court's decision. We need not discuss the issue of ratification since the finding of apparent authority was proper and sufficiently binds the principal by his agent's contract.

[2] Defendant-appellant next contends that the trial court erred in awarding plaintiff attorney's fees in the amount of 15% of the debt owed by defendant, without making findings as to the actual hours expended collecting the debt and the reasonable value of those services.

In the case *sub judice*, the trial judge stated that plaintiff's attorney had drafted pleadings, conducted two depositions, propounded interrogatories, requests for production, requests for admissions, and had participated in a trial which consumed the better part of the day. The court subsequently awarded attorney's fees to plaintiff. Defendant complains that "[t]here must be some notation with respect to the attorney's usual hourly charge for the time actually expended and . . . sufficient evidence such as is pro-

vided by an [a]ffidavit and billing statement showing the actual work performed and the attorney's hourly rates."

Defendant contends that such findings are required by *Coastal Productions v. Goodson Farms*, 70 N.C. App. 221, 319 S.E.2d 650, *disc. review denied*, 312 N.C. 621, 323 S.E.2d 922 (1984) (award of attorney's fees under N.C. Gen. Stat. § 6-21.2(1), where the note provided that the attorney's fees provision was "valid and enforceable up to but not in excess of fifteen percent"); *Barker v. Agee*, 93 N.C. App. 537, 378 S.E.2d 566 (1989), *aff'd in part and rev'd in part*, 326 N.C. 470, 389 S.E.2d 803 (1990) (award of attorney's fees under N.C. Gen. Stat. § 6-21.2(2), where the attorney's fees provision provided for reasonable fees "but not more than such attorney's usual hourly charges for time actually expended"); and *West End III Limited Partners v. Lamb*, 102 N.C. App. 458, 402 S.E.2d 472, *disc. review denied*, 329 N.C. 506, 407 S.E.2d 857 (1991) (provision for award of attorney's fees "not exceeding a sum equal to fifteen percent (15%) of the outstanding balance"). Defendant's reliance on these cases, none of which provided for "reasonable attorney's fees," is misplaced.

We first note that reasonableness is the key factor under all attorney's fees statutes, 70 N.C. App. at 228, 319 S.E.2d at 656. In *W.S. Clark & Sons, Inc. v. Ruiz*, 87 N.C. App. 420, 360 S.E.2d 814 (1987), this Court stated that "[a] formal credit agreement executed by the parties prior to the establishment of an open account is evidence of indebtedness; and if such an agreement contains a provision for attorney's fees it will be legally enforceable pursuant to G.S. § 6-21.2 (citation omitted)." *Id.* at 442, 360 S.E.2d at 816. In *Clark*, the plaintiff was allowed to recover a 15% fee, $4,800, without supporting affidavits.

In the instant case, as in *Clark*, although no supporting affidavit was presented, there was a formal credit agreement which provided for reasonable attorney's fees for the collection of past due debts. Moreover, in the case *sub judice*, the trial court had before it the pleadings, depositions, and interrogatories, enabling it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed. We, therefore, hold that the attorney's fees provision is legally enforceable and that plaintiff is entitled to the $3,761.27 award of attorney's fees pursuant to N.C. Gen. Stat. § 6-21.2(2). The decision of the trial court is

Affirmed.

Judges EAGLES and PARKER concur.

STATE OF NORTH CAROLINA EX REL. LACY H. THORNBURG, ATTORNEY GENERAL, PLAINTIFF v. LOT AND BUILDINGS AT 800 WAUGHTOWN ST., TAX BLOCK 741, LOT 101A, WINSTON-SALEM, N.C., BEING PROPERTY DESCRIBED IN DEED BOOK 1504, PAGE 1059, FORSYTH COUNTY REGISTRY, DEEDED TO EDWARD FRED BOWMAN; PLUS U.S. CURRENCY IN THE AMOUNT OF $37,132.05; ONE (1) 1988 CHEVROLET PICK-UP TRUCK, VEHICLE IDENTIFICATION NUMBER 1GCDC14K4JE108426; AND SEVERAL GAMBLING DEVICES, INCLUDING TWO (2) ELECTRONIC POKER MACHINES AND ASSORTED LOTTERY TICKETS, GAMBLING STAMPS, BETTING SHEETS, AND ASSOCIATED ITEMS, DEFENDANTS

No. 9121SC742

(Filed 6 October 1992)

1. Penalties § 1 (NCI3d)— RICO forfeiture proceeding—jurisdiction of superior court

The superior court had jurisdiction over a RICO forfeiture proceeding even though it did not have jurisdiction over the underlying crimes (misdemeanor gambling charges) which were the basis of the violation of the RICO Act, since the civil forfeiture dispute at the trial level was a "justiciable" matter over which both district and superior courts had jurisdiction. N.C.G.S. § 7A-240.

Am Jur 2d, Extortion, Blackmail, and Threats § 251.

2. Gambling § 3 (NCI4th); Penalties § 1 (NCI3d)— misdemeanor gambling offenses—predicate acts of racketeering activity sufficient for RICO forfeiture proceeding

The trial court did not err in finding that defendant's misdemeanor gambling convictions constituted predicate acts of racketeering activity sufficient to subject his property to forfeiture under the RICO Act, since the alternative definition of racketeering activity found in N.C.G.S. § 75D-3(c)(2), which incorporates by reference offenses listed in Title 18 of the U. S. Code § 1961(1), lists "any act or threat involving . . . gambling . . . which is chargeable under State law and punishable by imprisonment for more than one year"; defendant was convicted of gambling in houses of public entertain-

ment, operating or possessing gambling devices, and selling or possessing numbers tickets, all in violation of North Carolina statutes; and each of the gambling offenses was chargeable as a general misdemeanor punishable by up to two years imprisonment.

Am Jur 2d, Extortion, Blackmail, and Threats §§ 244, 245.

Gambling §§ 31 et seq.

Civil action for damages under state Racketeer Influenced and Corrupt Organization Acts (RICO) for losses from racketeering activity. 62 ALR4th 654.

3. **Penalties § 1 (NCI3d)— RICO forfeiture proceeding—criminal conduct on property for which forfeiture sought**

The evidence was sufficient to support a forfeiture of defendant's property in a proceeding under the RICO Act where the evidence revealed that each incident of criminal conduct took place on the real property for which forfeiture was sought.

Am Jur 2d, Extortion, Blackmail, and Threats § 176.

Civil Action for damages under state Racketeer Influenced and Corrupt Organizations Acts (RICO) for losses from racketeering activity. 62 ALR4th 654.

4. **Penalties § 1 (NCI3d)— gambling convictions—pattern of racketeering activity—sufficiency of evidence**

There was no merit to defendant's contention that, even if his property was used in the course of racketeering activity, his convictions did not amount to a "pattern of racketeering activity" so as to warrant forfeiture under N.C.G.S. § 75D-5(a), since defendant engaged in at least two incidents of racketeering activity which had the same or similar purposes and methods of commission; these incidents were not isolated or unrelated; they occurred after October 1, 1986; and at least one incident occurred within a four-year period of the other.

Am Jur 2d, Extortion, Blackmail, and Threats § 246.

Civil action for damages under state Racketeer Influenced and Corrupt Organizations Acts (RICO) for losses from racketeering activity. 62 ALR4th 654.

APPEAL by defendant Edward Bowman from judgment entered 14 March 1991 in FORSYTH County Superior Court by *Judge James A. Beaty, Jr.* Heard in the Court of Appeals 25 August 1992.

Plaintiff, State of North Carolina, ex rel. Lacy H. Thornburg, Attorney General, instituted a Racketeer Influenced and Corrupt Organizations (RICO) forfeiture proceeding pursuant to Chapter 75D of the North Carolina General Statutes, seeking forfeiture of certain real and personal property in which defendant Edward Bowman claimed an interest. Defendant filed a motion to dismiss the State's action, asserting that the superior court lacked subject matter jurisdiction to adjudicate the case and that the complaint failed to state a claim upon which relief could be granted under Rule 12(b) of the Rules of Civil Procedure. The motion was subsequently denied.

We note at the outset that the dispositive facts in this case are uncontroverted. Prior to this action, defendant Bowman entered guilty pleas to several misdemeanor gambling charges in Forsyth County District Court. That court accepted the pleas and entered judgment against the defendant. None of the convictions were appealed. Based on these misdemeanor convictions, the State, in a separate civil proceeding, filed a motion for partial summary judgment for forfeiture of certain of defendant's real and personal property. The trial court granted the State's motion and entered a final order of forfeiture and disposition in accordance therewith. The State voluntarily dismissed the remaining personal property claims. Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General W. Dale Talbert, for the State.

Robert K. Leonard for defendant-appellant.

WELLS, Judge.

Defendant submits four assignments of error for our review. Defendant first assigns as error the trial court's determination that it had subject matter jurisdiction over the case. Defendant's second and third assignments of error may be consolidated into one argument. Defendant contends that North Carolina's RICO forfeiture statute should not apply to him because the gambling charges for which he was convicted do not amount to "racketeering activity" or a "pattern of racketeering activity" as defined therein.

Defendant argues that without any proof of racketeering activity, the State failed to establish a fundamental and indispensable element of its claim for North Carolina RICO forfeiture. Therefore, defendant contends the trial court erred in refusing to grant defendant's Rule 12(b)(6) motion and in granting partial summary judgment for the State. Finally, defendant argues that the final order of forfeiture and disposition violates the Constitutions of the United States and the State of North Carolina because (1) the RICO statute is unconstitutionally vague, (2) its severe provisions are unreasonable and arbitrary, and (3) it imposes the penalty of forfeiture in violation of due process. Because defendant failed to preserve this issue for review, the question of the North Carolina RICO Act's constitutionality is not properly before this Court.

[1] Defendant contends that the superior court lacked subject matter jurisdiction because the gambling offenses, which allegedly served as predicate acts of racketeering activity subjecting defendant's property to forfeiture, were misdemeanors within the original jurisdiction of the district court. Under North Carolina law, gambling offenses are general misdemeanors subject to the exclusive original jurisdiction of the district court. *See* N.C. Gen. Stat. § 7A-272. Defendant, however, has overlooked the crucial distinction between instituting a forfeiture action for violation of the RICO Act itself and prosecuting the underlying crime that is the basis of the violation.

RICO forfeiture is a statutory cause of action, requiring an examination of legislative intent to interpret its enforcement procedure. The RICO statute was enacted in 1986 to remedy the problem of increasing organized crime. While the statute's primary purpose is to deter unlawful activity, it does not impose criminal penalties to accomplish its goals. Instead, North Carolina RICO is designed to prevent the unjust enrichment of criminal elements by the imposition of civil equitable sanctions requiring the forfeiture of certain assets used or acquired through a pattern of organized unlawful activity. *See* N.C. Gen. Stat. § 75D-2. The Act specifies that violation of RICO itself "constitutes a civil offense only and is not a crime." N.C. Gen. Stat. § 75D-4(b).

Generally, RICO prohibits persons from engaging in "a pattern of racketeering activity" and requires forfeiture of any property used in such activity. N.C. Gen. Stat. §§ 75D-4,-5. The statute sets forth various underlying crimes or so-called predicate acts which

may constitute racketeering activity. The State may institute criminal prosecution proceedings against individuals who engage in these predicate acts in violation of criminal law. If the State, however, is seeking recovery of certain assets derived from or used in the course of that unlawful activity, it must bring a separate civil forfeiture action under RICO. N.C. Gen. Stat. § 75D-5(a). Here, the State brought a civil forfeiture action, not a criminal prosecution. Therefore, the question of whether the superior court had original jurisdiction over defendant's misdemeanor gambling charges is irrelevant.

The question remains whether the trial court had jurisdiction to adjudicate the State's civil forfeiture claim. Subject matter jurisdiction over civil cases is statutorily conferred on the superior court under N.C. Gen. Stat. § 7A-240. This section vests "original general jurisdiction of all justiciable matters of a civil nature" concurrently in the superior court division and the district court division of the General Court of Justice. Unless jurisdiction is specifically placed elsewhere, both trial courts have subject matter jurisdiction over all "justiciable" civil claims. *Harris v. Pembaur*, 84 N.C. App. 666, 353 S.E.2d 673 (1987). The civil forfeiture dispute at the trial level was a "justiciable" matter. Therefore, the superior court's determination that it had subject matter jurisdiction was proper.

[2] Next, defendant contends the trial court erred in finding that the misdemeanor gambling convictions constituted predicate acts of racketeering activity sufficient to subject defendant's property to forfeiture under the Act. Defendant relies upon N.C. Gen. Stat. § 75D-3(c)(1) which defines "racketeering activity" as "acts which would be chargeable by indictment." Under North Carolina law, indictments are criminal pleadings necessary to instigate felony charges, not misdemeanor charges. *See* Article I, Section 22, Constitution of the State of North Carolina; N.C. Gen. Stat. §§ 15A-627, 7A-271. Defendant reasons that his gambling convictions are not indictable offenses because they are misdemeanors and therefore do not fall under the purview of the RICO forfeiture statute. Section 75D-3(c)(1) does exclude misdemeanors as predicate acts; however, defendant completely ignores the alternative definition of "racketeering activity" found in N.C. Gen. Stat. § 75D-3(c)(2). This section incorporates by reference offenses listed in Title 18 of the United States Code, § 1961(1), as prohibited racketeering activity. Included in this federal definition is the following:

> (A) any act or threat involving murder, kidnaping, *gambling*, arson, robbery, bribery, extortion, dealing in obscene matter, or dealing in narcotic, or other dangerous drugs, which is chargeable under State law *and punishable by imprisonment for more than one year. . . .*

18 U.S.C. § 1961(1) (Emphasis added.)

The trial court found and the record reveals that defendant was convicted of two counts of gambling in houses of public entertainment in violation of N.C. Gen. Stat. § 14-293; two counts of operating or possessing gambling devices in violation of N.C. Gen. Stat. § 14-302; and one count of selling or possessing numbers tickets in violation of N.C. Gen. Stat. § 14-291.1. Each of these gambling offenses is chargeable as a general misdemeanor punishable by up to two years imprisonment, thereby satisfying the federal criteria for racketeering activity under U.S.C. § 1961(1). *See* N.C. Gen. Stat. § 14-3(a). Therefore, we find that the gambling offenses constitute "racketeering activity" under the alternate definition established in N.C. Gen. Stat. § 75D-3(c)(2).

[3] Having determined that gambling is "racketeering activity" under the North Carolina RICO Act, the question becomes whether there is sufficient evidence to support a forfeiture of defendant's property. Under the RICO Act:

> All property of every kind used or intended for use in the course of, derived from, or realized through a racketeering activity or pattern of racketeering activity is subject to forfeiture to the State.

N.C. Gen. Stat. § 75D-5(a).

The State's forecast of evidence revealed that each incident of criminal conduct took place on the real property for which forfeiture was sought. Also included in the State's evidence were affidavits of law enforcement officers showing without question that such property was used to further defendant's criminal activity. We note that at the hearing before the trial court, the defendant made no effort to rebut or contest the State's evidence on this issue. We agree with the trial court's finding that there was ample evidence to show that defendant's property was used in the course of a racketeering activity as required by the Act.

[4] Defendant contends alternatively that even if his property was used in the course of racketeering activity, the convictions do not amount to a "pattern of racketeering activity" so as to warrant forfeiture under N.C. Gen. Stat. § 75D-5(a). For clarification, we note that, by its terms, North Carolina RICO compels forfeiture for proof of either "racketeering activity" or a "pattern of racketeering activity." N.C. Gen. Stat. § 75D-5(a). The General Assembly, however, did not intend for the RICO statute to apply to isolated or unrelated episodes of unlawful activity. Instead, the General Assembly wanted to target only those engaging in "an interrelated pattern of organized unlawful activity." N.C. Gen. Stat. § 75D-2(c). We must therefore determine whether a pattern of racketeering activity existed as contemplated by the RICO statute. The Act defines a "pattern of racketeering activity" as:

> engaging in at least two incidents of racketeering activity that have the same or similar purposes, results, accomplices, victims, or methods of commission or otherwise are interrelated by distinguishing characteristics and are not isolated and unrelated incidents, provided at least one of such incidents occurred after October 1, 1986, and that at least one other of such incidents occurred within a four-year period of time of the other, excluding any periods of imprisonment, after the commission of a prior incident of racketeering activity.

N.C. Gen. Stat. § 75D-3(b).

The trial court found and we agree that the defendant engaged in at least two incidents of racketeering activity that had the same or similar purposes and methods of commission; that these incidents were not isolated or unrelated; that they occurred after October 1, 1986; and that at least one incident occurred within a four-year period of the other. Thus, two of defendant's gambling convictions alone would constitute a "pattern of racketeering activity" under this Act. Since the evidence adduced at trial clearly shows that defendant engaged in a pattern of racketeering activity and that certain of his property was used in furtherance of such unlawful activity, the defendant's property is subject to forfeiture in accordance with the Act. Therefore, we find no error and affirm the trial court's order of forfeiture and disposition.

Finally, although no constitutional question was preserved for review, we are constrained to express our concern that in enacting N.C. Gen. Stat. § 75D-3(c)(2), the General Assembly may have

unlawfully delegated its power to *make laws* to the Congress of the United States.

Affirmed.

Judges ORR and GREENE concur.

IN THE MATTER OF: LARITA BELL, ELIZABETH BELL, KIMBERLY BECTON, AND SPENCER HILL, JUVENILES

No. 918DC843

(Filed 6 October 1992)

1. **Infants or Minors § 120 (NCI4th)— insufficient health care and food—failure to take children to day care—neglect—sufficiency of evidence**

The trial court did not err in finding that respondent's children were neglected where the evidence tended to show that respondent did not ensure that her children received proper treatment from the county health department in that her two younger children had never been immunized and her six-month-old had never been to a doctor at all; she did not use her food stamps so as to keep an adequate supply of food in the house; she did not provide the children with any socialization or stimulation at home; she failed to take her children across the street to free day care on a regular basis; and respondent thus deprived her children of an opportunity for normal growth and development.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 24, 54.

2. **Infants or Minors § 127 (NCI4th)— neglected children—order requiring children to attend day care appropriate**

The trial court did not err in ordering neglected children to attend day care since the finding of neglect was clearly supported by the evidence; it was obvious that the day care program operated by DSS would be beneficial to the children; and the court's order was a warranted intrusion into the life of a family on the brink. N.C.G.S. § 7A-646.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children § 29.

Chief Judge HEDRICK dissenting.

APPEAL by respondent-mother from order entered 29 May 1991 by *Judge Rodney R. Goodman* in LENOIR County District Court, Juvenile Section. Heard in the Court of Appeals 16 September 1992.

Griffin & Griffin, by Robert W. Griffin, for Lenoir County Department of Social Services, petitioner-appellee.

Perry, Perry & Perry, by James S. Perry, for respondent-appellant.

LEWIS, Judge.

The respondent-appellant, Joyce Tucker, is the mother of four children: Larita Bell, Elizabeth Bell, Kimberly Becton, and Spencer Hill, now aged seven, six, four, and two, respectively. On 25 April 1991 the Lenoir County Department of Social Services [DSS] filed petitions alleging that the children were neglected as defined in N.C.G.S. Section 7A-517(21). On 29 May 1991 the lower court found as a matter of law that they were neglected according to the statute. The court permitted Ms. Tucker to retain custody of her children, but ordered her to take them to day care and otherwise cooperate with the "protective supervision" of DSS. Ms. Tucker appeals from this order.

On appeal Ms. Tucker contends that the lower court erred in denying her motion to dismiss on the basis that DSS did not establish neglect by clear and convincing evidence. She also submits that the court erred in finding neglect, and in ordering her to take her children to day care.

According to the record, DSS began its investigation of the Tucker household in January 1991 upon receiving a report stating that the children had been left alone one night. The social worker, Ms. Coley, described for the court the conditions she found at the house at that time and in the ensuing months. The oldest child, Larita, was in school, but the three younger children stayed at home with their mother. Ms. Coley stated that the two youngest children had never been immunized against any childhood diseases, and Spencer, who was six months old at the time, had never been

to a doctor at all. Ms. Tucker did not keep an adequate supply of food in the house, and Ms. Coley reported a complete lack of milk, juice, and meat on some occasions. Several times Ms. Coley found Ms. Tucker asleep in the house with the children unsupervised. The children did not have any toys or crayons, and Ms. Tucker admittedly did not talk to the baby.

Ms. Coley made arrangements for the necessary immunizations and for free day care attendance at the Marvin B. Spence Day Care Center, located directly across the street from Ms. Tucker's residence. Although Ms. Tucker agreed that day care was a good idea, she failed to take her children on a regular basis. Even after Ms. Coley accompanied Ms. Tucker to the grocery store, Ms. Coley reported she would still find less than an adequate supply of food in the house and could get no explanations from Ms. Tucker.

On 25 April 1991 Ms. Coley filed four identical petitions alleging that the children were neglected. Each stated that:

> [T]he above-named juvenile is a neglected juvenile as defined in G.S. 7A-517(21) in that: The juvenile does not receive proper care, supervision, or discipline from his/her parent in that: Lenoir Co. DSS is providing Individual and Family Adjustment Services to this family because after completing a thorough assessment of the family it was felt that these children were living in an environment which was considered high risk for neglect. As a preventive measure our agency provides day care services for the three youngest children at Marvin B. Spence Day Care Center. This service was needed in order for the children to receive adequate stimulation and socialization that they were not receiving at home. Ms. Tucker has repeatedly failed to make sure the children attend day care on a regular basis as recommended. The mother has also neglected to assure that the children receive medical attention such as immunizations and/or regular medical follow-up when needed. The mother also has a problem sustaining an adequate supply of food for the children from month to month.

Ms. Tucker first contends that the lower court erred in denying her motion to dismiss at the close of petitioner's evidence. Upon a motion to dismiss, the court must view the evidence in the light most favorable to the petitioner, giving the petitioner the benefit of any inference. *Price v. Tomrich*, 275 N.C. 385, 167 S.E.2d 766 (1969). The test is whether there is substantial evidence to support

petitioner's allegations. *In re Cusson*, 43 N.C. App. 333, 258 S.E.2d 858 (1979). In this case, the transcript of the trial reveals that petitioner's evidence was sufficient to withstand the motion to dismiss. The allegations of Ms. Coley certainly meet the test of substantial evidence. Thus, this Court finds that the lower court properly denied the motion to dismiss.

[1] Ms. Tucker also contends that the lower court erred in finding that the children were neglected. She argues that the court made an impermissible socio-economically based value judgment in deciding that the children were neglected. *In re Evans*, 81 N.C. App. 449, 344 S.E.2d 325 (1986) (socio-economically based value judgments will be overruled). We disagree. The lower court did not base its judgment on the economic status of Ms. Tucker. The finding of neglect stemmed from her reluctance to take advantage of the opportunities available to her for her children. She did not ensure that her children received proper treatment from the county health department, she did not use her food stamps so as to keep an adequate supply of food in the house, and she did not take full advantage of the free day care.

N.C.G.S. Section 7A-517(21) defines a neglected juvenile as:

> A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker, . . . or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare. . . .

N.C.G.S. § 7A-517(21) (Supp. 1991). Allegations of neglect must be proven by clear and convincing evidence. N.C.G.S. § 7A-635 (1989). In *In re Evans*, 81 N.C. App. 449, 344 S.E.2d 325 (1986), the Court noted that the quantum of proof necessary for termination of parental rights is different from that necessary for removal of the child from the home. *Id.* at 452, 344 S.E.2d at 327. Logically, then, even less proof would be necessary when the parent is permitted to retain custody.

In *In re Devone*, 86 N.C. App. 57, 356 S.E.2d 389 (1987), this Court found neglect where a mentally retarded fifteen year old was kept out of public school, and its special education programs, because his father insisted on educating his children at home. The Court noted that the child needed "additional stimulation outside the home," and that denial of the remedial care available in the

public schools constituted neglect according to N.C.G.S. section 7A-517(21). *Id.* at 58, 60, 356 S.E.2d at 390, 391. Importantly, the Court stated that "[t]o deprive a child of the opportunity for normal growth and development is perhaps the greatest neglect a parent can impose upon a child." *Id.* at 60, 356 S.E.2d at 391 (*quoting In re Huber*, 57 N.C. App. 453, 458, 291 S.E.2d 916, 919, *disc. rev. denied*, 306 N.C. 557, 294 S.E.2d 223 (1982)).

Similarly, in the case at hand the children are being denied the opportunity to participate in free day care, which the social worker believes is necessary for their "adequate stimulation and socialization." Instead, the children are kept at home, where they do not receive proper medical care, supervision, or adequate nutrition. The facts of this case are certainly sufficient to support a finding of neglect by clear and convincing evidence.

[2] Finally, Ms. Tucker argues that the lower court erred in ordering the children to attend day care. In their briefs the parties dispute whether day care is actually beneficial to the children. Each cites several authorities who have researched the effects of day care on young children. However, this Court will not seek to analyze the beneficial or detrimental effects of the day care system as a whole. Rather, we conclude that in this case day care is an appropriate remedy. It can only be beneficial to temporarily remove the children from an environment where they were receiving inadequate care, and where the mother did not even talk to the baby, and to place them in a day care center for 7½ hours each day.

The best interests of the children is our foremost consideration here. The *Devone* Court stated that "[j]udicial intervention is authorized because the welfare and best interest of the child is always treated as the paramount consideration." 86 N.C. App. at 61, 356 S.E.2d at 391 (citation omitted); *see In re Ballard*, 311 N.C. 708, 715, 319 S.E.2d 227, 232 (1984) (in case involving termination of parental rights upon finding of neglect, a "determinative factor" is the best interests of the child). If an adult chooses to neglect herself or abuse herself, privately, that is her choice. This matter, however, concerns children, indeed, infants. Our youth is our most precious asset in this state and they must be protected and nurtured. We find this case one of warranted intrusion into the life of a family on the brink. The finding of neglect is clearly

supported by the evidence, and it is obvious that the day care program operated by DSS would be beneficial to these children.

According to N.C.G.S. section 7A-646,

> the initial approach [to the disposition of juvenile actions] should involve working with the juvenile and his family in their own home so that the appropriate community resources may be involved in care, supervision, and treatment according to the needs of the juvenile. Thus, the judge should arrange for appropriate community-level services to be provided to the juvenile and his family in order to strengthen the home situation.

N.C.G.S. § 7A-646 (1989). The lower court has followed the recommendation of this statute in fashioning the remedy in this case. The court did not deny Ms. Tucker custody of her children. It merely ordered her to take her children to free day care, and provided that even this would not be required if she and DSS later agreed that day care was unnecessary. The court also ordered Ms. Tucker to continue participating in an Early Intervention Program and a Homemaker Program, and to otherwise cooperate with the "protective supervision" of DSS. This Court agrees that these remedies were reasonable and appropriate in this case.

Affirmed.

Judge WYNN concurs.

Chief Judge HEDRICK dissents.

Chief Judge HEDRICK dissenting.

As her second assignment of error respondent contends the trial court committed reversible error in finding that the minor children were neglected. I agree.

The purpose of an adjudicatory hearing is to determine the "existence or nonexistence of any of the conditions alleged in a petition." G.S. 7A-631. At the hearing, "the allegations in a petition alleging . . . neglect . . . shall be proved by clear and convincing evidence." G.S. 7A-635. "If the judge finds that the allegations have not been proven, he shall dismiss the petition with prejudice . . . ." G.S. 7A-637.

G.S. 7A-517(21) defines a "neglected juvenile" as follows:

> A juvenile who does not receive proper care, supervision, or discipline from his parent, guardian, custodian, or caretaker; or who has been abandoned; or who is not provided necessary medical care or other remedial care recognized under State law, or who lives in an environment injurious to his welfare, or who has been placed for care or adoption in violation of law . . . .

In the present case, the testimony presented by Mrs. Coley tends to show that the allegations she made in the petition concern conditions which she found existed in respondent's home at the time she began her investigation in January 1991. Her testimony does not indicate that these conditions existed at the time she filed the petition in April 1991 or at the time of the hearing. In fact, the greater weight of her testimony suggests that through the intervention of DSS, these conditions were being remedied as of the date of the petition.

In his closing argument to the court, counsel for DSS stated:

> Your Honor, we would certainly admit that this is not one of the worst neglect cases that we have ever brought, it is a marginal case—its a case where the mother has worked with Social Services to some extent to try [to] improve conditions in the home . . . .

The trial judge apparently agreed with counsel to a certain extent as is evidenced by his order allowing respondent to retain custody of the children. However, the trial judge did find, by clear and convincing evidence, that the children were "neglected" pursuant to the statute and in so doing, placed respondent in a detrimental position for protecting her parental rights in the future.

I hold the trial judge's findings that respondent's children were "neglected" were not supported by clear and convincing evidence in the record. Thus, I vote to reverse the order adjudicating respondent's minor children to be neglected pursuant to G.S. 7A-517(21).

ADVENTURE TRAVEL WORLD, LTD., AND MICHAEL G. MORGAN, APPELLANTS v. GENERAL MOTORS CORPORATION AND ARNGAR, INC., D/B/A ARNOLD PALMER CADILLAC, APPELLEES

No. 9126SC761

(Filed 6 October 1992)

Automobiles and Other Vehicles § 253 (NCI4th) — lemon law case — automobile brake failure — summary judgment improper

In an action brought pursuant to the "lemon law," the trial court erred in granting defendants' motion for summary judgment where there was a genuine issue of material fact as to whether the braking system on plaintiffs' car functioned properly, since plaintiffs' evidence tended to show that the brakes failed for no apparent reason on four occasions, two of which resulted in collisions; a body shop employee who drove the vehicle following plaintiffs' second accident stated that he experienced sudden brake failure similar to that previously experienced by the owner; testimony by an auto mechanic who inspected and test drove the car indicated that the brake pads were worn unevenly and that a hydraulic problem with the braking system could cause the type of brake failure the owner had experienced; and the evidence presented by defendants merely showed that two mechanical engineers who briefly inspected and test drove the car on one occasion were unable to discover any mechanical problem with the car which would account for the failure of the brakes.

Am Jur 2d, Consumer Product Warranty Acts §§ 67, 68.

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

APPEAL by plaintiffs from *Jones (Julia V.), Judge.* Judgment entered 20 March 1991 in Superior Court, MECKLENBURG County. Heard in the Court of Appeals 26 August 1992.

This is a civil action instituted by plaintiff, Michael G. Morgan (hereinafter "Morgan"), to recover money damages resulting from his purchase of a new 1988 Cadillac Eldorado which Morgan alleged was equipped with a defective braking system.

Morgan is the sole shareholder and officer of Adventure Travel World, Ltd. (hereinafter "plaintiff corporation"). On or about 29

December 1988, Morgan purchased a new 1988 Cadillac Eldorado from defendant Arngar, Inc. d/b/a Arnold Palmer Cadillac (hereinafter "defendant seller"), for the sum of $28,313.38. The car was manufactured by defendant General Motors Corporation (hereinafter "defendant manufacturer"). Further, at the time of this sale, Morgan also paid $345.00 to purchase defendant manufacturer's extended coverage protection plan which covered the Cadillac for 48 months or 50,000 miles. Morgan bought the Cadillac for use in his business and plaintiff corporation is the titled owner of the car.

The evidence indicates that on several occasions when Morgan was driving the car, the brake system failed to respond normally when activated.

In January 1989, Morgan discovered that once he applied the brakes the car was not slowing down as gradually as it should and was not stopping within a reasonable and safe distance. At this time, Morgan notified defendant seller's service department about the problem. A service representative informed Morgan that the car was equipped with computer anti-lock brakes. He also told Morgan that what he was experiencing was "just the way [the car] feels."

In March 1989, an automobile suddenly stopped in front of Morgan while he was driving the Cadillac. When Morgan applied the brakes "with all his might," the car failed to come to a stop and collided with the stopped vehicle. Morgan informed defendant seller of the accident and the failure of the brakes to function properly on that occasion. Defendant seller's salesman told Morgan that the brakes were normal and could not have been the cause of the accident. On one other occasion in April 1989 the brakes again failed to function properly.

On 15 May 1989, the Cadillac's brakes again failed to stop the car even though Morgan applied as much pressure as possible to them. Consequently, the Cadillac crashed into the rear of a van causing personal injuries to Morgan and property damage to both vehicles. Following this accident Morgan again notified defendant seller of the problems he had experienced with the braking system. However, defendant seller refused to allow Morgan to leave the automobile for inspection or service.

On 16 July 1989, Morgan sent defendant manufacturer written notice of the Cadillac's brake failure. Morgan stated that he was

allowing defendant manufacturer 15 days in which to cure the "non-conformities or defects" in the automobile. Morgan also informed defendant manufacturer that if the defects were not cured within 15 days, it would have 10 days to refund his money pursuant to G.S. 20-351 *et seq*. On 15 August 1989, defendant manufacturer responded to Morgan's letter advising him that the car did not contain any non-conformities or defects and that it would not repair the vehicle or take any steps pursuant to the statute.

On 5 September 1989, plaintiffs filed a complaint against both defendants alleging, *inter alia*, that the 1988 Cadillac Eldorado he had purchased was a "lemon" pursuant to the "New Motor Vehicle Warranty Act" codified at G.S. 20-351 *et seq*. Plaintiffs alleged that the car was a "lemon" because "the automobile has been sitting unused and awaiting repair since May 15, 1989, due to the unwillingness on the part of [defendant seller] to repair the automobile, and [p]laintiff Michael G. Morgan's fear of serious injury to himself and others if another accident occurred due to the failure of the brakes." Plaintiffs also alleged that defendants breached both implied and express warranties and violated the "Magnuson-Moss Warranty Act," 15 U.S.C. 2301 *et seq*.

Defendant moved for summary judgment on plaintiffs' claims. In support of their motion, defendants submitted a report from consulting engineer Dr. Norman A. Cope who had been requested by plaintiff corporation's insurance company to inspect the braking system on the Cadillac following the 15 May 1989 collision. On 16 June 1989, Dr. Cope, in Morgan's presence, made a visual inspection of the car's brake system and test drove the vehicle. Based on his inspection, Dr. Cope found no evidence of brake fluid leakage and concluded that the brake system was in good condition.

Defendants also submitted an affidavit from mechanical engineer Duane H. Harwick who is employed by defendant manufacturer to design brake systems for GM automobiles. Mr. Harwick explained that the brake system on the 1988 Cadillac Eldorado is activated by a split hydraulic system and that in order to have a complete brake failure, there would have to be a simultaneous failure of both parts of the hydraulic system. He stated that the probability of a simultaneous failure was extremely remote and that such a failure would have to be repaired in order to function properly again as it could not correct itself. On 13 February 1991, Mr. Harwick inspected the braking system, test drove the Cadillac

and concluded that the braking system was in proper working order.

In opposition to defendants' motion for summary judgment, Morgan submitted an affidavit and supplemental affidavit in which he recounted the numerous instances in which he had experienced partial or complete brake failure while driving the Cadillac, including the two instances in which the failure of the brakes caused the car to collide with stopped vehicles. Morgan stated that he had operated the car in a safe and prudent manner on each occasion when the brakes failed to function normally. Morgan also stated that Dr. Cope's inspection of the car's brake system consisted of a look under the hood and a fifteen minute test drive. Morgan further stated that during Dr. Cope's inspection, Dr. Cope told him that he believed him when he said he had experienced problems with the brakes. Moreover, Morgan stated Dr. Cope told him that he had heard of several instances where the brakes had failed and there had been problems in determining the source. Dr. Cope also allegedly told plaintiff Morgan that the problem could be air getting into the brake system and causing instrument failure. Morgan further stated that neither Dr. Cope's nor Mr. Harwick's test drives of the car allowed it to get "warm" and did not include any emergency stopping likely to cause brake failure or fade.

Plaintiffs also submitted the affidavits of Doris Henderson, Tracy Langdon and Darryl Jackson in opposition to defendants' motion. Ms. Henderson, Morgan's mother, stated that she was riding in the Cadillac on 9 March 1989 when a car stopped abruptly in front of them, and although Morgan pumped the brakes, the Cadillac would not stop and collided with the stopped car. She further stated that at the time of the collision, Morgan was not exceeding a safe speed and was paying attention to what was happening around him. Ms. Henderson was also with Morgan on one occasion when he took the car to defendant seller to be repaired and observed an employee of the service department tell Morgan to "get out of here and not come back."

Tracy Langdon, an employee of Collision Body Shop who had repaired the Cadillac following the second accident, stated that during the repair process, he drove the car a few blocks from the body shop to another repair shop to have the front end aligned. During the course of this short drive, Langdon stated that an automobile in front of him stopped suddenly. When he tried to

apply the car's brakes forcefully, they did not respond and the pedal went all the way to the floor. Langdon said that after travelling approximately four car lengths, the brakes "caught" and stopped the Cadillac, preventing a near collision.

Darryl Jackson, the owner and operator of Beatties Ford Automotive Center, inspected the brakes and test drove the Cadillac on 19 March 1991. He found that the brake pads were worn abnormally for an automobile with such limited mileage. He also found that the rear brake pads were worn down further than the front pads and that the rotors appeared to be out of round. Jackson stated that he believed there was a hydraulic problem with the braking system due to very loose pressure on the brakes which could cause complete brake failure or brake "fade" in emergency situations where the brakes were hit hard. Based on his inspection, Jackson stated that he believed the Cadillac "ha[d] experienced brake failure in the past and could experience it in the future due to a defect in the braking system."

After reviewing the evidence submitted in support of and in opposition to defendants' motion, Judge Jones concluded that there was no genuine issue of material fact and entered summary judgment in favor of defendants. Plaintiffs appealed.

Weaver, Bennett & Bland, P.A., by Bill G. Whittaker, for plaintiffs, appellants.

Smith Helms Mulliss & Moore, by Catherine E. Thompson and Mary K. Mandeville, for defendants, appellees.

HEDRICK, Chief Judge.

As their sole assignment of error, plaintiffs contend the trial court erred in granting defendants' motion for summary judgment. Plaintiffs argue summary judgment was improperly entered because a genuine issue of material fact exists regarding whether there is a defect in the braking system of plaintiffs' Cadillac. We agree.

This Court has often held that "[s]ummary judgment is a drastic measure which should be used with caution since no person should be deprived of a trial on a genuine issue of material fact." *Lormic Development Corp. v. North American Roofing Co.*, 95 N.C. App. 705, 708, 383 S.E.2d 694, 696 (1989), *disc. review denied*, 326 N.C. 48, 389 S.E.2d 90 (1990). "The slightest doubt as to the facts entitles the non-moving party to a trial." *Ballenger v. Crowell*, 38 N.C.

App. 50, 247 S.E.2d 287 (1978). (Citation omitted). Consequently, in ruling on a motion for summary judgment "[a]ll the evidence must be viewed in the light most favorable to the non-moving party; and questions of witness credibility are to be resolved by the jury." *Wiggins v. City of Monroe*, 73 N.C. App. 44, 47, 326 S.E.2d 39, 42 (1985), *quoting Ragland v. Moore*, 299 N.C. 360, 261 S.E.2d 666 (1980).

In the present case, we find that plaintiffs' pleadings, discovery responses, depositions and affidavits submitted in opposition to defendants' motion for summary judgment raise a genuine issue of material fact regarding whether the braking system on plaintiffs' 1988 Cadillac Eldorado functioned properly. Taken in the light most favorable to plaintiffs, the evidence presented shows that the brakes on the Cadillac failed for no apparent reason on at least four occasions. On two of these occasions, the failure of the brakes to function properly resulted in the Cadillac colliding with other vehicles. Furthermore, a body shop employee, who drove the Cadillac following the second accident, stated that he experienced sudden brake failure similar to that previously experienced by Morgan. Additionally, testimony given by Darryl Jackson, an automobile mechanic who inspected and test drove the Cadillac in March 1991, indicates that the brake pads were worn unevenly and that a hydraulic problem with the braking system could cause the type of brake failure Morgan had experienced.

The evidence presented by defendants in support of their motion for summary judgment merely shows that two mechanical engineers who briefly inspected and test drove the Cadillac on one occasion were unable to discover any mechanical problem with the car which would account for the failure of the brakes.

The evidence presented, when viewed in the light most favorable to plaintiffs, clearly demonstrates the existence of a genuine issue of material fact regarding whether there is a defect in the braking system of plaintiffs' car. Thus, the trial court improperly granted defendants' motion for summary judgment.

Reversed.

Judges LEWIS and WYNN concur.

THURMAN VENABLE, PLAINTIFF-APPELLANT v. GKN AUTOMOTIVE, DEFENDANT-APPELLEE

No. 9111SC719

(Filed 6 October 1992)

Master and Servant § 10.2 (NCI3d) — refusal of supervisor to punish union organizers — supervisor fired — claims preempted by NLRA

Where plaintiff brought an action for wrongful discharge based on defendant's firing of him because he refused to punish union organizers, the trial court properly concluded that plaintiff's claims were preempted by federal law under the National Labor Relations Act, even though plaintiff was a supervisor and supervisors are not protected directly by the NLRA, since the NLRA does protect employees who are fired because of any unfair labor practice, and an employer's discharge of a supervisor for refusal to participate in the commission of an unfair labor practice is itself an unfair labor practice; furthermore, plaintiff failed to allege sufficient facts to establish independent claims under state tort law.

Am Jur 2d, Labor and Labor Relations § 917.

Discipline of supervisor for failure to support unlawful conduct of employer as unfair labor practice prohibited by § 8(a)(1) of the National Labor Relations Act (29 USCS § 158(a)(1)). 50 ALR Fed 866.

APPEAL by plaintiff from order entered 11 April 1991 by *Judge Knox Jenkins* in LEE County Superior Court. Heard in the Court of Appeals 13 May 1992.

Richard W. Rutherford for plaintiff appellant.

Edwards, Ballard, Bishop, Sturm, Clark and Keim, P.A., by Wade E. Ballard and Terry A. Clark; and Love & Wicker, P.A., by Dennis A. Wicker, for defendant appellee.

COZORT, Judge.

Plaintiff-employee brought an action alleging the following claims against his employer: (1) wrongful discharge in violation of public policy; (2) wrongful discharge based on breach of implied covenant

of good faith and fair dealing; and (3) intentional infliction of emotional distress. The trial court granted defendant-employer's motion to dismiss pursuant to Rule 12(b)(1) for lack of subject matter jurisdiction due to federal preemption under the National Labor Relations Act and pursuant to Rule 12(b)(6) for failure to state a claim upon which relief could be granted. We affirm.

Defendant GKN Automotive hired plaintiff Thurman Venable in June 1979 to work in defendant's Sanford automotive plant. Plaintiff subsequently became a supervisor of two departments within the plant and compiled a satisfactory work record over a nine-year period. In March of 1988, the United Auto Workers Union (UAW) began a Union campaign at GKN. During the Union campaign, plaintiff, as a supervisor, indicated to fellow supervisors that he would not mistreat or fire Union sympathizers. On 9 June 1988, plant manager Dave Forkner along with plaintiff's supervisor, Hulon Brown, called plaintiff into a meeting. Forkner and Brown made pointed inquiries as to plaintiff's loyalties concerning the Union campaign by asking plaintiff whether he was a member of the management "team," and whether he would support the company's efforts to ward off a Union threat. Following the 9 June meeting, plaintiff received his annual review from Mr. Brown. The evaluation was two weeks late and contained negative comments.

On 1 August 1988, company managers called all supervisors into a meeting. At this time, management was aware the Union campaign had failed. Mr. Forkner conducted the meeting and explained to the supervisors that he did not want to see nine named employees, who were suspected Union supporters, working in the plant by January 1989. The nine employees had been transferred previously into plaintiff's department and were his responsibility. When it became time for the nine employees to receive evaluations, Mr. Forkner ordered plaintiff to submit negative reviews for the Union supporters. Plaintiff refused to turn in adverse evaluations and gave all nine employees good ratings. After the evaluations were submitted to the personnel department, the records were changed to reflect negative performances. Mr. Forkner then directed plaintiff to explain to the nine employees that plaintiff had erred. Again, plaintiff refused.

On 21 January 1989, plaintiff was moved to the night shift for a ninety-day trial period. Defendant terminated plaintiff's employment on 17 April 1989. Plaintiff believed he was fired in retaliation

for his refusal to violate the rights of Union supporters by falsifying their evaluations or by firing them. Plaintiff thereupon brought an action against GKN on 30 July 1990. Defendant filed a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(1) and Rule 12(b)(6) on 20 August 1990. On 11 April 1991, the trial court granted defendant's motion to dismiss and made in part the following conclusions of law:

> 3. That the Complaint filed by plaintiff fails to state a claim upon which relief may be granted by the Court, and that all of the inter-related causes of action are preempted by Federal law under the National Labor Relations Act in Chapter 29 of the United States Code.
>
> 4. That the Court does not have jurisdiction of the subject matter, and that such subject matter is preempted by Federal law under the National Labor Relations Act pursuant to Chapter 29 of the United States Code.

Plaintiff asserts five assignments of error on appeal, the first three of which challenge the federal preemption of plaintiff's claim. The National Labor Relations Act (NLRA), codified in 29 U.S.C. § 150 *et seq.*, protects the rights of employees to engage in certain labor activities. The Act vests the National Labor Relations Board (NLRB) with exclusive jurisdiction over questions of Union representation and over unfair labor practices defined in the Act. 29 U.S.C. §§ 159-160 (1988). Thus, in some cases, the NLRB will have exclusive jurisdiction over claims which would otherwise appear appropriate for state jurisdiction. The United States Supreme Court explained the analysis used in determining whether state law claims are preempted by the NLRA in *San Diego Bldg. Trades Council v. Garmon*, 359 U.S. 236, 3 L.Ed.2d 775 (1959). The analysis set forth in *Garmon* was reemphasized more recently in *International Longshoremen's Assoc. v. Davis*, 476 U.S. 380, 90 L.Ed.2d 389 (1986):

> "[D]ue regard for the federal enactment requires that state jurisdiction must yield," when the activities sought to be regulated by a State are clearly or may fairly be assumed to be within the purview of § 7 or § 8. The [Garmon] Court acknowledged that "[a]t times it has not been clear whether the particular activity regulated by the States was governed by § 7 or § 8 or was, perhaps, outside both these sections." Even in such ambiguous situations, however, the Court concluded that "courts are not primary tribunals to adjudicate

> such issues. It is essential to the administration of the Act that these determinations be left in the first instance to the National Labor Relations Board." Thus the Court held that "[w]hen an activity is arguably subject to § 7 and § 8 of the Act, the States as well as the federal courts must defer to the exclusive competence of the National Labor Relations Board if the danger of state interference with national policy is to be averted."

Id. at 389-90, 90 L.Ed.2d at 400 (citations omitted).

Plaintiff contends preemption should not be applied, first arguing that his claims should not be preempted because his rights as a supervisor are peripheral in nature to the NLRA. We recognize that supervisors are not protected directly by the NLRA, because under the Act

> [t]he term "employee" shall include any employee, and shall not be limited to the employees of a particular employer, unless this subchapter explicitly states otherwise, and shall include any individual whose work has ceased as a consequence of, or in connection with, any current labor dispute or because of any unfair labor practice, and who has not obtained any other regular and substantially equivalent employment, *but shall not include . . . any individual employed as a supervisor* . . . .

29 U.S.C. § 152(3) (1988) (emphasis added). Nonetheless, it is clear that an employer's discharge of a supervisor for refusal to participate in the commission of an unfair labor practice is itself an unfair labor practice. *See generally, Kenrich Petrochemicals v. NLRB*, 907 F.2d 400, *cert. denied*, --- U.S. ---, 112 L.Ed.2d 522 (3rd Cir. 1990); *NLRB v. Talladega Cotton Factory*, 213 F.2d 209 (5th Cir. 1954); *Budget Marketing, Inc.*, 241 NLRB 1108 (1979).

Conduct by an employer which is considered to be an unfair labor practice is defined in 29 U.S.C. § 158(a) and provides in part:

> (a) **Unfair labor practices by employer**. It shall be an unfair labor practice for an employer—
>
> (1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 157 of this title;
>
> * * * *

> (3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any Labor organization[.]

Section 7 of the NLRA outlines the rights of employees as follows:

> Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 158(a)(3) of this title.

29 U.S.C. § 157 (1988).

In *Budget Marketing, Inc.*, the NLRB found a violation of the NLRA where an employer discharged a supervisor for failing to discharge another employee under the pretext of poor performance. The NLRB concluded, "[the employer] violated Section 8(a)(1) of the Act by discharging [the supervisor] because of his refusal to engage in unfair labor practices—that is, his refusal to discharge an employee . . . because of his Union activities." *Budget Marketing Inc.*, 241 NLRB at 1112. Plaintiff argues that the state has subject matter jurisdiction in the present case because the state has a significant interest in discouraging unfair labor practices and because the defendant's behavior was in violation of state public policy. Although the state does have an interest in discouraging unfair labor practices, it is clear in the case at bar that GKN's actions constituted an unfair labor practice within the purview of Section 7 of the NLRA. The preemption analysis set forth in *Davis* is therefore applicable here; the trial court did not err in finding that it lacked jurisdiction over plaintiff's claims.

Plaintiff's final assignments of error are based on arguments that the trial court failed to find defendant's action to be in violation of state laws and public policy. Plaintiff's complaint included the following allegations:

> 13. Plaintiff's firing was due to his refusal to violate the rights of Union supporters under the National Labor Relations Act by falsifying evaluations and by firing them.

> 14. Plaintiff's termination thus was in violation of the important statutorily codified public policy of this state and nation that Employees should not be fired or adversely treated for exercising protected rights under the National Labor Relations Act against and was made in bad faith and in violation of an implied covenant of good faith and fair dealing between plaintiff and GKN.
>
> 15. Plaintiff's termination has caused him great mental anguish and distress and has damaged him greatly in his relationships with his acquaintances and peers in the community, and has cost him the wages and benefits of his position.

Plaintiff's allegations are conclusory in nature and fail to allege facts sufficient to constitute a claim independent of the unfair labor practice claim. Thus, we hold that plaintiff's claims are based on allegations of unfair labor practices and are preempted by the NLRA. Furthermore, plaintiff has failed to allege sufficient facts to establish independent claims under state tort law. The trial court correctly dismissed the action under Rule 12(b)(1) and Rule 12(b)(6).

Affirmed.

Judges PARKER and GREENE concur.

C.F.R. FOODS, INC. v. RANDOLPH DEVELOPMENT COMPANY

No. 9119SC757

(Filed 6 October 1992)

Vendor and Purchaser § 6 (NCI3d)— commercial real estate transaction—no intent to deceive—no reliance on deception

Plaintiff's claims for actionable fraud and negligent misrepresentation in the purchase of a commercial property were properly dismissed where plaintiff showed neither defendant's intent to deceive nor plaintiff's own reasonable reliance on the deception, since this was a transaction involving commercial real estate between two commercial parties and defendant accordingly owed no duty of disclosure to plaintiff;

prior to its purchase, plaintiff requested and received from defendant a topographical map which contained both the original and current soil grades, including a specific indication that fill had been placed upon certain portions of the parcel; this map served to put plaintiff on notice that a further investigation of the soil would be prudent before beginning construction, but plaintiff failed to make one; plaintiff's reliance was not reasonable; and plaintiff was contributorily negligent in not performing further investigation.

Am Jur 2d, Vendor and Purchaser §§ 554-556.

APPEAL by plaintiff from order signed 20 March 1991 by *Judge Russell G. Walker, Jr.* in RANDOLPH County Superior Court. Heard in the Court of Appeals 25 August 1992.

This case involves defendant's sale of commercial land ("Out Parcel Number 5") to plaintiff. Defendant initially purchased a tract of land known as the Randolph Mall site, which included Out Parcel Number 5, to build a shopping mall. Defendant hired ATEC Associates to perform a preliminary subsurface investigation and a geotechnical engineering evaluation. ATEC's 13 February 1980 report referred to "two areas of existing fill which apparently resulted from previous grading on the sight. These areas are suspected of having buried organic material including trees and tree stumps." ATEC's second report revealed the precise location and reaffirmed ATEC's earlier recommendation to "undercut" and "backfill" the areas. On 1 June 1980, defendant contracted to have the unsuitable materials removed. During grading, the lot was "excavated, undercut, and backfilled" to a level consistent with the anticipated floor level of the mall. The out parcels were then smooth graded and sown with grass.

The trial judge made the following findings of fact concerning plaintiff's later purchase of the land:

> 9. . . . But for its ancillary connection, by virtue of its continued operation of the mall, the Defendant had no further contact with this parcel [Out Parcel Number 5], until such time as the Plaintiff demonstrated its purchase interest in 1986.
>
> 10. Mr. Ken Moser is a Vice President of the Western Steer Mom and Pop, and his duties include site development for the Western Steer Chain, as well as construction coordina-

tion. Cecil Hash and Ken Moser, officers of the Plaintiff, negotiated the purchase of Out Parcel Number 5, for approximately three months. On November 6, 1986, J.C. Faw, a Principal in Plaintiff-Corporation, entered into a contract for purchase and sale, with the defendant, at a purchase price of $175,000.00, which permitted immediate access to the property for the purpose of ". . . making soil tests thereon, conducting a survey of said property, engineering the property, and/or determining the suitability and feasibility of the land for development . . .".

11. During purchase negotiations no representations were made by Defendant or its representatives to the Plaintiff or its representatives, relative to the condition of the parcel or its feasibility for the plaintiff's intended use.

12. The Defendant did not in any willful, negligent, fraudulent, knowing or reckless manner conceal from or fail to disclose to Plaintiff or its representative any material fact regarding the condition of this parcel or its suitability for Plaintiff's intended use, and such "non-disclosure" was not pursuant to any intent or design to trick or induce the Plaintiff to rely thereon, nor did the Defendant engage in any unfair or deceptive conduct or practice which would have the capacity or tendency to deceive.

13. On or about October 10, 1986, the Defendant forwarded to the Plaintiff, at Plaintiff's request, a topographical map, which contained, *inter alia*, the original grade on subject parcel, and the then-existing grade, indicating that a considerable amount of "fill" had been placed upon portions of the parcel.

14. Prior to the closing of the purchase of Out Parcel Number 5, no geotechnical investigation was conducted by or on behalf of the Plaintiff, nor did the plaintiff make any inquiry of the defendant, although it was afforded ample opportunity to do so.

15. By Warranty Deed dated February 10, 1987 . . . the Defendant conveyed Out Parcel Number 5 to the Plaintiff.

. . . .

17. Prior to beginning construction, no geotechnical investigation was conducted by Plaintiff on this site. It is, [sic]

Plaintiff's established policy not to conduct pre-construction soil evaluations and it has not previously done so in constructing numerous Western Steer Restaurants.

18. Plaintiff also based its decision not to test the soil upon its observation that the parcel was grassed and that it "appeared" to be a ready-to-build lot.

19. That Plaintiff's reliance on this assumption was negligent, shows a lack of due diligence, and was unreasonable.

20. Plaintiff did, however, conduct extensive investigations, relative to traffic flow, national demographics, and the "come to" aspects of the proposed restaurant location, in an effort to anticipate potential sales.

21. Plaintiff then selected a prototype restaurant, previously approved on other Western Steer sites, but made no effort to site-adapt the prototype to this parcel.

After the restaurant opened, cracks appeared in the walls. Plaintiff hired an engineering firm to analyze the damage. The firm's test conclusions found the structural damage directly resulted from settlement of the soil beneath the restaurant, which was partially caused by decomposition of the organic material or trash.

On 24 May 1989, plaintiff filed a complaint against defendant alleging fraud, negligent misrepresentation, and unfair and deceptive trade practices. The parties waived a jury trial. The trial court heard evidence from both parties on 14 January 1991. Defendant moved for a directed verdict.

On 20 March 1991, the trial court, treating defendant's motion as a motion for involuntary dismissal pursuant to N.C.G.S. § 1A-1, Rule 41(b), granted defendant's motion and dismissed the action with prejudice. From this judgment, plaintiff appeals.

Greeson, Grace and Gatto, P.A., by Michael R. Greeson, Jr. and Lisa S. Costner, for plaintiff-appellant.

Smith, Casper, Smith & Alexander, by Archie L. Smith, Jr., for defendant-appellee.

EAGLES, Judge.

Plaintiff contends that the trial court did not base its findings on competent evidence and erred by granting defendant's motion

for involuntary dismissal with prejudice. After a careful examination of the record, we disagree and affirm.

