NORTH CAROLINA COURT OF APPEALS REPORTS

VOLUME 108

3 NOVEMBER 1992

2 FEBRUARY 1993

RALEIGH
1993

CITE THIS VOLUME
108 N.C. App.

TABLE OF CONTENTS

This volume is printed on permanent, acid-free paper in compliance with the North Carolina General Statutes.

THE COURT OF APPEALS
OF
NORTH CAROLINA

Chief Judge

GERALD ARNOLD

Judges

HUGH A. WELLS
CLIFTON E. JOHNSON
SIDNEY S. EAGLES, JR.
JACK COZORT
ROBERT F. ORR
K. EDWARD GREENE
JOHN B. LEWIS, JR.
JAMES A. WYNN, JR.
JOHN C. MARTIN
JOSEPH R. JOHN, SR.
ELIZABETH GORDON McCRODDEN

Retired Chief Judge

R. A. HEDRICK

Retired Judges

FRANK M. PARKER
EDWARD B. CLARK
ROBERT M. MARTIN
CECIL J. HILL
E. MAURICE BRASWELL
EUGENE H. PHILLIPS

Administrative Counsel

FRANCIS E. DAIL

Clerk

JOHN H. CONNELL

ADMINISTRATIVE OFFICE OF THE COURTS

Director

JAMES C. DRENNAN

Assistant Director

DALLAS A. CAMERON, JR.

APPELLATE DIVISION REPORTER

RALPH A. WHITE, JR.

ASSISTANT APPELLATE DIVISION REPORTER

H. JAMES HUTCHESON

TRIAL JUDGES OF THE GENERAL COURT OF JUSTICE

SUPERIOR COURT DIVISION

First Division

DISTRICT	JUDGES	ADDRESS
1	THOMAS S. WATTS	Elizabeth City
	J. RICHARD PARKER	Manteo
2	WILLIAM C. GRIFFIN, JR.	Williamston
3A	W. RUSSELL DUKE, JR.	Greenville
	MARK D. MARTIN	Greenville
3B	HERBERT O. PHILLIPS III	Beaufort
4A	HENRY L. STEVENS III	Kenansville
4B	JAMES R. STRICKLAND	Jacksonville
5	NAPOLEON B. BAREFOOT, SR.	Wilmington
	ERNEST B. FULLWOOD	Wilmington
	GARY E. TRAWICK	Burgaw
6A	RICHARD B. ALLSBROOK	Halifax
6B	CY A. GRANT	Windsor
7A	QUENTIN T. SUMNER	Rocky Mount
7B	G. K, BUTTERFIELD, JR.	Wilson
7BC	FRANK R. BROWN	Tarboro
8A	JAMES D. LLEWELLYN	Kinston
8B	PAUL MICHAEL WRIGHT	Goldsboro

Second Division

9	ROBERT H. HOBGOOD	Louisburg
	HENRY W. HIGHT, JR.	Henderson
10	ROBERT L. FARMER	Raleigh
	HENRY V. BARNETTE, JR.	Raleigh
	DONALD W. STEPHENS	Raleigh
	GEORGE R. GREENE	Raleigh
	NARLEY L. CASHWELL	Raleigh
11	WILEY F. BOWEN	Dunn
	KNOX V. JENKINS	Smithfield
12	COY E. BREWER, JR.	Fayetteville
	E. LYNN JOHNSON	Fayetteville
	GREGORY A. WEEKS	Fayetteville
	JACK A. THOMPSON	Fayetteville
13	WILLIAM C. GORE, JR.	Whiteville
	D. JACK HOOKS, JR.[1]	Whiteville
14	ANTHONY M. BRANNON	Durham
	J. MILTON READ, JR.	Durham
	ORLANDO F. HUDSON	Durham
	ALBERT LEON STANBACK, JR.	Durham
15A	J. B. ALLEN, JR.	Graham
15B	F. GORDON BATTLE	Hillsborough
16A	B. CRAIG ELLIS	Laurinburg
16B	JOE FREEMAN BRITT	Lumberton
	DEXTER BROOKS	Lumberton

DISTRICT	JUDGES	ADDRESS
	Third Division	
17A	MELZER A. MORGAN, JR.	Wentworth
	PETER M. MCHUGH	Wentworth
17B	JAMES M. LONG	Pilot Mountain
18	W. DOUGLAS ALBRIGHT	Greensboro
	THOMAS W. ROSS	Greensboro
	JOSEPH R. JOHN, SR.	Greensboro
	W. STEVEN ALLEN, SR.	Greensboro
	HOWARD R. GREESON, JR.	Greensboro
	CATHERINE C. EAGLES[2]	Greensboro
19A	JAMES C. DAVIS	Concord
19B	RUSSELL G. WALKER, JR.	Asheboro
19C	THOMAS W. SEAY, JR.	Salisbury
20A	F. FETZER MILLS	Wadesboro
	JAMES M. WEBB	Southern Pines
20B	WILLIAM H. HELMS	Monroe
21	JUDSON D. DERAMUS, JR.	Winston-Salem
	WILLIAM H. FREEMAN	Winston-Salem
	JAMES A. BEATY, JR.	Winston-Salem
	WILLIAM Z. WOOD, JR.	Winston-Salem
22	PRESTON CORNELIUS	Statesville
	LESTER P. MARTIN, JR.	Mocksville
23	JULIUS A. ROUSSEAU, JR.	North Wilkesboro
	Fourth Division	
24	CHARLES C. LAMM, JR.	Boone
25A	CLAUDE S. SITTON	Morganton
	BEVERLY T. BEAL	Lenoir
25B	FORREST A. FERRELL	Hickory
26	ROBERT M. BURROUGHS	Charlotte
	CHASE BOONE SAUNDERS	Charlotte
	SHIRLEY L. FULTON	Charlotte
	ROBERT P. JOHNSTON	Charlotte
	JULIA V. JONES	Charlotte
	MARCUS L. JOHNSON	Charlotte
27A	ROBERT W. KIRBY	Gastonia
	ROBERT E. GAINES	Gastonia
27B	JOHN MULL GARDNER	Shelby
28	ROBERT D. LEWIS	Asheville
	C. WALTER ALLEN	Asheville
29	ZORO J. GUICE, JR.	Rutherfordton
	LOTO GREENLEE CAVINESS	Marion
30A	JAMES U. DOWNS	Franklin
30B	JANET MARLENE HYATT	Waynesville

SPECIAL JUDGE

MARVIN K. GRAY	Charlotte

EMERGENCY JUDGES

HENRY A. MCKINNON, JR.	Lumberton
JOHN R. FRIDAY	Lincolnton
D. MARSH MCLELLAND	Burlington
EDWARD K. WASHINGTON	High Point
L. BRADFORD TILLERY	Wilmington
HOLLIS M. OWENS, JR.	Rutherfordton
DARIUS B. HERRING, JR.	Fayetteville
J. HERBERT SMALL	Elizabeth City
GILES R. CLARK	Elizabethtown

1. Appointed and sworn in 29 March 1993 to replace Giles R. Clark who retired 1 February 1993.
2. Appointed and sworn in 26 April 1993.

DISTRICT COURT DIVISION

DISTRICT	JUDGES	ADDRESS
1	GRAFTON G. BEAMAN (Chief)	Elizabeth City
	JANICE McK. COLE	Hertford
	C. CHRISTOPHER BEAN[1]	Edenton
2	JAMES W. HARDISON (Chief)	Williamston
	SAMUEL C. GRIMES	Washington
	MICHAEL A. PAUL	Washington
3A	E. BURT AYCOCK, JR. (Chief)	Greenville
	JAMES E. MARTIN	Greenville
	DAVID A. LEECH	Greenville
3B	JAMES E. RAGAN III (Chief)	New Bern
	WILLIE LEE LUMPKIN III	Morehead City
	GEORGE L. WAINWRIGHT, JR.	Morehead City
	JERRY F. WADDELL	New Bern
4	STEPHEN M. WILLIAMSON (Chief)	Kenansville
	WILLIAM M. CAMERON, JR.	Jacksonville
	WAYNE G. KIMBLE, JR.	Jacksonville
	LEONARD W. THAGARD	Clinton
	PAUL A. HARDISON	Jacksonville
	RUSSELL J. LANIER, JR.	Greenville
5	JACQUELINE MORRIS-GOODSON (Chief)	Wilmington
	ELTON G. TUCKER	Wilmington
	JOHN W. SMITH	Wilmington
	W. ALLEN COBB, JR.	Wilmington
	J. H. CORPENING II	Wilmington
	SHELLEY S. HOLT	Wilmington
6A	HAROLD PAUL McCOY, JR. (Chief)	Scotland Neck
	DWIGHT L. CRANFORD	Roanoke Rapids
6B	ALFRED W. KWASIKPUI (Chief)	Seaboard
	THOMAS R. J. NEWBERN	Aulander
7	GEORGE M. BRITT (Chief)	Tarboro
	ALBERT S. THOMAS, JR.	Wilson
	SARAH F. PATTERSON	Rocky Mount
	JOSEPH JOHN HARPER, JR.	Tarboro
	M. ALEXANDER BIGGS, JR.	Rocky Mount
	JOHN L. WHITLEY	Wilson
8	JOHN PATRICK EXUM (Chief)	Kinston
	ARNOLD O. JONES	Goldsboro
	KENNETH R. ELLIS	Goldsboro
	RODNEY R. GOODMAN	Kinston
	JOSEPH E. SETZER, JR.	Goldsboro
9	CLAUDE W. ALLEN, JR. (Chief)	Oxford
	CHARLES W. WILKINSON, JR.	Oxford
	J. LARRY SENTER	Franklinton
	HERBERT WELDON LLOYD, JR.	Henderson
	PATTIE S. HARRISON	Roxboro

DISTRICT	JUDGES	ADDRESS
10	STAFFORD G. BULLOCK (Chief)	Raleigh
	RUSSELL G. SHERRILL III	Raleigh
	LOUIS W. PAYNE, JR.	Raleigh
	WILLIAM A. CREECH	Raleigh
	JOYCE A. HAMILTON	Raleigh
	FRED M. MORELOCK	Raleigh
	JERRY W. LEONARD	Raleigh
	DONALD W. OVERBY	Raleigh
	JAMES R. FULLWOOD	Raleigh
	ANNE B. SALISBURY	Raleigh
	WILLIAM C. LAWTON	Raleigh
11	WILLIAM A. CHRISTIAN (Chief)	Sanford
	EDWARD H. MCCORMICK	Lillington
	SAMUEL S. STEPHENSON	Angier
	TYSON Y. DOBSON, JR.	Smithfield
	ALBERT A. CORBETT, JR.	Smithfield
	FRANKLIN F. LANIER	Buies Creek
12	SOL G. CHERRY (Chief)	Fayetteville
	A. ELIZABETH KEEVER	Fayetteville
	PATRICIA ANN TIMMONS-GOODSON	Fayetteville
	JOHN S. HAIR, JR.	Fayetteville
	JAMES F. AMMONS, JR.	Fayetteville
	ANDREW R. DEMPSTER	Fayetteville
13	JERRY A. JOLLY (Chief)[2]	Tabor City
	DAVID G. WALL	Elizabethtown
	NAPOLEON B. BAREFOOT, JR.	Bolivia
	OLA LEWIS[3]	Bolivia
14	KENNETH C. TITUS (Chief)	Durham
	DAVID Q. LABARRE	Durham
	RICHARD G. CHANEY	Durham
	CAROLYN D. JOHNSON	Durham
	WILLIAM Y. MANSON	Durham
15A	JAMES KENT WASHBURN (Chief)	Graham
	SPENCER B. ENNIS	Graham
	ERNEST J. HARVIEL	Graham
15B	PATRICIA S. LOVE (Chief)	Hillsborough
	STANLEY PEELE	Hillsborough
	LOWRY M. BETTS	Pittsboro
16A	WARREN L. PATE (Chief)	Raeford
	WILLIAM C. MCILWAIN	Wagram
16B	CHARLES G. MCLEAN (Chief)	Lumberton
	HERBERT LEE RICHARDSON	Lumberton
	GARY M. LOCKLEAR	Lumberton
	ROBERT F. FLOYD, JR.	Fairmont
	J. STANLEY CARMICAL	Lumberton
17A	ROBERT R. BLACKWELL (Chief)	Wentworth
	PHILIP W. ALLEN	Wentworth
	JANEICE B. WILLIAMS	Wentworth

DISTRICT	JUDGES	ADDRESS
17B	JERRY CASH MARTIN (Chief)	Dobson
	CLARENCE W. CARTER	Dobson
	OTIS M. OLIVER	Dobson
18	J. BRUCE MORTON (Chief)	Greensboro
	WILLIAM L. DAISY	Greensboro
	SHERRY FOWLER ALLOWAY	Greensboro
	LAWRENCE C. MCSWAIN	Greensboro
	WILLIAM A. VADEN	Greensboro
	THOMAS G. FOSTER, JR.	Greensboro
	JOSEPH E. TURNER	Greensboro
	DONALD L. BOONE	Greensboro
	BENJAMIN D. HAINES	Greensboro
	CHARLES L. WHITE	Greensboro
19A	ADAM C. GRANT, JR. (Chief)	Concord
	CLARENCE E. HORTON, JR.	Kannapolis
19B	WILLIAM M. NEELY (Chief)	Asheboro
	RICHARD M. TOOMES	Asheboro
	VANCE B. LONG	Asheboro
	MICHAEL A. SABISTON	Troy
19C	FRANK M. MONTGOMERY (Chief)	Salisbury
	ANNA M. WAGONER	Salisbury
20	DONALD R. HUFFMAN (Chief)	Wadesboro
	KENNETH W. HONEYCUTT	Monroe
	RONALD W. BURRIS	Albemarle
	MICHAEL EARLE BEALE	Pinehurst
	TANYA T. WALLACE	Rockingham
	SUSAN C. TAYLOR	Albemarle
21	JAMES A. HARRILL, JR. (Chief)	Winston-Salem
	ROBERT KASON KEIGER	Winston-Salem
	ROLAND HARRIS HAYES	Winston-Salem
	WILLIAM B. REINGOLD	Winston-Salem
	LORETTA C. BIGGS	Kernersville
	MARGARET L. SHARPE	Winston-Salem
	CHESTER C. DAVIS	Winston-Salem
22	ROBERT W. JOHNSON (Chief)	Statesville
	SAMUEL ALLEN CATHEY	Statesville
	GEORGE FULLER	Lexington
	KIMBERLY S. TAYLOR	Taylorsville
	JAMES M. HONEYCUTT	Lexington
	JESSIE A. CONLEY	Statesville
23	SAMUEL L. OSBORNE (Chief)	Wilkesboro
	EDGAR B. GREGORY	Wilkesboro
	MICHAEL E. HELMS	Wilkesboro
24	ROBERT H. LACEY (Chief)	Newland
	ALEXANDER LYERLY	Banner Elk
	CLAUDE D. SMITH, JR.	Boone
25	L. OLIVER NOBLE, JR. (Chief)	Hickory
	TIMOTHY S. KINCAID	Newton
	RONALD E. BOGLE	Hickory
	JONATHAN L. JONES	Valdese

DISTRICT	JUDGES	ADDRESS
	NANCY L. EINSTEIN	Lenoir
	ROBERT E. HODGES	Morganton
	ROBERT M. BRADY	Lenoir
26	JAMES E. LANNING (Chief)	Charlotte
	WILLIAM G. JONES	Charlotte
	DAPHENE L. CANTRELL	Charlotte
	RESA L. HARRIS	Charlotte
	MARILYN R. BISSELL	Charlotte
	RICHARD D. BONER	Charlotte
	H. BRENT MCKNIGHT	Charlotte
	H. WILLIAM CONSTANGY	Charlotte
	JANE V. HARPER	Charlotte
	FRITZ Y. MERCER, JR.	Charlotte
	PHILLIP F. HOWERTON, JR.	Charlotte
	YVONNE M. EVANS	Charlotte
	DAVID S. CAYER	Charlotte
27A	TIMOTHY L. PATTI (Chief)	Gastonia
	HARLEY B. GASTON, JR.	Gastonia
	CATHERINE C. STEVENS	Gastonia
	JOYCE A. BROWN	Gastonia
	MELISSA A. MAGEE	Gastonia
27B	GEORGE HAMRICK (Chief)	Shelby
	JAMES THOMAS BOWEN III	Lincolnton
	J. KEATON FONVIELLE	Shelby
	JAMES W. MORGAN	Shelby
28	EARL JUSTICE FOWLER, JR. (Chief)	Asheville
	PETER L. RODA	Asheville
	GARY S. CASH	Asheville
	SHIRLEY H. BROWN	Asheville
	REBECCA B. KNIGHT	Asheville
29	ROBERT S. CILLEY (Chief)	Rutherfordton
	STEVEN F. FRANKS	Rutherfordton
	DEBORAH M. BURGIN	Rutherfordton
	MARK E. POWELL	Hendersonville
30	JOHN J. SNOW (Chief)	Murphy
	DANNY E. DAVIS	Waynesville
	STEVEN J. BRYANT	Bryson City

1. Appointed and sworn in 7 April 1993 to replace J. Richard Parker.
2. Appointed and sworn in as Chief Judge 29 March 1993 to replace D. Jack Hooks, Jr. who was appointed to Superior Court.
3. Appointed and sworn in 11 May 1993 to replace Jerry A. Jolly.

ATTORNEY GENERAL OF NORTH CAROLINA

Attorney General

MICHAEL F. EASLEY

Chief of Staff
F. MICHAEL DAVIS

Chief Legal Counsel
JOHN R. MCARTHUR

Deputy Attorney General for Training and Standards
PHILLIP J. LYONS

Deputy Attorney General for Policy and Planning
JANE P. GRAY

Chief Deputy Attorney General
ANDREW A. VANORE, JR.

Senior Deputy Attorneys General

WILLIAM M. FARRELL, JR.
ANN REED DUNN
EUGENE A. SMITH
EDWIN M. SPEAS, JR.
REGINALD L. WATKINS

Special Deputy Attorneys General

HAROLD F. ASKINS
ISAAC T. AVERY III
DAVID R. BLACKWELL
ROBERT J. BLUM
GEORGE W. BOYLAN
CHRISTOPHER P. BREWER
STEVEN F. BRYANT
ELISHA H. BUNTING, JR.
JOAN H. BYERS
KATHRYN J. COOPER
JOHN R. CORNE
T. BUIE COSTEN
FRANCIS W. CRAWLEY
JAMES P. ERWIN, JR.
JAMES C. GULICK
NORMA S. HARRELL
WILLIAM P. HART
RALF F. HASKELL
CHARLES M. HENSEY
ALAN S. HIRSCH
I. B. HUDSON, JR.
J. ALLEN JERNIGAN
RICHARD N. LEAGUE
DANIEL F. MCLAWHORN
BARRY S. MCNEILL
GAYL M. MANTHEI
MICHELLE B. MCPHERSON
THOMAS R. MILLER
THOMAS F. MOFFITT
CHARLES J. MURRAY
LARS F. NANCE
DANIEL C. OAKLEY
DAVID M. PARKER
ROBIN P. PENDERGRAFT
JAMES B. RICHMOND
HENRY T. ROSSER
JACOB L. SAFRON
JO ANNE SANFORD
TIARE B. SMILEY
JAMES PEELER SMITH
W. DALE TALBERT
PHILIP A. TELFER
ROBERT G. WEBB
JAMES A. WELLONS
THOMAS J. ZIKO
THOMAS D. ZWEIGART

Assistant Attorneys General

CHRISTOPHER E. ALLEN
JOHN J. ALDRIDGE III
ARCHIE W. ANDERS
MARILYN A. BAIR
REBECCA B. BARBEE
VALERIE L. BATEMAN
BRYAN E. BEATTY
WILLIAM H. BORDEN
WILLIAM F. BRILEY
RUBY W. BULLARD
JUDITH R. BULLOCK
MABEL Y. BULLOCK
HILDA BURNETT-BAKER
MARJORIE S. CANADAY
ELAINE A. DAWKINS
CLARENCE J. DELFORGE III
JOSEPH P. DUGDALE
BERTHA L. FIELDS
WILLIAM W. FINLATOR, JR.
JANE T. FRIEDENSEN
VIRGINIA L. FULLER
JANE R. GARVEY
R. DAWN GIBBS
ROY A. GILES, JR.
MICHAEL D. GORDON
L. DARLENE GRAHAM
DEBRA C. GRAVES
JEFFREY P. GRAY
RICHARD L. GRIFFIN
P. BLY HALL
EMMETT B. HAYWOOD
JILL B. HICKEY
CHARLES H. HOBGOOD
DAVID F. HOKE
LAVEE H. JACKSON
DOUGLAS A. JOHNSTON
LORINZO L. JOYNER
GRAYSON G. KELLEY
DAVID N. KIRKMAN
DONALD W. LATON
M. JILL LEDFORD
PHILIP A. LEHMAN
FLOYD M. LEWIS
KAREN E. LONG
J. BRUCE MCKINNEY
JOHN F. MADDREY
JAMES E. MAGNER, JR.
ANGELINA M. MALETTO
THOMAS L. MALLONEE, JR.
SARAH Y. MEACHAM
THOMAS G. MEACHAM, JR.
ROBIN N. MICHAEL
D. SIGGSBEE MILLER
DIANE G. MILLER
DAVID R. MINGES
PATSY S. MORGAN
LINDA A. MORRIS
MARILYN R. MUDGE
G. PATRICK MURPHY
DENNIS P. MYERS
JANE L. OLIVER
HOWARD ALAN PELL
ALEXANDER M. PETERS
DIANE M. POMPER
NEWTON G. PRITCHETT, JR.
ANITA QUIGLESS
GRAYSON L. REEVES, JR.
JULIA F. RENFROW
NANCY E. SCOTT
ELLEN B. SCOUTEN
BARBARA A. SHAW
BELINDA A. SMITH
ROBIN W. SMITH
T. BYRON SMITH
RICHARD G. SOWERBY, JR.
VALERIE B. SPALDING
D. DAVID STEINBOCK, JR.
ELIZABETH STRICKLAND
KIP D. STURGIS
SUEANNA P. SUMPTER
SYLVIA H. THIBAUT
JANE R. THOMPSON
MELISSA L. TRIPPE
VICTORIA L. VOIGHT
JOHN C. WALDRUP
CHARLES C. WALKER, JR.
JOHN H. WATTERS
KATHLEEN M. WAYLETT
TERESA L. WHITE
THOMAS B. WOOD

DISTRICT ATTORNEYS

DISTRICT	DISTRICT ATTORNEY	ADDRESS
1	H. P. Williams, Jr.	Elizabeth City
2	Mitchell D. Norton	Washington
3A	Thomas D. Haigwood	Greenville
3B	W. David McFadyen, Jr.	New Bern
4	William H. Andrews	Jacksonville
5	Jerry Lee Spivey	Wilmington
6A	W. Robert Caudle II	Halifax
6B	David H. Beard, Jr.	Murfreesboro
7	Howard S. Boney, Jr.	Tarboro
8	Donald M. Jacobs	Goldsboro
9	David R. Waters	Oxford
10	C. Colon Willoughby, Jr.	Raleigh
11	Thomas H. Lock	Smithfield
12	Edward W. Grannis, Jr.	Fayetteville
13	Rex Gore	Bolivia
14	Ronald L. Stephens	Durham
15A	Steve A. Balog	Graham
15B	Carl R. Fox	Pittsboro
16A	Jean E. Powell	Raeford
16B	J. Richard Townsend	Lumberton
17A	Belinda J. Foster	Wentworth
17B	James L. Dellinger, Jr.	Dobson
18	Horace M. Kimel, Jr.	Greensboro
19A	William D. Kenerly	Concord
19B	Garland N. Yates	Asheboro
20	Carroll R. Lowder	Monroe
21	Thomas J. Keith	Winston-Salem
22	H. W. Zimmerman, Jr.	Lexington
23	Michael A. Ashburn	Wilkesboro
24	James T. Rusher	Boone
25	Robert E. Thomas	Newton
26	Peter S. Gilchrist III	Charlotte
27A	Michael K. Lands	Gastonia
27B	William Carlos Young	Shelby
28	Ronald L. Moore	Asheville
29	Alan C. Leonard	Rutherfordton
30	Charles W. Hipps	Waynesville

PUBLIC DEFENDERS

DISTRICT	PUBLIC DEFENDER	ADDRESS
3A	ROBERT L. SHOFFNER, JR.	Greenville
3B	HENRY C. BOSHAMER	Beaufort
12	PAUL F. HERZOG	Fayetteville
14	ROBERT BROWN, JR.	Durham
15B	JAMES E. WILLIAMS, JR.	Carrboro
16A	J. GRAHAM KING	Laurinburg
16B	ANGUS B. THOMPSON	Lumberton
18	WALLACE C. HARRELSON	Greensboro
26	ISABEL S. DAY	Charlotte
27	JESSE B. CALDWELL III	Gastonia
28	J. ROBERT HUFSTADER	Asheville

CASES REPORTED WITHOUT PUBLISHED OPINION

RULES OF EVIDENCE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED

RULES OF CIVIL PROCEDURE CITED AND CONSTRUED — Continued

CONSTITUTION OF UNITED STATES CITED AND CONSTRUED

CONSTITUTION OF NORTH CAROLINA CITED AND CONSTRUED

RULES OF APPELLATE PROCEDURE CITED AND CONSTRUED

CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

COUNTY OF GUILFORD v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PA., AND JEFFERSON INSURANCE COMPANY OF NEW YORK

No. 9118SC848

(Filed 3 November 1992)

Jails, Prisons and Prisoners § 66 (NCI4th)— one inmate assaulted by another—costs of medical care—liability of insurance company

The trial court erred in granting summary judgment for defendant insurance company in plaintiff county's action to recover amounts paid by it for a prisoner's medical expenses incurred after he was assaulted by another inmate since the action was not barred by the statute of limitations; although the named insured was "Guilford County Sheriff's Department," the policy included in the definition of "insured" the political subdivisions in which the named insured was located; payments made by plaintiff were made pursuant to a statutory obligation and, as such, were not made voluntarily; plaintiff's claim was not barred by a policy exclusion stating that the policy did not apply "to liability assumed by the Insured under any contract or agreement . . ."; and an insurance company which has entered into a settlement agreement on behalf of the insured pursuant to a liability insurance policy, unless otherwise

clearly agreed, is liable for the insured's total obligation under that agreement, subject to the monetary limits of the policy. N.C.G.S. § 153A-224(b).

Am Jur 2d, Insurance §§ 190, 461.

Penal and Correctional Institutions § 191.

Judge GREENE dissenting.

APPEAL by plaintiff from judgment entered 21 May 1991 in GUILFORD County Superior Court by *Judge Julius B. Rousseau.* Heard in the Court of Appeals 16 September 1992.

Guilford County Attorney's Office, by Jonathan V. Maxwell and J. Edwin Pons, for plaintiff-appellant.

Nichols, Caffrey, Hill, Evans & Murrelle, by Richard L. Pinto and ToNola D. Brown, for defendant-appellee.

WYNN, Judge.

On 15 January 1986, George Harris, an inmate in the Guilford County Jail, suffered severe injuries in an assault by another inmate. Mr. Harris died shortly after admission to Moses Cone Memorial Hospital in Greensboro, where his medical expenses totalled $28,585.61.

Mary Lee Harris, as Administratrix of the Estate of George Harris, brought an action in negligence against the inmate who assaulted Mr. Harris, the Sheriff of Guilford County, and Guilford County. The Sheriff of Guilford County and Guilford County were covered by liability insurance policies with National Union Fire Insurance Company of Pittsburgh, Pennsylvania ("National Union") and Jefferson Insurance Company of New York ("Jefferson Insurance"). Pursuant to a settlement agreement dated 29 August 1986, negotiated with the two insurance companies, Ms. Harris released all parties of liability in exchange for a lump sum payment of $61,414.39 plus the payment of the $28,585.61 in medical expenses incurred by Mr. Harris before his death. Guilford County had paid $22,450.61 of Mr. Harris' medical expenses prior to this release being signed. The lump sum payment to Ms. Harris and the balance of $6,135.00 owed for medical expenses were paid by the two insurance companies.

Guilford County thereafter sought reimbursement from the insurance companies for the $22,450.61 and was denied coverage under both policies. The County next brought suit against both National Union and Jefferson Insurance, but later reached a settlement with National Union and voluntarily dismissed against that party.

Prior to trial, Jefferson Insurance filed a motion for summary judgment on the following grounds: 1) Guilford County's voluntary payment of Mr. Harris' medical expenses violated the terms of the policy; 2) Guilford County was not an "insured" under the terms of the policy; 3) the claim was excluded from coverage under the policy; and 4) the action was barred by the applicable statute of limitations. Following the granting of this motion by the trial court, Guilford County appealed to this Court.

Guilford County's sole assignment of error challenges the trial court's award of summary judgment in favor of Jefferson Insurance. Summary judgment is proper if the record, viewed in the light most favorable to the nonmoving party, presents no genuine issue of material fact so that the moving party is entitled to judgment as a matter of law. *Belmont Land and Inv. Co. v. Standard Fire Ins. Co.*, 102 N.C. App. 745, 748, 403 S.E.2d 924, 925 (1991). The County argues that its claim is not barred by the statute of limitations; it is an "Insured" and therefore covered under the policy; its payment to the hospital was not voluntary; and its claim is not excluded from coverage by the terms of the policy. In short, the County contends that there were no grounds upon which the trial court could have granted summary judgment to Jefferson Insurance. We agree.

Our Supreme Court's recent decision in *Rowan County Board of Education v. United States Gypsum Co.*, 332 N.C. 1, 418 S.E.2d 648 (1992), confirms that Guilford County's claim against Jefferson Insurance is not barred by the statute of limitations. The *Rowan* Court clearly set forth the rules with regard to the doctrine of *nullum tempus occurrit regi*: "If the function at issue is governmental, time limitations do not run against the State or its subdivisions unless the statute expressly *includes* the State. If the function is proprietary, time limitations do run against the State and its subdivisions unless the statute at issue expressly *excludes* the State." *Id.* at 9, 418 S.E.2d at 654 (emphasis in original). Inasmuch as we find that the *Rowan* decision is controlling on this issue,

and we further note that the appellee conceded this point at oral argument, we conclude that Guilford County's claim is not barred by the statute of limitations.

We next address the question of whether Guilford County is covered by the Jefferson Insurance policy. Although the policy sets forth the "Named Insured" as "Guilford County Sheriff's Department," the policy includes in the definition of "Insured" "the political subdivisions in which the Named Insured is located." Guilford County fits within this definition and is therefore an "Insured" under the policy.

Guilford County next asserts that its payment of Mr. Harris' medical expenses was not voluntary, and, therefore, not barred from coverage by the terms of the policy. The policy in question provides that "[t]he Insured shall not, except at his own expense, voluntarily make any payment, assume any obligation or incur any expense other than for first aid to others at the time of the accident." Thus, any voluntary payment made by Guilford County would not be covered. We find, however, that the payments made by Guilford County were made pursuant to a statutory obligation, and as such were not made voluntarily.

North Carolina General Statutes provide that every county operating "a local confinement facility shall develop a plan for providing medical care for prisoners in the facility. The plan . . . [s]hall provide for medical supervision of prisoners and emergency medical care for prisoners to the extent necessary for their health and welfare." N.C. Gen. Stat. § 153A-225(a)(2) (1991). The statutes also mandate that "[i]n a medical emergency, the custodial personnel shall secure emergency medical care from a licensed physician according to the unit's plan for medical care. . . . The unit operating the facility *shall* pay the cost of emergency medical services." *Id.* § 153A-224(b) (emphasis added). This Court has recognized that "[t]hese statutes require that a county provide emergency medical services to prisoners incarcerated in the county's jail *and to pay for such services.*" *University of North Carolina v. Hill*, 96 N.C. App. 673, 675, 386 S.E.2d 755, 757, *aff'd*, 327 N.C. 465, 396 S.E.2d 323 (1990) (emphasis added). Since the medical payments made by Guilford County were mandated by statute, we find that paying Mr. Harris' medical expenses was not voluntary, and, therefore, payment under the policy was not barred for this reason.

The County next contends its claim is not excluded from the coverage of the policy. Exclusion (c) of the subject policy states that the policy does not apply "[t]o liability assumed by the Insured under any contract or agreement, except mutual law enforcement assistance agreements between political subdivisions." Jefferson Insurance argues that since the County had a contract with Moses Cone Memorial Hospital to provide medical care for prison inmates, the exclusion bars coverage of payments made under that contract. However, the County's liability for Mr. Harris' medical expenses was due not to its contract with the hospital, but rather to the statutory requirement that county prisons implement a plan for providing medical care to inmates. We find, therefore, that the County's claim is not barred by this policy exclusion.

Finally, Guilford County contends that it was improper to grant summary judgment on the ground that liability for Mr. Harris' injuries had not been established. Under the subject policy, Jefferson Insurance contracted to "pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of negligent acts, errors, or omissions arising out of the performance of the Insured's duty to provide law enforcement with respect to the following perils: personal injury, bodily injury, property damage." Jefferson Insurance contends that since Guilford County's liability has not been judicially determined, and that since the release is "not to be construed as an admission of liability," it is under no obligation to reimburse Guilford County for the medical expenses incurred by Mr. Harris. We disagree.

The policy in question further provides that "the Company shall have the right and duty to defend any suit against the Insured seeking damages . . . and, may make such investigation and settlement of any claim or suit as it deems expedient." The duty to defend arises prior to an adjudication on the merits of the claim. *W & J Rives, Inc. v. Kemper Ins. Group*, 92 N.C. App. 313, 319, 374 S.E.2d 430, 434 (1988), *disc. rev. denied*, 324 N.C. 342, 378 S.E.2d 809 (1989). In the course of such defense, any attempt to settle the claim must be done in good faith. "It is a matter of common knowledge that fair and reasonable settlements can generally be made at much less than the financial burden imposed in litigating claims. . . . [C]ourts have consistently held that an insurer owes a duty to its insured to act deligently [sic] and in good faith in effecting settlements . . . ." *Alford v. Insurance Co.*, 248 N.C. 224, 229, 103 S.E.2d 8, 12 (1958).

In the subject case Jefferson Insurance, through its lawyers, participated in the negotiation of the settlement and ultimate release with Ms. Harris. The release provided that Ms. Harris would be paid one lump sum of $61,414.39, and, additionally, the medical expenses totalling $28,585.61 incurred by Mr. Harris would be paid. Jefferson Insurance then paid the lump sum and the outstanding balance on the medical charges. There seems to be no dispute that once the settlement agreement was entered into, Jefferson Insurance was liable for Guilford County's obligation under the agreement, despite the inclusion of the "no admission of liability" clause. At that point the County's outstanding obligation included the lump sum and what remained on the medical bills. Had the release only provided for the outstanding balance to be paid, the outcome might be different, but the release specifically provided for the payment of the entire $28,585.61. Guilford County paid part of the medical costs only because of its statutory obligation. Once Jefferson Insurance became liable for the payments, Guilford County was entitled to be reimbursed for the medical expenses it paid. "[A]s plaintiff has paid what has now been either adjudicated or stipulated to be defendant's obligation, plaintiff is entitled to recover those monies by equitable subrogation, which is 'the mode which equity adopts to compel ultimate payment of a debt by one who injustice, equity, and good conscience ought to pay.' " *Nationwide Mutual Ins. Co. v. American Mutual Liability Ins. Co.*, 89 N.C. App. 299, 301, 365 S.E.2d 677, 679 (1988). We hold that where an insurance company has entered into a settlement agreement on behalf of the insured pursuant to a liability insurance policy, unless otherwise clearly agreed, the insurance company is liable for the insured's total obligation under that agreement, subject to the monetary limits of the policy. Because we have determined that the payments made by Guilford County were neither voluntary nor excluded by the terms of the policy at issue, Jefferson Insurance's refusal to reimburse Guilford County is unwarranted.

For the foregoing reasons we

Reverse the entry of summary judgment in favor of the defendant and

Remand this case to the Superior Court of Guilford County for entry of summary judgment in favor of the plaintiff.

Judge LEWIS concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree that plaintiff's action is not barred by the statute of limitations, that plaintiff is an "insured" under the insurance policy at issue, that plaintiff's payment of medical expenses incurred by inmate George Harris (Harris) was not "voluntary" as that term is used in the contract of insurance, and that policy exclusion (c) does not operate to exclude coverage of plaintiff's claim. However, I disagree with the majority's holding that, despite the fact that plaintiff's liability for Harris' injuries has not been established, summary judgment in favor of defendant was improper. To the contrary, because there has been no liability determination as to the cause of Harris' injuries and resulting medical expenses, defendant is not obligated under the terms of its insurance contract with plaintiff to reimburse plaintiff for the amount expended on medical bills for Harris.

I am cognizant that under North Carolina law, in certain cases an insured may properly bring a claim against its indemnity or liability insurer to recover payments made by the insured for medical expenses incurred by an injured third party prior to the settlement of a negligence claim brought by the third party against the insured. *See Blue Bird Cab Co. v. American Fidelity & Casualty Co.*, 219 N.C. 788, 15 S.E.2d 295 (1941). However, when, as in the instant breach of contract action, the liability insurance policy pursuant to which an insured seeks to recover prior payments contains a provision limiting coverage to damages which the insured become legally obligated to pay because of *negligence*, adjudication of the insured's negligence, or a stipulation thereto, is a prerequisite to its recovery from the insurer. Plaintiff acknowledges that its duty to pay Harris' medical expenses arose not by virtue of an adjudication of its negligence, but rather by statute. In fact, at the time that plaintiff filed its breach of contract action against defendant, plaintiff could not "become legally obligated to pay . . . damages because of negligen[ce]" related to the Harris incident because Harris' administratrix had released her right to bring a negligence action against plaintiff, and, even absent the release, the three-year statute of limitations for negligence claims had run. Furthermore, the release agreement on which the majority relies merely refers

to "the payment by Releasees [Guilford County and Jefferson Insurance Company] of $28,585.61 in medical bills incurred as a result of the incident giving rise to this claim" and in no way imposes the obligation to pay such expenses on defendant alone. Therefore, the trial court had no choice but to grant summary judgment for defendant.

I note that, in my opinion, the majority's application of the doctrine of equitable subrogation is misplaced. Plaintiff in the instant case has *not* paid "what has now been either adjudicated or stipulated to be defendant's obligation" since there has been (1) no adjudication that defendant is obligated to pay the entire $28,585.61 in medical expenses, (2) no adjudication of plaintiff's negligence (thus triggering defendant's obligation to pay damages under the terms of the insurance contract), and (3) no stipulation by the parties that defendant is obligated to pay the entire amount of medical expenses. Accordingly, I would affirm the trial court's order.

MARILYN W. BOWSER, ADMINISTRATOR OF THE ESTATE OF MILTON BERNARD BOWSER, DECEASED, PLAINTIFF v. DEBORAH DELORES WILLIAMS AND GLEN ADAM POWELL, DEFENDANTS

No. 911SC797

(Filed 3 November 1992)

1. **Insurance § 528 (NCI4th)— UIM coverage—terms of policy—application of Financial Responsibility Act**

The trial court did not err in concluding that Continental Insurance Company provided plaintiff $750,000 UIM coverage, since the policy defined uninsured motor vehicle to include an underinsured motor vehicle; the policy provided uninsured motorist coverage as specified under N.C.G.S. § 20-279.21; and pursuant to N.C.G.S. § 20-279.21(b)(4) UIM coverage was issued in an amount equal to the liability policy limits for bodily injury, which were $750,000, rather than the UM limits of $25,000 per person and $50,000 per accident.

Am Jur 2d, Automobile Insurance §§ 293-339.

2. Insurance § 551 (NCI4th)— two insurance companies as primary UIM carriers—one pro rata clause—one excess clause—error

The trial court erred in holding that two insurance companies were co-primary UIM carriers, since Continental's policy which contained a pro rata clause provided primary coverage, while Horace Mann's policy which contained an excess clause provided secondary coverage.

Am Jur 2d, Automobile Insurance §§ 326, 329.

Apportionment of liability between liability insurers each of whose policies provide that it shall be "excess" insurance. 69 ALR2d 1122.

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.

3. Insurance § 530 (NCI4th)— workers' compensation benefits—no set off from UIM coverage

An insurance company was not entitled to a set off from its UIM coverage to the extent that workers' compensation benefits were paid or payable to the deceased driver's estate.

Am Jur 2d, Automobile Insurance §§ 291, 326, 328, 368.

Uninsured motorist coverage: validity and effect of policy provision purporting to reduce coverage by amount paid under workmen's compensation law. 24 ALR3d 1369.

APPEAL by defendants from order of judgment entered 21 March 1991 by *Judge Thomas S. Watts* in GATES County Superior Court. Heard in the Court of Appeals 27 August 1992.

On 11 July 1988 the plaintiff's intestate, Milton Bowser, was driving a tractor trailer truck owned by B & B Lines, Inc. on U.S. Highway 13 in Hertford County. At the same time Deborah Williams was driving a 1975 Buick automobile owned by Glenn Powell. Ms. Williams allegedly pulled her car into the path of Mr. Bowser's truck from a private driveway. The two vehicles collided. Mr. Bowser died from injuries he received in the accident.

The tractor trailer driven by Mr. Bowser was insured by Continental Insurance Company (Continental) under a policy ceded through the North Carolina Reinsurance Facility (Reinsurance Facility). That policy provided liability limits of $750,000 and uninsured

motorist (UM) limits of $25,000 per person and $50,000 per accident. Continental contends that its policy did not provide underinsured motorist (UIM) coverage. The car driven by Williams was insured under a policy issued to Powell by State Farm Mutual Automobile Insurance Company (State Farm) with liability limits of $25,000 per person and $50,000 per accident. At the time of the accident, Mr. Bowser also had a personal insurance policy issued by Horace Mann Insurance Company (Mann) which provided liability and UIM limits of $100,000 per person and $300,000 per accident.

Plaintiff filed suit and subsequently entered into a "RELEASE IN FULL OF ALL CLAIMS" against Williams and Powell in exchange for payment of $25,000 by State Farm to the Administrator of Bowser's estate. The settlement and release was approved by the trial court on 19 June 1990. On 11 February 1991 the plaintiff filed a motion for summary judgment seeking resolution of whether Continental's policy provided UIM coverage and the priority of coverage between Continental and Mann. On 13 February 1991 Continental filed a motion for summary judgment seeking *inter alia* a ruling that Continental's policy does not provide UIM coverage. Finally, on 25 February 1991 Mann filed a motion for partial summary judgment seeking resolution of these issues and a ruling that if the Mann policy does provide UIM coverage, Mann should receive a set off to the extent any amount was paid or payable by any third parties.

On 21 March 1991 the trial court entered an order of summary judgment ruling as follows: (1) the Continental policy provides $750,000 UIM coverage; (2) the Mann policy provides $100,000 of UIM coverage; (3) that as between Continental and Mann any payments available to the plaintiff should be prorated according to their policy limits, including the $25,000 payment by State Farm; and (4) that Continental is entitled to a credit for worker's compensation benefits received by the plaintiff. From entry of judgment both Continental and Mann appeal.

C. Everett Thompson, II and Ronald G. Penny for plaintiff-appellee Marilyn W. Bowser.

Hedrick, Eatman, Gardner & Kincheloe, by John P. Barringer, for defendant-appellant Continental Insurance Company.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Theodore B. Smyth, for defendant-appellant Horace Mann Insurance Company.

EAGLES, Judge.

Both Continental and Mann have appealed from the judgment below. We address Continental's appeal first.

Continental's Appeal

[1] Continental argues that the trial court erred by concluding that its policy provided plaintiff $750,000 UIM coverage. We disagree.

Continental concedes in its statement of facts contained in its brief as appellant that it provided UM coverage of $25,000 per person and $50,000 per accident on the truck that Mr. Bowser was driving. Continental then states that its "policy was not issued with underinsured motorist coverage." This statement does not withstand close scrutiny of the Continental policy.

The Continental policy contains an endorsement on UM coverage. The following language appears at the top of that endorsement: "**THIS ENDORSEMENT CHANGES THE POLICY. PLEASE READ IT CAREFULLY.**" The endorsement then defines uninsured motor vehicle as follows:

> The definition of "**uninsured motor vehicle**" in this endorsement applies in its entirety unless an "X" is entered below:
>
> ☐ If an "X" is entered in this box paragraph b. of the definition of "**uninsured motor vehicle**" does not apply.
>
> A. **WORDS AND PHRASES WITH SPECIAL MEANING**
> In addition to the WORDS AND PHRASES WITH SPECIAL MEANING in the policy, the following words and phrases have special meaning for UNINSURED MOTORISTS INSURANCE:
>
> * * *
>
> 4. "**Uninsured motor vehicle**" means a land motor vehicle or trailer:
>
> * * *
>
> b. For which the sum of all bodily injury liability bonds or policies at the time of an **accident** provides at least the amounts required by the North Carolina Motor Vehicle Safety and Responsibility Act but their limits are less than the limits of this insurance, or . . . .

The language contained in paragraph b. essentially provides the conventional definition of an underinsured motor vehicle. *See*

Harris v. Nationwide Mut. Ins. Co., 332 N.C. 184, 420 S.E.2d 124, 126 (1992). There is no "X" in the box which would remove paragraph b. from the definition of an uninsured motor vehicle. Accordingly, Continental's policy defines uninsured motor vehicle to include an underinsured motor vehicle. It also follows, then, that Continental's policy purports on its face to provide UIM coverage of $25,000 per person and $50,000 per accident.

" 'The provisions of the Financial Responsibility Act are "written" into every automobile liability policy as a matter of law, and, when the terms of the policy conflict with the statute, the provisions of the statute will prevail.' " *Ohio Casualty Ins. Co. v. Leon*, 59 N.C. App. 621, 622, 298 S.E.2d 56, 57 (1982), *cert. denied*, 307 N.C. 698, 301 S.E.2d 101 (1983) (quoting *Insurance Co. v. Chantos*, 293 N.C. 431, 441, 238 S.E.2d 597, 604 (1977)). "The primary purpose of the compulsory motor vehicle liability insurance required by North Carolina's Financial Responsibility Act is to compensate innocent victims who have been injured by financially irresponsible motorists. Furthermore, the Act is to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished." *South Carolina Ins. Co. v. Smith*, 67 N.C. App. 632, 636, 313 S.E.2d 856, 860, *disc. review denied*, 311 N.C. 306, 317 S.E.2d 682 (1984) (citations omitted).

The Financial Responsibility Act in G.S. 20-279.21 provides in pertinent part:

> (b) Such owner's policy of liability insurance:
>
> * * *
>
> (4) Shall, in addition to the coverages set forth in subdivisions (2) and (3) of this subsection, provide underinsured motorists 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, *in an amount equal to the policy limits for automobile bodily injury liability as specified in the owner's policy.*

(Emphasis ours.)

Continental concedes that it provided liability coverage of $750,000, well in excess of that required by subdivision (b)(2). However, Continental argues that their UM coverage was not issued

under subsection (3), but was instead issued pursuant to the Reinsurance Facility's rules. This argument fails. The provisions of the Financial Responsibility Act, including G.S. § 20-279.21 are written into every automobile liability policy as a matter of law. Accordingly, Continental's policy provided UM coverage as specified under G.S. 20-279.21.

Even though Continental's policy met the statutory requirements for UIM coverage, the policy purports to provide UIM coverage of only $25,000 per person and $50,000 per accident. G.S. § 20-279.21(b)(4) mandates that where UIM coverage is issued, it must be issued in an amount equal to the liability policy limits for bodily injury. Accordingly, Continental is liable for $750,000 UIM coverage on the truck driven by Mr. Bowser.

Despite the express language of the policy and the mandate of G.S. § 20-279.21(b)(4), Continental argues that it did not provide UIM coverage and was not required to obtain a written waiver of UIM coverage pursuant to G.S. § 20-279.21(b)(4) because its policy was ceded through the Reinsurance Facility. We note, again, that the provisions of the Financial Responsibility Act including G.S. § 20-279.21(b)(4) are written into every automobile liability policy as a matter of law. G.S. § 20-279.21(b)(4) requires that when a policy is eligible for UIM coverage, UIM coverage must be issued in an amount equal to bodily injury liability unless a written waiver is obtained. Here, Continental failed to obtain a written waiver of UIM coverage. This omission is fatal to Continental's appeal. *See Proctor v. N.C. Farm Bureau Mutual Ins. Co.*, 324 N.C. 221, 376 S.E.2d 761 (1989) (insurance company's failure to comply with former G.S. § 20-279.21 resulted in UIM coverage in an amount equal to liability coverage). We note in passing that Continental argues that *Proctor* is distinguishable from the instant case. We disagree and find no merit in this assignment of error.

Horace Mann's Appeal

Mann raises two issues on appeal. First, Mann argues that the trial court erred by holding that Continental and Mann were co-primary UIM carriers. Second, Mann argues that the trial court erred by holding that Mann was not entitled to a set off from its UIM coverage to the extent that worker's compensation benefits are paid to the plaintiff. We address the arguments in tandem.

I

[2] In its first argument Mann contends the trial court erred by ruling that both Mann and Continental provided primary UIM coverage. We agree and reverse.

Both the Continental and the Mann policies provide "other insurance" clauses. The Continental clause provides:

> **B. OTHER INSURANCE-PRIMARY AND EXCESS INSURANCE PROVISIONS.**
>
> 1. This policy's *liability coverage* is primary for any covered **auto** while hired or borrowed by **you** and used exclusively in **your** business and pursuant to operating rights granted to **you** by a public authority. This policy's *liability coverage* is excess over any other collectible insurance for any covered **auto** while hired or borrowed from **you** by another **trucker**. However, while a covered auto which is a **trailer** is connected to a power unit, this policy's *liability coverage:*
>
> a. Is on the same basis, primary or excess, as for the power unit if the power unit is a covered **auto.**
>
> b. Is excess if the power unit is not a covered **auto.**
>
> 2. Any trailer interchange insurance provided by this policy is primary for any covered **auto.**
>
> 3. *Except as provided in paragraphs 1 and 2 above, this policy provides primary insurance for any covered* **auto you** *own and excess insurance for any covered* **auto you** *don't own.*
>
> 4. *When two or more policies cover on the same basis, either excess or primary,* **we** *will pay only* **our** *share.* **Our** *share is the proportion that the limit of* **our** *policy bears to the total of the limits of all the policies covering on the same basis.*

(Emphasis ours.) The Continental policy defines "you" and "your" to "mean the person or organization shown as the named insured in ITEM ONE of the declarations." Both B & B Lines, Inc. and Cecil Barnes are named insureds. It is undisputed that the tractor trailer involved in the wreck was owned by B & B Lines, Inc.

The Mann insurance policy provides:

OTHER INSURANCE

* * *

> In addition, if there is other applicable similar insurance we will pay only our share of the loss. Our share is the proportion that our limit of liability bears to the total of all applicable limits. *However, any insurance we provide with respect to a vehicle you do not own shall be excess over any other collectible insurance.*

(Emphasis ours.) The Mann policy defines "you" to include the named insured and his spouse. Both Milton Bowser and his wife Marilyn Bowser are named insureds under the Mann policy.

Mann argues that determination of primary and secondary UIM coverage in the instant case is governed by subsections 3 and 4 of Continental's "other insurance" clause and by the "excess" clause found in its own "other insurance" provision. Mann contends that the two contracts' provisions may be read together. We agree.

Continental argues that the "other insurance" clause in its contract is not applicable here because it did not provide UIM coverage to the plaintiff. Specifically, Continental argues that "all references to the Continental 'other insurance' clause refers specifically to the 'liability' coverage that Continental provided . . ." It is true that the plain language of subsection 1 of the "other insurance" clause expressly refers to liability coverage. However, subsection 3 states: *"[e]xcept as provided in Paragraphs 1 and 2 above*, this policy provides primary insurance coverage for any covered **auto you** own and excess insurance for any covered **auto you** don't own." It is clear from the language of this section that it applies to coverages other than liability coverage. Furthermore, we note that the "other insurance" provision is not contained within Part IV of the Continental policy designated for liability insurance. Rather, the other insurance clause is found in Part VII of the policy titled "CONDITIONS." It is clear that this section applies to UIM coverage.

In *Fidelity & Casualty Co. of New York v. North Carolina Farm Bureau Mutual Ins. Co.*, 16 N.C. App. 194, 192 S.E.2d 113, *cert. denied*, 282 N.C. 425, 192 S.E.2d 840 (1972), this Court addressed a similar issue. In *Fidelity*, the Court was confronted with interpretation of an excess clause and a pro rata clause in the

context of liability insurance coverage. *Id.* at 203, 192 S.E.2d at 121. There the court stated:

> The terms "prorate" and "excess" do not have, and were not meant by the insurers to have identical meanings. A construction which will give a fair meaning to both terms as used in the "other insurance" clauses is preferable to finding repugnancy.

Id. at 204, 192 S.E.2d at 121. Accordingly, the Court found that the insurance carrier's policy which contained the pro rata clause provided primary coverage while the carrier's policy containing the excess clause provided secondary coverage. *Id.*

Continental contends that *Fidelity* is distinguishable from the instant case because it dealt with liability coverage and not UIM coverage. We believe, however, that the *Fidelity* analysis holds true here despite its origin in the context of liability coverage.

Continental also argues that this case is controlled by *North Carolina Farm Bureau v. Hilliard*, 90 N.C. App. 507, 369 S.E.2d 386 (1988). However, *Hilliard* involved two policies which contained identical "other insurance" provisions. Accordingly, it is factually distinguishable.

II

[3] Mann next argues that it is entitled to a set off from its UIM coverage to the extent that worker's compensation benefits are paid or payable to Mr. Bowser's estate. Mann concedes that two cases have already decided this issue against the position it advocates. *See Ohio Casualty Ins. Group v. Owens*, 99 N.C. App. 131, 392 S.E.2d 647, *disc. review denied*, 327 N.C. 484, 396 S.E.2d 614 (1990); *Sproles v. Green*, 100 N.C. App. 96, 394 S.E.2d 691 (1990), *affirmed in part, reversed in part*, 329 N.C. 603, 407 S.E.2d 497 (1991). Accordingly, we overrule this assignment of error.

Conclusion

In conclusion we hold that Continental provides $750,000 UIM coverage on the truck Mr. Bowser was driving; that the Continental policy provides primary UIM coverage; that the Mann policy provides only secondary UIM coverage; and that Mann is not entitled to a set off from its UIM coverage to the extent that worker's compensation benefits are paid or payable to Mr. Bowser's estate. Accordingly, we affirm in part and reverse in part.

Affirmed in part; reversed in part.

Judges JOHNSON and PARKER concur.

SYMONS CORPORATION, PLAINTIFF-APPELLEE v. QUALITY CONCRETE CONSTRUCTION, INC., MARK S. BISSELL, RICHARD BURKE, AND FRANK W. ROGERS, DEFENDANTS-APPELLANTS

No. 911SC976

(Filed 3 November 1992)

1. **Rules of Civil Procedure § 56.1 (NCI3d)— summary judgment for plaintiff—failure to give timely notice—defendants not prejudiced**

There was no merit to defendants' contention that the trial court erred in granting summary judgment for plaintiff because plaintiff failed to give timely notice of its summary judgment motion, since defense counsel stated at the summary judgment hearing that he was prepared for trial and thus defendants were not prejudiced by the untimely notice.

Am Jur 2d, Summary Judgment § 14.

2. **Rules of Civil Procedure § 56 (NCI3d); Courts § 84 (NCI4th)— summary judgment on damages issue—no contravention of prior order reserving damages issue for trial**

The trial judge's entry of summary judgment for plaintiff on the issue of damages was not in contravention to or in any way a modification of a previous order by another superior court judge which granted plaintiff summary judgment on the issue of liability and preserved the issue of damages for later determination, since the prior summary judgment order was based on a stipulation and motion which specifically limited the court's consideration to the issue of liability; the issue of damages was never before the trial judge; and the language in the first judge's order that the action should be tried on the issue of damages only was mere surplusage.

Am Jur 2d, Summary Judgment §§ 41, 44.

3. Guaranty § 21 (NCI4th)— amount of indebtedness—no issue of fact—summary judgment proper

In an action to recover on a guaranty, the trial court did not err in granting plaintiff's motion for summary judgment where the evidence clearly supported plaintiff's allegation in its complaint as to the amount of defendants' indebtedness.

Am Jur 2d, Guaranty § 123; Summary Judgment § 26.

APPEAL by defendants from *Grant (Cy A.), Judge.* Judgment entered 23 April 1991 in Superior Court, DARE County. Heard in the Court of Appeals 14 October 1992.

This is a civil action wherein plaintiff seeks to recover a sum of money totalling $61,795.14 allegedly owed plaintiff by defendants pursuant to two lease and/or purchase agreements between plaintiff and defendant Quality Concrete Construction for the lease and/or purchase of certain concrete form equipment which transactions were induced by a "Guaranty" agreement executed by defendants Bissell, Burke and Rogers. The record indicates the following:

On 4 January 1988 and 21 March 1988, defendants Frank Rogers and Richard Burke entered into two lease and/or purchase agreements on behalf of Quality Concrete for the lease and/or purchase of certain equipment from plaintiff. On 9 March 1988, defendants Burke, Bissell and Rogers signed a "Guaranty" agreement promising to pay all sums then owed and which thereafter became owed by defendant Quality Concrete to plaintiff. The "Guaranty" agreement contained the following clause:

> This guaranty shall be considered as a general and continuing guaranty and shall not be revoked by the death of the Guarantor, but shall remain in full force and effect until the receipt from the Guarantor . . . or other legal representative of a 30 day prior written notice sent by registered mail . . . terminating the same, but no such notice of termination shall release the Guarantor from liability for any goods, merchandise or equipment sold and/or rented to Purchaser, or for any other indebtedness legally created by the Purchaser in favor of Symons prior to the effective termination date of such notice.

Defendant Quality Concrete failed to pay plaintiff the amount due on its account, and on 25 May 1989, plaintiff instituted this

action to recover the outstanding indebtedness and attorney's fees from Quality Concrete pursuant to the lease and/or purchase agreements and from Bissell, Burke and Rogers individually pursuant to the "Guaranty" agreement. On 7 August 1989, defendants Bissell and Rogers filed an answer to plaintiff's complaint alleging, among other things:

> 11. That by letter dated November 28, 1988, sent Certified Mail, Return Receipt Requested, the answering Defendants by and through their attorney, Joe G. Adams, gave written notice of termination of all guarantees made themselves to Symons Corporation on the principal account of Quality Concrete Construction, Inc.
>
> 12. That said written notice was received by Symons Corporation on or about the 6th day of December, 1988.
>
> 13. That the answering Defendants are not responsible for any sums which became due and owing to Symons Corporation by the Defendant, Quality Concrete Construction, Inc., on or after thirty (30) days from the mailing of said notice or its receipt.

On 26 September 1990, plaintiff and defendants Bissell and Rogers entered into and filed with the court the following "Stipulation:"

> 1. There is no genuine issue of fact as to the liability of the two named defendants to the plaintiff and that a partial summary judgment solely on the issue of liability may be entered against said defendants;
>
> . . .
>
> 3. The sole issue remaining to be determined is the amount of damages, if any, due the plaintiff by the defendants Mark S. Bissell and Frank W. Rogers.

Pursuant to the parties' "Stipulation," plaintiff filed a "Motion For Partial Summary Judgment" on 16 October 1990, pertaining to the issue of liability. On 13 November 1990, Judge Thomas S. Watts entered an order granting summary judgment in favor of plaintiff against defendants Bissell and Rogers on the issue of liability. Judge Watts' order further stated "that this action shall be tried on the issue of damages only."

In preparation for trial, a final pre-trial conference was held on 22 January 1991, and a final pre-trial order was entered between the parties on that same date. Then, on 4 April 1991, plaintiff filed a motion for summary judgment as to the issue of damages. On 15 April 1991, Judge Cy A. Grant held a hearing on plaintiff's motion and determined that there was no genuine issue as to any material fact. On 23 April 1991, Judge Grant entered a judgment awarding plaintiff $61,795.14 as a matter of law and ordered defendants Bissell and Rogers to pay plaintiff's attorney's fees in the amount of $7,330.00. Defendants Bissell and Rogers appealed.

Charles D. Coppage for plaintiff, appellee. Brief signed by Herbert L. Thomas, who was later allowed to withdraw as counsel of record.

Aldridge, Seawell & Khoury, by Joe G. Adams, for defendants, appellants.

HEDRICK, Chief Judge.

[1] On appeal, defendants Bissell and Rogers first contend that "[t]he trial court committed reversible error in granting summary judgment in favor of plaintiff . . . because plaintiff failed to give timely notice to appellants of said motion pursuant to . . . Rules 6(e) and 56(c)." We disagree.

As defendants correctly note, Rule 56(c) requires that "[t]he motion [for summary judgment] shall be served at least 10 days before the time fixed for the hearing." N.C.R. Civ. P. 56(c). Rule 6(e) allows a party an additional three days "to do some act or take some proceedings" when notice is served by mail. N.C.R. Civ. P. 6(e).

In the present case, plaintiff's motion for summary judgment and notice of hearing were filed and served on defendants by mail on 4 April 1991. The hearing on plaintiff's motion was held on 15 April 1991. In its brief, plaintiff concedes that "the Notice of the Summary Judgment Hearing was served by mail only nine days prior to the hearing instead of thirteen days as required." Plaintiff argues, however, and we agree, that defendants have failed to demonstrate any prejudice caused them by the untimely notice. At the summary judgment hearing held on 15 April 1991, counsel for defendants stated the following:

MR. ADAMS: Before we get into issues of this case, your Honor, I have a few things that I would like the court to deal with.

(1) is whether or not the time here before the court the summary judgment motion was served by mail on the 4th. It is my understanding of the law that you have ten days plus three when it is mailed which would put us here on the 17th. I would be frank with you, your Honor, I thought we were going to trial. We had a pretrial order and everything else, so *I am really prepared to be here and so I am not going to really push that objection.* (Emphasis added).

From this statement, it was apparent to the trial judge, as it is to us, that defendants were not unduly prejudiced by the untimely notice. This contention is frivolous.

[2] As their second assignment of error brought forward and argued on appeal, defendants contend that "[t]he trial court committed reversible error by entering summary judgment [in favor of plaintiff] because the entry of said order was in contravention of the previous order of the Honorable Thomas S. Watts . . . which stated that 'this action shall be tried on the issue of damages only.' " Defendants maintain that "[b]y granting Plaintiff's Motion for Summary Judgment on the issue of damages, Judge Grant overruled Judge Watts' order that the action be tried on the issue of damages." We disagree.

The record in this case indicates that Judge Watts entered his order granting plaintiff summary judgment on the issue of liability pursuant to a "Stipulation" entered into by the parties and a motion for "partial" summary judgment filed by plaintiff. Both the parties' "Stipulation" and plaintiff's motion specifically limited the court's consideration to the issue of liability and preserved the issue of damages for later determination. Therefore, the issue of damages was never before Judge Watts, and the language of his order stating that "this action shall be tried on the issue of damages only" was mere surplusage to insure that the damages issue was reserved for further determination following the entry of summary judgment on the issue of liability. Thus, the entry of Judge Grant's order awarding damages and attorney's fees to plaintiff was not in contravention to or in any way a modification of the previous order entered by Judge Watts. This contention is without merit.

[3] Defendants' final contention on appeal is that the trial court erred in granting plaintiff's motion for summary judgment because there were genuine issues of fact regarding the amount of money owed plaintiff by defendants. We disagree.

We have reviewed the record in its entirety, including the affidavits submitted by both plaintiff and defendants in support of and in opposition to plaintiff's motion for summary judgment and find that the evidence clearly supports plaintiff's allegation in its complaint as to the amount of defendants' indebtedness.

We note that although we have considered the affidavit of defendant Mark S. Bissell filed in opposition to plaintiff's motion for summary judgment, portions of this affidavit, on its face, do not meet the admissibility requirements set forth in Rule 56(e) since the statements contained therein were made "on information and belief" rather than from the affiant's personal knowledge. *See* N.C.R. Civ. P. 56(e); *Singleton v. Stewart*, 280 N.C. 460, 186 S.E.2d 400 (1972).

In this affidavit, defendant Bissell stated in part:

> 8. That on information and belief, approximately one-half of a tractor-trailer load of forms was left on site by Symons Corporation when they retook possession of the other forms.
>
> 9. That on information and belief, the forms which Symons Corporation left behind on the job site are still on the job site, and that Symons Corporation has the ability to locate these forms and retake their possession.
>
> 10. That on information and belief, Symons Corporation has not attempted to retake the possession of these forms.
>
> 11. That Symons Corporation has instead "sold" these forms to Quality Concrete Construction, Inc., for the amount of Sixteen Thousand Eight Hundred Fifty-Five and 77/100 Dollars ($16,855.77).
>
> 19. That my Guaranty and the Guaranty of Frank Rogers was effectively revoked as of January 5, 1989.
>
> 20. That neither my Guaranty or the Guaranty of Frank Rogers was in effect on January 13, 1989, or January 31, 1989.
>
> 21. That on January 13, 1989, and January 31, 1989, the total sum of Eighteen Thousand Two Hundred Eighteen and

66/100 Dollars (18,218.66) was billed to Quality Concrete Construction, Inc., by Symons Corporation.

22. That because Frank Rogers and I revoked our Guaranty prior to the dates on which the Eighteen Thousand Two Hundred Eighteen and 66/100 Dollars ($18,218.66) were charged to Quality Concrete Construction, Inc., we do not Guaranty those debts and are not responsible for them.

23. That on information and belief, Quality Concrete Construction, Inc., made the following payments to Symons Corporation which have not been credited to the account of Quality Concrete Construction, Inc.:

Check #	Date	Amount
0123	1-5-88	$5,000.00
0199	2-19-88	$1,333.55
0471	6-17-88	$7,000.00
0597	7-29-88	$4,000.00
0705	9-6-88	$5,000.00
	TOTAL:	$22,333.55

Plaintiff submitted the affidavit of Mr. R. A. Kosmicki, the Regional Credit Manager of Symons Corporation, and defendants' "Customer History Report," outlining the transactions between plaintiff and defendants. In his affidavit, Mr. Kosmicki stated that:

13. The total charges for rental and/or purchase of Symons concrete equipment and related accessories was $84,128.69;

The defendant corporation made the following payments on account:

Check #123	$5,000.00
Check #199	1,333.55
Check #471	7,000.00
Check #597	4,000.00
Check #705	5,000.00
TOTAL PAYMENTS	$22,333.55

14. The gross rental and purchase amount for all jobs is $84,128.69 less the total payments made by defendant corporation on account of $22,333.55 leaving a balance owing of $61,795.14.

15. Included in the total balance of $61,795.14 owed, are charges for equipment not returned by defendants to plaintiff corporation, in the amount of $16,855.77.

16. The affiant acknowledges receiving a notice dated November 28, 1988, of termination of guaranty agreement executed by Richard Burke, Mark S. Bissell and Frank W. Rogers, the date of said guaranty agreement being March 9, 1988; the only charges made to the defendant corporation's account after the receipt of said notice were for equipment rented to the defendant corporation which was already in the defendant corporation's possession at the time of receipt of said notice of termination and by the express provisions of said guaranty agreement, the guarantors are not released from items already rented to the purchaser (defendant corporation) at the time of the receipt of the notice of termination.

These affidavits clearly establish that the amount of defendants' indebtedness to plaintiff is $61,795.14, the amount demanded in plaintiff's complaint. The evidence presented did not raise any issue of fact, and the trial judge properly entered summary judgment for plaintiff and awarded plaintiff the sum of $61,795.14. The order of the trial court is affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

EEE-ZZZ LAY DRAIN COMPANY, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES; TRANSYLVANIA COUNTY HEALTH DEPARTMENT; STEVEN BERKOWITZ, INDIVIDUALLY; STEVE STEINBECK, INDIVIDUALLY; AND TERRY PIERCE, INDIVIDUALLY

No. 9129SC882

(Filed 3 November 1992)

1. Appeal and Error § 118 (NCI4th)— denial of summary adjudication motion—immunity as basis—immediate appealability

If immunity is raised as a basis in a motion for summary adjudication, a substantial right is affected and the denial of the motion is immediately appealable.

Am Jur 2d, Appeal and Error § 856.

2. **State § 4 (NCI3d)— suit against agency—suit against State barred by governmental immunity**

A suit against the Department of Environment, Health, and Natural Resources was a suit against the State which was barred by the doctrine of governmental immunity.

Am Jur 2d, States, Territories, and Dependencies § 104.

3. **State § 4 (NCI3d)— local health department—immunity from suit**

Local health departments are agents of the State which are immune from suit.

Am Jur 2d, Administrative Law § 804.

4. **Public Officers § 9 (NCI3d)— director of local health department—public officer—immunity except for malice—no malice shown**

The individual defendant, as director of a local health department, was a public officer, immune from suit except upon a showing of malice which plaintiff failed to make in this case based on defendant's refusal to issue plaintiff an unrestricted permit for installation of his innovative sewage disposal system.

Am Jur 2d, Administrative Law § 803.

5. **Public Officers § 9 (NCI3d)— State agency employees—public employees—liability for negligence—no negligence shown**

Two employees of the North Carolina Department of Environment, Health, and Natural Resources were public employees rather than public officers and thus were subject to liability for mere negligence in the performance of their jobs; however, plaintiff failed to show any negligence on their part in his action arising from defendants' failure to issue an unrestricted permit for installation of plaintiff's innovative sewage disposal system.

Am Jur 2d, Public Officers and Employees §§ 363, 375.

APPEAL by defendants from order denying defendants' motions to dismiss and for summary judgment signed 10 June 1991 by *Judge Loto Greenlee Caviness* in TRANSYLVANIA County Superior Court. Heard in the Court of Appeals 21 September 1992.

West and Banks, by Phillip S. Banks, III, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Mabel Y. Bullock, for defendants-appellants North Carolina Department of Human Resources (now, North Carolina Department of Environment, Health, and Natural Resources), Steven Berkowitz and Steve Steinbeck.

Womble Carlyle Sandridge & Rice, by James R. Morgan, Jr., for defendants-appellants Transylvania County Health Department and Terry Pierce.

LEWIS, Judge.

By this appeal we evaluate whether the trial court properly denied defendants' motions to dismiss and for summary judgment based upon immunity. We hold that the trial court erred in denying these motions, and therefore reverse and remand.

This case centers around an innovative sewage system invented and patented by the owners of plaintiff EEE-ZZZ Lay Drain Company. Plaintiff is in the business of designing, building, selling and servicing sewage systems. Plaintiff designed a new type of nitrification trench and line. A nitrification line typically uses gravel or small porous rocks in the trenches as a means of absorbing and distributing sewage into the soil. Plaintiff's system, by contrast, uses a polystyrene aggregate in this process.

Plaintiff sought to get its new nitrification method approved for use in Transylvania County, so it contacted the local health department and requested an inspection of its system. Defendant Terry Pierce, the Director of the Transylvania County Health Department, testified in his affidavit that no one affiliated with the local health department had the requisite technical expertise to properly evaluate the effectiveness of the system. Therefore, pursuant to 15A N.C. Admin. Code 18A .1964(b) (1990), the local department requested technical assistance from the North Carolina Department of Human Resources (now, North Carolina Department of Environment, Health, and Natural Resources, and hereinafter "DEHNR"). According to affidavits of the individual defendants from DEHNR, the plaintiff has not submitted the additional substantiating data they requested. The defendants contend that, in the absence of adequate information, they are unable to issue the unrestricted improvement permit which would allow the plaintiff to install and

utilize its new sewage system. On the basis of these simplified facts, plaintiff sued defendants.

[1] Defendants made motions for summary judgment and to dismiss based upon the doctrines of sovereign and governmental immunity. The court denied those motions, and defendants appealed.

Generally, the denial of a motion to dismiss or for summary judgment is interlocutory and not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a basis in the motion for summary adjudication, a substantial right is affected and the denial is immediately appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991); *see also Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (denial of motion for summary judgment based on immunity defenses to a 42 U.S.C. § 1983 action is immediately appealable). Here the defendants assert immunity as a defense; the appeal from the denial of their motions is therefore properly before this Court.

Next we discuss the merits of defendants' immunity arguments. The general rule, long recognized in North Carolina, is that the doctrine of sovereign immunity precludes suit against the State and its agencies unless the State has consented to be sued or waived its right. *Smith v. State*, 289 N.C. 303, 309, 222 S.E.2d 412, 417 (1976). Such waiver is manifested by the purchase of liability insurance, *see Baucom's Nursery Co. v. Mecklenburg County*, 89 N.C. App. 542, 544, 366 S.E.2d 558, 560, *disc. rev. denied*, 322 N.C. 834, 371 S.E.2d 274 (1988); to the extent of the applicability of the Tort Claims Act pursuant to N.C.G.S. § 143-291 *et seq.*; and when the State breaches a contract into which it validly entered. *Smith*, 289 N.C. 303, 222 S.E.2d 412. Because none of these applies in the present case, we conclude there is no consent here, and evaluate the sovereign immunity claims against the individual defendants.

[2] I. Department of Environment, Health, and Natural Resources

The North Carolina Department of Environment, Health, and Natural Resources is the agency responsible for the regulation, collection and treatment of sewage in this State. N.C.G.S. § 130A-333 *et seq.* DEHNR is a defendant in the present case.

Even though much of the general regulatory procedures have been delegated to the local departments, we find it manifestly clear that, given its authority and powers, DEHNR is a State

agency. *See The Prudential Ins. Co. of America v. Powell*, 217 N.C. 495, 8 S.E.2d 619 (1940) (Court looked at authority and powers of Unemployment Compensation Commission when considering whether it is a State agency). Consequently, a suit against this agency is a suit against the State, and is therefore barred by the doctrine of governmental immunity. *Id.* at 500, 8 S.E.2d at 622; *see also Nello L. Teer Co. v. North Carolina State Highway Comm'n*, 265 N.C. 1, 143 S.E.2d 247 (1965).

[3] II. Transylvania County Health Department

Counties are required by law to provide public health services and to operate a county health department. N.C.G.S. § 130A-34 (1989). Under the statutory scheme in place for the regulation of sanitary sewage systems, the local health departments are invested with a great deal of authority. It is up to the local health departments to issue improvement permits. N.C.G.S. §§ 130A-335(e), 336(b) (Cum. Supp. 1991); 15A N.C. Admin. Code 18A .1937. Along with DEHNR, the local health departments are also given the authority to impose conditions upon the issuance of permits and may revoke permits. *Id.* The rules promulgated pursuant to Chapter 130A, Article 11 of the General Statutes and found in Title 15A of the North Carolina Administrative Code specify with particularity the duties and powers of the local health departments as concerns sewage treatment and disposal systems.

After careful examination of the authority and duties imposed statutorily by the General Assembly upon the local health departments, we hold that they are agents of the State. *See Vaughn v. North Carolina Dep't of Human Resources*, 296 N.C. 683, 252 S.E.2d 792 (1979) (Court holding that the County Director of Social Services is an agent of the Social Services Commission of the Department of Human Resources with respect to placement of children in foster homes, given that the County Director has statutorily-imposed duties). Therefore, we hold that the Transylvania County Health Department is, like DEHNR, immune from suit.

III. Individual Defendants

A. Terry Pierce

[4] When a governmental worker is sued in his individual capacity, our courts have distinguished between whether the worker is an officer or an employee when assessing liability. Public officers are shielded from liability unless their actions are corrupt or malicious.

Smith v. State, 289 N.C. 303, 331, 222 S.E.2d 412, 430 (1976). On the other hand, public employees can be held personally liable for mere negligence. *Hare v. Butler*, 99 N.C. App. 693, 700, 394 S.E.2d 231, 236, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). We must, therefore, first determine whether defendant Pierce is a public officer or a public employee.

The basic distinctions between officer and employee center upon whether the worker's position was created by the constitution or laws of the state, and upon whether the position's duties are discretionary or merely ministerial. *State v. Hord*, 264 N.C. 149, 141 S.E.2d 241 (1965). In *Pigott v. City of Wilmington*, 50 N.C. App. 401, 273 S.E.2d 752, *cert denied*, 303 N.C. 181, 280 S.E.2d 453 (1981), this Court noted that positions of public office are generally created by legislation and have fixed public duties and responsibilities prescribed by law. Officers typically must take an oath of office, and are usually vested with a measure of discretion. *Id.* at 404-05, 273 S.E.2d at 755.

Applying these tests, we conclude that Terry Pierce, as the Director of the Transylvania County Health Department, is a public officer. The appointment of local health directors is provided for in N.C.G.S. § 130A-40 (Cum. Supp. 1991), and the directors' duties and powers are set forth with particularity in N.C.G.S. § 130A-41, and more generally in N.C.G.S. § 130A-4(a). Furthermore, the statutory provisions invest Pierce, in his position as local health director, with certain discretionary powers, such that he must use personal deliberation and judgment. *See Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236. For example, N.C.G.S. § 130A-19 states that "*If the . . . local health director determines* that a public health nuisance exists, the . . . *local health director may issue an order of abatement.*" N.C.G.S. § 130A-19 (emphasis added); *see Pigott*, 50 N.C. App. at 405 n.4, 273 S.E.2d at 755 n.4. Finally, in his affidavit, defendant Pierce testified that he took an oath of office, administered by the clerk of court, whereby he swore to "faithfully discharge the duties of [his] office as Health Director."

Because defendant Pierce is a public officer, he is liable here only upon a showing of malice. We start with the presumption that the actions a public officer takes in the performance of his duties are regular and made in good faith. It is the plaintiff's burden to allege and forecast evidence tending to prove otherwise; or, that the act was corrupt or malicious or taken outside the

scope of defendant's duties. *Id.* at 406, 273 S.E.2d at 755. We can find no evidence whatsoever in the record tending to show, much less prove, that defendant Pierce acted maliciously or corruptly as concerns plaintiff. Therefore, we hold that Pierce is immune from liability in the present suit.

B. Steven Berkowitz and Steve Steinbeck

[5] Because these defendants are sued in their individual capacities, we must use the same analysis as used for assessing defendant Pierce's liability. While the ultimate result is the same, we conclude that these defendants are public employees, not officers.

In his affidavit, Steven Berkowitz testified that he serves as the Senior Environmental Engineer in the On-Site Sewage Branch of the North Carolina Department of Environment, Health, and Natural Resources. He also testified as to the responsibilities and duties of his position. We note, however, that nowhere does Chapter 130A of the General Statutes make provisions for his particular position. Nor is there any indication that defendant Berkowitz's position required him to take an oath of office. Further, the position's duties appear to be ministerial in that they " 'involv[e] merely the execution of a specific duty arising from fixed and designated facts.' " *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236 (citing *Jensen v. S.C. Dep't of Social Services*, 297 S.C. 323, 377 S.E.2d 102 (1988)).

Defendant Steve Steinbeck testified by affidavit that he is the Branch Head of the On-Site Sewage Branch of the North Carolina Department of Environment, Health, and Natural Resources. Again, this position does not appear to be established by law, nor does it require an oath of office. His duties appear to us to be more ministerial than discretionary in nature. We conclude, then, that both defendants Berkowitz and Steinbeck are public employees, and as such are subject to liability for mere negligence in the performance of their jobs. *Hare*, 99 N.C. App. at 700, 394 S.E.2d at 236 (citations omitted).

Upon examination of the complaint and record, we can ascertain no concrete evidence of negligence on the part of these defendants. Plaintiff's first cause of action is one for slander; however, neither the record nor plaintiff's attorney in oral argument could point to real evidence as to when defendants made defamatory statements or as to the specific content of any allegedly slanderous comments.

The same is true of the cause of action for interference with prospective contractual relations. Plaintiff was unable to point to any specific instance when these acts occurred, and this Court is unable to find any evidence of such in the record. We find no basis for believing that such a cause of action even exists in North Carolina. Finally, the record is similarly devoid of evidence pertaining to the equal protection cause of action. In the absence of evidence in support of these claims, this Court would be hard-pressed to rule that these individual defendants might have been negligent and thereby expose them to liability.

We hold that the trial court improperly denied defendants' motions for summary judgment as to all defendants. We therefore reverse the order and remand the cause to the Superior Court with instructions to enter summary judgment for these defendants and dismiss the action.

Reversed and remanded.

Judges COZORT and WYNN concur.

DEALER SUPPLY COMPANY v. RONALD E. GREENE, GEORGE LAWRENCE GREENE, CHRISTINE G. GREENE AND PATRICIA WORLEY GREENE

No. 9122SC1085

(Filed 3 November 1992)

Fraudulent Conveyances § 33 (NCI4th)— property given to husband in separation agreement—entirety nature unchanged—conveyance not in defraud of creditors

There was no fraudulent conveyance of realty where the property in question was acquired by defendant and his wife and titled to them as tenants by the entirety; defendant and his wife executed a separation agreement on 12 August 1987 whereby defendant received the house and the wife received a lump sum payment; defendant conveyed the house to his parents on 12 August 1987; plaintiff brought suit against defendant while he was still married to collect a business debt; that action was terminated by consent judgment on 26 April 1988; defendant and his wife were divorced on 2 November

1988, over eight months following conveyance of the marital property to defendant's parents; the separation agreement did not terminate or change the tenancy by entirety in any way; and the property therefore remained entirety property at the time of the conveyance and could not be the subject of a conveyance in defraud of defendant's individual creditors.

Am Jur 2d, Fraudulent Conveyances § 50.

Judge WELLS concurring.

APPEAL by defendants from *Helms (William H.), Judge*. Judgment entered 26 August 1991 in Superior Court, IREDELL County. Heard in the Court of Appeals 19 October 1992.

Plaintiff instituted this civil action by filing a complaint wherein it alleged a fraudulent conveyance of realty by defendant Ronald E. Greene. The real property at issue was the marital home of Ronald Greene and his previous spouse Vicki O. Greene, who is not a party to this action. Ronald and Vicki Greene were married on 18 August 1961 and divorced on 2 November 1987. The realty which is the subject of this litigation was acquired during the marriage of Ronald and Vicki Greene and titled to them as tenants by the entirety.

On 12 August 1987, Ronald and Vicki Greene executed a separation agreement which included a division of their marital property. According to the terms of the agreement, Vicki Greene was to receive a lump sum payment of $55,640 within five (5) days of the execution of the agreement and Ronald Greene was to receive the remainder of the marital property which included the marital residence, also within five (5) days of the signing of the agreement. In order to generate funds with which to pay the lump sum to Vicki Greene, the mortgage which encumbered the marital residence was refinanced. Following this refinancing, the marital home was encumbered in the amount of $142,400. The record on appeal indicates that, immediately prior to the execution of the separation agreement, the marital home had been valued by an appraiser at $179,000.

Immediately following the signing of the separation agreement, Vicki Greene received the payment of $55,640 from Ronald Greene and the two thereafter signed and delivered a deed of the marital residence, subject to all then existing encumbrances, to defendants

George Lawrence Greene and Christine G. Greene, the parents of Ronald Greene. All defendants admit that this transfer of real property was without consideration, was for the purpose of preventing the marital residence from being subject to the claims of Ronald Greene's individual creditors and that the transfer left Ronald Greene without property fully sufficient and available to pay his then existing creditors.

During the marriage of Ronald and Vicki Greene, plaintiff Dealer Supply Company instituted a suit against Ronald Greene individually seeking to collect a business debt. The consent judgment which terminated that action was entered on 26 April 1988, over six (6) months following the divorce of Vicki and Ronald Greene and over eight (8) months after the conveyance of the marital home to Ronald Greene's parents on 12 August 1987. The consent judgment established that Ronald Greene was indebted to plaintiff in the amount of $100,000. Defendant Ronald Greene admitted during discovery that he was in fact indebted to plaintiff at the time of the transfer of the marital home.

Following the divorce of Ronald and Vicki Greene, Ronald Greene married defendant Patricia Worley Greene. On 22 August 1990, George Lawrence Greene and Christine G. Greene deeded the real property to defendant Patricia Greene. Defendants admit that this transfer was also without consideration and was made with the intent that the equity from the eventual planned sale of the property could be used to purchase another marital home for Ronald and Patricia Greene. When defendants Ronald and Patricia Greene attempted to sell the property to a third party purchaser, plaintiff instituted this present proceeding and filed notice of *lis pendens* against the property. The sale to the third party was completed by agreement of these parties and the net proceeds of that sale which totaled $112,216.90 were deposited with the Sheriff of Iredell County pursuant to a consent order of attachment.

Subsequent to discovery, plaintiff and defendants each filed motions for summary judgment with the trial court, both claiming entitlement to the proceeds of the sale as a matter of law. Judge Helms granted summary judgment in favor of plaintiff and ordered that the Sheriff of Iredell County disburse all funds held pursuant to the order of attachment to plaintiff. All defendants appeal the entry of the summary judgment.

Caudle & Spears, P.A., by Thad A. Throneburg, and Lloyd C. Caudle, for plaintiff, appellee.

Marvin Schiller and Michael S. Shulimson for defendants, appellants.

HEDRICK, Chief Judge.

Defendants argue that the trial court erred in granting plaintiff's motion for summary judgment and in failing to grant their motion for summary judgment due to the fact that the real property at issue herein was held by Ronald and Vicki Greene as tenants by the entirety at the time of the transfer which plaintiff claims was fraudulent. They argue that any proceeds of that transfer were therefore protected from the claims of Ronald Greene's individual creditors. Plaintiff, however, contends that the separation agreement executed by Ronald and Vicki Greene destroyed the tenancy by the entirety and vested a property interest in Ronald Greene against which plaintiff is entitled to levy.

In North Carolina, it is well established that an individual creditor of either a husband or a wife has no right to levy upon property held by the couple as tenants by the entirety. *Gas Co. v. Leggett*, 273 N.C. 547, 161 S.E.2d 23 (1968); *Hodge v. Hodge*, 12 N.C. App. 574, 183 S.E.2d 800, *cert. denied*, 279 N.C. 726, 184 S.E.2d 884 (1971). It follows therefore that a "[h]usband and wife [can] by joint voluntary conveyance transfer the [entirety held] property to anyone of their choice, free of lien or claim of [one spouse's] individual creditors." *Gas Co. v. Leggett*, 273 N.C. at 553, 161 S.E.2d at 28. Further, as a debtor can only commit a fraudulent conveyance by disposing of property to which a creditor has a legal right to take in satisfaction of his claim, *id.* at 555, 161 S.E.2d at 29, a husband's conveyance of his interest in entirety held property cannot come within the prohibition against fraudulent conveyances. *Id.* at 553, 161 S.E.2d at 28.

The creditor of an individual spouse can, however, levy upon the interest of that individual spouse which exists following the dissolution of the entirety estate. *Union Grove Milling and Manufacturing Co. v. Faw*, 103 N.C. App. 166, 404 S.E.2d 508 (1991); *Branch Banking and Trust Co. v. Wright*, 74 N.C. App. 550, 328 S.E.2d 840 (1985). This Court has stated that a tenancy by the entirety can be terminated or destroyed only in certain circumstances:

> The tenancy by the entirety may be terminated by a *voluntary partition* between the husband and the wife whereby they execute a joint instrument conveying the land to themselves as tenants in common or in severalty. But neither party is entitled to a *compulsory partition* to sever the tenancy.
>
> A divorce *a vinculo*, an absolute divorce which destroys the unity of husband and wife that is essential to the existence of the tenancy, will convert an estate by the entirety into a tenancy in common. The divorce spouses become equal co-tenants.
>
> A divorce *a mensa et thoro*, on the other hand, a divorce from bed and board which does not dissolve the marriage relation, does not sever the "unity of persons," and does not terminate or change the tenancy by the entirety in any way. In this connection, it should be observed that an estate by the entirety is not terminated or dissolved by the acts of the parties which constitute mere grounds for an absolute divorce; there must be a final decree of absolute divorce for this effect to occur.

Bransetter v. Bransetter, 36 N.C. App. 532, 534-35, 245 S.E.2d 87, 89-90 (1978), quoting J. Webster, Real Estate Law in North Carolina, § 116, p. 136 (1971).

Ronald and Vicki Greene were not divorced until 2 November 1987, over eight (8) months following the conveyance of the marital property to Ronald Greene's parents. We hold that the property therefore remained entirety property at the time of the conveyance and could not be the subject of a conveyance in defraud of Ronald Greene's individual creditors. The trial court erred in ordering that plaintiff was entitled to receive the proceeds of the sale of this property. As the initial conveyance to George and Christine Greene was a valid conveyance, defendant Patricia Greene is entitled to the full proceeds of any subsequent sale.

Plaintiff argues that the decision by this Court in *Riley v. Riley*, 86 N.C. App. 636, 359 S.E.2d 252 (1987), requires that we hold that the separation agreement executed by Ronald and Vicki Greene dissolved the tenancy by the entirety prior to the conveyance of the property to Ronald Greene's parents. We find, however, that *Riley* is not controlling in this case. In *Riley*, this Court simply held that the estate of a deceased husband was enti-

tled to enforce the terms of the separation agreement against the surviving spouse despite the fact that the husband had died prior to the entry of an absolute divorce between the parties.

Even assuming *arguendo* that *Riley* can be read as holding that the language of a separation agreement alone can dissolve a tenancy by the entirety, the language of the separation agreement in the case at hand is far different than that contained in the *Riley* agreement. In *Riley*, the parties agreed that the marital residence "was divided into two, individually owned shares." In the present case, Ronald and Vicki Greene agreed that Ronald Greene would take sole title to all marital property within five days of the execution of the agreement and Vicki Greene would receive a lump sum cash payment. There was no in kind "division" of the entirety property.

The summary judgment in favor of plaintiff is reversed and this cause is remanded to the trial court for entry of summary judgment in favor of defendants.

Reversed and remanded.

Judge ARNOLD concurs.

Judge WELLS concurs in a separate opinion.

Judge WELLS concurring.

I deem it appropriate to emphasize that the separation agreement between Ronald and Vicki Greene did not contain language conveying their estate by the entireties to Ronald separately, and therefore the entireties estate remained intact until the conveyance by deed to Ronald's parents.

SIDNEY F. MABRY v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY AND ROBERT FRANKLIN BURCHETTE

No. 9121SC861

(Filed 3 November 1992)

Insurance § 867 (NCI4th)— homeowner's insurance—noncompliance with residence requirement—awareness of insurer—subsequent negotiation not waiver of right to deny coverage

Defendant insurer's awareness of conflicting information regarding plaintiff's compliance with the residence requirement of its homeowner's policy did not as a matter of law constitute "knowledge" of a breach of a contract condition such that negotiation with the insured after obtaining this information constituted a waiver of defendant's right to deny coverage.

Am Jur 2d, Insurance §§ 204, 1209, 1216-1220.

Modern status of rules regarding materiality and effect of fake statements by insurance applicant as to previous insurance cancellations or rejections. 66 ALR3d 749.

APPEAL by plaintiff from judgment entered 21 March 1991 in FORSYTH Superior Court by *Judge Joseph R. John.* Heard in the Court of Appeals 16 September 1992.

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

Petree Stockton & Robinson, by Richard J. Keshian, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from a judgment filed 21 March 1991, which judgment in pertinent part denied plaintiff's motions for judgment notwithstanding the verdict, N.C.G.S. § 1A-1, Rule 50 (1990), and for a new trial, N.C.G.S. § 1A-1, Rule 59 (1990).

The evidence before this Court established that in May, 1989, as a result of a severe storm in the Winston-Salem area, plaintiff sustained damage to his house and property for which he made a claim on the homeowner's policy issued to him by defendant Nationwide Mutual Fire Insurance Company (Nationwide). Plain-

tiff's policy contained a provision requiring that plaintiff actually reside in the insured house, and plaintiff told Nationwide agent Betty Brackett (Brackett) that he was living in the house at the time of the storm, along with tenants Paul and Donna Whetstone (the Whetstones), who, at the time of the storm, had been renting the insured house from plaintiff for approximately nine months. Approximately one week after the storm, Brackett inspected the storm damage at plaintiff's house and observed, among other things, that the basement was completely flooded, despite the fact that there had been minimal rainfall during the storm. Brackett contacted a building contractor to perform an estimate of the cost to repair the damage to the house and property. Plaintiff informed Brackett that he wanted an estimate from another contractor as well, to which Brackett consented. Plaintiff thereafter hired Dan Salmon (Salmon) to provide plaintiff with an estimate of the cost to repair the damage done to plaintiff's house by the storm. Salmon's estimate, excluding the basement repairs, totalled $20,130.00.

Shortly after plaintiff submitted his claim to Nationwide, the Whetstones contacted and gave a recorded statement to Nationwide in which they indicated that plaintiff did not reside in the insured house and had not spent a single night there during the entire period that the Whetstones had been renting the house. According to the Whetstones, plaintiff lived in a house located at Lake Norman. The Whetstones further alleged that plaintiff had attempted to persuade them to increase the damage to the house by running a hose into the basement and flooding it, breaking up a picnic table and putting it under a fallen tree, and intentionally destroying several other items of property. In late May, 1989, plaintiff instituted summary ejectment proceedings against the Whetstones for their alleged failure to pay rent, which action was dismissed with prejudice based on the magistrate's finding that plaintiff had failed to prove his case by the greater weight of the evidence. Approximately four months later, the Whetstones moved out of the insured house.

Sometime after Brackett's inspection of plaintiff's property, Nationwide assigned one of its large loss specialists, Ted Hill (Hill), to plaintiff's claim. Hill met with plaintiff and inspected the damage. Plaintiff told Hill that he had been living in the house at the time of the storm. After an inspection, Hill determined and an engineer confirmed that the basement water damage was caused by surface water, long-term seepage which preexisted the storm,

and damage from a leaking washing machine, all of which are excluded by plaintiff's policy with Nationwide. Nationwide made an offer of $16,490.00 to plaintiff for repairs to his property, which did not include repairs to the basement. Plaintiff rejected this offer and refused a partial settlement.

On 22 March 1990, plaintiff filed a complaint against Nationwide seeking damages for breach of contract and claiming unfair and deceptive trade practices on the part of Nationwide. Plaintiff amended his complaint to add Nationwide agent Frank Burchette (Burchette) as a defendant, claiming that, if plaintiff's policy did not cover the damage to his residence, then Burchette was liable for negligent failure to procure such insurance. In its answer, Nationwide pleaded the affirmative defenses of misrepresentation and willful concealment by plaintiff regarding the policy's residence requirement, the way in which plaintiff's loss occurred, and the extent of the damage. After a four-day trial, the jury returned a verdict for Nationwide, finding that plaintiff had intentionally falsely represented and willfully concealed a material fact or circumstance relating to the contract of insurance between plaintiff and Nationwide. The jury also found that Nationwide did not waive the provisions of the insurance contract regarding required residence, and that the actions of agent Burchette did not constitute negligent failure to procure proper insurance coverage. Plaintiff made a motion during the trial for a directed verdict on Nationwide's defenses, which was denied, and post-trial motions for judgment notwithstanding the verdict and for a new trial on the grounds that Nationwide waived plaintiff's misrepresentations as a matter of law and engaged in misconduct during the trial. The trial court denied these motions after a hearing. Plaintiff appeals.

The issues presented are whether (I) an insurer's awareness of conflicting information regarding an insured's alleged breach of a policy condition constitutes "knowledge" of such breach for the purpose of applying the doctrine of waiver; and (II) the trial court abused its discretion by denying plaintiff's motion for a new trial.

I

Plaintiff argues that the trial court erred by denying plaintiff's motions for directed verdict and judgment notwithstanding the

verdict as to Nationwide's affirmative defenses of misrepresentation and willful concealment regarding plaintiff's residence in the insured house. Specifically, plaintiff contends that the trial court erred in submitting these issues to the jury because, according to plaintiff, Nationwide waived the provision in the insurance contract requiring plaintiff to reside in the insured house when it continued to process his claim despite evidence that plaintiff did not in fact reside there. Plaintiff's argument in effect suggests that the trial court should have directed a verdict in plaintiff's favor on the issue of waiver. Such action by the trial court would have necessitated a directed verdict in favor of plaintiff on Nationwide's defenses of misrepresentation and willful concealment. Nationwide, on the other hand, argues that the aforementioned affirmative defenses and whether it waived its right to assert them were issues properly submitted to the jury.

Waiver by an insurer of a forfeiture provision in an insurance policy requires (1) "knowledge on the part of the insurer of the pertinent facts," e.g., of a breach of a condition by the insured, and (2) "conduct thereafter inconsistent with an intention to enforce the condition" which leads the insured to believe that he is still protected by the policy. *Gouldin v. Inter-Ocean Ins. Co.*, 248 N.C. 161, 164, 102 S.E.2d 846, 848-49 (1958) (citation omitted). When the evidence is sufficient to justify, but not require, a finding of waiver on the part of the insurer, then the issue of waiver is one to be determined by the jury. *Id.* at 168, 102 S.E.2d at 851; *Brandon v. Nationwide Mut. Fire Ins. Co.*, 301 N.C. 366, 372-73, 271 S.E.2d 380, 384 (1980); *see also* 7 George J. Couch *et al.*, Couch on Insurance 2d § 35:271 (1985) (claimed waiver through conduct of insurer generally a question of fact for jury).

In the instant case, Nationwide presented evidence that, although it had received a statement from the Whetstones indicating that plaintiff did not, as required under the policy, reside in the insured house at the time of the storm and resulting damage, plaintiff repeatedly asserted to Nationwide his compliance with the insurance policy's residence requirement. Awareness of this conflicting information regarding plaintiff's compliance with the terms of the policy does not as a matter of law constitute "knowledge" of a breach of a contract condition such that negotiation with the insured after obtaining this information constitutes a waiver of Nationwide's right to deny coverage. This evidence allows, but does not *compel*, a finding of waiver on the part of Nationwide

and the trial court properly submitted the issue of waiver to the jury. Moreover, Nationwide's affirmative defenses of misrepresentation and willful concealment regarding the policy's required residence provision were properly before the jury since Nationwide presented substantial evidence of these defenses in the form of the Whetstones' testimony. *See State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980) (substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion").

II

Plaintiff argues that the trial court abused its discretion by failing to grant plaintiff a new trial pursuant to North Carolina Rule of Civil Procedure 59. Specifically, plaintiff contends that at trial defendants "tried repeatedly to prejudice the jury toward plaintiff and thereby deny plaintiff a fair trial."

It is well established that a trial court's decision on a motion for a new trial pursuant to Rule 59, where no question of law or legal inference is involved, cannot be disturbed absent a showing of abuse of discretion. *Seaman v. McQueen*, 51 N.C. App. 500, 505, 277 S.E.2d 118, 121 (1981). In the instant case, plaintiff's grounds for a new trial focus on defendants' alleged intentional exposure to the jury of "irrelevant and prejudicial evidence designed to alienate the jury from plaintiff," to which virtually all of plaintiff's objections were sustained. We have reviewed the specific evidence of which plaintiff complains, and discern no abuse on the part of the trial court in denying plaintiff's motion.

No error.

Judges WELLS and ORR concur.

BRENT S. BENNISH, PLAINTIFF v. THE NORTH CAROLINA DANCE THEATER, INC., DEFENDANT

No. 9126SC872

(Filed 3 November 1992)

1. **Arbitration and Award § 43 (NCI4th)— order denying arbitration—appealability**

A trial court's order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed.

Am Jur 2d, Appeal and Error § 856.

2. **Arbitration and Award § 6 (NCI4th)— personal services contract—transaction involving commerce—arbitration required**

An employment agreement which contained an arbitration clause and which provided for plaintiff to perform as a dancer for defendant during one season was "a contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Federal Arbitration Act, and the trial court therefore erred in failing to enter an order compelling arbitration, since a personal services contract which contemplates substantial interstate activity is a contract evidencing a transaction involving commerce, and the contract in question would have required plaintiff to tour outside North Carolina for eight weeks, giving 47 performances in twelve states during the season.

Am Jur 2d, Arbitration and Award § 42.

Contract containing arbitration agreement as subject to the stay and enforcement provisions of the United States Arbitration Act—federal cases. 18 L. Ed. 2d 1685.

3. **Arbitration and Award § 11 (NCI4th)— authority of trial court to substitute arbitrator**

In a proceeding to compel arbitration of a contract dispute involving a dancer in defendant's company, the trial court is ordered to substitute a neutral third arbitrator to insure a fair and impartial hearing, since to allow defendant, pursuant to the contract, to have two representatives, a trustee and a staff member, would make the proceedings inherently unfair.

Am Jur 2d, Arbitration and Award §§ 86, 87.

Disqualification of arbitrator by court or stay of arbitration proceedings prior to award, on ground of interest, bias, prejudice, collusion, of fraud of arbitrators. 65 ALR2d 755.

APPEAL by defendant from order signed 14 May 1991 by *Judge Robert Lewis* in MECKLENBURG County Superior Court. Heard in the Court of Appeals 17 September 1992.

On 30 May 1990, the parties entered a "1990-91 Employment Agreement" (the contract) for plaintiff to perform as a dancer for defendant during the 1990-91 season. Section III of the contract incorporated by reference the "North Carolina Dance Theater 1990-91 Dancer Guidelines" (the guidelines). The last section of the guidelines contained the following provision:

> 21. *ARBITRATION*: Any controversy or claim arising out of or relating to the ARTIST'S Employment AGREEMENT or the breach or interpretation thereof, may be settled by arbitration. Either the DANCE THEATER or ARTIST may demand arbitration in writing. Arbitration shall be by a committee of three (3): one member of the DANCE THEATER'S Board of Trustees, a dancers' representative, and a staff member, and shall not be held later than two (2) weeks following the date of a written request therefore. The decision of such committee shall be announced not later than one (1) week following the hearing, and shall be binding upon both parties.

On 27 July 1990, defendant terminated plaintiff's employment effective 14 August 1990. Defendant claims the termination occurred because the staff "determined that Bennish's levels of artistic ability, effort, and commitment were below the minimal requirements." Plaintiff claims he was terminated because of defendant's "inability to meet its financial obligations." Plaintiff demanded compensation; defendant countered on 24 October 1990 by sending plaintiff a letter demanding arbitration pursuant to the arbitration provision in the guidelines. Plaintiff refused arbitration and on 22 January 1991 filed a complaint in superior court alleging breach of contract and misrepresentation. On 21 March 1991, defendant made a motion in superior court to compel arbitration and stay the proceedings pending arbitration. Defendant's motion was denied on 14 May 1991. Defendant appeals.

David F. Williams and Kenneth L. Harris for plaintiff-appellee.

Robinson, Bradshaw & Hinson, P.A., by J. Daniel Bishop, for defendant-appellant.

EAGLES, Judge.

[1, 2] This is an interlocutory appeal arising from the denial of defendant's motion to stay the proceedings and compel arbitration. Initially, we note that a trial court's "order denying arbitration, although interlocutory, is immediately appealable because it involves a substantial right which might be lost if appeal is delayed." *Prime South Homes v. Byrd*, 102 N.C. App. 255, 258, 401 S.E.2d 822, 825 (1991) (citing *Sims v. Ritter Constr., Inc.*, 62 N.C. App. 52, 302 S.E.2d 293 (1983)); G.S. §§ 1-277(a) (1983), 7A-27(d)(1) (1989). Defendant contends that the contract containing the arbitration clause is "a contract evidencing a transaction involving commerce" within the meaning of Section 2 of the Federal Arbitration Act (FAA), 9 U.S.C. §§ 1-16 (1988 & Supp. III 1991). We agree and accordingly reverse the trial court and remand for an order compelling arbitration.

The FAA applies to the courts of North Carolina. *Board of Education v. Shaver Partnership*, 303 N.C. 408, 422, 279 S.E.2d 816, 825 (1981) ("The Federal Arbitration Act, by virtue of the Supremacy Clause [U.S. Const. Article VI, Clause 2], is, as discussed, part of North Carolina law."). There is a "strong public policy in North Carolina favoring arbitration." *Cyclone Roofing Co. v. LaFave Co.*, 312 N.C. 224, 229, 321 S.E.2d 872, 876 (1984); *Servomation Corp. v. Hickory Constr. Co.*, 316 N.C. 543, 544, 342 S.E.2d 853, 854 (1986).

Section 2 of the FAA provides in pertinent part:

> A written provision in . . . a contract evidencing a transaction involving commerce to settle by arbitration a controversy thereafter arising out of such contract or transaction . . . shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

In *Board of Education*, 303 N.C. at 417-18, 279 S.E.2d at 822, our Supreme Court set forth the following factors in determining whether a personal services contract was controlled by the FAA:

> As *Erving [v. Virginia Squires Basketball Club*, 468 F.2d 1064 (2d Cir. 1972)] . . . make[s] clear, a personal service contract which contemplates substantial interstate activity is a contract evidencing a transaction involving commerce within the meaning of the act. We agree with the approach suggested by Judge Lumbard, concurring in *Metro Industrial Painting Corp. v. Terminal Construction Co.*, 287 F.2d 382 (2d Cir. 1961), *cert. denied*, 368 U.S. 817 (1961):
>
> > "The significant question, therefore [in determining whether a contract evidences a transaction involving commerce], is not whether, in carrying out the terms of the contract, the parties *did* cross state lines, but whether, at the time they entered into it and accepted the arbitration clause, they *contemplated* substantial interstate activity. Cogent evidence regarding their state of mind at the time would be the terms of the contract, and if it, on its face, evidences interstate traffic . . . the contract should come within § 2. In addition, evidence as to how the parties expected the contract to be performed and how it was performed is relevant to whether substantial interstate activity was contemplated." 287 F.2d at 387. (Emphasis original.)

Here, the guidelines contained a clause limiting travel by bus or automobile to no more than ten hours per day and a clause explaining air travel. Additionally, defendant presented the affidavit of Salvatore A. Aiello, defendant's artistic director, which included an undisputed statement that defendant toured outside North Carolina for eight weeks and gave 47 performances in 12 states during the 1990-91 season. Accordingly, we hold that the FAA is applicable because there is sufficient evidence that the contract contemplated substantial interstate activity. Section 21 of the guidelines, incorporated by reference into the contract, expressly provides that either party "may demand arbitration in writing." Defendant made this demand in writing on 24 October 1990.

[3] Finally, we hold that the trial court has the authority to substitute a neutral third arbitrator to insure a fair and impartial hearing. The guidelines provide that the arbitration committee shall be composed of three members: (1) a member of defendant's board of trustees, (2) a collectively appointed dancers' representative, and (3) one of defendant's staff members. To allow defendant to have two representatives, a trustee and a staff member, would

make the proceedings inherently unfair and would tip the balance decidedly in favor of defendant. Accordingly, the trial court is to substitute a neutral third arbitrator for one of the defendant's representatives.

We direct the substitution of a neutral arbitrator in the interest of judicial economy and to preserve the purposes of the Federal Arbitration Act. A trial court's authority to appoint a neutral arbitrator is "inherent when the potential bias of a designated arbitrator would make arbitration proceedings [under the FAA] simply a prelude to later judicial proceedings challenging the arbitration award." *Masthead Mac Drilling Corp. v. Fleck*, 549 F.Supp. 854, 856 (S.D.N.Y. 1982) (citing *Erving*, 468 F.2d at 1067 & n.2 (2d Cir. 1972)); *see generally* Annotation, *Interest or Bias of Arbitrator*, 56 A.L.R.3d 697 (1974 & Supp. 1992). The court emphasized in *Erving*, 468 F.2d at 1067-68, that "the federal law is to be implemented in such a way as to make the arbitration effective and not to erect technical and unsubstantial barriers such as were the mode in the early days when arbitration was viewed by many courts with suspicion and hostility." *See Board of Education*, 303 N.C. at 415-18, 279 S.E.2d at 821-22 (favorably citing *Erving*). We note that the arbitration clause here appears to have been nothing more than standard boilerplate in the guidelines, consisting of 9 pages and 21 different sections, which were incorporated by reference into the three page employment contract. It is doubtful that plaintiff could have negotiated the selection of arbitrators before accepting employment with defendant. *Compare Thomas v. Howard*, 51 N.C. App. 350, 354, 276 S.E.2d 743, 746 (1981) (non-FAA case holding that where parties separately bargain for arbitration *after* a dispute develops, "the disability of an arbitrator is waived if the complaining party had prior knowledge of it.").

We hold that the trial court erred and that the contract must be submitted to arbitration pursuant to the FAA. Accordingly, the decision of the trial court is reversed and the case remanded for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges JOHNSON and PARKER concur.

HARRIET JOHNSON, PLAINTIFF v. AMERICAN ECONOMY INSURANCE COMPANY, DEFENDANT

No. 9118SC907

(Filed 3 November 1992)

Insurance § 527 (NCI4th)— underinsured motorist coverage— determining amount—Tennessee law

The trial court erred in considering the entire amount available to all persons injured in a collision in determining whether plaintiff was entitled to underinsured motorist coverage under a Tennessee automobile policy that provided UM/UIM coverage of $50,000 per accident since the sum of limits available to the insured under the applicable Tennessee statute is the sum of the "per person" coverages available to that insured and not the sum of either the "per person" coverages available to all insureds or the sum of "per accident" coverages.

Am Jur 2d, Automobile Insurance § 322.

Uninsured and underinsured motorist coverage: recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

APPEAL by plaintiff from judgment filed 24 June 1991 by *Judge Thomas W. Seay, Jr.*, in GUILFORD County Superior Court. Heard in the Court of Appeals 22 September 1992.

On 13 November 1988 plaintiff, Harriet Johnson, was riding as a passenger in a car driven by Theresa Brabson. Ms. Brabson's vehicle was struck in the rear by an automobile driven by Timothy Malone. Both the plaintiff and Ms. Brabson suffered injuries requiring medical treatment.

The car driven by Mr. Malone was insured under a liability policy issued by Charter Risk Adjusting, Inc. The Charter policy provided liability coverage of $25,000 per person and $50,000 per accident. The car driven by Ms. Brabson was owned by Robert F. Mitchell, Jr., a resident of Knoxville, Tennessee. Mr. Mitchell's car was insured by the defendant, American Economy Insurance Company, under a policy issued in Tennessee covering four vehicles. That policy provided *inter alia* uninsured motorist coverage with single limits of $50,000 per accident.

On 20 November 1990 the plaintiff entered into a settlement agreement releasing all claims against Mr. Malone in exchange for Charter's payment of $25,000. Under the agreement with Charter the plaintiff also reserved her rights to proceed against American. The trial court signed an order approving the settlement agreement on 8 April 1991. At about the same time that the plaintiff entered into her settlement agreement, Charter tendered to Ms. Brabson's attorney an offer of $25,000, the remaining "per person" coverage. There is no evidence of record to indicate whether Ms. Brabson has since settled or abandoned her claims or instituted suit.

After trial of her personal injury claims, a jury rendered a verdict for the plaintiff of $85,000. The trial court reduced the verdict by the $25,000 already paid by Charter and entered judgment awarding $60,000. The plaintiff then filed a declaratory judgment action against American to determine its obligation under the insurance contract on Mr. Mitchell's vehicle. The trial court determined that the law of Tennessee governs interpretation of American's policy and that American's policy did not provide plaintiff uninsured motorist coverage. Accordingly, the court entered judgment in favor of American.

From judgment entered, plaintiff appeals.

Donaldson & Horsley, P.A., by William F. Horsley and Stephanie C. Hess, for plaintiff-appellant.

Karl N. Hill, Jr. for defendant-appellee.

EAGLES, Judge.

The sole issue here is whether the trial court incorrectly determined that the plaintiff was not entitled to uninsured motorist coverage because the sum of the limits collectible under all liability and/or primary uninsured motorist insurance policies applicable to her claim was $50,000. We hold that the trial court erred and, accordingly, we reverse.

Initially, we note that the trial court correctly determined that the law of Tennessee controlled. Because the American policy was issued in the State of Tennessee, the law of Tennessee governs interpretation of the policy. *Roomy v. Allstate Insurance Company*, 256 N.C. 318, 123 S.E.2d 817 (1961).

Tennessee's statutory code provides:

> (d) The limit of liability for an insurer providing uninsured motorist coverage under this section is the amount of that coverage as specified in the policy less the sum of the limits collectible under all liability and/or primary uninsured motorist insurance policies, bonds, and securities *applicable to the bodily injury or death of the insured.*

Tenn. Code Ann. § 56-7-1201(d) (1989) (emphasis added).

> (a) For the purpose of this coverage, "uninsured motor vehicle" means a motor vehicle whose ownership, maintenance, or use has resulted in the bodily injury, death, or damage to property of an insured, *and for which the sum of the limits of liability available to the insured under all valid and collectible insurance policies, bonds, and securities applicable* to the bodily injury, death, or damage to property is less than the applicable limits of uninsured motorist coverage provided to the insured under the policy against which the claim is made.

Tenn. Code Ann. § 56-7-1202(a) (1988) (emphasis added).

Plaintiff argues that the trial court incorrectly determined that plaintiff was not covered under American's uninsured motorist coverage because it added $25,000, representing the prospective or potential value of Ms. Brabson's claim, to the $25,000 already paid to the plaintiff by Mr. Malone's carrier. Defendant, however, argues that the trial court acted properly. We agree with the plaintiff.

The language of both Tenn. Code Ann. § 56-7-1201 and § 56-7-1202 is couched in the singular. The statutes do not state that the limit of uninsured motorist coverage is determined as the difference between the coverage specified in the policy less the sum of limits collectible under all policies applicable and available to the bodily injury or death of the *insureds*. Rather, the statutes state that the sum collectible should be offset against the damages available to the *insured*. Accordingly, we believe the statute itself plainly requires that only those amounts available to each individual insured should be totalled to determine whether or not that insured may recover based on underinsured motorist coverage.

Moreover, we note that a recent case from Tennessee's Court of Appeals supports our decision. In *Gabel v. Lerma*, 812 S.W.2d 580 (1990), *permission to appeal denied* (4 June 1990), the plaintiff's decedent received fatal injuries while riding as a passenger in an automobile operated by the defendant. *Id.* at 581. The defendant

had insurance coverage under a policy issued by Permanent General Assurance Corporation (PGA). *Id.* The PGA policy provided liability limits of $15,000 per person and uninsured motorist limits of $15,000 per person. *Id.* The plaintiff's decedent also had an insurance policy with State Farm Mutual Automobile Insurance Company which included uninsured motorist coverage of $25,000 per person, and decedent's father had a policy with J.C. Penney Casualty Insurance Company which contained uninsured motorist coverage of $100,000 per person. *Id.* In deciding which carrier provided primary uninsured motorist coverage and which provided excess uninsured motorist coverage, the Tennessee Court quoted the pertinent portion of Tenn. Code Ann. § 56-7-1201(d). It then continued and held,

> [a]s mentioned above, the PGA policy also included liability coverage with a limit of $15,000 per person. Thus, when PGA paid the $15,000 into the court pursuant to the liability provision of its policy, it was absolved with respect to its uninsured motorist provision which also had a limit of liability of $15,000 per person.

Id. at 582. During its discussion of the facts of the case and its holding the Tennessee Court discussed only "per person" limits and did not even mention the total per accident coverage available under any of the policies involved. While *Gabel* does not directly address the issue presented here, we believe that it is instructive. It is apparent from the *Gabel* opinion that the figure to be used in calculating the sum of limits available to the insured is the sum of the "per person" coverages available to that insured and not the sum of either the "per person" coverages available to all insureds or the sum of "per accident" coverages.

Here, the only liability coverage available to plaintiff is the $25,000 she accepted from Charter. No other uninsured motorist coverage is available to the plaintiff. Accordingly, the plaintiff is entitled to recover $25,000 from American as the difference between the uninsured motorist coverage available ($50,000) and the sum of the limits collectible under all liability policies and primary uninsured motorist policies.

Finally, we believe that our decision is equitable. Under our interpretation of Tennessee's uninsured motorist statutes, the plaintiff will be entitled to recover $25,000 from American. If Ms. Brabson accepts the $25,000 tendered by Charter, she will also be entitled to recover up to $25,000 of uninsured motorist coverage from

American if she initiates a timely suit and she proves that her damages exceed $25,000. Thus, the largest sum that American will be required to pay under its uninsured coverage is $50,000 ($25,000 to plaintiff here and up to $25,000 to Ms. Brabson), the amount it agreed to pay when the contract was entered. We hold that plaintiff is entitled to recover $25,000 from American pursuant to American's uninsured motorist coverage. Accordingly, we reverse and remand for proceedings not inconsistent with this opinion.

Reversed and remanded.

Judges JOHNSON and PARKER concur.

DONNA McBRIDE, PLAINTIFF-APPELLEE v. TERRY McBRIDE, DEFENDANT-APPELLANT

No. 9122DC922

(Filed 3 November 1992)

Indigent Persons § 14 (NCI4th)— civil contempt—appointment of counsel—no requirement that court engage in due process complexity analysis

The trial court is not required to engage in the due process "complexity" analysis in every civil contempt case and then make a determination of whether counsel should be appointed, whether requested or not.