The standard regarding involuntary dismissal is as follows:

> "When a motion to dismiss pursuant to [N.C.G.S. § 1A-1, Rule] 41(b) is made, the judge becomes both the judge and the jury and he must consider and weigh all competent evidence before him." *Dealers Specialties, Inc. v. Neighborhood Housing Services, Inc.*, 305 N.C. 633, 640, 291 S.E.2d 137, 141 (1982). The trial judge in a non-jury case does not weigh the evidence in the light most favorable to the plaintiff as he does on a motion for directed verdict in a jury trial. *Id.* at 638, 291 S.E.2d at 13. Dismissal with prejudice pursuant to a Rule 41(b) motion is a judgment on the merits, subject to the usual rules of *res judicata. Barnes v. McGee,* 21 N.C.App. 287, 289, 204 S.E.2d 203, 205 (1974).

Progressive Sales, Inc. v. Williams, Willeford, Boger, Grady & Davis, 86 N.C. App. 51, 55, 356 S.E.2d 372, 375 (1987).

Plaintiff argues that its claims of actionable fraud and negligent misrepresentation should have survived the motion for involuntary dismissal because it met its burden of proof on all essential elements. We disagree.

First, plaintiff alleges that defendant's nondisclosure was fraudulent because defendant "had at least constructive knowledge" of the presence of the organic materials from the 13 February 1980 report by ATEC. In *Rowan County Board of Education v. U.S. Gypsum Co.*, 332 N.C. 1, 17, 418 S.E.2d 648, 658-59 (1992), our Supreme Court stated:

> The essential elements of fraud are: "(1) [F]alse representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) made with intent to deceive, (4) which does in fact deceive, (5) resulting in damage to the injured party." *Terry v. Terry*, 302 N.C. 77, 83, 273 S.E.2d 674, 677 (1981) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)); *accord Cofield v. Griffin*, 238 N.C. 377, 379, 78 S.E.2d 131, 133 (1953).

Additionally, plaintiff's reliance must be reasonable. *Forbes v. Par Ten Group, Inc.*, 99 N.C. App. 587, 594, 394 S.E.2d 643, 647 (1990), *rev. denied*, 328 N.C. 89, 402 S.E.2d 824 (1991); *Myers & Chapman,*

Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989). Here, plaintiff showed neither defendant's intent to deceive nor plaintiff's own reasonable reliance. We note that this was a transaction involving commercial real estate between two commercial parties. Accordingly, defendant owed no duty of disclosure to plaintiff. *Libby Hill Seafood Restaurants, Inc. v. Owens*, 62 N.C. App. 695, 699, 303 S.E.2d 565, 568, *rev. denied*, 309 N.C. 321, 307 S.E.2d 164 (1983).

"An action in fraud for misrepresentations regarding realty will lie *only* where the purchaser has been fraudulently induced to forego inquiries which he otherwise would have made. Thus, the representation generally must be definite and specific." *Id.* at 698, 303 S.E.2d at 568 (citations omitted). The evidence before the trial court showed that prior to its purchase, plaintiff requested and received from defendant a topographical map. This map contained both the original and current soil grades, including a specific indication that fill had been placed upon certain portions of the parcel.

This map served to put plaintiff on notice that a further investigation of the soil would be prudent before beginning construction. Instead, plaintiff chose to rely upon the mere appearance of the land, which it alleges *appeared* "ready-to-build." The trial court correctly found that plaintiff's reliance was not reasonable and that plaintiff was contributorily negligent in not performing further investigation. The agreement for purchase and sale gave plaintiff access to the property to perform tests. Furthermore, plaintiff's president, Cecil Hash, testified that such pre-construction soil tests had not been performed in the purchase of other properties by plaintiff, because "I never saw a need to do it."

Where "the purchaser has full opportunity to make pertinent inquiries but fails to do so through no artifice or inducement of the seller, an action in fraud will not lie." *Id.* at 698, 303 S.E.2d at 568. Here, plaintiff had a full opportunity to make pertinent inquiries and failed to do so through no inducement of the seller. By the exercise of reasonable diligence prior to its purchase, plaintiff could have discovered the problem and protected its interests accordingly. Similarly, the negligent misrepresentation claim fails because plaintiff has not established that defendant has breached any duty of care it owed as a seller of commercial real estate. *Id.* at 699, 303 S.E.2d at 568-69.

Finally, plaintiff's claim for unfair and deceptive trade practices pursuant to N.C.G.S. § 75-1.1 was appropriately dismissed. "In essence, a party is guilty of an unfair act or practice when it engages in conduct that amounts to an inequitable assertion of its power or position." *Libby Hill,* 62 N.C. App. at 700, 303 S.E.2d at 569. We find no such conduct here and hold that the trial court properly dismissed the unfair and deceptive trade practices claim.

Affirmed.

Judges JOHNSON and PARKER concur.

JERRY REINWAND, PLAINTIFF v. M. DALE SWIGGETT AND M. DALE SWIGGETT D/B/A GREAT MISTAKES, DEFENDANTS

No. 9115SC756

(Filed 6 October 1992)

Constitutional Law § 145 (NCI4th)— Alaska business solicited from North Carolina—goods shipped from North Carolina to Alaska—jurisdictional issue fully litigated—Alaska judgment entitled to full faith and credit

The trial court did not err in determining that plaintiff met his burden of proving that a judgment of the state courts of Alaska was entitled to full faith and credit pursuant to N.C.G.S. § 1C-1705(b), since the issue of jurisdiction was fully and fairly litigated.

Am Jur 2d, Constitutional Law § 860.

APPEAL by defendant from judgment entered 25 February 1991 by *Judge J. B. Allen, Jr.,* in ALAMANCE County Superior Court. Heard in the Court of Appeals 25 August 1992.

Poyner & Spruill, by Eric P. Stevens, for plaintiff-appellee.

Mathew E. Bates for defendant-appellant.

JOHNSON, Judge.

On 29 February 1990, plaintiff-appellee, Jerry Reinwand, received a default judgment against defendant-appellant, M. Dale Swiggett, in the Superior Court for the State of Alaska, First Judicial District at Juneau, in the amount of $81,925.36 plus post judgment interest accruing at the rate of $23.57 per day from 29 February 1990. The default judgment was made final in Alaska and was filed on 29 February 1990, with the public office of the Alaska trial courts in Juneau.

Plaintiff, a resident of Alaska, had filed the original suit in Alaska on 17 January 1990, claiming defendant, a resident of North Carolina, had sold him defective goods. The summons was served on defendant 22 January 1990. Under Alaska law, defendant had twenty days to respond, but failed to do so. Default by the clerk was entered on 14 February 1990.

On 22 February 1990, defendant filed a motion to dismiss for lack of jurisdiction, which was filed pro se in the Third Judicial District at Anchorage, Alaska which was the improper district. Because the motion was not filed in the proper district, the clerk in Alaska was unaware that defendant had responded to the complaint filed against him, and therefore entered a default judgment against him on 29 February 1990. The court, upon receiving the motion, considered it as a motion to set aside entry of default. On 24 June 1990, Judge Duane Craske of the Superior Court of Alaska, First Judicial District at Juneau, held in a memorandum of decision and order on motion to dismiss for lack of jurisdiction, that the court properly exercised personal jurisdiction over Defendant M. Dale Swiggett. A court official certified that a true copy of the memorandum decision was served upon defendant.

The court relied upon the affidavit of Jerry Reinwand, which states that defendant undertook extensive efforts, including sending samples to Alaska and making numerous telephone calls to Alaska, to induce plaintiff to purchase a van load of clothing to be shipped to Alaska. The court determined that this action constituted "purposeful availment" of the privilege of doing business in Alaska. The court further concluded that defendant's sale of goods to plaintiff and making arrangements to ship them to Alaska satisfied the Alaska Long-arm Statute.

In his memorandum of decision, the judge in Alaska expressly provided:

> [D]efendant may file a motion under Civil Rule 77 to set aside entry of default on other grounds within twenty days of the date of distribution of this order. The failure to file a motion under Civil Rule 77 will mean that the default judgment will continue to be valid and enforceable.

Defendant did not file a motion to set aside entry of default within the twenty days allowed, or at any time thereafter.

On 6 December 1990, plaintiff filed in Alamance County Superior Court, the default judgment entered against M. Dale Swiggett in the Superior Court for the State of Alaska, and sent defendant notice of the filing pursuant to the Uniform Enforcement of Foreign Judgments Act. *See* N.C. Gen. Stat. §§ 1C-1701-08 (1989). The copy of the default judgment filed in superior court was certified as authentic by the Alaska courts. Further, an affidavit from plaintiff's counsel in the Alaska court contained sworn testimony that the judgment was final and filed in the proper place.

In response to this action, defendant filed a motion for relief from judgment on 2 January 1991 in superior court. Defendant claimed that the Alaskan judgment was void because the Alaskan court did not have personal jurisdiction over him. Defendant also claimed that the judgment could not be enforced against him individually because the only liability, if any, was owed by Great Mistakes, Inc. and proceedings against Great Mistakes, Inc. were stayed by its filing for reorganization under Chaper 11 of the United States Bankruptcy Code.

On 16 January 1991, in response to defendant's motion for relief from judgment, plaintiff filed a motion to enforce the foreign judgment. Attached to the motion was a certified copy of the 29 February 1990 default judgment, a certified copy of the Alaska court's memorandum decision, an affidavit of plaintiff's Alaska counsel stating that both of these Alaskan court documents are full, true, and accurate copies of the records on file in the Alaska trial courts, and an affidavit of Jerry Reinwand which was attached to the memorandum decision.

A hearing on the motion to enforce the Alaskan judgment was held on 25 February 1991. The court, after hearing arguments of counsel, ordered that plaintiff's motion to enforce foreign judg-

ment be allowed and that defendant's motion for relief from judgment be denied. The court ordered that the default judgment from Alaska be given full faith and credit as a judgment of this State. Defendant appeals.

On appeal, defendant brings forth one assignment of error. Defendant argues that the trial court erred in determining that plaintiff met his burden of proving that a judgment of the state courts of Alaska was entitled to full faith and credit pursuant to N.C. Gen. Stat. § 1C-1705(b) (1989). North Carolina General Statute § 1C-1705(b) provides in pertinent part that "[t]he judgment creditor shall have the burden of proving that the foreign judgment is entitled to full faith and credit."

Defendant further argues that the Alaska court's determination that it had jurisdiction over him is conclusive only if the issue was fully and fairly litigated in Alaska. Defendant, therefore, seeks to attack the Alaska court's judgment on the basis that the issue of jurisdiction was not fully and fairly litigated.

In *Webster v. Webster*, 75 N.C. App. 621, 331 S.E.2d 276 (1985), this Court held that a Texas decree entering a default judgment for the wife in a divorce action seeking payment of arrears under a divorce decree, was entitled to full faith and credit in North Carolina. The *Webster* Court opined that "[a] judgment of another state may be attacked in this state only on grounds of fraud, public policy, or lack of jurisdiction." *Id.* at 622, 331 S.E.2d at 278.

Our review of the jurisdiction of a court rendering a judgment is limited to determining if the issues were indeed fully and fairly litigated. *Boyles v. Boyles*, 308 N.C. 488, 302 S.E.2d 790 (1983). Upon a finding that the issue of jurisdiction was fully and fairly litigated, constitutional federal principles preclude their relitigation elsewhere. *Durfree v. Duke*, 375 U.S. 106, 11 L.Ed.2d 186 (1963). *See Underwriters Assur. v. North Carolina Life*, 445 U.S. 691, 706, 71 L.Ed.2d 558, 572 (the principles of *res judicata* apply to questions of jurisdiction as well as other issues, and a judgment is entitled to full faith and credit, as to questions of jurisdiction, when the reviewing court's inquiry discloses that those questions have been fully and fairly litigated and finally decided in the court that rendered the original judgment).

In *Cook v. Cook*, 342 U.S. 126, 96 L.Ed. 146 (1951), the Supreme Court held that for full faith and credit purposes, appearing specially to contest jurisdictional issues constitutes litigation of those issues. The *Webster* Court noted that this rule of law "leaves non-resident parties the unenviable choice of not appearing at all in the foreign state or appearing to contest jurisdiction and, if unsuccessful, submitting to jurisdiction over the merits." 75 N.C. App. at 622, 331 S.E.2d at 278.

In the instant case, defendant was given the opportunity to litigate the issue of personal jurisdiction. Subsequent to the filing of the default judgment in the First Judicial District at Juneau, the court considered defendant's motion to dismiss for lack of jurisdiction, which was improperly filed pro se in the Third Judicial District at Anchorage, Alaska. The motion stated that defendant was appearing specially and pleading that the Alaska court did not have jurisdiction over him. The Alaska court treated the motion as a motion to set aside entry of default on grounds of improper exercise of jurisdiction.

On 24 June 1990, the Alaska Superior Court held in a memorandum of decision that the court properly exercised personal jurisdiction over defendant. The court specifically held that the Alaska court properly exercised personal jurisdiction over defendant under section 09.05.015(5)(E) of the Alaska Long-arm Statute, which affords jurisdiction in an action which relates to goods actually received in Alaska, without regard to where delivery was made to the carrier. The Alaska court also found the proper exercise of personal jurisdiction under the Federal Constitution. Constitutional minimum contacts, as defendant correctly contends are required by *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945), were found because defendant actively promoted the transaction by making numerous phone calls to plaintiff in Alaska and by sending representative merchandise to Alaska, and because this claim was directly related to the contacts.

Defendant was also given an opportunity to contest jurisdiction after he entered the special appearance. A copy of the memorandum decision was served on defendant and provided that "defendant may file a motion under Civil Rule 77 to set aside entry of default on other grounds within twenty days of the date of distribution of this order. The failure to file a motion under Civil Rule 77 will mean that the default judgment will continue to be valid and

enforceable." Defendant did not file a motion to set aside the entry of default nor did he appeal the Alaska default judgment. The aforementioned facts considered, we conclude that the issue of personal jurisdiction was fully and fairly litigated in the Alaska court and defendant is, therefore, precluded from relitigating the issue in the courts of North Carolina.

Defendant also argues that "a certified copy of the Alaskan judgment . . . , as a practical matter, seems to be the only admissible evidence brought forth by the plaintiff to prove that the judgment is entitled to full faith and credit," since the other documents introduced in support of the judgment were hearsay. We have considered this argument but find it meritless.

The decision of the trial court is

Affirmed.

Judges EAGLES and PARKER concur.

THOMAS G. EAVES, PLAINTIFF v. UNIVERSAL UNDERWRITERS GROUP, AMICA MUTUAL INSURANCE COMPANY, AND RICHARD GARY SIMS, DEFENDANTS

No. 9110SC749

(Filed 6 October 1992)

Insurance § 549 (NCI4th)— two insurance policies—coverage provided by policy of nonowner driver—no coverage provided by owner's policy

In a declaratory judgment action to determine whether insurance coverage was provided by defendant nonowner driver's personal automobile policy or by the owner's garage liability policy, the trial court erred in ruling that the owner's policy provided primary coverage to the driver and that the driver's policy provided excess coverage, since the nonownership policy never said it would *not* provide coverage if other insurance was available and the insurer thus automatically contracted for liability under any circumstances, and the owner's policy, by contrast, did not contract for any liability in its policy once other insurance was available; therefore,

the nonowner driver's policy provided coverage, while the owner's policy provided none.

Am Jur 2d, Automobile Insurance §§ 432, 433.

Automobile insurance: umbrella or catastrophe policy automobile liability coverage as affected by primary policy "other insurance" clause. 67 ALR4th 14.

Apportionment of liability between automobile liability insurers one or more of whose policies provide against any liability if there is other insurance. 46 ALR2d 1163.

APPEAL by defendant Universal Underwriters Group from judgment entered 31 May 1991 in WAKE County Superior Court by *Judge Robert L. Farmer.* Heard in the Court of Appeals 25 August 1992.

Plaintiff-appellee brought this declaratory judgment action against defendants Amica Mutual Insurance Company (hereinafter Amica), Universal Underwriters Group (hereinafter Universal), and Richard Gary Sims (hereinafter Sims), seeking a determination of the extent and order of coverage provided to Sims by the two insurers.

The record reveals that the coverage dispute arose out of an automobile accident which occurred on 29 May 1988. Plaintiff was injured when his motorcycle collided with a car owned by Singleton Chevrolet-Buick-Chrysler-Plymouth, Inc. (hereinafter Singleton Chevrolet) and driven by Sims. At the time of the accident, Sims was insured by Amica under a standard personal automobile liability policy for $300,000, and Singleton Chevrolet had a garage liability policy issued by Universal for $500,000.

The facts giving rise to the action are not in dispute. Singleton, one of the owners and officers of Singleton Chevrolet, owned a fishing boat and trailer that was usually towed by a Blazer automobile, a loaner vehicle for the dealership. Prior to the date of the accident, Singleton gave Tommy Leonard (hereinafter Leonard) permission to use the Blazer, the boat and the trailer to go on a fishing trip. Leonard decided to take along his son, his friend Sims, and Sims' family. On the day of the fishing trip, Leonard was too tired to drive, so he asked Sims to take over the driving for him. At the time of the collision, Sims was operating the vehicle and Leonard was sitting in the passenger seat next to him.

All parties moved for summary judgment with regard to the coverage issues. Defendant Universal sought a determination that it provided no coverage to Sims. Defendant Amica sought a declaration that Universal was the primary insurer up to the limits of its policy or was at least the primary insurer up to the limits required by North Carolina's Financial Responsibility Act.

The trial court granted summary judgment in favor of plaintiff and defendant Amica. In doing so, the trial court ruled that Universal provided primary coverage to Sims under its policy for $500,000, and Amica provided excess coverage in the amount of $300,000.

Teague, Campbell, Dennis & Gorham, by George W. Dennis, III, for plaintiff-appellee.

Petree Stockton & Robinson, by James H. Kelly, Jr., for defendant-appellant Universal Underwriters Group.

Young, Moore, Henderson & Alvis, P.A., by Walter E. Brock, Jr. and Knox Proctor, for defendants-appellees AMICA Mutual Insurance Company and Richard Gary Sims.

WELLS, Judge.

Although defendant Universal sets forth three alternative assignments of error for our review, we are limiting our review solely to the dispositive issue of which insurer owes Sims coverage. Universal challenges the trial court's determination that it was Sims' primary insurer and ultimately liable for the full coverage limits of its policy. Instead, Universal contends that it owed no insurance coverage to Sims in light of the coverage already afforded him by defendant Amica. After reviewing the record and controlling case law, we reverse the trial court's decision.

In determining the nature and extent of insurance liability coverage, we must give careful consideration to the construction of the policy terms. *Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967).

Universal's garage liability policy limits its coverage by the following "MOST WE WILL PAY" clause:

> With respect to persons or organizations required by law to be an INSURED, the most WE will pay is that portion of such limit needed to comply with the minimum limits provision of such law in the jurisdiction where the OCCURRENCE took place.

> When there is other insurance applicable, WE will pay only the amount needed to comply with such minimum limits after such other insurance has been exhausted.

Because Universal's policy is an owner's "motor vehicle liability" policy, its coverage limits must comply with the terms of the Financial Responsibility Act, N.C. Gen. Stat. § 20-279.21. Universal argues that the "MOST WE WILL PAY" clause effectively limits its coverage to the minimum limits of the Financial Responsibility Act. Next, Universal points to its "OTHER INSURANCE" provision which purports to make its coverage excess or secondary "for any person or organization who becomes an INSURED under this Coverage Part as required by law." Universal argues that these two provisions define its policy coverage so as to exclude liability where there is another insurance policy covering the insured and satisfying the minimum limits of the Financial Responsibility Act. Universal reasons that since Amica's policy covers the insured and satisfies the minimum coverage requirements of the Act, it owes no coverage to Sims.

The problem is that Amica's personal liability policy also contains an "OTHER INSURANCE" provision limiting coverage. The policy stipulates that any insurance Amica provides for a vehicle the insured does not own shall be excess over any other collectible insurance. Since Sims was not driving a vehicle he owned, Amica's "OTHER INSURANCE" provision applies to the case at hand. The question then becomes, if both Universal's and Amica's policies contain clauses making their insurance excess where other insurance is available, which policy's terms take precedence?

Until recently, our courts have held that the "excess" language in a non-ownership liability policy such as Amica's takes precedence over the excess clause in a garage liability policy like Universal's policy. Under that interpretation, Universal's insurance was considered "other collectible insurance" for purposes of excluding Amica from coverage, but Amica's insurance would not constitute "other applicable insurance" which would exempt Universal from coverage. *United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 104 N.C. App. 206, 408 S.E.2d 876 (1991); *see Insurance Co. v. Insurance Co.*, 269 N.C. 341, 152 S.E.2d 436 (1967).

In *United Services*, our Court faced the precise issue on substantially the same facts as the case before us here. United Services' policy stipulated under its "OTHER INSURANCE" provision that any

insurance it provided for a vehicle the insured does not own shall be excess over any other collectible insurance. Universal's policy also contained an "OTHER INSURANCE" provision purporting to make its coverage excess "for any person or organization who becomes an INSURED under this Coverage part as required by law." Universal argued that its garage liability policy coverage, by virtue of its "OTHER INSURANCE" clause, was rendered secondary to United Services' personal automobile policy. The court rejected Universal's position. In interpreting Universal's "OTHER INSURANCE" provision, the court found the language "required by law" to be ambiguous and read it out of the policy. It then concluded that after removing the ambiguous language, Universal's "OTHER INSURANCE" clause clearly provided primary coverage to the insured. Furthermore, the court held that, unlike the language in Universal's policy, United Services' non-ownership clause *clearly* made its policy excess whenever there was other collectible insurance.

In the leading case of *Zurich General Accident & Liability Ins. Co. v. Clamor*, 124 F.2d 717 (1941), the court also interpreted two policies with excess clauses virtually identical to those in question here. In that case, the owner's policy provided that its coverage did not extend to "any person . . . with respect to any loss against which he has other valid and collectible insurance," whereas the driver's policy provided that, as to his use of a non-owned car, the coverage would be "excess" over other valid and collectible insurance available to him. *Id.* at 720. The court held that the car owner's policy was in full force and his insurer was primarily liable because the driver's excess insurance was not "OTHER INSURANCE" for purposes of setting the owner's policy limitation into effect.

Other insurance law authority supports these decisions:

> It thus has been held that where the owner of an automobile or truck has a policy with an omnibus clause, and the additional insured also has a non-ownership policy which provides that it shall only constitute excess coverage over and above any other valid, collectible insurance, *the owner's insurer has the primary liability.*

8A Appleman, *Insurance Law and Practice* § 4909.45 (Emphasis added.)

Recently, the North Carolina Supreme Court took an entirely different view of existing insurance law in this State by reversing *United Services. See United Services Auto. Assn. v. Universal Underwriters Ins. Co.*, 332 N.C. 333, --- S.E.2d --- (1992). The Supreme Court held that Universal *had* effectively defined its policy limits to exclude liability in the event there was other collectible insurance which met the minimum standards set by the Financial Responsibility Act. It also found the inclusion by United Services of an "excess" clause limiting liability where other insurance was available and where the insured was driving a vehicle he did not own, to be immaterial. The Court determined that because the non-ownership policy never said it would *not* provide coverage if other insurance was available, the insurer automatically contracted for liability under any circumstances, and that Universal, by contrast, had not contracted for any liability in its policy once other insurance was available.

Thus, the precise issue before us has now been decided by the Supreme Court of North Carolina. Required as we are to follow precedent of the Supreme Court, we hold, as we must, that Universal does not provide any coverage to Sims. Accordingly, we reverse the judgment of the trial court and remand the case for judgment consistent with this opinion.

Reversed and remanded.

Judges ORR and GREENE concur.

KENNETH WEST, APPELLANT v. GEORGIA-PACIFIC CORP. AND EMPLOYMENT SECURITY COMMISSION OF NORTH CAROLINA, APPELLEES

No. 918SC769

(Filed 6 October 1992)

1. Master and Servant § 108 (NCI3d)— unemployment compensation—employer's policy—testimony by supervisor—sufficiency of evidence

In a proceeding for unemployment compensation benefits, the evidence was sufficient to support the trial court's finding that, under the employer's policy, an employee could be ter-

minated for refusing to participate in an alcohol rehabilitation program where such evidence consisted of testimony by petitioner's supervisor.

Am Jur 2d, Unemployment Compensation § 99.

Alcoholism or intoxication as ground for discharge justifying denial of unemployment compensation. 64 ALR4th 1151.

2. **Master and Servant § 108.1 (NCI3d)— unemployment compensation—employee's refusal to participate in alcohol treatment program—discharge for misconduct**

In a proceeding for unemployment compensation, the trial court did not err in holding that the Commission's findings of fact supported its conclusion that petitioner had been discharged for misconduct connected with his work where competent evidence supported findings by the Commission that petitioner reported to work smelling of alcohol, admitted to having consumed approximately five beers that day, and refused participation in an alcohol treatment program despite the fact that he knew he would be terminated otherwise.

Am Jur 2d, Unemployment Compensation §§ 99, 100.

Alcoholism or intoxication as ground for discharge justifying denial of unemployment compensation. 64 ALR4th 1151.

APPEAL by petitioner from *Duke (W. Russell, Jr.), Judge*. Judgment entered 13 May 1991 in Superior Court, WAYNE County. Heard in the Court of Appeals 26 August 1992.

This is a proceeding wherein petitioner seeks to have respondent, Employment Security Commission [hereinafter "Commission"], award him unemployment compensation benefits as a result of the termination of his employment by respondent, Georgia-Pacific. The record discloses the following:

Petitioner worked as a machine operator for Georgia-Pacific Corp. from 1981 until his termination on 18 September 1990. On 17 September 1990, petitioner reported to work at approximately 5:30 p.m. At that time, his supervisor, Jimmy Ward, detected the odor of alcohol on petitioner's breath. Petitioner was asked to report to the Human Resources Director, Terri Malpass, who asked petitioner if he had been drinking. Petitioner responded that he had consumed a six pack of beer that morning around 11:00 a.m. Ms.

Malpass requested that petitioner take a blood test. Petitioner agreed and signed a consent form. He was then taken to a local hospital, but was refused the blood test since it had not been authorized by the plant physician. Petitioner returned to the plant, at which point, Ms. Malpass instructed him to go home and return to work the following day.

Petitioner returned to work on 18 September 1990 and was informed by Ms. Malpass that he would have to agree to enter an alcohol rehabilitation program as a condition of his continued employment. Petitioner refused and was terminated.

On 1 October 1990, petitioner applied for unemployment compensation benefits with the Commission. Petitioner's claim was denied on 3 October 1990 by the Adjudicator, Marilyn R. Sommers, who determined that petitioner was discharged for reporting to work under the influence of alcohol and for refusing to participate in an alcohol treatment program and was thus ineligible for benefits because he had been discharged for misconduct connected with his work pursuant to G.S. 96-14(2).

Petitioner appealed the Adjudicator's decision and a hearing was held before Appeals Referee James Proctor on 7 November 1990. Mr. Proctor also determined that petitioner was disqualified for benefits because of misconduct. At this point, petitioner appealed to the Commission and in a decision entered by the Chief Deputy Commissioner Thelma M. Hill on 11 January 1991, the Commission made findings of fact and conclusions of law and upheld the Appeal Referee's decision.

Petitioner then gave notice of appeal from the Commission's decision to superior court, and on 13 May 1991, Superior Court Judge W. Russell Duke, Jr., affirmed the decision of the Commission stating:

> The Court, having examined the record on appeal and reviewed the evidence therein contained, finds that the facts found by the Commission . . . were based upon competent evidence contained in the record; and the Court further finds that the Employment Security Commission properly applied the law to those facts in concluding that the employer has met its responsibility because the evidence shows that claimant

> was discharged from the job for misconduct connected with the work.

Petitioner appealed.

Eastern Carolina Legal Services, by John R. Keller, for petitioner, appellant.

Employment Security Commission, by Chief Counsel T. S. Whitaker, and Staff Attorney John B. DeLuca, for respondent, appellee.

Haynsworth, Baldwin, Johnson and Graves, P.A., by James B. Spears, Jr., and Stephen D. Dellinger, amicus curiae.

HEDRICK, Chief Judge.

[1] In his first assignment of error argued on appeal, petitioner contends the superior court erred in holding that Finding of Fact No. 8 of the Commission's decision was supported by competent evidence in the record. We disagree.

The Commission's Finding of Fact No. 8 states:

> 8. Under the employer's policy, an employee can be discharged for refusing to participate in the alcohol rehabilitation program when the employer has reason to believe that the employee's performance is impaired because of alcohol use.

While it is true that respondent employer did not submit any written evidence of such a policy at the hearing, testimony was presented by Jimmy Ward, petitioner's supervisor, confirming its existence. At the hearing, Mr. Ward was asked whether or not petitioner would have been terminated for his refusal to participate in the alcohol rehabilitation program absent any other evidence of misconduct on his part. Mr. Ward responded, "Yes sir, that's one of our rules." Mr. Ward further stated that both he and Ms. Malpass had made petitioner well aware of the fact that his agreement to participate in the alcohol treatment program was a condition of his continued employment prior to his refusal.

Judicial review of a decision of the Employment Security Commission is governed by G.S. 96-15(i) which provides in pertinent part:

> In any judicial proceeding under this section, the findings of fact by the Commission, if there is any competent evidence

> to support them and in the absence of fraud, shall be conclusive, and the jurisdiction of the court shall be confined to questions of law . . . .

Furthermore, this Court has often held that findings of fact made by the Commission, if supported by competent evidence in the record are conclusive on appeal. *Vanhorn v. Bassett Furniture Industries, Inc.*, 76 N.C. App. 377, 333 S.E.2d 309 (1985); *Yelverton v. Kemp Furniture Industries, Inc.*, 51 N.C. App. 215, 275 S.E.2d 553 (1981).

We hold there was competent evidence in the record to support the Commission's finding challenged by petitioner, and the superior court properly upheld such finding on review.

[2] Petitioner also contends the superior court erred in holding that the Commission's findings of fact supported its conclusion that petitioner had been discharged for misconduct connected with his work.

G.S. 96-14(2) provides in pertinent part:

> An individual shall be disqualified for benefits . . . if it is determined by the Commission that such individual is, at the time such claim is filed, unemployed because he was discharged for misconduct connected with his work. Misconduct connected with the work is defined as conduct evincing such willful or wanton disregard of an employer's interest as is found in deliberate violations or disregard of standards of behavior which the employer has the right to expect of his employee . . . .
>
> "Discharge for misconduct with the work" as used in this section is defined to include but not be limited to separation initiated by an employer for reporting to work significantly impaired by alcohol . . . .

In *Intercraft Industries Corp. v. Morrison*, 305 N.C. 373, 289 S.E.2d 357 (1982), the Supreme Court interpreted the statutory disqualification for "misconduct" as follows:

> [M]isconduct sufficient to disqualify a discharged employee from receiving unemployment compensation is conduct which shows a wanton or willful disregard for the employer's interest, a deliberate violation of the employer's rules, or a wrongful intent. (citations omitted.)

> The obvious reasons for such a rule are to prevent benefits of the statute from going to persons who cause their unemployment by such callous, wanton, and deliberate misbehavior as would reasonably justify their discharge by an employer, and to prevent the dissipation of employment funds by persons engaged in such disqualifying acts.

Id. at 375, 289 S.E.2d at 359.

In the present case, the Commission made the following pertinent findings of fact:

> 3. The claimant was discharged for reporting to work with an odor of alcohol on him and refusing alcohol rehabilitation treatment. The claimant reported to work at or about 5:30 p.m. on September 17, 1990. Claimant admitted to having five beers that day starting at 10:30 a.m. . . . The supervisor smelled alcohol on the claimant when he reported at or about 5:30 p.m. and sent the claimant to the personnel office.
>
> 6. Claimant was asked to go through the alcohol rehabilitation program at Charter Northridge in Raleigh after he returned to the employer's place of business. Claimant refused. Claimant was told that if he refused to go through the rehabilitation program, he would be discharged.
>
> 7. Claimant was at the employer's last step in the employer's disciplinary process. He had a verbal warning concerning job performance. He had two written warnings for calling in and saying he would be coming to work late and then failing to come in at all or calling back.

From these findings, the Commission concluded that petitioner had been discharged for misconduct connected with the work.

The scope of appellate court review of decisions of the Commission is a determination of whether the facts found by the Commission are supported by competent evidence and, if so, whether the findings support the conclusions of law. *Reco Transportation, Inc. v. Employment Security Commission*, 81 N.C. App. 415, 344 S.E.2d 294, *disc. review denied*, 318 N.C. 509, 349 S.E.2d 865 (1986). Our review of the Commission's decision in the instant case reveals that the findings made by the Commission that petitioner reported to work smelling of alcohol and that petitioner admitted to having consumed approximately five beers that day are supported by com-

petent evidence in the record. The record also indicates that petitioner was offered participation in an alcohol treatment program as a condition of further employment, but petitioner refused to participate in the program despite the fact he knew he would be terminated otherwise. These facts clearly support the Commission's conclusion that petitioner was discharged for "misconduct" pursuant to G.S. 96-14(2); and in our opinion, these facts establish that petitioner was discharged for misconduct connected with his work as a matter of law. Petitioner's conduct evidenced a "willful or wanton disregard of [his] employer's interest" and was in "deliberate violation or disregard of standards of behavior which the employer has [a] right to expect of his employee." Furthermore, petitioner's misconduct, "caused his unemployment," and he therefore should be disqualified from reviewing benefits pursuant to the statute.

Since the Commission's findings were supported by competent evidence and since those findings supported its conclusion of law, the superior court properly affirmed the decision of the Commission denying petitioner's claim for unemployment benefits.

Affirmed.

Judges LEWIS and WYNN concur.

KEITH MARCELLETTE EDWARDS v. THE UNIVERSITY OF NORTH CAROLINA AT CHAPEL HILL

No. 9115SC787

(Filed 6 October 1992)

State § 12 (NCI3d)— reorganization of police department—white male promoted instead of black female—discrimination—jurisdiction of State Personnel Commission

A reorganization within defendant's police department was a promotion scheme and so was within the jurisdiction of the State Personnel Commission appeals process, and the trial court therefore erred in dismissing plaintiff's claim that discrimination occurred in the reorganization, since new positions were created which carried more rank, insignia to denote

rank, supervisory powers when no others of higher rank were present, and other additional duties; there was no change in salary or state job classification; "promotion," according to the SPC's definition, is a change in status upward resulting from assignment to a position of higher rank; a white male with less seniority and training was selected to fill the new position; and plaintiff, who was a black female, remained in her non-rank position with no change in title or duties.

Am Jur 2d, Job Discrimination §§ 744 et seq.

APPEAL by plaintiff from judgment entered 17 May 1991 in ORANGE County Superior Court by *Judge Henry A. McKinnon, Jr.* Heard in the Court of Appeals 26 August 1992.

Alan McSurely for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lars F. Nance and Assistant Attorney General David M. Parker, for defendant-appellee.

GREENE, Judge.

Keith Marcellette Edwards (Edwards) appeals from a judgment entered 17 May 1991 in Orange County Superior Court affirming the dismissal of her appeal by the State Personnel Commission.

Edwards was employed as a sworn police officer by the University of North Carolina at Chapel Hill (University). Edwards was the only black female employed in the University's Police Department (Department). In June 1987, the University initiated what it called a reorganization or reassignment plan which made sweeping changes in the Department. Several new rank positions were created and personnel within the Department were elevated to hold these newly created positions. The position of Major, which had been the highest rank in the Department, was changed to Chief. Two new Major positions were created. Those individuals holding the existing rank of Lieutenant had their titles changed to Captain. The existing Sergeant positions, which were held by individuals with the state job classification of Police Officer II, were changed to Lieutenant. Two new Sergeant positions were created within the Police Officer I state job classification. Those holding the Police Officer I state job classification had previously been exclusively line officers who held no rank or supervisory

powers. The newly created Sergeant positions carried with them rank, the insignia to denote rank, supervisory powers when no others of higher rank were present, and other additional duties. There was no change in salary or state job classification. After the new supervisory ranks were awarded, the Director of the Department posted a memo congratulating those assuming new responsibilities.

The new Sergeant position on Edwards' shift was awarded to a white male who held, before and after the reorganization, the state job classification of Police Officer I. The new Sergeant was given rank, sergeant stripes, and some supervisory duties over others in the Police Officer I job classification. He was also given responsibility for scheduling vehicle maintenance. Edwards remained in the non-rank position of Police Officer I with no change in title or duties. Edwards had been with the Department longer and had more training than the individual who was selected to fill the position of Sergeant. Edwards contends that she was discriminated against because of race and sex in the selection of the officer to fill the new Sergeant position.

Edwards properly followed in-house grievance procedures but was unsuccessful. She then appealed pursuant to N.C.G.S. § 126-36 (1987) to the Office of State Personnel (OSP). Pursuant to N.C.G.S. § 126-37 (1987), the OSP referred her case to the Office of Administrative Hearings (OAH) for a hearing before an Administrative Law Judge (ALJ). The ALJ found on 19 July 1990 that the changes in the Department were promotions, and that Edwards had established a prima facie case that discrimination occurred in the selection process. The ALJ found that the legitimate, non-discriminatory reasons put forth by the University for not giving a position of rank to Edwards were a pretext for race and sex discrimination. The ALJ recommended that Edwards be assigned to the rank of Sergeant and awarded reasonable attorney's fees.

The State Personnel Commission (SPC) did not accept the ALJ's finding, instead dismissing Edwards' claim on the ground that no promotion occurred and thus Edwards had failed to present an issue over which the SPC had jurisdiction under N.C.G.S. § 126-36. On appeal to the superior court, the court upheld the SPC's finding that Edwards' discrimination claim did not fall within the appellate jurisdiction of the SPC because no promotion occurred.

N.C.G.S. § 126-37 limits SPC jurisdiction to those appeals involving disciplinary action, alleged discrimination, and any other contested cases arising under the State Personnel Act. *Batten v. N.C. Dept. of Correction*, 326 N.C. 338, 343, 389 S.E.2d 35, 38 (1990). Edwards' allegations of race and sex discrimination meet this requirement. N.C.G.S. § 126-36 further restricts the jurisdiction of the SPC to those cases where the discrimination alleged results in denial of employment, promotion, training, or transfer. Edwards contends that the reorganization of the Department was a promotion scheme which discriminated against her and is therefore within the jurisdiction of the SPC appeals process. The University contends that the changes in rank made pursuant to the reorganization involved no increase in salary or change in state job classification, and were therefore not promotions within the jurisdiction of the SPC.

The dispositive issue is whether the reorganization within the Department was a promotion scheme and therefore within the appellate jurisdiction of the SPC.

N.C.G.S. § 126-36 does not contain a definition of promotion. Unless a word in a statute has acquired a technical meaning or the language of the statute indicates that a special use is intended, it must be given its "common and ordinary meaning." *State v. Coker*, 312 N.C. 432, 435, 323 S.E.2d 343, 346 (1984). Black's Law Dictionary defines technical as "peculiar to an art or profession." Black's Law Dictionary 1312 (6th ed. 1991). The word promotion is not peculiar to any particular profession, but is universally used. Nothing in the text of N.C.G.S. § 126-36 indicates that the Legislature sought to attach any technical meaning to its use. Promotion is an ordinary word, and in applying N.C.G.S. § 126-36 we must give the "ordinary words used therein their natural, approved and recognized meaning." *Watson Indus. v. Shaw*, 235 N.C. 203, 208, 69 S.E.2d 505, 509 (1952).

Courts use the dictionary to determine the common and ordinary meaning of words. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Promotion is defined as the "act or fact of being raised in position or rank." Webster's Ninth New Collegiate Dictionary 921 (9th ed. 1991). Rank is defined as "relative standing or position" within a group. Webster's Third New International Dictionary 1881 (3d ed. 1966). There is no mention in the definition of promotion of increased pay or change in job classifica-

tion. This definition is consistent with other states' interpretations of promotion, which recognize that salary increases and changes in job classification are not the sole criteria for determining the existence of a promotion. *See, e.g., Joyce v. Ortiz*, 487 N.Y.S.2d 746 (1985) (reclassification which confers enhanced responsibility is a promotion); *Colorado Ass'n of Pub. Employees v. Lamm*, 677 P.2d 1350 (Colo. 1984) (euphemistic description of upward allocation of position was really promotion, and will not be allowed to evade competitive bidding); *Hudson v. School Dist. of Kansas City*, 578 S.W.2d 301 (Mo. App. 1979) (promotion not limited to increased remuneration, but also includes greater responsibility and better working conditions).

The "common and ordinary" definition is also consistent with the SPC's own definition of promotion as "a change in status upward resulting from assignment to a position of higher level." N.C. Admin. Code tit. 25, r. 01D.0301 (Feb. 1976). Again, no mention is made of higher pay or a formal change in job classification. The important criteria in both the dictionary and SPC definitions of promotion are greater status and a higher standing in relation to others.

Accordingly, to the extent any individual's relative standing among his peers was raised when the Department reclassified ranks, that individual was promoted. In this case, the new Sergeant's standing relative to Edwards and others in the Police Officer I job classification was raised because he was given supervisory authority over them and he was given a title and insignia to denote a position of higher respect. This is so without regard to the presence or absence of any concomitant salary increase.

Because the action taken by the University was a promotion, the SPC had jurisdiction to adjudicate Edwards' appeal. Therefore, the finding of the superior court that the SPC lacked jurisdiction to hear Edwards' claim is reversed. This case is remanded to the superior court to be returned to the SPC for consideration of whether Edwards was discriminated against in the selection of the officer to fill the Sergeant position in the University's Police Department.

Reversed and remanded.

Judges WELLS and ORR concur.

FORSYTH MEMORIAL HOSPITAL, INC., PLAINTIFF v. ISAURO CONTRERAS AND FRANCES CONTRERAS, DEFENDANTS

No. 9121DC825

(Filed 6 October 1992)

Consumer and Borrower Protection § 48 (NCI4th) — debt collection — letters from plaintiff's holding company — communications not deceptive or misleading

Plaintiff's communications with defendants, made in an attempt to collect defendants' debt for defendant wife's hospitalization, were not misleading or deceptive in violation of Prohibited Acts by Debt Collectors, N.C.G.S. § 75-54, though plaintiff's relationship to its holding corporation and the vice president for legal affairs for the corporation was not clearly represented in the written communications from the vice president to defendants, since evidence at the trial tended to establish that defendants knew the demand letters from the vice president were attempts at collection on their account owing to plaintiff; each letter conspicuously referenced defendant's specific account number; defendants knew they owed money on this particular account; and it was clear from the content of the letters that the money was owed to plaintiff.

Am Jur 2d, Consumer and Borrower Protection § 292.

Validity, construction, and application of state statutes prohibiting abusive or coercive debt collection practices. 87 ALR3d 786.

APPEAL by defendants from judgment entered 15 May 1991 in FORSYTH County District Court by *Judge James A. Harrill, Jr.* Heard in the Court of Appeals 15 September 1992.

Plaintiff Forsyth Memorial Hospital instituted this action seeking to recover amounts due as a result of defendant Frances Contreras' hospitalization. The record reveals that in May of 1988, defendant was hospitalized for several days at Forsyth Memorial Hospital for the birth of her daughter. The defendants' insurance did not cover the hospitalization, and they were unable to pay the hospital bills when due. Plaintiff agreed to accept partial payments so defendants could pay off their account over a period of time. After defendants missed several payments, the plaintiff,

through its holding company, Carolina Medicorp, Inc., instituted collection procedures on the defendants' account. The defendants received many letters requesting prompt payment and informing them of the status of their account. When they repeatedly fell behind on their payment schedule, plaintiff brought this collection action to recover the unpaid portion of the account. Defendants filed a counterclaim alleging that in attempting to collect on the account, plaintiff violated N.C. Gen. Stat. § 75-50 *et seq.*, Prohibited Acts by Debt Collectors. Plaintiff then filed a motion for summary judgment. The trial court granted plaintiff's motion, awarded it a judgment of $2,481.31, and dismissed defendants' counterclaim. Defendants appeal.

House & Blanco, P.A., by John S. Harrison, for plaintiff-appellee.

Legal Aid Society of Northwest North Carolina, Inc., by Susan Gottsegen, for defendants-appellants.

WELLS, Judge.

Defendants assert that the trial court erred in granting plaintiff's summary judgment motion because plaintiff violated portions of Prohibited Acts by Debt Collectors when conducting its collection procedures. In support of this contention, defendants raise five arguments on appeal. Defendants argue that under the least sophisticated consumer test, a jury could find plaintiff allegedly committed prohibited debt collection acts (1) by threatening to obtain a judgment lien on "any property" the defendants possessed, (2) by sending letters misrepresenting that it had not received payments, (3) by warning that it would file suit immediately when it did not do so, (4) by harassing defendants regarding payment of their account, and (5) by sending misleading communications implying that their account had been turned over to either an independent attorney or a third-party collection agency. After reviewing the record, we find all but defendants' final assignment of error to be without merit. Therefore, we limit our review to the sole question of whether plaintiff's written correspondence was misleading in violation of Prohibited Acts by Debt Collectors, N.C. Gen. Stat. § 75-54.

N.C. Gen. Stat. § 75-54(1) provides, *inter alia*:

> No debt collector shall collect or attempt to collect a debt or obtain information concerning a consumer by any fraudu-

lent, deceptive or misleading representation. Such representations include, but are not limited to, the following:

(1) Communicating with the consumer other than in the name (or unique pseudonym) of the debt collector and the person or business on whose behalf the debt collector is acting or to whom the debt is owed.

Defendants argue they were misled as to the debt collector's identity inasmuch as plaintiff failed to state the relationship between plaintiff and the person or organization soliciting payment in their written communications. Plaintiff's allegedly misleading conduct, defendants contend, constituted a violation of the Act. Defendants construe this section to require exact disclosure of the debt collector's identity in each communication. The forecast of evidence before the trial court establishes that plaintiff's collection procedures were handled through its holding company, Carolina Medicorp, Inc., and correspondence was sent under the letterhead of Lawrence U. McGee, the Vice President for Legal Affairs for Carolina Medicorp, Inc. The correspondence did not indicate the affiliation between Carolina Medicorp, Inc. and plaintiff. Defendants argue these written communications led them to believe the matter had been turned over to an independent attorney for collection, or in the alternative, the account had been given to an independent third-party collection agency. In either case, the defendants argue, the written communications misrepresented the nature of the debt collector in violation of N.C. Gen. Stat. § 75-54(1).

We find Mr. McGee's communications did not violate N.C. Gen. Stat. § 75-54(1). The plain language of the statute only requires communications with a debtor to disclose (1) the name of the debt collector, and (2) the name of the person or business on whose behalf the debt collector is acting or to whom the debt is owed.

Even if plaintiff's collection procedures did not violate subsection (1) of the Act, the question remains whether the communications were nevertheless deceptive or misleading so as to implicate the general prohibition against deceptive or misleading representations found in N.C. Gen. Stat. § 75-54. Defendants again contend that the letters sent by Lawrence U. McGee were effectively misleading because they at least implied he was an independent attorney hired for collection purposes or that he was employed by Carolina Medicorp, Inc., an independent collection agency. Defendants presented evidence showing that the letterhead empha-

sized "Lawrence U. McGee, Attorney at Law" in bold type with Carolina Medicorp, Inc.'s name printed directly below. "Forsyth Memorial Hospital" never appeared in the heading.

While it is true that plaintiff's relationship to Carolina Medicorp, Inc. and Lawrence U. McGee was not clearly represented in the written communications, we find that this evidence is not sufficient in and of itself to constitute a violation of N.C. Gen. Stat. § 75-54.

The specific conduct delineated as prohibited in N.C. Gen. Stat. § 75-54 are examples of unfair practices proscribed by N.C. Gen. Stat. § 75-1.1. *See* N.C. Gen. Stat. § 75-56. Under N.C. Gen. Stat. § 75-54, unfair practices include conduct which is fraudulent, deceptive or misleading in debt collection. To prevail on a claim for violation of this section, one need not show deliberate acts of deceit or bad faith, but must nevertheless demonstrate that the act complained of "possessed the tendency or capacity to mislead, or created the likelihood of deception." *Overstreet v. Brookland, Inc.*, 52 N.C. App. 444, 279 S.E.2d 1 (1981). Defendants have failed to meet this burden.

The evidence presented at trial tended to establish that defendants knew the demand letters from Lawrence U. McGee were attempts at collection on their account owing to plaintiff. Each letter conspicuously referenced the defendant's specific account number. Defendants knew they owed money on this particular account for the May 1988 hospitalization, and it was clear from the content of the letters that such money was owed to the plaintiff. Furthermore, when defendants did make periodic payments, it was credited to their account with the hospital, and these partial payments were reflected in account statements received by them.

In applying N.C. Gen. Stat. § 75-54 to the case before us, we do not view "communication" as narrowly as defendants suggest. In the common-sense perspective of the events underlying defendants' claim, plaintiff hospital clearly communicated to the defendants the origin, nature, and extent of their debt. The letters from Carolina Medicorp, Inc., viewed in that perspective, could not reasonably be considered to be deceptive or misleading. Even assuming the least sophisticated consumer standard applies (without so deciding), the totality of the circumstances reflect that defendants, as such consumers, would have clearly understood the nature of the debt and to whom the debt was owed. Plaintiff's communications were not misleading or deceptive as contemplated by the

Act. Therefore, the trial court's granting of summary judgment in favor of the plaintiff was proper.

Affirmed.

Judges ORR and GREENE concur.

OTTWAY BURTON, P.A., PLAINTIFF-APPELLEE v. STEPHEN L. BLANTON, DEFENDANT-APPELLANT

No. 9119DC817

(Filed 6 October 1992)

Rules of Civil Procedure § 60.2 (NCI3d)— confession of judgment for legal services—judgment not void—Rule 60(b) motion properly dismissed

In plaintiff's action to renew and enforce a confession of judgment he obtained from defendant for legal services performed, the trial court properly denied defendant's motion for relief from judgment filed pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4), since void judgments may be attacked by Rule 60(b) motions; erroneous judgments may be corrected only by appeal; and the judgment in this case was not void in that the district court had jurisdiction to issue the confession of judgment and the authority to adjudicate the rights and liabilities of the parties involved, no jurisdictional question was ever raised, and the confession of judgment was not improper on its face.

Am Jur 2d, Judgments § 671.

APPEAL by defendant from judgment entered 18 April 1991 in RANDOLPH County District Court by *Judge Vance Bradford Long*. Heard in the Court of Appeals 15 September 1992.

Plaintiff instituted an action to renew and enforce a confession of judgment he obtained from defendant for legal services performed. Defendant sought to have that judgment set aside as void under the Retail Installment Sales Act, N.C. Gen. Stat. § 25A-18. Pursuant to N.C. Gen. Stat. § 1A-1, Rule 60(b)(4) of the North

Carolina Rules of Civil Procedure, defendant filed a motion for relief from judgment. The trial court denied defendant's motion. Defendant appealed.

Ottway Burton, P.A., by Ottway Burton, pro se.

Central Carolina Legal Services, by James C. Lee, for defendant-appellant.

WELLS, Judge.

In finding the confession of judgment to be valid, the trial court held that N.C. Gen. Stat. § 25A was inapplicable to confessions of judgment procured by members of the State Bar. Defendant contends that the trial court erred in this respect. He argues that N.C. Gen. Stat. § 25A-18 of the Retail Installment Sales Act renders confessions of judgment void for credit transactions of this nature and that his Rule 60(b)(4) motion should have been granted. Before reaching the substantive question of whether the Act prohibits professionals from obtaining confessions of judgment, we must first determine the propriety of the relief sought pursuant to Rule 60(b)(4). If we determine the defendant chose an improper procedure to challenge the confession of judgment, our inquiry ceases and it becomes unnecessary to resolve defendant's substantive question.

N.C. Gen. Stat. § 1A-1, Rule 60(b) of the Rules of Civil Procedure provides that upon proper motion, a "court may relieve a party or his legal representative from a final judgment, order, or proceeding." Specifically, defendant seeks relief under Rule 60(b)(4) which allows relief from a judgment that is void. A Rule 60(b)(4) motion is only proper where a judgment is "void" as that term is defined by the law. A judgment will not be deemed void merely for an error in law, fact, or procedure. A judgment is void only when the issuing court has no jurisdiction over the parties or subject matter in question or has no authority to render the judgment entered. *In re Brown*, 23 N.C. App. 109, 208 S.E.2d 282 (1974); *see Hayes v. Evergo Telephone Co.*, 100 N.C. App. 474, 397 S.E.2d 325 (1990). A judgment, if proper on its face, is not void. *Drummond v. Cordell*, 73 N.C. App. 438, 326 S.E.2d 292 (1985), *aff'd*, 315 N.C. 385, 337 S.E.2d 850 (1986).

The correct procedure for attacking a judgment is dependent upon the type of defect asserted. If a judgment is void, it is a

nullity and may be attacked at any time. *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987). Rule 60(b)(4) is an appropriate method of challenging such a judgment. An erroneous judgment, by contrast, is one entered according to proper court procedures and practices but is contrary to the law or involves a misapplication of the law. *Id.* As our appellate courts have consistently held, erroneous judgments may be corrected only by appeal and Rule 60(b) motions cannot be used as a substitute for appeal. *Town of Sylva v. Gibson*, 51 N.C. App. 545, 277 S.E.2d 115, *appeal dismissed and cert. denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). *See also Chicopee, Inc. v. Sims Metal Works, Inc.*, 98 N.C. App. 423, 391 S.E.2d 211 (1990); *J.D. Dawson Co. v. Robertson Marketing, Inc.*, 93 N.C. App. 62, 376 S.E.2d 254 (1989).

Here, the district court had jurisdiction to issue the confession of judgment and it had the authority to adjudicate the rights and liabilities of the parties involved. No jurisdictional question was ever raised. Furthermore, the confession of judgment was not improper on its face. Judgments rendered by a court with proper jurisdiction and authority are presumed to be valid. Since the confession of judgment was not void, defendant may not rely upon Rule 60(b)(4) to challenge the judgment. Therefore, the trial court correctly denied defendant's motion for relief under Rule 60(b)(4). The confession of judgment, although not void, may have been erroneous (*i.e.*, contrary to law), but we need not address this substantive issue. In limiting our review, we need not question the trial court's analysis in reaching its conclusion. A judgment under appellate review will stand if the correct result was reached, even though it was based on faulty reasoning. *See Hinshaw v. Wright*, 105 N.C. App. 158, 412 S.E.2d 138 (1992).

Affirmed.

Judges ORR and GREENE concur.

FRED B. DELAPPE, PLAINTIFF v. THOMAS H. CRAIG, SR. AND NEWTON TRANSPORTATION COMPANY, INC., DEFENDANTS

No. 9118DC878

(Filed 6 October 1992)

Automobiles and Other Vehicles § 314 (NCI4th) — telephone wire seen by driver — no attempt to avoid wire — failure to keep reasonable lookout — directed verdict for defendants improper

The trial court erred in directing verdict for defendants where the testimony of defendant driver clearly showed that, on the day of the accident, he was aware of the presence of a telephone wire, saw the wire, and proceeded to drive his tractor-trailer rig under the wire causing the trailer to collide with the wire and damage plaintiff's building, and a jury could find from this evidence that defendant driver did not keep a reasonable lookout so as to avoid collision with the wire in that, after he saw the wire, he did not take steps to ensure that his vehicle could successfully clear the wire without incident.

Am Jur 2d, Automobiles and Highway Traffic §§ 414, 762.

APPEAL by plaintiff from *Morton (J. Bruce), Judge.* Judgment entered 28 June 1991 in District Court, GUILFORD County. Heard in the Court of Appeals 21 September 1992.

This is a civil action wherein plaintiff seeks damages for the negligence of defendants in the operation of a tractor-trailer rig. The evidence tends to show the following:

Plaintiff is the owner of a building in High Point, North Carolina. On 12 May 1990, defendant Craig [hereinafter "defendant driver"] delivered a load of veneer to one of plaintiff's tenants for his employer, defendant Newton Transportation Company, Inc. [hereinafter "defendant employer"]. When defendant driver drove his tractor-trailer rig into plaintiff's parking lot, the trailer caught a telephone wire that crossed the parking lot, attached on one end to a telephone pole on the street in front of plaintiff's building and on the other end to a corner of plaintiff's building. As a result of defendants' trailer colliding with the telephone wire, a portion of plaintiff's wall and roof was "pulled down."

At trial, defendant driver testified that he had made deliveries to plaintiff's building in the same tractor-trailer rig on seven previous occasions, and on each occasion, the telephone wire was present, but the trailer successfully cleared the wire. On the day of the accident, defendant-driver testified, "I knew the wire was there. I seen the wire. But as far as anything being different about it, I mean, it didn't look different . . . ." Defendant driver proceeded under the wire as he had done in the past and stopped his vehicle only when he heard the cinder blocks falling off the building. He testified that his trailer "caught" the telephone wire "jerking" the blocks off plaintiff's building.

At the close of plaintiff's evidence, defendants moved for a directed verdict on the grounds that plaintiff had not proven any actionable negligence. The trial judge granted defendants' motion and dismissed the action. Plaintiff appealed.

Wyatt, Early, Harris, Wheeler & Hauser, by Thomas E. Terrell, Jr., for plaintiff, appellant.

Henson Henson Bayliss & Sue, by Gary K. Sue, and James H. Slaughter, for defendants, appellees.

HEDRICK, Chief Judge.

The sole question raised on appeal is whether the trial court erred in directing a verdict for defendants. Plaintiff argues that the evidence, when considered in the light most favorable to him, is sufficient to raise a question for the jury as to whether defendants were negligent in any way in the operation of their tractor-trailer rig and whether such negligence was a proximate cause of the damages done to plaintiff's building. We agree.

In *Bowen v. Gardner*, 275 N.C. 363, 168 S.E.2d 47 (1969), the Supreme Court stated:

> 'It is a general rule of law that the operator of a motor vehicle must exercise ordinary care, that is, that degree of care which an ordinarily prudent person would exercise under similar circumstances. And in the exercise of such duty it is incumbent upon the operator of a motor vehicle to keep same under control, and to keep a reasonably careful lookout, so as to avoid collision . . . .' It is the duty of a driver not merely to look but to keep a lookout in the direction of travel; 'and he is held to the duty of seeing what he ought to have seen.'

Id. at 367, 168 S.E.2d at 51, *quoting Adams v. Service Co.*, 237 N.C. 136, 141, 74 S.E.2d 332, 336, (1953), and *Wall v. Bain*, 222 N.C. 375, 379, 23 S.E.2d 330, 333 (1942). Whether the operator of a motor vehicle was keeping a reasonably careful lookout to avoid danger is an issue of fact to be determined by the jury. *Mims v. Dixon*, 272 N.C. 256, 158 S.E.2d 91 (1967); *Peeden v. Tait*, 254 N.C. 489, 119 S.E.2d 450 (1961).

In the present case, the testimony of defendant driver clearly shows that on the day of the accident, he was aware of the presence of the telephone wire, he saw the wire and he proceeded to drive his tractor-trailer rig under the wire causing the trailer to collide with the wire and damage plaintiff's building. From this evidence, a jury could find that defendant driver did not "keep a reasonabl[e] lookout so as to avoid collision" with the wire in that after he saw the wire he did not take steps to insure that his vehicle could successfully clear the wire without incident. Considering the evidence in the light most favorable to plaintiff, sufficient evidence was presented from which the jury could infer defendants' negligence in the operation of the tractor-trailer rig. The trial court, therefore, erred in directing a verdict for defendants, and the judgment of the trial court must be reversed.

Reversed.

Judges LEWIS and WYNN concur.

DAVID TOMPKINS, PLAINTIFF v. JACK ALLEN AND ROSES STORES, INC., DEFENDANTS

No. 9126SC780

(Filed 6 October 1992)

Master and Servant § 10.2 (NCI3d)— employer's bad faith—no public policy concern—no wrongful discharge of employee

The trial court properly dismissed plaintiff's claim for unlawful termination of his employment-at-will where plaintiff's evidence tended to show only that his supervisor temporarily altered inventory records and then used the altered inventory records as an excuse for plaintiff's discharge, a

discharge which could have been carried out absent any reason, and such action on the part of the supervisor, though tending to show bad faith which is not to be condoned, did not rise to the level of public policy concern.

Am Jur 2d, Master and Servant § 43.

Modern status of rule that employer may discharge at-will employee for any reason. 12 ALR4th 544.

APPEAL by plaintiff from judgment entered 12 March 1991 in MECKLENBURG County Superior Court by *Judge Julia V. Jones*. Heard in the Court of Appeals 26 August 1992.

On 1 July 1988, plaintiff David Tompkins filed a complaint in Mecklenburg County Superior Court against respondents Jack Allen and Roses Stores, Inc. The complaint alleged unlawful termination and breach of employment contract. Plaintiff took a voluntary dismissal of said action on 17 November 1989 and filed a new complaint on 26 October 1990. Plaintiff's second complaint re-alleged unlawful termination and breach of contract and added claims for negligent infliction of emotional distress and tortious interference with a contract. Defendants filed a motion to dismiss and a motion on the pleadings. On 12 March 1991, Judge Jones signed and filed an order dismissing the action with prejudice. Judge Jones dismissed plaintiff's claims for unlawful termination, breach of employment contract, and negligent infliction of emotional distress. The judge also determined that plaintiff's tortious interference with contract claim was barred by the statute of limitations. Plaintiff gave written notice of appeal to this Court on 11 April 1991.

Pamela A. Hunter for plaintiff-appellant.

Rayburn, Moon & Smith, P.A., by Matthew R. Joyner, for defendant-appellee Jack Allen.

Perry, Kittrell, Blackburn & Blackburn, by Charles F. Blackburn, for defendant-appellee Roses Stores, Inc.

WELLS, Judge.

Plaintiff brings forward in this appeal the sole question of whether his claim for unlawful termination was properly dismissed. Because the trial court considered matters outside the pleading,

the judgment entered there must be considered as one for summary judgment. *Long v. Fink*, 80 N.C. App. 482, 342 S.E.2d 557 (1986); *Kessing v. National Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971).

This cause of action arises out of plaintiff's termination as a store manager for a Roses Department Store. At the time of his dismissal, plaintiff was employed by defendant under an employment-at-will contract. Plaintiff alleged in his second complaint that defendant Jack Allen, plaintiff's supervisor, intentionally altered certain inventory records for which plaintiff was responsible and then used the altered records as a reason to terminate plaintiff's employment with Roses.

As a general rule, an employee-at-will has no claim for relief for wrongful discharge. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 335 S.E.2d 79, *disc. rev. denied*, 315 N.C. 597, 341 S.E.2d 39 (1986). Either party to an employment-at-will contract can terminate the contract at will for no reason at all, or for an arbitrary or irrational reason. *Privette v. University of North Carolina*, 96 N.C. App. 124, 385 S.E.2d 185 (1989). However, this doctrine is not without limits and a valid claim for relief exists for wrongful discharge of an employee at will if the contract is terminated for an unlawful reason or a purpose that contravenes public policy. *Coman v. Thomas Manufacturing Co.*, 325 N.C. 172, 381 S.E.2d 445 (1989); *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985).

Following the *Coman* decision, there was a significant amount of discussion as to how broadly the public policy exception would be applied and whether the *Coman* Court had recognized a bad-faith exception to the employment-at-will doctrine. In *Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992), our Supreme Court clarified North Carolina's position on the employment-at-will doctrine and its exceptions. In *Amos*, the Supreme Court made it very clear that North Carolina has not recognized a distinct tort for a bad-faith discharge of an employee at will, nor has North Carolina adopted a bad-faith exception to the employment-at-will doctrine; "To repeat: our discussion of bad faith discharge in *Coman* was *dicta*. The issue in *Coman* was whether to adopt a public policy exception to the employment-at-will doctrine." *Amos*, *supra*. Therefore, in order for a wrongful discharge claim arising out of

an employment-at-will setting to withstand a motion for summary judgment, plaintiff must demonstrate that his claim falls under the public policy exception to the employment-at-will doctrine.

Taking the forecast of evidence presented in the light most favorable to the plaintiff, it appears, as a matter of law, that plaintiff has failed to establish a claim for wrongful discharge. Taken as true, plaintiff's evidence tends only to show that his supervisor temporarily altered inventory records and then used the altered inventory records as an excuse for plaintiff's discharge, a discharge which could have been carried out absent any reason. While plaintiff's evidence tends to show bad faith, not to be condoned, such behavior does not rise to the level of public policy concern.

In *Privette, supra,* a case somewhat similar to the case at bar, the plaintiff was discharged by his employer for failing to keep a clean work area. In his complaint, plaintiff claimed wrongful discharge and alleged that defendants conspired to make plaintiff's work area appear to be in much worse condition than the other work areas. This Court held that while plaintiff's allegations possibly asserted an arbitrary reason for discharge, they did not assert an unlawful reason. Similarly, in the case at bar, we hold that plaintiff failed to support his claim for wrongful discharge. Because of our holding, we need not address plaintiff's other assignments of error.

The trial court's order of dismissal is

Affirmed.

Judges ORR and GREENE concur.

HUGH W. JOHNSTON AND AUDREY S. JOHNSTON, PLAINTIFFS v. ROYAL INDEMNITY COMPANY, DEFENDANT

No. 9127SC809

(Filed 6 October 1992)

Appeal and Error § 87 (NCI4th)— judgment determining breach of contract—damages unresolved—interlocutory appeal

A judgment which determines only that there has in fact been a breach of contract by defendant and leaves unresolved the issue of plaintiffs' damages is clearly an interlocutory order which does not affect a substantial right and is not appealable.

Am Jur 2d, Appeal and Error §§ 50, 53, 62.

APPEAL by defendant from *Caviness (Loto G.), Judge.* Order entered 13 May 1991 in Superior Court, GASTON County. Heard in the Court of Appeals 14 September 1992.

Plaintiffs instituted this civil action by filing a complaint wherein they alleged that defendant had issued a multi-peril insurance policy which covered a building owned by plaintiffs located in Gastonia, North Carolina and which was in full force and effect at the time the building was damaged as the result of a severe rain storm. The complaint stated that defendant refused coverage of the damage and prayed the court for judgment against defendant in excess of $10,000. Defendant's answer denied that the policy issued to plaintiffs provided coverage for the particular damage suffered.

When the matter came on for hearing, the trial judge heard the evidence and argument of counsel without a jury. The court thereafter issued extensive findings of fact and conclusions of law and held that the damage to plaintiffs' building was covered by the policy issued by defendant. The court further stated in its order that "the matter of damages is held open pending a request by either party to be placed on the calendar for determination." Defendant filed notice of appeal following the entry of this order and there has to date been no determination of the issue of damages.

Don H. Bumgardner and William K. Goldfarb for plaintiffs, appellees.

Dean & Gibson, by Rodney Dean, and Michael G. Gibson, for defendant, appellant.

HEDRICK, Chief Judge.

Defendant assigns as error the ruling by the trial judge that the insurance policy issued by defendant to plaintiff provided coverage for the damage suffered to the building located in Gastonia, North Carolina as the result of a severe rain storm. We do not, however, address that issue as we find that this appeal is not taken from a final judgment and must therefore be dismissed.

Plaintiffs' complaint sets forth a claim for a breach of contract and requests that the trial court enter judgment against defendant for the damages resulting from this breach. A judgment which determines only that there has in fact been a breach by defendant and leaves unresolved the issue of plaintiffs' damage is clearly an interlocutory order. G.S. § 1-277; G.S. § 7A-27; *Industries, Inc. v. Insurance Co.*, 296 N.C. 486, 251 S.E.2d 443 (1979); *Bacon v. Leatherwood*, 52 N.C. App. 587, 279 S.E.2d 86 (1981). While G.S. § 1-277 and § 7A-27 allow appeals of interlocutory orders which "affect a substantial right" of the party seeking to appeal, the Supreme Court has held that an order determining only the issue of liability and leaving unresolved other issues such as that of damages cannot be held to "affect a substantial right" as:

> [i]f . . . [such a] partial . . . judgment is in error defendant can preserve its right to complain of the error on appeal from the final judgment by a duly entered exception. Even if defendant is correct on its legal position, the most it will suffer from being denied an immediate appeal is a trial on the issue of damages.

Industries, Inc. v. Insurance Co., 296 N.C. at 491, 251 S.E.2d at 447 (1979).

Defendant's appeal is dismissed.

Dismissed.

Judges LEWIS and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 OCTOBER 1992

Case	County	Disposition
GRIFFIN v. HAIRE No. 9212SC182	Cumberland (89CVS5007)	The order of the trial court allowing defendant's motion pursuant to Rule 60(b)(6) is reversed & this matter is remanded to the trial court for a new trial
HENDERSON COUNTY DEPT. OF SOCIAL SERVICES v. MURRAY No. 9129DC788	Henderson (90J62) (90J63)	No Error
STARLING v. RIGDON No. 9111SC681	Johnston (91CVS51)	Affirmed
STATE v. BIGGS No. 9217SC456	Rockingham (90CRS7623)	No Error
STATE v. McCORKLE No. 9210SC399	Wake (90CRS0004)	No Error
STATE v. MONGRO No. 9225SC397	Caldwell (88CRS5928) (91CRS500) (91CRS501) (91CRS502) (91CRS503) (91CRS504) (91CRS505)	Vacated & remanded in part; & affirmed in part
STATE v. WALKER No. 9218SC508	Guilford (91CRS58339)	No Error
WALKER v. WAKE COUNTY MENTAL HEALTH No. 9110SC496	Wake (90CVS5587)	Reversed and remanded

STATE OF NORTH CAROLINA v. JIMMY RAY NOBLES

No. 913SC627

(Filed 20 October 1992)

Searches and Seizures § 1 (NCI3d)— fish dealership—warrantless administrative search—constitutional

The trial court erred by dismissing a misdemeanor citation of defendant for refusal to allow inspection of a licensed fish dealership on the grounds that N.C.G.S. § 113-136(k) allows unreasonable warrantless searches and seizures in violation of the Fourth Amendment. The trial court erred in finding N.C.G.S. § 113-136(k) unconstitutional on its face because the coastal fishing industry is a pervasively regulated industry in N.C.; the maintenance, preservation, and protection of N.C.'s marine resources are substantial government interests; the transient and disposable nature of fish subject to regulation dictate that an effective inspection scheme, including warrantless administrative searches, is necessary to further the government's interests; the commercial fisher has a low expectation of privacy and has constructive notice of periodic inspections; and the statutory section authorizing the inspections is limited sufficiently as to time, place, and scope.

Am Jur 2d, Searches and Seizures §§ 15, 19.

Judge GREENE dissenting.

APPEAL by the State from order entered 14 February 1991 by *Judge William C. Griffin, Jr.*, in PITT County Superior Court. Heard in the Court of Appeals 18 February 1992.

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

Pritchett, Cooke & Burch, by Lloyd C. Smith, Jr., and David J. Irvine, Jr., for defendant appellee.

COZORT, Judge.

On 6 March 1990, Jimmy Ray Nobles was charged with refusing to allow an inspection of a licensed fish dealership, "West End Seafood," in Greenville, North Carolina, pursuant to N.C. Gen. Stat. § 113-136(k). When defendant refused to allow two officers to in-

spect fish being sold on the premises, the officers subsequently obtained a search warrant and issued a misdemeanor citation to defendant for the refusal. The trial judge granted defendant's motion to dismiss the charge on the grounds that § 113-136(k) allows unreasonable warrantless searches and seizures in violation of the Fourth Amendment. The State appeals.

The only issue presented is whether the trial court decided correctly that N.C. Gen. Stat. § 113-136(k) on its face violates the constitutional right to be free from unreasonable searches and seizures by permitting warrantless administrative searches of commercial premises. We find the statutory provision in question does not violate the Fourth Amendment and reverse the trial court's order striking down the subsection in its entirety.

The statutory section authorizing the warrantless inspections reads as follows:

> It is unlawful to refuse to exhibit upon request by any inspector, protector, or other law enforcement officer any item required to be carried by any law or rule as to which inspectors or protectors have enforcement jurisdiction. The items that must be exhibited include boating safety or other equipment or any license, permit, tax receipt, certificate, or identification. *It is unlawful to refuse to allow inspectors, protectors, or other law enforcement officers to inspect weapons, equipment, fish, or wildlife that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction.*

N.C. Gen. Stat. § 113-136(k) (Cum. Supp. 1991) (emphasis added). We note at the outset that although the trial court's order struck down N.C. Gen. Stat. § 113-136(k) in its entirety, we are concerned only with the latter portion of the subsection which is highlighted above. The parties agree that the initial provision of the statute making it unlawful to refuse to exhibit licenses, permits, etc., is not the primary source of contention, since this provision was not before the trial court on defendant's motion to dismiss. We therefore have narrowed our review to the emphasized section, in considering only the constitutionality of the statute as it relates to the inspection of fish or fishing equipment possessed incident to regulation. Our inquiry concerns inspections of fish at various locations, including boats, docks, fish houses, and other commercial dealerships.

No evidence has been presented, nor are there arguments before this Court, challenging the constitutionality of the statute as it governs the inspection of weapons or wildlife, since those items do not fall immediately within the inspection powers of the Marine Fisheries Commission. Our analysis is therefore limited to the question of whether a warrantless inspection of a fish dealership pursuant to the above statute violates the Fourth Amendment to the United States Constitution.

The Fourth Amendment protects individuals from unreasonable searches and seizures. The purpose of the amendment is to impose a requirement of "reasonableness" upon the exercise of discretion by government officials in order "to safeguard the privacy and security of individuals against arbitrary invasions." *Camara v. Municipal Court*, 387 U.S. 523, 528, 18 L.Ed.2d 930, 935 (1967). The Fourth Amendment applies to administrative inspections of private commercial property. *See v. City of Seattle*, 387 U.S. 541, 546, 18 L.Ed.2d 943, 948 (1967). A government search of private property without consent is considered a violation of the Fourth Amendment unless it is conducted pursuant to a valid search warrant or falls within one of a few narrowly defined exceptions. *Camara*, 387 U.S. at 528-29, 18 L.Ed.2d at 935. Reviewing courts must apply a case-by-case analysis when determining whether a regulatory scheme including warrantless inspections is reasonable under the Fourth Amendment. *Marshall v. Barlow's, Inc.*, 436 U.S. 307, 321, 56 L.Ed.2d 305, 317 (1978). What is reasonable depends on the expectation of privacy in the area searched, the importance of the governmental interest justifying the search, and the degree to which the authority given for the search is tailored to that interest in order to minimize intrusion. *Donovan v. Dewey*, 452 U.S. 594, 69 L.Ed.2d 262 (1981). Warrantless inspections of commercial property may be unreasonable if they are unnecessary to further important governmental interests, or if their occurrence is so random, infrequent, or unpredictable that the owner has no real expectation that the property will from time to time be inspected. *Id.* at 599, 69 L.Ed.2d at 269. Where, however, a regulatory scheme does protect business owners from being exposed to the "almost unbridled discretion [of] executive and administrative officers, particularly those in the field, as to when to search and whom to search," *Marshall*, 436 U.S. at 323, 56 L.Ed.2d at 317-18, statutes authorizing warrantless administrative searches may pass constitutional muster.

As a threshold matter, it is important to note "the expectation of privacy that the owner of commercial property enjoys in such property differs significantly from the sanctity accorded an individual's home." *Donovan*, 452 U.S. at 598-99, 69 L.Ed.2d at 269. An individual engaged in an industry that is pervasively regulated by the government or which has been traditionally the target of close scrutiny is generally considered to be on notice that periodic inspections will occur and, consequently, has no reasonable expectation of privacy in the areas where he knows those inspections will occur. *Id.* at 606, 69 L.Ed.2d at 273-74. Several cases demonstrate the exemptions from the warrant requirement: in *Donovan*, 452 U.S. 594, 69 L.Ed.2d 262, the Supreme Court upheld warrantless inspections of stone quarries authorized by the Federal Mine and Safety Act; in *United States v. Biswell*, 406 U.S. 311, 32 L.Ed.2d 87 (1972), warrantless inspections of firearms in pawnshops were upheld pursuant to the Gun Control Act; and in *Colonnade Catering Corp. v. United States*, 397 U.S. 72, 25 L.Ed.2d 60 (1970), warrantless inspections of businesses holding alcoholic beverage licenses were found to be reasonable.

Defendant argues the coastal fishing industry is not closely regulated in our state. We disagree. Few industries are as "pervasively regulated" as the commercial fishing business. The fishing industry has been the subject of close regulation "almost since the founding of the Republic." *Lovgren v. Byrne*, 787 F.2d 857, 865 (3d Cir. 1986). Government regulation of the fishing industry has been ongoing since at least 1793 when licenses were required for vessels to engage in cod and mackerel fishing. *See* Act of Feb. 18, 1793, 1 Stat. 305. The same may be said regarding regulation of the fishing industry in our state. *See State v. Sermons*, 169 N.C. 285, 84 S.E. 337 (1915); N.C. Gen. Stat. § 113-136 (Session Laws 1915, Chapter 84, Section 6). Today, it is well recognized that the coastal fishing industry is "closely regulated" because of the pervasive regulation within the industry and the substantial government interests implicated in managing and conserving fishery resources. *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991); *Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986); *United States v. Kaiyo Maru*, 699 F.2d 989 (9th Cir. 1983). We find the business operated by defendant, a wholesale fish dealership, to be closely regulated in our state for purposes of evaluating the expectation of privacy involved in determining whether a Fourth Amendment violation has occurred.

In *New York v. Burger*, 482 U.S. 691, 96 L.Ed.2d 601 (1987), the United States Supreme Court articulated a specific test to be applied when deciding the propriety of administrative inspections of pervasively or closely regulated industries. The Court, prefacing the test, explained, "where the privacy interests of the owner are weakened and the government interests in regulating particular businesses are concomitantly heightened, a warrantless inspection of commercial premises may well be reasonable within the meaning of the Fourth Amendment." *Id.* at 702, 96 L.Ed.2d at 613-14.

> This warrantless inspection, however, even in the context of a pervasively regulated business, will be deemed to be reasonable only so long as three criteria are met. First, there must be a "substantial" government interest that informs the regulatory scheme pursuant to which the inspection is made. . . .
>
> Second, the warrantless inspections must be "necessary to further [the] regulatory scheme.". . . .
>
> Finally, "the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant." In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers.

Id. at 702-03, 96 L.Ed.2d at 614 (citations omitted).

Here, application of the *Burger* analysis reveals that N.C. Gen. Stat. § 113-136(k) and the regulatory scheme adopted thereunder meet all three prongs of the test necessary to fall within the exception to the warrant requirement for administrative inspections of closely regulated businesses. The first two prongs of the *Burger* test are satisfied easily. According to the North Carolina Fisheries Rules for Coastal Waters, the Marine Fisheries Division

> is charged with the stewardship of the marine and estuarine resources of the State of North Carolina and is responsible for the management of all marine and estuarine resources. This responsibility includes the administration and enforcement of all statutes and rules governing commercial and recreational fishing in coastal waters, the development and

> improvement of the cultivation and harvesting of shellfish, and submerged land claims in North Carolina.
>
> * * * *
>
> . . . The rules are designed to carry out, in part, the duty of the Division of Marine Fisheries to maintain, preserve, protect, and develop all the marine and estuarine resources of the State.

N.C. Admin. Code tit. 15A, r. 3H.0002 (a) and (d) (1991). Fish are a valuable natural and economic resource for which stringent governmental protection is essential. We find the maintenance, preservation, protection and development of our state's marine resources serve as substantial public and important state interests to support fishing industry regulation. These interests are in turn furthered by a regulatory scheme which includes warrantless inspections. Warrantless inspections of marine fish are necessary for many reasons. First, fish are highly perishable products which are extracted from coastal waters and then injected rapidly into the stream of commerce by being transported or sold. Due to such high perishability and portability, the time during which inspectors may check fish is limited. While a fisheries inspector is obtaining a warrant, fish dealers may dispose of fish which are possessed in violation of size and quantity limitations. Secondly, as a practical matter, "[t]he logistical problems in establishing a successful inspection program requiring warrants are insurmountable" in the fishing industry. *Kaiyo Maru*, 699 F.2d at 996. Fishing is a highly variable activity, and with respect to fish being possessed on boats, at docks, in trucks, and even in markets, procuring a warrant is often impractical. Fishing itself is an ongoing process which fluctuates based on variables such as the weather. It follows then, that the transportation of fish and the eventual arrival of fish at wholesale and retail fish dealerships also varies. Requiring a warrant to inspect boats, docks, trucks, and for purposes of this case, the fish houses, would frustrate the effectiveness of the inspections.

> Unlike *See v. City of Seattle*, . . . a case involving housing code violations, and *Marshall v. Barlow's Inc.*, . . . a case involving OSHA inspections, the government in this case will rarely have time to obtain a warrant before the status quo is changed. The fish are highly perishable and even in the best of circumstance are unlikely to remain on the docks for any length of time. Moreover, it would often be difficult to

> obtain a warrant in advance since the purpose of inspection will frequently be limited to obtaining information, not seeking out wrongdoers.

Lovgren, 787 F.2d at 866. Lastly, imposing a warrant requirement renders the inspections meaningless. If fishermen or fish dealers have knowledge of upcoming checks, the probability of violations would be low, since violators would circumvent the law by concealing unlawful activity. "[I]f inspection is to be effective and serve as a credible deterrent, unannounced, even frequent, inspections are essential." *Biswell*, 406 U.S. at 316, 32 L.Ed.2d at 92. Unannounced inspections ferret and discipline those entities which disobey the law. Warrantless inspections thus are needed to provide close regulation of the fishing industry—regulation which is necessary to promote our state's interests in preserving a natural resource. A warrant requirement would impede the specific enforcement needs of the statutory scheme.

We now reach the third prong of the *Burger* test, which measures whether the statute allowing warrantless inspections is structured in order to limit the discretion of the inspecting officers, thus providing a " 'constitutionally adequate substitute for a warrant.' " *Burger*, 482 U.S. at 703, 96 L.Ed.2d at 614 (quoting *Donovan*, 452 U.S. 594, 600, 69 L.Ed.2d 262, 270). To meet the third prong of the test, the statutory provision must (1) notify property owners that they " 'will be subject to periodic inspections undertaken for specific purposes,' " *id.*, and (2) carefully limit official discretion as to the time, place, and scope of the inspections. *Biswell*, 406 U.S. at 315, 32 L.Ed.2d at 92. After analyzing the statutory framework in light of current law, we are of the opinion the statute constitutes an adequate substitute for a warrant.

First, we cannot say those who hold commercial fishing dealership licenses are completely unaware of the possibility of periodic inspections of their products and equipment. Participation in a closely regulated business in and of itself places a fish dealer on notice that inspections are certain to occur. The cases recognize this type of constructive notice in these pervasively regulated industries. For instance, in *Biswell*, the Supreme Court found warrantless inspections of firearms pursuant to § 923 of the Gun Control Act of 1968 not violative of the Fourth Amendment. The statute gave treasury agents the authority to enter the premises of any firearms dealer during business hours for the purpose of inspecting or ex-

amining any records or documents required to be kept and any firearms or ammunition kept or stored by such dealer. *Id.* at 311-12, 32 L.Ed.2d at 90. In finding the statute valid, the Court stated:

> [I]nspections for compliance with the Gun Control Act pose only limited threats to the dealer's justifiable expectations of privacy. When a dealer chooses to engage in this pervasively regulated business and to accept a federal license, he does so with the knowledge that his business records, firearms, and ammunition will be subject to effective inspection.

Id. at 316, 32 L.Ed.2d at 92-93. The same rationale was applied in *Donovan* where the Court upheld inspections of stone quarries under § 103(a) of the Federal Mine Safety and Health Act of 1977. The *Donovan* Court indicated that warrants may not be necessary when searches are needed to further the regulatory scheme, and the "owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes." *Donovan*, 452 U.S. at 600, 69 L.Ed.2d at 270. Similarly, in the present case, the statute and its surrounding regulatory scheme put the commercial fish dealer on notice concerning the inevitability of inspections. Courts have examined other portions of the pertinent regulatory scheme to determine whether or not the provision adopting warrantless inspections gives the individual subject to inspection proper notice. *See, i.e., Donovan*, 452 U.S. at 604-05, 69 L.Ed.2d at 272. In addition to the subsection at issue, other provisions within the regulatory framework of the subchapter governing the conservation of marine and estuarine resources specify that licensed commercial fish dealers will be subject to inspections. For example, the statutory section which enumerates the prerequisites for obtaining a fish dealer's license notifies the dealer that his or her business will be subject to periodic inspections of records.

> Every fish dealer subject to the licensing provisions of this section must secure a separate license or set of licenses for each established location. Where a dealer does not have an established location for transacting the fisheries business within the State, the license application must be denied unless the applicant satisfies the Secretary that his residence, or some other office or address, within the State, is a suitable substitute for an established location and that records kept in connection

> with licensing, sale, and tax requirements *will be available for inspection when necessary.*

N.C. Gen. Stat. § 113-156(d) (Cum. Supp. 1991) (emphasis added). These statutes and the corresponding regulations implemented by the Marine Fisheries Commission are part of the public record and are also published in the Fisheries Rules for North Carolina Coastal Waters. These provisions give adequate notice to fish dealers that their premises are subject to inspection.

Additionally, commercial fish dealers, by procuring a fish dealer's license, impliedly consent to such inspections. In a case similar to the case at bar, a court upheld the warrantless search of a wholesale fish dealer's facility. That court stated:

> The central precept to be found in *Colonnade, Biswell,* and *Donovan* is that, in undertaking to engage in a highly regulated and licensed enterprise, the entrepreneur thereby consents to the array of regulations associated with the trade; that is, its burden as well as its benefits. The businessman engaged in such a trade cannot but reasonably anticipate that his establishment is subject to periodic inspections undertaken to further the regulatory objective.

People v. Harbor Hut Restaurant, 148 Cal. App. 3d 1151, 1154-55, 196 Cal. Rptr. 7, 9 (1983). Implied consent was also a factor in upholding warrantless inspections of fishing vessels in *Tallman v. Dep't of Natural Resources,* 421 Mich. 585, 365 N.W.2d 724 (1984). The *Tallman* court determined that licenses issued to the commercial fishermen gave them direct notice that warrantless searches of business premises could be performed at any time as a condition of receiving the license. The court noted, "Neither commercial fishers nor other business people can be required to surrender their constitutionally protected rights in exchange for the privilege of doing business. However, anyone engaged in the commercial fishing business must be prepared to submit to reasonable regulations and, consequently, to diminished expectations of privacy." *Tallman,* 421 Mich. at 629, 365 N.W.2d at 744 (citation omitted).

The courts of our state have also acknowledged that acceptance of certain licenses creates an implied consent to inspections where pervasively regulated industries are concerned. In *Greensboro Elks Lodge v. N.C. Bd. of Alcoholic Control,* 27 N.C. App. 594, 603, 220 S.E.2d 106, 112 (1975), *cert. denied,* 289 N.C. 296, 222 S.E.2d

696 (1976), this Court held "that by seeking a permit, petitioner waived its Fourth Amendment right to the limited extent of inspection incident enforcement of State A.B.C. regulations." This holding was based on a recognition of the implied consent doctrine in our state. The alcoholic beverage statute which authorizes inspection of licensed premises permits officers

> to investigate the operation of each licensed premises for which an ABC permit has been issued, to make inspections that include viewing the entire premises, and to examine the books and records of the permittee. The inspection authorized by this section may be made at any time it reasonably appears that someone is on the premises.

N.C. Gen. Stat. § 18B-502(a) (1989). The statute provides for the revocation or suspension of an A.B.C. permit where a permittee refuses inspection. N.C. Gen. Stat. § 18B-502(b) (1989). Any resistance of an inspection is a misdemeanor where a permittee obstructs an officer's attempt to make a lawful inspection. *Id.* The Court in *Greensboro Elks Lodge* found the licensed dealers to have impliedly consented to inspection by looking to other licensing statutes as support. For example, our state has adopted a motor vehicles statute in which automobile drivers give implied consent to a chemical analysis when charged with an implied-consent offense. N.C. Gen. Stat. § 20-16.2 (Cum. Supp. 1991). *See also* N.C. Gen. Stat. § 20-16 (Driver's License Suspension).

The commercial fish licensing statute and its provision for inspection are comparable. The inspection provision allows inspections day or night and carries a punishment for any refusal to inspect. "Indeed the expectation of finding the game warden looking over one's shoulder at the catch is virtually as old as fishing itself." *Lovgren*, 787 F.2d at 865. We do not find that an implied consent to search or inspect certain items or areas automatically attaches with an issuance of any given license in our state. However, the similarity of a commercial fishing license to an alcoholic beverage license compels us to find implied consent in this instance. We emphasize the final holding of this case does not rely solely on a consent to search or waiver theory. Consent is significant as evidence that commercially licensed fish dealers are on notice that periodic inspections can be expected. The defendant appellee holds a commercial fish dealer's license and has knowledge that periodic inspections are a regular component of the enforcement scheme.

Resultingly, as in *Greensboro Elks Lodge*, he agreed to the inspections by accepting the rights and responsibilities which necessarily follow with the acquisition of the license.

We now turn to the final inquiry with respect to the *Burger* test. Warrantless searches of commercial property are permissible where the benefits of the warrant process would be minimal since inspections are conducted within "the context of a regulatory inspection system of business premises that is carefully limited in time, place, and scope." *Biswell*, 406 U.S. at 315, 32 L.Ed.2d at 92. Defendant appellee argues that because N.C. Gen. Stat. § 113-136(k) does not circumscribe any limitation as to when the warrantless searches must occur, the statute is unconstitutional. In the *Burger* case, the New York statute authorized police officers to inspect automobile junkyards " 'during [the] regular and usual business hours.' " *Burger*, 482 U.S. at 711, 96 L.Ed.2d at 619. The statutory provision in the present case has no such time limitation. Although N.C. Gen. Stat. § 113-136 does not state explicitly a time limitation dictating when inspections may occur, this omission is not fatal. A careful reading of *Burger* discloses that the time, place, and scope limitations are only *factors* to consider in evaluating the constitutionality of the statute; they are not dispositive. A footnote in the case states:

> Respondent contends that § 415-a5 is unconstitutional because it fails to limit the number of searches that may be conducted of a particular business during any given period. . . . While such limitations, or the absence thereof, are a factor in an analysis of the adequacy of a particular statute, they are not determinative of the result so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers. Indeed, we have approved statutes authorizing warrantless inspections even when such statutes did not establish a fixed number of inspections for a particular time period. And we have suggested that, in some situations, inspections must be conducted frequently to achieve the purposes of the statutory scheme.

Burger, 482 U.S. at 711, 96 L.Ed.2d at 619 n.21 (citations omitted).

Courts reviewing statutes allowing warrantless searches lacking time constraints on the searches have consistently employed the "factor" analysis and have upheld certain statutes which otherwise limit officers' discretion. For instance, in *United States v.*

Dominguez-Prieto, 923 F.2d 464, 466 (6th Cir. 1991), *cert. denied*, --- U.S. ---, 114 L.Ed.2d 468 (1991), the court upheld a statute which allowed enforcement officers to stop motor vehicles and to inspect the contents of motor vehicles "upon reasonable belief that any motor vehicle is being operated in violation of any provisions of this part . . . ." The statute in *Dominguez-Prieto* specifically gave Tennessee Public Service Commission officers the authority to "[l]icense, supervise and regulate every *motor carrier* in [the] state," and included the power to inspect contents of the trucks for purposes of comparing bills of lading with invoices or other evidence of ownership or of transportation for compensation. *Id.* at 465-66. In upholding the search provision, the court indicated the only differentiation between the statutory inspection scheme in *Burger* and the Tennessee statute was the limitation on time. The *Dominguez-Prieto* court reasoned:

> The statutory scheme at issue here does not limit the time frame within which such inspections are permitted. Such a limitation would, of course, render the entire inspection scheme unworkable and meaningless. Trucks operate twenty-four hours a day and the officers must, necessarily, have the authority to conduct these administrative inspections at any time. Thus, this difference between the statutes is inconsequential.

Id. at 470. Courts which have examined statutes similar to the one in the present case have upheld such statutes despite the failure to impose explicit restrictions as to times when inspections may occur. In *Lovgren*, the court found the Magnuson Act provision authorizing warrantless inspections of fishing vessels to be carefully tailored since the inspections were "limited to only those times when and those places where groundfish may be found." *Lovgren*, 787 F.2d at 867. Similarly, in *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991), the court concluded that a statute authorizing warrantless documentation checks of commercial fishing vessels need not contain an explicit "checklist" of time and place limitations for conducting documentation inspections. The court in *Tart* considered the lack of time limitations in the context of the entire regulatory scheme applicable to the commercial fishing industry and found "[t]he lack of explicit constraints on the officers' discretion is not determinative." *Tart*, 949 F.2d at 499.

Limitations as to frequency and time, then, are only factors to consider in the test. Because the statute in the case at bar

governs all aspects of the commercial fishing process—on the water, at the dockside, in transit and in the marketplace—we do not agree that a failure to delineate times for searches automatically dooms the entire statute. Here, time limits on inspections, as in *Dominguez-Prieto*, would not be feasible particularly because of the ongoing variable activities of commercial fishing. As the other cases involving commercial fishing inspections indicate, the statute allows inspectors the flexibility and convenience to inspect fish while they are being held at varying stages of the commercial fishing process. We adopt the reasoning of those cases. Defendant appellee contends nothing in the statute limits the officers' discretion in that officers may target certain individuals or businesses for frequent and unjustified spot checks. Whether such an application of the statute is unconstitutional is not before us; defendant has challenged the statute solely on its face. No evidence is before the Court to suggest defendant appellee was or would become a "target" of fish inspectors. If such were to happen, any challenge to the statute would be grounded on the unreasonableness of the provision *in its application, not on its face.* We therefore find the statute's failure to specify time limits is not constitutionally fatal.

As to limitations on what places may be searched, the section at issue is sufficiently limited. Searches may occur only in places where fish are "possessed incident to an activity regulated by any law or rule as to which inspectors and protectors have enforcement jurisdiction." N.C. Gen. Stat. § 113-136(k). These areas would include fishing vessels, docks, trucks, and markets. The inspections are limited by the following subsection which provides, "[n]othing in this section authorizes searches within the curtilage of a dwelling or of the living quarters of a vessel in contravention of constitutional prohibitions against unreasonable searches and seizures." N.C. Gen. Stat. § 113-136(l). The higher expectation of privacy as to private areas is therefore preserved by limiting the places where fisheries commission officers may conduct the searches.

Finally, the statute is limited in its scope. The plain language of the statute limits inspecting officers to inspecting fish "that the officer reasonably believes" are possessed incident to a regulated activity. If the officer reasonably believes the fish are possessed for commercial sale, then he or she has the ability to inspect without a warrant. The reasonable belief requirement imposes a limitation as to what fish may be inspected. Any inspection without a reasonable belief would be violative of the protections against unreasonable

searches. And, the statute is also limited in that only officers with the proper jurisdiction, the Marine Fisheries inspectors, may inspect. These limitations as to scope, coupled with the other limitations in the statute as a whole, constrain "the exercise of official discretion to the minimum enforcement measures required to assure reasonable compliance" with the regulations in the commercial fishing industry. *Tart*, at 499.

We further find that the obtaining of a warrant prior to inspection would not afford any extra protection to a participant in the commercial fishing industry. Other courts interpreting similar statutes have agreed. In *State v. Erickson*, 101 Wis.2d 224, 303 N.W.2d 850 (1981), the court found that the warrantless search by conservation wardens of a truck being loaded behind a wholesale fish market was presumptively reasonable. The statute in that case authorized the inspection of "buildings, structures, vessels or vehicles, all pertinent equipment including nets . . . and any fish stored, processed, packed or held in the places to be inspected." *Erickson*, 101 Wis.2d at 226-27 n.3, 303 N.W.2d at 851 (quoting Wis. Stat. 29.33(6)). The court in *Erickson* took into consideration the implied consent doctrine and stated: "By accepting a commercial fishing license or permit from the state, . . . the holder effectively consents to spot inspections by state officials." *Id.* at 229, 303 N.W.2d at 852. The court went on to conclude that "a warrant requirement would only marginally increase a commercial fisherman's privacy and security from governmental interference. Balancing the competing interests, we conclude that the security interest of licensed commercial fisherman must be subordinate to the enforcement needs of the state." *Id.*

In *Tallman*, 421 Mich. 585, 365 N.W.2d 724, the court upheld a commercial fishing statute which permitted inspection of a licensee's "fishing operations." *Tallman*, 421 Mich. at 630, 365 N.W.2d at 749. The *Tallman* court applied a "balancing of interests" test, an expanded version of the *Burger* test, including an examination of implied consent. The court found the statute to fall within the warrant exception for pervasively regulated industries. Another case, *People v. Harbor Hut Restaurant*, 148 Cal. App. 3d 1151, 196 Cal. Rptr. 7 (1983), upheld a warrantless inspection of a walk-in freezer for the purpose of verifying information found in the business records of a wholesale fish dealership. The court in *Harbor Hut* found the inspection statutes, "when viewed in their totality and in light of the laws governing the regulation of commercial fishing,

lead to the inescapable conclusion that inspections by officials . . . are sufficiently circumscribed so as to satisfy the requirements of the Fourth Amendment." *Harbor Hut*, 148 Cal. App. 3d at 1156, 196 Cal. Rptr. at 10. In *State v. Westside Fish Co.*, 31 Or. App. 299, 570 P.2d 401 (1977), the court upheld a statute authorizing inspection of licensed wholesale fish dealers' premises for the purpose of enforcing the commercial fishing laws. Although the statutes involved in the cases above are not identical to the statute at issue here, the principles articulated in these cases are applicable. The basic recurring theme is that where warrantless searches relating to the fishing industry are at issue, courts must balance the public interest against the privacy interests of commercial fishers in deciding the reasonableness of warrantless inspections. Where the *Burger* test is satisfied and the public interest outweighs a minimal intrusion, as in the case at bar, the statute does not violate the Fourth Amendment.

In sum, we conclude: (1) the coastal fishing industry is a pervasively regulated industry in our state; (2) the maintenance, preservation, and protection of our state's marine resources are substantial government interests; (3) the transient and disposable nature of fish subject to regulation dictate that an effective inspection scheme, including warrantless administrative searches, is necessary to further the government's interests; (4) the commercial fisher has a low expectation of privacy and has constructive notice of periodic inspections; and (5) the statutory section authorizing the inspections is limited sufficiently as to time, place, and scope. After balancing carefully the interests of the government against the interests of the privacy of a licensed commercial fish dealer, we hold that the trial court erred in finding N.C. Gen. Stat. § 113-136(k) unconstitutional on its face. The order is

Reversed.

Judge JOHNSON concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

Although I agree with the majority that the North Carolina fishing industry is pervasively regulated and thus falls within the *Colonnade-Biswell* doctrine permitting warrantless inspections, I

do not agree that the warrantless inspections allowed under Section 113-136(k) meet the reasonableness requirements set forth in *Burger*. *See New York v. Burger*, 482 U.S. 691, 702-03, 96 L. Ed. 2d 601, 614 (1987). Specifically, in my opinion the statute does not sufficiently restrict the discretion of the inspecting officers.

I agree with the majority's characterization as "substantial" the State's interest in the maintenance, preservation, protection and development of our marine resources. Furthermore, for the reasons articulated by the majority, the ability of enforcement officers to inspect without the requirement of a warrant furthers this substantial interest. Accordingly, I agree that the first two prongs of the *Burger* test are met. *See Burger*, 482 U.S. at 702-03, 96 L. Ed. 2d at 614. However, I disagree with the majority's conclusion that Section 113-136(k), "in terms of the certainty and regularity of its application," serves as "a constitutionally adequate substitute for a warrant." *Id.* In order to comply with this third requirement, a statute authorizing warrantless inspections must (1) "advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope," and (2) "limit the discretion of the inspecting officers." *Burger*, 482 U.S. at 703, 96 L. Ed. 2d at 614 (citations omitted).

The notice requirement contemplates a statute which is "sufficiently comprehensive and defined" to put the owner of commercial premises on notice that his property "will be subject to periodic inspections undertaken for specific purposes," *Donovan v. Dewey*, 452 U.S. 594, 600, 69 L. Ed. 2d 262, 270 (1981), and I agree that the portion of Section 113-136(k) at issue meets this requirement. The statute makes it unlawful to refuse to allow the inspection of fish (thus a fish dealer cannot help but know that periodic inspections of his fish will occur) that the officer reasonably believes to be possessed incident to an activity regulated by any law or rule over which inspectors and protectors have enforcement jurisdiction (indicating that the purpose of an inspection is to determine compliance with the regulatory scheme).

In addition to providing notice, however, the statute must also be "carefully limited in time, place, and scope." *United States v. Biswell*, 406 U.S. 311, 315, 32 L. Ed. 2d 87, 92 (1972). With regard to place, Section 113-136 prohibits warrantless searches only "within the curtilage of a dwelling or of the living quarters of a vessel . . . ." N.C.G.S. § 113-136(l) (Supp. 1991). Nothing in the

statutory framework of Section 113-136 otherwise limits the places at which inspections may be performed, or the hours during which inspections may occur. The majority concludes that the failure of Section 113-136 to establish time restrictions is not fatal. However, the footnote in *Burger* upon which the majority bases its conclusion addresses only the adequacy of a statute which fails to limit the *number of searches* that may be conducted of a particular business during any given period, not the hours during which such inspections may occur. The *Burger* Court concluded that the omission of limits on the frequency of inspections is not determinative of the statute's constitutionality "so long as the statute, as a whole, places adequate limits upon the discretion of the inspecting officers." *Burger*, 482 U.S. at 711 n.21, 96 L. Ed. 2d at 619 n.21 (although it did not limit the number of searches, statute at issue restricted conduct of inspections to "regular and usual business hours" of "vehicle-dismantling and related industries" to "examine records as well as any vehicles or parts of vehicles which are subject to [the statute] and which are on the premises"). And although I am aware, as the majority notes, that courts have upheld statutes authorizing warrantless inspections which contain no restrictions as to the hours during which the inspections may take place, the pivotal factor in the court's rationale in each of these cases is the ongoing and unpredictable hours of operation of the regulated enterprise. *See, e.g., Lovgren v. Byrne*, 787 F.2d 857 (3d Cir. 1986) (warrantless inspection of commercial fishing vessels and surrounding vehicles, buildings, piers, or dock facilities); *Tart v. Massachusetts*, 949 F.2d 490 (1st Cir. 1991) (warrantless documentation check of commercial fishing vessels); *United States v. Dominguez-Prieto*, 923 F.2d 464 (6th Cir. 1991), *cert. denied*, --- U.S. ---, 114 L. Ed. 2d 468 (1991) (warrantless inspection of trucks). Section 113-136(k), however, does not limit the entities subject to warrantless inspections to those with unpredictable hours of operation, such as commercial fishing vessels. Rather, the statute permits the inspection of fish at any time day or night, wherever located—whether on a dock, on a boat, in a fish house, restaurant, building, or grocery store—and as often as the protector, inspector, or "other law enforcement officers" wish to inspect. The inspecting officer need only reasonably believe that the fish are possessed *incident to*, not in violation of, a regulated activity (or with regard to vehicles traveling along the primary highways of the State, that someone in the vehicle "is or has recently been engaged in an activity regulated by the Wildlife Resources Commission"). The sole restriction in

Section 113-136 prohibiting inspections within the curtilage of a dwelling or the living quarters of a vessel "is plainly insufficient to provide either a meaningful limitation on the otherwise unlimited discretion the statute affords or a satisfactory means to minimize the risk of arbitrary and/or abusive enforcement." *People v. Scott*, 593 N.E.2d 1328, 1344 (N.Y. 1992). Consistent with the United States Supreme Court's interpretation of the federal Fourth Amendment, and with our own Constitution's prohibition against unreasonable searches and seizures, *see* N.C. Const. art. I, § 20, I would hold that in order for such warrantless inspections, in particular of fish houses and other businesses with regular hours of operation, to be reasonable, greater restrictions on the inspecting officers' discretion are required. *See, e.g.*, N.C.G.S. § 113-302.1 (1990) (reasonable warrantless inspection of premises by protectors to determine whether wildlife is possessed in accordance with applicable laws or rules limited to an appropriate time of day).

For the foregoing reasons, I conclude that the portion of Section 113-136(k) permitting the warrantless inspection of fish, wherever located and without limitation, is not a constitutionally adequate substitute for a warrant and is therefore in violation of the Fourth Amendment. Accordingly, I would affirm the trial court's order to the extent that it found Section 113-136(k)'s authorization of warrantless inspections of fish to be unconstitutional.

CHARLIE TILLMAN FREEMAN v. GRACE TURLINGTON FREEMAN

No. 9111DC822

(Filed 20 October 1992)

1. Divorce and Separation § 131 (NCI4th)— equitable distribution—workers' compensation—marital property

The trial court erred in an equitable distribution action by classifying the husband's lump sum workers' compensation settlement as the separate property of the husband where the wife offered an affidavit that the husband received the award three months prior to the separation; the husband presented no evidence regarding the portion of the award, if any, which represented compensation for loss of earning capacity during the marriage versus after the separation, and

there was no evidence that the husband contended that any portion of the award represented compensation for pain and suffering. Although the trial court erred by holding that the entire award was separate property, the case was remanded in light of the fact that this opinion set out for the first time the proper procedure for the allocation of workers' compensation awards.

Am Jur 2d, Divorce and Separation §§ 879, 892, 914, 930, 937.

Equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 155 (NCI4th)— equitable distribution—marital home—security system—installed post-separation—separate expense**

The trial court did not abuse its discretion in an equitable distribution action by failing to give the wife credit for approximately $3500.00 expended for a security system for the marital home where the wife contended that the expense was incurred in light of the husband's conduct. The trial court considered the wife's evidence regarding the money spent by the wife on the installation of a security system and found that it was for her own use after the date of the separation and not to maintain the marital home.

Am Jur 2d, Divorce and Separation §§ 879, 892, 914, 930, 937.

Equitable distribution doctrine. 41 ALR4th 481.

3. **Divorce and Separation § 127 (NCI4th)— equitable distribution—automobile—purchased after separation—marital funds—marital property**

The trial court in an equitable distribution action properly classified a car as marital property subject to equitable distribution even though it was purchased after the separation where the court found that the funds used for the purchase of the car were marital and the evidence supports that finding. N.C.G.S. § 50-20(b)(1).

Am Jur 2d, Divorce and Separation §§ 879, 892, 914, 930, 937.

Equitable distribution doctrine. 41 ALR4th 481.

4. Divorce and Alimony § 136 (NCI4th)— equitable distribution— automobile—amount of marital funds used in purchase

The trial court did not err in an equitable distribution action in valuing the husband's car at $14,500 where the husband testified that he used $15,000 in marital funds toward its purchase, but the sales contract showed that the purchase price actually paid by the husband was $14,500, $13,500 in cash and $1,000 financed. The court's finding was supported by competent evidence in the record.

Am Jur 2d, Divorce and Separation §§ 879, 892, 914, 930, 937.

Equitable distribution doctrine. 41 ALR4th 481.

5. Divorce and Alimony § 143 (NCI4th)— equitable distribution—equal distribution of marital property—no abuse of discretion

The trial court did not abuse its discretion in an equitable distribution action by ordering an equal distribution of marital property even though the husband contended that an uneven division was supported by the husband's contribution to the wife's educational accomplishments, the husband's retirement due to medical necessity, and the husband's post-separation rent and utility payments. The court found that the wife's educational accomplishments were substantial but did not require large expenditures of money from accumulated savings or from the husband's current income, that the husband was capable of supporting himself if required to do so by financial reasons, and that the husband's post-separation living expenses did not require an unequal division of the marital property.

Am Jur 2d, Divorce and Separation §§ 879, 892, 914, 930, 937.

Equitable distribution doctrine. 41 ALR4th 481.

APPEAL by defendant and cross-appeal by plaintiff from order filed 28 June 1991 in LEE County District Court by *Judge William A. Christian.* Heard in the Court of Appeals 15 September 1992.

Harrington, Ward, Gilleland & Winstead, by Eddie S. Winstead, III, for plaintiff-appellee/appellant.

Staton, Perkinson, Doster, Post, Silverman & Adcock, by Jonathan Silverman and Diane W. Stevens, for defendant-appellant/appellee.

GREENE, Judge.

Defendant appeals and plaintiff cross-appeals from an equitable distribution order filed on 28 June 1991.

Plaintiff (Husband) is fifty-eight years old and retired. He receives retirement, pension, and social security benefits totalling $913.37 per month. Defendant (Wife) is fifty-six years old and is employed as a clerk in the business office of Moore Regional Hospital where she earns $21,000.00 per year. Husband and Wife were married on 23 December 1955. During the marriage, Husband was employed by GKN Automotive as an assembly worker. Wife worked in the Lee County school system and as a bank teller. Wife also earned an associate's degree, a bachelor's degree, and a Masters in Business Administration over a ten-year period during the marriage at a total cost of less than $10,000.00, which, according to Wife, was paid from interest earned on funds received from the sale of a tract of land owned jointly by Husband and Wife.

On 6 August 1985, Husband suffered a work-related injury to his right hand for which he made a workers' compensation claim. The claim was accepted as compensable, and Husband received payment of all medical bills and expenses and benefits for temporary total disability while out of work. On 19 July 1988, Husband's doctor determined that Husband had reached his maximum medical improvement and rated Husband as having a forty percent permanent disability of the right hand. On 8 February 1989, Husband entered into an agreement for a final compromise and release of his workers' compensation claim with his employer and its insurance company. Pursuant to this agreement, Husband received a lump sum payment of $32,500.00 in March, 1989, as compensation for permanent partial disability of his right hand, plus payment of all medical bills and expenses incurred for treatment of his injuries from the date of Husband's maximum medical improvement up to the date of the agreement. Husband deposited the settlement proceeds into a certificate of deposit at Wachovia Bank and Trust Company in Sanford. The record does not reveal whether the cer-

tificate of deposit was in Husband's name only or in the names of both Husband and Wife. In her brief, Wife states that Husband placed the funds in an "individual account."

On 24 May 1989, approximately three months after Husband's receipt of the workers' compensation settlement, Husband and Wife separated. At the time of the parties' separation Husband was unemployed, having permanently retired from employment on 1 January 1987 due to various health problems. Husband remained in the jointly owned marital home located on 108 acres of land. Husband filed a complaint on 17 September 1989 seeking divorce from bed and board, equitable distribution of marital property, and sole possession and use of the marital residence. On 14 November 1989, Wife filed a counterclaim seeking dismissal of Husband's claim, divorce from bed and board, sole and exclusive use of the marital residence, and equitable distribution.

At the time of separation, Husband and Wife jointly owned a fifty-eight acre tract of land in another area of the county which had been leased for farming purposes. After separation, Husband unilaterally began cutting timber from the tract. Husband received $15,500.00 from the sale of the timber, of which, according to Husband's testimony, $15,000.00 was used by Husband to purchase a 1990 Oldsmobile. The automobile contract of sale indicates that Husband made a cash downpayment of $13,500.00 toward the purchase of the car and financed $1,000.00. Wife purchased a 1989 Toyota after the parties' separation, using $21,700.00 of funds taken from a certificate of deposit owned by the parties. On 11 March 1990, Wife filed a motion for injunctive relief in order to stop Husband from cutting the timber, and a temporary restraining order was entered the same day. This order was extended on 19 March 1990, and the parties resolved their agreement regarding the timber by consent order entered in April, 1990, pursuant to which Husband agreed to vacate the marital residence, giving Wife sole possession, and Wife agreed to withdraw her motion for injunctive relief. The order stated that at the time of equitable distribution, the trial court could consider Husband's expenses incurred living outside the marital home and Wife's expenses in maintaining the marital home.

When Wife attempted to return to the marital residence, she discovered that Husband had barricaded all of the doors. Wife had to obtain the services of a locksmith to gain entry. After

Wife moved in, Husband came to the marital residence with a sledgehammer and attempted to smash in the front door. Wife thereafter obtained a domestic violence restraining order against Husband. During the time that Wife was living in the marital residence pursuant to the consent order, she expended approximately $1,500.00 for miscellaneous repairs and maintenance of the residence and approximately $3,500.00 for the installation of a security system in the home. Husband moved in with his brother, to whom he paid $300.00 per month for rent and utilities.

On 25 May 1990, Husband filed an action for absolute divorce and equitable distribution of the marital property. Wife filed an answer and counterclaim seeking the same relief on 23 July 1990. The parties were granted an absolute divorce on 20 August 1990. Their equitable distribution claims were severed and consolidated for trial. After a trial, an equitable distribution order was filed on 28 June 1991. In its order, the trial court made the following pertinent findings of fact:

> 10. That with regard to the sum of $37,000.00 currently invested in a certificate of deposit with Wachovia Bank and Trust Company of Sanford, North Carolina, the Court finds that:
>
> > a) That the sum of $5000.00 was received as farm rent for the year 1990.
> >
> > b) That said $32,500.00 was received in the settlement of a workers['] compensation claim between [Husband], his employer GKN Automotive Components and the employer's insurer, Crown Insurance Company. This amount was paid one lump sum pursuant to an agreement for final compromise and settlement and release entered into between [Husband], GKN and Royal Insurance on February 8, 1989.
> >
> > c) That said proceeds were for pain and suffering, loss of use of [Husband's] arm, and permanent partial disability.
> >
> > d) That prior to the entry of the settlement with the insurance carrier, said insurance company had paid all outstanding medical bills of the plaintiff, had paid his average weekly wage for loss [sic] income for a period of 48 weeks and had reimbursed [Husband] for all travel and related expenses incidental to treatment for the injury to his arm.