Am Jur 2d, Contempt § 201.

Right to Counsel in contempt proceeding. 52 ALR3d 1002.

Judge GREENE concurring.

APPEAL by defendant from order entered 7 June 1991 in DAVIDSON County District Court by *Judge George Fuller*. Heard in the Court of Appeals 23 September 1992.

On 12 January 1989, defendant signed a Voluntary Support Agreement in which he agreed to pay $40 a week in child support. That same day, a district court judge signed the agreement, making it a court order. On 10 May 1991, after defendant failed to appear

in court for a civil contempt hearing involving failure to pay child support, a district court judge ordered defendant's arrest. On 7 June 1991, defendant was brought before District Court Judge George Fuller. The materials before us clearly show that the trial court's order now on appeal was for civil contempt growing out of defendant's failure to comply with a previous court order in this civil case. We also note that the trial court's order contained a finding that defendant "Has not just cause for refusing to pay support as heretofore called for, in the cause, and that defendant is in willful contempt of the Court." Defendant represented himself and he neither requested nor was offered counsel. After the hearing, Judge Fuller issued an order which held defendant in custody until he purged himself by paying $1,380.46, the full amount of child support arrearage. On 2 July 1991, defendant gave notice of appeal.

No brief filed for plaintiff-appellee.

Central Carolina Legal Services, Inc., by Stanley B. Sprague, for defendant-appellant.

WELLS, Judge.

Defendant's assignments of error are as follows:

1. It was error for the court to jail Mr. McBride for civil contempt without first evaluating whether he should be appointed an attorney under the standards set forth in *Jolly v. Wright*, 265 S.E.2d 135, 143 (N.C. 1980).

2. It was error for the court to issue an order jailing Mr. McBride for civil contempt without stating in the order his reasons for refusing to appoint counsel. Record, p. 8, 9.

3. It was error for the court to jail Mr. McBride for civil contempt without first appointing counsel to represent him. Record, p. 8, 9.

Without direct reference to his assignments of error, but generally tracking his assignments, defendant makes the following three arguments:

1. Due Process requires that trial judges actually evaluate the necessity of counsel in civil contempt cases.

2. Due Process requires that trial judges state in their civil contempt orders their grounds for refusing to appoint counsel.

3. Due Process requires appointment of counsel for any indigent defendant in any civil contempt case in which the defendant will be jailed.

We begin our analysis by revisiting *Jolly v. Wright*, 300 N.C. 83, 265 S.E.2d 135 (1980). The factual and legal context of *Jolly* was virtually identical to the case now before us. However, in *Jolly*, there was a pre-trial motion for appointment of counsel, and the trial court's order contained the following finding:

8. That the character of the issues raised by this particular proceeding requiring the Defendant to show cause why he should not be held in civil contempt for failure to comply with the terms of the support order previously entered in this cause are of insufficient complexity for the Defendant to be prejudiced or treated unfairly by the refusal of the Court to appoint him legal counsel.

The holding in *Jolly* speaks for itself, but does not directly address the question of whether, as defendant here argues, that the *trial court* must engage in the due process "complexity" analysis in every civil contempt case and then make a determination of whether counsel should be appointed, whether requested or not.

The question was indirectly before this Court in *Hodges v. Hodges*, 64 N.C. App. 550, 307 S.E.2d 575 (1983). There, defendant's request for counsel was denied, but apparently the trial court did not engage in the due process "complexity" analysis. In affirming the trial court's denial of counsel, *this Court* made the analysis, to wit: "The instant case presents no unusually complex issues of law or fact which would necessitate the appointment of counsel."

Daugherty v. Daugherty, 62 N.C. App. 318, 302 S.E.2d 664 (1983) presented the same question. This Court responded as follows:

Defendant, who appeared at the contempt hearing without counsel, first cites as error the court's failure to ascertain and find whether defendant desired and was able to employ counsel, and whether the assistance of counsel was necessary for a proper presentation of his case. According to the record, the defendant's possible indigency and possible need of and desire for court appointed counsel were not mentioned by de-

fendant or anyone else. The contention is that the court's failure to initiate about and resolve these matters was manifest prejudicial error as a matter of law. We disagree.

The *Daugherty* Court engaged in the same "after the fact" analysis made by the *Hodges* Court, and upheld the trial court's order of civil contempt.

We are persuaded that both *Hodges* and *Daugherty* require us to reject all of defendant's arguments in this case, and therefore affirm the order below. The stay order pending the outcome of this appeal is vacated and the order of arrest and confinement shall be given immediate effect upon the certification of this opinion to the trial court.

Affirmed and remanded.

Judge ORR concurs.

Judge GREENE concurs in separate opinion.

Judge GREENE concurring.

The character of the relief ordered by the trial court is the dispositive distinction between criminal and civil contempt, and because the trial court ordered defendant incarcerated, but provided for defendant's release from jail upon payment of the amount of arrearage owed, I agree with the majority that the proceeding was one for civil contempt. *See Bishop v. Bishop*, 90 N.C. App. 499, 504-05, 369 S.E.2d 106, 108-09 (1988) (contempt order is remedial and coercive and thus civil in character if the contemnor may avoid or terminate his imprisonment by performing some act required by the court). I write separately to emphasize that the trial court failed to make a finding that defendant has the present ability to comply with the court order, and there is no evidence in the record to support such a finding. Under these circumstances, the lack of the required finding is reversible error. *See Adkins v. Adkins*, 82 N.C. App. 289, 293, 346 S.E.2d 220, 222 (1986) (trial court in civil contempt proceeding must find that the alleged contemnor has the present ability to comply with the court order); *Hodges v. Hodges*, 64 N.C. App. 550, 553, 307 S.E.2d 575, 577-78 (1983) (failure to make finding that alleged contemnor has present ability to pay reversible error when there is no evidence in the

record to support such a finding). However, defendant has failed to properly preserve this issue for appeal, *see* N.C.R. App. P. 10 (1992) (scope of appellate review confined to a consideration of those assignments of error properly set out in the record on appeal), and I respect the majority's decision not to exercise its discretion under N.C.R. App. P. 2 to suspend the rules in order to address the issue.

VANN L. POPLIN, EMPLOYEE/PLAINTIFF v. PPG INDUSTRIES, SELF-INSURED, EMPLOYER/DEFENDANT

No. 9210IC499

(Filed 3 November 1992)

Master and Servant § 99 (NCI3d)— workers' compensation—case defended without reasonable grounds—award of attorneys' fees proper—attorneys' fees for appeal awarded

The trial court properly awarded plaintiff attorneys' fees pursuant to N.C.G.S. § 97-88.1 where defendant accepted liability, received evidence addressing medical causation, and therefore defended the case without reasonable grounds; furthermore, pursuant to N.C.G.S. § 97-88 plaintiff is awarded additional reasonable attorneys' fees for the appeal from the deputy commissioner to the Full Commission and to the Court of Appeals.

Am Jur 2d, Workers' Compensation § 725.

Attorneys' fees: obduracy as basis for state-court award. 49 ALR4th 825.

APPEAL by defendant from Opinion and Award of the Industrial Commission entered 24 February 1992. Heard in the Court of Appeals 19 October 1992.

Plaintiff instituted this action against defendant seeking workers' compensation benefits due to an accident which occurred on 4 July 1988. Following a hearing held on 26 March 1990, a deputy commissioner of the Industrial Commission entered an order on 1 June 1990 finding *inter alia*: that defendant's counsel agreed that defendant would accept liability; that as a result of defendant's acceptance

of liability, a hearing scheduled for 10 April 1989 was not held; that although liability had been accepted, defendant withheld settlement because no evidence addressing medical causation had been received; that defendant received numerous medical records and a medical report rating plaintiff's disability; that although the record was left open for thirty days at the request of defendant's counsel, defendant offered no additional evidence on medical causation; that defendant acted in bad faith in accepting liability and thereafter refusing to pay expenses which were clearly compensable; and that the case was defended without reasonable grounds.

Based on the findings of fact, the deputy commissioner made conclusions of law as follows:

> 1. The plaintiff sustained an injury by accident while in the capacity of employee of the employer on July 4, 1988, which arose out of and in the course of his employment.
>
> 2. As a result of said injury, the plaintiff has a 10 percent permanent partial disability to his back.
>
> 3. Plaintiff has incurred various medical expenses, travel expenses, lost wages, and other compensable expenses as a direct result of the injury.
>
> 4. Claimant is entitled to attorney fees paid as the case was defended without reasonable cause pursuant to N.C.G.S. § 97-88.1.

Based on the findings of fact and conclusions of law, the deputy commissioner awarded plaintiff compensation for the permanent partial disability, medical expenses, and attorneys' fees. Defendant appealed to the Full Commission, and on 24 February 1992, the Full Commission affirmed and adopted the deputy commissioner's decision. Defendant appealed.

Wallace and Whitley, by Mona Lisa Wallace and David A. Shelby, for plaintiff-appellee.

Wilson, Biesecker, Tripp and Sink, by Joe E. Biesecker, for defendant-appellant.

WELLS, Judge.

Defendant's only argument is that the Industrial Commission erred by ordering defendant to pay attorneys' fees. Specifically, defendant contends that the order is not supported by adequate

conclusions of law or findings of fact and that the findings of fact are not supported by the evidence. We disagree.

N.C. Gen. Stat. § 97-88.1 provides:

> If the Industrial Commission shall determine that any hearing has been brought, prosecuted, or defended without reasonable ground, it may assess the whole cost of the proceedings including reasonable fees for defendant's attorney or plaintiff's attorney upon the party who has brought or defended them.

The decision as to whether to award attorneys' fees pursuant to this statute is a matter within the sound discretion of the Industrial Commission. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 298 S.E.2d 681 (1983). "Whether the evidence shows a 'reasonable ground' to defend is, however, a matter reviewable by this court." *Robinson v. J.P. Stevens*, 57 N.C. App. 619, 627, 292 S.E.2d 144, 149 (1982). "The test is not whether the defense prevails, but whether it is based in reason rather than in stubborn, unfounded litigiousness." *Sparks v. Mountain Breeze Restaurant*, 55 N.C. App. 663, 286 S.E.2d 575 (1982).

In this case, the record fails to show a "reasonable ground" to defend. Defendant admitted in a letter from counsel that plaintiff "suffered an injury arising out of and in the course and scope of his employment," but later contended there had been no evidence of medical causation brought forward. This contention was made even after defendant was supplied with plaintiff's medical records and a medical report rating plaintiff's disability. As a result, the record was held open for thirty days and a hearing was conducted. At the hearing, defendant offered no evidence. This evidence supports the findings of fact made by the Industrial Commission and the findings of fact support the conclusions of law. We hold that the Industrial Commission did not abuse its discretion in awarding attorneys' fees. The Opinion and Award of the Industrial Commission will be affirmed.

Plaintiff, in his brief, contends that additional attorneys' fees should be awarded due to defendant's appeal, and we agree. N.C. Gen. Stat. § 97-88 provides:

> If the Industrial Commission at a hearing on review or any court before which any proceedings are brought on appeal under this Article, shall find that such hearing or proceedings

were brought by the insurer and the Commission or court by its decision orders the insurer to make, or to continue payments of benefits, including compensation for medical expenses, to the injured employee, the Commission or court may further order that the cost to the injured employee of such hearing or proceedings including therein reasonable attorney's fee to be determined by the Commission shall be paid by the insurer as a part of the bill of costs.

Our decision requires "the insurer to make, or to continue payments of benefits," and we hold that plaintiff is entitled to have his attorneys' fees paid by defendant as part of the costs of his defense of defendant's appeal from the deputy commissioner to the Full Commission and the appeal to this Court. *See Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 395 S.E.2d 160 (1990). We have affirmed that defendant had no reasonable basis to appeal the decision of the deputy commissioner to the Full Commission. In its appeal here, defendant has shown no merit in its effort to further delay justice in this case. Therefore, the matter is remanded to the Industrial Commission for entry of an order requiring defendant to pay to plaintiff's attorneys, as part of the costs, a reasonable fee for representing plaintiff in the appeal from the deputy commissioner to the Full Commission and to this Court.

Affirmed and remanded.

Judges EAGLES and ORR concur.

CARL ROSANIA, PLAINTIFF v. ANITA J. ROSANIA (NOW JURKOWSKI), DEFENDANT

No. 9122DC989

(Filed 3 November 1992)

Divorce and Separation § 15 (NCI4th)— prior agreement for distribution of marital property—subsequent property settlement agreement—prior agreement superseded

The trial court properly refused to enforce a 1986 handwritten agreement between the parties which concerned the distribution of marital assets and which provided that defendant would pay plaintiff $15,000 upon her remarriage or upon her

sale of a specific parcel of marital property, since the parties' subsequent property settlement agreement of 1988 was a full and final settlement of the distribution of marital property which superseded any and all prior agreements between the parties.

Am Jur 2d, Divorce and Separation §§ 819, 820, 842.

APPEAL by plaintiff from *Cathey (Samuel A.), Judge.* Order entered 2 May 1991 in District Court, IREDELL County. Heard in the Court of Appeals 14 October 1992.

Defendant instituted this civil action by "Motion in the Cause" after filing an exemplified copy of a judgment entered on 30 June 1988 in the Superior Court of New Jersey, Chancery Division—Family Part, Hunterdon County, with the Clerk of Superior Court, Iredell County pursuant to G.S. § 50A-15. The New Jersey judgment granted an absolute divorce to plaintiff and defendant and incorporated the parties' previously executed "Property Settlement Agreement." The property settlement agreement relates that plaintiff and defendant were married on 22 August 1981 in Hunterdon County, New Jersey and that there were two children born of the marriage. Defendant was awarded custody of both children and plaintiff was awarded visitation privileges. Plaintiff agreed to pay child support in the amount of $150 each month. Defendant and the minor children have resided in North Carolina since the entry of the divorce judgment.

Defendant's "Motion in the Cause" requested that the North Carolina court modify the child support order contained within the New Jersey judgment by increasing the monthly obligation of plaintiff to reflect a change of circumstances occurring since the entry of the original order. Plaintiff responded to defendant's motion and requested that the district court deny the request for an increase in support and modify the New Jersey order by granting primary custody of the children to him. Plaintiff also requested that the court enforce a 1986 agreement between the parties dealing with the distribution of marital assets. Plaintiff alleged that, pursuant to the terms of that earlier agreement, defendant was indebted to him in the amount of $15,000.

When the matter came on for hearing in district court, Judge Cathey denied plaintiff's request for a change of custody, granted defendant's request for an increase in child support, altered and

expanded plaintiff's visitation rights, and denied plaintiff's claim for judgment against defendant in the amount of $15,000. The trial court concluded that plaintiff was not entitled to recover from defendant due to its finding that "[t]he [property settlement agreement signed by the parties and incorporated into the judgment of the New Jersey court] constitutes a full and final division of the parties' marital property. It superseded and invalidated the 1986 handwritten agreement between the parties . . . ."

Plaintiff appeals only from the trial court's denial of his claim against defendant for $15,000.

Pope, McMillan, Gourley, Kutteh & Parker, by David P. Parker, for plaintiff, appellant.

Mattox, Mallory & Simon, by Pamela H. Simon, for defendant, appellee.

HEDRICK, Chief Judge.

The only question presented by plaintiff on appeal is whether the trial court erred in refusing to enforce a 1986 handwritten agreement between the parties which concerned the distribution of marital assets and which provided that defendant would pay plaintiff $15,000 upon her remarriage or upon her sale of a specific parcel of marital property. Plaintiff contends that as defendant has remarried and sold the property, he is entitled to recover that sum.

The property settlement agreement which was incorporated into the New Jersey judgment on 30 June 1988 specifically states:

> Except as provided for in this Agreement, the parties have heretofore divided and distributed all of their real and personal property to their mutual satisfaction, and each hereby confirms and ratifies that distribution . . . .
>
> [Further,] [e]xcept as otherwise herein expressly provided, the parties shall and do hereby mutually remise, release and forever discharge each other from any and all actions, suits, debts, claims, demands and obligations whatsoever, both in law and in equity, which either of them ever had, now has, or may hereafter have against the other upon or by reason of any matter, cause or thing up to the date of the execution of this Agreement, excepting only any cause of action for divorce.

The agreement further contains a paragraph in which each party agreed to release "except as herein otherwise provided" the right to any property, under any theory, from the other, and a "merger" clause stating that the agreement "contains the entire understanding of the parties, and there are no representations, warranties, covenants or undertakings other than those expressly set forth herein."

This language clearly indicates that the property settlement agreement of 1988 was a full and final settlement of the distribution of marital property which superseded any and all prior agreements between the parties. The express language leaves no room for interpretation. "Where the language of a contract is clear and unambiguous, the court is obligated to interpret the contract as written, and the court cannot look beyond the terms to see what the intentions of the parties might have been in making the agreement." *Renfro v. Meacham*, 50 N.C. App. 491, 496, 274 S.E.2d 377, 379 (1981); *Asheville Mall v. F.W. Woolworth Co.*, 76 N.C. App. 130, 132, 331 S.E.2d 772, 773-74 (1985). The 1988 agreement contains no provision for payment of any amount to plaintiff by defendant and the trial judge properly denied plaintiff's claim.

Affirmed.

Judges ARNOLD and WELLS concur.

GREGORY POOLE EQUIPMENT COMPANY, PLAINTIFF-APPELLEE v. AMOS F. DAVIS, D/B/A AMOS F. DAVIS LOGGING, DEFENDANT-APPELLANT

No. 918SC1049

(Filed 3 November 1992)

Trial § 52 (NCI3d) — verdict that defendant not indebted to plaintiff — setting aside — no abuse of discretion

In an action to recover on account for the purchase of logging equipment, the trial court did not abuse its discretion in setting aside the jury's verdict that defendant was not indebted to plaintiff and in ordering a new trial.

Am Jur 2d, Judgments §§ 679, 682, 708; Trial §§ 1953-1955.

APPEAL by defendant from *Fountain (George M.), Judge.* Order entered 22 May 1991 in Superior Court, LENOIR County. Heard in the Court of Appeals 19 October 1992.

This is a civil action wherein plaintiff seeks to recover money damages totalling $90,011.17 allegedly due as the deficiency balance remaining on two Conditional Sales Contracts executed by plaintiff and defendant for the purchase of certain farm equipment by defendant from plaintiff.

At trial, only one issue was submitted to and answered by the jury as follows:

What amount if any is the Defendant indebted to the Plaintiff?

Answer: $0.00

Upon the return of the verdict, Judge Fountain entered the following order:

> The jury having answered "nothing" to the issue submitted to the jury, which issue read: "What amount, if any, is the Defendant indebted to the Plaintiff?" Upon the return of such verdict, the Court, in its discretion, sets aside the verdict as being inadequate.

From Judge Fountain's order setting aside the verdict and ordering a new trial, defendant appealed.

Howard, From, Stallings & Hutson, P.A., by John N. Hutson, Jr. and Maria C. Scanga, for plaintiff, appellee.

White & Allen, P.A., by John P. Marshall, for defendant, appellant.

HEDRICK, Chief Judge.

The record indicates that Judge Fountain peremptorily instructed the jury on the one issue submitted to it as follows:

> THE COURT: Ladies and Gentlemen of the jury this is a civil action wherein the plaintiff seeks to recover on account for the purchase of two log skidders, and an open account. The defendant has filed an answer in which he has denied that he's indebted to the plaintiff in the amounts claimed by the plaintiff.

> One issue will be submitted to you. And that simply means one question will be submitted to you, and your answer to that question will constitute your verdict. It reads as follows: "What amount, if any is the defendant" — that is Mr. Davis — "indebted to the plaintiff" — that is Gregory Poole Company?
>
> . . .
>
> So, if you find from the evidence the facts to be as all the evidence tends to show, you will award the plaintiff the sum of $89,542.42. If you do not so find, you will answer it "nothing."

Defendant argues the trial court erred in setting aside the verdict and ordering a new trial. We disagree.

The trial judge has the discretionary power to set aside a verdict or grant a new trial when, in his opinion, it would work injustice to let the jury's verdict stand; and, if no question of law or legal inference is involved, his action in so doing is not subject to review on appeal in the absence of a clear abuse of discretion. *Seaman v. McQueen*, 51 N.C. App. 500, 277 S.E.2d 118 (1981). The record discloses no abuse of discretion on the part of the trial judge in setting aside the verdict and ordering a new trial. The appeal is dismissed.

Dismissed.

Judges ARNOLD and WELLS concur.

PAUL M. SPILLMAN AND WIFE, CONNIE SPILLMAN, PLAINTIFFS APPELLEES v. AMERICAN HOMES OF MOCKSVILLE, INC., DEFENDANT APPELLANTS

No. 9122DC802

(Filed 3 November 1992)

Negligence § 2 (NCI3d)— negligent performance of contract—damage to subject matter of contract—no tort action

A tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract,

even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract.

Am Jur 2d, Contracts § 732.

APPEAL by defendant from *Conley (Jessie M.), Judge*. Judgment entered 23 April 1991 in District Court, DAVIE County. Heard in the Court of Appeals 14 September 1992.

Plaintiff Paul Spillman instituted this civil action by filing a complaint on 8 August 1989 wherein he alleged claims of breach of contract, breach of express and implied warranties, negligent breach of contract, and breach of warranty of construction in a workmanlike manner arising out of plaintiffs' purchase of a mobile home from defendant. Connie Spillman was subsequently joined by order of the court as an additional party plaintiff. Each claim set forth by plaintiffs was based upon the alleged improper construction and installation of the mobile home by defendant. All damage suffered by plaintiffs consisted of the cost to repair the defects in the mobile home and to repair the damage to the mobile home resulting from the improper installation.

On 28 March 1990, the trial court granted partial summary judgment in favor of defendant dismissing plaintiffs' claims based upon breach of express and implied warranties and breach of warranty of construction in a workmanlike manner. The case was tried before a jury at the 22 April 1991 session of the Civil District Court, Davie County on the two remaining issues of breach of contract and negligent breach of contract. The jury returned a verdict finding that defendant had not breached the contract with plaintiffs and finding that defendant had negligently performed the contract concerning "the sale and set up of the manufactured home." The verdict awarded plaintiffs $7,000 for defendant's negligence.

Defendant appeals from the trial court's denial of its motion for a directed verdict.

Law Offices of Grady L. McClamrock, Jr., by Michael J. Parker, for plaintiffs, appellees.

Peebles & Schramm, by Stafford R. Peebles, Jr., for defendant, appellant.

HEDRICK, Chief Judge.

Defendant assigns as error the trial court's denial of its motion for a directed verdict. Defendant argues that plaintiff failed to produce evidence sufficient to submit either the issue of breach of contract or negligent performance of the contract to the jury. As the jury found in defendant's favor on the issue of breach of contract, the submission of that issue resulted in no prejudice to defendant and we do not therefore address that portion of defendant's argument.

Plaintiffs' claim of negligence is premised upon the allegation that defendant's failure to properly perform the terms of the contract between the parties resulted in damage to the mobile home which is the subject matter of the contract. Such a premise is clearly insufficient. Absent the existence of a public policy exception, as in the case of contracts involving a common carrier, innkeeper or other bailee, *see Ports Authority v. Roofing Co.*, 294 N.C. 73, 82, 240 S.E.2d 345, 350-51 (1978), a tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if that failure to properly perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. *Id.* at 83, 240 S.E.2d at 351; *Warfield v. Hicks*, 91 N.C. App. 1, 9-10, 370 S.E.2d 689, 694, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 602 (1988); *Sims v. Mobile Homes*, 27 N.C. App. 25, 28, 217 S.E.2d 737, 739-40, *cert. denied*, 288 N.C. 511, 219 S.E.2d 347 (1975). It is the law of contract and not the law of negligence which defines the obligations and remedies of the parties in such a situation.

As the evidence presented by plaintiffs does not support a claim of negligence, the trial court's denial of defendant's motion for a directed verdict as to that issue was error. The judgment entered by the District Court in response to the jury's answers to issues three and four is reversed.

Reversed.

Judge LEWIS concurs.

Judge WYNN concurs in the result only.

YVONNE B. CHANDLER, PLAINTIFF/APPELLEE v. JACK L. CHANDLER, DEFENDANT/APPELLANT

No. 9114DC812

(Filed 17 November 1992)

1. Divorce and Separation § 119 (NCI4th)— equitable distribution—post-separation net rental income from marital property—distributional factor

The trial court erred in an equitable distribution action by classifying and distributing as marital property post-separation rental income from marital property. Rental income received from marital property between the date of separation and the date of the equitable distribution action may not be added to the marital estate. The trial court must consider the existence of the income, determine to whose benefit it has accrued, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable.

Am Jur 2d, Divorce and Separation §§ 878-881.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

2. Divorce and Separation § 135 (NCI4th)— equitable distribution—findings—post-separation depreciation, payments of debt, gifts—consideration as distributional factors

The trial court in an equitable distribution action made sufficient findings as to the value at separation of all marital properties, the post-separation payment of marital debt, appreciation in the value of two limited partnerships, and the gift of stock to the parties' children, but did not make required findings as to the post-separation depreciation of three partnerships and a stock account and made insufficient findings to show that it considered the evidence that was presented under the distributional factors of N.C.G.S. § 50-20(c).

Am Jur 2d, Divorce and Separation §§ 937-949.

Necessity that divorce court value property before distributing it. 51 ALR4th 11.

Divorce: equitable distribution doctrine. 41 ALR4th 48.

APPEAL by defendant from judgment entered 29 January 1991 by *Judge David Q. Labarre* in DURHAM County District Court. Heard in the Court of Appeals 14 September 1992.

Northen, Blue, Little, Rooks, Thibaut & Anderson, by J. William Blue, Jr., for plaintiff-appellee.

Gulley, Eakes, Volland & Calhoun, by Michael D. Calhoun and John L. Saxon, for defendant-appellant.

WYNN, Judge.

Plaintiff and defendant were married on 4 September 1954. Four children were born of the marriage, all of whom were emancipated adults under no disability at the time of trial. Plaintiff sought an absolute divorce which was granted on 27 September 1990. Subsequently, an order for equitable distribution was entered on 29 January 1991 wherein the trial judge held that an equal division of property was equitable and divided the parties' property accordingly. The court found as fact that defendant received $140,796.63 of income from marital assets during the period between separation and the equitable distribution action. From that amount, the court further found that defendant made tax payments on marital property, capital contributions, and mortgage payments on the marital home totaling $41,639. The court gave the defendant a credit for these payments against the total income received, leaving a total net post-separation income of $99,157.63. The court concluded that this rental income obtained from properties owned by the parties as tenants by the entirety was "marital property" subject to distribution and ordered the defendant to pay plaintiff $49,578.82, representing one-half of the net rental income. From this order of the trial court, defendant appeals. Additional facts will be discussed as necessary for a proper resolution of the issues raised on appeal.

I.

[1] Appellant first assigns as error the trial court's classification and distribution as "marital property," of the $99,157.63 in post-separation net rental income received by defendant from rental properties owned by the parties as tenants by the entirety. He contends that post-separation rental income obtained from marital

property is not itself subject to distribution as "marital property" under North Carolina's equitable distribution statute. We agree.

North Carolina General Statute § 50-20(b)(1) defines marital property as "all real and personal property acquired by either spouse or both spouses *during the course of marriage and before the date of separation of the parties*, and presently owned except property determined to be separate property." (Emphasis added). Property is not part of the marital estate unless it is owned by the parties on the date of separation. N.C. Gen. Stat. § 50-20(b); *Lawrence v. Lawrence*, 100 N.C. App. 1, 16, 394 S.E.2d 267, 275 (1990); *Becker v. Becker*, 88 N.C. App. 606, 607, 364 S.E.2d 175, 176 (1988). Under our equitable distribution statute, only property meeting this definition of "marital property" is subject to equitable distribution. *See* N.C. Gen. Stat. § 50-20(a); *Wade v. Wade*, 72 N.C. App. 372, 325 S.E.2d 260, *disc. rev. denied*, 313 N.C. 612, 330 S.E.2d 616 (1985); *Rogers v. Rogers*, 90 N.C. App. 408, 409, 368 S.E.2d 412, 413 (1988). The statute provides no authority to distribute non-marital property or separate property.

Accordingly, this Court has held that post-separation appreciation of a marital asset, whether passive appreciation or appreciation due to the efforts of an individual spouse, is not marital property and cannot be distributed by the court. *Truesdale v. Truesdale*, 89 N.C. App. 445, 448, 366 S.E.2d 512, 514 (1988). In *Truesdale*, Judge Greene, writing for this Court stated that:

> [t]he post separation appreciation of marital property is itself neither marital nor separate property. *Such appreciation must instead be treated as a distributional factor* under Section 50-20(c)(11a) or (12) since: (1) Section 50-20(b)(1) restricts the definition of marital property to property "acquired . . . before the date of separation"; (2) Section 50-21(b) mandates the valuation of marital property on the date of separation; and (3) Section 50-20(b)(2) limits the scope of separate property to property acquired before marriage or "by bequest, devise, descent or gift during the course of marriage."

Id. (citations omitted) (emphasis added).

Thus, an increase in the value of a marital asset which occurs after separation of the parties but before the date of the equitable distribution trial, should be considered pursuant to N.C.G.S. § 50-20(c)(11a) or (c)(12) as a "distributional factor" by the court

in its determination of what constitutes an equitable distribution of the marital estate. Section 50-20(c)(11a) covers the "[a]cts of either party to maintain, preserve, develop, or expand; or to waste, neglect, devalue or convert such marital property, during the period after separation of the parties and before the time of distribution." Section 50-20(c)(12) is a "catchall provision" under which the court may consider, "[a]ny other factor which the court finds to be just and proper." Pursuant to Section 50-20(c)(12), any "[m]arked increases or decreases in the value of property not caused by either party's acts between the date of separation and the date of the equitable distribution action could . . . be considered . . . as an 'any other distributional factor.' " *Truesdale*, 89 N.C. App. at 448-49, 368 S.E.2d at 515 (citations omitted).

Post-separation appreciation and depreciation of marital property have consistently been viewed as distributional factors under Section 50-20(c)(11a) and (c)(12). *See generally Truesdale*, 89 N.C. App. 445, 366 S.E.2d 512; *Nye v. Nye*, 100 N.C. App. 326, 396 S.E.2d 91 (1990), *disc. rev. denied*, 328 N.C. 92, 402 S.E.2d 416 (1991); *Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991). This Court has also held in *Becker v. Becker*, that the rental value of the marital home during the period of separation is not a proper consideration for the court to include in the marital estate because "no new property may be added to the marital estate after the date of separation." 88 N.C. App. at 607, 364 S.E.2d at 176. A trial court may, however, consider the post-separation use of the marital home as a residence, as a "distributional factor" in determining whether an equal distribution is equitable. *Id.* at 607-08, 364 S.E.2d at 177.

It follows therefrom, that rental income received from marital property between the date of separation and the date of the equitable distribution action may not be added to the marital estate. Rather than distributing the sums representing the income received from marital property, the trial court must consider the existence of this income, determine to whose benefit the income has accrued, and then consider that benefit when determining whether an equal or unequal distribution of the marital estate would be equitable. Where, as in this case, the post-separation income is not a result of either party's action, the income could be considered as an "any other distributional factor" under Section 50-20(c)(12).

The evidence and findings in the present case show that during the period of separation, defendant received and had exclusive use of $140,796.63 in income from various marital assets. Defendant used some of the income received to make tax payments on marital property, reduce the outstanding mortgage against the marital home, and make capital contributions which increased the capital value of limited partnerships held as marital property. All of these are factors the trial court may consider on remand in making its determination as to whether an equal distribution is equitable; or, if not, what unequal distribution is equitable.

As this Court pointed out in *Truesdale*, where as here, there has been no exchange, contribution or conversion of marital funds or assets since separation, the "source of funds" theory does not apply to convert the post-separation income into a marital asset. 89 N.C. App. at 449, 366 S.E.2d at 515. Following *Truesdale*, we likewise, *reject* the notion that

> it is harmless error to distribute such [rental income] so long as it is distributed in the same ratio deemed equitable under Section 50-20(c): the trial court cannot determine in the first place what an equitable distribution ratio would be without first considering evidence of this [income] as a distributional factor under Section 50-20(c)(11a) or (12).

Id.

Thus, while it is apparent that the trial judge attempted to make an equitable distribution between the parties, he failed to follow the mandates of North Carolina's equitable distribution statute. Our legislature expressed its intent through the use of very restrictive language in the equitable distribution statute. By considering post-separation income as a distributional factor, the court can distribute marital property in an equitable manner while adhering to the requirements and definitional standards set out in our equitable distribution statute.

II.

[2] Appellant also contends that the trial court erred by failing to make sufficient findings of fact with respect to the post-separation depreciation in the values of defendant's partnership interests and stock account, post-separation payments of marital debts, and the post-separation gift of stock to the parties' children. He further contends that the trial court failed to consider each of the above

post-separation activities as a distributional factor in determining whether an equal division of property was equitable.

Defendant testified and presented Schedule K-1's, "Partner's Share of Income, Credits, Deductions, Etc.," regarding the market value of his interests in five limited partnerships for 1987, the date of separation, and 1989, the date of the equitable distribution. The evidence presented tends to show that the total value of defendant's interests in three limited partnerships, namely, Executive Park, Eno Trace, and Research Triangle Associates, decreased by $50,839.00 between the date of separation and the equitable distribution. However, the value of defendant's interest in two other limited partnerships, Sedwick Associates and Southern Pines One, increased by $15,623.00 and $13,607.00, respectively. Thus, the changes in value represented by all of these partnership interests resulted in a net loss of $21,609.00.

With respect to the depreciation in value of defendant's stock account, defendant's evidence consisted of his own testimony that the market value at the time of the distribution hearing was one-third of its date of separation value. As to the post-separation payment of marital debts, the defendant submitted evidence tending to indicate that he made over $150,000.00 in payments on marital debts during the post-separation period. Finally, the evidence tends to show that subsequent to the date of separation of the parties, the defendant made gifts of approximately 1,600 shares of J-Rod, Inc. stock to the parties' children.

When evidence is presented from which a reasonable finder of fact could determine that an equal division would be inequitable, the trial court is required to consider the distributional factors set forth in N.C.G.S. § 50-20(c), "but guided always by the public policy expressed . . . [in the Act] favoring an equal division." *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). Pursuant to N.C.G.S. § 50-20(j), the trial court then must "make written findings of fact that support the determination that marital property has been equitably divided." Therefore, written findings of fact are required in every case in which a distribution of marital property is ordered under the Equitable Distribution Act, not merely when property is divided unequally. *Armstrong v. Armstrong*, 322 N.C. 396, 403, 368 S.E.2d 595, 599 (1988).

"The purpose for the requirement of specific findings of fact that support the court's conclusions of law is to permit the appellate

court on review 'to determine from the record whether the judgment—and the legal conclusions that underlie it—represent a correct application of the law.' " *Patton v. Patton*, 318 N.C. 404, 406, 348 S.E.2d 593, 595 (1986) (quoting *Coble v. Coble*, 300 N.C. 708, 712, 268 S.E.2d 185, 189 (1980)). This only requires that the court make findings as to ultimate rather than evidentiary facts. *Id.* at 407, 348 S.E.2d at 595. The trial court is not required to recite in detail the evidence it considered in determining what division is equitable. *Armstrong*, 322 N.C. at 405, 368 S.E.2d at 600.

In the case at bar, the court made the following findings of fact with respect to the *payment of marital debts:*

> 10. That with the post-separation funds which the Defendant acknowledges receiving, he has made tax payments on marital property in the amount of $3,931.00 for the home on Pinafore Drive and $5,058.00 for the property on 15-501 Boulevard. In addition, the court finds that he has made capital contributions to Southern Pines One and Sedwick Associates which have increased the capital account in those partnerships in the amounts of $13,607.00 and $15,623.00, respectively. In addition, he has reduced the outstanding principal due on the mortgage against the marital home in the amount of $3,600, for which the Court in its discretion, has determined that the Defendant is entitled to a credit for those payments against the post-separation income which he has received, but the court further determines that in light of the fact that most of the other expenses which the Defendant claims are related to interest payments which did not increase the capital value nor did it diminish outstanding indebtedness, that the Defendant has used the interest payments and depreciation of marital property to reduce his personal income tax liability and that the Court further believes that the Defendant has not acknowledged all of the cash to which he had access subsequent to the separation of the parties.

The court's findings as to the post-separation *gift of stock to the parties' children* are as follows:

> 6.(a) . . . Subsequent to the separation of the parties, the Defendant made an additional gift to his children of approximately 1,600 shares of J-Rod, Inc. stock. The Plaintiff, Mrs. Chandler did not consent to such transfer and did not waive her marital interest in the stock which the Defendant trans-

ferred, and as such, the Court finds that the marital property of the parties at date of separation includes 2,779 shares of stock in J-Rod, Inc. at a value of $62.44 per share as of the date of separation.

After reviewing the findings of fact, we find that the trial court made sufficient findings as to the value at separation of all marital properties. In addition, the findings as to post-separation payment of marital debt, appreciation in the value of two limited partnerships and the gift of stock to the parties' children are sufficient. As this court has previously stated, the general rule is that "[u]pon appellate review of a case heard without a jury the trial court's findings of fact are conclusive on appeal if there is evidence to support them, even though the evidence might sustain a finding to the contrary." *Draughon v. Draughon*, 82 N.C. App. 738, 740, 347 S.E.2d 871, 872 (1986), *cert. denied*, 319 N.C. 103, 353 S.E.2d 107 (1987) (citations omitted).

The trial court did not, however, make findings as to the post-separation depreciation in the value of defendant's interest in three partnerships and the post-separation depreciation of the Peeler stock account. As discussed previously, findings as to these and other factors must be made and considered pursuant to N.C.G.S. § 50-20(c)(11a) or (12) when evidence concerning them is introduced, in determining whether marital property has been equitably divided. *Truesdale*, 89 N.C. App. at 450, 336 S.E.2d at 516.

The trial court stated that it "considered all of the factors set out in statute [sic] and . . . determined that an equal division by using net value of all marital property as of the date of separation would be equitable in this case." This conclusion, even taken in conjunction with the court's findings of fact, does not provide this Court with the information necessary for appellate review. *Armstrong*, 322 N.C. at 406, 368 S.E.2d at 600.

Here, the court made insufficient findings to show that it considered the evidence that was presented under the distributional factors of N.C.G.S. § 50-20(c). Specifically, we hold that the court made insufficient findings as to the post-separation depreciation in the value of defendant's partnership interest and the value of the Peeler stock account.

III.

We have examined defendant's remaining assignment of error and find it to be without merit.

The order of equitable distribution is vacated and the matter is remanded to the trial court for further proceedings in accordance with this opinion.

Chief Judge HEDRICK and Judge LEWIS concur.

IN THE MATTER OF MICHAEL COWLES

No. 9118DC758

(Filed 17 November 1992)

Infants or Minors § 72 (NCI4th)— commitment of juvenile to training school—eighteenth birthday while appeal pending—no jurisdiction

An appeal of an order committing a juvenile to training school was dismissed where the juvenile attained the age of eighteen while the appeal was pending. The district court retains jurisdiction over a delinquent juvenile until terminated by order of the court or until he reaches his eighteenth birthday. N.C.G.S. § 7A-524.

Am Jur 2d, Juvenile Courts §§ 26, 27.

Age of child at time of alleged offense or delinquency, or at time of legal proceedings, as criterion of jurisdiction of juvenile court. 89 ALR2d 506.

Judge WYNN concurring.

APPEAL by juvenile from order entered 28 March 1991 in GUILFORD County District Court by *Judge Lawrence C. McSwain.* Heard in the Court of Appeals 14 October 1992.

Attorney General Lacy H. Thornburg, by Associate Attorney General Marilyn A. Bair, for the State.

Judith G. Behar for juvenile-appellant.

GREENE, Judge.

Michael Cowles (the juvenile) appeals from an order entered 28 March 1991, committing the juvenile to training school.

The evidence in the record establishes that the juvenile was born on 13 February 1974. Shortly before the juvenile's sixteenth birthday in February, 1990, four juvenile petitions were filed, each alleging that the juvenile had taken and used his mother's bank credit card without permission. The juvenile admitted the allegations and on 8 March 1990 was adjudicated delinquent under N.C.G.S. § 7A-517 (1989). After a dispositional hearing on 22 March 1990, the court found that the court counselor recommended that the juvenile be placed on probation for a period of twelve months, and that the juvenile "has caused some problems at home causing his parents to want the intervention of the Court." The court ordered that the juvenile (1) be placed on probation for a period of twelve months; (2) pay restitution for the use and benefit of his mother; (3) find either part-time or full-time employment and be gainfully employed during the period of his probation; (4) open a savings account and place at least ten percent of his weekly income into the account and not withdraw it without the permission of his court counselor or the court; and (5) cooperate in counseling and participate in any testing, evaluation, or counseling recommended by his court counselor.

Approximately six months later, in September, 1990, the court counselor submitted two motions for review. These motions alleged that the juvenile had violated the terms of his probation by stealing money from his parents and by breaking into a locked closet and taking his mother's car keys and driving her car without permission for an entire day, missing school. Following a hearing on the court counselor's motions, wherein the juvenile admitted the allegations, the court ordered that the juvenile continue on probation for an additional six month period under the same terms and conditions and with the additional special conditions that the juvenile cooperate with counseling at Youth Care for as long and with such frequency as the Youth Care agency deems appropriate, that the Youth Care counselor file a written report with the court, and that the juvenile seek employment and, if not found, that he perform service work as arranged for him by his court counselor.

Around the middle of October, 1990, the court counselor submitted to the court a progress report detailing the status of the

juvenile with regard to his adjustment to his living situation, school, employment, and community, and his attitude and response to supervision. The report indicated that the juvenile had adjusted poorly in all areas, and that, although he had an "acceptable" attitude toward his court counselor, his response to supervision "has much to be desired." The report also stated that the juvenile's attendance at Youth Care counseling sessions had not been acceptable in that he continued to miss appointments for no reason. The court counselor recommended that the juvenile be detained for five days at the county detention center and that he be required to perform fifty hours of community service.

On 11 October 1990, the court after a dispositional hearing filed an order finding that the juvenile, among other things, had not been attending class, had not saved ten percent of his earnings, and had resigned from a job at a grocery store after being caught buying meat from another employee at a reduced price. The court also found that the juvenile had been in counseling in the community for five to ten years and that he had received private counseling at Charter Hospital. The court concluded that the juvenile had violated the conditions of his probation and was in need of the supervision of the court, and that the juvenile had not exhausted all community-based alternatives and needed to be continued under the supervision of the court. The court ordered that the juvenile continue on probation for a period of twelve months under the same conditions, and, in addition, that the juvenile spend five days in detention, then re-enroll in school and attend on a regular basis, that he continue his counseling at Youth Care, that he obtain employment, and that he complete twenty-five hours of community service.

On 3 January 1991, after a probationary review hearing, the court found that the juvenile had complied with the conditions of probation except for the condition requiring that he find employment. The court ordered the juvenile to obtain a job within thirty days. On 27 February 1991, the court counselor filed another progress report indicating that the juvenile's adjustment to his living situation had been poor and that he was currently living with a friend because his mother requested that he leave her home due to his refusal to comply with her rules. The report indicated that the juvenile continued to miss school, and stated that he had been receiving counseling at Youth Focus on a weekly basis. The report stated that "the court does not belong in the middle of" a fight between the juvenile and his mother, and that the juvenile,

at age seventeen, did not belong on juvenile probation. The court counselor recommended that, "since all appropriate and useful resources have been attempted and/or exhausted, . . . that [the juvenile] be committed to training school for his consistent violations of probation, or that he be terminated from probation." The juvenile's counselor at Youth Focus submitted to the court a summary of the juvenile's progress indicating that, in his opinion, an acceptable alternative to training school would be group home placement.

After a review on 28 February 1991, the court found that placement at Methodist Children's Home was an option for residential placement for the juvenile, and that the juvenile agreed to such placement in lieu of training school, and accordingly ordered such placement, provided that it could be accomplished. The court continued the matter on 4 March 1991 in order to give the parties more time to secure placement. On 12 March 1991, the court counselor once again filed a motion for review, alleging numerous probation violations on the part of the juvenile. The court held a dispositional hearing on 28 March 1991, where it was revealed that, despite efforts of the juvenile's parents and others, timely placement in a group home was not possible. The juvenile's parents stated that, at this point, training school appeared to be the only option. The parents did not believe that it would be in the juvenile's best interest for the court to terminate its relationship with the juvenile. A placement in a group home was possible within four weeks of the hearing, and the court gave the juvenile the choice of either (1) waiting in detention for one week to determine if such placement would become available, and if such placement did not become available, then the court would conduct another review, or (2) immediately hearing the decision of the court. The juvenile rejected the court's option of waiting in detention for group home placement. The court then determined that all community-based alternatives had been exhausted, and committed the juvenile to the Division of Youth Services (training school). The court did not make a finding that the juvenile's behavior constituted a threat to persons or property in the community. The juvenile appealed, and on 8 April 1991, a stay of the order committing the juvenile to training school was granted pending hearing on appeal. The juvenile turned eighteen on 13 February 1992.

The issues presented by these facts are whether (I) the trial court properly concluded that all community-based alternatives to commitment to training school were exhausted; and (II) the trial court's failure to find that the juvenile's behavior constitutes a threat to persons or property in the community pursuant to N.C.G.S. § 7A-652(a), and the lack of evidence in the record to support such a finding, constitutes reversible error.

We do not have to decide the foregoing issues, as the dispositive fact with regard to this appeal is the juvenile's current age of eighteen. The district court retains jurisdiction over a delinquent juvenile "until terminated by order of the court or until he reaches his eighteenth birthday." N.C.G.S. § 7A-524 (1989). Thus, were we to affirm the trial court's order committing the juvenile to training school, the court would no longer have jurisdiction to enforce such commitment. And were we to discern error and reverse and remand, the trial court would be without jurisdiction to rehear the issues. In other words, this case is rendered moot by the fact that the juvenile turned eighteen while this appeal was pending. *See In re Doe*, 329 N.C. 743, 748 n.7, 407 S.E.2d 798, 801 n.7 (1991) (Court's decision as applied to juvenile moot due to fact that juvenile had already turned eighteen). Our Courts generally "will not hear an appeal when the subject matter of the litigation . . . has ceased to exist." *In re Swindell*, 326 N.C. 473, 474, 390 S.E.2d 134, 135 (1990) (citations omitted).

We note that this appeal is representative of a common problem in North Carolina relative to the commitment of juveniles to the Division of Youth Services. The appeal of a commitment order made pursuant to Section 7A-652 stays enforcement of the commitment "unless the judge orders otherwise." N.C.G.S. § 7A-668 (1989). Herein lies the dilemma. If the trial judge does not "order otherwise," the juvenile is not required to abide by the order, as it is stayed pending appeal. If the appellate court affirms the commitment order and the juvenile has at that time attained the age of eighteen, the juvenile can never be required to abide by the order since the juvenile is no longer subject to the jurisdiction of the juvenile court. On the other hand, the trial court may determine that, pending appeal, it is in the best interest of the juvenile or the State that the juvenile be committed. In this event, if the appellate court discerns error with regard to the commitment order, in light of the fact that the average period of commitment is 9.8 months, *see* Division of Youth Services Training School Monthly

Report for September, 1992, the appellate court is often unable to provide the juvenile with effective relief since in most cases the juvenile has already fully complied with the commitment order and been released.

Because the time necessary to process an appeal approaches one year, many appeals of commitments made under Section 7A-652 are rendered moot by the time they are set for hearing in the appellate court. In the interest of sound public policy, solutions to this problem need to be considered. Such solutions could include, among others, an amendment to Section 7A-524 to, in cases where the juvenile turns eighteen while his commitment appeal is pending, allow the juvenile court to retain jurisdiction over the juvenile for a period equal to the time taken to process the appeal, or possibly an amendment to the Rules of Appellate Procedure to provide for expedited appeals in juvenile cases.

Appeal dismissed.

Judge WALKER concurs.

Judge WYNN concurs with separate opinion.

Judge WYNN concurring.

I concur fully with the majority opinion except for that part which suggests as a solution that an amendment to Section 7A-524 be made to allow the juvenile court to retain jurisdiction over the juvenile beyond the age of eighteen. In my view, the more workable and meaningful solution is the other suggested solution of providing for expedited appeals in juvenile cases.

HICKMAN v. FUQUA

[108 N.C. App. 80 (1992)]

ANDRE L. HICKMAN, A MINOR BY HIS GUARDIAN AD LITEM, T. DANIEL WOMBLE, PLAINTIFF v. DERRICK MONTRIC FUQUA, HELEN W. NICHOLS, INDIVIDUALLY AND D/B/A TINY TIM NURSERY AND KINDERGARTEN, CITY OF WINSTON-SALEM, WINSTON-SALEM TENNIS INC., DAVID L. LASH, DEFENDANTS

WILLIAM L. HICKMAN AND WIFE, ROSLYN R. HICKMAN, PLAINTIFFS v. DERRICK MONTRIC FUQUA, HELEN W. NICHOLS, INDIVIDUALLY AND D/B/A TINY TIM NURSERY AND KINDERGARTEN, CITY OF WINSTON-SALEM, WINSTON-SALEM TENNIS INC., DAVID L. LASH, DEFENDANTS

No. 9121SC804

(Filed 17 November 1992)

Municipal Corporations § 12 (NCI3d)— governmental immunity— municipal tennis program—governmental activity

The trial court erred by denying defendant City's motion for summary judgment based on governmental immunity where plaintiff Hickman was injured while crossing the street after attending a free tennis clinic offered by defendant City and a private nonprofit corporation at high school tennis courts adjacent to a public park. The City did not waive its immunity by organizing a corporation to handle liability claims of $1,000,000 or less; although other unrelated tennis offerings produce revenue for the City, there was absolutely no charge involved in this clinic; there is no evidence of revenue generated at the high school courts, which were merely leased by the City; and it is irrelevant that the courts are adjacent to a public park. Moreover, the profit motive is not the sole determinative factor in deciding whether an activity is governmental or proprietary; the City's sponsorship of this clinic is a recreational program properly established and conducted through the municipality's governmental powers.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 87-110.

Comment note—Municipal immunity from liability for torts. 60 ALR2d 1198.

State's immunity from tort liability as dependent on governmental or proprietary nature of function. 40 ALR2d 927.

HICKMAN v. FUQUA

[108 N.C. App. 80 (1992)]

APPEAL by defendant City of Winston-Salem from order denying its motion for summary judgment entered 5 June 1991 by *Judge Preston Cornelius* in FORSYTH County Superior Court. Heard in the Court of Appeals 14 September 1992.

Frye and Kasper, by Leslie G. Frye and Granice L. Geyer, for plaintiffs-appellees Andre L. Hickman, William L. Hickman, and Roslyn R. Hickman.

Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr. and Gusti W. Frankel, for defendant-appellant City of Winston-Salem.

Hendrick, Zotian, Cocklereece & Robinson, by William A. Blancato, for defendant-appellee Winston-Salem Tennis, Inc.

LEWIS, Judge.

In this case we are asked to decide whether a city which co-sponsors a free youth tennis program held at a public high school that adjoins a city-owned park enjoys immunity from a negligence suit. Defendant City of Winston-Salem made a motion for summary judgment based upon governmental immunity. The trial court denied this motion, and the City appeals. We reverse.

The City of Winston-Salem and Winston-Salem Tennis, Inc., a private nonprofit corporation, have for over twenty years co-sponsored the Young Folks Tennis Clinic, a program which provides free tennis lessons for children. The clinics are held at various tennis courts throughout the city. During the summer of 1988, when the actions giving rise to the present lawsuit occurred, the clinics were offered at three locations: Carver High School, South Fork Recreation Center, and Hanes Park. Defendant David L. Lash was the tennis instructor at Carver.

On 18 July 1988 plaintiff Andre Hickman, then four years old, was attending the Tiny Tim Nursery and Kindergarten ("Tiny Tim"), which is located across and down the street a short distance from the Carver tennis courts. Plaintiff and other children from Tiny Tim were taken that morning to the Carver tennis courts so that they could participate in the Young Folks Tennis Clinic.

According to the complaint, after the lessons that day were completed, no one from Tiny Tim returned to pick up the children. Consequently, plaintiff Hickman and some other children attempted to cross the street to return to Tiny Tim. Plaintiff was struck

and injured by a car driven by defendant Fuqua. Plaintiff, by his guardian ad litem, and plaintiff's parents brought negligence actions against Fuqua, the City of Winston-Salem, Winston-Salem Tennis, Inc., Lash, and Helen W. Nichols in her individual capacity and doing business as Tiny Tim Nursery and Kindergarten. The present appeal concerns only the denial of the City of Winston-Salem's motion for summary judgment made on the grounds of governmental immunity.

It is a general rule that the denial of a motion for summary judgment is interlocutory and therefore not immediately appealable. However, recent case law clearly establishes that if immunity is raised as a grounds for the summary judgment motion, a substantial right is affected and the denial is immediately appealable. *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991); *see also Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276 (1992) (denial of a motion for summary judgment based on immunity defenses to a 42 U.S.C. § 1983 action is immediately appealable). The present appeal is properly before this Court.

There are two basic immunity questions in the case at bar. First, has Winston-Salem waived its immunity pursuant to N.C.G.S. § 160A-485(a)(1987) by organizing a corporation, Risk Management Corporation ("RAMCO"), for the purpose of handling liability claims of $1,000,000.00 or less against the City? Secondly, by sponsoring the Young Folks Tennis Clinic is the City acting in its governmental or its proprietary capacity?

The North Carolina Supreme Court has recently answered the first question. In *Blackwelder v. City of Winston-Salem*, 332 N.C. 319, 420 S.E.2d 432 (1992), the Court held that the City of Winston-Salem did not waive its immunity from civil tort liability when it established RAMCO. The Court held that Winston-Salem has neither purchased liability insurance nor participated in a local governmental risk pool. Therefore, under the terms of N.C.G.S. § 160A-485(a), there is no waiver of immunity.

Only the second issue remains. The case law in this field has long given our courts difficulty and has "resulted in irreconcilable splits of authority and confusion as to what functions are governmental and what functions are proprietary." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 528, 186 S.E.2d 897, 907 (1972).

The general rule is, of course, well established and straightforward: the doctrine of governmental immunity shields a municipality

from liability when the municipality performs a governmental function. Governmental immunity does not, however, apply when the municipality engages in a proprietary function.

Our Supreme Court has described governmental functions as those which are "discretionary, political, legislative, or public in nature and performed for the public good in behalf of the State." *Britt v. City of Wilmington*, 236 N.C. 446, 450, 73 S.E.2d 289, 293 (1952). By contrast, the proprietary activities undertaken by a municipality are those which are "commercial or chiefly for the private advantage of the compact community." *Id.*

The Supreme Court in *Britt* went further than merely defining the terms, and elucidated a test. "If the undertaking of the municipality is one in which only a governmental agency could engage, it is governmental in nature. It is proprietary and 'private' when any corporation, individual, or group of individuals could do the same thing." *Id.* at 451, 73 S.E.2d at 293.

Our courts, when applying this test, have focused on the commercial aspect of the definition. Decisions have looked at whether a monetary charge was involved in the activity, or at the amount of revenue the activity generated. However, there appears to be a split of authority over whether the court should consider the money raised solely by the activity, or whether it should consider the money raised by, for example, the entire parks and recreation department of a city. *Compare Casey v. Wake County*, 45 N.C. App. 522, 263 S.E.2d 360, *disc. rev. denied*, 300 N.C. 371, 267 S.E.2d 673 (1980) (Court looked only at the pecuniary aspects of the disputed family planning program and not at the entire health department program) *with Glenn v. City of Raleigh*, 248 N.C. 378, 103 S.E.2d 482 (1958) (Court considered revenue of a single park *in connection with* the overall budget requirements for operation of the City's entire recreation program).

While the record indicates that other tennis offerings unrelated to the Young Folks program produce revenue for the City, we find this fact irrelevant to this case. We are persuaded instead by the authority of *Casey*. In that case, the Court looked only to the costs particular to the individual program in dispute. We find further support for that position in language by the Supreme Court in *Rich v. City of Goldsboro*, 282 N.C. 383, 192 S.E.2d 824 (1972). There, the Court said: "This Court has held (*Glenn v. Raleigh*, 246 N.C. 469) that: 'In order to deprive a municipal corporation

of the benefit of governmental immunity, the *act or function* must involve special corporate benefit or pecuniary profit inuring to the municipality.' " *Id.* at 386, 192 S.E.2d at 826 (emphasis added).

If we consider only the Young Folks Tennis Clinic, we find there to be absolutely no charge involved. We also can find no evidence of revenue generated at Carver's tennis courts, which are owned by the local School Board, and merely leased by the City. It is irrelevant to our analysis that the tennis courts are adjacent to a public park.

In any event, a "profit motive" is not the sole determinative factor when deciding whether an activity is governmental or proprietary. *Sides v. Cabarrus Memorial Hospital*, 287 N.C. 14, 23, 213 S.E.2d 297, 303 (1975). Using the *Britt* test, courts look to see whether an undertaking is one "traditionally" provided by the local governmental units. *Id.* at 25, 213 S.E.2d at 304. The creation and operation of public parks and recreation programs are legitimate and traditional functions of the government. *See Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. rev. denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). Going one step farther, we hold that when a municipality provides free sports instruction as under the facts of this case, it is acting in a governmental capacity.

Our holding is made even clearer in light of the General Assembly's pronouncement on the general subject. Our Legislature has declared State policy to be as follows:

> The lack of adequate recreational programs and facilities is a menace to the morals, happiness, and welfare of the people of this State. Making available recreational opportunities for citizens of all ages is a subject of general interest and concern, and a function requiring appropriate action by both State and *local government.* The General Assembly therefore declares that the public good and the general welfare of the citizens of this State require adequate recreation programs, that the *creation, establishment, and operation of* parks and *recreation programs is a proper governmental function*, and that it is the policy of North Carolina to forever encourage, foster, and provide these facilities and programs for all its citizens.

N.C.G.S. § 160A-351 (1987) (emphasis added).

Each city in the State is expressly given the power and authority to "[e]stablish and conduct a system of supervised recreation."

N.C.G.S. § 160A-353(1) (1987). "Recreation" is defined by statute as "activities that are diversionary in character and aid in promoting entertainment, pleasure, relaxation, instruction, and other physical, mental, and cultural development and leisure time experiences." N.C.G.S. § 160A-352 (1987).

The statute is clear. The City's sponsorship of the Young Folks Tennis Clinic is a recreational program properly established and conducted through the municipality's governmental powers. As such, and in the absence of liability insurance, the City is immune from liability for torts arising out of the program.

We therefore reverse the trial court's denial of Winston-Salem's motion for summary judgment and remand for entry of summary judgment in the City's favor.

Reversed and remanded.

Chief Judge HEDRICK and Judge WYNN concur.

JOHNNY PARKER, EMPLOYEE, RESPONDENT-PLAINTIFF v. UNION CAMP CORPORATION, EMPLOYER, SELF-INSURED, APPELLANT-DEFENDANT

No. 9110IC810

(Filed 17 November 1992)

Master and Servant § 79 (NCI3d)— workers' compensation—recipient subsequently incarcerated—disability payments suspended

Plaintiff was not entitled to receive workers' compensation disability payments for the period of his incarceration. Prior to his imprisonment, plaintiff's incapacity to earn wages was a result of his injury; however, while he was in prison he did not have the right to earn wages and that incapacity to earn was caused by his imprisonment, not by his injury.

Am Jur 2d, Workers' Compensation § 377.

Workers' compensation: incarceration as terminating benefits. 54 ALR4th 241.

Judge WYNN dissenting.

APPEAL by defendant from order entered 26 April 1991 by Commissioner J. Harold Davis of the North Carolina Industrial Commission. Heard in the Court of Appeals 14 September 1992.

Brent Adams & Associates, by Brenton D. Adams, for plaintiff-appellee.

Maupin Taylor Ellis & Adams, P.A., by Steven M. Rudisill and Harry Brody, for defendant-appellant.

LEWIS, Judge.

Plaintiff-appellee suffered work-related injuries on 21 May 1981 and again on 6 April 1982. Defendant-appellant, Union Camp, paid disability benefits to plaintiff until 1986, when he was convicted of a crime and sentenced to seven years in prison. Plaintiff actually served one year and eight months, from 22 April 1986 to 3 December 1987. Union Camp suspended the disability payments for the period of incarceration upon the Industrial Commission's approving its request to stop payment. Deputy Commissioner Rush ordered Union Camp to resume payments after plaintiff's release.

Deputy Commissioner Ford presided over an April 1988 hearing on the propriety of the Stop Payment Order for the period of incarceration. He found in plaintiff's favor, but due to a lost transcript the hearing was held again. At the second hearing, in February 1990, Deputy Commissioner Willis decided that plaintiff was not entitled to the disability payments while in prison. Plaintiff appealed to the Full Commission. In April 1991 the Full Commission determined that the payments should have continued throughout the period of incarceration. The Commission stated that Mr. Parker remained permanently and totally disabled throughout his incarceration, and that his inability to earn wages continued to be caused by his disability, not by his imprisonment. Union Camp appealed to this Court.

The only issue on appeal is whether imprisonment of a person already receiving worker's compensation disability payments cuts off the employer's duty to make payments during the period of confinement. This is an issue of first impression in North Carolina. Both parties have submitted very good briefs, especially noteworthy since they both stayed within eight pages. Although the North

Carolina legislature has not dealt directly with this issue, existing statutes reveal the legislative intent to deny prisoners worker's compensation benefits for the period of their imprisonment. Thus, this Court holds that Mr. Parker is not entitled to his disability payments for the period of his incarceration.

N.C.G.S. § 97-13(c) states that the Worker's Compensation Act "shall not apply to prisoners being worked by the State . . .," except to the extent specified in this subsection. N.C.G.S. § 97-13(c) (1991). The statute provides for payment of limited benefits to prisoners, stipulating that such payment is not to begin until the prisoner's discharge. Furthermore, "[i]f any person who has been awarded compensation under the provisions of this subsection shall be recommitted to prison upon conviction of an offense committed subsequent to the award, such compensation shall immediately cease." *Id.* A recent bill ratified by the General Assembly of North Carolina, effective on 6 July 1992, supplies further evidence of the legislative intent towards prisoners. The bill, which governs employment of prisoners by counties, specifically states that "Chapters 96 and 97 [the Worker's Compensation Act] of the General Statutes shall have no application to prisoners working pursuant to G.S. 162-58." Act of July 6, 1992, ch. 841, Sen. Bill 1073 (to be codified at N.C.G.S. §§ 162-58 to 162-61, and 14-255).

Even though Mr. Parker was injured years before his incarceration began, and therefore was not injured while "being worked by the State" as section 97-13 specifies, he should not have received benefits while in prison. A prisoner entitled to the limited benefits of section 97-13 does not receive any payments until after his or her release. If that person is later recommitted to prison, the benefits are terminated. Logically, then, a person receiving benefits at the time of imprisonment should not be entitled to continue receiving those benefits while incarcerated. As Commissioner Ward stated in his dissent to the Order of the Full Commission, by imprisoning a person the State purposefully deprives that person of the right to earn wages. I.C. No. 864059 (April 26, 1991) (Commissioner Ward, dissenting). It follows that one who does not have the right to work and earn wages should not have the right to receive payments made in lieu of wages. *See Mize v. Cleveland Express*, 195 Ga. App. 56, 392 S.E.2d 275 (1990) (cert. withdrawn) (an offer of employment would have been "ineffectual" since prisoner could not "meaningfully accept").

Furthermore, to be entitled to worker's compensation benefits in North Carolina, an employee must prove that he or she is incapable of earning the same wages in the same or any other employment after the injury, and that this incapacity to earn was caused by the injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 290 S.E.2d 682 (1982). N.C.G.S. § 97-2(9) defines "disability" as "incapacity because of injury to earn the wages which the employee was receiving at the time of injury. . . ." N.C.G.S. § 97-2(9) (1991). Prior to his imprisonment, Mr. Parker's incapacity to earn wages was a result of his injury. However, while he was in prison Mr. Parker did not have the right to earn wages; his incapacity to earn was caused by his imprisonment, not by his injury. He therefore does not meet the requirements for entitlement to worker's compensation benefits during that period. *See State ex rel. Ashcraft v. Industrial Comm'n of Ohio*, 34 Ohio St. 3d 42, 44-45, 517 N.E.2d 533, 535 (1987) (once incarcerated, employee is no longer able to work, incurs no loss of earnings, and thus is not entitled to worker's compensation benefits). *But see Walker v. Tampa*, 520 So. 2d 66, 68 (Fla. Dist. Ct. App.), *cause dismissed*, 523 So. 2d 576 (Fla. 1988) (incarceration did not alter inability to work or right to receive compensation due to inability to work); *Sims v. R.D. Brooks, Inc.*, 389 Mich. 91, 93, 204 N.W.2d 139, 141 (1973) (compensation award not affected by later imprisonment).

The order of the Full Commission is reversed. Although this Court holds that Mr. Parker was not entitled to receive worker's compensation benefits while in prison, we note that the legislature may want to examine the possibility of continuing payment of benefits during a period of incarceration directly to a prisoner's dependents, who may have been relying on the disability payments as a major, or sole, source of income. *See Wood v. Beatrice Foods*, 813 P.2d 821 (Colo. Ct. App. 1991), *cert. denied*, (July 29, 1991) (court upheld statute suspending benefits to prisoners following conviction but allowing assignment of permanent disability payments to prisoner's spouse or minor children); *Garner v. Shulte*, 23 A.D.2d 127, 259 N.Y.S.2d 161 (1965). Because there are no dependents involved in this case, that issue is not before this Court.

Reversed.

Chief Judge HEDRICK concurs.

Judge WYNN dissents.

Judge WYNN dissenting.

I respectfully dissent from the majority opinion. The Worker's Compensation Act specifically defines "disability" as the "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. Gen. Stat. § 97-2(9) (1991) (emphasis added). Thus, in order for the Industrial Commission to find that an employee is disabled, the employee must show that, after his injury, he was incapable of earning the same wages he had earned before his injury in the same or different employment, and that this incapacity was caused by his physical injury. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 683 (1982). Thus, the basis of a Worker's Compensation award is not merely that the employee is unable to work, but rather that a work-related physical injury has caused the employee's incapacity to earn wages.

The majority asserts that when an employee enters prison the State deprives him of the right to earn wages, and it is that deprivation, not the physical injury, that causes his lack of earning capacity. However, after it has been determined that an employee is entitled to benefits because of a work-related injury, a change in physical condition is the only basis upon which the Industrial Commission can modify such benefits. *See* N.C. Gen. Stat. § 97-47 (1991) (a worker's compensation award can be modified only "on the grounds of a change of condition"); *McLean v. Roadway Express, Inc.*, 307 N.C. 99, 104, 296 S.E.2d 456, 459 (1982) ("change of condition" means "a substantial change, after a final award of compensation, of physical capacity to earn and, in some cases, earnings"). Mr. Parker in prison had the same physical incapacity to earn wages as he did out of prison and the fact of his incarceration should not deprive him and his dependents, if any, of the benefits to which he is legally entitled. If a different result is desired by the legislature, then it is up to that body of government, not this Court, to enact laws to that effect.

For the foregoing reasons I respectfully dissent.

GAIL B. ROSE, PLAINTIFF v. ROBERT THOMAS ROSE, DEFENDANT

No. 9112DC735

(Filed 17 November 1992)

1. **Divorce and Separation § 392.1 (NCI4th)— Child Support Guidelines—notice of hearing—waiver**

The trial court did not err by deviating from the Child Support Guidelines in an action to enforce a separation agreement where there was no notice of a request for a hearing to determine the reasonable needs of the children or the relative ability of the parents to pay support. Defendant waived the notice requirement when evidence was presented on these issues without objection. N.C.G.S. § 50-13.4(c).

Am Jur 2d, Trial § 412.

2. **Divorce and Separation § 392.1 (NCI4th)— Child Support Guidelines—deviation—findings—sufficient**

The trial court's findings were sufficiently specific to support a child support order which deviated from the Guidelines where the trial court made findings of fact concerning the plaintiff-wife's job and present earnings, the defendant-husband's job, 1990 salary and 1991 earnings, the reasonable monthly expenses and needs of the plaintiff and the two minor children, the defendant's fixed total expenses, and the amount he can reasonably afford to pay each month.

Am Jur 2d, Divorce and Separation §§ 1040, 1041.

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

Court's power as to support and maintenance of children in marriage annulment proceedings. 63 ALR2d 1029.

3. **Divorce and Separation § 22 (NCI4th)— separation agreement—not incorporated into divorce decree—modification**

The trial court erred by modifying a provision of a separation agreement which had not been incorporated into the divorce decree without the parties' consent. The unincorporated separation agreement is a contract and the court was without authority to modify it absent the parties' consent. The Court of Appeals also expressed concern regarding a portion of the order which

obligated defendant to pay $1009.70 per month in child support, even though the reasonable needs of the children were $1386, with $376.30 per month deducted from the father's equity in the marital home, because there was no guarantee of when or whether the marital home would be sold. If there are no available assets and the monthly amount cannot be paid, the support must be reduced.

Am Jur 2d, Divorce and Separation §§ 426, 1040, 1041.

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

Opening or modification of divorce decree as to support or custody of child not provided for in the decree. 71 ALR2d 1370.

Court's power as to support and maintenance of children in marriage annulment proceedings. 63 ALR2d 1029.

APPEAL by defendant from Order signed 13 May 1991 by *Judge Patricia Timmons-Goodson* in CUMBERLAND County District Court. Heard in the Court of Appeals 24 August 1992.

Bobby G. Deaver for plaintiff-appellee.

Harris, Mitchell, Hancox & VanStory, by Ronnie M. Mitchell, Ellen B. Hancox, and Kathleen G. Sumner, for defendant-appellant.

LEWIS, Judge.

Plaintiff and defendant were married on 4 March 1972. Two children were born of the marriage, both of whom are minors. On 24 January 1986 the parties executed a separation agreement, the terms of which included provisions for child support, child custody and visitation, and for the division of their property. According to our review of the record, we are unable to ascertain the date the divorce decree was entered. However, the separation agreement was not incorporated into the divorce order. The record indicates that only the defendant has remarried, and the plaintiff continues to reside in the marital residence with the two minor children.

On 28 March 1990 plaintiff-wife filed a complaint with the Cumberland County District Court, alleging that the defendant had breached the terms of the separation agreement. She asked

for specific performance of the agreement and that the court incorporate the separation agreement into the judgment. This action came to trial, and an order was signed by the District Court judge on 13 May 1991. The defendant-husband appeals.

The court expressly declined to incorporate the separation agreement into the 13 May 1991 order. The provisions in the order relating to custody, visitation and the obligations of the parties with regard to extraordinary medical and dental expenditures for the minor children are not in dispute.

The findings of fact pertinent to the present case are set out below:

> 10. That under the separation agreement which was entered into between the parties, the Defendant has been paying expenses toward the maintenance of the family residence as child support in the sum of $1,386.00 per month.
>
> 11. That based upon the child support guidelines which were enacted on July 1, 1990, the basic child support for the two minor children should be $890.00 per month; that the Defendant should pay to the Plaintiff as child support an amount equal to the first and second mortgages of the marital residence, the Cumberland County ad valorem taxes, and the property insurance which said amount is in the sum of $1,009.70 per month; that the difference in said sum of $1,386.00 per month which the Defendant was paying pursuant to the separation agreement and the sum of $1,009.70 will be deducted from the Defendant's equity in the marital residence.

The conclusions of law reflected these findings, and the court therefore ordered:

> 2. That the Defendant be and is hereby ordered to pay directly to the Plaintiff each month an amount equal to the first and second mortgages on the marital residence, the Cumberland County ad valorem taxes and the property insurance which amount is in the total sum of $1,009.70 per month as support for the two minor children; that the difference in said sum of $1,386.00 per month which the Defendant was paying pursuant to the separation agreement and the sum of $1,009.70 shall be deducted from the Defendant's equity in the marital residence at the rate of $376.30 per month, as a further portion of child support.

Defendant brings several arguments to this Court. First, he asserts that the lower court erred by deviating from the North Carolina Child Support Guidelines when it determined the amount of support for which defendant is responsible. Defendant further contends that the order's findings of fact are insufficient to support the amount of child support ordered, and as a result the presumptive amount as determined by application of the Child Support Guidelines constitutes the appropriate amount of his obligation for child support.

[1] The present North Carolina Child Support Guidelines have been in place since 1 October 1990 and are therefore applicable to the order presently before us. The guidelines are presumptive and are used by courts to properly determine child support obligations. *Greer v. Greer*, 101 N.C. App. 351, 352, 399 S.E.2d 399, 400 (1991). Failure to follow the guidelines constitutes reversible error. *Id.* at 354, 399 S.E.2d at 401. Trial courts are permitted to deviate from the guidelines only after a party requests the court hear evidence "relating to the reasonable needs of the child for support and the relative ability of each parent to provide support." N.C.G.S. § 50-13.4(c) (Cum. Supp. 1991). If the court finds, after examination of the evidence, that

> application of the guidelines would not meet or would exceed the reasonable needs of the child considering the relative ability of each parent to provide support or would be otherwise unjust or inappropriate the Court may vary from the guidelines. If the court orders an amount other than the amount determined by application of the presumptive guidelines, the court shall make findings of fact as to the criteria that justify varying from the guidelines and the basis for the amount ordered.

N.C.G.S. § 50-13.4(c).

Defendant contends that the court improperly deviated from the presumptive guidelines because there was no notice of a request for a hearing to determine the reasonable needs of the children or the relative ability of the parents to pay support. However, the record indicates that evidence was nevertheless presented, without objection, on these issues. This constitutes a waiver of the notice requirement. *Browne v. Browne*, 101 N.C. App. 617, 624, 400 S.E.2d 736, 741 (1991). Defendant, then, cannot now be heard to complain about the lack of notice.

[2] Further complaining about the court's deviation from the guidelines, the defendant contends that the facts found by the court are insufficient to justify the amount of the support ordered. Specifically, defendant alleges the trial court failed to make sufficient findings of fact as to the estates, earnings, conditions, and accustomed standard of living of the children and the parents pursuant to N.C.G.S. § 50-13.4(c). The trial court is "required to make specific findings of fact with respect to factors listed in the statute." *Greer*, 101 N.C. App. at 355, 399 S.E.2d at 402 (citing *Boyd v. Boyd*, 81 N.C. App. 71, 343 S.E.2d 581 (1986)).

The trial court made findings of fact concerning the plaintiff-wife's job and present earnings, the defendant-husband's job, 1990 salary and 1991 monthly earnings, the reasonable monthly expenses and needs of the plaintiff and the two minor children, and the defendant's fixed total expenses and the amount he can reasonably afford to pay each month. We find these facts to be sufficiently specific to support the child support order. *Id.*

[3] Further, defendant argues that the lower court erred by modifying the separation agreement's property settlement provision. Defendant contends that the order awarding a monthly amount of equity in the family residence as child support to the plaintiff is a modification of the property settlement. Defendant contends error because the separation agreement here was not incorporated into the divorce decree, and the trial court expressly declined to incorporate it into the 13 May 1990 order. A separation agreement which is not incorporated into a court judgment is a contract and cannot be modified absent the consent of the parties. *Walters v. Walters*, 307 N.C. 381, 386, 298 S.E.2d 338, 342 (1983).

The separation agreement executed by the parties included provisions for child support, child custody and visitation, and for the division of property. Under paragraph 5 of the "PROVISIONS FOR PROPERTY SETTLEMENT," the parties agreed that plaintiff should occupy the family residence with the minor children. Plaintiff's right to reside there terminates if one or more enumerated events occur. Should plaintiff's right of residence terminate, the house is to be sold and "the net proceeds from the sale shall be divided between the Husband and Wife with fifty percent (50%) to the Husband and fifty percent (50%) to the Wife."

In the child support order, the court ordered that "[an amount] shall be deducted from the Defendant's equity in the marital residence

at the rate of $376.30 per month, as a further portion of child support." Therefore, in the event that a sale of the marital house occurs, defendant will at that time receive less than his fifty percent equity in the house. Defendant contends that this is a modification of an unincorporated separation agreement, and absent the parties' consent, the court had no authority to take this action. We agree. The unincorporated separation agreement is a contract, and the court therefore erred by modifying one of its provisions without the consent of both parties.

We write further to express our concern about the nature of orders such as these. This order would have obligated the defendant to pay only $1,009.70 each month, even though the reasonable monthly needs of the children were determined to be $1,386.00. There is no guarantee when or even that the marital residence will one day be sold. As a consequence, there is likewise no guarantee that the children will ever realize the $376.30 per month being deducted from their father's equity in the house. While the law is clear that a defendant will not be made to specifically perform an obligation if he is incapable of doing so, *Cavenaugh v. Cavenaugh*, 317 N.C. 652, 657, 347 S.E.2d 19, 23 (1986), we do not see how it can be in the best interests of the children to require their support be paid in such a tenuous manner. If there are no available assets and if the monthly amount cannot be paid, the support must be reduced

We reverse and remand to the District Court for an order consistent with this opinion.

Chief Judge HEDRICK and Judge WYNN concur.

SHAW FOOD SERVICES COMPANY, INC., PLAINTIFF-APPELLEE v. MOREHOUSE COLLEGE, DEFENDANT-APPELLANT

No. 9110SC1132

(Filed 17 November 1992)

Process § 14.3 (NCI3d) — college food service contract — out-of-state college — North Carolina company — minimum contacts

The trial court properly denied defendant's motion to dismiss for lack of personal jurisdiction where defendant was

a college located in Atlanta, Georgia; plaintiff was a Mississippi corporation with its principal place of business in North Carolina; plaintiff and defendant entered into a contract for plaintiff to provide its food services; defendant subsequently attempted to terminate that contract; and plaintiff filed an action in North Carolina challenging the termination. Forcing defendant to litigate this contract dispute in North Carolina does not offend notions of fair play and substantial justice because the contract itself states the situs of the contract as North Carolina and specifies that North Carolina law is to govern; defendant contacted plaintiff in North Carolina and solicited the plaintiff to come to Atlanta to develop and submit a proposal for administering food services at the college; the contract envisioned an ongoing relationship between the defendant and the forum state as its daily operation required regular and systemic interaction between defendant and plaintiff's North Carolina headquarters; and defendant could reasonably have foreseen that disputes arising out of the contractual relationship would well be litigated in North Carolina.

Am Jur 2d, Courts § 146.

Construction and application of state statutes or rules of court predicating in personam jurisdiction over nonresidents or foreign corporations on making or performing a contract within the state. 23 ALR3d 551.

APPEAL by defendant from an order entered 25 July 1991 in WAKE County Superior Court by *Judge Robert L. Farmer.* Heard in the Court of Appeals 21 October 1992.

On 16 July 1991, plaintiff Shaw Food Services Company, Inc. (Shaw Food), a Mississippi corporation with its principal offices in Fayetteville, North Carolina, filed a complaint alleging breach of contract against Morehouse College, a private college located in Atlanta, Georgia. The action arose out of a service contract that was entered into on 14 May 1990 in which the parties agreed that plaintiff would occupy the college's dining hall facilities and provide food services to the students and staff of Morehouse College. From 1 June 1990 until 20 July 1991, plaintiff operated defendant's dining hall facilities. On 23 May 1991, defendant attempted to terminate the parties' contract. Challenging the validity of de-

fendant's subsequent termination of the contract and alleging breach, plaintiff filed this action.

On 25 July 1991, defendant filed a motion to dismiss, pursuant to Rule 12(b)(1) and 12(b)(2) of the North Carolina Rules of Civil Procedure, alleging that North Carolina's courts lacked personal jurisdiction over the defendant. On 25 July 1991, Judge Farmer issued an order denying defendant's motion to dismiss and on 1 August 1991, defendant filed notice of appeal.

Hunton & Williams, by A. Todd Brown and Odes L. Stroupe, Jr., for plaintiff-appellee.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by Adam Stein and Melvin L. Watt, for defendant-appellant.

WELLS, Judge.

The sole issue on appeal is whether the trial court erred in denying defendant's motion to dismiss for lack of personal jurisdiction.

"We apply a two step analysis in determining whether our state courts have *in personam* jurisdiction over non-resident defendants. 'First, the transaction must fall within the language of the State's long-arm statute. Second, the exercise of jurisdiction must not violate the due process clause of the fourteenth amendment to the United States Constitution.' " *Climatological Consulting Corp. v. Trattner*, 105 N.C. App. 669, 414 S.E.2d 382 (1992) (*quoting Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 348 S.E.2d 782 (1986)).

In the case at bar, the defendant does not contest the trial court's finding of statutory jurisdiction. Therefore, we need only address whether this assertion of jurisdiction is consistent with the Fourteenth Amendment's due process guarantee.

The Trial Court's Findings

The following is a summary of the trial court's findings of fact and conclusions of law that are pertinent to this appeal, which Judge Farmer included in the order denying defendant's motion to dismiss for lack of *in personam* jurisdiction:

In April of 1990, LeRoy Keith, President of Morehouse College, contacted Shaw Food by phone, indicated that Morehouse College

was searching for a food service provider for the 1990-1991 school year and beyond, and then solicited and requested Shaw Food to come from its headquarters in North Carolina to Georgia to assess the food services operation at Morehouse College and to submit a proposal with recommendations regarding facility layout, decor, ambience, equipment, etc. In response to Dr. Keith's request, representatives from Shaw Food's North Carolina headquarters traveled to Atlanta and began an assessment study of Morehouse College's dining facilities. On 1 May 1990, Shaw Food forwarded to Morehouse College a report on the results of their operation assessment studies and supplemented that report with a detailed budgetary plan. All feasibility studies and cafeteria designs were developed by Shaw Food in North Carolina and delivered from North Carolina to Morehouse College. This fact was known to Morehouse College.

On 14 May 1990, Morehouse College entered into an agreement for food services with Shaw Food and the contract between Shaw Food and Morehouse College specifically indicated that the situs of the contract shall be Cumberland County, North Carolina. On page 15 of the contract, it is specifically stated that, "This contract shall be governed by the laws of the State of North Carolina."

Morehouse College knew that Shaw Food was a North Carolina Corporation and that to fulfill its obligations under the agreement Shaw Food would have to relocate management personnel from North Carolina to Georgia and send or ship vehicles, inventory and equipment. Morehouse College also knew that all administrative support required by Shaw Food in carrying out the contract, (including accounting, payroll, tax withholding, legal affairs, management training, etc.), would be located in North Carolina and that the food services operations would be centrally operated and directed by Shaw Food's executives, located at Shaw Food's headquarters in Fayetteville, North Carolina.

The contract between Shaw Food and Morehouse College had a substantial connection with the State of North Carolina. Morehouse College benefitted from the laws of North Carolina by, *inter alia*, entering the market to solicit Shaw Food's services. Requiring Morehouse College to litigate in the State of North Carolina does not offend notions of fair play and justice and would not violate constitutional due process requirements of the United States and North Carolina Constitutions.

Due Process Analysis

Basically, the defendant contends that Morehouse College's contacts with North Carolina are so attenuated that imposing personal jurisdiction in this State over this defendant offends notions of fair play and substantial justice. We disagree.

To satisfy requirements of the due process clause when establishing the existence of a forum state's jurisdiction over a foreign defendant, there must exist certain minimum contacts between the non-resident defendant and the forum state such that maintenance of the suit does not offend traditional notions of fair play and substantial justice. *Tom Togs, Inc., supra.* "The forum state may exercise jurisdiction over a defendant if there are 'sufficient continuous and systematic' contacts between the defendant and the forum state." *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 394 S.E.2d 651 (1990) (*quoting Williams v. Institute for Computational Studies*, 85 N.C. App. 421, 355 S.E.2d 177 (1987)). "[A] single contract may be a sufficient basis for the exercise of *in personam* jurisdiction if it has substantial connection with this state." *Id.*

In the case at bar, the contract itself states the situs of the agreement to be North Carolina and specifies that North Carolina law is to govern. When establishing a forum state's jurisdiction, "[a] factor in determining fairness concerning a breach of contract cause of action is whether the contract expressly provides that the law of the forum state would apply to actions arising out of the contract." *Id.*

Secondly, the trial court found that the defendant contacted the plaintiff in North Carolina and solicited the plaintiff to come to Atlanta to develop and submit a proposal for administering food services at the College. Solicitation of business by the foreign defendant in the forum state is a factor to consider when determining whether a particular defendant has established the minimum contact with the forum state to satisfy due process. *See Mabry v. Fuller-Shuwayer Co.*, 50 N.C. App. 245, 273 S.E.2d 509, *cert. denied*, 302 N.C. 398, 279 S.E.2d 352 (1981).

Thirdly, the contract envisioned an ongoing relationship between the defendant and the forum state as the contract's potential duration was for several years and its daily operation required regular and systematic interaction between the defendant and the

plaintiff's North Carolina headquarters. The fact that the dining facility assessment reports were substantially compiled in North Carolina and that the administrative support and the overall supervision of the dining facilities were centrally located in North Carolina supports the conclusion that the defendant in this case received substantial benefits from its interaction with the forum state. North Carolina has a legitimate interest in exercising personal jurisdiction over parties to contracts that are formed in and are to be substantially carried out in North Carolina. *Tom Togs, Inc., supra.*

Lastly, considering that the situs of the contract was North Carolina, the choice of law the contract applied was North Carolina law, and the fact that substantial and necessary elements of the contract's performance were carried out in North Carolina, the defendant could have reasonably foreseen that disputes arising out of this contractual relationship could well be litigated in North Carolina. For the reasons stated above, we find that forcing the defendant to litigate this contract dispute in North Carolina does not offend notions of fair play and substantial justice.

Therefore, the trial court's order denying defendant's motion to dismiss for lack of personal jurisdiction is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

LAKE DRIVE CORPORATION, PLAINTIFF v. JOHN A. PORTNER AND ERVEANE PORTNER, DEFENDANTS

No. 911SC1121

(Filed 17 November 1992)

Adverse Possession § 5 (NCI4th)— action to quiet title—jury verdict—plaintiff did not have superior record title and defendants had adversely possessed—not inconsistent

The trial court did not err in an action to quiet title by denying plaintiff's motion for a new trial based on an inconsistent jury verdict where the jury found that plaintiff did not have superior record title and that defendants had been

in adverse possession for more than 20 years. Although plaintiff contended that the verdict was inconsistent in that defendants could not have adversely possessed the property if they were the record title holders, the verdict in fact only established that plaintiff failed to carry its burden of proof with regard to its claim of record ownership. Moreover, a claim of adverse possession is based upon an assertion of ownership rights as against all persons, not simply the record owner.

Am Jur 2d, Adverse Possession §§ 2, 8-11.

APPEAL by plaintiff from *Grant (Cy Anthony), Judge*. Order entered 17 May 1991 in Superior Court, DARE County. Heard in the Court of Appeals 21 October 1992.

Plaintiff instituted this civil action seeking to quiet title to a 47.67 acre tract of land located in Dare County, North Carolina. Plaintiff alleged in its complaint that defendants asserted an adverse claim to a portion of that property. Defendants' answer claimed that defendants owned superior record title to 3.166 acres of the 47.67 acre tract and also claimed that defendants had exercised "continuous, actual, exclusive, hostile, open and notorious possession" of the 3.166 acre tract for over 30 years.

When the matter came on for hearing, the following issues were submitted to and answered by the jury:

Issue One:

1. Does Plaintiff, Lake Drive Corporation, have superior record title to the 3.166 acre parcel of land described on the map of H. P. Pyatt, Jr. identified as DX-9?

Answer: No.

Issue Two:

2. Did Defendants Portner acquire title to the 3.166 acre parcel of land described on the plat of H. F. Pyatt, Jr. identified as DX-9 by adverse possession for a period of more than twenty (20) years before this action was filed on December 29, 1987?

Answer: Yes.

Judgment was thereafter entered by the court declaring defendants the rightful owners of the contested tract of land.

Plaintiff then moved the court for a new trial pursuant to Rule 59(a)(7) and (a)(9) arguing that the jury's answers to Issue 1 and Issue 2 were inconsistent and "contrary to law." According to plaintiff "if the jury did not find that the plaintiff had title to the property, then the jury could not have found, as a matter of law, that the defendants adversely possessed the property for a period of more than 20 years before the action was filed . . . ." The trial court denied plaintiff's motion and plaintiff appealed.

Twiford, O'Neal & Vincent, by Edward A. O'Neal, for plaintiff, appellant.

Hornthal, Riley, Ellis & Maland, by M. H. Hood Ellis, for defendant, appellee, Erveane Massey Portner.

HEDRICK, Chief Judge.

Plaintiff's only argument on appeal is that the trial court erred in failing to grant plaintiff's motion for a new trial due to the "inconsistent" verdict of the jury. Plaintiff does not contend that the trial court erred in submitting both issues to the jury, nor does it argue that the trial court erred in instructing the jury with regard to either issue or to the requirement that both issues be answered. In fact, plaintiff made no objection nor tendered any exception to the jury instructions given by the court.

Our courts have held on numerous occasions that when a jury's answers to issues "are so contradictory as to invalidate the judgment, the practice of the court is to grant a new trial, or *venire de novo*, because of the evident confusion." *Palmer v. Jennette*, 227 N.C. 377, 378, 42 S.E.2d 345, 347 (1947) (citations omitted); *In re Will of Leonard*, 71 N.C. App. 714, 719, 323 S.E.2d 377, 380 (1984). The verdict rendered in this case, however, clearly supports the judgment and reflects no confusion on the part of the jury.

Plaintiff's argument is based upon the premise that the jury's conclusion that plaintiff did not have superior record title to the disputed tract necessarily established defendants as the superior record title holders. With such record title, plaintiff contends defendants could not have adversely possessed the property. The jury's response to the first issue, contrary to plaintiff's contention, established only that plaintiff failed to carry its burden of proof with regard to its claim of record ownership. Our Supreme Court has stated that:

> A failure of one of the parties to carry his burden of proof on the issue of title does not, *ipso facto*, entitle the adverse party to an adjudication that title to the disputed land is in him. . . . There are cases involving a disputed title to land in which neither party can carry the burden of proof.

Cutts v. Casey, 278 N.C. 390, 411-412, 180 S.E.2d 297, 307-308 (1971).

Further, plaintiff's argument implies that a party seeking to establish title by adverse possession must necessarily establish the identity of the record title holder. We find no such requirement in the law of this State. A claim of adverse possession is based upon an assertion of ownership rights as against *all persons*, not simply the record owner. *See Newkirk v. Porter*, 237 N.C. 115, 74 S.E.2d 235 (1953) and *Carswell v. Carswell*, 217 N.C. 40, 7 S.E.2d 58 (1940). In order to establish "open and notorious possession," a claimant must show acts of possession of such a nature as to give notice of his claim of ownership to the "*whole world*." *Price v. Tomrich Corp.*, 275 N.C. 385, 167 S.E.2d 766 (1969); *McDaris v. "T" Corporation*, 265 N.C. 298, 144 S.E.2d 59 (1965). The requirement that possession be "hostile" simply connotes that claimant asserts exclusive right to occupy the land. *Brewer v. Brewer*, 238 N.C. 607, 78 S.E.2d 719 (1954). Our Supreme Court has specifically rejected any requirement that the adverse possessor show a conscious intent to claim the land of another in order to establish "hostility." *Walls v. Grohman*, 315 N.C. 239, 337 S.E.2d 556 (1985).

It was not, therefore, necessarily contradictory for the jury to find that plaintiff was not the record title holder of the contested portion of the property and find that defendants had properly acquired title to the tract by adverse possession. The trial court's denial of plaintiff's motion for a new trial is not error.

No error.

Judges ARNOLD and WELLS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 3 NOVEMBER 1992

BURTON v. SAUNDERS No. 9119SC794	Randolph (90CVS680)	Affirmed
CARRBORO STATION PARTNERS v. SHU No. 9215DC602	Orange (90CVD963)	Vacated & remanded
ENDERBY v. DAVIS No. 9126SC931	Mecklenburg (89CVS10603)	Affirmed
McLEOD v. McLEOD No. 9228DC525	Buncombe (89CVD1289)	Reversed
MURRAY v. SUNSHINE-NORTH CAROLINA INVESTMENTS No. 9117SC912 No. 9117SC1264	Rockingham (89CVS1537)	As to No. 9117SC1264, reversed & order vacated. As to No. 9117SC912, dismissed.
PITTMAN v. WINGO No. 9212SC471	Cumberland (90CVS089)	Affirmed
PUCKETT v. PREVIEW FURNITURE CO. No. 9110IC864	Ind. Comm. (632994)	Dismissed
STATE v. BREWER No. 9226SC644	Mecklenburg (89CRS83762)	No Error
STATE v. CAMERON No. 9212SC522	Cumberland (90CRS23191)	No Error
STATE v. CRADLE No. 9214SC564	Durham (91CRS2855)	Remanded for resentencing
STATE v. DOWNING No. 922SC567	Washington (91CRS661) (91CRS1098)	Vacated & remanded
STATE v. GRAVES No. 9221SC553	Forsyth (91CRS49699)	No Error
STATE v. HEMMINGWAY No. 924SC393	Sampson (91CRS1096)	No Error
STATE v. MARTIN No. 9217SC614	Surry (91CRS9018)	No Error
STATE v. PARKER No. 925SC355	New Hanover (91CRS17810)	No Error

STATE v. RICHARDSON No. 921SC523	Gates (91CRS56) (91CRS61)	No Error
STATE v. SMITH No. 9220SC515	Richmond (91CRS4957) (91CRS4958) (91CRS7067)	No Error
STATE v. STEVENS No. 9226SC502	Mecklenburg (91CRS31793) (91CRS31794) (91CRS31795)	No Error
STATE v. TYLER No. 9212SC561	Cumberland (89CRS46766)	New Trial
STATE v. WALL No. 9210SC574	Wake (91CRS74257)	No Error
STATE v. WALLACE No. 922SC751	Beaufort (92CRS171)	No Error
WATKINS v. K-MART CORP. No. 915SC883	New Hanover (89CVS1382)	No Error
WELLS v. HAWKINS No. 9215SC600	Alamance (91CVS2490)	Affirmed

FILED 17 NOVEMBER 1992

EATON FINANCIAL CORP. v. H.W.C., Inc. No. 913DC991	Carteret (90CVD137)	Affirmed in part, reversed & remanded in part
EATON FINANCIAL CORP. v. PHMM, Inc. No. 913DC992	Carteret (90CVD136)	Affirmed in part, vacated in part & remanded
FORBES v. BENZ No. 9124DC1021	Mitchell (90CVD127)	Vacated & remanded
LEAK v. KNOLLWOOD HALL No. 9121SC791	Forsyth (90CVS07790)	Affirmed
MARTIN v. MARTIN No. 9111DC925	Lee (88CVD00116)	Vacated

CAROLYN B. FOWLER v. J. M. VALENCOURT AND CITY OF SALISBURY, NORTH CAROLINA

No. 9119SC1137

(Filed 1 December 1992)

1. **Limitations, Repose, and Laches § 44 (NCI4th)— false imprisonment—assault—statute of limitations**

Plaintiff's claims against a police officer for false imprisonment and assault were barred by the one-year statute of limitations of N.C.G.S. § 1-54(3) where the claims were based on plaintiff's arrest on 18 October 1989 and the complaint was filed on 22 October 1990.

Am Jur 2d, Assault and Battery § 65; False Imprisonment § 105.

2. **Appeal and Error § 418 (NCI4th)— questions omitted from brief—abandonment**

Questions not presented and discussed in a party's brief are deemed abandoned. Appellate Rule 28(c).

Am Jur 2d, Trial §§ 50, 186.

3. **Malicious Prosecution § 19 (NCI4th)— police officer—probable cause—summary judgment improper**

Summary judgment was improperly entered for defendant police officer in plaintiff's action for malicious prosecution of plaintiff on a charge of willfully obstructing the officer because the evidence raised a material factual issue as to probable cause where it showed that plaintiff drove away from her sister's residence with her brother in the car while the officer was waiting for warrants to arrive for the brother's arrest; the officer's affidavit stated that he informed the brother in plaintiff's presence not to leave the residence; plaintiff testified by deposition that the officer testified at her criminal trial that he did not believe plaintiff knew that he intended to arrest the brother; and the evidence was thus conflicting as to whether the officer believed that defendant intentionally obstructed him when she drove away from her sister's residence.

Am Jur 2d, Summary Judgment §§ 15, 17.

4. Municipal Corporations § 12.3 (NCI3d) — tort by police officer — liability of city

Defendant city is liable for any tort committed by defendant police officer during the course and scope of his employment to the extent that the city has waived governmental immunity by purchasing liability insurance. N.C.G.S. § 160A-485(a).

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 1, 5.

Coverage and exclusions under liability policy issued to municipal corporation or similar governmental body. 23 ALR3d 1282.

5. Public Officers § 9 (NCI3d) — civil rights action — police officer — qualified immunity — summary judgment improper

Summary judgment was improperly entered for defendant policeman on the issue of qualified immunity in plaintiff's 42 U.S.C. § 1983 action based on defendant's alleged false arrest and malicious prosecution of plaintiff for willfully obstructing the officer in violation of N.C.G.S. § 14-223 where plaintiff's forecast of evidence tended to show that defendant admitted under oath that he did not believe plaintiff had committed a violation of § 14-223 at the time he arrested her.

Am Jur 2d, Civil Rights § 19.

6. Public Officers § 9 (NCI3d) — civil rights action — assault by police officer — insufficient forecast of evidence

Plaintiff's forecast of evidence was insufficient to support her 42 U.S.C. § 1983 claim that defendant police officer assaulted her at the time of her arrest in violation of her constitutional rights where it tended to show that defendant officer did not participate in the physical arrest of plaintiff but only directed another officer to place handcuffs on plaintiff's wrists, and plaintiff made no attempt to show that either officer used force which was excessive under the circumstances.

Am Jur 2d, Civil Rights § 19.

When does police officer's use of force during arrest become so excessive as to constitute violation of constitutional rights, imposing liability under Federal Civil Rights Act of 1871 (42 USCS sec. 1983). 60 ALR Fed 204.

7. Public Officers § 9 (NCI3d) — civil rights action — arrest without probable cause — unreasonable seizure — sufficient forecast of evidence

Plaintiff's forecast of evidence was sufficient to support her 42 U.S.C. § 1983 claim that defendant police officer arrested her without probable cause in violation of her Fourth Amendment right to be free from unreasonable seizures where it tended to show that defendant arrested plaintiff for willfully obstructing him from arresting her brother in violation of N.C.G.S. § 14-233, and that defendant admitted under oath in her criminal trial that he did not believe plaintiff knew at the time of her arrest that defendant intended to arrest her brother.

Am Jur 2d, Civil Rights § 19.

8. Public Officers § 9 (NCI3d) — alleged malicious prosecution claim — insufficient for civil rights claim

Plaintiff's allegation that her constitutional rights were violated when defendant police officer maliciously initiated a criminal prosecution against her was insufficient to state a 42 U.S.C. § 1983 claim against the officer.

Am Jur 2d, Civil Rights § 19.

Appeal by plaintiff from DeRamus (Judson D.), Judge. Order entered 26 August 1991 in Superior Court, Rowan County. Heard in the Court of Appeals 21 October 1992.

Plaintiff instituted this civil action against defendants by complaint filed 22 October 1990 wherein she alleged state common law tort claims of assault, false arrest and malicious prosecution and a claim for relief pursuant to the Federal Civil Rights Act, Title 42 U.S.C. § 1983. Plaintiff also alleged entitlement to both actual and punitive damages from both defendants. All of plaintiff's claims arise out of an incident which occurred on 18 October 1989. Defendants' answer denied the allegations of the complaint and asserted the affirmative defense of governmental immunity on the part of the City of Salisbury, the one year statute of limitations contained in G.S. § 1-54(3) as to plaintiff's assault and false arrest claims and qualified immunity on the part of Officer Valencourt.

Following discovery, defendants filed a motion for summary judgment which was granted by Judge DeRamus. It is from that order dismissing all of her claims that plaintiff appeals.

Smith, Follin & James, by Norman B. Smith and Seth R. Cohen, for plaintiff, appellant.

Michael B. Brough & Associates, by William C. Morgan, Jr., and Michael B. Brough, for defendants, appellees.

HEDRICK, Chief Judge.

The facts set forth in the affidavits and depositions presented at the hearing of defendants' summary judgment motion, stated in the light most favorable to plaintiff, tend to show that at all times relevant hereto defendant Valencourt was a police officer for the City of Salisbury. On 18 October 1989, plaintiff was arrested and charged with resisting, delaying and obstructing Officer Valencourt. On 8 December 1989, plaintiff was tried in District Court, Rowan County and found not guilty of the charge. Plaintiff suffered permanent disability to her left hand as a result of the manner in which she was handcuffed and transported to the jail at the time of her arrest.

On the date of her arrest, plaintiff had driven to the home of her sister, Ann B. Dixon, after work in order to pick up and take home their brother, Norman Blackwell. Upon arriving at Ms. Dixon's home, Ms. Fowler found Officer Valencourt talking with Ms. Dixon concerning a television set which had been stolen from her home. Mr. Blackwell was also at Ms. Dixon's residence, and plaintiff informed her brother that she needed to leave in order to go to her home.

Officer Valencourt stated in his affidavit that, upon arriving at Ms. Dixon's residence, he made a telephone call regarding the stolen television. While discussing the theft over the telephone with a Rowan County Sheriff's Deputy, Valencourt learned of outstanding arrest warrants against Norman Blackwell. He thereafter requested that the deputy bring the warrants to Ms. Dixon's house. Defendant Valencourt initially informed only Ms. Dixon of the warrants for her brother's arrest. Ms. Dixon, however, became very upset and began shouting and arguing with Officer Valencourt. Valencourt stated that he then informed Mr. Blackwell that

the orders for arrest were en route and that Mr. Blackwell should not leave Ms. Dixon's residence.

Plaintiff testified in deposition that she knew that Ms. Dixon and Officer Valencourt were arguing and shouting at each other in the kitchen. She did not, however, know the subject matter of their argument and she testified that she did not know that Officer Valencourt had told her brother not to leave the residence. Ms. Fowler walked to her car and her brother followed. She testified that it was raining very hard and, after getting into her car, she could no longer hear the argument between Ms. Dixon and defendant Valencourt. Plaintiff did admit that the two followed her out of the house and stood on the porch as she and her brother drove away.

Defendant Valencourt walked to his vehicle and called for assistance. He thereafter followed plaintiff's vehicle and stopped her approximately two blocks from her sister's home. Another officer, responding to Valencourt's call, arrived as plaintiff stopped her vehicle. Defendant Valencourt took Mr. Blackwell from the car, handcuffed him, and led him to the patrol car. At Valencourt's direction, the other officer handcuffed plaintiff and placed her in his patrol car. Plaintiff testified that she complained about the fitting of the handcuffs on at least three occasions during her trip to the police station, and when the handcuffs were finally removed from her wrists, plaintiff's hands were numb and blistered. Dr. Gary Poehling testified in deposition that plaintiff received a fifteen percent permanent partial disability to her left hand as a result of the injury caused by the handcuffs.

In his affidavit, defendant Valencourt states that he informed Mr. Blackwell not to leave Ms. Dixon's residence within the presence of plaintiff. He further stated that he again informed Mr. Blackwell not to leave as he and plaintiff were walking to plaintiff's car. Plaintiff, however, stated in deposition that, while testifying at the trial of her criminal charge, Officer Valencourt admitted that he knew at the time he arrested plaintiff that she "did not know anything that was going on" at her sister's house and that he further admitted that he did not at any time tell plaintiff not to leave Ms. Dixon's residence.

[1] Plaintiff's only assignment of error is that the trial court improperly granted summary judgment as the forecast of evidence establishes the existence of disputed material facts with

regard to each claim set forth in her complaint. It is clear, however, that plaintiff's state common law claims of false imprisonment and assault are barred by the statute of limitations set forth in G.S. § 1-54(3). This one year limitation period applies to all actions for assault and false imprisonment, even those actions wherein the defendant is a police officer. *See Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981). Plaintiff was arrested 18 October 1989 and the complaint was filed 22 October 1990. Summary judgment was proper as to these two claims against both defendants.

[2] Plaintiff concedes in her brief filed with this Court that she has failed to present a forecast of evidence sufficient to survive defendants' motion for summary judgment with regard to the issue of the liability of defendant City of Salisbury pursuant to 42 U.S.C. § 1983. We will not therefore address that issue. Further, plaintiff presents no argument in support of the contention within her complaint that she is entitled to an award of punitive damages against both defendants. Rule 28 of the Rules of Appellate Procedure provides that questions not presented and discussed in a party's brief are deemed abandoned. N.C.R. App. P. 28(a); *Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 237, 371 S.E.2d 302, 303 (1988); *Love v. Pressley*, 34 N.C. App. 503, 239 S.E.2d 574 (1974), *disc. review denied*, 294 N.C. 441, 241 S.E.2d 843 (1978).

[3] Plaintiff next argues that the conduct of defendant Valencourt supports a state common law claim of malicious prosecution and that defendant City of Salisbury is also liable as Valencourt acted during the course and scope of his employment as a city police officer. In order to establish a claim of malicious prosecution, plaintiff must show: 1) that defendant initiated the earlier proceeding; 2) that he did so maliciously and without probable cause; and 3) that the earlier proceeding terminated in plaintiff's favor. *Jones v. Gwynne*, 312 N.C. 393, 397, 323 S.E.2d 9, 11 (1984); *Stanback v. Stanback*, 297 N.C. 181, 202, 245 S.E.2d 611, 625 (1979). As malice can be inferred from the want of probable cause alone, *Cook v. Lanier*, 267 N.C. 166, 170, 147 S.E.2d 910, 914 (1966); *Wright v. Harris*, 160 N.C. 542, 550, 76 S.E. 489, 497 (1912), and as there is no dispute that defendant initiated the criminal prosecution against plaintiff and that the prosecution ended with the adjudication that she was not guilty as charged, the only issue for resolution is the existence or absence of probable cause.

Our Supreme Court has stated:

> In cases grounded on malicious prosecution, probable cause 'has been properly defined as the existence of such facts and circumstances, known to him at the time, as would induce a reasonable man to commence a prosecution.' *Morgan v. Stewart*, 144 N.C. 424, 430, 57 S.E. 149, 151 (1907). The existence or nonexistence of probable cause is a mixed question of law and fact. *Cook v. Lanier*, 267 N.C. 166, 147 S.E.2d 910 (1966); *Taylor v. Hodge, supra.* If the facts are admitted or established it is a question for the court. *Carson v. Doggett*, 231 N.C. 629, 58 S.E.2d 609 (1950). Conversely, when the facts are in dispute the question of probable cause is for the jury.

Pitts v. Pizza, Inc., 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978); *See Koury v. John Meyer of Norwich*, 44 N.C. App. 392, 261 S.E.2d 217, *disc. review denied*, 299 N.C. 736, 267 S.E.2d 662 (1980). Plaintiff was arrested for allegedly violating G.S. § 14-223 which makes it an offense to "wilfully and unlawfully resist, delay, or obstruct a public officer in discharging or attempting to discharge a duty of his office, ..." N.C. Gen. Stat. § 14-223 (1986). This statute expressly contains the element of willfulness, "one who does not intend to resist, obstruct or delay the officer's performance of his duty cannot be [guilty of the offense] . . . ." *State v. Singletary*, 73 N.C. App. 612, 615, 327 S.E.2d 11, 13, *disc. review denied*, 314 N.C. 335, 333 S.E.2d 495 (1985). Defendant Valencourt contends that plaintiff committed this offense when she drove away from her sister's residence with her brother Norman Blackwell in the car.

Defendant Valencourt's affidavit states that he informed Mr. Blackwell not to leave Ms. Dixon's residence in the presence of plaintiff. Plaintiff testified in deposition, however, that defendant Valencourt stated under oath at her criminal trial that he did not believe plaintiff knew what had transpired between he and her brother or between he and Ms. Dixon prior to plaintiff's leaving Ms. Dixon's residence. If in fact plaintiff did not know that defendant Valencourt intended to arrest her brother, she obviously was not "intentionally obstructing a public officer" when she drove away from her sister's house. We hold that the evidence of these conflicting statements by defendant raises a material factual issue as to whether defendant Valencourt believed plaintiff had committed a violation of G.S. § 14-223 at the time he arrested her. Summary judgment on this issue was therefore improper.

[4] Further, defendant City of Salisbury can be held liable for any tort committed by defendant Valencourt during the course and scope of his employment, *West v. Woolworth*, 215 N.C. 211, 1 S.E.2d 546 (1939), to the extent that the City has waived governmental immunity by purchasing liability insurance. N.C. Gen. Stat. § 160A-485(a) (1987); *Edwards v. Akion*, 52 N.C. App. 688, 279 S.E.2d 894 (1981). Defendants do not argue that Officer Valencourt was not acting within the scope of his employment at the time of plaintiff's arrest, and the City admitted in its answer to plaintiff's complaint that it had purchased liability insurance. Summary judgment in favor of defendant City of Salisbury on this issue was also improper.

Plaintiff's remaining claims concern only defendant Valencourt and are based upon 42 U.S.C. § 1983. Plaintiff argues that defendant Valencourt's conduct in assaulting her, falsely arresting her and in maliciously prosecuting her each amounts to a deprivation, under color of state law, of rights secured by the Constitution and laws of the United States. Defendant Valencourt denies that the facts alleged by plaintiff amount to a deprivation of any constitutional right and further argues that the doctrine of qualified immunity protects him from liability as a matter of law. We will first address the issue of qualified immunity.

The Supreme Court of the United States has recently stated:

> Our cases establish that qualified immunity shields [police officers] from suits for damages if 'a reasonable officer could have believed [the arrest] to be lawful, in light of clearly established law and the information the [arresting] officers possessed.' *Anderson v. Creighton*, 483 U.S. 635, 641, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987). Even law enforcement officials who 'reasonably but mistakenly conclude that probable cause is present' are entitled to immunity. *Ibid.* Moreover, because '[t]he entitlement is an *immunity from suit* rather than a mere defense to liability,' *Mitchell v. Forsyth*, 472 U.S. 511, 526, 86 L.Ed.2d 411, 105 S.Ct. 2806 (1985), we have repeatedly stressed the importance of resolving immunity questions at the earliest possible stage of litigation. *See Harlow v. Fitzgerald*, 457 U.S. 800, 818, 73 L.Ed.2d 396, 102 S.Ct. 2727 (1982) . . . .

Hunter v. Bryant, 502 U.S. ---, 116 L.Ed.2d 589, 595, 112 S.Ct. --- (1991) (citations omitted). However, the doctrine of qualified immunity does not extend protection to those law enforcement

officials who are "plainly incompetent or those who knowingly violate the law." *Malley v. Briggs*, 475 U.S. 335, 341, 89 L.Ed.2d 271, 106 S.Ct. 1092 (1986); *See Anderson v. Creighton*, 483 U.S. 635, 97 L.Ed.2d 523, 107 S.Ct. 3034 (1987).

[5] Plaintiff has brought forth evidence tending to show that Officer Valencourt admitted under oath that he did not believe plaintiff had committed a violation of G.S. § 14-223 at the time that he arrested her. If true, defendant Valencourt certainly "knowingly violate[d] the law" and is not entitled to immunity. As all evidence submitted by plaintiff at this stage of the proceedings must be considered indulgently, *Page v. Sloan*, 281 N.C. 697, 190 S.E.2d 189 (1972), and as the slightest doubt as to the facts entitles plaintiff to a trial, *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *disc. review denied*, 312 N.C. 85, 321 S.E.2d 899 (1984), summary judgment on the issue of qualified immunity was also improper.

We must therefore determine whether plaintiff has presented a forecast of evidence sufficient to support a claim for damages pursuant to 42 U.S.C. § 1983. The Federal Civil Rights Act imposes civil liability upon persons who deprive an individual, under color of state law, of rights secured by the Constitution and laws of the United States. 42 U.S.C. § 1983; *Myrick v. Cooley*, 91 N.C. App. 209, 371 S.E.2d 492, *disc. review denied*, 323 N.C. 477, 373 S.E.2d 865 (1988). In order to state "a meritorious claim [pursuant to Section 1983], a plaintiff must allege that he was deprived of some constitutional right." *Cramer v. Crutchfield*, 648 F.2d 943, 945 (4th Cir. 1981). State courts have concurrent jurisdiction with federal courts with regard to actions pursuant to § 1983 and such claims are therefore properly instituted and maintained in the courts of this State. *Jones v. City of Greensboro*, 51 N.C. App. 571, 277 S.E.2d 562 (1981).

[6] Plaintiff first argues that Officer Valencourt committed an assault upon her at the time of her arrest which violated her constitutional rights. Pursuant to the common law of North Carolina, an assault by a law enforcement officer upon a citizen can provide the basis for a civil action for damages against the officer only if a plaintiff can show that the officer used force against plaintiff which was excessive under the given circumstances. *Myrick*, at 215, 371 S.E.2d at 496; *See Kuykendall v. Turner*, 61 N.C. App. 638, 301 S.E.2d 715 (1983); *Todd v. Creech*, 23 N.C. App. 537, 209 S.E.2d 293, *cert. denied*, 286 N.C. 341, 211 S.E.2d 216 (1974). To

establish a constitutional violation sufficient to support liability pursuant to § 1983, however, plaintiff must establish an even greater degree of excessive force than that required for a state law tort action. *Myrick, supra, citing, Justice v. Dennis*, 834 F.2d 380, 382 (4th Cir. 1987).

Officer Valencourt did not participate in the physical arrest of plaintiff. Ms. Fowler argues only that he "directed" the other officer to place the handcuffs on her wrists. Further, plaintiff does not even attempt to argue that either officer used force which was excessive under the circumstances. Plaintiff contends only that because Officer Valencourt was a city police officer at the time of the alleged assault, she is entitled to maintain a § 1983 action. Such a contention is clearly insufficient to state a constitutional violation. *See Justice*, 834 F.2d 380 (4th Cir. 1987); *Cramer*, 648 F.2d 943 (4th Cir. 1981).

[7] Plaintiff next contends that Officer Valencourt violated her fourth amendment right to be free from unreasonable seizures when he arrested her without probable cause. It is well established that an arrest made in violation of the fourth amendment will give rise to a cause of action under § 1983, *Myrick*, at 212, 371 S.E.2d at 494, *citing, Monroe v. Pape*, 365 U.S. 167, 5 L.Ed.2d 492 (1961), and "under fourth amendment standards, the validity of arrest turns upon the existence of probable cause." *Id.* In situations involving a warrantless arrest, the existence of probable cause depends upon whether "the facts and circumstances within [the arresting officer's] knowledge and of which [he] had reasonable trustworthy information were sufficient to warrant a prudent man in believing that [plaintiff] had committed or was committing an offense." *Moore v. Marketplace Restaurant, Inc.*, 754 F.2d 1336, 1345 (7th Cir. 1985).

As we previously stated above, there is a genuine issue of material fact in this matter regarding whether defendant Valencourt believed plaintiff had committed a crime at the time he made the arrest. When the "facts and circumstances" upon which the determination of probable cause depends are in dispute, summary judgment on the validity of the arrest is improper. *Id.* at 1347. We find that the jury must resolve the inconsistency between the statement made by defendant Valencourt in his affidavit and that statement which plaintiff contends he made at the trial of her criminal case before the existence or absence of probable cause can be properly determined.

[8] Finally, plaintiff argues that her constitutional rights were violated when defendant maliciously initiated a criminal prosecution against her. Again, "a valid cause of action under § 1983 is not alleged by the simple assertion that a common law tort was committed by a state official. . . . [A] plaintiff must allege that he was deprived of some constitutional right." *Cramer*, at 945; *Justice*, 834 F.2d 380. Although it is clear that there can be situations wherein an officer's wrongful initiation and continuation of a criminal prosecution can rise to the level of a constitutional deprivation, *see Goodwin v. Metts*, 885 F.2d 157 (4th Cir. 1989), plaintiff makes no effort to distinguish her federal claim from her state common law claim of malicious prosecution and fails to set forth the precise "constitutional right" which she contends has been violated by the prosecution. Summary judgment was therefore proper with regard to this aspect of plaintiff's federal cause of action.

In conclusion, the trial court's summary judgment dismissing plaintiff's state common law claims of assault and false imprisonment against both defendants and dismissing plaintiff's claims pursuant to 42 U.S.C. § 1983 based upon assault and malicious prosecution against both defendants will be affirmed. Further, the summary judgment dismissing all federal claims against defendant City of Salisbury will be affirmed as will be the dismissal of plaintiff's claim for punitive damages against both defendants. The summary judgment dismissing plaintiff's state common law claims of malicious prosecution against both defendants will be reversed as will be the judgment dismissing plaintiff's § 1983 claim against defendant Valencourt based upon her alleged unlawful arrest.