> e) That said settlement proceeds were received by [Husband] in March, 1989, approximately two months prior to the date of separation.

The trial court concluded that the entire workers' compensation settlement is Husband's separate property. The court also found that Husband's new car was purchased after separation with marital funds and valued the car at $14,500.00; that Wife's new car was purchased after separation with marital funds and valued it at $21,700.00; that, "while [Husband] has retired he is capable of supporting himself if required to do so for financial reasons"; that "the education accomplishments of [Wife] were substantial but did not require large expenditures of money from accumulated savings or from [Husband's] current income"; and that [Husband] has expended $300.00 per month since May, 1990, as expenses for rent and utilities which "could be considered by the court pursuant to the order . . . entered April 2, 1990."

The trial court concluded that an equal division of the marital property was equitable, and, among other things, ordered the parties to each pay one-half of the approximately $1,500.00 expended by Wife in the post-separation maintenance of the marital home. The court concluded that the expenses to install the security system in the marital home "were incurred by [Wife] for her own use and satisfaction after the date of separation, and were not incurred to maintain the marital home." The court made no provision in its order for distribution of the $300.00 per month expended by Husband for rent and utilities while living with his brother. In distributing the marital property, the trial court awarded to Wife items of property valued at $330,414.00, including the marital residence and surrounding 108 acres valued at $268,375.00, and awarded to Husband items of property with a total value of $88,996.40. The court concluded that, because the value of property awarded to Wife exceeds in value the items of property awarded to Husband, "it is equitable that [Wife] pay to [Husband] . . . a distributive award in the total sum of $116,338.05 within nine months of the date of entry of this Order." From the equitable distribution order, Husband and Wife appeal.

The issues presented are (I) whether proceeds from a lump sum workers' compensation settlement received by a spouse during marriage as compensation for permanent partial disability caused

by a work-related injury sustained during the marriage constitutes marital property or separate property under North Carolina's Equitable Distribution Act; (II) whether the trial court erred in (A) determining that Wife's security system expenditures do not constitute maintenance of the marital home; (B) classifying Wife's new car as marital property; and (C) valuing Husband's new car at $14,500.00; and (III) whether the trial court abused its discretion in ordering an equal distribution of the marital property.

I

[1] Wife argues that the trial court erred in classifying Husband's lump sum workers' compensation settlement as the separate property of Husband. She contends that, because the settlement proceeds were received by Husband during the marriage and prior to separation, the settlement proceeds constitute marital property.

The party claiming property to be marital has the burden of proving by a preponderance of the evidence that the property was acquired by either spouse or both spouses during the marriage and before separation and that the property is presently owned. *Atkins v. Atkins*, 102 N.C. App. 199, 206, 401 S.E.2d 784, 787 (1991). If this burden is met, then the party claiming the property to be separate must show that the property meets the definition of separate property. *Id.* at 206, 401 S.E.2d at 788. If both parties meet their respective burdens, then the property is classified as separate property. *Id.* Property acquired after separation may nevertheless be marital if the party claiming it to be marital proves by a preponderance of the evidence that the source of funds used to acquire the property is marital. *Wade v. Wade*, 72 N.C. App. 372, 382, 325 S.E.2d 260, 269, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985).

Whether all or any portion of a workers' compensation award constitutes the separate property of the injured spouse has never been addressed by the appellate courts of North Carolina. However, other equitable distribution jurisdictions have considered the issue and generally follow three different approaches in classifying such awards. *See Crocker v. Crocker*, 824 P.2d 1117 (Okla. 1991) (outlining the several approaches used among equitable distribution states). The first of these is the mechanistic approach, under which workers' compensation benefits awarded during coverture for a work-related injury occurring during the marriage are classified as marital property, while benefits received after separation generally are classified

as the separate property of the injured spouse. *See, e.g.*, *Orszula v. Orszula*, 356 S.E.2d 114 (S.C. 1987). A few states follow the unitary approach, pursuant to which a workers' compensation award is treated as being uniquely personal to the injured spouse and is always characterized as his separate property. *See, e.g.*, *Gloria B.S. v. Richard G.S.*, 458 A.2d 707 (Del. Fam. Ct. 1982).

A third method, the analytic approach, has been adopted in a number of equitable distribution states. *See, e.g.*, *Crocker*, 824 P.2d at 1123; *In re Marriage of Smith*, 817 P.2d 641 (Colo. Ct. App. 1991); *Kirk v. Kirk*, 577 A.2d 976 (R.I. 1990); *Pauley v. Pauley*, 771 S.W.2d 105 (Mo. Ct. App. 1989); *Weisfeld v. Weisfeld*, 545 So. 2d 1341 (Fla. 1989); *Lentini v. Lentini*, 565 A.2d 701 (N.J. Super. Ct. App. Div. 1989); *Dees v. Dees*, 377 S.E.2d 845 (Ga. 1989); *Cummings v. Cummings*, 540 A.2d 778 (Me. 1988); *Queen v. Queen*, 521 A.2d 320 (Md. 1987); *Miller v. Miller*, 739 P.2d 163 (Alaska 1987). This approach classifies a workers' compensation award as either marital or separate property depending on what the award was intended to replace. Because workers' compensation benefits are generally treated as wage replacement, *see* 2 Arnold H. Rutkin *et al.*, Valuation & Distribution of Marital Property § 23.08[7] (John P. McCahey ed., 1992) (benefits are awarded to an employee "in lieu of lost wages and not as damages for pain, suffering, and monetary loss caused by the fault of the employer"), the majority of courts following the analytic approach have determined that the portion of the award which represents compensation for lost wages, loss of earning capacity, and medical expenses sustained during the marriage is marital property, and the portion representing payment for lost wages, loss of earning capacity, and medical expenses occurring after separation is the separate property of the injured spouse. *See, e.g.*, *Crocker*, 824 P.2d at 1121.[1]

Of the various approaches used to classify workers' compensation awards, the analytic approach is most consistent with the policy behind North Carolina's Equitable Distribution Act recognizing marriage as a shared enterprise, the assets and debts of which

1. In at least one jurisdiction, certain workers' compensation benefits represent compensation for non-economic loss, and these benefits have been characterized as the separate property of the injured spouse under the analytic approach. *See, e.g.*, *Kirk*, 577 A.2d at 978-79 (workers' compensation benefits received for disfigurement, loss of use of a limb, and rehabilitation of the injured worker are deemed to replace the separate property of the injured spouse and are accordingly classified as separate property).

should be fairly distributed upon divorce. *See Loeb v. Loeb*, 72 N.C. App. 205, 209, 324 S.E.2d 33, 37, *cert. denied*, 313 N.C. 508, 329 S.E.2d 393 (1985). Accordingly, we follow the growing number of jurisdictions which have adopted this approach. In addition, adoption of the analytic approach for the purpose of classifying workers' compensation awards is consistent with the manner in which North Carolina classifies personal injury awards. *See Johnson v. Johnson*, 317 N.C. 437, 346 S.E.2d 430 (1986) (adopting analytic approach for the purpose of classifying personal injury awards as well as life insurance accident benefits in the equitable distribution context); *Lilly v. Lilly*, 107 N.C. App. 484, --- S.E.2d --- (1992). Thus, whether all or any portion of a workers' compensation award constitutes the separate property of the injured spouse in North Carolina depends on the purpose of such awards under our workers' compensation law.

North Carolina's Workers' Compensation Act, N.C.G.S. §§ 97-1 *et seq.* (the Act), authorizes the payment of benefits to an employee for disability and medical expenses caused by a work-related injury. *Gray v. Carolina Freight Carriers, Inc.*, 105 N.C. App. 480, 483-84, 414 S.E.2d 102, 104 (1992). As used in the Act, the term "disability" means "incapacity because of injury to earn the wages which the employee was receiving at the time of injury in the same or any other employment." N.C.G.S. § 97-2(9) (1991). "[P]ain is not in and of itself" compensable. *Jackson v. Fayetteville Area Sys. of Transp.*, 78 N.C. App. 412, 414, 337 S.E.2d 110, 112 (1985); *Branham v. Denny Roll & Panel Co.*, 223 N.C. 233, 236, 25 S.E.2d 865, 867-68 (1943). The Act provides for compensation to be paid during the injured employee's healing period, that is, the time that the employee is unable to work because of his injury. *Gray*, 105 N.C. App. at 483, 414 S.E.2d at 104. In addition, an employee may be entitled to an award either for permanent total disability, *see* N.C.G.S. § 97-29 (1991), or permanent partial disability, i.e., a diminished capacity to earn wages. *See* N.C.G.S. § 97-30 (1991) (authorizing compensation for partial disability which is proved by the employee); N.C.G.S. § 97-31 (1991) (authorizing compensation for partial disability caused by a scheduled injury); *see also Harrell v. Harriet & Henderson Yarns*, 314 N.C. 566, 575, 336 S.E.2d 47, 52-53 (1985) (losses included in the schedule contained in Section 97-31 are conclusively presumed to diminish wage-earning capacity); *Liles v. Charles Lee Byrd Logging Co.*, 309 N.C. 150, 154, 305 S.E.2d 523, 526 (1983) (compensable disfigurement presumed to diminish wage-

earning capacity). Awards for permanent disability may be paid in weekly installments or in one lump sum. N.C.G.S. § 97-44 (1991).

Because established precedent in North Carolina holds that compensation awarded under the Act is intended solely to replace medical expenses, lost wages, or the diminished capacity to earn wages—that is, economic loss—and is not compensation for pain and suffering or other non-economic loss, workers' compensation awards are to be allocated as follows for the purpose of equitable distribution. To the extent that an award replaces medical expenses, lost wages, or loss of earning capacity sustained during the marriage, it is marital property subject to equitable distribution. To the extent that the award replaces such economic loss occurring after separation, it is the separate property of the injured spouse. However, if the party claiming that the award is marital (i.e., the non-injured spouse) shows by a preponderance of the evidence that the award was acquired by the injured spouse during the marriage and before separation, then the entire award will be marital property unless the party claiming it to be separate property (i.e., the injured spouse) proves by a preponderance of the evidence that the award, or some portion of it, was intended to compensate him for economic loss occurring after the date of separation and is therefore his separate property. *See Atkins*, 102 N.C. App. at 206, 401 S.E.2d at 787-88; *see also* N.C.G.S. § 50-20(b)(1) (Supp. 1991) (property acquired by a spouse during marriage and before separation presumed to be marital unless rebutted by evidence that it is separate property); *Ciobanu v. Ciobanu*, 104 N.C. App. 461, 466, 409 S.E.2d 749, 752 (1991) (allocation of burdens of proof as set forth in *Atkins* consistent with 1991 amendment to Section 50-20(b)(1)).

In situations where a spouse is injured during the marriage and prior to separation, but does not receive a workers' compensation award until *after* the date of separation, such an award nevertheless constitutes marital property to the extent that the award represents compensation for economic loss occurring during the marriage and prior to separation. In such a case, because the award is not acquired during the marriage and prior to separation, the non-injured spouse will not have the benefit of the marital property presumption, and instead must, in order to support classification of the award as marital, prove by a preponderance of the evidence that all or some portion of the award is compensation for economic loss occurring during the marriage and before separation. *See*

Johnson, 317 N.C. at 454-55 n.4, 346 S.E.2d at 440 n.4 (property must be classified depending on proof presented to the trial court of the nature of such property).

In the instant case, the record indicates that Wife offered evidence in the form of an equitable distribution affidavit that Husband received a workers' compensation award, *see Pruitt v. Knight Publishing Co.*, 289 N.C. 254, 258, 221 S.E.2d 355, 358 (1976) (approved settlements made pursuant to Section 97-17 become an award), in March, 1989, three months prior to the parties' separation, and that the proceeds were presently in a Wachovia certificate of deposit. Thus, Wife met her burden under Section 50-20(b)(1) of proving that the award constitutes marital property. Husband's evidence established only that Husband received a workers' compensation award for permanent partial disability of the right hand in March, 1989, and that the proceeds from the award remained in a certificate of deposit at the time of trial. As previously discussed, awards for permanent partial disability represent compensation for loss of earning capacity, yet Husband presented no evidence regarding what portion, if any, of the award represents compensation for Husband's loss of earning capacity during the marriage versus after the parties' separation. In addition, there is no evidence in the record that Husband contended at trial that any portion of the award represented compensation for pain and suffering. Despite Husband's failure to prove that any portion of the award is his separate property, the trial court made a finding that Husband's award represented compensation for "pain and suffering, loss of use of [Husband's] arm, and permanent partial disability," and concluded that the entire award is Husband's separate property. This was error. *Nix v. Nix*, 80 N.C. App. 110, 112, 341 S.E.2d 116, 118 (1986) (trial court's findings must be supported by competent evidence in the record). However, in light of the fact that this opinion for the first time sets out the proper procedure for the allocation of workers' compensation awards, we remand this case in order to allow the parties to present evidence in this regard.

II

A

[2] Wife argues that the trial court erred in failing to give credit to Wife for the approximately $3,500.00 expended for a security system for the marital home since, according to Wife, the expense

was incurred "to maintain a liveable house in light of [Husband's] outrageous conduct."

One of the factors to be considered by the trial court in arriving at an equitable distribution of the marital property is the "acts of either party to maintain, preserve, develop, or expand . . . marital property during the period after separation of the parties and before the time of distribution." N.C.G.S. § 50-20(c)(11a) (Supp. 1991). When a party introduces evidence of a distributional factor, the trial court must consider the factor and make a finding of fact with regard to it. *Haywood v. Haywood*, 106 N.C. App. 91, 100, 415 S.E.2d 565, 571, *disc. rev. denied*, 331 N.C. 553, 418 S.E.2d 666 (1992).

In the instant case, the trial court considered Wife's evidence regarding the money spent by Wife on the installation of a security system and found that it was "for her own use and satisfaction after the date of separation . . . and . . . not . . . to maintain the marital home." The trial court, having followed the proper procedure, was within its discretion to make such a determination, and accordingly Wife's assignment of error in this regard is overruled.

B

[3] Wife argues that the trial court erred in classifying her new car as marital property. Wife contends that, because she purchased the automobile after the parties' separation, the property does not meet the definition of marital property set forth in N.C.G.S. § 50-20(b)(1) and is therefore her separate property.

Contrary to Wife's argument, whether the automobile is her separate property depends not on whether she acquired it after the parties' separation, "but whether the source of funds for [its] purchase was marital funds." *Mauser v. Mauser*, 75 N.C. App. 115, 118, 330 S.E.2d 63, 65 (1985). If the funds used to purchase the car were marital, then "their exchange for other property after separation does not convert them into separate property." *Phillips v. Phillips*, 73 N.C. App. 68, 75, 326 S.E.2d 57, 61 (1985). The trial court found that the funds used by Wife to purchase the car were marital, and the evidence in the record supports this finding. Accordingly, the trial court properly classified the car as marital property subject to equitable distribution.

C

[4] Wife argues that the trial court erred in valuing Husband's 1990 Oldsmobile at $14,500.00. Although the parties agree that the car constitutes marital property to the extent that Husband used marital funds toward its purchase, they disagree as to the amount. Wife contends that, because Husband testified at trial that he used $15,000.00 in marital funds acquired from the sale of timber toward the purchase of the car, that the trial court should have valued the car at $15,000.00. Husband argues on appeal that the sales contract shows the purchase price actually paid by Husband (taking into account a $2,600.00 rebate) to be $14,500.00: $13,500.00 paid in cash and $1,000.00 financed.

Under the source of funds rule, an asset purchased after separation with marital funds is marital property to the extent that marital funds were used toward its purchase. *Mauser*, 75 N.C. App. at 118, 330 S.E.2d at 65; *Wade*, 72 N.C. App. at 381, 325 S.E.2d at 269. The trial court apparently valued Husband's automobile at $14,500.00 with this principle in mind, and relied on the sales contract rather than Husband's testimony in determining what amount of marital funds was expended on the car. We discern no error in the trial court's finding, as it is supported by competent evidence in the record.

III

[5] Husband argues that the trial court abused its discretion in ordering an equal distribution of the marital property. According to Husband, an unequal division of the marital property is supported by Husband's contribution to Wife's educational accomplishments, Husband's retirement in 1987 due to medical necessity, and Husband's $300.00 per month rent and utilities payments made prior to trial.

The distribution of marital property is committed to the sound discretion of the trial court, and in the absence of evidence that the trial court's decision in this regard is manifestly unsupported by reason, it will not be disturbed. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). In the instant case, the trial court considered Husband's evidence of Wife's educational accomplishments and found that such accomplishments were "substantial but did not require large expenditures of money from accumulated savings or from [Husband's] current income." The court

also considered Husband's evidence of health problems and found that, although retired, Husband is capable of supporting himself if required to do so for financial reasons. Both of the trial court's challenged findings are supported by competent evidence in the record. Thus, the court properly considered and made findings of fact with regard to the relevant distributional factors under Section 50-20(c). *See* N.C.G.S. § 50-20(c)(3) and (7) (Supp. 1991); *see also Haywood*, 106 N.C. App. at 100, 415 S.E.2d at 571. In addition, the trial court's order indicates that the court considered Husband's post-separation living expenses but determined that such expenses did not require an unequal division of the marital property. Based on the evidence before the trial court, we discern no abuse of discretion by the court in ordering an equal division of the marital property.

However, because this case is remanded for reclassification of Husband's workers' compensation award in accordance with this opinion, if and to the extent that the trial court deems it necessary as a result of such reclassification, the court shall enter a new distribution order consistent with N.C.G.S. § 50-20(c). In all other respects, the trial court's equitable distribution order is affirmed.

Affirmed in part, reversed in part, and remanded.

Judges WELLS and ORR concur.

COUNTY OF HOKE v. HUEY I. BYRD AND WIFE, ZENOBIA ANN SMITH BYRD

No. 9116SC771

(Filed 20 October 1992)

1. Municipal Corporations § 37 (NCI3d)— junkyards—fencing and vegetation—police power—valid ordinance

A county ordinance requiring automobile graveyards, junkyards or repair shops located within specified distances from public roads, schools, churches or residences to be entirely surrounded by wire fencing and vegetation is a valid exercise of the police power where the stated objectives of the ordinance were to ensure the safety of county residents, to preserve the environment and physical integrity of the land,

and to protect county citizens from the spread of disease and a proliferation of rodents and mosquitoes; the objectives of the ordinance are within the scope of the police power; the ordinance establishes reasonable means to achieve its objectives; and the interference with the right of landowners to use their property is reasonable in degree.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 438-440, 471, 472.

Validity, construction, and application of zoning ordinance relating to operation of junkyard or scrap metal processing plant. 50 ALR3d 837.

2. **Municipal Corporations § 37 (NCI3d) — junkyards — fencing and vegetation — equal protection**

A county ordinance requiring automobile graveyards, junkyards or repair shops in certain locations to be surrounded by wire fencing and vegetation does not establish an arbitrary classification in violation of equal protection. Appellants' contention that automobile repair yards, meat processing plants, sand and gravel pits, landfills and sites with open dumpsters are just as dangerous and aesthetically displeasing as the establishments regulated by the ordinance is insufficient to require a finding that the ordinance violates the equal protection clause.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 364-366.

Validity, construction, and application of zoning ordinance relating to operation of junkyard or scrap metal processing plant. 50 ALR3d 837.

3. **Municipal Corporations § 37 (NCI3d) — junkyards — fencing and vegetation — county ordinance — no preemption by state statute**

A county ordinance requiring automobile graveyards, junkyards or repair shops located within specified distances from public roads, schools, churches or residences to be surrounded by wire fencing and vegetation was not preempted by the Junkyard Control Act, N.C.G.S. § 136-141 *et seq.*, since the Junkyard Control Act applies only to junkyards located on "primary highways," and defendants' junkyard is located

on a secondary road and is not subject to the Junkyard Control Act.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 374, 375.

4. **Costs § 37 (NCI4th) — enforcing county ordinance — attorney's fees not permitted**

The trial court erred in awarding attorney's fees to plaintiff county as part of the costs in an action to enforce a county ordinance requiring wire fencing and vegetation around defendants' junkyard since there is no statutory authority for an award of attorney's fees in this case.

Am Jur 2d, Costs § 33.

APPEAL by defendant from judgment entered 25 April 1991 in HOKE County Superior Court by *Judge B. Craig Ellis*. Heard in the Court of Appeals 26 August 1992.

Willcox & McFadyen, by Duncan B. McFadyen, III, for plaintiff-appellee.

Gill & Dow, by Douglas R. Gill, for defendants-appellants.

WYNN, Judge.

Defendants, Huey I. Byrd and his wife, Zenobia Ann Smith Byrd, have owned a piece of property in Hoke County since 1975. Huey Byrd operates his business, Byrd's Welding and Repair Shop, on this property. Large quantities of scrap metal materials are stored on the property and used by Byrd in his business. They are not enclosed in any building.

On October 19, 1987, the Hoke County Board of Commissioners adopted an ordinance entitled *Ordinance Regulating the Operation or Maintenance of Automobile Graveyards, Junkyards and Repair Shops in Hoke County* (hereinafter *Hoke County Ordinance*). This ordinance requires that any automobile graveyard, junkyard or repair shop that is within three-hundred feet of the center line of any public road, within 1/2 mile of any school or church, within any residential area or within three-hundred feet of a housing unit must be entirely surrounded by wire fencing and vegetation. This vegetation "shall be of a type that can reach a minimum height of eight feet within eight years of the date planted and shall be

planted . . . so that a continuous, unopen hedgerow . . . will exist to a height of at least eight feet along the length of the fence . . . ."

The Byrds' property is a junkyard as defined in the ordinance. The property is located within three-hundred feet of the center line of Highway 211 and within three-hundred feet of the nearest residence. Within a ¼ mile wide strip contiguous and parallel to the outer boundaries of the Byrd property are twelve residences and one church. There is currently no fence nor any vegetation along the one thousand foot perimeter of the Byrd property.

Because Huey Byrd was operating his business prior to the implementation of the ordinance he was required to comply with "Section Seven, Nonconforming Automobile Graveyards, Junkyards and Repair Shops Existing at Effective Date of this Ordinance." Pursuant to this section, Byrd registered Byrd's Welding and Repair Shop with the Hoke County Health Department within 180 days and paid an initial license fee. Section Seven then allotted him a twelve month grace period within which to comply with the fencing and vegetation requirements.

The Byrds are presently in violation of the ordinance because they have failed to erect a wire fence and plant the necessary vegetation. As reason for this failure they cite the prohibitive costs of $6,700 for fencing and $1,900 for shrubbery. They appeal here from the Superior Court's order to remove the scrap materials from their property.

I.

Appellants first assign error to the trial court's determination that the ordinance is statutorily and constitutionally sufficient. In support of this contention, they present three arguments: (A) the ordinance is statutorily insufficient because it imposes prohibitively expensive requirements far beyond those necessary to achieve its purposes; (B) the ordinance violates appellants' constitutional right to equal protection of the laws; and (C) the ordinance is pre-empted by state statute. For the reasons that follow, we disagree.

A. Statutory Basis

[1] North Carolina General Statute § 153A-121 endows the counties with a general police power. *Summey Outdoor Advertising v. County of Henderson*, 96 N.C. App. 533, 537-38, 386 S.E.2d 439, 442-43 (1989), *disc. rev. denied*, 326 N.C. 486, 392 S.E.2d 101 (1990).

This statute provides that "[a] county may by ordinance define, regulate, prohibit, or abate acts, omissions, or conditions detrimental to the health, safety, or welfare of its citizens and the peace and dignity of the county; and may define and abate nuisances." N.C. Gen. Stat. § 153A-121(a) (1991). The validity of a county ordinance is determined via application of the test articulated by our Supreme Court in *A-S-P Associates v. City of Raleigh*, 298 N.C. 207, 258 S.E.2d 444 (1979). This test first requires us to determine whether the Hoke County Ordinance represents a valid exercise of the police power. *Id.* at 214, 258 S.E.2d at 448. We conclude that it does. The ordinance was passed to ensure the safety of Hoke County citizens, to preserve the environment and physical integrity of the land, and to protect Hoke County citizens from the spread of disease and a proliferation of rodents and mosquitoes. Section Two: Purposes and Objectives, *Hoke County Ordinance*. As such, we find that it is within the broad boundaries of power conferred by the statute.

Once it is determined that the objectives of an ordinance are within the scope of the police power, the *A-S-P Associates* test next requires a determination that the means chosen to implement those objectives are not unreasonable. *A-S-P Associates*, 298 N.C. at 214, 258 S.E.2d at 448-49. In the subject case, the ordinance requires that any automobile graveyard, junkyard or repair shop that is within three-hundred feet of the center line of any public road, within ½ mile of any school or church, within ½ mile of any residential area, or within three-hundred feet of a housing unit must be entirely surrounded by wire fencing and vegetation. Appellants assert that these requirements are unreasonable. We disagree.

In determining whether the means by which the Hoke County Board of Commissioners has chosen to regulate are reasonable, we must employ the two-pronged inquiry set forth in *A-S-P Associates*: "(1) Is the [ordinance] in its application reasonably necessary to promote the accomplishment of a public good and (2) is the interference with the owner's right to use his property as he deems appropriate reasonable in degree?" *Id.*

Regarding the first prong, we note that the reasons for which the Hoke County Ordinance was passed, discussed *supra*, also articulate the public good the Board hopes to achieve. The findings published by the Board of Commissioners at the beginning of the

ordinance establish that the Board's regulation of automobile graveyards, junkyards and repair shops is reasonably necessary to achieve that desired public good. These findings indicate that, when located near public roads and schools, such establishments are "patently offensive to the dignity and aesthetic quality of the environment in Hoke County unless at least partially obstructed from view by appropriate fencing or combination of fencing and vegetation." *Hoke County Ordinance* at 1. Further, when such businesses are located near public roads, residential areas, schools and churches, the health, safety and welfare of citizens, residents and children are at risk "due to the hazard of fire, the possible entrapment of children and others in areas of confinement . . . and the possibility of injury to persons, especially children, resulting from said persons coming into contact with metal, glass or other rigid materials." *Id.*

Appellants contend that the ordinance is unreasonable because there are other less burdensome means by which Hoke County could achieve its purposes. While it is possible that the regulation might be just as effective with some lesser means of enclosing the targeted properties, it is equally possible that any less burdensome means would be inadequate. "When the most that can be said against [an ordinance] is that whether it was an unreasonable, arbitrary or unequal exercise of power is fairly debatable, the courts will not interfere." *A-S-P Associates*, 298 N.C. at 214, 258 S.E.2d at 449 (citations omitted). The Hoke County Board of Commissioners has been charged, via statute, with determining what actions are in the best interests of its citizens. As a rule, therefore, this Court should not substitute its own judgment for the Board's discretion. *Id.*

Appellants contend that *State v. Vestal*, 281 N.C. 517, 189 S.E.2d 152 (1972), lends support to their argument that the ordinance, as applied to them, is invalid. We, however, find that case to be distinguishable from the case at bar. The ordinance in *Vestal* was applied to the owner of an automobile wrecking yard located in a "general industrial district." *Id.* at 523, 189 S.E.2d at 157. It was found to be invalid because it had "no substantial relation to the public health, morals or safety such as will sustain the requirement as a legitimate exercise of the police power of the State for any of these purposes." *Id.* The "general industrial district" in which Vestal's automobile wrecking yard was located is much different than the rural area, surrounded by houses and

churches, in which the Byrds' property is located. The *Vestal* Court recognized that in populated areas where "the safety of pedestrians upon adjoining sidewalks, the fire hazard inherent in an accumulation of junk, the threat to the public health incident to the attraction of such yards for rats . . . and the attraction of materials therein for playing children" are at issue, then there is a legitimate need for secure fencing. *Id.* at 524, 189 S.E.2d at 157. That describes precisely the location of the Byrds' property. Even though it is in what would be classified a rural area, it is near enough to a residential, populated area to warrant the fencing and vegetation requirements imposed by the Hoke County Ordinance. The ordinance establishes reasonable means to achieve its objectives and therefore meets the first prong set forth in *A-S-P Associates.*

The second prong is also met: The interference with the Byrds' right to use their property as they deem appropriate is reasonable in degree. Appellants argue that because Byrd's Welding and Repair Shop realized a net profit of only $527 in 1989, the $8,600 cost they will incur in complying with the ordinance will likely prohibit them from continuing the business. However, appellants present no evidence to support their contention that the ordinance is prohibitively expensive for all salvage yard owners in Hoke County, only that it is prohibitively expensive for them. "In examining the reasonableness of an ordinance, due process dictates that the court look at the entire ordinance and not only at the provision as it applies to a particular inhabitant of the municipality. The fact that one citizen is adversely affected by a zoning ordinance does not invalidate the ordinance." *State v. Joyner*, 286 N.C. 366, 371, 211 S.E.2d 320, 323, *appeal dismissed*, 422 U.S. 1002, 45 L.Ed.2d 666 (1975). Moreover, there are numerous other uses the Byrds can make of their property if they ultimately decide the cost of compliance is too high. We, therefore, conclude that the interference with the Byrds' property is reasonable in degree.

B. Constitutional Basis

[2] Also in support of their first assignment of error, appellants assert that the ordinance singles out a narrow class of businesses for regulation with no rational basis for distinguishing that class from other businesses. We disagree.

The rational basis standard is the correct standard to apply where a governmental classification does not infringe upon a fundamental right nor involve a suspect classification. *White v. Pate,*

308 N.C. 759, 766, 304 S.E.2d 199, 204 (1983). Thus, a classification is presumed to be constitutional unless it "trammels fundamental personal rights or is drawn upon inherently suspect distinctions such as race, religion, or alienage." *New Orleans v. Dukes*, 427 U.S. 297, 303, 49 L.Ed.2d 511, 517 (1976). Because the classification in the subject case does not involve an inherently suspect distinction, it must merely be rationally related to some legitimate state interest in order to be found constitutional. *Id.* In determining whether there is such a rational relationship "it is only invidious discrimination, the wholly arbitrary act, which cannot stand consistently with the Fourteenth Amendment." *Id.* at 303-04, 49 L.Ed.2d at 517.

Appellants assert that there is no rational basis for singling out businesses like theirs. They contend that "[j]unkyards alone are singled out and placed within a unique class . . . ." However, the record indicates that the ordinance applies to automobile graveyards, junkyards, and repair shops, not just to junkyards. These businesses are defined in the Hoke County Ordinance as follows:

> A. *Automobile Graveyard*: Site where more than three (3) wrecked, scrapped, ruined, dismantled, or inoperable motor vehicles or motorized equipment not being restored to operation are located on a land parcel used in conjunction with any establishment; or site where there are more than three (3) wrecked, scrapped, ruined, dismantled, or inoperable motor vehicles or motorized equipment used in conjunction with said establishment but located on another land parcel.
>
> J. *Junkyard*: Any land parcel which is maintained, operated, or used for storing, keeping, buying or selling junk in conjunction with any establishment which is maintained, operated, or used for storing, keeping, buying or selling junk regardless of the length of time that junk is stored or kept, or for maintenance or operation of an automobile graveyard. "Junkyard" shall not include the County operated sanitary landfill.
>
> O. *Repair Shop*: An establishment which is maintained and operated for the purpose of repairing, storing, keeping, buying or selling appliances or equipment other than motor vehicles and which stores or keeps any of the said appliances or equipment on the land parcel outside a building.

Section Three: Definitions, *Hoke County Ordinance*. Subjecting these three types of businesses to the regulation of the ordinance is rationally related to the protection of citizens from the dangers the Board of Commissioners believes such businesses present.

The classification of automobile graveyards, junkyards and repair shops is not arbitrary, as it violates none of the rules recognized by the United States Supreme Court in *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 55 L.Ed. 369 (1911), to test an allegation of arbitrariness. The first rule states that the legislative body making the classification is to be granted broad discretion and will be overturned only if it acts without any reasonable basis and the classification is, therefore, purely arbitrary. *Id.* at 78, 55 L.Ed. at 377. The Board of Commissioners found that the establishments regulated by the ordinance posed a threat to the safety and welfare of the citizens of Hoke County. The Board, therefore, established a class of automobile graveyards, junkyards, and repair shops and regulated them accordingly. The second rule states that just because a classification is "not made with mathematical nicety or . . . in practice results in some inequality" does not in itself establish a violation of the equal protection clause. *Id.* Thus, appellants' contention that automobile repair yards, meat processing plants, sand and gravel pits, landfills, and sites with open dumpsters are just as dangerous and aesthetically displeasing as the establishments regulated by the Hoke County Ordinance is not by itself sufficient to find the Board of Commissioners' classification violative of the equal protection clause. This is further supported by the third rule, which states that when a classification is questioned, "if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the [ordinance] was passed must be assumed." *Id.* It is not unreasonable to assume that the businesses appellants assert should be classified with theirs do not pose the same dangers, and, therefore, any regulation of such other businesses should be a separate consideration. The final rule recognized with respect to arbitrary classification provides that anyone challenging the validity of a classification has the burden of proving it is arbitrary. *Id.* at 78-79, 55 L.Ed. at 377. Appellants, however, have presented no convincing argument to rebut the validity of the classification at issue. We conclude, therefore, that the Board of Commissioners did not act arbitrarily in regulating a class of automobile graveyards, junkyards and repair shops. The ordinance itself articulates the Board's find-

ings that such establishments posed a threat to the safety and welfare of the citizens of Hoke County and thus illustrates that the classification was carefully considered.

C. Pre-emption by State Statute

[3] Finally, in support of their first assignment of error, appellants contend that the subject the ordinance purports to regulate has already been pre-empted by state law. When a state statute is in effect at the time an ordinance is passed, which statute regulates the same area the ordinance purports to regulate, the ordinance is pre-empted and is thus invalid. *State v. Tenore*, 280 N.C. 238, 248, 185 S.E.2d 644, 651 (1972).

Appellants argue that North Carolina's "Junkyard Control Act of 1971," N.C. Gen. Stat. §§ 136-141—136-155 (1986), renders the Hoke County Ordinance void as pre-empted. This Act provides that "[n]o junkyard shall be established, operated or maintained, any portion of which is within 1,000 feet of the nearest edge of the right-of-way of any interstate or *primary highway*" unless it falls into one of the statute's enumerated exceptions. *Id.* § 136-144 (emphasis added).

Apparently, appellants would prefer to be subject to this statute because the screening requirements are less stringent than those provided for in the ordinance. The Junkyard Control Act, however, applies only to junkyards located on "primary highways." The trial court found as fact that the Byrds' property is located on Highway 211, and that Highway 211 "is designated by the North Carolina Department of Transportation as a federal-aid secondary road" and is therefore not subject to the provisions of the "Junkyard Control Act." Therefore, appellants' assertion that the ordinance is pre-empted by the statute is without merit.

In summary, we conclude that while the subject ordinance does impose expensive requirements on the Byrds which may prohibit them from continuing to use their property in *one* manner, these requirements do not exceed the boundaries of the Board's discretion and, therefore, the ordinance should be left undisturbed. Moreover, the Byrds are not deprived of equal protection of the laws, as the class of businesses subject to the ordinance is rationally related to a legitimate purpose, nor is the ordinance pre-empted by any state statute. Thus, appellants' first assignment of error is overruled.

II.

[4] Appellants' second and final assignment of error challenges the trial court's determination that the Byrds should pay the plaintiff-appellee's attorneys' fees. Appellants argue that there is no statutory authority which supports such an award. We agree.

Attorneys' fees cannot be awarded unless specifically authorized by statute. *City of Charlotte v. McNeely*, 281 N.C. 684, 695, 190 S.E.2d 179, 187 (1972). The legislative authority of the Hoke County Board of Commissioners is limited to that which is "granted to it expressly or by necessary implication from expressly granted powers." *State v. Tenore*, 280 N.C. 238, 249, 185 S.E.2d 644, 651 (1972). The statute granting Hoke County the authority to pass the ordinance at issue does not provide for attorneys' fees. Appellee asserts that "if the Court of Appeals finds that the County has the authority to adopt an Ordinance providing that attorneys' fees may be awarded as part of the costs, the trial court's findings should be affirmed."

We are unwilling to extend the authority granted in the statute to allow the Board to award attorneys' fees absent a *specific* statutory provision. Thus, we reverse the award of attorneys' fees in this case.

For the foregoing reasons the decision of the trial court is,

Affirmed as to the validity of the ordinance and reversed as to the award of attorneys' fees.

Chief Judge HEDRICK and Judge LEWIS concur.

STATE OF NORTH CAROLINA v. TIMOTHY SCOTT BRIDGES

No. 9126SC657

(Filed 20 October 1992)

1. Evidence and Witnesses § 2201 (NCI4th)— rape and assault—hair found at scene—statistical probability of matching samples—not prejudicial

There was no prejudicial error in a prosecution for rape and assault where the court allowed an expert in hair com-

parison to testify to the statistical probability of another person's hair being indistinguishable from defendant's hair and that it was likely that unknown hairs found at the crime scene originated from defendant. The expert gave essentially the same testimony as in *State v. Suddreth*, 105 N.C. App. 122, and the testimony did not constitute an improper identification of defendant. Although the expert by his own admission merely offered an estimate as to the probabilities of a random hair match and the trial court erred by admitting the statistical probability testimony, defendant failed to demonstrate prejudicial effect.

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

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

2. Criminal Law § 463 (NCI4th)— rape and assault—closing argument—bloody palm print—no error

The trial court did not err in a rape and assault prosecution by permitting the prosecutor to argue that a bloody palm print found on the wall of the crime scene belonged to the victim's daughter-in-law even though the State could not prove that the print belonged to her. The prosecutor did not exceed the limits of the evidence, but concentrated on one aspect of the expert's testimony rather than another.

Am Jur 2d, Trial § 533.

3. Criminal Law § 687 (NCI4th)— rape and assault—instructions—hair sample analysis—requested instruction given in part—no error

The trial court did not err in a rape and assault prosecution by giving only the first sentence of defendant's requested instruction on hair sample analysis, deleting the second sentence, and adding a cautionary instruction.

Am Jur 2d, Trial §§ 1092, 1093.

Judge GREENE dissenting.

APPEAL by defendant from judgments entered 2 February 1991 by *Judge Robert P. Johnston* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 7 April 1992.

Attorney General Lacy H. Thornburg, by G. Lawrence Reeves, Jr., for the State.

Public Defender Isabel Scott Day, by Assistant Public Defenders Marc D. Towler and Grady Jessup, for defendant appellant.

COZORT, Judge.

On 16 April 1990 defendant was charged with first-degree rape, assault with a deadly weapon with intent to kill inflicting serious injury on a handicapped person, and felonious breaking or entering. Upon a jury verdict of guilty on all three counts, the trial court imposed a life sentence for the first two consolidated charges and a ten-year consecutive sentence for the third charge. Defendant appeals. We find no error.

The State presented evidence that an eighty-three-year-old wheelchair-bound woman was beaten and raped in her home in Charlotte on the evening of 14 May 1989. The next day, the victim's daughter-in-law discovered the victim and called the victim's grandson's wife, Roxie. Roxie went to the victim's apartment, found her lying in bed, and telephoned the police. The victim had been severely beaten and despite her denial, a physician concluded that the victim had been raped. On several occasions the victim described her assailant as having shoulder-length wavy blonde hair. At least two other times, she described him as having brown hair. Sometimes the victim described the assailant as being tall, and other times she described him as being short. Defendant had shoulder-length blonde wavy hair. Three witnesses testified that defendant told them he had committed the attack and rape. In investigating the scene, a technician found a bloody palm print located on a wall in the back of the bedroom adjacent to a light switch. The technician also collected hair samples. The victim and her daughter-in-law both died before trial.

Defendant raises three issues on appeal: (1) whether the trial court erred in permitting an expert in trace evidence examination to testify to the statistical probability of one hair sample matching another, (2) whether the trial court erred in permitting the prosecutor to argue that the bloody palm print found on the wall of the crime scene belonged to the victim's daughter-in-law, and (3) whether the trial court erred in refusing to give the defendant's requested jury instruction on hair comparison.

[1] In his first assignment of error, defendant argues that the trial court erred in permitting the State's expert in hair comparison to testify to the statistical probability of another person's hair being indistinguishable from defendant's hair and that it was "likely" that the unknown hairs found at the crime scene originated from the defendant. Mr. Elinos Whitlock III first explained in general the methodology of analyzing hair samples. He stated that "it is possible for two individuals to have hairs which are consistent with each other; that hair is not as unique and identifying as a fingerprint." He further testified that he was familiar with two studies on hair comparison. The first study concluded that there is a 1 in 4,500 chance of unknown hair matching a random individual from the Caucasian population. The study, however, had been criticized by other experts. The second study involved 100 individuals in which the testers removed 9 or 10 hairs from each of the individuals but could not find a match from the other individuals, thereby indicating a "very low chance" of unknown hair matching an individual at random. The expert stated he had examined between 2,000 and 3,000 hairs but that he had not conducted any statistical analysis. Based upon the two studies and his personal experience, the expert opined that the "likelihood of two Caucasian individuals having indistinguishable head hair, it is very low. A conservative *estimate* for that probability would be . . . approximately one in a thousand." (Emphasis added.)

Defendant argues that the expert's opinions were not supported by sufficient foundation and improperly suggested positive identification of the defendant as the perpetrator of the crime. We find no reversible error. Testimony by a properly qualified witness on hair identification and comparison is admissible if relevant, *State v. Green*, 305 N.C. 463, 290 S.E.2d 625 (1982), but may not be used to positively identify a defendant as the perpetrator of a crime. *State v. Stallings*, 77 N.C. App. 189, 191, 334 S.E.2d 485, 486 (1985), *disc. review denied*, 315 N.C. 596, 341 S.E.2d 36 (1986). In *State v. Suddreth*, 105 N.C. App. 122, 412 S.E.2d 126, *appeal dismissed*, 331 N.C. 281, 417 S.E.2d 68 (1992), this Court concluded that expert testimony on hair comparison did not constitute an improper identification of the defendant. Mr. Whitlock (the same expert who testified in the case at bar) testified that an unknown hair found on a paper towel found at the crime scene was consistent with a hair sample taken from the defendant. He defined the terms "consistent with" to mean that the hair "ex-

hibited all the same macroscopic and microscopic characteristics, and it is quite likely to have originated from Keith Suddreth." *Id.* at 131, 412 S.E.2d at 131. He further defined the terms "quite likely" to mean:

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

Id. at 132, 412 S.E.2d at 131. In addition, Mr. Whitlock testified that characteristics of head hair are not as unique as fingerprints and that he could not testify that a particular hair originated from a particular person. *Id.* at 133, 412 S.E.2d at 132. Consistent with Mr. Whitlock's testimony, the trial court instructed the jury that "comparative microscopy of hair is not accepted as reliable for positively identifying individuals and is not conclusive." *Id.*

In finding that the testimony did not rise to the level of a positive identification of the defendant, we reasoned that the expert's statement that "it [the hair] is quite likely to have been from [the defendant]," did not rule out the possibility that the hair originated from someone other than the defendant. We further reasoned that the statistical illustration was based on the expert's experience and expertise in the hair microscopy field and did not eliminate the possibility of sources of the hair other than defendant. *Id.* We found no error because "the expert did not venture beyond his area of expertise, the testimony did not constitute a positive identification, and the trial court's instructions prevented the jury from reaching a decision based solely on the hair analysis testimony." *Id.* In the case at bar, Mr. Whitlock gave essentially the same testimony as in *Suddreth*. Following the reasoning in *Suddreth*, we find the testimony did not constitute an improper identification of defendant.

Suddreth is not dispositive of defendant's argument that the State failed to lay a sufficient foundation for Mr. Whitlock's testimony. Defendant did not raise the foundation issue in *Suddreth*, and our opinion there does not address the sufficiency of the foundation for the expert testimony. Defendant relies heavily upon *United States v. Massey*, 594 F.2d 676 (8th Cir. 1979) to

support his argument. In *Massey*, an expert in microscopic analysis testified that three of the five hairs found in a blue ski mask allegedly used in a bank robbery matched a hair sample taken from defendant's head. In response to the trial court's query as to the likelihood of the defendant's hair matching another individual's hair, the expert stated that he could identify the race of the hair source, but could not identify one individual to the exclusion of others. After the expert stated that he had examined in excess of 2,000 hairs and only found indistinguishable hair from two individuals on a couple of occasions, the trial court asked: "Two chances—one chance in a thousand?" The expert responded, "Well, that's very difficult—you're putting it in probabilities—because I do not take a hair from each case and compare it with hair from all other cases. But that's the frequency with which I have seen it." *Id.* at 679. The expert also referred to a Canadian study indicating a 1 in 4,500 chance that one hair taken from one individual could match the hair taken from another individual of the same race.

The United States Court of Appeals for the Eighth Circuit found there was "no foundation to show the factual circumstances surrounding each of [the expert's] examinations and certainly there is no statistical probability which could be drawn from his experience to show that there was only 'one chance in a 1,000' that hair comparisons could be in error." *Id.* at 680. The court further found there was no foundation for testimony regarding the Canadian study since the expert testified that "he did not know the nature and extent of the studies conducted from which the statistics were gathered." *Id.* The court concluded that the gravamen of the error occurred when the trial court construed the expert's testimony in terms of probabilities. Prejudicial error occurred, the court reasoned, when during closing arguments the prosecutor tied the statistical probability of a random hair match to the probability of defendant's guilt beyond a reasonable doubt.

Although we decline to follow the federal court's reasoning on the identification issue, the reasoning is persuasive on the improper foundation issue. Several other courts have excluded statistical probability testimony on the basis of insufficient foundation for the testimony. In *State v. Sneed*, 76 N.M. 349, 414 P.2d 858 (1966), an expert witness testified that there was a 1 in 240 billion chance that someone other than the defendant had purchased a gun at a pawnshop on the date of the murder. The expert arrived

at the figure by examining telephone books for defendant's last name, examining the pawnshop register for descriptions of purchasers generally matching defendant's description, and estimating that the probability of two people picking the same post office box number from 1,000 numbers was 1 in 1,000. The expert then multiplied the factors to arrive at the final percentage. The New Mexico Supreme Court held "that mathematical odds are not admissible as evidence to identify a defendant in a criminal proceeding so long as the odds are based on estimates, the validity of which have not been demonstrated." *Id.* at 354, 414 P.2d at 861. The Arkansas Supreme Court held in *Miller v. State*, 399 S.W.2d 268, 270 (1966), that "[a]dmission of the unsubstantial, speculative testimony on probabilities was clearly erroneous." The State's expert testified that the probability that a dirt sample taken from defendant and a dirt sample taken from a ditch near the crime scene would have the same color was 1 in 10, the same texture 1 in 100, and the same density 1 in 1,000, and that there was a 1 in 1,000,000 chance that all the characteristics would match. The court reasoned that the expert witness

> had made no tests on which he could reasonably base his probabilities of one in ten on soil color, one in one hundred on soil texture, or one in one thousand on soil density (which he multiplied together to obtain his one-in-one-million figure), nor did he base his testimony on studies of such tests made by others. He admitted that his figures were predicated on "estimates" and "assumptions." In short, there is no foundation upon which to base his probabilities of one in a million.

399 S.W.2d at 270.

In the present case, Mr. Whitlock referred to the Canadian study indicating a 1 in 4,500 chance of a random match of hair from two individuals and another study involving a comparison of hair samples taken from a hundred people indicating a "very low chance" of unknown hair matching an individual at random. Mr. Whitlock testified that although he had examined 2,000 or 3,000 hairs, he had not "been involved in any controlled statistical studies." Based upon the two studies and his personal experience, Mr. Whitlock offered a conservative estimate that the likelihood of two Caucasions having indistinguishable head hair would be approximately one in a thousand. Although there may have been a sufficient foundation laid as to the statistical probabilities set

forth in the two studies, we cannot find there was a sufficient foundation laid to permit Mr. Whitlock's variation on the statistics established in controlled studies. By his own admission, Mr. Whitlock merely offered an estimate as to the probabilities of a random hair match. We find the trial court erred in admitting the statistical probability testimony offered by Mr. Whitlock. Defendant, however, has failed to demonstrate the prejudicial effect of the inadmissible testimony. *See* N.C. Gen. Stat. § 15A-1443 (1988). We have already concluded that the testimony did not constitute improper identification of defendant and defendant has presented no other basis for showing prejudice. Defendant's first assignment of error is overruled.

[2] In his second assignment of error, defendant argues that the trial court erred in permitting the prosecutor to argue that the bloody palm print found on the wall of the crime scene belonged to the victim's daughter-in-law even though the State could not prove that the print belonged to her. The State's expert testified that the print was compared to the prints of sixty-three people who had access to the crime scene. On direct examination, the expert testified that she compared the palm prints of the victim's daughter-in-law to the palm print found at the crime scene, but there was insufficient area of the prints to eliminate the daughter-in-law as the maker of the print. The expert further testified that she did not inform the police department or the district attorney's office that the prints were not sufficient to conduct an analysis. On cross-examination, however, the expert testified: "Q. And, in fact, Ms. Brown stated that she wished it was her print, didn't she? A. I don't recall. Q. And you said it's not, didn't you? A. Yes, it's not."

"[A]rguments of counsel are left largely to the control and discretion of the trial judge and . . . counsel will be granted wide latitude in the argument of hotly contested cases. Counsel is permitted to argue the facts which have been presented, as well as reasonable inferences which can be drawn therefrom." *State v. Williams*, 317 N.C. 474, 481, 346 S.E.2d 405, 410 (1986) (citations omitted). The State argues that there is a reasonable inference from the evidence that the palm print may have belonged to the daughter-in-law since the daughter-in-law was seen near the victim's apartment on the day the victim was discovered and the daughter-in-law discovered the victim. Although the State's expert apparently contradicted herself, she did testify on direct and cross examinations that there was insufficient data to determine if the

print belonged to the daughter-in-law. In arguing that the print belonged to the daughter-in-law, the prosecutor did not exceed the limits of the evidence, but rather concentrated on one aspect of the expert's testimony rather than another. In the case of conflicting testimony, it is for the jury to decide which part, if any, of an expert's testimony to believe. Defendant's assignment of error is therefore overruled.

[3] In his third assignment of error, defendant argues that the trial court erred in refusing to give the following instruction:

> At most, in law, analysis of hair samples tends to identify the defendant as belonging to the class which the person whose hair sample analyzed belonged. However, it should be noted that due to the variable nature of hair, it is not possible to identify a hair as having originated from a particular individual to the exclusion of all other persons.

The trial court instructed the jury on the first sentence of the requested instruction, deleted the second, and added the following sentence: "It is for you, the jury to give such weight and credibility to this evidence as you determine is appropriate." If a defendant's requested instruction is correct in law and supported by the evidence, the trial court is not required to give the instruction exactly as requested, but must adequately convey the substance of defendant's request. *State v. Green*, 305 N.C. at 477, 290 S.E.2d at 633. Noting that the instruction given in the instant case is identical to the cautionary instruction offered in *Green*, we find no error in the jury instruction.

Affirmed.

Judge PARKER concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree with the majority, and for the reasons given, that it was error for the trial court to admit Mr. Whitlock's testimony that the mathematical odds of finding two people whose hairs have the same microscopic characteristics are one in 1000.

I do, however, contrary to the majority, believe that this error requires a new trial. The one in 1000 statistical testimony was significant to the State's case and there is a "reasonable possibility that . . . [this evidence] contributed to the conviction." *State v. Milby*, 302 N.C. 137, 142, 237 S.E.2d 716, 720 (1981). The two hairs found at the scene are the only physical evidence linking defendant to the crime. Although Mr. Whitlock also testified that the hair found at the scene "likely . . . originated" from the defendant, this testimony is far less persuasive than the one in 1000 testimony. Furthermore, the one in 1000 testimony was emphasized by the district attorney in her closing argument to the jury:

> And that leads us to the hair. Now, doesn't it just seem a little too coincidental to you that the one person that we have made all these stories up about . . . happens to be the same hair type as the hairs that are found at the scene? Now, that's awful coincidental if you ask me, because as Mr. Whitlock testified, it would be about a one in a thousand chance of two people at random in the population having the same hair characteristics.

In addition to the weakness of the State's evidence, there is physical evidence that someone other than the defendant could have been the assailant. There was a bloody palm print found at the scene which was positively identified as not belonging to the defendant or to any family member or police and rescue personnel. Accordingly, there exists a reasonable possibility that a different result would have been reached had the erroneous evidence not been before the jury. *State v. Gardner*, 316 N.C. 605, 613, 342 S.E.2d 872, 877 (1986). I would, therefore, grant the defendant a new trial.

CURTIS WILSON TAYLOR, PLAINTIFF-APPELLEE v. VOLVO NORTH AMERICA CORPORATION, DEFENDANT-APPELLANT

No. 9118SC753

(Filed 20 October 1992)

1. **Automobiles and Other Vehicles § 254 (NCI4th)— New Motor Vehicles Warranties Act—recovery by plaintiff—evidence sufficient**

The trial court correctly held that the New Motor Vehicles Warranties Act had been violated and that plaintiff was entitled to recover where plaintiff first complained of a front end shimmy and vibration upon initially acquiring the car, and shortly thereafter complained of the clicking noise upon the application of the brakes; defendant's regional sales manager, who had been a parts and service manager during the lease period, testified that he was familiar with defendant's warranty policies and the nonconformities were covered by a twelve-month-unlimited mileage warranty for parts and workmanship; plaintiff brought the automobile to the dealer at least four times regarding the same nonconformity and the defect was not repaired; and defendant failed to prove any of the affirmative defenses under N.C.G.S. § 20-351.4. The Act places no burden on consumers to identify the cause or source of problems.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

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

2. **Automobiles and Other Vehicles § 259 (NCI4th)— New Motor Vehicles Warranties Act—damages trebled—no error**

The trial court did not err by trebling damages in an action under the New Motor Vehicles Warranties Act where the court could reasonably conclude that defendant unreasonably refused to comply with the statute, given plaintiff's repeated attempts to have the automobile repaired over a period of approximately eight months and defendant's continuing inaction.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

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

3. Automobiles and Other Vehicles § 259 (NCI4th)— New Motor Vehicles Warranties Act—damages trebled before set-off—no error

The trial court did not err in an action under the New Motor Vehicles Warranties Act by trebling damages prior to deducting an amount representing a reasonable allowance for plaintiff's use of the vehicle. Since the items listed for refund that constitute damages to be trebled under N.C.G.S. § 20-351.8 and the offset are found in different subsections of N.C.G.S. § 20-351.3, defendant is entitled to an offset only after plaintiff's damages have been trebled. Defendant's contrary interpretation of the remedies statute is inconsistent with prior interpretations of similar statutory language and would seriously erode the overall purpose for which the statute was enacted, reduce the effectiveness of the Act, and circumvent the intent of the legislature.

Am Jur 2d, Automobiles and Highway Traffic §§ 721 et seq.

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

4. Appeal and Error § 63 (NCI4th)— New Vehicles Warranties Act—lease cancelled—no standing to object

The defendant in an action under the New Vehicles Warranties Act, Volvo North America Corporation, did not have standing to object to the cancellation of a lease between plaintiff and Volvo Finance of North America where defendant argued in its brief and at oral argument that it and Volvo Finance were separate corporations.

Am Jur 2d, Appeal and Error § 172.

APPEAL by defendant from judgment filed 22 February 1991 by *Judge W. Steven Allen* in GUILFORD County Superior Court. Heard in the Court of Appeals 25 August 1992.

Plaintiff brought this action on 16 November 1989, under the New Motor Vehicles Warranties Act, G.S. § 20-351 *et seq.* The parties waived a jury trial. After hearing evidence from both parties, the trial court found the following facts:

2. On 27 December 1988, plaintiff entered a lease contract with Maxwell Volkswagen, Inc. as to the subject 1989 Volvo

vehicle, agreeing to make 72 monthly payments totaling $34,992.00. Plaintiff took delivery of the automobile on 27 December 1988. Plaintiff made the first monthly payment and deposited $500.00 as security.

3. Upon test driving the vehicle, plaintiff detected a "shimmy" in the wheel when driving, and informed the dealership's sales manager. Upon delivery, the vehicle had 736 miles on the odometer, it having been driven by the wife of the dealer as a demonstrator. The dealership assured plaintiff that problems would be corrected at the 1,000 mile checkup. When plaintiff brought the vehicle in on 6 January 1989 for that checkup, this condition was not corrected.

4. Complaints as to "high idling" were corrected, but the car had a clicking noise in the left front wheel, and it continued to shimmy at 45 miles per hour, which conditions appreciably impaired its value to the consumer, who had leased the vehicle for business purposes. The vehicle was returned to the dealership on 6 March 1989, on 16 May 1989, on 3 July 1989, and on 10 July 1989, for various complaints, including the clicking in the wheel and the shimmy. The car was left at the dealership, and plaintiff had to be transported by his employees, after which he returned to pick up the vehicle. He continued to complain of the shimmy on each occasion, and the clicking in the brakes, neither of which was repaired. At the 5,000-mile maintenance checkup, he complained of loss of power, the clicking noise, the shimmy and shaking, none of which were corrected except the loss of power. On 16 May, the dealership attempted to correct warped rotors, resurfacing them, but the car still had the clicking noise and shimmy at the front. On 3 July 1989, the left front door would not open; the dealer had to replace it. The right front seat switch was not operating, the brake pads had to be changed, and the dealership's shop foreman drove the vehicle, determined that there was a shimmy and a clicking which he attributed to the anti-lock brakes defendant had just installed that year. On 10 July, the windshield wipers were non-operative, more repair had to be made on the rotors, and the seat switch was said to be back ordered from Holland.

5. Defendant extended to plaintiff as to the subject vehicle an express warranty that it would be free from defect in parts

and workmanship for at least twelve months and for unlimited mileage, with some exceptions which are not applicable in this case. The continuing and uncorrected clicking noise and shimmy in the front of the vehicle were direct violations of that warranty so as substantially to impair the vehicle to plaintiff as consumer, making it non-conforming to the contract.

6. Upon obtaining an attorney in September, 1989, plaintiff notified defendant on 11 September 1989 by letter of his intent to exercise rights under North Carolina's Lemon law, G.S. Section 20-351 *et seq.*, and defendant responded with only one telephone call to plaintiff's counsel after that.

7. The window sticker on the vehicle gave defendant's address, as did the warranty manual, and plaintiff used that address to notify both the defendant and the lessor-assignee, Volvo Finance of North America, Inc., the addresses being virtually the same.

8. On 10 October 1989, defendant acknowledges receipt of plaintiff's counsel's 11 September 1989 letter, whereby both defendant and Volvo Finance of North America, Inc. were notified under G.S. 20-351 *et seq.*, and between then and 25 October 1989, defendant attempted only one telephone call, which was unsuccessful, and it took no further action to attempt to remedy the nonconformity in its warranty or to attempt to repair the subject vehicle. Plaintiff attempted to return the car to defendant's dealer, and the dealer refused to accept the car.

9. At the time of lease agreement, plaintiff informed the defendant's dealer of his reliance on the subject vehicle for safety and reliability, and informed it of the clicking noise and shimmy causing him concern, and the failure to repair these conditions was a substantial impairment of its value to him, and a breach of defendant's express warranty.

10. Plaintiff made all lease payments from January through August, 1989, prior to the vehicle's being repossessed by Volvo Finance of North America, Inc. During the time plaintiff used the vehicle from 27 December 1988 until repossession, he put approximately 21,000 miles on the vehicle's odometer.

The trial court found that defendant breached its express warranties and accordingly held that defendant violated the New Motor Vehicles Warranties Act. In addition to terminating plaintiff's lease

without penalty, the trial court held that plaintiff could recover $4,511.95, which included lease payments, the security deposit, and repair costs. This amount was then trebled because the defendant "unreasonably refused to comply with the requirements of G.S. §§ 20-351.2 and [20-]351.3, in that it made only one unsuccessful telephone call to plaintiff's attorney to attempt to remedy the matter." From the trebled award of $13,535.85, the trial court deducted $5,429.00 as an offset representing a reasonable allowance for plaintiff's use of the automobile. This reduced plaintiff's award to $8,106.85. Additionally, the trial court awarded the plaintiff $4,125.00 in attorney's fees pursuant to G.S. § 20-351.8(3)(a), due to the manufacturer's "unreasonable fail[ure] to resolve this matter, as required by statute." Defendant appeals.

J. Sam Johnson, Jr. for plaintiff-appellee.

Smith Helms Mulliss & Moore, by Bynum M. Hunter and William Sam Byassee, for defendant-appellant.

EAGLES, Judge.

Defendant raises four assignments of error. After careful consideration, we affirm.

I.

[1] First, defendant argues that plaintiff's evidence was insufficient as a matter of law to support his recovery. We disagree.

The New Motor Vehicles Warranties Act (the Act), Article 15A of Chapter 20, establishes a private remedy for consumers. G.S. §§ 20-351—20-351.10 (1989); *see Anders v. Hyundai Motor America Corp.*, 104 N.C. App. 61, 64, 407 S.E.2d 618, 620, *disc. rev. denied*, 330 N.C. 440, 412 S.E.2d 69 (1991). Under the Act, a consumer may seek recovery from an automobile manufacturer for its failure to conform an automobile to its express warranties. Here, the Act is applicable to plaintiff as a "consumer" under G.S. § 20-351.1(1) and to the defendant as a "manufacturer" under G.S. § 20-351.1(2).

In *Anders*, 104 N.C. App. at 64, 407 S.E.2d at 620, it was held that "the Act imposes a duty on the manufacturer post-sale to conform the car to express warranties" as follows:

> Express warranties for a new motor vehicle shall remain in effect at least one year or 12,000 miles. If a new motor vehicle does not conform to all applicable express warranties for a period of one year, or the term of the express warranties, whichever is greater, following the date of original delivery of the motor vehicle to the consumer, and the consumer reports the nonconformity to the manufacturer, its agent, or its authorized dealer during such period, the manufacturer shall make, or arrange to have made, repairs necessary to conform the vehicle to the express warranties, whether or not these repairs are made after the expiration of the applicable warranty period.

G.S. § 20-351.2(a). Defendant contends that the duty does not exist here because "plaintiff failed to introduce any evidence about the source or cause of the problems about which he complains." The statute places no burden upon a consumer to identify the cause or source of the problems of which he complains. Instead, the statute requires the consumer to show a nonconformity that is covered by an express warranty.

Under G.S. § 20-351.2(a), the consumer must timely complain of the nonconformity to the manufacturer, its agent, or its authorized dealer. Here, plaintiff first complained of the automobile's front end shimmy and vibration upon initially acquiring the car from the dealer on 27 December 1988, the beginning of the one year warranty period. Shortly thereafter, on 6 January 1989, plaintiff first complained of the clicking noise from the application of the brakes.

Then, the consumer must show that the nonconformity is covered by an express warranty. Here, defendant's regional sales manager, who was a parts and service manager during the lease period, testified that he was familiar with defendant's warranty policies and that the nonconformities were covered by a twelve month-unlimited mileage warranty for parts and workmanship. Specifically, he testified as follows:

> Q: If there were a shimmy in the front wheels of this car, is that warranted under that 1989 warranty?
>
> A: It would be warranted depending on what causes the shimmy.
>
> . . . .

Q: Were the brakes warranted on this car, this particular model for parts and workmanship?

A: Depending upon the condition of the brakes, yes, sir, they were.

Q: What did it depend on?

A: It would depend on what the problem was with the brakes.

Q: Well, if the problem was a clicking in the brakes that was unexplained and unrepaired, was that warrantied [sic] or not?

A: The clicking in the brakes?

Q: Yes, sir.

A: It would be warrantied [sic] if it were in fact a defect, yes, sir.

Paragraph 36 of the "Standard Provisions" of the "Closed End Lease Agreement" referred to the warranty. Further, the repair receipts indicated that the warranty was in effect.

The Act provides that a lessee is entitled to a recovery "if the manufacturer is unable, after a reasonable number of attempts, to conform the motor vehicle to any express warranty by repairing or correcting, or arranging for the repair or correction of, any defect or condition or series of defects or conditions which substantially impair the value of the motor vehicle to the consumer." G.S. § 20-351.3(b). The Act "assist[s] a consumer in showing a manufacturer's failure to conform the vehicle to express warranties," *Anders*, 104 N.C. App. at 64, 407 S.E.2d at 620, by providing that it is to be "presumed that a reasonable number of attempts have been undertaken to conform a motor vehicle to the applicable express warranties if: (1) The same nonconformity has been presented for repair to the manufacturer, its agent, or its authorized dealer four or more times but the same nonconformity continues to exist." G.S. § 20-351.5(a). By bringing the automobile to the dealer at least four times regarding the same nonconformity, plaintiff here was entitled to the statutory presumption that a reasonable number of attempts had been undertaken to conform the car to the express warranties. Despite these visits to the dealer, the defect was not repaired. Additionally, defendant failed to prove any of the affirmative defenses under G.S. § 20-351.4. Accordingly, we hold that the trial court correctly held that the Act had been violated and that plaintiff was entitled to recover.

II.

[2] Second, defendant argues that the trial court erred in trebling damages because plaintiff introduced evidence insufficient as a matter of law to show that defendant unreasonably refused to comply with G.S. §§ 20-351.2 and 20-351.3. We disagree.

G.S. § 20-351.8(2) provides that monetary damages to an injured consumer "shall be trebled upon a finding that the manufacturer unreasonably refused to comply with G.S. 20-351.2 or G.S. 20-351.3." The Act is a "consumer protection statute," and is to be interpreted by an "examination of the plain language of the statute." *Anders*, 104 N.C. App. at 65, 67, 407 S.E.2d at 621-622. After appropriate notice from plaintiff, defendant here failed to cure the defect within 15 days, the maximum statutory period. G.S. § 20-351.5(a). *See* G.S. § 20-351.2(a); G.S. § 20-351.3(b). Defendant's only attempt at compliance was *one unsuccessful effort* to call plaintiff's attorney approximately one month after plaintiff mailed his notification letter. Given plaintiff's repeated attempts to have the automobile repaired over a period of approximately eight months and defendant's continuing inaction, the trial court could reasonably conclude that defendant unreasonably refused to comply with the statute and that plaintiff was entitled to treble damages.

III.

[3] Third, defendant contends that the trial court erred by trebling damages prior to deducting an amount representing a reasonable allowance for plaintiff's use of the vehicle. We disagree. This issue is not explicitly addressed by the statute. Accordingly, we proceed by examining the language and structure of the statute, prior decisions interpreting statutes with similar language, and the legislature's intent in establishing this statutorily-created cause of action.

Initially, we turn to the broad language of the portion of the Act entitled "Remedies," which provides:

> In any action brought under this Article, the court may grant as relief:
>
> (1) A permanent or temporary injunction or other equitable relief as the court deems just;
>
> (2) Monetary damages to the injured consumer *in the amount fixed by the verdict*. Such damages shall be trebled upon a finding that the manufacturer unreason-

> ably refused to comply with G.S. 20-351.2 or G.S. 20-351.3. The jury may consider as damages *all items listed for refund* under G.S. 20-351.3.

G.S. § 20-351.8 (emphasis added). Defendant contends that once plaintiff's damages ($4,511.95) are offset by the reasonable allowance for plaintiff's use ($5,429.00), "the 'amount fixed by the verdict' is zero, and there is nothing to treble." We disagree. The "items listed for refund" constituting the "damages" that "shall be trebled" under G.S. § 20-351.8(2) are found for a lessee under G.S. § 20-351.3(b), which provides that the manufacturer shall

> accept return of the vehicle from the consumer and refund the following:
>
> (1) To the consumer:
>
> a. All sums previously paid by the consumer under the terms of the lease;
>
> b. All sums previously paid by the consumer in connection with entering into the lease agreement including, but not limited to, any capitalized cost reduction, sales tax, license and registration fees, and similar government charges; and
>
> c. Any incidental and monetary consequential damages.

The provision for offset to which defendant refers is found in the next subsection of G.S. § 20-351.3, which provides in pertinent part:

> The refund to the consumer shall be reduced by a reasonable allowance for the consumer's use of the vehicle. A reasonable allowance for use is that amount directly attributable to use by the consumer prior to his first report of the nonconformity to the manufacturer, its agent, or its authorized dealer, and during any subsequent period when the vehicle is not out of service because of repair.

G.S. § 20-351.3(c). Accordingly, since the "items listed for refund" that constitute the "damages" that "shall be trebled" under G.S. § 20-351.8 and the offset are found in different subsections of G.S. § 20-351.3, we hold that defendant is entitled to an offset only *after* plaintiff's damages under G.S. § 20-351.3(b) have been trebled.

Additionally, defendant's interpretation of the remedies statute is inconsistent with prior interpretations of similar statutory language. The phrase "the amount fixed by the verdict" also appears in G.S. § 75-16 (1988), another consumer protection act which provides for treble damages. *Marshall v. Miller*, 302 N.C. 539, 543, 276 S.E.2d 397, 400 (1981). In *Seafare Corp. v. Trenor Corp.*, 88 N.C. App. 404, 416-17, 363 S.E.2d 643, 652-53, *disc. rev. denied*, 322 N.C. 113, 367 S.E.2d 917 (1988), this Court held under G.S. § 75-16 that the credit was to be deducted from the plaintiff's award *after* trebling plaintiff's damages, rather than before trebling the damages. *See Washburn v. Vandiver*, 93 N.C. App. 657, 664, 379 S.E.2d 65, 69-70 (1989); *see also Providence Hospital v. Truly*, 611 S.W. 2d 127, 136 (Tex. Civ. App. 1980) (statute similar to N.C.G.S. § 75-16); *Flintkote Company v. Lysfjord*, 246 F.2d 368, 398 (9th Cir.), *cert. denied*, 355 U.S. 835, 2 L.Ed.2d 46 (1957) (Clayton Act).

Furthermore, in interpreting the treble damages provisions of G.S. § 75-16, our Supreme Court in *Marshall*, 302 N.C. at 549, 276 S.E.2d at 403, noted that the overall purpose for which the statute was enacted should be considered. There, the Court observed that a "statutory provision for treble damages . . . serves two purposes. First, it makes more economically feasible the bringing of an action where the possible money damages are limited, and thus encourages private enforcement. Second, it increases the incentive for reaching a settlement." *Id.* at 549, 276 S.E.2d at 403-04 (citation omitted). Were we to follow defendant's suggested interpretation, we would seriously erode both these purposes, reduce the effectiveness of the Act, and circumvent the intent of the legislature. Defendant's interpretation would also defeat the legislature's intent in enacting a new statutory scheme creating a cause of action for automobile consumers more broad than traditional common law actions. Accordingly, defendant's interpretation fails.

IV.

[4] Finally, defendant argues that the trial court erred in cancelling, pursuant to G.S. § 20-351.3(b), the lease that existed between plaintiff and the lessor, Volvo Finance of North America, Inc. Defendant argued in its brief and at oral argument that defendant and Volvo Finance were "separate corporations." Accordingly, we hold that defendant does not have standing to raise this issue on behalf of Volvo Finance of North America, Inc. *See Lowder*

v. All Star Mills, 91 N.C. App. 621, 624-25, 372 S.E.2d 739, 741 (1988), *disc. rev. denied*, 324 N.C. 113, 377 S.E.2d 234 (1989); *Lone Star Industries v. Ready Mixed Concrete*, 68 N.C. App. 308, 309, 314 S.E.2d 302, 303 (1984) ("Under our law, it is rudimentary that the only person who may appeal is the 'party aggrieved.' ").

V.

In conclusion, we hold that the trial court correctly found a violation of the New Motor Vehicles Warranties Act and correctly computed plaintiff's damages.

Affirmed.

Judges JOHNSON and PARKER concur.

DAVID ANDREW PHILLIPS, BY AND THROUGH HIS GUARDIAN AD LITEM, RICHARD B. SCHULTZ, AND BEVERLY PHILLIPS v. LORRIE S. HOLLAND

No. 9119SC765

(Filed 20 October 1992)

Automobiles and Other Vehicles § 551 (NCI4th)— automobile accident—child darting into road—directed verdict for defendant—erroneous

The trial court erred by granting a directed verdict for defendant in an automobile accident case involving a child darting into traffic where, giving plaintiff the benefit of all reasonable inferences, the evidence as to time and distance creates a question as to whether defendant kept a reasonable lookout and maintained proper control over her car. While darting children cases affirming a directed verdict for a defendant driver generally involve a plaintiff failing to present sufficient evidence on defendant's ability to avoid the accident, the evidence in this record and the legitimate inference arising therefrom do not compel, but permit, a jury finding that the defendant had sufficient stopping time and distance to avoid the accident and resulting injury to the plaintiff if driving in a reasonable manner under the circumstances.

Am Jur 2d, Automobiles and Highway Traffic § 516.

Duty of motor vehicle driver approaching place where children are playing or gathered. 30 ALR2d 5.

Chief Judge HEDRICK dissenting.

APPEAL by plaintiffs from judgment entered 8 March 1991 by *Judge James C. Davis* in CABARRUS County Superior Court. Heard in the Court of Appeals 26 August 1992.

Tim L. Harris & Associates, by Robert D. Jenkins and Jerry N. Ragan, for plaintiffs-appellants.

Hartsell, Hartsell & Mills, by W. Erwin Spainhour, for defendant-appellee.

WYNN, Judge.

Plaintiffs, David Andrew Phillips by his guardian ad litem, Richard B. Schultz, and Beverly Phillips brought this action to recover for injuries allegedly caused by the negligence of defendant, Lorrie S. Holland. Plaintiff Beverly Phillips, parent of the minor plaintiff, seeks recovery for expenses she has allegedly incurred or will incur because of the injuries sustained by the minor plaintiff when he was struck by a motor vehicle operated by defendant.

Plaintiff's evidence offered at trial tends to show the following:

Allison Street runs north and south in Concord, North Carolina and is approximately thirty feet wide. Cannon Avenue runs east and west and intersects with Allison Street at the top of a hill. The speed limit is thirty-five miles per hour on both streets.

On September 21, 1987 at about 7:38 a.m., plaintiff Beverly Phillips drove her six year old son, David, two blocks south from their home on Allison Street to the intersection of Cannon Avenue and Allison Street to drop him off for school. Mrs. Phillips stopped her Pontiac Bonneville a short distance north of the intersection to let David out. He got out on the passenger's side and walked to the rear of the car to cross the street.

Defendant, Lorrie Holland, drove her Chevrolet Camaro in a northerly direction on Allison Street at twenty-five to thirty miles per hour. She was taking three children to school. As defendant crested the hill at the intersection of Allison Street and Cannon Avenue, she first saw the plaintiff David Phillips "running" in

an easterly direction in the southbound lane of Allison Street. Approximately five to ten seconds passed from the time defendant first saw the minor plaintiff to the time of impact. The collision occurred in the middle of the street approximately forty-five feet from the northeast corner of the intersection of Cannon and Allison. Plaintiff was struck by the left front quarter panel of defendant's car. Defendant did not blow her horn because she "did not have time."

There were fifty-four feet of skid marks prior to the impact and defendant's car traveled about an additional twenty-five feet after the collision before coming to a stop. The trial court took judicial notice that the distance traveled by a vehicle at twenty-five miles per hour is 36.9 feet per second; and at thirty miles per hour, 44 feet per second.

Following the close of plaintiffs' evidence, the trial judge granted defendant's motion for a directed verdict on the ground that "the evidence presented by plaintiffs, when considered in the light most favorable to the plaintiffs, is insufficient to permit a finding by the jury that any act or omission on the part of the defendant proximately caused any injury or damage to the plaintiffs." Plaintiffs appealed.

Appellants contend that the trial court erred in allowing the defendant's motion for directed verdict in that the evidence presented by plaintiffs was sufficient to present a prima facie case of negligence to the jury. We agree.

It is well established that a defendant's motion for directed verdict under G.S. § 1A-1, Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 670, 231 S.E.2d 678, 680 (1977). On defendant's motion for a directed verdict, plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference which may legitimately be drawn from the evidence. *Id.* A directed verdict is improper unless, as a matter of law, a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish. *Id.; Koonce v. May*, 59 N.C. App. 633, 634, 298 S.E.2d 69, 71 (1982). If there is even a scintilla of evidence to support plaintiff's prima facie case such that reasonable minds could differ as to whether the plaintiff is

entitled to recover, the motion should be denied and the case should go to the jury. *Wallace v. Evans*, 60 N.C. App. 145, 146, 298 S.E.2d 193, 194 (1982); *Broyhill v. Coppage*, 79 N.C. App. 221, 226, 339 S.E.2d 32, 36 (1986). Thus our inquiry is whether the evidence presented by plaintiffs would support a jury finding of negligence on the part of defendant.

Generally, every motorist is under a duty to exercise due care to avoid colliding with pedestrians on a roadway and to exercise proper precaution upon observing any child upon a roadway. N.C. Gen. Stat. § 20-174(e) (1991). Such duty of care requires the motorist to keep a proper lookout, i.e., to look in the direction of travel, to see what is there to be seen. *Troy v. Todd*, 68 N.C. App. 63, 66, 313 S.E.2d 896, 898 (1984). In recognizing the often impulsive nature of children, the North Carolina Supreme Court and this Court have held that a driver is not, however, the insurer of the safety of children in the street and is not bound to anticipate the sudden appearance of children in his pathway. *Winters v. Burch*, 284 N.C. 205, 210, 200 S.E.2d 55, 58 (1973); *Daniels v. Johnson*, 25 N.C. App. 68, 70, 212 S.E.2d 245, 246 (1975). Thus, no presumption of negligence arises from the mere fact that a motorist strikes and injures a child who darts into the street or highway in the path of her approaching vehicle. Rather there must be some evidence that the motorist could have avoided the accident by the exercise of reasonable care under the circumstances. *Winters*, 284 N.C. at 210, 200 S.E.2d at 58; *Daniels*, 25 N.C. App. at 70, 212 S.E.2d at 246.

The cases involving injuries to children by motor vehicles are numerous. In *Koonce v. May*, 59 N.C. App. 633, 298 S.E.2d 69 (1982), this Court thoroughly reviewed those cases dealing specifically with "darting children." Based on that review, it concluded that the jury could reasonably have found that the defendant, by maintaining a proper lookout, could have observed the plaintiff in time and avoided the collision. This conclusion arose from evidence showing that when the seven year old plaintiff entered the street on his "Green Machine" tricycle, his playmates saw the defendant approaching from sixty feet away at a speed of between fifteen and twenty miles per hour. The court distinguished *Koonce* from the "typical 'darting child' case," because there was "evidence from which the jury could have concluded that plaintiff was in the street for a sufficient length of time to give the defendant an opportunity to exercise due care to avoid colliding with him." *Id.* at 637, 298 S.E.2d at 73.

Similarly, in *Wallace v. Evans*, 60 N.C. App. 145, 298 S.E.2d 193 (1982), the evidence permitted a finding that the defendant traveling at twenty miles per hour from 200 feet away could have seen the minor plaintiff approaching the road from his driveway. This Court, in comparing the 200 feet of travel in *Wallace* to the 60 feet in *Koonce*, held that this was sufficient evidence to permit, but not compel, a finding that by maintaining a proper lookout and exercising due care and caution, the defendant could have averted the collision. *Id.* at 148, 298 S.E.2d at 196. *See Lewis v. Dove*, 39 N.C. App. 599, 251 S.E.2d 669, *disc. review denied*, 297 N.C. 300, 254 S.E.2d 920 (1979) (evidence that motorist saw a child on the side of the road and slowed to twenty miles below the posted speed limit, but failed to warn of his approach by blowing his horn and could not stop when the child ran in front of him at 75 feet away found sufficient to submit to jury).

It should be noted that the "darting children" cases affirming a defendant driver's motion for a directed verdict appear to share a common theme. Generally, the plaintiff in those cases failed to present sufficient evidence on the defendant's ability to avoid the accident.

> [T]he evidence adduced at trial [did] not provide the answer to the crucial question in the case, that is, whether defendant, in the exercise of due care could have seen the plaintiff in sufficient time to anticipate his collision course and to have taken effective measures to avoid striking him. Left to speculation is where the defendant was when she saw or by the exercise of reasonable care should have seen the plaintiff.

Daniels, 25 N.C. App. at 70, 212 S.E.2d at 246-47 (evidence failed to show where the defendant was at any particular time until she applied her brakes five feet before striking the child); *see Koonce*, 59 N.C. App. at 636, 298 S.E.2d at 72, for review of decisional precedents.

Defendant contends that the North Carolina Supreme Court's holding in *Winters v. Burch*, 284 N.C. 205, 200 S.E.2d 55 (1973), controls the outcome of this case because of factual similarities. In *Winters*, a seven year old child was injured when he drove his "big wheelie" into the street and was hit by a car. The Court affirmed a directed verdict motion in favor of the defendant-motorist based on the plaintiff's failure to provide evidence that the defendant could have seen the child in time to avoid the accident. Although

there were fifty-four feet of skid marks (the same as in the case at hand), the court found that the evidence did not tend to show where that plaintiff was, when in the exercise of proper care, the defendant could or should have seen him or at what point he rode into the street.

However, as in *Koonce v. May*, the evidence offered by plaintiffs in the subject case distinguishes this from the typical "darting child" case. Giving the plaintiff the benefit of all reasonable inferences, as required, the evidence tends to show that defendant conceivably could have seen the minor plaintiff from a distance of between 186 feet and 440 feet away (five seconds at twenty-five miles per hour up to ten seconds at thirty miles per hour). Defendant testified that she first saw the plaintiff when he was half way into the southbound lane. She also testified that between five and ten seconds passed from the time she first saw the defendant until the collision occurred. There were skid marks for fifty-four feet, yet the defendant traveled an additional twenty-five feet after the impact occurred. This evidence as to time and distance creates a question as to whether the defendant kept a reasonable lookout and maintained proper control over her car. The evidence in the record and the legitimate inference arising therefrom does not compel, but permits, a jury finding that the defendant had sufficient stopping time and distance to avoid the accident and resulting injury to the plaintiff if driving in a reasonable manner under the circumstances.

Moreover, in light of the trial judge's characterization of this case as an "extremely close" one, we re-emphasize the following procedural point which has been noted in "borderline cases" such as this:

> Where the question of granting a directed verdict is a close one, the better practice is for the trial judge to reserve his decision on the motion and allow the case to be submitted to the jury. If the jury returns a verdict in favor of the moving party, no decision on the motion is necessary and an appeal may be avoided. If the jury finds for the nonmoving party, the judge may reconsider the motion and enter a judgment not withstanding the verdict under G.S. 1A-1, Rule 50(b), provided he is convinced the evidence was insufficient. On appeal, if the motion proves to have been improperly granted, the appellate court then has the option of ordering entry of the

judgment on the verdict, thereby eliminating the expense and delay involved in a retrial.

Koonce, 59 N.C. App. at 637, 298 S.E.2d at 73; *Manganello*, 291 N.C. at 669-70, 231 S.E.2d at 680; *Wallace*, 60 N.C. App. at 148-49, 298 S.E.2d at 196.

It cannot be said as a matter of law that the plaintiffs' evidence when taken as true and in a light most favorable to them, is insufficient to permit a jury to find that the defendant's negligence caused the minor plaintiff's injuries. Defendant's motion for directed verdict was improperly granted.

Reversed and remanded.

Chief Judge HEDRICK dissents in a separate opinion.

Judge LEWIS concurs.

Chief Judge HEDRICK dissenting.

While the evidence, when considered in the light most favorable to plaintiff, is sufficient, in my opinion, to raise an inference from which the jury could find that defendant might have been negligent in the operation of her motor vehicle in some manner as she approached the intersection of Allison Street and Cannon Avenue, the evidence is not sufficient to allow the jury to find that any negligence upon the part of defendant was a proximate cause of this unfortunate accident.

From the evidence, and from the majority opinion, it is clear that defendant saw the minor plaintiff running across the street, and that defendant applied her brakes and stopped her vehicle within a reasonable distance and time. The evidence discloses that the minor plaintiff ran into the side of defendant's car, not as the majority opinion states: "Plaintiff was struck by the left front quarter panel of defendant's car." The only way defendant could have avoided the accident was not to have operated her vehicle on the street at all, but defendant was operating her vehicle where she had a right to operate it and nothing she did, or did not do, caused the child's injuries.

I vote to affirm Judge Davis' ruling.

JANICE SPAINHOUR KENNEDY v. ROBERT KENNETH KENNEDY

No. 9118DC813

(Filed 20 October 1992)

1. **Divorce and Separation § 392.1[1] (NCI4th)— Child Support Guidelines—father's self-employment income—expense deductions not allowed**

The trial court did not err in a child support action by not deducting certain business expenses from the father's gross receipts from self-employment as a musician where the court determined that those expenses would be incurred whether or not the father was in the music business. The Guidelines vest the trial court with the discretion to disallow the deduction of any business expenses which are inappropriate for the purposes of calculating child support.

Am Jur 2d, Divorce and Separation § 1035.

2. **Divorce and Separation § 400 (NCI4th)— child support—father's rental income—entireties property with new wife—entire income erroneously included**

The trial court erred in a child support action by attributing to the father the entire amount of rental income received by the father and his present wife where the rental property was owned by them in tenancy by the entirety. The father is considered to have received only one-half of the income.

Am Jur 2d, Divorce and Separation § 1041.

3. **Divorce and Separation § 401 (NCI4th)— child support—intentional depression of income**

The trial court erred in a child support action by imputing income to the father where there was no evidence in the record to support a finding that the father deliberately depressed his income.

Am Jur 2d, Divorce and Separation § 1041.

4. **Divorce and Separation § 392.1 (NCI4th)— Child Support Guidelines—child from current marriage—failure to consider**

The trial court erred in a child support action by failing to consider the father's responsibility for his two year old

1. New section pending publication of 1993 supplement.

daughter from his present marriage. The July, 1990 guidelines expressly state that a parent's financial responsibility for his or her children currently residing in the household should be deducted from gross income. By failing to adjust the father's gross income, the trial court failed to properly calculate the presumptive amount of support and was accordingly precluded from properly assessing whether deviation from the Guidelines was necessary.

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

5. **Divorce and Separation § 392.1 (NCI4th)— Child Support Guidelines—monthly health insurance premium—deduction from gross income**

The trial court erred in a child support action by failing to deduct from the mother's monthly gross income the amount of the monthly health insurance premium paid by her to maintain health insurance on the parties' children. Under the Guidelines, if either parent maintains health insurance for the child or children due support, the cost of that coverage for that parent and children only should be deducted from that parent's gross income.

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

6. **Divorce and Separation § 359 (NCI4th)— child custody—modification—no action sua sponte**

The trial court erred by modifying the existing joint custody of a child by entering the order without request from either party. The court may modify custody only upon motion by either party or anyone interested, but may not act *sua sponte.* N.C.G.S. § 50-13.7.

Am Jur 2d, Divorce and Separation §§ 1003, 1006.

Divorce: power of court to modify decree for support of child which was based on agreement of parties. 61 ALR3d 657.

APPEAL by defendant from order filed 1 March 1991 in GUILFORD County District Court by *Judge William A. Vaden.* Heard in the Court of Appeals 15 September 1992.

Wyatt Early Harris Wheeler & Hauser, by A. Doyle Early, Jr. and Lee M. Cecil, for plaintiff-appellee.

C. Richard Tate, Jr. for defendant-appellant.

GREENE, Judge.

Defendant (Father) appeals from a child support order filed 1 March 1991 in the Guilford County District Court.

Plaintiff (Mother) and Father were married in 1972. They have two daughters, Jennifer and Julie, ages 16 and 14, respectively, at the time that the order which is the subject of this appeal was filed. Mother and Father were divorced on 12 August 1985, and both have remarried. Father and his present wife have a two-year-old daughter.

On 5 June 1986, Mother and Father entered into a consent order pursuant to which the parties were awarded joint custody of the children, with the primary residence of the children to be with Mother. Pursuant to this order, Father agreed to pay on a monthly basis child support in the amount of $237.50 per child, and to pay all reasonable medical, dental, and prescription drug expenses incurred on behalf of the children for "as long as he has a duty to support said children." On 1 February 1989, the parties entered into a consent order which provided that Julie would live with Father and Jennifer with Mother, however the order did not change joint custody. The order also provided that each party shall assume and be responsible for the payment of all expenses incurred on behalf of the child in his or her custody, including medical and hospitalization insurance and all reasonable medical, dental, and prescription drug expenses.

On 3 January 1991, Julie returned to Mother's residence to live, and on 9 January 1991, Mother filed a motion requesting that Julie be allowed to permanently reside with her and that Father be ordered to pay child support for both daughters. This motion did not request a modification of custody. The evidence at the hearing on Mother's motion established that Father, a former insurance salesman, is now a self-employed musician who works out of his home. In 1990, Father had gross receipts from music of $45,714.00 and gross income from commissions on insurance policy renewals of $3,651.14. Father and his present wife also received in 1990 $9,000.00 in non-taxable rental income for renting their home for two two-week periods during the High Point furniture market, and $2,700.00 in rental income from the rental of an apartment located on their property. Both the home and the apartment are held by Father and his wife in tenancy by the entirety. Father testified that from his gross receipts from music, he paid the fol-

lowing expenses: agent commissions - $1,710.00; musicians—$18,161.80; refunds—$75.00; office and musical supplies—$2,188.39; utilities—$1,049.38; telephone - $3,101.47; advertising—$1,386.75; travel and entertainment - $795.50; truck lease—$4,896.13; insurance—$1,156.16; maintenance of equipment and vehicles—$2,905.76; taxes - $323.53; depreciation—$2,648.25; interest—$1,870.34; bank charges—$664.70; and miscellaneous expenses —$45.00. According to Father, his net profit in 1990 from self-employment as a musician was $6,967.40, or $580.61 per month.

Mother, a school teacher, testified that her gross income from teaching in 1990 was $21,293.00, or $1,774.00 per month. At trial, Mother contended that Father's monthly gross income is $2,500.00, and, pursuant to the North Carolina Child Support Guidelines, submitted a completed Child Support Obligation Worksheet A which showed the presumptive basic child support amount to be $927.00 per month. Of this amount, Father's share (based on a monthly gross income of $2,500.00) was calculated at 58.5 percent, or $542.00, and Mother's share (based on a monthly gross income of $1,774.00) was calculated at 41.5 percent, or $385.00. After hearing the evidence presented by both parties, the trial court found that:

> 8. [Father] is a self-employed musician doing business as the Ken Kennedy Agency. [Father's] gross income for 1990 was $45,714.42 and after paying agent commissions, insurance commissions and subcontractor musician payments, [Father's] gross income was $29,998.76. [Father] operates his business out of his home, and [Father] has business expenses of $2,188.39 for office and musical supplies, $1,386.75 for advertising, $795.50 for travel and entertainment, $2,648.00 for the purchase of musical equipment and $1,870.34 for interest payments on a loan incurred for the business, which is in the name of [Father's] present wife for tax purposes. The balance after the deduction of these expenses is $20,400.17. [Father] also has expenses for utilities, phone, lease on his 1988 Suburban vehicle, homeowners, automobile and life insurance, maintenance on the home and vehicle and personal property taxes, which total $13,432.43. Most of these expenses would be incurred whether [Father] is in the music business or not. . . .

The trial court also found that (1) Father receives rental income totalling $11,700.00 per year; (2) Father "is capable of earning and does earn a gross income of at least $2500.00 per month" and

Mother earns a gross income of $1,774.00 per month;[1] (3) Mother maintains medical and dental insurance on the two children at a cost to her of $1,650.00 per year; and (4) Father is capable of paying and should pay all reasonable medical, dental, orthodontic, and prescribed drug expenses incurred on behalf of the two children which are not covered by insurance, and any reasonable and necessary extraordinary medical, dental, orthodontic, and prescribed drug expenses after being consulted by Mother prior to such expense being incurred.

The trial court concluded that Father's monthly basic child support obligation is $542.00, and ordered Father to pay this amount and all reasonable and necessary uninsured medical, dental, orthodontic, and prescribed drug expenses incurred on behalf of the children. From this order, Father appeals.

The issues presented are whether, under the applicable North Carolina Child Support Guidelines (the Guidelines), the trial court (I) improperly computed Father's monthly gross income by (A) disallowing certain self-employment expenses claimed by Father, (B) attributing to Father the total amount of rental income received by Father and his present wife for rental of property owned by them in tenancy by the entirety, and (C) imputing income to Father; and (II) erroneously failed to adjust the parties' monthly gross incomes by (A) failing to subtract from Father's monthly gross income Father's responsibility for his daughter from his present marriage, and (B) failing to subtract from Mother's monthly gross income the health insurance premium paid by Mother for the parties' children.

We note at the outset that the resolution of this appeal is determined under the July, 1990 version of the mandatory North Carolina Child Support Guidelines, which were in effect at the time of the trial court's order.

I

Father argues that the trial court improperly calculated his monthly gross income.

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1. The trial court's "findings" regarding the parties' gross incomes are actually conclusions of law rather than findings of fact since the determination of gross income requires the application of fixed rules of law, specifically, the North Carolina Child Support Guidelines. *Lawrence v. Tise*, 107 N.C. App. 140, 145 n.1, 419 S.E.2d 176, 179 n.1 (1992).

A

[1] Father contends that the trial court erroneously refused to deduct certain business expenses from Father's gross receipts from self-employment as a musician. The Guidelines define gross income from self-employment or operation of a business as "gross receipts minus ordinary and necessary expenses required for self-employment or business operation." Under the Guidelines, "ordinary and necessary" expenses do not include those "determined by the court to be inappropriate for determining gross income for the purposes of calculating child support."

In the instant case, the trial court deducted a total of $25,314.25 in business expenses from Father's 1990 gross income of $45,714.42 from self-employment as a musician. The court, however, disallowed expenses incurred by Father for utilities, phone, truck lease, insurance, home and truck maintenance, and personal property taxes, having determined that these expenses "would be incurred whether [Father] is in the music business or not." Because the Guidelines vest the trial court with the discretion to disallow the deduction of any business expenses which are inappropriate for the purposes of calculating child support, *Lawrence v. Tise*, 107 N.C. App. 140, 147-48, 419 S.E.2d 176, 181 (1992), the trial court's decision in the instant case to disallow the claimed expenses must be upheld unless it is "manifestly unsupported by reason" and therefore an abuse of discretion. *See White v. White*, 312 N.C. 770, 777, 324 S.E.2d 829, 833 (1985). Having carefully reviewed the record, we discern no abuse of discretion.

B

[2] Father next contends that the trial court erroneously attributed to Father the entire amount of the rental income received by Father and his present wife. We agree. The evidence in the record establishes that Father and his present wife receive a total of $11,700.00 per year, or an average of $975.00 per month, from the rental of property owned by them in tenancy by the entirety. Under the Guidelines, income from rental property is included in the calculation of a parent's gross income, however, because Father and his wife own the property in tenancy by the entirety, he is considered to have received only one-half of the income, or $487.50 per month. *See* N.C.G.S. § 39-13.6 (1984) (when property is held in tenancy by the entirety, husband and wife have equal right to rents and, for income tax purposes, each spouse is considered

to have received one-half of the income from the property). It was therefore error for the trial court to attribute the full amount of income from the property to Father.

C

[3] Father argues that the trial court improperly imputed income to Father in order to arrive at $2,500.00 as Father's monthly gross income. In support of this argument, Father points to the trial court's finding that Father "is capable of earning" a gross income of "at least" $2,500.00 per month, and to the court's comments at trial regarding Father's income, specifically, "that [Father] could go to McDonald's and make $860.00 a month" and that he "has the capabilities of making at least $2,500.00 a month."

The Guidelines provide that "[i]f a parent is voluntarily unemployed or underemployed, child support shall be calculated based on a determination of potential income . . . ."[2] That is, the trial court must impute income to a parent only if the record supports a finding that the parent is deliberately depressing his income. *See Greer v. Greer*, 101 N.C. App. 351, 355-56, 399 S.E.2d 399, 402 (1991) (person's capacity to earn income may be basis of child support award "if there is a finding that the party deliberately depressed" income); *accord McDonald v. Taylor*, 106 N.C. App. 18, 26, 415 S.E.2d 81, 85 (1992); *see also Lawrence*, 107 N.C. App. at 148, 419 S.E.2d at 181 (in action controlled by July, 1990 Guidelines, evidence that Father is failing to make good faith effort to obtain highest rental income would require trial court to use potential rather than actual rental income). Because there is no evidence in the record to support a finding that Father deliberately depressed his income, the trial court erred in imputing any amount of income to Father.

II

A

[4] Father argues that the trial court improperly calculated Father's basic monthly child support obligation. Specifically, Father argues

2. Under the July, 1990 Guidelines, if the trial court determines that a parent is voluntarily unemployed or underemployed, the court is *required* to impute income. Under the August, 1991 version of the Guidelines, even if the court determines that a parent is voluntarily unemployed or underemployed, the court is vested with *discretion* regarding whether or not to impute income.

that the trial court erroneously failed to take into account Father's responsibility for his two-year-old daughter from his present marriage. We agree.

The July, 1990 Guidelines expressly state that "[t]he amount of financial responsibility a parent has for his or her children currently residing in the household who are not involved in this action should be deducted from gross income." The amount to be deducted "is the amount listed in the Schedule of Basic Child Support Obligations which would represent a support obligation based only on the responsible parent's gross income, without any other adjustments, for the number of children for whom the parent is also responsible."[3] In the instant case, Father presented evidence that he has one daughter from his present marriage and that she lives in his household, therefore, the trial court erred when it failed to take this into account in determining Father's gross income.[4]

B

[5] In addition to failing to properly adjust Father's monthly gross income, the trial court also erroneously failed to subtract from Mother's monthly gross income the amount of the monthly health insurance premium paid by Mother to maintain health insurance on the parties' children. Under the Guidelines, if either parent maintains health insurance for the child or children due support, "the cost of that coverage for that parent and children only should be deducted from that parent's gross income." Because Mother's

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3. Under the current version of the Guidelines (August, 1991), the reduction is based upon the combined income of both parents of the "other" child or children, and the amount to be subtracted is one-half of the amount listed in the Schedule of Basic Child Support Obligations.

4. Mother argues that the trial court's failure to adjust Father's income in light of the evidence of his "other" daughter simply constitutes a proper variance, or deviation, from the Guidelines. We disagree. A trial court cannot *properly* deviate from the Guidelines without first calculating, pursuant to the applicable Guidelines, the presumptive amount of support. Only after the presumptive amount of support has been properly determined may the trial court, after hearing evidence regarding the reasonable needs of the child for support and the relative ability of each parent to provide support, decide whether that amount fails to meet or exceeds the reasonable needs of the child for support, thus allowing a deviation from the Guideline amount. *See generally Browne v. Browne*, 101 N.C. App. 617, 621-26, 400 S.E.2d 736, 739-41 (1991). In the instant case, the trial court, by failing to adjust Father's gross income, failed to properly calculate the presumptive amount of support, and was accordingly precluded from properly assessing whether deviation was necessary. Thus, we reject Mother's contention in this regard.

evidence established that she pays the premiums for health insurance on the children, that amount should have been deducted from her gross income.

[6] We note that in its order the trial court, without request from either party, modified the existing joint custody of Julie and gave Mother sole custody and Father reasonable visitation rights. Father argues and Mother concedes that the trial court was without authority to do so, and we agree. The trial court may modify custody only upon motion by either party or "anyone interested." N.C.G.S. § 50-13.7 (1987). The trial court may not *sua sponte* enter an order modifying a previously entered custody decree.

Because of the errors outlined in this opinion, the order of the trial court is vacated and remanded. On remand, the trial court shall, using the July, 1990 Guidelines, redetermine the parties' child support obligations based on the evidence in the record and consistent with this opinion.

Vacated and remanded.

Judges WELLS and ORR concur.

JOHN D. TUTTERROW AND GLOBAL INTERNATIONAL, INC., PLAINTIFF-APPELLEE v. RONALD MANSFIELD LEACH, HERBERT J. ABEDON, FIDELITY NATIONAL TRUST, AND FIRST FIDELITY REVENUE TRUST, LTD., DEFENDANT-APPELLANT

No. 9110DC476

(Filed 20 October 1992)

Process § 9.1 (NCI3d)— out of state defendants—lack of personal jurisdiction

The trial court erred by denying defendants' motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(2) based on lack of personal jurisdiction where plaintiffs brought an action for breach of contract, fraud, and unfair and deceptive trade practices based upon defendants' alleged failure to issue a performance bond after plaintiff had paid a $5,000 fee for that purpose. It could not be discerned from the record where the performance bond was to be delivered, so that jurisdiction does not

follow under the long-arm statute. The contacts between defendants and North Carolina were insufficient to fulfill the necessary due process requirements in that defendants never solicited their business within North Carolina; the contract was created over the telephone and was later memorialized when plaintiff Tutterrow drafted a letter and sent it to defendant Leach in Rhode Island; the only contacts between the parties other than telephone conversations consisted of a handful of letters; none of the letters indicated that the performance bond would be delivered by defendants to plaintiffs in North Carolina; the agreement provided that defendants would perform acts outside North Carolina; any services actually rendered by defendants were performed in Rhode Island; and defendants' affidavits indicate no other business dealings or activities in relation to North Carolina prior to the contract with plaintiffs. A finding of *in personam* jurisdiction would clearly violate defendants' due process rights. N.C.G.S. § 1-75.4.

Am Jur 2d, Process §§ 175, 186-191.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

APPEAL by defendants from order entered 7 February 1991 by *Judge James R. Fullwood* in WAKE County District Court. Heard in the Court of Appeals 12 March 1992.

David H. Rogers for plaintiff appellees.

Futrell, Hunter & Knutson, by Archie W. Futrell III, for defendant appellants.

COZORT, Judge.

Plaintiffs brought an action against defendants alleging breach of contract, fraud, and unfair and deceptive trade practices. Defendants made a motion to dismiss pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (1990), based on lack of personal jurisdiction. The trial court denied the motion to dismiss, and defendants now appeal. We reverse.

Plaintiff John D. Tutterrow is the president and chief executive officer of plaintiff Global International, Inc. ("Global"), a Nevada

corporation with its principal place of business in Wake County, North Carolina. In the spring of 1990, Mr. Tutterrow learned about an open request for bids for the construction of a desalinization plant in Abu Dhabi. Mr. Tutterrow made a written request for information about the bid, but after reviewing the material, he believed he could not qualify for the project. Subsequently, while on a business trip, Tutterrow became acquainted with Olu Olayemi. Tutterrow and Olayemi discussed international business, and Tutterrow expressed his disappointment at being unable to bid on the Abu Dhabi project. Mr. Olayemi informed Tutterrow that he represented an investment banking firm in Rhode Island which could help solve Tutterrow's problems. Olayemi told Tutterrow to contact defendant Ronald Mansfield Leach in Rhode Island. Tutterrow thereafter consulted Mr. Leach by telephone and the two discussed how Leach's companies, Fidelity National Trust ("Fidelity"), and First Fidelity Revenue Trust Ltd. ("First Fidelity"), could help Tutterrow secure a performance bond necessary for the construction bid.

On 15 May 1990, Tutterrow and Leach entered into an oral contract by telephone which was memorialized later the same day in a letter sent from Tutterrow by facsimile to Leach in Rhode Island. The parties agreed that a certificate of deposit would be used as security to obtain a performance completion bond which would be sent to Abu Dhabi. The letter stated in pertinent part:

> It is agreed that Global will send $5,000 USD to Fidelity National Trust's attorney Herbert J. Abedon, Esq. as fees. It is agreed that Fidelity National Trust/Mr. R. Leach will use a 15 Million USD certificate of deposit as an instrument to show Global's net worth as such in order to place a 15 Million USD Construction Completion Bond (Performance Bond) to Gulf Utilities of Abu Dhabi from a rated bonding company acceptable to the Abu Dhabi Government.
>
> It is agreed that Fidelity National Trust will cause a Letter of Intent from this Rated Bonding Company to be faxed to Gulf Utilities within 36 hours of receipt of the $5,000 fee showing evidence that a 15 Million USD Performance Bond will follow in a timely manner.

One of Tutterrow's business associates, an Illinois resident, sent a check drawn on a California bank to defendant Abedon. When no performance bond was ever obtained, plaintiffs filed an

action against defendants alleging breach of contract, fraud, and unfair and deceptive trade practices. Plaintiffs sued for damages in the amount of $5,000.00, plus lost profits and attorney's fees. Defendants moved for dismissal pursuant to N.C. Gen. Stat. § 1A-1, Rule 12(b)(2) (1990), based on lack of personal jurisdiction, and filed affidavits in support. The trial court made finding of fact and conclusions of law and entered an order holding that personal jurisdiction was conferred over all the defendants pursuant to N.C. Gen. Stat. § 1-75.4 (1983). Defendants argue on appeal that the evidence before the trial court failed to establish *in personam* jurisdiction pursuant to N.C. Gen. Stat. § 1-75.4, and the exercise of jurisdiction violates due process of law. We agree that the trial court erred.

The jurisdictional issue in this case involves a two-part analysis. First, we must determine whether N.C. Gen. Stat. § 1-75.4, North Carolina's "long arm" statute, confers *in personam* jurisdiction over the defendants. We then must decide whether the exercise of such jurisdiction would violate due process of law. *Mony Credit Corp. v. Ultra-Funding Corp.*, 100 N.C. App. 646, 648, 397 S.E.2d 757, 758 (1990). The crucial inquiry and the ultimate determinative factor in assessing whether jurisdiction may be asserted under the long-arm statute is due process. *Phoenix America Corp. v. Brissey*, 46 N.C. App. 527, 530, 265 S.E.2d 476, 479 (1980).

In the case below, the trial court did not indicate which subsection of the long-arm statute conferred jurisdiction over the defendants. Plaintiffs contend several subsections of the long-arm statute apply in this case. A review of the subsections, in conjunction with the evidence presented in the record, discloses that only two provisions, N.C. Gen. Stat. §§ 1-75.4(5)(1) and (5)(c), have the potential for establishing jurisdiction. N.C. Gen. Stat. § 1-75.4 provides in part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * * *
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> a. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the

defendant to perform services within this State or to pay for services to be performed in this State by the plaintiff; or

* * * *

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value; . . .

The provisions of N.C. Gen. Stat. § 1-75.4 are to be liberally construed in favor of finding personal jurisdiction subject only to due process considerations. *Munchak Corp. v. Riko Enter., Inc.*, 368 F. Supp. 1366, 1371 (M.D.N.C. 1973). Accordingly, if the evidence supports a finding which comports with one of the above provisions, jurisdiction will follow under the long-arm statute. The trial court's order included the following finding of fact:

> The aforesaid construction performance bond, or a suitable documentation and evidence of it, was intended by the parties to be delivered by the Defendants or their agents to the Plaintiffs, for use by the Plaintiffs in and from their principal places of business in North Carolina.

Defendants dispute this finding by arguing that no evidence exists in the record to show the parties intended the bond to be delivered to North Carolina. We have reviewed the record carefully and cannot discern where the performance bond was to be delivered. Neither plaintiffs' complaint nor any of the correspondence between the parties indicates the bond was to be sent to North Carolina. However, as in *Modern Globe, Inc. v. Spellman*, 45 N.C. App. 618, 263 S.E.2d 859, *disc. review denied*, 300 N.C. 373, 267 S.E.2d 677 (1980), we do not need to determine whether the contract is in accord with either N.C. Gen. Stat. §§ 1-75.4(5)(a) or (5)(c), "since we hold that even if the statute is satisfied here, due process is not." *Modern Globe*, 45 N.C. App. at 623, 263 S.E.2d at 863.

To determine whether due process has been violated by a particular grant of jurisdiction, we apply the standard set out in *International Shoe Co. v. Washington*, 326 U.S. 310, 90 L.Ed. 95 (1945): a defendant must have certain minimum contacts with our state "such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" *Id.* at 316, 90 L.Ed. at 102. Our Supreme Court, in *Chadbourn, Inc. v. Katz*,

285 N.C. 700, 208 S.E.2d 676 (1974), emphasized that despite the liberal trend toward exercising personal jurisdiction over nonresident defendants, minimum contacts between the defendant and the forum state are absolutely necessary for our state to invoke jurisdiction. The Court explained:

> Application of the "minimum contacts" rule "will vary with the quality and nature of the defendant's activity, but it is essential in each case that there be some act by which the defendant purposefully avails itself of the privilege of conducting activities within the forum State, thus invoking the benefits and protections of its laws."

Id., at 705, 208 S.E.2d at 679 (quoting *Hanson v. Denckla,* 357 U.S. 235, 253, 2 L.Ed.2d 1283, 1298 (1958)). Whether the activity of the defendant adequately satisfies due process depends upon the facts of each case. *Perkins v. Benguet Consol. Mining Co.*, 342 U.S. 437, 445, 96 L.Ed. 485, 492 (1952). Factors to be considered when undertaking to analyze whether minimum contacts are present include the quantity of the contacts, the nature and quality of the contacts, and the source and connection of the cause of action with those contacts. *Phoenix America,* 46 N.C. App. at 531, 265 S.E.2d at 479. The analysis also requires the Court to weigh and to consider the interests of and fairness to both the plaintiff and the defendant. The touchstone remains, however, that the defendant must have engaged in purposeful activity within our state by which he or she may be said to have invoked the benefits and protections of the law of our state. *Farmer v. Ferris,* 260 N.C. 619, 625, 133 S.E.2d 492, 497 (1963).

It is undisputed that an isolated contract may be the basis for the exercise of personal jurisdiction over a nonresident defendant. *McGee v. International Life Ins. Co.*, 355 U.S. 220, 223, 2 L.Ed.2d 223, 226 (1957). Clearly, when the contract is to be performed in North Carolina and has a substantial connection to our state, jurisdiction is proper. *Staley v. Homeland, Inc.*, 368 F. Supp. 1344, 1350 (E.D.N.C. 1974). The mere act, however, of entering into a contract with a resident of a forum state will not provide sufficient minimum contacts with that forum. *Phoenix America,* 46 N.C. App. at 532, 265 S.E.2d at 480. For example, in *Modern Globe*, this Court found neither the contract nor the defendant's activities surrounding the contractual relationship to provide satisfactory minimum contacts to meet the requirements of due process.

The following factors gave rise to that decision: the contract was entered into outside of North Carolina; the contract was governed by the law of another state; there was no provision in the contract requiring defendant to perform services in North Carolina; any services performed were performed outside of North Carolina; and defendant had never been to North Carolina for any purpose.

For reasons similar to those articulated in *Modern Globe*, we find the contacts between defendants and North Carolina to be insufficient to fulfill the necessary due process requirements. The record reflects that defendants never solicited their business within North Carolina; in fact, plaintiff Tutterrow was the first to initiate any contact with defendants. Defendant Leach stated in a letter written to plaintiff Tutterrow prior to the institution of this action, "[Y]ou were referred by Mr. Olayemi, we did not solicit any business from you," and, "I accepted this request primarily because of a business relationship with Mr. Olayemi." The contract was created over the telephone and was later memorialized when plaintiff Tutterrow drafted a letter and sent it to defendant Leach in Rhode Island. The only contacts between the parties other than telephone conversations consisted of a handful of letters. None of the letters indicated the performance bond would be delivered by defendants to plaintiffs in North Carolina. Rather, the agreement provided that defendants would "place a [performance bond] to Gulf Utilities of Abu Dhabi from a rated bonding company acceptable to the Abu Dhabi Government," acts clearly to be performed outside of North Carolina. Any services actually rendered by defendants were performed at Fidelity National's offices in Rhode Island. Furthermore, defendants' affidavits indicate no other business dealings or activities in relation to North Carolina prior to the contract with plaintiffs. Defendant Abedon's only connection to the contract was the receipt of the $5,000.00 check sent by plaintiffs from Illinois and drawn on a California bank.

A finding of *in personam* jurisdiction in the case at bar would clearly violate defendants' due process rights. We therefore reverse the trial court and remand the cause to the district court for an entry of an order dismissing plaintiffs' complaint.

Reversed and remanded.

Judges JOHNSON and GREENE concur.

BARNEY K. HUANG v. NORTH CAROLINA STATE UNIVERSITY, NORTH CAROLINA STATE UNIVERSITY BOARD OF TRUSTEES, AND BRUCE R. POULTON

No. 9110SC5

(Filed 20 October 1992)

1. Administrative Law and Procedure § 58 (NCI4th)— state university—breach of contract claim—summary judgment for plaintiff—exhaustion of administrative remedies

Plaintiff had not exhausted his administrative remedies before filing an action in superior court where he had been a tenured professor at NCSU; he was arrested for attempted rape and eventually convicted and imprisoned for assault on a female; he was suspended without pay and eventually terminated; he exercised his rights to appeal pursuant to the administrative remedies available in the Code of Governors of the University of North Carolina, which governs the dismissal and suspension of tenured faculty members in the University system; plaintiff filed a complaint in superior court while review was pending before the Board of Governors of the University of North Carolina; and the Board subsequently rendered a decision awarding plaintiff his salary during the time of his suspension. Plaintiff did not exhaust his University remedies prior to filing his claim in superior court because the petition to the Board was pending when the claim was filed in superior court; the premature filing was not cured when the Board rendered a decision before the superior court entered summary judgment because the trial court did not have before it the complete administrative record as required by N.C.G.S. § 150B-47. Furthermore, the correct procedure for seeking review of an administrative decision is to file a petition explicitly stating exceptions to the administrative decision rather than a complaint seeking compensatory and punitive damages.