Summary judgment is affirmed in part and reversed in part.

Judges ARNOLD and WELLS concur.

STATE OF NORTH CAROLINA v. VERNON FORREST WILSON

No. 9115SC728

(Filed 1 December 1992)

1. Evidence and Witnesses § 369 (NCI4th)— armed robbery— other crimes, wrongs, acts—conversation concerning armed robberies—plan, scheme or design

The trial court did not err in an armed robbery prosecution by admitting evidence of a conversation between defendant and another man, prior to the robbery with which defendant is charged, in which defendant suggested that they commit armed robberies to obtain money. Evidence of defendant's prior *conversation* constitutes evidence of another "crime, wrong, or act" as those terms are used under N.C.G.S. § 8C-1, Rule 404(b) and the evidence was properly admitted for the purpose of showing that defendant had a plan, scheme, system, or design involving the commission of robberies in the Joppa Oaks area of Hillsborough. In addition, the State presented substantial evidence that the prior conversation actually occurred and that defendant participated in it, it reasonably tends to prove a material fact in issue other than the character of the accused, and it is of great probative value because it occurred only twenty days before the robbery in question, and the place and manner in which the robbery occurred closely parallels the place and manner for committing robbery suggested by defendant in the conversation. Finally, the trial court instructed the jury that the evidence was admitted solely for the purpose of showing on defendant's part a plan or scheme involving the charged crime.

Am Jur 2d, Evidence §§ 320-325, 363, 366.

2. Evidence and Witnesses § 369 (NCI4th)— armed robbery— prior robbery—admissible

The trial court did not err in an armed robbery prosecution by admitting evidence of a prior robbery where the evidence was admissible to show a common plan or scheme and the evidence had great probative value due to the similarities between the robberies and the fact that this robbery occurred only twenty days prior to the robbery for which defendant

was tried. Furthermore, a proper limiting instruction was provided.

Am Jur 2d, Evidence §§ 326, 366.

3. **Evidence and Witnesses § 369 (NCI4th)— armed robbery—prior attempted break-in—admissible**

The trial court did not err in an armed robbery prosecution by admitting evidence of a prior attempted break-in where the evidence was admissible to show a common scheme or plan and was relevant, was of high probative value in that it occurred just three weeks prior to the actual robbery, and was of the same business which defendant eventually robbed. Although no limiting instruction was given, there is no evidence that one was requested.

Am Jur 2d, Evidence §§ 326, 366.

4. **Evidence and Witnesses § 369 (NCI4th)— armed robbery—prior break-in—prior police chase—admissible**

The trial court did not err in an armed robbery prosecution by admitting evidence of defendant's prior break-in of a residence and his participation in a police chase where defendant recovered a .22 caliber rifle during the break-in, the stock of the rifle was broken during the chase, and there was testimony that a .22 caliber rifle with a sawed-off stock was used in the robbery for which defendant was tried. This evidence tends to make more probable defendant's participation in that robbery.

Am Jur 2d, Evidence §§ 280, 366.

5. **Evidence and Witnesses § 1708 (NCI4th)— robbery—photographs of scene—admissible**

The trial court did not err in a robbery prosecution by admitting photographs of the scene to illustrate testimony regarding the robbery.

Am Jur 2d, Evidence §§ 785 et seq.

Appeal by defendant from judgment entered 5 April 1991 in Orange County Superior Court by Judge J. Milton Read, Jr. Heard in the Court of Appeals 14 October 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Clarence J. DelForge, III, for the State.

Levine, Stewart & Davis, by John T. Stewart, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 5 April 1991, which judgment is based on a jury verdict convicting defendant of robbery with a dangerous weapon, N.C.G.S. § 14-87 (1986).

The evidence presented by the State established that on the evening of 28 December 1988, defendant and Andrew Hyde (Hyde), along with two other men, were driving around the Joppa Oaks area of Hillsborough, North Carolina. They discussed the possibility of robbing Chris's Truck Stop on Highway 86, but decided against it because the truck stop was too crowded. The group instead decided to rob the adjacent Schrift's Food Mart, a business which, according to Hyde's testimony, defendant and Hyde had unsuccessfully attempted to break into three weeks earlier by chopping their way through the roof of the building with an ax.

Defendant drove into the parking lot of Chris's Truck Stop and parked beside a dumpster. Hyde, armed with a .22 caliber rifle with a broken-off stock and wearing a ski mask, entered the store. Buck Owens (Owens), the clerk on duty at the time, testified that the robber pointed the gun at him and demanded money. Owens put approximately $500.00 into a paper bag and gave it to Hyde, who ran out of the store and to the car. Defendant then took the money from Hyde and drove back to Durham where the men lived.

Defendant and Hyde were indicted on the charge of robbery with a dangerous weapon. Defendant pleaded not guilty, but Hyde agreed to plead guilty and testify against defendant in exchange for a twenty-year sentence. At trial, the court considered the admissibility of numerous armed robberies and break-ins allegedly committed by defendant and Hyde prior to the robbery at Schrift's. The trial court determined that the probative value of the majority of these prior acts would be substantially outweighed by the danger of unfair prejudice to defendant, and ruled such evidence inadmissible. However, the trial court ruled admissible, over defendant's objection, testimony regarding the breaking and entering on 8

December 1988 of the Durham residence of Alma Smith (Smith), who had died two weeks earlier. Hyde's testimony established that defendant, Hyde, and defendant's brother entered Smith's house and took a .22 caliber rifle, silver flatware, and a watch. During the course of Hyde's testimony regarding the break-in at Smith's residence, the trial court instructed the jury that such evidence was admitted only for the purpose of showing "a plan, scheme, system, or design involving the crime charged in this case."

The trial court also allowed Hyde to testify that immediately after breaking into Smith's residence, defendant and Hyde engaged in a conversation regarding the commission of robbery. Hyde testified that defendant stated that he was tired of stealing and having to "spend all day trying to find somebody to buy" the stolen items, and that the men could get cash more easily by robbing a store. Defendant reasoned that, since the men had recovered a gun from the Alma Smith break-in, they should use it to commit armed robbery. According to Hyde, defendant explained how to commit such a robbery, and convinced Hyde that defendant should drive the getaway car and Hyde should actually enter the store.

Defendant and Hyde decided to rob Ed's Food Mart, which is located approximately two miles from Schrift's Food Mart. At the last minute, however, Hyde, who had been drinking heavily, backed out. The men decided instead to rob Ray's Easy Shop, which was located on the other side of Chris's Truck Stop. Defendant found a white plastic bag, put it over Hyde's head, tore out holes for Hyde's eyes and mouth, and sent Hyde into the store with the .22 caliber rifle stolen from Alma Smith's residence while defendant waited outside in the car. During Hyde's testimony, the trial court allowed, over defendant's objection, the State's use of two photographs for illustrative purposes. The clerk on duty at Ray's Easy Shop at the time of the robbery, Joe Teston, testified that at approximately 9:30 p.m. on 8 December 1988, a man with a white plastic bag over his head and a .22 caliber rifle robbed the store of $755.00. After the robbery, Hyde ran back to the car, gave defendant the money, and defendant drove away. Again, defendant objected to this testimony and the trial court instructed the jury that this testimony was admitted solely to show "in the mind of [defendant] a plan, a scheme, a system, or design involving the crime charged."

The trial court also admitted, over defendant's objection, Hyde's testimony that on 21 December 1988, while stopped at a traffic light in Durham, defendant and Hyde noticed an unmarked police car beside them. One of the officers stared at the two men. When the light changed, defendant sped away and a chase ensued, during which Hyde threw a ski mask, the .22 caliber rifle, and a .25 caliber pistol out of the car window. After successfully eluding the police, defendant stopped the car and the two men fled on foot. Hyde later returned to the scene of the chase and recovered the .22 caliber rifle. The rifle apparently had struck a telephone pole, breaking off its stock. Officer Kerman Hall, who participated in the chase, later identified the driver of the car as defendant. Defendant did not request and the trial court did not give a limiting instruction with regard to this portion of Hyde's testimony.

Defendant presented no evidence at trial. He was convicted of one count of robbery with a dangerous weapon, and the trial court imposed a sentence of twenty years, to be served consecutively with a 120-year sentence imposed on defendant for three convictions in other cases.

The issues presented are whether (I) evidence of defendant's alleged participation in (A) a conversation with Hyde regarding their intended commission of robberies in Hillsborough, (B) the prior uncharged robbery of Ray's Easy Shop, and (C) the prior attempted break-in of Schrift's Food Mart, is admissible to show on defendant's part a plan, scheme, system, or design involving the robbery with which defendant is charged; (II) evidence of defendant's alleged participation in (A) the break-in of Alma Smith's residence, and (B) the police chase in Durham, is relevant to any issue in the case; and (III) the trial court abused its discretion by allowing the State to use photographs to illustrate Hyde's testimony regarding the prior uncharged robbery of Ray's Easy Shop.

I

[1] Evidence of a defendant's other crimes, wrongs, or acts is admissible only if such evidence (1) is offered for a proper purpose, *see* N.C.G.S. § 8C-1, Rule 404(b) (1992); (2) is relevant, *see* N.C.G.S. § 8C-1, Rules 401 and 104(b) (1992); (3) has probative value which is not substantially outweighed by the danger of unfair prejudice to the defendant, *see* N.C.G.S. § 8C-1, Rule 403 (1992); and (4) if requested, is coupled with a limiting instruction, *see* N.C.G.S.

§ 8C-1, Rule 105 (1992). *State v. Haskins*, 104 N.C. App. 675, 679, 411 S.E.2d 376, 380 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992). Although many purposes are deemed "proper" under Rule 404(b), when the State offers evidence "solely to show that the defendant has the propensity to commit an offense of the nature of the crime charged," such evidence is not offered for a proper purpose. *Id.* at 679, 411 S.E.2d at 380. And even if offered for a proper purpose, to qualify as "relevant" the evidence must reasonably tend to prove a material fact in issue other than the character of the accused, *and* there must exist substantial evidence that the other crime, wrong, or act occurred and that the defendant was the actor. *Id.* at 679-80, 411 S.E.2d at 380-81.

A

Defendant argues that the trial court committed reversible error by allowing Hyde to testify that, prior to their actual commission of the robbery of Schrift's Food Mart, with which defendant is charged, defendant suggested to Hyde that they commit armed robberies in Hillsborough in order to obtain money. According to defendant, this evidence "served only to prove that the character of defendant is such that he acted in conformity on the occasion in question." The State, on the other hand, contends that evidence of the conversation between defendant and Hyde shows on the part of defendant a plan to commit armed robberies in a particular area of Hillsborough.

At the outset we note that evidence of defendant's prior *conversation* with Hyde constitutes evidence of another "crime, wrong, or act," as those terms are used under Rule 404(b). Other crimes evidence is not limited to evidence of other criminal or unlawful acts on the part of the defendant, but also includes *any* extrinsic conduct or misconduct by the defendant which is relevant to an issue in the case other than to show that the defendant has the propensity for the type of conduct with which he is charged. *See State v. Morgan*, 315 N.C. 626, 636-37, 340 S.E.2d 84, 91 (1986) (discussing the admissibility of the "extrinsic conduct" of a criminal defendant under Rule 404(b)). Accordingly, evidence of defendant's alleged conversation with Hyde in which defendant, among other things, discussed the advantages of committing armed robbery over stealing and selling property as well as the manner in which it could be done, constitutes Rule 404(b) evidence of another "crime, wrong, or act" on the part of defendant.

In the instant case, such evidence is admissible for the following reasons. The State offered and the trial court admitted evidence of defendant's conversation with Hyde for the purpose of showing that defendant had a plan, scheme, system, or design involving the commission of robberies in the Joppa Oaks area of Hillsborough. Such is a proper purpose under Rule 404(b). In addition, the evidence is relevant because (1) the State, through the testimony of Hyde, presented substantial evidence that the prior conversation actually occurred and that defendant participated in it, and (2) it reasonably tends to prove a material fact in issue other than the character of the accused—specifically, defendant's planning of and participation in the armed robbery of Schrift's Food Mart, a business located in the Joppa Oaks area of Hillsborough. *See* N.C.G.S. § 8C-1, Rules 401 and 104(b) (1992). Moreover, the evidence of defendant's conversation is of great probative value because it occurred only twenty days before the robbery of Schrift's, and because the place and the manner in which the Schrift's robbery occurred parallels the place and the manner for committing robbery suggested by defendant in his conversation with Hyde. *See State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988) (to be admissible, other crimes evidence admitted to show a common plan under Rule 404(b) must be sufficiently similar to the crime charged and not too remote in time). Nothing in the record suggests that the trial court abused its discretion in determining that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to the defendant. *See* N.C.G.S. § 8C-1, Rule 403 (1992). Finally, the trial court instructed the jury that the evidence was admitted solely for the purpose of showing on defendant's part a plan or scheme involving the charged crime—the robbery of Schrift's Food Mart. *See* N.C.G.S. § 8C-1, Rule 105 (1992).

B

[2] Defendant argues that the trial court erroneously admitted evidence of defendant's participation in the robbery of Ray's Easy Shop because the sole relevance of such evidence was to show that defendant had the propensity to commit armed robbery. The State contends that the evidence is admissible to show a plan or scheme on defendant's part to commit armed robberies in the Joppa Oaks area of Hillsborough.

For the same reasons that evidence of defendant's conversation with Hyde was admitted for a proper purpose and is relevant,

the evidence of the prior robbery of Ray's Easy Shop was admitted for a proper purpose and is relevant. In addition, the similarities between the robbery of Ray's and the robbery of Schrift's, and the fact that the robbery of Ray's occurred only twenty days prior to the Schrift's robbery, gives the evidence great probative value, which the trial court in its discretion determined was not substantially outweighed by the danger of unfair prejudice. We discern no abuse of discretion in this regard. Furthermore, the trial court provided a proper limiting instruction with regard to this evidence.

C

[3] Defendant argues that evidence of his prior attempted break-in of Schrift's Food Mart impermissibly showed only that he had the propensity to commit the robbery of Schrift's, with which he is charged. Again, the State argues that such evidence shows on defendant's part a plan to rob Schrift's.

Evidence of the attempted break-in of Schrift's three weeks prior to the actual robbery of the store, for the same reasons discussed above, was admitted for a proper purpose and is relevant. Furthermore, its high probative value can be measured by the fact that the attempted break-in occurred just three weeks prior to the actual robbery, and was of the same business which defendant eventually robbed. We discern no abuse of discretion on the part of the trial court in determining that the probative value of this evidence was not substantially outweighed by the danger of unfair prejudice to defendant. And although no limiting instruction was given with regard to this particular portion of Hyde's testimony, there is no evidence in the record that one was requested. *See Haskins*, 104 N.C. App. at 679, 411 S.E.2d at 380 (limiting instruction for evidence admitted under Rule 404(b) required only if requested by defendant).

II

[4] Defendant argues that evidence of his participation in the break-in of Alma Smith's residence on 8 December 1988, and of his participation in a police chase on 21 December 1988, is irrelevant and therefore inadmissible. Relevant evidence is defined as "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C.G.S. § 8C-1, Rule 401 (1992). All relevant evidence is admissible,

N.C.G.S. § 8C-1, Rule 402 (1992), subject to the restrictions of Rule 403.

A

During the break-in of Alma Smith's residence, defendant, Hyde, and defendant's brother recovered, among other things, a .22 caliber rifle. The evidence at trial established that a .22 caliber rifle was used during the commission of the robbery of Schrift's Food Mart. Thus, the evidence of which defendant complains tends to make more probable the fact that defendant participated in the robbery of Schrift's because it shows that he had recently gained access to the same type of weapon that was used in the robbery. Accordingly, the evidence is relevant.

B

Hyde testified that, during the high-speed chase involving himself and defendant and the police, Hyde threw from the car window the .22 caliber rifle which defendant and Hyde had stolen from Alma Smith's residence. According to Hyde, the gun apparently struck a telephone pole, because when Hyde went back to the scene to retrieve the gun, its stock had broken off. At trial, the clerk on duty at Schrift's on the night of the robbery testified that the gunman used a .22 caliber rifle with a "sawed-off" stock. Thus, the evidence of the chase, during which the gun was broken, tends to make more probable defendant's participation in the robbery of Schrift's because it shows that defendant had access to a gun with the same features as the one used during the commission of the robbery with which defendant is charged.

III

[5] Defendant argues that the trial court erroneously admitted into evidence two photographs, which Hyde used to illustrate his testimony regarding the robbery of Ray's Easy Shop on 8 December 1988 in which he and defendant participated. One of the photographs depicts the entrance ramp to Interstate 85, where defendant parked the getaway car during the robbery. The other photograph depicts the layout of the store. According to defendant, the photographs served only to prejudice the jury against him because Hyde used the photographs "to needlessly repeat testimony which tended to show that defendant frequently exhibited criminal behavior."

The exclusion of relevant evidence is a matter within the sound discretion of the trial court. *See* N.C.G.S. § 8C-1, Rule 403 (1992) (trial court *may* exclude relevant evidence if its probative value is substantially outweighed by, among other things, the danger of unfair prejudice to the defendant or the needless presentation of cumulative evidence). "Whether the use of photographic evidence is more probative than prejudicial . . . likewise lies within the discretion of the trial court." *State v. Hennis*, 323 N.C. 279, 285, 372 S.E.2d 523, 527 (1988). To assess whether the State's use of photographs is unfairly prejudicial to the defendant, the trial court must examine the content and manner in which the challenged photographs are used and "scrutinize the totality of the circumstances composing that presentation." *Id.* at 285, 372 S.E.2d at 527.

In the instant case, as previously discussed, the trial court properly allowed Hyde's testimony regarding defendant's participation in the robbery of Ray's Easy Shop, and we discern no abuse of discretion in the court's decision to allow the State to use two rather bland photographs to illustrate Hyde's testimony.

No error.

Judges WYNN and WALKER concur.

HERBERT A. NOBLES, PLAINTIFF v. FIRST CAROLINA COMMUNICATIONS, INC.; E. B. CHESTER, JR.; AIKEN CABLEVISION, INC., FORMERLY KNOWN AS F. C. BARNWELL, INC.; F. C. AIKEN, INC.; GARY PHILLIPS; C. DAVID SMITH; A. P. THORPE, III; G. W. THORPE; THOMAS D. LIVINGSTON; FRANK B. CANNON; LON CARRUTH, ROY F. COPPEDGE, III; ANTHONY J. BOLLAND; WALTER F. PAYNE, JR.; 1ST CABLEVISION, INC., A NEVADA CORPORATION; DEFENDANTS

HERBERT A. NOBLES, PLAINTIFF v. KILPATRICK & CODY, A GEORGIA GENERAL PARTNERSHIP, DEFENDANT

No. 917SC365

(Filed 1 December 1992)

1. Appeal and Error § 206 (NCI4th)— motion to amend judgment—tolling of time for filing notice of appeal

Pursuant to Appellate Rule 3(c)(2), the time period for filing and serving a notice of appeal is tolled by a timely motion under N.C.G.S. § 1A-1, Rule 52(b), and plaintiff's notice of appeal in this case was appropriately given on 27 December 1990 after the trial court's order denying plaintiff's Rule 52(b) motion to amend the judgment was entered on 27 November 1990.

Am Jur 2d, Appeal and Error §§ 6, 292, 293, 316.

2. Rules of Civil Procedure § 23 (NCI3d)— class action—denial of certification—appealability

An order denying certification of a class action is appealable.

Am Jur 2d, Parties § 81.

Appealability of order denying right to proceed in form of class action—state cases. 54 ALR3d 595.

3. Rules of Civil Procedure § 23 (NCI3d)— class action—grant or denial of certification—appellate review—abuse of discretion standard

Since the decision to grant or deny class certification rests within the sound discretion of the trial court, the appro-

priate standard for appellate review is whether the trial court's decision manifests an abuse of discretion.

Am Jur 2d, Parties § 78.

4. **Rules of Civil Procedure § 23 (NCI3d)— class action—grant or denial of certification—necessity for findings**

The trial court is required to make findings of fact when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful appellate review under the abuse of discretion standard. The trial court's order denying class certification was inadequate where the court merely found that "there are not sufficient elements present to justify certification of a class."

Am Jur 2d, Parties § 78.

5. **Rules of Civil Procedure § 52 (NCI3d)— findings and conclusions—request after orders entered**

Plaintiff's request for findings and conclusions under N.C.G.S. § 1A-1, Rule 52(a)(2) in orders ruling on class certification was untimely where it was made after the entry of the orders.

Am Jur 2d, Trial §§ 1973, 1980.

Appeal by plaintiff from orders entered 28 September 1990, 2 October 1990, and 27 November 1990 by Judge Frank R. Brown in Nash County Superior Court. Heard in the Court of Appeals 12 February 1992.

These cases arose from plaintiff's purchase of limited partnership units in Aiken Cablevision, Ltd. (the "Partnership"), a North Carolina limited partnership. In 1984 plaintiff purchased ten units for $5,000 as part of a registered public offering of 11,000 limited partnership units. The public offering was made pursuant to a prospectus dated 30 November 1983 and amended 4 February 1984, which stated the proceeds of the offering were to be used to acquire, upgrade and expand an existing cable television system (the "System") in Aiken, South Carolina.

In 1986 the Partnership's managing general partner, First Carolina Communications, Inc. ("First Carolina") decided to sell the System and dissolve the Partnership. Plaintiff and the other limited partners were informed of this proposed transaction by

letter on 9 October 1986, whereby First Carolina stated the Partnership had entered into an agreement to sell all of its assets to a subsidiary of First Carolina. The letter explained that no vote, consent, or approval of the limited partners would be sought as such was unnecessary under the Partnership Agreement. The agreed upon sale price was $12,400,000 based upon an independent appraisal of the System.

Subsequently, First Carolina sent the limited partners a copy of the Schedule 13E-3 filed with the Securities and Exchange Commission concerning the proposed sale of the System. The Schedule, filed on 10 December 1986, indicated the purchase price had been increased to $14,074,880 to compensate the Partnership for the System's value increase subsequent to the original appraisal date. The Schedule also stated the transaction might be abandoned at any time prior to its expected closing on 31 December 1986 if "any action, suit or proceeding shall have been instituted or threatened" against the Partnership, F. C. Aiken, Inc. (a wholly owned subsidiary of the Partnership), or F. C. Barnwell, Inc. (the First Carolina subsidiary and prospective purchaser of the System) to restrain or prohibit the transaction.

Although plaintiff was discontented with the sale price and the fact the buyer was a subsidiary of a general partner, he did not express these concerns to the Partnership or First Carolina prior to the sale on 31 December 1986. Following the sale, the Partnership was dissolved and the proceeds were distributed to the limited partners and general partners as specified in the Partnership Agreement. Each limited partner received cash in exchange for limited partnership units. Plaintiff received $7,700 in exchange for the ten limited partnership units he had purchased in 1984 for $5,000. Less than six months later in June 1987, First Carolina sold the System and other of its cable holdings for approximately $300,000,000.

In January 1987 plaintiff sent Mr. Clark papers he had been saving concerning the Partnership and transaction. Mr. Clark is an attorney with whom plaintiff had consulted in previous class action litigation. In April 1988 plaintiff and Mr. Clark invited several of the limited partners to a meeting in which to discuss the possibility of these limited partners joining in the suit as plaintiffs. Though no partners expressed an interest in participating in a lawsuit at that time, plaintiff and Mr. Clark filed suit against First Caro-

lina on 27 May 1988 alleging a breach of fiduciary duty, actual and constructive fraud, violation of state securities laws, breach of contract, and gross and ordinary negligence.

On 25 April 1989 plaintiff commenced an action against Kilpatrick & Cody, a law partnership with its principal office in Atlanta, Georgia. Plaintiff asserted claims for breach of fiduciary duty, constructive fraud, gross and ordinary negligence, violations of Chapters 78A and 78B of the North Carolina General Statutes, fraudulent practices under G.S. 84-13, conspiracy, and aiding and abetting, all of which stemmed from the firm's involvement in drafting certain business documents for First Carolina.

Plaintiff filed a motion for class certification in these actions on 27 November 1989. Both state court actions were designated as exceptional civil cases and assigned to Judge Brown on 23 March 1990.

On 28 September 1990 an order was entered denying class certification in plaintiff's case against First Carolina. An order denying class certification in plaintiff's case against Kilpatrick & Cody was entered 2 October 1990. On 5 October 1990 plaintiff made motions to amend the judgments pursuant to Rule 52(b) of N.C. Rules of Civil Procedure and a request for findings of fact and conclusions of law pursuant to Rule 52(a)(2). The court entered orders denying these motions on 21 November 1990, which were filed on 27 November 1990.

On 27 December 1990 plaintiff filed his notices of appeal. The proposed record was served on 18 February 1991. Kilpatrick & Cody filed a motion to dismiss plaintiff's appeal on 7 May 1991 on the grounds notice of appeal was untimely (filed more than 30 days after the entry of the judgment) and service of the proposed record was untimely (effected more than 35 days after filing notice of appeal). Defendants First Carolina also moved to dismiss plaintiff's appeal. However, this Court deemed the record timely filed by order dated 17 May 1991.

Clark Wharton & Berry, by David M. Clark and B. Douglas Martin, and Terry W. Alford and William W. Aycock, Jr. for plaintiff appellant.

Smith Helms Mullis & Moore, by E. Osborne Ayscue, Jr., Catherine E. Thompson, and Bradley R. Kutrow for defendant appellees First Carolina Communications et al.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by James D. Blount, Jr., Michael E. Weddington, and Donald H. Tucker, Jr. for defendant appellee Kilpatrick & Cody.

WALKER, Judge.

[1] Pursuant to N.C. Rules of Appellate Procedure, Rule 3(c)(2), the time period for filing and serving a notice of appeal is tolled by a timely motion under Rule 52(b). Insofar as the trial court failed to find that plaintiff's motion to amend judgment pursuant to Rule 52(b) was untimely, plaintiff's notice of appeal in the present case was appropriately given on 27 December 1990 after Judge Brown's order denying plaintiff's Rule 52(b) motion was entered on 27 November 1990. The motions of First Carolina and Kilpatrick & Cody to dismiss plaintiff's appeal are therefore denied. However, if notice of appeal had not been timely filed, we would have granted plaintiff's alternative petition for certiorari on the grounds that the order denying class certification affects substantial legal rights which might be lost if review were denied. Since it is not necessary for us to grant certiorari in order to dispose of this case on its merits, plaintiff's petition for certiorari under G.S. 7A-32 and alternative petition for certiorari pursuant to G.S. 7A-32 are denied.

Plaintiff presents three assignments of error for this Court to consider on appeal. He contends (1) the trial court erred in denying his motion for class certification because all requisites for a class action were present; (2) the court erred in refusing to leave open for later determination the question of whether class certification should be granted; and (3) the court erred in failing to make additional findings of fact and conclusions of law as requested by plaintiff and as required pursuant to G.S. 1A-1, Rule 52.

[2] We note at the outset the significance of a trial court's decision regarding class certification, since our research reveals no instance where our courts have determined whether there is any continuing review of this issue. Contrary to its counterpart in the federal rules, N.C.G.S. § 1A-1, Rule 23 contains no provision providing for continuing or subsequent review of this determination. However, this Court has previously held that an order denying certification of a class action is appealable, and this action is now properly before us. *Perry v. Cullipher*, 69 N.C.App. 761, 318 S.E.2d 354 (1984).

The North Carolina Supreme Court set forth the salient principles applicable to Rule 23(a) and the prerequisites for certifica-

tion of a class action in *Crow v. Citicorp Acceptance Co., Inc.*, 319 N.C. 274, 354 S.E.2d 459 (1987). Under *Crow*, plaintiff must first establish that a class exists.

> [A] "class" exists under Rule 23 when the named and unnamed members each have an interest in either the same issue of law or of fact, and that issue predominates over issues affecting only individual class members.

Id. at 280, 354 S.E.2d at 464. Plaintiff must also show that the named representative will fairly and adequately represent the interests of all members of the class, including out-of-state residents; that there is no conflict of interest between the named representatives and the unnamed class members; and that the class members are so numerous that it is impractical to bring them all before the court. *Id.* at 282-83, 354 S.E.2d at 465-66. *See also English v. Holden Beach Realty Corp.*, 41 N.C.App. 1, 254 S.E.2d 223, *disc. review denied*, 297 N.C. 609, 257 S.E.2d 217 (1979). The trial court has broad discretion in determining whether class certification is appropriate, however, and is not limited to those prerequisites which have been expressly enunciated in either Rule 23 or in *Crow*. *Id.* at 284, 354 S.E.2d at 466; *Perry v. Union Camp Corp.*, 100 N.C.App. 168, 394 S.E.2d 681 (1990). *Maffei v. Alert Cable TV of North Carolina, Inc.*, 75 N.C.App. 473, 331 S.E.2d 188 (1985), *reversed on other grounds*, 316 N.C. 615, 342 S.E.2d 867 (1986).

[3] Since the decision to grant or deny class certification rests within the sound discretion of the trial court, the appropriate standard for appellate review is whether the trial court's decision manifests an abuse of discretion. In this regard, an appellate court is bound by the court's findings of fact if they are supported by competent evidence. *Howell v. Landry*, 96 N.C.App. 516, 386 S.E.2d 610 (1989), *disc. review denied*, 326 N.C. 482, 392 S.E.2d 90 (1990). In the instant case, the trial court denied class certification after having "determined that there are not sufficient elements present to justify certification of a class" based upon its consideration of "the pleadings, the evidence of record, the legal memoranda submitted by the parties and the arguments of counsel." The court did not specify which elements were lacking and the order contains no other findings. Although we do not now decide whether these elements have been satisfied such that plaintiff may maintain this action as a class action, we find this order deficient in that the findings of fact are inadequate to enable us to determine whether the court's

decision was based upon competent evidence. *See Cotton v. Stanley*, 94 N.C.App. 367, 380 S.E.2d 419 (1989).

We acknowledge that neither Rule 23 nor applicable case law expressly mandate findings of fact by the trial court with regard to its decision to grant or deny class certification. However, in light of the numerous requisites which must be shown in order to be entitled to class certification, and the fact that the trial court's decision is not limited to consideration of the enumerated factors, an order denying certification without adequate findings of fact and conclusions does not provide appropriate grounds for review by an appellate court. We cannot undertake to ascertain whether or not a ground for denying class certification exists in the record since such a determination would require us "to deal with subsidiary questions requiring resolution of factual disputes or exercise of discretion—judicial actions which are not appropriately a part of the appellate function." *Inda v. United Air Lines, Inc.*, 565 F.2d 554, 563 (9th Cir. 1977), *cert. denied*, 435 U.S. 1007, 56 L.Ed.2d 388 (1978). Thus, absent findings, the appellate court can only speculate as to the basis for the court's denial of certification and cannot ascertain with some degree of certainty whether the trial court abused its discretion or whether its decision was based upon competent evidence.

[4] Consequently, we now hold that findings of fact are required by the trial court when rendering a judgment granting or denying class certification in order for the appellate courts to afford meaningful review under the abuse of discretion standard. *See Andrews v. Peters*, 318 N.C. 133, 347 S.E.2d 409 (1986). Such findings must be made with sufficient specificity to allow effective appellate review. *See Quick v. Quick*, 305 N.C. 446, 290 S.E.2d 653 (1982); *Coble v. Coble*, 300 N.C. 708, 268 S.E.2d 185 (1980). We note that this holding, although not mandated by the language of Rule 23, is in accord with the law of other states which require findings upon which the trial court determines that an action is or is not certifiable as a class. The Indiana Court of Appeals has ruled, and we agree, that "the District Court has broad discretion and its decision will not be disturbed on appeal in the absence of a finding of abuse, provided the court has made findings which reflect the material facts and the reasons on which its decision is based," despite the absence of such mandatory statutory language. *Kuespert v. State of Indiana*, 177 Ind.App. 142, 149, 378 N.E.2d 888, 893 (1978). *See also* Maryland Rules of Civ. Pro., Rule 2-231(c) ("The

order shall include the court's findings and reasons for certifying or refusing to certify the action as a class action."); Florida Rules of Civ. Pro., Rule 1.220(d)(1) ("Irrespective of whether the court determines that the claim or defense is maintainable on behalf of a class, the order shall separately state the findings of fact and conclusions of law upon which the determination is based.") We also note that this Court has previously supplemented the language of Rule 23 by directing that adequate notice be given to members of the class, although Rule 23(a) does not expressly require it. *English v. Holden Beach Realty Corp., supra.*

> Therefore, upon remand, we remind the trial court that:
>
> Rule 23 should receive a liberal construction, and it should not be loaded down with arbitrary and technical restrictions. . . . The rule has as its objectives "the efficient resolution of the claims or liabilities of many individuals in a single action" and "the elimination of repetitious litigation and possible inconsistent adjudications involving common questions, related events, or requests for similar relief." (Citations omitted.)

English v. Holden Beach Realty Corp., 41 N.C.App. at 9, 254 S.E.2d at 230-31. There are approximately 589 potential class members who are similarly situated to plaintiff. Plaintiff must therefore make a showing of some preliminary interest of potential class members so as not to unnecessarily burden the trial court with the responsibility, time and expense of notifying these potential members if indeed they are not united in interest from the outset. *See Perry v. Union Camp Corp., supra.*

[5] Plaintiff additionally assigns error to the trial court's failure to make additional findings of fact and conclusions of law with regard to its orders, since plaintiff requested such pursuant to Rule 52(a)(2). Although we now hold that findings of fact are required where the trial court denies class certification, we do not conclude that the court's denial of plaintiff's Rule 52(a)(2) motions was error. This Court has previously stated that a request for findings and conclusions under Rule 52(a)(2) is untimely if made after the entry of a trial court's order. *Strickland v. Jacobs*, 88 N.C.App. 397, 363 S.E.2d 229 (1988). In the instant case, the record indicates that the orders denying class certification were entered on 28 September 1990 and on 2 October 1990, and plaintiff's motions pursuant to Rule 52(a)(2) were dated 5 October 1990. Plaintiff argues in his brief that his motions were made in a timely fashion prior

to entry of the orders, however, we are unable to extrapolate from the record any evidence confirming this contention. Hence, the trial court's denial of plaintiff's Rule 52(a)(2) motions was not error. Plaintiff's appeal from the trial court's denial of his motions to amend the judgment under Rule 52(b) is dismissed as abandoned pursuant to Rule 28(b)(5), N.C. Rules of Appellate Procedure.

Remanded for further proceedings not inconsistent with this opinion including a *de novo* hearing if deemed necessary by the trial court.

Judges ARNOLD and PARKER concur.

VIRGINIA P. ABELS, PLAINTIFF, APPELLEE v. RENFRO CORPORATION, DEFENDANT-APPELLANT

No. 9117SC839

(Filed 1 December 1992)

1. **Evidence and Witnesses § 1380 (NCI4th)— retaliatory discharge claim for filing workers' compensation—Industrial Commission findings on workers' compensation claim—not res judicata—excluded**

The trial court did not err in a retaliatory discharge action arising from a workers' compensation claim by excluding the Industrial Commission's findings that plaintiff's alleged injuries were not compensable. Although defendant contended that the court should have admitted the findings based on *res judicata*, this was a claim for retaliatory discharge under N.C.G.S. § 97-6.1 and not the same cause of action that plaintiff brought before the Industrial Commission.

Am Jur 2d, Evidence §§ 746, 747; Judgments §§ 394 et seq.; Wrongful Discharge §§ 199 et seq.

2. **Evidence and Witnesses § 219 (NCI4th)— retaliatory discharge claim—evidence of similarly situated employees—no error**

The trial court did not err in a retaliatory discharge action arising from a workers' compensation claim by excluding evidence of similarly situated employees. Defendant's conten-

tion that an action for retaliatory discharge under N.C.G.S. § 97-6.1 is analogous to an action for employment discrimination under federal law would circumvent the intent of the legislature.

Am Jur 2d, Job Discrimination §§ 1974 et seq.; Wrongful Discharge §§ 25 et seq.

3. **Damages § 21 (NCI4th)— retaliatory discharge—emotional distress—properly submitted to jury**

The trial court did not err in a retaliatory discharge action by submitting the issue of emotional distress damages to the jury. Emotional distress damages are a form of damages suffered by an employee and accordingly are recoverable as a form of reasonable damages in a civil action brought by an employee under N.C.G.S. § 97-6.1.

Am Jur 2d, Job Discrimination § 2421; Wrongful Discharge § 256.

Damages recoverable for wrongful discharge of at-will employee. 44 ALR4th 1131.

4. **Labor and Employment § 75 (NCI4th)— retaliatory discharge for filing workers' compensation—evidence sufficient**

The trial court did not err in a retaliatory discharge action arising from a workers' compensation claim by denying defendant's motion for a judgment n.o.v. where plaintiff introduced evidence of the events causing her injuries, the injuries themselves, the treatment she received for the injuries, her filing workers' compensation claims, and "quality lists" created weekly by defendant, which showed that the quality of plaintiff's work was at or near the best during July, the month before her discharge. Furthermore, the trial court did not abuse its discretion by denying defendant's motion for a new trial.

Am Jur 2d, Job Discrimination §§ 2003 et seq.; Wrongful Discharge §§ 237, 238.

5. **Labor and Employment § 75 (NCI4th)— retaliatory discharge for filing workers' compensation claim—motion to compel medical exam after verdict—denied**

The trial court did not err by refusing to order an independent medical examination of plaintiff where plaintiff had

won a retaliatory discharge action and the court had ordered reinstatement. Reinstatement is expressly provided as a remedy for a successful retaliatory discharge claimant in N.C.G.S. § 97-6.1(b). Defendant had the right to compel an independent medical examination under N.C.G.S. § 1A-1, Rule 35 during pretrial discovery but chose not to exercise that right, knowing the possible consequences if plaintiff was successful.

Am Jur 2d, Workers' Compensation § 504; Wrongful Discharge § 247.

Appeal by defendant from judgment entered 25 March 1991 and order entered 26 March 1991 by Judge James M. Long in Surry County Superior Court. Heard in the Court of Appeals 15 September 1992.

Plaintiff first worked for defendant, a hosiery manufacturer, from 1949 until the time of her pregnancy in 1962. Plaintiff resumed her employment as a knitter with defendant in 1972. At the time of her discharge on 19 August 1987, plaintiff's duties included overseeing approximately 40 knitting machines and inspecting the quality of manufactured socks.

Plaintiff claimed that she was injured twice during her employment. Plaintiff alleged that she injured her back and leg when she slipped and fell on some flat cardboard boxes while attempting to get a spool of yarn on 15 June 1984. Plaintiff reported her injury to defendant but did not file a workers' compensation claim at that time. Plaintiff alleged that her second injury occurred on 26 June 1987, when one of defendant's employees, in the process of moving boxes, struck her from behind, injuring the back of her head, her upper back, her neck, and her ribs.

Defendant discharged plaintiff on 19 August 1987. Approximately six weeks after her termination, plaintiff filed workers' compensation claims for her alleged 15 June 1984 and 26 June 1987 injuries. Plaintiff filed suit against defendant on 25 November 1987, alleging that defendant violated G.S. § 97-6.1 by discharging her in retaliation for her filing the workers' compensation claims. Defendant argued that plaintiff was discharged because of the poor quality of her work and that prior to her discharge, plaintiff received several warnings from management to either improve the quality of her work or face termination.

On 31 October 1988, a Deputy Commissioner of the North Carolina Industrial Commission entered an order denying plaintiff compensation for her alleged injuries, ruling that the 1984 claim was barred by the statute of limitations and that the 1987 claim was not based on a compensable injury. This decision was affirmed by the Full Commission on 13 June 1989 and by the North Carolina Court of Appeals on 21 August 1990.

A jury trial on the retaliatory discharge claim began on 22 January 1991. On 23 January 1991, the trial court ruled that defendant could not introduce as substantive evidence the findings of the Deputy Commissioner, the Full Commission, or the Court of Appeals. The trial court further ruled that plaintiff's testimony before the Deputy Commissioner could be used only for impeachment purposes. On 28 January 1991, the jury returned a verdict finding that plaintiff was wrongfully discharged and awarding her $82,200 in damages as follows: $60,000 for loss of earnings, $12,000 for loss of health insurance benefits, $7,200 for loss of defendant's contributions to Social Security, $2,000 for loss of profit sharing, and $1,000 for mental and emotional distress. On 25 March 1991, the trial court ordered plaintiff's reinstatement to her former position with defendant.

On 26 March 1991, the trial court denied defendant's motion for judgment notwithstanding the verdict, motion for a new trial, and motion to compel plaintiff to undergo a medical examination in the event of reinstatement. On 10 April 1991, the trial court granted defendant's motion to stay reinstatement of plaintiff as an employee pending appeal and motion to stay execution of the judgment pending appeal. On 29 April 1991, defendant again filed a motion to compel a medical examination of plaintiff. The trial court dismissed this motion on 3 May 1991. Defendant appeals.

Franklin Smith and Brian K. Flatley for plaintiff-appellee.

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

EAGLES, Judge.

Defendant brings forth six assignments of error. After a careful examination of the record before us, we affirm.

I.

[1] In its first assignment of error, defendant argues that the trial court erred by excluding the Industrial Commission's findings that plaintiff's alleged injuries were not compensable. Defendant contends that the trial court should have admitted these findings based on the principles of *res judicata*. We disagree.

Regarding the application of the doctrine of *res judicata*, our Supreme Court has stated:

> As we recently noted in *Duke 1988 [State ex rel. Utilities Commission v. Public Staff*, 322 N.C. 689, 370 S.E.2d 567 (1988)]:
>
> > The doctrine of *res judicata* treats a final judgment as the full measure of relief to be accorded between the same parties on the same "claim" or "cause of action." C. Wright, *Federal Practice and Procedure*, § 4402 (1969). "The essential elements of *res judicata* are: (1) a final judgment on the merits in an earlier suit, (2) an identity of the cause of action in both the earlier and the later suit, and (3) an identity of parties or their privies in the two suits." *Hogan v. Cone Mills Corporation*, 315 N.C. 127, 135, 337 S.E.2d 477, 482 (1985).
>
> *Duke 1988*, 322 N.C. at 692, 370 S.E.2d at 569; *see, e.g., In re Trucking Co.*, 285 N.C. 552, 560, 206 S.E.2d 172, 177-78 (1974). More specifically, in addressing the issue of whether a Commission order can be deemed *res judicata* this Court has held that "only specific questions actually heard and finally determined by the Commission in its *judicial* character are *res judicata*, and then only as to the parties to the hearing." *Utilities Commission v. Area Development, Inc.*, 257 N.C. 560, 570, 126 S.E.2d 325, 333 (1962) (emphasis added).

State ex rel. Utilities Commission v. Thornburg, 325 N.C. 463, 468, 385 S.E.2d 451, 453-54 (1989).

Here, defendant's *res judicata* arguments fail because this is a claim of retaliatory discharge under G.S. § 97-6.1 and is not the same cause of action that plaintiff brought before the Industrial Commission. A different set of rights was determined in each forum. "North Carolina law has long prohibited the use of a previous finding of a court as evidence of the fact found in another tri-

bunal. *Masters v. Dunstan*, 256 N.C. 520, 124 S.E.2d 574 (1962)." *Reliable Properties, Inc. v. McAllister*, 77 N.C. App. 783, 787, 336 S.E.2d 108, 110 (1985), *disc. review denied*, 316 N.C. 379, 342 S.E.2d 897 (1986). In *Masters*, 256 N.C. at 524, 124 S.E.2d at 576-77, our Supreme Court held that:

> An estoppel by judgment arises when there has been a final judgment or decree, necessarily determining a fact, question, or right in issue, rendered by a court of record and of competent jurisdiction, and there is a later suit involving an issue as to the identical fact, question or right theretofore determined, and involving identical parties or parties in privity with a party or parties to the prior suit. *Cannon v. Cannon*, 223 N.C. 664, 28 S.E.2d 240; *Distributing Co. v. Carraway*, 196 N.C. 58, 114 S.E.2d 535.

The purpose of the Industrial Commission hearing is to determine whether the employee has suffered an injury for which he or she is entitled to receive compensation under the Workers' Compensation Act. *See Hanks v. Utilities Co.*, 210 N.C. 312, 186 S.E. 252 (1936); *Hogan v. Cone Mills Corp.*, 315 N.C. 127, 337 S.E.2d 477 (1985); G.S. § 97-77; G.S. § 97-91. An employee's G.S. § 97-6.1 civil case is brought independently of the Industrial Commission hearing in order to protect the employee's right to file a workers' compensation claim before the Industrial Commission, notwithstanding the Commission's adverse findings regarding the employee's alleged injury. The public policy behind G.S. § 97-6.1 is to promote an open environment in which employees can pursue their remedies under the Workers' Compensation Act without the fear of retaliation from their employers. *See Wright v. Fiber Industries, Inc.*, 60 N.C. App. 486, 299 S.E.2d 284 (1983); *Henderson v. Traditional Log Homes, Inc.*, 70 N.C. App. 303, 319 S.E.2d 290, *disc. review denied*, 312 N.C. 622, 323 S.E.2d 923 (1984).

II.

[2] In its second assignment of error, defendant contends that the trial court erred by excluding defendant's evidence of similarly situated employees. One set of employees included those who were discharged for the poor quality of their work. Another set of employees included those who returned to their jobs without incident after filing workers' compensation claims. Defendant argues that the exclusion of this evidence was reversible error. We disagree.

Defendant bases its argument on the manner in which "disparate treatment" employment discrimination cases are litigated under federal law. Defendant asserts in its brief that "[a] policy that is applied equally to all employees—even an unfair policy—does not constitute unlawful discrimination." In this regard, defendant argues that "[a]n action for retaliatory discharge [under G.S. § 97-6.1] is analogous to an action for employment discrimination under federal law." We disagree.

Defendant appears to argue that an employer who treats all employees alike could potentially discharge all employees who file workers' compensation claims and be free of the sanctions of the Workers' Compensation Act. Defendant's interpretation would circumvent the intent of the legislature and must not prevail.

Defendant's reasoning is inconsistent with the legislature's intent in creating G.S. § 97-6.1 and with the overall goals of the Workers' Compensation Act. In *Wright*, 60 N.C. App. at 491, 299 S.E.2d at 287, this Court interpreted the legislature's intent in enacting G.S. § 97-6.1 as follows:

> Clearly, G.S. 97-6.1 was intended to prevent employers from firing or demoting employees in retaliation for pursuing their remedies under the Workers' Compensation Act. If G.S. 97-6.1 were limited only to retaliatory acts which occurred after the employee filed his claim, an employer could easily avoid the statute by firing the injured employee before he filed. We do not think the legislature intended the statute to be so easily circumvented.
>
> The courts of this State have recognized that the Workers' Compensation Act should be liberally construed so that benefits will not be denied by technical, narrow, or strict interpretation. *Stevenson v. City of Durham*, 281 N.C. 300, 188 S.E.2d 281 (1972); *Johnson v. Asheville Hosiery Co.*, 199 N.C. 38, 153 S.E. 591 (1930). Liberally construed, the statute encompasses acts by employers intending to prevent employees from exercising their rights under the Workers' Compensation Act.

This assignment of error fails.

III.

[3] In its third assignment of error, defendant argues that the trial court should not have submitted the issue of emotional dis-

tress damages to the jury, because this is not a form of "reasonable damages" that a discharged employee may recover under G.S. § 97-6.1(b). We disagree.

Initially, we note that in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, 296-97, 395 S.E.2d 85, 92-93, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990), our Supreme Court held that emotional distress damages may be based upon a claim for breach of contract or tort. G.S. § 97-6.1(b) provides that, "[a]ny employer who violates any provision of this section shall be liable in a civil action for reasonable damages *suffered by an employee* as a result of the violation . . ." (emphasis added). The phrase "suffered by an employee," found in G.S. § 97-6.1(b), has been interpreted by this Court according to its plain meaning. *Buie v. Daniel International*, 56 N.C. App. 445, 447, 289 S.E.2d 118, 119, *disc. review denied*, 305 N.C. 759, 292 S.E.2d 574 (1982) ("Punitive damages, by their very nature, are not damages 'suffered' by anyone. Rather, they are damages awarded to punish a wrongdoer, over and above the amount required to compensate for the injury."). Unlike the punitive damages sought by the plaintiff in *Buie*, emotional distress damages are a form of damages "suffered by an employee" and accordingly are recoverable as a form of "reasonable damages" in a civil action brought by an employee under G.S. § 97-6.1. *See also Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 434-35, 378 S.E.2d 232, 234 (1989), *review dismissed*, 326 N.C. 356, 388 S.E.2d 769 (1990); *Hogan v. Forsyth Country Club Co.*, 79 N.C. App. 483, 488-90, 340 S.E.2d 116, 120-21, *disc. review denied*, 317 N.C. 334, 346 S.E.2d 140 (1986).

IV.

[4] In its next two assignments of error, defendant argues that the trial court erred by not granting its motion for judgment notwithstanding the verdict, or in the alternative, its motion for new trial. Defendant alleges that there was insufficient evidence to support the verdict. We disagree.

Upon review of a motion for judgment notwithstanding the verdict, "[t]he trial court must consider all the evidence in the light most favorable to the non-movant and must resolve in favor of the non-movant contradictions, conflicts and inconsistencies in the evidence." *Williams v. Randolph*, 94 N.C. App. 413, 418, 380 S.E.2d 553, 556, *disc. review denied*, 325 N.C. 437, 384 S.E.2d 547

(1989) (citations omitted). Plaintiff's recovery was based on G.S. § 97-6.1, which provides in pertinent part:

> (a) No employer may discharge or demote any employee because the employee has instituted or caused to be instituted, in good faith, any proceeding under the North Carolina Workers' Compensation Act, or has testified or is about to testify in any such proceeding.

To recover under the statute, plaintiff must show that her discharge was caused by her good faith institution of the workers' compensation proceedings or by her testimony or her anticipated testimony in those proceedings. *Hull v. Floyd S. Pike Electrical Contractor*, 64 N.C. App. 379, 307 S.E.2d 404 (1983).

Plaintiff provided sufficient evidence at trial to withstand the judgment n.o.v. motion. At trial, plaintiff introduced evidence of: (1) the events causing her injuries; (2) the injuries themselves; (3) the treatment she received for each of the injuries; and (4) her filing the workers' compensation claims based upon those injuries. Additionally, plaintiff introduced "quality lists" created weekly by the defendant. These lists ranked each employee according to the percentage of defects that existed in each employee's work. These lists demonstrated that the quality of plaintiff's work was at or near the best during July 1987, the month following plaintiff's second injury.

Defendant contends that plaintiff's discharge was not retaliatory because it has a "neutral" employee discharge policy, based upon an employee's continuous absence from work for more than six months. Here, plaintiff requested only a one month leave of absence at the time she was discharged. Plaintiff presented a witness, Dr. Joseph Jackson, who testified that "there was no reason to think that she [plaintiff] wouldn't be able to at least make an attempt to resume her normal employment" after a one month leave of absence. Accordingly, we find no error in the trial court's denial of defendant's motions as there was sufficient evidence to support the jury's verdict.

As to defendant's motion for new trial, we find that the trial court correctly denied the motion. "An appellate court's review of a trial judge's discretionary ruling denying a motion to set aside a verdict and order a new trial is limited to a determination of whether the record clearly demonstrates a manifest abuse of dis-

cretion by the trial judge. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982)." *Pittman v. Nationwide Mutual Fire Ins. Co.*, 79 N.C. App. 431, 434-35, 339 S.E.2d 441, 444, *disc. review denied*, 316 N.C. 733, 345 S.E.2d 391 (1986). The record here does not demonstrate an abuse of discretion by the trial court.

V.

[5] Finally, defendant contends that the trial court erred by denying defendant's motion, filed approximately six weeks after trial, to compel plaintiff to undergo an independent medical examination, the purpose of which would be to determine whether she was capable of performing her duties as a knitter. We disagree.

G.S. § 97-6.1(b) expressly provides reinstatement as a remedy for a successful retaliatory discharge claimant. "[A]n employee discharged or demoted in violation of this section shall be entitled to be reinstated to his [or her] former position." *Id.* During pretrial discovery, defendant had the right to compel plaintiff to undergo an independent medical examination under Rule 35 of the North Carolina Rules of Civil Procedure. G.S. § 1A-1, Rule 35. Knowing the possible consequences of G.S. § 97-6.1 if plaintiff was successful, defendant chose not to exercise that right. Accordingly, we find no error in the trial court's refusal to order an independent medical examination of plaintiff.

VI.

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

Affirmed.

Judges JOHNSON and PARKER concur.

JOYCE BOWLIN, PLAINTIFF-APPELLANT v. DUKE UNIVERSITY, PRIVATE DIAGNOSTIC CLINIC, AND ROY B. JONES, DEFENDANT-APPELLEE

No. 9110SC1195

(Filed 1 December 1992)

1. **Pleadings § 2.1 (NCI3d)— applicability of rule of law or evidence—pled as a separate claim for relief**

Although it appears that N.C.G.S. § 1A-1, Rules 12(b)(6) and 8(a) suggest that pleadings should be limited to those facts or descriptions of transactions, occurrences, or series of transactions or occurrences intended to be proved, plaintiff's *res ipsa loquitur* claim was considered on its merits.

Am Jur 2d, Negligence §§ 1983-2006, 2015; Pleadings § 104.

Modern trends as to pleading a particular cause of injury or act of negligence as waiving or barring the right to rely on res ipsa loquitur. 2 ALR3d 1335.

2. **Physicians, Surgeons, and Allied Professions § 16 (NCI3d)— res ipsa loquitur—inappropriate to medical malpractice**

The trial court did not err by dismissing plaintiff's *res ipsa loquitur* claim in a medical malpractice action where there was conflicting expert testimony as to the cause of plaintiff's injury and it could not be found that the injury was one that ordinarily would not occur except for some negligent act or omission. Furthermore, *res ipsa loquitur* is based upon common knowledge and experience generally known to laymen and the Court of Appeals has consistently reaffirmed that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert opinion.

Am Jur 2d, Negligence §§ 2215, 2219, 2238; Physicians, Surgeons, and Other Healers §§ 333, 335, 339.

Physicians and surgeons: res ipsa loquitur, or presumption or inference of negligence, in malpractice cases. 82 ALR2d 1262.

3. **Physicians, Surgeons, and Allied Professions § 17.1 (NCI3d)—malpractice—informed consent—use of medical student in surgery**

The trial court did not err in a medical malpractice action by granting summary judgment for defendants on the informed consent claim where plaintiff contended that defendant Dr. Jones should have informed her of any health care providers who would assist in the bone marrow harvest procedure and their levels of expertise. Defendants' forecast of evidence included expert testimony that the use of medical students in providing health care is standard practice in teaching hospitals and plaintiff acknowledged that she signed a consent form which included a statement in which she agreed that medical students could assist in providing her care, both specifically and by acknowledging the fact that Duke University Medical Center is a teaching institution. There is no statutory or common law duty for an attending physician to inform a patient of the particular qualifications of individuals who will be assisting.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 186-190, 194, 195.

4. **Physicians, Surgeons, and Allied Professions § 16.1 (NCI3d)—constructive fraud by physician—use of medical student in surgery—summary judgment for defendants**

The evidence was insufficient in a medical malpractice action to support plaintiff's claim for constructive fraud based on her physician's failure to reveal the status of an unlicensed medical student assisting in surgery. While plaintiff established a relationship of trust and confidence between defendant Dr. Jones and herself, there was no affirmative duty to inform the plaintiff of the medical student's status and it is common practice for medical students at teaching hospitals to assist in medical procedures.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 190, 366.

Appeal by plaintiff from judgment entered 17 July 1991 in Wake County Superior Court by Judge Knox V. Jenkins, Jr. Heard in the Court of Appeals 9 November 1992.

Plaintiff instituted this medical malpractice action seeking to recover damages for personal injuries she allegedly sustained during a bone marrow harvest procedure at Duke University Medical Center on 6 October 1986. The forecast of evidence before the trial court reveals the following events and circumstances:

Plaintiff was diagnosed as seriously ill with breast cancer in the spring of 1986. She had a radical mastectomy and then underwent chemotherapy, prior to coming to Duke Medical Center. Plaintiff's oncologist found she was at high risk for reoccurrence and referred her to Duke for a bone marrow harvest procedure. This procedure involves the extraction and preservation of bone marrow for later use by the patient if the cancer reoccurs.

Plaintiff's bone marrow procedure was performed by defendant Dr. Roy B. Jones (hereinafter Dr. Jones), a partner at defendant Private Diagnostic Clinic (PDC) and assistant professor at Duke University Medical Center. Zachary Shpall, at that time a fourth-year medical student and enrolled in a subinternship in hematology/oncology, assisted with the procedure and actually performed the marrow extractions on one side of plaintiff's hip. Defendant Dr. Jones did not specifically inform plaintiff that a fourth-year medical student would be participating in her medical procedure.

Following the procedure, plaintiff immediately noticed numbness and severe pain in her right buttock and posterior thigh. The medical records did not indicate that plaintiff complained about her discomfort in the immediate post-operative period. After plaintiff complained of severe pain to Dr. Jones, he arranged for plaintiff to see a neurologist for an evaluation of her condition.

There was a difference of medical opinion as to plaintiff's condition and its exact cause. Plaintiff's experts diagnosed her condition as partial neuropathy of the sciatic nerve caused by needle penetration during the harvest procedure. Defendants' experts found that plaintiff did not suffer any injury to her sciatic nerve as a result of the bone marrow harvest procedure. Instead, they determined plaintiff's injury was multi-factorial in cause, stemming from several pre-existing conditions.

Defendants moved for summary judgment. After a three-day hearing on the motions and after reviewing the forecast of evidence with respect to each of plaintiff's claims, the trial court granted defendants' motions as to all of plaintiff's claims except

her ordinary negligence claims. Plaintiff appeals from the trial court's order allowing partial summary judgment.

Tharrington, Smith & Hargrove, by Marcus W. Trathen; and Elizabeth F. Kuniholm, for plaintiff-appellant.

Newsom, Graham, Hedrick, Bryson & Kennon, by E. C. Bryson, Jr. and Mark E. Anderson, for defendant-appellee Duke University.

Smith, Anderson, Blount, Dorsett, Mitchell & Jernigan, by William H. Moss and Samuel G. Thompson, for defendant-appellees Private Diagnostic Clinic and Roy B. Jones.

WELLS, Judge.

We note initially that the summary judgment below did not resolve all claims between all parties. Partial summary judgment is interlocutory and subject to dismissal. However, following our Supreme Court's reasoning and holding in *Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976) and its progeny, we conclude that plaintiff had a substantial right to have all her claims tried at the same time before the same judge and jury. We therefore will determine plaintiff's appeal on its merits.

Plaintiff sets forth four assignments of error for our review. First, plaintiff argues that the trial court erred in dismissing her first claim, in which she asserted that the doctrine of *res ipsa loquitur* should apply. Second, plaintiff contends partial summary judgment was improper because defendant Dr. Jones did not obtain her informed consent to the procedure. Third, plaintiff argues partial summary judgment was improper because defendant Dr. Jones' alleged misrepresentation of the status of Zachary Shpall, a fourth-year medical student, amounted to constructive fraud. Finally, plaintiff argues that the trial court erred in granting partial summary judgment because there was sufficient evidence of intentional misrepresentation on the part of defendant Dr. Jones. We find plaintiff's final assignment of error to be without merit, and we therefore do not address it.

"RES IPSA" CLAIM

[1] We initially question whether it is acceptable practice under our Rules of Civil Procedure to "plead" the applicability of a rule of law or evidence as a separate claim for relief. Although in re-

pealing N.C. Gen. Stat. § 1-122 requiring a complaint to state "the facts constituting a cause of action" the legislature has adopted the more liberal concept of "notice pleading," the clear import of Rule 8(a), is to retain the idea of factual pleading; that is, to set forth those essential facts required to give adequate "notice" for preparation by the opponent. N.C. Gen. Stat. § 1-122 (repealed 1 January 1970). *See generally Sutton v. Duke*, 277 N.C. 94, 176 S.E.2d 161 (1970) (*citing* an explanation of the New York rules on notice pleading, the source of the North Carolina rules, providing guidance in interpretation of our Rule 8(a)). Furthermore, in testing the legal sufficiency of pleadings, using the Rule 12(b)(6) motion, well-pleaded material allegations of fact are taken as admitted, but conclusions of law or unwarranted deductions of fact are not admitted. *Id.* Taken together, it appears that Rules 12(b)(6) and 8(a) suggest pleadings should be limited to those facts or descriptions of "transactions, occurrences, or series of transactions or occurrences, intended to be proved." North Carolina Rules of Civil Procedure, Rule 8(a). Nevertheless, we address plaintiff's *res ipsa loquitur* claim on its merits.

[2] *Res ipsa loquitur* is a doctrine addressed to those situations where the facts or circumstances accompanying an injury by their very nature raise a presumption of negligence on the part of defendant. It is applicable when no proof of the cause of an injury is available, the instrument involved in the injury is in the exclusive control of defendant, and the injury is of a type that would not normally occur in the absence of negligence. *Grigg v. Lester*, 102 N.C. App. 332, 401 S.E.2d 657, *cert. denied*, 329 N.C. 788, 408 S.E.2d 520 (1991); *See* Brandis on North Carolina Evidence, 227 (3rd ed. 1988).

In this case, there was conflicting expert testimony as to the cause of plaintiff's injury. We, therefore, cannot find the injury to be one that ordinarily would not occur except for some negligent act or omission. Furthermore, "*res ipsa loquitur* is based upon common knowledge and experience" generally known to laymen. *Grigg, supra.* It is our opinion that injury to the sciatic nerve during a bone marrow harvest procedure is peculiarly the subject of expert opinion, and a layman would have no basis for concluding that defendant was negligent in extracting the marrow. This Court has consistently reaffirmed that *res ipsa loquitur* is inappropriate in the usual medical malpractice case, where the question of injury and the facts in evidence are peculiarly in the province of expert

opinion. *Grigg, supra. See also Elliot v. Owen*, 99 N.C. App. 465, 393 S.E.2d 347 (1990). We therefore affirm the trial court's ruling.

INFORMED CONSENT CLAIM

[3] Second, plaintiff argues that defendant Dr. Jones did not obtain her informed consent to the bone marrow harvest procedure. Specifically, plaintiff alleged that Dr. Jones misrepresented the status of his assistant, Zachary Shpall, to plaintiff before she underwent the procedure. This misrepresentation, plaintiff asserts, violated N.C. Gen. Stat. § 90-21.13, requiring a physician to obtain consent from the patient "in accordance with the standards of practice among members of the same health care profession with similar training and experience situated in the same or similar communities[.]" N.C. Gen. Stat. § 90-21.13(a)(1).

The forecast of evidence presented at trial does not support this contention. We first note that defendants' forecast of evidence included expert testimony that the use of medical students in providing health care is standard practice in teaching hospitals. Second, we note that plaintiff acknowledged that she signed a consent form which included a statement that she agreed medical students could assist in providing her care, both specifically and by acknowledging the fact that Duke University Medical Center is a teaching institution. The pertinent "consent" language in the form plaintiff signed was as follows:

> TEACHING INSTITUTION
>
> I understand that Duke University Medical Center is a teaching institution, and I agree that students training to be physicians, nurses, [and] allied health personnel may assist in providing my care and that my medical records may be used for purposes of research, education, and patient care.

It appears that plaintiff contends defendant Dr. Jones should have informed her of any health care provider who would assist him in the bone marrow harvest procedure and their levels of expertise. There is, however, no statutory or common law duty for an attending surgeon to inform a patient of the particular qualifications of individuals who will be assisting, and the consent given by plaintiff defeats this argument. *See generally Foard v. Jarman*, 326 N.C. 24, 387 S.E.2d 162 (1990). We therefore hold that the trial court's granting summary judgment on the informed consent claim to be proper.

CONSTRUCTIVE FRAUD CLAIM

[4] Finally, plaintiff argues that defendant Dr. Jones' failure to reveal Mr. Shpall's status as an unlicensed medical student amounts to constructive fraud. To sustain a cause of action for constructive fraud, plaintiff must allege facts and circumstances (1) which created a relationship of trust and confidence, and (2) which led up to and surrounded a transaction in which defendant allegedly took advantage of his position of trust to injure the plaintiff. *Watts v. Cumberland County Hosp. System*, 317 N.C. 110, 343 S.E.2d 879 (1986). The first prong of the test in *Watts* is easily satisfied if plaintiff alleges defendant Dr. Jones was her attending physician at Duke Medical Center. Our Court has consistently recognized the physician-patient relationship to be a fiduciary one, "imposing upon the physician the duty of good faith and fair dealing." *Id. See Black v. Littlejohn*, 312 N.C. 626, 325 S.E.2d 469 (1985).

While plaintiff has established a relationship of trust and confidence between defendant Dr. Jones and herself, we find that she has not alleged facts sufficient to show defendant Dr. Jones breached his fiduciary duty or took advantage of plaintiff's trust to her detriment. Again, there was no affirmative duty to inform the plaintiff of Mr. Shpall's status, and it is common practice for medical students at teaching hospitals to assist in medical procedures. As we have noted, informing the patient of each assistant's level of training or level of expertise is not an affirmative duty we will impose in such cases. Therefore, we find the forecast of evidence presented insufficient to support plaintiff's claim for constructive fraud.

For the reasons stated, we affirm the trial court's order granting partial summary judgment in favor of defendants.

Affirmed.

Judges ARNOLD and LEWIS concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. GENE PREVATTE, WANDA PREVATTE, CYNTHIA JEAN PREVATTE, BY AND THROUGH HER GUARDIAN AD LITEM WANDA PREVATTE, JOHNNY SIMPSON AND SHIRLEY SIMPSON, DEFENDANTS

No. 9126SC1094

(Filed 1 December 1992)

1. **Insurance § 725 (NCI4th)— homeowner's insurance—ATV accident on nearby property—insured location**

Where homeowners had used nearby property owned by a neighbor for several years to ride their all-terrain vehicles (ATVs) and to take walks beginning and ending at their residence, the nearby property was "used in connection with" the homeowners' insured premises, and an ATV accident on the nearby property thus occurred on an "insured location" as defined by their homeowner's policy and was covered by the policy. The coverage provided by the policy is not limited to those locations in which the homeowners have some legal interest.

Am Jur 2d, Insurance §§ 285, 727.

2. **Insurance § 822 (NCI4th)— homeowner's insurance—ATV accident—use of ATV to service residence—motor vehicle exclusion inapplicable**

An ATV was a conveyance not subject to motor vehicle registration which was "used to service" the insureds' residence so that the motor vehicle exclusion in a homeowner's policy did not apply to an ATV accident where the insureds testified that their ATVs were used more than 50% of the time to haul trash, rocks and pine needles and to go down the half-mile driveway to the mailbox daily. The fact that the ATV was not being used to service the insureds' residence at the time of the accident did not bar recovery under the homeowner's policy.

Am Jur 2d, Insurance §§ 285, 727.

Appeal by plaintiff from order entered 29 July 1991 by Judge Robert E. Gaines, in Mecklenburg County Superior Court. Heard in the Court of Appeals 20 October 1992.

Rex C. Morgan for plaintiff-appellant.

Monnett, Caudle & Berry, by Charles G. Monnett III, for defendants-appellees Wanda Prevatte, Gene Prevatte and Cynthia Jean Prevatte.

Thomas D. Windsor for defendants-appellees Johnny Simpson and Shirley Simpson.

JOHNSON, Judge.

On 26 November 1988, Cynthia Jean Prevatte was injured when thrown from a Honda All-Terrain Vehicle (ATV) owned by defendant Johnny Simpson. At the time of the accident, Miss Prevatte was a guest in the Simpson home. The Simpsons were insured by a policy of homeowner's insurance issued by plaintiff-Nationwide. Miss Prevatte was riding on a trail which began on the Simpson property and ended on the property owned by a neighbor at the time the accident occurred.

On 23 February 1990, Nationwide Mutual Insurance Company filed a complaint for declaratory judgment to determine whether the homeowner's policy issued to defendants Johnny and Shirley Simpson provides liability coverage for injuries sustained by Cynthia Prevatte in the previously mentioned accident. Defendants answered the complaint and all parties moved for summary judgment. Summary judgment was granted in favor of defendants. Plaintiff appeals.

[1] By its first assignment of error, plaintiff-insurer contends that the trial court committed reversible error in finding that the ATV accident occurred on an "insured location" as defined in the Nationwide Homeowner's Insurance Policy.

The liability coverage of the homeowner's policy at issue excludes coverage for bodily injury arising out of the ownership or use of motor vehicles and all other motorized land conveyances. The policy, however, provides an exception to the exclusion. The exclusion does not apply to:

> (2) a motorized land conveyance designed for recreational use off public roads, not subject to motor vehicle registration and:

(a) not owned by an insured; or

(b) owned by an insured and on an insured location;

. . .

(4) a vehicle or conveyance not subject to motor vehicle registration which is:

(a) used to service an insured's residence[.]

The definitions section of the policy contains the following definition of insured location:

4. "insured location" means:

a. the residence premises;

b. the part of other premises, other structures and grounds used by you as a residence and:

(1) which is shown in the Declarations; or

(2) which is acquired by you during the policy period for your use as a residence;

c. any premises used by you in connection with a premises in 4a or 4b above; (Emphasis added.);

d. any part of a premises:

(1) not owned by an insured; and

(2) where an insured is temporarily residing;

e. vacant land, other than farm land, owned by or rented to an insured;

f. land owned by or rented to an insured on which a one- or two-family dwelling is being built as a residence for an insured;

g. individual or family cemetery plots or burial vaults of an insured; or

h. any part of a premises occasionally rented to an insured for other than business use.

Nationwide argues that the definition of "insured location" taken as a whole clearly suggests that the coverage provided by

the policy in issue is limited to those locations in which the insured has some legal interest. We disagree, noting that this Court must enforce the terms of an insurance policy according to its express language, without rewriting the policy to provide coverage. *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 348 S.E.2d 794 (1986). Section 4d of the Simpsons' homeowner's policy provides coverage for "any part of a premises: (1) Not owned by an insured; and (2) Where an insured is temporarily residing." This definition clearly affords coverage in locations where the insured may not have a legal interest.

Plaintiff's reliance on *Motorists Mutual Ins. Co. v. Kulp*, 688 F.Supp. 1033 (E.D. Pa.), *aff'd*, 866 F.2d 1413 (1988), is misplaced. In *Kulp*, a 10 year old was given permission by the owners/insureds of a homemade scooter equipped with a lawnmower engine (minibike) to ride it in a nearby field where their children commonly rode minibikes. While riding the scooter in the field, which was neither part of nor adjacent to the insureds' premises, the child was injured. The scooter in *Kulp* was not licensed for use on public roads, and there was no evidence that the scooter was ever used on public roads. The scooter was sometimes used on the insureds' premises; however, the neighboring field was where they most often rode it. The policy excluded coverage for injuries sustained off the insured location.

The *Kulp* Court denied coverage under the homeowner's policy based on the insureds' lack of a "reasonable expectation of coverage." The Court opined, "I find nothing unconscionable in the exclusion relied upon by the insurer in this case. Such clauses are not unusual in homeowner's policies in Pennsylvania. I know of no case law to support defendants' position that an issuer of a homeowner's policy has an absolute obligation to provide coverage for the use of a motorized bike off the insured premises." *Id.* at 1038.

Plaintiff-Nationwide, however, fails to acknowledge that in *Kulp*, no definition of "insured location" was set forth. The policy in that case excluded coverage for bodily injury "arising out of the ownership, maintenance or use of a motor vehicle owned by any insured." The policy defined "motor vehicle" as a motorized land vehicle owned by any insured and designed for recreational use off public roads, while off an insured location. *Id.* at 1035.

The Court found that the motorized scooter was a motorized vehicle and thereby excluded coverage under the terms of the

policy. The defendants in *Kulp* argued that the exclusion in the case should not be enforced because the Kulps had a reasonable expectation of coverage.

The Court responded, without addressing the issue of "insured location," that "[t]he general rule in Pennsylvania is that 'where . . . the policy limitation relied upon by the insurer to deny coverage is clearly worded and conspicuously displayed, the insured may not avoid the consequences of that limitation by proof that he failed to read the limitation or that he did not understand it.' " *Id.* at 1038.

In the case *sub judice*, the plain unambiguous language of the policy governs. Paragraph 4c of the policy defines insured location as "any premises used by you in connection with a premises in 4a [the residence premises] or 4b [the part of the premises used by you as a resident] above."

During Shirley Simpson's deposition, she testified that her children regularly rode the ATV's on the property where the accident occurred and that the family used the trail for walking. Ms. Simpson indicated that they had been walking and riding on the property for several years. Each walk or ride began and ended on the Simpson residence. We, therefore, conclude that the location where the accident occurred was an insured location as defined by the policy because it was used in connection with the Simpson residence.

We are unwilling to rewrite the insurance policy at issue to restrict coverage to locations where the insureds have a legal interest. The facts of the case *sub judice* fall squarely within the exception enumerated in 4c which allows coverage under the policy. We also note that plaintiff-insurer, who drafted the policy, had the opportunity to restrict the definition of insured location to include only those locations in which the insureds had a legal interest, by expressly providing so in the policy. Plaintiff-insurer failed to include such a provision. Absent such a clause of restriction, coverage should not be denied under the facts of this case.

Plaintiff also cites *Safeco Ins. Co. v. Brimie*, 163 Ill. App. 3d 200, 516 N.E.2d 577 (1987) to support its assertion that liability and coverage extends only to "reasonable geographic limits." Plaintiff's reliance on this case is also misplaced. In *Safeco*, the policy defined "insured location" to include *adjacent* property used in

connection with the residence premises. The policy in the case at bar contained no such limitation.

In a memorandum of additional authority, plaintiff cites *State Automobile Mutual Ins. Co. v. Hoyle*, 106 N.C. App. 199, 415 S.E.2d 764, *disc. review denied*, 331 N.C. 557, 417 S.E.2d 803 (1992). The instant case, however, is distinguishable from *Hoyle* on its facts. In *Hoyle*, it was undisputed that the go-cart was owned by the insured and that the accident occurred on a public street, which was not an insured location. In the case at bar, the issue is whether the accident occurred on an insured location. *Hoyle* is not dispositive, as it merely stands for the proposition that a public street is not an insured location. Miss Prevatte's accident occurred on a neighbor's property which was used in connection with the Simpson's residence; therefore, coverage should be allowed.

[2] Although defendant is allowed coverage under section 4c of the homeowner's policy, we nonetheless address plaintiff's second assignment of error. Plaintiff next argues that the trial court erred in concluding that the ATV on which Cynthia Prevatte was riding was used to service the Simpson's residence. We disagree.

The Nationwide policy provided that the exclusion for injuries caused by a motorized vehicle does not apply to:

> (4) a vehicle or conveyance not subject to motor vehicle registration which is:
>
> (a) used to service an insured's residence.

The term service is not defined in the policy; therefore, its ordinary meaning governs. "Service" is defined as "to repair or provide maintenance for." The Merriam-Webster Dictionary (3d ed. 1968).

Shirley and Johnny Simpson testified that both ATV's were used more than 50% of the time to perform chores and maintenance around their home. The ATV's were used to haul trash, rocks and pine needles, and to go down the one-half mile driveway to the mailbox daily. Nationwide offered no testimony or affidavits in opposition to the Simpson testimony.

Plaintiffs argue that at the time of the accident, the ATV Cynthia Prevatte was riding was not being used to service the insureds' residence. We agree, but note that such an acknowledgment does not bar recovery in the instant case. The policy at

issue provides that the ATV be used to service the insured's residence, *not* that the ATV be used to service the insured's residence at the time of the accident. Plaintiff-insurer also had the opportunity to add this restriction to the policy. It chose not to. Accordingly, the plain unambiguous language of the policy controls, and coverage is thereby afforded.

Nationwide's third assignment of error charges that summary judgment was improvidently granted. This assignment is overruled.

The decision of the trial court is

Affirmed.

Judges COZORT and LEWIS concur.

HENRY MILTON BEST, III, D.D.S., PETITIONER v. NORTH CAROLINA STATE BOARD OF DENTAL EXAMINERS, RESPONDENT

No. 9110SC1006

(Filed 1 December 1992)

1. **Hospitals § 5 (NCI3d); Physicians, Surgeons, and Allied Professions § 5 (NCI3d)— anesthetics for dental patient—lawfully qualified nurse—decision by Dental Examiners**

The State Board of Dental Examiners, not the Board of Nursing, has the authority to determine what constitutes a "lawfully qualified nurse" who may administer intraoral injections of anesthetics to dental patients pursuant to N.C.G.S. § 90-29(b)(6). The authority granted to the Board of Nursing is limited to the practices found in the Nursing Practice Act.

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 140, 244.

2. **Physicians, Surgeons, and Allied Professions § 5 (NCI3d)— anesthetics for dental patients—meaning of lawfully qualified nurse—amendment of statute—moot issue**

The issue of whether the Board of Dental Examiners was correct in ruling that a "lawfully qualified nurse" who may

administer intraoral injections of anesthetics under N.C.G.S. § 90-29(b)(6) means a certified registered nurse anesthetist was rendered moot when that statute was amended on 1 July 1992 to read "lawfully qualified nurse anesthetist."

Am Jur 2d, Physicians, Surgeons, and Other Healers §§ 140, 244.

Appeal by respondent from order signed 26 August 1991 by Judge Henry W. Hight in Wake County Superior Court. Heard in the Court of Appeals 15 October 1992.

Parker, Poe, Adams & Bernstein, by Heman R. Clark, Stephen D. Coggins, Jim Wade Goodman, and Sharon Coull Wilson, for petitioner-appellee.

Bailey & Dixon, by Ralph McDonald, Dorothy V. Kibler, and Denise Stanford Haskell, for respondent-appellant.

LEWIS, Judge.

The petitioner is a periodontist who practices in Jacksonville. By this action he seeks to determine what constitutes a "lawfully qualified nurse" in N.C.G.S. § 90-29(b)(6). We must determine whether the Dental Board or the Nursing Board has the authority and jurisdiction to define "lawfully qualified nurse" under this provision of the Dental Practice Act.

In May 1986, to assist him in his dental practice, petitioner hired a registered nurse. Petitioner trained the nurse, and delegated to her, among other duties, the task of administering intraoral injections of anesthetic. Petitioner inquired of the North Carolina State Board of Dental Examiners ("Dental Board") whether delegation of this particular duty comported with the Dental Practice Act.

Under this Act, only those specifically licensed to do so are permitted to practice dentistry in this State. N.C.G.S. §§ 90-22(a), 29(a) (1990). The statute holds that a person practices dentistry in the state if he:

> (6) Administers an anesthetic of any kind in the treatment of dental or oral diseases or physical conditions, or in preparation for or incident to any operation within the oral cavity; provided, however, that this subsection shall not apply to a

> *lawfully qualified nurse or anesthetist* who administers such anesthetic under the supervision and direction of a licensed dentist or physician.

N.C.G.S. § 90-29(b)(6) (1990) (emphasis added).

Upon receiving petitioner's inquiry, the Dental Board contacted the North Carolina Board of Nursing ("Nursing Board") to "request a ruling as to whether nurses licensed in North Carolina are lawfully qualified to inject anesthetics intraorally." In response, the Nursing Board concluded that a "lawfully qualified nurse" pursuant to N.C.G.S. § 90-29(b)(6) meant a certified registered nurse anesthetist ("CRNA"). While we can find no indication of it in the record, the Dental Board apparently then relayed this information to the petitioner. Believing the determination to be overly restrictive, petitioner contacted and petitioned the Nursing Board to reconsider its ruling.

In response to petitioner's petition, the Nursing Board amended its determination of lawfully qualified nurses for the purpose of administering anesthetic intraorally. The Nursing Board determined that:

> [i]t is within the scope of practice of the registered nurse to administer intraoral local infiltrates for dental procedure provided that there is (1) written protocol, (2) documentation of appropriate training and supervised clinical practice and (3) written approval of agency administration and/or appropriate dentist or physician. (January 1987) (emphasis original).

In response, the Dental Board wrote to the Nursing Board and expressed its concern over this determination.

The Dental Board then, in response to petitioner's request, issued a declaratory ruling holding that a "lawfully qualified nurse" under N.C.G.S. § 90-29(b)(6) is a CRNA. Petitioner sought judicial review. The Superior Court vacated the Dental Board's ruling, and held that the "North Carolina Board of Nursing, and not the [Dental Board], has the authority and jurisdiction to interpret the phrase 'lawfully qualified nurse' in N.C.G.S. § 90-29(b)(6)." The Dental Board appealed.

A reviewing court (here the Superior Court) may reverse or modify an agency's final 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.G.S. § 150B-51(b) (1991).

Petitioner's request for judicial review claimed that the Dental Board's ruling was in excess of its statutory authority, was made upon an unlawful procedure, was affected by erroneous interpretation of law, and was arbitrary and capricious. The basic issues on appeal concern (1) the correct statutory interpretation of the term "lawfully qualified nurse," and (2) which agency has the authority to interpret its meaning in the present context. Errors made in interpreting a statute are errors of law. *Savings and Loan League v. Credit Union Comm'n*, 302 N.C. 458, 464, 276 S.E.2d 404, 409 (1981). "When the issue on appeal is whether a state agency erred in interpreting a statutory term, an appellate court may freely substitute its judgment for that of the agency and employ *de novo* review." *Id.* at 465, 276 S.E.2d at 410 (citations omitted).

We utilize the "whole record" test in our review. When an appellate court reviews a lower court's decision as opposed to when it hears direct appeals from administrative agency's decisions, review is governed by N.C.G.S. § 150B-52 (1991). The scope of review in these instances is the same as it is for other civil cases. *Henderson v. North Carolina Dep't of Human Resources*, 91 N.C. App. 527, 531, 372 S.E.2d 887, 890 (1988); *see also Scroggs v. North Carolina Criminal Justice Standards Comm'n*, 101 N.C. App. 699, 400 S.E.2d 742 (1991). "Thus, our consideration of the superior court judgment is limited to determining whether the court committed any errors of law. . . . [W]e must consider the 'whole record'

so that we may determine whether the superior court judge was correct as a matter of law" in vacating the Dental Board's ruling. *Henderson*, 91 N.C. App. at 531, 372 S.E.2d at 890.

In considering the whole record, we must determine if the agency's findings and conclusions are supported by substantial evidence, or, evidence that a reasonable mind could find adequate to support a conclusion. *North Carolina Dep't of Correction v. Hodge*, 99 N.C. App. 602, 610, 394 S.E.2d 285, 289 (1990). We must take into account both evidence that supports and that contradicts the agency's decision. Our question, essentially, is whether the agency's decision has a rational basis in the evidence. *Id.* (quoting *In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)).

We note first that although courts are the final interpreters of statutory terms, "the interpretation of a statute by an agency created to administer that statute is traditionally accorded some deference." *Savings and Loan League v. Credit Union Comm'n*, 302 N.C. 458, 466, 276 S.E.2d 404, 410 (1981). The Legislature has conferred the authority to regulate the practice of dentistry on the North Carolina State Board of Dental Examiners. N.C.G.S. § 90-22(b) (1990). N.C.G.S. § 90-29 defines and regulates the practice of dentistry in this State.

[1] The Dental Board found that the administration of oral injections—except by lawfully qualified nurses and anesthetists who do so under a dentist's supervision—constituted the practice of dentistry. The Dental Board further found that administering anesthetic can be a dangerous procedure if performed by an improperly trained person. The Board found that nurses are not generally trained in the anatomy of the mouth, in dentistry in particular, or in the intraoral administration of anesthetic. The declaratory ruling also held that lawfully qualified nurses under N.C.G.S. § 90-29 are certified registered nurse anesthetists, because CRNAs are "trained in the anatomy of [the] neck and mouth, . . . and [are] trained to deal with the types of emergencies that could arise in connection with the use of anesthesia." The Dental Board reasoned that this holding would assure more consistent and uniform training of nurses, and thereby be more protective of the public health, safety, and welfare.

Nurses are regulated under Chapter 90, Article 9A, more commonly referred to as the Nursing Practice Act. Under these statutory provisions, the North Carolina Board of Nursing is empowered

to "(1) [a]dminister *this* Article; (2) [i]ssue its interpretations of *this* Article; [and] (3) [a]dopt, amend or repeal rules and regulations as may be necessary to carry out the provisions of *this* Article." N.C.G.S. § 90-171.23(b) (1990) (emphasis added). The intraoral injection of anesthetic by lawfully qualified nurses is not a subject covered in the Nursing Practice Act, but instead is specifically provided for—and characterized as "dentistry"—in the Dental Practice Act. We do not believe our Legislature intended that one profession set the standards of qualification for another. The authority granted the Nursing Board is limited to the practices found in the Nursing Practice Act.

We find substantial evidence in the record to uphold the declaratory ruling of the Dental Board. For the superior court to vacate this ruling constituted an error of law. We therefore reverse the Superior Court's order, and hold that the Dental Board is the correct agency to determine what kind of nurse qualifies as a "lawfully qualified nurse" pursuant to N.C.G.S. § 90-29(b)(6).

[2] Finally, we note that this statute has been amended, effective 1 July 1992, to read "lawfully qualified nurse anesthetist." N.C.G.S. § 90-29(b)(6) (Cum. Supp. 1992). This amendment deletes the word "or." Considering the evidence before us that the Dental Board lobbied for the change, there is more than a reasonable inference that "lawfully qualified nurse anesthetist" was intended to equate CRNA. We find the matter is moot.

Reversed.

Judges JOHNSON and COZORT concur.

RADFORD GURGANIOUS AND WIFE, SHIRLEY GURGANIOUS, PLAINTIFFS v. INTEGON GENERAL INSURANCE CORPORATION, DEFENDANT

No. 915SC1060

(Filed 1 December 1992)

Insurance § 535 (NCI4th)— UIM coverage—effect of insureds' settlement with tortfeasor

Where defendant underinsured motorist (UIM) carrier was notified of plaintiffs' action against the tortfeasor, that the

tortfeasor's liability insurer had tendered its policy limit of $25,000 in settlement of plaintiffs' claim, and that plaintiffs would seek UIM coverage from defendant, and where defendant failed to advance to plaintiffs the amount of the tortfeasor's policy limit or to defend the suit, defendant UIM carrier had no right to object to plaintiffs' settlement of their claim against the tortfeasor, and plaintiffs' dismissal with prejudice of their claim against the tortfeasor was not *res judicata* in plaintiffs' action against defendant carrier to recover the UIM coverage. N.C.G.S. § 20-279.21(b)(4) (1985).

Am Jur 2d, Automobile Insurance §§ 330-333.

Validity, construction, and effect of "no-consent-to-settlement" exclusion clauses in automobile insurance policy. 18 ALR4th 249.

Appeal by defendant from judgment entered 11 September 1991 by Judge Paul M. Wright in New Hanover County Superior Court. Heard in the Court of Appeals 19 October 1992.

On 12 August 1986, plaintiff Shirley Gurganious was a passenger in an automobile operated by Debra Williams. The automobile operated by Ms. Williams was insured under a policy of insurance issued by defendant, Integon General Insurance Corporation (Integon). The policy included guests as persons insured and provided protection from underinsured motorists.

Mrs. Gurganious and Ms. Williams were traveling on Highway 421 in Erwin, North Carolina when an automobile operated by Tammy Parker Allen failed to yield the right of way at an intersection and collided with the automobile in which defendant was a passenger. Ms. Allen was charged with and pled guilty to failing to yield the right of way.

Following the accident, plaintiffs filed a civil action against Ms. Allen in the New Hanover District Court. Ms. Allen's automobile was insured by United States Liability Insurance Company (United). The total limit of liability under that policy was $25,000.00. United later offered the full amount of its policy in settlement.

By letter dated 13 January 1989, plaintiffs' attorney notified defendant of the institution of the civil action. The letter also informed defendant that United had tendered $25,000.00 in full set-

tlement of plaintiffs' claim against Ms. Parker and that plaintiffs would be seeking underinsured coverage from defendant.

Defendant chose not to preserve its subrogation rights by tendering to plaintiffs the amount of United's policy limit; nor did defendant choose to defend the action. Subsequently, plaintiffs accepted United's settlement offer and dismissed with prejudice the action against Ms. Allen pursuant to the settlement agreement.

Plaintiffs next filed a claim against defendant for underinsured coverage. Defendant filed a Motion for Summary Judgment on the ground that the action was *res judicata* since plaintiffs previously dismissed with prejudice their claim against the primary tort-feasor. Defendant's motion was denied, but the judge granted the plaintiffs' Motion for Summary Judgment on the issue of *res judicata.* The issues of the primary tort-feasor's negligence and the amount of damages were preserved for trial. The trial court found that the primary tort-feasor was negligent and that defendant was liable to plaintiffs in the amount $175,000.00. Judgment was entered accordingly. From this judgment defendant appeals.

Shipman & Lea, by Gary K. Shipman, for plaintiff-appellees.

Johnson & Lambeth, by Maynard M. Brown, for defendant-appellant.

ARNOLD, Judge.

Defendant argues that since a UIM insurance carrier's liability is derivative of the primary tort-feasor's liability, and the action against the primary tort-feasor was dismissed with prejudice, the present action is barred by *res judicata.* However, our Supreme Court has held that a final judgment between the primary tort-feasor and plaintiff does not necessarily bar a subsequent claim against the UIM carrier. *Silvers v. Horace Mann Ins. Co.*, 324 N.C. 289, 378 S.E.2d 21 (1989).

As defendant properly points out, the *Silvers* decision was based upon the 1983 version of N.C. Gen. Stat. § 20-279.21(b)(4) while this case is governed by the 1985 version. However, for the reasons contained herein, the 1985 amendments to the statute do not affect the application of the *Silvers* decision to this particular case.

In *Silvers*, the Court stated that its decision was based only on the 1983 version of N.C. Gen. Stat. § 20-279.21(b)(4), and that the statute was amended in 1985 to provide for different procedures in claims for underinsurance benefits. *Silvers*, 324 N.C. at 293 n.3, 378 S.E.2d at 24 n.3. Since defendant in this case chose not to take advantage of those new procedures, it is placed in the same setting as the *Silvers* case.

The amendment referred to in *Silvers* added extensive procedures to N.C. Gen. Stat. § 20-279.21(b)(4) through which a UIM carrier may protect itself. Pursuant to that subsection, a plaintiff is now required to notify the UIM insurance carrier when a claim is filed against the primary tort-feasor, and also when a settlement offer has been made. Plaintiffs in this case properly notified defendant of the claim as well as the settlement offer.

In accordance with the statute, when the primary liability insurance carrier offered the limits of its policy in settlement, defendant could have paid that amount to plaintiffs, thereby preserving its subrogation rights. However, defendant chose not to follow that course. The statute provides in such a case that:

> No insurer shall exercise any right of subrogation or any right to approve settlement with the original owner, operator, or maintainer of the underinsured highway vehicle under a policy providing coverage against an underinsured motorist where the insurer has been provided with written notice in advance of a settlement between its insured and the underinsured motorist and the insurer fails to advance a payment to the insured in an amount equal to the tentative settlement within 30 days following receipt of such notice.

1985 N.C. Sess. Laws ch. 666, § 74. Defendant did not forward the money to plaintiffs and therefore had no right to approve or disapprove the settlement.

The statute also provides a method whereby defendant could have defended the suit against the primary tort-feasor, thereby protecting its rights in the first action. The statute provides:

> Upon receipt of such notice, the underinsured motorist insurer shall have the right to appear in defense of such claim without being named as a party therein, and . . . participate in such suit as fully as if it were a party.

1985 N.C. Sess. Laws ch. 666, § 74. Defendant chose not to pursue this course either.

Since defendant did not take advantage of the procedures added in 1985, the plaintiffs were put in a position similar to the plaintiff in *Silvers*. In *Silvers*, the Court dealt with conflicting provisions contained within the statute and the policy. Specifically, the Court reasoned that while a release of the tort-feasor acts to release the UIM insurance carrier of its derivative liability, the statute regarding UIM coverage appears "to require the insured to exhaust all liability policies by judgment or settlement before the insurer is obligated to pay under the UIM coverage." *Silvers*, 324 N.C. at 294-95, 378 S.E.2d at 25. The statutory language in question read:

> The insurer shall not be obligated to make any payment . . . to which underinsured motorist insurance coverage applies . . . until after the limits of liability under all bodily injury liability bonds or insurance policies applicable at the time of the accident have been exhausted by payment of judgments or settlements . . . .

Silvers, 324 N.C. at 294, 378 S.E.2d at 25 (citing, 1983 N.C. Sess. Laws ch. 777, § 1). The Court determined that since the statute is remedial and is to be liberally construed to provide coverage, "it was not the intent of the General Assembly that plaintiff be prohibited from recovering UIM benefits. . . ." *Id.* at 296, 378 S.E.2d at 26.

Likewise, the 1985 version of N.C. Gen. Stat. § 20-279.21(b)(4) appears to require exhaustion of all liability policies by judgment or settlement before the UIM carrier must pay. The pertinent part of the 1985 amendment reads:

> Underinsured motorist coverage shall be deemed to apply when, by reason of payment of judgment or settlement, all liability bonds or insurance policies providing coverage for bodily injury caused by the ownership, maintenance, or use of the underinsured highway vehicle have been exhausted . . . .

1985 N.C. Sess. Laws ch. 666, § 74. Although the wording is different, the effect is the same. The plaintiffs could have read the exhaustion clause to require them to approach the UIM carrier with judgment or settlement in hand when seeking to recover under the UIM provisions of the policy, *Silvers*, 324 N.C. at

295, 378 S.E.2d at 25, particularly since defendant chose not to involve itself in the litigation at any level.

The same type of inconsistency exists in the amended statute as in the 1983 version. The amended portion of the statute referred to in *Silvers* only provides a way for the UIM insurance carrier to be notified of claims and to protect its rights in such claims. Where the UIM carrier chooses not to avail itself of those procedures, as in this case, and leaves the injured plaintiffs to their own devices, it has no right to object to the settlement of the primary claim and cannot complain when the insureds attempt to take the steps they feel necessary to recover from the UIM carrier, especially when defendant was aware before settlement that plaintiffs would be seeking UIM coverage.

Just as in *Silvers*, we look to the purpose of the statute as a guide to the intent of the legislature. The amendments to the statute in 1985 did not change the remedial nature of the Motor Vehicle Safety and Financial Responsibility Act. The Act is still to be construed liberally to effectuate its purpose of providing coverage to motorists injured by underinsured motorists. In light of the Act's remedial purpose, we hold that plaintiffs are not barred from recovering UIM benefits from defendant because of the dismissal with prejudice of the underlying claim against the primary tort-feasor.

Affirmed.

Chief Judge HEDRICK and Judge WELLS concur.

NORMAN W. DROUILLARD AND PRINT PURCHASING CONSULTANTS, INC. v. KEISTER WILLIAMS NEWSPAPER SERVICES, INC., D/B/A LINDSAY PUBLISHING COMPANY, CLARK LINDSAY, AND G. WALTON LINDSAY

No. 9117SC1189

(Filed 1 December 1992)

1. Unfair Competition § 4 (NCI3d)— violation of Trade Secrets Protection Act—unfair trade practice

N.C.G.S. § 75-1.1 is applicable to violations of the Trade Secrets Protection Act. Although plaintiffs contended that violation of that Act would not constitute unfair or deceptive acts or practices because the Legislature did not make a specific provision to that effect, it has been repeatedly held that violation of regulatory statutes which govern business activities may also violate N.C.G.S. § 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of N.C.G.S. § 75-1.1. If the violation of the Trade Secrets Protection Act satisfies the three-prong test in *Spartan Leasing v. Pollard*, 101 N.C. App. 450, it would be a violation of N.C.G.S. § 75-1.1.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 704, 738, 739.

2. Unfair Competition § 4 (NCI3d)— customer lists, pricing and bidding formulas as trade secrets—conclusions supported by findings

The facts found supported the finding that defendant's customer lists and pricing and bidding formulas were trade secrets in an action arising from plaintiff ending his employment with defendant Lindsay Publishing and working for a competitor as a consultant. Plaintiff did not provide a verbatim transcript and appellate review is limited to whether the facts found supported the conclusions of law.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 707, 708.

3. Unfair Competition § 4 (NCI3d)— misappropriation of trade secrets—damages

The trial court's findings supported its conclusion that defendant suffered damage by plaintiffs' purported misap-

propriation of trade secrets where the trial court found Lindsay Publishing to have lost profits in the amount of $35,000 by reason of plaintiff's successful transfer of an account from his old employer to his new employer and that plaintiff had used defendant's customer lists and pricing and bidding formulas without defendant's consent, and concluded that defendant was entitled to recover damages from the plaintiff in the amount of $35,000 for the misappropriation of trade secrets in violation of the North Carolina Trade Secrets Protection Act.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices §§ 709, 711.

Proper measure and elements of damages for misappropriation of trade secret. 11 ALR4th 12.

4. Unfair Competition § 4 (NCI3d)— violation of Trade Secrets Protection Act—injunctive relief

Injunctive relief was proper where the court concluded that customer lists and pricing and bidding formulas were trade secrets and that misappropriation of such information violated the Trade Secrets Protection Act.

Am Jur 2d, Monopolies, Restraints of Trade, and Unfair Trade Practices § 711.

Appeal by plaintiffs from judgment entered 16 May 1991 in Stokes County Superior Court by Judge James M. Long. Heard in the Court of Appeals 9 November 1992.

The facts before us are not in dispute. Defendant Lindsay Publishing Company (hereinafter Lindsay Publishing) is engaged in newspaper publication and the printing business. Plaintiff Norman Drouillard (hereinafter Drouillard) was the General Manager of Lindsay Publishing from 1978 through 1989. His contract contained a limited covenant not to compete. As General Manager, Drouillard was familiar with the bidding and pricing of printing contracts, had regular contact with printing customers, and had access to bidding and pricing information.

On 1 January 1990, Drouillard ended his employment with Lindsay Publishing by resignation. Shortly thereafter, Drouillard was employed as a consultant by Pilot Graphics, Inc. Prior to concluding his services for Lindsay Publishing, Drouillard assisted his newly hired replacement in preparing a bid for the Byrd Food

Stores account. This bid was higher than previous bids for the same work. After Drouillard began working for Pilot Graphics, Inc., Pilot Graphics, Inc. submitted a lower bid for the Byrd Food Stores account. Although Lindsay Publishing was permitted to submit a revised bid, the Byrd account was acquired from Lindsay Publishing by Drouillard, working for Pilot Graphics, Inc., in March 1990.

Plaintiffs Drouillard and Print Purchasing Consultants, Inc. brought this action, originally, alleging tortious conduct on the part of defendants including fraud, slander, trade defamation and unfair trade practices. Defendants filed a counterclaim alleging interference with contractual and business relationships, misappropriation of trade secrets, and unfair and deceptive trade practices, seeking damages and injunctive relief. On 6 November 1990, defendants moved for partial summary judgment, dismissing all the plaintiffs' causes of action but reserving the defendants' counterclaims. Defendants' motion was granted in its entirety on 15 February 1991. This judgment was not appealed. The counterclaims came on for trial 18 February 1991 before the court without a jury. The trial court entered judgment for defendants, actual damages in the amount of $35,000.00, to be trebled for a total of $105,000.00. Plaintiff appeals.

Law Office of Herman L. Stephens, by Herman L. Stephens, for plaintiffs-appellants.

Hamilton C. Horton, Jr. for defendants-appellees.

WELLS, Judge.

We first note that plaintiffs have not separated their assignments of error in their arguments as required by Rule 28 of the North Carolina Rules of Appellate Procedure. It appears, however, that although plaintiffs have set forth five assignments of error for our review, there are only four dispositive questions before us: (1) whether the trial court erred in finding a violation of the Trade Secrets Protection Act to be an unfair practice under N.C. Gen. Stat. § 75-1.1, (2) whether there was competent evidence to support the trial court's finding that Lindsay Publishing maintained its customer list and pricing and bidding formulas as trade secrets, (3) whether the trial court erred in finding that Lindsay Publishing was "damaged" or "injured" by plaintiff's unfair acts, and (4) whether the trial court erred in issuing injunctive relief.

Plaintiffs' other arguments are meritless and therefore we will not address them.

[1] First, plaintiffs argue that violation of the Trade Secrets Protection Act (Article 24, Chapter 66) is not an unfair trade practice under N.C. Gen. Stat. § 75-1.1. Plaintiffs contend that because the Legislature did not specifically provide that any violation of Article 24, Chapter 66 would constitute unfair or deceptive acts or practices under N.C. Gen. Stat. § 75-1.1, such a result was not intended. We disagree.

N.C. Gen. Stat. § 75-1.1 should not be so narrowly construed. This section declares "[u]nfair methods of competition in or affecting commerce," to be unlawful. The statute was created to provide an additional remedy apart from those less adequate remedies afforded under common law causes of action for fraud, breach of contract, or breach of warranty. The result was a broader cause of action with broader remedies. *See Bernard v. Central Carolina Truck Sales*, 68 N.C. App. 228, 314 S.E.2d 582, *cert. denied*, 311 N.C. 751, 321 S.E.2d 126 (1984). Given the expansive language of this section, all defendants need to show to maintain a cause of action under this section is (1) an unfair or deceptive act or practice, or an unfair method of competition, (2) in or affecting commerce, (3) proximately causing actual injury to defendant or defendant business. *Spartan Leasing v. Pollard*, 101 N.C. App. 450, 400 S.E.2d 476 (1991). If the violation of the Trade Secrets Protection Act satisfies this three prong test, it would be a violation of N.C. Gen. Stat. § 75-1.1.

Furthermore, the fact that the Trade Secrets Protection Act was not one of the regulatory statutes specifically listed in Chapter 66 as violative of N.C. Gen. Stat. § 75-1.1 is immaterial. This Court has repeatedly held that the violation of regulatory statutes which govern business activities may also be a violation of N.C. Gen. Stat. § 75-1.1 whether or not such activities are listed specifically in the regulatory act as a violation of N.C. Gen. Stat. § 75-1.1. *See United Virginia Bank v. Air-Lift Associates*, 79 N.C. App. 315, 339 S.E.2d 90 (1986) (finding N.C. Gen. Stat. § 75-1.1 applicable to commercial transactions also regulated by the Uniform Commercial Code); *Eastern Roofing and Aluminum Co. v. Brock*, 70 N.C. App. 431, 320 S.E.2d 22 (1984) (finding a violation of a Federal Trade Regulation (16 C.F.R. § 429.1(b) and (e)) to be a violation of N.C. Gen. Stat. § 75-1.1 as well); *Ellis v. Smith-Broadhurst*,

Inc., 48 N.C. App. 180, 268 S.E.2d 271 (1980) (holding the Insurance Statutes (N.C. Gen. Stat. § 58-54 *et seq.*) did not provide exclusive regulation for that industry and that N.C. Gen. Stat. § 75-1.1 was applicable); *Edmisten, Attorney General v. Chemical Co.*, 45 N.C. App. 604, 263 S.E.2d 849 (1980) (N.C. Gen. Stat. § 75-1.1 found applicable to labelling anti-freeze even though it was regulated by the Department of Agriculture). We, therefore, reject plaintiffs' limited interpretation of N.C. Gen. Stat. § 75-1.1 and hold it to be applicable to violations of the Trade Secrets Protection Act.

[2] Plaintiffs next contend that the evidence presented was insufficient to support the trial court's finding that Lindsay Publishing maintained, as trade secrets, its customer lists and its pricing and bidding formulas. We note that plaintiff failed to provide this Court with a verbatim transcript of the proceedings pursuant to Rule 9(c) of the North Carolina Rules of Appellate Procedure.

Our review is limited to that which appears in the verbatim transcript or record on appeal. Where evidence is not presented in the record on appeal, we cannot speculate that there was prejudicial error but must assume that the findings of fact are conclusive and supported by competent evidence. *Forrest v. Pitt County Bd. of Education*, 100 N.C. App. 119, 394 S.E.2d 659, *review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990), *cert. denied*, 328 N.C. 330, 400 S.E.2d 448, *affirmed*, 328 N.C. 327, 401 S.E.2d 366 (1991). For that reason, we are precluded from addressing questions of whether the evidence was sufficient to support the trial court's findings of fact, and the only remaining issue is whether the facts found support the conclusions of law. *Britt v. Britt*, 49 N.C. App. 463, 271 S.E.2d 921 (1980). It is clear from the findings made that the trial court determined the defendant's customer lists and pricing and bidding formulas to be trade secrets. This assignment is therefore overruled.

[3] Plaintiffs also assign as error the trial court's conclusion that defendant Lindsay Publishing suffered "damage" by reason of the purported misappropriation of trade secrets. Again, our review is limited to whether the findings of fact as set forth support the trial court's conclusions of law. The record discloses that the trial court found Lindsay Publishing to have lost profits in the amount of $35,000.00 by reason of plaintiff's successful transfer of the Byrd Food Stores printing account from his old employer to his new employer. The court also found that in obtaining the

Byrd Food Stores business for Pilot Graphics, Inc., plaintiff used defendant's customer lists and pricing and bidding formulas without defendant's consent. Based on these findings of fact, the court concluded that defendant is entitled to recover damages from the plaintiff in the amount of $35,000.00 for the misappropriation of trade secrets in violation of the North Carolina Trade Secrets Protection Act. Assuming, as we must, that the court's findings of fact are supported by the evidence and are therefore conclusive, we find that these facts are sufficient to support the trial court's conclusion of law.

[4] Finally, plaintiffs argue that the injunctive relief granted was improper because there was no violation of the Trade Secrets Protection Act. Having previously concluded that the customer lists and pricing and bidding formulas were trade secrets under Chapter 66, and in determining that misappropriation of such information violated the Trade Secrets Protection Act, we find injunctive relief was proper.

For the reasons stated, we affirm the trial court's judgment.

Affirmed.

Judges ARNOLD and LEWIS concur.

BETTY RAY BREWER v. WILLIAM ERVIN SPIVEY AND IMPORT MANAGEMENT, INC., D/B/A ACURA OF RALEIGH

No. 9110SC730

(Filed 1 December 1992)

Principal and Agent § 9.1 (NCI3d)— automobile accident—driver of dealership automobile—agent of dealership

The trial court did not err by denying defendant Acura's motion for a judgment notwithstanding the verdict where plaintiff Brewer was injured in an automobile collision with a car driven by defendant Spivey and owned by defendant Acura. Although defendant Acura contended that plaintiff failed to present sufficient evidence to support the jury's finding of agency and argues that the evidence showed, as a matter

of law, that defendant Spivey was acting as an independent contractor, plaintiff is entitled to the presumption of agency provided by N.C.G.S. § 20-71.1(b), the uncontradicted evidence that defendant Acura could have terminated defendant Spivey's employment at any time tends to show that Spivey was not an independent contractor, and Spivey's testimony directly contradicted Acura's claim that it exercised no control over the time and manner in which the task for which Spivey was employed was to be performed.

Am Jur 2d, Agency §§ 3, 21; Independent Contractors §§ 7-9.

Appeal by defendant Import Management, Inc., d/b/a Acura of Raleigh (hereinafter "Acura") from Allen (J. B., Jr.), Judge. Order entered 29 October 1990 in Superior Court, Wake County. Heard in the Court of Appeals 12 October 1992.

Plaintiff instituted this civil action by complaint filed 6 October 1987 wherein plaintiff alleged she sustained personal injuries as the result of an automobile collision caused by the negligence of defendant William Spivey. Plaintiff also alleged that, at the time of the collision, defendant Spivey was acting within the scope and course of his employment with defendant Acura. Both defendants answered denying negligence and denying that Spivey was the employee of Acura.

When the matter came on for trial, the jury found that defendant Spivey's negligence caused plaintiff's injuries, that Spivey was acting as the agent of Acura at the time of the accident and awarded plaintiff $100,000. Defendant Acura thereafter moved the court for a judgment notwithstanding the verdict pursuant to Rule 50(b) of the North Carolina Rules of Civil Procedure as to the issue submitted to the jury concerning the agency of defendant Spivey and requested that the court "enter judgment in accordance with [Acura's] motions for a directed verdict . . . ." The trial court denied Acura's motion.

Defendant Acura appeals from the denial of this motion, and defendant Spivey has filed a brief in opposition to Acura's appeal.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr., for defendant, appellant Import Management, Inc.

Bailey & Dixon, by Gary S. Parsons and Denise Stanford Haskell, for defendant, appellee Spivey.

No brief filed for plaintiff, appellee.

HEDRICK, Chief Judge.

Defendant Acura assigns several errors to the trial court. However, as Acura's notice of appeal is only from the order entered by Judge Allen on 29 October 1990 denying Acura's motion for judgment notwithstanding the verdict, we do not address any issue raised with regard to the underlying judgment entered on 26 September 1990 as a result of the jury verdict in favor of plaintiff. *See* N.C.R. App. P. 3(d); *Von Ramm v. Von Ramm*, 99 N.C. App. 153, 392 S.E.2d 422 (1990).

The only question presented therefore is whether the trial judge erred in denying Acura's motion for judgment notwithstanding the verdict. Defendant Acura contends that plaintiff failed to present sufficient evidence to support the jury's finding of agency and argues that the evidence showed, as a matter of law, that Spivey was acting as an independent contractor at the time of the incident which forms the basis of this lawsuit.

The evidence presented at trial tends to show that in 1987, defendant Spivey was a retired carpenter who occasionally drove automobiles from one location to another for automobile dealers. Generally, the dealerships would call Spivey, as well as several of his acquaintances, and hire the group to drive various automobiles, all of which were owned by the dealerships involved, to locations designated by the dealerships.

Prior to the incident involved in this action, Spivey was employed by defendant Acura to drive vehicles owned by Acura from Raleigh to Fayetteville. As Acura was sending a number of cars to Fayetteville at the same time, several of Spivey's friends were also employed for the same trip. On 21 May 1987, a driver from the Acura dealership drove to Sanford where Spivey and the others resided and transported them to the Raleigh sales lot of Acura. Once at the sales lot, Spivey and the others were directed to the cars needing to be moved to Fayetteville.

Defendant Spivey testified that he was unaware of the route to be taken to Fayetteville and that he planned to follow the other vehicles which included the van of the driver who had transported

Spivey from his home in Sanford. As Spivey drove the Acura automobile off the sales lot, he was following another vehicle which was leading the way to Fayetteville. The collision with plaintiff occurred shortly after Spivey left the Acura premises.

Spivey further testified that he understood that he was required to follow any instruction given by Acura concerning the transportation of these vehicles and that Acura could terminate his employment at any time. He also stated that he did not engage in the independent business of driving cars and that he did not possess any particular or unique driving skill. Spivey testified that he was not required to exercise his personal judgment concerning the completion of the job assignment as he was assigned a vehicle to drive, and he had been instructed to simply follow the lead vehicle on a route to Fayetteville which had been designated by another. Once he completed the initial trip to Fayetteville, Spivey and the others were instructed to return to Raleigh in the dealership's van in order to transport the remaining vehicles in the same manner.

Defendant Acura points to evidence which shows that Spivey was not a regular employee of Acura and that the day of this accident was the only time Spivey ever drove for Acura, that Spivey received no instruction from Acura concerning the manner in which the vehicles were to be driven, and that he was paid per trip as support for its argument that the evidence established Spivey's independent contractor status as a matter of law. Acura contends that it exercised no control over the manner in which the vehicles were driven to Fayetteville.

It is well settled that the controlling issue in a determination of whether the relationship between two parties is that of employer and employee or independent contractor is the extent to which the employer retains "the right to control the workman with respect to the manner and method of doing the work as distinguished from the mere right to require certain results, and it is not material as determinative of the relationship whether the employer actually exercises the right of control." *Harris v. Construction Co.*, 240 N.C. 556, 560, 82 S.E.2d 689, 692 (1954) (*citations omitted*). The burden of proving the status of an independent contractor when that status is asserted as a defense to an allegation of agency rests with the employer, *Lassiter v. Cline*, 222 N.C. 271, 274, 22 S.E.2d 558, 560 (1942); *Embler v. Lumber Co.*, 167 N.C. 457, 461,

83 S.E. 740, 742 (1914), and where evidence is presented which would support a finding of the existence of the relationship of employer-employee, the determination of the status of the relationship must rest with the jury. *See Harris*, 240 N.C. at 560, 82 S.E.2d at 692; *Lassiter*, 222 N.C. at 274, 22 S.E.2d at 560; *Embler*, 167 N.C. at 461, 83 S.E. 742; *Little v. Poole*, 11 N.C. App. 597, 182 S.E.2d 206 (1971).

We hold that plaintiff presented sufficient evidence to support a finding of the existence of an employer-employee relationship. Not only is plaintiff entitled to the presumption of agency provided by *G.S. § 20-71.1(b)* arising out of Acura's ownership of the vehicle here involved, the uncontradicted evidence that defendant Acura could have terminated Spivey's employment at any time, "tends strongly to show that [Spivey was] not an independent contractor." *Lassiter*, 222 N.C. at 274, 22 S.E.2d at 560 (*citations omitted*). Spivey's testimony directly contradicted Acura's claim that it exercised no control over the time and manner in which the task for which Spivey was employed was to be performed.

The trial court's denial of defendant Acura's motion for judgment notwithstanding the verdict was not error and the judgment will be affirmed.

Affirmed.

Judges ARNOLD and WELLS concur.

NORTH CAROLINA DEPARTMENT OF TRANSPORTATION v. RONALD E. DAVENPORT

No. 9110SC942

(Filed 1 December 1992)

1. Appeal and Error § 112 (NCI4th)— alleged governmental immunity—refusal to dismiss—immediate appeal

The trial court's refusal to dismiss a contempt proceeding against a state agency on the ground of governmental immunity was immediately appealable.

Am Jur 2d, Appeal and Error § 168; Courts § 152.

2. Courts § 60 (NCI4th)— State employee—failure to reinstate—contempt—no jurisdiction in superior court

The superior court did not have subject matter jurisdiction of a motion to hold the Department of Transportation in contempt on the ground that it failed to comply with an order to reinstate respondent employee when it gave him another job title and moved him to a different location since the court must make findings of fact to support its judgment in a contempt proceeding and the superior court was sitting as an appellate court in this action and could not hear matters requiring factual findings.

Am Jur 2d, Courts §§ 87 et seq.

Judge WELLS dissenting.

Appeal by Department of Transportation from an order denying a motion to dismiss contempt proceedings entered 7 June 1991 by Judge Robert Farmer in Wake County Superior Court. Heard in the Court of Appeals 12 October 1992.

Originally this case arose from the dismissal of appellee, Ronald Davenport, from employment with appellant, the Department of Transportation (D.O.T.). Ronald Davenport was employed with D.O.T. from 5 August 1967 to 27 March 1987 at which time he was suspended. Davenport was finally dismissed on 3 September 1987. Davenport petitioned the Office of Administrative Hearings for a hearing pursuant to N.C. Gen. Stat. § 150B-23 (Supp. 1990). The administrative law judge concluded that Davenport had been dismissed without just cause and recommended reinstatement with back pay.

The State Personnel Commission adopted the administrative law judge's recommendation that Davenport be reinstated but rejected the conclusion that he was entitled to back pay. D.O.T. then petitioned the superior court for review of the Personnel Commission's decision. The superior court affirmed the reinstatement but modified the Commission's decision to include the award of back pay. This decision was appealed to the Court of Appeals where it was affirmed. *North Carolina Dep't of Transp. v. Davenport*, 102 N.C. App. 476, 402 S.E.2d 477 (1991).

Prior to his dismissal, Davenport held the title "District Engineer" in the Lenoir County District Office and his pay grade

was 77. When he returned to D.O.T., his new title was "Division Operations Engineer" in Wilson, North Carolina at pay grade 77. Davenport states that his new position requires him to commute approximately two hours each day, whereas his previous position required only a ten to fifteen minute commute.

Davenport filed a Motion For Show Cause Contempt in the superior court under the original action claiming that D.O.T. had not complied with the superior court's order to reinstate him since he was given another job title and was moved to a different location. In response, D.O.T. claimed sovereign immunity and filed a Motion to Dismiss Contempt Proceeding and for Summary Judgment on that ground. Judge Farmer denied the motion. D.O.T. appeals the denial of the Motion to Dismiss.

Simultaneously with this appeal, D.O.T. filed a Petition for Writ of Certiorari which is allowed in order for this Court to consider whether the superior court has subject matter jurisdiction to hear the contempt proceedings.

Attorney General Lacy H. Thornburg, by Associate Attorney General Patsy Smith Morgan, for appellant.

Crisp, Davis, Schwentker, Page, Currin & Nichols, by M. Jackson Nichols and Lynn Fontana, for appellee.

ARNOLD, Judge.