Am Jur 2d, Administrative Law §§ 595, 605.

2. Administrative Law and Procedure § 52 (NCI4th)— exhaustion of administrative remedies—inadequacy of administrative remedy

Plaintiff failed to properly raise the issue of inadequacy of administrative remedies in an action in superior court arising from the termination of his position as a tenured professor

at NCSU where there was nothing in his complaint in superior court or the record on appeal to show that he raised the issue in the trial court.

Am Jur 2d, Administrative Law §§ 595, 605.

APPEAL by defendant North Carolina State University from order entered 26 July 1990 in WAKE County Superior Court by *Judge George R. Greene.* Heard in the Court of Appeals 15 September 1992.

Jones Avery and Willis, by Allen D. Avery and Maola Jones, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Thomas J. Ziko, for the State.

GREENE, Judge.

Defendant North Carolina State University (NCSU) appeals from summary judgment in favor of plaintiff Dr. Barney Huang (Huang) on breach of contract claim. Huang filed a complaint in the superior court alleging breach of contract and intentional infliction of emotional distress by NCSU. NCSU filed an answer asserting that the court lacked jurisdiction over Huang's contract claim because Huang failed to exhaust the administrative remedies available to him. Both parties filed motions for summary judgment. The trial court granted Huang summary judgment on the contract claim. At a later hearing summary judgment for NCSU was granted on Huang's claim for intentional infliction of emotional distress. NCSU appeals summary judgment in favor of Huang on the contract claim.

Huang was a tenured professor at NCSU. In July 1988, Huang was arrested for attempted rape. Based on this criminal charge and previous complaints of alleged physical assault and verbal abuse by Huang against his colleagues, NCSU Chancellor Bruce R. Poulton (Poulton) notified Huang that NCSU intended to dismiss him from the faculty and suspended him with pay pending dismissal. Section 603 of The Code of the Board of Governors of the University of North Carolina (the Code) governs the dismissal and suspension of tenured faculty members in the University system and outlines the administrative remedies available to faculty members who contend that their suspension or dismissal is unjust. The Code requires that suspension of a faculty member be with full pay. Pursuant

to the administrative remedies available in the Code, Huang requested a hearing on the proposed dismissal before the Faculty Hearing Committee (Committee). Three days prior to the scheduled hearing, Huang was found not guilty of the rape charge, but was convicted and imprisoned on the lesser charge of assault on a female.[1] Upon learning of this conviction, Poulton notified Huang that his salary was to be terminated effective 1 January 1989. Due to Huang's incarceration, the Committee hearing was postponed until 5 January 1989. The Committee returned a finding on 1 February 1989 that Huang was guilty of misconduct great enough to render him unfit to serve as a faculty member and recommended his discharge. Poulton accepted the Committee's recommendation and discharged Huang on 7 February 1989. Pursuant to the Code, Huang appealed both Poulton's decision to dismiss him and the termination of his salary during the period of his suspension to the NCSU Board of Trustees (Trustees). The Trustees found against Huang on both these issues, whereupon Huang exercised his right under the Code to appeal the Trustees' decision by petitioning to the Board of Governors of the University of North Carolina (Board). The Board agreed to accept portions of Huang's petition. While the Board review was pending, Huang filed his complaint in superior court. Subsequent to the filing of Huang's complaint in superior court, the Board did render a decision which awarded Huang his salary during the time of his suspension.

NCSU contends that the superior court lacked jurisdiction over Huang's contract claim because Huang failed to exhaust his administrative remedies before filing his claim. Huang contends that he had exhausted his administrative remedies because the Board had reached its final decision prior to the time summary judgment was actually granted by the trial court. He also contends, in the alternative, that he was free to file his claim against NCSU directly in the superior court without exhausting administrative remedies because administrative action could not grant him the relief to which he is allegedly entitled.

The questions presented are: (I) whether Huang exhausted his administrative remedies prior to filing his claim in the superior

1. This Court overturned Huang's conviction for assault on a female and granted him a new trial due to erroneously admitted evidence concerning post-traumatic stress disorder. *State v. Huang*, 99 N.C. App. 658, 394 S.E.2d 279 (1990).

court; and (II) if not, whether Huang asserted a claim for which remedies under the Code are inadequate.

I

[1] The Administrative Procedure Act (APA), as codified in N.C.G.S. § 150B, establishes a uniform system of administrative and adjudicatory procedures for state agencies. Among these procedures are administrative remedies by which persons who are aggrieved by agency actions can seek redress. N.C.G.S. §§ 150B-38 – 150B-42 (1991). The administrative remedies available under the APA include the assignment of a contested case to an administrative law judge and the rendering of the agency's final decision on the case based on the findings of the administrative law judge. *Id.* If the results of these procedures are not satisfactory to the aggrieved party, judicial review of the agency's final decision is available under N.C.G.S. § 150B-43, which provides

> [a]ny person who is aggrieved by the final decision in a contested case, and who has exhausted all administrative remedies made available to him by statute or agency rule, is entitled to judicial review of the decision under this Article [4], unless adequate procedure for judicial review is provided by another statute . . . .

N.C.G.S. § 150B-43 (1991). Thus, five requirements must generally be satisfied before a party may ask a court to rule on an adverse administrative determination: (1) the person must be aggrieved; (2) there must be a contested case; (3) there must be a final agency decision; (4) administrative remedies must be exhausted; and (5) no other adequate procedure for judicial review can be provided by another statute. *Dyer v. Bradshaw*, 54 N.C. App. 136, 138, 282 S.E.2d 548, 550 (1981) (interpreting the same provision as contained in former N.C.G.S. § 150A-43 (1973)); *Presnell v. Pell*, 298 N.C. 715, 721, 260 S.E.2d 611, 615 (1979) ("where the legislature has provided . . . an effective administrative remedy, that remedy is exclusive and its relief must be exhausted before recourse . . . to the courts").

The actions of the University of North Carolina (University), of which NCSU is a part, are specifically made subject to the judicial review procedures of N.C.G.S. § 150B-43. N.C.G.S. § 150B-1(f) (1991). The University is, however, exempt from all administrative remedies outlined in the APA. *Id.* Because no statutory ad-

ministrative remedies are made available to employees of the University, those who have grievances with the University have available only those administrative remedies provided by the rules and regulations of the University and must exhaust those remedies before having access to the courts. Therefore, before a party may ask the courts for relief from a University decision: (1) the person must be aggrieved; (2) there must be a contested case; and (3) the administrative remedies provided by the University must be exhausted.

There is no debate between the parties that Huang is an aggrieved party and that there exists a contested case, and we therefore assume their existence. NCSU argues, and we agree, that Huang did not exhaust the administrative remedies provided by the University prior to the filing of his claim in superior court.

The University system, through the agency rules set forth in the Code, allows Huang several levels of appeal. Section 603 of the Code allowed Huang to appeal first to the Committee, then to the Trustees, and finally to the Board. Huang appealed to the Committee, then to the Trustees, and finally to the Board. In each appeal he alleged that NCSU had violated the Code by dismissing him without cause and by terminating his salary during suspension in violation of the Code requirement that suspension be with full pay. This petition was pending before the Board when Huang filed his claim in superior court. Accordingly, Huang did not exhaust his University remedies prior to filing his claim in superior court and the court therefore did not have jurisdiction.

In so holding, we reject Huang's argument that the premature filing in superior court was cured because the Board actually rendered a decision before the superior court entered summary judgment. To adopt Huang's contention would make it impossible for the trial court to perform its function of reviewing the administrative proceedings based on the completed administrative record. *See Presnell*, 298 N.C. at 721-22, 260 S.E.2d at 615. The trial court did not have before it the complete administrative record, as required by N.C.G.S. § 150B-47. Indeed the trial court conducted a *de novo* hearing, not a review of the record of the agency proceedings. This is so even though the trial court was made aware of the Board's decision prior to entering summary judgment. Furthermore, Huang filed a complaint in superior court seeking compensatory and punitive damages. The correct procedure for seeking

review of an administrative decision is to file a petition in the court "explicitly stat[ing] what exceptions are taken to the [administrative] decision." N.C.G.S. §§ 150B-45, 46 (1991). This judicial review is to be conducted without a jury. N.C.G.S. § 150B-50 (1991). Huang specifically requested a jury trial.

In summary, the policy of requiring the exhaustion of administrative remedies prior to the filing of court actions "does not require merely the initiation of prescribed administrative procedures, but that they should be pursued to their appropriate conclusion and their final outcome awaited before seeking judicial intervention . . . ." 2 Am. Jur. 2d *Administrative Law* § 608 (1962). This Huang did not do.

II

[2] In the alternative, Huang argues that because the administrative relief provided by the Code did not permit full redress of his claims, he was not required to exhaust his administrative remedies prior to filing his claim in the superior court. Huang correctly states the general principle that "exhaustion of [administrative] remedies is not required when the only remedies available from the agency are shown to be inadequate." 5 Jacob A. Stein *et al.*, Administrative Law § 49.02[1] (1992); *Honig v. Doe*, 484 U.S. 305, 327, 98 L. Ed. 2d 686, 709 (1988) (bypass of administrative process permitted "where exhaustion would be futile or inadequate"); *see also Orange County v. North Carolina Dept. of Transp.*, 46 N.C. App. 350, 376-77, 265 S.E.2d 890, 907-08 (1980). The burden of showing the inadequacy of the administrative remedy is on the party claiming the inadequacy, *Honig*, 484 U.S. at 327, 98 L. Ed. 2d at 709, and the party making such a claim must include such allegation in the complaint. *Snuggs v. Stanly County Dept. of Public Health*, 310 N.C. 739, 740, 314 S.E.2d 528, 529 (1984). The remedy is considered inadequate unless it is "calculated to give relief more or less commensurate with the claim." L. Jaffe, Judicial Control of Administrative Action, at 426 (1965). For example, if a party seeks monetary damages and the agency is powerless to grant such relief, the administrative remedy is inadequate. *See* Stein at § 49.02[1]. In determining the adequacy of administrative remedies, the complaint should be "carefully scrutinized to ensure that the claim for relief [is] not inserted for the sole purpose of avoiding the exhaustion rule." *Plano v. Baker*, 504 F.2d 595, 599 (2d Cir. 1974).

Huang claims in his complaint that he is entitled to recover "all amounts withheld since January 1, 1989, in salary and benefits, plus interest" and "compensatory and punitive damages." He now claims that the administrative remedies available under the Code do not provide him an opportunity for monetary relief to the same degree requested in the complaint. Huang therefore contends that the superior court had jurisdiction to adjudicate his claim. We disagree. There is nothing in Huang's complaint filed in the superior court and nothing in this record to show that Huang raised in the trial court the alleged inadequacy of his administrative remedies. He has therefore failed to properly raise the issue and the complaint should have been dismissed by the trial court.

The summary judgment is therefore

Vacated.

Judges WELLS and ORR concur.

CROWELL CONSTRUCTORS, INC., PETITIONER-APPELLANT v. NORTH CAROLINA DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, RESPONDENT-APPELLEE

No. 9112SC576

(Filed 20 October 1992)

1. Mines and Minerals § 2 (NCI3d)— mining without permit—penalty—violations prior to notice

A civil penalty for mining without a permit may be assessed for violations of the Mining Act which occurred prior to the operator's receipt of notice of the violations as long as notice is received by the operator before the civil penalty is assessed. N.C.G.S. § 74-64(a)(1)a.

Am Jur 2d, Mines and Minerals §§ 175, 176.

2. Mines and Minerals § 2 (NCI3d)— mining without permit—affected area—measurement by pacing

There was substantial competent evidence to support the Mining Commission's determination that the affected land upon which petitioner was mining without a permit constituted

greater than one acre in violation of N.C.G.S. § 74-50 on the dates in question where an inspector "paced off" an affected area of 1.18 acres; the evidence indicated that although "pacing" is not a completely accurate method of measurement, this method usually results in a conservative estimate in the operator's favor; this measurement excluded two areas which should have been considered as part of the mine site; and the site was later measured with a tape and determined to be 1.58 acres.

Am Jur 2d, Mines and Minerals §§ 239-245.

APPEAL by petitioner from judgment entered 18 February 1991 by *Judge Gregory A. Weeks* in CUMBERLAND County Superior Court. Heard in the Court of Appeals 8 April 1992.

McCoy Weaver Wiggins Cleveland & Raper, by Richard M. Wiggins and Kimbrell Kelly Tucker, for petitioner appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Kathryn Jones Cooper, for respondent appellee.

COZORT, Judge.

Petitioner appeals from a judgment affirming a final agency decision issued by the North Carolina Mining Commission ("Mining Commission"), which imposed a $26,000.00 civil penalty against petitioner for mining without a permit. Petitioner contends the Mining Commission erred in imposing penalties for violations which occurred prior to its receiving notice of the violations pursuant to N.C. Gen. Stat. § 74-64(a)(1)a. (Cum. Supp. 1991) and alleges there is no substantial evidence in the record to support a conclusion that petitioner mined without a permit. We disagree and affirm.

Petitioner Crowell Constructors, Inc. ("Crowell"), purchased a tract of land in Robeson County in January 1986 for the purpose of removing sand from the subsurface of the plot. The sand was to be used in Crowell's asphalt plant in Fayetteville and for other construction projects. On 27 March 1986, Mr. Gerald Lee, an environmental technician employed by respondent North Carolina Department of Environment, Health and Natural Resources, visited the site and prepared a mining inspection report in which he indicated that based on his "stepping off" the dimensions of the pit and stockpile area, the mine site was 1.16 to 1.18 acres. Mr.

Lee revisited the site on 6 May 1986 and determined that 75% of the stockpiled sand that was on site during his prior visit had been removed; the pit area remained as it was on 27 March 1986. On 14 May 1986, Mr. Lee once again inspected the area and discovered the entire stockpile had been removed. Following the inspections, the respondent sent Crowell a notice of violation for mining without a permit. Crowell received the notice on 22 May 1986, but continued to work at the site until 27 May 1986, due to the company's inability to contact the project manager to close down the operation. On 28 May 1986, Mr. Lee, along with Mr. Joe Glass, one of respondent's regional engineers, physically measured the site with a tape measure and determined the affected area of the mine site to be approximately 1.58 acres. Thereafter, on 14 April 1987, the director of the Division of Land Resources, an agency of respondent Department, assessed a civil penalty of $15,000.00 against Crowell for mining without a permit on three dates. Later, records obtained from Crowell revealed that Crowell had engaged in mining activity on 11 dates in addition to the dates specified in the 14 April assessment. The director amended the earlier assessment and added the additional violations for mining without a permit. The new civil penalty assessed on 20 October 1987 totalled $26,000.00 and covered 14 days of violations. Crowell appealed the penalty assessment and was granted an administrative hearing on the matter.

On 6 April 1988, Administrative Law Judge Thomas R. West ("ALJ") conducted a hearing in accordance with the North Carolina Mining Act, N.C. Gen. Stat. § 74-46 *et seq.*, (1985) and the North Carolina Administrative Procedures Act, N.C. Gen. Stat. § 150B-1 *et seq.*, (1991) ("APA"). The purpose of the hearing was to determine whether respondent held the authority to issue a penalty against petitioner and whether a penalty in the amount of $26,000.00 was reasonable and appropriate under the circumstances. Judge West issued a recommended decision on 22 February 1989 which suggested a $4,000.00 penalty be assessed against Crowell for violations of the Mining Act on four dates. Pursuant to N.C. Gen. Stat. § 74-61 (1985), the Mining Commission reviewed the ALJ's recommendation and issued a final agency decision on 30 October 1989 which generally supported the director's initial findings that Crowell had mined without a permit on 14 dates. The Mining Commission then imposed a civil penalty in the amount of $26,000.00 against petitioner. Petitioner appealed to Cumberland County Superior

Court. Superior Court Judge Gregory A. Weeks affirmed the final agency decision. Petitioner appeals to this Court.

Our standard of review is dictated by the APA, and specifically by N.C. Gen. Stat. § 150B-51(b) which states:

> [T]he court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions, or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority or jurisdiction of the agency;
>
> (3) Made upon unlawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

N.C. Gen. Stat. § 150B-51(b) (1991). The scope of review applied by an appellate court when reviewing a decision of a lower court is the same as in other civil cases. *Henderson v. N.C. Dep't of Human Resources*, 91 N.C. App. 527, 530, 372 S.E.2d 887, 889 (1988). Thus, our review is limited to determining whether the superior court committed any errors of law. The applicable scope of review in the present case is the "whole record" test. When the test is applied, the reviewing court is required to take into account all of the evidence, including that which supports the findings and contradictory evidence. *Mt. Olive Home Health Care Agency, Inc. v. N.C. Dep't of Human Resources*, 78 N.C. App. 224, 228, 336 S.E.2d 625, 627 (1985). We now consider whether the trial court made any errors of law in light of the record considered as a whole.

[1] The first issue petitioner raises on appeal requires us to interpret N.C. Gen. Stat. § 74-64(a)(1)a. which reads:

> A civil penalty of not more than five thousand dollars ($5,000) may be assessed by the Department against any person who

> fails to secure a valid operating permit prior to engaging in mining, as required by G.S. 74-50. No civil penalty shall be assessed until the operator has been given notice of the violation pursuant to G.S. 74-60. Each day of a continuing violation shall constitute a separate violation and a civil penalty of not more than five thousand dollars ($5,000) per day may be assessed for each day the violation continues.

Petitioner contends that the above statutory provision limits respondent's ability to assess a civil penalty against Crowell to violations which occurred after *receipt* of notice of the violation. Conversely, respondent argues the statute allows the department to assess civil penalties against Crowell for violations of the Mining Act which occurred prior to petitioner's receipt of the notice of violation as long as the notice is received by the operator before the civil penalty is assessed. In the case below, Crowell received notice of the violation on 22 May 1986, but was assessed penalties for violations which took place on several dates prior to 22 May. Petitioner contends that the penalties prior to 22 May are improper because Crowell had no notice it was in violation of the mining statute. Additionally, petitioner advances the policy argument that a reading of the statute contrary to Crowell's interpretation would lead to unfair results in that the agency could sit idly by until violations had accumulated and then send notice of violations assessing large penalties. We disagree with petitioner's contentions.

N.C. Gen. Stat. § 74-64(a)(1)a. states only that "[n]o civil penalty shall be *assessed* until the operator has been given notice of the violation pursuant to G.S. 74-60." The statute means exactly what it says, that is, the only notice required must be sent to the violator prior to the *assessment* of any penalty. Nowhere does the statute indicate that violations which occurred prior to receipt of notice of the violation should be exempt from penalty. Rather, we find the notice requirement serves essentially to provide the procedural due process guaranteed to violators and nothing more. Furthermore, a reading of the administrative rule promulgated in conjunction with N.C. Gen. Stat. § 74-64(a)(1)a. dispels any doubt about our interpretation of the notice provision. The rule states:

> In determining whether to assess a civil penalty *for any violation committed prior or subsequent to receipt of the notice of violation*, the director shall consider whether the violator ceased mining, restored the affected area, or otherwise com-

> plied with the requirements of the notice of the violation and shall also consider the various criteria in Regulation 5F .0007. The civil penalty assessment shall specify with reasonable particularity the violation(s) for which the penalty has been assessed and shall be transmitted to the violator by certified or registered mail, return receipt requested.

N.C. Admin. Code tit. 15A, r. 5F .0005(b) (1988) (emphasis added). Accordingly, we conclude the trial court did not err in upholding the Mining Commission's assessment of a civil penalty in the total amount of $26,000.00 against petitioner for mining without a permit on the days prior to and subsequent to 22 May 1986 when Crowell received the notice of the violation.

[2] Petitioner next contends that the trial court erred in finding substantial evidence in the record to support the Mining Commission's conclusion that Crowell had mined without a permit within the meaning of N.C. Gen. Stat. § 74-50 (1985). As noted above, we apply the "whole record" test to determine if the findings and conclusions of the Mining Commission, which were in turn upheld by the trial court, are supported by competent, material, and substantial evidence. Our review of the whole record discloses that substantial evidence was present to support the Mining Commission's conclusions.

"Mining" is defined by statute as:

> a. The breaking of the surface soil in order to facilitate or accomplish the extraction or removal of minerals, ores, or other solid matter,
>
> b. Any activity or process constituting all or part of a process for the extraction or removal of minerals, ores, soils, and other solid matter from its original location,
>
> c. The preparation, washing, cleaning, or other treatment of minerals, ores, or other solid matter so as to make them suitable for commercial, industrial, or construction use.
>
> It shall not include those aspects of deep mining not having significant effect on the surface, where the affected land does not exceed one acre in area. It shall not include mining operations where the affected land does not exceed one acre in area.

N.C. Gen. Stat. § 74-49(7) (Cum. Supp. 1991). "Affected land" is defined as being "the surface area of land that is mined, the surface area of land on which overburden and waste is deposited, and the surface area of land used for processing or treatment plant, stockpiles, and settling ponds." N.C. Gen. Stat. § 74-49(1). Crowell disputes the initial measurement of the affected land taken by Mr. Lee on 27 March 1986 when Lee "paced off" an area greater than one acre. Crowell submits that no accurate measure of the area was made until 28 May 1986 when the site was measured with a tape and determined to be 1.58 acres. Evidence in the record indicates that although "pacing" is not a completely accurate method of measurement, the approximation usually results in a conservative estimate in the operator's favor. In addition, Mr. Lee's first measurement of the site excluded the cleared area adjacent to the pit and the access road; both should have been considered part of the mine site. We find this evidence to be competent, material, and substantial to support the Mining Commission's determination that the affected land upon which petitioner was mining without a permit constituted greater than one acre in violation of N.C. Gen. Stat. § 74-50.

Petitioner's final issue raised on appeal has not been properly preserved for review. Petitioner contends the Mining Commission's penalty assessment was arbitrary and capricious, yet no assignment of error in the record challenges the decision on that basis. Because petitioner failed to properly designate an assignment of error pursuant to N.C.R. App. P. 10(c), he has waived the right to argue whether the Mining Commission's imposition of the $26,000.00 penalty was arbitrary and capricious. Nonetheless, in our discretion, we have reviewed the record to determine whether the penalty was arbitrary and capricious, and we find it was not. The trial court's judgment upholding the final agency decision of the Mining Commission is

Affirmed.

Judges PARKER and GREENE concur.

BUNCOMBE COUNTY BY AND THROUGH ITS CHILD ENFORCEMENT SUPPORT AGENCY, EX REL. MARY FRANCES LOMBROIA, AND MARY FRANCES LOMBROIA, PLAINTIFFS/APPELLEES v. RONALD E. PEEK, DEFENDANT/APPELLANT

No. 9128DC1068

(Filed 20 October 1992)

Divorce and Separation § 420 (NCI4th)— child support—paternity action and support order reversed—bond order also reversed

The trial court's order requiring defendant to post a cash bond to secure enforcement of a child support order must be reversed where the Court of Appeals reversed the underlying paternity action and remanded for a new trial and, as a result thereof, also reversed the child support order.

Am Jur 2d, Bastards § 128.

APPEAL by defendant from order entered 16 May 1992 by *Judge Shirley Brown* in BUNCOMBE County District Court. This action was consolidated with two other actions for appeal, No. 9128DC853 and No. 9128DC869, and heard in the Court of Appeals 16 September 1992.

Sutton & Edmonds, by John R. Sutton, for plaintiff-appellee.

Buncombe County Child Support Enforcement Agency, by Carol A. Saliba, for plaintiff-appellee Buncombe County IV-D Agency.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for defendant-appellant.

WYNN, Judge.

This case was consolidated for appeal with two prior actions: a paternity action in which the defendant was adjudicated to be the father of the subject minor child; and, a subsequent child support action in which the defendant was ordered to pay child support. The subject appeal is a challenge to the trial court's order requiring defendant to post a cash bond to secure enforcement of the child support judgment. We reversed the underlying paternity action, *Lombroia v. Peek*, and remanded that case to the District Court for a new trial. As a result of our holding in *Lombroia v. Peek*, we reversed the Child Support Order. It follows

that we must also reverse the Security Bond Order and remand to the District Court for appropriate action.

Reversed and remanded.

Chief Judge HEDRICK and Judge LEWIS concur.

LONG DRIVE APARTMENTS, PLAINTIFF/APPELLEE v. TESSIE PARKER, DEFENDANT/APPELLANT

No. 9120DC898

(Filed 20 October 1992)

1. **Landlord and Tenant § 13.1 (NCI3d)— federally subsidized private housing—material noncompliance under lease—termination of electrical services**

The trial court did not err in a summary ejectment action by concluding that plaintiff was entitled to possession of the premises due to material noncompliance with the lease where the lease stipulated that defendant would provide electrical services to the apartment and the evidence at trial showed that defendant's electricity was terminated three times for nonpayment of amounts due. Although defendant contended that the lease violations do not rise to the level of "material noncompliance" so as to warrant ejectment, that interpretation fails to consider the express language of the lease agreement setting forth specific violations for which ejection may be sought. The evidence was sufficient to support a finding that defendant's failure to maintain electricity was characterized by the lease as a "Substantial Violation," and, furthermore, defendant had "created a physical hazard" and therefore materially breached the lease by allowing the electricity in her apartment to be cut off during periods of freezing temperatures.

Am Jur 2d, Landlord and Tenant §§ 175, 1039.

2. **Landlord and Tenant § 13.1 (NCI3d)— lease—material breach—waiver of right to terminate**

Plaintiff did not waive its right to terminate a lease through certain provisions in the Notice to Quit and Vacate where

the Notice did not, as defendant contended, provide defendant an opportunity to cure the breach, but merely afforded the tenant an opportunity to discuss the termination with the manager within ten days and specifically stated without qualification that the tenant must quit and vacate by the specified date. Plaintiff was not estopped from terminating the lease because it had twice before allowed defendant to remain on the premises after the breach was cured because there was no evidence that plaintiff intended to relinquish its rights under the lease. Additionally, the HUD-approved lease precludes automatic waiver where the landlord has acquiesced to certain past conduct in violation of the lease agreement.

Am Jur 2d, Landlord and Tenant §§ 175, 1039.

APPEAL by defendant from judgment entered 21 May 1991 in RICHMOND County District Court by *Judge Kenneth W. Honeycutt.* Heard in the Court of Appeals 22 September 1992.

Plaintiff Long Drive Apartments instituted this summary ejectment action against defendant Tessie Parker. Plaintiff operates a private housing complex which receives monthly subsidies from the United States Department of Housing and Urban Development (HUD) on behalf of low income tenants pursuant to Section 8 of the United States Housing Act of 1987. The defendant qualifies for and receives a rent subsidy from HUD and therefore does not pay any rent to plaintiff. For the same reason, defendant also receives a utility check from plaintiff which is required to be paid to Carolina Power & Light (CP&L), the utility services provider for the leased premises.

Defendant and her family moved into Long Drive Apartments in March of 1989. Plaintiff and defendant entered into a written lease agreement which stipulated, in pertinent part, that defendant agree to maintain electrical services to the leased premises. The lease agreement also provided that failure to maintain electricity would constitute a "Substantial Violation" of the lease agreement.

The evidence at trial tends to establish that on three separate occasions, defendant's electricity was terminated by reason of nonpayment of amounts due to the utility, CP&L. Defendant also endorsed and cashed the utility checks she received from plaintiff rather than sending them directly to CP&L. After electrical services were terminated for the third time, plaintiff notified defendant

that her failure to maintain electricity was a substantial violation of the lease agreement and delivered two Notices to Quit and Vacate, demanding surrender of the leased premises by 18 February 1991.

Plaintiff then brought a summary ejectment action against defendant in small claims court. The magistrate awarded plaintiff possession of the leased premises. Defendant appealed the magistrate's decision to the district court. The court conducted a trial *de novo* and granted plaintiff an order of ejectment. Defendant appeals.

Law Offices of Mark C. Kirby, by Mark C. Kirby and Howard S. Kohn, for plaintiff-appellee.

North State Legal Services, by Candace Carraway and Carlene McNulty, for defendant-appellant.

WELLS, Judge.

[1] Defendant first contends that the trial court erred in concluding that plaintiff was entitled to possession of the premises because plaintiff did not prove "material noncompliance" with the lease. Second, defendant contends that the trial court erroneously concluded that plaintiff had not waived its right to terminate the lease. We find no error.

Defendant asserts that the alleged lease violations do not rise to the level of "material noncompliance" so as to warrant ejectment. Paragraph 23 of the lease agreement provides:

> The Landlord may terminate this Agreement only for: (1) the Tenant's material noncompliance with the terms of this Agreement; (2) the Tenant's material failure to carry out obligations under any State Landlord and Tenant Act; or (3) other good cause. . . . Material noncompliance includes, but is not limited to, nonpayment of rent, beyond any grace period available under State law; failure to reimburse the Landlord within 30 days for repairs made under Paragraph 11 of this Agreement; three late payments in a twelve month period; permitting unauthorized persons to live in the unit; serious or repeated damage to the unit or common areas; creation of physical hazards; serious or repeated interference with the rights and quiet enjoyment of other tenants; failure to repay unauthorized assistance payments; and giving the Landlord false information

regarding income or other factors considered in determining the Tenant's rent.

Defendant argues that "material noncompliance" is conduct which would constitute "good cause" for termination. Defendant asserts that to uphold an eviction for "good cause," it must be shown that a tenant's conduct so seriously injures or poses a hazard to the complex or other tenants that the tenant is no longer entitled to occupancy. Therefore, defendant contends, plaintiff may not evict defendant for material noncompliance (*i.e.* good cause) unless he has adversely affected the other tenants or the apartment complex.

Defendant's interpretation of material noncompliance as requiring "good cause," fails to consider the express language in the lease agreement setting forth the specific violations for which ejection may be sought. Plaintiff, under paragraph 23 of the lease agreement, elected to terminate defendant's tenancy for "material noncompliance" which is specifically defined in the lease to include "serious or repeated damage *to the unit* or common areas; [or] *creation of physical hazards*." (Emphasis added.) The lease does not require, in addition to "material noncompliance," proof of "other good cause" to support termination. The trial court found and we agree that plaintiff sustained its burden in proving "material noncompliance" as that term is defined in the lease.

The evidence presented is sufficient to support a finding that the failure to maintain electricity is characterized by the lease itself as a "Substantial Violation." Furthermore, defendant *had* "created a physical hazard" and therefore materially breached the lease by allowing the electricity in her apartment to be cut off during periods of freezing temperatures. Such conditions could cause adverse effects such as unsanitary conditions, frozen pipes, risk of fire, and uninsurability. The fact that there was no actual physical damage to the premises is immaterial. *See Maxton Housing Authority v. McLean*, 70 N.C. App. 550, 320 S.E.2d 322 (1984), *rev'd on other grounds*, 313 N.C. 277, 328 S.E.2d 290 (1985). This portion of the lease was designed to preserve the safety of the dwelling unit and fellow tenants by permitting termination where a tenant is in material breach of the lease agreement. Therefore, allowing termination of electrical services creates a physical hazard sufficient to constitute "material noncompliance" under this lease.

The cases relied on by defendant requiring a separate showing of "good cause" for termination are inapposite. One Fourth Circuit

case merely held that a landlord could not terminate a federally subsidized housing lease at the end of a successive term without good cause. In other words, there must a reason for termination of the tenancy besides the expiration of the lease term in the case of federally subsidized housing. *See Swann v. Gastonia Housing Authority*, 675 F.2d 1342 (1982). Another case which required a showing of "good cause" for termination was strictly limited to tenants living in *public housing* as opposed to private tenancies. *Goler Metropolitan Apartments v. Williams*, 43 N.C. App. 648, 260 S.E.2d 146 (1979). None of these cases added a "good cause" requirement to termination for a tenant's material noncompliance with the lease.

[2] Having found defendant to have materially breached the lease agreement, the question becomes whether plaintiff waived its right to terminate the lease. Defendant asserts that plaintiff's Notice to Quit and Vacate gave defendant the opportunity to cure the breach by providing proof that electrical service was restored within ten days. Defendant argues that in giving an alternative to forfeiture, plaintiff waived its right to forfeiture when defendant met the condition of the notice because the notice constituted an election to continue the lease in effect if certain conditions were met.

The evidence does not support defendant's contention. The Notice to Quit and Vacate, by its express terms, did not provide defendant with an opportunity to cure. The notice merely afforded the tenant the opportunity to discuss the termination with the manager within ten days. Furthermore, the notice specifically stated, without qualification, that the tenant must quit and vacate by the date contained therein.

Defendant next argues that plaintiff is estopped from terminating the lease because plaintiff had twice before allowed defendant to remain on the leased premises after she restored her power. Plaintiff's prior actions, defendant contends, constituted an implied promise not to strictly enforce the part of the lease requiring maintenance of electrical services. This "implied waiver" lulled defendant into thinking that failure to maintain electrical services would not be grounds for eviction if she could cure within ten days.

Again, we find this argument to be without merit. In order to prove waiver by estoppel, defendant must show that there was an express or implied promise on the part of the plaintiff to waive its right to terminate the lease and that defendant detrimentally

relied upon such promise. The essential elements of waiver are the "existence at the time of the alleged waiver of a right, advantage or benefit, the knowledge, actual or constructive, of the existence thereof, *and an intention to relinquish such right*, advantage or benefit." *J. W. Cross Industries v. Warner Hardware Co.*, 94 N.C. App. 184, 379 S.E.2d 649 (1989). (Emphasis added.) The question of whether the plaintiff intended to excuse a lease violation must be inferred from the facts and circumstances. *Id.* On the evidence in this case, it would be absurd to conclude that plaintiff impliedly waived its right to terminate by allowing defendant to cure on past occasions. There was no course of conduct between the parties that would have lulled the defendant into believing future lease violations of this nature would be tolerated. There was no evidence presented from which it could be inferred that plaintiff intended to excuse defendant's failure to maintain electricity. Furthermore, evidence of plaintiff's conduct does not raise the inference that plaintiff did not intend to declare the lease forfeited if defendant materially breached the lease. In short, there was no evidence that plaintiff intended to relinquish its rights under the lease. In addition, the HUD-approved lease agreement between the parties clearly states:

> 28. **NON-WAIVER:** Failure of the Landlord to insist upon the strict performance of the terms, covenants, agreements and conditions herein contained, or any of them, shall not constitute or be construed as a waiver or relinquishment of the Landlord's rights thereinafter to enforce any such terms, covenants, agreements, or conditions, but the same shall continue in full force and effect.

This section precludes an automatic waiver where the landlord has acquiesced to certain past conduct in violation of the lease agreement. The fact that plaintiff allowed defendant to cure her breach on two prior occasions would not indicate the relinquishment of its right to terminate for all future violations. If that were the case, a landlord could never give a tenant a second chance after an initial breach without risk that the landlord and fellow tenants would be condemned to suffer a series of infinite breaches of their safety and security.

Since defendant was in material noncompliance with the lease agreement and plaintiff had not waived its right to terminate,

we find the trial court's awarding possession of the leased premises to the plaintiff to be correct.

No error.

Judges ORR and GREENE concur.

JIMMY CLAY HARRINGTON v. BARBARA J. STEVENS, ADMINISTRATOR OF THE ESTATE OF ROBERT STEVEN STEVENS, A/K/A ROBERT STEVEN BANNER, JOSEPH MARION HENSON, AND NATIONWIDE MUTUAL INSURANCE COMPANY

No. 9122SC849

(Filed 20 October 1992)

Insurance § 528 (NCI4th)— injured party living with father and brother—UIM coverages—no stacking under father's and brother's policies

An insured of the first class residing in the same household with his father and brother was not entitled to stack UIM coverages under personal automobile policies issued to plaintiff's father and brother where plaintiff was an adult who was not dependent on his father for support; plaintiff purchased his own automobile insurance; and there was no evidence that the father or brother would benefit if the plaintiff should be allowed to stack the UIM coverages in their policies.

Am Jur 2d, Automobile Insurance § 329.

Combining or "stacking" uninsured motorist coverages provided in policies issued by different insurers to different insureds. 28 ALR4th 362.

Combining or "stacking" uninsured motorist coverages provided in separate policies by same insurer to different insureds. 23 ALR4th 108.

Judge WELLS dissenting.

APPEAL by defendant from judgment filed 7 June 1991 in ALEXANDER County Superior Court by *Judge Lester P. Martin,*

Jr., granting plaintiff's motion for summary judgment. Heard in the Court of Appeals 16 September 1992.

Joel C. Harbinson for plaintiff-appellee.

Nichols, Caffrey, Hill, Evans & Murrelle, by Paul D. Coates and ToNola D. Brown, for defendant-appellant Nationwide Mutual Insurance Company.

GREENE, Judge.

Plaintiff Jimmy Clay Harrington was injured on 24 July 1988 when his car was struck by a car driven by Robert Steven Stevens (Stevens). With respect to the injuries plaintiff sustained in the accident, the car driven by Stevens was underinsured. Pursuant to plaintiff's auto insurance policy, defendant Nationwide Mutual Insurance Company (Nationwide) provided plaintiff with underinsured motorist coverage (UIM), and paid plaintiff pursuant to his personal policy. At the time of the accident, plaintiff resided in the same household with his father, Crafton, and his brother, Rickey. Nationwide had also issued personal automobile policies to plaintiff's father and brother. Plaintiff's brother's policy covered two separate motor vehicles and provided UIM coverage for bodily injury in the amount of $50,000.00 per person and $100,000.00 per occurrence. Plaintiff's father's policy also covered two vehicles and provided UIM coverage for bodily injury in the amount of $50,000.00 per person and $100,000.00 per occurrence. Plaintiff sought "inter-policy" stacking of his brother's and father's policies, and within each of the two policies sought "intra-policy" stacking. Thus, plaintiff sought total coverage of $200,000.00 from Nationwide based on these two policies. At trial, Judge Martin heard cross-motions for summary judgment and granted plaintiff's motion. Defendant Nationwide appeals.

The issue is whether all persons insured of the first class are permitted to stack UIM coverages.

Both parties to this appeal agree that N.C.G.S. § 20-279.21(b)(4) is governing in this case. As part of the Motor Vehicles Safety and Financial Responsibility Act of 1953, N.C.G.S. § 20-279.21(b)(4) was enacted to prevail over relevant language in underinsured motorist coverages and allow stacking of underinsured motorist

coverage. Section 279.21(b)(4), as it existed at the time of the accident, provided in relevant part:

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

N.C.G.S. § 20-279.21(b)(4) (1989).

In *Harris v. Nationwide Mutual Insurance Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), our Supreme Court addressed the issue of whether N.C.G.S. § 279.21(b)(4) allows a non-policy owner to stack UIM coverages. The Court, without deciding whether the statute allows only the "owner" to stack UIM coverages, held that if the non-owner is a (1) spouse or relative of the policy owner, (2) resides in the same household as the policy owner, and (3) the policy owner benefits if the non-owner is allowed to stack UIM coverages in the owner's policy, stacking of the policy owner's UIM coverages by the non-owner is permitted. *Harris*, 332 N.C. at 193-94, 420 S.E.2d at 130.

In *Harris*, the Court held that because the policy owners would benefit if their minor daughter Michelle K. Harris, who lived in her parents' household, was allowed to stack the UIM coverages in her parents' policies, stacking was permitted. As noted by the *Harris* Court, Michelle, as a minor

> was under no duty to honor any contract of insurance she might have purchased on her own. . . . Therefore, Michelle was dependent on her parents for insurance coverage. Also, since Michelle was a minor at the time of the accident, it was her parents' duty to support her to the best of their abilities. . . . By discharging their duty of support and protecting their daughter, the [policy owner parents] plainly "benefit" by limiting their out of pocket expenses, as well as increasing their peace of mind.

Harris, 332 N.C. at 194, 420 S.E.2d at 130 (citations omitted). In conclusion, the Court in a very narrow holding held that the minor plaintiff, "as a nonowner family member living in the same household as the named insured, is entitled to stack UIM coverages under her parents' policy." *Id.* Accordingly, we do not read *Harris*, as plaintiff suggests, as permitting all persons insured of the first class to stack UIM coverages. *See Crowder v. North Carolina Farm Bureau Mut. Ins. Co.*, 79 N.C. App. 551, 554, 340 S.E.2d 127, 129, *disc. rev. denied*, 316 N.C. 731, 345 S.E.2d 387 (1986) (defining persons insured of the first class as a spouse or relative of the named insured who is a resident of the named insured's household). The Court emphasized throughout the opinion the necessity of finding a "benefit" running to the owner of the policies as a prerequisite to stacking by a non-owner. Therefore, if there is no "benefit" running to the owner, there is no stacking of UIM coverages.

In this case, although the plaintiff is a family member residing in the household of his father and brother, there is no evidence that the father or brother would benefit if the plaintiff were allowed to stack the underinsurance coverages in the father's and brother's policies. The plaintiff, as an adult with children of his own, was not dependent, as was Michelle in the *Harris* case, on his father for support. The plaintiff was fully responsible for purchasing his own insurance and in fact did so. Accordingly, the order of the trial court must be reversed, and remanded for entry of summary judgment in favor of defendant Nationwide.

Reversed and remanded.

Judge ORR concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

In my opinion, the clear teachings of *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); *Bass v. N.C. Farm Bureau Mutual Ins. Co.*, 332 N.C. 109, 418 S.E.2d 221 (1992); *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 382 S.E.2d 759, *rehearing denied*, 325 N.C. 437, 384 S.E.2d 546 (1989); *Amos v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 629, 406 S.E.2d 652 (1991), *affirmed*, 332 N.C. 340, 420 S.E.2d 123 (1992);

and now *Grain Dealers Mutual Insurance Co. v. Long*, 332 N.C. 477, 421 S.E.2d 142 (1992), is that as an insured of the first class residing in the same household with his father and brother, plaintiff is entitled to stack both his father's and brother's UIM coverages. In my opinion, the "benefits" discussion in *Harris v. Nationwide Mutual Insurance Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), does not alter this fundamental rule, and I therefore vote to affirm the trial court.

I believe it appropriate to express my concern that if the "benefit" predicate driving the majority opinion is correct, this and other such cases would not be appropriate for summary disposition, as the issue of who might be an intended "beneficiary" in such cases could only be determined by a trier of fact.

GLENDA S. GUM, PLAINTIFF-APPELLEE v. HOWARD L. GUM, DEFENDANT-APPELLANT

No. 9128DC886

(Filed 20 October 1992)

1. Divorce and Separation § 123 (NCI4th)— equitable distribution—post-separation appreciation of marital assets—distribution improper

The trial court erred in distributing the post-separation passive appreciation of two marital assets equally between the parties because post-separation appreciation of a marital asset, whether passive or due to the efforts of an individual spouse, is not marital property and cannot be distributed by the trial court. Rather, the increase in the value of marital assets between the date of separation and the date of the equitable distribution is a factor which the court must consider in its determination of what constitutes an equitable distribution of the marital estate. N.C.G.S. §§ 50-20(c)(1), (c)(11a), (c)(12).

Am Jur 2d, Divorce and Separation §§ 870, 878-880, 915.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. Divorce and Separation § 150 (NCI4th)— equitable distribution—child custody not distributional factor—need for marital home inapplicable

The fact that plaintiff wife has custody of the children born of the marriage is not alone a proper distributional factor pursuant to N.C.G.S. § 50-20(c). Furthermore, the provision of N.C.G.S. § 50-20(c)(4) permitting the court to consider the need of a custodial parent to occupy or own the marital residence was inapplicable where the marital residence had been sold by the parties prior to the equitable distribution trial.

Am Jur 2d, Divorce and Separation §§ 915-929.

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation § 152 (NCI4th)— equitable distribution—distributional factor—monetary value not required

The trial court in an equitable distribution proceeding was not required to place a monetary value on plaintiff wife's direct contribution to defendant husband's legal education and career development in order to consider this contribution as a distributional factor. N.C.G.S. § 50-20(c)(8).

Am Jur 2d, Divorce and Separation §§ 915, 937, 943.

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

4. Divorce and Separation § 180 (NCI4th)— equitable distribution—unequal division—appellate review

The trial court's determination that an unequal division of the marital property is equitable will not be disturbed on appeal absent a clear showing of an abuse of discretion.

Am Jur 2d, Divorce and Separation § 930; Appeal and Error §§ 772-775.

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

5. Appeal and Error § 342 (NCI4th)— cross-assignment of error—failure to give notice of appeal

Plaintiff's attempted cross-appeal is dismissed where plaintiff set forth two assignments of error in the record on appeal requesting that the trial court's equitable distribution order

be reversed in part but plaintiff failed to file a written notice of appeal in accordance with Appellate Procedure Rule 3(a).

Am Jur 2d, Appeal and Error § 678.

APPEAL by defendant from order entered 10 July 1990 in BUNCOMBE County District Court by *Judge Peter L. Roda.* Heard in the Court of Appeals 21 September 1992.

Plaintiff instituted this action on 3 December 1987 by complaint requesting alimony without divorce, child custody and support, and equitable distribution. By separate action, the parties were granted an absolute divorce on 28 March 1988, and on 13 May 1991 the trial court entered an order of equitable distribution. The court valued the net marital estate at $57,769.00 and awarded 75% of the estate to plaintiff wife and 25% to defendant husband. In doing so, the court found as facts:

> That because of the Plaintiff's [Wife's] providing for the legal education of the Defendant [Husband], and because of her necessity to remain in the home and care for the parties' children, therefore being unable to enhance her own earning capacity; it would be equitable that the Plaintiff [Wife] receive a greater share of the property of the parties and therefore a division of the marital property allowing the Plaintiff [Wife] to receive a 75% and the Defendant [Husband] 25% would be equitable.

The court then concluded as a matter of law:

> That because of the difference in the income of the parties as shown in the Findings of Fact and because the wife has the custody of the children and because of the direct contribution made by the wife to educate and develop the career potential of the husband, an unequal distribution of the property would be equitable and a division giving the wife 75% of the marital assets . . . would be an equitable distribution.

The court further found that two marital assets, one being the marital interest in the building housing defendant husband's law practice and the other being the escrow account into which the proceeds from the sale of the marital home had been placed, had increased in value since the date of the parties' separation in a total net amount of $19,941.41. The court then "determine[d] that said increase in value of the assets should be equally divided

between the parties and therefore each party to receive $9,745.71 of said increase. . . . "

Defendant appeals from the entry of the order of equitable distribution.

John E. Shackelford for plaintiff-appellee.

Adams, Hendon, Carson, Crow & Saenger, P.A., by S. J. Crow and Lori M. Glenn, for defendant-appellant.

LEWIS, Judge.

[1] We will first address appellant's second argument wherein he contends that the trial court erred in distributing the post-separation appreciation of two of the marital assets equally between the parties. Specifically, the court found that the building housing the defendant's law firm was in part marital property and distributed the marital interest in the building to defendant husband. The court then found that the building had increased in value between the date of separation and the date of trial as the result of "passive appreciation" and mortgage reduction in the net amount of $16,955.67. The court also found that the escrow account containing the proceeds from the sale of the marital home was marital property and distributed that account to plaintiff wife. The court then concluded that the account had increased in value by $3,272.01 since the date of separation. The court ordered that the appreciation of both assets be distributed by awarding plaintiff wife the entire $3,272.01 from the growth of the escrow account and by ordering defendant husband to pay plaintiff wife cash in the amount of $6,473.70 in order to bring her total share of the combined appreciation to 50%. We agree that the trial court erred in this distribution.

Pursuant to N.C.G.S. § 50-20(a), the trial court may only distribute marital property. N.C.G.S. § 50-20(a) (Supp. 1991); *Wade v. Wade*, 72 N.C. App. 372, 378, 325 S.E.2d 260, 267, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985). N.C.G.S. § 50-20(b)(1) specifically defines "marital property" to mean only that property acquired "before the date of the separation." N.C.G.S. § 50-20(b)(1) (Supp. 1991). Post-separation appreciation of a marital asset, whether passive appreciation or appreciation due to the efforts of an individual spouse, is not therefore marital property and cannot be

distributed by the trial court. *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988).

The increase in the value of marital assets between the date of separation and the date of the equitable distribution trial is a factor which the court must consider in its determination of what constitutes an equitable distribution of the marital estate pursuant to N.C.G.S. §§ 50-20(c)(1), (c)(11a), or (c)(12); *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). In this particular case, the trial court found that both assets gained value as the result of "passive appreciation" rather than as the result of the individual effort of either party. The applicable sections of the statute in this case would therefore be (c)(1) or (c)(12). Rather than distributing the sums representing the appreciation, the trial court must consider the existence of this appreciation, determine to whose benefit the increase in value will accrue, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable.

Defendant further argues that the trial court erred in finding as fact that the value of the building had increased due to passive appreciation rather than due to his individual efforts following separation. Findings of fact by the trial court are upheld on appeal as long as they are supported by competent evidence. *Lawing v. Lawing*, 81 N.C. App. 159, 162, 344 S.E.2d 100, 104 (1986). Defendant appellant has failed to provide this Court with a transcript of the proceedings at the trial level and the record does not contain a recitation of the evidence presented. As appellant has the burden of showing error, we must assume that this finding by the trial court was in fact supported by competent evidence.

Defendant also argues that the trial court erred in finding and concluding that 75%-25% division of the marital estate is an equitable division of the marital property. The order of the trial court states that the unequal division is supported by "the difference of the income of the parties . . ., [the fact that] the wife has the custody of the children," and the fact that the wife made direct contributions to the legal education and career development of defendant husband by securing employment which provided the income for the support and maintenance of the family while defendant attended law school. Defendant contends that the trial court erred in considering custody and erred in failing to place a monetary

value upon plaintiff's "direct contributions" to defendant's education prior to finding that contribution as a distributional factor.

[2] We agree that the fact that plaintiff wife has custody of the children born of the marriage is not alone a proper distributional factor pursuant to N.C.G.S. § 50-20(c). Section (c)(4) of the statute mandates that the court consider "[t]he need of a parent with custody of a child or children of the marriage to occupy or own the marital residence and to use or own its household effects." N.C.G.S. § 50-20(c)(4) (Supp. 1991). In the present case, the marital residence had been sold by the parties prior to the equitable distribution trial and there is no mention in the record of the household effects of the parties nor of the need of plaintiff to have the use of those effects in order to properly care for the children.

Further, custody is not an appropriate consideration within § (c)(12). The only factors considered "just and proper" within the meaning of that section are those relating to "the source, availability, and use by a wife and husband of economic resources during the course of their marriage." *Smith v. Smith*, 314 N.C. 80, 86, 331 S.E.2d 682, 686 (1985). In addition, N.C.G.S. § 50-20(f) specifically requires that the court "provide for an equitable distribution without regard to alimony for either party or support of the children of both parties." N.C.G.S. § 50-20(f) (Supp. 1991).

[3] We do not agree with defendant husband's contention that the court is required to place a value on what it found to be plaintiff wife's "direct" contribution to defendant's legal education and career development. The trial court specifically found that plaintiff provided the income needed to support and maintain the couple while defendant attended law school and further found that plaintiff remained in the home and cared for the children born of the marriage thereby allowing defendant to gain experience in the practice of law and increase his earning potential. The trial court is required to consider evidence of such contributions as a distributional factor according to N.C.G.S. § 50-20(c)(8). There is no language within § (c) which would indicate that the trial court is required to place a monetary value on any distributional factor and we decline to impose such an unnecessary burden upon the trial court.

[4] Finally, defendant argues that the division of 75% of the marital assets to plaintiff wife and 25% to defendant husband was not equitable. As we are remanding this matter to the trial court to

re-evaluate the distribution of marital assets in accordance with this opinion, we do not specifically address this contention. We will note, however, that the trial court's determination that this unequal division is equitable will not be disturbed on appeal absent a clear showing of an abuse of discretion. *White v. White*, 312 N.C. 770, 776-77, 324 S.E.2d 829, 832-33 (1985).

[5] Plaintiff has attempted to cross-appeal by setting forth two assignments of error in the record on appeal requesting that the equitable distribution order of the trial court be reversed in part. Plaintiff did not, however, file a written notice of appeal in accordance with Rule 3(a) of the North Carolina Rules of Appellate Procedure. As "[a]ppellate Rule 3 is jurisdictional," *Currin-Dillehay Building Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, 683, *disc. rev. denied*, 327 N.C. 633, 399 S.E.2d 326 (1990), plaintiff's cross-appeal must be dismissed.

The order of equitable distribution is vacated and the matter is remanded to the trial court for an entry of judgment in accordance with this opinion. Plaintiff's cross-appeal is dismissed.

Chief Judge HEDRICK and Judge WYNN concur.

HENDERSON & CORBIN, INC., D/B/A HCI GENERAL CONTRACTORS v. WEST CARTERET WATER CORPORATION, INC.

WEST CARTERET WATER CORPORATION, INC. v. PENNSYLVANIA NATIONAL INSURANCE COMPANIES

No. 913SC746

(Filed 20 October 1992)

Contracts § 15 (NCI4th)— tentative acceptance of bid—contract not formed

A "tentative notice of award" of a contract for construction of a water treatment plant which stated that it was subject to final review and approval by the Farmer's Home Administration was not a valid acceptance of plaintiff's bid, and no contract was ever formed where plaintiff withdrew

its bid after the expiration of the sixty-day period during which bids were irrevocable.

Am Jur 2d, Public Works and Contracts § 63.

APPEAL by defendant West Carteret Water Corporation from order entered 26 April 1991 in CARTERET County Superior Court by *Judge Quentin T. Sumner.* Heard in the Court of Appeals 25 August 1992.

John E. Bugg, P.A., by John E. Bugg, for plaintiff-appellee and defendant-appellee.

Lamar Jones for defendant-appellant.

GREENE, Judge.

Henderson and Corbin, Inc. (HCI) brought suit against West Carteret Water Corporation (West Carteret) 26 March 1990 seeking to enjoin West Carteret from taking any action to recover against HCI or its surety, Pennsylvania National Insurance Companies (Insurance Co.), for damages resulting from HCI's failure to perform on a bid entered for a construction project. The damages HCI sought to enjoin included the forfeiture of its bid bond. HCI also sought a declaratory judgment allowing HCI to withdraw its bid on the project. West Carteret moved for summary judgment. West Carteret then filed a complaint against Insurance Co. seeking to recover the full amount of the bid bond. Insurance Co. and HCI moved for summary judgment against West Carteret on the ground that HCI properly withdrew its bid because it was not timely accepted by West Carteret. The trial court consolidated the motions for hearing. West Carteret's motion for summary judgment against HCI was denied because the court found that genuine issues of material fact existed as to whether HCI should be allowed to withdraw their bid based on mistake. HCI's and Insurance Co.'s motions for summary judgment were granted. West Carteret appeals summary judgment in favor of Insurance Co. and HCI.

West Carteret is a private, non-profit corporation organized to provide water to residents in western Carteret County. In late 1989, West Carteret issued an invitation for bids for the construction of a water treatment plant, which they anticipated would be funded through the Farmer's Home Administration (FmHA). A five

percent bid bond was required for all bids. The information for bidders provided by West Carteret stated that

> [n]o BIDDER may withdraw a BID within 60 days after the actual date of the opening thereof. Should there be reasons why the contract cannot be awarded within the specified period, the time may be extended by mutual agreement between the OWNER and the BIDDER.
>
> . . .
>
> The party to whom the contract is awarded will be required to execute the Agreement and obtain the performance BOND and payment BOND within ten (10) calendar days from the date when NOTICE OF AWARD is delivered to the BIDDER.
>
> . . .
>
> All applicable laws, ordinances, and the rules and regulations of all authorities having jurisdiction over construction of the PROJECT shall apply to the contract throughout.

The information for bidders defined notice of award as "[t]he written notice of the acceptance of the BID from the OWNER to the successful BIDDER." The regulations of the FmHA provided that the "contract documents, bid bonds, and bid tabulation sheets will be forwarded to FmHA for approval prior to awarding."

When bids were opened on 30 January 1990, HCI had submitted the low bid for the project, accompanied by a bid bond of $54,550.00 for which Insurance Co. was surety. Immediately after bid opening HCI discovered that it had inadvertently omitted the complete cost of electrical work from the bid. HCI notified West Carteret of the mistake and asked to be allowed to withdraw the bid. West Carteret refused. During the time period when HCI and West Carteret were discussing withdrawal of the allegedly mistaken bid, it was discovered that West Carteret would need additional funding of $700,000.00 from FmHA to complete the project.