[1] Initially it may be noted that this is a proper appeal even though it was taken from an interlocutory order. D.O.T. moved to dismiss on the ground of governmental immunity, and we have previously held that "an immediate appeal lies under N.C. Gen. Stat. § 1-277(b) for the court's refusal to dismiss a suit against the state on the grounds of governmental immunity." *Stahl-Rider, Inc. v. State*, 48 N.C. App. 380, 383, 269 S.E.2d 217, 219 (1980), (citing *Sides v. Cabarrus Memorial Hosp.*, 22 N.C. App. 117, 205 S.E.2d 784 (1974), *modified on other grounds*, 287 N.C. 14, 213 S.E.2d 297 (1975)).

[2] D.O.T.'s appeal and first two assignments of error are founded upon sovereign immunity. However we need not address those issues since our decision is based solely upon D.O.T.'s third assignment of error, that the superior court did not have subject matter jurisdiction to hear the contempt proceeding. We agree and reverse the superior court's denial of D.O.T.'s motion to dismiss.

In appeals from administrative decisions, the superior court sits as an appellate court, and its decision is based solely upon the record from the prior proceedings. *Batch v. Town of Chapel Hill*, 326 N.C. 1, 11, 387 S.E.2d 655, 662, *cert. denied*, 496 U.S. 931 (1990). The superior court judge may not make findings of fact. *Id.*

This appeal comes from a contempt proceeding. It is uniformly held that in contempt proceedings the court must make findings of fact to support the judgment. *Smith v. Smith*, 247 N.C. 223, 225, 100 S.E.2d 370, 372 (1957). Since the superior court was sitting as an appellate court in this matter, and therefore could not hear matters requiring factual findings, it was without jurisdiction to find D.O.T. in contempt. *See Quick v. Quick*, 305 N.C. 446, 461, 290 S.E.2d 653, 663 (1982). Therefore, the superior court erred when it denied D.O.T.'s Motion to Dismiss.

We are aware that the superior court did designate part of its order modifying the Personnel Commission's order as findings of fact. In that instance however, the superior court judge was only setting out his reasons for modifying the Commission's decision, denominating them as findings of fact, and he therefore did not exceed the bounds of appropriate judicial review. *Star Automobile Co. v. Saab-Scania of America Inc.*, 84 N.C. App. 531, 535, 353 S.E.2d 260, 263 (1987).

For the reasons stated above, the decision of the superior court should be reversed.

Reversed.

Chief Judge HEDRICK concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The majority opinion misperceives the nature of the case before us. When Judge Farmer denied the DOT's motion to dismiss, he was not acting in an appellate review context. He was acting in response to Mr. Davenport's motion to require the DOT to do what it had been ordered to do in Judge Weeks' judgment, which was affirmed in all respects by this Court. Our opinion made it abundantly clear that the DOT should award Mr. Davenport his

back pay, and since DOT did not appeal the Commission's order of reinstatement, that mandate is binding on the DOT.

This litigation has been going on for five years, having begun in the fall of 1987. The ALJ's decision to award back pay and reinstatement was entered in March of 1989 and affirmed by Judge Weeks in May of 1990. "Subject matter" is a straw man, simply being used as another delaying tactic by the DOT. Mr. Davenport has been denied justice for far too long, and I vote to affirm Judge Farmer's order.

THE LAW BUILDING OF ASHEBORO, INC., PLAINTIFF/PETITIONER v. THE CITY OF ASHEBORO, DEFENDANT/RESPONDENT

No. 9119SC945

(Filed 1 December 1992)

Building Codes and Regulations § 69 (NCI4th) — building permit — no action for wrongful denial

The trial court did not err by granting defendant's motion for a dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) of a claim for wrongful denial of a building permit by a municipality. There is no authority or precedent for recognizing such an action; moreover, the record also makes clear that plaintiff's application for a permit had not run its administrative course at the time the judgment below was entered.

Am Jur 2d, Buildings §§ 8 et seq.

Appeal by plaintiff from order entered 20 March 1991 in Randolph County Superior Court by Judge Russell G. Walker, Jr. Heard in the Court of Appeals 12 October 1992.

Law Building of Asheboro, Inc. (the Law Building) commenced this action against defendant City of Asheboro (the City) seeking (1) recovery of punitive damages for the alleged unlawful refusal to issue plaintiff a building permit, and (2) to "appeal" from an order of the City's Building Inspector denying plaintiff a permit.

The events leading up to the judgment in this case appear to be as follows: On 7 December 1989, Larry R. Trotter, Chief

Building Inspector for the City, notified the Law Building that because of the deteriorated and dangerous condition of the building, it was being condemned. That notice directed prompt action to remedy the dangerous condition of the building. On 15 June 1990, the City served upon the Law Building a complaint and notice of hearing detailing the defects in the building. The complaint was set to be heard on 26 June 1990 and required the Law Building to appear and present evidence on the question of whether an order should be issued to have the building immediately repaired or demolished.

On 26 June 1990, the Law Building responded in writing to the 15 June 1990 notice, objected to the City's proposed action, and appeared at the hearing. Following the hearing, on 20 July 1990, the City issued an order to repair or demolish, requiring that the building be appropriately repaired or be demolished on or before 24 September 1990.

On 9 August 1990, the Law Building gave notice of appeal to the Asheboro City Council. On 30 August 1990, the Law Building filed a "Complaint Petition" in the Superior Court of Randolph County, in which it alleged that the City had "unlawfully" refused it a building permit to repair the building, seeking actual and punitive damages. On 6 September 1990, the hearing pursuant to the Law Building's appeal to the City Council was heard, resulting in an affirmance of the order to repair or demolish.

On 24 October 1990, the City filed an "Answer/Response and Counterclaim" to the Law Building's "Complaint." In its answer, the City denied that it had wrongfully denied the Law Building a permit and also moved for dismissal for failure to state a claim upon which relief could be granted and for failure to exhaust administrative remedies. In its "Counterclaim," the City sought to require the Law Building's compliance with its prior order to repair, or, in the alternative, to require the demolition of the building.

On 11 January 1991, an application for a building permit to repair was submitted on behalf of the Law Building to the City's Building Inspector. On 6 February 1991, the City's Building Inspector replied to the Law Building's request for a permit, indicating that more detailed information and plans were necessary in order to appropriately consider the Law Building's application.

On 11 March 1991, the City's motion to dismiss came on for hearing before Judge Walker, and on 20 March 1991, Judge Walker entered an order allowing the City's motion to dismiss on all grounds asserted. It is from that order that plaintiff has appealed.

John Randolph Ingram for plaintiff.

Michael B. Brough & Associates, by Michael B. Brough and Jan S. Simmons, for defendant.

WELLS, Judge.

We first note that as the judgment being appealed from did not resolve all claims of all parties, it is interlocutory and subject to dismissal. For reasons which will appear in this opinion and in the interest of judicial economy, we exercise our discretion to resolve this appeal rather than dismiss it.

The North Carolina General Statutes provide for the enactment of local building codes and the issuing or granting of building permits. *See* Article 19, Part 5 of the North Carolina General Statutes. These administrative requirements are mandatory and exclusive. We know of no authority or precedent for recognizing or allowing a civil action in damages for alleged unlawful denial of a building permit by a municipality and we decline to do so. Plaintiff failed to state a claim for which relief could be granted, and the court below lacked subject matter jurisdiction to hear a claim for damages as asserted by plaintiff. The record also makes it clear that at the time the judgment below was entered, plaintiff's application for a permit had not run its administrative course. For all these reasons, the judgment below should be affirmed.

We judicially notice that the City's "Counterclaim" has gone to final judgment. On 22 August 1991, judgment was entered in the Superior Court of Randolph County granting the City the relief it sought in this action, requiring the Law Building to repair its premises as required by the City, or, in the alternative, for the Law Building to be demolished at the Law Building's expense. That judgment is the subject of a separate appeal by the Law Building to this Court, now pending in our docket number 9119SC1256.

The judgment below in this appeal is

Affirmed.

Chief Judge HEDRICK and Judge ARNOLD concur.

STATE OF NORTH CAROLINA v. JERRY LEWIS CUNNINGHAM

No. 9118SC818

(Filed 15 December 1992)

1. **Criminal Law § 321 (NCI4th)— conspiracy to sell and deliver controlled substance—joinder of defendants for trial—no error**

The trial court did not err in a prosecution for conspiracy to sell and deliver crack by joining two defendants for trial where at least one of the statutory prerequisites for joinder is present in that the offense with which both defendants were charged was part of the same act or transaction. Although the record contains no evidence of a written motion for joinder by the State, the Court assumed that the motion was properly made because defendant did not contend otherwise. N.C.G.S. § 15A-926(b).

Am Jur 2d, Trial §§ 157-175.

2. **Criminal Law § 339 (NCI4th)— conspiracy to sell and deliver controlled substance—motion to sever trials—no prejudice from denial**

A defendant in a prosecution for conspiracy to sell and deliver crack failed to show that the trial court's denial of his motion to sever deprived him of a fair trial where the only evidence elicited by his co-defendant's counsel (O'Hale) which could be deemed prejudicial to defendant was properly elicited by the State at defendant's consolidated trial and could have been properly elicited by the State if defendant had been tried alone. Moreover, the evidence against the co-defendant (Young) was weak and resulted in her acquittal.

Am Jur 2d, Trial §§ 157-175.

3. Criminal Law § 105 (NCI4th)— conspiracy to sell and deliver controlled substance—discovery of tests—report furnished insufficient—no prejudice

There was no prejudice in a prosecution for conspiracy to sell and deliver crack where the sole document provided to defendant before trial was the SBI "laboratory report," which revealed only the ultimate result of the numerous tests performed and did not enable defense counsel to determine what tests were performed, whether the testing was appropriate, or to become familiar with the test procedures. The information sought by defendant was discoverable pursuant to N.C.G.S. § 15A-903(e) and Article I, Section 19 of the North Carolina Constitution but not under the United States Constitution because there was no evidence that the information was exculpatory; however, the State met its burden of showing that the trial court's failure to grant defendant's discovery request was harmless beyond a reasonable doubt because the State presented overwhelming evidence of defendant's guilt.

Am Jur 2d, Depositions and Discovery § 449.

Right of accused in state court to have expert inspect, examine, or test physical evidence in possession of prosecution—modern cases. 27 ALR4th 1188.

4. Criminal Law § 1097 (NCI4th)— conspiracy to sell and deliver controlled substance—sentencing—prosecutor's statement of prior convictions—defense counsel's response—stipulation or admission

The trial court did not err when sentencing defendant for conspiracy to sell or deliver crack by finding as an aggravating factor that defendant had a prior conviction punishable by more than sixty days' confinement where, in response to the prosecutor's statement at sentencing that defendant has prior convictions of loitering and resisting a public officer, defense counsel stated, "Judge, we'd object to the loitering. That doesn't carry sixty days." Such a response is unequivocal and is tantamount to an admission or stipulation that defendant has the prior convictions asserted by the State. N.C.G.S. § 15A-1340.4(e).

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgment entered 13 March 1991 in Guilford County Superior Court by Judge Julius A. Rousseau, Jr. Heard in the Court of Appeals 16 October 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Lorinzo L. Joyner, for the State.

Assistant Public Defender Frederick G. Lind for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 13 March 1991, which judgment is based on a jury verdict convicting defendant of conspiracy to commit the felony of sale and delivery of a controlled substance, N.C.G.S. § 90-98 (1990).

The evidence presented by the State established that on 6 September 1990, defendant, Juanita Simmons (Simmons), Vanessa Young (Young), Ronald Hubbard (Hubbard), and Ella Jackson (Jackson) were in Hubbard's apartment at 303-A Avalon Road in Greensboro smoking crack cocaine. At approximately 11:30 p.m., several men drove into the parking lot. Young was standing outside, and according to Simmons' testimony, the men talked to Young about purchasing drugs. Young returned to the apartment, and Simmons obtained a "fifty," or one piece of cocaine worth $50.00, from defendant and took it outside to one of the men. The man told Simmons that he needed more crack because he had his friends with him, and Simmons returned to the apartment and obtained another "fifty" from defendant. Simmons gave both of the pieces of crack to the man in exchange for $100.00 in cash. She returned to the apartment and gave the money to defendant, then left the apartment with defendant and Jackson. Simmons was arrested when she and defendant returned to the apartment later that evening.

Detective Fulmore of the Vice/Narcotics Division of the Greensboro Police Department testified that on 6 September 1990, he and Detectives Reece, Phifer, and McMinn were involved in an undercover drug investigation in southeastern Greensboro. As part of that investigation, the police officers drove to an apartment located at 303-A Avalon Road at approximately 11:30 p.m. and discussed with Young, who was standing outside of the apartment, the possibility of purchasing drugs. Young went inside the apartment and Simmons emerged and approached the officers' car. Detec-

tive Fulmore purchased two white rock-like substances from Simmons for $100.00 in cash. Detective Phifer placed distinct folds in the bills used by Detective Fulmore to purchase the drugs.

Detective Fulmore returned to the apartment with additional officers approximately thirty to forty minutes after the initial drug purchase. When police knocked on the apartment door, Young answered and allowed them to enter. Hubbard testified that he was present when the police entered and was also present when defendant gave Simmons the two $50.00 pieces of crack cocaine to sell to the officers. Hubbard also saw Simmons give the proceeds of the sale to defendant. Hubbard gave the officers permission to search the premises. Simmons and defendant returned to the apartment while the officers were conducting the search. Detective Phifer conducted a pat-down search of defendant and found $312.00 in cash. Included in that amount were the folded bills in the denominations used by Detective Fulmore to purchase the rock-like substance from Simmons. Detective Phifer testified that defendant told him that he had purchased the two pieces of rock-like substance for $80.00 from an area called "The Hill."

The State Bureau of Investigation (SBI) conducted a laboratory analysis of the rock-like substance purchased from Simmons. Nancy Higgins (Higgins), a special agent with the SBI and a forensic drug chemist, performed a series of tests on the substance which revealed that the substance, weighing 0.4 grams, contained cocaine, a Schedule II controlled substance. Defendant was indicted for conspiracy to commit the sale and delivery of a controlled substance.

Prior to trial, upon request by defendant, the State provided defendant with a laboratory report which contained the following information: (1) the item submitted for analysis: "plastic bag containing off-white hard material"; (2) the type of analysis requested: "analyze for controlled substances"; (3) the results of the analysis: "cocaine base—Schedule II; weight of material—0.4 gram"; and (4) the disposition of evidence: "the unconsumed portion of the evidence is being retained for pick-up." Several days prior to trial, defendant filed a motion pursuant to N.C.G.S. § 15A-903(e) to discover all of the testing procedures and data derived as a result of the chemist's tests and examination of the rock-like substance purchased from Simmons. This motion was not ruled on until trial. On a motion by the State, defendant's case was joined for trial with that of Young, who was also charged with conspiracy to com-

mit the sale and delivery of cocaine. Young was represented by Greensboro Assistant Public Defender Robert O'Hale (O'Hale), and defendant was represented by Greensboro Assistant Public Defender Frederick Lind (Lind). Defendant unsuccessfully moved to sever the cases on the ground that O'Hale had advised Lind that O'Hale might be put in the position of having to attack defendant at trial in order to defend Young. Defendant renewed his motion to sever during trial and unsuccessfully moved for a mistrial based on the trial court's denial of his motions to sever.

At trial, in support of his earlier discovery motion, defendant introduced as *voir dire* exhibits the form used by Higgins to indicate the various tests performed by Higgins on the rock-like substance and the result of each (referred to by Higgins at trial as her "notes"), as well as a graph depicting an infrared scan of the substance, the scan being one of the tests performed by Higgins. The discovery motion was denied by the trial court. The trial court also denied a motion by defendant to suppress evidence, specifically $312.00 in cash, seized from his person. Defendant also moved for a mistrial based on the prosecutor's questioning of Hubbard regarding whether Hubbard had seen defendant with drugs prior to the day on which defendant was arrested, and based on the prosecutor's comment during his closing argument that crack cocaine "is a problem in our community and in every other community."

The jury convicted defendant as charged, however, it acquitted Young. At sentencing, the following exchange took place:

> THE COURT: All right. What, if any, prior criminal record does this defendant have?
>
> [THE PROSECUTOR]: Your Honor, this defendant, at 89 Cr 75412, was convicted of loitering for the purpose of drug-related activity. That was on 12/20/1989. He was subsequently convicted of resisting and obstructing a public officer at 89 Cr 75411. He was convicted on the same date, Your Honor. That is the defendant's prior record to date.
>
> THE COURT: All right, Mr. Lind.
>
> MR. LIND: Judge, we'd object to the loitering. That doesn't carry 60 days.
>
> THE COURT: Well, is that a city ordinance or—

MR. LIND: City ordinance.

THE COURT: All right, I'll disregard the loitering.

The trial court found as an aggravating sentencing factor that defendant has a criminal record punishable by more than sixty days' imprisonment. The court found no sentencing factors in mitigation, and sentenced defendant to a prison term of six years, a term in excess of the presumptive term. The trial court denied defendant's motion to arrest judgment based on the alleged failure of the indictment to allege every element of the offense charged. Defendant appeals.

The issues are whether (I) the trial court abused its discretion by granting the State's motion for joinder of defendant and Vanessa Young for trial and by denying defendant's motion to sever his trial from that of Young; (II) defendant was entitled to pretrial discovery of the chemist's laboratory form indicating the various tests performed on the rock-like substance at issue and the results thereof, and the graph of the infrared scan and, if so, whether the trial court's refusal to order production of such documents upon motion by defendant constitutes reversible error; and (III) defendant effectively stipulated to the prosecutor's assertion that defendant has a prior conviction for a criminal offense punishable by more than sixty days' confinement.

I

Defendant argues that the trial court's grant of the State's motion for joinder and its denial of his motions to sever his trial from that of Vanessa Young, and for a mistrial based on the court's refusal to sever the trials, deprived him of a fair trial. We disagree.

Joinder

[1] The trial court, in its discretion, may join two defendants for trial upon written motion of the prosecutor (1) when each of the defendants is charged with accountability for each offense, or (2) when the several offenses charged were part of a common scheme or plan or 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. N.C.G.S. § 15A-926(b) (1988). The joinder of two defendants charged with the same crime or crimes is not only permissible under Section

15A-926, but "public policy strongly compels consolidation as the rule rather than the exception." *State v. Belton*, 318 N.C. 141, 147, 347 S.E.2d 755, 759 (1986) (citations omitted).

The record in the instant case indicates that at least one of the statutory prerequisites for joinder is present in that the offense with which both defendant and Young were charged was part of the same act or transaction. And although the record contains no evidence of a written motion for joinder by the State, we assume that it was properly made in light of the fact that defendant does not contend otherwise. *See Belton*, 318 N.C. at 147 n.2, 347 S.E.2d at 759 n.2 (where defendant does not contest joinder on the ground that written motion was not made by prosecution, Court assumes proper motion was made).

Severance

[2] When a defendant moves for severance of multiple defendants who have been joined for trial, the trial court must grant the motion whenever (1) if before trial, it is found necessary to promote a fair determination of the guilt or innocence of one or more defendants, or, (2) if during trial, it is found necessary to achieve a fair determination of the guilt or innocence of that defendant. N.C.G.S. § 15A-927(c) (1988). A trial court's denial of a defendant's motion to sever trials is discretionary, and will not be disturbed unless the defendant shows that the joinder has deprived him of a fair trial. *State v. Porter*, 303 N.C. 680, 688, 281 S.E.2d 377, 383 (1981).

> Mere inconsistencies in defenses do not necessarily amount to the kind of antagonism between defendants joined for trial that deprives one or the other of a fair trial. Rather, the defenses must be "so irreconcilable that 'the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty' . . . [or] so discrepant as to pose an evidentiary contest more between defendants themselves than between the State and the defendants . . . [resulting in a] spectacle where the State simply stands by and witnesses 'a combat in which the defendants [attempt] to destroy each other.' "

Belton, 318 N.C. at 148, 347 S.E.2d at 760 (citations omitted).

In the instant case, defendant points to testimony elicited by O'Hale on cross-examination of Detectives Reece and Phifer as being "very damaging to the defendant." However, our review of the transcript reveals otherwise. O'Hale elicited nothing on cross-

examination of Detective Reece which could be considered "damaging" or prejudicial to defendant. O'Hale asked Detective Reece only one question regarding defendant: "Okay. [Defendant] never said anything at all about Vanessa Young, did he?" Detective Reece responded, "He never did." Detective Phifer testified on cross-examination by O'Hale that defendant had given a statement to police in which he admitted purchasing drugs from "The Hill" area for $80.00 in an attempt to sell them for $100.00 in order to make a $20.00 profit. However, identical testimony had previously been elicited by the prosecutor in her direct examination of Detective Phifer. Co-defendant Young did not testify at trial.

The testimony elicited by O'Hale regarding defendant's statement to police—the only evidence elicited by O'Hale which could be deemed prejudicial to defendant—was properly elicited *by the State* at defendant's consolidated trial, and could have been properly elicited by the State if defendant had been tried alone. Moreover, the evidence against Young was weak and resulted in her acquittal. Thus, defendant cannot contend that his association with Young prejudiced the jury against him. In sum, defendant has failed to show that the trial court's denial of his motion to sever his trial from that of Young deprived him of a fair trial.

II

[3] Defendant argues that the trial court erred by denying his motion to discover the tests performed on, and the data derived therefrom, the rock-like substance sold to police officers on the night in question. According to defendant, the copy of a laboratory report provided by the SBI indicating that the substance analyzed was cocaine base and weighed 0.4 grams is a mere conclusion of the chemical examiner as to the presence of a certain controlled substance and is insufficient to enable defense counsel to adequately prepare for trial, thereby depriving defendant of his right to due process of law, a fair trial, confrontation, and the right to compulsory process as guaranteed by the Fifth, Sixth, and Fourteenth Amendments of the United States Constitution, and of his rights under Article 1, Sections 19 and 23 of the North Carolina Constitution.

Whether a criminal defendant is entitled to a chemist's laboratory tests performed during a controlled substance analysis, and the data derived therefrom, is an issue of first impression for our Courts.

Statutory Right to Criminal Discovery of Scientific Tests

In North Carolina, several different categories of the State's case are available to a criminal defendant pursuant to statute. *See* N.C.G.S. § 15A-903 (1988). North Carolina Gen. Stat. § 15A-903, enacted in 1973, provides in pertinent part:

> (e) Reports of Examinations and Tests.—Upon motion of a defendant, the court must order the prosecutor to provide a copy of or to permit the defendant to inspect and copy or photograph results or reports of physical or mental examinations or of tests, measurements or experiments made in connection with the case, or copies thereof, within the possession, custody, or control of the State, the existence of which is known or by the exercise of due diligence may become known to the prosecutor. . . .

N.C.G.S. § 15A-903(e) (1988). The Official Commentary to Section 15A-903 indicates that Section 15A-903 was patterned after Federal Rule of Criminal Procedure 16, which was initially adopted in 1946 and amended several times thereafter. *See* N.C.G.S. § 15A-903 (1988), Official Commentary; *see also State v. Brown*, 306 N.C. 151, 163, 293 S.E.2d 569, 578, *cert. denied*, 459 U.S. 1080, 74 L. Ed. 2d 642 (1982) (Rule 16 of the Federal Rules of Criminal Procedure is the "federal counterpart of our G.S. 15A-903"). Accordingly, cases and commentary construing Rule 16 provide guidance regarding the proper construction of Section 15A-903(e). *Cf. Brewer v. Harris*, 279 N.C. 288, 292, 182 S.E.2d 345, 347 (1971) (because federal rules are the source of the North Carolina Rules of Civil Procedure, we look to the decisions of federal jurisdictions for guidance). Federal Rule 16 contains the following provision:

> (D) Reports of Examinations and Tests. Upon request of a defendant the government shall permit the defendant to inspect and copy or photograph any results or reports of physical or mental examinations, and of scientific tests or experiments, or copies thereof, which are within the possession, custody, or control of the government, the existence of which is known, or by the exercise of due diligence may become known, to the attorney for the government, and which are material to the preparation of the defense or are intended for use by the government as evidence in chief at the trial.

Fed. R. Crim. P. 16(a)(1)(D). Under both Section 15A-903(e) and federal Rule 16, the disclosure of discoverable "results or reports" of examinations or tests is mandatory. *See* N.C.G.S. § 15A-903(e) (1988) (upon motion of defendant, the trial court *must* order access by defendant to results or reports); Fed. R. Crim. P. 16 advisory committee's note, 1974 amendment.

Because of the extraordinarily high probative value generally assigned by jurors to expert testimony, of the need for intensive trial preparation due to the difficulty involved in the cross-examination of expert witnesses, and of the inequality of investigative resources between prosecution and defense regarding evidence which must be analyzed in a laboratory, federal Rule 16 has been construed to provide criminal defendants with broad pretrial access to a wide array of medical, scientific, and other materials obtained by or prepared for the prosecution which are material to the preparation of the defense or are intended for use by the government in its case in chief. *See* Daniel A. Rezneck, *The New Federal Rules of Criminal Procedure*, 54 Geo. L.J. 1276, 1278 (1966). Such material includes not only conclusory reports by chemists indicating that an "analysis" revealed the presence of a controlled substance, but also the results of any tests performed or procedures utilized by the chemists to reach such a conclusion. *Id.; see also* 2 A.B.A. Standards for Criminal Justice, Commentary to Standard 11-2.1(a)(iv) (2d ed. 1980 & Supp. 1986) (advocating pretrial access by defense counsel to "relevant tests" to enable counsel to determine that the tests performed were appropriate and to become familiar with test procedures); Fed. R. Crim. P. 16 advisory committee's note, 1974 amendment (indicating that the term "any results or reports" is to be given a liberal, not a restricted construction); *United States v. Penix*, 516 F. Supp. 248 (W.D. Okla. 1981) (defendant entitled to copies of all scientific tests performed on cocaine pursuant to his request for "any and all results" of physical or mental examination or of tests); *State v. Burgess*, 482 So. 2d 651 (La. Ct. App. 1985) (discovery statute similar in part to federal Rule 16 required more than the conclusory report of two experts in order to afford defendant an opportunity to prepare adequately for trial).

As previously discussed, the relevant portion of Section 15A-903(e) provides that, upon motion by defendant, the court *must* order the prosecutor to allow defendant access to "results or reports . . . of tests . . . made in connection with the case . . . [and] within the possession, custody, or control of the State . . . ." Like

federal Rule 16(a)(1)(D), Section 15A-903(e) must be construed as entitling a criminal defendant to pretrial discovery of not only conclusory laboratory reports, but also of any tests performed or procedures utilized by chemists to reach such conclusions. However, unlike under federal Rule 16(a)(1)(D), no requirement exists that such information be material to the preparation of the defense or intended for use by the State in its case in chief.

Constitutional Right To Criminal Discovery of Scientific Tests

United States Constitution

With the exception of evidence falling within the realm of the *Brady* rule, *see Brady v. Maryland*, 373 U.S. 83, 10 L. Ed. 2d 215 (1963) (prosecution has duty under the Due Process Clause to disclose evidence favorable to the defendant upon request), there is no general right to discovery in criminal cases under the United States Constitution, thus a state does not violate the Due Process Clause of the Federal Constitution when it fails to grant pretrial disclosure of material relevant to defense preparation but not exculpatory. 2 Charles A. Wright, *Federal Practice and Procedure: Criminal 2d* § 252 (1982) (citing *Weatherford v. Bursey*, 429 U.S. 545, 51 L. Ed. 2d 30 (1977)); 2 Wayne R. LaFave & Jerold H. Israel, *Criminal Procedure* § 19.3(a) (1984 & Supp. 1991).

North Carolina Constitution

Although the extent to which a criminal defendant is entitled to discovery under the United States Constitution seems to be well-settled, the scope of a defendant's right to discovery in a criminal case under Article I, Section 19 of the North Carolina Constitution has not been well-defined by our Courts. Despite the fact that our Courts are bound by federal court decisions construing the Due Process Clause of the United States Constitution, such decisions do not control an interpretation by our Courts of the Law of the Land Clause contained in the North Carolina Constitution. *McNeil v. Harnett County*, 327 N.C. 552, 563, 398 S.E.2d 475, 481 (1990). Thus, our Courts have recognized a criminal defendant's due process right in limited circumstances to inspect the crime scene, *see Brown*, 306 N.C. at 163-64, 293 S.E.2d at 578, and to have an independent chemical analysis performed upon seized substances. *See State v. Jones*, 85 N.C. App. 56, 65-66, 354

S.E.2d 251, 257, *disc. rev. denied*, 320 N.C. 173, 358 S.E.2d 61 (1987).[1]

The record in the instant case indicates that Agent Higgins performed a number of tests on the substance at issue, including a Marquis test, a cobalt thiocyanate test, a microcrystalline test, and an infrared spectroscopy. Higgins entered the result of each of these tests on a one-page form. In addition, Higgins generated a graph during her performance of the infrared spectroscopy. The trial court denied defendant pretrial access to both the form and the graph. On direct examination at trial, using the form, Higgins testified regarding her performance of "all of these different tests." The trial court denied defendant's request for a recess in order to review some of "the items" to which Higgins referred in her testimony, but allowed defendant time to review the documents during his cross-examination of Higgins.

In sum, the sole document provided to defendant before trial by the State was the SBI "laboratory report." This report, which basically is limited to a statement that the material analyzed contained cocaine, reveals only the ultimate result of the numerous tests performed by Agent Higgins. As such, it does not enable defendant's counsel to determine what tests were performed and whether the testing was appropriate, or to become familiar with the test procedures. We conclude that the information sought by defendant is discoverable pursuant to Section 15A-903(e) and the North Carolina Constitution, *cf. State v. Goldberg*, 261 N.C. 181, 192-93, 134 S.E.2d 334, 341, *cert. denied*, 377 U.S. 978, 12 L. Ed. 2d 747 (1964) (defendants have no unqualified right under the State constitution to "an inspection of all papers and documents, if any, in the files of the [SBI]"), and therefore the trial court erroneously denied defendant's motion for pretrial discovery of these documents. Defendant in this case has no federal constitutional right to such discovery because there is no evidence that the information was exculpatory.

However, even under the heightened standard of review applied by this Court to constitutional errors, the State has met its burden of showing that the trial court's failure to grant defend-

1. A defendant currently enjoys a concomitant statutory right to inspect the crime scene and to independently analyze seized substances. *See* N.C.G.S. § 15A-903(d), (e) (1988).

ant's discovery request was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1988); *State v. Wallace*, 104 N.C. App. 498, 505, 410 S.E.2d 226, 230 (1991), *disc. rev. denied*, 331 N.C. 290, 416 S.E.2d 398 (1992) (harmless beyond a reasonable doubt proper standard for violations of both federal and state constitutions). This is so because the State presented overwhelming evidence of defendant's guilt, including testimony from others present at the apartment on the night in question that defendant and others were "smoking crack" and "getting high" (tending to corroborate Higgins' testimony that the substance seized was indeed cocaine) and testimony from police officers that defendant admitted that he purchased drugs from "The Hill" to resell prior to being arrested.

III

[4] Defendant argues that the trial court committed reversible error by finding as an aggravating sentencing factor that defendant has a prior conviction for a criminal offense punishable by more than sixty days' confinement. Specifically, defendant contends that the trial court's finding is based on the mere unsworn assertion by the prosecutor of defendant's criminal record, which as a matter of law cannot support such a finding.

Under the Fair Sentencing Act, N.C.G.S. § 15A-1340.1 *et seq.*, the trial court may not, absent a stipulation of the parties, find as an aggravating factor a defendant's prior conviction where the only evidence to support it is the prosecutor's mere assertion that the factor exists. *See* N.C.G.S. § 15A-1340.4(e) (1988) (prior conviction may be proved by stipulation or by presentation of either the original or a certified copy of the court record of the prior conviction); *State v. Thompson*, 309 N.C. 421, 424-25, 307 S.E.2d 156, 159 (1983). However, a defense counsel's response to the prosecutor's assertion of a prior conviction can in certain cases constitute a stipulation or an admission that the defendant indeed has the convictions represented by the State. *State v. Brewer*, 89 N.C. App. 431, 436, 366 S.E.2d 580, 583, *disc. rev. denied*, 322 N.C. 482, 370 S.E.2d 229 (1988) (when prosecutor stated that defendant had eleven and fourteen-year-old convictions, defense counsel's response that defendant's record indicated no convictions for almost ten years constituted an admission that defendant did have the two older convictions); *State v. Albert*, 312 N.C. 567, 579-80, 324 S.E.2d 233, 241 (1985) (when asked if any of the three defendants had a prior criminal record, prosecutor's response that "only Mr.

Dearen" had one constituted a stipulation that neither of the other two defendants had a criminal record and supported that fact in mitigation); *see also State v. Canady*, 330 N.C. 398, 399-400, 410 S.E.2d 875, 877 (1991) (defendant's *silence* while the prosecuting attorney makes a statement does *not* support an inference that defendant consented to the statement).

In the instant case, in response to the prosecutor's statement at sentencing that defendant has prior convictions of loitering and resisting a public officer, defense counsel stated, "Judge, we'd object to the loitering. That doesn't carry sixty days." Such a response is unequivocal and is tantamount to an admission or stipulation that defendant has the prior convictions asserted by the State, and, accordingly, we reject this assignment of error.

We have reviewed defendant's remaining assignments of error, and have determined that they are either without merit or do not constitute prejudicial error entitling defendant to a new trial.

No error.

Judges WYNN and WALKER concur.

BOARD OF ADJUSTMENT OF THE TOWN OF SWANSBORO, IAN SMITH, MARY ELLEN YANICH, LELAND ZIEGLER, ALLEN E. GUIN, WESLEY STANLEY, AND RAYMOND C. FRENCH, JR. v. THE TOWN OF SWANSBORO, A MUNICIPAL CORPORATION, MATTHEW TEACHEY, JOHN D. LICKO, MARK J. ALEXANDER, AND VERNON TAYLOR (IN THEIR OFFICIAL CAPACITIES AS THE PURPORTED MEMBERS OF THE BOARD OF ADJUSTMENT OF THE TOWN OF SWANSBORO), JOAN DEATON, LESLIE W. EDMONDS, JR., GEORGE W. KIETZMAN, AND PAUL W. EDGERTON (IN THEIR OFFICIAL CAPACITIES AS THE BOARD OF COMMISSIONERS OF THE TOWN OF SWANSBORO), AND WILLIAM E. RUSSELL, IN HIS OFFICIAL CAPACITY AS MAYOR OF THE TOWN OF SWANSBORO

No. 914SC846

(Filed 15 December 1992)

1. Municipal Corporations § 6 (NCI3d)— Board of Adjustment— proposed change—public notice—sufficient

The third notice of a public hearing concerning the abolition of the old Board of Adjustment for the Town of Swansboro

and the appointment of a new Board of Adjustment sufficiently apprised plaintiffs of the nature and character of the action proposed by defendants where neither of the first two notices referenced the creation of a new Board of Adjustment, but the final notice not only referenced the abolition of the old Board but delineated in detail the content of the section establishing the new Board. N.C.G.S. § 160A-364.

Am Jur 2d, Municipal Corporations § 161.

2. **Municipal Corporations § 6 (NCI3d)— Board of Adjustment— abolition of old Board and creation of new—effectively shortening terms—no error**

The abolition of the Board of Adjustment by the Town of Swansboro and the creation of a new Board did not violate N.C.G.S. § 160A-388(a) in that the terms of three members were effectively shortened. If a board of adjustment is created, then it must consist of at least five appointees who each have three year terms and such terms may not be reduced by the city council as long as the board of adjustment is in existence. However, the prohibition against the reduction of the length of the terms of the members of an existing board of adjustment does not diminish the authority of the city council to abolish the board. N.C.G.S. § 160A-388(a); N.C.G.S. § 160A-146.

Am Jur 2d, Municipal Corporations § 239.

3. **Municipal Corporations § 6 (NCI3d)— Board of Adjustment— abolition of old and creation of new—motives—immaterial**

Although plaintiffs contend that the abolition of the old Board of Adjustment and the creation of a new Board by the Board of Commissioners of the Town of Swansboro was arbitrary and capricious in that the sole motive for the action was the anger of the mayor over the refusal of the old Board to grant the mayor a special use permit, defendants are authorized by statute to abolish and create boards of adjustment and the reason for defendants' actions are immaterial. N.C.G.S. § 160A-146; N.C.G.S. § 160A-388(a).

Am Jur 2d, Municipal Corporations § 239.

4. Municipal Corporations § 6 (NCI4th)— municipal ordinance—concurrent service prohibited—conflict with statute—invalid

A provision of an ordinance of the Town of Swansboro prohibiting dual service as an elected official and a member of the Board of Adjustment or for one year after termination of service as an elected official is invalid because it makes unlawful an act expressly made lawful by N.C.G.S. § 128-1.1, which provides that any person who holds an elective office in State or local government is authorized to hold concurrently one other appointive office in either State or local government.

Am Jur 2d, Municipal Corporations § 246.

Judge LEWIS dissenting.

Appeal by plaintiffs from order filed 1 May 1991 in Onslow County Superior Court by Judge Gary E. Trawick. Heard in the Court of Appeals 16 September 1992.

Jeffrey S. Miller for plaintiff-appellants.

Richard L. Stanley for defendant-appellees.

GREENE, Judge.

Plaintiffs appeal from an order filed 1 May 1991, granting defendants' motion for summary judgment, N.C.G.S. § 1A-1, Rule 56 (1990).

The facts pertinent to this appeal establish that on 20 September 1985, the Board of Commissioners of the Town of Swansboro enacted Section 9-2-16 of its Code of Ordinances which provided for the appointment of a Board of Adjustment consisting of five residents of the town and two additional members from its extraterritorial jurisdiction. On 8 June 1989, plaintiffs Ian Smith (Smith) and Mary Ellen Yanich (Yanich) were appointed to the Swansboro Board of Adjustment for three-year terms. On 9 November 1989, plaintiff Leland Ziegler (Ziegler) was appointed to the Board of Adjustment for a three-year term.

On 14 December 1989, at a meeting of the Board of Commissioners, defendant Mayor William E. Russell (Russell) presented a proposed change to Section 9-2-16 regarding the appointments and terms of members of the Board of Adjustment. On 27 December

1989 and again on 3 January 1990, the Board of Commissioners published the following notice in a local newspaper:

PUBLIC HEARING NOTICE

> The Board of Commissioners of the Town of Swansboro will hold a public hearing on Thursday January 11, 1990 at 6:30 p.m. to give parties of interest an opportunity to be heard on the proposed ordinance amendment regarding length of appointment terms, etc. for the Board of Adjustment.
>
> Town Administrator

Plaintiffs Smith, Yanich, and Ziegler attended the public hearing, and, following a discussion, the Board of Commissioners voted to readvertise notice of the public hearing in order to inform the public that one of the purposes of the proposed amendment was to abolish the Board of Adjustment. On 17 January 1990 and again on 24 January 1990, the Board of Commissioners published the following notice:

PUBLIC HEARING
TOWN OF SWANSBORO

> The Board of Commissioners of the Town of Swansboro will hold a public hearing on Thursday, January 25, 1990 at 7:00 p.m. to give parties of interest an opportunity to be heard on the change to the Town of Swansboro Zoning Ordinance, in respect to abolishing the Board of Adjustment. A copy of the proposed change is on file with the Town Clerk's Office. Additional amendments may be presented and changes made prior to adoption.
>
> Town Administrator

At the conclusion of the 25 January 1990 public hearing, the Board of Commissioners adopted an amendment to Section 9-2-16 which abolishes the old Board of Adjustment and provides for the appointment of a new Board of Adjustment consisting of five resident members and two alternate resident members, and two members and one alternate member from the extraterritorial jurisdiction of the town. The amended ordinance also provides that "members of the Town governing body, Mayor and Commissioners are not eligible to serve on the [new] Board of Adjustment while serving on the governing body or for a period of one (1) year after service on the governing body is terminated." The appointments to the

new Board of Adjustment are for a term of three years, with the initial terms being staggered. Previous Board of Adjustment members who are eligible under the criteria established by the amendment may be considered for appointment to the new Board of Adjustment. Appointees to the new Board of Adjustment may serve no more than two consecutive three-year terms.

At the 8 February 1990 regular meeting of the Board of Commissioners, appointments were made to the new Board of Adjustment. None of the members of the old Board were appointed, and, in fact, plaintiffs Yanich and Ziegler, as former members of the city council, were ineligible for appointment to the new Board as a result of the changes effected by the amendment to Section 9-2-16. On 2 March 1990, plaintiffs filed an action against defendants claiming that the newly enacted ordinance was invalid and seeking injunctive and declaratory relief. Plaintiffs' complaint alleges in pertinent part that the abolition of the old Board of Adjustment and the effect of the new ordinance on plaintiffs' eligibility to serve on the new Board were prompted by defendant Russell's anger regarding the old Board's refusal to grant Russell a special use permit for property owned by Russell in downtown Swansboro.

On 21 and 28 March 1990, the Board of Commissioners readvertised notice of public hearing and held a public hearing on 3 April 1990 to once again consider the proposed amendment to Section 9-2-16. According to defendants, this was done because the old Board of Adjustment did not complete its business at its 12 February 1990 meeting and because "doubt existed as to the effective date of the Amendment." This third and final notice reads as follows:

> STATE OF NORTH CAROLINA
> NOTICE OF PUBLIC HEARING
> COUNTY OF ONSLOW
>
> The Board of Commissioners of the Town of Swansboro will hold a public hearing on April 3, 1990, at 7:00 p.m. in the Swansboro Town Hall to consider the following amendments to the Town of Swansboro Zoning Ordinance:
>
> 1. The proposed zoning amendment to Section 9-2-16 would abolish the Swansboro Board of Adjustment as it existed prior to January 25, 1990.
>
> 2. A new Section 9-2-16 to the Zoning Ordinance would be adopted which would provide for a new Board of Adjustment

consisting of seven members, five of which would be residents of the Town of Swansboro, and the remaining two members would reside outside the Town of Swansboro but within its zoning jurisdiction. Said amendment would further provide that members of the Town Board of Commissioners and the Mayor would not be eligible to serve during their term of office as an elected official of the Town of Swansboro or for a period of one year after their term of office had expired. Appointments to the Board of Adjustment would be for a period of three years but some of the initial appointments will be for a term of two years in order to provide for staggered terms.

3. The proposed amendment would repeal Section 9-2-16(a) of the Zoning Ordinance as it existed prior to January 25, 1990, and would repeal any attempted enactment of amendments to Section 9-2-16 on and after January 25, 1990.

A copy of the proposed amendment may be reviewed in the office of the Town Clerk.

This the 19th day of March, 1990.

Town of Swansboro
By: William Price
Town Administrator

Following the hearing, the Board of Commissioners adopted new Section 9-2-16 in the same form as that adopted at the conclusion of the 25 January 1990 public hearing, the amendment to become effective after 16 April 1990.

On 26 April 1990, the trial court heard and denied plaintiffs' motion for a preliminary injunction. On 20 August 1990, plaintiffs filed a motion for summary judgment, and on 30 August 1990, defendants did the same. On 1 May 1991, the trial court granted defendants' motion for summary judgment. Plaintiffs appeal.

The issues presented are whether (I) defendants' notice of public hearing regarding the proposed amendment to Section 9-2-16 sufficiently apprised those interested of the nature and character of the proposed action as a matter of law; (II) defendants' abolition of the old Board of Adjustment shortened the terms of plaintiffs Smith, Yanich, and Ziegler in violation of N.C.G.S. § 160A-388(a); (III) defendants' motive for abolishing the old Board and contem-

poraneously creating a new Board is relevant to the issue of the validity of defendants' actions; and (IV) the amendment to Section 9-2-16 impermissibly restricts dual service as an elected and appointed official in violation of N.C.G.S. § 128-1.1.

I

[1] Plaintiffs argue that the content of defendants' notice of public hearing to discuss the proposed changes to Section 9-2-16 was insufficient as a matter of law. Specifically, plaintiffs argue that the notice failed to apprise those interested of the proposed establishment of the new Board of Adjustment.

North Carolina Gen. Stat. § 160A-364 provides that, "before adopting or amending any ordinance, . . . the city council shall hold a public hearing on it." N.C.G.S. § 160A-364 (1987). Notice of the public hearing must be published in an area newspaper once a week for two consecutive weeks, the first notice being published not less than ten days nor more than twenty-five days before the date fixed for the hearing. *Id.* To be adequate, the notice required under Section 160A-364 "must fairly and sufficiently apprise those whose rights may be affected of the nature and character of the action proposed." *Sellers v. City of Asheville*, 33 N.C. App. 544, 549, 236 S.E.2d 283, 286 (1977). Not only must notice of a zoning ordinance or amendment "adequately inform as to what changes are proposed, [but] the actual change must conform substantially to the proposed changes in the notice." 8A Eugene McQuillan, *The Law of Municipal Corporations* § 25.249 (3d ed. 1986); *accord Heaton v. City of Charlotte*, 277 N.C. 506, 518, 178 S.E.2d 352, 359 (1971).

That defendants complied with the frequency and time requirements of Section 160A-364 is undisputed. The record indicates that after publication of the first notice, which referenced a "proposed ordinance amendment regarding length of appointment terms, etc. for the Board of Adjustment," and the first hearing, defendants republished notice of a hearing to discuss "changes to the Swansboro Zoning Ordinance in respect to abolishing the Board of Adjustment," after which a second hearing was held and the amendment creating the new Board of Adjustment adopted. We agree with plaintiffs that, at this point, defendants had not complied with the notice requirement of Section 160A-364 because neither of the first two notices referenced the creation of a new Board of Adjustment, and thus failed to sufficiently apprise those interested of

the nature and character of defendants' proposed action. However, on 21 and 28 March 1990, defendants once again published notice of public hearing and held a third public hearing on the same issues. The final notice not only referenced the abolition of the old Board, but also delineated in detail the content of new Section 9-2-16, establishing the new Board of Adjustment. We hold that the third notice, which was published prior to the final public hearing on the matter and prior to the reenactment of the amendment to Section 9-2-16 and its effective date, sufficiently apprised plaintiffs of the nature and character of the action proposed by defendants.

II

[2] Plaintiffs argue that defendants' abolition of the old Board of Adjustment shortened the three-year terms of Smith, Yanich, and Ziegler in violation of N.C.G.S. § 160A-388(a), which, according to plaintiffs, mandates that all Board of Adjustment members serve for three years.

North Carolina Gen. Stat. § 160A-388(a) provides in pertinent part that "[t]he city council *may* provide for the appointment and compensation of a board of adjustment consisting of five or more members, each to be appointed for three years." N.C.G.S. § 160A-388(a) (Supp. 1991) (emphasis added). Section 160A-146 grants to the city council the authority to "*create*, change, *abolish*, and consolidate offices, positions, departments, *boards*, commissions, and agencies of the city government," except that the council may not abolish any office, position, department, board, commission, or agency established and required by law. N.C.G.S. § 160A-146 (1987) (emphasis added). The establishment of a board of adjustment is not required by law. *See* N.C.G.S. § 160A-388(a) (Supp. 1991) (city council *may* provide for a board of adjustment).

Section 160A-388(a) expressly provides that the establishment of a board of adjustment is within the city council's discretion, and that if such a board is created, it must consist of five or more members each having three-year terms. Section 160A-146 empowers the city council to create *and abolish* boards. The fact that defendants' action had the effect of shortening the terms of some of the old Board members is not dispositive. This is so because the teaching of Section 160A-146 and Section 160A-388(a), when read together to give effect to each, *see Jackson v. Guilford County Bd. of Adjustment*, 275 N.C. 155, 166 S.E.2d 78 (1969) (statutes dealing with same subject matter must be construed *in pari materia*

and harmonized, if possible, to give effect to each), is as follows: *If* a board of adjustment is created, then it must consist of at least five appointees, each with three-year terms. Such terms may not be reduced by the city council as long as the board of adjustment is in existence. However, the prohibition against the reduction of the length of the terms of the members of an existing board of adjustment does not diminish the authority of the city council to abolish the board.

III

[3] Plaintiffs contend that the sole motive for the abolition of the old Board and contemporaneous creation of a new one was defendant Russell's anger regarding the old Board of Adjustment's refusal to grant Russell a special use permit, a matter which was later resolved through litigation in Russell's favor, and that therefore the action of the Board of Commissioners was arbitrary and capricious.

It is well-established that a court may not inquire into the motives of the city council in enacting an ordinance which is valid on its face. *Clark's Greenville, Inc. v. West*, 268 N.C. 527, 530, 151 S.E.2d 5, 7-8 (1966); *S.S. Kresge Co. v. Tomlinson*, 275 N.C. 1, 13, 165 S.E.2d 236, 243 (1969). In the instant case, the enactment of the amendment to Section 9-2-16, abolishing the old and creating a new Board of Adjustment, is valid because defendants are authorized by statute to abolish and to create boards of adjustment. *See* N.C.G.S. § 160A-146 (1987); N.C.G.S. § 160A-388(a) (Supp. 1991). Thus, the reasons for defendants' actions are immaterial.

IV

[4] Plaintiffs argue that the amendment to Section 9-2-16 conflicts with N.C.G.S. § 128-1.1, and is therefore invalid. Section 9-2-16 in part prohibits concurrent service by members of the town governing body, the mayor, or the commissioners on the new Board of Adjustment or for one year after termination of service on the governing body. North Carolina Gen. Stat. § 128-1.1 provides that any person who holds an elective office in State or local government is authorized to hold concurrently one other appointive office in either State or local government. N.C.G.S. § 128-1.1(b) (1991). Plaintiffs contend that such conflict is prohibited under N.C.G.S. § 160A-174, which provides in pertinent part that a city ordinance shall be consistent with the laws of North Carolina, and is inconsist-

ent when "the ordinance makes unlawful an act, omission, or condition which is expressly made lawful by State or federal law." N.C.G.S. § 160A-174(b) (1987).

The dispositive question is whether the provision in Section 9-2-16 prohibiting concurrent service as an elected town official and as a member of the Board of Adjustment, an appointed position, conflicts with Section 128-1.1. We hold that it does. The prohibition in the Swansboro ordinance makes unlawful an act which is expressly made lawful by Section 128-1.1. Therefore, that portion of Section 9-2-16 prohibiting dual service as an elected official and as a member of the Board of Adjustment or for one year after termination of service as an elected official is invalid. However, because the invalid provision is separable from the remaining provisions of new Section 9-2-16, in all other respects the ordinance is enforceable. *See Jackson*, 275 N.C. at 167-68, 166 S.E.2d at 87 (if valid and invalid provisions of an ordinance are separable, valid portions will be given full effect). The trial court properly granted summary judgment for defendants.

Affirmed.

Judge WYNN concurs.

Judge LEWIS dissents with separate opinion.

Judge LEWIS dissenting.

I respectfully dissent from the majority's interpretation of N.C.G.S. §§ 160A-146 and 160A-388. These statutes cannot be harmonized as the majority asserts unless the three-year term found in § 160A-388(a) is given effect. The general rule is "[w]here . . . one statute deals with a particular situation in detail, while another statute deals with it in general and comprehensive terms, the particular statute will be construed as controlling absent a clear legislative intent to the contrary." *Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559 (1988) (citation omitted); *Doyle v. Southeastern Glass Laminates, Inc.*, 104 N.C. App. 326, 332, 409 S.E.2d 732 (1991), *rev'd on other grounds*, 331 N.C. 748, 417 S.E.2d 236 (1992). Because there is no clear legislative intent to the contrary in the case at hand, the specific statute, § 160A-388(a), must control.

Section 160A-146 broadly confers upon a city council the power to "create, change, abolish, and consolidate offices, positions, departments, boards, commissions, and agencies of the city government and generally organize and reorganize the city government in order to promote orderly and efficient administration of city affairs. . . ." N.C.G.S. § 160A-146 (1987). Section 160A-388(a), however, specifically deals with the creation of a board of adjustment, stating that "[t]he city council may provide for the appointment and compensation of a board of adjustment consisting of five or more members, *each to be appointed for three years*." N.C.G.S. § 160A-388(a) (Supp. 1992) (emphasis added). Although it is not required to do so, if a town chooses to create a Board of Adjustment, § 160A-388(a) mandates that the members be appointed to serve three-year terms. Fixed terms ensure that members will be able to act impartially, and will not be subject to unwarranted political pressure or be dissuaded from making unpopular decisions for fear that they will be replaced. Because § 160A-388(a) specifically addresses the various aspects of a Board of Adjustment, its provisions should prevail over the more general provisions of § 160A-146.

Section 160A-146 does give a city council the right to create and abolish, among other things, boards created by the council. The city council was not required to create the Board of Adjustment and certainly had the power to abolish it altogether. However, abolishing the Board and then immediately recreating it with different members goes beyond the scope of this statute. The majority's interpretation of the statutes allowing such actions permits a city council to replace members of a board at will. The Board's supposed independence is nullified and the members reduced to no more than the puppets of the mayor and town board. Had the legislature wanted such a situation it would have made the appointments "at will" instead of "for three years." The defendants have been permitted to circumvent the requirements of § 160A-388(a) for obvious political purposes.

As the majority points out, § 160A-146 excludes offices and other entities from its provisions if they are "required by law." § 160A-146. Since the creation of a board of adjustment is permissive, and therefore not required by law, such a board is subject to § 160A-146 and may be abolished. However, it does not follow that a town may abolish a board with the intention of simultaneous-

ly recreating it in order to alter its membership and eviscerate its independence.

Indeed, the United States Constitution states that "[t]he judicial power of the United States shall be vested in one supreme court, and in such inferior courts as the congress *may* from time to time ordain and establish." U.S. Const. art. III, § 1 (emphasis added). All federal judges serve terms on "good behavior" under this provision. Obviously, the creation of the federal court system, other than the supreme court, was permissive. Can it be said, then, if the Federal Article III judiciary did not toe the congressional line, that congress could abolish these judgeships and immediately recreate them with all new and compliant judges, paying them and their successors as well so as not to reduce their pay while in office?

Defendants could have achieved their goal of amending the ordinance and implementing its provisions without violating the provisions of § 160A-388(a). The possibilities are many for fair resolution, but under this scenario, the public would have to opine, like Marcellus in *Hamlet*, that "[s]omething is rotten in the state of Denmark." William Shakespeare, *Hamlet, Prince of Denmark* act 1, sc. 4.

I agree with the majority that ordinance § 9-2-16 cannot override N.C.G.S. § 128-1.1.

I would reverse the decision of the trial court, and therefore I respectfully dissent.

JERRY BAYNE, INC., PLAINTIFF v. SKYLAND INDUSTRIES, INC., AND S. WADE HALL, SAUNDRA D. HALL, A/K/A TOUR-O-TEL OF ASHEVILLE, INC., DEFENDANTS

No. 9129SC1174

(Filed 15 December 1992)

1. Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions— trial court's refusal to enter—no abuse of discretion

The trial court did not err by refusing to enter judgment for sanctions against defendant pursuant to N.C.G.S. § 1A-1, Rule 11 where plaintiff was a masonry subcontractor on a

shopping center project; defendant Skyland Industries was the contractor; defendant Skyland approved plaintiff's final invoice; Skyland filed suit against the owners of the project for its final invoices; the owners' answer contained broad attacks on the quality of the work but did not provide specific objections; plaintiff filed suit against Skyland; Skyland's answer denied the complaint and stated that the owners had raised broad allegations that the work failed to meet contract requirements; and plaintiff contended that Skyland would have ascertained that the owners' objection was meritless if it had conducted a reasonable inquiry prior to filing the answer and that the answer had been interposed for the improper purpose of avoiding or delaying payment. Defendant's actions comply with an objective standard of reasonable inquiry in that it was reasonable for Skyland to assume there was some validity to the assertions contained in the owners' answer, as the owners might have discovered problems with the masonry work which went undetected by Skyland. At this early stage in the proceedings, Skyland was not required to undertake discovery to determine the merit of the owners' claim and objections.

Am Jur 2d, Pleading §§ 211-213, 339.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed. 107.

2. Rules of Civil Procedure § 11 (NCI3d)— Rule 11 sanctions—improper purpose in denying allegations—motion denied—no abuse of discretion

The trial court did not abuse its discretion by denying plaintiff's motion for sanctions under N.C.G.S. § 1A-1, Rule 11 where plaintiff was a subcontractor to defendant Skyland; Skyland's final invoices were not paid by the project owner; Skyland brought an action against the owner; the owner's answer contained broad attacks on the quality of the work; plaintiff brought an action against Skyland for its final invoice; Skyland in its answer denied that plaintiff had substantially and fully performed its obligations because the owner had raised allegations about the quality of work on the project; and plaintiff contended that Skyland denied satisfaction with plaintiff's work in an attempt to delay payment or to force compliance with a proposed payment schedule.

Am Jur 2d, Pleading §§ 211-213, 339.

Comment Note—General principles regarding imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 95 ALR Fed. 107.

Judge WYNN concurring.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 16 July 1991 by Judge C. Walter Allen in Henderson County Superior Court. Heard in the Court of Appeals 23 October 1992.

Skyland Industries, Inc. ("Skyland") was the general contractor on a shopping center project in Buncombe County called Merrimon Square. Skyland hired Jerry Bayne, Inc. ("Bayne") to perform masonry subcontracting work on the project. The subcontract required that final payment be made to Bayne within 45 days after satisfactory completion of the masonry.

By letter dated 15 February 1990, Ron Firmin, president of Skyland, stated:

> Mr. Bayne completed the work satisfactorily and on time. He was very consciencious [sic] about keeping up with the work schedule, and all his work was performed in a professional, workmanlike manner.

Mr. Firmin also approved as "o.k." an invoice from Bayne reciting a final balance due of $15,554.56. Bayne had previously received payments of $135,941.05 from Skyland.

On 9 March 1990 Skyland filed suit against the owners for payment of Skyland's final invoices totalling $261,956.17. The owners' answer contained broad attacks on the quality of the work but did not provide specific objections.

On 12 June 1990 Bayne filed suit against Skyland alleging breach of contract and demanding $15,554.56, the amount of the final invoice to Skyland. Skyland's answer, signed by its attorney Allan P. Root, denied Bayne's complaint, stating that the owner of the project had raised broad allegations that the work at Merrimon Square failed to meet the requirements of the contract documents. Thereafter, Skyland served an interrogatory on the owners requesting that they identify any objections they had to the work

of plaintiff Bayne on the Merrimon Square project. In response, the owners stated that they objected to the quality of Bayne's work because the bricks used at Merrimon Square had not been cleaned properly. Skyland subsequently deposed the principal owner, who again took exception to the condition of the bricks.

Despite the owner's testimony that Bayne's masonry work was unacceptable, Skyland elected to repudiate these objections and offered judgment to Bayne in the full amount of Bayne's claim. Bayne rejected this offer and then sought summary judgment for the same amount, which was granted. Bayne also filed a motion for sanctions against Skyland and its attorney pursuant to Rule 11, N.C. Rules of Civil Procedure. From the denial of this motion, plaintiff now appeals.

Safran Law Offices, by Perry R. Safran for plaintiff appellant.

Roberts, Stevens & Cogburn, P.A., by Allan P. Root for defendant appellee.

WALKER, Judge.

[1] Plaintiff assigns as error the trial court's refusal to enter judgment for sanctions against defendant pursuant to Rule 11 on the ground that the evidence established as a matter of law that defendant's actions violated this rule. Specifically, plaintiff argues Rule 11 was violated because: (1) the answer filed by Skyland's attorney Allan P. Root was neither formed after reasonable inquiry nor well-grounded in fact, was not legally justifiable, and failed to satisfy the objective reasonableness standard; and (2) Skyland's answer was interposed for the improper purpose of delaying litigation while a related suit was pending.

Plaintiff contends that both the 15 February 1990 letter by Ron Firmin and Mr. Firmin's approval of Bayne's final invoice represent Skyland's satisfaction with plaintiff's work. Furthermore, plaintiff refers to a letter from Skyland's attorney Allan Root and addressed to plaintiff's attorney Perry Safran, in which Mr. Root admits that he is obligated to amend his answer and states that he is "unaware of what worth, if any, there is to [the owner's] statement that the bricks were improperly cleaned." It is plaintiff's position that despite being satisfied with the masonry work, Skyland denied plaintiff's complaint on the basis of a general objection by the owner, and that if Skyland had made reasonable inquiry

concerning this objection prior to filing its answer it would have ascertained that this objection was unfounded and meritless, as Skyland subsequently did determine.

Additionally, plaintiff asserts that Skyland's answer was interposed for an improper purpose and was "a blatant attempt to avoid or delay payment, admittedly due and owing to Bayne, before the resolution of the suit by Skyland against the Owners." Plaintiff again refers to the letter from Mr. Root to Mr. Safran, in which Mr. Root states that Skyland is in poor financial shape and that he is trying to arrange interim payment schedules with the Merrimon Square subcontractors until money is collected from the owners. Mr. Root then offers "payments of $300 per month starting in January 1991 to begin working down the money due Bayne." Plaintiff thereby seems to argue that Skyland's answer denied satisfaction with plaintiff's masonry work in an attempt to force it to comply with Skyland's proposed payment schedule.

We note at the outset that a trial court's decision to impose or not to impose sanctions under N.C.G.S. § 1A-1, Rule 11(a) is reviewable *de novo* as a legal issue. *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989). *See also Oglesby v. S.E. Nichols, Inc.*, 101 N.C.App. 676, 401 S.E.2d 92, *disc. review denied*, 329 N.C. 270, 407 S.E.2d 839 (1991). Pursuant to this standard of review, the appellate court must determine (1) whether the trial court's conclusions of law support its determination, (2) whether the trial court's conclusions of law are supported by its findings of fact, and (3) whether the evidence is sufficient to support the court's findings of fact. *Id.* If the appellate court answers all three questions affirmatively, it must uphold the trial court's decision to impose or deny the imposition of mandatory sanctions under Rule 11. *Id.* In the instant case, the trial court concluded:

> 1. That Defendant Skyland Industries, Inc. and its counsel acted reasonably, diligently and in good faith in filing their answer denying Plaintiff's complaint while investigating the Owners' objections to the project.
>
> 2. That Defendant Skyland Industries, Inc. and its counsel acted reasonably, diligently and in good faith in investigating the Plaintiff's claim and the owner's objections in this matter.
>
> 3. That the Defendant Skyland Industries, Inc. and its counsel fulfilled their obligation to abandon their defenses to

Plaintiff's complaint upon discovering evidence that led them to believe the defense was meritless.

4. The Defendant Skyland Industries, Inc. and its counsel have met the obligations placed upon them by Rule 11 of the North Carolina Rules of Civil Procedure.

Thereafter, the court rendered judgment denying plaintiff's motion for sanctions against defendant Skyland. We find that these conclusions support the trial court's determination and are amply supported by the findings of fact and the underlying evidence.

N.C.G.S. § 1A-1, Rule 11(a) sets forth a three prong test in which the signer certifies that the pleading is (1) well grounded in fact; (2) warranted by existing law, "or a good faith argument for the extension, modification, or reversal of existing law" (legal sufficiency); and (3) not interposed for any improper purpose. Compliance with the first two prongs of this rule requires the signer to certify "that to the best of his knowledge, information, and belief formed after reasonable inquiry it is well grounded in fact and is warranted by existing law." In this regard, our Supreme Court has interpreted the term "reasonable inquiry" and determined that "[i]f, given the knowledge and information which can be imputed to a party, a reasonable person under the same or similar circumstances would have terminated his or her inquiry and formed the belief that the claim was warranted under existing law, then the party's inquiry will be deemed objectively reasonable." *Bryson v. Sullivan*, 330 N.C. 644, 661-662, 412 S.E.2d 327, 336 (1992).

Here, defendant Skyland's answer denied plaintiff's allegations that plaintiff substantially and fully performed its contractual obligations thereby entitling it to payment, because "in a related lawsuit the owner of the project has raised broad allegations concerning the failure of the work at Merrimon Square to meet the requirements of the contract documents." The trial court found, and the record indicates, that on 9 March 1990 Skyland filed suit against the owners of Merrimon Square for failure to pay Skyland's final invoices. There was evidence that Skyland served interrogatories upon the owners with the summonses and complaints, requesting them to identify any claimed setoffs to the amounts owed Skyland and to identify any objections. Subsequently, the owners filed their answer to Skyland's complaint which contained broad attacks on the quality of the work performed but failed to provide any specific

objections. According to Mr. Root's affidavit, the owners' answers to Skyland's interrogatories provided no more specificity.

On 12 June 1990, plaintiff Bayne filed the present lawsuit. In response to the owners' objections to the quality of the work at Merrimon Square, Skyland undertook discovery to ascertain the owners' specific objections. Specifically, Skyland submitted an interrogatory requesting the owners to identify any objections they had to any of the work of plaintiff Bayne on the Merrimon Square project. At the time defendant Skyland was required to file its answer, it was aware that the owners were objecting to the quality of the work at Merrimon Square, however, it had not yet ascertained their specific objections.

Our Supreme Court has held that when determining whether a pleading is warranted under existing law, "reference should be made to the document itself, and the reasonableness of the belief that it is warranted by existing law should be judged as of the time the document was signed." *Bryson v. Sullivan* at 656, 412 S.E.2d at 333. In the instant case, the owners' expressed their dissatisfaction with the work performed on the Merrimon Square project in their 17 May 1990 answer. Skyland was aware of the general objections but had not been able to determine any specific problems. In light of these objections, Skyland could not then admit that plaintiff's work was satisfactory or that the amount claimed was due and payable. Despite a previous statement that plaintiff's work was satisfactory, it was reasonable for Skyland to assume there was some validity to the assertions contained in the owners' answer, as the owners might have discovered problems with the masonry work which went undetected by Skyland. At this early stage in the pleadings, Skyland was not required to undertake discovery to determine the merit of the owners' claim and objections. We find that defendant's actions comply with an objective standard of reasonable inquiry such that its answer satisfied the factual and legal sufficiency prongs of Rule 11 at the time it was signed.

[2] With regard to plaintiff's second argument, we note that although plaintiff's motion for sanctions does not define the alleged improper purpose with specificity, it cites the rule's requirement that a pleading must not be "interposed for any improper purpose, such as to harass or to cause unnecessary delay or needless increase in the cost of litigation." Plaintiff subsequently argues in its brief

that "Skyland, facing a precarious financial situation and an uncertain pending suit against the Owners, was forced to utilize a legally unjustifiable defense in an effort to delay the action by [plaintiff] for payment already admittedly owed. This bad faith delay resulted in [plaintiff] finally receiving Summary Judgment."

Whether or not a motion, pleading, or other paper has been utilized for an improper purpose must be determined pursuant to an objective standard. *Bryson v. Sullivan, supra.* Having reviewed the record, however, we find no evidentiary support for plaintiff's contention that Skyland's answer denied satisfaction with plaintiff's work in an attempt to delay payment owed or to force plaintiff's compliance with Skyland's proposed payment schedule. Instead, Skyland and its attorney appear to have taken all reasonable steps to insure the accuracy and the viability of its claims. Upon considering the owners' interrogatory response and deposition testimony, Skyland concluded that there were no valid grounds for objection to plaintiff's work and offered judgment to plaintiff in the full amount of the claim plus interest. Plaintiff chose not to accept this offer, however, and pursued a remedy in court in the form of a summary judgment motion for the identical amount initially offered by Skyland. Any needless increase in the cost of litigation therefore directly resulted from plaintiff's own actions, and plaintiff has failed to show that Skyland's actions were taken in an attempt to delay payment owed to plaintiff or for some other improper purpose.

Having reviewed the record, we conclude that the trial court based its decision on the relevant factors before it and did not abuse its discretion in denying plaintiff's motion for sanctions under Rule 11. *See H. McBride Realty, Inc. v. Myers*, 94 N.C.App. 511, 380 S.E.2d 586 (1989). Further, defendants' motion to strike plaintiff's reply brief is hereby denied.

Affirmed.

Judge GREENE dissents.

Judge WYNN concurs by separate opinion.

Judge GREENE dissenting.

I disagree with the majority that Skyland's denials, in its answer, of certain allegations of the complaint were based on reasonable

inquiries, as required by Rule 11. The relevant allegations in the complaint are:

> 10. . . . all of Bayne's work was performed in a professional, and workmanlike manner. . . .
>
> . . . .
>
> 12. Bayne substantially performed all its obligations under the contract.

Skyland answered in relevant part as follows:

> 10. . . . the allegations of paragraph 10 of Plaintiff's complaint are denied . . . .
>
> . . . .
>
> 12. As in a related lawsuit, the owner of the project has raised broad allegations concerning the failure of the work at Merrimon Square to meet the requirements of the contract documents and has refused to pay the Bayne invoice date December 9, 1989, this defendant denies the allegations of paragraph 12 of plaintiff's complaint.

The issue presented is whether Skyland made a reasonable inquiry into the facts *prior to* denying the allegations in paragraphs 10 and 12 of the complaint. If not, Skyland's answer was signed in violation of Rule 11, and some sanction must be imposed. Gregory P. Joseph, *Sanctions, The Federal Law of Litigation Abuse* § 7(B) (1989) (hereinafter *Joseph*) (inquiry must precede the signing, as a pleading "may not be signed first and the basis investigated thereafter"); *Turner v. Duke Univ.*, 325 N.C. 152, 171, 381 S.E.2d 706, 717 (1989) (sanctions clause of Rule 11(a) is mandatory). The adequacy of a pre-signing investigation must be judged under a standard of objective reasonableness. *Turner*, 325 N.C. at 164, 381 S.E.2d at 713. Some factors recognized as relevant to a determination of whether the inquiry is reasonable include: (1) the amount of time available to investigate the facts; (2) the complexity of the factual issues in question; (3) the extent to which the investigation is feasible; (4) the extent to which pertinent facts are available to the signer; (5) the resources reasonably available to the signer to devote to the inquiry; and (6) the extent to which the signer was on notice that further inquiry might be appropriate. *Joseph* at § 8(A).

At the time its answer was signed, Skyland, through its president, had previously executed a "note of affirmation" certifying that the work completed by plaintiff was satisfactory and timely. Skyland also was aware at the time its answer was signed that the owner of the land had some "general objections" to the quality of the work at the shopping center project, however, Skyland did not know whether any of those objections involved the masonry work completed by plaintiff. Under Rule 11, Skyland's knowledge of the owner's general objections to the quality of work at the construction project cannot serve as a proper basis for its denial of plaintiff's allegations that plaintiff performed its work in a professional and workmanlike manner and substantially performed all of its obligations under the contract. Rather, particularly in light of Skyland's previous certification of plaintiff's work as satisfactory, such information should have put Skyland on notice that further inquiry was necessary in order to determine the veracity of plaintiff's allegations regarding its compliance with the masonry contract. Furthermore, the record indicates that the masonry work in question was readily available for inspection by Skyland, and the amount of time and resources necessary to make such additional investigation was not unreasonable or burdensome. The fact that Skyland made inquiries regarding the quality of plaintiff's work *after* signing and filing its answer is immaterial, as a violation of Rule 11 is complete when the paper is signed. *Bryson v. Sullivan*, 330 N.C. 644, 656, 412 S.E.2d 327, 333 (1992). Thus, the trial court's conclusion that Skyland and its counsel "acted reasonably" is not supported by the court's finding that, at the time Skyland filed its answer, Skyland "had not yet ascertained from the Owners their specific objections to the work at the shopping center project," and therefore cannot serve as a proper basis for the court's denial of plaintiff's motion for sanctions. In fact, the court's finding supports the opposite conclusion.

Accordingly, I would reverse the order of the trial judge denying plaintiff's motion for sanctions and remand for an appropriate entry of sanctions.

Judge WYNN concurring by separate opinion.

I concur with the majority opinion and write separately to add that in determining whether a reasonable inquiry has been conducted for purposes of Rule 11, the time constraints for filing a pleading should be considered. Here, the responsive pleading

filed by the defendant was required to be timely filed in accordance with Rule 12 of the Rules of Civil Procedure, which generally requires the defendant to serve his answer within 30 days from the service of the summons and complaint upon him. Even with the extension of 30 days allowed by the court in this case, the defendant has met the "reasonable inquiry" requirement of Rule 11. There is, in my opinion, no evidence that the investigative efforts suggested by the dissent could have been conducted within the applicable time constraints placed upon the defendant.

STATE OF NORTH CAROLINA v. DONALD BURTON

No. 9114SC460

(Filed 15 December 1992)

1. **Appeal and Error § 344 (NCI4th)— motion to dismiss—motion to set aside verdict—evidence introduced after close of State's evidence—right to appeal denied**

A defendant waived the right to appeal the denial of his motion to dismiss at the close of the State's evidence where he introduced evidence after the close of the State's evidence and waived the right to appeal the denial of his motion to set aside the verdicts where he failed to address the issue in his brief. N.C.R. App. 28(b)(5); N.C.R. App. 10(b)(3).

Am Jur 2d, Appeal and Error §§ 248, 430, 431.

2. **Assault and Battery § 60 (NCI4th)— assault on an officer—sufficiency of evidence**

A jury in a prosecution for assaulting an officer could reasonably conclude that officers were attempting to lawfully arrest defendant for resisting, delaying, and obstructing a police officer when the assault occurred, and defendant's motion to dismiss was properly denied, where officers had probable cause to believe that defendant willfully prevented Sergeant Tiffin from performing his duties concerning a traffic stop. The State presented evidence that Sergeant Tiffin observed defendant traveling at a speed estimated to be twenty m.p.h. greater than the posted speed limit; Sergeant Tiffin attempted to use his car radio to run a check on the registration of the vehicle

after stopping defendant; defendant stood beside the patrol car, spoke in a loud and hostile manner, and refused to return to his car after the officer requested three times that he do so; Sergeant Tiffin was concerned for his safety as a result of defendant's behavior; he was unable to communicate on the radio; and he warned defendant that he would arrest defendant for obstructing an officer, but defendant did not desist. N.C.G.S. § 14-33(b)(8); N.C.G.S. § 14-223.

Am Jur 2d, Assault and Battery § 107.

3. Arrest and Bail § 96 (NCI4th)— assault on an officer—use of force by officers—not excessive

A jury in a prosecution for assaulting an officer could reasonably conclude that officers did not use excessive force in arresting defendant for resisting an officer and that defendant was not entitled to resist in any manner where defendant was stopped for speeding; stood next to the patrol car, talked in a loud and hostile manner, and refused to return to his car while the officer attempted to radio a check on the registration; after warning defendant several times, the officer (Sergeant Tiffin) attempted to arrest defendant for obstruction and placed his hand on defendant's shoulder to execute the arrest; defendant did not respond and leaned against the patrol car; Sergeant Tiffin and Officer Taylor, who had arrived at the scene to assist Sergeant Tiffin, attempted to turn defendant around and handcuff him but were unable to do so; Corporal Allen arrived and the three officers attempted to secure defendant; defendant fell into the patrol car; and Officer Taylor struck defendant twice on the wrist with a nightstick after defendant attempted to bite Corporal Allen, kicked Sergeant Tiffin in the shin causing injury, and dislocated Officer Taylor's thumb.

Am Jur 2d, Arrest §§ 80, 81.

4. Indictment, Information, and Criminal Pleadings § 50 (NCI4th)— indictment—assaulting an officer—underlying arrest dismissed —no variance

There was not a fatal variance between warrant allegations and the evidence presented at trial where defendant was charged with resisting, obstructing and delaying an officer and three counts of assault on a police officer; the resisting, obstructing, and delaying charge was dismissed prior to jury

selection; and defendant was convicted of three counts of assault on a police officer. The State presented evidence that the officers had probable cause to believe that defendant was resisting, obstructing, and delaying an officer in the performance of his official duty; an officer does not have to be attempting an arrest in order to be performing an official duty of his office. Certainly an officer is performing an official duty when he stops a vehicle for speeding and attempts to use his car radio to obtain information on the registration of the stopped vehicle.

Am Jur 2d, Assault and Battery § 95.

5. Assault and Battery § 60 (NCI4th)— assault on an officer—request for further instructions—definition of obstructing—no plain error

There was no plain error in a prosecution for assault on an officer arising from an attempted arrest for obstructing an officer where the jury requested an additional instruction on the definition of "obstruct," and the definition given at that point did not include the necessary element of willfulness. In convicting defendant, the jury must have determined that he acted willfully when he refused to return to his car as requested by the officer and repeatedly talked in a loud voice as the officer attempted to use the patrol car radio. The Court of Appeals was not convinced that the jury would have reached a different result absent the alleged error.

Am Jur 2d, Trial §§ 1448, 1449.

6. Evidence and Witnesses § 2973 (NCI4th)— assault on an officer—cross-examination of officer—alleged misconduct—questions properly excluded or no prejudice

Two questions asked of an officer on cross-examination during a prosecution for assault on an officer were properly excluded because they dealt with complaints and discipline against the officer and did not address his character for truthfulness or untruthfulness. While the third question specifically addressed the officer's veracity and should have been allowed, defendant failed to prove that there was a reasonable possibility that the outcome of the trial would have

been different if the excluded evidence had been admitted. N.C.G.S. § 8C-1, Rule 608(b); N.C.G.S. § 15A-1230(a).

Am Jur 2d, Evidence § 342.

7. **Criminal Law § 438 (NCI4th)— assault on an officer—prosecutor's closing argument—no prejudicial error**

There was no prejudicial error in a prosecution for assault on an officer where the prosecutor commented in his closing argument on the lack of use of sirens in stopping cars for traffic violations; on defendant's snickering as officers described his conduct and their injuries; and that defendant's testimony was consistent with that of the officers except for two parts he "made up" and how victims ended up becoming the defendant. Although the comment on use of sirens may have encompassed matters outside the record, the charges of assault on officers were not related directly to the initial traffic stop; urging jurors to observe defendant's demeanor for themselves does not inject the prosecutor's opinions into his argument; and while the last comment was improper, it did not constitute such gross impropriety as to influence the verdict of the jury.

Am Jur 2d, Trial §§ 554-556, 609, 637, 664-666, 681.

Appeal by defendant from judgment entered 25 February 1990 by Judge Frank Brown in Durham County Superior Court. Heard in the Court of Appeals 11 February 1992.

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

Irving Joyner for defendant appellant.

COZORT, Judge.

Defendant was charged with operating a motor vehicle at a speed greater than reasonable under the conditions then existing; resisting, delaying, and obstructing an officer in the performance of his duties; injury to personal property; and three counts of assault on a police officer. In Durham County District Court, defendant was found guilty of three counts of assault on a police officer and appealed the conviction to superior court. On appeal to superior court, the jury found defendant guilty of three counts of assault on a police officer in violation of N.C. Gen. Stat. § 14-33(b)(8) (1991

Cum. Supp). Defendant was fined $100.00 and sentenced to six months in prison, suspended, and one year unsupervised probation. Defendant appeals. We find no error.

The State presented the following evidence: On 2 January 1990, at approximately 4:00 p.m., Durham Police Sergeant C. M. Tiffin observed defendant driving a vehicle on a city street. Sergeant Tiffin concluded that defendant was traveling approximately 55 m.p.h. in a 35 m.p.h. zone. Sergeant Tiffin activated his blue lights and followed defendant to the parking lot of an auto parts store. Sergeant Tiffin approached defendant who was walking away from the store, and informed him that he was driving too fast. Upon Sergeant Tiffin's request for his driver's license, defendant first produced a business card and then his driver's license. Defendant was not the owner of the car and did not possess the registration. Defendant stood to the left of the police car as Sergeant Tiffin attempted to use the car radio to run a check on the registration. Defendant repeatedly questioned Sergeant Tiffin's actions and refused to return to his car, even after Sergeant Tiffin instructed him to do so three times. Sergeant Tiffin informed defendant that he would be placed under arrest if he did not stop interfering and obstructing him in the performance of his duties. After defendant refused to cooperate, Sergeant Tiffin placed defendant under arrest and called for assistance. Officer T. M. Taylor arrived on the scene, but he and Sergeant Tiffin were unable to secure custody of defendant. Corporal C. M. Allen arrived to assist his fellow officers. A struggle ensued, and defendant fell into the open door of the patrol car. Sergeant Tiffin instructed Officer Taylor to strike defendant with his nightstick. Officer Taylor responded by striking defendant twice on the wrist. As a result of the struggle, Officer Taylor suffered a dislocated thumb and Sergeant Tiffin suffered injury to his shin. Defendant was finally brought under control.

Defendant presented the following evidence: Defendant was driving a vehicle at 30 or 35 m.p.h. when Sergeant Tiffin stopped him. Defendant questioned Sergeant Tiffin about the detention and his actions. After the other officers arrived on the scene, defendant asked to speak to a superior officer. Defendant refused to cooperate as the officers tried to handcuff him, and Officer Taylor struck defendant on the head with his nightstick.

On appeal defendant argues that the trial court erred in (1) denying defendant's motions to dismiss at the close of State's

evidence and the close of all the evidence, to vacate the verdicts after their return, and to set aside the verdicts; (2) instructing the jury on request that they were to give the term "obstruct" its ordinary meaning; (3) denying defendant the opportunity to cross-examine Sergeant Tiffin about alleged misconduct; and (4) allowing the assistant district attorney to make certain remarks during closing argument.

[1] N.C.R. App. P. 10(b)(3) provides in part that "if defendant makes [a motion to dismiss the action] after the State has presented all its evidence and has rested its case and that motion is denied and the defendant then introduces evidence, his motion for dismissal or judgment in case on nonsuit made at the close of State's evidence is waived." Since defendant introduced evidence after the close of State's evidence, he has waived the right to appeal the denial of his motion at the close of State's evidence. Defendant has also waived the right to appeal the denial of his motion to set aside the verdicts, since he has failed to address the issue in his brief. N.C.R. App. P. 28(b)(5).

[2] Therefore, we need consider only defendant's argument that the trial court erred in failing to dismiss the action at the close of all the evidence. The trial court must dismiss charges for insufficiency of the evidence, if, viewing the evidence in the light most favorable to the State, the State fails to present substantial evidence of each essential element of the offenses charged. *State v. Herring*, 322 N.C. 733, 738, 370 S.E.2d 363, 367 (1988). "Substantial evidence is such evidence as a reasonable mind might accept as adequate to support a conclusion." *Id.* Specifically, defendant argues that (1) the officer did not have probable cause to arrest him for resisting arrest; (2) he was entitled to protect himself against use of excessive force by the police officers; and (3) there was a fatal variance between the warrant allegations and the State's evidence.

N.C. Gen. Stat. § 14-33(b)(8) provides that a person is guilty of a misdemeanor if he assaults a law enforcement officer when the officer is discharging or attempting to discharge a duty of his office.

> In order to obtain a conviction under [this section], the burden is on the State to satisfy the jury from the evidence and beyond a reasonable doubt that the party assaulted was a law enforcement officer performing the duty of his office, and

that the defendant knew his victim was a law enforcement officer.

State v. Rowland, 54 N.C. App. 458, 462, 283 S.E.2d 543, 546 (1981). " '[T]he offense under [this section]' . . . presupposes lawful conduct of the public officer in discharging . . . a duty of his office." *State v. Jefferies*, 17 N.C. App. 195, 198, 193 S.E.2d 388, 391 (1972), *cert. denied*, 282 N.C. 673, 194 S.E.2d 153 (1973) (interpreting former N.C. Gen. Stat. § 14-33(c)(4)). "One resisting an illegal arrest is not resisting an officer within the discharge of his official duties." *State v. Anderson*, 40 N.C. App. 318, 322, 253 S.E.2d 48, 51 (1979).

Accordingly, in order for defendant to be convicted of assault on a police officer in violation of N.C. Gen. Stat. § 14-33(b)(8), the jury must first determine whether the officers were attempting to lawfully arrest defendant for resisting, delaying, and obstructing a police officer in violation of N.C. Gen. Stat. § 14-223 (1986). A warrantless arrest is lawful if based upon probable cause. *State v. Phillips*, 300 N.C. 678, 683, 268 S.E.2d 452, 456 (1980). The question, then, is whether the officers had probable cause to arrest defendant. Probable cause " 'has been defined to be a reasonable ground of suspicion supported by circumstances sufficiently strong in themselves to warrant a cautious man in believing the accused to be guilty.' " *State v. Zuniga*, 312 N.C. 251, 259, 322 S.E.2d 140, 145 (1984) (quoting *State v. Shore*, 285 N.C. 328, 335, 204 S.E.2d 682, 687 (1974)).

N.C. Gen. Stat. § 14-223 (1986) makes it unlawful for any person to "willfully and unlawfully resist, delay or obstruct a public officer in discharging or attempting to discharge a duty of his office . . . ." Actual physical force or assault is not necessary. *State v. Downing*, 66 N.C. App. 686, 690, 311 S.E.2d 702, 704 (1984), *aff'd in part and rev'd in part*, 313 N.C. 164, 326 S.E.2d 256 (1985). The State does not have to prove that the officer was permanently prevented from discharging his duties by defendant's conduct. *Id.* Instead, the State must prove only that

> "the officer was obstructed or interfered with, and that such obstruction or interference was willful on the part of the defendant. . . . To 'interfere' is to check or hamper the action of the officer, or to do something which hinders or prevents or tends to prevent the performance of his legal duty; and to 'obstruct' signifies direct or indirect opposition or resistace [*sic*] to the lawful discharge of his official duty."

State v. Leigh, 278 N.C. 243, 248, 179 S.E.2d 708, 711 (1971) (quoting *State v. Estes*, 185 N.C. 752, 117 S.E. 581 (1923)). "Merely remonstrating with an officer in behalf of another, or criticizing an officer while he is performing his duty, does not amount to obstructing, hindering, or interfering with an officer." *State v. Allen*, 14 N.C. App. 485, 491, 188 S.E.2d 568, 573 (1972).

The State presented evidence that Sergeant Tiffin observed defendant traveling at a speed estimated to be twenty m.p.h. greater than the posted speed limit. On the basis of his observation and training, Sergeant Tiffin had at least reasonable suspicion to stop defendant's vehicle. *See State v. Morocco*, 99 N.C. App. 421, 393 S.E.2d 545 (1990). After stopping the defendant for speeding, Sergeant Tiffin attempted to use his car radio to run a check on the registration of the vehicle. Defendant was standing beside the patrol car and speaking in a loud and hostile manner. He refused to return to his car after the officer requested three times for him to do so. Sergeant Tiffin was concerned for his safety as a result of defendant's behavior, and he was unable to successfully communicate on the radio. He then warned defendant that he would arrest him for obstructing an officer, but defendant did not desist. Based upon the evidence presented by the State, a jury could reasonably conclude that the officers lawfully arrested defendant because they had probable cause to believe that defendant willfully prevented Sergeant Tiffin from performing his duties concerning the traffic stop.

[3] Defendant next argues that defendant had the right to protect himself against the use of excessive force during an unlawful arrest. We have already determined that a jury could reasonably conclude that the arrest was lawful. If attempting a lawful arrest, an officer has the right to use reasonable force to subdue the arrestee and the arrestee has no right to resist. N.C. Gen. Stat. § 15A-401(d)(1) (1991 Cum. Supp.). If, however, an officer uses excessive force to execute a lawful arrest, the arrestee may defend against the excessive force. *See State v. Mensch*, 34 N.C. App. 572, 575, 239 S.E.2d 297, 299 (1977), *cert. denied*, 294 N.C. 443, 241 S.E.2d 845 (1978).

The State presented evidence that after warning defendant several times, Sergeant Tiffin attempted to arrest defendant for obstruction and placed his hand on defendant's shoulder to execute the arrest. Defendant did not respond and leaned against the patrol car. Sergeant Tiffin and Officer Taylor, who had arrived at the scene to assist Sergeant Tiffin, attempted to turn defendant around

and handcuff him but were unable to do so. Corporal Allen arrived and the three officers attempted to secure defendant. Defendant fell into the patrol car. After defendant attempted to bite Corporal Allen, kicked Sergeant Tiffin in the shin causing injury, and dislocated Officer Taylor's thumb, Officer Taylor struck defendant twice on the wrist with a nightstick. A jury could reasonably conclude that the officers did not use excessive force in executing the arrest and that defendant was not entitled to resist in any manner.

[4] Defendant further argues that there was a fatal variance in the warrant allegations for resisting arrest and the State's evidence presented at trial. Defendant was charged with the offense of resisting, obstructing, and delaying in violation of § 14-223 and three counts of assault on a police officer in violation of § 14-33(b)(8). The resisting, obstructing, and delaying charge was dismissed prior to jury selection. Defendant was convicted of three counts of assault on a police officer. The State had the burden of proving that the persons assaulted were police officers performing their duties and that defendant knew they were police officers. *See Rowland*, 54 N.C. App. at 462, 283 S.E.2d at 546. In order to meet this burden, the State also had to present evidence that the officers were making a lawful arrest for resisting, obstructing, and delaying. As stated above, the State presented evidence that the officers had probable cause to believe defendant was resisting, obstructing, and delaying Sergeant Tiffin in the performance of his official duty. An officer does not have to be attempting an arrest in order to be performing an official duty of his office. Certainly an officer is performing an official duty when he stops a vehicle for speeding and attempts to use his car radio to obtain information on the registration of the stopped vehicle. We find defendant's argument that there was a fatal variance in the warrant and evidence presented at trial to be without merit.

Considering the evidence in the light most favorable to the State, we find the State presented substantial evidence of each element of the crimes charged, three counts of assault on a police officer, and that defendant was the perpetrator of the crimes. Accordingly, we find that the trial court did not err in denying defendant's motion to dismiss for insufficiency of evidence at the close of trial. Defendant's first assignment of error is overruled.

[5] In his second assignment of error, defendant contends that the trial court committed plain error when it responded to a ques-

tion from the jury concerning the definition of obstructing a police officer. Defendant does not challenge the correctness of the initial instructions here. In that charge, the trial court properly instructed the jury on the charge of assault on a police officer. The trial court then instructed the jury on the offense of resisting, delaying, and obstructing a police officer. The trial court explained that the officer had to have probable cause to believe that the defendant had committed the offense of delaying and obstructing; probable cause would exist if the circumstances surrounding defendant's conduct would lead a prudent person to believe defendant had committed the offense of delaying and obstructing. The trial court then instructed the jury that

> [m]erely remonstrating with an officer, protesting, objecting, questioning or criticizing an officer when he is performing his duties, does not amount to delaying and interfering an officer, they, in temperance language, used without apparent purpose is not sufficient, although force or threatened force is not always an indispensable ingredient of the offense of interfering with an officer in the discharge of his duty, mere remonstrating or criticizing an officer is not usually held to be the equivalent of unlawful interference.

Defendant argues that plain error occurred when the jury, after retiring for deliberation, requested in writing a definition of the phrase "obstructing an officer" and the trial court responded that the jury was to give the term "its ordinary meaning." Defendant's attorney did not object to the trial court's response to the jury's question. He now argues on appeal that the trial court's response to the jury's question was plain error, an error so fundamental that defendant must receive a new trial. He argues that the trial court's instruction to the jury that they could give the term "obstructing" its "ordinary meaning," which would not require a finding of willfulness, would allow the jury to find the defendant guilty of assault on an officer without having to first find that the officer had probable cause to arrest the defendant for the defendant's willful obstruction of the officer in the performance of his duties.

Webster's Third New International Dictionary (1971) defines obstruct: "to be or come in the way of: hinder from passing, action, or operation: IMPEDE, RETARD." The Second College Edition of the American Heritage Dictionary (1985) offers a similar definition:

"to impede, retard, or interfere with; hinder." Looking at these definitions of the "ordinary meaning" of obstruct, we agree with defendant's contention that the ordinary meaning of obstruct does not necessarily include an element of willfulness, an element which is required in the crime of obstructing an officer under N.C. Gen. Stat. § 14-223. We must now determine whether the trial court's response to the jury's question, which failed to require that the defendant's obstruction be willful in order to support the offense of assault, was so fundamental an error that a new trial is required. We hold that it was not.

After reviewing the entire record, we are not convinced "that absent the alleged error, a jury probably would have reached a different verdict." *State v. Robinson*, 330 N.C. 1, 22, 409 S.E.2d 288, 300 (1991). Here, the jury was correctly instructed that merely remonstrating or criticizing an officer did not amount to the offense of obstructing an officer. In order to convict defendant of assault on a police officer, the jury first had to determine whether there was probable cause for Sergeant Tiffin to arrest defendant for resisting, obstructing, and delaying an officer. In convicting defendant, the jury must have determined that he acted willfully when he refused to return to his car as requested by Sergeant Tiffin and repeatedly talked in a loud voice as Sergeant Tiffin attempted to use the patrol car radio. Defendant's second assignment of error is overruled.

[6] In his third assignment of error, defendant argues the trial court erred in denying defendant the opportunity to cross-examine Sergeant Tiffin about alleged misconduct. Specifically, defendant sought to ask the following questions in order to impeach the credibility of Sergeant Tiffin:

> 1. [D]uring the time that you have been employed with the Durham Police Department, have you not had a number of complaints filed against you?
>
> 2. And have you not been disciplined for some of these alleged incidents of misconduct?
>
> 3. Were you dismissed from the police department . . . for lying to your superior officers about an incident involving some officers under your command in a policemen's conduct matter?

N.C. Gen. Stat. § 8C-1, Rule 608(b) (1988) provides that specific instances of conduct may "in the discretion of the court, if probative

of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness . . . ." We find that the first two questions were properly excluded by the trial court because they do not address Sergeant Tiffin's character for truthfulness or untruthfulness. The third question, however, does specifically address the question of Sergeant Tiffin's veracity and should have been allowed. Although we find error in the exclusion of the question, defendant has failed to prove that there was a reasonable possibility that the outcome of the trial would have been different if the excluded evidence had been admitted. *See* N.C. Gen. Stat. § 15A-1443 (1988).

[7] Finally, defendant argues that the trial court erred in permitting the assistant district attorney to comment during the closing argument (1) about the lack of use of sirens in stopping cars for traffic violations; (2) about defendant's snickering as the officers described their injuries and his conduct; and (3) that "defendant's own testimony is consistent with what the officers said other than the two parts he made up, and ladies and gentlemen it always amazed me that whenever I try a case how the victims end up becoming the defendant." N.C. Gen. Stat. § 15A-1230(a) (1988) prohibits an attorney from injecting personal experiences and making arguments on the basis of matters outside the record, except for those matters of which the court may take judicial notice. "Whether counsel abuses this privilege is a matter ordinarily left to the sound discretion of the trial judge, and we will not review the exercise of this discretion unless there be such gross impropriety in the argument as would be likely to influence the verdict of the jury." *State v. Covington*, 290 N.C. 313, 328, 226 S.E.2d 629, 640 (1976) (citations omitted.) Addressing the first comment, although the statement may have encompassed matters outside the record, we do not find the statement to be prejudicial to defendant. As the State points out, the charges of assault on police officers were not related directly to the initial traffic stop of the defendant. As to the second comment, "urging the jurors to observe defendant's demeanor for themselves does not inject the prosecutor's own opinions into his argument, but calls to the jurors' attention the fact that evidence is not only what they hear on the stand but what they witness in the courtroom." *State v. Brown*, 320 N.C. 179, 199, 358 S.E.2d 1, 15, *cert. denied*, 484 U.S. 970, 98 L.Ed.2d 406 (1987). Finally, we find the third comment to be improper, but

we do not think the comment constitutes such gross impropriety as to influence the verdict of the jury. Defendant has failed to demonstrate prejudicial error, and his fourth assignment of error is therefore overruled.

No error.

Judges EAGLES and ORR concur.

ELIZABETH R. COVINGTON, WILLIAM JOHN EVANS, JR., LAURA M. GRIMES, NANCY L. GUTSKE, LONNIE D. HEDRICK, TRACEY S. HEDRICK, LYNN C. HOWELL, NANCY L. HUGHES, WILLIAM J. HUGHES, DORIS B. SEYMOUR, DAVID P. TRUEBLOOD, JACOB VAN KRETSCHMAR, AND TERESA VAN KRETSCHMAR, APPELLEES v. THE TOWN OF APEX; CLARICE D. ATWATER, MICHAEL JONES, EVERETT M. EDWARDS, JR. AND JACK H. KERLEY, AS MEMBERS OF THE TOWN OF APEX BOARD OF COMMISSIONERS; AND C&D INVESTMENT COMPANY, INC., APPELLANTS

No. 9110SC930

(Filed 15 December 1992)

1. **Municipal Corporations § 30.11 (NCI3d)— conditional use zoning—summary judgment—plaintiffs' forecast of evidence opposing zoning**

Plaintiffs provided sufficient evidence that a zoning change from Office and Institutional to Conditional Use Business-2 was unreasonable, arbitrary, and not in the public interest where the rezoning was sought to permit electronic assembly by a prospective tenant; defendants supported their motion for summary judgment by providing affidavits which identified the public purposes of the rezoning ordinance; one affidavit stated that the rezoning ordinance serves legitimate public purposes in that it contributes to the revitalization of downtown, promotes economic stability, and serves to promote the express statutory goal of conserving the value of buildings; plaintiffs' pleadings and supporting affidavits showed that the owners of the property voluntarily terminated their lease with their former tenant in order to execute a lease with a new tenant, which required that the property be rezoned because its line of business involved electronic assembly; the only public in-

terest cited in the petition and the planning administrator's recommendation was "occupancy of a vacant building"; the only benefit to the community provided by the amended rezoning ordinance was aesthetic in that the prospective tenant would have to provide streetscaping for the general area around the property; there is no indication that the enactment of the amended ordinance without the creation of jobs, services or other benefits would revitalize downtown or provide economic stability to the community; plaintiffs provided supporting materials illustrating the lack of effort by the owners to find other tenants that could have leased the building and helped to conserve its value without rezoning the tract; and the express statutory goal of conservation of buildings could have been accomplished without the rezoning necessary to accommodate the prospective tenant.

Am Jur 2d, Zoning and Planning § 609.

2. Municipal Corporations § 30.9 (NCI3d)— rezoning petition— spot zoning—no reasonable basis

The trial court correctly granted plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment on the contention that a conditional use zoning constituted spot zoning where plaintiffs used zoning maps to show that the subject tract is surrounded by a vast majority of property zoned either Residential-6 or Office and Institutional; the two isolated pockets of property zoned Business-1 and Business-2 were both surrounded by Residential-6 and Office and Institutional zoning at the time they were implemented; and those properties are themselves examples of spot zoning. There was no reasonable basis for the spot zoning in that the tract is a single rectangular lot, 100′ × 275′ with a one story masonry building containing 3,780 square feet of net interior floor space and surrounded by residences on three sides; although this property is zoned Conditional Use Business-2 with the same features as Office & Institutional, the uses to be employed are industrial in nature and the amended zoning ordinance is in direct contravention of its comprehensive zoning plan; the only benefit to the community is one of an aesthetic nature; no jobs will be created by the zoning change nor services provided which would specifically benefit the community; the detriment to the community would be the placement of an industrial use in an area where the property is

used for residential and professional purposes; there was no community support for the change and sixty residents signed a petition in opposition to the change; and the use envisioned by the new tenant is a drastic change from the uses already present in the surrounding area.

Am Jur 2d, Zoning and Planning §§ 147-152.

Spot zoning. 51 ALR2d 263.

Appeal by defendants from judgment entered 7 June 1991 by Judge Donald W. Stephens, in Wake County Superior Court. Heard in the Court of Appeals 23 September 1992.

Grimes and Teich, by S. Janson Grimes, for plaintiffs-appellees.

Holleman and Stam, by Henry C. Fordham, Jr., for defendants-appellants.

JOHNSON, Judge.

On 26 March 1990, C&D Investment Company, Inc. (hereinafter C&D) petitioned the Town of Apex to rezone the property located at 212 S. Salem Street, Apex, N.C. from Office & Institutional-1 to Conditional Use Business-2. The rezoning was sought to permit electronic assembly by a prospective tenant, A&E Electronic, Inc. (hereinafter A&E), within the former post office building located on the subject property.

The subject property is bordered by property zoned as follows: to its immediate north by property zoned Office & Institutional-1; to its immediate east by property zoned Business-1; to its immediate southeast by property zoned Business-2; to its immediate south by property zoned Office & Institutional-1; and to its immediate west by property zoned Residential-6.

On 7 May 1990, the Apex Planning Board held a public hearing on the rezoning application. The Apex Planning Director, David Rowland, recommended approval of the rezoning petition in his memorandum given to the Planning Board and Board of Commissioners. On 4 June 1990, the Planning Board voted 5-2 to recommend approval of the rezoning.

On 10 May 1990, several persons, including Donald W. Grimes who resides next to the subject property, submitted a valid protest petition to the Town of Apex. The Apex Board of Commissioners

held public hearings on 15 May 1990 and 5 June 1990. After hearing the testimony, the board voted 4-1 to amend the zoning ordinance to rezone the subject property to a Conditional Use Business-2 district with the condition that use of the tract be restricted to the uses permitted in Office and Institutional-1 plus the use of electronic assembly. The mayor executed the ordinance effecting the rezoning on 19 June 1990. Plaintiffs instituted this action.

Plaintiffs filed suit in the Superior Court of Wake County. After defendants answered denying plaintiffs' allegations, plaintiffs filed a motion for summary judgment. Defendants also filed a motion for summary judgment. The Honorable Donald W. Stephens, Superior Court Judge, granted plaintiffs' motion and denied defendants' motion. Defendants, the Town of Apex and the named commissioners, gave timely notice of appeal.

On appeal, defendants bring forth two assignments of error. Defendants first contend that they were entitled to summary judgment as a matter of law because plaintiffs did not make a "sufficient showing" to defendants' motion and supporting materials. Defendants also contend that plaintiffs failed to establish as a matter of law that the Town of Apex's legislative act of rezoning the "subject tract" was illegal entitling plaintiffs to summary judgment. The two assignments of error will be addressed simultaneously.

[1] Summary judgment is proper only when there is no genuine issue of material fact and one party is entitled to judgment as a matter of law. *Little v. National Service Industries Inc.*, 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986). By making a motion for summary judgment, a defendant may force a plaintiff to produce a forecast of evidence demonstrating that the plaintiff will be able to make out at least a prima facie case at trial or be able to surmount an affirmative defense. *Dickens v. Puryear*, 302 N.C. 437, 453, 276 S.E.2d 325, 335 (1981). A plaintiff need not present all the evidence in his favor but only that necessary to rebut the defendant's showing that an essential element of his claim is nonexistent or that he cannot surmount an affirmative defense. *Id.*

"Zoning, as a definitional matter, is the regulation by a local governmental entity of the use of land within a given community, and of the buildings and structures which may be located thereon." *Chrismon v. Guilford County*, 322 N.C. 611, 617, 370 S.E.2d 579, 583 (1988). "A county's legislative body has authority to rezone when reasonably necessary to do so in the interests of the public

health, safety, morals or general welfare; ordinarily the only limitation upon this authority is that it may not be exercised arbitrarily or capriciously." *Nelson v. Burlington*, 80 N.C. App. 285, 287, 341 S.E.2d 739, 740-41 (1986). "A duly adopted zoning ordinance is presumed to be valid, and the burden is upon the plaintiff to establish its invalidity." *Id.*

In the case *sub judice*, the Town of Apex enacted a conditional use zoning ordinance. The practice of conditional use zoning, when carried out properly, is an approved practice in North Carolina. *Chrismon*, 322 N.C. at 622, 370 S.E.2d at 586. "In order to be legal and proper, conditional use zoning, like any type of zoning, must be reasonable, neither arbitrary nor unduly discriminatory, and in the public interest." *Id.*

Defendants supported their motion for summary judgment by providing affidavits which identified the public purposes of the rezoning ordinance. Mr. David Rowland's affidavit stated that the rezoning ordinance serves legitimate public purposes in that it contributes to the revitalization of downtown, it promotes economic stability, and it serves to promote the express statutory goal of conserving the value of buildings.

Plaintiffs' pleadings and supporting affidavits showed that C&D, the owners of the subject property, voluntarily terminated their lease with their former tenant, the postal service, in order to execute a lease with A&E. Because A&E's line of business involved electronic assembly, the property had to be rezoned in order to permit use of the property by A&E. C&D, with the execution of the lease, would realize a $10,000.00 increase in rental profits, and A&E would pay less money in rent for more space. When they executed the lease agreement, A&E was under a present lease until the year 1993 in an area zoned for light industry. C&D, in order to effectuate the lease agreement, petitioned the Town of Apex for a zoning change.

The only public interest cited in the petition and in the Town of Apex's Planning Administrator's recommendation was "occupancy of a vacant building." No other explanation was provided for a zoning change that would implement an industrial use into a neighborhood heavily populated by residential dwellings.

Plaintiff also showed that the enactment of the zoning ordinance would produce minimal benefit to the community. The only

benefit to the community provided by the rezoning ordinance was aesthetic in nature in that the prospective tenant would have to provide streetscaping for the general area around the property.

No jobs were to be created by the zoning change. In fact, Ann Sears, president of A&E, stated in her deposition that she did not intend to increase her staff. No services or other benefits were to be provided for the community by the implementation of the zoning change. There is no indication that the enactment of the zoning ordinance without the creation of jobs, services or other benefits would revitalize downtown or provide economic stability to the community.

A fact more suggestive of the unreasonableness and arbitrariness of the rezoning ordinance was the lack of effort by the owners to find other tenants that could have leased the building and helped to conserve its value without rezoning the subject tract. Plaintiffs provided supporting materials illustrating that fact.

Mr. Billy Johnson, owner of Apex Realty, indicated in his affidavit that he advertised the property for two weeks and had six to seven inquiries concerning the subject tract. Mr. Johnson's activities were on behalf of the tenant, the postal service. After Mr. Johnson informed the postal service that he had a potential tenant (other than A&E) ready, willing, and able to sub-lease the premises, he determined that the postal service would or could not pay a real estate commission. He then contacted one of the owners, an attorney, who advised Mr. Johnson that he wanted to terminate the lease with the postal service since the property was capable of producing higher rents. The affidavit of Mr. Dixon, president of C&D, does indicate that a law firm contacted him about purchasing the building, but the deal never materialized. The affidavits of Mr. Johnson and Mr. Dixon indicate that potential tenants were interested in the subject tract. The express statutory goal of conservation of buildings could have been accomplished without the rezoning necessary to accommodate the prospective tenant, A&E. We, therefore, conclude that plaintiffs provided sufficient evidence that the zoning change from Office & Institutional to Conditional Use Business-2 was unreasonable, arbitrary, and not in the public interest.

[2] Defendants also argue that plaintiffs failed to present sufficient evidence that the conditional use zoning enacted constituted spot zoning. We disagree.

"In this case and indeed in any spot zoning case in North Carolina courts, two questions must be addressed by the fact finder: (1) did the zoning activity in the case constitute spot zoning as our courts have defined that term; and (2) if so, did the zoning authority make a clear showing of a reasonable basis for the zoning." *Chrismon*, 322 N.C. at 625, 370 S.E.2d at 588.

The North Carolina Supreme Court has defined spot zoning as

> A zoning ordinance, or amendment which singles out and reclassifies a relatively small tract owned by a single person and surrounded by a much larger area uniformly zoned . . . so as to relieve the small tract from restrictions to which the rest of the area is subjected is called spot zoning.

Dale v. Town of Columbus, 101 N.C. App. 335, 338, 399 S.E.2d 350, 352 (1991); *see Blades v. City of Raleigh*, 280 N.C. 531, 187 S.E.2d 35 (1972).

An essential element of spot zoning is a small tract of land owned by a single person and surrounded by a much larger area uniformly zoned. Plaintiffs' supporting materials showed that the parcel of land was a small rectangular lot, 100′ × 275′ in size, and owned by a single owner, C&D. They also presented materials which showed that the vast majority of the land surrounding the subject tract is uniformly zoned.

The Court of Appeals, in *Mahaffey v. Forsyth County*, 99 N.C. App. 676, 394 S.E.2d 203 (1990), *aff'd*, 328 N.C. 323, 401 S.E.2d 365 (1991), stated that a tract must be examined relative to the vast majority of the land immediately surrounding it, not just a small isolated pocket of property. The vast majority of the land in *Mahaffey* was zoned Residential-5 and Residential-6 while property 700 feet down the highway was zoned Business-1. The Court found that the property zoned Business-1 was an isolated pocket of spot zoning and held that the vast majority of the property surrounding the subject tract, absent the isolated pocket of spot zoning, was uniformly zoned. *Mahaffey*, 99 N.C. App. at 681, 394 S.E.2d at 206.

In the case *sub judice*, plaintiffs used zoning maps to show that the subject tract is surrounded by a vast majority of property zoned either Residential-6 or Office & Institutional. Property adjacent to the subject tract is zoned Business-1 and Business-2. The two isolated pockets of property zoned Business-1 and Business-2,

at the time they were implemented, were both surrounded by Residential-6 and Office & Institutional zoning. The properties zoned Business-1 and Business-2 are themselves examples of spot zoning. On the basis that the property is surrounded by property uniformly zoned Residential-6 and Office & Institutional, the zoning ordinance enacted by the Town of Apex is spot zoning as defined by the North Carolina Courts.

The North Carolina Supreme Court, however, has established that spot zoning is not invalid per se. *Chrismon*, 322 N.C. at 627, 370 S.E.2d at 589. If there is a reasonable basis for the spot zoning in question, then the spot zoning is legal and therefore valid. "The practice [of spot zoning] is not invalid per se but is beyond the authority of the municipality or county and therefore void only in the absence of a reasonable basis." *Id.*

The North Carolina Supreme Court has enumerated several factors that are relevant to a showing of the existence of a sufficient reasonable basis for spot zoning.

1. The size of the tract in question.

2. The compatibility of the disputed action with an existing comprehensive zoning plan.

3. The benefits and detriments for the owner, his neighbors and the surrounding community.

4. The relationship of the uses envisioned under the new zoning and the uses currently present in adjacent tracts.

Chrismon, 322 N.C. at 628, 370 S.E.2d at 389.

The first factor is the size of the tract in question. Plaintiffs provided evidence that the tract is a single rectangular lot, 100′ × 275′ in size, with a one-story masonry building containing 3,780 square feet of net interior floor space. The lot is surrounded by residences on three sides and is uniformly zoned Residential-6 and Office & Institutional.

The second factor is the compatibility of the disputed action with an existing comprehensive zoning plan. "Zoning generally must be accomplished in accordance with a comprehensive plan in order to promote the general welfare and serve the purpose of the enabling statute. *Alderman v. Chatham County*, 89 N.C. App. 610, 615-16, 366 S.E.2d 885, 889, *disc. review denied*, 323 N.C. 171,

373 S.E.2d 103 (1988). The North Carolina General Statutes § 153A-341 (1983) addresses this issue:

> Zoning regulations shall be made in accordance with a comprehensive plan[.] The regulations shall be made with reasonable consideration as to, among other things, the character of the district and its peculiar suitability for particular uses, and with a view to conserving the value of buildings and encouraging the most appropriate use of land through the county. . . .

In the present case, a comprehensive zoning plan entitled 2010 Land Use Plan was adopted on 5 December 1989. The plan lists several guidelines for future development in the Town of Apex. The two that are relevant to this appeal are the following: (1) Use buffer areas and transitional zoning to protect adjacent existing residential development and (2) Industrial uses should be located adjacent to or near the major railroad corridors and away from residential areas. The 2010 Land Use Map also provides that South Salem Street should continue to be zoned and developed for Office & Institutional uses to provide a transition between residential and more intensive uses. Although the property is zoned Conditional Use Business-2 with the same features as Office & Institutional, the uses to be employed are industrial in nature. The Town of Apex enacted a zoning ordinance in direct contravention of its comprehensive zoning plan.

The third relevant factor is the benefits and detriments to the owner, his neighbors and the surrounding community.

> The standard is not the advantage or detriment to particular neighboring landowners, but rather the effect upon the entire community as a social, economic and political unit. That which makes for the exclusive and preferential benefit of such particular landowner, with no relation to the community as a whole, is not a valid exercise of this sovereign power.

Chrismon, 322 N.C. at 629, 370 S.E.2d at 590, citing *Mansfield & Swett, Inc. v. West Orange*, 120 N.J.L. 145, 150, 198 A. 225, 233 (1938). The benefits to the owner are monetary in nature. When C&D leased the premises to the postal service in December 1989, the rent was $8,000.00 per year. The lease between C&D and A&E, dated 1 June 1990, fixed the rent at $18,000.00 per year. By leasing the premises to A&E, C&D will receive a $10,000.00 increase in rental profits. C&D will also benefit from the special conditions

of the permit which required additional streetscaping to be performed by the tenant around the subject property. The zoning change presents no detriment to C&D.

The only benefit to the community provided by the zoning change is one of an aesthetic nature. Again, the prospective tenant, in accordance with the conditions listed in the zoning ordinance, is obligated to perform streetscaping around the premises. No jobs will be created by the zoning change nor services provided which would specifically benefit the community. The main detriment to the community would be the placement of an industrial use in an area where the property is used for residential and professional purposes.

In *Chrismon*, the Court considered the community's support of the rezoning ordinance in order to assess the benefit of the zoning change to the community. In the case *sub judice*, there was no support for the purported zoning change. In fact, sixty Apex residents signed a protest petition in opposition to the proposed zoning change.

The final factor listed by the *Chrismon* Court in determining whether or not a reasonable basis exists for spot zoning focuses on the compatibility of the uses envisioned in the rezoned tract with the uses already present in adjacent tracts. The use envisioned under the new zoning change is electronic assembly. Present uses of property surrounding the subject tract include: residential dwellings on three sides, medical offices, a bank, a pharmacy and a jewelry store.

Plaintiffs correctly contend that the use envisioned by A&E is a drastic change from the uses already present in the surrounding area. Electronic assembly is manufacturing which is totally different from the various uses that are already present in the surrounding areas. Ann Sears, president of A&E, stated in her deposition that at various times automobiles, vans and tractor trailer trucks would create a flow of traffic in and out of the premises. This type of activity would totally destroy the tenor of the basically residential and professional area. In *Chrismon*, the Court declared that "rezoning of a parcel in an old and well established residential district to a commercial or industrial district would be clearly objectionable." 322 N.C. at 631, 370 S.E.2d at 391.

For the foregoing reasons, the trial court correctly granted the plaintiffs' motion for summary judgment and denied defendants' motion for summary judgment. Accordingly, we

Affirm.

Judges EAGLES and PARKER concur.

ACE, INCORPORATED v. WAYNE R. MAYNARD; UNIFIED TECHNOLOGIES OF TEXAS, INC.; KEN GEDNEY, D/B/A KEN GEDNEY AIRCRAFT SALES AND KEN GEDNEY, INDIVIDUALLY

No. 9121SC854

(Filed 15 December 1992)

1. **Uniform Commercial Code § 9 (NCI3d)— purchase agreement— disclaimer of warranties—evidence of express warranties inadmissible—parol evidence rule**

Where an airplane purchase agreement signed by plaintiff corporation's sole shareholder and the seller's broker stated that "there are NO WARRANTIES, EXPRESS OR IMPLIED AS TO ANY MATTER WHATSOEVER, INCLUDING . . . THE CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES," and the evidence indicated that the writing was the final expression of the parties' agreement as to the terms contained therein, the broker's prior oral statements with regard to the quality and condition of the airplane were inadmissible under the parol evidence rule to show express warranties by the seller because they contradicted the terms of the parties' written agreement. N.C.G.S. §§ 25-2-202 and 25-2-316(1).

Am Jur 2d, Sales §§ 325, 327, 340.

Comment Note—The parol evidence rule and admissibility of extrinsic evidence to establish and clarify ambiguity in written contract. 40 ALR3d 1384.

2. **Uniform Commercial Code § 15 (NCI3d)— warranty of merchantability—exclusion by purchase agreement**

An implied warranty of merchantability of an airplane was properly excluded by a provision in the purchase agree-

ment stating that the sale of the airplane was "as is" and conspicuous language in the agreement specifically disclaiming a warranty of merchantability. N.C.G.S. §§ 25-2-314(1) and 25-2-316.

Am Jur 2d, Sales § 835.

Construction and effect of affirmative provision in contract of sale by which purchaser agrees to take article "as is," in the condition in which it is, or equivalent term. 24 ALR3d 465.

3. Fraud, Deceit, and Misrepresentation § 14 (NCI4th)— fraud in sale of airplane—insufficient evidence

Plaintiff's evidence was insufficient for submission to the jury on the issue of fraud by defendants in the sale of an airplane where the evidence established that plaintiff's sole shareholder read and signed a purchase agreement stating that "there are no REPRESENTATIONS . . . AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES," the shareholder admitted at trial that he understood the effect of this language in the agreement, and plaintiff presented no evidence that defendants knew of any defects in the airplane.

Am Jur 2d, Fraud and Deceit § 388.

Appeal by plaintiff from order filed 9 April 1991 in Forsyth County Superior Court by Judge William H. Freeman. Heard in the Court of Appeals 16 September 1992.

Petree Stockton & Robinson, by Jerry M. Smith, for plaintiff-appellant.