On 20 March 1990, less than 60 days after bids were opened, West Carteret's project engineer sent HCI a notice of award. The notice of award was a pre-printed form document which stated that HCI's bid had been accepted and also contained the ten-day time limit for execution and furnishing of bonds. Typed on the printed form was the following notation: "This is a tentative Notice of Award subject to Farmer[']s Home Administration review and

approval." The cover sheet which accompanied the tentative notice of award contained the following: "Please take notice that these are tentative Award Notices, subject to final review and approval by Farmer[']s Home Administration." West Carteret's project engineer stated that the acceptance was made tentative because the project costs were more than originally contemplated and FmHA funding for the full amount had not yet been approved. Specifically, he testified that he "was instructed by the Farmer's Home to tentatively award [the contract]." HCI never executed an agreement to perform the work nor furnished a contractor's performance or payment bond. Within ten days after the award, HCI filed its complaint against West Carteret. West Carteret made no further attempt to award the project within the sixty-day period.

The trial court granted partial summary judgment in favor of HCI and Insurance Co., finding the tentative notice of award ineffective as an acceptance. Because there was not an effective acceptance of HCI's bid during the sixty-day period when the bid was irrevocable, no contract was ever formed. HCI was therefore free, as a matter of law, to withdraw its bid after the sixty days had passed.

The dispositive issue is whether the notice of award was a valid acceptance of the bid.

West Carteret contends that the notice of award was an acceptance of the bid and created a contract. The fact that the award was subject to FmHA approval, West Carteret argues, did not relate to the formation of the contract but instead to the performance of the contract. HCI contends that because the notice of award was labeled "tentative," the acceptance of the bid was equivocal and a contract was never formed between HCI and West Carteret.

The formation of a contract is usually conditioned upon the existence of an offer and an acceptance. John D. Calamari & Joseph M. Perillo, Contracts § 11-1 (3d ed. 1987) (hereinafter *Calamari*). Once the presence of an offer and acceptance is decided, questions may arise as to the conditions under which the contract is to be performed. Conditions are frequently labelled as conditions precedent, conditions concurrent, and conditions subsequent. *Id.* at § 11-3; *see also Harris and Harris Constr. Co. v. Crain and Denbo, Inc.*, 256 N.C. 110, 117, 123 S.E.2d 590, 595 (1962). For example, a "condition subsequent is any event the existence of which, by

agreement of the parties, operates to discharge a duty of performance that has arisen." *Calamari* at § 11-7. Before deciding what conditions, if any, apply to the performance of a contract, we must first employ "the terminology of offer and acceptance . . . to determine if there is a . . . contract." *Id.* at § 11-1. The first inquiry, therefore, is whether a contract was formed.

In this case we determine that a contract was never formed. HCI's bid was an offer, *see Home Electric Co. v. Hall and Underdown Heating and Air Conditioning Co.*, 86 N.C. App. 540, 545, 358 S.E.2d 539, 542 (1987), *aff'd per curiam*, 322 N.C. 107, 366 S.E.2d 441 (1988), which was officially entered on the day bids were opened. HCI's bid was irrevocable for a period of sixty days after its entry. Forty-nine days after the bid was officially entered, West Carteret notified HCI in writing that the bid had been accepted and specifically typed on the preprinted "NOTICE OF AWARD" form that the award was "tentative." It was "tentative," according to the record, because the final funding for the project had not yet been guaranteed by the FmHA. Because an acceptance of an offer must be unequivocal and unqualified, *Standard Sand & Gravel v. McClay*, 191 N.C. 313, 316, 131 S.E. 754, 755 (1926), this tentative acceptance was not an acceptance. *See Calamari* at § 2-11(a). Accordingly no contract was formed and HCI was within its rights to withdraw its bid after the expiration of the sixty-day period during which bids were irrevocable. Therefore the trial court correctly entered summary judgment for HCI and Insurance Co.

In so holding we reject the argument of West Carteret that HCI knew when making the bid that any acceptance would be conditional on the approval of the FmHA. As we read the information to bidders supplied by West Carteret, the bid was irrevocable for a period of sixty days after submission and that although subject to the approval of the FmHA, that approval was to be obtained within the sixty-day period. In fact the FmHA regulations themselves require that the approval of the FmHA be obtained "prior to" the award, not within ten days after the award, as suggested by West Carteret. The contractor was required to submit a performance bond, a payment bond, and a certificate of insurance within ten days after the award. However, this requirement was not a prerequisite to the award.

Accordingly, the summary judgment in favor of HCI and Insurance Co. is

Affirmed.

Judges WELLS and ORR concur.

MARY FRANCES LOMBROIA, PLAINTIFF/APPELLEE v. RONALD E. PEEK, DEFENDANT/APPELLANT

No. 9128DC853

(Filed 20 October 1992)

1. **Evidence and Witnesses § 565 (NCI4th)— paternity—judgment of Florida court that husband not natural father—admission erroneous**

The trial court erred in a paternity action by admitting a Florida judgment which found that plaintiff's husband was not the natural father of the child where defendant was not a party to the Florida action and cannot be bound by the findings of that judgment. This error alone was not sufficient to mandate a new trial in light of the other competent evidence presented by plaintiff to rebut the presumption of paternity, but, when combined with additional errors, requires a new trial.

Am Jur 2d, Bastards §§ 74, 94, 104, 107, 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

2. **Evidence and Witnesses § 1920 (NCI4th)— paternity—testimony concerning blood test—chain of custody—opinion of paternity**

The trial court erred in a paternity action by admitting the testimony of an expert in immunology and paternity evaluation concerning a report of a blood test prepared by a Florida physician where plaintiff offered no witness competent to testify as to the proper administration of the blood test nor of the proper chain of possession, transportation, and safekeeping of the blood sample sufficient to establish a likelihood that the blood tested was in fact blood drawn from plaintiff's husband.

Am Jur 2d, Bastards §§ 74, 94, 104, 107, 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

3. Evidence and Witnesses § 2150 (NCI4th) — paternity — testimony of expert — improper

The trial court erred in a paternity action by allowing an expert to testify that in his opinion "it's extremely likely" that defendant is the father of the child. The North Carolina Supreme Court concluded in *State v. Jackson*, 320 N.C. 452, that the jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity.

Am Jur 2d, Bastards §§ 74, 94, 104, 107, 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

4. Illegitimate Children § 9 (NCI4th) — paternity — sufficiency of evidence to rebut presumption

Although remanded on other grounds, there was sufficient evidence in a paternity action to rebut the presumption of legitimacy in favor of the husband and require submission of the case to the jury where plaintiff's evidence included the results of a blood test which established that defendant would be 377 times more likely to be the father of the minor child and that the probability of paternity is 99.7%, testimony concerning the sexual relationship between plaintiff and defendant at the time of the child's conception, and lack of contact between plaintiff and her husband at that time.

Am Jur 2d, Bastards §§ 74, 94, 104, 107, 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

5. Illegitimate Children § 4 (NCI4th) — paternity — husband — not a necessary party

The trial court did not err in a paternity action by ruling that plaintiff's husband, Thomas Lombroia, was not a necessary party to a paternity action where defendant contended that another judge had requested that plaintiff's counsel prepare an order making Lombroia a party to the proceeding, the request was not made while court was in session and the order was never prepared or executed by any judge, and the outcome of this case will not affect Mr. Lombroia's interest in any way because his rights and responsibilities with regard

to the child had been finally determined when a Florida court found that he was not the father.

Am Jur 2d, Bastards §§ 74, 94, 104, 107, 118.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

APPEAL by defendant from *Brown (Shirley H.), Judge.* Judgment entered 8 February 1991 in District Court, BUNCOMBE County. Heard in the Court of Appeals 16 September 1992.

Plaintiff instituted this civil action by complaint filed 21 December 1988 requesting that defendant be adjudicated the father of her child Brendon Scott Lombroia. In her pleadings, plaintiff stated that she was married to Thomas Robert Lombroia when the child was conceived and born, and that a Florida court had previously entered an order declaring that Mr. Lombroia was not the natural father of the minor child. Defendant answered denying paternity.

The matter was tried before a jury which returned a verdict in favor of plaintiff finding defendant to be the father of the minor child. From entry of judgment in accordance with that verdict, defendant appeals.

Sutton & Edmonds, by John R. Sutton, and Carol A. Saliba, for plaintiff, appellee.

Hyler & Lopez, P.A., by George B. Hyler, Jr., and Robert J. Lopez, for defendant, appellant.

HEDRICK, Chief Judge.

[1] Defendant first assigns error to the trial court's admission into evidence of the Florida judgment which found that Thomas Lombroia, plaintiff's husband at the time of the birth of the minor child, was not the father of that child. Plaintiff contends that the judgment was admissible to rebut the common law presumption, as set forth in *Eubanks v. Eubanks*, 273 N.C. 189, 159 S.E.2d 562 (1968), that "[w]hen a child is born in wedlock, . . . [it is] legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father . . . ." *Id.*, at 197, 159 S.E.2d at 568.

Assuming *arguendo* that plaintiff is required to show that her husband is not the father of the child in order to establish her claim against this defendant, a judgment or finding of another court cannot be used to prove a fact essential to that judgment, except where the principle of *res judicata* is involved. *See Wiles v. Mullinax*, 275 N.C. 473, 168 S.E.2d 366 (1969); *Warren v. Insurance Co.*, 215 N.C. 402, 2 S.E.2d 17 (1939); *Bank v. McCaskill*, 174 N.C. 362, 93 S.E. 905 (1917); Comment, G.S. § 8C-1, Rule 803(23), *citing* Brandis on North Carolina Evidence § 143 (1982). Defendant was not a party to the Florida action and he cannot be bound by the findings of that judgment. *Warren v. Insurance Co.*, 215 N.C. at 404, 2 S.E.2d at 18.

We find that the trial court did commit error in allowing the Floridian judgment to be introduced as evidence, yet we do not find this error alone sufficient to mandate a new trial in light of the other competent evidence presented by plaintiff to rebut the presumption of Lombroia's paternity. However, as plaintiff is required to prove defendant's paternity "beyond a reasonable doubt," G.S. § 49-14, we hold that this error, when combined with the additional errors discussed below, requires that defendant be allowed a new trial.

[2] Defendant next argues that the trial court erred in allowing Roche Biomedical immunologist, Dr. Lloyd Osborne, to testify as to the results of paternity blood testing of Thomas Lombroia which had been performed by another Roche Biomedical physician working in the state of Florida wherein Mr. Lombroia resides. Again, plaintiff offered the results of this testing to rebut the presumption of Lombroia's paternity. Defendant argues that plaintiff failed to establish a proper foundation for the admission of the results of the blood test by failing to offer proper proof that the blood tested was in fact the blood of Thomas Lombroia.

Prior to testifying regarding the results of Lombroia's blood test, Dr. Osborne was qualified by the court as an expert in the field of immunology and paternity evaluation. He testified that his knowledge of the Lombroia blood test was based upon his reading of a report prepared by the Florida physician. Dr. Osborne further stated that such reports are prepared and kept in the ordinary course of business by Roche Biomedical and that he was a custodian of the records of the company. The court allowed plain-

tiff to introduce the report into evidence and also allowed Dr. Osborne to testify concerning the contents of that document.

Plaintiff contends that this report is admissible pursuant to several of the hearsay exceptions contained within the Rules of Evidence. Hearsay rules, however, do not become an issue until the relevancy of the evidence has been established. *See* G.S. 8C-1, Rule 402. In order to establish the relevancy of blood test results, plaintiff is required to "lay a foundation . . . by way of expert testimony explaining the way the test is conducted, attesting its scientific reliability, and vouching for its correct administration in [this] particular case." *FCX, Inc. v. Caudill*, 85 N.C. App. 272, 276, 354 S.E.2d 767, 771 (1987), *citing Robinson v. Life and Casualty Insurance Co.*, 255 N.C. 669, 122 S.E.2d 801 (1961). Further, "the substance analyzed must be accurately identified . . . [by proving] a chain of custody to insure that the substance came from the source claimed and that its condition was unchanged." *Id.*, *citing* McCormick on Evidence § 212 at 667-68 (E. Cleary 3rd ed. 1984), and Brandis on North Carolina Evidence § 117, n.2 (2d ed. 1982).

Plaintiff herein offered no witness competent to testify as to the proper administration of the blood test nor of the proper chain of possession, transportation and safekeeping of the blood sample sufficient to establish a likelihood that the blood tested was in fact blood drawn from Mr. Lombroia. *See State v. Britt*, 291 N.C. 528, 231 S.E.2d 644 (1977). Dr. Osborne was the only witness offered by plaintiff regarding this blood test and he admitted that he had no personal knowledge concerning the administration of this particular test nor any personal ability to trace a chain of custody for the sample allegedly tested. Plaintiff therefore failed to establish the relevancy of this test result. The trial court erred in allowing Dr. Osborne's testimony concerning the report and in admitting that document into evidence.

[3] Defendant further argues that the trial court committed error in allowing Dr. Osborne to testify that, in his opinion, "it's extremely likely" that defendant is the father of the minor child. Dr. Osborne should not have been allowed to state such an opinion. Our Supreme Court held in *State v. Jackson*, 320 N.C. 452, 358 S.E.2d 679 (1987), that, although it may be proper for a qualified physician to testify concerning the result of a defendant's blood test and concerning the use and application of the paternity index, it is not proper to allow the expert to state his opinion concerning paternity as

such an opinion is of no assistance to the trier of fact. The court concluded that the jury is equally capable of weighing the genetic factors along with the nongenetic circumstances to determine the ultimate probability of paternity. This Court has ruled similarly in *State ex rel. Williams v. Coppedge*, 105 N.C. App. 470, 414 S.E.2d 81 (1992).

[4] Defendant next assigns as error the trial court's failure to grant his motions for directed verdict based upon his contention that plaintiff's evidence failed to "rebut the presumption of legitimacy in favor of Thomas Lombroia." Although we are remanding this matter for a new trial based upon the reasons set forth above, we nevertheless find that plaintiff's competent evidence, which included the results of a blood test which established that defendant Peek "would be 377 times more likely to be the father of the minor child and that the probability of paternity is 99.7%," as well as testimony concerning the sexual relationship between plaintiff and defendant at the time of the child's conception and of the lack of contact between plaintiff and Thomas Lombroia at that time, was sufficient to require submission of the case to the jury. *See Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1971).

[5] Finally, defendant argues that the trial court erred in ruling that Thomas Lombroia was not a necessary party to this action. Defendant contends that this order by the trial judge effectively overruled an earlier decision by another district court judge who had requested that plaintiff's counsel prepare an order for the court's signature making Lombroia a party to the proceeding. Both parties agree that the judge did not make this request while court was in session, and both parties agree that no such order was ever prepared nor executed by any judge. On the day of trial, Judge Brown ruled that "there has never been an entry of that order by the court," and further held that "Thomas Lombroia is not a necessary party to this lawsuit."

Defendant's assignment of error is without merit. Even assuming *arguendo* that the trial judge did overrule an order of another judge, which she obviously did not, defendant can show no prejudice from the ruling as it is clear that Lombroia is not a necessary party to this action. The term "necessary party" embraces all persons who have a claim or material interest in the subject matter of the controversy, which interest will be directly affected by the outcome of the litigation. G.S. § 1A-1, Rule 19(b); *Wall v. Sneed*,

13 N.C. App. 719, 187 S.E.2d 454 (1972); *Rice v. Randolph*, 96 N.C. App. 112, 384 S.E.2d 295 (1989). This litigation concerns only the paternity of defendant. Mr. Lombroia's rights and responsibilities with regard to the minor child were finally determined when the Florida court found that he was not the father of the child. The outcome of this case will not affect his interest in any way.

The entry of judgment by the trial court in accordance with the jury verdict is reversed and this matter is remanded to the District Court for a new trial.

Reversed and remanded.

Judges LEWIS and WYNN concur.

JAMES BLANKLEY v. WHITE SWAN UNIFORM RENTALS, CINCINNATI INSURANCE COMPANY

No. 9110IC1236

(Filed 20 October 1992)

1. Master and Servant § 65.2 (NCI3d)— workers' compensation— back injury—medical opinion—employer's physician

The Industrial Commission did not err in a workers' compensation hearing by failing to adopt the position of plaintiff's treating physician rather than the employer's physician on plaintiff's physical condition before and after the accident. Plaintiff is required by N.C.G.S. § 97-27 to submit to a medical examination by a physician of the employer's choice, who is not likely to be the treating physician, and the Commission is the statutorily designated fact-finder. The issue is plaintiff's present medical condition, not his medical history.

Am Jur 2d, Workers' Compensation § 504.

2. Master and Servant § 65.2 (NCI3d)— workers' compensation— back injury—suitable employment refused—conflicting medical opinions

The Industrial Commission did not err by finding that plaintiff refused suitable employment offered by his employer without justification where plaintiff claimed that the jobs of-

fered were either significantly lower paying or beyond the post-injury physical limits set by his treating physician and the employer's physician testified that plaintiff could resume his prior job without any additional weight lifting restrictions. The conflict in the medical testimony was resolved by the Commission by a finding that plaintiff was physically able to return to his former job and by findings that defendant-employer offered plaintiff a sales/delivery route similar to the one he had, paying approximately the same, in which he could lift as little or as much weight as he desired, as well as jobs working in the plant or making only sales calls.

Am Jur 2d, Workers' Compensation § 399.

APPEAL by plaintiff from opinion and award of the North Carolina Industrial Commission filed 24 September 1991. Heard in the Court of Appeals 24 August 1992.

Franklin Smith for plaintiff-appellant.

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

LEWIS, Judge.

Plaintiff was a 36 year old high school graduate employed by defendant White Swan as a sales/delivery person. In 1979, prior to his employment with defendant, plaintiff sustained an injury to the lumbar area of his back which left him with a 25% permanent partial disability. On 7 December 1987, plaintiff sustained an injury to his head, neck and back in the course of his employment with defendant. Dr. Adams, who treated plaintiff for both back injuries, rated the 1987 injury as 25% functional impairment of the spine. At the insurance company's insistence, plaintiff was examined by another orthopedic surgeon, Dr. Serene.

Plaintiff reached maximum medical improvement on 10 November 1988. Dr. Adams recommended that plaintiff resume work without driving or heavy lifting. According to plaintiff, defendant offered him one of two positions: an in-house job at the rate of $4.50 per hour or a sales/delivery route virtually identical in pay to his previous job. Plaintiff declined these offers and accepted a job as a car salesman on 12 December 1988. Plaintiff's

average monthly wage with defendant was $1,680 and is between $1,800 and $2,000 with the car dealership.

Plaintiff received 41 6/7 weeks of compensation for temporary total disability from 24 January 1988 until 11 November 1988, but sought to recover additional compensation for permanent disability. Following a hearing, a deputy commissioner denied his claim for additional compensation because plaintiff refused, without justification, employment suitable to his capacity procured for him by his employer pursuant to N.C.G.S. § 97-32. Without additional findings, the Full Commission adopted the deputy commissioner's opinion and affirmed the award. Plaintiff appeals.

Plaintiff assigns as error the Industrial Commission's (Commission) failure to consider evidence of his physical condition before and after the work related accident. He also assigns as error the Commission's giving undue weight to the testimony of the employer's physician over the testimony of plaintiff's treating physician.

[1] The crux of plaintiff's arguments is that the only medical opinion which should be accorded any weight is that of the treating physician. Having treated both of plaintiff's back injuries, it is undisputed that Dr. Adams would be more familiar with plaintiff's medical history. However, it is not his medical history, but his present medical condition which is at issue. The Worker's Compensation Statute (statute) refers to the examination of the injured employee by a "qualified physician or surgeon." N.C.G.S. § 97-27 (1991). It does not compel the defendant employer, nor the Commission, to rely upon one source of medical information, that provided by the injured plaintiff. The statute specifically suspends an injured employee's right to compensation should he or she refuse to submit to examination by a physician designated and paid by the employer. N.C.G.S. § 97-27. "Moreover, the notion that it is obligatory for the Commission to accord an involuntary or unquestioned credence to any particular testimony runs counter to the statute which confers upon it full fact-finding authority." *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951) (citation omitted); N.C.G.S. § 97-84 (1991) (Commission determines disputes). *See Evans v. AT&T Technologies*, 103 N.C. App. 45, 47, 404 S.E.2d 183, 185 (1991), *rev'd on other grounds*, 332 N.C. 78, 418 S.E.2d 503 (1992) (appellate courts only review errors of law; credibility and weight of evidence determined by Industrial Commission). Because the statute requires a plaintiff to submit to a medical

examination by a physician of the employer's choice, unlikely to be the treating physician, and because the Commission is the statutorily designated fact-finder, plaintiff's argument that the Commission erred by failing to adopt the treating physician's position fails.

[2] Plaintiff argues that the Commission erred in finding that he refused suitable employment offered by his employer without justification. Plaintiff claims that the jobs offered were either significantly lower paying or were beyond the post-injury physical limits set by Dr. Adams. Though both physicians testified that plaintiff sustained a 10% permanent partial disability, as set out in North Carolina Industrial Commission guidelines, their opinions differed as to plaintiff's post-injury physical capabilities. Plaintiff's physician, Dr. Adams, testified that plaintiff would be unable to resume his past position with defendant employer because it exceeded the recommended weight lifting restrictions. Defendant's physician, Dr. Serene, testified that plaintiff could resume his prior job without any additional weight lifting restrictions.

The Commission is the "sole judge of the credibility of the witnesses, and of the weight to be given to their testimony[;] . . . it may accept or reject the testimony of a witness . . . in whole or in part. . . ." *Anderson*, 233 N.C. at 376, 64 S.E.2d at 268; *see Evans*, 103 N.C. App. at 47, 404 S.E.2d at 185. The Commission has the "duty and authority to resolve conflicts in the testimony . . ., and the conflict should not always be resolved in favor of the complainant." *Cauble v. Macke Co.*, 78 N.C. App. 793, 795, 338 S.E.2d 320, 321 (1986). "[I]f the evidence before the Commission is capable of supporting two conflicting findings, the determination of the Commission is conclusive on appeal." *Dolbow v. Holland Industrial, Inc.*, 64 N.C. App. 695, 697, 308 S.E.2d 335, 336 (1983), *disc. rev. denied*, 310 N.C. 308, 312 S.E.2d 651 (1984). It is not the function of an appellate court to weigh the evidence. *Evans*, 103 N.C. App. at 47, 404 S.E.2d at 185 (citing *Anderson v. Lincoln Constr. Co.*, 265 N.C. 431, 144 S.E.2d 272 (1965)). "Inasmuch as the findings of fact of the Full Commission are supported by legal evidence, they cannot be disturbed." *Anderson*, 233 N.C. at 376, 64 S.E.2d at 268; *see* N.C.G.S. § 97-86 (1991) (award conclusive as to facts); *Hansel v. Sherman Textiles*, 304 N.C. 44, 49, 283 S.E.2d 101, 104 (1981) (findings of fact conclusive on appeal if supported by competent evidence).

In the present case, the conflict in the medical testimony was resolved by the Commission by a finding of fact that plaintiff was physically able to return to his former job. The Commission also made findings that defendant-employer offered plaintiff a sales/delivery route similar to the one he had, paying approximately the same amount, in which he could lift as little or as much weight as he desired, as well as jobs working in the plant or making only sales calls. These findings are supported by competent evidence in the record and thus are binding. *See Hansel*, 304 N.C. at 49, 283 S.E.2d at 104. These findings amply support a conclusion that his refusing the offers of employment was unjustified. Plaintiff's assignments of error are overruled and the opinion and award of the Commission is affirmed.

Affirmed.

Judge WYNN concurs.

Chief Judge HEDRICK concurs in the result only.

MEYSHA VICTORIA LASH, BY HER GUARDIAN AD LITEM, MARK WILSON, PLAINTIFF-APPELLANT v. ALTON L. LASH, ET AL., DEFENDANTS-APPELLEES

No. 9118SC890

(Filed 20 October 1992)

Wills § 25 (NCI3d)— caveat—attorney fees—discretion of courts

The trial court correctly granted partial summary judgment in favor of defendant in an action seeking damages for procuring and propounding a spurious will where the materials before the trial court clearly showed that plaintiff successfully attacked the validity of the purported will in a caveat proceeding, then sought in a separate action the necessary costs incurred in maintaining such an action. Plaintiff's claim for recovery of attorney's fees and other court costs could only be adjudicated in the caveat proceeding.

Am Jur 2d, Wills § 846.

APPEAL by plaintiff from judgment entered 4 June 1991 in GUILFORD County Superior Court by *Judge Julius A. Rousseau*. Heard in the Court of Appeals 22 September 1992.

Plaintiff, by her Guardian Ad Litem, instituted this action against defendant seeking to recover damages resulting from the alleged fraudulent procuring and propounding of a purported will of plaintiff's father, Alfred Lash.

Plaintiff alleges that after Alfred Lash's death, defendant found a purported will in the deceased's truck. Defendant presented this document for probate to the clerk of the superior court and thereby became the executor of Alfred Lash's estate. Plaintiff directly challenged the validity of the purported will in a caveat proceeding and the will was found to be a nullity.

Plaintiff then brought a separate action in superior court containing five claims for relief, the last of which alleged tortious conduct of the defendant. Plaintiff sought to recover damages based on the alleged procuring and propounding of a spurious will. Defendant asserted in his defense that he believed the will to be genuine and produced affidavits in support thereof. In response, plaintiff produced affidavits which tended to disprove defendant's allegations. Thereafter, defendant moved for a partial summary judgment on the fifth claim for relief on the ground that there was no genuine issue of material fact and defendant was entitled to summary judgment as a matter of law. The trial court granted partial summary judgment in favor of defendant on this claim. Plaintiff appeals.

Turner, Rollins, Rollins & Clark, by Clyde T. Rollins, for plaintiff-appellant.

Barbee & Glenn, by Ronald Barbee, for defendant-appellee.

WELLS, Judge.

Although this case is before us on partial summary judgment, it is our opinion that plaintiff has a substantial right to have all her viable claims for relief tried simultaneously before the same judge and jury. We hold that plaintiff's appeal is properly before us and therefore consider the appeal on its merits. *Hoke v. E.F. Hutton and Co.*, 91 N.C. App. 159, 370 S.E.2d 857 (1988).

The essence of plaintiff's fifth claim for relief is that due to the fraudulent procuring or offering of Alfred Lash's purported

will by defendant, plaintiff was required to incur the cost of a caveat proceeding, including attorneys' fees.

It is the settled law of this State that the validity of a propounded will may only be challenged directly in a caveat proceeding pursuant to statute. A collateral attack is not permitted. *See* N.C. Gen. Stat. § 31-32 (1971); *In re Will of Charles*, 263 N.C. 411, 139 S.E.2d 588 (1965); *In re Will of Puett*, 229 N.C. 8, 47 S.E.2d 488 (1948). *See also In re Will of Hester*, 320 N.C. 738, 360 S.E.2d 801, *cert. denied*, 321 N.C. 300, 362 S.E.2d 780 (1987).

The general rule governing award of attorneys' fees and court costs is set forth in N.C. Gen. Stat. § 6-21:

> Costs in the following matters shall be taxed against either party, or apportioned among the parties, in the discretion of the court:
>
> . . . .
>
> (2) Caveats to wills and any action or proceeding which may require the construction of any will or trust agreement, or fix the rights and duties of parties thereunder; provided, that in any caveat proceeding under this subdivision, the court shall allow attorneys' fees for the attorneys of the caveators only if it finds that the proceeding has substantial merit.
>
> . . . .
>
> The word "costs" as the same appears and is used in this section shall be construed to include reasonable attorneys' fees in such amounts as the court shall in its discretion determine and allow[.]

The ability of the courts to award such costs is statutorily conferred. Case law in this State has consistently held that the decision to award costs in caveat proceedings is addressed to the sound discretion of the courts. *Dyer v. State*, 331 N.C. 374, 416 S.E.2d 1 (1992); *In re Ridge*, 302 N.C. 375, 275 S.E.2d 424 (1981). It is a matter of the court's discretion whether to award fees and the amount of such fees. *See Trust Co. v. Dodson*, 260 N.C. 22, 131 S.E.2d 875 (1963).

The materials before the trial court clearly showed that plaintiff successfully attacked the validity of the purported will

propounded by defendant in a caveat proceeding. Now, however, plaintiff seeks to recover, in a separate action, the necessary costs incurred in maintaining such an action. The question of which party bears court costs, including attorneys' fees, is properly resolved in the caveat proceeding itself. Our cases have held that the expense of litigating a caveat is *not* a lawful claim against another party; rather, such "expense is a cost of court taxable 'against either party, or apportioned among the parties, in the discretion of the court.'" *See In re Estate of Ward*, 97 N.C. App. 660, 389 S.E.2d 441 (1990); N.C. Gen. Stat. § 6-21. Therefore, plaintiff's claim for recovery of attorneys' fees and other court costs could only be adjudicated in the caveat proceeding.

In view of the settled law of wills and estates in this jurisdiction dealing with caveats and assessment of court costs in such proceedings, it would be inconsistent and illogical to recognize and allow an independent action in tort for damages related to expenses incurred in a caveat proceeding. Therefore, we affirm the trial court's order granting partial summary judgment in favor of defendant.

Affirmed.

Judges ORR and GREENE concur.

SUSAN B. HARDIN, EX-WIFE AND KELLY HARDIN, MINOR DAUGHTER OF RANDY HARDIN, DECEASED, EMPLOYEE, PLAINTIFF v. VENTURE CONSTRUCTION COMPANY, EMPLOYER; CNA INSURANCE COMPANY, CARRIER; DEFENDANTS

No. 9110IC884

(Filed 20 October 1992)

1. Master and Servant § 94.3 (NCI3d)— workers' compensation— remand for evidence and findings—failure of Commission to carry out duties

The full Industrial Commission failed to carry out its duties under N.C.G.S. § 97-85 when it remanded a workers' compensation proceeding to the hearing commissioner to take further

evidence and determine the deceased employee's average weekly wage.

Am Jur 2d, Workers' Compensation §§ 686, 687.

2. **Master and Servant § 95 (NCI3d) — workers' compensation — interlocutory order — no right of appeal**

No appeal lies from the interlocutory order of the Industrial Commission remanding a workers' compensation proceeding to the hearing commissioner to take further evidence and determine the deceased employee's average weekly wage.

Am Jur 2d, Workers' Compensation §§ 688, 689.

Judge LEWIS concurs in the result.

APPEAL by defendants from a decision of the North Carolina Industrial Commission (full Commission) entered 1 May 1991. Heard in the Court of Appeals 21 September 1992.

This is a proceeding wherein plaintiff Kelly Hardin seeks to recover benefits pursuant to the Worker's Compensation Act for the wrongful death of her father Randy Hardin which occurred in the course of his employment with defendant Venture Construction Company.

The record indicates the following: On 24 February 1987, while working on a job for defendant employer, the decedent fell from a roof approximately twelve feet high and hit his head on a concrete floor. As a result of this fall, Randy Hardin went into a coma and died on 9 April 1987.

On 25 February 1987, defendant employer filed a Form 19 reporting the accident. When plaintiff and defendant employer's insurance carrier were unable to agree on compensation, plaintiff requested a hearing before the Industrial Commission.

The hearing was held on 29 June 1989 before Deputy Commissioner Edward Garner, Jr. On 16 January 1990, Deputy Commissioner Garner entered a decision awarding plaintiff compensation pursuant to the statute at an unspecified rate since no evidence had been presented as to decedent's average weekly wage.

On 2 February 1990, defendants appealed the decision of the Deputy Commissioner to the full Commission. The appeal was heard by the full Commission, and a decision was entered affirming the

deputy's award and remanding the matter to the deputy for the taking of further evidence to determine plaintiff's average weekly wage. Defendants appealed.

Harold F. Greeson for plaintiff, appellees.

Young, Moore, Henderson & Alvis, P.A., by Joseph W. Williford and Richard J. Archie, for defendant, appellants.

HEDRICK, Chief Judge.

[1] On 1 May 1991, the North Carolina Industrial Commission (full Commission) entered the following order:

> The undersigned have reviewed the record with reference to the errors alleged and find no reversible error.
>
> In view of the foregoing, the Full Commission AFFIRMS and ADOPTS as its own the Opinion and Award as filed.
>
> It is ORDERED that this matter is REMANDED to the Deputy Commissioner for taking such further evidence as he deems necessary to determine the plaintiff's average weekly wage for the purposes of the compensation payable. It is FURTHER ORDERED that plaintiff forthwith submit to Deputy Commissioner Garner copies of the decedent's income tax returns for periods including the twelve months preceding his death, and that the defendant submit to the Deputy Commissioner copies of its records of the decedent's draws and payments pursuant to subcontracts entered into with defendant Venture. The parties shall serve opposing parties with copies of the said documents when submitted.

Once again, the full Commission has failed to carry out its duties pursuant to G.S. 97-85 and has compounded its failure by remanding the matter to the Deputy Commissioner to carry out the duties of the full Commission. G.S. 97-85; *Vieregge v. North Carolina State University*, 105 N.C. App. 633, 414 S.E.2d 771 (1992); *Joyner v. Rocky Mount Mills*, 92 N.C. App. 478, 374 S.E.2d 610 (1988).

[2] In the present case, defendants have attempted to appeal from an order of the Industrial Commission which is not final on its face, the Commission having enumerated the matters yet to be determined. G.S. 7A-29 and Rule 18(b)(2) of the North Carolina Rules of Appellate Procedure allow parties to appeal from final decisions of the North Carolina Industrial Commission. No appeal,

however, lies from an interlocutory order of the Industrial Commission. *Lynch v. M.B. Kahn Construction Co.*, 41 N.C. App. 127, 254 S.E.2d 236, *disc. review denied*, 298 N.C. 298, 259 S.E.2d 914 (1979); *Vaughn v. North Carolina Dept. of Human Resources*, 37 N.C. App. 86, 245 S.E.2d 892, *aff'd*, 296 N.C. 683, 252 S.E.2d 792 (1978).

The action of the full Commission in remanding the matter to the Deputy Commissioner to "tak[e] such further evidence as he deems necessary to determine the plaintiff's average weekly wage" is a perfect example of the failure of the full Commission to carry out its duties which results in great delay in the employee receiving the benefits to which the Commission itself finds he is entitled. The "yo-yo" procedure, up and down, up and down, in which the full Commission engages works to defeat the very purpose of the Workers' Compensation Act. The North Carolina Industrial Commission is the only agency authorized to enter a final award in these cases. We have no authority to do so. We can only remand the proceeding to the full Commission to enter a final award which we hope will bring the matter to a conclusion, and the daughter of the deceased employee will finally receive the benefits to which she is entitled.

Appeal dismissed.

Judge WYNN concurs.

Judge LEWIS concurs in the result.

CASES REPORTED WITHOUT PUBLISHED OPINION
Filed 20 October 1992

BUNCOMBE COUNTY ex rel. LOMBROIA v. PEEK No. 9128DC869	Buncombe (88CVD3995)	Reversed & remanded
DAUGHTRY v. RADFORD No. 9211DC315	Johnston (91CVD281)	Reversed & remanded
HAWKINS v. ROADWAY EXPRESS, INC. No. 9110IC919	Ind. Comm. (022456)	Affirmed
IN RE DILLWORTH No. 9221DC222	Forsyth (90J381)	Affirmed in part; reversed & remanded in part
IN RE ESTATE OF McCANN No. 9223SC339	Alleghany (90E109)	Affirmed
IN RE SUGGS No. 9227DC398	Gaston (92J11)	Affirmed
SHAW v. UNITED PARCEL SERVICES No. 9110IC855	Ind. Comm. (852525)	Reversed & remanded
STATE v. BRYANT No. 928SC264	Wayne (90CRS12629)	No Error
STATE v. DAVIS No. 9230SC426	Haywood (91CRS3776)	No Error
STATE v. DIXON No. 9128SC1086	Buncombe (91CRS2180)	No Error
STATE v. GAINEY No. 924SC316	Onslow (90CRS23169) (90CRS23170)	No Error
STATE v. HELMS No. 9226SC240	Mecklenburg (91CRS9480) (91CRS9481) (91CRS9483) (91CRS9484)	No Error
STATE v. MOORE No. 9220SC389	Union (91CRS440)	No Error
STATE v. RAMSEUR No. 9218SC501	Guilford (91CRS1306)	Affirmed
STATE v. STARR No. 9226SC366	Mecklenburg (91CRS47526)	No Error

STATE v. WATERS No. 922SC256	Beaufort (91CRS4811) (91CRS5747)	No Error
TAYLOR v. TAYLOR No. 9228DC394	Buncombe (91CVD3378)	Vacated & remanded
WATTS v. RIDENHOUR No. 9119DC602	Cabarrus (87CVD1561)	No Error

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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§ 8 (NCI4th). Checks given as payment in full or as agreed settlement

Plaintiff vendees' claims for fraud and breach of contract arising from the sale of resort property were barred by the doctrine of accord and satisfaction where defendants gave plaintiffs a check containing language that it was in full and final settlement of all claims, the female plaintiff marked out the settlement language on the check, and plaintiffs thereafter negotiated the check. *Canady v. Mann*, 252.

ACCOUNTS AND ACCOUNTS STATED

§ 14 (NCI4th). Parties liable on agreement or account

The evidence was sufficient to support the trial court's finding that the vice-president and secretary of defendant corporation had apparent authority to sign a credit application on behalf of the corporation. *Institution Food House v. Circus Hall of Cream*, 552.

ADMINISTRATIVE LAW AND PROCEDURE

§ 44 (NCI4th). Final decisions or orders

There was no error in the appeal of a sediment control fine where the administrative law judge made findings of fact and conclusions of law and recommended that no penalty be assessed, the action was referred to the Secretary of the Department for final agency decision and the Secretary selectively adopted some conclusions of law and rejected others, made his own conclusions of law, adopted part of the recommended decision, and rejected part of the decision. *Ford v. N.C. Dept. of Environment, Health, and Nat. Res.*, 192.

§ 52 (NCI4th). Exhaustion of administrative remedies

Plaintiff failed to properly raise the issue of inadequacy of administrative remedies where there was nothing to show that the issue was raised in the trial court. *Huang v. N.C. State University*, 710.

§ 58 (NCI4th). What meets requirement of exhaustion of administrative remedies

Plaintiff had not exhausted his administrative remedies before filing an action in superior court to review his suspension and dismissal as a university professor where plaintiff filed a complaint in superior court while review was pending before the Board of Governors of the University, and the premature filing was not cured when the Board rendered a decision before the superior court entered summary judgment. *Huang v. N.C. State University*, 710.

§ 65 (NCI4th). Procedure on judicial review; scope and effect of review

The scope of appellate review of a superior court decision reviewing a State Personnel decision is the same as in other civil cases. *Debnam v. N.C. Department of Correction*, 517.

§ 67 (NCI4th). Applicability of "whole record test"

The Court of Appeals could employ a de novo rather than a "whole record" review of a final decision by respondent board suspending petitioner's general contractor's license for gross negligence where the issue was whether respondent erred in interpreting the term "gross negligence." *Bashford v. N.C. Licensing Bd. for General Contractors*, 462.

APPEAL AND ERROR

§ 68 (NCI4th). Who is "party aggrieved" generally

The defendant in an action under the New Vehicles Warranties Act, Volvo North America Corporation, did not have standing to object to the cancellation of a lease between plaintiff and Volvo Finance of North America. *Taylor v. Volvo North America Corp.*, 678.

§ 87 (NCI4th). Other interlocutory orders in civil actions

A judgment which determines only that there has been a breach of contract by defendant and leaves unresolved the issue of plaintiffs' damages is an unappealable interlocutory order. *Johnston v. Royal Indemnity Co.*, 624.

§ 91 (NCI4th). Final judgments involving multiple claims or parties

An appeal from a jury verdict in an action arising from the termination of a social worker was interlocutory and was dismissed. *Donnelly v. Guilford County*, 289.

§ 114 (NCI4th). Motions based on failure to state claim; failure to join necessary party

An unsuccessful movant for a dismissal for failure to state a claim may not seek review of the denial of such motion on appeal from judgment on the merits against him. *Berrier v. Thrift*, 356.

§ 130 (NCI4th). Right to appeal sanction orders

An attorney may immediately appeal the trial court's imposition of Rule 11 sanctions where the sanctions run only against the attorney. *Mack v. Moore*, 87.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Defendants' contention that the trial court erred in failing to give requested instructions and in the issues submitted was not before the appellate court where their objection failed to state distinctly that to which they objected and the grounds for the objection. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

Defendants failed to preserve their right to present on appeal an argument regarding an instruction where they failed to object to the wording of the instruction at trial. *State v. Sluka*, 200.

Defendant's motion in limine to exclude evidence was sufficient to preserve the issue of admission of the evidence for appellate review without the necessity of a formal exception to the trial court's denial of the motion. *State v. Moore*, 388.

§ 156 (NCI4th). Effect of failure to make motion, objection, or request; civil actions

Defendants waived any objection to the introduction of an exhibit by not objecting to the testimony which the exhibit illustrated. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

§ 340 (NCI4th). Assignments of error generally; form and record references

Defendants lost the right to challenge any variance between the complaint and the judgment where they did not state separate assignments of error confined to a single issue of law but instead made one broadside assignment of error. *Lumsden v. Lawing*, 493.

§ 342 (NCI4th). Cross-assignments of error by appellee

Plaintiff's attempted cross-appeal is dismissed where plaintiff set forth two assignments of error in the record on appeal requesting that the trial court's

APPEAL AND ERROR — Continued

equitable distribution order be reversed in part but plaintiff failed to file a written notice of appeal. *Gum v. Gum*, 734.

§ 343 (NCI4th). Assignments of error; jury instructions

Defendant waived his objection to the trial court's failure to instruct on gross contributory negligence where he made no request that the court give such an instruction at either of the two charge conferences or when given the opportunity to object to the jury instructions before the jury retired. *Berrier v. Thrift*, 356.

§ 515 (NCI4th). Effect of remand on lower court jurisdiction

The trial court did not err by finding that it had jurisdiction to hear a motion for supplemental relief where the case had been remanded for the award of damages against the board rather than the individual defendants. *Crump v. Board of Education*, 375.

§ 556 (NCI4th). Effect of decision on former judgment

The trial court did not err in its determination that further proceedings were barred by previous appellate decisions where a judgment for plaintiff had been remanded for a damage award against the board rather than the individual defendants and plaintiff moved for supplemental relief in the trial court on remand. *Crump v. Board of Education*, 375.

ASSAULT AND BATTERY

§ 116 (NCI4th). Particular circumstances not requiring submission of lessor degrees of offenses

The trial court did not err by refusing defendant's requested instruction on assault by pointing a gun as a lesser offense of assault with a deadly weapon with intent to kill. *State v. Clark*, 184.

ATTORNEYS AT LAW

§ 63 (NCI4th). Attorneys' lien

No right to an attorney's charging lien exists when an attorney working pursuant to a contingent fee agreement withdraws prior to settlement or judgment being entered in the case. *Mack v. Moore*, 87.

§ 68 (NCI4th). Sanctions; reciprocal discipline

The Disciplinary Hearing Commission of the N.C. State Bar did not abuse its discretion by suspending an attorney from the practice of law for nine months where the attorney had withdrawn from a firm and deposited a check from a client in his personal account. *North Carolina State Bar v. Nelson*, 543.

§ 85 (NCI4th). Procedure for discipline and disbarment; evidence and witnesses; findings

The findings of the Disciplinary Hearing Commission of the N.C. State Bar were sufficient to support the conclusion that an attorney did not have a reasonable good faith belief that he had a legitimate claim to client fees deposited into his account after he withdrew from a firm. *North Carolina State Bar v. Nelson*, 543.

§ 86 (NCI4th). Procedure for discipline and disbarment; standard of proof

The task of the Court of Appeals when reviewing the Disciplinary Hearing Commission of the N.C. State Bar is not to replace DHC's judgment with its

ATTORNEYS AT LAW — Continued

own, but to apply the whole record test and determine whether DHC's findings are properly supported by the record even though the Court might have reached a different result had the matter been before it de novo. *North Carolina State Bar v. Nelson,* 543.

The record in an appeal from a hearing before the Disciplinary Hearing Commission of the N.C. State Bar contained substantial evidence to support contested findings of fact in a case involving retention of fees after withdrawal from a firm. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES

§ 78 (NCI4th). Suspension of license condition of suspension of sentence

The trial court did not err in imposing the maximum two-year sentence for misdemeanor death by vehicle suspended on the conditions that defendant serve an active term of 120 days and surrender his driver's license for five years. *State v. Moore,* 388.

§ 253 (NCI4th). Express warranties generally

The trial court erred in granting defendants' motion for summary judgment in an action for breach of warranty in the sale of an automobile based upon a defective braking system. *Adventure Travel World v. General Motors Corp.,* 573.

§ 254 (NCI4th). Express warranties; effect of failure to conform

The trial court correctly held that the New Motor Vehicles Warranties Act had been violated and that plaintiff was entitled to recover. *Taylor v. Volvo North America Corp.,* 678.

§ 259 (NCI4th). Express warranties; relief available; liability

The trial court did not err by trebling damages in an action under the New Motor Vehicles Warranties Act where the court could reasonably conclude that defendant unreasonably refused to comply with the statute. *Taylor v. Volvo North America Corp.,* 678.

The trial court did not err in an action under the New Motor Vehicles Warranties Act by trebling damages prior to deducting an amount representing a reasonable allowance for plaintiff's use of the vehicle. *Ibid.*

§ 314 (NCI4th). Avoidance of collision and injury, generally

The jury could find that defendant tractor-trailer driver did not keep a reasonable lookout so as to avoid collision with a telephone wire in that, after he saw the wire, he did not take steps to insure that his vehicle could successfully clear the wire without incident. *Delappe v. Craig,* 618.

§ 551 (NCI4th). Injuries to children darting into road; evidence sufficient to submit to jury

The trial court erred by granting a directed verdict for defendant in an automobile accident case involving a child darting into traffic where the evidence as to time and distance creates a question as to whether defendant kept a reasonable lookout and maintained proper control over her car. *Phillips v. Holland,* 688.

§ 563 (NCI4th). Driver's willful and wanton conduct

The evidence in a wrongful death action was sufficient to support the jury's verdict finding willful and wanton negligence by defendant in driving while intoxicated and awarding punitive damages to plaintiff. *Berrier v. Thrift,* 356.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 786 (NCI4th). Felony and misdemeanor death by vehicle

The trial court was not required to find factors in aggravation and mitigation before imposing the maximum two-year sentence for misdemeanor death by vehicle. *State v. Moore*, 388.

§ 789 (NCI4th). Instruction as to death by vehicle and manslaughter

The trial court in a prosecution for involuntary manslaughter did not err in submitting the charge of misdemeanor death by motor vehicle based on defendant's failure to exercise due care to avoid striking the pedestrian victim and failure to operate his vehicle at a reasonable and prudent speed under the circumstances. *State v. Moore*, 388.

§ 797 (NCI4th). Culpable negligence; sufficiency of evidence of proximate cause

The evidence was sufficient for the jury in a prosecution for involuntary manslaughter while driving under the influence of alcohol. *State v. Moore*, 388.

BROKERS AND FACTORS

§ 47 (NCI4th). Sufficiency of evidence to withstand motion for summary judgment

The trial court properly granted summary judgment for plaintiff realty company in an action to recover a sales commission where defendants argued that a handwritten document, executed after the original listing expired, was patently ambiguous and created no contractual obligation. *Thomco Realty, Inc. v. Helms*, 224.

BURGLARY AND UNLAWFUL BREAKINGS

§ 85 (NCI4th). Breaking or entering; sufficiency of evidence

The trial court did not err by denying defendants' motion to dismiss where the evidence, though circumstantial, was sufficient for the jury to infer that defendants acted in concert to enter a hog house/roost with the intent to commit larceny. *State v. Sluka*, 200.

CANCELLATION AND RESCISSION OF INSTRUMENTS

§ 22 (NCI4th). Damages and other relief

Plaintiff vendees' actions for fraud and breach of contract arising from the sale of resort property were barred by their rescission of the contract of sale where they alleged fraud but failed to plead special damages. *Canady v. Mann*, 252.

CONSTITUTIONAL LAW

§ 128 (NCI4th). Right to access of courts and legal remedy

Article I, § 24 of the N. C. Constitution does not create a constitutional open courts presumption in all cases but applies only to a criminal proceeding. *In re Belk*, 448.

§ 145 (NCI4th). Full faith and credit; authenticated judgments of other states and federal courts

Plaintiff met his burden of proving that a judgment of the state courts of Alaska was entitled to full faith and credit where the issue of jurisdiction was fully and fairly litigated. *Reinwand v. Swiggett*, 590.

CONSTITUTIONAL LAW — Continued

§ 354 (NCI4th). Self-incrimination; when privilege may be invoked

A state employee subject to administrative investigation must be advised that the questions will relate specifically and narrowly to the performance of official duties; that the answers cannot be used against the employee in any subsequent criminal prosecution; and that the penalty for refusal is dismissal. In the absence of such advice, no penalties can be imposed on the employee for refusing to answer the questions. *Debnam v. N.C. Department of Correction,* 517.

§ 374 (NCI4th). Cruel and unusual punishment; life imprisonment generally

A life sentence for first degree sexual offense is not cruel and unusual punishment. *State v. Stallings,* 241.

CONSUMER AND BORROWER PROTECTION

§ 48 (NCI4th). Debt collectors; deceptive representation

Plaintiff's communications with defendants, made in an attempt to collect defendants' debt for defendant wife's hospitalization, were not misleading or deceptive in violation of the statute prohibiting certain acts by debt collectors. *Forsyth Memorial Hospital v. Contreras,* 611.

CONTRACTORS

§ 10 (NCI4th). Revocation, suspension, and reissuance of license

Petitioner's general contractor's license was improperly suspended for gross negligence where petitioner installed a steel angle support in violation of the building code. *Bashford v. N.C. Licensing Bd. for General Contractors,* 462.

CONTRACTS

§ 15 (NCI4th). Conditional acceptance or counteroffer generally

A "tentative notice of award" of a contract for construction of a water treatment plant which stated that it was subject to final review and approval by the Farmer's Home Administration was not a valid acceptance of plaintiff's bid, and no contract was formed where plaintiff withdrew its bid after the expiration of the sixty-day period during which bids were irrevocable. *Henderson & Corbin v. West Carteret Water Corp.,* 740.

§ 115 (NCI4th). Parties; defendants

A defendant who was not a party to a contract could not be held liable for breach of the contract. *Canady v. Mann,* 252.

CORPORATIONS

§ 103 (NCI4th). Acts indicative of agency by apparent authority

The evidence was sufficient to support the trial court's finding that the vice-president and secretary of defendant corporation had apparent authority to sign a credit application on behalf of the corporation. *Institution Food House v. Circus Hall of Cream,* 552.

§ 160 (NCI4th). Dissenters' rights; judicial appraisal of share value

A statutory appraisal is a dissenting shareholder's exclusive remedy when the shareholder's objection to a "freeze-out" merger is essentially a complaint

CORPORATIONS — Continued

regarding the price which he received for his shares. *IRA ex rel. Oppenheimer v. Brenner Companies, Inc.*, 16.

The trial court did not err in granting summary judgment for defendant corporate directors on plaintiff minority shareholders' claims alleging unfairness of a "freeze-out" merger, breach of fiduciary duty, and actual and constructive fraud where plaintiffs' forecast of evidence related only to the price paid for their shares and the valuation method. *Ibid.*

The trial court did not err in denying plaintiff shareholders' motion to compel discovery of the corporation's pre-merger and post-merger financial information where the information was sought to show the value of the stock and should be considered in the statutory appraisal proceeding. *Ibid.*

COSTS

§ 27 (NCI4th). Attorney's fees; federal statutory allowances

The trial court erred by failing to award attorney fees under 42 U.S.C. 1988 without stating a reason. *Crump v. Board of Education*, 375.

§ 33 (NCI4th). Attorney's fees in actions to collect debts

The trial court properly awarded attorney's fees to plaintiff in an action to collect an account where there was a formal credit agreement providing for reasonable attorney's fees for the collection of past due debts, and the court had before it pleadings, depositions, and interrogatories which enabled it to make a determination as to the extent of work performed by counsel and the reasonableness of the fees assessed. *Institution Food House v. Circus Hall of Cream*, 552.

§ 37 (NCI4th). Attorney's fees in other particular actions or proceedings

Pursuant to the statute allowing an award of attorney fees in a proceeding to compel disclosure of public records if the agency acted without substantial justification, the test for substantial justification is whether respondent's reluctance to disclose was justified to a degree that could satisfy a reasonable person under the existing law and facts known to, or reasonably believed by, respondent at the time respondent refused to make disclosure. *S.E.T.A. UNC-CH v. Huffines*, 440.

Respondent had substantial justification for denying petitioner access to records of laboratory animal protocols at UNC-CH, and the trial court properly refused to award attorney fees to plaintiff in a successful action requiring disclosure of the protocols. *Ibid.*

The trial court did not have the authority to award attorney's fees to plaintiff county as part of the costs in an action to enforce a county ordinance requiring wire fencing and vegetation around defendants' junkyard. *County of Hoke v. Byrd*, 658.

§ 40 (NCI4th). Expert witness fees

An expert's fee for the preparation of documents used to support defendant's motion for summary judgment may not be taxed as a cost to a plaintiff who takes a voluntary dismissal after the motion for summary judgment was filed but before the case was calendared for trial. *Brandenburg Land Co. v. Champion International Corp.*, 102.

COURTS

§ 107 (NCI4th). District court trials; hearings and orders in chambers

Article I, § 24 of the N. C. Constitution does not create a constitutional open courts presumption in all cases but applies only to a criminal proceeding. *In re Belk*, 448.

CRIMINAL LAW

§ 76 (NCI4th). Motion for change of venue; prejudice, pretrial publicity or inability to receive fair trial

The trial court did not abuse its discretion by denying defendants' motion for a change of venue or a special venire due to pretrial publicity in a narcotics prosecution. *State v. Crummy*, 305.

§ 263 (NCI4th). Continuance; time for review of transcripts of hearings or trials

The trial court did not err in a prosecution for burglary and larceny by denying defendant's motion for a continuance where defendant did not have the transcript of a prior trial at which an accomplice also testified; defendant's mere intangible hope that something helpful may have turned up in the testimony was not a basis for delaying trial. *State v. Pickard*, 94.

§ 321 (NCI4th). Joinder or consolidation of charges against defendants charged with the same offense; drug offenses

The trial court did not abuse its discretion by denying a motion to sever where three defendants were charged with several cocaine trafficking offenses. *State v. Crummy*, 305.

§ 365 (NCI4th). Expression of opinion on evidence during trial generally

There was no improper expression of opinion by the trial court in a prosecution for breaking or entering and larceny. *State v. Sluka*, 200.

§ 380 (NCI4th). Conduct and duties of judge; colloquies with counsel

The trial court did not abuse its discretion in a narcotics prosecution where the court granted defense counsel a continuing objection to a line of questioning, reiterated that point several times, then, when counsel continued to object on the same grounds, commented in the presence of the jury that defense counsel was interrupting and diverting the jury's attention and admonished defense counsel outside the presence of the jury. *State v. Crummy*, 305.

§ 414 (NCI4th). Right to conclude argument

The trial court did not err by denying defendant's motion for final argument to the jury where defendant had offered evidence. *State v. Pickard*, 94.

§ 448 (NCI4th). Latitude and scope of argument; victim's age or circumstances

The argument of a prosecutor in a narcotics prosecution that children had been present and could smell the odor when defendants cooked cocaine into crack was a reasonable inference from the evidence and was not grossly improper. *State v. Crummy*, 305.

§ 463 (NCI4th). Latitude and scope of argument; comments supported by evidence

The trial court did not err in a rape and assault prosecution by permitting a prosecutor to argue that a bloody palm print found on the wall belonged to the victim's daughter-in-law even though the State could not prove that the palm print belonged to her because the prosecutor was concentrating on one aspect

CRIMINAL LAW — Continued

of an expert's testimony rather than another and did not exceed the limits of the evidence. *State v. Bridges*, 668.

§ 475 (NCI4th). Conduct affecting jury; exposure to evidence not formally introduced

The trial court did not abuse its discretion in a narcotics prosecution by not holding an evidentiary hearing where a juror told a court official and a news reporter after the trial that she had heard about a shooting incident which occurred during deliberations which may have involved defendant or his brother, that she was intimidated by the report of the shooting, and there was evidence that she may have spoken with one of the State's witnesses by telephone during deliberations. *State v. Crummy*, 305.

§ 476 (NCI4th). Prospective jurors; statements, conduct of others

The trial court did not err in a narcotics prosecution by denying defendant's motion for a special venire or by failing to inquire into possible jury taint where a prospective juror reported to the court that she had overheard a hallway conversation between deputies which she felt was intimidating. *State v. Crummy*, 305.