Brooks, Pierce, McLendon, Humphrey & Leonard, by Mack Sperling, for defendant-appellees.

GREENE, Judge.

Plaintiff appeals from a judgment notwithstanding the verdict, N.C.G.S. § 1A-1, Rule 50, filed 9 April 1991.

The evidence in the record before this Court establishes that in January, 1989, defendant Unified Technologies of Texas, Inc. (Unified) marketed for sale a used Beechcraft Baron airplane through

Trade-A-Plane, an aviation advertising journal. Plaintiff, through its sole shareholder, Winston-Salem attorney Thompson Comerford (Comerford), contacted defendant Ken Gedney (Gedney), the broker for the airplane, at Gedney's office in Dallas, Texas. During that and subsequent telephone conversations, Gedney stated that the airplane had been "excellently maintained," had been operated under Section 135 flight regulations (meaning the plane had been subject to airworthiness inspections every one-hundred flight hours), and that he was personally familiar with its performance and characteristics. Gedney also sent Comerford a specifications sheet outlining the airplane's avionics and its cosmetic and optional features, as well as a videotape of the plane.

Comerford and Gedney reached an agreement for the sale of the airplane to plaintiff. They agreed that the sale was subject to an inspection, which was conducted by independent mechanic Ferrell Trask in Dallas who advised Comerford that the aircraft was completely airworthy, and a test flight by Comerford. At the time Comerford agreed to the purchase, the plane was three months from its annual inspection and twenty-five flight hours from its next one-hundred-hour inspection. Comerford sent Gedney $3500.00 to hold the plane until Gedney could deliver it to him in North Carolina. Gedney later informed Comerford that his schedule did not permit him to deliver the plane, so they agreed that Comerford would travel to Dallas to pick it up. Prior to Comerford's traveling to Dallas, Gedney informed Comerford that the balance of the purchase price, $80,000.00, would need to be wired to Unified's account in Dallas in order to obtain the release of a lien on the plane. Comerford wired the money to a bank in Dallas prior to leaving North Carolina.

Upon arrival in Dallas on 21 July 1989, Comerford accompanied Gedney to a bank in order to ascertain that the money wired by Comerford had been received. This process took several hours. Comerford and Gedney then went to Gedney's aircraft hangar where the plane was located. Comerford observed the plane for the first time and was immediately "disappointed" in its cosmetic features. Comerford then checked the plane's log books, which Comerford testified "appeared to be in order." At this point, according to Comerford's testimony, he and Gedney agreed that, since it was getting late and Comerford did not have time to test fly the plane, Comerford's flight back to North Carolina would serve as the test flight. Prior to Comerford's departure, Gedney, on instructions from

Unified, presented to Comerford a one-page "Purchase Agreement." Gedney informed Comerford that his signature on the document would be required in order for Comerford to take the plane to North Carolina. Comerford read and "reluctantly" signed the document, which provides in pertinent part that

> [p]urchasers [Ace, Incorporated] have been informed and understand that this is a final sale, and that the aircraft, parts and accessories, are being sold "AS IS" and "WHERE IS," and that there are "NO REPRESENTATIONS OR WARRANTIES, EXPRESS OR IMPLIED AS TO ANY MATTER WHATSOEVER, INCLUDING, WHITHOUT [SIC] LIMITATION, THE CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES, ITS MERCHANTABILITY OR ITS FITNESS FOR ANY PARTICULAR PURPOSE."

After both parties signed the document, Comerford started the airplane and taxied it down the runway. Experiencing problems with the brakes and the plane's steering mechanism, Comerford returned to the hangar to discuss the problems with Gedney, who, according to Comerford, promised to correct the defects. Comerford then flew the airplane to North Carolina, during which time he discovered more problems, "the most significant of which was unsatisfactory climb and cruise performance." Comerford called Gedney immediately upon landing in North Carolina, and, according to Comerford, Gedney stated that any problems with the aircraft would be resolved but that he "couldn't talk now because he was having a party." Comerford unsuccessfully attempted to contact Gedney and defendant Wayne Maynard, president of Unified, throughout the weekend. Defendants later refused to repair the defects in the aircraft and rejected plaintiff's tender of the plane in exchange for the purchase price. Plaintiff repaired the airplane at its own expense and brought the instant action for damages, asserting claims for breach of warranty, fraud, and unfair and deceptive trade practices.

At trial, both Comerford and plaintiff's expert Thomas Hurlocker testified that the airplane's condition was not consistent with a "Part 135 operation," and that, in fact, had certain repairs not been made after plaintiff's purchase of the plane, the plane would be considered unairworthy. At the close of all the evidence, defendants made a motion for a directed verdict, which was denied. The jury returned a verdict in favor of plaintiff on plaintiff's claims for breach of express warranty, breach of the implied warranty

of merchantability, and fraud. Defendants subsequently made a motion for judgment notwithstanding the verdict and, in the alternative, for a new trial. From an order by the trial court granting defendants' motion, plaintiff appeals.

The issues presented are (I) whether the Purchase Agreement properly disclaimed any express warranties regarding the airplane; (II) whether the Purchase Agreement properly disclaimed the implied warranty of merchantability; and (III) whether plaintiff failed to present substantial evidence of the essential elements of fraud on the part of defendants, thus rendering the trial court's granting of defendants' motion for judgment notwithstanding the verdict proper.

When the trial court denies a defendant's motion for a directed verdict made at the close of all the evidence, the court may, upon motion by the defendant made within ten days after entry of judgment, reconsider the sufficiency of the evidence and enter judgment notwithstanding the verdict (JNOV). N.C.G.S. § 1A-1, Rule 50 (1990). "A [JNOV motion] is simply a motion that judgment be entered in accordance with the movant's earlier motion for a directed verdict and notwithstanding the contrary verdict actually returned by the jury." W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 50-6 (4th ed. 1992).

The central question for the reviewing court when a trial court grants a defendant's motion for judgment notwithstanding the verdict is whether, taking the evidence in the light most favorable to the plaintiff and resolving all inconsistencies in his favor, the plaintiff met his burden at trial of presenting substantial evidence of his claim. Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

I

Express Warranties

[1] Plaintiff argues that it presented substantial evidence at trial of defendants' creation and breach of express warranties with regard to the quality and condition of the airplane, and that the trial court erred by granting defendants' JNOV motion on this issue. Specifically, plaintiff argues that the following statements by Gedney created express warranties: (1) the aircraft's icing boots were in

excellent condition; (2) the aircraft received excellent maintenance; (3) the aircraft received pampered treatment and was babied; and (4) the aircraft was maintained as a Part 135 air taxi operation. Defendants contend that the Purchase Agreement signed by Comerford disclaimed any express warranties, and that Gedney's prior oral statements to Comerford are legally ineffective under the parol evidence rule. In the alternative, defendants argue that, if Gedney's statements are deemed admissible, such statements are mere opinion or "puff," and do not give rise to express warranties.

We need not decide whether plaintiff presented substantial evidence that Gedney's statements to Comerford regarding the airplane created any express warranties or whether such warranties, if created, were breached, as plaintiff contends, because evidence of such statements was not properly before the jury at trial. The sale of the airplane constitutes the sale of goods and is thus governed by Article 2 of the Uniform Commercial Code (UCC), which provides in pertinent part that

> [w]ords or conduct relevant to the creation of an express warranty and words or conduct tending to negate or limit warranty shall be construed wherever reasonable as consistent with each other; but *subject to the provisions of this article on parol or extrinsic evidence (G.S. 25-2-202)* negation or limitation is inoperative to the extent that such construction is unreasonable.

N.C.G.S. § 25-2-316(1) (1986) (emphasis added). As stated in the statute, the provisions of Section 25-2-316(1) are subject to the parol evidence rule, which provides that

> [t]erms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
>
> (a) by course of dealing or usage of trade (G.S. 25-1-205) or by course of performance (G.S. 25-2-208); and
>
> (b) by evidence of consistent additional terms unless the court finds the writing to have been intended also as a complete and exclusive statement of the terms of the agreement.

N.C.G.S. § 25-2-202 (1986). The reference to the parol evidence rule in Section 25-2-316(1) is intended to protect the seller "against false allegations of oral warranties." N.C.G.S. § 25-2-316 cmt. 2 (1986). Thus, evidence of any oral statements made by the seller to the buyer prior to or contemporaneous with the parties entering into a final written agreement which tend to contradict the terms of the written agreement are inadmissible unless (1) the written agreement was not intended by the parties as a final expression of their agreement; or (2) even if the writing was intended as a final expression of the parties' agreement, the evidence is of consistent additional terms which supplement the writing, and the writing was not intended as a complete and exclusive statement of the terms of the agreement. James J. White & Robert S. Summers, *Uniform Commercial Code* § 12-4 (3d ed. 1988).

In the instant case, plaintiff, through Comerford, and defendants, through Gedney, entered into a written agreement which expressly provided that "purchasers . . . understand that this is a final sale" and that "there are NO WARRANTIES, EXPRESS OR IMPLIED AS TO ANY MATTER WHATSOEVER, INCLUDING . . . THE CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES . . . ." The evidence before this Court indicates that the writing was the final expression of the parties' agreement as to the terms contained therein.[1] Both Comerford and Gedney read and signed the writing, the validity of which is undisputed, the writing is unambiguous, and plaintiff presented no evidence that the writing was intended to be tentative and preliminary to a final draft, in which case the parol evidence rule would not apply. *See* John D. Calamari & Joseph M. Perillo, *Contracts* § 3-3 (3d ed. 1987). In fact, Comerford testified at trial that he knew that the effect of his signing the agreement was to "waive . . . any rights that I would have because [defendants were] asking me to say I'm accepting [the plane] as is without ever having flown it," yet he made the decision to sign it, albeit "reluctantly." Because plaintiff's evidence of the alleged express oral warranties made by Gedney contradicts the terms of the parties' written agreement disclaiming any express warranties "AS TO ANY MATTER WHATSOEVER, INCLUDING . . . THE CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES," the jury never should have heard such evidence. The fact that the jury *did* hear the evidence is

1. The question of whether the writing was intended to be final is for the court. John D. Calamari & Joseph M. Perillo, *Contracts* § 3-3 (3d ed. 1987).

immaterial as the parol evidence rule is not a rule of evidence but one of substantive law which, when coupled with a proper objection, renders legally ineffective the prior oral contradictory statements.[2] *See* 2 Henry Brandis, Jr., *Brandis on North Carolina Evidence* § 251 (3d ed. 1988); *Lindsey v. North Carolina Farm Bureau Mut. Ins. Co.*, 103 N.C. App. 432, 436, 405 S.E.2d 803, 805 (1991) (in North Carolina, parol evidence admitted without objection must be considered by the fact finder). Accordingly, the trial court correctly granted defendants' JNOV motion with regard to this issue.[3]

II

[2] Plaintiff argues that defendants breached the implied warranty of merchantability with regard to the sale of the airplane. Defendants argue that such warranty was properly excluded by the language of the Purchase Agreement.

> The UCC, Section 25-2-314, provides in pertinent part that
>
> [u]nless excluded or modified (G.S. 25-2-316), a warranty that the goods shall be merchantable is implied in a contract for their sale if the seller is a merchant with respect to goods of that kind.

N.C.G.S. § 25-2-314(1) (1986). The dispositive question in the instant case with regard to the implied warranty of merchantability is whether defendants properly excluded it. Section 25-2-316 in relevant part provides:

---

2. Here, even though defendants did not object at trial to the introduction of evidence of Gedney's alleged oral statements, defendants had previously, but unsuccessfully, made a motion in limine requesting exclusion of such evidence on the ground that it was barred by the parol evidence rule. Their motion was equivalent to an objection at trial, and sufficiently preserved the issue for appellate review. *State v. Moore*, 107 N.C. App. 388, 394-95, 420 S.E.2d 691, 696 (1992) (motion in limine sufficient to preserve issue for appellate review despite fact that party failed to object to the introduction of the evidence at trial).

3. We note that plaintiff presented evidence that Gedney orally agreed to correct certain problems discovered by Comerford after the signing of the Purchase Agreement, thus raising the question of post-sale oral modification of the written contract and disclaimer. *See Muther-Ballenger v. Griffin Elec. Consultants, Inc.*, 100 N.C. App. 505, 511, 397 S.E.2d 247, 250 (1990) (parol evidence rule would not bar evidence of oral modification made subsequent to the execution of the written contract). However, this issue was not presented to the jury at trial and is not argued by plaintiff before this Court.

(2) Subject to subsection (3), to exclude or modify the implied warranty of merchantability or any part of it the language must mention merchantability and in case of a writing must be conspicuous, ...

(3) Notwithstanding subsection (2)

(a) unless the circumstances indicate otherwise, all implied warranties are excluded by expressions like "as is," "with all faults" or other language which in common understanding calls the buyer's attention to the exclusion of warranties and makes plain that there is no implied warranty; . . . .

N.C.G.S. § 25-2-316 (1986). Terms such as "as is" and the like "in ordinary commercial usage are understood to mean that the buyer takes the entire risk as to the quality of the goods involved." *Id.* cmt. 7.

In the instant case, the Purchase Agreement contained more than that necessary to properly exclude the implied warranty of merchantability: the mention of "merchantability" in conspicuous language, *see* N.C.G.S. § 25-1-201(10) (1986) (language is conspicuous if it is "so written that a reasonable person against whom it is to operate ought to have noticed it") and the provision that the sale of the plane was "as is." Comerford admitted at trial to an understanding of the effect of such language. We reject plaintiff's contention that the trial court erred in granting defendants' JNOV motion as to this issue.

III

[3] Plaintiff argues that it presented substantial evidence of fraud on the part of defendants, and that therefore the trial court erred in granting defendants' JNOV motion as to this issue. We disagree.

Substantial evidence of fraud consists of "(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." *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 627, 381 S.E.2d 156, 160 (1989), *aff'd*, 326 N.C. 480, 390 S.E.2d 137 (1990) (citation omitted). In the instant case, the evidence established that Comerford, on behalf of plaintiff, read and signed a Purchase Agreement which expressly provided that "there are NO REPRESENTATIONS . . . AS TO ANY MATTER WHATSOEVER, INCLUDING, WITHOUT LIMITATION, THE

CONDITION OF THE AIRCRAFT, PARTS OR ACCESSORIES . . . ." At trial, Comerford, an experienced civil litigation attorney, acknowledged that he understood that the effect of the agreement would be to "waive any rights that I would have" because "I [was] accepting [the plane] as is without ever having flown it." Thus, because Comerford effectively agreed when he signed the Purchase Agreement that defendants made no representations whatsoever with regard to the plane, plaintiff is unable to establish the making of a *false* representation. Moreover, plaintiff failed to establish concealment of a material fact on the part of defendants because plaintiff presented no evidence that defendants knew of any defects in the plane. *See Myers & Chapman, Inc. v. Thomas G. Evans, Inc.*, 323 N.C. 559, 568, 374 S.E.2d 385, 391 (1988) (knowledge and an intent to deceive are required in order to establish the *scienter* necessary for fraud). The evidence established that, at the time of plaintiff's purchase, the plane was close to being due for its annual inspection as well as its next one-hundred-hour inspection. Comerford himself testified that he had never had an annual inspection performed on one of his planes "where there wasn't work that had to be done in addition to just the routine inspection." Because plaintiff, through Comerford, assented to the terms of the agreement, as evidenced by Comerford's signature and his acknowledgement at trial to an understanding of its effect, and because plaintiff failed to present substantial evidence of *scienter* on the part of defendants, the issue of fraud should not have been submitted to the jury. Accordingly, the trial court correctly granted defendants' JNOV motion on this issue. The trial court's correct ruling in this regard makes it unnecessary to address plaintiff's assignment of error regarding his claim for unfair and deceptive trade practices.

Based on the foregoing, we discern

No error.

Judges WELLS and ORR concur.

THOMAS E. VASS v. BOARD OF TRUSTEES OF THE TEACHERS' AND STATE EMPLOYEES' COMPREHENSIVE MAJOR MEDICAL PLAN

No. 9110SC895

(Filed 15 December 1992)

1. **Administrative Law and Procedure § 56 (NCI4th)— commencement of contested case—applicability of former APA**

A contested case commenced when plaintiff State employee, on 14 November 1984, appealed to the Board of Trustees of the State Employees' Medical Plan from the claim processor's decision to deny coverage for a radial keratotomy procedure, and the dispute was governed by the former APA, N.C.G.S. Ch. 150A, because the contested case was commenced before 1 January 1986. However, the Board was not prejudiced by the trial court's consideration of the case under N.C.G.S. Ch. 150B where the Board never entered a final decision denying plaintiff's claim and he was thus not time-barred from seeking judicial review under Ch. 150A; and although Ch. 150B provides that the case shall be heard before an ALJ and Ch. 150A provides that the hearing shall be before the Board, the Board is required in both instances to make the final decision and did so in this case.

Am Jur 2d, Administrative Law § 354.

2. **Insurance § 338 (NCI4th)— State Employees' Medical Plan—coverage of radial keratotomy**

Substantial evidence did not exist in the record to support a conclusion by defendant Board of Trustees that plaintiff's radial keratotomy was not a covered procedure under the State Employees' Medical Plan where the evidence showed that the radial keratotomy was not performed for cosmetic reasons or as a substitute for eyeglasses but was recommended by plaintiff's ophthalmologist as medically necessary to stop the worsening of the myopic condition in plaintiff's right eye; the procedure requires incisions or cuts to the patient's cornea and constitutes surgery; neither the American Medical Association nor the N.C. Medical Association has characterized the procedure as having no medical value; and the Board did not

deny plaintiff's claim as part of an overall program of cost containment. N.C.G.S. §§ 135-40.6, 135-40.7.

Am Jur 2d, Insurance § 547.

Appeal by respondent from judgment entered 25 March 1991 in Wake County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 22 September 1992.

Thomas L. Fowler, and Bowden & Rabil, P.A., by S. Mark Rabil, for petitioner-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Grayson G. Kelley, for respondent-appellant.

GREENE, Judge.

Plaintiff Thomas E. Vass (Vass) filed a petition for judicial review of the decision of the defendant Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan (the Board), which denied Vass coverage for a medical claim. The trial court reversed the Board and the Board appeals.

Vass was an employee of the North Carolina Department of Labor in 1984, and as a part of his contract of employment was covered by the Teachers' and State Employees' Comprehensive Major Medical Plan (the Medical Plan). The Medical Plan is administered by the Board. Benefits under the Medical Plan are paid pursuant to N.C.G.S. §§ 135-40 to -40.7 (Supp. 1983). At the time this dispute arose, the Board had contracted with EDS Federal Corporation (EDS Federal), pursuant to N.C.G.S. § 135-40(b), to process claims and administer benefits under the Medical Plan. On 21 March 1984, in response to an inquiry from Vass, EDS Federal advised Vass that radial keratotomy, a surgical procedure in which laser incisions are made in the front surface of the patient's cornea, was not a covered procedure under the Medical Plan, and that no reimbursement would be made for the procedure. Vass and his ophthalmologist felt he needed radial keratotomy to stop the steady deterioration of vision in his right eye due to myopia (nearsightedness). On 19 June 1984, Vass underwent the radial keratotomy procedure, which was successful in stopping the deterioration, and incurred expenses of $1,725.00. On 21 June 1984, Vass filed a claim with EDS Federal for payment of these expenses. The claim was denied by EDS Federal on 28 August 1984. Vass appealed the

denial through EDS Federal and reimbursement was again denied. Vass then appealed directly to the Board. The Board decided, without granting Vass a hearing, that the claim would not be paid. The Board gave as its reasons that radial keratotomy was a substitute for eyeglasses and had no medical value. After being informed of the Board's decision, Vass contacted the Medical Director of EDS Federal and sought to have the Board's decision reconsidered. On 22 March 1985, Vass was informed by EDS Federal's Medical Director that he had exhausted all of his appeals and "[t]here is no further appeal other than through litigation."

Having been told that his only available relief was through litigation, Vass filed a complaint in Wake County District Court against the Board on 10 July 1985, alleging that the Board was breaching its employment contract with Vass by refusing to reimburse his legitimate medical expenses under the Medical Plan. The trial court granted the Board's motion for summary judgment, and Vass appealed to this Court. In an opinion dated 15 March 1988, this Court held that the trial court lacked subject matter jurisdiction over the case because the Board was an administrative agency. Therefore, contrary to the Medical Director's representation to Vass that he had exhausted his administrative remedies, any dispute with the Board must be brought under the Administrative Procedure Act (the APA). *Vass v. Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan*, 89 N.C. App. 333, 335, 366 S.E.2d 1, 2 (1988), *modified and aff'd*, 324 N.C. 402, 379 S.E.2d 26 (1989). The North Carolina Supreme Court modified and affirmed this ruling, stating that the Board's decision to deny Vass coverage for radial keratotomy surgery was subject to judicial review only under the terms of the APA, and that Vass must therefore exhaust all administrative remedies available to him under the APA prior to seeking judicial review. Because Vass had not exhausted his administrative remedies prior to seeking judicial review, summary judgment for the Board was vacated and the case dismissed. *Vass v. Board of Trustees of the Teachers' and State Employees' Comprehensive Major Medical Plan*, 324 N.C. 402, 379 S.E.2d 26 (1989). In so ruling, the Court specifically declined to consider whether the former version of the APA, N.C.G.S. § 150A, or the current version of the APA, N.C.G.S. § 150B, would apply to this dispute. The Court also declined to decide whether Vass is now time-barred from commencing an administrative proceeding under the controlling version of the APA. *Id.*

On 13 April 1988, Vass filed a petition for a contested case hearing in the Office of Administrative Hearings (the OAH) pursuant to N.C.G.S. § 150B. The OAH referred the case to an Administrative Law Judge (ALJ). The ALJ ruled that N.C.G.S. § 150B controlled the case, and recommended on 18 August 1989 that payment be made for the radial keratotomy procedure. The Board rejected the ALJ's recommendation on 15 November 1989 and affirmed its original decision that the procedure was not eligible for reimbursement. Vass was served with the decision on 17 January 1990. On 26 February 1990, Vass filed a petition for judicial review in superior court. The trial court found that Vass had properly filed this action under N.C.G.S. § 150B, that the action was not time-barred, and reversed the final agency decision that radial keratotomy was not a covered procedure under the Medical Plan.

The Board contends that Vass' dispute became a contested case when appealed from EDS Federal to the Board on 14 November 1984, and the former version of the APA, N.C.G.S. § 150A, applies. The Board further contends that Vass' action seeking judicial review is time-barred because he did not file a petition for judicial review within thirty days of the Board's final decision as required by N.C.G.S. § 150A. In the alternative, the Board contends that the trial court failed to follow the standard of review set forth in N.C.G.S. § 150B-51 for reviewing the Board's final decision.

Vass contends that the current version of the APA, Chapter 150B, controls because he was given no opportunity for a hearing prior to his filing of a petition for a contested case hearing with the OAH on 26 April 1988. He further contends that his petition for judicial review was timely filed within thirty days of the Board's final decision and the trial court acted properly in reviewing the final decision of the Board.

The issues presented are whether (I) the trial court committed harmful error in applying N.C.G.S. § 150B to this case; and (II) substantial evidence exists in the record to support the final decision of the Board.

I

Administrative remedies designed to settle disputes between state agencies and those affected by agency action are set forth

in the APA. The original APA, codified as N.C.G.S. § 150A, was effective until 31 December 1985. The APA was rewritten in 1985 and recodified as N.C.G.S. § 150B, with the new version becoming effective 1 January 1986. 1985 N.C. Sess. Laws ch. 746, § 1. The provisions of N.C.G.S. § 150B "shall not affect contested cases commenced before January 1, 1986." 1985 N.C. Sess. Laws ch. 746, § 19. Therefore, if a contested case commenced between Vass and the Board prior to 1 January 1986, it was error to apply N.C.G.S. § 150B to this case.

N.C.G.S. § 150A, in effect at the time the dispute between Vass and the Board arose, is silent as to the time when a contested case commences. N.C.G.S. § 150A-2(2) defines contested case as

> any agency proceeding, by whatever name called, wherein the legal rights, duties or privileges of a party are required by law to be determined by an agency after an opportunity for an adjudicatory hearing.

N.C.G.S. § 150A-2(2) (1983). Under this definition there are two essential elements in determining when a contested case is commenced: (1) there must be an agency proceeding, (2) wherein the rights of a party must be determined. *Lloyd v. Babb*, 296 N.C. 416, 424-25, 251 S.E.2d 843, 850 (1979).

[1] Under the criteria of *Lloyd*, because N.C.G.S. § 135-39.7 provided a procedure whereby the Board was authorized to resolve medical coverage disputes, a contested case commenced when the dispute was presented to the Board in Vass' appeal. N.C.G.S. § 135-39.7 (Supp. 1983) (person aggrieved by claims contractor's resolution of medical claim entitled to appeal to Board). Thus when Vass, on 14 November 1984, appealed the decision of EDS Federal to deny coverage for the radial keratotomy procedure, a contested case was commenced. Therefore, because this contested case was commenced prior to 1 January 1986, the dispute between the Board and Vass was governed by N.C.G.S. § 150A. *Pinewood Manor Mobile Homes, Inc. v. North Carolina Manufactured Hous. Bd.*, 84 N.C. App. 564, 566, 353 S.E.2d 231, 232, *disc. rev. denied*, 319 N.C. 674, 356 S.E.2d 780 (1987). Accordingly, it was error to resolve this dispute according to N.C.G.S. § 150B.

However, because this error does not prejudice the Board, it did not constitute reversible error. *In re Estate of Tucci*, 104 N.C. App. 142, 151, 408 S.E.2d 859, 865 (1991) (party seeking relief

on appeal must show both error and that error was prejudicial). The Board contends that allowing Vass to proceed under N.C.G.S. § 150B prejudices the Board because it affords him the opportunity to seek judicial review when he would be time-barred from doing so under N.C.G.S. § 150A. N.C.G.S. § 150A-45 (1983) (party to agency dispute waives right to seek judicial review if petition not filed in superior court within thirty days of final agency decision). We disagree. Because the Board never entered a final decision denying Vass' claim, the time for seeking judicial review had not yet accrued. *In re Appeal of Harris*, 273 N.C. 20, 27, 159 S.E.2d 539, 545 (1968) (right to petition for judicial review continues until provisions of statute strictly complied with).

The decision of the Board was not final because the record does not reflect that the decision was based on review of an official record created at a hearing where all parties are allowed to present evidence and legal arguments. N.C.G.S. §§ 150A-23, -36, -37 (1983). Nor did the decision include findings of fact and conclusions of law as required by N.C.G.S. § 150A-36. N.C.G.S. § 150A-36 (1983). Therefore, because the time to petition for judicial review under N.C.G.S. § 150A never accrued and thus was not waived, the application of N.C.G.S. § 150B does not prejudice the Board.

Furthermore, the Board is not prejudiced because the hearing afforded Vass under N.C.G.S. § 150B is different than that under N.C.G.S. § 150A. We acknowledge that N.C.G.S. § 150B provides that the case shall be heard before an ALJ and that N.C.G.S. § 150A provides that the hearing be before the Board. N.C.G.S. §§ 150A-23, -36 (1983); N.C.G.S. §§ 150B-23, -36 (1991). However, in both instances the Board is required to make the final decision and did so in this case. N.C.G.S. § 150A-36 (1983); N.C.G.S. § 150B-36 (1991). Thus, because no prejudice accrued to the Board from the application of N.C.G.S. § 150B to this dispute, the error was harmless. Accordingly, we review these proceedings under N.C.G.S. § 150B.

II

The scope of this Court's appellate review of the trial court's decision is the same as that utilized by the trial court. *Jarrett v. North Carolina Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991). In reviewing a final agency decision, we must determine whether the decision of the administrative agency should be reversed because the substantial rights of the peti-

tioner 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 . . . in view of the entire record as submitted; or

(6) Arbitrary or capricious.

N.C.G.S. § 150B-51 (1991). Our review is further limited to assignments of error to the trial court's order. *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987). Here the Board assigns as error that the Board's decision was properly supported by substantial evidence and we limit our review to that issue.

When reviewing an agency decision to determine whether it is supported by substantial evidence, we must apply the whole record test, taking all evidence into account to determine whether there is substantial evidence that a reasonable mind might accept as adequate to support the agency decision. *Walker v. North Carolina Dep't. of Human Resources*, 100 N.C. App. 498, 502-03, 397 S.E.2d 350, 354 (1990), *disc. rev. denied*, 328 N.C. 98, 402 S.E.2d 430 (1991). If the agency decision is not supported by substantial evidence, the decision must be reversed or modified. N.C.G.S. § 150B-51 (1991).

In Vass' case, the Board's decision concerning medical coverage is governed by N.C.G.S. §§ 135-40.6 to -40.7. N.C.G.S. § 135-40.6 provides that the Medical Plan will pay for surgery. Under covered surgical benefits is listed, among others, "[c]utting procedures." N.C.G.S. § 135-40.6(5)(a) (Supp. 1983). The Medical Plan will not cover "[c]osmetic surgery or surgery solely for beautifying purposes." N.C.G.S. § 135-40.6(6)(b) (Supp. 1983). Nor will benefits be paid for surgical procedures "specifically listed by the American Medical Association or the North Carolina Medical Association as having no medical value." N.C.G.S. § 135-40.6(6)(h) (Supp. 1983). Eyeglasses are specifically excluded from coverage. N.C.G.S. § 135-40.6(9)(f) (Supp. 1983). The Medical Plan also generally ex-

cludes payment for any charges which are not "certified by a physician who is attending the individual as being required for the necessary treatment of the injury or disease." N.C.G.S. § 135-40.7(5) (Supp. 1983). The Medical Plan is also authorized to deny costs "as part of its overall program of . . . cost containment." N.C.G.S. § 135-40.7(16) (Supp. 1983). Nowhere in the list of exclusions to medical coverage is it specifically stated that radial keratotomy in not a covered procedure.[1]

In rendering its final decision pursuant to its governing statutes that radial keratotomy was not a covered procedure, the Board made thirty-one findings of fact. The most important of these findings of fact were that radial keratotomy: (1) was not required to treat a disease or accidental bodily injury; (2) was a substitute for eyeglasses; (3) was primarily for convenience and cosmetic purposes; (4) was listed by the American Medical Association and other medical agencies as an investigational procedure only, and therefore had no medical value; and (5) that EDS Federal, under its contract with the Medical Plan, was required to determine which medical procedures were covered, and had established that radial keratotomy was not a covered procedure.

[2] We have reviewed the entire record and find that there is not substantial evidence in the record to support the Board's decision to refuse coverage. The record shows, through the affidavits of Vass and his doctors, that the radial keratotomy was not performed for cosmetic reasons nor as a substitute for eyeglasses. In the opinion of Vass' ophthalmologist, radial keratotomy was medically necessary to stop the worsening of the myopic condition in his right eye, which had become an impediment to his ability to work and perform his daily activities. It is uncontested that radial keratotomy requires incisions or cuts to the patient's cornea, which is a cutting procedure and therefore surgery. There is no evidence in the record to support the Board's contention that the American Medical Association or the North Carolina Medical Association has characterized radial keratotomy as having no medical value. Indeed, an affidavit from the Program Administrator of the American Medical Association's Technology Assessment Department states that "[t]he American Medical Association does not take, and to

1. We note that since this controversy arose the legislature has now specifically provided that radial keratotomy will not be covered by the Medical Plan. N.C.G.S. § 135-40.6(j) (1992).

the best of my knowledge has never taken, the position that radial keratotomy has no medical value." An affidavit from the North Carolina Medical Association contains a similar statement. Although evidence was presented which showed that many medical experts and the American Medical Association consider the procedure to be either investigative or experimental, this does not equate to a declaration that radial keratotomy is of no medical value. It is not disputed that EDS Federal is authorized by N.C.G.S. § 135-40(b) to determine medical benefits for the Medical Plan, but nowhere is it suggested that EDS Federal is authorized to deny benefits other than in conformity with the statutory language in N.C.G.S. §§ 135-40.6 to -40.7. N.C.G.S. § 135-40(b) (Supp. 1983). Nor does any evidence in the record suggest that the Board initially denied the claim as part of an overall program of cost containment.

In summary, a review of all the evidence in the record reveals that substantial evidence does not exist in the record to support the Board's conclusion that the radial keratotomy was not a covered procedure under the Medical Plan. The record in fact supports the contrary conclusion that the Medical Plan did provide coverage for the radial keratotomy procedure.

Accordingly, the order of the trial court reversing the Board's decision is

Affirmed.

Judges ARNOLD and WELLS concur.

ROBERT JERRY MATTHEWS, EMPLOYEE, PLAINTIFF v. PETROLEUM TANK SERVICE, INC., EMPLOYER; HARTFORD ACCIDENT & INDEMNITY COMPANY, CARRIER, DEFENDANTS

No. 9110IC1106

(Filed 15 December 1992)

1. Master and Servant § 65.2 (NCI3d)— back injury—temporary total disability—supported by evidence

The evidence supported the Industrial Commission's finding that plaintiff was temporarily totally disabled where plaintiff injured and re-injured his back while working for defendant

and there was evidence that plaintiff suffers from chronic pain syndrome as a result of his injury; chronic pain syndrome is not curable; plaintiff will have to live with pain the rest of his life; the pain is 50% physical and 50% psychological; the pain is real despite the fact that it has a partly psychological origin; several doctors agreed that plaintiff suffered pain, although they disagreed on the cause; one doctor gave his opinion that plaintiff could never return to the heavy work he had performed and another felt that plaintiff could perform medium to light work; none of the experts described any method whereby the intensity of a person's pain can be measured other than by the subjective opinion of the patient himself; plaintiff described his pain to a doctor during examination as constant and unrelenting and as being aggravated by all activity, particularly activity involving movement, stooping, bending, and lifting; plaintiff assessed his pain at five on a scale of one to five, with five being unbearable; and plaintiff testified before the Commission that he had not returned to work because his pain was so severe that he had not been able to do so. The Commission, in its proper role as sole judge of the credibility of witnesses, found plaintiff's testimony that he was unable to work due to pain more credible than the expert testimony that he was capable of performing medium to light work.

Am Jur 2d, Damages §§ 969, 982.

Admissibility, in civil case, of expert evidence as to existence or nonexistence, or severity of pain. 11 ALR3d 1249.

Sufficiency of evidence, in personal injury action, to prove permanence of injuries and to warrant instructions to jury thereon. 18 ALR3d 170.

2. **Master and Servant § 65.2 (NCI3d)— back injury—future medical and surgical treatment—supported by evidence**

The evidence supports the Industrial Commission's finding that plaintiff is entitled to future medical care where plaintiff injured and re-injured his back while working for defendant; the Commission correctly found that plaintiff was temporarily totally disabled; and, despite evidence to the contrary, there was evidence that a doctor recommended further medical treatment and that such treatment might effect a cure or give relief.

Am Jur 2d, Damages §§ 166, 200, 213.

Requisite proof to permit recovery for future medical expenses as item of damages in personal injury action. 69 ALR2d 1261.

3. Master and Servant § 99 (NCI3d)— back injury—workers' compensation—attorney fees

The portion of a motion in the Court of Appeals for attorney fees in defending a workers' compensation appeal before the Industrial Commission was remanded to the Commission where the record reflects that the Commission ordered each side to pay its own costs, but it is not clear whether "costs" referred to attorney fees. The portion of the motion dealing with attorney fees for the appeal to the Court of Appeals was granted because the insurer brought the appeal and the decision required the insurer to pay temporary disability benefits and future medical expenses. N.C.G.S. § 97-88; N.C.G.S. § 97-88.1.

Am Jur 2d, Worker's Compensation §§ 723, 725.

Appeal by defendants from the Opinion and Award for the North Carolina Industrial Commission entered 1 August 1991. Heard in the Court of Appeals 21 October 1992.

Charles M. Welling for plaintiff-appellee.

Hedrick, Eatman, Gardner & Kincheloe, by Edward L. Eatman, Jr. and Jeffrey D. Penley, for defendant-appellants.

GREENE, Judge.

Employer Petroleum Tank Service, Inc. (Petroleum) and insurance carrier Hartford Accident & Indemnity Company (Hartford) appeal from the North Carolina Industrial Commission's award of temporary total disability compensation and future medical expenses to employee Robert Jerry Matthews (Matthews).

Petroleum is engaged in the business of cleaning and servicing large petroleum tanks. Hartford is Petroleum's workers' compensation insurance carrier. Matthews was employed by Petroleum as a sandblaster and covered by its workers' compensation policy. On 28 April 1988, Matthews was driving one of Petroleum's trucks to a work site in Meridian, Mississippi when the truck was rear-

ended by another vehicle. Matthews sustained injury to his lower back and was hospitalized for six days. When Matthews returned home to Charlotte he was treated at a local clinic and by a chiropractor. When his back pain failed to improve, he contacted Dr. Nandal C. Shah (Dr. Shah), who specialized in rehabilitative medicine. Dr. Shah diagnosed Matthews as suffering from chronic lower back pain as a result of the impact of the collision, and treated him with ultrasound therapy, massage, and physical therapy. Matthews made some improvement and was released by Dr. Shah on 14 October 1988.

Matthews returned to his regular job with Petroleum, but the pain recurred in late January, 1989, this time in both his back and legs. Dr. Shah again treated Matthews for several weeks, but he made little improvement. Dr. Shah referred Matthews to Dr. Frederick E. Finger (Dr. Finger), a neurosurgeon, in February, 1989, and tests conducted by Dr. Finger revealed a slight disc herniation and other spinal problems. Dr. Finger did not feel these problems were serious enough to warrant back surgery. Before releasing Matthews, Dr. Finger suggested that he seek a second opinion if he desired. Dr. Finger later saw Matthews on a referral basis from Dr. Shah and conducted more tests. These tests convinced Dr. Finger that Matthews was suffering from too much pain to be explained by the physical condition of his back.

On 2 February 1989, Dr. Shah had a conference with Susan Fender, a rehabilitation coordinator working with Hartford. Dr. Shah recommended that Matthews undergo further rehabilitative treatment. Without authorizing such treatment, Fender requested that Dr. Shah conduct a final disability evaluation of Matthews for Hartford. On 28 June 1989, Dr. Shah gave Matthews a partial permanent disability rating of 20% of the back. Matthews returned to his work at Petroleum, but still suffered pain.

Petroleum and Hartford were unable to reach agreement with Matthews as to compensation because Hartford denied any coverage for future medical expenses relating to the injury. Matthews was granted a hearing before the Deputy Commissioner of the North Carolina Industrial Commission (Commission) on 2 November 1989. After hearing evidence, the hearing was adjourned with instructions that medical experts for both sides be deposed.

One week later, on 9 November 1989, Matthews was sandblasting the interior of a large storage tank in Charleston, South

Carolina, for Petroleum. Sandblasting requires that the worker stand for long periods while maintaining control of a three-inch hose which pumps out sand at 120 pounds of pressure. After several hours of sandblasting, Matthews collapsed in great pain and was carried from the work site. The next day Matthews saw Dr. Shah, who found that Matthews' condition had deteriorated. He was in great pain and was experiencing back spasms. X-rays showed further degenerative changes in Matthews' back. Dr. Shah prescribed pain medication, resumed physical therapy, and ordered more tests. The test results, on 27 November 1989, suggested to Dr. Shah that Matthews had degenerative disc disease, and Dr. Shah recommended that Matthews again consult a neurosurgeon. Hartford refused to authorize more treatment. Dr. Shah did not discharge Matthews from his care, but felt there was nothing more he could do for him without further neurosurgical consultation. Matthews has not worked since the 9 November 1989 injury.

Matthews requested a second hearing as a result of the aggravation of his condition, and the earlier case and the aggravating injury were consolidated for hearing before the Deputy Commissioner on 27 April 1990. The Deputy Commissioner received evidence from Dr. Shah and from Hartford's expert, Dr. John H. Caughran (Dr. Caughran), who was employed to examine Matthews. Dr. Caughran diagnosed Matthews as suffering from chronic pain syndrome, an incurable condition which results from a combination of physical injury and psychological maladjustment to the injury. The result is failure to improve despite prolonged treatment. In Dr. Caughran's opinion, Matthews' pain is 50% physical and 50% psychological. Although Dr. Caughran did not feel that Matthews could ever return to the heavy work which he formerly performed for Petroleum, he did feel that Matthews retained the capacity to perform medium to light work. Dr. Caughran felt that Matthews was not in need of further medical treatment, nor a candidate for back surgery. When asked why he had not worked since the 9 November 1989 reinjury to his back, Matthews replied that his pain was so severe that he was unable to work.

The Deputy Commissioner found that Matthews was not in need of any further medical treatment and that his disability was limited to a 20% permanent partial disability of the back. Matthews filed notice of appeal to the Commission on 15 March 1991. Petroleum and Hartford also appealed. The Commission found that Matthews was temporarily totally disabled due to the back injuries suffered

during his employment by Petroleum, and that Matthews was entitled to further medical treatment related to his injury until he is able to return to work. Petroleum and Hartford appealed to this Court, and Matthews subsequently made a motion in this Court for an award of attorney's fees incurred in defending the appeal by Petroleum and Hartford before the Commission, and the appeal by Hartford in this Court.

Petroleum and Hartford contend that the Commission's finding of temporary total disability is error because no competent evidence in the record suggests that Matthews is unable to work at some job and earn wages. They further contend that the Commission's finding that Matthews is entitled to future medical coverage is error because it is not supported by competent evidence in the record showing that Matthews is in need of any further medical care.

The issues presented are whether (I) there is competent evidence to support the Commission's finding that Matthews is temporarily totally disabled; (II) there is competent evidence to support the Commission's finding that Matthews is entitled to future medical treatment; and (III) Matthews is entitled to costs, including reasonable attorney's fees, incurred on appeal.

I

[1] The Commission is vested with the exclusive authority to find facts necessary to determine workers' compensation awards, and such findings must be upheld on appeal if there is any competent evidence to support them. *Errante v. Cumberland County Solid Waste Management*, 106 N.C. App. 114, 118, 415 S.E.2d 583, 585 (1992). This is so even if there is evidence which would support contrary findings. *Richards v. Town of Valdese*, 92 N.C. App. 222, 225, 374 S.E.2d 116, 118 (1988), *disc. rev. denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). The Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and its determination of these issues is conclusive on appeal. *Watkins v. City of Asheville*, 99 N.C. App. 302, 303, 392 S.E.2d 754, 756, *disc. rev. denied*, 327 N.C. 488, 397 S.E.2d 238 (1990).

Disability is the "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). When the employee suffers the total lack of capacity to earn wages in

any job, his disability is total. *Carothers v. Ti-Caro*, 83 N.C. App. 301, 304, 350 S.E.2d 95, 97 (1986). Although the pain caused by an injury is not compensable under the Workers' Compensation Act, the degree of pain experienced must be considered by the Commission in determining the extent of the employee's incapacity to work and earn wages. *Niple v. Seawell Realty & Ins. Co.*, 88 N.C. App. 136, 139, 362 S.E.2d 572, 574 (1987), *disc. rev. denied*, 321 N.C. 744, 365 S.E.2d 903 (1988); 1C Arthur Larson, *The Law of Workmen's Compensation* § 57.11 (1992).

The evidence in this case supports the Commission's finding that Matthews is temporarily totally disabled because he is unable to earn wages in any job. In Dr. Caughran's deposition he gave his opinion that Matthews suffers from chronic pain syndrome as a result of his injury at work, which is not curable, and that Matthews will have to live with pain the rest of his life. He opined that the pain is 50% physical and 50% psychological, and despite the fact that Matthews' pain has a partly psychological origin, his pain is real. Drs. Caughran, Shah, and Finger, although disagreeing on the cause of Matthews' pain, all agreed that he indeed suffered pain. Dr. Caughran also gave his opinion that, because of the back injury and resulting pain, Matthews could never return to the heavy work he performed for Petroleum. Dr. Caughran felt, however, that despite his pain Matthews could perform some job which entailed only medium to light work.

None of the medical experts offering opinions in this case described any method whereby the intensity of a person's pain can be measured other than by the subjective opinion of the patient himself. When asked by Dr. Caughran to describe his pain during his examination, Matthews replied that it was constant and unrelenting, and that it was aggravated by all activity, particularly that involving movement, stooping, bending, and lifting. "When asked to self assess the severity of his pain on a scale of one to five with five being unbearable, [Matthews] reports his pain at five." When questioned during his testimony before the Commission about why he has not returned to work, Matthews stated that his pain was so severe "I haven't been able to." Matthews' testimony is competent evidence as to his ability to work, and the Commission chose to believe him. *Niple*, 88 N.C. App. at 139, 362 S.E.2d at 574 (employee's own testimony as to pain upon physical exertion competent evidence as to ability to work). Thus, the Commission, in its proper role as sole judge of the credibility of witnesses,

found Matthews' testimony that he was unable to work due to pain more credible than the expert testimony that Matthews was capable of performing medium to light work. Therefore, despite contrary evidence in the record, the medical experts' testimony that Matthews does suffer real pain and Matthews' testimony that the pain is so severe that he is unable to work and earn wages supports the Commission's finding that Matthews is temporarily totally disabled.

II

[2] An employer of a disabled worker is required to provide future medical and surgical treatment deemed necessary by the Commission if such treatment will lessen the period of disability or is reasonably calculated to effect a cure or give relief. *Little v. Penn Ventilator Co.*, 317 N.C. 206, 210, 345 S.E.2d 204, 207 (1986). The Commission's finding that Matthews is entitled to future medical treatment is supported by competent evidence. Dr. Shah testified that he felt that Matthews should "get another surgical evaluation . . . . If the . . . complete neurosurgical evaluation suggests there is no indication for any surgical treatment, then I would be more than happy to treat [Matthews] conservatively and over a period of time, he may get better than what he is." Therefore, despite contrary evidence in the record, the evidence that Dr. Shah recommends further medical treatment for Matthews and that such treatment might effect a cure or give relief supports the Commission's finding that Matthews is entitled to future medical care.

III

[3] Matthews moved in this Court for an award of attorney's fees incurred in defending Petroleum and Hartford's appeal to the Commission and Hartford's appeal to this Court.

Appeal to the Industrial Commission

The Commission may assess the costs of appeal, including reasonable attorney's fees, against the worker's compensation insurer pursuant to N.C.G.S. § 97-88 when both the employee and the insurer or only the insurer appeal to the Commission. *Harwell v. Groves Thread*, 78 N.C. App. 437, 439, 337 S.E.2d 112, 113 (1985). Costs of the entire hearing, including reasonable attorney's fees, can be awarded by the Commission pursuant to N.C.G.S. § 97-88.1 if the Commission determines that the hearing before it was "brought, prosecuted, or defended without reasonable ground" by any party

to the dispute. N.C.G.S. § 97-88.1 (1991). An award under either statute is within the sound discretion of the Commission. *Taylor v. J.P. Stevens Co.*, 307 N.C. 392, 397-98, 298 S.E.2d 681, 684-85 (1983). The record in this case reveals that all the parties appealed to the Commission and that no motion was made seeking an award of attorney's fees under either of these statutes. The record does reflect in the Opinion and Award that the Commission ordered that "[e]ach side shall pay its own costs." It is unclear from the language of the Opinion and Award whether the "costs" referred to include attorney's fees and thus whether the Commission has exercised its discretion in denying an award of attorney's fees. We therefore remand to the Commission for their consideration of that portion of Matthews' motion filed in this Court seeking attorney's fees incurred in defending Petroleum and Hartford's appeal before the Commission.

Appeal to the Court of Appeals

Pursuant to N.C.G.S. § 97-88, this Court may order that the costs to the injured employee of appeals to this Court, including reasonable attorney's fees, be paid by the insurer if: (1) the insurer brings the appeal; and (2) this Court orders the insurer to make or continue to make payments of benefits or medical expenses. N.C.G.S. § 97-88 (1991). The appeal to this Court was brought by Hartford and we have by this decision required Hartford to pay temporary total disability benefits and future medical expenses. Therefore, Matthews' motion that Hartford pay Matthews' costs in this appeal, including reasonable attorney's fees, is granted, and this case is remanded to the Commission with instructions that the Commission decide the exact amount to be awarded.

Accordingly, the Commission's award is affirmed, and this action is remanded for award of costs and attorney's fees incurred by Matthews in defending Hartford's appeal to this Court. We also remand for a determination by the Commission as to whether Matthews should be awarded attorney's fees he incurred in defending Petroleum and Hartford's appeal to the Commission pursuant to N.C.G.S. § 97-88 or N.C.G.S. § 97-88.1.

Affirmed and remanded.

Judges WYNN and WALKER concur.

DONALD RAY ROUTH AND PENNY C. ROUTH, PLAINTIFFS-APPELLEES v. SNAP-ON TOOLS CORPORATION, TRACE S. DENGLER, III, INDIVIDUALLY AND AS A BRANCH MANAGER OF SNAP-ON TOOLS CORPORATION; MARK TROMBLEY, INDIVIDUALLY AND AS A FIELD MANAGER OF SNAP-ON TOOLS CORPORATION; AND ED BONGE, JR., INDIVIDUALLY AND AS A SALES MANAGER OF SNAP-ON TOOLS CORPORATION, DEFENDANTS-APPELLANTS

No. 9121SC695

(Filed 15 December 1992)

Arbitration and Award § 2 (NCI4th)— termination agreement— arbitration clause—no meeting of minds as to arbitration

Where a dealership termination agreement containing an arbitration clause was not signed by plaintiff on the line designated for his signature but was signed by him only below an addition to the agreement whereby plaintiff agreed to repay defendant corporation $1,000 per month until the balance he owed was paid, an ambiguity existed as to whether plaintiff agreed to all the terms in the termination agreement or merely to those in the addition immediately preceding his signature, and the trial court properly admitted extrinsic evidence to explain this ambiguity. The evidence supported the trial court's finding and conclusion that there was no valid agreement to arbitrate where plaintiff's evidence showed that his only concern on the date the agreement was signed was to arrive at an agreement to pay the balance he owed defendant corporation, that no negotiations concerning arbitration ever occurred, and that defendant's representatives never discussed or explained the arbitration clause.

Am Jur 2d, Arbitration and Award §§ 11, 12.

Appeal by defendants from order entered 30 April 1991 by Judge W. Steven Allen in Forsyth County Superior Court. Heard in the Court of Appeals 12 May 1992.

In this action, plaintiffs are seeking damages allegedly incurred as a result of misrepresentations made by defendants arising out of the employment relationship between plaintiff Donald Ray Routh and defendant Snap-On Tools Corporation (Snap-On). In January of 1986, Donald Routh (plaintiff) invested $52,500 with Snap-On to become an independent Snap-On dealer. According to plaintiff, he decided to become a Snap-On dealer based upon defendants'

representations that he would earn in excess of $100,000 per year. After working for more than a year, plaintiff determined that he could not generate the income level as represented by defendants and on 19 October 1987, gave written notice that he was terminating his Snap-On dealership.

Shortly after plaintiff gave written notice, defendant Mark Trombley (a Snap-On Field Manager) called plaintiff and instructed him to come to Charlotte in order to turn in his tool inventory and settle accounts. On 9 November 1987, plaintiff met with defendant Trace Dengler (a Snap-On Branch Manager) in Charlotte and checked in his remaining tool inventory. At this meeting plaintiff signed three (3) documents entitled "Financial Settlement," "Dealer Termination Statement, Assignments and Creditors" and "Extended Credit Listing for Terminating Dealers." At some point in time, plaintiff also signed the back of a "standard form" document entitled "Termination Agreement" which this controversy now pertains to.

According to plaintiff, in this agreement matters of damaged inventory and the balance owed Snap-On of $5,900 were settled with plaintiff agreeing to pay this amount at the rate of $1,000 per month. These terms were added to the back of the Termination Agreement. The Termination Agreement provides in pertinent part:

TERMINATION AGREEMENT

. . . .

2. The Dealer agrees to pay, within (see back) from the date of this Agreement, the difference between the outstanding balance due to the Company and the credit provided by paragraph 1 of this Agreement for the repurchase of inventory. The Dealer must deliver the remaining inventory, by the date specified in paragraph 1. The Dealer agrees that the Company may deduct the balance due it from the inventory credit to satisfy this provision.

. . . .

6. This Agreement extends to all agents, heirs, employees and officers of either party to this Agreement. It is effective as of the above date and it supersedes any and all prior agreements, which are now cancelled. If any dispute arises over the terms of this Agreement, the parties will submit

to final and binding arbitration as the sole method of resolving the controversy. The request for arbitration must be filed in writing within one (1) year of the above date or all claims, known or unknown, are forever waived. The rules of the American Arbitration Association shall apply, and the terms of this Agreement shall govern. The prevailing party shall be awarded reasonable costs and fees.

7. Except as above, both parties to this Agreement freely waive any and all claims they may have against each other arising out of the Dealership terminated by this Agreement.

SNAP-ON TOOLS CORPORATION

By _____ By S/T.S. Dengler

(Dealer) (Branch Manager)

. . . .

I, Donald Routh, agree to pay balance owed Snap-On Tools at approm. $1,000.00 a month until paid.

S/Donald R. Routh

On 7 March 1989, plaintiffs filed the present action against defendants. Plaintiffs' complaint is based upon theories of fraud, unfair and deceptive trade practices, negligent misrepresentation, intentional and negligent infliction of emotional distress, breach of contract, breach of implied covenant of good faith and fair dealing, and loss of consortium. In their answer, defendants denied these allegations and asserted several affirmative defenses which include the following: (1) the Termination Agreement by its terms releases all claims arising out of the dealership; and (2) plaintiffs' action is barred since they failed to request arbitration within one year as required by the Termination Agreement. After initial discovery was conducted, defendants filed a Motion for Judgment on the Pleadings and an alternative Motion to Compel Arbitration based upon the Termination Agreement.

On 19 February 1990, the trial court entered an order denying both of defendants' motions. However, in its order the trial court failed to summarily determine whether, as a matter of law, a valid arbitration agreement exists. Because of this omission in the 19 February 1990 order, this Court on appeal reversed the trial court and remanded the case with instructions for the trial court to

determine whether a valid arbitration agreement exists. *Routh v. Snap-On Tools Corp.*, 101 N.C.App. 703, 400 S.E.2d 755 (1991).

On 29 April 1991, the trial court held a hearing where it considered the Termination Agreement, the pleadings, briefs and the affidavits of both plaintiffs and entered an order denying defendants' Motion to Compel Arbitration. The trial court concluded as a matter of law that:

> Plaintiff Don Routh and the Defendants did not have a meeting of the minds regarding any agreement to arbitrate claims or controversies that arose out of Don Routh's Snap-On Tools dealership. The Termination Agreement which Defendants contend contains an arbitration agreement between the parties of this lawsuit was never executed and is therefore invalid and unenforceable.

Blanchard, Twiggs, Abrams & Strickland, P.A., by Donald R. Strickland and Howard F. Twiggs, for plaintiff appellees.

Petree Stockton & Robinson, by Rodrick J. Enns, Thomas E. Graham and Denise M. Jennings, for defendant appellants.

WALKER, Judge.

In this appeal, defendants question the validity of the trial court's order which concluded there was no agreement to arbitrate. According to defendants, their motion to arbitrate should have been granted since plaintiff Donald Routh's signature appears on page two (2) of the Termination Agreement wherein there is contained an agreement to arbitrate all controversies. Furthermore, defendants contend that plaintiffs cannot now maintain an action (by arbitration or otherwise) since plaintiffs failed to comply with the one year limitations period contained in paragraph six (6) of the Termination Agreement.

Initially, we note that public policy favors settling disputes by means of arbitration. *Prime South Homes, Inc. v. Byrd*, 102 N.C.App. 255, 401 S.E.2d 822 (1991). However, before a dispute can be settled in this manner, there must first exist a valid agreement to arbitrate. G.S. § 1-567.2. The law of contracts governs the issue of whether there exists an agreement to arbitrate. *Southern Spindle and Flyer Co., Inc. v. Milliken & Co.*, 53 N.C.App. 785, 281 S.E.2d 734 (1981), *disc. review denied*, 304 N.C. 729, 288 S.E.2d 381 (1982). Accordingly, the party seeking arbitration must show

that the parties mutually agreed to arbitrate their disputes. *Id.* This Court has even suggested that an agreement to arbitrate, if contained in a contract covering other topics, must be independently negotiated. *Blow v. Shaughnessy*, 68 N.C.App. 1, 16, 313 S.E.2d 868, 876-877, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 127 (1984). This apparent requirement for independent negotiation underscores the importance of an arbitration provision and "militates against its inclusion in contracts of adhesion." *Id.* at 16, 313 S.E.2d at 877.

In the case at bar, the trial court's conclusion that the arbitration agreement was unenforceable was based upon its finding of fact that:

> (12) At the time Don Routh signed the agreement agreeing to repay Snap-On One Thousand ($1,000.00) Dollars a month until his balance was paid, he did not realize he was signing a Termination Agreement that contained an arbitration provision and Plaintiff Don Routh had no intention to be bound by the terms of the Termination Agreement.

Findings of fact made 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 competent evidence to support them, although the evidence might have supported findings to the contrary. *Henderson County v. Osteen*, 297 N.C. 113, 254 S.E.2d 160 (1979). Accordingly, in reviewing the decision of the trial court, we must determine whether there is evidence in the record which supports the trial court's findings of fact and if so, whether these findings of fact in turn support the conclusion that there was no agreement to arbitrate. *Prime South Homes, Inc. v. Byrd, supra.*

The trial court considered plaintiff Don Routh's 23 April 1991 affidavit which was filed four days before reargument of the motion to compel arbitration. On appeal, defendants contend this document should not have been admitted into evidence since it contradicted plaintiff's earlier deposition. After reviewing the evidence, we find no merit in defendants' argument. Plaintiff's affidavit only conflicted with his prior deposition in regards to the date in November 1987 when the Termination Agreement was signed. In his affidavit and deposition, plaintiff maintains that defendants did not review the Termination Agreement with him, that he never read this document, and that the only reason he signed the document was to acknowledge he owed Snap-On $5,900. We further note from

the record that defendants failed to object to plaintiff's affidavit being received into evidence. Where no objection or exception is made at trial to the introduction of evidence, the appellant may not challenge the item on appeal. Rule 10(b)(1), N.C. Rules of Appellate Procedure; *Catoe v. Helms Construction & Concrete Co.*, 91 N.C.App. 492, 372 S.E.2d 331 (1988).

We now turn to the primary issue in this case which is whether the trial court properly concluded as a matter of law that plaintiff and defendants did not have a meeting of the minds regarding an agreement to arbitrate and thus no enforceable agreement.

Before a valid contract can exist, there must be mutual agreement between the parties as to the terms of the contract. *Normile v. Miller and Segal v. Miller*, 313 N.C. 98, 326 S.E.2d 11 (1985). Where there is no mutual agreement, there is no contract. If a question arises concerning a party's assent to a written instrument, the court must first examine the written instrument to ascertain the intention of the parties. *See Corbin v. Langdon*, 23 N.C.App. 21, 208 S.E.2d 251 (1974). When the language of the contract is clear and unambiguous, the court must interpret the contract as written. *Robbins v. C. W. Meyers Trading Post, Inc.*, 253 N.C. 474, 117 S.E.2d 438 (1960). However, where an agreement is ambiguous, interpretation of the contract is a question for the fact-finder to resolve, *Thompson-Arthur Paving Co. v. Lincoln Battleground Associates, Ltd.*, 95 N.C.App. 270, 382 S.E.2d 817 (1989), and parol or extrinsic evidence is admissible to explain or qualify the written instrument. *Root v. Allstate Insurance Co.*, 272 N.C. 580, 158 S.E.2d 829 (1968).

As previously noted, plaintiff's signature appears only after the language added to the Termination Agreement and not on the line designated for his signature. Both parties agree that the sentence immediately preceding plaintiff's signature is an addition to the original standard Termination Agreement. Since plaintiff signed below only the added language whereby he agreed to repay Snap-On $1000 per month and not on the applicable signature line, an ambiguity results as to whether plaintiff agreed to all the terms contained in the Termination Agreement or merely those terms in the added sentence immediately preceding his signature. Since this instrument is susceptible to more than one meaning, the trial court properly admitted extrinsic evidence to explain this ambiguity. *Root v. Allstate Insurance Co., supra.*

Upon reviewing the evidence it becomes apparent that plaintiff Donald Routh's only concern on the date the agreement was signed was to arrive at an agreement to pay the balance he owed Snap-On. According to plaintiff, no negotiations regarding arbitration ever took place and "[b]y signing this document the only agreement I was entering into with Snap-On was to pay them One Thousand ($1,000.00) Dollars a month until I paid off the Fifty-nine Hundred ($5,900.00) Dollars Snap-On claimed I owed them." According to plaintiffs' evidence, defendant Dengler never discussed arbitration or the waiver or release of any legal claims. In *Blow v. Shaughnessy*, 68 N.C.App. 1, 313 S.E.2d 868, *disc. review denied*, 311 N.C. 751, 321 S.E.2d 127 (1984), it was noted:

> [R]ather than simply presuming the validity of an arbitration provision from the validity of the underlying agreement, the Court seemed to require some showing that the agreement to arbitrate, whether a separate agreement or a provision of the same agreement, . . . was made in an arm's-length negotiation by experienced and sophisticated businessmen. . . . This apparent requirement for independent negotiation underscores the importance of such a provision and militates against its inclusion in contracts of adhesion.

Id. at 16, 313 S.E.2d at 876-877.

Although not necessary to our decision today, we also note that an arbitration clause, such as the one at issue in the present case, is ordinarily negotiated at the outset of a contractual relationship in an "arms-length negotiation." The fact that an arbitration agreement was attempted in a contract of adhesion at the close of the relationship further indicates a lack of mutuality of interest between these parties.

Whether defendants met their burden of establishing an agreement to arbitrate was a matter for the trial court's determination. The trial court's findings of fact are binding upon this Court unless there was no competent evidence to support them. *Blow v. Shaughnessy, supra.* Here, the evidence supports the trial court's findings and conclusion that the Termination Agreement was invalid and unenforceable.

Affirmed.

Judges LEWIS and WYNN concur.

CAROLINE BATCHELDOR, TOM SMITH, JAMES B. SMITH, JOHN B. SMITH, ALLEN SMITH, MARION C. SMITH, AND HARRIET SMITH ANISOWICZ, PLAINTIFFS v. WILLIAM RICHARD BOYD, SR., T. MICHAEL JORDAN, SUCCESSOR ADMINISTRATOR OF THE ESTATE OF J. R. BOYD, JR., BARBARA BURGIN, TOMMY G. BOYD, JR., CAROLYN CLAYTON, EXECUTRIX OF THE ESTATE OF HENRY CLAYTON, AND ROBERT M. CHAFIN AND JOHN LYNDON CHAFIN, CO-EXECUTORS OF THE ESTATE OF ROBERT CHAFIN, DEFENDANTS

No. 9130SC1285

(Filed 15 December 1992)

Evidence and Witnesses § 2211 (NCI4th); Parent and Child § 1.1 (NCI3d)— right to inherit—legitimation—DNA testing—exhumation order

The trial court did not err in an action to determine paternity and inheritance rights by permitting the exhumation of the corpse of J. R. Boyd, Jr. for purposes of performing DNA sampling where the court correctly concluded that the information sought was reasonably calculated to lead to admissible evidence and that defendant Boyd had shown good cause to exhume the body as required by N.C.G.S. § 130A-390(b). If a proper foundation is laid, DNA sampling may be admissible as "dependable evidence to the contrary" to rebut the presumption that a child born of a married woman is her husband's child. This ruling will not engender the filing of unnecessary meritless claims, given the substantial evidence presented by defendant Boyd supporting the claim of paternity, and the findings of the trial court on the motion seeking exhumation are applicable to the exhumation only and are not binding on any other issue.

Am Jur 2d, Bastards § 19; Dead Bodies §§ 74-76; Evidence §§ 367, 825, 1104.

Admissibility of DNA identification evidence. 84 ALR4th 313.

Appeal by plaintiffs and defendants Barbara Burgin, Tommy G. Boyd, Jr., Carolyn Clayton, Robert M. Chafin and John Lyndon Chafin from order entered 19 June 1991 by Judge Beverly T. Beal in Haywood County Superior Court. Heard in the Court of Appeals 12 November 1992.

McLean & Dickson, P.A., by Russell L. McLean III; and Westall, Gray, Kimel & Connolly, P.A., by Jack W. Westall for appellants.

Brown, Ward, Haynes, Griffin & Seago, P.A., by Randal Seago for appellee William Richard Boyd, Sr.

COZORT, Judge.

This appeal is from an order permitting the exhumation of the corpse of J. R. Boyd, Jr., for the purposes of deoxyribonucleic acid (DNA) testing of tissue samples to aid in determining the paternity of defendant William Richard Boyd, Sr. We affirm.

On 17 January 1990, the Haywood County Clerk of Superior Court appointed William Richard Boyd, Sr., defendant herein, administrator of J. R. Boyd, Jr.'s estate. On 23 February 1990, Robert Chafin and Henry Clayton filed a petition requesting revocation of defendant Boyd's appointment. After a hearing, the clerk of superior court removed defendant Boyd as administrator and substituted T. Michael Jordan. In April 1990 defendant Boyd filed a complaint stating that he intended to bring a declaratory judgment action to determine inheritance rights and petitioned the court for permission to depose a seriously ill witness. The court appointed counsel and set the deposition for 8 May 1990, but the witness was too ill to be deposed. Plaintiffs herein, alleged heirs of J. R. Boyd, Jr., filed a declaratory judgment action on 12 June 1990 seeking a determination of whether defendant Boyd is J. R. Boyd, Jr.'s son and whether he is entitled to share in the estate. The declaratory judgment action was filed against defendant William Richard Boyd, Sr., Chafin, Clayton, and others with interests in line with the plaintiffs.

In November 1990 defendant Boyd filed a motion seeking permission to exhume J. R. Boyd, Jr.'s body in order to perform DNA sampling and testing to determine the relationship, if any, between J. R. Boyd, Jr., and defendant Boyd. Judge Marlene Hyatt denied the request; however, she provided in the order that defendant Boyd could move for a rehearing at the end of February 1991 after the completion of additional discovery related to the exhumation and DNA testing. The exhumation rehearing was held on 27 May 1991 before Judge Beverly T. Beal. On 19 June 1991, Judge Beal entered an order, finding the following pertinent facts:

2. J. R. Boyd, Jr., died intestate;

3. Defendant Boyd was born on September 16, 1936, to Mary Kirkpatrick. His original name was William Algernon Kirkpatrick; (Defendant's Exhibit 1). No father's name is shown on the birth certificate in the space provided;

4. There exists a complaint for divorce filed by "Mary K. Jones," against Armistead Jones, filed in Haywood County (Defendant's Exhibit 3). In neither the divorce complaint nor judgment is there an allegation or finding that a child was born to the marriage;

5. Mary K. Jones was Mary Kirkpatrick. She alleged that she and her husband Armistead Jones were married "during the month of August 1935," and lived together "until November 1935," at which time they separated;

6. Boyd family anecdotal history relates that Defendant Boyd was conceived on December 15, 1935 of the union of J. R. Boyd, Jr., and Mary Kirkpatrick (Defendant's Exhibit 5). Dicky [*sic*] Boyd (Defendant) is referred to in Will of J. R. Boyd, Sr. He served as Co-Executor of the Estate of Bessie Boyd, sister of J. R. Boyd, Jr. (Defendant's Exhibit 8) as Co-Executor of the estate of Daisy Boyd, also sister of J. R. Boyd, Jr. (Defendant's Exhibit 8) in both applications for Letters Dickey [*sic*] Boyd is referred to as "nephew" of deceased, and listed as a beneficiary of the Wills;

7. J. R. Boyd, Jr. and Mary Kirkpatrick were married on December 22, 1940 (Defendant's Exhibit 9);

8. Defendant Boyd lived with J. R. Boyd, and J. R. Boyd, Jr. held him out in the community to be his son and readily admitted his paternity (Defendant's Exhibits 11, 12);

9. Defendant Boyd changed his name from William Algernon Kirkpatrick to William Richard Boyd by special proceeding in Haywood County in 1958. That proceeding required the posting of a notice of intent to change name at the courthouse (Defendants' Burgin, Tommy G. Boyd, Jr., Clayton and Chafin Exhibit E attached to brief);

10. Mary K. Boyd sought divorce in an action in Florida. She alleged that "no children were born of this marriage."

(Bill of Complaint, certified copy, submitted by Defendants Burgin, T. G. Boyd, Jr., Clayton and Chafin);

11. There is no evidence that Mary Kirkpatrick sought child custody, or support, as opposed to either Armistead Jones or J. R. Boyd, Jr.;

* * * *

14. North Carolina law has recognized blood testing for purposes of establishing or disproving parentage (G.S. 8-50.1). DNA tests and comparisons have been developed and are presented through the testimony of qualified geneticists;

15. DNA genetic testing for the purpose of determining parentage has been established as a reliable process; the tests have the power to exclude an individual as the parent or child of another; statistical probability of inclusion is presentable;

16. If the remains to be tested are affected by the embalming process or ground water, the effect will be to prevent testing, or render testing obviously inconclusive; the vault was designed to be air and water tight;

17. Valid testing, analysis and reporting comparing DNA obtained from a dead human body and from the blood of a living human can be accomplished (See also Defendant Boyd's Exhibits 17 and 18; see Dr. Ryal's testimony);

Based upon the findings of fact, Judge Beal concluded:

(2) The information sought is reasonably calculated to lead to the discovery of admissible evidence.

(3) DNA testing for parentage is established as reliable. The complexities related to obtaining and testing specimens of bone, tissue and blood from a dead body are not so insurmountable as to preclude the attempt.

(4) Good cause has been shown to exhume the body of J. R. Boyd, Jr.

(5) The just and orderly disposition of a decedent's property is a lawful state interest, the importance of which outweighs the natural and proper respect for the place of interment of the dead.

> It is therefore ORDERED that the body of J. R. Boyd, Jr. be exhumed and that DNA testing be conducted . . . .

On 18 July 1991, notice of appeal was filed by plaintiffs and those defendants with interests in line with the plaintiffs, who shall be known hereinafter as "Appellants." Appellants obtained from Judge Hyatt a stay of Judge Beal's order of exhumation.

On appeal appellants argue that the trial court erred in issuing the order of exhumation because the results of the DNA testing are not admissible for the purpose of establishing a right to inherit from a decedent's estate. Defendant Boyd counters that results of DNA testing are admissible to prove that he was legitimated pursuant to N.C. Gen. Stat. § 49-12 (1984) by the subsequent marriage of his mother to J. R. Boyd, Jr. As a legitimate child, defendant argues, he is entitled to share in his father's estate.

N.C. Gen. Stat. § 49-12 provides:

> When the mother of any child *born out of wedlock* and the reputed father of such child shall intermarry or shall have intermarried at any time after the birth of such child, the child shall, in all respects after such intermarriage be deemed and held to be legitimate and the child shall be entitled, by succession, inheritance or distribution, to real and personal property by, through, and from his father and mother as if such child had been born in lawful wedlock. (Emphasis added.)

To be entitled to share in J. R. Boyd, Jr.'s estate pursuant to § 49-12, defendant Boyd must present evidence that he was "born out of wedlock." "[T]he phrase, 'born out of wedlock,' should refer 'to the status of the parents of the child in relation to each other.' 'A child born to a married woman, but begotten by one other than her husband, is a child "born out of wedlock" . . . .' " *Matter of Legitimation of Locklear by Jones*, 314 N.C. 412, 418, 334 S.E.2d 46, 50 (1985) (citations omitted). In order to show that he was born out of wedlock, defendant Boyd must rebut the presumption recognized by North Carolina law that the child of a married woman is her husband's child. *See Eubanks v. Eubanks*, 273 N.C. 189, 197, 159 S.E.2d 562 (1968).

In *Wright v. Wright*, 281 N.C. 159, 188 S.E.2d 317 (1972), the North Carolina Supreme Court recognized the admissibility of blood-grouping tests to rebut the presumption. The Court first

determined that language in the *Eubanks* case did not prohibit the introduction of blood-grouping tests.

> The opinion in *Eubanks* contains this statement: 'If there was access, there is a conclusive presumption that the child was lawfully begotten in wedlock.' Taken literally and out of context, the quoted statement would disallow evidence even of impotency or physical or racial differences to rebut the presumption. However, the topic sentence of the paragraph in which the above statement is found demonstrates the real rationale of the rule: 'When a child is born in wedlock, the law presumes it to be legitimate, and this presumption can be rebutted only by facts and circumstances which show that the husband could not have been the father, *as that* he was impotent or could not have had access to his wife.' ([Their] italics.) Impotency and nonaccess are set out therein as examples of types of evidence that would 'show that the husband could not have been the father.' Since the results of blood-grouping tests would be significant only if they tended to show that defendant herein could not have been the father, we find nothing in *Eubanks* that would preclude their admission in evidence.

Id. at 171-72, 188 S.E.2d at 325 (citations omitted) (emphasis in original). The Court further reasoned that

> [p]rior to the discovery and perfection of the blood-grouping test, the only kinds of evidence which showed to even an approximate certainty that a husband was not the father of his wife's child were evidence of impotency, racial or other distinctive physical differences, or nonaccess during the probable time of conception. Although we continue to recognize its primary importance in preserving the status of legitimacy of children born in wedlock, *this presumption must give way before dependable evidence to the contrary.* Blood-grouping tests which show that a man cannot be the father of a child are perhaps the most dependable evidence we have known.

Id. at 172, 188 S.E.2d at 325-26 (emphasis added).

Following the reasoning in *Wright*, we conclude that if a proper foundation is laid, DNA sampling may be admissible as "dependable evidence to the contrary" to rebut the presumption that a child born of a married woman is her husband's child. The legitimation

statutes and case law contemplate the advancement of scientific techniques. Reliable direct evidence that the mother's husband is not the father of a child cannot be ignored. The North Carolina Supreme Court has recognized that DNA profile testing is generally admissible as an established technique considered to be reliable within the scientific community. *See State v. Pennington*, 327 N.C. 89, 101, 393 S.E.2d 847, 854 (1990).

In the case below, if the trial court finds the DNA sampling results admissible, the results may be used to show that J. R. Boyd, Jr., and not Silas Armistead Jones was defendant Boyd's father, thereby rebutting the presumption and simultaneously offering evidence that defendant Boyd was "born out of wedlock" within the meaning of N.C. Gen. Stat. § 49-12. Defendant Boyd then could present further evidence that he was legitimated pursuant to § 49-12 when his mother later married J. R. Boyd, Jr. Likewise, if the DNA testing yields evidence that J. R. Boyd, Jr., was not the father of defendant, the evidence would be admissible for that purpose. Accordingly, we conclude on the facts presented in this case that the trial court did not err in permitting the exhumation of the corpse of J. R. Boyd, Jr., for purposes of performing DNA sampling. The trial court correctly concluded that the information sought was reasonably calculated to lead to admissible evidence and that defendant Boyd had shown good cause to exhume the body as required by N.C. Gen. Stat. § 130A-390(b) (Cum. Supp. 1991).

Appellants next argue that if the exhumation is permitted in this case, the courts will be flooded with petitions for exhumations from would-be heirs. That argument has no merit against the facts below. Defendant Boyd presented substantial evidence to the trial court to support his claim that he is indeed J. R. Boyd, Jr.'s son. The evidence includes, but is not limited to, the following: Defendant Boyd was born in September 1936. In her divorce complaint, Mary Kirkpatrick stated that she had lived apart from Silas Jones since November 1935. The complaint made no mention of children born of the marriage. Mary married J. R. Boyd, Jr., in December 1940. When Mary was unable to care for her son (defendant Boyd) because of health problems, Bessie and Daisy Boyd (sisters to J. R. Boyd, Jr.) took care of defendant Boyd and raised him in J. R. Boyd, Sr.'s home. In 1942, J. R. Boyd, Sr., executed a will in which he made "provision for the education of Dicky Boyd, the son of my son, James R. Boyd, Jr. and Mary

Kirkpatrick Boyd." In 1958, defendant Boyd changed his name from William Algernon Kirkpatrick to William Richard Boyd. In applications for letters testamentary in the estates of Bessie and Daisy Boyd submitted in 1968 and 1977 respectively, J. R. Boyd, Jr., was listed as "brother" and defendant Boyd was listed as "nephew." The Haywood County Clerk of Superior Court initially appointed defendant Boyd as the administrator of J. R. Boyd, Jr.'s estate. Given this substantial evidence, we do not believe our ruling today will engender the filing of unnecessary meritless claims. To the contrary, in those cases, such as the one below, where much evidence of paternity already exists, the "floodgate of litigation" argument should not be allowed to deter the court from its search for the truth.

Lastly, appellants contend the trial court's order is in error because the findings of fact can be construed to be binding as to ultimate issues yet to be decided in the case. Our reading of the record and the order in question leads us to the conclusion that the contested findings were made solely for the purpose of ruling on the exhumation request. Nonetheless, to prevent the possibility of unfairness or confusion, we hold that Judge Beal's findings are applicable to the exhumation issue only and are not binding on any subsequent factfinder on any other issue.

Lastly, we dissolve the stay filed by Judge Hyatt on 2 July 1991. As aptly pointed out by defendant Boyd in a motion filed in this court, further delay in exhuming the body to obtain the requested samples will reduce the likelihood of obtaining satisfactory tissue samples because of the perishable nature of the corpse.

The order below is affirmed, and the stay is dissolved.

Affirmed.

Judges JOHNSON and LEWIS concur.

IN THE MATTER OF STATE OF NORTH CAROLINA EX REL. UTILITIES COMMISSION, AND SOLOMON HORNEY, APPELLEES v. MOUNTAIN ELECTRIC COOPERATIVE, INC., AND NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, APPELLANTS

No. 9110UC713

(Filed 15 December 1992)

Energy § 18 (NCI4th)— electric membership corporation—line siting complaint—jurisdiction of Utilities Commission

The Utilities Commission had jurisdiction under N.C.G.S. § 62-42 to hear and resolve a complaint against an electric membership corporation involving the siting of a 69 kilovolt electric transmission line.

Am Jur 2d, Public Utilities § 232.

Judge GREENE dissenting.

Appeal by respondent Mountain Electric Cooperative, Inc., and intervenor North Carolina Electric Membership Corporation from order issued 28 January 1991 by the North Carolina Utilities Commission. Heard in the Court of Appeals 13 May 1992.

Public Staff of the North Carolina Utilities Commission, by Chief Counsel Antoinette R. Wike and Staff Attorney A.W. Turner, Jr., for complainant-appellee.

Crisp, Davis, Schwentker, Page & Currin, by Robert B. Schwentker, for respondent-appellant Mountain Electric Cooperative, Inc.

Associate General Counsel Thomas K. Austin for respondent-appellant North Carolina Electric Membership Corporation.

PARKER, Judge.

The sole issue presented by this appeal is whether the North Carolina Utilities Commission ("the Commission") lacked jurisdiction over a dispute arising from the proposed siting of an electrical transmission line. We conclude the Commission possessed statutory authority to hear and resolve the dispute and thus affirm the result below.

This proceeding was commenced by a 14 February 1990 letter to the chairman of the Commission from complainant Solomon Horney in which he voiced dissatisfaction with the proposal of respondent Mountain Electric Cooperative, Inc., ("MEC") to build a 69 kilovolt transmission line from near Horney's residence to the top of Beech Mountain, North Carolina. Treating the letter as a complaint, on 22 February 1990 the Commission issued an order serving the complaint upon respondent MEC. On 27 February respondent North Carolina Electric Membership Corporation petitioned to intervene and also moved to dismiss the proceeding for lack of jurisdiction. The petition to intervene was granted. On 16 March 1990 respondent MEC answered the complaint and moved to dismiss for lack of jurisdiction. In its order dated 31 July 1990, the Commission concluded it had jurisdiction over the parties' dispute and denied the motions to dismiss. The case was set for hearing on 18 October 1990.

After hearing the dispute, in an order issued 28 January 1991 the Commission reaffirmed its earlier conclusion as to jurisdiction and made lengthy findings of fact and conclusions of law. Concluding that in no instance had respondent MEC acted arbitrarily or capriciously with respect to siting the line, the Commission found in favor of respondents.

Appellants argue that the Commission concluded it had jurisdiction under N.C.G.S. § 62-42 to hear the complaint "[o]nly by employing the most contorted and convoluted semantics imaginable." We do not agree.

"The Utilities Commission, being an administrative agency created by statute, has no regulatory authority except such as is conferred upon it by Ch[apter] 62 of the General Statutes." *Utilities Comm. v. Merchandising Corp.*, 288 N.C. 715, 722, 220 S.E.2d 304, 308 (1975) (citation omitted) (holding Commission lacked statutory authority to enact a rule giving a telephone public utility a monopoly on advertising by its business subscribers). Except where expressly provided by Chapter 62, the designation "public utility" does not include electric membership corporations. N.C.G.S. § 62-3(23)(d) (1989). Services and facilities of electric membership corporations are subject to regulation by the Commission as though such corporations were public utilities:

(a) Except as otherwise limited in this Chapter, whenever the Commission, after notice and hearing had upon its own motion or upon a complaint, finds:

(1) That the service of any public utility is inadequate, insufficient or unreasonably discriminatory, or

. . . .

(3) That additions, extensions, repairs or improvements to, or changes in, the existing plant, equipment, apparatus, facilities or other physical property of any public utility, o[r] any two or more public utilities ought reasonably to be made, or

(4) That it is reasonable and proper that new structures should be erected to promote the security or convenience or safety of its patrons, employees and the public, or

(5) That any other act is necessary to secure reasonably adequate service or facilities and reasonably and adequately to serve the public convenience and necessity,

the Commission shall enter and serve an order directing that such additions, extensions, repairs, improvements, or additional services or changes shall be made or [e]ffected within a reasonable time . . . .

. . . .

(c) For the purpose of this section, "public utility" shall include any electric membership corporation operating within this State.

N.C.G.S. § 62-42 (1989). Similarly, such corporations are subject to regulation as public utilities for purposes of the certification required for construction of generating facilities, N.C.G.S. § 62-110.1 (1989); the assignment of service areas, N.C.G.S. § 62-110.2 (Supp. 1991); rate filings, N.C.G.S. § 62-138 (1989); and the prohibition against granting unreasonable preferences in services or rates, N.C.G.S. § 62-140 (1989).

The 31 July 1990 order of the Commission denying respondents' motions to dismiss, reaffirmed in the order issued 28 January 1991, stated that the Commission agreed with the Public Staff that the statute which vests the Commission with jurisdiction to hear such

complaints is N.C.G.S. § 62-42. Given that subsection (c) of the statute authorizes the Commission to treat electric membership corporations as public utilities, the Commission looked to prior decisions in which it held it had jurisdiction to hear and determine complaints against electric public utilities involving the siting of transmission and distribution lines. *See, e.g., Crohn v. Power Co.*, 78 Report of the N.C. Utilities Comm. 213 (1988) (affirming denial of electric public utility's motion to dismiss for lack of jurisdiction over 100 kilovolt line site dispute); *Gwynn Valley v. Power Co.*, 78 Report of the N.C. Utilities Comm. 186 (1988) (same as to 44 kilovolt line site dispute); *Town v. Electric and Power Co.*, 73 Report of the N.C. Utilities Comm. 102 (1983) (no challenge to jurisdiction of Commission over 115 kilovolt line site dispute); and *Kirkman v. Power Co.*, 64 Report of the N.C. Utilities Comm. 89 (1974) (affirming denial of electric public utility's motion to dismiss for lack of jurisdiction over 230 kilovolt line site dispute). The Commission reviewed the statutes it had previously read together and construed as providing jurisdiction to hear such complaints against electric public utilities. Turning to N.C.G.S. § 62-42, the Commission reasoned that under the plain language of subsection (c), this statute applied "to electric membership corporations in the same manner and to the same degree as . . . to a public utility such as Duke Power Company or Carolina Power & Light Company."

According to the Commission, N.C.G.S. § 62-42(a)(1), (3), and (5) could be read singly or together to give jurisdiction to hear line siting complaints against an electric membership corporation. The Commission placed particular emphasis on subsection (a)(5), since the obligations of electric public utilities arising out of the public convenience and necessity standard include an obligation to give due regard to the environmental policy set forth in Chapter 113A of the General Statutes.

Respondents argue for a very narrow construction of N.C.G.S. § 62-42, but they have not advanced any reason why, in light of subsection (c), this Court should hold that the Commission may treat line siting complaints against electric membership corporations differently from those against electric public utilities. Finding the careful and thorough reasoning of the Commission persuasive, we hold it did not err in concluding it had jurisdiction to hear and resolve such complaints against electric membership corporations.

As of 1 December 1991, North Carolina public utilities law makes explicit provision for the Commission to resolve some disputes over the siting by public utilities, including electric membership corporations, of electrical transmission lines. *See* N.C.G.S. §§ 62-100—62-107 (Supp. 1991). A statutory resolution process exists only for disputes involving lines designed to carry 161 kilovolts or more. *See* N.C.G.S. § 62-101(c)(1) (Supp. 1991). Where one statute deals with a particular situation in detail but another "deals with it in general and comprehensive terms, the particular statute will be construed as controlling absent a clear legislative intent to the contrary." *Merritt v. Edwards Ridge*, 323 N.C. 330, 337, 372 S.E.2d 559, 563 (1988) (construing antideficiency statute and comprehensive statute governing awards of attorney's fees and holding antideficiency statute controlled and prohibited award of such fees). We are not convinced that a conflict necessarily exists between the more general statutory framework construed hereinabove to permit the Commission to hear disputes about electrical line siting and the more recent statutes which govern in detail the resolution of such disputes about lines carrying 161 or more kilovolts. Nevertheless, we leave for another day the question of whether the statutes permit the Commission after the effective date of N.C.G.S. §§ 62-100 *et seq.* to continue to resolve, in the same manner as before, disputes involving lines carrying less than 161 kilovolts.

Affirmed.

Judge COZORT concurs.

Judge GREENE dissents with separate dissenting opinion.

Judge GREENE dissenting.

I do not agree with the majority that N.C.G.S. § 62-42 vests the North Carolina Utilities Commission (Commission) with jurisdiction to adjudicate disputes regarding the siting of transmission lines. I read Section 62-42 as relating to the need for improvements or changes in *existing* services, not the review of the siting of new transmission lines. This view is substantiated by N.C.G.S. § 62-101, which was enacted by the legislature in 1991, and made effective 1 December 1991. This statute does vest the Commission with the jurisdiction to adjudicate the siting of transmission lines by any public utility, including electric membership corporations, provided the line has a designed capacity of at least 161 kilovolts.

See N.C.G.S. § 62-100(6), (7) (Supp. 1992). This amendment to Chapter 62 reflects an acknowledgement by the legislature that it was creating a right in the Commission that did not previously exist. *See Childers v. Parker's. Inc.*, 274 N.C. 256, 260, 162 S.E.2d 401, 483 (1968).

Because the Commission has no regulatory authority except as conferred upon it by Chapter 62, *State ex rel. Utilities Comm'n v. National Merchandising Corp.*, 288 N.C. 715, 722, 220 S.E.2d 304, 308 (1975), and because there did not exist any authority in 1990 for the Commission to regulate the siting of transmission lines, I would vacate the order of the Commission as being entered without jurisdiction.

ALTON BALLANCE, ANN EHRINGHAUS, MURRAY FULCHER, JAMES B. GASKILL, ERIK S. MATTSSON AND CHARLES RUNYON, PETITIONERS-APPELLEES v. NORTH CAROLINA COASTAL RESOURCES COMMISSION, RESPONDENT-APPELLANT

No. 9110SC983

(Filed 15 December 1992)

1. **Administrative Law § 57 (NCI4th)— chairman's denial of contested case hearing—final agency decision—judicial review**

An order of the chairman of the Coastal Resources Commission denying petitioners' request for a contested case hearing of a permit decision was a final agency decision subject to judicial review. N.C.G.S. § 113A-121.1.

Am Jur 2d, Administrative Law § 585.

2. **Environmental Protection, Regulation, and Conservation § 40 (NCI4th)— public trust waters—pier extension—CAMA permit erroneously issued**

The whole record supports the trial court's conclusion that, as a matter of law, the Coastal Resources Commission erred when it issued a CAMA permit allowing the extension of an existing pier in public trust waters and the construction of docking facilities on the pier where the trial court's findings of fact were based on its consideration of uncontradicted reports of federal and state agencies citing a variety of ecological concerns, potential environmental damage, and interference with public access to and the use of the affected waters, and

where the only basis for issuing the permit was that it would make the public waters adjacent to the permittee's condominium project more convenient for the permittee's use.

Am Jur 2d, Waters § 97.

Appeal by respondent from judgment entered 29 May 1991 in Wake County Superior Court by Judge Jack A. Thompson. Heard in the Court of Appeals 9 November 1992.

Southern Environment Law Center, by Lark Hayes and Derb S. Carter, Jr.; and Theodore O. Fillette, III; for petitioners-appellees.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Daniel C. Oakley and Assistant Attorney General Robin W. Smith, for respondent-appellant.

WELLS, Judge.

The Coastal Area Management ACT (CAMA), N.C. Gen. Stat. § 113A-100, *et seq.*, was enacted to provide for the protection and continued productivity of the coastal resources, to manage competing uses of those resources, and to protect public trust rights in the lands and waters of the coastal area. CAMA directs and empowers the Coastal Resource Commission (CRC) to enforce the Act's provisions. Under the authority vested in it by CAMA, the CRC has designated all public trust waters as subject to its management under coastal management development standards. Any development in public trust waters requires a CAMA permit. N.C. Gen. Stat. § 113A-118.

On 28 August 1990, CRC (respondent) issued a CAMA Major Development Permit (No. 127-90) to Paley-Midgette Partnership. In public trust waters (the Pamlico Sound) off Ocracoke Island, the CAMA permit authorized the extension of an existing pier and the construction of docking facilities on the pier.

On 16 September 1990, pursuant to N.C. Gen. Stat. § 113A-121.1(b), petitioners requested CRC to grant them an administrative contested case hearing concerning petitioners' opposition to CRC's issuance of the CAMA permit. On 22 October 1990, CRC's Chairman, James E. Harrington, denied the petitioners' request for a contested case hearing. On 3 December 1990, petitioners petitioned the Wake County Superior Court to review the CRC's

decision to grant the permit and to review respondent's denial of petitioners' request for an administrative contested hearing.

Following the 18 April 1991 hearing on the merits, Judge Jack A. Thompson found that petitioners were entitled to a contested case hearing, that petitioners had exhausted their administrative remedies, and that petitioners were entitled to the full scope of judicial review provided by N.C. Gen. Stat. § 150B-43. Judge Thompson's judgment included an order rescinding the CAMA Permit No. 127-90. North Carolina Coastal Resources Commission appealed.

The sole issue in this appeal is whether the trial court properly rescinded CAMA Permit No. 127-90. While the respondent concedes that the court could properly reverse CRC's decision denying petitioners' contested case hearing request, respondent contends that the trial court erred when it went on to rescind the permit. Respondent presents three arguments in opposition to the trial court's recision of the CAMA permit.

Respondent's first and third arguments can be summed up as follows: Respondent asserts that the trial court erred when it found that the petitioners had exhausted their administrative remedies. Respondent also argues that the trial court's judicial review of CRC's administrative decision improperly contains additional findings of fact which should have been reserved for the administrative agency to address. In conclusion, respondent contends that the trial court lacked subject matter jurisdiction and asserts that the trial court's recision of the CAMA permit amounted to a ruling on a substantive factual issue before that issue had been considered by the administrative agency. Respondent's contentions are without merit.

[1] First, respondent's contention that CRC has not been allowed an opportunity to consider the issues at bar is hollow. For all practical purposes, the CRC issued a final decision on the merits of this case when it, through its agent Chairman Harrington, denied petitioners' request for a contested case hearing, stating that "[p]etitioners have failed to put forward a prima facie case that the permit decision violated the cited standards and therefore have failed to demonstrate a reasonable likelihood of success on the merits . . . ." (Order of the Chairman of the Coastal Resources Commission denying petitioners' request for a contested case hearing.)

It is important to note that by granting the chairman the authority to dispose of certain petitions for contested review without the need of a hearing before the full commission, the respondent has delegated to its agent the authority to make a final determination. This delegation of authority within the agency does not act so as to give the agency two shots at making a final determination, (once by the chairman and once after remand of his denial for a contested case hearing), but rather acts so as to make the delegee's final determination binding upon the agency.

The provisions of N.C. Gen. Stat. § 113A-121.1 make it abundantly clear that the agency's denial of petitioners' request for a contested case hearing is a final agency decision subject to judicial review.

§ 113A-121.1 Administrative review of permit decisions.

(a) An applicant for a minor or major development permit who is dissatisfied with the decision on his application may file a petition for a contested case hearing under G.S. 150B-23 within 20 days after the decision is made. When a local official makes a decision to grant or deny a minor development permit and the Secretary is dissatisfied with the decision, the Secretary may file a petition for a contested case within 20 days after the decision is made.

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

(1) Has alleged that the decision is contrary to a statute or rule;

(2) Is directly affected by the decision; and

(3) Has a substantial likelihood of prevailing in a contested case hearing.

> If the Commission determines a contested case hearing is appropriate, the petition for a contested case shall be filed within 20 days after the Commission makes its determination. A determination that a person may not commence a contested case is a final agency decision and is subject to judicial review under Article 4 of Chapter 150B of the General Statutes. (Emphasis added.)

It is therefore clear that the Court below had subject matter jurisdiction in this case.

The question of whether the trial court erred in making findings of fact is simply not a "subject matter" issue. That question is properly resolved under the judicial review standard set out in N.C. Gen. Stat. § 150B-51 which states that:

> the court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may also reverse or modify the agency's decision if the substantial rights of the petitioners may have been prejudiced because the agency's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions;
>
> (2) In excess of the statutory authority of 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.

Pursuant to its legislative mandate, the CRC has adopted and promulgated the following rules pertinent to the resolution of this case, which the trial court correctly concluded were violated by the issuing of the permit in this case.

> .0207 PUBLIC TRUST AREAS
>
> . . .

(b) Significance. The public has rights in these areas, including navigation and recreation. In addition, these areas support valuable commercial and sports fisheries, have aesthetic value, and are important resources for economic development.

(c) Management Objective. To protect public rights for navigation and recreation and to preserve and manage the public trust areas so as to safeguard and perpetuate their biological, economic, and aesthetic value.

(d) Use Standards. Acceptable uses shall be those consistent with the management objectives in (c) of this Rule. In the absence of overriding public benefit, any use which significantly interferes with the public right of navigation or other public trust rights which the public may be found to have in these areas shall not be allowed . . . . [T]he building of piers, wharfs, or marinas are examples of uses that may be acceptable within public trust areas, provided that such uses will not be detrimental to the public trust rights and the biological and physical functions of the estuary.

15A N.C.A.C. 7H .0207

.0208 USE STANDARDS

(a) General Use Standards

. . .

(2) Before being granted a permit by the CRC . . . there shall be a finding that the applicant has complied with the following standards:

(A) The location, design, and need for development as well as the construction activities involved must be consistent with the stated management objective. . . .

(3) When the proposed development is in conflict with the general or specific use standards set forth in this Rule, the CRC may approve the development if the applicant can demonstrate that the activity associated with the proposed project will have public benefits as identified in the findings and goals of the Coastal Area Management Act, that the public benefits clearly outweigh the long range adverse effects of the project. . . .

15A N.C.A.C. 7H .0208

It is clear upon our review that the trial court's conclusions were based upon the entire record as submitted.

[2] In summary, the trial court correctly concluded, *inter alia*, that the granting of the permit was made upon unlawful procedure, was affected by other errors of law, was not supported by substantial evidence in view of the entire record as submitted, and was arbitrary and capricious.

As for the respondent's contention that the trial court improperly made findings of fact, respondent does not contend that the trial court's findings were not correct, only that it was not properly the role of the trial court to make any findings of fact. While the cases are somewhat conflicting on this narrow question, we find that the trial court's findings in this case accurately reflect the factual contents of the entire record of this case. Therefore, if it was error for the trial court to make such findings, it was certainly harmless error. The "whole record" makes it clear that the trial court considered uncontradicted reports from the United States Fish and Wildlife Service of the Department of the Interior, the National Marine Fisheries Service of the U.S. Department of Commerce, the U.S. Army Corps of Engineers, the North Carolina Wildlife Resources Commission, the Division of Marine Fisheries of the North Carolina Department of the Environment, Health and Natural Resources, Ocracoke residents themselves, and the Field Services Section of the respondent's own agency, all of which asserted opposition to the extension of the pier in question and supported denial of the permit application. Citing a variety of ecological concerns, potential environmental damage, and interference with public access to and use of the affected waters, the uncontradicted reports support the trial court's conclusion that, as a matter of law, the CRC erred when it issued permit No. 127-90. On the other hand, the whole record shows that the only basis for issuing the permit was that it would make the public waters adjacent to the permittee's condominium project more convenient for the permittee's use. Therefore, we affirm the trial court's rescission of the CAMA permit.

In its second argument, respondent contends that the trial court's judgment is faulty because the trial court did not have personal jurisdiction over the permit applicant. This contention is also without merit. The trial court's order is addressed to the North Carolina Coastal Resources Commission and instructs the Commission to carry out acts within its authority.

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

Affirmed.

Judges ARNOLD and LEWIS concur.

STATE OF NORTH CAROLINA v. TONY WILLIAMS

No. 914SC827

(Filed 15 December 1992)

Robbery § 5.2 (NCI3d) — armed robbery — appearance of firearm — instruction on presumption of danger to victim's life

Neither the State nor the defendant presented any evidence that defendant did not use a firearm or other dangerous weapon in a robbery and an attempted robbery, and the trial court properly instructed the jury on the mandatory presumption that a victim's life is endangered or threatened when there is evidence that defendant committed a robbery with what appeared to the victim to be a firearm or other dangerous weapon, where the robbery victim testified that defendant had what looked like a pistol wrapped up in something and that it "stuck out"; the attempted robbery victim testified that defendant had his hand in his coat and was pointing something at her, and that she "thought it was a gun" because "he kept pointing it at me and saying he was going to shoot me"; and defendant testified that he was at his brother's birthday party at the time of the robberies and that he did not own a gun or "mess with" guns. Neither testimony by the victims nor defendant's denial of the complete offense in each case and his denial of gun ownership constituted "some evidence" that the instrument used by defendant was incapable of threatening or endangering the victims' lives.

Am Jur 2d, Trial §§ 1293, 1294.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 14 February 1991 in Sampson County Superior Court by Judge Henry L. Stevens, III. Heard in the Court of Appeals 16 October 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Donald W. Laton, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., and Assistant Appellate Defender, M. Patricia DeVine, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 14 February 1991, which judgment is based on a jury verdict in consolidated cases convicting defendant of robbery with a dangerous weapon and attempted robbery with a dangerous weapon, N.C.G.S. § 14-87 (1986).

The evidence presented by the State established that on the evening of 20 November 1990, Janet Jordan (Jordan) was working as a cashier at The Scotchman, a convenience store located in Sampson County. At approximately 7:20 p.m., a black male, later identified by Jordan as defendant, entered the store and approached the counter. He pulled something out of his pocket, looked at Jordan, and said, "Give me your money." According to Jordan's testimony on direct examination, the object that the man pulled out of his pocket "looked like a pistol, but he had it wrapped up where I couldn't see what it was. It looked like the way he was holding it [—] it looked like a pistol that he had wrapped in something, and it stuck out." When asked whether she believed the object to be a real gun, Jordan answered, "Well, I thought it was."

The man demanded that Jordan open the cash register, and then took a total of $60.00—all of the money in the register except for the coins. After taking the money, the man ran out of the store, and Jordan immediately called the police. Based on her observation of the man during the robbery, Jordan described him as light-skinned, in his upper twenties, weighing approximately 150 pounds and being five feet, six inches tall, and wearing a cap and a shiny red jacket.

At approximately 10:20 p.m., a black male entered the Petro Mart in Sampson County and approached Cathy Tew Smith (Smith), the cashier, who was cleaning the store at the time. The man, who Smith later identified as defendant, then approached the counter

and asked for a pack of cigarettes. Smith testified that as soon as she hit the cigarette key on the cash register, the man demanded that she "open the drawer, b---, open the drawer b--- right now or I'll shoot you." The man had his right hand in his jacket pocket pointing it toward Smith. Smith testified on direct examination that she "thought he had a gun because he was pointing at me and he kept saying that he was going to shoot me." He was beating on the counter with his left fist, continually demanding that Smith "open the drawer." Smith became flustered and could not open the cash register, and finally the man pulled the register onto the floor. When it still would not open, the man fled the store. Smith described the man as wearing a light blue jacket and a cap, and being approximately five feet, six inches tall. The transaction at the Petro Mart was captured on the store's videotape.

Defendant testified that he did not commit the robberies with which he is charged. He stated that on the day of the robberies, he was with friends and family celebrating his younger brother's birthday, and further testified that he did not own a gun and did not "mess with guns." Defendant's younger brother, older brother, and five friends also testified on behalf of defendant. Each of the witnesses corroborated defendant's testimony.

At the close of all the evidence, defendant made a motion to dismiss the charges, which was denied. The trial court conducted an in-chambers charge conference, which was not recorded. The transcript indicates, however, that defendant objected to the portions of the charge "concerning a dangerous weapon." The trial court first instructed the jury on attempted robbery with a dangerous weapon. In relevant part, the court instructed the jury that to find defendant guilty, the jury must find that defendant

> used, or threatened to use a dangerous weapon or purported dangerous weapon in such a way as to endanger or threaten the life of that person, or by conduct which reasonably caused her to believe that her life was being endangered or threatened at the time. . . . Now, listen well, when a person attempts or perpetrates a robbery in such a way that it purportedly and reasonably appears to the victim that a firearm or other dangerous weapon is being used by such person, in the absence of any evidence to the contrary, the law of this state presumes the instrument to be what his conduct represented it to be, that is, a firearm or other dangerous weapon.

The relevant portion of the court's charge on robbery with a dangerous weapon is essentially identical to the above-quoted passage. The trial court in each case also instructed the jury that, if it did not find defendant guilty of robbery (or attempted robbery) with a dangerous weapon, that it could find defendant guilty of common law robbery, or not guilty.

The jury convicted defendant of robbery with a dangerous weapon and attempted robbery with a dangerous weapon, and the trial court sentenced defendant to forty years imprisonment. Defendant appeals.

The dispositive issue is whether there is any evidence that defendant did not use a firearm or other dangerous weapon capable of threatening or endangering the life of the victims.

Defendant argues that the trial court committed reversible error in its instruction on robbery with a dangerous weapon and attempted robbery with a dangerous weapon. Specifically, defendant contends that, based on the evidence in the case, the court's instruction that the law, in the absence of evidence to the contrary, presumes that an instrument is what the defendant's conduct represented it to be, is contrary to the law of North Carolina and violates defendant's right to due process of law.

A person commits robbery with a dangerous weapon when he, "having in possession or with the use or threatened use of any firearms or other dangerous weapon . . . whereby the life of a person is endangered or threatened, unlawfully takes or attempts to take personal property from another or from any place of business . . . where there is a person or persons in attendance . . . ." N.C.G.S. § 14-87(a) (1986). It is well-established that

> [w]hen a person commits a robbery by the use or threatened use of an implement which appears to be a firearm or other dangerous weapon, *the law presumes*, in the absence of any evidence to the contrary, that the instrument is what his conduct represents it to be—an implement endangering or threatening the life of the person being robbed. Thus, where there is evidence that a defendant has committed a robbery with what appears to the victim to be a firearm or other dangerous weapon *and nothing to the contrary appears in evidence*, the

> presumption that the victim's life was endangered or threatened is mandatory.

State v. Joyner, 312 N.C. 779, 782, 324 S.E.2d 841, 844 (1985) (citations omitted). This mandatory presumption is valid, *id.* at 783, 324 S.E.2d at 844; *see also State v. White*, 300 N.C. 494, 507, 268 S.E.2d 481, 489-90 (1980), and does not violate the Due Process Clause of the Fourteenth Amendment to the United States Constitution. *State v. Blair*, 101 N.C. App. 653, 657, 401 S.E.2d 102, 105 (1991). When *any* evidence is introduced which tends to establish that the victim's life was not endangered or threatened by a firearm or other dangerous weapon, "the mandatory presumption disappears, leaving . . . a mere permissive inference" which permits but does not require the jury to infer from proof of robbery with what appeared to the victim to be a firearm or other dangerous weapon, that the victim's life was endangered or threatened. *Id.* Accordingly,

> in a case where the instrument used to commit a robbery is described as appearing to be a firearm or other dangerous weapon capable of threatening or endangering the life of the victim and there is no evidence to the contrary, *it would be proper to instruct the jury to conclude that the instrument was what it appeared to be.* The jury should not be so instructed if there is evidence that the instrument was not, in fact, such a weapon, but was a toy pistol or some other instrument incapable of threatening or endangering the victim's life even if the victim thought otherwise.

State v. Allen, 317 N.C. 119, 125, 343 S.E.2d 893, 897 (1986) (emphasis added).

In light of the foregoing principles, the pivotal question in the instant case is whether either defendant or the State presented *any evidence* that defendant did not use a firearm or other dangerous weapon. A victim's testimony that the instrument used by the defendant during a robbery appeared to be a gun, but that he "could not positively say" that it was a gun does not constitute such evidence. *See State v. Thompson*, 297 N.C. 285, 289, 254 S.E.2d 526, 528 (1979) (admission of victim who testified that he was robbed by use of a firearm but that he could not positively say it was a gun is of insufficient probative value to warrant submission of common law robbery). Whether the victim makes such an admission on cross-examination or direct examination is immaterial.

The State presented the testimony of the two victims. Jordan testified that, during the robbery, defendant had what looked like a pistol wrapped up in something, and that it "stuck out." Smith testified that defendant had his hand in his coat and was pointing something at her, and that she "thought it was a gun" because "he kept pointing it at me and saying he was going to shoot me."[1] Defendant testified that he was at his brother's birthday party at the time of the robberies, and that he did not own a gun or "mess with" guns. Neither defendant's denial of the complete offense in each case and his general denial regarding ownership of a gun, nor the testimony of the victims, constitutes "some evidence" that the instrument used by defendant was incapable of threatening or endangering the victims' lives. There is no evidence that during the robberies defendant used a toy gun, a cap gun, or an inoperative pistol. Accordingly, the trial court correctly gave the mandatory presumption instruction.

No error.

Judge WALKER concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

I disagree with the conclusion reached by the majority that neither the state nor the defendant presented *any evidence* that the defendant did not use a firearm or dangerous weapon. Both victims offered testimony that they were unsure as to whether the robber possessed a firearm. Although Ms. Smith testified that the robber pointed his right jacket pocket at her as if he had a gun inside his pocket, she nonetheless concluded that she "didn't see no gun." Likewise, Ms. Jordan testified that the robber wielded something that "looked like a pistol, but it was wrapped up where I couldn't see what it was."

---

1. We see no valid distinction between testimony that what a defendant used during a robbery "appeared to be" a firearm and testimony that the victim "thought it was" a firearm. In both instances, absent some evidence that the defendant did not have a firearm or other dangerous weapon, it is proper for the trial court to instruct the jury on the mandatory presumption.

Under *State v. Thompson*, 297 N.C. 285, 254 S.E.2d 526 (1979) and *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985), the law presumes that an implement that appears to be a dangerous or deadly weapon is what it appears to be, in the absence of any evidence to the contrary. In *Thompson*, the court held that an eye-witness's concession on cross-examination that what appeared to be a gun might not have been, in fact, a gun "was not of sufficient probative value" to constitute contrary evidence. Thus, it would appear that the evidence elicited from the victims in this case, standing alone, would not be enough to warrant a rejection of an instruction on the mandatory presumption.

However, in the subject case, the defendant in presenting an alibi defense, took the stand and testified in his own behalf that he did not "mess with guns." Moreover, on cross-examination, when the prosecutor asked the defendant, "Mr. Williams, did you testify you don't have a gun, you don't mess with guns?," the defendant replied, "Correct. I don't own a gun." This evidence, when coupled with the evidence that neither of the victims ever saw a gun, is evidence that the defendant did not have a gun. It was therefore error to give the mandatory presumption instruction in this case.

DEBORAH ANN REED, PLAINTIFF v. CLARA PARKS ABRAHAMSON, JAMES OWEN ABRAHAMSON, KAREN BARWICK AND ROBERT LEONARD BARWICK, SR., DEFENDANTS

No. 9015SC568

(Filed 15 December 1992)

1. Automobiles and Other Vehicles § 531 (NCI4th)— automobile collision—stalled automobile partially on highway

The evidence was sufficient to go to the jury on defendant Barwick's negligence where Barwick was driving on an icy, two-lane road at approximately 8:15 a.m.; she noticed smoke coming from under the hood, pulled to the right of the road, and turned off the engine; unable to restart the car, she obtained assistance and pushed the car as far to the right side of the road as she could; 50 to 60 percent of the car remained on the paved portion of the road; she tried to call a towing service, but none was available; she then left the scene to

attend college classes and called another towing service at approximately 5:15 p.m.; in the meantime, plaintiff passed Barwick's car heading in the same direction; a car passing from plaintiff's direction could not pass Barwick's car without crossing the center line and plaintiff stopped her car before pulling around defendant's car; plaintiff proceeded back along the same road in the opposite direction at about 3:30 p.m.; defendant Abrahamson rounded a sharp curve, confronted Barwick's car partially obstructing her lane of travel, and steered to the left; and Abrahamson collided with plaintiff. Although defendant Barwick claims that there was insufficient evidence to send the issue of her negligence to the jury, she left her vehicle in the highway for approximately seven and one-half hours. This was sufficient to take to the jury the question of whether, in the exercise of reasonable care, defendant Barwick was entitled to be exonerated under the disablement exception in N.C.G.S. § 20-161(a).

Am Jur 2d, Automobiles and Highway Traffic § 901.

2. **Automobiles and Other Vehicles § 590 (NCI4th)— plaintiff striking oncoming vehicle—lane of oncoming vehicle partially blocked—contributory negligence**

The question of plaintiff's contributory negligence properly went to the jury where plaintiff collided with defendant Abrahamson's vehicle while Abrahamson was swerving around defendant Barwick's disabled car, which was partially blocking Abrahamson's lane. The evidence at trial did not establish as a matter of law that plaintiff was negligent.

Am Jur 2d, Automobiles and Highway Traffic § 843.

Negligence of motorist colliding with vehicle approaching in wrong lane. 47 ALR2d 6.

3. **Automobiles and Other Vehicles § 426 (NCI4th)— disabled vehicle—negligence of swerving driver—concurring or insulating—jury issue**

The evidence at trial was sufficient to submit to the jury the question of whether defendant Abrahamson's intervening negligence was concurring or insulating where plaintiff collided with defendant Abrahamson's vehicle while Abrahamson was

swerving around defendant Barwick's disabled car, which was partially blocking Abrahamson's lane.

Am Jur 2d, Automobiles and Highway Traffic §§ 432, 433.

4. Damages § 114 (NCI4th)— automobile accident—damages—pain—evidence sufficient

The evidence was sufficient in an automobile accident case to support the jury's award of $50,000, and the trial court correctly denied plaintiff's motion to set aside the verdict, where plaintiff presented evidence of the continuing nature of the chest and back pain she suffers as a result of the accident; her orthopedic surgeon stated that her injuries were permanent and rated plaintiff with a 5% permanent partial disability of the upper thoracic spine; other medical experts supported that diagnosis; and plaintiff established the necessity for her treatments at Duke University Medical Center Pain Clinic and Medical and Surgical Private Diagnostic Clinics.

Am Jur 2d, Automobiles and Highway Traffic §§ 914-915, 917.

5. Automobiles and Other Vehicles § 767 (NCI4th)— vehicle stopped on highway—no perception of emergency—instruction on sudden emergency correctly denied

The trial court did not err by failing to instruct the jury on the doctrine of sudden emergency in an automobile accident case where defendant Abrahamson rounded a curve and was confronted with defendant Barwick's disabled car partially in her lane of travel, swerved, and collided with plaintiff where it is clear from defendant Abrahamson's testimony that she did not perceive herself to be in an emergency situation and she never testified that she could not stop upon finding the Barwick vehicle in her path.

Am Jur 2d, Automobiles and Highway Traffic § 420.

Instructions on sudden emergency in motor vehicle cases. 80 ALR2d 5.

6. Evidence and Witnesses § 226 (NCI4th)— automobile accident—medical bills—pain diary—admissible

The trial court did not err in an automobile accident case by admitting evidence of plaintiff's medical bills and plaintiff's pain diary. The medical treatments were reasonably necessary

as rehabilitative measures and the bills submitted were reasonable in amount. The pain diary was actually part of plaintiff's medical record and falls squarely into the hearsay exception for Statements for Purposes of Medical Diagnosis or Treatment under N.C.G.S. § 8C-1, Rule 803(4).

Am Jur 2d, Damages § 198; Evidence § 496.

7. Trial § 13 (NCI3d)— exhibits—taken into jury room without consent of both parties—no prejudice

There was no prejudice in an automobile accident case where the trial court permitted the jury to take exhibits into the jury room and retain them during deliberations without the consent of the parties.

Am Jur 2d, Trial § 1691.

Appeal by defendants from judgment entered 9 October 1986 in Orange County Superior Court by Judge Gordon F. Battle. Heard in the Court of Appeals 17 November 1992.

Plaintiff brought this personal injury action seeking damages for injuries plaintiff sustained in an automobile accident on 22 January 1985. The record discloses the following facts:

At approximately 8:15 a.m. on the morning of the accident, defendant Karen Barwick (hereinafter Barwick) was traveling in a westerly direction on an icy, paved two-lane road when she noticed smoke coming from under her hood. She pulled the car to the right side of the road and turned off the engine. Unable to start the car again, she obtained assistance and pushed the vehicle as far to the right side of the road as she could. The evidence presented tends to establish that 50 to 60 percent of defendant Barwick's car still remained on the paved portion of the road. Defendant Barwick then tried to call a towing service, but no tow truck was available at that time. Defendant Barwick, a student *en route* to Chapel Hill, left the scene to attend her classes. After her classes were over, she called another towing service at approximately 5:15 p.m.

In the meantime, plaintiff passed defendant Barwick's parked car heading in a westerly direction. Upon approaching the vehicle, plaintiff stopped her car before pulling out around defendant Barwick's car. A car passing from plaintiff's direction could not have passed defendant Barwick's car without crossing the center line.

At about 3:30 p.m. that afternoon, plaintiff proceeded back along the same road in an easterly direction. As plaintiff approached defendant Barwick's parked car, defendant Clara Parks Abrahamson (hereinafter Abrahamson), who was driving from the opposite direction, rounded a sharp curve in the road and confronted the parked car partially obstructing her lane of travel. Defendant Abrahamson steered to the left to pass defendant Barwick's car. A collision resulted from defendant Abrahamson's maneuver. The evidence presented shows that defendant Abrahamson was traveling below the posted speed limit of 45 miles per hour.

Plaintiff instituted this negligence cause of action against both defendants. The jury returned a verdict for plaintiff against both defendants, jointly and severally, for $50,000.00. From that judgment, defendants appeal.

Toms, Reagan & Montgomery, by Frederic E. Toms, for plaintiff-appellee.

Young, Moore, Henderson & Alvis, P.A., by Ralph W. Meekins, for defendants-appellants Clara and James Abrahamson.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by E. Elizabeth Lefler and George W. Miller, Jr., for defendants-appellants Karen and Robert Barwick, Sr.

WELLS, Judge.

[1] Defendants each set forth separate assignments of error for our review and we shall address each individually. First, defendant Barwick contends the trial court erred in denying her motion for directed verdict and judgment notwithstanding the verdict. She bases this assertion on three independent and alternative arguments. Defendant Barwick first claims that there was insufficient evidence to send the issue of her negligence to the jury. In the alternative, she asserts that even if there was competent evidence to establish negligence on the part of defendant Barwick, either plaintiff's contributory negligence or defendant Abrahamson's insulating negligence was the proximate cause of plaintiff's injuries, thereby precluding recovery from defendant Barwick.

> A motion by a defendant for a 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. On such a motion,

> plaintiff's evidence must be taken as true and considered in the light most favorable to the plaintiff, giving plaintiff the benefit of every reasonable inference to be drawn therefrom. A directed verdict for the defendant is not properly allowed unless it appears as a matter of law that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish.

Koonce v. May, 59 N.C. App. 633, 634, 298 S.E.2d 69, 71 (1982). A motion for judgment notwithstanding the verdict is essentially a renewal of an earlier motion for directed verdict, *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 329 S.E.2d 333 (1985), and the same standard will apply.

In this case, there was sufficient evidence from which a jury could find defendant Barwick was negligent. N.C. Gen. Stat. § 20-161(a) provides the following:

> No person shall park or leave standing any vehicle, whether attended or unattended, upon the paved or main-traveled portion of any highway or highway bridge outside municipal corporate limits unless the vehicle is disabled to such an extent that it is impossible to avoid stopping and temporarily leaving the vehicle upon the paved or main traveled portion of the highway or highway bridge.

Accepting *arguendo* that defendant Barwick's vehicle was disabled to the extent that it was impossible to avoid stopping in the traveled portion of the highway; and accepting *arguendo* that she removed her car from the highway as best she could upon its disablement, these circumstances do not settle the question of whether defendant Barwick was entitled, as a matter of law, to be excused from negligence under the disablement exception in N.C. Gen. Stat. § 20-161(a). The operative circumstances of this case are that defendant Barwick did not only temporarily leave her vehicle in the highway, but also, left it there for approximately seven and one-half hours. This was sufficient to take to the jury the question of whether, in the exercise of reasonable care, defendant Barwick was entitled to be exonerated under the disablement exception. This evidence was also clearly sufficient to allow the jury to determine that the presence of the Barwick vehicle in the traveled portion of the highway was a proximate cause of plaintiff's injuries.

[2] As to the question of plaintiff's alleged contributory negligence, we find no substance to defendant's position. The evidence at trial certainly did not establish, as a matter of law, that plaintiff was negligent in the operation of her vehicle, and thus this question properly went to and was settled by the jury.

[3] The evidence adduced at trial was also sufficient to submit to the jury the question of whether defendant Abrahamson's intervening negligence was concurring or insulating. Where the evidence presented is of "such a character that reasonable men could form divergent opinions of its import," the issues should be submitted to the jury for consideration. *Bryant, supra.* We therefore find the trial court's denial of defendant Barwick's motions to be proper.

[4] Defendant Barwick next contends that the trial court should have granted her motion for judgment notwithstanding the verdict and motion to set aside the verdict because the damage award was excessive and the evidence was insufficient to support an award of $50,000.00. A motion to set aside a verdict as excessive is addressed to the sound discretion of the trial court and, absent a manifest abuse of discretion, will not be disturbed upon appeal. *Worthington v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982).

Plaintiff presented evidence of the continuing nature of the chest and back pain she suffers as a result of the accident. She further presented deposition testimony of her orthopedic surgeon who stated that her injuries were permanent in nature and rated the plaintiff with a 5% permanent partial disability of the upper thoracic spine. Plaintiff brought forth other medical experts whose testimony tended to support her orthopedic surgeon's diagnosis. Plaintiff also established the necessity for her treatments at Duke University Medical Center Pain Clinic and Medical and Surgical Private Diagnostic Clinics. Dr. Bruno Urban, who treated plaintiff at the Pain Clinic, examined plaintiff and formed a clinical impression that plaintiff's symptoms were consistent with her accident history. He devised a treatment plan for plaintiff including biofeedback techniques and physical therapy. As part of plaintiff's treatment at the Pain Clinic, she received services from the Medical and Surgical Private Diagnostic Clinics at Duke. Plaintiff, Dr. Urban, and plaintiff's physical therapist, testified that they believed plaintiff benefitted from her treatment at the Pain Clinic by reduction of her pain. Plaintiff's testimony together with that of the medical

professionals established sufficient evidence to support the jury's award of $50,000.00. After reviewing the evidence presented, we find no indication of manifest abuse and we therefore affirm the trial court's denial of defendant Barwick's motions.

[5] In her first assignment of error, defendant Abrahamson argues that the trial court erred in failing to instruct the jury on the doctrine of sudden emergency. The doctrine of sudden emergency applies when defendant is confronted with "an emergency situation not of his own making and requires defendant to act only as a reasonable person would react to similar emergency circumstances." *Massengill v. Starling*, 87 N.C. App. 233, 360 S.E.2d 512 (1987), *disc. review denied*, 321 N.C. 474, 364 S.E.2d 923 (1988). We find the doctrine of sudden emergency inapplicable based upon the facts before us.

An "emergency situation" has been defined by our courts as that which "compels [defendant] to act instantly to avoid a collision or injury[.]" (Emphasis added.) *Schaefer v. Wickstead*, 88 N.C. App. 468, 363 S.E.2d 653 (1988) (*citing Foy v. Bremson*, 286 N.C. 108, 209 S.E.2d 439 (1974)). From defendant Abrahamson's testimony, it is clear that she did not perceive herself to be in an emergency situation. Instead, she testified that she saw the Barwick vehicle about ten to fifteen car lengths away, and upon determining that there were no cars approaching from the other direction and that it was safe to proceed, she pulled into the lane of oncoming traffic. Defendant Abrahamson never testified that she could not stop upon finding the Barwick vehicle in her path. Therefore, based on the testimony and facts before us, we find that there was no "emergency" as our cases define that term. This assignment of error is overruled.

[6] Both defendants Barwick and Abrahamson contend that the trial court erred in admitting evidence of plaintiff's medical bills. We find no error in that there was competent evidence to show that the medical treatments were reasonably necessary as rehabilitative measures and that the bills submitted were reasonable in amount.

Both defendants also contend that it was reversible error for the court to admit plaintiff's "pain diary" because it was inadmissible hearsay. Defendants argue that admission of the diary constituted prejudicial error and prevented them from receiving a fair trial.

Upon reviewing the record before us, we find that the "pain diary" in question was actually part of plaintiff's medical record and consisted of subjective responses plaintiff provided to Dr. Francis Keith, a psychologist, on a form he had given her, enabling him to effectively evaluate her condition and prescribe treatment. At Dr. Keith's request, plaintiff kept a daily log of her subjective experience of pain as part of her treatment program. Plaintiff provided this record to Dr. Keith every time she met with him, and it was incorporated as part of her medical record. Clearly, this subjective record of plaintiff's pain falls squarely into the hearsay exception for Statements for Purposes of Medical Diagnosis or Treatment under Rule 803(4) of the Rules of Evidence. We therefore find this assignment of error to be without merit.

[7] Finally, defendants assign as error the trial court's submission of an exhibit to the jury without the consent of all parties. While it is true our Court has held that it is error for the trial court to permit the jury to take exhibits into the jury room and retain them during deliberations without the consent of the parties, such error requires reversal only when the objecting party demonstrates it has suffered resulting prejudice. *Robinson v. Seaboard System Railroad*, 87 N.C. App. 512, 361 S.E.2d 909 (1987), *review denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). Defendants have not demonstrated prejudice or the denial of a substantial right based on the trial court's error. This assignment of error is overruled.

We find defendants Barwick's and Abrahamson's additional assignments of error to be without merit and therefore do not address them.

No error.

Judges EAGLES and LEWIS concur.

BOBBY J. PLUMMER, PLAINTIFF-APPELLANT v. BENNIE KEARNEY D/B/A KEARNEY'S MASONRY, EMPLOYER; AMERICAN MUTUAL INSURANCE COMPANY, (NOW INSOLVENT); HELMSMAN MANAGEMENT SERVICE, INC., (ADMINISTRATOR THROUGH THE WORKERS' COMPENSATION SECURITY FUND OF THE N.C. DEPARTMENT OF INSURANCE), CARRIER; AND/OR ASHLAND CONSTRUCTION COMPANY, EMPLOYER; CIGNA INSURANCE COMPANY, CARRIER; DEFENDANTS-APPELLEES

No. 9110IC1163

(Filed 15 December 1992)

Master and Servant § 95 (NCI3d)— workers' compensation— dismissal of parties—unappealable interlocutory order

An order dismissing a subcontractor's insolvent former compensation carrier, the general contractor and the general contractor's compensation carrier from a workers' compensation action instituted by plaintiff, an employee of the subcontractor, on the ground that they were not liable for any compensation benefits which might be payable to plaintiff was an unappealable interlocutory order where the Industrial Commission made no certification of questions of law, and no substantial right of plaintiff employee to avoid separate trials on the same issue was affected because the issues resolved by the Commission were different from the remaining issue of whether plaintiff's injuries were compensable under the Workers' Compensation Act.

Am Jur 2d, Appeal and Error § 106.

Appeal by plaintiff from Opinion and Award for the North Carolina Industrial Commission filed 1 August 1991. Heard in the Court of Appeals 23 October 1992.

Ben E. Roney, Jr., by Ben E. Roney, Jr., for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by John P. Barringer, for defendant-appellee American Mutual Insurance Company/Helmsman Management Service, Inc.

Teague, Campbell, Dennis & Gorham, by Robert C. Kerner, Jr., for defendant-appellees Ashland Construction Company and CIGNA Insurance Company.

GREENE, Judge.

Employee Bobby J. Plummer (Plummer) appeals from an order of the North Carolina Industrial Commission (the Commission) dismissing American Mutual Insurance Company (American Mutual), Helmsman Management Services, Inc. (Helmsman), Ashland Construction Company (Ashland), and CIGNA Insurance Company (CIGNA) as defendants in Plummer's workers' compensation action.

Plummer was employed as a laborer and fork lift driver by Bennie Kearney, doing business as Kearney's Masonry (Kearney's). In 1989, Kearney's had an oral contract with Ashland to subcontract work at a job site in South Boston, Virginia. Prior to allowing Kearney's to begin work on the project, Ashland obtained from Kearney's a certificate of insurance which showed that Kearney's had obtained workers' compensation insurance coverage from American Mutual for the period from 11 October 1988 to 11 October 1989. Subsequent to the issuance of this certificate, American Mutual was declared insolvent effective 9 March 1989 by a Massachusetts court order. Helmsman was named administrator for American Mutual through the Workers' Compensation Security Fund of the North Carolina Department of Insurance. All insurance policies issued by American Mutual were cancelled effective 8 May 1989. On 22 March 1989, the Massachusetts court specified that notices of cancellation were to be sent by first class mail, postage prepaid, with proof of mailing obtained. Such a notice was sent to Kearney's, but the record does not reveal whether Kearney's actually received it. Kearney's did not replace its workers' compensation coverage, nor did it notify Ashland or CIGNA, Ashland's workers' compensation carrier, that the coverage had been cancelled.

On 22 September 1989, Plummer allegedly injured his back while lifting blocks for Kearney's at the South Boston work site. Plummer filed a claim under the North Carolina Workers' Compensation Act in October, 1989, naming Kearney's, American Mutual, Helmsman, Ashland, and CIGNA as defendants. A hearing on Plummer's claim was scheduled before a Deputy Commissioner of the Commission in August, 1990, but was continued at the request of Kearney's. During the next two months the parties and the Deputy Commissioner reached an agreement whereby the parties would stipulate a record from which the Deputy Commissioner could decide the issue of insurance coverage for Plummer's claim. The Deputy Commissioner, in her award and opinion of 29 November

1990, concluded that American Mutual, Helmsman, Ashland, and CIGNA were not liable for any benefits which might be payable to Plummer under the Workers' Compensation Act and consequently dismissed them from the action. This left Bennie Kearney, doing business as Kearney's, as the only party liable for any benefits due Plummer. Both Plummer and Kearney's appealed the Deputy Commissioner's opinion and award to the Commission. The Commission adopted the Deputy Commissioner's opinion and award in its entirety on 24 July 1991.

Plummer contends that because Ashland did not obtain a certificate of insurance directly from the Commission as required by N.C.G.S. § 97-19, Ashland and its insurance carrier CIGNA are therefore liable for Plummer's workers' compensation benefits. Plummer further contends that the method of notification of workers' compensation insurance cancellation used, despite the fact that it was approved by the Massachusetts court, does not comply with the requirements of N.C.G.S. § 97-99(a) that such notification be by registered mail and is therefore ineffective. Since effective notice of cancellation was not given, Plummer contends American Mutual and Helmsman remain liable for his workers' compensation benefits. Also, Plummer contends that the Commission erred in making a finding of fact that Kearney's had received the notice of cancellation, as no evidence in the record supports this finding.

The dispositive issue is whether this appeal must be dismissed as interlocutory. Although this issue was not raised by the parties, it is appropriately raised by this Court *sua sponte*. *Bailey v. Gooding*, 301 N.C. 205, 208, 270 S.E.2d 431, 433 (1980).

An appeal is taken from an order and award of the Commission "under the same terms and conditions as govern appeals from the superior court to the Court of Appeals in ordinary civil actions." N.C.G.S. § 97-86 (1991). These terms and conditions are set forth in N.C.G.S. § 7A-27, which provides that appeal is available to this Court from final judgments, "including any final judgment entered upon review of a decision of an administrative agency . . . ." N.C.G.S. § 7A-27 (1989). An order is not final, and therefore interlocutory, if it fails to determine the entire controversy between all the parties. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Thus an order and award from the Commission is interlocutory if it determines one but not all

of the issues in a workers' compensation case. *Fisher v. E.I. Du Pont De Nemours*, 54 N.C. App. 176, 178, 282 S.E.2d 543, 544 (1981) (order not final when amount of compensation not determined). Even if the parties request and agree that only a specific issue rather than the entire controversy is to be decided by the Commission at a particular hearing, the order which issues is not a final order. *Fisher*, 54 N.C. App. at 177-78, 282 S.E.2d at 544 (parties cannot by agreement modify the scope of appellate review prescribed by statute).

Such interlocutory orders are generally not appealable. *Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982). Two avenues do exist, however, whereby an interlocutory order may be immediately appealed. *Baker v. Rushing*, 104 N.C. App. 240, 245, 409 S.E.2d 108, 111 (1991). First, the order may be certified by the trial court as immediately appealable pursuant to N.C.G.S. § 1A-1, Rule 54(b) (1990). An equivalent procedure to certification exists in N.C.G.S. § 97-86, whereby the Commission may, upon its own motion, certify questions of law to this Court for determination. N.C.G.S. § 97-86 (1991). Second, an interlocutory order may be appealed pursuant to N.C.G.S. § 7A-27(d) or N.C.G.S. § 1-277 if it: (1) determines the action; (2) discontinues the action; (3) grants or refuses a new trial; or (4) affects a substantial right of the appellant. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). The most common reason for allowing immediate appeal of an interlocutory order under these statutes is the prejudice of a substantial right. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 491, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989). For an interlocutory order of the Commission to be immediately appealable under the substantial right analysis it must: (1) affect a substantial right of the appellant; and (2) have the potential to work injury if not appealed before final judgment. *Johnson v. North Carolina Dep't of Transp.*, 70 N.C. App. 784, 785, 321 S.E.2d 20, 20-21 (1984) (substantial right analysis applied to order and award of the Commission); *Goldston v. American Motors Corp.*, 326 N.C. 723, 728, 392 S.E.2d 735, 737 (1990) (substantial right analysis applied to trial court order).

Because no rule exists for determining when a substantial right is affected, we must consider the particular facts of each case and the procedural context in which the order was entered in determining which appeals affect a substantial right. *Estrada v. Jaques*, 70 N.C. App. 627, 640, 321 S.E.2d 240, 249 (1984). The

substantial right most often addressed is the right to avoid two separate trials on the same issues. *Slurry*, 88 N.C. App. at 5-6, 362 S.E.2d at 815. Denial of this substantial right creates the possibility of prejudice from different fact-finders rendering inconsistent verdicts on the same issue. *T'ai Co. v. Market Square Ltd. Partnership*, 92 N.C. App. 234, 236, 373 S.E.2d 885, 886 (1988). In this case the Deputy Commissioner and the parties agreed to generate a record by stipulation from which findings of fact and conclusions of law could be made as to the coverage issue only. The appeal before the Commission also heard only the issue of coverage. The Commission has made no award of compensation. Indeed, the record does not reveal that the Commission has decided whether Plummer was in fact injured, the nature and extent of his injury, if any, or whether the injury occurred in the scope and in the course of his employment. Therefore, despite the agreement that this single issue only was to be resolved, the order which issued is interlocutory. No certification of questions of law was made by the Commission, nor does this order determine the action, discontinue the action, or grant or refuse a new trial. Thus there remains only the question of the existence of a substantial right.

Failure to hear this appeal will not prejudice a substantial right of Plummer. The issues resolved by the Commission in determining that American Mutual, Helmsman, Ashland, and CIGNA were not liable for any benefits which might be payable to Plummer are different from the issue of whether Plummer's injuries are compensable under the provisions of the Workers' Compensation Act. Therefore, there is no possibility of inconsistent decisions on these issues, and Plummer must await full resolution of all issues in the case before we will address the issues he attempts to raise in this premature appeal.

Accordingly, the appeal is

Dismissed.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA v. KENNETH WAYNE SMOTHERS

No. 9117SC972

(Filed 15 December 1992)

1. **Searches and Seizures § 24 (NCI3d)— search warrant—probable cause—no showing of informant's reliability—sufficiency of affidavit—totality of circumstances**

Although an officer's affidavit contained no showing of a named informant's reliability and veracity, the affidavit was sufficient under the totality of the circumstances test to sustain the magistrate's finding of probable cause for the issuance of a warrant to search defendant's home for narcotics where it alleged: (1) the informant had advised the officer that he had been in defendant's residence approximately seventy-two hours earlier and had observed defendant and others heating cocaine and then snorting it through a straw, that he had personally observed a box containing small bags of white powder and a bag containing what appeared to be marijuana in the residence, that defendant offered him some cocaine but he declined, and that he had personal knowledge of the appearance of cocaine and marijuana because a relative had previously used drugs; (2) the officer personally spoke with a second individual who stated that he was with the informant at defendant's residence and that the informant told him that he had seen cocaine and marijuana in the residence and had been offered cocaine by defendant; (3) the officer verified that defendant resides at the home in question by checking the address listed with the Department of Motor Vehicles on defendant's driver's license; and (4) the officer has received information in the past from other citizens living near defendant's home concerning an unusual amount of traffic going to and from defendant's home at all hours of the day and night.

Am Jur 2d, Searches and Seizures § 69.

2. **Criminal Law § 959 (NCI4th)— newly discovered evidence—motion for appropriate relief—waiver—untimeliness**

Defendant waived his right to assert on appeal a motion for appropriate relief seeking to reopen a suppression hearing based upon the discovery of new evidence consisting of four letters where the letters were discovered prior to sentencing,

the trial court was not divested of jurisdiction to hear motions concerning this new evidence until defendant gave notice of appeal after judgment was entered, and defendant failed to make an appropriate motion in the trial court. Furthermore, defendant was not entitled to assert his motion for appropriate relief more than ten days after entry of judgment under N.C.G.S. § 15A-1415 because the evidence was not unknown or unavailable to the defendant at the time of trial (*i.e.*, the sentencing hearing).

Am Jur 2d, Coram Nobis § 50.

Appeal by defendant from judgment entered 9 April 1991 by Judge Joseph R. John in Rockingham County Superior Court. Heard in the Court of Appeals 13 November 1992.

On 14 September 1989, Lieutenant Richard Anderson of the Mayodan Police Department received information from Kenneth Ray Farmer, a former resident of Mayodan, that he had been in defendant's residence approximately seventy-two hours earlier and had observed defendant and others heating cocaine and then snorting it through a straw. The informant also stated that he observed substances which appeared to be cocaine and marijuana in the residence. A second individual verified to Lieutenant Anderson that he had been with the informant at defendant's residence and that the informant had entered the residence.

After confirming defendant's address, Lieutenant Anderson issued a probable cause affidavit and obtained a search warrant. A subsequent search of defendant's residence resulted in the seizure of drugs, drug paraphernalia and a large amount of cash.

Defendant was arrested, indicted, and charged with possession with intent to sell and deliver 3.6 grams of cocaine and with possession of drug paraphernalia. Defendant was also indicted for maintaining a dwelling to keep and sell a controlled substance. He was further charged with possession of two tablets of diazepam, possession of non-tax liquor, simple possession of marijuana, and possession of diethylpropon, a Schedule IV controlled substance.

Defendant moved to suppress the evidence obtained pursuant to the search warrant and a hearing on the motion was held 20 August 1990, which was denied. He filed notice of his intention to appeal the denial of his motion to suppress on 20 August 1990.

Thereafter, defendant entered into a plea agreement with the State, whereby he pled guilty to possession with intent to sell and deliver cocaine and to maintaining a dwelling for keeping controlled substances. Pursuant to the agreement, all other charges were dropped. Defendant was sentenced to a term of four years imprisonment. He timely appealed denial of his suppression motion, which matter is now before this Court.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Philip A. Telfer, for the State.

Mary K. Nicholson for defendant appellant.

WALKER, Judge.

Defendant presents two arguments to this Court for review. He contends (1) the trial court erred in failing to grant defendant's motion to suppress the evidence and (2) the trial court erred in failing to reopen the suppression hearing based on new evidence of the defendant. We find no error and therefore affirm the trial court.

[1] With regard to the first exception, defendant argues that the circumstances in this case do not support the magistrate's finding of probable cause to issue the warrant, because the warrant was based predominantly on the informant's statements and there was no corroborating or supporting information in the affidavit. Defendant also submits that the affidavit lacks information establishing the reliability or veracity of the informant. There is no indication that this informant had provided reliable information in the past or that the affiant knew him to be credible. Though named, the informant is not a citizen informant and he made no statements against his interest which might otherwise carry an indicia of credibility. In fact, the informant had a prior criminal record and was involved in a dispute with defendant. Thus, insofar as the affidavit contained no showing of the informant's reliability, veracity, character or reputation in the community, defendant contends it was insufficient to sustain a finding of probable cause by the magistrate and a subsequent issuance of a search warrant.

We note at the outset that, although an informant's veracity, reliability and basis of knowledge are highly relevant in determining the weight to be afforded to his report, these elements "should be understood simply as closely intertwined issues that may usefully illuminate the commonsense, practical question whether there

is 'probable cause' to believe that contraband or evidence is located in a particular place." *State v. Jackson*, 309 N.C. 26, 37, 305 S.E.2d 703, 712 (1983) *quoting with approval Illinois v. Gates*, 462 U.S. 213, 230, 76 L.Ed.2d 527, 543, *reh'g denied*, 463 U.S. 1237, 77 L.Ed.2d 1453 (1983). "[E]ven if we entertain some doubt as to an informant's motives, his explicit and detailed description of alleged wrongdoing, along with a statement that the event was observed firsthand, entitles his tip to greater weight than might otherwise be the case." *Illinois v. Gates*, 462 U.S. at 234, 76 L.Ed.2d at 545. In *State v. Arrington*, 311 N.C. 633, 319 S.E.2d 254 (1984), our Supreme Court expressly adopted the totality of circumstances test enunciated by the U.S. Supreme Court in *Illinois v. Gates, supra*, and *Massachusetts v. Upton*, 466 U.S. 727, 80 L.Ed.2d 721 (1984), for determining the sufficiency of an informant's tip to supply probable cause and the subsequent issuance of a search warrant. Pursuant to this test:

> The task of the issuing magistrate is simply to make a practical, common sense decision whether, given all the circumstances set forth in the affidavit before him, including the "veracity" and "basis of knowledge" of persons supplying hearsay information, there is a fair probability that contraband or evidence of a crime will be found in a particular place. And the duty of a reviewing court is simply to ensure that the magistrate had a "substantial basis for . . . conclud[ing]" that probable cause existed.

State v. Arrington, 311 N.C. at 638, 319 S.E.2d at 257-258, *quoting with approval, Illinois v. Gates*, 462 U.S. at 238-239, 76 L.Ed.2d at 548. "[G]reat deference should be paid a magistrate's determination of probable cause and . . . after-the-fact scrutiny should not take the form of a *de novo* review." *Id.* at 638, 319 S.E.2d at 258.

In the instant case, the information supplied by the informant established that he had been in defendant's residence during the previous seventy-two hours and that he had personally observed a box containing "a bunch" of small bags of white powder and a zip lock bag of what appeared to be marijuana in the residence. The informant advised the officer that he had personally observed defendant and others using cocaine by heating it and then snorting it through a straw, and that defendant offered the informant some cocaine but the informant declined. The informant stated that he

had personal knowledge of the appearance of cocaine and marijuana because a relative previously used these drugs.

In addition to the information provided by the informant, the affidavit reveals that the affiant, Lieutenant Anderson, personally spoke with a second individual who was with the informant at defendant's residence and who verified that the informant entered defendant's residence. This individual also told the officer that the informant stated to him that he had seen cocaine and marijuana in the residence and had been offered cocaine by defendant.

The affidavit indicates that Lieutenant Anderson verified that defendant resides at the home in question by checking the address listed with the North Carolina Department of Motor Vehicles on defendant's driver's license. Further, the affidavit recites that the officer has received information in the past from other citizens living near defendant's residence concerning an unusual amount of traffic going to and from defendant's residence at all hours of the day and night.

Applying the totality of circumstances test prescribed by our Supreme Court, and giving proper deference to the magistrate's decision to issue a search warrant, we find there to be a substantial basis for the magistrate's finding of probable cause in the present case. The information supplied by the informant and contained in the affidavit was based upon the informant's first-hand knowledge, communicated within seventy-two hours of observing the crimes, and consistent with the statements of the second individual. There was therefore sufficient detail to overcome a lack of specific evidence of the informant's reliability and veracity. When considered in conjunction with the statements of the other individual and the officer's own investigation, the information sufficiently indicates a fair probability that defendant possessed cocaine and marijuana, that he was keeping these substances in his residence, and that he was selling such from his home. Thus, we conclude that, when considered as a whole, the circumstances in this case sufficiently established probable cause within the purview of the Fourth Amendment.

[2] Defendant's second assignment of error asserts that the trial court erred in failing to reopen the suppression hearing based upon the discovery of new evidence, which consisted of four letters. Defendant argues that at the time this evidence was discovered, he had already given notice of appeal of the suppression hearing

and jurisdiction was within this Court except as to the matter of sentencing. He thereby pursues this matter in the form of a motion for appropriate relief filed in this Court on 12 November 1991. Defendant admits in his motion for appropriate relief, however, that these letters were discovered subsequent to the denial of his motion to suppress but prior to entry of judgment, and were presented to the trial court at the sentencing hearing.

Although defendant gave notice of *intent* to appeal following the suppression hearing on 20 August 1990, he did not give notice of appeal until 15 April 1991, after judgment was entered on 9 April 1991. Consequently, the trial court was not divested of jurisdiction to hear any motions concerning this new evidence until 15 April 1991, and we cannot agree with defendant's argument to the contrary. Since defendant failed to make an appropriate and timely motion in the trial court, he is deemed to have waived his right to assert such on appeal, pursuant to N.C.G.S. § 15A-1446.

Additionally, we decline to review this motion on the grounds that it affects a substantial right or is otherwise meritorious and in the interest of justice. N.C.G.S. § 15A-1446; N.C.G.S. § 15A-1419(b). Defendant's motion for appropriate relief is based upon N.C.G.S. § 15A-1415 which provides in part:

> (b) The following are the only grounds which the defendant may assert by a motion for appropriate relief made more than 10 days after entry of judgment.
>
> . . . .
>
> (6) Evidence is available which was unknown or unavailable to the defendant at the time of the trial, which could not with due diligence have been discovered or made available at that time, and which has a direct and material bearing upon the guilt or innocence of the defendant.

In the instant case, defendant admits that the letters were discovered after the suppression hearing but prior to sentencing. Thus, the evidence was not "unknown or unavailable to the defendant at the time of the trial" (i.e. the sentencing hearing). Defendant thereby fails to satisfy this ground for appropriate relief and neglects to assert an alternative ground upon which a motion for relief may be made more than ten days after entry of judgment. For the

foregoing reasons, defendant's motion for appropriate relief is dismissed.

AFFIRMED.

Judges GREENE and WYNN concur.

STATE OF NORTH CAROLINA v. KOLIFA SAPATCH

No. 9118SC926

(Filed 15 December 1992)

1. **Intoxicating Liquor § 88 (NCI4th); Searches and Seizures § 1 (NCI3d)— search of ABC permittee's premises—statutory right—waiver of Fourth Amendment rights by ABC application—inapplicable to closed film canisters**

An officer's right to conduct a warrantless search of an ABC permittee's licensed premises for violations of the ABC laws pursuant to N.C.G.S. § 18B-502, and the permittee's waiver of his Fourth Amendment rights for inspections incident to enforcement of the ABC regulations by his application for an ABC permit, did not extend to searches of closed film canisters observed by the officer on the licensed premises. Therefore, the trial court should have suppressed evidence of cocaine rocks discovered by the officer in the film canisters.

Am Jur 2d, Searches and Seizures § 97.

2. **Searches and Seizures § 33 (NCI3d)— search for ABC violations—search of closed canisters—plain view rule inapplicable**

An officer's search of two closed film canisters observed by the officer on an ABC permittee's premises while conducting an administrative search for ABC violations was not justified under the plain view doctrine because it could not have been immediately apparent to the officer that the canisters constituted evidence of a crime.

Am Jur 2d, Searches and Seizures § 88.

Validity of seizure under Fourth Amendment "plain view" doctrine—Supreme Court cases. 75 L. Ed. 2d 1018.

Appeal by defendant from judgment entered 22 May 1991 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 12 November 1992.

At approximately 2:30 a.m. on 22 December 1990, Officer Kyle Shearer of the High Point Police Department entered Cliff's Variety Store, which is owned by defendant, for the purpose of conducting an ABC check. According to the officer, alcohol consumption should have ceased by 1:30 a.m. and "[t]he table should have been cleared of all alcohol." However, about thirty people remained on the premises and Officer Shearer observed some of them still drinking.

Subsequently, Officer Shearer approached defendant to advise him of the violation of the liquor laws. Defendant was seated behind a counter with an open container of beer sitting on a stool just in front of him. The open beer was still cold. As Officer Shearer reached for the container of beer, he looked down and noticed on the shelf below an open brown paper bag which contained two film canisters. Officer Shearer reached for the canisters but defendant intervened and pushed the canisters back on the counter, saying "No, No, No." The officer pushed defendant aside and opened the film canisters, which contained rocks of cocaine wrapped in cellophane. Officer Shearer thereby arrested defendant for possession of cocaine.

The trial court conducted a *voir dire* hearing on defendant's motion to suppress the evidence obtained from this search. The court denied defendant's motion, however, finding that the film canisters were in plain view and that defendant, as holder of a liquor license, waived his Fourth Amendment rights and consented to administrative searches "to the limited extent of inspections by officers for violations of the state ABC regulations." Pursuant to N.C.G.S. § 15A-979, defendant entered a guilty plea with notice of intent to appeal the court's denial of the suppression motion.

Attorney General Lacy H. Thornburg, by Associate Attorney General Ronnie E. Rowell, for the State.

Stanley Hammer, Assistant Public Defender for the Eighteenth Judicial District, for defendant appellant.

WALKER, Judge.

[1] In denying defendant's motion to suppress, the trial court concluded in part:

> 3. The administrative inspection search by the officer was not unreasonable upon the totality of the circumstances here;
>
> 4. The warrantless search by the officer here and the seizure of evidence in plain view from a shelf in the conduct of an administrative search and inspection for violation of the ABC laws did not violate the constitutional rights of the Defendant under the Fourth Amendment of the U.S. Constitution or under any other provision of law, state or federal;
>
> 5. The officer was lawfully upon the premises and the search conducted by the officer and seizure of evidence was not unlawful;
>
> 6. The suppression of the evidence in question is not required by either the U.S. or state constitutions or any other provision of law.

We find these conclusions to be erroneous as a matter of law and therefore reverse the trial court's denial of defendant's motion to suppress.

N.C.G.S. § 18B-502(a) provides that:

> To procure evidence of violations of the ABC law. . . officers of local law-enforcement agencies that have contracted to provide ABC enforcement under G.S. 18B-501(f) shall have authority 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. . . at any time it reasonably appears that someone is on the premises.

This Court has concluded that by seeking ABC permits, a permittee waives his Fourth Amendment rights as to searches and seizures to the limited extent of inspection by officers incident to enforcement of State ABC regulations. *Elks Lodge v. Board of Alcoholic Control*, 27 N.C.App. 594, 220 S.E.2d 106 (1975), *disc. review denied*, 289 N.C. 296, 222 S.E.2d 696 (1976). In order to insure compliance with ABC regulations, then, it is clear that the law allows officers to conduct warrantless searches and inspections of licensed premises. This rationale has been justified by the fact that liquor is a sensitive,

highly regulated business, such that the businessman who engages in this trade has a reduced expectation of privacy and must accept the restrictions placed upon him in order to reap the profits. *See Almeida-Sanchez v. United States*, 413 U.S. 266, 37 L.Ed.2d 596 (1973). We cannot conclude, however, that the warrantless search conducted in the instant case is excepted from the requirements of the Fourth Amendment on the ground that it was incidental to an administrative search pursuant to N.C.G.S. § 18B-502.

N.C.G.S. § 18B-502 unambiguously provides that a law enforcement officer's ability to conduct a warrantless search is limited to the purpose of procuring violations of the ABC law, and this Court has applied it only "to the limited extent of inspection incident enforcement of State A.B.C. regulations." *Elks Lodge v. Board of Alcoholic Control* at 603, 220 S.E.2d at 112. Our unwillingness to broadly construe this statute and the permissible scope of warrantless searches finds support in the United States Supreme Court decision *New York v. Burger*, 482 U.S. 691, 702-703, 96 L.Ed.2d 601, 614 (1987), in which the Court set forth three criteria that must be satisfied in order to permit a warrantless inspection pursuant to an administrative regulation, even in the context of a pervasively regulated business. The Court stated:

> 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.

Applying the *Burger* standard, we cannot conclude that the warrantless search in the present case was "necessary to further the

regulatory scheme." Film canisters are not component parts of the liquor business, and defendant's possession of them in this case did not give rise to a finding of a probable ABC violation. A search of the containers was not necessary to enforcement of the ABC regulatory scheme and was therefore not authorized by statute. Although defendant, as holder of an ABC permit, waived his Fourth Amendment rights as to searches and seizures by officers incident to enforcement of ABC regulations, we do not extend this waiver to warrantless searches of items unconnected with the ABC regulatory scheme, such as closed film canisters. Despite the fact that film canisters are known to be used for holding illicit substances, they also have legitimate purposes. We are not prepared to hold that an individual has a reduced expectation of privacy in these or other unrelated items, such that they may be subjected to warrantless searches, simply because the individual has submitted to warrantless administrative searches pursuant to N.C.G.S. § 18B-502 by nature of his business. Thus, the trial court erred in finding that this search was not unreasonable and that it did not violate defendant's constitutional rights under the Fourth Amendment.

[2] Furthermore, we decline to find that the search and subsequent seizure in question was justified under the plain view doctrine. In *Coolidge v. New Hampshire*, 403 U.S. 443, 29 L.Ed.2d 564, *reh'g denied*, 404 U.S. 874, 30 L.Ed.2d 120 (1971) the U.S. Supreme Court held that the police may seize without a warrant the instrumentalities or evidence of a crime which is within "plain view" if three requirements are met. First, the initial intrusion which leads to the plain view discovery of the evidence must be lawful. Additionally, the discovery of the evidence must be inadvertent. Third, it must be immediately apparent upon discovery that the items constitute evidence of a crime. *Id. See also State v. Williams*, 315 N.C. 310, 338 S.E.2d 75 (1986). In the instant case, we conclude that the third prong of this test is not satisfied. Officer Shearer inadvertently discovered the closed film containers while conducting an administrative search for ABC violations. Upon discovery of the closed canisters, it could not have been immediately apparent to Officer Shearer that they constituted evidence of a crime, even though the officer may have had personal knowledge of their illegal use in other incidents. Possession of film canisters, without more, is insufficient to give rise to probable cause of a crime. For this reason, we cannot conclude that this search and

seizure was justified under the plain view doctrine, and the trial court erred in concluding to the contrary.

REVERSED.

Judges GREENE and WYNN concur.

JAMES B. KIRKLAND, JR. AND EVELYN KIRKLAND D/B/A JEVKO INVESTMENTS v. NATIONAL CIVIC ASSISTANCE GROUP, INC. AND PEERLESS INSURANCE COMPANY

No. 9110SC1013

(Filed 15 December 1992)

Charities and Foundations § 14 (NCI4th); Principal and Surety § 11 (NCI3d)— charitable contributions—bond of professional solicitor—inapplicability to office lease

A bond provided by defendant surety to a professional solicitor of charitable contributions under N.C.G.S. § 131C-10 of the Charitable Solicitation Act did not cover the breach of a lease of office space by the professional solicitor since (1) the leasing of office space is not a fund-raising expense and thus is not an activity "subject to this Chapter" within the meaning of § 131C-10, and (2) the purpose of the bond is to protect those who have made charitable contributions.

Am Jur 2d, Suretyship § 104.

Appeal by plaintiffs from judgment entered 19 July 1991 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 15 October 1992.

David R. Cockman for plaintiffs-appellants.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by George W. Miller, Jr. and John R. Kincaid, for defendant-appellee Peerless Insurance Company.

LEWIS, Judge.

In January 1989 defendant National Civic Assistance Group, Inc. [hereinafter National] agreed to lease space from plaintiffs

for a period beginning February 1, 1989 and ending January 31, 1992. National never paid any rent, defaulted on the lease, and abandoned it in December 1989, owing plaintiffs $10,576.67. The record does not reveal whether National ever actually occupied the premises.

In September 1989 defendant Peerless Insurance Company—[hereinafter Peerless] provided National with a bond, effective October 1, 1989, in conformance with N.C.G.S. § 131C-10 of the Charitable Solicitations Act [hereinafter Chapter 131C or the Act]. This bond was completely unrelated to the lease. Peerless was not involved in the lease agreement and had no relationship with National at that time. The $20,000.00 bond is a condition of licensure for professional solicitors. § 131C-10 (Supp. 1992). There is no evidence, however, that National ever actually applied for or obtained a license under Chapter 131C.

Plaintiffs filed suit in June 1990 against both National and Peerless to recover the unpaid rent and attorney's fees. The trial court granted summary judgment in favor of Peerless on July 19, 1991, and entered a final default judgment against National on August 14, 1991, awarding plaintiffs $10,576.67 in unpaid rent as well as costs, interest, and attorney's fees. Plaintiffs now appeal the order granting summary judgment in favor of Peerless.

At the outset we note summary judgment is appropriate only where there is no genuine issue of material fact and the movant is entitled to judgment as a matter of law. N.C.G.S. § 1A-1, Rule 56(c) (1990); *DiOrio v. Penny*, 331 N.C. 726, 728, 417 S.E.2d 457, 459 (1992). The court must view the evidence in the light most favorable to the nonmovant, giving the nonmovant the benefit of any reasonable inference. *Virginia Elec. & Power Co. v. Tillett*, 80 N.C. App. 383, 385, 343 S.E.2d 188, 191, *cert. denied*, 317 N.C. 715, 347 S.E.2d 457 (1986). Because we find there are no genuine issues of material fact in this case and Peerless is entitled to judgment as a matter of law, we uphold summary judgment in favor of Peerless.

The only question before this Court is whether the bond issued by Peerless covers National's breach of the lease agreement and should therefore be available to plaintiffs to satisfy their judgment against National. We note the purpose of the Charitable Solicitations Act is to "protect the general public and public charity in

the State of North Carolina and to provide for the establishment and enforcement of basic standards for the soliciting and use of charitable funds in North Carolina." § 131C-2 (1986). National's intentions were apparently to act as a professional solicitor under this Act. Section 131C-6 requires any person acting as a professional solicitor to apply for and obtain an annual license from the Department of Human Resources. § 131C-6 (Supp. 1992). Applicants are also required to file a $20,000.00 bond "at the time of making application," which

> shall run to the State for . . . any penalties and to any person who may have a cause of action against the obligor of the bond for any losses resulting from the obligor's conduct of any and all *activities subject to this Chapter* or arising out of a violation of this Chapter or any rule of the Commission.

§ 131C-10 (Supp. 1992) (emphasis added). Exactly which activities are "activities subject to this Chapter" is not stated in the statute. Although the bond is also available for losses resulting from "violation[s] of this Chapter or any rule of the Commission [Social Services Commission]," plaintiffs did not extensively address these alternatives, but merely stated the breach of the lease should be included in "any and all activities subject to this chapter." The question properly before this Court is whether the lease agreement falls within the scope of activities covered by the Act.

Plaintiffs contend that "activities subject to this Chapter" include fund-raising activities and the expenses incurred, which would include leasing office space. Plaintiffs argue that it would be "absurd to leave out the physical location from which solicitations are made." However, Chapter 131C itself defines fund-raising expenses as "the expenses of all activities that constitute a part of soliciting charitable contributions." § 131C-3(6) (1986). To "solicit" means to "request or appeal . . . for any charitable contribution," which includes oral and written requests, announcements through the press, television, or telephone, distribution and circulation of handbills and advertisements, and the sale of advertisements, advertising space, subscriptions, and tickets. § 131C-3(11). Nothing in the definition of solicitation encompasses an activity such as leasing office space or indicates that leasing space could be considered "a part" of solicitation. We are bound by the statutory definitions and must conclude that leasing office space is not a fund-raising

expense. Plaintiffs do not offer any other theories or examples of activities subject to Chapter 131C.

Peerless contends the only relevant activities are those associated with solicitation by a licensed professional solicitor. A professional solicitor subject to § 131C-6, and thus subject to § 131C-10, is "any person who . . . solicits or employs another to solicit contributions." § 131C-3(9). Peerless claims that leasing office space does not fall within the definition of solicitation, and is therefore not covered by the bond. As stated above, we agree with Peerless that leasing space is not an activity included within the definition of solicitation.

Furthermore, according to Peerless, the purpose of the bond is to protect those who have made charitable contributions. This interpretation is consistent with the purpose of the Act as a whole, which is to govern "the soliciting and use of charitable funds." § 131C-2. We agree the bond was not meant to be used to satisfy obligations on a lease which was already in default at the time the bond was issued.

We choose a narrow interpretation of the activities covered by the bond, because to hold otherwise would be to open the door to questionable claims. We do not want to encourage persons or organizations to obtain a bond under Chapter 131C and then incur liabilities ostensibly as charitable fund-raising expenses, believing that the bond will cover any default regardless of whether they have complied with the other provisions of Chapter 131C. Unless the statutory definition of fund-raising expenses is followed almost anything could arguably be considered such an expense, including leasing or purchasing property, automobiles, boats, airplanes, etc. Such activities would clearly be beyond the scope of activities subject to this Chapter and intended to be covered by the bond.

We find no error and hold that summary judgment in favor of Peerless was appropriate.

Affirmed.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. BOBBY PORTER NEVILLE

No. 9115SC828

(Filed 15 December 1992)

1. **Forgery § 18 (NCI4th); Indictment, Information, and Criminal Pleadings § 3 (NCI4th)— forgery indictment—guilty plea to uttering—information not signed by defendant and attorney—no waiver of indictment—plea improperly accepted**

Where defendant was indicted for forgery, defendant pled guilty to uttering a forged instrument pursuant to a plea agreement and a bill of information signed by the prosecutor, and neither defendant nor his attorney signed the waiver of a bill of indictment attached to the bill of information, the trial court was without jurisdiction to accept the guilty plea to uttering and to enter judgment thereon because defendant never formally waived his right to a bill of indictment, and the indictment for forgery does not support a plea to uttering. N.C. Const. art. I, § 12; N.C.G.S. § 15A-642(c).

Am Jur 2d, Indictments and Informations § 3.

2. **Criminal Law § 1244 (NCI4th)— mitigating factor—extenuating relationship—inapplicability—insufficiency of evidence**

The trial court did not err in failing to find as a mitigating factor for felonious assault that the relationship between defendant and the victim was an extenuating circumstance under N.C.G.S. § 15A-1340.4(a)(2)i where defendant contended that his actions were due to distress over the breakup of his relationship with the victim. Even if this mitigating factor applied to such a case, defendant failed to present credible, uncontradicted evidence to this effect.

Am Jur 2d, Criminal Law §§ 598, 599.

Appeal by defendant from judgments entered 14 March 1991 by Judge F. Gordon Battle in Chatham County Superior Court. Heard in the Court of Appeals 16 October 1992.

Defendant and Joyce Penny were involved in a relationship for approximately three and one-half years, during which time they lived together. The relationship began to deteriorate, however, and Ms. Penny swore out warrants for defendant's arrest on several

occasions. There was also evidence that defendant had been ordered to stay away from Ms. Penny.

On 14 September 1990 defendant encountered Ms. Penny at a convenience store. As she drove away, he followed her in his car and tried to talk to her. Ms. Penny continued to drive and did not respond to defendant. Defendant then drove ahead of her and pulled his car across the road. When Ms. Penny did not stop but drove around defendant's car, defendant fired a shotgun into the back window of her car. Ms. Penny suffered injuries to her head, neck and shoulders from shattered glass and shotgun pellets. Defendant drove off after the shooting but surrendered to authorities two days later.

Pursuant to a plea agreement, defendant pled guilty to assault with a deadly weapon with intent to kill inflicting serious injury and also to uttering a forged instrument. In exchange, the State dismissed the charges of discharging a firearm into an occupied vehicle and forgery.

The sentencing court found in aggravation that the defendant had prior convictions for criminal offenses punishable by more than sixty days confinement. In mitigation, the court found that defendant had voluntarily acknowledged wrongdoing prior to arrest and that he had been honorably discharged from the armed services. The court found that the aggravating factor outweighed the mitigating factors, and sentenced defendant to fifteen years imprisonment for the assault and two years imprisonment for the uttering count.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Philip A. Lehman, for the State.

Malcolm Ray Hunter, Jr., Appellate Defender, for defendant appellant.

WALKER, Judge.

[1] On appeal defendant argues: (1) his guilty plea to uttering is a nullity because he never formally waived his right to a Bill of Indictment, and he was never indicted for uttering; and (2) the sentencing court erred in failing to find as a mitigating factor that the relationship between defendant and victim was an extenuating circumstance.

I.

Defendant pled guilty to uttering a forged instrument pursuant to a plea agreement and a Bill of Information which was signed by the prosecutor. Neither defendant nor his attorney signed the waiver of a Bill of Indictment attached to the Bill of Information, and the indictment issued against defendant alleged forgery. Defendant argues, therefore, that the court was without jurisdiction to accept the guilty plea and to enter judgment because he never formally waived his right to an indictment, and an indictment for forgery does not support a plea to uttering. We agree.

Article I, section 12, of the North Carolina Constitution requires an indictment, unless waived, for all criminal actions originating in Superior Court. *See State v. Stokes*, 274 N.C. 409, 163 S.E.2d 770 (1968). N.C.G.S. § 15A-642(c) provides:

> Waiver of indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information.

In the instant case, we cannot conclude that defendant waived his right to an indictment because the waiver form was not signed by either defendant or his counsel pursuant to the statutory mandate. Although defendant was indicted for forgery, forgery is an offense distinct from that of uttering, such that an indictment for one will not support a plea of guilty to the other. *See State v. Greenlee*, 272 N.C. 651, 159 S.E.2d 22 (1968). Thus, defendant was not indicted for uttering and did not formally waive his right to an indictment of this offense.

North Carolina law has long provided that "[t]here can be no trial, conviction, or punishment for a crime without a formal and sufficient accusation. In the absence of an accusation the court aquires no jurisdiction whatever, and if it assumes jurisdiction a trial and conviction are a nullity." *McClure v. State*, 267 N.C. 212, 215, 148 S.E.2d 15, 17-18 (1966). *See also State v. Stokes, supra.* In *McClure*, our Supreme Court vacated an order sentencing defendant to imprisonment where he was indicted with unlawfully, wilfully and feloniously carnally knowing a female child over twelve and under sixteen years of age, but entered a plea of guilty to an assault with intent to commit rape. The Court held that "there was no formal and sufficient accusation against him for the offense to which he pleaded guilty" so that the sentence of imprisonment

violated defendant's constitutional rights. *Id.* at 215, 148 S.E.2d at 18. "[A] plea of guilty standing alone does not waive a jurisdictional defect." *State v. Stokes*, 274 N.C. at 412, 163 S.E.2d at 772.

In the case before us, the absence of a sufficient accusation or a formal waiver of indictment deprived the trial court of jurisdiction to accept defendant's plea and to enter judgment. Thus, defendant's plea and the court's judgment with regard to the charge of uttering must be vacated. The trial court is not precluded, however, from proceeding against defendant on a legally sufficient indictment for uttering. *See State v. Stokes, supra.* Additionally, by vacating defendant's guilty plea to uttering, which was entered pursuant to the State's agreement to dismiss the forgery charge, this portion of the agreement is nullified and the indictment alleging forgery survives.

II.

[2] In defendant's second assignment of error, he alleges that the sentencing court erred in failing to find as a mitigating factor that the relationship between defendant and victim was an extenuating circumstance under N.C.G.S. § 15A-1340.4(a)(2)i, insofar as his actions towards Ms. Penny were a result of misguided love. We disagree.

N.C.G.S. § 15A-1340.4(a)(2)i provides for a statutory mitigating factor where "[t]he defendant acted under strong provocation, or the relationship between the defendant and the victim was otherwise extenuating." This Court has interpreted the second prong of this factor, which is relevant here, and concluded that, "[t]here is nothing on the face of the statute to indicate that our legislature meant to provide shorter prison terms for defendants motivated by jealousy or rage." *State v. Puckett*, 66 N.C.App. 600, 606, 312 S.E.2d 207, 211 (1984). The statute was meant to apply under "circumstances that morally shift part of the fault for a crime from the criminal to the victim" but not "to make homicides of spouses or relatives . . . less deserving of punishment than those of others." *State v. Martin*, 68 N.C.App. 272, 276, 314 S.E.2d 805, 807 (1984).

In the instant case, defendant does not dispute the facts but contends the severity of his crime is lessened because his actions were due to distress over the breakup of his relationship with the victim. However, in accordance with other decisions of this Court, we decline to extend this mitigating factor to cases such

as the one at bar, and there is no evidence to support a finding that defendant's assault is less culpable. Even if the facts in this case might support the mitigating factor of the existence of an extenuating relationship, defendant has not presented credible, uncontradicted evidence to this effect. We cannot conclude, therefore, that the trial court committed reversible error in failing to find that the relationship between defendant and the victim was an extenuating circumstance and a mitigating factor pursuant to N.C.G.S. § 15A-1340.4(a)(2)i. *See State v. Seagroves*, 78 N.C.App. 49, 336 S.E.2d 684 (1985), *disc. review denied*, 316 N.C. 384, 342 S.E.2d 905 (1986).

VACATED AS TO THE FIRST COUNT. NO ERROR AS TO THE SECOND COUNT.

Judges GREENE and WYNN concur.

KINRO, INC. v. RANDOLPH COUNTY

No. 9119SC918

(Filed 15 December 1992)

Taxation § 25.11 (NCI3d)— ad valorem taxes—valuation—initial protest letter—failure to assert valid defense—civil action not allowed

A taxpayer seeking relief from an allegedly unjust tax assessment pursuant to N.C.G.S. § 105-381(c)(2) must assert a valid defense set forth in N.C.G.S. § 105-381(a)(1) in its initial statement to the governing body of the taxing unit as a prerequisite to the filing of a civil action. Therefore, where plaintiff taxpayer failed to assert a valid defense in its initial letter protesting the valuation of unlisted machinery, equipment and fixtures, it could not proceed against the county in a civil action seeking a refund.

Am Jur 2d, State and Local Taxation § 1115.

Appeal by plaintiff from order entered 10 June 1991 in Randolph County Superior Court by Judge Peter M. McHugh. Heard in the Court of Appeals 23 September 1992.

Stern, Graham & Klepfer, by Brinton D. Wright and William A. Eagles, for plaintiff-appellant.

Womble Carlyle Sandridge & Rice, by Dewey W. Wells and Lawrence Pierce Egerton, and Gavin Cox & Pugh, by W. Ed Gavin, for defendant-appellee.

GREENE, Judge.

Plaintiff Kinro, Inc. (Kinro) filed a complaint seeking refund of allegedly excessive property taxes from defendant Randolph County (the County). From the trial court's grant of summary judgment in favor of the County, Kinro appeals.

Kinro is an Ohio corporation which operates manufacturing facilities in several states, including one located in the County, which produces windows for recreational vehicles. Kinro owned various items of equipment and inventory located at the plant which were subject to ad valorem property taxes payable to the County. In 1977, the County requested that Kinro list its machinery, equipment, and fixtures by year of acquisition and cost. Kinro responded that it did not maintain records which reflected this information on a plant-by-plant basis and would be unable to comply. On 10 October 1980, the County informed Kinro that if it failed to list in the required method the County would assess the property in accordance with the assessor's best judgment. When Kinro failed to list in 1983, the County discovered the property pursuant to N.C.G.S. § 105-312 and tentatively appraised and listed its value at $800,000.00. Kinro received a notice of discovered property as required by Section 105-312, which informed Kinro of the amount of tentative appraisal and that the listing and appraisal would become final unless Kinro filed a written exception within thirty days. Kinro did not file an exception, and later paid the tax without objection. In each of the following four years, from 1984 through 1987, Kinro again failed to list the property at the Liberty plant. In each of these years the County provided a notice of discovered property which included tentative appraisals which ranged from $1,800,000.00 in 1984 to $10,000,000.00 in 1987. Each notice of discovered property was accompanied by a statement informing Kinro that failure to file a written exception within thirty days would result in the appraisal and listing becoming permanent. In each of these years Kinro failed to file an exception and paid the resulting tax bill without objection. On 7 March 1989, Kinro

filed an amended listing of assets with the County for the years 1983 through 1987, accompanied by a written request for a refund. Kinro stated in the refund request that the taxes for these years were overpaid "due to over assessed values of personal property assets at Kinro's Liberty, North Carolina Plant." A cover letter with the refund request stated that Kinro had hired an independent appraisal company to take an inventory of Kinro's assets, and the resulting appraisal formed the basis of the refund request. The new appraisal revealed that Kinro had overpaid taxes on the actual value of its assets in the amount of approximately $91,000.00. On 5 May 1989, the County informed Kinro that no refund would be made. Kinro then filed this action in superior court pursuant to N.C.G.S. § 105-381, seeking refunds for the years 1984 through 1987.[1]

With one exception, the parties do not dispute that all requirements for instituting a civil action against the County for incorrect assessment of taxes against Kinro have been met. The parties do dispute whether Kinro made a timely assertion of a valid defense. Kinro contends that its assertion in its complaint filed in superior court that the tax was illegal, resulted from a clerical error, and was levied for an unlawful purpose, is a timely assertion of a valid defense and allows Kinro to pursue a civil action under N.C.G.S. § 105-381(c)(2). The County contends that the defenses were not timely because they were not included in Kinro's initial request for a refund submitted to the Randolph County Tax Commission.

The single issue presented is whether a party seeking relief under N.C.G.S. § 105-381(c)(2) must assert a valid defense, as that term is defined in N.C.G.S. § 105-381(a)(1), in their initial statement to the governing body of the taxing unit as a prerequisite to the later filing of a civil action.

A taxpayer may seek relief from an allegedly unjust tax assessment pursuant to N.C.G.S. § 105-381,[2] which provides

---

1. The tax year 1983, for which Kinro originally requested a refund, fell outside the five-year statute of limitation of N.C.G.S. § 105-381(a)(3), and Kinro therefore did not seek a refund for that year in its complaint. N.C.G.S. § 105-381(a)(3) (1992).

2. A second avenue for relief from what is perceived to be an unjust tax assessment is the administrative remedy provided in N.C.G.S. § 105-322(g)(2). N.C.G.S.

(a) Statement of Defense.—Any taxpayer asserting a valid defense to the enforcement of the collection of a tax assessed upon his property shall proceed as hereinafter provided.

(1) For the purpose of this subsection, a valid defense shall include the following:

a. A tax imposed through clerical error;

b. An illegal tax;

c. A tax levied for an illegal purpose.

. . . .

(3) If a tax has been paid, the taxpayer, at any time within five years after said tax first became due or within six months from the date of payment of such tax, whichever is the later date, may make a demand for a refund of the tax paid by submitting to the governing body of the taxing unit a written statement of his [valid] defense and a request for a refund thereof.

N.C.G.S. § 105-381(a) (1992). If this demand is not resolved in the taxpayer's favor, he or she may then bring a civil action to compel a refund. N.C.G.S. § 105-381(d) (1992). In order to file such an action, "the taxpayer must first have filed a written statement of a valid defense to the tax with the governing body of the taxing unit . . . ." *Johnston v. Gaston County*, 71 N.C. App. 707, 711, 323 S.E.2d 381, 383 (1984), *disc. rev. denied*, 313 N.C. 508, 329 S.E.2d 392 (1985). Mere allegation of a valid defense in the civil complaint without first asserting the defense to the governing body of the taxing unit is not sufficient.

In Kinro's letter to the Randolph County Tax Commission (in this case the governing body of the taxing unit) requesting a refund for the tax years 1983-87, Kinro stated as its only defense that the refund was necessary "due to over assessed values of personal property assets at Kinro's Liberty, North Carolina Plant." Over-assessment is not one of the three valid defenses pursuant

---

§ 105-322(g)(2) (1992) (request hearing before the County Board of Equalization and Review). The right to administrative review and subsequent appeal is waived in the case of discovered property if the taxpayer does not except to the notice of discovery within thirty days. N.C.G.S. § 105-312(d) (1992). Kinro does not dispute that by failing to file such an exception within thirty days of the notice of discovery, this avenue for relief was foreclosed.

to N.C.G.S. § 105-381(a)(1). N.C.G.S. § 105-381(a)(1) (1992) (valid defenses are clerical error, illegal tax or illegal purpose). Therefore, because Kinro failed to follow the statutory procedures for disputing a property tax in that Kinro failed to assert a valid defense in its initial statement to the governing body of the taxing unit, it could not proceed against the County under N.C.G.S. § 105-381. *Richmond & Danville R.R. Co. v. Town of Reidsville*, 109 N.C. 494, 498-99, 13 S.E. 865, 867 (1891) (taxpayer must strictly comply with the requirements of statutes governing method of preferring claims against county for taxes assessed). Accordingly, the trial court's summary judgment is

Affirmed.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. MAX ARTHUR BUCHANAN, JR.

No. 9127SC743

(Filed 15 December 1992)

1. **Criminal Law §§ 868, 869 (NCI4th)— repetition of instruction—request by jury—consultation with counsel not required**

Where the jury during deliberations requested a restatement of the law of acting in concert, the trial court's reinstruction which was almost verbatim of the original, proper instruction on acting in concert was not needlessly repetitious or erroneous. Furthermore, the trial court was not required to consult with counsel prior to giving the reinstruction because an instruction repeated at the jury's request is not an additional instruction within the meaning of N.C.G.S. § 15A-1234(c).

Am Jur 2d, Trial §§ 1108, 1109.

Giving, in accused's absence, additional instruction to jury after submission of felony case. 94 ALR2d 270.

2. **Criminal Law §§ 1599, 1600 (NCI4th)— restitution—condition of work release or parole—amount unsupported by evidence**

The written judgment and commitment recommending restitution as a condition of work release or parole controlled

over the court's statement at the sentencing hearing mandating restitution, and such a recommendation was proper. However, the amount recommended by the court as restitution was not supported by competent evidence where the trial court based the amount on unsworn statements by the prosecutor as to the victim's medical expenses and lost wages. N.C.G.S. §§ 148-33.2(c), 15A-1343(d).

Am Jur 2d, Pardon and Parole § 80.

Appeal by defendant from judgment entered 14 May 1991 by Judge Loto G. Caviness in Gaston County Superior Court. Heard in the Court of Appeals 14 October 1992.

On the morning of 1 January 1990, defendant, Charles Harrison and several others were involved in a fight in the parking lot of a convenience store. The State's evidence showed that defendant struck Charles Harrison about his body and approximately ten to fifteen times in the face while using brass knuckles. As a result, Mr. Harrison's upper jaw was crushed, some teeth were lost, and his shoulder was dislocated. Mr. Harrison was required to undergo extensive medical work to repair his teeth and jaw and is now required to wear a brace to hold the remaining teeth. He has had constant pain from his teeth and problems with gum infections and bleeding, in addition to problems with his shoulder. The defendant offered evidence that although he was present at the convenience store during the fight, he did not participate in it. Co-defendant David Kale's testimony corroborated defendant's story.

Defendant was convicted of assault with a deadly weapon inflicting serious injury and was sentenced to ten years imprisonment. The court also recommended that "defendant be required to pay, as a condition of parole if parole is granted, or from his earnings if work release is granted" his ratable share of $11,875.45 as restitution.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Elaine A. Dawkins, for the State.

Childers, Fowler & Childers, P.A., by David C. Childers, for defendant appellant.

WALKER, Judge.

Defendant brings forth two assignments of error on appeal: (1) the trial court erred by repeating part of the prior instruction to the jury dealing with acting in concert, and did so without consulting counsel prior to the reinstruction; and (2) the court erred by requiring that defendant pay his ratable portion of restitution as a condition precedent to work release, early release or parole.

[1] In support of defendant's first assignment of error, he directs attention to the fact that, after deliberating one hour, the jury requested reinstruction on the law as it pertains to acting in concert. The court complied with this request without consulting counsel for either the State or defendant, and approximately fifteen minutes later the jury returned with a guilty verdict. Defendant thereby contends that these facts indicate that he was prejudiced by the court's reinstruction to the jury, which unduly emphasized the principle of acting in concert to the exclusion of the other instructions in the case. Additionally, he asserts that it was error for the trial court not to consult with counsel prior to repeating the instruction.

Absent some error in the charge, the trial court may repeat instructions previously given to the jury in its discretion. *State v. Bartow*, 77 N.C.App. 103, 334 S.E.2d 480 (1985). It is recognized, however, that a needless repetition of instructions is undesirable and may be held to be erroneous. *State v. Dawson*, 278 N.C. 351, 180 S.E.2d 140 (1971). In the instant case, the jury requested "a restatement of the law pertaining to the responsibility of individuals in a group crime." The trial court's reinstruction in this regard was almost verbatim that of the original instruction and stated:

> If two or more persons act together with a common purpose to commit an assault with a deadly weapon inflicting serious injury, each of them is held responsible for the acts of the other done in the commission of the assault with a deadly weapon inflicting serious injury. So I instruct that, if you find from the evidence beyond a reasonable doubt that on or about January 1, 1990, Max Arthur Buchanan, Jr., and David Kale, Jr., acting either by themselves or acting with other persons, did commit an assault with a deadly weapon inflicting serious injury, it would be your duty to return a verdict of guilty to the charge. If you do not so find or cannot say where

> the truth lies, it will be your duty to return a verdict of not guilty.

We do not find this instruction to be erroneous nor do we find its repetition to be needless, in light of the fact that it was specifically requested by the jury. Furthermore, an instruction which is repeated at the jury's request does not constitute an additional instruction within the meaning of N.C.G.S. § 15A-1234(c), such that the trial court did not err in failing to consult with counsel prior to the reinstruction. *State v. Farrington*, 40 N.C.App. 341, 253 S.E.2d 24 (1979).

[2] Defendant's second assignment of error asserts that the trial court erred by requiring that he pay his ratable portion of restitution as a condition precedent to work release or parole. We note at the outset that the trial court orally mandated payment of restitution as a condition of work release or parole at the sentencing hearing. However, the judgment and commitment form states payment of restitution only as a recommendation. We find the written judgment and commitment form to be controlling, as it modifies anything earlier ordered by the trial court. *See State v. Oakley*, 75 N.C.App. 99, 330 S.E.2d 59 (1985). Defendant's sentence thereby recommends restitution as a condition of work release or parole and is not inconsistent with the laws of this State. *See* N.C.G.S. § 148-33.2(c); N.C.G.S. § 15A-1343(d).

Defendant argues that there is insufficient evidence to support the amount awarded as restitution, as the sum ordered was based solely on the prosecutor's statements that, "As through today's date, we have receipts for medical bills that total $5,275.45" and that the victim "was out of work for six months as a result of this and has lost wages of $6,600.00." In the absence of an agreement or stipulation between defendant and the State, evidence must be presented in support of an award of restitution. Further, it is elementary that a trial court's award of restitution must be supported by competent evidence in the record. N.C.G.S. § 15A-1343(d); *State v. Easter*, 101 N.C.App. 36, 398 S.E.2d 619 (1990). In the instant case, an exhaustive review of the record reveals that no evidence was presented at trial or at sentencing which supports the figures offered by the State. The trial court therefore based the amount of restitution only upon the unsworn statements of the prosecutor, which does not constitute evidence and cannot support the amount of restitution recommended. *Cf.*

State v. Canady, 330 N.C. 398, 410 S.E.2d 875 (1991) (trial court may not find aggravating factor where the only evidence to support it is the prosecutor's mere assertion that the factor exists). Accordingly, we vacate that portion of the judgment recommending the payment of restitution as a condition of work release or parole.

In the trial of this matter we find:

NO ERROR. VACATED AND REMANDED AS TO THE RECOMMENDATION OF RESTITUTION.

Judges GREENE AND WYNN concur.

MEDIO MONTI, IN HIS OWN RIGHT AND FOR THE USE AND BENEFIT OF THE UNITED STATES OF AMERICA v. UNITED SERVICES AUTOMOBILE ASSOCIATION

No. 914SC1141

(Filed 15 December 1992)

Insurance §§ 509, 527 (NCI4th)— South Carolina tortfeasor—liability limit below North Carolina minimum—UM and UIM coverage—recovery of either

Where the South Carolina tortfeasor's automobile policy had a liability limit of $15,000, the minimum required by South Carolina law and $10,000 below the minimum required by North Carolina law, when he injured plaintiff North Carolina resident in an accident in South Carolina, the tortfeasor was both an uninsured and an underinsured motorist under North Carolina statutes, and plaintiff is entitled to seek recovery under either the uninsured or the underinsured provisions of his policy but not both. N.C.G.S. §§ 20-279.21(b)(3) and (4).

Am Jur 2d, Automobile Insurance §§ 293, 322.

Uninsured and underinsured motorist coverage: Recoverability, under uninsured or underinsured motorist coverage, of deficiencies in compensation afforded injured party by tortfeasor's liability coverage. 24 ALR4th 13.

Appeal by plaintiff from order entered 12 September 1991 by Judge Gary E. Trawick in Onslow County Superior Court. Heard in the Court of Appeals 21 October 1992.

On 22 August 1988, plaintiff's motorcycle collided with a car driven by James Earl Hurst ("the tortfeasor") after Hurst failed to yield at a stop sign. The accident occurred in South Carolina. Plaintiff was a resident of Camp Lejeune, Onslow County, North Carolina.

The tortfeasor's insurance policy had a liability limit of $15,000.00, the minimum required by South Carolina law. Plaintiff settled his claim against the tortfeasor for the $15,000.00 liability limit. Plaintiff then demanded underinsured motorist (UIM) coverage from defendant insurer, but defendant denied coverage. Therefore, plaintiff filed this action seeking recovery under his policy with defendant. Plaintiff sought recovery both in his own right and also for the use and benefit of the United States for the reasonable value of past and future medical treatment.

Defendant filed a motion to dismiss for failure to state a claim. See N.C.R. Civ. P. 12(b)(6). The trial court granted defendant's motion. From this order plaintiff appeals.

Roger A. Moore for plaintiff appellant.

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

ARNOLD, Judge.

The sole issue here is whether the trial court erred in dismissing plaintiff's complaint for failure to state a claim under Rule 12(b)(6). A motion to dismiss under Rule 12(b)(6) "should not be allowed unless the complaint affirmatively shows that plaintiff has no cause of action." *Estridge v. Ford Motor Co.*, 101 N.C. App. 716, 718, 401 S.E.2d 85, 86, *disc. review denied*, 329 N.C. 267, 404 S.E.2d 867 (1991). A Rule 12(b)(6) motion "generally tests the legal sufficiency of the complaint: Has the pleader given notice of such facts as will, if true, support a claim for relief under some legal theory?" *Concrete Service Corp. v. Investors Group, Inc.*, 79 N.C. App. 678, 681, 340 S.E.2d 755, 758, *cert. denied*, 317 N.C. 333, 346 S.E.2d 137 (1986).

Defendant asserts that the tortfeasor was an uninsured rather than an underinsured motorist, since his $15,000 liability limit was lower than the $25,000 minimum required by N.C. Gen. Stat. § 20-279.21(b)(2) (1989). Therefore, defendant contends that plaintiff did not have a claim for UIM coverage and the complaint was properly dismissed. Plaintiff concedes that the tortfeasor had only $15,000 in liability coverage, the South Carolina minimum, and therefore he was an uninsured motorist pursuant to G.S. § 20-279.21(b)(3). However, plaintiff argues that the tortfeasor was also an underinsured motorist pursuant to G.S. § 20-279.21(b)(4).

An uninsured motor vehicle includes "a motor vehicle as to which there is no bodily injury liability insurance . . . in at least" the amount of $25,000 to cover bodily injury to one person in any one accident. *Id.* § 20-279.21(b)(3). In addition, G.S. § 20-279.21(b)(4) provides as follows:

> An "uninsured motor vehicle," as described in [G.S. § 20-279.21(b)(3)], includes an "underinsured highway vehicle," which means a highway vehicle with respect to the ownership, maintenance, or use of which, the sum of the limits of liability under all bodily injury liability bonds and insurance policies applicable at the time of the accident is less than the applicable limits of liability under the owner's policy.

Accordingly, the tortfeasor was also an underinsured motorist.

The issue, therefore, is whether UIM coverage and uninsured motorist (UI) coverage are mutually exclusive. Although our Courts have not yet had occasion to address this question, the Minnesota Supreme Court has. In *Murphy v. Milbank Mut. Ins. Co.*, 388 N.W.2d 732, 734 (Minn. 1986), a Minnesota resident was killed in an accident in which the tortfeasor was an Iowa resident. The tortfeasor's limit of liability was $10,000, the minimum required by Iowa law. *Id.* However, the limit of liability required by Minnesota law was $25,000. *Id.* As in our case, the clear statutory language established the tortfeasor as both an uninsured and underinsured motorist. *Id.* at 737. The Minnesota Supreme Court held that

> [t]he issue is one of legislative intent. Only when an insured has an accident in a foreign state with a foreign vehicle having lower liability limits than Minnesota does it appear that the question of duplicative coverage arises. The fact is that the Iowa tortfeasor's vehicle fits the legislature's descrip-

> tions of both uninsured and underinsured coverage. The statutory language describing each coverage is complete and unambiguous. It is idle for us to speculate if the legislature intended or even thought about duplicative coverage in a case such as we have here. We must take the legislature at its word. If it seems odd for a vehicle to be both uninsured and underinsured, nothing in the No-Fault Act suggests that oddity cannot be. But if the No-Fault Act allows duplicative coverages, it is clear that the Act does not intend duplicative recoveries. We hold, therefore, that both uninsured and underinsured coverage may be applicable to decedent's Iowa auto accident, and, if so found, plaintiff can recover under either, but not both, coverages.

Id. (citations omitted); *but see Fireman's Ins. Co. v. State Farm Mut. Auto. Ins. Co.*, 370 S.E.2d 85 (S.C. 1988). We note that plaintiff here is not seeking duplicative recoveries.

In *Sutton v. Aetna Casualty & Surety Co.*, 325 N.C. 259, 263, 382 S.E.2d 759, 762 (1989), our Supreme Court noted that "[u]ninsured motorist insurance allows a recovery for an injured party where a tortfeasor has no liability insurance. By comparison, UIM coverage allows the insured to recover when the tortfeasor has insurance, but his coverage is in an amount insufficient to compensate fully the injured party." (Citations omitted.) In addition, the Supreme Court noted that

> [t]he avowed purpose of the Financial Responsibility Act, of which N.C.G.S. § 20-279.21(b)(4) is a part, is to compensate the innocent victims of financially irresponsible motorists. It is a remedial statute to be liberally construed so that the beneficial purpose intended by its enactment may be accomplished.

Id. at 265, 382 S.E.2d at 763 (citations omitted).

With this purpose in mind, we adopt the reasoning of the Minnesota Supreme Court in *Murphy* and hold that plaintiff's complaint states a claim upon which relief can be granted. Plaintiff can recover under either coverage, but not both. Therefore, the order of the trial court dismissing plaintiff's complaint is

Reversed.

Chief Judge HEDRICK and Judge WELLS concur.

RICE ASSOCIATES OF THE SOUTHERN HIGHLANDS, INC., PETITIONER v. TOWN OF WEAVERVILLE ZONING BOARD OF ADJUSTMENT, RESPONDENT

No. 9128SC1212

(Filed 15 December 1992)

Municipal Corporations § 30.6 (NCI3d)— denial of zoning application—bias of one board member—reversal not required

Even though one member of defendant zoning board had previously expressed bias against petitioner, the board member's bias did not require reversal of the board's decision denying petitioner's application for a special exception permit to construct a unified housing development where the proposed development did not meet objective criteria of the zoning ordinance requiring two points of ingress and egress, petitioner was not entitled to the permit under any circumstances, and the bias of a single board member could not have affected the acceptance or rejection of petitioner's application.

Am Jur 2d, Zoning and Planning §§ 716, 812, 975, 976.

Appeal by petitioner from judgment entered 14 October 1991 in Buncombe County Superior Court by Judge Robert D. Lewis. Heard in the Court of Appeals 1 December 1992.

Petitioner Rice Associates of the Southern Highlands, Inc. commenced this action by seeking a writ of certiorari to review the decision of Weaverville's Zoning Board of Adjustment (hereinafter Zoning Board) denying petitioner the Special Exception Permit Application it sought for construction of a Unified Housing Development pursuant to § 17-114 of the Zoning Ordinance of the Town of Weaverville.

Petitioner owns a tract of land on "Hamburg Mountain" upon which it intended to construct a housing development. The proposed tract of land was accessible by means of a private road

which petitioner had constructed on the face of the mountain. Petitioner filed the appropriate application with the Zoning Administrator for review pursuant to § 17-130 *et seq.* of Weaverville's Zoning Ordinance. The Zoning Administrator approved petitioner's application for development in all respects. Petitioner completed the process to bring its application before the Zoning Board. Joe Joyner, a board member who had a previously expressed bias against petitioner, sat on the Zoning Board during this period and fully participated in the hearings.

By letter dated 31 May 1990, the Zoning Board rejected petitioner's application for a Special Exception Permit, citing specifically petitioner's failure to submit plans which provided for more than one point of ingress and egress to the Unified Housing Development as required by § 17-114(3)(b) of Weaverville's Zoning Ordinance. Thereafter, petitioner filed a writ of certiorari with the Buncombe County Superior Court, seeking judicial review of the Zoning Board's decision. The trial court entered judgment in the Zoning Board's favor. Petitioner appeals.

Shuford, Best, Kelly, Cagle, Rowe, Brondyke & Wolcott, by James Gary Rowe, for petitioner-appellant.

Roberts Stevens & Cogburn, P.A., by Carl W. Loftin, for respondent-appellee.

WELLS, Judge.

The sole question presented for our review is whether the trial court erred in affirming the Zoning Board's decision to deny petitioner's Special Exception Permit Application. We find no error.

Petitioner argues that the trial court should not have affirmed the Zoning Board's denial of petitioner's application when it also determined from the evidence in the record that a member of the board, Joe Joyner, had a previously expressed bias and should have recused himself from participating in the hearing. Relying upon *Crump v. Bd. of Education*, 326 N.C. 603, 392 S.E.2d 579 (1990), petitioner submits that this finding of bias is sufficient, in and of itself, to require reversal of the Zoning Board's decision. We do not find the *Crump* decision to be controlling here.

In *Crump*, the question before the court was whether compensatory damages may be recovered for an injury traceable to single member bias in a teacher dismissal hearing. At that hearing, the

school board reviewed evidence of alleged acts of immorality and subordination in order to make a subjective determination whether or not to dismiss Crump.

The case before us is distinguishable on its facts. The question presented here is whether a procedural remedy must be afforded to a permit applicant subjected to single member bias in a board action where the applicant is not entitled to the requested permit under any circumstances. Petitioner's permit application was denied because it failed to meet the minimum requirements of the Weaverville Zoning Ordinance. Section 17-114(3) of the ordinance for Unified Housing Developments requires the following:

> (b) Points of access and egress shall be located a sufficient distance from highway intersections to minimize traffic hazards, inconvenience, and congestion. Furthermore, each development shall have a minimum of two (2) such points to ensure the safety of the inhabitants. (Emphasis added.)

Whether petitioner met such requirement is a question of law interpreting language of the ordinance. It is fundamental in the interpretation of a municipal ordinance that the court give the language in question its plain and ordinary meaning and significance. *Donnelly v. Bd. of Adjustment of the Village of Pinehurst*, 99 N.C. App. 702, 394 S.E.2d 246 (1990). The trial court applied this well-settled principle of construction in interpreting the zoning ordinance and found that petitioner, as a matter of law, did not meet the objective minimum criteria that the housing development have two points of ingress and egress. We find that the record fully supports the trial court's findings and conclusions.

The court also determined that the bias of a single board member, Joe Joyner, could not have affected the acceptance or rejection of petitioner's application for a Special Exception Permit. In its decision, the trial court aptly distinguished the *Crump* case, specifically making the following findings and conclusions:

> [W]hereas the decision makers in the "*Crump*" case were making a subjective determination, the Zoning Board of Adjustment of the Town of Weaverville, in making a decision in the instant case, had a specific set of objective criteria to follow. One of such criteria was that the Unified Housing Development project, upon which it was asked to pass, was required to have a minimum of two points of access and egress.

The Zoning Board of Adjustment of The Town of Weaverville could only conclude that the project in question did not have two such points of access and egress, and in so concluding, should have denied the request for a Special Exception Permit. The bias of board member Joe Joyner could, therefore, not have affected the acceptance or rejection of the request for a Special Exception Permit for a Unified Housing Development.

In affirming the trial court's judgment, we find that petitioner's bias argument is not dispositive where its zoning application was so fundamentally flawed that those circumstances could not have affected the denial of its permit.

Affirmed.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. DAVID FRITZGERALD LIGHTNER

No. 9126SC936

(Filed 15 December 1992)

Assault and Battery § 60 (NCI4th)— off-duty police officers—security guards—assaults on law officers—sufficiency of evidence

Defendant was properly convicted on two counts of assault on a law officer in violation of N.C.G.S. § 14-33(b)(4) where the evidence tended to show that the officers were off-duty members of the Charlotte Police Department working as security guards for a restaurant; the officers were working in full police uniform and were carrying sidearms; the officers' employment with the restaurant had been arranged through the Charlotte Police Department and the officers were required to follow Department mandated rules and guidelines; and the officers were attempting to place defendant under arrest at the time they were assaulted.

Am Jur 2d, Assault and Battery § 79.

Appeal by defendant from judgments entered 8 May 1991 by Judge Robert D. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 12 November 1992.

On 16 January 1990, defendant was indicted on two counts of assault on a law officer in violation of G.S. § 14-33(b) and on one count of disorderly conduct in violation of G.S. § 14-288.4. These charges arose from an incident at a Bojangles Restaurant located at 1401 W. Trade Street in Charlotte.

The State's evidence tended to show that on 3 December 1989, Charlotte police officers H. E. Henry and R. L. Ferguson were working off-duty as security guards for Bojangles Restaurant which was open twenty-four hours a day. Between 2:30 a.m. and 3:00 a.m., the officers observed defendant standing in line, waiting to pick up his food. At some point, defendant began to shout obscenities at the officers and was asked to leave. Defendant refused to leave and continued to shout at the officers. At this time Officer Ferguson informed defendant that he was under arrest. Defendant resisted arrest and struck both officers. After ten or fifteen minutes, defendant was physically restrained and placed in a waiting patrol car.

On 8 May 1991, the jury convicted defendant of two counts of assault on a law enforcement officer and one count of disorderly conduct.

Attorney General Lacy H. Thornburg, by Associate Attorney General Kelly Haskins-Moore, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Cynthia A. Brooks, for defendant appellant.

WALKER, Judge.

Defendant's only argument on appeal is that his motion to dismiss should have been granted since Officers Henry and Ferguson were off-duty at the time of the incident and therefore he did not commit an assault on a law enforcement officer. In determining if the evidence is sufficient to withstand defendant's motion to dismiss, the court must consider the evidence in the light most favorable to the state, allowing every reasonable inference to be drawn therefrom. *State v. Irwin*, 304 N.C. 93, 282 S.E.2d 439 (1981).

According to defendant, there was not sufficient evidence presented to establish a violation of G.S. § 14-33(b)(4). In pertinent part this statute provides that a person is guilty of misdemeanor assault if he:

> Assaults a law-enforcement officer, . . . while the officer . . . is discharging or attempting to discharge a duty of his office.

As regards this statute, it does not appear our Courts have considered the question of whether an off-duty police officer retains the status of a law-enforcement officer and is still discharging the duties of his office.

While not examining the precise question before us, our Supreme Court recently resolved a very similar controversy. In *State v. Gaines*, 332 N.C. 461, 421 S.E.2d 569 (1992), defendant argued there was not sufficient evidence presented to establish the capital punishment aggravating circumstance of G.S. § 15A-2000(e)(8). This aggravating circumstance exists where "[t]he capital felony was committed against a law-enforcement officer . . . while engaged in the performance of his official duties or because of the exercise of his official duty." The evidence presented in *Gaines* disclosed that the officer who was killed was a Charlotte policeman "moonlighting" as a security guard for Red Roof Inn. The officer was fully uniformed and carrying a sidearm. The Court further noted that the officer's off-duty employment was arranged by the Charlotte Police Department and the officer was required to conform to the same standard of conduct as when he was on duty. Based upon the facts, the Court held there was sufficient evidence to establish that the officer retained his status as a law-enforcement officer and was "engaged in the performance of his official duties." *State v. Gaines*, 332 N.C. at 477, 421 S.E.2d at 577.

In the present case, Officers Henry and Ferguson were off-duty members of the Charlotte Police Department. They were working in full police uniform and were carrying sidearms. As in *Gaines*, the officers' employment with Bojangles had been arranged through the Charlotte Police Department and the officers were required to follow Department mandated rules and guidelines. Furthermore, at the time they were assaulted, Officers Henry and Ferguson were attempting to place defendant under arrest. Making arrests is one of the official duties of law-enforcement officers. *See State v. Gaines*, 332 N.C. at 471, 421 S.E.2d at 574. Under the reasoning

of the *Gaines* decision, we find there was sufficient evidence presented at trial to establish a violation of G.S. 14-33(b)(4) and therefore the trial court properly denied defendant's motion to dismiss.

No error.

Judges GREENE and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 1 DECEMBER 1992

CHEMICAL FINANCIAL CORP. v. STEPHENS No. 9130SC865	Clay (90CVS19)	Dismissed
DUTY v. DUTY No. 9111DC1128	Lee (90CVD1128)	Affirmed
GRAY v. HAMAD No. 913SC944	Carteret (89CVS1064)	Affirmed
IN RE WILL OF MELTON No. 9129SC923	Rutherford (90E372) (90SP96)	No Error
JONES v. PURVIS No. 917SC1110	Nash (90CVS1345)	No Error
LEWIS v. WATKINS No. 9110SC555	Wake (88CVS2748)	No Error
MURPHY v. VANDERPOOL No. 9110IC1200	Ind. Comm. (539510)	Reversed & Remanded
OWEN v. PSYCHIATRIC INSTITUTES OF AMERICA No. 9128SC1004	Buncombe (88CVS1807)	No Error
ROBINSON v. LUMBERMENS MUT. CASUALTY CO. No. 9121SC904	Forsyth (91CVS1945)	Affirmed
SELLERS v. N.C. FARM BUREAU MUT. INS. CO. No. 9124SC1104	Madison (90CVS86)	Affirmed
STATE v. ATHEY No. 9222SC674	Davidson (90CRS11723) (90CRS11724)	No Error
STATE v. BONNER No. 915SC707	New Hanover (90CRS10459) (90CRS17538)	No Error
STATE v. COOK No. 9214SC658	Durham (90CRS28945)	No Error
STATE v. HARRIS No. 9226SC620	Mecklenburg (91CRS025741)	No Error
STATE v. LEWIS No. 9227SC699	Lincoln (91CRS5256)	No Error

STATE v. MARTIN No. 9210SC625	Wake (91CVS2248)	Remanded
STATE v. McFARLIN No. 9221SC634	Forsyth (91CRS49263)	No Error
STATE v. MORGAN No. 9210SC559	Wake (91CRS32752)	No Error
STATE v. STEELE No. 9228SC645	Buncombe (91CRS16485) (91CRS58599)	*91CRS58599, simple assault—no error; 91CRS16485, operating a motor vehicle on a street without corrective lenses—judgment arrested. Remanded for resentencing.
STATE v. TAYLOR No. 9226SC601	Mecklenburg (91CRS16200) (91CRS16201)	No Error
STEPHENS v. N.C. FARM BUREAU MUT. INS. CO. No. 9130SC870	Clay (88CVS73)	No Error
WHICKER v. GRAVETTE No. 9115SC601	Orange (88CVS946)	Reversed & remanded for further action not inconsistent with this opinion
WHITMAN v. DAVIDSON COUNTY No. 9110IC1089	Ind. Comm. (803900)	Affirmed

FILED 15 DECEMBER 1992

BUNCH v. BUNCH No. 913SC1062	Pitt (78SP78)	Reversed & remanded
COLLINGS v. UNITED HOLDING CORP. No. 9129DC1181	Transylvania (89CVD166)	Dismissed
FINANCIAL FIRST FEDERAL SAVINGS BANK v. BAUCOM No. 9215SC631 No. 9215SC632	Alamance (91CVS742) (91CVS743)	Appeal Dismissed

HAMILTON v. BOYLE & CO. No. 9122SC688	Iredell (90CVS2182)	Reversed & remanded
HOLMES v. STEED No. 9114DC1187	Durham (90CVD2862)	Defendant's appeal is dismissed. The trial court's dismissal of plaintiff's complaint is reversed.
IN RE ESTATE OF MOSTELLER No. 9225SC433	Catawba (90E360)	Dismissed
KIOUSIS v. KIOUSIS No. 911DC1192	Dare (88CVD446)	Dismissed
LANDINGHAM PLUMBING AND HEATING v. FUNNELL No. 9118SC646	Guilford (88CVS5775)	No Error
MOBLEY v. ESTATE OF JOHNSON No. 9212SC637	Cumberland (90CVS6636) (90CVS6640)	Dismissed
MOFFITT v. PUTMAN No. 9124DC1217	Mitchell (90CVD185)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. CROWDER No. 928SC431	Lenoir (91CVS143)	Affirmed
N.C. FARM BUREAU MUT. INS. CO. v. MATTHEWS No. 9128SC1213	Buncombe (90CVS1570)	Affirmed
NATIONWIDE MUTUAL INS. CO. v. ROCHELLE No. 913SC977	Craven (91CVS137)	Affirmed
NELSON v. LAWS No. 9119SC1164	Randolph (90CVS1294)	Affirmed
PATE v. EASTERN INSULATION SERVICE No. 917SC1193	Wilson (88CVS848)	Affirmed
RADEKER v. RADEKER No. 9228DC386	Buncombe (89CVD3894)	Reversed & remanded
SNEED v. N.C. DEPT. OF TRANSPORTATION No. 9210IC734	Ind. Comm. (TA11693) (TA11701) (TA11734)	Affirmed

STATE v. ABSHER No. 9123SC1079	Wilkes (87CRS718) (Transferred from Ashe County 89CRS6325)	Vacated
STATE v. EALEY No. 9226SC621	Mecklenburg (91CRS65217)	No Error
STATE v. GIBSON No. 921SC497	Dare (91CRS3581)	Vacated & remanded for resentencing
STATE v. GRAHAM No. 9216SC749	Scotland (91CRS908)	No Error
STATE v. McGHEE No. 926SC728	Halifax (90CRS6180)	No Error
STATE v. McKOY No. 924SC679	Sampson (91CRS5573)	No Error
STATE v. MEREDITH No. 9227SC482	Gaston (90CRS024524)	No Error
STATE v. PHIFER No. 9218SC650	Guilford (90CRS15395)	Affirmed
STATE v. RHODES No. 9213SC444	Brunswick (89CRS557) (89CRS1482)	No Error
STATE v. SIMPSON No. 9212SC412	Cumberland (90CRS20464)	Affirmed
STREET v. HOWARD No. 9110SC889	Wake (90CVS2991)	Affirmed
WATSON v. SUGAR TOP RESORT CONDOMINIUM ASSN. No. 9124SC837	Avery (90CVS282)	Affirmed

DOROTHY M. FAULKENBURY, ON BEHALF OF HERSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A CORPORATION; BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER OF THE STATE OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES TEACHERS' AND STATE EMPLOYEES' RETIREMENT SYSTEM OF NORTH CAROLINA (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); AND STATE OF NORTH CAROLINA, DEFENDANTS

No. 9110SC1023

(Filed 5 January 1993)

1. **Appeal and Error § 176 (NCI4th)— notice of appeal to Court of Appeals—subsequent voluntary dismissal as to some defendants—proper**

Although the general rule is that the lower court is divested of jurisdiction once an appeal is perfected, plaintiffs' voluntary dismissal without prejudice as to two of the defendants after notice of appeal was filed by defendants was proper because the dismissal did not affect the subject matter of the action and was not an attempt to amend the complaint. N.C.G.S. § 1A-1, Rule 41(a).

Am Jur 2d, Appeal and Error § 355.

2. **Administrative Law and Procedure § 58 (NCI4th)— appeal—administrative exhaustion—inadequacy and futility of administrative review**

Plaintiffs' failure to pursue their rights using the administrative process was not fatal to their case where plaintiffs alleged that an amendment to a statute setting out the calculation for disability retirement benefits was unconstitutional and brought an action for injunctive relief, a constructive or resulting trust, and relief under 42 U.S.C. § 1983. Plaintiffs specifically alleged inadequacy and futility of administrative review in their complaint by stating that the person who would conduct the administrative review does not have the jurisdiction or authority to rule upon the constitutionality of the statute.

Am Jur 2d, Administrative Law §§ 603, 605.

3. Appeal and Error § 114 (NCI4th)— denial of motion to dismiss for failure to state claim—immunity defense to § 1983 claim—appeal not interlocutory

An appeal from the denial of a motion to dismiss a § 1983 claim under N.C.G.S. § 1A-1, Rule 12(b)(6) was not interlocutory where the defense was based on the doctrines of qualified and official immunity, whether defendants were persons within the meaning of § 1983, and whether the doctrine of sovereign immunity bars suit against defendants. The Supreme Court has held that the doctrine of sovereign immunity presents a personal jurisdiction question so that the denial of a motion to dismiss on this basis is immediately appealable, and that the denial of a motion for summary judgment affects a substantial right and is immediately appealable where the motion was based upon an immunity defense to a § 1983 claim.

Am Jur 2d, Appeal and Error §§ 87, 105.

4. Public Officers § 9 (NCI3d); Constitutional Law § 86 (NCI4th)— § 1983 claims against State officials—monetary damages—defendants not persons

Defendants were not properly characterized as "persons" under 42 U.S.C. § 1983 insofar as monetary damages were explicitly requested in an action which alleged that a statutory modification of the disability calculation in the North Carolina Teachers' and State Employees' Retirement System violated plaintiffs' due process and equal protection rights under 42 U.S.C. § 1983. The remedy sought must be prospective or injunctive for plaintiffs to make a valid § 1983 claim against these government defendants.

Am Jur 2d, Civil Rights § 264.

Supreme Court's view as to who is "person" under civil rights statute (42 USCS sec. 1983) providing private right of action for violation of federal rights. 105 L. Ed. 2d 721.

5. Limitations, Repose, and Laches § 111 (NCI4th)— § 1983 claim—statute of limitations—defendants not estopped from asserting

The three-year statute of limitations of N.C.G.S. § 1-52 as applied to 42 U.S.C. § 1983 was not tolled where plaintiffs asserted that their § 1983 rights had been violated by a statutory change in the disability calculation in the North Carolina

Teachers' and State Employees' Retirement System; defendants asserted the statute of limitations in that any invasion of plaintiffs' rights occurred at the moment the amended statute became effective or when plaintiff Faulkenbury received her first payment, in either case more than three years before the suit was filed; and plaintiffs asserted that the equitable doctrine of demand and refusal estops defendants from asserting the statute of limitations as a defense. That doctrine as a bar to the statute of limitations is a very limited exception to the statute and has been applied only in breach of fiduciary duty cases which arise in contract actions or in actions on a trust, not to toll the statute when a § 1983 or a constitutional action is before the court.

Am Jur 2d, Limitation of Actions § 127.

6. Limitations, Repose, and Laches § 111 (NCI4th)— disability benefits changed—§ 1983 action—statute of limitations—continuing violation doctrine not applicable

The statute of limitations ran on plaintiffs' claim under 42 U.S.C. § 1983 where plaintiffs brought the action following a statutory change in the calculation of disability benefits in the Teachers' and State Employees' Retirement System; defendants alleged that the statute of limitations had run in that the action was brought more than three years after the effective date of the statute and the first payment to plaintiff Faulkenbury under the new calculation; and plaintiffs alleged a continually recurring violation in that each monthly disability payment constitutes a separate violation. The nature of the alleged wrongful conduct here was the modification of N.C.G.S. § 135-5(d3) to a different method for calculating retirement disability payments and plaintiffs suffer from the continuing effects of the original action of amending the statute. Further, plaintiff Faulkenbury was aware or had reason to be aware of the alleged violation when she first received disability payments.

Am Jur 2d, Limitation of Actions § 107.

7. Appeal and Error § 44 (NCI4th)— change in disability benefit calculation—denial of 12(b)(6) motion to dismiss—appeal interlocutory—appeal heard in discretion of Court

The Court of Appeals exercised its supervisory discretion to address an appeal on the merits where defendants appealed

from the denial of their motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) claims for breach of contract and breach of fiduciary duty in connection with a statutory change in the calculation of disability benefits. The Court had proper jurisdiction over other issues concerning a sovereign immunity defense and the parties desired an answer to a question which was fundamental in determining their rights and was also of public importance.

Am Jur 2d, Appeal and Error § 5.

8. **Retirement Systems § 2 (NCI3d)— change in disability calculation—impairment of contract—valid claim stated**

Plaintiffs stated a valid claim for impairment of obligation of contract in an action arising from a statutory change in disability benefit calculations for teachers and state employees. Determining whether a state unconstitutionally impairs the Contract Clause involves the application of a tripartite test; here, a contractual obligation exists and there is an impairment of rights. It is unnecessary and not in the Court's authority to determine the third issue, whether the impairment was reasonable and necessary to serve an important public purpose, because the case came to the court merely on the denial of a motion to dismiss.

Am Jur 2d, Constitutional Law § 694.

9. **Appeal and Error § 418 (NCI4th)— change in disability benefits—claim for constitutional impairment of contract—appeal abandoned**

An argument that the three-year statute of limitations applies to a constitutional impairment claim arising from a statutory change in the calculation of disability benefits for teachers and state employees was not argued and was deemed abandoned.

Am Jur 2d, Appeal and Error § 698.

10. **Pensions § 1 (NCI3d)— change in disability calculation—no breach of fiduciary duty**

The trial court should have granted defendants' motion to dismiss a claim for breach of fiduciary duty under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiffs' action arose from a statutory change in the calculation of disability benefits for

teachers and state employees. Even if defendants are fiduciaries owing duties to individual members, plaintiffs have not stated a valid claim for relief in that plaintiffs complain that defendants did not protect plaintiffs' interests by deliberately remaining silent about the vested rights of disability retirees, but there is nothing in the statutes that requires such notification and the court found compelling the general principle that actions taken by state officials are presumed to be valid when they enforce a statute likewise presumed to be valid.

Am Jur 2d, Evidence § 171.

11. Appeal and Error § 44 (NCI4th); Parties § 5 (NCI3d)— motion to certify class granted—interlocutory—heard in discretion of court

An appeal from an order granting certification of a class was interlocutory, but the Court of Appeals took into account the importance of the case and the fact that appeals were permitted on other issues and granted certiorari.

Am Jur 2d, Appeal and Error § 50.

12. Rules of Civil Procedure § 23 (NCI3d)— change in disability calculation—certification as class action

The trial court properly certified plaintiffs' suit as a class action under N.C.G.S. § 1A-1, Rule 23 where plaintiffs brought an action contesting a change in the disability calculation for teachers and state employees; the trial court specifically found that there was a class; that the members of the class have an interest in the same issues of law or fact; that these issues predominate over the issues affecting only individual members; and that the prerequisites of *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, were satisfied. Although defendants also asserted that plaintiff Faulkenbury does not have standing to represent all members of each subclass, the controlling and dispositive factor is that each class member enjoys a vested contractual right to the benefits enumerated in Chapter 135 of the North Carolina General Statutes.

Am Jur 2d, Parties §§ 50-73.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendants from orders denying defendants' motions to dismiss the complaint and from order certifying the action as a class action. These orders were entered 28 June 1991 in Wake County Superior Court by Judge Narley L. Cashwell. Heard in the Court of Appeals 14 May 1992.

Marvin Schiller and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce and Donald L. Smith, for plaintiffs-appellees.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Tiare B. Smiley, Special Deputy Attorney General Norma S. Harrell, and Assistant Attorney General Alexander McC. Peters, for defendants-appellants.

LEWIS, Judge.

By this action for declaratory judgment and damages the plaintiffs challenge an amendment, effective 1 July 1982, to the teachers' and State employees' retirement disability statute enacted by the North Carolina General Assembly. The trial court granted the plaintiffs' motion for class certification, and denied defendants' motions to dismiss the lawsuit. From these orders defendants appealed to this Court.

Plaintiff Dorothy M. Faulkenbury was a public school teacher who retired on disability at age 53 in 1983. Because her years of service as of 1 July 1982 and at the time of her retirement were more than five years, she was a vested member of the Teachers' and State Employees' Retirement System of North Carolina ("Retirement System"), N.C.G.S. § 135-5(a)(1), and was eligible for a disability retirement pension pursuant to N.C.G.S. § 135-5.

Plaintiffs contend that the method in N.C.G.S. § 135-5(d4), the amended statute, for calculating disability retirement benefits unconstitutionally gives them lower benefits than they would have received had the former method of calculation found in N.C.G.S. § 135-5(d3) been used. Under N.C.G.S. § 135-5(d3), benefits for a vested employee retiring on disability were calculated as if the employee had worked to the age of 65 years; or, the employee enjoyed unlimited creditable service to 65 years of age. Under (d4), benefits are calculated with a limit: as if the employee worked to age 65 or worked thirty years, whichever comes first. Plaintiff Faulkenbury alleges that because of this statutory modification, and because there was no "grandfather clause" in place to protect

her rights as vested before the amendment, her disability retirement benefit has been underpaid by approximately $76.79 each month. Upon plaintiff Faulkenbury's motion, the trial court certified the suit as a class action, thereby bringing in all persons whose rights had vested under the former statute but who have received disability retirement benefits pursuant to § 135-5(d4).

In this action, the plaintiffs allege that the statutory modification violates their due process and equal protection rights under 42 U.S.C. § 1983; that it constitutes an unconstitutional impairment of the obligations of contracts under Article I, Section 10 of the United States Constitution; and that it constitutes a breach of fiduciary duty. The plaintiffs also allege violations of the North Carolina Constitution, specifically, Article I, Sections 1 and 19, and a violation of N.C.G.S. Chapter 128.

For these alleged wrongs, the plaintiffs seek a declaratory judgment stating that N.C.G.S. § 135-5(d4) is unconstitutional as applied to them and that they are entitled to receive disability benefits calculated under N.C.G.S. § 135-5(d3). Plaintiffs request a constructive or resulting trust be impressed upon all funds held by defendants to which plaintiffs claim entitlement. Finally, plaintiffs' complaint states, "This is a Complaint for damages and other relief, including 42 U.S.C. § 1983, a Class Action and Action for a Declaratory Judgment pursuant to N.C.G.S. § 1-253 *et seq.*, and for a Writ of Mandamus or other appropriate order."

Plaintiffs brought this action against several parties: the State of North Carolina; the Teachers' and State Employees' Retirement System of North Carolina, a corporation established under N.C.G.S. § 135-2; and its Board of Trustees. *See* N.C.G.S. §§ 135-6, 7(a). Plaintiffs also sued Dennis Ducker, the Director of the Retirement Systems Division and Deputy Treasurer of the State of North Carolina, and Harlan E. Boyles, the Treasurer of the State of North Carolina and Chairman of the Retirement System's Board of Trustees.

[1] Plaintiffs sued defendants Ducker and Boyles in both their individual and official capacities. However, on 30 August 1991, after the notice of appeal was filed by defendants, the plaintiffs filed a notice of voluntary dismissal without prejudice as to the claims they asserted against Ducker and Boyles in their individual capacities only.

A plaintiff may take a voluntary dismissal without prejudice at any time before it rests. N.C.G.S. § 1A-1, Rule 41(a) (1990). The case law is clear that a voluntary dismissal prior to the entry of final judgment is proper. *See In re Estate of Tucci*, 104 N.C. 142, 149, 408 S.E.2d 859, 864 (1991), *rev. dismissed*, 331 N.C. 749, 417 S.E.2d 236 (1992). There has been no final judgment rendered here, nor have the plaintiffs rested.

Furthermore, while it is true the general rule is that once an appeal is perfected, the lower court is divested of jurisdiction, *Wiggins v. Bunch*, 280 N.C. 106, 184 S.E.2d 879 (1971), the lower court nonetheless retains jurisdiction to take action which aids the appeal, *id.* at 111, 184 S.E.2d at 881, and to hear motions and grant orders, so long as they do not concern the subject matter of the suit and are not affected by the judgment appealed from. N.C.G.S. § 1-294 (1983); *Herring v. Pugh*, 126 N.C. 852, 36 S.E. 287 (1900); *see also Hightower v. Hightower*, 85 N.C. App. 333, 354 S.E.2d 743, *cert. denied*, 320 N.C. 792, 361 S.E.2d 76 (1987) (after entry of judgment and notice of appeal, trial court retains authority to approve the judgment and direct its filing). We are not convinced that the plaintiffs' voluntary dismissal as to two of the present defendants in their individual capacities affects the subject matter of the action, nor are we persuaded that the dismissal is in actuality an attempt to amend the complaint. We find the voluntary dismissal under Rule 41 to be proper and defendants' appeal on that issue is dismissed.

[2] Defendants argue that it was improper for the plaintiffs to bring an action immediately to the court system. However, our Supreme Court, in a per curiam decision, implicitly recognized an exception to the administrative exhaustion requirement. In *Snuggs v. Stanly County Dep't of Pub. Health*, 310 N.C. 739, 314 S.E.2d 528 (1984), the Supreme Court allowed the defendants' motions, which it treated as motions to dismiss for failure to state a claim upon which relief may be granted under Rule 12(b)(6). The Court held the motions must be allowed since "plaintiffs ha[d] failed to allege that they do not have adequate remedies under State law which provide due process." *Id.* at 740, 314 S.E.2d at 529 (citations omitted). In *Snuggs*, the plaintiffs, after being dismissed from their jobs, appealed to the State Personnel Commission. While that appeal was pending, plaintiffs instituted a 42 U.S.C. § 1983 action in Stanly County Superior Court.

Snuggs is similar to the case at bar. In both cases, plaintiffs failed to exhaust their administrative remedies before seeking judicial review on a section 1983 question. In both cases, defendants filed motions to dismiss. In *Snuggs*, the Court upheld the lower court's granting the motion, reasoning that the plaintiffs had failed to allege inadequate remedies. However, the case at bar differs in that plaintiffs, in their complaint, have specifically alleged inadequacy and futility of administrative review, by stating that "Dennis Ducker, . . . the person who would conduct the administrative review, does not have the jurisdiction or authority to rule upon the constitutionality of the statute." We therefore hold that, pursuant to *Snuggs*, the plaintiffs' failure to pursue their alleged rights using the administrative process is not fatal to their case.

I. § 1983 AND THE IMMUNITY DEFENSES

[3] Defendants filed Rule 12(b) motions to dismiss the complaint which the Superior Court denied. The defendants attack the validity of plaintiffs' 42 U.S.C. § 1983 cause of action on essentially three bases: (A) the doctrines of qualified and official immunity shield the defendants from suit brought under the theories of section 1983 and any state law claims; (B) defendants are not "persons" subject to suit within the meaning of section 1983; and (C) the doctrine of sovereign immunity bars suit against the defendants.

Plaintiffs, by separate motion dated 11 October 1991, asked this Court to dismiss defendants' appeal on the above issues. The plaintiffs primarily characterize the appeal as interlocutory. It is generally true that a denial of a motion to dismiss is interlocutory and hence not immediately appealable. *See Zimmer v. North Carolina Dep't of Transp.*, 87 N.C. App. 132, 133-34, 360 S.E.2d 115, 116 (1987) (recognizing the general rule but holding that the doctrine of sovereign immunity presents a personal jurisdiction question and as a result the denial of a motion to dismiss on this basis is immediately appealable). However, our Supreme Court has recently held that the denial of a motion for summary judgment affects a substantial right and therefore is immediately appealable where the motion was based upon an immunity defense to a section 1983 claim. *Corum v. University of North Carolina*, 330 N.C. 761, 413 S.E.2d 276, *cert. denied*, 61 U.S.L.W. 3287 (U.S. Nov. 16, 1992). This authority and that of the *Zimmer* decision persuade us to hold that the denial of defendants' motion to dismiss is properly before this Court.

A. "Persons" Under § 1983

[4] Section 1983 permits actions only against "persons" who deprive others of any rights, privileges, or immunities secured by the Constitution and laws. 42 U.S.C. § 1983. In *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 105 L. Ed. 2d 45, 109 S. Ct. 2304 (1989), the United States Supreme Court was presented the question whether "a State, or an official of the State while acting in his or her official capacity, is a 'person' within the meaning of" section 1983. *Id.* at 60, 105 L. Ed. 2d at 50-51. In that case, the Court held that in a section 1983 action brought in state court against government defendants, neither the State nor its officials acting in their official capacities is a "person" for the purposes of the statute. *Id.* at 71, 105 L. Ed. 2d at 58; *see also Hafer v. Melo*, 502 U.S. ---, 116 L. Ed. 2d 301, 112 S. Ct. 358 (1991) (state officers sued in their official capacities for monetary damages are not "persons" under section 1983).

Our Supreme Court, when confronted with the same question, cited *Will* and held that when defendants are the State and officials acting in their official capacities, they are not "persons" in a section 1983 action "when the remedy sought is monetary damages." *Corum v. University of North Carolina*, 330 N.C. 761, 771, 413 S.E.2d 276, 283 (1992); *Harwood v. Johnson*, 326 N.C. 231, 238-39, 388 S.E.2d 439, 443 (1990). The cases—both federal and North Carolina—are clear, however, that a different result occurs when a different remedy is sought. "Notably however, when injunctive relief is being sought under section 1983 from State institutions or employees acting in their official capacities, such equitable actions are not barred." *Corum*, 330 N.C. at 771, 413 S.E.2d at 283.

For the plaintiffs to make a valid section 1983 claim against these government defendants, the remedy sought must be prospective or injunctive. Here, plaintiffs' complaint asks the Superior Court to declare that the plaintiffs are entitled to receive their disability retirement payments in accordance with their vested rights under N.C.G.S. § 135-5(d3), and to declare that N.C.G.S. § 135-5(d4) is unconstitutional as applied to them. Further, plaintiffs seek to have a constructive or resulting trust or common fund impressed upon the funds held by defendants to which plaintiffs allege entitlement. However, plaintiffs' complaint also quite clearly requests damages. Plaintiffs' complaint states, "This is a Complaint for damages and other relief, including 42 U.S.C. § 1983." Insofar as

plaintiffs explicitly request monetary damages, defendants are not properly characterized as "persons" for section 1983 purposes. The following section discusses plaintiffs' section 1983 action to the extent their complaint requests injunctive relief.

B. The Statute of Limitations

[5] Defendants assign error to the court's denying their Rule 12(b)(6) motion to dismiss on the grounds that the action is barred by the statute of limitations. Defendants contend that a three year statute of limitations pursuant to N.C.G.S. § 1-52 (1983) applies, and argue that the statute has run.

Defendants maintain that if the plaintiffs suffered any invasion of their rights, they did so at the moment when the amended statute became effective, or, 1 July 1982. At the latest, defendants argue, the statute began to run when plaintiff Faulkenbury received her first retirement payment in October 1983. Thus, in either case the three year statute of limitations as set forth in N.C.G.S. § 1-52 has run, since plaintiff Faulkenbury did not file suit until November 1990.

The three year statute of limitations as set forth in N.C.G.S. § 1-52 applies to 42 U.S.C. § 1983 actions brought in the North Carolina court system. *National Advertising Co. v. City of Raleigh*, 947 F.2d 1158, 1162 n.2 (4th Cir. 1991), *cert. denied*, --- U.S. ---, 118 L. Ed. 2d 593, 112 S. Ct. 1997 (1992) (citing *Wilson v. Garcia*, 471 U.S. 261, 85 L. Ed. 2d 254, 105 S. Ct. 1938 (1985) and holding "the three-year period for personal injury action as set forth in § 1-52(5) is the North Carolina limitations period applicable to § 1983 actions"); *see also Gentile v. Town of Kure Beach*, 91 N.C. App. 236, 371 S.E.2d 302 (1988). Plaintiffs assert that the equitable doctrine of demand and refusal estops defendants from asserting the statute of limitations as a defense. This doctrine as a bar to the statute of limitations appears to be a very limited exception to the statute, and has been applied only in breach of fiduciary duty cases which arise in contract actions or in actions on a trust, *see, e.g., Efird v. Sikes*, 206 N.C. 560, 174 S.E. 513 (1934); *Troy's Stereo Center v. Hodson*, 39 N.C. App. 591, 251 S.E.2d 673 (1979), or in actions for conversion. *See, e.g., White v. White*, 76 N.C. App. 127, 331 S.E.2d 703 (1985). We were unable to find any cases when this doctrine was invoked to toll the statute when a 42 U.S.C. § 1983—or, a constitutional—action is before the court, and we decline to write new law now.

[6] Plaintiffs also maintain, perhaps in the alternative, that the "continuing wrong" doctrine applies. *See, e.g., Almond v. Boyles*, 612 F. Supp. 223 (E.D.N.C. 1985), *aff'd in part and vacated in part*, 792 F.2d 451 (4th Cir. 1986), *and cert. denied*, 479 U.S. 1091, 94 L. Ed. 2d 157, 107 S. Ct. 1302 (1987). Our research uncovered no state cases in North Carolina where the continuing wrong doctrine was applied in a section 1983 case in which the statute of limitations had been raised as a defense. There are, however, federal cases from North Carolina which have applied the doctrine. In *Ocean Acres Ltd. v. Dare County Bd. of Health*, 707 F.2d 103 (4th Cir. 1983), a 42 U.S.C. § 1983 action which arose in the Eastern District of North Carolina, the Fourth Circuit Court of Appeals agreed with the District Court that the three year statute of limitations had run and the plaintiff could not rely on the continuing wrong doctrine. The Court reiterated the well-established principle that a continuing violation " 'is occasioned by continual unlawful acts, not continual ill effects from an original violation.' " *Id.* at 106 (quoting *Ward v. Caulk*, 650 F.2d 1144, 1147 (9th Cir. 1981)) (due process action challenging county's ban on septic tank installation not saved by the continuing wrong doctrine and hence barred by the statute of limitations).

Courts view continuing violations as falling into two narrow categories. *Dixon v. Anderson*, 928 F.2d 212, 216 (6th Cir. 1991). One category arises when there has been a long-standing policy of discrimination. *Id.* at 217. Plaintiffs here do not appear to argue that there has been a long-standing policy of discrimination; instead, plaintiffs seem to argue that the second category is applicable. In the second continuing violation category, there is a continually recurring violation. *Id.* at 216. Plaintiffs contend that each monthly disability payment constitutes a separate violation on defendants' part. Since this payment, and alleged corresponding violation, have been on-going, plaintiffs assert the three year statute had not run when they commenced their action in 1990.

In assessing whether the plaintiffs have established a continuing wrong, we follow the federal cases arising in North Carolina and apply the two-part analysis outlined in *Cooper v. United States*, 442 F.2d 908 (7th Cir. 1971). The two-part analysis requires consideration of the policies of the statute of limitations and the nature of the wrongful conduct and the harm alleged. *Id.* at 912; *see also National Advertising*, 947 F.2d at 1167 (following and applying *Cooper*). The nature of the alleged wrongful conduct here was the

modification of N.C.G.S. § 135-5(d3) to a different method for calculating retirement disability payments. While we acknowledge that the distinction between on-going violations and continuing effects of an initial violation is subtle, we are of the opinion that this case demonstrates the latter. Here the plaintiffs suffer from the continuing effects of the defendants' original action of amending the statute. We do not believe that each payment constitutes a discriminatory act rising to the level of a violation. *Accord Virginia Hosp. Ass'n v. Baliles*, 868 F.2d 653, 663 (4th Cir. 1989), *aff'd sub nom. Wilder v. Virginia Hosp. Ass'n*, 496 U.S. 498, 110 L. Ed. 2d 455, 110 S. Ct. 2510 (1990) (holding that the statute of limitations cannot insulate the continued enforcement of an unconstitutional statute). Further, upon examination of the principles and policies of the applicable statute of limitations, we are persuaded that plaintiff Faulkenbury was aware or had reason to know of the alleged violation when she first received disability payments in October 1983. *See, e.g., National Advertising*, 947 F.2d at 1168.

We find that the continuing violation doctrine does not apply here. As such, the statute of limitations ran on plaintiffs' section 1983 action, and we reverse.

II. OBLIGATION OF CONTRACT AND BREACH OF FIDUCIARY DUTY

[7] Defendants assign as error the trial court's denying their motion under Rule 12(b)(6) to dismiss for failure to state a claim for relief for "breach of contract" and for breach of fiduciary duty. Generally, the denial of a Rule 12(b)(6) motion to dismiss is interlocutory and not immediately appealable. *State ex rel. Edmisten v. Fayetteville St. Christian Sch.*, 299 N.C. 351, 355, 261 S.E.2d 908, 911 (1980). However, given this Court's proper jurisdiction over the other issues concerning the sovereign immunity defense, and because "the parties desire an answer to a question which is fundamental in determining their rights, is also of public importance, and when decided will aid State agencies in the performance of their duties," *Moses v. State Highway Comm'n*, 261 N.C. 316, 317, 134 S.E.2d 664, 665, *cert. denied*, 379 U.S. 930, 13 L. Ed. 2d 342, 85 S. Ct. 327 (1964), we exercise our supervisory discretion to address on the merits the appeal on these issues.

A. Impairment of Obligation of Contract Claim

[8] The defendants argue that if it states a valid claim for anything at all, the plaintiffs' complaint states a claim for breach of employ-

ment contract. Relying on *Smith v. State*, 289 N.C. 303, 222 S.E.2d 412 (1976), defendants maintain that the contract here, as in *Smith*, is between the State and the plaintiffs only, and not between the plaintiffs and the other defendants.

Contrary to defendants' characterization of this cause of action as a breach of contract, the plaintiffs instead contend that the defendants' application of N.C.G.S. § 135-5(d4) violates Article I § 10 of the United States Constitution. This provision prohibits states from enacting any law "impairing the obligations of contracts." Specifically, the plaintiffs point out that their rights had vested under the former statute, and the defendants' calculation of their disability retirement payments under the amended statute impaired their contractual rights to the additional payments they would have received and would still be receiving each month under N.C.G.S. § 135-5(d3).

This case is factually similar to *Simpson v. North Carolina Local Gov't Employees' Retirement Sys.*, 88 N.C. App. 218, 363 S.E.2d 90 (1987), *aff'd per curiam*, 323 N.C. 362, 372 S.E.2d 559 (1988). In *Simpson*, plaintiffs brought a class action suit against the State of North Carolina, North Carolina Local Government Employees' Retirement System and its Board of Trustees, and individuals. By this action, the plaintiffs, vested members of the Retirement System, argued that the defendants had unconstitutionally impaired their contractual rights to a pension plan when the North Carolina Legislature amended the method of calculating the amount of the pension plan's benefits.

In *Simpson*, this Court held that the relationship between vested members of the pension fund and the Retirement System is contractual. *Id.* at 223, 363 S.E.2d at 93. This is so, we reasoned, because a government retiree's pension is correctly characterized as deferred compensation to which the retiree is contractually entitled. *Id.* at 223, 363 S.E.2d at 94. Hence, a statute that diminishes the calculated benefits of an employee impairs that employee's contractual rights. The guiding principle behind our *Simpson* holding was that:

> A public employee has a right to expect that the retirement rights bargained for in exchange for his loyalty and continued services, and continually promised him over many years, will not be removed or diminished. Plaintiffs, as members of the North Carolina Local Governmental Employees' Retirement

> System, had a contractual right to rely on the terms of the retirement plan as these terms existed at the moment their retirement rights became vested.

Id. at 224, 363 S.E.2d at 94.