§ 499 (NCI4th). Other written materials brought into jury room

The trial court's error in allowing, over defendant's objection, the jury's request to view defendant's statement during deliberations was not prejudicial. *State v. Flowe*, 468.

§ 687 (NCI4th). Court's discretion to give substance of, or to refuse to give, requested instruction

The trial court did not err in a rape and assault prosecution by giving only the first sentence of defendant's requested instruction on hair sample analysis and adding a cautionary instruction. *State v. Bridges*, 668.

§ 912 (NCI4th). Polling the jury; generally

There was no error in a narcotics prosecution where the defendants contended that a juror failed to confirm her verdict when polled in that her response was almost inaudible and that she appeared reluctant and required assistance by other members of the jury in standing and answering questions, but the record shows that the juror affirmed her verdict and there was no evidence that she was intimidated or did not freely assent to the verdict. *State v. Crummy*, 305.

§ 923 (NCI4th). Responsiveness of verdict; informality of language; clerical errors

There was no error in a narcotics prosecution in accepting a verdict of guilty of trafficking in cocaine by transportation even though the instructions referred to trafficking in cocaine by possession where it was clear that the court simply mistakenly used the word possession when it meant transportation. *State v. Crummy*, 305.

§ 1081 (NCI4th). Consideration of aggravating and mitigating factors where mitigating factors outnumber aggravating factors

The trial court did not abuse its discretion when sentencing defendant for assault and manslaughter by finding that one aggravating factor outweighed six mitigating factors. *State v. Clark*, 184.

CRIMINAL LAW — Continued

§ 1086 (NCI4th). Consideration of aggravating and mitigating factors where two or more convictions are consolidated for hearing or judgment

The trial court erred in its findings when sentencing defendant where it appeared that the court erroneously applied the contemporaneous conviction of assault with a deadly weapon with intent to kill to a conviction for assault with a deadly weapon with intent to kill inflicting serious injury, and the court did not make written findings nor indicate at the sentencing hearing the aggravating factor being applied to the assault with a deadly weapon with intent to kill. *State v. Clark*, 184.

§ 1102 (NCI4th). Permissible use of nonstatutory aggravating factor

The trial court did not err by finding a nonstatutory aggravating factor although the State did not request the trial court to do so. *State v. Flowe*, 468.

§ 1133 (NCI4th). Aggravating factors; position of leadership or inducement of others to participate generally; facts indicative of defendant's role

The evidence was sufficient in a prosecution for burglary and larceny for the trial court to find the aggravating factor that defendant induced others to participate. *State v. Pickard*, 94.

§ 1185 (NCI4th). Aggravating factors; what constitutes a prior conviction

The trial court did not err by using prior convictions to aggravate defendant's sentences for burglary and larceny where the State offered a certified copy of a consolidated judgment which had been entered pursuant to guilty pleas and which reflected that defendant had been represented by counsel and had pled guilty freely, voluntarily, and understandingly, even though defendant asserted that the court could not consider these prior convictions because defendant testified that he had no recollection of being advised of his rights by the judge before entering his plea. *State v. Pickard*, 94.

DAMAGES

§ 131 (NCI4th). Punitive damages; willful and wanton conduct

The evidence in a wrongful death action was sufficient to support the jury's verdict finding willful and wanton negligence by defendant in driving while intoxicated and awarding punitive damages to plaintiff. *Berrier v. Thrift*, 356.

DEATH

§ 26 (NCI4th). Requirement that personal representative bring action

Where the original pleading in a wrongful death action instituted before the statute of limitations expired by a plaintiff who had not yet qualified as the administratrix gave notice of the transactions and occurrences upon which the claim was based, and plaintiff qualified as administratrix after the statute of limitations had run, plaintiff was entitled to amend her pleading to show that the action was instituted in her capacity as a personal representative and to have the amendment relate back to the commencement of the action so that the claim was not time barred. *Westinghouse v. Hair*, 106.

DECLARATORY JUDGMENT ACTIONS

§ 15 (NCI4th). Availability of remedy in real property matters

Plaintiff's allegation that defendants "intend to violate" the restrictive covenant applicable to their subdivision lot by building a second dwelling thereon was insufficient to allege a justiciable controversy under the Declaratory Judgment Act. *Wendell v. Long*, 80.

DEDICATION

§ 11 (NCI4th). Sufficiency of acts of dedication

An easement to both a lake and the surrounding property in a subdivision was created by the actions of defendants' predecessor, which developed the subdivision. *Shear v. Stevens Building Co.*, 154.

DEEDS

§ 20 (NCI4th). Execution generally

The trial court properly granted summary judgment for plaintiff in an action challenging the transfer of real property by an inactive nonprofit organization where the last recorded officers, who signed the deed, were not officers at the time the deed was executed and the seal did not meet statutory requirements. *Catawba County Horsemen's Assn. v. Deal*, 213.

DISCOVERY AND DEPOSITIONS

§ 47 (NCI4th). Production of documents or things; inspection of property; generally

The trial court abused its discretion in an action by a creditor alleging fraudulent conveyance of stock by denying plaintiff's motion to compel production of documents and granting summary judgment for defendants. *Kirkhart v. Saieed*, 293.

DIVORCE AND SEPARATION

§ 36 (NCI4th). What constitutes a resumption of marital relations

The parties resumed marital relations as a matter of law and defendant husband's duty under a consent judgment to pay alimony to plaintiff wife in the future ended at the time of the reconciliation. *Schultz v. Schultz*, 366.

§ 123 (NCI4th). Equitable distribution; increase in value of separate property

The future value of timber growing on marital property which will not mature until the year 2007 should not be considered either as marital property or as a distributional factor for equitable distribution purposes. *Cobb v. Cobb*, 382.

The trial court erred in distributing the post-separation passive appreciation of two marital assets equally between the parties because post-separation appreciation of a marital asset is not marital property and cannot be distributed by the trial court. *Gum v. Gum*, 734.

§ 125 (NCI4th). Equitable distribution; property acquired in exchange for separate property

An insurance settlement which was originally the separate property of the wife did not become marital property when the wife deposited it into the parties' joint checking account. *Lilly v. Lilly*, 484.

DIVORCE AND SEPARATION — Continued

§ 127 (NCI4th). Equitable distribution; property acquired after separation

The trial court in an equitable distribution action properly classified a car as marital property subject to equitable distribution where the car was purchased after separation with marital property. *Freeman v. Freeman*, 644.

§ 130 (NCI4th). Equitable distribution; insurance proceeds and policies, generally

The trial court did not err in finding that a $25,000 insurance settlement was defendant wife's separate property where it compensated her only for her pain and suffering. *Lilly v. Lilly*, 484.

§ 131 (NCI4th). Equitable distribution; personal injury awards

The trial court erred in an equitable distribution action by classifying the husband's lump sum workers' compensation settlement as the separate property of the husband. *Freeman v. Freeman*, 644.

§ 135 (NCI4th). Equitable distribution; court's duty to value property

Although the Court of Appeals in an earlier opinion determined that a witness had based his valuation partly on a circumstance not in existence at the time of separation, the trial court did not err in relying on the witness's written appraisals when valuing the parties' assets where the court found that this circumstance was not a factor considered by the witness when he compiled his written analysis. *Christensen v. Christensen*, 431.

Plaintiff did not receive a double recovery in an equitable distribution proceeding when the trial court adopted the valuations of the parties' assets by a particular witness. *Ibid.*

The trial court was not required to utilize appraisals by one witness over those of another and had the discretion to determine which appraisals were reliable. *Ibid.*

§ 136 (NCI4th). Equitable distribution; measure of value of property

The trial court did not err in an equitable distribution action in valuing the husband's car at $14,500 where the husband testified that he used $15,000 in marital funds toward its purchase, but the sales contract showed that the purchase price was $14,500, $13,500 in cash and $1000 financed. *Freeman v. Freeman*, 644.

§ 143 (NCI4th). Equitable distribution; generally; "equitable" and "equal" distinguished

The trial court did not abuse its discretion in an equitable distribution action by ordering an equal distribution of marital property. *Freeman v. Freeman*, 644.

§ 149 (NCI4th). Equitable distribution factors; alimony or support

The trial court did not err in determining that checks totalling $45,457 written by the husband to the wife from their joint checking account for her living expenses after the date of separation were advances on the wife's share of the marital estate rather than gifts. *Cobb v. Cobb*, 382.

§ 150 (NCI4th). Equitable distribution; needs of custodial parent

The fact that plaintiff wife has custody of the children born of the marriage is not alone a proper distributional factor under G.S. 50-20(c). *Gum v. Gum*, 734.

DIVORCE AND SEPARATION — Continued

§ 152 (NCI4th). Equitable distribution; contributions to spouse's education or career

The trial court was not required to place a monetary value on plaintiff wife's direct contribution to defendant husband's legal education and career development in order to consider this contribution as a distributional factor. *Gum v. Gum*, 734.

§ 155 (NCI4th). Maintenance or development of property after separation

The trial court did not abuse its discretion in an equitable distribution action by failing to give the wife credit for an amount expended for a security system for the marital home where the wife contended that the expense was incurred in light of the husband's conduct. *Freeman v. Freeman*, 644.

§ 161 (NCI4th). Equitable distribution; application of distribution factors in particular cases

The trial court did not err in ordering an unequal distribution of marital property where the trial court found the presence of a number of distributional factors, including the husband's payment of property taxes, interest, insurance and repairs on marital property for three years after the parties separated. *Cobb v. Cobb*, 382.

§ 162 (NCI4th). Equitable distribution; agreements dividing property; separation agreements

The trial court did not err in a domestic action by ordering defendant to pay plaintiff an amount expended by plaintiff in warding off a foreclosure against marital property where the parties had entered into a memorandum of judgment which was loosely worded regarding financial arrangements concerning division of marital debts. *Hall v. Hall*, 298.

§ 175 (NCI4th). Equitable distribution; consent judgments

The parties' consent order dividing marital assets was valid and enforceable even though the order was entered into by defendant without benefit of counsel, defendant was ignorant of her rights under the equitable distribution laws, and the order awarded plaintiff a larger portion of the marital assets. *Thacker v. Thacker*, 479.

A consent judgment was not void or irregular due to the failure of the trial judge to require both plaintiff and defendant to participate in a voir dire regarding their understanding of the terms of the agreement. *Ibid.*

§ 180 (NCI4th). Equitable distribution; review

The trial court's determination that an unequal division of the marital property is equitable will not be disturbed on appeal absent a clear showing of an abuse of discretion. *Gum v. Gum*, 734.

§ 301 (NCI4th). Grounds for termination of alimony; reconciliation; resumption of marital relations

The trial court did not err in holding defendant husband in civil contempt for failure to pay alimony required by a consent judgment up until the time of reconciliation of the parties. *Schultz v. Schultz*, 366.

§ 333 (NCI4th). Contempt; willfulness requirement

The trial court properly found that defendant's failure to pay alimony required by a consent judgment was willful and without just cause based upon defendant's

DIVORCE AND SEPARATION — Continued

stipulation that he had the means and ability to comply with the consent judgment but failed to make alimony payments because he felt plaintiff wife did not deserve the money. *Schultz v. Schultz*, 366.

§ 359 (NCI4th). Modification of child custody order generally

The trial court erred by modifying the existing joint custody of a child by entering the order without request from either party. *Kennedy v. Kennedy*, 695.

§ 365 (NCI4th). Modification of custody order; change in parent's employment or residence

Evidence that a proposed relocation of the custodial parent's residence will likely or probably adversely affect the welfare of the child will support a finding of changed circumstances which will in turn support a modification of custody. *Ramirez-Barker v. Barker*, 71.

The noncustodial father met his burden of showing that the proposed relocation of the mother and child to California would likely adversely affect the welfare of the child, and the trial court did not abuse its discretion in concluding that the proposed move was not in the best interest of the child. *Ibid.*

§ 392 (NCI4th). Amount of child support generally

A child support order requiring equal payment of uninsured medical and dental expenses on behalf of the child was remanded where the order was manifestly unsupported by reason, given the large disparity in the incomes of the parties. *Lawrence v. Tise*, 140.

§ 392.1 (NCI4th). Child support guidelines

The trial court erred in a child support action by entering an order for an amount greater than the presumptive amount without reference to the child support guidelines. *Hall v. Hall*, 298.

The trial court did not err in a child support action by not deducting certain business expenses from the father's gross receipts from self-employment as a musician where the court determined that those expenses would be incurred whether or not the father was in the music business. *Kennedy v. Kennedy*, 695.

The trial court erred in a child support action by failing to consider the father's responsibility for his two year old daughter from his present marriage. *Ibid.*

The trial court erred in a child support action by failing to deduct from the mother's monthly gross income the amount of the monthly health insurance premium paid by her for the children. *Ibid.*

§ 397 (NCI4th). Child support; past and present expenses

The trial court erred in a child support action by basing the retroactive award on the Guidelines in effect at the time the expenses were incurred rather than on the actual expenditures. *Lawrence v. Tise*, 140.

The trial court did not err in a child support order by refusing to treat a portion of the medical insurance premiums paid by the mother for a policy insuring herself and the child as an expenditure incurred on behalf of the child. *Ibid.*

The trial court erred when awarding retroactive child support by utilizing the Guidelines to determine the allocation of the retroactive obligation and not considering the custodial parent's child care and homemaker services. *Ibid.*

DIVORCE AND SEPARATION — Continued

§ 400 (NCI4th). Child support; consideration of party's actual income

The findings were not sufficient in a child support action for the appellate court to determine whether the trial court had properly applied the Child Support Guidelines in determining the father's gross income. *Lawrence v. Tise*, 140.

The trial court erred in a child support action by improperly considering the father's non-reimbursed employee expenses. *Ibid.*

The trial court erred in a child support action by attributing to the father the entire amount of rental income received by the father and his present wife where the rental property was owned by them in tenancy by the entirety. *Kennedy v. Kennedy*, 695.

§ 401 (NCI4th). Child support; intentional suppression of income

There was no evidence in a child support action that the father was intentionally depressing his income from rental property and no evidence that the property was held by the father as trustee for his sons by his prior marriage, which would prevent the deduction of losses from his income. *Lawrence v. Tise*, 140.

The trial court erred in a child support action by imputing income to the father where there was no evidence in the record to support a finding that the father deliberately depressed his income. *Kennedy v. Kennedy*, 695.

§ 420 (NCI4th). Remedies available to enforce child support orders; security

The trial court's order requiring defendant to post a cash bond to secure enforcement of a child support order must be reversed where the Court of Appeals reversed the underlying paternity action and the child support order. *Buncombe County ex rel. v. Lombroia v. Peek*, 723.

§ 456 (NCI4th). Child custody and support; venue generally

Once a child custody and support order is entered by a court having subject matter jurisdiction and the parties remain the same, the proper venue for any modification of this decree is the court entering the original decree, but a waiver of venue occurs when a modification request is filed with the district court in an improper county and there is no timely demand that the trial be conducted in the proper county. *Brooks v. Brooks*, 44.

Defendant waived her right to remove from Buncombe County to New Hanover County plaintiff's action for modification of a child custody and support order entered in New Hanover County when she failed to make her demand for removal by a plea in abatement either in a pre-answer motion or in the answer. *Ibid.*

§ 522 (NCI4th). Counsel fees and costs; divorce and alimony generally

A trial court order denying the mother's request for attorney fees in a child support action was reversed where the action was properly characterized as one for custody and support, the mother was an interested party acting in good faith, and the finding that the mother had the means to pay her attorney was not supported by the evidence. *Lawrence v. Tise*, 140.

§ 566 (NCI4th). URESA; registration of foreign support order

Plaintiff substantially complied with the requirements of G.S. 52A-29 for registration of a Florida judgment for child support arrearages under URESA although she failed to attach to her petition a copy of the Florida Reciprocal Enforcement of Support Act, a list of states where the Florida order is registered, and a description of the obligor's property subject to execution. *Silvering v. Vito*, 270.

DIVORCE AND SEPARATION — Continued

Although defendant did not receive notice from the clerk of the registration of a foreign child support judgment as required by G.S. 52A-29, defendant's due process rights were not violated where a civil summons and the URESA petition were served upon defendant eight days after the URESA petition was filed. *Ibid.*

§ 567 (NCI4th). URESA; enforcement of foreign support order

Where defendant father's child support arrearages were reduced to judgment by a Florida court, plaintiff mother is entitled to full enforcement of that judgment in North Carolina for a period of ten years after its entry and is not limited to recovery of arrearages which accrued within ten years prior to the filing of the URESA petition. *Silvering v. Vito*, 270.

EASEMENTS

§ 42 (NCI4th). Operation of easement; extent and limitations generally

The trial court erred in a declaratory judgment action concerning a subdivision lake and its surrounding property by allowing defendants to maintain the water level represented on a 1988 plat and develop the surrounding property where allowing defendants to maintain the lake at its lower 1988 level, which defendants created by draining the lake, and allowing a portion of the surrounding land to be developed, would be an encroachment on the scope of the easement created at the time of the original development. *Shear v. Stevens Building Co.*, 154.

The trial court erred by ordering that the cost of maintaining a subdivision lake should be equally divided between the subdivision landowners and the developer and its successors where the landowners were the holders of an appurtenant easement to the lake and surrounding property. *Ibid.*

§ 62 (NCI4th). Prescriptive easements; sufficiency of evidence

Plaintiff's evidence was sufficient to show an easement by prescription in a roadway across defendants' land. *Mitchell v. Golden*, 413.

EVIDENCE AND WITNESSES

§ 190 (NCI4th). Physical or mental condition or appearance of victim

In a prosecution of defendant for involuntary manslaughter while driving under the influence of alcohol, evidence that the victim was eight and one-half months pregnant was relevant to the defense of unavoidable accident and misadventure. *State v. Moore*, 388.

§ 294 (NCI4th). Suggestion or implication of other crimes, wrongs, or acts

In a prosecution for trafficking in cocaine, evidence found inside a tote bag showing that defendant had been issued a traffic citation in another state was admissible to show that defendant exercised control or had possession of the tote bag. *State v. Hunter*, 402.

§ 565 (NCI4th). Facts relating to particular types of civil actions; paternity action

The trial court erred in a paternity action by admitting a Florida judgment which found that plaintiff's husband was not the natural father of the child where defendant was not a party to the Florida action and cannot be bound by the findings of that judgment. *Lombroia v. Peek*, 745.

EVIDENCE AND WITNESSES — Continued

§ 959 (NCI4th). State of mind exception to hearsay rule

The trial court did not err in a prosecution in which defendant was convicted of manslaughter, assault, and misdemeanor breaking or entering by admitting testimony of the deceased's brother regarding statements made to him by the deceased showing the mental condition of deceased as one of passivity as well as an intent not to meet defendant. *State v. Clark*, 184.

§ 1017 (NCI4th). Admissions or declarations against interest regarding fault or liability

Summary judgment was properly granted for defendant Ronald Body in an automobile accident case where deposition testimony by plaintiff Candy Body unequivocally repudiated any claim for negligence against that defendant. *Body v. Varner*, 219.

§ 1214 (NCI4th). Bruton rule; codefendant implicated by confession or statement

The admission of certain hearsay statements of a nontestifying codefendant did not violate defendant's right of confrontation where defendant did not object to some of the statements, defendant failed to state any constitutional grounds for objections to certain statements, and the statements were not "powerfully incriminating." *State v. Hunter*, 402.

§ 1362 (NCI4th). Evidence from former trial or proceeding; demand or waiver of probable cause hearing

There was no prejudicial error in a prosecution for breaking or entering and larceny where the trial court granted the State's motion in limine to prohibit defense counsel from mentioning that no probable cause was found in district court. *State v. Sluka*, 200.

§ 1920 (NCI4th). Blood tests to establish or disprove parentage

The trial court erred in a paternity action by admitting the testimony of an expert in immunology and paternity evaluation concerning a report of a blood test prepared by a Florida physician where plaintiff did not establish a likelihood that the blood tested was in fact blood drawn from plaintiff's husband. *Lombroia v. Peek*, 745.

§ 2142 (NCI4th). Lay testimony; consistency of statements

Testimony by a child victim advocate that a child rape and sexual offense victim had never told her anything different from what she told on the witness stand was admissible on the issue of the victim's credibility. *State v. Stallings*, 241.

§ 2150 (NCI4th). Opinion testimony by experts as to ultimate issue; claimed invasion of province of jury

The trial court erred in a paternity action by allowing an expert to testify that in his opinion it was extremely likely that defendant is the father of the child. *Lombroia v. Peek*, 745.

§ 2201 (NCI4th). Particular subjects of expert testimony; hair

There was no prejudicial error in a rape and assault prosecution where the court allowed an expert in hair comparison to testify to the statistical probability of another person's hair being indistinguishable from defendant's hair and that it was likely that unknown hairs found at the crime scene originated from defendant. *State v. Bridges*, 668.

EVIDENCE AND WITNESSES — Continued

§ 2303 (NCI4th). Particular subjects of expert testimony; self-defense

The trial court did not abuse its discretion in a prosecution in which defendant was convicted of voluntary manslaughter, assault, and misdemeanor breaking or entering by excluding the testimony of a clinical psychologist that defendant suffered from three diagnosable psychological conditions at the time of the offenses. *State v. Clark*, 184.

§ 2341 (NCI4th). Child sexual abuse accommodation syndrome

The trial court erred in permitting a pediatrician to testify that a rape and sexual offense victim was suffering from child sexual abuse accommodation syndrome without limiting the jury's consideration of such testimony to corroborative purposes, but the admission of this testimony for substantive purposes was not prejudicial. *State v. Stallings*, 241.

§ 2366 (NCI4th). Accident reconstruction; conditions at scene

The trial court erred in instructing the jury in a prosecution for misdemeanor death by vehicle to consider the testimony of an expert in transportation engineering and accident reconstruction solely on the issue of proximate cause, but such error was not prejudicial. *State v. Moore*, 388.

§ 2598 (NCI4th). Persons presented as witnesses; juror on inquiry into validity of verdict

An affidavit of a juror concerning a verdict was properly struck. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

EXECUTION AND ENFORCEMENT OF JUDGMENTS

§ 35 (NCI4th). Exemptions; waiver

No execution may be issued until a Notice to Designate Exemptions has been served and any waiver applies only to the particular execution issued. *Household Finance Corp. v. Ellis*, 262.

G.S. 1C-1601(c) and 1C-1603(e)(2) are unconstitutional as they attempt to limit the claiming of constitutional exemptions to 20 days after the notice to designate is served. *Ibid.*

FIDUCIARIES

§ 1 (NCI4th). Generally

Plaintiff bank did not breach a fiduciary duty to defendants by releasing certain lots from a deed of trust securing a promissory note executed by defendants where a mere debtor-creditor relationship existed between plaintiff and defendants. *Branch Banking and Trust Co. v. Thompson*, 53.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 38 (NCI4th). Summary judgment; jury questions

Summary judgment was improperly entered for defendant sales manager on plaintiffs' claim for fraud in the sale of resort property. *Canady v. Mann*, 252.

GAMBLING

§ 3 (NCI4th). Seizure of property and proceeds

The trial court did not err in finding that defendant's misdemeanor gambling convictions constituted predicate acts of racketeering activity sufficient to subject his property to forfeiture under the RICO Act. *State ex rel. Thornburg v. Lot and Buildings*, 559.

GRAND JURY

§ 17 (NCI4th). Secrecy

The trial court did not err in a narcotics prosecution by refusing to allow defendants to inspect investigative grand jury documents. *State v. Crummy*, 305.

GUARANTY

§ 17 (NCI4th). Discharge of guarantor

The defense of discharge because of impairment of collateral is available to accommodation parties but is not available to non-accommodating makers or co-makers. *Branch Banking and Trust Co. v. Thompson*, 53.

§ 20 (NCI4th). Instructions to jury

The trial court did not err in an action arising from the sale of property under a lease guaranty by allowing the jury to compute damages based on the theory that the agreements were leases instead of security agreements, or by instructing the jury that they should consider the amount due, if any, under the lease at the time of the default and deduct from that the fair market value of the personal property and the amount, if any, by which plaintiff could have mitigated its damages. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

HOMICIDE

§ 86 (NCI4th). Self-defense; effect of aggression or provocation by defendant generally

There was no plain error in a homicide prosecution where defendant contended that the court erred by instructing the jury that defendant would be guilty if he was the aggressor even though there was no evidence that defendant was the aggressor where defendant did not object to the instruction or show plain error. *State v. Clark*, 184.

ILLEGITIMATE CHILDREN

§ 4 (NCI4th). Civil action to establish paternity; parties

The trial court did not err in a paternity action by ruling that plaintiff's husband was not a necessary party where his rights and responsibilities with regard to the child had been finally determined when a Florida court found that he was not the father. *Lombroia v. Peek*, 745.

§ 9 (NCI4th). Civil action to establish paternity; sufficiency of evidence

Although remanded on other grounds, there was sufficient evidence in a paternity action to rebut the presumption of legitimacy in favor of the husband and require submission of the case to the jury. *Lombroia v. Peek*, 745.

INCOMPETENT PERSONS

§ 20 (NCI4th). Incompetency proceedings; hearing procedures

North Carolina's involuntary commitment statutes are not unconstitutional because the hearing is not open to the public. *In re Belk*, 448.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 42 (NCI4th). Bill of particulars; effect on state's evidence

Statements made by the prosecutor during a hearing on defendant's motion for a bill of particulars did not constitute a bill of particulars, and there was no merit to defendant's contention that there was a fatal variance between the court's charge and the bill of particulars and that evidence of cunnilingus was inadmissible as outside the scope of the bill of particulars. *State v. Stallings*, 241.

§ 43 (NCI4th). Discretionary denial of motion for bill of particulars; review

The trial court did not err in the denial of defendant's motion for a bill of particulars in a sexual offense case. *State v. Stallings*, 241.

INFANTS OR MINORS

§ 120 (NCI4th). Abused and neglected children

The trial court did not err in finding that respondent's children were neglected based upon her failure to provide health care and food for the children and to take them across the street to free day care. *In re Bell*, 566.

§ 127 (NCI4th). Dispositional alternatives for abused, neglected, or dependent juveniles

The trial court did not err in ordering neglected children to attend day care. *In re Bell*, 566.

INJUNCTIONS

§ 37 (NCI4th). Pleadings; motions, generally

Verification of the complaint is not a condition for issuance of a preliminary injunction. *Moore v. Wykle*, 120.

INSURANCE

§ 43 (NCI4th). Extent of obligation of guaranty association

Punitive damages cannot be recovered from the North Carolina Insurance Guaranty Association for the acts of insolvent insurers, and no action will lie against the Association for an insolvent insurer's violation of the Unfair or Deceptive Trade Practices Act. *Bentley v. N.C. Insurance Guaranty Association*, 1.

§ 75 (NCI4th). Liability of broker or agent to insured; effect of agent having procured insurance

The trial court did not err by granting summary judgment in favor of an insurance agency and its employee on claims of bad faith refusal to settle, negligence, breach of fiduciary duty and unfair or deceptive practices where defendants were not parties to the settlement negotiations, any negligence by defendants could not have been the proximate cause of any loss, there was no evidence of an ongoing

INSURANCE — Continued

relationship between plaintiff and the agency or agent, and defendants were not responsible for the insurer's bad faith refusal to settle. *Bentley v. N.C. Insurance Guaranty Association*, 1.

§ 514 (NCI4th). Stacking uninsured motorist coverage

Intrapolicy stacking of uninsured motorist coverages on two automobiles covered by insureds' policy was controlled by the language of the policy and was prohibited where the policy provided that liability was limited to $50,000 per person and $100,000 per accident "regardless of the number of . . . vehicles or premiums shown in the Declarations." *Harleysville Insurance Co. v. Poole*, 234.

§ 528 (NCI4th). Extent of underinsured motorist coverage

An insured of the first class residing in the same household with his father and brother was not entitled to stack UIM coverages under personal automobile policies issued to his father and brother. *Harrington v. Stevens*, 730.

§ 532 (NCI4th). Underinsured coverage; effect of policy provisions being in conflict with underinsured motorist statute

Plaintiff was entitled to engage in both interpolicy and intrapolicy stacking of underinsured motorist coverages for an accident that killed plaintiff's decedent prior to the 1985 amendment to G.S. 20-279.21(b)(4) even though the policies provided to the contrary and the statute did not specifically provide for stacking of underinsured coverages at that time. *Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 26.

§ 549 (NCI4th). Garage liability insurance

The nonowner driver's personal automobile policy rather than the dealer-owner's garage liability policy provided coverage for an accident involving a vehicle borrowed from the dealer. *Eaves v. Universal Underwriters Group*, 595.

§ 561 (NCI4th). What constitutes "replacement" vehicle

A stationwagon purchased by the named insured's husband did not constitute a replacement vehicle covered by the wife's policy at the time of an accident where it was not purchased by the husband during the policy period for which coverage is claimed but was purchased during the previous policy period. *N.C. Farm Bureau Mutual Ins. Co. v. Walton*, 207.

§ 571 (NCI4th). Regular use of other or nonowned automobile by insured

The husband was excluded from coverage under the wife's automobile liability policy while he was driving a noncovered vehicle which was available for his regular use. *N.C. Farm Bureau Mutual Ins. Co. v. Walton*, 207.

§ 815 (NCI4th). Validity of arbitration award

Neither an appraisal clause in a fire insurance policy nor the appraisal process as carried out deprived plaintiff of his property without due process or his right to a trial by jury. *Bentley v. N.C. Insurance Guaranty Association*, 26.

§ 943 (NCI4th). Action against agent; contributory negligence by insured

The trial court did not err in instructing the jury that it could consider the education and business and professional experience of plaintiff's agent in determining whether he was contributorily negligent in failing to inquire of defendant broker concerning the meaning of language in a medical malpractice policy. *Kron Medical Corp. v. Collier Cobb & Associates*, 331.

JUDGES, JUSTICES, AND MAGISTRATES

§ 2 (NCI4th). Disability of judges

There is no requirement or implication in G.S. 1A-1, Rule 63 that the judge who heard the case must have become incapacitated before a different judge can rule on post-trial motions. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

JURY

§ 5 (NCI3d). Excusing of jurors

There was no error where venire persons were excused from jury service after ex parte communications with court personnel where the judge expressed concern that those who had recently been added to the venire would not have sufficient time to get their affairs in order. *State v. Crummy*, 305.

§ 7.6 (NCI3d). Challenges for cause; generally; time and order of challenging

The trial court did not err in a narcotics prosecution by refusing to allow defendants to ask rehabilitative questions to jurors excused for cause after stating that they could not be fair and impartial. *State v. Crummy*, 305.

§ 7.14 (NCI3d). Peremptory challenges; manner, order, and time of exercising challenge

The trial court did not err by finding that the prosecutor's peremptory challenges were not racially motivated where the State's showing was sufficient to rebut any showing of a prima facie case. *State v. Crummy*, 305.

LANDLORD AND TENANT

§ 13.1 (NCI3d). Option to terminate or provision for termination

The trial court did not err in a summary ejectment action by concluding that plaintiff was entitled to possession of the premises due to material noncompliance with the lease where the lease stipulated that defendant would provide electrical services to the apartment and the evidence at trial showed that defendant's electricity was terminated three times for nonpayment of amounts due. *Long Drive Apartments v. Parker*, 724.

Plaintiff did not waive its right to terminate a lease where the Notice to Quit and Vacate did not provide defendant an opportunity to cure the breach, but merely afforded the tenant an opportunity to discuss the termination with the manager. *Ibid.*

LARCENY

§ 7.2 (NCI3d). Identity of property stolen; value of property

The trial court correctly denied defendant's motion to dismiss a charge of felonious larceny where defendant was charged with stealing a public pay telephone containing $162.20 and a wall unit enclosure, there was no evidence of market value, and there was evidence that the telephone and enclosure were not common articles with a market value and that the replacement value exceeded $1500. *State v. Helms*, 237.

§ 7.4 (NCI3d). Weight and sufficiency of evidence; possession of stolen property

The trial court did not err by instructing the jury on the doctrine of recent possession in a prosecution for felonious larceny and felonious breaking or entering

LARCENY — Continued

where there was evidence that defendants had joint possession of the stolen property and had acted in concert in committing the offenses. *State v. Sluka*, 200.

§ 7.8 (NCI3d). Felonious breaking and entering and larceny; cases where evidence sufficient

There was sufficient evidence in a prosecution for felonious larceny to permit the jury to find that defendant took the property of another without his consent, carried it away with the intent to permanently deprive him of the property, and took the property pursuant to a breaking or entering. *State v. Sluka*, 200.

§ 8.3 (NCI3d). Instructions as to value of property stolen

The trial court did not err in a felonious larceny prosecution by refusing defendant's request for an instruction that the worth of the property stolen be determined by its fair market value where the testimony at trial was that the stolen property was not a common article susceptible to market valuation and the jury was instructed on non-felonious larceny. *State v. Helms*, 237.

LIMITATION OF ACTIONS

§ 4.2 (NCI3d). Negligence actions

The statute of repose for a defective condition of an improvement to realty set forth in G.S. 1-50(5), rather than that provided in G.S. 1-50(6) for defective products, applied to plaintiffs' claims against defendant manufacturer for negligence and breach of warranty in producing and selling floor coverings containing asbestos that was used in the construction of a hospital. *Forsyth Memorial Hospital v. Armstrong World Industries*, 110.

The ten-year limitation of G.S. 1-52(16) still applies when the six-year limitation of G.S. 1-50(5) does not apply because of allegations of willful and wanton negligence in furnishing materials, and plaintiffs' claim for willful and wanton negligence by defendants in furnishing to plaintiffs floor coverings containing asbestos is barred on its face where plaintiffs' cause of action accrued more than ten years from the last omission of defendant relating to plaintiffs. *Ibid.*

§ 16 (NCI3d). Mode or manner of raising defense of the statute

The affirmative defense of the statute of limitations was before the trial court with the consent of both parties, and the failure to assert such defense in defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim was not fatal. *Johnson v. N.C. Dept. of Transportation*, 63.

MASTER AND SERVANT

§ 9 (NCI3d). Actions to recover compensation

The State Wage and Hour Act did not afford plaintiff a remedy against the Department of Transportation for overtime pay. *Johnson v. N.C. Dept. of Transportation*, 63.

Provisions of the N. C. Administrative Code do not confer any right of action in the courts for the payment of overtime wages. *Ibid.*

§ 10.2 (NCI3d). Actions for wrongful discharge

Plaintiff supervisor's action for wrongful discharge based on defendant's firing of him because he refused to punish union organizers was preempted by federal law under the NLRA. *Venable v. GKN Automotive*, 579.

MASTER AND SERVANT — Continued

The trial court properly dismissed plaintiff's claim for unlawful termination of his employment-at-will based on evidence that plaintiff's supervisor temporarily altered inventory records and used the altered inventory records as an excuse for plaintiff's discharge. *Tompkins v. Allen,* 620.

§ 49.1 (NCI3d). Employees with meaning of Workers' Compensation Act; status of particular persons

A student at Durham Technical Institute who was receiving on-the-job training at defendant hospital as a respiratory therapist was an apprentice employee of the hospital within the meaning of the Workers' Compensation Act, and his sole remedy for injuries received in a fall in the hospital is under the Act. *Ryles v. Durham County Hospital Corp.,* 455.

§ 65.2 (NCI3d). Back injuries

The Industrial Commission did not err in a workers' compensation hearing by failing to adopt the position of plaintiff's treating physician rather than the employer's physician on plaintiff's physical condition before and after the accident causing a second back injury. *Blankley v. White Swan Uniform Rentals,* 751.

The Industrial Commission did not err by finding that plaintiff refused suitable employment offered by his employer without justification where there was conflicting medical testimony as to plaintiff's post-injury physical capabilities. *Ibid.*

§ 68 (NCI3d). Occupational diseases

A physician's medical opinion was sufficient evidence to support the Industrial Commission's finding that plaintiff suffered from an occupational disease caused by exposure to a dry cleaning solution used in the workplace. *Keel v. H & V Inc.,* 536.

§ 80 (NCI3d). Rates and regulation of compensation insurers

A genuine issue of material fact was presented as to whether the retrospective adjustment of plaintiff's premiums for workers' compensation insurance based on claims and loss experience was to be calculated for each year of a three-year period or was to be calculated only once for the entire three-year period. *Transall, Inc. v. Protective Insurance Co.,* 283.

§ 93.2 (NCI3d). Proceedings before the Commission; admissibility of evidence

Where the decision to take additional evidence is discretionary and neither party has put forth good cause for such evidence to be considered, the Industrial Commission may decide to exclude evidence which it has previously seen fit to hear. *Keel v. H & V Inc.,* 536.

§ 94.3 (NCI3d). Rehearing and review by Commission

The full Industrial Commission failed to carry out its duties under G.S. 97-85 when it remanded a workers' compensation proceeding to the hearing commissioner to take further evidence and determine the deceased employee's average weekly wage. *Hardin v. Venture Construction Co.,* 758.

§ 95 (NCI3d). Right to appeal or review of compensation award; mode of review

No appeal lies from the interlocutory order of the Industrial Commission remanding a workers' compensation proceeding to the hearing commissioner to take further evidence and determine the deceased employee's average weekly wage. *Hardin v. Venture Construction Co.,* 758.

MASTER AND SERVANT — Continued

§ 108 (NCI3d). Right to unemployment compensation generally

Testimony by petitioner's supervisor was sufficient to support the trial court's finding that, under the employer's policy, an employee could be terminated for refusing to participate in an alcohol rehabilitation program. *West v. Georgia-Pacific Corp.*, 600.

§ 108.1 (NCI3d). Effect of misconduct

Petitioner was discharged for misconduct connected with his work where the evidence showed that petitioner reported to work smelling of alcohol and refused to participate in an alcohol treatment program. *West v. Georgia-Pacific Corp.*, 600.

§ 112 (NCI3d). Federal Wage and Hour Law; validity and construction generally

The two-year statute of limitations set forth in the federal Fair Labor Standards Act preempts the three-year statute of limitations provided in G.S. 1-52(11) for recovery of any amount due pursuant to the Fair Labor Standards Act. *Johnson v. N.C. Dept. of Transportation*, 63.

The federal statute of limitations for an action under the Fair Labor Standards Act is not tolled while the aggrieved party pursues administrative remedies. *Ibid.*

MINES AND MINERALS

§ 2 (NCI3d). Liabilities in connection with mining operations

A civil penalty for mining without a permit may be assessed for violations of the Mining Act which occurred prior to the operator's receipt of notice of the violations as long as notice is received before the civil penalty is assessed. *Crowell Constructors, Inc. v. N.C. Dept. of E.H.N.R.*, 716.

Evidence that an inspector "paced off" an affected area of 1.18 acres supported the Mining Commission's determination that the affected land upon which petitioner was mining without a permit constituted greater than one acre in violation of G.S. 74-50. *Ibid.*

MUNICIPAL CORPORATIONS

§ 30.6 (NCI3d). Special permits and variances

The evidence was sufficient to support a city council's findings that properties near a proposed outdoor amphitheater would be protected from sound amplification, that the facility and activities conducted there would not have a substantial adverse effect on the surrounding properties, and that the facility would not substantially reduce the value of the property in the surrounding neighborhood. *In re Application of City of Raleigh*, 505.

§ 30.21 (NCI3d). Zoning ordinances; hearing

Respondent city council afforded petitioners notice and an opportunity to be heard in the process of issuing a permit for the building of an outdoor amphitheater. *In re Application of City of Raleigh*, 505.

Although the record reflected a city council's enthusiasm for an outdoor amphitheater, the council's pre-hearing participation did not reflect impermissible bias on its part in the permit process. *Ibid.*

§ 37 (NCI3d). Regulations relating to safety

A county ordinance requiring automobile graveyards, junkyards or repair shops located within specified distances from public roads, schools, churches or residences

MUNICIPAL CORPORATIONS — Continued

to be surrounded by wire fencing and vegetation was not preempted by the Junkyard Control Act, does not violate equal protection, and is a valid exercise of the police power. *County of Hoke v. Byrd,* 658.

NARCOTICS

§ 1.3 (NCI3d). Elements and essentials of statutory offenses relating to narcotics

Defendant could not properly be convicted of trafficking in cocaine by possession and possession of the same cocaine. *State v. Hunter,* 402.

§ 4 (NCI3d). Sufficiency of evidence and nonsuit; cases where evidence was sufficient

There was sufficient evidence in a prosecution for trafficking in cocaine as to the amount and identity of the controlled substance where the only evidence of the weight and nature of the substance was the uncorroborated testimony of persons involved in the conspiracy who were testifying under agreement with the State. *State v. Crummy,* 305.

§ 4.3 (NCI3d). Sufficiency of evidence of constructive possession

The evidence was sufficient to show that defendant either actually or constructively possessed cocaine found in an automobile leased by defendant. *State v. Hunter,* 402.

PENALTIES

§ 1 (NCI3d). Generally

The superior court had jurisdiction over a RICO forfeiture proceeding even though it did not have jurisdiction over the misdemeanor gambling charges which were the basis of the violation of the RICO Act. *State ex rel. Thornburg v. Lot and Buildings,* 559.

The trial court did not err in finding that defendant's misdemeanor gambling convictions constituted predicate acts of racketeering activity sufficient to subject his property to forfeiture under the RICO Act. *Ibid.*

PRINCIPAL AND SURETY

§ 2 (NCI4th). Actions on surety bonds in general

The trial court erred by granting summary judgment for plaintiff in an action on a surety bond where there was a disputed issue of fact as to whether the corporation covered by the surety bond is the same as the entity which sold the car to plaintiff and which plaintiff originally sued. *Whiteside v. Lawyers Surety Corp.,* 230.

PROCESS

§ 9.1 (NCI3d). Minimum contacts

The trial court erred by denying defendants' motion to dismiss based on lack of personal jurisdiction in an action based on the alleged failure to deliver a performance bond where it could not be discerned where the bond was to be delivered, so that jurisdiction does not follow under the long-arm statute, and the contacts

PROCESS — Continued

between defendants and North Carolina were insufficient to fulfill the necessary due process requirements. *Tutterrow v. Leach*, 703.

RULES OF CIVIL PROCEDURE

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court properly imposed sanctions upon an attorney for a violation of the legal sufficiency prong of Rule 11 by filing notice of a charging lien after she had withdrawn from her former client's case and before a settlement or judgment was entered. *Mack v. Moore*, 87.

A strong inference of improper purpose, i.e., harassment of a former client and her present attorneys, was created by a former attorney's filing of a notice of a charging lien seeking recovery on the basis of quantum meruit plus a percentage of the judgment after she had withdrawn from the case out of anger because the client refused to accept a settlement offer. *Ibid.*

§ 12.1 (NCI3d). Defenses and objections; when and how presented

The affirmative defense of the statute of limitations was before the trial court with the consent of both parties, and the failure to assert such defense in defendant's Rule 12(b)(6) motion to dismiss for failure to state a claim was not fatal. *Johnson v. N.C. Dept. of Transportation*, 63.

§ 15.1 (NCI3d). Discretion of court to grant amendment to pleadings

The trial court did not abuse its discretion by denying defendants' motion to amend their answer where the court noted that the complaint was filed on 16 January 1987, the motion for summary judgment was filed on 21 December 1988, the partial summary judgment was entered on 13 April 1989, the Court of Appeals affirmed the partial summary judgment on 20 March 1990, and the motion to amend the answer was made on the first day of trial, 30 July 1990. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

§ 50.2 (NCI3d). Directed verdict for party with burden of proof

A directed verdict in favor of the party with the burden of proof on the substantive issues is appropriate only if the credibility of the movant's evidence is manifest as a matter of law. *In re Will of Jarvis*, 34.

§ 56.4 (NCI3d). Summary judgment; necessity for and sufficiency of supporting material; opposing party

Plaintiff's affidavit in opposition to defendants' motion for summary judgment was not inconsistent with her deposition testimony but corroborated a portion of that testimony, and plaintiff therefore did not create an issue of fact by contradicting in her affidavit her prior sworn testimony. *Mitchell v. Golden*, 413.

§ 59 (NCI3d). New trials; amendment of judgments

The trial court in an action to recover damages for the unlawful cutting of timber abused its discretion in granting defendant a new trial on his counterclaim that plaintiff breached its contractual obligation to put forth its best efforts to facilitate the sale of the property in question to defendant. *Perry-Griffin Foundation v. Proctor*, 528.

RULES OF CIVIL PROCEDURE — Continued

§ 60.2 (NCI3d). Grounds for relief from judgment or order

The trial court properly denied defendant's motion for relief from a confession of judgment obtained for legal services where the judgment was not void. *Burton v. Blanton*, 615.

SALES

§ 6.4 (NCI3d). Warranties in sale of house by builder-vendor

Defendants breached an implied warranty that a house and lot sold to plaintiffs would be suitable for use as a single-family residence where restrictive covenants confined use of the lot to a single-family dwelling, and the lot was unsuitable for a septic tank or on-site sewage system. *Lumsden v. Lawing*, 493.

§ 19 (NCI3d). Measure of damages for breach of warranty

Where the trial court rescinded a contract for the purchase of a house based on defendants' breach of an implied warranty that the house would be suitable as a single-family residence, plaintiffs were entitled not only to the full purchase price, interest, ad valorem taxes, and expenses advanced in repair of a septic tank, but also to sums expended on mortgage interest and insurance premiums. *Lumsden v. Lawing*, 493.

Where plaintiffs' contract to purchase a house was rescinded by the court, plaintiffs were obligated to pay the reasonable rental value of the premises during their occupancy. *Ibid.*

SCHOOLS

§ 6 (NCI3d). School property

Plaintiffs' complaint failed to state a claim against defendant board of education concerning the proposed sale of a school building even though the sale allegedly resulted from the board's improper purchase of an administration building with school bond funds. *Moore v. Wykle*, 120.

The trial court did not err in dismissing plaintiffs' claim for a preliminary injunction enjoining the disposal of school property. *Ibid.*

§ 7.3 (NCI3d). Allocation of bond proceeds

Plaintiffs failed to state a claim against defendants as individuals and as members of a county board of education and a board of county commissioners where they alleged that defendants diverted school bond funds from school construction projects set forth in the bond resolution to the purchase of an administration building for the school system. *Moore v. Wykle*, 120.

Plaintiffs stated no claim against defendant school superintendent based on the use of school bond funds for the purchase of an administration building. *Ibid.*

The trial court did not err in limiting its denial of motions to dismiss by defendant board of education and defendant board of county commissioners to the allegations relating to the propriety of the expenditure of school bond proceeds on the purchase and renovation of an administration building. *Ibid.*

SEARCHES AND SEIZURES

§ 1 (NCI3d). What constitutes search or seizure; scope of protection generally

The trial court erred by dismissing a citation for refusal to allow a warrantless inspection of a licensed fish dealership. *State v. Nobles*, 627.

SEARCHES AND SEIZURES — Continued

§ 12 (NCI3d). "Stop and frisk" procedures

An officer's initial stop of defendant for being illegally parked in a rest area was not pretextual, and the officer's subsequent investigation after issuing a warning ticket did not exceed the scope of the stop. *State v. Hunter*, 402.

§ 15 (NCI3d). Standing to challenge lawfulness of search generally

Defendant had no standing to challenge the search of a radio seized from a vehicle in which he was a passenger. *State v. Hunter*, 402.

§ 18 (NCI3d). Consent given by owner of vehicle

There was no merit to defendant's contention that he did not consent to the search of his automobile where defendant signed a consent to search form, and the trooper did not threaten or otherwise force defendant to sign the form. *State v. Hunter*, 402.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1 (NCI3d). Generally

Monthly utility reimbursement payments received by petitioner pursuant to a HUD housing assistance program should be excluded from income for the purpose of calculating petitioner's food stamp benefits. *Carpenter v. N.C. Dept. of Human Resources*, 278.

STATE

§ 12 (NCI3d). State Personnel Commission authority and actions

Plaintiff was barred from pursuing his claim for overtime compensation under the State Personnel Act where he did not seek review of an administrative law judge's decision in superior court. *Johnson v. N.C. Dept. of Transportation*, 63.

A reorganization within the UNC police department was a promotion scheme and so was within the jurisdiction of the State Personnel Commission appeals process, and the trial court erred in dismissing the claim of a black female officer that discrimination occurred when a white male with less seniority and training was selected to fill a new position. *Edwards v. University of North Carolina*, 606.

STATUTES

§ 5.8 (NCI3d). General and special provisions

Inasmuch as G.S. Ch. 122C addresses specifically the procedure for involuntary commitment hearings and speaks specifically to the right to view records from a commitment hearing, its provisions control over the general language of the public records statutes. *In re Belk*, 448.

TAXATION

§ 12 (NCI3d). Application of proceeds of bonds or tax

Plaintiffs failed to state a claim against defendants as individuals and as members of a county board of education and a board of county commissioners where they alleged that defendants diverted school bond funds from school construction projects set forth in the bond resolution to the purchase of an administration building for the school system. *Moore v. Wykle*, 120.

TAXATION — Continued

Plaintiffs stated no claim against defendant school superintendent based on the use of school bond funds for the purchase of an administration building. *Ibid.*

TRESPASS

§ 1 (NCI3d). Civil trespass; definition; elements

The trial court did not err by not instructing the jury that plaintiff would not have been in lawful actual possession and could not recover if a licensing agreement under which plaintiff occupied the property failed to describe the property. *Maintenance Equipment Co. v. Godley Builders*, 343.

§ 6 (NCI3d). Competency and relevancy of evidence

The trial court did not err in a trespass action by refusing to admit documents disclosing that defendants had permission of the lessor to perform grading work on land leased by plaintiff. *Maintenance Equipment Co. v. Godley Builders*, 343.

The trial court did not err in a trespass action arising from grading adjacent property by allowing plaintiff's witnesses to testify about the value of damaged or lost personal property where the witnesses testified that they had operated a business upon the property for a number of years and were personally acquainted with each item of property. *Ibid.*

§ 7 (NCI3d). Sufficiency of evidence and nonsuit

The trial court properly denied defendant's motion for a directed verdict in a trespass action where defendant contended that plaintiff merely held a license, but the agreement grants plaintiff the right to occupy and use the property, plaintiff paid annual rent and actively utilized the premises, and plaintiff complained to defendant when the grading began. *Maintenance Equipment Co. v. Godley Builders*, 343.

§ 8 (NCI3d). Damages in general

There was sufficient evidence to support an award of punitive damages in a trespass action arising from grading adjacent property, the court did not err in its instructions, and the court did not abuse its discretion by not awarding a new trial upon allegations that the punitive damages award was excessive. *Maintenance Equipment Co. v. Godley Builders*, 343.

§ 8.1 (NCI3d). Consequential damages

The trial court did not err in its instruction on special damages in a trespass action arising from grading on adjacent property where there was evidence of a rental value from which the jury could find special damages and the court instructed the jury that plaintiff was entitled to special damages if it was proved by the greater weight of the evidence that such damages did occur and were the proximate result of defendant's conduct. *Maintenance Equipment Co. v. Godley Builders*, 343.

§ 8.2 (NCI3d). Damages for injuries to property attached to or forming part of realty

The trial court erred in failing to double damages for defendant's unlawful cutting of timber from plaintiff's lands, and any credit to defendant for proceeds recovered by plaintiff and for the value of timber left on the ground should have been deducted after the damages were doubled. *Perry-Griffin Foundation v. Proctor*, 528.

TRIAL

§ 5 (NCI3d). Course and conduct of trial in general

The trial court did not deny defendants a fair trial in its procedural and evidentiary rulings in an action arising from the sale of property under a lease guaranty. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

§ 10.1 (NCI3d). Expression of opinion on evidence by court during progress of the trial; particular cases

The cumulative effect of the trial court's comments to defense counsel was not prejudicial. *Maintenance Equipment Co. v. Godley Builders*, 343.

§ 46 (NCI3d). Impeaching the verdict

The trial court properly refused to permit defendant to impeach a verdict awarding punitive damages in a wrongful death action by the affidavits of three jurors that the jury foreman misinformed the jurors during deliberations that punitive damages were only a "statement" of what decedent's life was worth rather than a collectible money judgment. *Berrier v. Thrift*, 356.

§ 47 (NCI3d). Judgment non obstante veredicto

There was no error in the denial of a motion for a judgment n.o.v. in an action arising from the sale of property under a lease guaranty. *Borg-Warner Acceptance Corp. v. Johnston*, 174.

§ 58 (NCI3d). Findings and judgment of the court

The trial court's findings and conclusions did not finally resolve the issues raised in a proceeding to divide the parties' properties, and the judgment is vacated and the cause remanded to the district court. *Small v. Small*, 474.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices, in general

Plaintiff bank's alleged release of several subdivision lots from a deed of trust in violation of the terms of a promissory note and loan agreement executed by defendants did not constitute an unfair trade practice. *Branch Banking and Trust Co. v. Thompson*, 53.

Plaintiffs' forecast of evidence raised a genuine issue of material fact in an action for unfair practices by defendants in fraudulently inducing plaintiffs to purchase lots in a resort community which were unsuitable for building. *Canady v. Mann*, 252.

A failure to disclose information may be an unfair or deceptive insurance practice in violation of G.S. 58-63-15(1). *Kron Medical Corp. v. Collier Cobb & Associates*, 331.

The trial court erred in entering judgment n.o.v. for defendant broker and defendant agent on plaintiff's unfair trade practice claim based on a violation of the unfair insurance practice statute where the jury found that defendant knew or should have known that plaintiff believed that the rate structure for a medical malpractice policy procured for plaintiff by defendants included a "deposit premium" which was partially refundable if actual coverage used was less than projected coverage and that defendants failed to explain to plaintiff that no portion of the premium was refundable. *Ibid.*

UNIFORM COMMERCIAL CODE

§ 11 (NCI3d). Express warranties

Plaintiff satisfied the statutory requirement of notice to Ford of a warranty defect on a Ford pickup truck by giving notice to the dealership which sold the truck to him where language in Ford's warranty booklet designated the selling dealership as its representative for purposes of honoring the express warranty issued by Ford to plaintiff. *Halprin v. Ford Motor Co.*, 423.

The Court of Appeals declined to rule on the question as to whether a buyer who seeks to recover for breach of warranty must give notice to the remote remanufacturer as opposed to the immediate seller. *Ibid.*

§ 33 (NCI3d). Signatures

Defendants executed a promissory note as co-makers and not as accommodation parties and were not entitled to assert the defense of discharge. *Branch Banking and Trust Co. v. Thompson*, 53.

§ 35 (NCI3d). Accommodation party

The defense of discharge because of impairment of collateral is available to accommodation parties but is not available to non-accommodating makers or co-makers. *Branch Banking and Trust Co. v. Thompson*, 53.

VENDOR AND PURCHASER

§ 6 (NCI3d). Responsibility for condition of premises; failure to disclose material facts

Plaintiff's claims for fraud and negligent misrepresentation in the purchase of commercial property were properly dismissed where plaintiff showed neither defendant's intent to deceive nor plaintiff's own reasonable reliance on the deception. *C.F.R. Foods, Inc. v. Randolph Development Co.*, 584.

WILLS

§ 20 (NCI3d). Evidence of due execution of will

The trial court properly directed a verdict for propounders on the issue of due execution where the nonmovant caveators rendered propounders' evidence manifestly credible by admitting that testator made his own mark (an X) in the spaces designated "His mark" with an attesting witness guiding the pen. *In re Will of Jarvis*, 34.

§ 21.4 (NCI3d). Sufficiency of evidence of undue influence

The trial court properly directed a verdict for propounders on the issue of undue influence. *In re Will of Jarvis*, 34.

§ 22 (NCI3d). Mental capacity; evidence of mental condition of testator

The trial court properly directed a verdict for propounders on the issue of testator's mental capacity to make a will where caveators' evidence related to testator's physical rather than mental disability. *In re Will of Jarvis*, 34.

§ 24.1 (NCI3d). Jury trial in caveat proceeding; direction of verdict and nonsuit

The trial court may direct a verdict for propounders in a caveat proceeding at the close of all the evidence. *In re Will of Jarvis*, 34.

WILLS — Continued

§ 25 (NCI3d). Costs and attorney fees

The trial court correctly granted partial summary judgment in favor of defendant in a separate action seeking damages for procuring and propounding a spurious will; plaintiff's claim for attorney's fees and other court costs could only be adjudicated in the caveat proceeding. *Lash v. Lash,* 755.

§ 28.4 (NCI3d). Intention of testator generally; determining intent from language of will and circumstances surrounding execution

The trial court correctly granted partial summary judgment for plaintiff in a declaratory judgment action to construe a will to determine the ownership interests in land and other rights and damages arising from ownership of the land. *Hollowell v. Hollowell,* 166.

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