However, we must also make plain that "the question whether an act unconstitutionally impairs the right to contract violates the Contract Clause is one courts must resolve case by case." *Bailey v. State*, 330 N.C. 227, 244 n.6, 412 S.E.2d 295, 305 n.6 (1991), *cert. denied*, --- U.S. ---, 118 L. Ed. 2d 547, 112 S. Ct. 1942 (1992). Not every impairment of contractual obligations by a state violates the United States Contract Clause. *Id.; Maryland State Teachers Ass'n v. Hughes*, 594 F. Supp. 1353, 1360 (D. Md. 1984). In acting to protect the general welfare of the people and in exercising its police power, a state may constitutionally impair its contractual obligations. *Simpson*, 88 N.C. App. at 224, 363 S.E.2d at 94.

Determining whether a state unconstitutionally impairs the Contract Clause involves the application of a tripartite test that was elucidated by the United States Supreme Court and adopted by the *Simpson* Court. In this analysis, the court first ascertains whether or not a statute creates a contractual obligation. *United States Trust Co. of New York v. State of New Jersey*, 431 U.S. 1, 17, 52 L. Ed. 2d 92, 106, 97 S. Ct. 1505 (1977). The *Simpson* Court has already answered that question for us, and we accordingly hold that a contractual obligation exists. *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. Secondly, the court must determine if the actions of the state legislature impaired the obligation of the state's contract. *United States Trust*, 431 U.S. at 19-21, 52 L. Ed. 2d at 107-09. Again, *Simpson* guides us in our present holding that there is an impairment of rights "as plaintiffs stand to suffer significant reductions in their retirement allowances as a result of the legislative amendment under challenge." *Simpson*, 88 N.C. App. at 225, 363 S.E.2d at 94. Finally, the court must determine whether the impairment was reasonable and necessary to serve an important public purpose. *United States Trust*, 431 U.S. at 21-26, 52 L. Ed. 2d at 108-12. In *Simpson*, the Court remanded for a "proper resolution" on this third part of the test.

Simpson, then, gives us unclear guidance as concerns the third part of the applicable tripartite test. However, we feel it is presently unnecessary, and indeed not even in our authority, to determine this issue, as this case comes to us merely by way of a denial

of a motion to dismiss. We do, however, hold that upon the application of the first two prongs of the test, the plaintiffs here have stated a valid claim for impairment of obligation of contract against the named defendants.

[9] Finally, we address the defendants' assignment of error concerning the court's denial of a motion to dismiss on the grounds that the statute of limitations ran on this cause of action. As stated previously, defendants contend that the three year statute of limitations pursuant to N.C.G.S. § 1-52 applies to the plaintiffs' "breach of contract" action. We expressly reject defendants' argument on this issue. Plaintiffs allege and make a valid claim for a constitutional impairment of contract claim, not a common law breach of contract. There is a distinct difference between these two causes of action. *See Hays v. Port of Seattle*, 251 U.S. 233, 64 L. Ed. 243, 40 S. Ct. 125 (1920). Because the defendants have not argued the statute of limitations as pertains to the constitutional impairment of contract claim, this argument is deemed abandoned. N.C. R. App. P. 28(b)(5). We hold the trial court properly denied defendants' motion to dismiss on this basis.

B. Breach of Fiduciary Duty Claim

[10] Defendants contend that the trial court erred by denying their motion to dismiss for failure to state a claim for breach of fiduciary duty. Plaintiffs' complaint alleges that all of the defendants are fiduciaries with respect to members of the Retirement System. They say defendants have breached their respective fiduciary duties by implementing and administering a statute that unconstitutionally underpays disability retirement benefits to the plaintiffs.

A fiduciary relationship exists where there has been some special confidence reposed in one who in equity and good conscience is bound to act in good faith and in due regard to the one reposing confidence. *Vail v. Vail*, 233 N.C. 109, 63 S.E.2d 202 (1951). A fiduciary relationship does not necessarily spring only from a contract, as defendants seem to suggest, but may arise from a relationship of "special confidence," such as through the acceptance of particular duties and obligations by a trustee or executor. *See Tyson v. North Carolina Nat'l Bank*, 305 N.C. 136, 286 S.E.2d 561 (1982) (court considered a fiduciary the executor of an estate and trustee of testamentary trusts who accepted the obligations inherent in these positions).

Defendants contend that the Board of Trustees, the Retirement System, Ducker, and Boyles do not owe a fiduciary duty to the individual members of the Retirement System but rather to the vested members and beneficiaries of the system as a whole. This is so, according to defendants, because the contract at issue here, the disability retirement benefits plan set out in N.C.G.S. Chapter 135 is one between only the State and the plaintiffs as a group of vested members, not as individual members.

In support of this contention, defendants cite *Moore v. Moore*, 28 N.C. App. 381, 221 S.E.2d 384 (1976). *Moore* and the present case are factually dissimilar. To determine whether defendants are fiduciaries, we carefully examine the statutorily prescribed rules and obligations of defendants in conjunction with the Retirement System's administration.

The Retirement System is charged with "providing retirement allowances and other benefits . . . for teachers and State employees of the State of North Carolina." N.C.G.S. § 135-2. The Board of Trustees acts as the trustee of the funds of the Retirement System, N.C.G.S. § 135-7(a), and is also responsible for the general administration and operation of the System itself. N.C.G.S. § 135-6. Each Board member must swear to "diligently and honestly administer the affairs of the . . . Board," N.C.G.S. § 135-6(d), and the Board as a whole has the discretion to adopt rules and regulations for the administration of the funds, and to "prevent injustices and inequalities which might otherwise arise in the administration of this Chapter." N.C.G.S. § 135-6(f). In addition, section 135-6(p) speaks of the Retirement System using lists of names and addresses to notify members, beneficiaries, and beneficiaries of members of "their rights to and accruals of benefits in" the System. The State Treasurer, Harlan Boyles, acts as the ex officio Chairman of the Board of Trustees, and is the custodian of the funds created by the Retirement System, N.C.G.S. § 135-7(c), while Dennis Ducker is the Director of the Retirement Systems Division.

Using the statutes as our guide, we are not entirely convinced that these defendants are properly labeled fiduciaries. However, our decision need not rest on such a characterization. We are of the opinion that even if these defendants are fiduciaries owing duties to individual members, plaintiffs have not stated a valid claim for relief in that they have not demonstrated a breach of the alleged fiduciary duty. Plaintiffs complain that defendants did

not protect the plaintiffs' interests by deliberately "remain[ing] silent about the vested rights of disability retirees and perfidiously fail[ing] to notify Plaintiff and class members of their vested rights." We find nothing in the statutes that requires such notification. Further, we find compelling the general principle that actions taken by state officials are presumed to be valid when they enforce a statute that is likewise presumed to be valid. *See, e.g., Bailey v. State*, 330 N.C. 227, 412 S.E.2d 295 (1991) (stating the general principle with regard to liability of public officials in a 42 U.S.C. § 1983 action).

We hold that plaintiffs have not stated a valid claim for relief on the grounds of breach of fiduciary duty. We find it unnecessary to reach the defendants' appeal addressing the running of the statute of limitations on this cause of action. We reverse the Superior Court's denial of defendants' motion to dismiss based upon failure to state a claim for breach of fiduciary duty.

III. CLASS CERTIFICATION

A. Interlocutory Appeal Not Affecting a Substantial Right

[11] Defendants assign error to the court's granting plaintiff Faulkenbury's motion to certify a class and subclasses pursuant to N.C.G.S. § 1A-1, Rule 23 (1990). Defendants assert that this class certification was in error because Faulkenbury lacks standing to represent the class and subclasses; the individual issues predominate over any common issues of law or fact; and a class action is not an efficient method for the adjudication of the present controversy. Plaintiffs contend that the appeal on this issue is interlocutory, and we agree.

This Court has held that while an order denying a class certification is interlocutory, it is nonetheless immediately appealable as it affects a substantial right of the unnamed plaintiffs. *Perry v. Cullipher*, 69 N.C. App. 761, 318 S.E.2d 354 (1984); *see also Crow v. Citicorp Acceptance Co.*, 79 N.C. App. 447, 339 S.E.2d 437 (1986), *rev'd on other grounds*, 319 N.C. 274, 354 S.E.2d 459 (1987). If the trial court refuses to certify the action and the named plaintiff recovers, "the other members of the class will suffer an injury which could not be corrected if there were no appeal before the final judgment. The judgment in his favor could be affirmed and they would not recover anything." *Perry*, 69 N.C. App. at 762, 318 S.E.2d at 356.

Here, however, the motion to certify the action was granted, not denied. Defendants contend that the certification nonetheless affects a substantial right because "trying this case as a class action . . . will be complex, expensive and time consuming," and is unduly burdensome on defendants given their contention that plaintiff Faulkenbury lacks representative capacity for all of the classes and subclasses certified. We do not agree. Defendants, however, petitioned this Court for certiorari under N.C. R. App. P. 21(a)(1). Taking into consideration the importance of this case and the fact that we permitted the appeals on the other issues, we have decided to exercise our discretion and grant certiorari to address this appeal on its merits. *See Hoots v. Pryor*, 106 N.C. App. 397, 403, 417 S.E.2d 269, 273, *disc. rev. denied*, 332 N.C. 345, 421 S.E.2d 148 (1992) (Court determined appeal from denial of motion to amend a pleading is interlocutory and not affecting a substantial right, but nonetheless allowed the appeal under Appellate Rule 21(a)(1)).

B. Was a Class Action Proper In this Case?

[12] The trial court certified plaintiff Faulkenbury's suit as a class action. The class was divided into six subclasses, three of these consisting of living persons who retired as vested members of the Retirement System and three of these subclasses consisting of living beneficiaries, heirs, or personal representatives of persons comprising the first three subclasses. Defendants contest this certification.

Rule 23(a) states that "[i]f persons constituting a class are so numerous as to make it impracticable to bring them all before the court, such of them, one or more, as will fairly insure the adequate representation of all may, on behalf of all, sue or be sued." N.C.G.S. § 1A-1, Rule 23 (1990). Rule 23 is to be liberally construed and "should not be loaded down with arbitrary and technical restrictions." *English v. Holden Beach Realty Corp.*, 41 N.C. App. 1, 9, 254 S.E.2d 223, 230, *disc. rev. denied*, 297 N.C. 609, 257 S.E.2d 217 (1979).

A "class" exists when the members each have an interest in either the same issue of law or fact, and that issue predominates over issues which affect only individual class members. *Crow v. Citicorp Acceptance Co.*, 319 N.C. 274, 280, 354 S.E.2d 459, 464 (1987). Even if a class exists, the party seeking to bring a class

action still has the burden of proving a class action is appropriate. This party has to satisfy six prerequisites: (1) the named representative must establish that she will fairly and adequately represent the interests of all members of the class; (2) there is no conflict of interest between the named representative and the other members of the class who are not named parties; (3) the named party has a genuine personal interest in the action; (4) the named representative must adequately represent those outside the jurisdiction; (5) the class members are so numerous that it is impractical to bring them all before the court; and (6) adequate notice must be given to members of the class. *Id.* at 282-83, 354 S.E.2d at 465-66. The Supreme Court also added that this list of prerequisites was not all-inclusive. *Id.* at 282 n.2, 354 S.E.2d at 465 n.2.

The North Carolina Supreme Court has emphasized that class actions are appropriate and should be permitted when they can "serve useful purposes" such as preventing a multiplicity of suits or inconsistent results. *Id.* at 284, 354 S.E.2d at 466. The trial court has broad discretion in determining whether an action may be maintained as a class action. *Id.*

In its findings of fact, the trial court in the present case specifically found that there was a "class," that those members of the class have an interest in the same issues of law or fact, and that these issues predominate over the issues affecting only individual members. The court explicitly found that the *Crow* prerequisites were satisfied. In particular, plaintiff Faulkenbury's interest is genuine and typical of the claims of the other class members in that she and the other class members allege unconstitutional underpayment of disability retirement benefits. Moreover, the court found that the large number of class members makes individual actions impractical, and in essence held the class action was more efficient and hence the superior method for class members to seek their rights.

Defendants also assert that plaintiff Faulkenbury does not have standing to represent all members of each subclass. We find the controlling and dispositive factor to be that each class member enjoys a vested contractual right to the benefits enumerated in Chapter 135 of the North Carolina General Statutes. We also note that *Simpson* was brought as a class action. For the foregoing reasons, and recognizing the trial court's broad discretion in certifying a class, we overrule defendants' assignment of error.

Affirmed as to the trial court's denial of defendants' motion to dismiss on the issue of constitutional impairment of obligation of contract and as to the certification of the lawsuit as a class claim.

Reversed and remanded to the Superior Court with instructions to enter motions to dismiss on the issues of:

Plaintiffs' 42 U.S.C. § 1983 action and plaintiffs' breach of fiduciary duty claim.

Judge WYNN concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part, dissenting in part.

I concur with the majority opinion in all aspects except that portion which addresses plaintiffs' claim of breach of fiduciary duty, to which I respectfully dissent.

Plaintiffs argue that defendants Boyles, Ducker, the Retirement System, and the Board of Trustees of the Retirement System have breached and continue to breach the fiduciary duties owed to plaintiff and other class members by unlawful underpayment of monthly disability retirement benefits. Specifically, plaintiff Faulkenbury contends that "[d]efendants applied N.C. Gen. Stat. § 135-5(d4) in such manner as to impair her vested contractual right to the retirement benefits under the system of calculation in place at the time of her vesting rather than applying the Act only to those whose benefits vested after the passage of the Act." Without determining whether defendants are fiduciaries, however, the majority concluded that "plaintiffs have not stated a valid claim for relief in that they have not demonstrated a breach of the alleged fiduciary duty. Plaintiffs complain that defendants did not protect the plaintiffs' interests by deliberately 'remain[ing] silent about the vested rights of disability retirees and perfidiously fail[ing] to notify Plaintiff and class members of their vested rights.' We find nothing in the statutes that requires such notification."

It is my opinion that defendants, by nature of their relationship with plaintiff and class members, owed a fiduciary duty to plaintiff and class members which preceded any duties created by modification of the statute. Satisfaction of such a fiduciary duty requires more than mere notification to the beneficiaries but imposes a

"duty of the person in whom the confidence is reposed to exercise the utmost good faith . . . and to refrain from abusing such confidence by obtaining any advantage to himself at the expense of the confiding party." *Vail v. Vail*, 233 N.C. 109, 114, 63 S.E.2d 202, 206 (1951). (Citation omitted.) Communication is but one duty required by those who occupy the position of a fiduciary.

At this pleadings stage, I believe plaintiffs' allegations are sufficient to establish a fiduciary relationship. I am unwilling to conclude that duties created by the statutes supersede those duties imposed by the fiduciary relationship. Therefore, I cannot agree with the majority that plaintiffs have failed to demonstrate a valid claim of breach of fiduciary duty based solely upon the language of the statute, and I would affirm the trial court's denial of defendants' motion to dismiss the complaint concerning this claim for relief.

WILLIAM H. WOODARD, ON BEHALF OF HIMSELF AND ALL OTHERS SIMILARLY SITUATED, PLAINTIFFS v. NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A CORPORATION; BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM, A BODY POLITIC AND CORPORATE; DENNIS DUCKER, DIRECTOR OF THE RETIREMENT SYSTEMS DIVISION AND DEPUTY TREASURER FOR THE STATE OF NORTH CAROLINA (IN HIS OFFICIAL CAPACITY); HARLAN E. BOYLES, TREASURER OF THE STATE OF NORTH CAROLINA AND CHAIRMAN OF THE BOARD OF TRUSTEES OF THE NORTH CAROLINA LOCAL GOVERNMENTAL EMPLOYEES' RETIREMENT SYSTEM (IN HIS INDIVIDUAL AND OFFICIAL CAPACITIES); STATE OF NORTH CAROLINA, DEFENDANTS

No. 9110SC1024

(Filed 5 January 1993)

1. Appeal and Error § 176 (NCI4th)— notice of appeal to Court of Appeals—subsequent voluntary dismissal as to one defendant—proper

As in *Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, to which this case is virtually identical both factually and legally, plaintiffs successfully dismissed their action as to defendant Boyles in his individual capacity after notice of appeal.

Am Jur 2d, Appeal and Error § 355.

2. Administrative Law and Procedure § 58 (NCI4th)— appeal— administrative exhaustion—inadequacy and futility of administrative review

As in *Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, to which this case is virtually identical both factually and legally, plaintiffs did not need to exhaust their administrative remedies where they specifically alleged inadequacy and futility of administrative review.

Am Jur 2d, Administrative Law §§ 603, 605.

3. Limitations, Repose, and Laches § 111 (NCI4th)— disability benefits changed—§ 1983 action—statute of limitations—continuing violation doctrine not applicable

As in *Faulkenbury v. Teachers' and State Employees' Retirement System*, 108 N.C. App. 357, to which this case is virtually identical both factually and legally, the denial of defendants' motion to dismiss on the basis that the statute of limitations had run on plaintiffs' 42 U.S.C. § 1983 action was reversed.

Am Jur 2d, Limitation of Actions § 107.

Judge WALKER concurring in part and dissenting in part.

Appeal by defendants from orders denying defendants' motions to dismiss the complaint and from order certifying the action as a class action. These orders were entered 28 June 1991 in Wake County Superior Court by Judge Narley L. Cashwell. Heard in the Court of Appeals 14 May 1992.

Marvin Schiller and Womble Carlyle Sandridge & Rice, by G. Eugene Boyce and Donald L. Smith, for plaintiffs-appellees.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Tiare B. Smiley, Special Deputy Attorney General Norma S. Harrell, and Assistant Attorney General Alexander McC. Peters, for defendants-appellants.

LEWIS, Judge.

The present case is virtually identical, both factually and legally, to *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina*, filed simultaneously herewith. By this

action the plaintiffs challenge an amendment, effective 1 July 1982, to the retirement disability statute in place for local government employees in this State. The case is before this Court from a denial of defendants' motion to dismiss the action, and from the trial court's certifying the action as a class action.

Plaintiff William H. Woodard was a police officer for the City of Greensboro from 1957 until he retired on disability at the end of 1985. Because he had more than five years of creditable service at the time of his retirement, Woodard was a vested member of the Law-Enforcement Officers' Retirement System, and was eligible for a disability retirement pension. His rights under the Retirement System had also vested by the time of the amendment to the statute.

As of 1 January 1986, the membership of all presently employed law-enforcement officers, beneficiaries who were last employed as officers, and surviving beneficiaries of officers last employed by a county, city, town or other State political subdivision was transferred from the Law-Enforcement Officers' Retirement System as provided for in Article 12, Chapter 143 of the North Carolina General Statutes to the North Carolina Local Governmental Employees' Retirement System ("Local Retirement System"). N.C.G.S. § 143-166.50(b) (1990). The latter, with which we are concerned, is provided for under Article 3 of Chapter 128 of the General Statutes. The transfer in no way diminished any accrued or inchoate rights of any members of the Law-Enforcement Officers' Retirement System. N.C.G.S. § 143-166.50(c) (1990).

Plaintiff Woodard and the class member plaintiffs, vested members and beneficiaries of the Local Retirement System, contend that N.C.G.S. § 128-27(d4), "Allowance on Disability Retirement of Persons Retiring on or after July 1, 1982," (the same provision found previously in N.C.G.S. § 143-166(y)), awards them lower benefits than they would be entitled under the former disability provision. N.C.G.S. § 143-166(y) (1977) set forth the method for calculating the amount of benefits owed a person retiring on disability. This provision read:

> Upon retirement for disability, . . . a member shall receive a service retirement allowance if he has qualified for an unreduced service retirement allowance; otherwise the allowance shall be equal to a service retirement allowance calculated on the member's average final compensation prior to his disabili-

> ty retirement and the creditable service he would have had had he continued in service until his 55th birthday.

The underlined portion of this statute was amended, effective 1 July 1982, to read, "the earliest date on which he would have qualified for an unreduced service retirement allowance." This amendment, then, calculates the disabled retiree's benefits as if he had worked to the age of 55, or thirty years, whichever comes first. Therefore, a member who begins creditable service at age twenty and whose rights have vested can at the most receive a benefit calculated as if he had worked thirty years. Plaintiff Woodard alleges that under this statutory modification, he had been underpaid his disability retirement benefit by at least $100.00 each month. Upon plaintiff Woodard's motion, the trial court certified the suit as a class action, thereby bringing in all persons whose rights had vested under the statute and who claim entitlement to disability retirement benefits pursuant to the unamended N.C.G.S. § 143-166(y) provision.

In this action, as in *Faulkenbury*, the plaintiffs allege that since their rights had vested under the previous statute, the amended statute violates their due process and equal protection rights under 42 U.S.C. § 1983, that it constitutes an unconstitutional impairment of the obligations of contracts in violation of Article I, Section 10 of the United States Constitution, and that it constitutes a breach of fiduciary duty. The plaintiffs also allege violations of the North Carolina Constitution, specifically, Article I, Sections 1 and 19, and a violation of N.C.G.S. Chapter 128.

For these alleged wrongs, the plaintiffs request a declaratory judgment stating that N.C.G.S. § 143-166(y) as that statute read prior to 1 July 1982 (now § 128-27(d4)) is unconstitutional as applied to them and hence they are entitled to receive disability benefits calculated under N.C.G.S. § 143-166(y) (1977). Furthermore, plaintiffs request a constructive or resulting trust be impressed upon all funds held by defendants to which plaintiffs claim entitlement. Finally, plaintiffs' complaint states, "This is a Complaint for damages and for other relief, including 42 U.S.C. § 1983, a Class Action and an Action for a Declaratory Judgment pursuant to N.C.G.S. § 1-253 *et seq.* and for a Writ of Mandamus or other appropriate order."

Because the issues on appeal are identical to those raised in the companion case of *Faulkenbury*, our opinion is consistent with our opinion in that case.

[1] First, the plaintiffs have successfully voluntarily dismissed their action as to defendant Boyles in his individual capacity only pursuant to Rule 41 of the North Carolina Rules of Civil Procedure. Defendants' appeal on this issue is dismissed.

[2] We hold that for the reasons stated in *Faulkenbury*, the plaintiffs did not need to exhaust their administrative remedies.

[3] We reverse the trial court's denial of defendants' motion to dismiss on the basis that the statute of limitations had run on plaintiffs' 42 U.S.C. § 1983 action. Defendants maintain the statute of limitations began running on 1 July 1982—the date N.C.G.S. § 143-166(y) was amended. At the very latest, defendants contend, the statute began to run when plaintiff Woodard received his first disability retirement payment. While the record appears to be silent on the precise date of Woodard's first payment, this Court will assume it was in January 1986, given his retirement occurred at the end of December 1985. In either case, the three year statute had run by the time plaintiffs instituted the action in January 1991. Neither the equitable doctrine of demand and refusal nor the continuing violation doctrine saves this cause of action.

Affirmed as to the trial court's denial of defendants' motion to dismiss on the issue of constitutional impairment of obligation of contract and as to the certification of the lawsuit as a class action.

Reversed and remanded to the Superior Court with instructions to enter motions to dismiss on the issues of:

Plaintiffs' 42 U.S.C. § 1983 action and plaintiffs' breach of fiduciary duty claim.

Judge WYNN concurs.

Judge WALKER concurs in part and dissents in part.

Judge WALKER concurring in part, dissenting in part.

I concur with the majority opinion in all aspects except that portion which addresses plaintiffs' claim of breach of fiduciary

duty, to which I respectfully dissent for the reasons set forth in *Faulkenbury v. Teachers' and State Employees' Retirement System of North Carolina.*

IN THE MATTER OF: THE APPEAL OF PERRY-GRIFFIN FOUNDATION FROM THE APPRAISAL OF CERTAIN REAL PROPERTY BY THE PAMLICO COUNTY BOARD OF EQUALIZATION AND REVIEW FOR 1989

No. 9110PTC1222

(Filed 5 January 1993)

1. **Taxation § 25.7 (NCI3d)— property tax valuation—property within trust—sale forbidden by trust—highest and best use—sale for development**

The Tax Commission did not err by reversing the Pamlico County Board's valuation where the property in question was held by a charitable trust; the terms of the trust forbade the sale of the real estate, but allowed leasing and the sale of timber; the trust had instituted a lawsuit seeking to modify the terms of the trust to enable it to market the forest land; the lawsuit was resolved in a judgment which permitted the sale of so much of the rental (town) property as was necessary and in effect precluded development and/or sale of the forest property; the County valued the forest land at $2,293,440, based upon the assumption that the property is subject to development and sale as residential and/or recreational property; and the value of the property as timberland was $331,012. Under the statutorily mandated whole record test of N.C.G.S. § 105-345.2, this Court is not permitted to replace the Tax Commission's judgment with its own judgment even where there are two reasonably conflicting views, and the weight to be attributed to the evidence is a matter for the fact finder.

Am Jur 2d, State and Local Taxation §§ 759-763.

Requirement of full-value real property taxation assessments. 42 ALR4th 676.

Sale price of real property as evidence in determining value for tax assessment purposes. 89 ALR3d 1126.

2. Taxation § 25.7 (NCI3d)— valuation—County's valuation arbitrary—evidence of lesser value—burden shifting to County

There was no error in the Tax Commission's determination that the Pamlico County Board's residential and recreational use valuation was substantially greater than the timberland valuation. With the plaintiff having shown that the Pamlico County Board's valuation was arbitrary and substantially greater than the true value of the land, the burden then shifted to the Pamlico County Board, which produced nothing to rebut the evidence and which accordingly failed to meet its burden. N.C.G.S. § 105-345.2(b)(5).

Am Jur 2d, State and Local Taxation §§ 759-763.

Requirement of full-value real property taxation assessments. 42 ALR4th 676.

Sale price of real property as evidence in determining value for tax assessment purposes. 89 ALR3d 1126.

3. Taxation § 25.7 (NCI3d)— property tax—factors affecting property's value—refusal to consider

The Property Tax Commission did not err by finding that the Pamlico County Board acted arbitrarily in its refusal to consider factors affecting the property's value under N.C.G.S. § 105-317(a) where the property was held in a charitable trust which forbade sale of the property; the trust had earlier sought the Superior Court's approval to sell the timberland to a willing purchaser and the Court refused to declare the restraint on alienation void; and the County valued the property based on the assumption that it is subject to sale and development. Because of the valid and enforceable restraint on alienation, the property itself is unmarketable and taxing the property according to normal market assumptions would be unfair to the charitable trust and would seriously erode and ultimately defeat the public policy in favor of charitable trusts. There is no statutory proscription against the Tax Commission's declining to use the highest and best use valuation provided it has considered both the specifically enumerated factors of N.C.G.S. § 105-317(a) and any other factors that may affect the land's value.

Am Jur 2d, State and Local Taxation §§ 759-763.

Requirements of full-value real property taxation assessments. 42 ALR4th 676.

Sale price of real property as evidence in determining value for tax assessment purposes. 89 ALR3d 1126.

Appeal by Pamlico County and the Pamlico County Board of Equalization and Review for 1989 from a final decision of the North Carolina Property Tax Commission (sitting as the State Board of Equalization and Review) entered 5 September 1991. Heard in the Court of Appeals 10 November 1992.

This case involves a dispute between Perry-Griffin Foundation, taxpayer (hereinafter "Foundation-taxpayer"), and the Pamlico County Board of Equalization and Review for 1989 (hereinafter "Pamlico County Board"), whose appraisal of Foundation-taxpayer's property was reversed by the Property Tax Commission (hereinafter "Tax Commission"). The "undisputed facts," as stipulated by Foundation-taxpayer and the Pamlico County Board in their "Order On Final Pre-hearing Conference" filed with the Tax Commission and as adopted by the Tax Commission as part of its findings of fact in its 5 September 1991 final decision, are as follows:

> 1. Taxpayer, Perry-Griffin Foundation, (hereinafter referred to as "Foundation") is a non-profit corporation of North Carolina organized and chartered pursuant to the provision of Chapter 55A, General Statutes of North Carolina, with its principal office in Oriental, Pamlico County, North Carolina; and is a charitable trust, created by the last will and testament of Clare G. Perry, late of Pamlico County, North Carolina, who died testate April, 1965. A true copy of said last will and testament of Clare G. Perry is one of the exhibits identified herein.
>
> 2. The will directs that a foundation be established for certain "religious, benevolent, and educational purposes" and appoints five directors to administer the same.
>
> The Foundation is qualified as a tax exempt charitable entity pursuant to Section 501(c)(3) of the U.S. Internal Revenue Code.
>
> 3. The primary mission of the charitable trust is (a) the construction and maintenance of living quarters for women of limited means; and, (b) making of educational loans to students.

4. Article IV provides that: "no real estate is to be sold, however, it may be leased in the discretion of the directors, provided however, the timber may be sold at the discretion of the directors."

5. The assets of the trust consist primarily of real estate. The unimproved real estate (forest land) constitutes the bulk of the assets of the estate of which there are approximately 1,135 acres located generally around but outside the Town of Oriental in Pamlico County. This forest land is the subject matter of this proceeding. Most of the remaining assets of said trust consists [sic] of real property located within the town limits of Oriental, including an office building and lot on which it is situated, a small house and lot, and several vacant lots. The town property valuation is not contested nor involved in this proceeding.

6. The total valuation by Pamlico County for the forest land for tax purposes is $2,293,440.00. This valuation is based upon the assumption that the property is subject to development and sale as residential and/or recreational property.

7. The taxpayer has no quarrel with the County's valuation of said property as forest land.

8. The taxpayer is legally unable to develop, sell or market said forest lands and is unable legally to make any other use of the same except to harvest timber.

In July of 1987, taxpayer instituted a lawsuit pursuant to North Carolina General Statute 36A, seeking to modify the terms of this trust to enable it to market the said forest land pursuant to the enabling powers of *cy pres*, and seeking to enlarge the mission and objects of the trust in order to justify sale and marketing of the forest land. This lawsuit also sought to have the restraint on alienation of real property declared void as against public policy.

9. The said lawsuit, after trial, was resolved in a "judgment" of the Superior Court dated March 21, 1988, which held, *inter alia*, that the restraint on alienation of land is not void as against public policy because the property is held in a charitable trust; and, that pursuant to *cy pres*, in order to fund the purposes of the trust, the Foundation was permitted to sell so

much of the rental property (in town property) as is necessary to effect the ends and purposes of the trust.

The net effect of this judgment was to preclude development and/or sale of forest property in that a sale of only a portion of the in-town property was sufficient to fund the purposes of the trust hereinabove described.

10. This judgment was appealed through the North Carolina Court of Appeals, which affirmed *in toto* the Superior Court's judgment and held that: "the Foundation being a charitable trust the restraints on the alienation of its real property are not invalid. G.S. 36A-49."

11. Petition for certiorari was made to the North Carolina Supreme Court and denied.

This taxpayer has sold, pursuant to said judgment, several pieces of real estate in the Town of Oriental and has accumulated sufficient funds therefrom to fund the purposes of the trust.

Additionally, in its 5 September 1991 final decision the Tax Commission made the following findings of fact:

Findings of Fact

The Commission adopts the Stipulations set out above as part of its Findings of Fact. Based on the evidence presented by the parties and listed above, the Commission adopts the facts contained in the Statement of Case as part of its Findings of Fact, and makes the following additional findings:

1. The Taxpayer, Perry-Griffin Foundation, is prevented by a legally binding restraint on alienation from selling the subject property without the approval of a Superior Court Judge.

2. The restraint on alienation does not run with the land; in the event that the Foundation were to sell some or all of the subject property, the purchaser would take the land free and clear of all restriction [sic], and would be free to utilize the property for its highest and best use, which is residential and recreational development.

3. The County's appraisal of the subject property is consistent with the County's appraisal of similar property having the same "highest and best use" and located in the same area.

Further, the County's appraisal was conducted in accordance with its duly adopted schedule of values.

4. The County's appraisal of the subject property did not exceed the value which the subject property would have commanded if it had been offered for sale (free of restrictions) on 1 January 1989. The market value of the property for development purposes as of 1 January 1989 was greater than the County's appraisal of $2,293,440, or approximately $2,022 per acre.

5. The Will of Clare G. Perry is the only impediment to actual development of the subject property for residential and recreational purposes. In all other respects, the land is physically and legally capable of residential and recreational use, and a ready market exists in Pamlico County for land adaptable for such uses.

6. The essence of the Taxpayer's argument is that the County's refusal to consider the effect of the restraint against alienation in the course of its appraisal was arbitrary. The Commission agrees.

7. The Commission finds that, as of 1 January 1989, the value of the subject property to the Taxpayer was $331,012.00. This represents the value of the property as timber land, without considering its potential for residential and recreational development.

The Tax Commission then reversed the decision of the Pamlico County Board by entering the following "Conclusions, Decision, and Order" in its 5 September 1991 final decision:

Based on its Findings of Fact, as set forth above, the Commission makes the following Conclusions of Law:

1. The restraint on alienation created by the Will of Clare G. Perry is legally binding on the trustees of the Perry-Griffin Foundation. The County's refusal to consider the effect of this restriction in its appraisal of the subject property was arbitrary, and resulted in an appraisal of the subject property which was substantially greater than its true value in money as of 1 January 1989.

2. The true value in money of the subject property as of 1 January 1989 was $331,012.00, based on the ability of the land to produce income through timber production.

. . . .

. . . [T]he property has not changed hands, nor is it possible for the Taxpayer to sell the property without approval from the Superior Court. If the Taxpayer were able to sell the subject property, the purchaser would take it free of restrictions and would pay a price consistent with the County's appraisal. The Taxpayer, however, is unlikely to receive approval for such a sale within the foreseeable future. The value of the land in the hands of the Taxpayer, therefore, is its value for timber production purposes.

WHEREFORE, IT IS ORDERED, ADJUDGED, AND DECREED that the decision of the Pamlico County Board of Equalization and Review for 1989 concerning the appraisal of the subject property for the tax year 1989 is REVERSED. The Commission finds the facts in this case to be unique and accordingly reaches its decision solely on the facts presented in this case. The County is instructed to reduce the appraised value of the subject property, effective 1 January 1989, from $2,293,440 to $331,012.00, and to make such changes in its tax records as may be needed to reflect the findings and conclusions of the Commission set forth herein.

One member of the Tax Commission dissented from the final decision. Pamlico County and the Pamlico County Board appeal from the Tax Commission's final decision.

Sumrell, Sugg, Carmichael & Ashton, by James R. Sugg, Rudolph A. Ashton, III, and Jimmie B. Hicks, for appellant, Pamlico County and Pamlico County Board of Equalization and Review for 1989.

Henderson, Baxter, & Alford, P.A., by David S. Henderson and Brian Z. Taylor, for appellee, Perry-Griffin Foundation.

EAGLES, Judge.

The Board brings forth two assignments of error concerning the Tax Commission's final decision. These assignments of error present the following issues: (1) whether the Tax Commission erred

in its reversal of the Pamlico County Board's valuation of the property; and (2) whether the Tax Commission's decision places uniformity in assessments at risk. After a thorough and careful review of the record, we affirm the final decision of the Tax Commission.

I.

Initially, we note the important competing interests involved in this case in light of this Court's statement in *In Re Appeal of Bosley*, 29 N.C. App. 468, 472-73, 224 S.E.2d 686, 689, *disc. review denied*, 290 N.C. 551, 226 S.E.2d 509 (1976), recognizing that "[i]t would be meaningless to construe literally the applicable appraisal statutes of the Machinery Act. These statutes must be interpreted in the light of tax history and legislative purpose in formulating laws to guide local authority in the difficult and complex problem of appraising property for tax purposes." On the one hand, there are the significant and substantial concerns involving the general principles of uniformity and equality in taxation, well established in numerous opinions addressing contexts other than the taxation of the property of charitable trusts. *See generally Realty Corp. v. Coble, Sec. of Revenue*, 291 N.C. 608, 231 S.E.2d 656 (1977); *Bosley*, 29 N.C. App. 468, 224 S.E.2d 686; *Hajoca Corp. v. Clayton, Comr. of Revenue*, 277 N.C. 560, 178 S.E.2d 481 (1971).

On the other hand, there are the significant and substantial concerns involving both the unique characteristics and public policy purposes of charitable trusts, previously recognized in numerous opinions and statutes. *See generally Board of Trustees of UNC-CH v. Heirs of Prince*, 311 N.C. 644, 648, 319 S.E.2d 239, 242 (1984) ("It is a well recognized principle that gifts and trusts for charities are highly favored by the courts. Thus, the donor's intentions are effectuated by the most liberal rules of construction permitted."); *Edmisten v. Sands*, 307 N.C. 670, 674, 300 S.E.2d 387, 390 (1983) ("This Court unquestionably concurs with the trial court's finding that the public policy of North Carolina is to preserve, to the fullest extent possible, the manifested intention of a testator or donor to bestow a gift for charitable purposes. The policy of protecting charitable trusts is repeatedly declared throughout the statutory provisions of Chapter 36A."); *YWCA v. Morgan, Attorney General*, 281 N.C. 485, 189 S.E.2d 169 (1972) (defining charitable trusts and the *cy-pres* doctrine); *Trust Co. v. Morgan, Attorney General*, 279 N.C. 265, 272, 182 S.E.2d 356, 361 (1971) ("long-established policy" that courts should assist in carrying out the charitable purposes

of charitable trusts); *Trust Co. v. Construction Co.*, 275 N.C. 399, 168 S.E.2d 358 (1969) (rule against perpetuities does not apply to a charitable trust, which is an exception to the rule that a restraint on alienation is void); *Sternberger v. Tannenbaum*, 273 N.C. 658, 678-79, 161 S.E.2d 116, 131 (1968) ("It seems that the State as *parens patriae*, through its Attorney General, has the common law right and power to protect the beneficiaries of charitable trusts and the property to which they are or may be entitled."); G.S. 36A-52(a) (declaring "the policy of the State of North Carolina that . . . devises for religious, educational, charitable, or benevolent uses or purposes . . . are and shall be valid . . . and this section shall be construed liberally to affect [sic] the policy herein declared."); G.S. 36A-52(b) (not invalid for indefiniteness); G.S. 36A-52(c) (remedy for enforcement "in a suit for a writ of mandamus by the Attorney General"); G.S. 36A-53 (Charitable Trusts Administration Act); G.S. 36A-54 (tax-exempt status).

We also note that the land in controversy here has been the subject of earlier litigation. Foundation-taxpayer filed a complaint in Pamlico County Superior Court on 8 July 1987 seeking to have the restraint on alienation voided "[b]ecause of the inability of the foundation to generate sufficient assets or income to provide the charitable objects created in the Will." In that action brought pursuant to G.S. 36A-53(a), Foundation-taxpayer sought the Superior Court's permission to sell its real properties, including the timberland which the Pamlico County Board seeks to tax at its highest and best use of residential and recreational development. In the complaint, Foundation-taxpayer specifically alleged that "[t]he Foundation has a good faith offer to purchase its timberland tracts for Two Million Two Hundred Thousand Dollars ($2,200,000.00)." The proposed purchaser intervened as a party plaintiff. On 21 March 1988, the Superior Court issued a judgment ruling that the restraint on alienation was valid and enforceable and authorizing "a sale of so much of the real property as is necessary to accomplish such charitable purposes [as found in Perry's will]." The judgment specifically directed that the rental properties were to be sold first. In *Perry-Griffin Foundation v. Thornburg*, 93 N.C. App. 790, 379 S.E.2d 114, *disc. review denied*, 325 N.C. 272, 384 S.E.2d 518 (1989) (unpublished opinion), this Court affirmed the Superior Court's judgment and held that the restraint on the alienation of Foundation-taxpayer's property was valid and enforceable precisely because Foundation-taxpayer was a charitable trust. This Court stated:

> In directing that the rental property be sold first and only so much of the timberland as is necessary to create the loan fund and build the houses referred to in the will the court reformed the trust in a manner that appears to be in accord with its best interest and that will least conflict with the testatrix's ban against selling any of the trust real estate. While the court might have justifiably approved the sale of all the rural real estate to the intervenor for $2,200,000, it certainly did not err in declining to do so since, *inter alia*, expert evidence was presented to the effect that the timberland is worth twice that amount. Nor is it fatal to the judgment that it makes no provision for either meeting the foundation's annual maintenance costs and expenses or for eventually disposing of or using the other real property and any remaining surplus after the relatively small needs of the student loan funds and homes for ladies of limited means are met. Such provisions can be made under the court's *cy-pres* powers whenever it is made to appear that they are either necessary, as paying the foundation's expenses certainly is, or in the best interest of the trust.

Id. Accordingly, the Pamlico County Board and Foundation-taxpayer have stipulated before the Tax Commission that "[t]he net effect of this [the Superior Court's 21 March 1988] judgment was to preclude development and/or sale of forest property in that a sale of only a portion of the in-town property was sufficient to fund the purposes of the trust" and that Foundation-taxpayer "is legally unable to develop, sell or market said forest lands and is unable legally to make any other use of the same except to harvest timber."

II.

[1] The Pamlico County Board argues that the Tax Commission erred by reversing the Pamlico County Board's valuation. The Pamlico County Board's valuation was based on the assumption that residential and recreational development was the highest and best use of Foundation-taxpayer's property. The Pamlico County Board argues that this reversal was "unlawful, unreasonable, unjust and unwarranted." We disagree and find that the Tax Commission did not err.

"G.S. 105-345.2 governs the extent of review for appeals from the Property Tax Commission and its provisions are remarkably identical to those found in G.S. 150A. . . . G.S. 105-345.2(c) provides

that the court shall review the whole record and due account shall be taken of the rule of prejudicial error." *In re McElwee*, 304 N.C. 68, 73-74, 283 S.E.2d 115, 119 (1981). G.S. 105-345.2 provides:

> (b) So far as necessary to the decision and where presented, the court shall decide all relevant questions of law, interpret constitutional and statutory provisions, and determine the meaning and applicability of the terms of any Commission action. The court may affirm or reverse the decision of the Commission, declare the same null and void, or remand the case for further proceedings; or it may reverse or modify the decision if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or
>
> (2) In excess of statutory authority or jurisdiction of the Commission; or
>
> (3) Made upon unlawful proceedings; or
>
> (4) Affected by other errors of law; or
>
> (5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

Under the statutorily mandated whole record test of G.S. 105-345.2, this Court is not permitted to replace the Tax Commission's judgment with its own judgment even where there are two reasonably conflicting views. "The whole record test is not 'a tool of judicial intrusion; instead it merely gives a reviewing court the capability to determine whether an administrative decision has a rational basis in the evidence.' " *Rainbow Springs Partnership v. County of Macon*, 79 N.C. App. 335, 341, 339 S.E.2d 681, 685, *disc. review denied*, 316 N.C. 734, 345 S.E.2d 392 (1986) (*quoting In re Rogers*, 297 N.C. 48, 65, 253 S.E.2d 912, 922 (1979)); *Thompson v. Wake County Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). Furthermore, "[r]esolving conflicts in the evidence and weighing the credibility of the witnesses is for the fact-finder, in this case, the [Property Tax] Commission." *Rainbow Springs Partnership*, 79 N.C. App. at 343, 339 S.E.2d at 686 (citing *In re Appeal of the Greensboro Office Partnership*, 72 N.C. App. 635, 325 S.E.2d 24, *disc. review denied*, 313 N.C. 601, 330 S.E.2d

610 (1985)). In reviewing whether the whole record fully supports the Commission's decision, this Court must evaluate whether the Commission's judgment, as between two reasonably conflicting views, is supported by substantial evidence, and if substantial evidence is found, this Court is not permitted to overturn the Tax Commission's decision. *Rainbow Springs Partnership*, 79 N.C. App. 335, 339 S.E.2d 681; *Thompson*, 292 N.C. 406, 233 S.E.2d 538.

"It is a principle of law in this State that ad valorem tax assessments are presumed correct. *In re Appeal of Amp, Inc.*, 287 N.C. 547, 215 S.E.2d 752 (1975); *In re Land and Mineral Co.*, 49 N.C. App. 60[8], 272 S.E.2d 878 (1980), *disc. rev. denied*, 302 N.C. 397, 279 S.E.2d 351 (1981). This presumption places the burden upon the taxpayer to prove that the assessments are incorrect." *In re Odom*, 56 N.C. App. 412, 413, 289 S.E.2d 83, 85-86, *cert. denied*, 305 N.C. 760, 292 S.E.2d 575 (1982). Regarding the rebuttal of this presumption, our Supreme Court has stated:

> We also noted in *Amp* that the presumption of correctness by the county officials is, of course, rebuttable:
>
> > [I]n order for the taxpayer to rebut the presumption [of correctness] he must produce "competent, material and substantial" evidence that tends to show that: (1) Either the county tax supervisor used an *arbitrary method* of valuation; or (2) the county tax supervisor used an *illegal method* of evaluation; AND (3) the assessment *substantially* exceeded the true value in money of the property. [Citation omitted.] Simply stated, it is not enough for the taxpayer to show that the means adopted by the tax supervisor were wrong, he must also show that the result arrived at is *substantially* greater than the true value in money of the property assessed, i.e., that the valuation was *unreasonably high*.
>
> 287 N.C. at 563, 215 S.E.2d at 762 (emphasis in original).
>
> . . . .
>
> When a taxpayer has rebutted the presumption of regularity in favor of the county, as appellants have here, the burden then shifts to the county to demonstrate to the Property Tax Commission that the values determined in the revaluation process were not substantially higher than that called for by the statutory formula, and the county must demonstrate the

reasonableness of its valuation "by competent, material and substantial evidence." G.S. 105-345.2(b)(5).

> At this juncture, we reiterate that it is the function of the administrative agency to determine the weight and sufficiency of the evidence and the credibility of the witnesses, to draw inferences from the facts, and to appraise conflicting and circumstantial evidence. We cannot substitute our judgment for that of the agency when the evidence is conflicting. *Commissioner of Insurance v. Rate Bureau*, 300 N.C. 381, 269 S.E.2d 547 [1980].

McElwee, 304 N.C. at 75, 86-87, 283 S.E.2d at 120, 126-27 (alterations in original).

In reviewing valuation decisions, two statutes, G.S. 105-283 and G.S. 105-317(a), "must be read in conjunction." *Greensboro Office Partnership*, 72 N.C. App. at 639, 325 S.E.2d at 26. G.S. 105-283 provides in pertinent part:

> All property, real and personal, shall as far as practicable be appraised or valued at its true value in money. When used in this Subchapter, the words "true value" shall be interpreted as meaning market value, that is, the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller, neither being under any compulsion to buy or to sell and both having reasonable knowledge of all the uses to which the property is adapted and for which it is capable of being used.

G.S. 105-317(a) lists the types of factors that are to be considered when determining the "true value" of real property:

> (a) Whenever any real property is appraised it shall be the duty of the persons making appraisals:
>
> (1) In determining the true value of land, to consider as to each tract, parcel, or lot separately listed at least its advantages and disadvantages as to location; zoning; quality of soil; waterpower; water privileges; dedication as a nature preserve; mineral, quarry, or other valuable deposits; fertility; adaptability for agricultural, timber-producing, commercial, industrial, or other uses; past income; probable future income; and any other factors that may affect its value except growing crops of a seasonal or annual nature.

The Tax Commission's findings show that it considered the factors listed above. In its findings of fact, the Tax Commission stated "[t]he Taxpayer, Perry-Griffin Foundation, is prevented by a legally binding restraint on alienation from selling the subject property without the approval of a Superior Court judge" and that the restraint on alienation was an "impediment to [the] actual development of the subject property for residential and recreational purposes." The Tax Commission's findings of fact also show that the Tax Commission fully realized that "in the event that the Foundation were to sell some or all of the subject property, the purchaser would take the land free and clear of all restriction [sic], and would be free to utilize the property for its highest and best use, which is residential and recreational development." From its consideration of these factors, the Tax Commission concluded that Foundation-taxpayer "is unlikely to receive approval for such a sale within the forseeable future. The value of the land in the hands of the Taxpayer, therefore, is its value for timber production purposes."

We find that all of this evidence was relevant to the statutory factors of G.S. 105-317(a). "[T]he weight to be attributed to the evidence is a matter for the fact finder, which in this case is the [Property Tax] Commission." *Greensboro Office Partnership*, 72 N.C. App. at 640, 325 S.E.2d at 26. The Commission's findings and conclusions indicate that it placed much weight on the analysis of probable future income based on the other factor affecting the land's value, the binding restraint on alienation. G.S. 105-317(a) clearly provides that the factors of "probable future income," "past income," "adaptability for . . . timber-producing . . . uses," and "any other factors that may affect its [the land's] value" are to be considered in determining the true value of land. Furthermore, contrary to the Pamlico County Board's contentions, "neither G.S. 105-283 nor 105-317(a) *requires* the Commission to value property according to its sales price in a recent arm's length transaction when competent evidence of a different value is presented." *Greensboro Office Partnership*, 72 N.C. App. at 640, 325 S.E.2d at 26 (emphasis added). Accordingly, we find no error in the Tax Commission's decision.

[2] Similarly, we find no error in the Tax Commission's determination that the Pamlico County Board's residential and recreational use valuation, $2,293,440.00, was substantially greater than the timberland valuation of $331,012.00. *See Land and Mineral Co.*,

49 N.C. App. at 616, 272 S.E.2d at 883 (affirming Superior Court's reversal of Tax Commission's decision to sustain valuation by county that was five times in excess of the true value). With the plaintiff having shown that the Pamlico County Board's valuation was arbitrary and substantially greater than the true value of the land, the burden then shifted to the Pamlico County Board. The Pamlico County Board produced nothing to rebut this evidence and accordingly failed to meet its burden of demonstrating "that the values determined in the revaluation process were not substantially higher than that called for by the statutory formula, and . . . the reasonableness of its valuation 'by competent, material and substantial evidence.' G.S. § 105-345.2(b)(5)." *McElwee*, 304 N.C. at 86-87, 283 S.E.2d at 126.

III.

[3] Additionally, the Pamlico County Board argues that the Tax Commission's decision "destroys the principle of uniformity in assessments for property tax purposes, especially where the restraint was voluntarily created by the taxpayer and where any grantee upon any future permitted conveyance will take free of any and all restraints, and therefore the Property Tax Commission's decision is unlawful, unjust, unreasonable, and unwarranted." We disagree.

In its brief, the Pamlico County Board argues:

> Note that N.C.G.S. § 105-283 states that the true value is the price estimated in terms of money at which the property would change hands between a willing and financially able buyer and a willing seller and for which it is adapted for and capable of being used. Such criteria necessarily refers to the property in the hands of the purchaser, not the seller. Legal restraints in the hands of the owner/seller are not relevant, but it is only the value of the land in the hands of a willing and financially able buyer that is relevant. A buyer of Foundation land would take free of any and all restraints. Therefore, in no manner does the Machinery Act allow for a consideration of facts whereby the seller of the land is under a voluntary legal restraint from selling said land in calculating its true value for tax purposes. Rather N.C.G.S. § 105-317(a) provides for particular factors to be considered in this "true value" determination, and all of these factors relate to encum-

> brances which would affect the value of said land in the hands of a willing and financially able buyer.

We disagree. Initially, we note that from the Tax Commission's first five findings of fact, statement of the case, and conclusions, it is apparent that the Tax Commission duly considered this argument and the Pamlico County Board's reasons offered in support of its valuation.

The Machinery Act does not require the unyielding uniformity suggested by the Pamlico County Board in its brief. As noted *supra*, this Court has previously held that "neither G.S. 105-283 nor 105-317(a) *requires* the Commission to value property according to its sales price in a recent arm's length transaction when competent evidence of a different value is presented." *Greensboro Office Partnership*, 72 N.C. App. at 640, 325 S.E.2d at 26 (emphasis added). Additionally, G.S. 105-283 specifically provides that "[a]ll property, real and personal, shall *as far as practicable* be appraised or valued at its true value in money." (Emphasis added.) Had the legislature intended the unyielding uniformity proposed by the Pamlico County Board, it would not have included the words "as far as practicable" within the legislative directive of G.S. 105-283.

In the last paragraph of its final decision, the Tax Commission specifically emphasized that "[t]he Commission finds the facts in this case to be unique and accordingly reaches its decision based solely on the facts presented in this case." Accordingly, it is apparent that the Tax Commission found that to tax the Foundation-taxpayer's property according to the market value standard would not be "practicable" under G.S. 105-283 because of the unique circumstances involving the charitable trust in this case. The Tax Commission's decision is rational because there is no market, as the term is used in the Machinery Act, for the property in question. The record shows that in the earlier litigation Foundation-taxpayer sought the Superior Court's approval to sell the timberland to a willing purchaser and the Superior Court refused to declare the restraint on alienation void. The property cannot be sold without the application to and subsequent approval of the Superior Court. The Pamlico County Board itself stipulated that "[t]he taxpayer is legally unable to *develop, sell or market* said forest lands and is unable legally to make any other use of the same except to harvest timber." (Emphasis added.) Hence, no market, as the term is used in the Machinery Act, exists for this particular piece of

property. Because of the valid and enforceable restraint on alienation, the property itself is unmarketable. *Cf. McElwee*, 304 N.C. at 84, 283 S.E.2d at 125 (in appraisal process, county's decision that "does not comport with the realities of the economic world" held to be "plainly arbitrary"). Accordingly, to tax the property according to normal market assumptions would be unfair to the charitable trust and in doing so, would seriously erode and ultimately defeat the public policy of this State in favor of charitable trusts. At oral argument, counsel for appellant conceded that the Pamlico County Board's appraisal would place a severe tax burden on Foundation-taxpayer, such that Foundation-taxpayer would essentially be forced to sell a significant portion of the corpus of the trust just to pay the taxes. Accordingly, we find no error in the Tax Commission's finding that the Pamlico County Board acted arbitrarily in its refusal to consider these factors affecting the property's value under G.S. 105-317(a).

We have considered *In re Southern Railway*, 313 N.C. 177, 328 S.E.2d 235 (1985) and find it readily distinguishable. In that case, our Supreme Court overturned the Tax Commission's appraisal because the appraisal was based on the testimony of an expert who testified that " 'I find the true value of the railroad system property by determining the value to the owner of the property. I explained that *I do not consider value to a willing buyer* because railroad sales are few and those sales are abnormal and don't represent fair market.' (Emphasis added)." *Id.* at 188, 328 S.E.2d at 242. In *Southern Railway*, the owner of the railroad was free to sell the property at any time, whereas here we are dealing with the property of a charitable trust. Here, there is a legal restraint on alienation which serves as an impediment to the sale of the property and is supported by the public policy favoring charitable trusts.

Furthermore, in *Bosley*, 29 N.C. App. at 472, 224 S.E.2d at 689, this Court stated that "[i]t would be meaningless to construe literally the applicable appraisal statutes of the Machinery Act." This Court further emphasized that it is the uniformity in *reasonable variations* from market value which must be preserved, not outright uniformity in taxing each piece of property according to its hypothetical highest and best use in the marketplace:

> Equality of appraisal, with resulting equity in taxation, is fundamental in the Machinery Act. There may be *reasonable varia-*

> *tions* from market value in appraisals of property for tax purposes *if these variations are uniform*. A uniform and dependable method of property appraisal which gives effect to the various factors that influence the market value of property and results in equitable taxation does not violate the appraisal provisions of the Machinery Act.

Bosley, 29 N.C. App. at 472, 224 S.E.2d at 688 (emphasis added). We agree and reaffirm this statement. There is no statutory proscription against the Tax Commission's declining to use the highest and best use valuation provided it has considered both the specifically enumerated factors of G.S. 105-317(a) and, as G.S. 105-317(a) itself provides, "any other factors that may affect its [the land's] value." Accordingly, since the Tax Commission's valuation decision was not strictly a question of law, we deem that the Tax Commission's decision was made in good faith and fell within a zone of reason, being well grounded in law and public policy, and as such was neither arbitrary nor illegal. Of course, the holding of this opinion is limited to the ad valorem taxation of real property held by charitable trusts.

IV.

In sum, a careful and thorough review of the whole record shows that the Tax Commission's final decision is supported by competent, material, and substantial evidence. Since we have determined that the decision has a rational basis in the evidence, the Tax Commission's final decision, holding that the Foundation-taxpayer's property shall be taxed at the appraised value of $331,012.00, is affirmed.

Affirmed.

Judges PARKER and ORR concur.

STATE OF NORTH CAROLINA v. CHARLES SAMUEL BRUNO

No. 915SC832

(Filed 5 January 1993)

1. **Evidence and Witnesses § 2211 (NCI4th)— DNA test results—changing procedures—admissibility**

DNA test results were not inadmissible because the FBI's testing procedure is still changing where an FBI expert in DNA testing testified that there had been no significant changes in the testing procedures and that he would interpret the case the same way now as he did when the original tests were conducted, and two other expert witnesses testified that the underlying procedures were reliable.

Am Jur 2d, Evidence § 370; Expert and Opinion Testimony §§ 278, 300; Rape §§ 61, 68.

Admissibility of DNA identification evidence. 84 ALR 4th 313.

2. **Evidence and Witnesses § 2211 (NCI4th)— DNA experts—different results—jury question**

Where two DNA experts reached differing results based on independent analyses, it was for the jury to weigh the DNA evidence.

Am Jur 2d, Expert and Opinion Testimony §§ 129-135.

3. **Evidence and Witnesses § 672 (NCI4th)— objection to *testimony—similar evidence admitted without objection*—waiver of objection**

The benefit of defendant's objection to testimony by two expert witnesses was lost when similar testimony by a third expert witness was thereafter admitted without objection.

Am Jur 2d, Appeal and Error §§ 601-604; Trial §§ 413, 420.

4. **Evidence and Witnesses § 2211 (NCI4th)— *DNA testing—FBI* errors—exclusion of specific case—harmless error**

Where defendant's DNA expert was permitted to testify by deposition that there have been cases where false positives incriminated innocent suspects by mistake and that the FBI had admitted making errors in two cases which he named,

any error committed by the trial court in excising the expert's testimony about a specific third case was harmless.

Am Jur 2d, Appeal and Error §§ 778, 800.

5. **Evidence and Witnesses § 2211 (NCI4th)— DNA testing—inconclusive results—testimony not improper**

A DNA expert was not improperly permitted to give unsupported testimony that the upper bands of the fourth probe were a match where he did not testify that streaking indicated there was a match among the upper bands of the fourth probe but merely explained to the jury why streaks appeared on the x-ray, and he specifically testified that the upper bands were inconclusive.

Am Jur 2d, Expert and Opinion Testimony §§ 33, 34, 36.

6. **Evidence and Witnesses § 2176 (NCI4th)— standard for scientific evidence—opinion excluded**

The trial court did not err in sustaining the State's objection to a question asking the State's DNA expert his opinion concerning the exactness required of a scientific test used to deprive someone of his liberty since the N.C. Supreme Court has already adopted a standard to determine when a scientific test may be used to deprive a defendant of his liberty.

Am Jur 2d, Expert and Opinion Testimony § 136.

7. **Rape and Allied Offenses § 5 (NCI3d)— second degree rape—sufficient evidence of slight penetration**

The State's evidence of slight penetration was sufficient to withstand defendant's motion to dismiss a charge of second degree rape where the victim testified that defendant attempted to have sex with her but couldn't because, in defendant's words, she was "too tight," and the examining physician testified that he discovered a bruise around the right upper part of the lips of the vaginal vault in the entrance to the vagina consistent with vaginal penetration.

Am Jur 2d, Rape §§ 3, 113; Trial §§ 901-904.

Appeal by defendant from judgment entered 25 June 1990 by Judge James R. Strickland in New Hanover County Superior Court. Heard in the Court of Appeals 10 November 1992.

Defendant was indicted and convicted of the following crimes: second degree sex offense, second degree rape and first degree burglary. The charges were consolidated for judgment and defendant was sentenced to a thirty-nine year prison term with the North Carolina Department of Correction.

The State's evidence tended to show the following: The victim's mother lived with her husband and her three children in a town home at Forest By The Sea at Carolina Beach, North Carolina. The victim, the eldest of the three children, lived in a bedroom on the first floor. Her mother lived in a bedroom on the second floor. The victim's father, a Merchant Marine, was frequently away from the home for extended periods of time.

The State's evidence also tended to show that the victim's mother knew the defendant for about three years prior to the date of trial and had had a "relationship" with the defendant for about two years. During their relationship the defendant visited the victim's mother at least once a week in her home. The defendant was familiar with each of the rooms in the home, knew each of the children, and often put the two youngest children to bed. Several times the defendant scaled the back of the town home to reach the balcony outside the victim's mother's bedroom. Once there, he would tap on the sliding glass door. The victim's mother stopped seeing the defendant after the two "started having a lot of problems" in October or November 1988.

The victim's mother testified that on 5 April 1989 she left her children at home between 8:30 p.m. and 9:00 p.m. and went to meet some friends at Adams, a local lounge. Once there, she found the defendant talking with her friends inside the lounge. A short while later, the victim's mother decided to go next door to Harvey's, a lounge at the Ramada Inn. Before she left, the defendant asked her if one of her friends was her new boyfriend. She replied that he was not, and the defendant "said something to the effect that you will get yours." The victim's mother ignored the defendant and left with her friends.

About an hour after the victim's mother arrived at Harvey's she received a phone call from her daughter, the victim. When she answered the call the victim said, "Mommy, Chuck [the defendant] was here .... He raped me[.]" The victim's mother immediately went home. When she arrived at home she noticed that the victim had bruises on her face and neck and that there was a white

streak on her cheek. The victim again told her that the defendant had raped her.

The victim's mother also testified that when she left to go to the lounge earlier that evening she had left her bedroom window open and had closed but not locked her bedroom's sliding glass door. When she arrived back home, the sliding glass door in her bedroom was open and both her bedroom and the victim's bedroom had been left "upside down[.]"

The victim testified that on 5 April 1989 she fell asleep on her bed after watching television. Her bedroom window was open. The victim was asleep on her stomach when she felt someone jump on her back and strike her in the back of the head. Her attacker covered her face, picked her up by her arm, flipped her over onto her back, and told her, "Don't move or scream or I will kill you and cut you up into pieces." He also called her by her first name several times. The victim recognized the attacker's voice, his cologne and the odor of cigarette smoke as that of the defendant. After threatening her and calling her by name the defendant took off the victim's underpants and climbed onto the bed. The defendant attempted to have sex with the victim but was unable and said, "You are too tight." The defendant got mad, hit the victim and "asked [her] to play with his thing." The defendant then told the victim "to put his penis in [her] mouth." The victim complied, but bit down very hard. The defendant became angry again and began choking the victim. The defendant then said, "If you move or scream I will cut you up into pieces." The defendant left the victim's room and quickly ran up the stairs to her mother's bedroom. After the attack "[s]perm was all over [the victim's] face and in [her] mouth, [and] on the side of [her] face." A short while later, the victim got up, looked at herself in the bathroom mirror and then ran to the kitchen where she picked up a knife and dialed 911. After the police arrived, the victim called her mother and was later taken to the hospital. The victim was fourteen years old at the time of the attack.

Dr. Spicer, an expert in the field of emergency medicine, testified that he examined the victim in the early morning hours of 6 April 1989. During his examination, he found multiple bruises around the victim's head and neck including linear marks around her neck suggesting that force had been used to control her neck. Dr. Spicer also found a white stain on the right side of her jaw that fluoresced

under black light suggesting the presence of sperm. The victim's teeth were tender, particularly the two upper front teeth. Dr. Spicer also performed a visual pelvic exam on the victim which revealed a bruise around the right upper part of the lips of the vaginal vault in the entrance to the vagina consistent with vaginal penetration.

Sgt. Still, then a detective with the Carolina Beach Police Department, testified that around 1:30 a.m. on 6 April 1989 he received a call from Det. Hall of the Kure Beach Police Department requesting help with the investigation of a rape case. Det. Hall picked up Sgt. Still and the two men went to the victim's home. Sgt. Still entered the home, collected various items for evidence including the victim's bed linens, a pair of female panties which were lying next to the bed on the floor and a stuffed animal which appeared to have stains on it. Sgt. Still attempted to lift fingerprints from various places throughout the home, but was unable to obtain any prints that were not smudged. Sgt. Still and Det. Hall then went to the hospital where Sgt. Still obtained the victim's nightgown and rape kit which included blood samples. After speaking with the victim, Sgt. Still and Det. Hall obtained an arrest warrant for the defendant and went to Camp Lejeune where they picked him up. Sgt. Still later "obtained a search warrant to obtain a suspect kit" on the defendant. Sgt. Still took the defendant to a hospital and a physician completed "a standard suspect evidence collection kit" which included taking a blood sample. During the physician's examination of the defendant, he noticed marks on the defendant's penis. However, because the marks appeared to the physician to be 24 hours old, no pictures were taken. The next day Sgt. Still packaged the evidence that he had collected, including the night gown and blood samples, and took it to the State Bureau of Investigation's lab in Raleigh.

Peter Deaver, a Special Agent with the SBI and an expert in the field of forensic serology, testified that he conducted tests on the evidence collected by Sgt. Still. A microscopic examination of the victim's gown revealed the presence of spermatozoa. Agent Deaver cut the stain out of the night gown and typed it in order to compare it to blood samples. He determined that the defendant, the victim and her attacker were all ABO type A secreters. However, because bodily fluids can become mixed when a penis is inserted into the mouth of another person, Agent Deaver was unable to make a comparison of the semen stain with the defendant's blood

sample. After conducting these tests, Agent Deaver made dried blood stains of the blood of both the victim and the defendant. The stains, together with a cutting from the night gown containing the semen stain, were marked, packaged and sent to the FBI laboratory for further analysis. The remaining evidence was returned to Sgt. Still. The cheek swabs, the bed linens, the pillow case, the stuffed bear, the vaginal smear, the vaginal swab and the saliva swab of the victim all tested negative for the presence of semen.

After a lengthy *voir dire* hearing the State presented DNA evidence over the defendant's objection. Dr. Harold Deadman, Jr., a Special Agent with the Federal Bureau of Investigation and an expert in the field of DNA analysis, testified for the State. Dr. Deadman explained that DNA, a substance present in each cell of a living organism, contains information controlling the characteristics of organisms from their hair color to their personality and intelligence. Dr. Deadman testified that, with the exception of identical twins, DNA is considered to be unique to each individual. Dr. Deadman also testified that the purpose of DNA analysis is to be able to make a meaningful association or establish a link between different individuals or between a person and a physical object. Dr. Deadman explained the procedure for conducting an analysis of DNA and how that procedure was developed and validated. The procedure involves the use of radioactive DNA probes and results in an x-ray film on which "bands" appear.

Dr. Deadman testified that he received two dried blood stains and a cutting from the victim's night gown from Special Agent Deaver. A DNA analysis was performed on the evidence. During the analysis four probes were conducted which resulted in four x-rays to be used for comparison. According to Dr. Deadman, the first, second and third probes resulted in matches between the stain on the night gown and the defendant. The fourth probe revealed a match among "bottom bands" while the "top band" was inconclusive. Dr. Deadman testified that he did not find any evidence to exclude the defendant as the victim's attacker. Dr. Deadman also testified, over the defendant's objection, that "[t]he four probe result is the basis of a much stronger association than any of the results taken individually." He elaborated, "[t]aken individually they are each the basis for an association and a meaningful association. When they are taken all together it's the basis for an extremely strong association."

Dr. Wesley Kloos and Dr. Mark Nelson also testified as experts on behalf of the State. Dr. Kloos testified that he had reviewed the results of the four probes and agreed that each of the first three probes matched and that the fourth probe's lower band matched while the upper band was inconclusive. Dr. Kloos also testified that there is "[a] greater significance when there is more than one probe matching." Dr. Nelson testified that he reviewed the case file on the defendant and that he found the first three probes to be matches while the fourth probe was inconclusive. Dr. Nelson also testified that "every time you add an extra probe and get an additional match it further strengthens the significance of your analysis."

The defendant, a Marine stationed at Camp Lejeune, testified in his own behalf. He arrived at Adams lounge around 9:30 p.m. on 5 April 1989. While there he agreed to be the third contestant in a "honey dip roll of money contest" or a "money honey roll contest." He stayed at Adams until the second contest had been completed and he found out that another contestant had been found for the third contest. Defendant testified that while at Adams he drank approximately seven beers "[b]ecause I was going to be in the contest and I wanted to get my nerve up to get the dollar bills taken from me from the female." The defendant left Adams about 12:30 or 12:40 a.m. and headed back toward Camp Lejeune. On his way back, the defendant stopped at a Handy Mart where he bought coffee and cigarettes. The defendant then drove to his barracks. The defendant changed clothes, went to the duty hut to see if he had any messages, returned to his barracks and went to bed. The defendant was awakened at approximately 4:00 a.m. by military police who took him to the Provost Marshal's Office, where he was later arrested.

The defendant denied going to the victim's home on the evening in question and denied having physical contact with the victim. The defendant testified that the reason he had climbed up and down from the balcony during his relationship with the victim's mother was because the victim's mother wanted to hide their relationship from the victim. The defendant also testified that his private investigator found out that the cameras at the Handy Mart were non-operational and were there just to make people think they were being filmed. Finally, the defendant explained the marks on his penis as being "burn marks from making love."

The defendant also presented testimony to corroborate his alibi. Debbie Golf testified that she saw the defendant at Adams lounge around 10:30 or 11:00 p.m. right before the second "honey dipping contest" and talked to him for about ten or fifteen minutes. Debra Britt testified that she saw the defendant at Adams lounge at about 12:15 or 12:20 a.m. on 6 April 1989. Larry Anderson testified that he was standing duty NCO at Camp Lejeune on the night of 5 April 1989. He saw the defendant come into the duty hut shortly after 2:10 a.m. on 6 April 1989. Finally, Mark Perry, a private investigator, testified to the length of time it would take to drive from Adams to Forest By The Sea and from Forest By the Sea to Camp Lejeune. The cumulative effect of this testimony was to show that the defendant could not have driven from Adams to Forest By The Sea and then to Camp Lejeune in time to be seen by Mr. Anderson at 2:10 a.m.

The defendant also presented deposition testimony of Dr. Steven C. Peiper, an expert in the field of molecular biology and pathology with particular expertise with DNA. By deposition, Dr. Peiper testified that based on the FBI's criteria for a match probes 1, 2 and 3 were matches. Probe 4, however, was not a match and indicated that the DNA specimen from the gown came from someone other than the defendant. Dr. Peiper also testified that he re-analyzed the first three probes himself and determined that only the first two were in fact matches. He testified that this indicated that the defendant was not the source of the genetic material.

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

Nora Henry Hargrove for the defendant-appellant.

EAGLES, Judge.

I

At the outset we note that the defendant raises twenty-two assignments of error. However, because the defendant has failed to bring forward assignments 1, 2, 5, 6, 8, 10, 11, 12, 14, 17, 18, 19, 21 and 22 in his brief, they are deemed abandoned. N.C.R. App. Pro. 28(b)(5).

II

By way of his third and fourth assignments defendant argues that the trial court committed reversible error by admitting DNA evidence. Specifically, defendant argues the evidence should have been excluded because: (1) the FBI's procedures are unreliable because they are in a state of flux and the results are not reproducible and (2) the trial court failed to resolve conflicts in the expert DNA testimony. We disagree.

In *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990), our Supreme Court determined that DNA evidence was sufficiently reliable to be admitted into evidence. In so determining, the Court

> focused on the following indices of reliability: the expert's use of established techniques, the expert's professional background in the field, the use of visual aids before the jury so that the jury is not asked to "sacrifice its independence by accepting [the] scientific hypotheses on faith," and the independent research conducted by the expert.

Id. at 98, 393 S.E.2d at 853 (citation omitted). However, that admission was not without qualification.

> The admissibility of any such evidence remains subject to attack. Issues pertaining to relevancy or prejudice may be raised. For example, expert testimony may be presented to impeach the particular procedures used in a specific test or the reliability of the results obtained. *See, e.g., People v. Castro*, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (1989). In addition, traditional challenges to the admissibility of evidence such as the contamination of the sample or chain of custody questions may be presented. These issues relate to the weight of the evidence. The evidence may be found to be so tainted that it is totally unreliable and, therefore, must be excluded.
>
> *State v. Ford*, --- S.C. at ---, 392 S.E.2d at 784. *See also State v. Schwartz*, 447 N.W.2d 422, 428 (Minn. 1989) . . . .

Id. at 101, 393 S.E.2d at 854. We read *Pennington* to hold that a trial court may decide as a matter of law that DNA evidence is inadmissible for any number of reasons including, but not limited to, unreliable procedures or results, contamination of the sample or chain of custody questions. However, where unfair prejudice

is not clear and where there is merely conflicting expert testimony regarding interpretation of the DNA evidence or where two experts have reached differing results based on independent analyses of the DNA, the issue becomes one of credibility of the experts. In that situation the jury is obligated to determine what weight each expert's testimony should receive.

[1] Here, the defendant first argues that the procedures used by the FBI were unreliable because they are in a state of flux. More specifically, defendant argues that "[a]lthough the underlying procedure may be reliable, . . . the F.B.I.'s witness showed that the procedure was still changing." The State correctly points out in its brief that the "[d]efendant appears to have overlooked the commonly known fact that most or all scientific procedures are constantly being refined in an effort to improve man's knowledge. If this were not so, our knowledge of ourselves and our universe would be both minimal and static."

The critical question here is not whether the DNA procedures were changing, but whether the changes that have been made by the FBI demonstrate that the earlier procedures, which were used in the instant case, were so unreliable that the trial court should have completely excluded the evidence. The defendant admits in his brief that both Dr. Kloos and Dr. Nelson testified that the underlying procedures were reliable. Moreover, Dr. Deadman, the FBI's expert, addressed the concerns of the defendant. Dr. Deadman testified that there had been no significant changes in the testing procedures and that he would interpret the case the same way now as he did when the original tests were conducted. Defendant's argument is without merit.

[2] Defendant next argues the FBI's procedures were unreliable because "Dr. Peiper was unable to reproduce their match analysis." Where two experts have reached differing results based on independent analyses, the jury is left to weigh the evidence. This argument is also without merit.

Finally, under this assignment, the defendant argues that the trial court erred by concluding that the DNA evidence was reliable. Specifically, defendant argues that the trial court erred by failing to resolve conflicts in expert testimony regarding interpretation of the fourth probe. Once again, this was an issue properly left to the jury. Accordingly, this argument is overruled.

III

[3] By way of his seventh assignment of error defendant argues that the trial court erred by allowing both Dr. Deadman and Dr. Kloos to testify that the combined results of the several probes resulted in a stronger and more significant association than any one of the probes taken individually. However, the defendant failed to object when Dr. Nelson subsequently testified giving substantially the same testimony. "It is well settled that where evidence is admitted over objection, and the same evidence is later admitted without objection, the benefit of the objection is lost." *State v. Beasley*, 104 N.C. App. 529, 532, 410 S.E.2d 236, 238 (1991) (citing *State v. Whitley*, 311 N.C. 656, 319 S.E.2d 584 (1984)). This assignment is overruled.

IV

[4] Defendant argues in his sixteenth assignment of error that the trial court erred by excising portions of Dr. Peiper's deposition testimony. We disagree.

Defendant first argues that the trial court erred by excising Dr. Peiper's testimony regarding the case of *People v. Castro*, 144 Misc. 2d 956, 545 N.Y.S.2d 985 (1989). Defendant contends that Dr. Peiper should have been allowed to testify about the facts and name of the specific case to illustrate to the jury that DNA "tests are not infallible." According to defendant, if the jury heard a specific case name, "the idea of scientific fallibility [would] become[ ] real."

Assuming *arguendo* that the trial court committed error by excising the testimony, any error committed was harmless. Dr. Peiper was allowed to testify that there have been cases where false positives incriminate innocent suspects by mistake. Moreover, Dr. Peiper was allowed to testify that he was aware that the FBI had admitted making errors in two specific cases, *Iowa v. Smith* and *New Mexico v. Anderson*. This argument is overruled.

Defendant next argues that the trial court erred by excluding Dr. Peiper's testimony concerning the shortcomings of the FBI's data base. At trial the defendant made a motion in limine to prevent State witnesses "from making any reference to any numerical figure in connection with the DNA testing . . . [because] the [FBI's] data base for attaching a numerical probability figure is inadequate and insufficient." The trial court allowed the defendant's motion in limine.

The defendant now argues that because the trial court allowed the State's experts to testify that matches of multiple probes are more significant than a match of an individual probe, the trial court violated its own ruling and forced the defendant to choose between opening the door to statistical evidence of a match by impeaching the FBI's data base and "try[ing] to cut his losses by not allowing invalid and misleading number crunching to be introduced." We have already determined that defendant here failed to properly preserve for our review the issue of whether the testimony regarding the significance of multiple matches was proper. Accordingly, we do not address that issue again. Furthermore, we note that it was the defendant who sought to exclude statistical evidence of a match because the FBI's data base was allegedly inadequate. He cannot now complain that his own expert was not allowed to testify to impeach the very data base evidence that he successfully asked be excluded. "A defendant is not prejudiced by the granting of relief which he has sought or by error resulting from his own conduct." G.S. 15A-1443(c); *e.g. State v. Patterson*, 332 N.C. 409, 420 S.E.2d 98 (1992). Accordingly, this assignment is overruled.

V

[5] In his ninth assignment of error, the defendant argues that the trial court erred by allowing Dr. Deadman to testify that the fourth probe was inconclusive because the probative value of that evidence was outweighed by its prejudicial effect. We disagree.

During direct examination, Dr. Deadman testified that his examination of the fourth probe revealed that the bottom bands of the probe were a match. The upper bands, however, were inconclusive due to DNA degradation. In fact, Dr. Deadman testified that the upper four bands were essentially invisible. Dr. Deadman also testified that there was "streaking from the position of the defendant's upper band . . . being consistent with degraded DNA." Dr. Deadman, over objection, explained the streaking as follows:

> In order for an exposed area to develope [sic] in a piece of x-ray film the probe has to bind to something. The probe is only going to bind to particular pieces that have the sequence that it recognizes.
>
> The probe is, in fact, binding to something in this upper region. If there were no bands above this lower band the

probe would not be expected to bind to any great extent at that point and so the streaking from, from this upper point on down is consistent with something being there even though a distinct band cannot be seen.

Defendant argues that he was unfairly prejudiced by this testimony because Dr. Deadman was allowed to testify that there were matching bands when in fact there simply was no evidence to support his testimony. We disagree with defendant's interpretation of Dr. Deadman's testimony. Dr. Deadman did not testify that the streaking indicated there was a match among the upper bands of the fourth probe. Rather, his testimony merely explained to the jury why streaks appeared on the x-ray. Moreover, Dr. Deadman specifically testified that the upper bands were inconclusive. This assignment is overruled.

VI

[6] By his thirteenth assignment defendant argues that the trial court committed reversible error by limiting the cross-examination of Dr. Kloos. At trial the following exchange occurred:

Q. You heard Dr. Deadman testify that even using computers and television cameras that the bands cannot be measured exactly?

A. Correct.

Q. So this is not an exact science by any means?

A. I look at the whole area of biology as perhaps a little less exact than physics, for example, if that's what you are using. I am surmising you may be using it as a standard for an exact science if there is such a beast.

Q. Do you think it is too much to demand with someone's liberty is at stake that the test be—

MS. HOLT: Objection.

COURT: That objection is sustained.

A: I think—

MS. HOLT: You don't need to answer.

COURT: Wait for the next question.

Defendant argues that the trial court's ruling effectively prevented him from properly developing "[t]he concept of scientific error in a forensic setting and its consequences. . . ." We disagree.

First, it should be noted that Dr. Kloos earlier testified that DNA is not yet automated and, therefore, is only as good as the people performing the tests. Second, the testimony which the defendant sought to elicit from Dr. Kloos is irrelevant here. Regardless of what standard Dr. Kloos feels should be applied, our Supreme Court has already adopted a standard to determine when a "scientific test" may be used to deprive someone of their liberty. *E.g., State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984). This argument is wholly without merit.

VII

[7] Defendant next argues, in his fifteenth assignment of error, that the trial court erred by denying his motion to dismiss the charge of second degree rape because there was no evidence of vaginal penetration. We disagree.

> In ruling on a motion to dismiss for insufficient evidence the trial court must consider the evidence in the light most favorable to the state, which is entitled to every reasonable inference which can be drawn from that evidence. *State v. Bell*, 311 N.C. 131, 138, 316 S.E.2d 611, 615 (1984). There must, however, be substantial evidence of each essential element of the offense charged, together with evidence that the defendant was the perpetrator of the offense. *State v. Gardner*, 311 N.C. 489, 510-11, 319 S.E.2d 591, 605 (1984).

State v. McNicholas, 322 N.C. 548, 556-57, 369 S.E.2d 569, 574 (1988).

In order for a charge of second degree rape to withstand a motion to dismiss, evidence of vaginal intercourse must be presented. G.S. 14-27.3 (1986)."The slightest penetration of the female sex organ by the male sex organ is sufficient to constitute vaginal intercourse within the meaning of the statute." *McNicholas*, 322 N.C. at 556, 369 S.E.2d at 574 (1988). "It is not necessary that the vagina be entered or that the hymen be ruptured; the entering of the vulva or labia is sufficient." *State v. Murry*, 277 N.C. 197, 202, 176 S.E.2d 738, 742 (1970).

Here, the victim testified that the defendant attempted to have sex with her but couldn't because in the defendant's words, she was "too tight." Dr. Spicer testified that when he examined her he discovered a bruise around the right upper part of the lips of the vaginal vault in the entrance to the vagina consistent with vaginal penetration. This testimony was clearly sufficient on the issue of penetration to withstand the defendant's motion to dismiss. This assignment is overruled.

VIII

Defendant finally argues in his third, fourth, and twentieth assignments that admission of DNA analysis in the forensic setting is premature and deprived the defendant of his right to due process and a fair trial. To support this assignment, the defendant points to a number of "issues" raised by literature in the field. However, the defendant also concedes that our Supreme Court has already decided that North Carolina's courts are generally open to the admission of DNA evidence. *State v. Pennington*, 327 N.C. 89, 393 S.E.2d 847 (1990). Of course, the reliability of DNA evidence may be questioned in any given case. *Id.* This assignment does not bring forward a specific objection to the admission of DNA evidence in this case, but rather challenges its general admissibility. We are bound by the holding in *Pennington*. Accordingly, this assignment is overruled.

IX

Finally, we note that we are not directly confronted with the troublesome issue of whether the FBI's data base is sufficiently broad to allow introduction of evidence concerning the statistical probability that a given defendant is the perpetrator of a charged offense. Accordingly, we do not address it here.

No error.

Judges PARKER and ORR concur.

GAIL LOVELL, ADMINISTRATRIX OF THE ESTATE OF ALLISON LOVELL, DECEASED, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9126SC619

(Filed 5 January 1993)

1. **Damages § 135 (NCI4th)— automobile accident—insurance—bad faith refusal to settle claim—evidence sufficient**

The evidence of bad faith refusal to settle a med pay (medical payments) insurance claim arising from an automobile accident was sufficient to withstand a motion for a directed verdict where there was no dispute that the med pay claim was valid; although defendant alleged that it did not actually refuse to pay the claim and that plaintiff failed to make a formal demand and defendant simply forgot, common sense leads to the conclusion that plaintiff's submission of the funeral expenses to defendant was a sufficient indication of a desire to be paid under the med pay provisions, bearing in mind that defendant's adjuster had specifically stated that the bills would be paid upon receipt; the jury could reasonably draw the inference from the evidence presented that defendant's failure to pay was intentional, in bad faith, not due to innocent mistake or honest disagreement, and intended to "wear down" plaintiff to influence settlement of the liability claim; and there was sufficient evidence of aggravated conduct. Although plaintiff relies on conduct not specifically connected to the med pay claim to support allegations of aggravated conduct, defendant linked the wrongful death and liability claims and wanted to resolve them at the same time, so that consideration of the whole record of defendant's conduct is permissible.

Am Jur 2d, Insurance §§ 1403, 1404.

Liability insurance: third party's right of action for insurer's bad-faith tactics designed to delay payment of claim. 62 ALR4th 1113.

2. **Appeal and Error § 156 (NCI4th)— insurance company's bad faith refusal to settle—instructions—failure to object or to request special instruction in writing**

Review of defendant insurance company's assignment of error to the instructions on bad faith refusal to settle was

precluded where defendant orally requested the trial judge to instruct on bad faith refusal to settle, objected at trial and requested re-instruction on a portion of the instruction, and did not make further objections when the judge complied. Failure to timely object to jury instructions constitutes a waiver of any objection and special instruction requests are required to be submitted in writing. N.C.G.S. § 1A-1, Rule 51(b).

Am Jur 2d, Appeal and Error §§ 533, 537.

3. **Damages § 135 (NCI4th) — insurer's bad faith refusal to settle claim — punitive damages — not excessive**

The trial court correctly denied defendant's motion for a new trial based on an excessive punitive damages award where plaintiff alleged bad faith refusal to settle a claim, the claim at issue was a $2,000 med pay claim, and the jury awarded $225,000 in punitive damages. The trial judge, who actively participated in the trial and had first-hand knowledge of the proceedings, was clearly in a much better position than the appellate court to determine whether the award was excessive. The fact that plaintiff only requested $15,000 in punitive damages is a factor but is not determinative. Had plaintiff pled correctly, the complaint would have merely requested punitive damages in excess of $10,000 and the evidence presented at trial was sufficient to support the jury's verdict.

Am Jur 2d, Damages § 739.

Insurer's liability for consequential or punitive damages for wrongful delay or refusal to make payments due under contracts. 47 ALR3d 314.

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

Judge WALKER dissenting.

Appeal by defendant from judgment entered 12 February 1991 by Judge John R. Friday in Mecklenburg County Superior Court. Heard in the Court of Appeals 14 April 1992.

DeVore & Acton, by William D. Acton, Jr. and Fred W. DeVore, III, for plaintiff-appellee.

Kennedy Covington Lobdell & Hickman, by Wayne P. Huckel, Charles V. Tompkins, and Michelle C. Landers, for defendant-appellant.

LEWIS, Judge.

Allison Lovell and Rusty Lewis were killed in a car accident the morning after their high school prom. Rusty was driving the car with the permission of the owner, Allison's father Michael Lovell. The vehicle was insured by an automobile liability policy issued by defendant. The policy included a bodily injury liability limit of $250,000.00 per person per accident, medical payments [hereinafter med pay] coverage of $2,000.00 per person per accident, and collision coverage. Both occupants of the car were entitled to the med pay coverage. Because Rusty was driving at the time of the accident with the permission of Mr. Lovell, defendant was obligated to provide him with liability coverage. This obligation placed defendant in a position adversarial to that of plaintiff, who had a significant wrongful death claim against Rusty's estate.

William Gill, defendant's agent who had previously dealt with Mr. Lovell in connection with this insurance policy, and Francis Walker, an adjuster and twenty-year employee of defendant, repeatedly contacted the Lovells before the funeral until they met with Mr. Walker eight days after the accident. At that meeting Mr. Walker assured the Lovells that the med pay claim, which covered funeral expenses, would be paid within two weeks of receipt of the bills regardless of the status of any liability claim. Mr. Walker never stated that in addition to submitting the bills the Lovells would have to make a specific request or demand for payment, nor was such a demand mentioned in the policy. At this point the Lovells had not mentioned the possibility of filing a wrongful death claim. To the Lovells' surprise and revulsion, Mr. Walker began discussing the liability coverage and the low value of their daughter's wrongful death claim at this initial meeting.

One day later Mr. Walker informed plaintiff by telephone that defendant would prefer to settle all claims including the med pay claim and any liability claim, arising out of the same accident at the same time. The Lovells then retained an attorney, Harold

Bender, who notified defendant that he would handle all further inquiries and communications for the Lovells.

The Lovells submitted the funeral bills on July 21, 1988, but these bills had not yet been paid at the time this lawsuit was filed in May 1989. In comparison, the bills submitted for Rusty Lewis on that same day were paid within two or three weeks. Defendants contend that this disparity in treatment is due to the fact that Mrs. Lewis specifically requested payment in a letter sent along with the bills, whereas Mr. Bender merely stated that he wanted to discuss the case with Mr. Walker and did not mention the med pay claim in the letter he sent with the Lovells' bills.

In September 1988 Mr. Bender informed Mr. Walker by letter that the Lovells were demanding the policy limits of $250,000.00 on the wrongful death claim. On November 4, 1988, Mr. Walker offered to settle the wrongful death claim for $30,000.00. The Lovells rejected the offer and continued to demand the policy limits of $250,000.00. Mr. Bender filed the wrongful death action on November 14, 1988. Thereafter Mr. Walker maintains that his only involvement with the case was some follow-up work and discussion of the wrongful death action, and that he never heard anything else from Mr. Bender or the Lovells regarding the med pay claim. During the summer of 1990, the wrongful death action went to trial and ended in a mistrial four days later after the jury could not reach a verdict. That claim was then settled for $200,000.00.

Plaintiff, mother and administratrix of the estate of Allison Lovell, filed this lawsuit on May 1, 1989 to recover on the $2,000.00 med pay claim. Plaintiff also alleged that defendant's refusal to settle and negotiate plaintiff's claim was willful and in bad faith, and therefore sought punitive damages of $15,000.00. At the February 4, 1991 trial, defendant's excuses for nonpayment of the claim were that it "just plumb forgot," and that plaintiff had failed to make a formal written demand for payment. The jury awarded $2,000.00 on the med pay claim and $225,000.00 in punitive damages, and judgment was entered accordingly. Defendant appeals, alleging that the judge erred in denying its motion for a directed verdict, the judge erred in failing to correctly identify and explain the essential elements of a bad faith refusal to settle in its instructions to the jury, and the judge erred in refusing

to grant its motion for a new trial on the basis that the verdict was excessive.

I. Elements of tort of insurance company's bad faith refusal to settle a claim

[1] First, the defendant challenges the denial of its motion for a directed verdict at the conclusion of the evidence, alleging that plaintiff's evidence did not establish the elements of a bad faith refusal to settle a claim. On a motion for directed verdict the court must consider the evidence in the light most favorable to the nonmovant, allowing the nonmovant the benefit of every reasonable inference. *Atlantic Tobacco Co. v. Honeycutt*, 101 N.C. App. 160, 163, 398 S.E.2d 641, 643 (1990), *disc. rev. denied*, 328 N.C. 569, 403 S.E.2d 506 (1991). If there is more than a scintilla of evidence in the nonmovant's favor, the motion must be denied. *Snead v. Holloman*, 101 N.C. App. 462, 464, 400 S.E.2d 91, 92 (1991). Finally, if the question of whether to grant a directed verdict is close, the case should go to the jury. *Atlantic Tobacco*, 101 N.C. App. at 163, 398 S.E.2d at 642. In this case, the evidence was sufficient to withstand the motion for directed verdict.

In order to recover punitive damages for the tort of an insurance company's bad faith refusal to settle, the plaintiff must prove (1) a refusal to pay after recognition of a valid claim, (2) bad faith, and (3) aggravating or outrageous conduct. *Michael v. Metropolitan Life Ins. Co.*, 631 F. Supp. 451, 455 (W.D.N.C. 1986); *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985).

(1) Refusal to pay valid claim

There is no dispute that the med pay claim was valid; defendant stipulated to this in its response to the complaint. Defendant alleges, however, that it did not actually refuse to pay the claim. Rather, it "just plumb forgot," and plaintiff failed to make a formal demand for payment when she submitted the bills to defendant. Defendant stresses the fact that all of the communications between Mr. Walker and Mr. Bender dealt with the liability claim and that neither mentioned the med pay claim. Thus, nonpayment could only be due to "innocent mistake" or a "lack of attention," not a conscious and intentional decision to refuse payment.

Plaintiff, on the other hand, alleges that defendant procrastinated on the med pay claim in order to induce a lower settlement of the liability claim. Moreover, Mr. Walker himself told plaintiff that the med pay claim would be paid upon receipt of the bills and never mentioned the need to formally demand payment. The fact that the bills remained unpaid until defendant's response to the complaint indicates a refusal to pay, according to plaintiff. Also, Mr. Lovell testified that he had, in fact, repeatedly inquired through one of defendant's agents as to the status of the med pay claim.

Common sense leads this Court to the conclusion that submission of the bills representing funeral expenses to defendant was obviously a sufficient indication of the Lovells' desire to be paid under the med pay provisions of their insurance policy. Mr. Walker had specifically stated that the bills would be paid upon receipt. The evidence, when viewed in the light most favorable to plaintiff, is more than sufficient to go to the jury on this element.

(2) Bad faith

According to *Dailey v. Integon Gen. Ins. Corp.*, 75 N.C. App. 387, 331 S.E.2d 148, *disc. rev. denied*, 314 N.C. 664, 336 S.E.2d 399 (1985), bad faith means "not based on honest disagreement or innocent mistake." *Id.* at 396, 331 S.E.2d at 155 (citing *Newton v. Standard Fire Ins. Co.*, 291 N.C. 105, 229 S.E.2d 297 (1976)). Defendant interprets *Dailey* to require a "wrongful reason, purpose or motive for not paying" in order to show bad faith.

Defendant alleges that even if the jury determined it had refused to pay, this refusal was not in bad faith. Defendant denies plaintiff's theory that the delay in payment on the med pay claim was intended to "wear down" plaintiff in order to effectuate a low settlement of the wrongful death claim, noting that the only evidence of this theory was nonpayment from July 1988 to May 1989.

Plaintiff maintains that defendant's excuses for nonpayment were not credible. It is hard to believe that defendant "just plumb forgot" to pay the bills when it promptly paid the Lewis' bills which were submitted on the very same day. Plaintiff also points out that Mr. Walker was a "master adjuster" with 21 years experience, and the evidence reveals that he and his supervisor constantly reviewed the Lovells' file. Defendant's other excuse, that the plaintiff failed to make a formal demand for payment, is weak in light of the fact that Mr. Walker stated the bills would be

paid upon receipt and nothing in the policy required a formal demand for payment. Thus, plaintiff surmises that since these excuses were not convincing, defendant's delay in payment must have been deliberate and intentional in order to "wear down" the Lovells regarding the liability claim. *See Payne v. N.C. Farm Bureau Mut. Ins. Co.*, 67 N.C. App. 692, 694-95, 313 S.E.2d 912, 914 (1984) (pattern of excuses for nonpayment of claim indicative of bad faith).

The evidence, while not overwhelming, was sufficient to withstand the motion for directed verdict. From the evidence presented, the jury could reasonably draw the inference that defendant's failure to pay was intentional, in bad faith, and not due to innocent mistake or honest disagreement. Plaintiff's evidence is even sufficient under defendant's interpretation of *Dailey* requiring wrongful purpose or motive, since it tends to establish that defendant intended to "wear down" the Lovells to influence settlement of the liability claim.

(3) Aggravated conduct

Aggravated conduct may be shown by fraud, malice, gross negligence, insult, rudeness, oppression, or wanton and reckless disregard of plaintiff's rights. *Dailey*, 75 N.C. App. at 394, 331 S.E.2d at 154 (citation omitted).

Defendant claims that there was insufficient evidence of any aggravating conduct. Some of the incidents of questionable conduct occurred before the bills covered by the med pay claim were even submitted, and therefore are irrelevant to failure to pay the med pay claim. Other conduct relied upon by plaintiff concerned only the liability claim, and should not be considered in this case, either, according to defendant.

Plaintiff claims defendant's actions on the whole were insulting, indignant and outrageous. For example, defendant's agent contacted plaintiff and her husband five times before the funeral of their daughter to urge them to meet with the adjuster as soon as possible, and even insinuated that the policy could be voided if they did not immediately comply. At the first meeting, although the Lovells expected to discuss only the car and the med pay coverage, Mr. Walker informed them of a low settlement in another wrongful death case and told them their daughter wasn't worth very much. He stated that he "didn't see a lot of value here," and noted that Allison was "only a high school student" with no job and no dependents. Defendant admits that the adjuster told Mr. Lovell

that his daughter was not asleep at the time of the accident and that she had "burned up."

Plaintiff also claims that aggravated conduct is shown by the fact that defendant admittedly linked the med pay claim and the liability claim, and stated that it wanted to settle all claims at once. Plaintiff's allegations that defendant delayed payment of the med pay claim in order to force a low settlement of the wrongful death claim certainly indicate aggravated conduct. *See Smith v. Nationwide Mut. Fire Ins. Co.*, 96 N.C. App. 215, 219, 385 S.E.2d 152, 154 (1989), *disc. rev. denied*, 326 N.C. 365, 389 S.E.2d 816 (1990) (delay on payment of claim for 5 months a factor showing aggravated conduct). *See also* N.C.G.S. § 58-63-15(11)(m) (1991) (states that "[f]ailure to promptly settle claims where liability has become reasonably clear, under one portion of the insurance coverage in order to influence settlement under other portions of the insurance policy coverage" is an unfair claim settlement practice; however, such a violation can only be challenged by the Commissioner of Insurance of North Carolina, and must be performed often enough to constitute a general business practice).

Plaintiff notes defendant's late start on the investigation of the liability coverage, and a series of unanswered letters from Mr. Bender to Mr. Walker sent from July 1988 to October 1988 regarding the progress on the liability claim. Defendant even denied that Rusty Lewis was the driver of the car, although Allison Lovell's body was found seat-belted on the passenger side. The Lovells had to go to the expense of hiring a reconstruction expert on this issue before defendant admitted liability. *See Dailey*, 75 N.C. App. at 397, 331 S.E.2d at 155 (requiring plaintiff to "go to the inconvenience and expense of obtaining qualified, expert estimates" indicative of aggravated conduct). Plaintiff also notes defendant's low settlement offer of $30,000.00. *See Smith*, 96 N.C. App. at 218, 385 S.E.2d at 154 (a factor contributing to aggravated conduct was low settlement offer in violation of N.C.G.S. § 58-63-15(11)(h) (cited incorrectly as § 58-54.4(11)(h) in text)). Finally, plaintiff alleges that in response to Mr. Lovell's inquiry concerning nonpayment of the med pay claim, defendant's agent responded "[y]ou're the one who got a lawyer," evincing an intent to delay prompt settlement of the suit and hostility to the fact that plaintiff had retained a lawyer.

It is true, as defendant contends, that plaintiff relies on conduct not specifically connected to the med pay claim to support the allegations of aggravated conduct. However, since defendant admittedly linked the wrongful death and med pay claims and wanted to resolve them at the same time, this Court finds it permissible for plaintiff to consider the whole record of defendant's conduct in the matter. There was sufficient evidence in this case to go to the jury on the issue of aggravated conduct on the part of the defendant. The denial of defendant's motion for directed verdict was therefore proper since plaintiff presented sufficient evidence on each element of the tort of bad faith refusal to settle a claim.

II. Jury instructions on elements of bad faith refusal to settle

[2] In its second assignment of error defendant contends the trial court failed to correctly identify and explain the essential elements of the tort of an insurance company's bad faith refusal to settle a claim in its instructions to the jury. During the pre-charge conference defendant orally requested the trial judge to instruct on bad faith refusal to settle, and the judge agreed to do so. However, after the charge was read at trial defendant objected and requested re-instruction on a portion of the charge. The court complied and defendant did not make any further objections until this appeal.

According to the N.C. 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. . . ." Rule 10(b)(2) (1992). The purpose of Rule 10(b)(2) is to avoid unnecessary new trials due to faulty instructions which the court could have corrected if brought to its attention. *See State v. Bradley*, 91 N.C. App. 559, 564, 373 S.E.2d 130, 133 (1988), *disc. rev. denied*, 324 N.C. 114, 377 S.E.2d 238 (1989). Case law establishes that failure to timely object to jury instructions constitutes a waiver of any objection. *See, e.g., Chastain v. Wall*, 78 N.C. App. 350, 355, 337 S.E.2d 150, 153 (1985), *disc. rev. denied*, 316 N.C. 375, 342 S.E.2d 891 (1986). Also relevant to this assignment of error, the General Rules of the Superior and District Courts require that special instruction requests be submitted in writing at the jury instruction conference, and the North Carolina Rules of Civil Procedure require submission in writing before the judge begins his charge to the jury. General Rules of Practice for the Superior and District Courts, Rule 21 (1992); N.C.G.S. § 1A-1, Rule 51(b) (1990).

We agree with plaintiff and hold that defendant's failure to timely object at trial and failure to submit its request for special instructions in writing precludes our review of this assignment of error.

III. Punitive damages

[3] As its third assignment of error, defendant challenges the trial judge's denial of its motion for a new trial on the basis of an excessive punitive damage award. At the outset we note that defendant has submitted a Memorandum of Additional Authority which it seeks to append to this portion of the appeal. Defendant cites *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991), in which the Fourth Circuit struck down South Carolina law on punitive damages as being violative of due process and unconstitutional. Neither party previously raised the issue of the constitutionality of North Carolina's punitive damages scheme, and that issue is not now properly before this Court. *See State v. Cooke*, 306 N.C. 132, 137, 291 S.E.2d 618, 621 (1982) (constitutional issue not raised and passed upon in trial court will not normally be considered on appeal) (quoting *State v. Hunter*, 305 N.C. 106, 112, 286 S.E.2d 535, 539 (1982)).

Rule 59 of the North Carolina Rules of Civil Procedure provides that a new trial may be granted on the grounds of "[e]xcessive or inadequate damages appearing to have been given under the influence of passion or prejudice. . . ." N.C.G.S. § 1A-1, Rule 59(a)(6) (1990). It is within the sole discretion of the trial judge to determine whether to grant a Rule 59 motion for new trial on the grounds of excessive damages. *See Worthington v. Bynum*, 305 N.C. 478, 482, 290 S.E.2d 599, 602 (1982). The judge's decision may be reversed on appeal only if the appellate court "is reasonably convinced by the cold record that the trial judge's ruling probably amounted to a substantial miscarriage of justice" or a "manifest abuse of discretion. . . ." *Id.* at 487, 482, 290 S.E.2d at 605, 604. Furthermore, the party challenging the trial judge's decision must meet a heavy burden of proof. *Id.* at 484-85, 290 S.E.2d at 604; *Burgess v. Vestal*, 99 N.C. App. 545, 550, 393 S.E.2d 324, 327, *disc. rev. denied*, 327 N.C. 632, 399 S.E.2d 324 (1990).

Defendant contends that the $225,000.00 punitive damages award is "clearly unreasonable" because it "does not bear any logical relation" to the amount of the medical payments claim or conduct of Nationwide. Recently, this Court held that a trial judge had

not abused his discretion in denying a Rule 59 motion for new trial on the basis that the punitive damages of $175,000.00 were excessive when compared to the compensatory damages of $4,550.00. *Maintenance Equip. Co. v. Godley Builders*, 107 N.C. App. 343, 353-54, 420 S.E.2d 199, 204-05 (1992). The Court noted that punitive damages are awarded "above and beyond actual damages" in order to punish the wrongdoer. *Id.* at 354, 420 S.E.2d at 205. 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), a jury awarded $1.5 million compensatory damages and $1.5 million punitive damages for the wrongful death of a child who had been playing near an unlocked electrical cabinet and was electrocuted when he climbed inside. The Court upheld the verdict, finding no "substantial miscarriage of justice." 81 N.C. App. at 226, 344 S.E.2d at 137. *See also Hairston v. Alexander Tank & Equip. Co.*, 60 N.C. App. 320, 330, 299 S.E.2d 790, 796 (1983), *rev'd on other grounds*, 310 N.C. 227, 311 S.E.2d 559 (1984) (this Court upheld $200,000.00 verdict in negligence action, stating that it would not "second-guess a jury"); *Kremer v. Food Lion, Inc.*, 102 N.C. App. 291, 296, 401 S.E.2d 837, 839-40 (1991) (this Court upheld trial judge's denial of Rule 59 motion for new trial on grounds of excessive verdict where jury had awarded plaintiff who fell in defendant's supermarket $90,000.00). We have not found any cases finding an abuse of discretion for failure to order a new trial on the basis of excessive damages in North Carolina.

The trial judge, who actively participated in the trial and had first-hand knowledge of the proceedings, was clearly in a much better position than this Court to determine whether the jury award was excessive. *Worthington*, 305 N.C. at 487, 290 S.E.2d at 605. Our Supreme Court stated in *Worthington* that the appellate courts "should place great faith and confidence in the ability of our trial judges to make the right decision, fairly and without partiality, regarding the necessity for a new trial." *Id.* Moreover, trial judges should use their discretion "sparingly," and "in proper deference to the finality and sanctity of a jury's findings." *Hairston*, 60 N.C. App. at 330, 299 S.E.2d at 796. We find no abuse of discretion here.

The fact that plaintiff only requested $15,000.00 in punitive damages in the complaint is a factor, but is not determinative as to whether the verdict was excessive. Had the plaintiff plead correctly, the complaint would have merely requested punitive

damages in excess of $10,000.00. N.C.G.S. § 1A-1, Rule 8(a)(2) (1990). This Court has noted the "longstanding rule that damages in this state are governed by the evidence presented, rather than the claim made for relief. . . ." *Biggs v. Cumberland County Hosp. Sys., Inc.*, 69 N.C. App. 547, 550, 317 S.E.2d 421, 424 (1984). The evidence presented at trial was sufficient to support the jury's verdict. The fact that the complaint contains a much lower figure does not persuade this Court that the trial judge abused his discretion.

The evidence presented was sufficient to support both the finding of the tort of bad faith refusal to settle a claim and the punitive damages award. We find no error. The decision of the superior court is

Affirmed

Judge WYNN concurs.

Judge WALKER dissents.

Judge WALKER dissenting.

I respectfully dissent from that portion of the majority opinion which upholds the jury's award of $225,000 as punitive damages. Although I agree that the facts in this case are sufficient to support a finding of actionable, aggravating conduct, so that the trial court properly submitted the issue of punitive damages to the jury, "the amount assessed [as punitive damages] is not to be excessively disproportionate to the circumstances." *Carawan v. Tate*, 53 N.C.App. 161, 165, 280 S.E.2d 528, 531 (1981), *modified and aff'd*, 304 N.C. 696, 286 S.E.2d 99 (1982). *See Swinton v. Savoy Realty Co.*, 236 N.C. 723, 725, 73 S.E.2d 785, 787 (1953) (The jury's award must be "within reasonable limits"). The jury's discretion in awarding punitive damages must be exercised "within reasonable constraints" in order to satisfy due process. *Pacific Mutual Life Insurance Company v. Haslip*, 499 U.S. ---, 113 L.Ed.2d 1 (1991). Having reviewed the evidence in the instant case, I believe that the jury award was excessive under the circumstances and that a new trial was warranted and should have been granted pursuant to Rule 59.

It is unquestionable that this case strikes at the heart of one's emotions. Allison Lovell was tragically killed on the way home

from her high school prom. There was evidence that defendant pressured the Lovells for a meeting with the adjuster prior to Allison's funeral, and that although the Lovells expected to address the damage to the car and the medical payments provision at this meeting, the adjuster instead immediately began discussing the liability coverage of the policy.

Aside from the discussion of liability, there was evidence that defendant's adjuster assured the Lovells that the medical payments provision was a matter of contract independent from the liability coverage, and that once submitted, those bills would be paid within ten to fourteen days. However, when the timely submitted bills remained unpaid, the complaint was filed. Defendant's answer admitted that plaintiff had submitted the requisite documentation and stated that "defendant is ready, willing, and able to pay . . . medical benefits of $2,000.00 which are available to her." Additionally, the funeral bills for Rusty Lewis had been submitted to defendant on the same date, 21 July 1988, and were paid by defendant under the Lovells' medical payments provision within two or three weeks.

Although I find such conduct to be objectionable, I cannot conclude that the amount assessed was not excessively disproportionate to the circumstances. I do not believe the evidence supports a finding of conduct so patently offensive or outrageous as to warrant punitive damages in the amount of $225,000 and can only conclude that this award was given "under the influence of passion" because of the emotional nature of the case. Additionally, I note that the complaint asserted a claim for punitive damages in the amount of $15,000. (Although this pleading violates G.S. 1A-1, Rule 8(a)(2), defendant did not challenge it and the issue is not before this Court on appeal.) The fact that the jury's award exceeded the amount sought in the complaint is not reversible error as a matter of law. Shuford, N.C. Civ. Prac. & Proc. (3rd Ed.), Sec. 54-7. However, G.S. 1A-1, Rule 8 provides in part:

> (a) A pleading which sets forth a claim for relief . . . shall contain
>
> (2) A demand for judgment for the relief to which he deems himself entitled.

I infer from the pleading, therefore, that plaintiff considered $15,000 to be an appropriate sanction for defendant's conduct, and it is

further evidence that the jury's $225,000 award was excessive under the circumstances.

The majority opinion cites *Maintenance Equipment Co. v. Godley Builders*, 107 N.C.App. 343, 420 S.E.2d 199 (1992), in which this Court upheld an award of $4,550 in compensatory damages and $175,000 in punitive damages. In that case, there was sufficient evidence from which the 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 again follow the same course of action. Such egregious conduct supported an assessment of $175,000 in punitive damages, as it was not "excessively disproportionate to the circumstances of contumely and indignity present in the case." *Id.* at 354, 420 S.E.2d at 205, *quoting Carawan v. Tate, supra.*

On remand, it is my view that the conduct to be examined as the basis for plaintiff's claim for punitive damages should be limited to defendant's failure to promptly pay the medical payments claim pursuant to the terms of the contract, as opposed to defendant's conduct arising out of attempts to settle the liability claim. In this regard, the amount of punitive damages awarded, if any, should bear a rational relationship to the defendant's conduct concerning its failure to timely pay the medical payments coverage of $2,000.

SOUTHEASTERN STEEL ERECTORS, INC. v. INCO, INC.

No. 919SC807

(Filed 5 January 1993)

1. Liens § 32 (NCI4th)— crane rental—lessor not third tier subcontractor—not labor or materials—no Ch. 44A lien

The lessor of a crane for use by a second tier subcontractor on "various jobs" was not entitled to an N.C.G.S. Ch. 44A lien on a construction project for which the crane was used because (1) the lessor was not acting as a third tier

subcontractor within the meaning of N.C.G.S. § 44A-175, and (2) the rental agreement did not constitute the furnishing of labor or materials. N.C.G.S. Ch. 44A, Art. 2.

Am Jur 2d, Mechanics Liens §§ 49, 81, 99, 103, 104.

Labor in examination, repair or servicing of fixtures, machinery, or attachments in building as supporting a mechanics' lien, or as extending time for filing such a lien. 51 ALR3d 1087.

2. Liens § 32 (NCI4th)— crane rental—repairs to crane—no Ch. 44A lien

The lessor of a crane for use by a second tier subcontractor on "various jobs" was not entitled to an N.C.G.S. Ch. 44A lien on a construction project for repairs made on the crane while it was at the project site.

Am Jur 2d, Mechanics Liens §§ 49, 81, 99, 103, 104.

Labor in examination, repair or servicing of fixtures, machinery, or attachments in building as supporting a mechanics' lien, or as extending time for filing such a lien. 51 ALR3d 1087.

Appeal by defendant from judgment entered 29 May 1991 by Judge Robert Farmer in Vance County Superior Court. Heard in the Court of Appeals 14 September 1992.

Browning, Sams, Hill, and Hilburn, by Stanley M. Sams, for plaintiff-appellee.

Fields & Cooper, by John S. Williford, Jr., for defendant-appellant.

WYNN, Judge.

Southeastern Steel Erectors, Inc. ("Southeastern") was the second tier subcontractor at a job site owned by the Iams Company ("Iams"). On April 30, 1990, Southeastern entered into an equipment rental agreement with Inco, Inc. ("Inco") for a twenty-five ton Link-Belt crane. The agreement stated that Southeastern intended to use the crane at "various jobs" and it also contained an option for Southeastern to purchase the crane at the end of the six month lease term. Inco provided no operator for the crane, but did on two occasions go to the Iams site to make repairs, which repairs were not a part of the rental agreement.

Disputes arose between Southeastern and Inco regarding the condition of the crane and each party's responsibility under the agreement. This caused Southeastern to stop payment on a check already issued for rental payments, to refrain from making any further monthly payments, and to return the crane to Inco. Inco requested payment from Southeastern for the value of the equipment rental agreement plus the cost of repairs. When Southeastern refused to make such payment, Inco, claiming the rights of a third tier subcontractor, served a notice of claim of lien on Iams as owner of the real property, the general contractor, first tier subcontractor, and Southeastern as second tier subcontractor. Subsequently, Inco filed a claim of lien on the real property, pursuant to North Carolina General Statute Chapter 44A, with the Clerk of Superior Court of Vance County and thereafter filed a suit in Edgecombe County to enforce its subcontractor notice of claim of lien rights and its claim of lien rights under Chapter 44A of the North Carolina General Statutes.

Plaintiff-appellee Southeastern brought an action for a declaratory judgment "that [Inco's] Notice of Claim of Lien of Third Tier Subcontractor . . . is not valid, and that [Inco] is not entitled to a lien pursuant to Chapter 44A of the N.C. General Statutes." Southeastern's subsequent Motion for Summary Judgment was granted, the Superior Court finding that Inco's Notice of Claim of Lien of Third Tier Subcontractor was, in fact, invalid and Inco was not entitled to a lien on the Iams property pursuant to Chapter 44A. It is from this order for summary judgment that Inco appeals.

I.

[1] Summary judgment is properly granted where there is no triable issue of fact so that the moving party is entitled to judgment as a matter of law. *Mace v. Lawyers Title Ins. Corp.*, 48 N.C. App. 297, 302, 269 S.E.2d 191, 194 (1980). North Carolina General Statute, Chapter 44A, Article 2, provides that "[a] third tier subcontractor who furnished *labor or materials* at the site of the improvement shall be entitled to a lien upon funds which are owed to the second tier subcontractor" and may also be subrogated to the rights of the second and first tier subcontractors to obtain a lien on the real property involved. N.C. Gen. Stat. § 44A-18(3) (1989) (emphasis added). *See also Electric Supply Co. v. Swain Electrical Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). In order to be able to claim a lien, Inco must show that it is a third tier subcontractor

and that it furnished labor or materials for the improvement of the Iams real property. Thus, we are confronted with two initial issues in this case: (1) Did Inco act as a third tier subcontractor within the meaning of Article 2, and (2) If so, did its rental of the crane to Southeastern constitute a "furnishing of labor or materials for the improvement of real property" within the scope of the statute.

A third tier subcontractor is defined as "a person who contracts with a second tier subcontractor to improve real property." N.C. Gen. Stat. § 44A-17(5). Clearly, Southeastern is a second tier subcontractor. The rental agreement between Southeastern and Inco, however, is a simple contract regarding the use of the crane. The record indicates that Inco knew Southeastern intended to use the crane on various projects, and that the rental was not for the improvement of any *specific* property. Because Inco did not contract with Southeastern to improve real property, but rather to provide a crane, we conclude that Inco was not acting as a third tier subcontractor within the meaning of the statute.

However, even assuming *arguendo* that Inco did act as a third tier subcontractor, it is not entitled to a lien on the Iams property because the rental agreement does not constitute the furnishing of labor or materials.

Article 2 of Chapter 44A provides no definition for the term "labor or materials" and there has been no North Carolina case up to now that has addressed this specific issue. There is, however, North Carolina case law addressing more generally the scope of "labor or materials" as used in Article 2, the statutory provisions of Article 3 of Chapter 44A, and case law from other jurisdictions addressing this particular issue. We discuss each of these in turn, and conclude that the rental of equipment is not within the scope of "labor or materials" in Article 2 of Chapter 44A.

A. North Carolina Consideration of Labor and Materials

This Court has recognized that the primary purpose of a lien statute is "to protect laborers and materialmen who expend their labor and materials upon the buildings of others." *Carolina Bldrs. Corp. v. Howard-Veasey Homes, Inc.*, 72 N.C. App. 224, 233-34, 324 S.E.2d 626, 632, *disc. rev. denied*, 313 N.C. 597, 330 S.E.2d 606 (1985) (quoting *Lemire v. McCollum*, 425 P.2d 755, 759 (Or. 1967)). The lien statute is remedial in nature and, therefore, should

be liberally construed to advance the legislature's intent. *Id.* at 229, 324 S.E.2d at 632; *Wilmington Shipyard v. North Carolina State Highway Comm'n*, 6 N.C. App. 649, 651, 171 S.E.2d 222, 224 (1969). No statute, however, should be construed so liberally as to give it a meaning never intended by the legislature.

Section 44A-18 is found in Part 2 of Article 2 in Chapter 44A. Part 2 governs the liens of mechanics, materialmen and laborers dealing with someone other than the owner of the improved property, *i.e.*, subcontractors. Part 1 of the Article, which includes section 44A-8, governs the liens of those dealing directly with the owner. A key concept in both sections is the furnishing of labor or materials. Much of the case law construing the terms labor and materials have focused on 44A-8, but nonetheless govern the meaning of the same terms in 44A-18.

The concept of "labor" as used in the lien statute has evolved considerably through both case law and amendments to the statute. This Court has previously examined that evolution in *Wilbur Smith and Associates, Inc. v. South Mountain Properties, Inc.*, 29 N.C. App. 447, 224 S.E.2d 692, *disc. rev. denied*, 290 N.C. 552, 226 S.E.2d 514 (1976). Prior to a 1969 amendment to the statute, only "actual labor performed in the physical improvement of the property" was sufficient to warrant a lien against that property. *Id.* at 450, 224 S.E.2d at 694 (emphasis omitted). This meant that only manual, unskilled labor was lienable, and that skilled craftsmen, architects, bookkeepers or supervisors were not entitled to liens for their contributions to the improvements made at a construction site. *Id.* (citing *Whitaker v. Smith*, 81 N.C. 340 (1879); *Cook v. Ross*, 117 N.C. 193, 23 S.E. 252 (1895); *Nash v. Southwick*, 120 N.C. 459, 27 S.E. 127 (1897); *Moore v. American Industrial Company*, 138 N.C. 304, 50 S.E. 687 (1905); *Stephens v. Hicks*, 156 N.C. 239, 72 S.E. 313 (1911)).

In 1969 the definition of "improve" was added to the statute and provided the following:

> "Improve" means to build, erect, alter, repair, or demolish any improvement upon, connected with, or on or beneath the surface of any real property, or to excavate, clear, grade, fill or landscape any real property, or to construct driveways and private roadways, or to furnish materials, including trees and shrubbery, for any of such purposes, or to perform any labor upon such improvements.

N.C. Gen. Stat. § 44A-7. At the same time, section 44A-8 was added to replace section 44-1, the former lien statute. Section 44A-8 provided that "[a]ny person who performs or furnishes labor or furnishes materials pursuant to a contract, either express or implied, with the owner of real property, for the making of an improvement thereon shall . . . have a lien on such real property . . . ." Section 44-1 had provided that "[e]very building built, rebuilt, repaired or improved, together with the necessary lots on which such building is situated, and every lot, farm or vessel, or any kind of property, real or personal, not herein enumerated, shall be subject to a lien for payment of all debts contracted for work done on the same, or material furnished." The statute was amended again in 1975 to provide that " 'improve' . . . shall also mean and include any design or other professional or skilled services furnished by architects, engineers, land surveyors and landscape architects" and also expanded section 44A-8 to include those who perform or furnish professional design or surveying services. It is apparent that "labor" and "improve" contemplate actual work done by the person claiming a lien, whether that person be a manual laborer, supervisor, or skilled professional, which *directly* impacted on the real property in question. Providing rental equipment is an *indirect* means of aiding in the improvement of real property, and therefore does not constitute furnishing labor.

The rules of statutory construction confirm that "providing rental equipment" is not equivalent to "furnishing labor." Because it is not explicitly defined in Article 2, "labor" must be given its "common and ordinary meaning." *In re Clayton-Marcus Co.*, 286 N.C. 215, 219, 210 S.E.2d 199, 202-03 (1974). The dictionary definition of "labor" is an "expenditure of physical or mental effort, esp. when fatiguing, difficult or compulsory, [or] human activity that produces the goods or provides the services in demand in an economy." *Webster's Third New International Dictionary* (1968) [hereinafter Webster's]. This common definition precludes extending "labor" to include the rental equipment at issue here. This Court has recognized that the common meaning of "furnish" is "to supply, provide, or equip, for accomplishment of a particular purpose." *Queensboro Steel Corp. v. East Coast Machine & Iron Works*, 82 N.C. App. 182, 185-86, 346 S.E.2d 248, 250, *disc. rev. denied*, 318 N.C. 508, 349 S.E.2d 865 (1986). The use of the phrase "furnished labor," then, contemplates providing one with the manpower to do a job. It does not, therefore, include renting equipment.

Applying the above statutory construction analysis to "material" we conclude also that providing rental equipment does not constitute furnishing material. The common meaning of the word material is simply "the basic matter (as metal, wood, plastic, fiber) from which the whole or the greater part of something physical (as a machine, tool, building, fabric) is made." *Webster's*. This Court, in *Raleigh Paint and Wallpaper Co. v. Peacock & Associates, Inc.*, 38 N.C. App. 144, 247 S.E.2d 728 (1978), *disc. rev. denied*, 296 N.C. 415, 251 S.E.2d 470 (1979), recognized that "[t]he requirement of furnishing material at the site provides *visible* notice to subsequent lienors and encumbrances of the priority of suppliers of material." *Id.* at 148, 247 S.E.2d at 731 (emphasis added). "The test of whether a placement is sufficiently visible is whether a person is able, in the exercise of reasonable diligence, to *see that materials have been placed at the site.*" *Id.* at 148, 247 S.E.2d at 731-32 (emphasis added). It is clear that by using the word "material," considered in the context of the definitions of "improve" and "improvement," the legislature contemplated something that is capable of becoming a part of the real property. Thus the rental equipment is not a material furnished by Inco for the improvement of real property.

B. North Carolina Bond Cases, Article 3 of Chapter 44A

Article 3 of Chapter 44A, which governs Performance Bonds, specifically provides that for the purposes of Article 3 " '[l]abor or materials' shall include all materials furnished or labor performed in the prosecution of the work called for by the construction contract . . . and further shall include . . . rental of equipment . . . directly utilized in the performance of the work . . . ." N.C. Gen. Stat. § 44A-25 (1989). Thus far, the legislature has not included any such definition in Article 2 and we, therefore, decline to apply the Article 3 definition to the provisions in Article 2.

Despite the difference between the two articles, appellant asserts that the reasoning of *Interstate Equipment Co. v. Smith*, 292 N.C. 592, 234 S.E.2d 599 (1977), which involved a bond contract between plaintiff and defendant to guarantee payment of a construction contract between plaintiff and a third party, is persuasive in its holding that rental equipment is included within "labor or materials" for Article 2 purposes. Our Supreme Court in that case quoted the language of *Wiseman v. Lacy*, 193 N.C. 751, 752, 138 S.E. 121, 122 (1927) in determining that " '[t]he renting of the machines

in question was but the substitution of mechanical power for manual labor,' " and as such should be included in the term "labor and material" as found in the bond document involved. *Interstate Equipment*, 292 N.C. at 597, 234 S.E.2d at 602. It is this concept that was codified when the legislature chose to include rental equipment in its Article 3 definition of "labor or materials." Because the legislature has not chosen to codify the same concept in Article 2, we do not find that the reasoning in *Wiseman* and *Interstate Equipment* controls the subject case.

Moreover, the suretyship relationship is unique and as such precludes our construing the legislature's action in Article 3 as being meant also for Article 2. "[S]uretyship creates a tripartite relationship between and among the party secured (the bond obligee), the principal (the bond obligor), and the party secondarily liable (the surety)." B.C. Hart, *Bad Faith Litigation Against Sureties*, 24 Tort and Ins. L. J. 18 (1988). The surety's duty arises at the time the bond is issued. In entering a contract to execute a bond, "the surety is [therefore] chargeable with notice . . . as to whether [the contractor] possesses the plant, equipment, and tools required in undertaking the particular work, or will be compelled to rent and hire the same, or some part thereof, all of which matters are factors . . . upon which the surety fixes the premiums exacted for executing the bond." *Interstate Equipment*, 292 N.C. at 596, 234 S.E.2d at 601 (citations omitted). The surety expressly promises to pay that for which the principal is responsible. By contrast, the owner of the construction site does not bear any responsibility to a subcontractor until the subcontractor files a claim of lien against the property or against the funds owed to others on the site because of said subcontractor's failure to be paid for work done or materials furnished at the site. The owner is not charged with the same degree of notice as the surety is, and has no reason to inquire as to whether the equipment used by the general contractor and subcontractors is owned by them or leased from another. We, therefore, conclude that a surety is held to a higher degree of knowledge of the contracts entered into by its principal than the owner of real property is with respect to contracts entered into by their subcontractors. As such, it was logical for the legislature to include rental equipment in its definition of Article 3 for the purposes of the bond cases, but it would be equally illogical for us to read such a definition into Article 2.

C. Other Jurisdictions

Other jurisdictions have directly addressed the issue of whether rental equipment should be included in the term "labor or materials." The prevailing view appears to be that, absent a specific statutory provision stating otherwise, rental equipment is *not* "labor or materials." *Logan Equipment Corp. v. Profile Constr. Co.*, 585 A.2d 73 (R.I. 1991); *Giles and Ransome, Inc. v. First Nat'l Realty Corp.*, 208 A.2d 582 (Md. App. 1965); *Lembke Constr. Co. v. J.D. Coggins Co.*, 382 P.2d 983 (N.M. 1963); *Wilkinson v. Pacific Mid-West Oil Co.*, 107 P.2d 726 (Kan. 1940); *Steele & Lebby v. Flynn-Sullivan Co.*, 54 S.W.2d 325 (Ky. 1932). These jurisdictions reason that when such equipment is hired out it becomes the equipment of the lessee, a part of his plant, and is used by the lessee as though it were his own. *See, e.g., Lembke*, 382 P.2d at 987. In so renting the equipment, the lessor does not perform labor that contributes to the improvement of the real property, and so is not entitled to a lien against that property. *Id.* They also appear to recognize that the plain meaning of the lien statutes necessitates "actual[ ] participat[ion] in the work done . . . something more than taking the equipment to the site of the job, keeping it in running order while it was there, and removing it when the grading was completed." *See, e.g., Giles and Ransome*, 208 A.2d at 584 (recognizing an exception to the general rule where the lessor provides not only the equipment but also someone to operate the equipment). This reasoning is consistent with our characterization of the legislature's intent in using the word "labor," and we, therefore, conclude that in North Carolina, absent a specific statutory provision to the contrary, rental equipment is not included in the term "labor or materials."

Those jurisdictions which recognize rental equipment as labor adopt reasoning similar to that expressed in the North Carolina bond cases, *Wiseman v. Lacy* and *Interstate Equipment Co. v. Smith*, both discussed *supra*. While we recognize that the construction industry is changing and the traditional supply of manual labor is being rapidly replaced by machinery, we believe it is up to the legislature, and not this Court, to make corresponding changes in the statutes. Until our legislature indicates otherwise, then, we conclude that rental equipment is not "labor" under Article 2 of North Carolina's lien statute.

The prevailing view of other jurisdictions appears also to be that rental equipment is not a "material" furnished for the improve-

ment of real property. *See, e.g., Logan*, 585 A.2d at 74 (asserting that Tennessee is alone in its classification of rental equipment as materials); *Air Service Co. v. Cosmo Investments, Inc.*, 155 S.E.2d 413, 414 (Ga. App. 1967); *Chesebro-Whitman Co. v. Edenboro Apartments, Inc.*, 207 A.2d 186 (N.J. Super. 1965). These cases instead equate the rental of equipment with the purchase of equipment. They reason that if such equipment is not totally depreciated by its use on the real property in question it is equivalent to the purchase of the equipment. As the purchase of equipment to be used at a job site is not lienable, these courts reason that neither should the rental of equipment be lienable.

The minority view on the issue of whether rental of equipment is a "material" furnished, as asserted by the Tennessee Supreme Court in *R.L. Harris, Inc. v. Cincinnati, New Orleans, and Texas Pacific Railway Co.*, 280 S.W.2d 800 (Tenn. 1955), holds that the rental was "necessarily consumed in the carrying on of the contract work." 280 S.W.2d at 802. The court further stated that such equipment was " 'not a part of the regular equipment of the contractor, but was engaged for the particular and special use' " in one specific job. *Id.* (citations omitted). The court further noted that the rental equipment was not purchased, but its use for a particular purpose was purchased, which use was consumed on the job and was thus lienable as a material furnished. This analysis, however, is inconsistent with what we have recognized, *supra*, as the North Carolina legislature's conception of the term material being something concrete that is capable of becoming a part of an improvement made to real property.

We conclude first that Inco was not a third tier subcontractor within the meaning of Article 2. Assuming for the sake of argument, however, that Inco was acting as a third tier subcontractor, we further conclude that the use of the term "labor or materials" in Article 2 of Chapter 44A does not encompass rental equipment. The history of the cases examining "labor" and "materials" supports such a conclusion, as does our recognition that, despite its addition of a definition of "labor or materials" expressly including rental equipment to Article 3, the legislature chose to make no such addition to Article 2. In so concluding, we adopt the prevailing view on this issue from other jurisdictions, which we believe is consistent with our direction. We, therefore, overrule appellant's first assignment of error and hold that the general lease of this

crane is not a lienable item pursuant to Article 2 of North Carolina General Statute Chapter 44A.

II.

[2] Appellant asserts, in its second and final assignment of error, that the repairs made by Inco on the crane, while it was at the Iams site, are a lienable item pursuant to Article 2 of Chapter 44A. We disagree. To hold that the rental of equipment in this case will not give rise to a lien on the real property composing the Iams site and then to subsequently hold that the repairs made to that equipment *will* give rise to such a lien is illogical.

The statute allows a third tier subcontractor to realize a lien on funds arising out of the improvement on which the third tier subcontractor worked or for which it furnished materials. N.C. Gen. Stat. § 44A-18(3). Clearly, this statute contemplates work or materials *directly* effecting the real property.

Appellant once again points us to a bond case in an effort to support its contention that the repairs in question are within the scope of the statute. Even were we to agree with appellant that such cases are relevant to the subject case, we cannot agree that the repairs in question constitute a lienable item. *Continental Casualty Co. v. Clarence L. Boyd Co.*, 140 F.2d 115 (10th Cir. 1944), upon which the appellant relies, states that repairs made solely to compensate for wear and tear on the equipment, and which do not add substantially to the value of the equipment, are within the scope of the payment bond. *Id.* at 116. The court also stated, however, that those repairs done in order to make the equipment available for other jobs are not within the scope of the bond. *Id.* It is this latter characterization that most closely reflects the repairs done by Inco.

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

Affirmed.

Chief Judge HEDRICK and Judge LEWIS concur.

WILMA LANG, PLAINTIFF v. MANFRED LANG, DEFENDANT

No. 9129SC966

(Filed 5 January 1993)

1. **Rules of Civil Procedure § 60.2 (NCI3d)— foreign divorce decree—summary judgment—Rule 60 motion—newly discovered evidence—denied**

The trial court correctly denied defendant's motion to vacate or modify a judgment on the grounds of newly discovered evidence where the parties, citizens of the Federal Republic of Germany, entered a divorce judgment in Germany in 1974 which called for defendant to pay plaintiff support, for defendant to pay child support, for defendant to place an encumbrance on real property in Germany to secure the support claims, and for defendant to repay to plaintiff certain loans; defendant did not pay the loans; plaintiff sought and received a German judgment on the loans which defendant did not pay; defendant unilaterally stopped making support payments and plaintiff foreclosed on the German property; plaintiff filed a complaint in Henderson County to enforce the German judgment on the loans; the Henderson County Superior Court granted summary judgment; plaintiff filed a notice of appeal but failed to timely serve the record on appeal; a motion for extension of time was denied, as were petitions for certiorari to the Court of Appeals and the Supreme Court; the appeal was dismissed; and plaintiff filed this Rule 60 motion. Although defendant contended that with due diligence he could not have discovered that plaintiff had seized and foreclosed upon his property in Germany and that he could have asserted partial or complete satisfaction of the German judgment on the loans had he known, defendant unilaterally ceased making the support payments and should have reasonably expected that plaintiff would take appropriate actions such as foreclosure.

Am Jur 2d, Judgments §§ 820, 905, 906.

Propriety of United States District Court where judgment is registered, pursuant to 28 USCS Sec. 1963, granting relief from that judgment under Rule 60(b) of Federal Rules of Civil Procedure. 55 ALR Fed 439.

2. Rules of Civil Procedure § 60.2 (NCI3d)— German divorce agreement—summary judgment for plaintiff on action to enforce—Rule 60 motion denied

The trial court correctly denied defendant's motion under N.C.G.S. § 1A-1, Rule 60(b)(3) where defendant contended that plaintiff had made misrepresentations concerning a German foreclosure sale in an action to enforce a German divorce agreement. Defendant was a German citizen when the German judgments were entered and did not contest jurisdiction before the German court, failed to demonstrate extrinsic fraud, and failed to show that the judgments offend public policy. The misrepresentation claimed by defendant was that plaintiff stated that she had not received a set-off as to a German judgment arising from defendant's failure to repay a loan according to the divorce decree; however, the foreclosure action resulted from failure to pay support, an obligation unrelated to defendant's obligation to repay the loan.

Am Jur 2d, Judgments §§ 841, 905, 906.

Fraud in obtaining or maintaining default judgment as ground for vacating or setting aside in state courts. 78 ALR3d 150.

3. Appeal and Error § 63 (NCI4th)— action to enforce German judgment—personal jurisdiction—amount of judgment—appropriate appeal in German courts

The appropriate route of appeal for issues involving personal jurisdiction of a German court over defendant and the amount of a judgment was through German courts where plaintiff brought an action in North Carolina to enforce a German judgment, summary judgment was granted for plaintiff, defendant's appeal was dismissed and his petitions for certiorari denied, his Rule 60 motion to vacate the judgment was denied, and he brought this appeal from that denial. Defendant presented no basis to disturb the German court's ruling on the amount of the judgment and, even if the Court of Appeals could address the issue of the German court's jurisdiction, such a discussion would be barred by the Superior Court's dismissal of plaintiff's original appeal. These issues were not a part of defendant's motion to vacate or modify judgment before the trial court.

Am Jur 2d, Judgments §§ 753, 1232, 1239.

4. Rules of Civil Procedure § 60.2 (NCI3d)— action to enforce German judgment—summary judgment for plaintiff—motion to vacate or modify judgment denied

The trial court did not err by denying a N.C.G.S. § 1A-1, Rule 60(b)(5) motion to vacate or modify a summary judgment in an action to enforce a German judgment where the court found that, under German law, plaintiff did not have to account for the profits from her sale of defendant's foreclosed-upon German property and that defendant was not entitled to credit for that amount toward the loan which was the subject of this action. Because there was no set-off under German law, plaintiff made no misrepresentations to the Superior Court and defendant fails to cite any German statutes or cases to show that the German court erred.

Am Jur 2d, Conflict of Laws §§ 10, 16, 34; Judgments §§ 905, 906.

5. Rules of Civil Procedure § 60.3 (NCI4th)— enforcement of German judgment—exchange rate—appeal not perfected—Rule 60 motion not a substitute

Any discussion of the exchange rate used in a judgment enforcing a German judgment was barred by the Superior Court's appropriate dismissal of defendant's appeal in that action. A motion under N.C.G.S. § 1A-1, Rule 60(b), the subject of this appeal, is not to be used as a substitute for appellate review.

Am Jur 2d, Judgments §§ 905, 906.

Appealability of order setting aside, or refusing to set aside, default judgment. 8 ALR3d 1272.

Appeal by defendant from order entered 18 July 1991 by Judge C. Walter Allen in Henderson County Superior Court. Heard in the Court of Appeals 10 November 1992.

This case involves an action in Superior Court for the enforcement of a German court's judgment, which arose from defendant's loan obligation to plaintiff in their German divorce settlement decree. The parties, citizens of the Federal Republic of Germany, entered a divorce agreement there which was filed in the District Court of Heilbronn, Federal Republic of Germany, on 23 April 1974. The certified translation of the divorce agreement appears in the record.

The agreement provided that defendant was to make support payments, secured by defendant's real property in Germany, as follows:

1. a) The defendant shall pay the plaintiff for her support as of the entering of a non-appealable divorce decree the monthly amount of DM 1,500.—. Payment shall be made in advance (of each month), respectively.

. . . .

2. The defendant shall pay to each of the children stemming from the marriage, Silvia Lang, Beatrix Lang, and Karin Lang, to the hands of the plaintiff, DM 500.00 per month at the beginning of the month for their support.

. . . .

3. c) For the purpose of securing the support claims set forth under 1. and 2. in the amount stated, the defendant is obligated to place a conditional encumbrance on the real property located in the District of Weiler GBH Pfaffenhofen-W-No. 265, div. I No. 5, parcel No. 549/2 Untennaus, Construction Site 4 a 04 sqm at the most readily available priority position and to agree to record such encumbrance in the Land Register.

Additionally, the divorce agreement and a supplemental agreement dated 10 May 1974 provided that defendant would repay, to plaintiff, certain loans with interest.

Defendant did not repay the loans. To enforce defendant's obligation on the loans, plaintiff sought and received a judgment from the District Court of Heilbronn on 11 July 1985. Defendant did not pay this judgment. On 3 January 1989, plaintiff filed a complaint in Henderson County Superior Court to enforce the German court's 11 July 1985 judgment. The Superior Court granted summary judgment for plaintiff on 13 September 1990, entering the following "Order and Judgment":

FINDINGS OF FACT

. . . .

2. The Civil Court of the District Court of Heilbronn, Federal Republic of Germany, had personal jurisdiction over

the Defendant in the action resulting in the entry of this Foreign Judgment, which this Court so held in its Order of July 10, 1989 in ruling against the Defendant on his Motion to Dismiss this action.

3. The Foreign Judgment provides that the Defendant is to pay to the Plaintiff DM 140,000, plus 4% interest from January 1, 1983, and DM 81,200, with no provision for interest. The Court finds that the total principal sum of DM 221,200.00 together with interest in the amount of DM 42,912.88 was due and owing the Plaintiff by the Defendant on this Foreigh [sic] Judgment as of August 30, 1990, the date this Motion for Summary Judgment was heard.

4. The Court takes judicial notice of the fact that the currency conversion rate of deutsche marks to U.S. dollars as published in The Wall Street Journal on August 30, 1990 was .64123 dollars per deutsche mark.

CONCLUSIONS OF LAW

Based on these findings of fact, the Court makes the following conclusions of law:

1. There is no genuine issue of material fact as to Plaintiff's claims against the Defendant, and Plaintiff is entitled to judgment as a matter of law on the amounts prayed for in the Complaint.

2. The Plaintiff is entitled to a judgment against the Defendant in the amount of DM 221,200.00 for the principal due and owing on the Foreign Judgment. This amount is to be converted to U.S. currency at the conversion rate of .64123 dollars per deutsche mark for a total amount of $141,840.08. Plaintiff is further entitled to recover post-judgment interest at the legal rate on this amount.

3. The Plaintiff is also entitled to a judgment against the Defendant in the amount of DM 42,912.88 for the interest due and owing on the Foreign Judgment as of August 30, 1990. This amount is to be converted to U.S. currency at the conversion rate of .64123 dollars per deutsche mark for a total amount of $27,517.03.

4. The Plaintiff is further entitled to recover its court costs.

On 14 September 1990, defendant filed his notice of appeal from the Superior Court's entry of summary judgment for plaintiff. Defendant failed to timely serve the record on appeal. On 11 December 1990, after the period for serving a proposed record on appeal had expired, defendant filed a motion for extension of time with this Court. This Court denied defendant's motion on 27 December 1990. Subsequently, on 15 January 1991, defendant filed a petition for writ of certiorari, which this Court denied on 1 February 1991. Thereafter, on 8 February 1991, defendant filed a petition for writ of certiorari with our Supreme Court, which denied the petition on 13 March 1991.

On 6 May 1991, the Superior Court dismissed defendant's appeal for failure to timely perfect the appeal. On 8 May 1991, defendant filed in Superior Court a motion to vacate or modify the 13 September 1990 summary judgment pursuant to G.S. 1A-1, Rule 60. A hearing was held on 8 July 1991. On 18 July 1991, the Superior Court entered the following order denying defendant's motion to vacate or modify the 13 September 1990 summary judgment:

FINDINGS OF FACT

1. On September 13, 1990, this Court entered a summary judgment in favor of the plaintiff which in effect domesticated a foreign judgment against the defendant entered by the Heilbronn District Court in Germany on July 11, 1985 (the "July 11, 1985 Judgment"). The defendant filed notice of appeal to the North Carolina Court of Appeals, but the defendant failed to perfect his appeal and his appeal was dismissed by this Court on May 6, 1991.

2. The July 11, 1985 Judgment resulted from defendant's failure to repay certain loans as established in a divorce agreement between the plaintiff and defendant that was entered on or about April 23, 1974. As a separate obligation in the divorce agreement between the parties, the defendant was to make certain support payments to the plaintiff and their children, and to secure payment of these support obligations the defendant encumbered a certain piece of real property he owned in Germany (the "Property").

3. In violation of the divorce agreement, the defendant ceased making support payments, and on or about March 3, 1986, the plaintiff initiated a foreclosure action in Germany against the Property to satisfy the support obligations which had accrued and which continued to accrue (the "Foreclosure Action").

4. Under German law, the local court where the Property is located was responsible for preparing the papers to initiate the Foreclosure Action and for serving these papers on the defendant or someone appointed to accept service on behalf of the defendant. The plaintiff was not responsible for preparing or serving these documents on the defendant.

5. In the Foreclosure Action, the German court attempted, without success, to serve papers and documents upon the defendant by delivering them to Lutz Wachsmann, who was believed to be the defendant's authorized agent to accept service, and by mailing them to the defendant at two different addresses in the United States. In accordance with German law, the German court then appointed Arthur Lang, the defendant's father, to accept service on behalf of the defendant.

6. Prior to selling the Property, the German court established its fair market value at DM 250,000.00. Under German law, the purchase price paid for the property at the foreclosure auction cannot be challenged unless the bid is less than 70% of the determined fair market value.

7. The Property was auctioned off by the German court on March 7, 1988, and the plaintiff was the last and highest bidder at the sale, purchasing the Property for DM 217,000.00, plus interest.

8. The purchase price paid for the Property was distributed among various creditors of the defendant in accordance with a plan of distribution approved by the German court. The plaintiff's claims against the proceeds from the Foreclosure Action totalled DM 77,702.40, which represented DM 75,000.00 for arrearages in support payments from February 1, 1984 through March 31, 1988, and DM 2,702.49 for the cost of judicial prosecution. The plaintiff only received DM 49,496.47 in the Foreclosure Action in partial satisfaction of her claims.

9. Subsequent to the Foreclosure Action the plaintiff sold the Property. Under German law the plaintiff did not have to account for the benefit of the defendant any profit she received from her sale of the Property.

CONCLUSIONS OF LAW

Based on these findings of fact, the Court makes the following conclusions of law:

1. The plaintiff received no proceeds from the Foreclosure Action which could have been applied toward the satisfaction of the July 11, 1985 Judgment, and therefore the plaintiff made no misrepresentations to this Court in this action to recover the full amount owed on the July 11, 1985 Judgment. The defendant's motion under [G.S. 1A-1] Rule 60(b)(5) and [G.S. 1A-1] Rule 60(b)(3) of the North Carolina Rules of Civil Procedure should be denied.

2. The documents and information about the Foreclosure Action is not evidence sufficient to set aside or modify the judgment in this case and is not newly obtained evidence which by due diligence could not have been discovered in time to move for a new trial under [G.S. 1A-1] Rule 59(b). The defendant's motion under [G.S. 1A-1] Rule 60(b)(2) of the North Carolina Rules of Civil Procedure should be denied.

3. The exchange rate used in converting deutsche marks to dollars is a matter which should have been addressed by the defendant in an appeal in this case. Nevertheless, the exchange rate used at the time judgment was entered was correct in that the plaintiff was entitled to recover an amount in dollars equivalent to the amount in deutsche marks owed under the July 11, 1985 Judgment. The defendant's motion under [G.S. 1A-1] Rule 60(b)(6) of the North Carolina Rules of Civil Procedure should be denied.

NOW, THEREFORE, IT IS ORDERED, ADJUDGED AND DECREED that:

1. Defendant's Motion to Modify or Vacate Judgment is hereby denied;

2. That the stay of execution previously entered in this matter pursuant to a Stipulation and Agreement between the parties on May 31, 1991 is terminated;

3. That plaintiff is entitled to proceed in enforcing her judgment against the defendant, including but not limited to having the real property pledged in the Bond posted by the defendant and his wife, Edith Lang, sold and the proceeds applied toward the satisfaction of the plaintiff's judgment; and

4. Until plaintiff's judgment is satisfied in full, the defendant and his wife, Edith Lang, shall not sell, encumber, transfer title, or in any other manner dispose of the property pledged in the Bond, except as may be ordered by this Court, which property is more accurately described as follows:

> Lots 13, 27, 28, 59, 60, 61, 70, 71, 72, 73, 74, 75, 77, 78, 106, 107, and 108, Wildwood Heights subdivision and is a portion of that property recorded in Deed Book 701, at Page 767, Henderson County Registry.

From the trial court's 18 July 1991 order, defendant appeals.

Smith Helms Mulliss & Moore, by Robert H. Pryor and Gregory S. Hilderbran, for plaintiff-appellee.

Bazzle, Carr & Gasperson, P.A., by Ervin W. Bazzle, for defendant-appellant.

EAGLES, Judge.

Defendant brings forth six assignments of error in his appeal from the Superior Court's 18 July 1991 denial of his G.S. 1A-1, Rule 60 motion to vacate or modify the 13 September 1990 summary judgment. We note initially that defendant made this motion on 8 May 1991, two days after his original appeal from the 13 September 1990 summary judgment was appropriately dismissed by the Superior Court. We further note that prior to that dismissal, defendant's motion for an extension of time to serve the record on appeal in that appeal was denied by this Court and defendant's petition for a writ of certiorari was subsequently denied by this Court and later by our Supreme Court. After careful examination of the record, we affirm the Superior Court's 18 July 1991 order.

I.

[1] Defendant contends that the Superior Court erred by denying his G.S. 1A-1, Rule 60(b)(2) motion to vacate or modify the judgment on the grounds that new evidence had been discovered. Defendant asserts that he with due diligence could not have discovered that

plaintiff had seized and foreclosed upon his property in Germany and that, had he known, he could have asserted the defense of partial or complete satisfaction of the 1985 German judgment on the loan. We disagree.

According to G.S. 1A-1, Rule 60(b)(2), a trial court may grant a party relief from a final judgment or order when there is "[n]ewly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b)." G.S. 1A-1, Rule 59(b) provides that a party has ten days after the entry of judgment to move for a new trial.

Defendant has failed to establish that the evidence could not have been discovered with due diligence within ten days after the summary judgment was entered on 13 September 1990. The divorce agreement entered before the German court in 1974 expressly stated that defendant's property would serve as security for defendant's obligation to pay the support payments. Defendant unilaterally ceased making these support payments in 1982. Because he had pledged his property as security for these support payments in the divorce decree, defendant should have reasonably expected that plaintiff would take appropriate actions (such as foreclosure) to assure payment of defendant's obligation.

Accordingly, by the express terms of the 1974 divorce agreement, defendant had at least constructive knowledge that one of plaintiff's possible alternatives included foreclosure on defendant's property mentioned in the agreement. We find no merit in defendant's contention that this constituted newly discovered evidence which by due diligence he could not have discovered in time to move for a new trial under G.S. 1A-1, Rule 59(b).

II.

[2] Defendant contends that the Superior Court erred in denying his G.S. 1A-1, Rule 60(b)(3) motion by concluding as a matter of law that plaintiff had not made misrepresentations (concerning the proceeds from the German court's foreclosure sale) to the Superior Court in obtaining the 13 September 1990 summary judgment. We disagree.

We note initially that defendant states in his brief that he "did not ask the [t]rial [c]ourt and is not asking this Court to review or take any action regarding the German [c]ourt's seizure and sale of his property," and we additionally note that even if

defendant tried to make this argument, it would fail. Despite this statement in defendant's brief, defendant nevertheless argues that plaintiff made misrepresentations to the Superior Court by alleging that plaintiff made misrepresentations to the German court, thus "demonstrat[ing] a pattern by the [p]laintiff of deception and misrepresentation to the presiding [c]ourt." This Court has previously held that

> the final judgment of another jurisdiction may be collaterally attacked on three grounds: (1) lack of jurisdiction; (2) fraud in the procurement; or (3) that it is against public policy. *Fungaroli v. Fungaroli*, 53 N.C. App. 270, 278, 280 S.E.2d 787, 792 (1981); *see also Courtney v. Courtney*, 40 N.C. App. 291, 253 S.E.2d 2 (1979).
>
> However, to make a successful attack upon a foreign judgment on the basis of fraud, it is necessary that *extrinsic* fraud be alleged. *Id.* Extrinsic fraud is that which is collateral to the foreign proceeding, and not that which arises within the proceeding itself and concerns some matter necessarily under the consideration of the foreign court upon the merits. *See Horne v. Edwards*, 215 N.C. 622, 624, 3 S.E.2d 1, 3 (1939).

J.I.C. Electric, Inc. v. Murphy, 81 N.C. App. 658, 660, 344 S.E.2d 835, 837 (1986) (emphasis in original). When the German judgments were rendered, defendant was a German citizen. Defendant has not contested before the German courts their exercise of jurisdiction in rendering those judgments. Defendant has failed to show extrinsic fraud and has failed to demonstrate that the judgments offend public policy. Accordingly, defendant has shown no reason for this Court to decline recognition under the principles of comity to all aspects of the German judgments. *See Mayer v. Mayer*, 66 N.C. App. 522, 527, 311 S.E.2d 659, 663, *disc. review denied*, 311 N.C. 760, 321 S.E.2d 140 (1984) ("Recognition of foreign decrees by a State of the Union is governed by principles of comity."); 1 R. Lee, N.C. Family Law §104 (4th ed. 1979 & Cum. Supp. 1989).

Defendant specifically contends that plaintiff committed a misrepresentation before the Superior Court when she stated that she had not received a "setoff" from defendant as to the 1985 German judgment arising from defendant's failure to repay the loan according to the terms of the 1974 divorce decree. Defendant contends that the excess funds received in the foreclosure action constituted this alleged setoff. However, as the record before us

and the findings of the Superior Court clearly demonstrate, the foreclosure action resulted from defendant's failure to pay the support payments, an obligation unrelated to defendant's obligation to repay the loan. Accordingly, no setoff existed as to the 1985 German judgment and plaintiff committed no misrepresentation before the Superior Court. We find defendant's argument to be without merit.

III.

[3] In his next two assignments of error, defendant contends that the Superior Court erred by: 1) finding that defendant was properly served with the German court's foreclosure action in accordance with German law because defendant was "a resident alien of the United States [and t]he German court was required to comply with the Hague Convention on Service Abroad of Judicial and Extrajudicial Documents in Civil or Commercial Matters [20 U.S.T. 36, T.I.A.S. 6638 (Hague Convention)]," and 2) finding that "[p]laintiff was entitled to a claim of DM 77,702.40 against the proceeds of the foreclosure action." Without reaching the merits, we find that these arguments fail because these issues were not a part of defendant's motion to vacate or modify judgment before the trial court.

Defendant first raised the issue of the personal jurisdiction of the German courts in his 4 August 1989 answer to plaintiff's 3 January 1989 complaint (filed in the Henderson County Superior Court) to enforce the 1985 German judgment. Defendant's appeal of the 13 September 1990 summary judgment, which arose from that complaint, was appropriately dismissed by the trial court after: 1) this Court's denial of defendant's motion for an extension of time and 2) subsequent denials of defendant's petitions for a writ of certiorari by this Court and our Supreme Court. Even if, assuming *arguendo*, this Court could address the issue of the German court's exercise of jurisdiction over defendant in the German court's own foreclosure action, such a discussion would be barred by the Superior Court's appropriate dismissal of plaintiff's appeal. Defendant's remedy, if it exists at all, exists in the courts of Germany, where the judgments were originally entered.

The amount of plaintiff's claim, DM 77,702.40, originally arose from the German court's evaluation of defendant's failure to pay his support obligations. This figure was approved by the German court in its plan of distribution. The Superior Court was presented no basis to disturb the German court's ruling. Again, defendant's

appropriate route of appeal is to the German courts. We note that plaintiff received only DM 49,496.47 from the actual proceeds of the foreclosure action itself, which was partial satisfaction of the DM 77,702.40 owed by defendant.

IV.

[4] Defendant argues that the trial court erred in denying his G.S. 1A-1, Rule 60(b)(5) motion to vacate or modify the judgment by finding that, under German law, plaintiff did not have to account for the profits from her sale of defendant's foreclosed-upon German property and by not crediting this amount towards the satisfaction of the 1985 German judgment arising from the default on the loan. Defendant cites no cases or statutes for this proposition but merely argues that

> [t]he facts described in detail in Arguments II and IV [regarding the German court's foreclosure sale] show that the Plaintiff was unjustly enriched in the amount of 92,271.74 DM, due to her misrepresentations. This amount was taken in constructive trust by her for Defendant Lang, and, if nothing else, should be applied as a setoff against the 1985 [German] judgment [which arose separately from the default on the loan].
>
> To allow the Plaintiff to recover the full amount of the judgment would be unfair.

As discussed *supra*, because there was no setoff under German law, plaintiff made no misrepresentations to the Superior Court. Additionally, defendant fails to cite any German statutes or cases to show that the German court erred or to challenge the existence of the 70% rule in German foreclosure actions, explained in the Superior Court's 18 July 1991 order, *supra*. Accordingly, this assignment of error fails.

V.

[5] Finally, defendant argues that the Superior Court erred by denying his motion to vacate or modify the judgment under G.S. 1A-1, Rule 60(b)(6) because the exchange rate used in the 13 September 1990 summary judgment was incorrect. We disagree.

As defendant admits in his brief, defendant failed to perfect his appeal of the 13 September 1990 judgment. The Superior Court properly dismissed that appeal on 6 May 1991. Regarding the correction of erroneous judgments, this Court has previously held:

> It is settled law that erroneous judgments may be corrected only by appeal, *Young v. Insurance Co.*, 267 N.C. 339, 343, 148 S.E. 2d 226, 229 (1966) and that a motion under G.S. 1A-1, Rule 60(b) of the Rules of Civil Procedure cannot be used as a substitute for appellate review. *O'Neill v. Bank*, 40 N.C. App. 227, 231, 252 S.E.2d 231, 234 (1979); *see also In re Snipes*, 45 N.C. App. 79, 81, 262 S.E.2d 292, 294 (1980); 2 McIntosh, N.C. Practice and Procedure § 1720 (Supp. 1970).

Town of Sylva v. Gibson, 51 N.C. App. 545, 548, 277 S.E.2d 115, 117, *disc. review denied*, 303 N.C. 319, 281 S.E.2d 659 (1981). The Superior Court's appropriate dismissal of defendant's appeal bars any discussion of the merits of the exchange rate used in the judgment. Accordingly, the trial court properly denied defendant's G.S. 1A-1, Rule 60(b)(6) motion.

VI.

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

Affirmed.

Judges PARKER and ORR concur.

SAMUEL PAUL HILL AND JESSIE H. MORTON, ET AL., CAVEATORS v. MARY LARGEN COX, IDELL LARGEN BAKER, ET AL., PROPOUNDERS

SAMUEL PAUL HILL, PLAINTIFF v. IDELL BAKER, ADMINISTRATRIX CTS OF THE ESTATE OF MAYOLA T. HILL LARGEN, ERNEST COX, EXECUTOR OF THE ESTATE OF HOBERT LARGEN, MARY LARGEN COX, ET AL., DEFENDANTS

SAMUEL PAUL HILL, PLAINTIFF v. ROBERT EARL BAKER, IDELL BAKER, ET AL., DEFENDANTS

Nos. 9118SC1041
9218SC152

(Filed 5 January 1993)

1. **Wills § 25 (NCI3d)— caveat proceeding—two attorneys representing different groups—denial of fees to one attorney—abuse of discretion**

Where the trial court permitted an attorney to withdraw as counsel for certain caveators, these caveators retained a second attorney to represent them, both attorneys actively participated in the trial as counsel for different groups of caveators, the jury found that the will was valid, and the trial court implicitly found that the caveat proceeding had substantial merit by awarding fees to the original attorney, the trial court abused its discretion by summarily denying the second attorney's petition for fees and expenses. N.C.G.S. § 6-21(2).

Am Jur 2d, Costs §§ 72 et seq.

2. **Constitutional Law § 119 (NCI4th)— trial court's daily prayer—constitutional violation—harmlessness—no expression of opinion**

Assuming arguendo that the jury in a caveat proceeding was present for the trial court's daily prayer "that what we do might be equitable to our fellow man," any violation of the Establishment Clause of the First Amendment and the "secular neutrality toward religion" mandate of Art. I, § 13 of the N.C. Constitution was harmless where the trial court instructed the jury that it had no opinion as to how the case should be decided and there is no indication that the integrity of the verdict was compromised. Furthermore, the trial court's prayer did not constitute an expression of opinion that the

jury should render an equitable verdict to the exclusion of applicable legal principles.

Am Jur 2d, Appeal and Error § 776; Constitutional Law §§ 466, 477, 485; Trial § 1077.

3. Wills § 21.4 (NCI3d)— caveat proceeding—undue influence—denial of directed verdict

There was sufficient evidence in a caveat proceeding rebutting the presumption of undue influence raised by the fiduciary relationship between testator and testator's stepfather and beneficiary under his will to support the trial court's denial of the caveators' motion for a directed verdict.

Am Jur 2d, Wills §§ 425, 428, 439, 491.

Presumption or inference of undue influence from testamentary gift to relative, friend, or associate of person preparing will or procuring its execution. 13 ALR3d 381.

4. Wills § 23 (NCI3d)— caveat proceeding—testamentary capacity—reasonableness of disposition—failure to give requested instruction—no prejudicial error

The trial court did not err in failing to give the caveators' requested instruction that the jury should disregard the reasonableness of the disposition if it found that testator lacked testamentary capacity where the trial court gave the pattern instruction that the jury should disregard the unreasonableness of the disposition if it found that testator had testamentary capacity and further instructed that evidence of the reasonableness of the disposition was relevant only to the extent that it related to testator's testamentary capacity. Although the requested instruction may have been preferred since there was evidence of a close, fiduciary relationship between testator and his beneficiary and the jury could have found a reasonable disposition, the court's charge as a whole was supported by the evidence and fairly presented the law applicable to the case.

Am Jur 2d, Wills § 494.

5. Wills § 25 (NCI3d)— statements by court—no attorney fees for appeal—absence of prejudice

Caveators were not prejudiced by the trial court's statements that no attorney fees would be paid from the estate

for an appeal where these remarks were made subsequent to the court's ruling on post-verdict motions, and caveators did in fact appeal. Upon remand, the trial court may consider further requests for fees incurred as a result of this appeal.

Am Jur 2d, Appeal and Error § 776; Costs §§ 72 et seq.

Appeal by caveators from judgment entered 29 April 1991 by Judge James C. Davis in Guilford County Superior Court. Heard in the Court of Appeals 17 November 1992.

William Ernest Bynum Hill ("Bynum Hill"), a resident of Guilford County, died on 28 January 1989. At the time of his death he had no wife and no children and was the only child of William Ernest Hill and Mayola Hill Largen. When his father died intestate, Bynum Hill inherited a 205 acre tract of land in Randolph County, North Carolina. Subsequently, his mother married Hobert Largen, who had two daughters by a previous marriage, Idell Largen Baker and Mary Largen Cox.

Bynum Hill's mother died on 14 June 1988. Following her death, Bynum's stepfather, Hobert Largen, and his stepsister, Mary Cox, consulted attorney James L. Tennant. At that meeting, Hobert indicated that he wanted a will. On 22 June 1988, Bynum accompanied Hobert to Mr. Tennant's office and, in Bynum's presence, Mr. Tennant and Hobert discussed the property owned by Hobert and its disposition if Hobert died intestate. Bynum thereby stated that he wanted a will and, when asked by Mr. Tennant, indicated that at his death he wished all of his property to go to Hobert. There was evidence that Bynum further indicated that he did not want his property to pass to the heirs of his deceased mother and father, as it would if he were to die intestate, and that, in the event Hobert predeceased Bynum, Bynum wanted his property to be disposed of under the same terms as those contained in Hobert's will, such that everything would pass to his stepsisters Mary Cox and Idell Baker. Hobert Largen's will made no provision for Bynum.

Two days later, Hobert and Bynum returned to Mr. Tennant's office to execute their wills. There was evidence that Mr. Tennant read through each will "word for word" and explained the property dispositions under them. Hobert and Bynum affixed their signatures to their respective wills, and Mr. Tennant and his paralegal signed as witnesses. Mr. Tennant then told Bynum that he was being

placed under oath, that he was swearing that this document was his last will, that he was over eighteen years of age, that he was of sound mind, and that he was not being unduly influenced, to which Bynum nodded his head "yes."

Bynum Hill was classified as moderately mentally retarded with an I.Q. of 51. He also suffered from schizophrenia and a speech impediment. Treatment for his schizophrenia often required the use of antipsychotic medication and hospitalization. There was evidence that he could not read or write but could sign his name, although he more often made his mark with an "X." He could not prepare his own meals and was never publicly employed. Bynum lived with his mother throughout his life and then with Hobert when she remarried. There was evidence that Hobert and Bynum were constant companions, and Hobert was the designated payee of Bynum's social security benefits.

Additional evidence showed that Bynum had his own money which he carried in a billfold and a change purse, and that he had saved cash in excess of $1,400 at his death. There was testimony that he could go into a store, pick out what he wanted, pay with the right change or pay more than was owed and know how much change was due. He voluntarily used $1,000 of his own money for his mother's funeral expenses. There was evidence that Bynum was capable of performing numerous tasks and had certain responsibilities on the farm. There was also evidence that Bynum had a close relationship with his stepsisters.

The paper writing dated 24 June 1988 and purporting to be the Last Will and Testament of Bynum Hill was offered for probate to the clerk of Guilford County on 4 April 1989. This document named the propounders Mary Largen Cox and Idell Largen Baker, Bynum's stepsisters, as persons entitled to share in the estate.

On 11 April 1989 a caveat proceeding was commenced naming the majority of the heirs at law as caveators. By this action, the caveators sought to set aside and declare null and void the purported will on the grounds of undue influence and lack of testamentary capacity. The propounders sought dismissal of the caveat and entry of judgment declaring the document to be in each and every part the Last Will and Testament of Bynum Hill.

At the commencement of this action, Bobby J. Crumley was listed as the attorney of record for the named caveators. Mr. Crumley

served as attorney for all caveators until 29 October 1990, when he was allowed by order of the court to withdraw as counsel for three of the caveators. Thereafter, on 7 January 1991, the law firm of Wyatt, Early, Harris, Wheeler & Hauser (hereinafter "law firm") gave written notice of appearance in this action on behalf of caveators Archie Samuel Hill, Judy L. Hill, S.P. Hill, Robert Jackson Hill, Horace J. Tuttle, Ivery Elizabeth Idol, Donald R. Watson, Jan W. Abbassi, Thurman G. Truett, Richard Dean Watson, Lawrence Watson, Alice C. Spencer, Robie Gray Tuttle and wife, Macie Tuttle. Three of these persons were represented by Mr. Crumley prior to his withdrawal, and five other of these individuals were represented by Mr. Crumley when the caveat was filed. Mr. Crumley continued to represent all other caveators. Throughout these proceedings, the propounders were represented by John Haworth.

On 17 December 1990 Mr. Crumley filed a motion for interim attorney fees and later an affidavit of counsel to support his fee request. That same day, Mr. Haworth filed an application for interim allowance of attorney fees and expenses on behalf of the propounders. By order filed 15 January 1991 the trial court allowed interim attorney fees and expenses for Mr. Crumley in the amount of $17,175.48. Mr. Haworth was allowed interim fees in the amount of $25,218.75 plus expenses in the amount of $1,880.91 on 18 January 1991.

At trial, Mr. Hundley of the law firm appeared on behalf of the caveators it represented and actively participated as co-counsel with Mr. Crumley. Upon submission of the issues based upon the evidence, the jury found that there was a valid will and that the testator had sufficient mental capacity and was not unduly influenced. Following trial, on 22 April 1991, Mr. Crumley filed a motion for attorney fees and supporting affidavit. On 26 April 1991, the law firm filed a petition for approval and award of legal expenses on behalf of the caveators. Mr. Haworth also filed an application for attorney fees on 26 April 1991.

Subsequently, Mr. Crumley's motion was granted and he was awarded additional fees and expenses in the sum of $17,291.60. Mr. Haworth was also allowed additional fees and expenses in the amount of $12,272.50. However, the trial court denied the law firm's petition for fees and expenses on behalf of the caveators.

Wyatt, Early, Harris, Wheeler & Hauser, by James R. Hundley, for caveators appellants.

Turner, Enochs & Lloyd, P.A., by Peter Chastain and S. Rebecca Bowen, for caveators appellants.

Haworth, Riggs, Kuhn and Haworth, by John Haworth, for propounders appellees.

WALKER, Judge.

I.

[1] In the first action before this Court, the law firm, on behalf of those caveators it represented, alleges that the trial court abused its discretion by denying their petition for approval and award of legal expenses filed on 26 April 1991. They argue that the caveat proceeding had substantial merit, and the trial court's decision to deny them reasonable fees was arbitrary and unreasonable. We agree.

N.C.G.S. § 6-21(2) authorizes the trial court, in its discretion, to allow attorney fees to counsel for unsuccessful caveators where the proceeding has substantial merit. The purpose of this statute is to insure that parties with meritorious challenges to a will or trust agreement are not discouraged from bringing those claims by the prospect of incurring legal fees. *In re Kirkman*, 302 N.C. 164, 273 S.E.2d 712 (1981). In the absence of abuse or arbitrariness, a discretionary order of the trial court in this regard is conclusive on appeal. *State Highway Commission v. Hemphill*, 269 N.C. 535, 153 S.E.2d 22 (1967).

At the outset, we conclude that the trial court implicitly found that the caveat proceeding had substantial merit in allowing and awarding Mr. Crumley's application for attorney fees. The trial court also recognized the merit of the claims asserted in stating: "I know that they [the jury] could have gone one way or they could have gone the other based upon the evidence that was presented and whichever way they went in this case they had a good reason to go whichever way they went."

Additionally, there was evidence that the law firm performed substantial services on behalf of the caveators it represented. Mr. Hundley was introduced to the jury as counsel for caveators and actively participated as such throughout trial. He cross-examined

seven witnesses for the propounders, and conducted the examination of nine of the fourteen witnesses, as well as two of the three rebuttal witnesses, called by all of the caveators. He attended and participated in the jury charge conference and made a closing argument on behalf of caveators. He also argued several motions to the court. At the conclusion of the trial, the court recognized the parties were competently represented by the three attorneys and acknowledged that the case was extremely difficult but had been exceptionally well tried. The court praised the attorneys for their knowledge of the case, the law, and the manner in which they participated in the trial.

As previously noted from the record, the trial court permitted Mr. Crumley to withdraw as counsel of record for certain caveators on 29 October 1990. Implicit in that decision was permission for these caveators to retain their own counsel. Therefore, if at the outset of the trial of this cause, the court determined that there was duplicity on the part of all counsel in its representation of the caveators, then the caveators should have been apprised that such a determination by the trial court might result in the denial of attorney fees pursuant to N.C.G.S. § 6-21(2), rather than for the trial court to summarily deny the law firm's request for fees at the conclusion of this matter.

For the aforementioned reasons, we find that the trial court was correct in its decision to award attorney fees pursuant to N.C.G.S. § 6-21(2). However, the trial court manifested an abuse of discretion in summarily denying caveators' petition for approval and award of legal expenses by Mr. Hundley and the law firm. We therefore reverse the trial court's denial of the law firm's petition for attorney fees and expenses entered 29 April 1991 and remand this case to the trial court for further hearing on the issue of caveators' attorney fees and expenses.

II.

By their second action, caveators contend: (1) the trial court violated the First Amendment by praying upon the opening of each morning session of court; (2) the trial court's daily prayer was an improper expression of opinion which violated Rule 51(a); (3) the trial court erred in denying caveators' motion for a directed verdict and judgment notwithstanding the verdict based upon the failure of the propounders to present sufficient evidence to rebut the presumption of undue influence raised by the fiduciary relation-

ship; (4) the trial court erred in failing to instruct the jury that they could find that the testator's disposition was fair, reasonable and just, but could fail for lack of testamentary capacity; and (5) the trial court abused its discretion by ruling peremptorily that no attorneys' fees would be awarded to the caveators in the event they chose to appeal. Caveators thereby assert that they are entitled to a new trial.

[2] In their first and second assignments of error, caveators take exception to the daily prayer offered by the trial court at the beginning of each court session. Specifically, the trial court asked all individuals in the courtroom to join him "as we invoke the blessing of the Almighty that what we do this date might be guided by his hand and further that what we do might be equitable to our fellow man." Caveators argue that the prayer violated the First Amendment and the Establishment Clause of the United States Constitution because the purpose of the prayer was religious, it advanced religion, and it fostered excessive government entanglement with religion, thereby failing the three-part test set forth in *Lemon v. Kurtzman*, 403 U.S. 602, 29 L.Ed.2d 745, *reh'g denied*, 404 U.S. 876, 30 L.Ed.2d 123 (1971). Additionally, they claim this prayer violated Article I, Section 13 of the North Carolina Constitution and the constitutional mandate of "secular neutrality toward religion." *Heritage Village Church and Missionary Fellowship, Inc. v. State*, 299 N.C. 399, 406, 263 S.E.2d 726, 730 (1980). Caveators also contend this prayer was an impermissible expression of opinion, in violation of Rule 51(a), which unduly emphasized the jury's need to render an equitable judgment to the exclusion of applicable legal principles.

The Establishment Clause of the First Amendment provides that "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof." As applied to the states through the Fourteenth Amendment, the First Amendment "also restricts action by state governments and the servants, agents and agencies, of state governments." *North Carolina Civil Liberties Union v. Constangy*, 751 F.Supp. 552, 553 (W.D.N.C. 1990), *aff'd*, 947 F.2d 1145 (4th Cir. 1991). (Emphasis omitted.) We decline to discuss the merits of caveators' argument, however, on the ground that "[e]very 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).

From a review of the record, we cannot conclude that the daily prayer prejudiced the caveators such that a different result would likely have been reached absent the prayer. *Glenn v. City of Raleigh*, 248 N.C. 378, 103 S.E.2d 482 (1958); *First-Citizens Bank & Trust Company v. Carr*, 10 N.C.App. 610, 179 S.E.2d 838, *modified on other grounds*, 279 N.C. 539, 184 S.E.2d 268 (1971). There is no evidence that the jury was present at the time the trial court recited the prayer. Assuming *arguendo* that the jury was present, we do not construe the trial court's prayer "that what we do might be equitable to our fellow man" as an implicit directive to the jurors to disregard legal principles and the explicit instructions of the trial court. Instead, the trial court instructed the jury that it had no opinion as to how the case should be decided. N.C.P.I. 150.20. It is our opinion, therefore, that any error which may have occurred within the context of the court's prayer would have been cured by the trial court's instructions, and there is no indication that the integrity of the verdict was compromised. Having found no prejudice, we conclude that any constitutional violation which might have occurred was harmless beyond a reasonable doubt. Furthermore, absent caveators' showing of prejudice, we cannot conclude that the trial court's prayer amounted to an impermissible expression of opinion in violation of Rule 51(a).

[3] Caveators next contend that the trial court erred in denying their motion for a directed verdict and judgment notwithstanding the verdict on the grounds that there was insufficient evidence to rebut the presumption of undue influence raised by the fiduciary relationship between the testator and Hobert Largen, the testator's stepfather and beneficiary under testator's will. A motion for judgment notwithstanding the verdict is technically a renewal of the directed verdict motion, such that our standard of review is the same for both. *Dotson v. Payne*, 71 N.C.App. 691, 323 S.E.2d 362 (1984). *In re Andrews*, 299 N.C. 52, 261 S.E.2d 198 (1980). We must therefore determine whether the evidence, taken in the light most favorable to the propounders, was sufficient for submission of the case to the jury. *Id.* Having reviewed the record and the transcripts covering ten days of trial, numerous exhibits, and the testimony of more than thirty-five witnesses, we find that there was sufficient evidence to support the trial court's determination and therefore find no error.

[4] Additionally, caveators argue that the trial court erred in failing to instruct the jury that they could find that the testator's disposition was fair, reasonable and just, but could fail for lack of testamentary capacity. In instructing the jury on the issue of testamentary capacity, the trial court followed the pattern jury instructions and stated:

> [I]f you find that the testator made an unreasonable or unfair or unjust disposition, but are satisfied that he had testamentary capacity, then you would disregard the unreasonableness or unfairness or injustice of the disposition.

Caveators except to this charge on the ground that the jury could have concluded that the disposition in the testator's will was reasonable based upon the evidentiary showing of the extremely close, confidential relationship which existed between the testator and his stepfather. The reasonableness and fairness of his disposition would be irrelevant, however, if the testator lacked testamentary capacity. Caveators thereby contend that the evidence in this case required the trial court to submit the following instruction:

> If you find that the testator made a reasonable or fair or just disposition, but are satisfied that he lacked testamentary capacity, then you would disregard the reasonableness or fairness or justice of the disposition.

Clearly, it is incumbent upon the trial court to instruct the jury on the law as it applies to the substantive features of the case arising from the evidence. *Millis Construction Co. v. Fairfield Sapphire Valley, Inc.*, 86 N.C.App. 506, 358 S.E.2d 566 (1987). While we do not disagree with caveators that their requested charge is a preferred instruction on this aspect of the law, we cannot conclude that prejudicial error resulted from the instruction given. The trial court's instructions to the jury, when challenged for error, must be considered contextually. *In re Worrell*, 35 N.C.App. 278, 241 S.E.2d 343, *disc. review denied*, 295 N.C. 90, 244 S.E.2d 263 (1978). In the instant case, the trial court charged that evidence of the reasonableness of the property disposition was relevant only to the extent that it related to the testator's testamentary capacity. The court stated:

> Now, in passing upon testamentary capacity, you may, in the light of all the evidence as to his circumstances, consider the reasonableness or unreasonableness, the fairness or unfair-

> ness, and the justice or injustice of the disposition of the property disposed of in the paper writing. But you may consider these things only as they bear upon the question of his mental condition.

Thus, when considered as a whole, we find that the court's charge was supported by the evidence and fairly presented the law applicable to the case.

[5] By caveators' final assignment of error, they allege that the trial court abused its discretion by ruling peremptorily that no attorney fees would be awarded to the caveators in the event they chose to appeal. Specifically, caveators object to the court's comments following its ruling on post-verdict motions that:

> If any appeals are filed in this case, there will be no attorney's fees provided for anybody. Anybody that appeals the case, there will be no fees paid from the estate. They will be paid by those people who may appeal.
>
> . . . .
>
> Now, from this point on there will be no attorney's fees paid from the estate. Only from the people who hire you to appeal, if in fact you do appeal. And I think that needs to be known at this particular point and not some point down the line.

Caveators argue that the trial court's refusal to exercise its discretionary power to award attorney fees pursuant to N.C.G.S. § 6-21(2) was arbitrary, unreasonable, and constituted an abuse of discretion. They submit that these statements implied that the court found no substantial merit to any of caveators' grounds for appeal, and may also have had a coercive effect on the parties' exercise of their rights to appeal.

As to this assignment of error, we cannot conclude that caveators were prejudiced. These remarks were made subsequent to the verdict and the court's ruling on post-verdict motions. Furthermore, it does not appear that the court's comments had a chilling effect in light of the appeal now before this Court. The trial court will not be precluded, upon remand, from considering further requests for fees incurred by the parties as a result of this appeal.

As to the trial of this caveat to the will of Bynum Hill, we find NO ERROR in the judgment of the trial court. REVERSED and

REMANDED for further proceedings as to attorneys' fees in this case including the appeal.

Judges COZORT and GREENE concur.

STATE OF NORTH CAROLINA v. BRENDA GAY MORRELL

No. 9123SC933

(Filed 5 January 1993)

1. Evidence and Witnesses § 1233 (NCI4th) — confession to social worker — agent of State — absence of Miranda warnings — admission as harmless error

Defendant's confession to a social worker without the benefit of *Miranda* warnings was obtained in violation of her Fifth Amendment right against self-incrimination where (1) the social worker's interview of defendant amounted to custodial interrogation because defendant was incarcerated in the Mecklenburg County jail and the social worker asked her specific questions about her sexual activities with a twelve-year-old boy, and (2) the social worker was acting as an agent of the Wilkes County Sheriff's Department because she had begun working with the Sheriff's Department on the case prior to interviewing defendant and her investigation was made at least in part for the purpose of obtaining information with which to initiate criminal proceedings against defendant. However, defendant was not prejudiced by the admission of this confession in light of the proper admission of defendant's subsequent, more inculpatory confession to a detective and the strong evidence of defendant's guilt.

Am Jur 2d, Evidence §§ 554, 555, 556.

What constitutes "custodial interrogation" within rule of Miranda v. Arizona requiring that suspect be informed of his federal constitutional rights before custodial interrogation. 31 ALR3d 565.

2. Evidence and Witnesses § 1227 (NCI4th)— inadmissible confession to social worker—subsequent confession to detective not inadmissible

Defendant's confession to a detective after proper *Miranda* warnings was not rendered inadmissible by defendant's prior inadmissible confession to a social worker without *Miranda* warnings where the record established that defendant's earlier statement to the social worker was not coerced or made under circumstances calculated to undermine her free will but was made freely and voluntarily.

Am Jur 2d, Evidence §§ 537, 582.

3. Constitutional Law § 367 (NCI4th)— consecutive life sentences—no cruel and unusual punishment

The imposition on defendant of two consecutive life terms for two counts of first degree rape of a child, two counts of first degree sexual offense against a child, two counts of taking indecent liberties with a child, and one count of child abduction did not constitute cruel and unusual punishment since defendant could have received four life sentences for the rapes and sexual offenses had the trial court not consolidated the cases for sentencing.

Am Jur 2d, Criminal Law §§ 625, 626, 629.

Comment note—length of sentence as violation of constitutional provisions prohibiting cruel and unusual punishment. 33 ALR3d 335.

Appeal by defendant from judgments entered 24 April 1991 in Wilkes County Superior Court by Judge James A. Beaty. Heard in the Court of Appeals 10 November 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

GREENE, Judge.

Defendant appeals from judgments entered on 24 April 1991, which judgments are based on jury verdicts convicting defendant

of two counts of first degree sexual offense, N.C.G.S. § 14-27.4 (1986), one count of abduction of a child, N.C.G.S. § 14-41 (1986), two counts of first degree rape, N.C.G.S. § 14-27.2 (1986), and two counts of indecent liberties, N.C.G.S. § 14-202.1 (1986).

The evidence presented by the State tends to establish that Christopher, who was twelve years old at the time of trial, lived during the summer and fall of 1990 in Roaring River, North Carolina, with his mother and step-father, Jack Nunnary (Nunnary), and defendant Brenda Morrell, who was twenty-nine years old at the time of trial. Christopher's parents, who were long-distance truck drivers, had met defendant on a trip and had brought her to their home to live as, according to Christopher, "Mom's girlfriend." Christopher characterized defendant and Nunnary as his "babysitters." Defendant shared a bedroom with Christopher's parents, and Christopher and Nunnary each had a separate bedroom. Christopher often watched sexual activity between defendant and his parents through a grating in his room.

Christopher testified that one evening in August, 1990, he was asked to come down to his parents' bedroom. Upon entering the room, he saw his mother and defendant rubbing lotion on each other, after which they had "intercourse," which Christopher described as "my mom . . . sticking her finger up . . . [defendant's] mid-section." At the same time, Christopher observed his step-father "sticking his penis in [my mom's] butt." Christopher then "climbed on top of [defendant] and put . . . my penis in her mid-section," or vagina, and had intercourse with her. Afterwards, his step-father told him to take a cold shower and go to bed, which he did. Christopher testified that he and defendant "played house" on two subsequent occasions when Christopher's parents were "out on the road" and Nunnary was at work. On both occasions, defendant performed oral sex on Christopher prior to their having intercourse, and, on the latter occasion, Christopher performed oral sex on defendant after intercourse. Nunnary learned that Christopher and defendant had been having sex when he and Christopher's parents were not at home and told the parents, who demanded that defendant leave their home.

On 13 October 1990, defendant returned to Christopher's home. Christopher was alone, and defendant asked if she could take a hot shower and get some clothes. Defendant told Christopher to get some of his clothes ready because he was "going to go on

a long trip." Christopher told defendant that he did not want to go on a long trip. They began walking down the highway, and, according to Christopher, he tried to get away but defendant caught him. After a short time walking, they began hitchhiking and were picked up by a truck driver who took them to Washington, D.C., where defendant insisted that Christopher use a false name. After two days there, defendant and Christopher went to defendant's parents' home in Maryland, where they remained until law enforcement authorities came for Christopher. On 18 October 1990, Christopher was transported to Charlotte, North Carolina, where he was met at the airport by Chris Shew (Shew), chief detective of the Wilkes County Sheriff's Department, and Stephanie Broyhill (Broyhill), a social worker in the child protective services unit of the Wilkes County Department of Social Services. Christopher told Shew and Broyhill about the events surrounding his association with defendant.

Broyhill testified that on 5 November 1990, she talked with defendant while defendant was in custody at the Mecklenburg County jail after having been arrested on a federal charge of child abduction. Broyhill told defendant her name and that she was from the Wilkes County Department of Social Services, and that she was conducting an investigation of alleged sexual abuse and neglect of Christopher. Broyhill then testified, over defendant's objection, that defendant told her that she had had sexual relations with Christopher on an occasion when she and Christopher's parents were in their bed with Christopher. Defendant also indicated to Broyhill that on another occasion, she did not actually have intercourse with Christopher but that Christopher "ate her cookie" and that she tried to give him "a blow job" but he pushed her away. Defendant told Broyhill that on a third occasion, Nunnary overheard her asking Christopher if he "wanted to play house," which resulted in defendant leaving the home. Broyhill testified that during the interview defendant was very calm, cooperative, and matter of fact.

Detective Shew testified that on 7 November 1990, he and a deputy went to the Mecklenburg County jail to take defendant into custody and transport her back to Wilkes County. Shew testified that, upon entering the vehicle, he warned her pursuant to *Miranda*, after which defendant indicated that she understood her rights and agreed to talk to Shew without a lawyer. Upon arrival at the Wilkes County Sheriff's Department, Shew again gave defendant a *Miranda* warning, and defendant again waived her right to

an attorney and signed a form to that effect. Defendant then made a formal statement which, over defendant's objection, Shew read to the jury. In her statement, defendant indicated that she had had intercourse with Christopher on two occasions, that she had performed oral sex on him once, and that he had performed oral sex on her once. Defendant also stated that Christopher left North Carolina and went to Maryland with her voluntarily.

Defendant presented no evidence. Prior to trial, defendant made a motion in limine seeking to exclude all evidence regarding defendant's statement to Broyhill on the ground that she was not informed of her *Miranda* rights prior to making the statement. In the same motion, defendant also sought to exclude evidence regarding the statement made to Shew on the ground that, after being advised of her rights, defendant asked to confer with an attorney and was not granted this request. The trial court denied defendant's motion.

The jury convicted defendant of two counts of first degree rape in August and September, 1990, two counts of taking indecent liberties with a child in August and September, 1990, one count of first degree sexual offense involving fellatio, one count of first degree sexual offense involving cunnilingus, and one count of abduction of a child. The trial court consolidated the charges and sentenced defendant to two consecutive life terms. Defendant appeals.

The issues presented are whether (I) Broyhill's failure to inform defendant of her Fifth Amendment right to remain silent and to the presence of counsel prior to questioning defendant in the Mecklenburg County jail renders defendant's statement inadmissible; and (II) if so, whether defendant's subsequent warned confession to Detective Shew is inadmissible as "fruit of the poisonous tree."

I

Defendant argues that evidence regarding her statement to social worker Broyhill should have been excluded as obtained in violation of her Fifth Amendment privilege against self-incrimination because Broyhill was acting as an agent of law enforcement and therefore was required to inform defendant of her *Miranda* rights prior to the interview at the Mecklenburg County jail.

A suspect who is subjected to custodial interrogation is entitled under the Fifth Amendment of the United States Constitution, made applicable to the states through the Fourteenth Amendment, to be informed that he has the right to remain silent, that any statement he does make may be used as evidence against him, and that he is entitled to have an attorney present during questioning, either retained or appointed. *Miranda v. Arizona*, 384 U.S. 436, 444, 16 L. Ed. 2d 694, 706-07 (1966); *Malloy v. Hogan*, 378 U.S. 1, 12 L. Ed. 2d 653 (1964). Once informed of his rights, the suspect may voluntarily, knowingly, and intelligently waive them, however, failure to inform a suspect of his rights renders his statements inadmissible. *Miranda*, 384 U.S. at 444, 16 L. Ed. 2d at 707. "Custodial interrogation" refers to "questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom of action in any significant way." *Id.; State v. Thomas*, 284 N.C. 212, 216, 200 S.E.2d 3, 7 (1973). For Fifth Amendment purposes, included within the meaning of "questioning" are any actions that police "should know are reasonably likely to elicit an incriminating response from a suspect." *Rhode Island v. Innis*, 446 U.S. 291, 301, 64 L. Ed. 2d 297, 308 (1980).

It is well-established in North Carolina that unwarned statements made by defendants to private individuals *unconnected with law enforcement*, if made freely and voluntarily, are admissible at trial. *State v. Etheridge*, 319 N.C. 34, 43, 352 S.E.2d 673, 679 (1987) (emphasis added). However, when an accused's statements stem from custodial interrogation by one who in effect is acting as an agent of law enforcement, such statements are inadmissible unless the accused received a *Miranda* warning prior to questioning. *See id.* at 44, 352 S.E.2d at 679; *State v. Nations II*, 319 N.C. 329, 331, 354 S.E.2d 516, 518 (1987); *see also Estelle v. Smith*, 451 U.S. 454, 466-68, 68 L. Ed. 2d 359, 371-72 (1981) (Court ruled inadmissible defendant's unwarned statement, made while in jail, to court-appointed psychiatrist who was "essentially an agent of the state"); *Cates v. State*, 776 S.W.2d 170 (Tex. Crim. App. 1989) (incarcerated defendant's unwarned child abuse confession made to social services worker inadmissible in light of court's determination that social worker was acting as agent of law enforcement). Thus, if in the instant case the totality of the circumstances reveals that the interview of defendant amounted to a "custodial interrogation" by Broyhill, acting either wholly or in part as an agent of

the Wilkes County Sheriff's Department, then defendant was entitled to a *Miranda* warning and Broyhill's failure to provide such warning renders defendant's statement inadmissible.

Custodial Interrogation

Because it is undisputed that defendant was incarcerated in the Mecklenburg County jail and thus had been deprived of her freedom at the time of Broyhill's interview, defendant was in "custody." Thus, the assessment of the interview as a "custodial interrogation" turns upon its characterization as an "interrogation." Assuming for the purposes of this analysis that Broyhill was acting as an agent of law enforcement, Broyhill "interrogated" defendant if she expressly questioned defendant or if she should have known that her actions were reasonably likely to elicit an incriminating response from defendant. Given the fact that Broyhill, by her own admission, asked defendant specific "questions about the various incidents that Christopher had related to me," including defendant's sexual activity with Christopher, a child under the age of thirteen, Broyhill's interview with defendant amounted to an interrogation for Fifth Amendment purposes.

Broyhill As State Agent

In the companion cases of *State v. Nations I* and *II*, our Supreme Court addressed, among other things, a defendant's argument that the social worker to whom he made an incriminating statement while incarcerated, after having previously been warned and invoking his right to counsel, was an agent of the State for Fifth and Sixth Amendment purposes. *State v. Nations I*, 319 N.C. 318, 354 S.E.2d 510 (1987); *State v. Nations II*, 319 N.C. 329, 354 S.E.2d 516 (1987). The defendant in *Nations I* and *II* was incarcerated after having been arrested on charges of child sexual abuse. After initially agreeing to talk with police officers, he changed his mind and invoked his right to counsel. A few days later, he asked the jailer if he could see someone from "mental health." The jailer referred this request to a social worker who happened to be arriving at the jail for the purpose of interviewing the defendant. The social worker's visit was prompted by an earlier telephone call from a woman who informed him that the defendant had sexually molested her daughter and was currently in jail on unrelated charges.

When asked by the defendant if their conversation would be confidential, the social worker told the defendant that he had an obligation to report to the District Attorney if he learned that a crime had been committed. The defendant nevertheless indicated that he wanted to "clear his conscience" and confessed to having sexually abused the child. The defendant told the social worker that he would be willing to talk with a police officer, to whom he also confessed. The specific issue before the Court in *Nations II* was whether the social worker's interview with the defendant constituted a "subsequent police-initiated interrogation" in violation of the defendant's Fifth Amendment right to the presence of counsel. The Court upheld the trial court's conclusion that no violation had occurred, emphasizing that, because the social worker was not an agent of law enforcement (as determined in *Nations I*), his contact with defendant was not "police-initiated." The Court also held that the confession to the social worker was not the product of custodial interrogation because there was no evidence that by allowing the interview, which was not police-initiated, the police were reasonably likely to elicit an incriminating response.

In upholding in *Nations I* the trial court's conclusion that the social worker was not an agent of the police, the Court determined that there was competent evidence to support the trial court's findings that the social worker (1) was not a sworn law enforcement officer, had no arrest power, and was not affiliated in any way with any law enforcement agency, and (2) did not visit the defendant at the direction of any law enforcement agency or for the purpose, either wholly or in part, of obtaining information with which to initiate further criminal proceedings against the defendant.

Under very different facts, the trial court in the instant case in its order denying defendant's motion to suppress made the following relevant findings, which are almost identical to those made by the trial court and upheld in *Nations I*:

> Broyhill was not a sworn enforcement officer nor did she have any type of arrest power, criminal jurisdiction, or affiliation in any way with law enforcement authorities.
>
> . . . .
>
> Based upon the information available to the Court at the time of the April 29, 1991 session of Court, the Court finds that the contact made by Stephanie Broyhill with the defend-

ant was not initiated by any law enforcement agency requesting an interview by her with the defendant on behalf of that law enforcement agency. But rather the Court finds that the interview of the defendant by Mrs. Broyhill was conducted as a part of her agency's investigative policies.

In addition the Court finds that the planned interview by Mrs. Broyhill of the defendant was not at the direction of any law enforcement agency charged with the enforcement of criminal statutes and further that the interview so conducted was not made wholly or in part for the purpose of obtaining information with which to initiate criminal proceedings against the defendant.

Findings of fact regarding the admissibility of a confession are conclusive if supported by competent evidence. *State v. Simpson*, 314 N.C. 359, 368, 334 S.E.2d 53, 59 (1985). It is undisputed that Broyhill was not a sworn law enforcement officer with arrest power. However, unlike in *Nations I* and *II*, where the record established that the social worker's contact with the defendant was prompted by both the defendant's request and a mother's telephone call, the record in the instant case contains no evidence to support the trial court's finding that the contact made by Broyhill with defendant "was not initiated by any law enforcement agency requesting that Broyhill interview the defendant" and that Broyhill had no "affiliation in any way with law enforcement authorities." To the contrary, the record establishes that Broyhill and Detective Shew had been in contact with each other as early as 18 October 1990, when they, together, met Christopher at the Charlotte Airport upon his return by authorities from Maryland, and, together, interviewed Christopher in order to obtain information regarding his sexual encounters with defendant and his parents. Furthermore, although Broyhill testified that she participated on behalf of the Department of Social Services in the investigation of Christopher's case, given her early association with Detective Shew, there is no evidence to support the court's finding that Broyhill's investigation was not made at least *in part* for the purpose of obtaining information with which to initiate criminal proceedings against defendant.

We are aware that the Department of Social Services has a statutory duty to report findings of child abuse to the district attorney. N.C.G.S. § 7A-548(a) (1989 & Supp. 1992). However, when

Broyhill went beyond merely fulfilling her role as Christopher's social worker and began working with the Wilkes County Sheriff's Department on the case *prior to* interviewing defendant, eventually testifying for the State at defendant's trial, Broyhill's "role changed and became essentially like that of an agent of the State recounting unwarned statements made in a postarrest custodial setting." *Estelle*, 451 U.S. at 467, 68 L. Ed. 2d at 372. Accordingly, because Broyhill did not advise defendant of her *Miranda* rights, the trial court erred in denying defendant's motion to suppress statements made during her interview with Broyhill.

II

[2] Defendant argues that, because her statements to Broyhill were obtained in violation of *Miranda* and are therefore inadmissible, defendant's subsequent *warned* statement to Detective Shew constitutes fruit of the earlier inadmissible statement and is likewise inadmissible.[1]

The Fifth Amendment requires suppression of a confession that is the fruit of an earlier statement obtained in violation of *Miranda* only when the earlier inadmissible statement is "coerced or given under circumstances calculated to undermine the suspect's ability to exercise his or her free will." *Oregon v. Elstad*, 470 U.S. 298, 309, 84 L. Ed. 2d 222, 232 (1985); *State v. Barlow*, 330 N.C. 133, 138-39, 409 S.E.2d 906, 910 (1991). We need not decide whether the statement given by defendant to Detective Shew after defendant had waived her *Miranda* rights constitutes "fruit" of her earlier statement to Broyhill, because the record establishes that defendant's earlier statement to Broyhill was neither coerced nor made under circumstances calculated to undermine her free will.

The "voluntariness [of a confession] is determined in light of the totality of the circumstances surrounding the confession." *Barlow*, 330 N.C. at 140-41, 409 S.E.2d at 911 (citing *State v. Richardson*, 316 N.C. 594, 601, 342 S.E.2d 823, 829 (1986)). Some factors to be considered are "whether the defendant was in custody when

1. The trial court found that defendant's confession to Shew was made after defendant freely, knowingly, understandingly, and intelligently waived her rights under *Miranda*, and defendant does not argue otherwise before this Court. Defendant confines her argument to the inadmissibility of the confession to Shew based on it being fruit of the prior inadmissible statement to Broyhill.

he made the statement; the mental capacity of the defendant; and the presence of psychological coercion, physical torture, threats, or promises." *Id.* at 140, 409 S.E.2d at 911. Although in the instant case defendant was in custody when she spoke with Broyhill, that fact alone is not determinative. The trial court found that defendant freely gave statements to Broyhill about her involvement with Christopher, without any threat or promise and without any duress, and that defendant was not suffering from any mental or emotional disorder or disease at the time the statements were made, nor was she impaired or disabled. The court concluded based on these findings that the unwarned statements made by defendant to Broyhill were voluntary. The court's findings are supported by the evidence in the record, and, accordingly, we are bound by them. *Simpson*, 314 N.C. at 368, 334 S.E.2d at 59. Thus, we uphold the trial court's denial of defendant's motion to suppress the statement given to Detective Shew.

[1] Because we have determined that defendant's confession to Detective Shew, the content of which is more inculpatory than that of defendant's statement to Broyhill, was properly admitted at trial, and in light of the strong evidence of defendant's guilt in the form of Christopher's testimony, the State has met its burden of showing that the erroneous admission of defendant's statement to Broyhill was harmless beyond a reasonable doubt. *See* N.C.G.S. § 15A-1443(b) (1988) (defendant entitled to new trial unless State shows that constitutional error is harmless beyond a reasonable doubt).

III

[3] Defendant argues that her sentence of two consecutive life terms constitutes cruel and unusual punishment in violation of the Eighth Amendment of the United States Constitution.

It is well-settled that a life sentence for first-degree sexual offense committed upon a child, even when committed without verbal or physical abuse or violence, does not violate the Eighth Amendment. *State v. Higginbottom*, 312 N.C. 760, 762-64, 324 S.E.2d 834, 837 (1985). In the instant case, defendant was convicted of, among other things, two counts of first-degree sexual offense and two counts of first-degree rape, all Class B felonies punishable by mandatory life imprisonment. N.C.G.S. § 14-1.1(a)(2) (1986). Had the trial court not consolidated the cases for sentencing, defendant by statute would have been subject to four life terms. "Since it

is the function of the legislature and not the judiciary to determine the extent of punishment to be imposed, we accord substantial deference to the wisdom of that body." *Higginbottom*, 312 N.C. at 763-64, 324 S.E.2d at 837. Accordingly, we reject this assignment of error.

We have reviewed defendant's remaining assignments of error, and have determined that they are either without merit or do not constitute prejudicial error entitling defendant to a new trial.

No error.

Judges WYNN and WALKER concur.

STATE OF NORTH CAROLINA v. ROBERT JAMES BAYMON

No. 917SC943

(Filed 5 January 1993)

1. **Evidence and Witnesses § 2332 (NCI4th)— child sexual abuse— testimony of expert—credibility of victim**

The trial court did not err in a prosecution for sexually abusing a child by allowing an expert to testify that children who have been sexually abused do not lie, but erred by allowing the expert to testify that she "had not picked up on anything" to suggest that someone had told the victim what to say and that she had no concerns that the victim had been coached. An expert in child sexual abuse may properly testify regarding the credibility of children in general who relate stories of sexual abuse and there was no abuse of discretion in the trial court's determination that the probative value was not substantially outweighed by the danger of unfair prejudice. The testimony as to coaching bore directly on the victim's credibility.

Am Jur 2d, Expert and Opinion Evidence § 191; Evidence § 342.

Necessity and admissibility of expert testimony as to credibility of witness. 20 ALR3d 684.

2. Evidence and Witnesses § 2972 (NCI4th) — child sexual abuse victim — specific acts of truthfulness — not admissible

The trial court erred in a prosecution for sexually abusing a nine year old child by allowing the victim's teacher to testify on direct examination regarding specific instances of conduct which tended to establish the victim's truthfulness where her character for truthfulness was not "in issue" in defendant's trial and where the specific instances of conduct illustrating her character were related on direct examination of her teacher by the State.

Am Jur 2d, Evidence §§ 342, 344.

Construction and application of Rule 608(b) of Federal Rules of Evidence dealing with use of specific instances of conduct to attack or support credibility. 36 ALR Fed 564.

3. Evidence and Witnesses § 743 (NCI4th) — child sexual abuse — credibility of victim — evidence of veracity — admission prejudicial

There was prejudice in a child sexual abuse prosecution in the erroneous admission of testimony from an expert that this victim showed no signs of coaching and testimony from a teacher relating specific instances of truthful conduct where the medical evidence was conflicting and there was a reasonable possibility that, had the trial court not improperly admitted testimony from two witnesses tending to establish the victim's veracity, the jury would have reached a different verdict.

Am Jur 2d, New Trial § 343.

Error in evidentiary ruling in federal civil case as harmless or prejudicial under Rule 103(a), Federal Rules of Evidence. 84 ALR Fed 28.

Judge WALKER dissenting.

Appeal by defendant from judgments entered 21 March 1991 in Wilson County Superior Court by Judge G. K. Butterfield. Heard in the Court of Appeals 10 November 1992.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert J. Blum, for the State.

Gibbons, Cozart, Jones, James, Hughes, Sallenger & Taylor, by W. Earl Taylor, Jr., for defendant-appellant.

GREENE, Judge.

Defendant appeals from judgments entered 21 March 1991, which judgments are based on jury verdicts convicting defendant of two counts of first-degree sexual offense, N.C.G.S. § 14-27.4 (1986), and two counts of first-degree rape, N.C.G.S. § 14-27.2 (1986).

In relevant part, the evidence presented by the State established that Christina, who was nine years old at the time of trial, lived with her mother, her sister, and defendant in Wilson, North Carolina. Christina testified that defendant would make her stay in the house while other children were outside playing, and that he would perform sexual acts on her while they were on the couch in the living room. In essence, Christina testified that defendant penetrated her both vaginally and rectally, and performed cunnilingus on her. The things defendant did to Christina hurt her and she would sometimes bleed. Christina did not tell anyone about defendant's actions because she feared that she would get in trouble.

Christina's cousin testified that on 2 July 1990, Christina told her that defendant had been "messing with her." On 13 July 1990, Christina complained to her cousin a second time, and appeared to have difficulty sitting. Christina went to the bathroom at her cousin's house, and shortly thereafter her cousin found blood in the commode. When questioned, Christina, pointing to her vagina, told her cousin that defendant "stuck his thing in me and caused me to bleed like that." On 14 July 1990, Christina told a similar story to her aunt.

Patty Renfrow (Renfrow), a social worker with Wilson County Social Services, testified that she first met Christina on 2 July 1990, during a visit to Christina's home which was prompted by a referral indicating that Christina and her sister were being neglected and abused by defendant. Christina appeared to be nervous during this visit. Renfrow visited the home again on 14 July 1990, at which time Christina's cousin, Wilson Police Department Detective Tim Bunn, and social worker Debbie Orcutt (Orcutt) were present. Orcutt had been contacted by the police department in response to a call by Christina's aunt indicating that Christina had been sexually abused by defendant and was bleeding from the rectum. Christina told Renfrow that she had been bleeding from her rectum and that defendant had "stuck his ding-dong" in her. Christina's mother, cousin, Detective Bunn, and Renfrow took Christina to Immediate Care. While at Immediate Care,

Renfrow and Detective Bunn interviewed Christina, who told them about defendant's actions and demonstrated cunnilingus and both vaginal and anal intercourse with anatomically correct dolls. Christina was then examined by Dr. Brna for evaluation of possible sexual abuse.

Dr. Brna testified that he performed a genital exam on Christina, which revealed a significant amount of redness and irritation and tenderness around the urinary opening. Dr. Brna testified that such irritation could result from a number of causes, including bubble bath or poor hygiene. Because Christina was very tender, Dr. Brna "could not do a very good vaginal exam," however, he did not see any secretions or tears in the area. A rectal exam revealed no external tears, bruises, or lacerations. Dr. Brna testified on cross-examination that the history he had obtained from Christina and Renfrow prior to performing the examination was that Christina may have been fondled or had some penile contact, but, contrary to Renfrow's testimony, that no penetration had occurred. He further testified that he could not see into the vagina, and could not positively determine whether the hymen was open. Dr. Brna also testified that the redness and irritation was around the urinary opening, above the vagina, and that he saw no evidence whatsoever of sexual abuse in Christina's rectal area. He also stated that, in his medical opinion, there had been no penetration of Christina's vagina.

Christina's teacher, Susan Everett (Susan), testified that Christina is in a class for students who are considered "educable mentally handicapped," and that Christina has an IQ of forty-eight. On direct examination, Susan was asked whether she had "had an opportunity, during the course of the year, to observe Christina in terms of relating factual happenings . . . ." Susan responded, over defendant's objection, that Christina "would relate things to me, . . . like she had been to church, and in a couple of weeks, she'd come and she would be singing a song I know she had learned in church, so I knew she hadn't made that up." Susan further testified that Christina "might would [say] she had been shopping. She'd have on some new clothes so I knew that it was true. . . . I have never had any reason to doubt that what she tells me is not true."

Dr. Vivian Denise Everett (Dr. Everett), director of the child sexual abuse team at Wake Medical Center in Raleigh, North

Carolina, testified as an expert in the field of pediatric medicine and child sexual abuse. Dr. Everett testified that on 31 July 1990, the child sexual abuse team conducted an evaluation for child sexual abuse on Christina. As part of the evaluation, the team's counselor, Kimberly Crews (Crews), conducted a videotaped interview with Christina. Following the interview, Crews discussed the interview with Dr. Everett, who then performed a medical exam on Christina. Dr. Everett's examination of Christina's genital area revealed that the opening of Christina's hymen measured six millimeters, which, according to Dr. Everett, was unusual because children less than thirteen years old should have an opening measuring from zero to four millimeters. Dr. Everett testified that an opening measuring greater than four millimeters is a strong indicator of sexual abuse. The examination also revealed some redness in the vaginal area as well as increased vascularity, which Dr. Everett characterized as "non-specific findings." Dr. Everett did not find any tears or lacerations in the area, however, she stated that, because of the "miraculous healing power" of the hymen, the majority of girls who have been sexually abused show no physical trauma to the hymen. A rectal exam revealed "no abnormality," however, again Dr. Everett explained that it is very difficult to find significant rectal findings in children who have been sexually abused due to the rapid healing process of rectal tissue. Dr. Everett testified that, in her opinion, both the physical exam and the history given by Christina in the interview with Crews were consistent with sexual abuse. The following exchange then occurred between the prosecutor and Dr. Everett:

> Q. In your experience, Dr. Everett, in general, do children lie about sexual abuse?
>
> [DEFENSE COUNSEL]: Objection.
>
> THE COURT: Overruled.
>
> A. In my experience children do not lie about sexual abuse.
>
> [DEFENSE COUNSEL]: Motion to strike, Your Honor.
>
> THE COURT: Motion to strike is denied.

On redirect by the prosecutor, Dr. Everett testified as follows:

> Q. Now, your entire evaluation of Christina, including this [videotape] and the physical exam, what, if anything, what

if any fact did you ever pick up on from Christina, anything else you heard, that someone was telling Christina what to say?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. I have not picked up on anything to suggest that someone told her.

Q. Have you ever had other cases where you did pick up on that[?]

[DEFENSE COUNSEL]: Objection[.]

A. There have been cases where we have had concerns.

Q. Concerns that have what?

A. That the children may have been coached by someone usually in custody cases.

Q. Do you have these concerns in Christina's case?

[DEFENSE COUNSEL]: Objection.

THE COURT: Overruled.

A. No.

Dr. Everett also testified that Crews had died since the interview with Christina, and at the end of Dr. Everett's testimony, the court, over defendant's objection, admitted the videotape as corroborative evidence and allowed the State to show the tape to the jury.

Defendant presented no evidence. The jury convicted defendant of two counts of first-degree sexual offense and two counts of first-degree rape. The trial court sentenced defendant to four consecutive life terms. Defendant appeals, raising numerous assignments of error. Based on the issues raised, we find it necessary to address only the following assignments of error.

The issues presented are whether the trial court erred in allowing, over defendant's objection, (I) child sexual abuse expert Dr. Vivian Denise Everett to testify that, in general, victims of child sexual abuse do not lie and that, in her opinion, Christina had not been coached; and (II) Christina's teacher to relate on

direct examination specific instances of conduct tending to establish Christina's capacity for truthfulness; and (III) if so, whether the errors entitle defendant to a new trial.

I

[1] Defendant argues that the trial court erred by allowing Dr. Everett to testify that, in general, children do not lie about sexual abuse, and that, in Christina's case, Dr. Everett had no "concerns" about Christina having been coached on what to say. According to defendant, the admission of this evidence constitutes prejudicial error entitling him to a new trial.

It is now well-established that an expert witness may not testify regarding the veracity of the prosecuting child witness in a sexual abuse trial. *State v. Oliver*, 85 N.C. App. 1, 11, 354 S.E.2d 527, 533, *disc. rev. denied*, 320 N.C. 174, 358 S.E.2d 65 (1987); N.C.G.S. § 8C-1, Rules 405(a), 608 (1992); *see also State v. Aguallo*, 318 N.C. 590, 598, 350 S.E.2d 76, 81 (1986) (testimony that child was believable inadmissible); *State v. Heath*, 316 N.C. 337, 341, 341 S.E.2d 565, 568 (1986) (testimony that nothing indicated child had a record of lying inadmissible); *State v. Kim*, 318 N.C. 614, 621, 350 S.E.2d 347, 350-51 (1986) (testimony that victim had not been untruthful with expert inadmissible); *State v. Holloway*, 82 N.C. App. 586, 587, 347 S.E.2d 72, 73 (1986) (testimony that child had testified truthfully inadmissible). However, an expert in the area of child sexual abuse may, because of his or her higher degree of understanding of the special traits of such victims, properly testify regarding the credibility of children in general who relate stories of sexual abuse, provided, however, that the probative value of such testimony is not substantially outweighed by the danger of unfair prejudice to the defendant. *Oliver*, 85 N.C. App. at 11-12, 354 S.E.2d at 534.

In the instant case, the trial court qualified Dr. Everett as an expert in the area of child sexual abuse, a ruling which is not challenged by defendant before this Court. Thus, under *Oliver*, Dr. Everett's testimony that, in general, children who have been sexually abused do not lie, was admissible if the court in its discretion properly determined that the probative value of such evidence was not substantially outweighed by the danger of unfair prejudice to defendant. Because the evidence was helpful to the jury in assessing the credibility of child sexual abuse victims, a subject with which most jurors are unfamiliar, it was of probative value, and

we discern no abuse of discretion on the part of the trial court in determining that this probative value was not substantially outweighed by the danger of unfair prejudice to defendant.

However, Dr. Everett's statements that she "had not picked up on anything" to suggest that someone had told Christina what to say, and that she had no concerns that Christina had been "coached," bear directly on *Christina's* credibility. As such, the testimony was inadmissible, and the trial court improperly overruled defendant's objection to this evidence.

II

[2] Defendant argues that the trial court erred by allowing Christina's teacher, Susan Everett, to testify on direct examination regarding specific instances of Christina's conduct which tended to establish Christina's truthfulness. We agree.

North Carolina Rule of Evidence 608 in relevant part provides:

> (a) *Opinion and reputation evidence of character.*—The credibility of a witness may be attacked or supported by evidence in the form of reputation or opinion as provided in Rule 405(a), but subject to these limitations: (1) the evidence may refer only to character for truthfulness or untruthfulness, and (2) evidence of truthful character is admissible only after the character of the witness for truthfulness has been attacked by opinion or reputation evidence or otherwise.
>
> (b) *Specific instances of conduct.*—Specific instances of the conduct of a witness, for the purpose of attacking or supporting his credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning his character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

N.C.G.S. § 8C-1, Rule 608 (1992). In other words, "specific act evidence is barred except for record proof of conviction of crime and discretionary admission on cross-examination of the witness himself or a character witness." 1 Henry Brandis, Jr., *Brandis on North Carolina*

Evidence §§ 107, 115 (1988). An exception to this general rule occurs when the character of a witness is directly in issue (*i.e.*, is an essential element of a charge, claim, or defense), such as "the competency of the driver in an action for negligently entrusting a motor vehicle to an incompetent driver." *See* N.C.G.S. § 8C-1, Rule 404 (1992), Official Commentary. In such a case, relevant specific act evidence is admissible as provided by Rule 405(b). Because Christina's character for truthfulness was not "in issue" in defendant's trial, and because the specific instances of Christina's conduct which illustrated Christina's character for truthfulness were related on direct examination of Christina's teacher by the State, under our Rules of Evidence, such testimony should not have been admitted. *See State v. Hewett*, 93 N.C. App. 1, 15-16, 376 S.E.2d 467, 476 (1989). Accordingly, the trial court erred in overruling defendant's objection.

III

[3] Defendant argues that the admission of the aforementioned evidence constitutes prejudicial error thereby entitling him to a new trial. We agree.

To establish prejudicial error, a defendant must show that there is a reasonable possibility that, had the error or errors in question not been committed, a different result would have been reached at trial. N.C.G.S. § 15A-1443(a) (1988). In the instant case, the prosecuting witness was a nine-year-old child with an IQ of forty-eight. Significantly, a medical examination performed by Dr. Brna on 14 July 1990, immediately following Christina's assertion that defendant had placed his penis in her rectum and "made it bleed," revealed no evidence of either vaginal or rectal penetration. A subsequent genital examination performed by Dr. Everett on 31 July 1990 revealed no abnormal rectal findings, although Dr. Everett testified that, in her opinion, Christina had been "sexually abused." In light of this conflicting testimony, we must conclude that there is a reasonable possibility that, had the trial court not improperly admitted testimony from two witnesses, one an expert, tending to establish Christina's veracity, the jury would have reached a different result. Accordingly, defendant is entitled to a

New trial.

Judge WYNN concurs.

Judge WALKER dissents with separate opinion.

Judge WALKER dissenting.

The majority concludes that Dr. Everett's statements that she had "not picked up on anything" to suggest that someone had "coached" Christina were inadmissible because they related directly to Christina's credibility. I believe, however, that there is a distinction between testimony from a witness such as Dr. Everett that a child victim was truthful or untruthful, which is inadmissible, and testimony that the expert discerned no evidence that the child had been "coached." In this case, Dr. Everett's testimony concerned the question of whether, in her opinion, there was any evidence that some individual might have told Christina what to say. In my opinion, the fact that a child may have been "coached" does not necessarily indicate that the child was more or less truthful pursuant to the instructions of that "coach," but a child such as Christina who is knowledgeable of the difference between the truth and a lie may speak truthfully or untruthfully of her own volition. Thus, I cannot conclude that these statements by Dr. Everett related directly to Christina's credibility. Additionally, Dr. Everett had been extensively cross-examined by defendant and the responses here were on redirect examination. In any event, I find no prejudicial error and would uphold the trial court's admission of these statements into evidence.

Additionally, the majority holds that the trial court erred in allowing Christina's teacher, Susan Everett, to testify as to specific instances of Christina's conduct, which it concludes tended to establish Christina's truthfulness. Ms. Everett testified over defendant's objections:

> Q. Have you had an opportunity to, during the course of a year, to observe her in terms of relating factual happenings to you?
>
> . . . .
>
> A. There have been many times we talk a lot about what we do over the weekends, they relate things to me, and she would come and say things like she had been to church, and in a couple of weeks, she'd come and she would be singing a song I know she had learned in church, so I knew she hadn't made that up.

She might would come she had been shopping. She'd have on some new clothes so I knew that it was true.

She could go outside, they go outside with my assistant, and she could come in and tell me things that went on and I know that they are true.

I have never had any reason to doubt that what she tells me is not true.

In the context of this question, I do not agree that Ms. Everett's testimony constituted specific instances of Christina's conduct elicited for the purpose of bolstering Christina's credibility, in violation of Rule 608, North Carolina Rules of Evidence. The question posed to Ms. Everett made no reference to Christina's veracity and did not seek Ms. Everett's opinion on this matter. Instead, I find Ms. Everett's testimony to bear more directly on Christina's ability to communicate and her level of understanding, not her veracity. The instances recited by Ms. Everett were given as examples in order for her to better explain Christina's ability to communicate with and understand others, and as evidence that Christina functioned better than her I.Q. of forty-eight would indicate, all of which were in issue and highly relevant since Christina is classified as mentally handicapped.

Therefore, having concluded there was no prejudicial error in the trial court's admission of this testimony, I dissent.

GREGORIO JUAREZ-MARTINEZ v. DONALD E. DEANS

No. 9110SC729

(Filed 5 January 1993)

1. Venue § 2 (NCI3d)— motion for change of venue denied— residence of plaintiff—convenience of witnesses

There was no error or abuse of discretion when defendant's motion for a change of venue in a civil assault action was denied. Although defendant contended that plaintiff was not a resident of Wake County when the action was filed, plaintiff was in fact residing in Wake County when he filed the action, even though he had been a resident for only four

days and moved to another county the next month. There was no showing of abuse in the denial of the motion on the grounds of convenience of witnesses and ends of justice.

Am Jur 2d, Venue § 15.

2. Malicious Prosecution § 19 (NCI4th)— civil assault action—malicious prosecution counterclaim—summary judgment for plaintiff

The trial court correctly granted summary judgment in favor of plaintiff on defendant's counterclaim for malicious prosecution where defendant contended that plaintiff did not have probable cause to institute the prior prosecution for criminal assault against defendant, but defendant's own testimony reveals that he entered plaintiff's house, called his name loudly several times and poured beer upon plaintiff while plaintiff was sleeping, then hit plaintiff several times with a metal pin. Additionally, a *prima facie* case of probable cause was established because the magistrate made an "independent determination" that probable cause existed and issued a warrant for defendant's arrest.

Am Jur 2d, Malicious Prosecution §§ 50-55, 176.

Malicious prosecution: commitment, binding over, or holding for trial by examining magistrate or commissioner as evidence of probable cause. 68 ALR2d 1168.

Necessity and sufficiency of allegations in complaint for malicious prosecution or tort action analogous thereto that defendant or defendants acted without probable cause. 14 ALR2d 264.

3. Assault and Battery § 3 (NCI4th)— civil assault—claim of self-defense—directed verdict for plaintiff

The trial court did not err by directing a verdict for plaintiff on the issue of self-defense in a civil assault action where defendant's own testimony reveals that he entered plaintiff's residence, calling plaintiff's name loudly and holding a metal pin in one hand, and poured beer upon the face of the sleeping plaintiff. The only evidence of withdrawal is defendant's testimony that, after he poured the beer, plaintiff sprang from the bed and defendant jumped backwards. An act of withdrawal must be so clear that the other combatant will

know danger has passed and any further action will take the form of vengeance. Merely jumping backwards did not adequately inform plaintiff that defendant was withdrawing from the fight.

Am Jur 2d, Assault and Battery § 158.

Comment note: Withdrawal, after provocation of conflict, as reviving right of self-defense. 55 ALR3d 1000.

4. Assault and Battery § 2 (NCI4th)— civil assault—counterclaim for assault—sufficiency of evidence

The trial court in a civil assault suit properly directed a verdict for plaintiff on defendant's counterclaim for assault where defendant stood over plaintiff pouring beer on plaintiff's face with one hand while holding a metal pin in the other hand. A person in plaintiff's situation would feel a reasonable apprehension of apparent danger and, if plaintiff retaliated against defendant, he was entitled to do so in self-defense.

Am Jur 2d, Assault and Battery §§ 109, 110, 158-162.

Danger or apparent danger of great bodily harm or death as a condition of self-defense in civil action for assault and battery, personal injury, or death. 25 ALR2d 1215.

5. Assault and Battery § 9 (NCI4th)— civil assault instructions—landlord-tenant relationship

The trial court did not err in a civil assault action by instructing the jury that plaintiff and defendant were in the relationship of landlord and tenant; that defendant, as landlord, needed plaintiff's consent before entering plaintiff's house; and that a person free from fault in bringing on the difficulty who is attacked in his own home is under no duty to retreat. It was relevant and proper for the trial court to instruct that plaintiff, a tenant of defendant, had a right to be left alone and to be free from harmful or offensive contact with his person. Most of the additional instructions pertaining to landlord-tenant relationships were not necessary for resolution of the controversy but did not show favoritism and were not otherwise manifestly prejudicial.

Am Jur 2d, Assault and Battery § 166; Trial § 1123.

6. Assault and Battery § 10 (NCI4th)— civil assault—punitive damages—evidence sufficient

Plaintiff in a civil assault action clearly presented sufficient evidence to prove that he was entitled to punitive damages and the threshold test of *Hawkins v. Hawkins*, 331 N.C. 743, was met since plaintiff received an award of $20,000 in compensatory damages. The appellate court cannot substitute its judgment for that of the trial court and could not say as a matter of law that the trial court erred in denying defendant's motion for a new trial based on excessive punitive damages.

Am Jur 2d, Assault and Battery §§ 186-193.

Sufficiency of showing of actual damages to support award of punitive damages—modern cases. 40 ALR4th 11.

Appeal by defendant from judgment entered 16 October 1990 and from order entered 10 January 1991 by Judge George R. Greene in Wake County Superior Court. Heard in the Court of Appeals 14 May 1992.

Gregorio Juarez-Martinez (plaintiff) brought this action seeking damages for assault and battery after an altercation between himself and Donald E. Deans (defendant). For approximately one year prior to this altercation, defendant employed plaintiff as a migrant farmworker on defendant's Nash County farm. During this time, plaintiff and his family resided in a house which defendant provided.

On the afternoon of 15 July 1988 defendant admitted being angry because plaintiff was not working. He entered plaintiff's residence holding an eight-inch steel tractor hitch pin in his hand. After entering the house, defendant called plaintiff's name several times but received no response. Defendant then entered the bedroom where plaintiff was sleeping, picked up a bottle containing some beer from the bed-side table and poured some of the beer on plaintiff's face. After this point, the remaining facts are in dispute.

Plaintiff contends that he awakened suddenly when he felt beer splashing on his face. As he attempted to get up, defendant hit him repeatedly with the metal pin, knocking him back on the bed and inflicting injuries resulting in bleeding and a lot of pain. On the other hand, defendant asserts that he sprinkled some beer on plaintiff's face and plaintiff jumped up from the bed. At this point defendant jumped backwards and plaintiff attacked him, throw-

ing him to the floor and causing him to fear for his own safety. While being held down by plaintiff, defendant struck plaintiff with the metal pin until he was able to free himself and escape.

On 29 July 1988, plaintiff caused a warrant to be issued charging defendant with assault with a deadly weapon. Defendant was found not guilty of this charge in Nash County District Court on 10 November 1988. Thereafter, on 12 July 1989, plaintiff filed this civil action in Wake County Superior Court. Defendant answered alleging that Wake County was not the proper county for trial and moved that venue be changed to Nash County. Defendant's answer also asserted (1) defenses of affray and self-defense and (2) counterclaims for compensatory and punitive damages for assault and malicious prosecution.

On 15 February 1990, the trial court denied defendant's motion for change of venue. On 5 July 1990, the trial court granted summary judgment in favor of plaintiff on defendant's counterclaim of malicious prosecution. The trial court also granted plaintiff's motion for a directed verdict on the issue of self-defense and on defendant's counterclaim for assault. On 9 October 1990, the jury returned a verdict awarding plaintiff $20,000 in actual damages and $30,000 in punitive damages. After judgment was entered, the trial court denied defendant's motions for judgment notwithstanding the verdict and for a new trial.

Becton, Slifkin & Fuller, P.A., by James C. Fuller, Anne R. Slifkin and Maria J. Mangano, for plaintiff appellee.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by D. James Jones, Jr. and Sheila M. Bossier; and Valentine, Adams, Lamar, Etheridge & Sykes, by Raymond M. Sykes, Jr., for defendant appellant.

WALKER, Judge.

[1] In his first assignment of error, defendant contends the trial court erred when it denied his motion to change venue from Wake County to Nash County. Defendant makes two arguments in support of this contention.

Defendant first argues that the trial court should have granted its motion to change venue under G.S. 1-83(1) because plaintiff was not a resident of Wake County at the time the action was filed. Under G.S. 1-82, venue is proper in the county in which

either the plaintiff or the defendant resides at the time of the commencement of the suit. Plaintiff is a migrant farmworker and in June of 1989, he vacated the trailer in which he was living in Smithfield and moved in temporarily with a relative in Nash County. On 8 July 1989, plaintiff moved into a trailer in Raleigh (Wake County) and began searching for work there. While residing in Wake County, plaintiff filed the present action. In late August of 1989, with the arrival of several family members from Mexico and because of the crowded conditions, plaintiff moved back to Nash County. This evidence supports the trial court's conclusion that at the time the action was filed, plaintiff was a resident of Wake County. *See Howard v. Queen City Coach Co.*, 212 N.C. 201, 193 S.E. 138 (1937) (Traveling businessman was a resident of McDowell County where he moved his household effects and family to McDowell County from Buncombe County on 22 July 1936 and filed his action within a few days after moving. He then subsequently moved from McDowell County within 6 months).

In his second venue argument, defendant contends that his motion should have been allowed for the reasons enumerated in G.S. 1-83(2), *i.e.*, to promote the convenience of witnesses and ends of justice. It is well settled that a decision to change venue on these grounds is addressed to the sound discretion of the trial judge and will not be overturned unless there is a showing of abuse. In the present case, there has been no showing of abuse of discretion and accordingly defendant's argument is without merit.

[2] In his next assignment of error, defendant argues that the trial court erred when it granted summary judgment in favor of plaintiff on defendant's counterclaim for malicious prosecution. Summary judgment is appropriate when the moving party demonstrates that the opposing party cannot support an essential element of his claim and the moving party is entitled to judgment as a matter of law. *Dellinger v. Belk*, 34 N.C.App. 488, 238 S.E.2d 788 (1977), *disc. review denied*, 294 N.C. 182, 241 S.E.2d 517 (1978).

In order for defendant to prevail on a claim for malicious prosecution, he must prove the following: (1) plaintiff instituted the earlier proceeding; (2) maliciously; (3) without probable cause; and (4) the earlier proceeding terminated in defendant's favor. *Williams v. Kuppenheimer Manufacturing Co. Inc.*, 105 N.C.App. 198, 412 S.E.2d 897 (1992). Here, defendant's contention is directed to the third element; that plaintiff did not have probable cause

to institute the prior criminal action against him. Probable cause has been defined as "the existence of such facts and circumstances . . . as would induce a reasonable man to commence a prosecution." *Pitts v. Village Inn Pizza, Inc.*, 296 N.C. 81, 87, 249 S.E.2d 375, 379 (1978). In the case *sub judice*, the evidence adequately establishes the existence of probable cause to bring the criminal assault action notwithstanding defendant's acquittal on these charges. Defendant's own testimony reveals that he entered plaintiff's house, called his name loudly several times and then poured beer upon plaintiff while plaintiff was sleeping. Thereafter he hit plaintiff several times with a metal pin. Additionally, because the magistrate made an "independent determination" that probable cause existed and issued a warrant for defendant's arrest, a *prima facie* case of probable cause was established. *Newton v. McGowan*, 256 N.C. 421, 124 S.E.2d 142 (1962).

Defendant next assigns as error the trial court's grant of directed verdicts on (1) the issue of self-defense; and (2) defendant's counterclaim for assault. When considering a plaintiff's motion for directed verdict, the court must view the evidence in the light most favorable to the non-moving party, drawing all reasonable inferences and resolving all conflicts in his or her favor. *Sharp v. Wyse*, 317 N.C. 694, 346 S.E.2d 485 (1986). Since this assignment of error poses two legal questions, each will be examined separately.

[3] As regards the issue of self-defense, defendant argues that the evidence considered in the light most favorable to him indicates he acted in self-defense when striking plaintiff and therefore the jury should have been instructed on this defense. Since the tort rules on self-defense are virtually identical to those of the criminal law, we turn to both areas of the law for guidance in resolving the present controversy. *Harris v. Hodges*, 57 N.C.App. 360, 291 S.E.2d 346, *disc. review denied*, 306 N.C. 384, 294 S.E.2d 208 (1982).

When there is evidence from which it can be inferred that a defendant acted in self-defense, he is entitled to have the jury consider this evidence. *State v. Marsh*, 293 N.C. 353, 237 S.E.2d 745 (1977). "However, the right of self-defense is only available to a person who is without fault, and if a person voluntarily, that is aggressively and willingly, enters into a fight, he cannot invoke the doctrine of self-defense unless he first abandons the fight, withdraws from it and gives notice to his adversary that he has

done so." *Id.* at 354, 237 S.E.2d at 747; *see also Griffin v. Starlite Disco, Inc.*, 49 N.C.App. 77, 270 S.E.2d 613 (1980).

Here, even when the evidence is viewed in the light most favorable to defendant, it becomes clear that defendant "aggressively and willingly" instigated this conflict. Defendant's own testimony reveals that he entered plaintiff's residence, calling plaintiff's name loudly and holding a metal pin in one hand. He then poured beer upon the face of plaintiff who was sleeping. Then, according to defendant, plaintiff awoke and attacked him. This evidence sufficiently establishes that defendant was the aggressor.

Defendant further argues that even if he was the aggressor, he is nevertheless entitled to the benefit of an instruction on self-defense because he withdrew from the conflict. We note that the surrounding facts and circumstances, and not just defendant's simple belief, constitute the determining factor as to whether defendant acted in self-defense. *State v. Randolph*, 228 N.C. 228, 45 S.E.2d 132 (1947). Here, the only evidence of withdrawal is defendant's testimony that after he poured the beer, plaintiff "sprang from the bed and I—I jumped backwards and he caught me in his grasp." An act of withdrawal must be so clear that the other combatant will know danger has passed and any further action by this other combatant will take the form of vengeance. *State v. Winford*, 279 N.C. 58, 181 S.E.2d 423 (1971). In *State v. Correll*, 228 N.C. 28, 44 S.E.2d 334 (1947), our Supreme Court was confronted with the question of whether a defendant withdrew from a conflict. There, defendant's evidence was that he and a companion were in the act of leaving the premises when the deceased threatened to kill the defendant. The defendant then shot and killed the deceased. In ruling that the defendant was entitled to have submitted to the jury the issue of whether the defendant in good faith abandoned the quarrel and notified his assailant, the Court explained:

> [B]ut before the right of perfect self-defense can be restored to one who has wrongfully brought on a difficulty, and particularly where he has done so by committing a battery, he is required to abandon the combat in good faith and signify this in some way to his adversary.

Id. at 31, 44 S.E.2d at 335. In reviewing the evidence in the light most favorable to defendant, we find defendant's act of merely jumping backwards did not adequately inform plaintiff that defend-

ant was withdrawing from the fight. Therefore, the trial court did not err in directing a verdict on the issue of self-defense.

[4] As regards defendant's counterclaim for assault, defendant contends plaintiff was the aggressor and therefore he has a valid action for assault against plaintiff. We conclude defendant's argument is without merit since the evidence presented discloses that even if plaintiff attacked defendant, plaintiff was acting in self-defense.

An assault is an offer to show violence to another without striking him or her. The interest which this action protects is the freedom from apprehension of harmful or offensive contact with one's person. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981). However, a party cannot recover for assault if his opponent was merely acting in self-defense. *Evans v. Hughes*, 135 F.Supp. 555 (M.D.N.C. 1955); *see also* N.C.P.I., Civil 800.53 n.1. "[T]he right to self-defense depends upon . . . reasonable apprehension of real or apparent danger." *Lail v. Woods*, 36 N.C.App. 590, 592, 244 S.E.2d 500, 502, *disc. review denied*, 295 N.C. 550, 248 S.E.2d 727 (1978). A person may use reasonable force to protect himself from bodily harm or offensive physical contact, even though he is not put in actual or apparent danger of death or great bodily harm. *State v. Beaver*, 14 N.C.App 459, 188 S.E.2d 576 (1972); *see also State v. Anderson*, 230 N.C. 54, 51 S.E.2d 895 (1949). Under the facts of this case, where defendant is standing over plaintiff pouring beer on plaintiff's face with one hand while holding a metal pin in the other hand, a person in plaintiff's situation would feel a reasonable apprehension of apparent danger. Accordingly, if plaintiff retaliated against defendant, he was entitled to do so in self-defense and the trial court properly directed a verdict for plaintiff on defendant's counterclaim for assault.

[5] In his next assignment of error, defendant contends the trial court erred when it instructed the jury on assault and battery. Defendant objects to that portion of the instruction wherein the trial court stated that plaintiff and defendant were in the relationship of landlord and tenant; that defendant, as landlord, needed plaintiff's consent before entering plaintiff's house; and that "when a person who is free from fault and bringing on a difficulty is attacked in his own home, the law imposes upon him . . . no duty to retreat." We first note that it was both relevant and proper for the trial court to instruct that plaintiff, a tenant of defendant,

had a right to be left alone and to be free from harmful or offensive contact with his person. *See Rickman Manufacturing Co. v. Gable*, 246 N.C. 1, 97 S.E.2d 672 (1957) (a landlord does not have the right to enter upon the leased premises unless the tenant consents); *see also State v. McCray*, 312 N.C. 519, 324 S.E.2d 606 (1985) (when a person who is free from fault in bringing on a conflict is attacked in his own home, he does not have to retreat before fighting in self-defense). While we agree with defendant that most of the additional instructions pertaining to landlord-tenant relationships were not necessary for resolution of the controversy, we cannot conclude that these additional instructions showed favoritism by the trial court or were otherwise manifestly prejudicial to defendant. An instruction is not erroneous if it assumes an uncontroverted fact or one which has been conclusively proved. *See Crampton v. Ivie*, 124 N.C. 591, 32 S.E. 968 (1899).

[6] In his final assignment of error, defendant contends that the trial court erred in denying his motion for a new trial because the award of punitive damages was clearly excessive. 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. *Worthington v. Bynum and Cogdell v. Bynum*, 305 N.C. 478, 290 S.E.2d 599 (1982). There is not a precise definition of what constitutes an abuse of discretion in refusing to grant a new trial, rather an "abuse of discretion must be made to appear from the record as a whole with the party alleging the existence of an abuse bearing that heavy burden of proof." *Id.* at 484-485, 290 S.E.2d at 604.

Punitive damages are not awarded as compensation. As the name clearly implies, they are awarded as punishment due to the outrageous nature of the wrongdoer's conduct. *Cavin's, Inc. v. Atlantic Mutual Insurance Co.*, 27 N.C.App. 698, 220 S.E.2d 403 (1975). Because these damages are awarded to punish a defendant, the jury is allowed to consider the circumstances of a defendant's conduct as well as his or her financial position. *Carawan v. Tate*, 53 N.C.App. 161, 280 S.E.2d 528 (1981), *modified and affirmed*, 304 N.C. 696, 286 S.E.2d 99 (1982). In regards 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. Our Supreme Court recently upheld an award of $25,000 in punitive damages where neither compensatory damages nor nominal damages were recovered. *Hawkins v. Hawkins*, 331 N.C. 743, 417 S.E.2d 447 (1992). Under *Hawkins*, punitive damages may be awarded if the plaintiff is entitled to recover at least nominal damages; the fact that plaintiff did not actually receive any nominal damages is not determinative.

In the present case, the plaintiff clearly presented sufficient evidence to prove he was entitled to an award of punitive damages. The *Hawkins* threshold test for awarding punitive damages has also been met since plaintiff received an award of $20,000 in compensatory damages. We cannot now substitute our judgment for that of the trial court; we can only strictly review the record to determine whether the trial court abused its discretion. When the record is viewed in this light, we simply cannot say as a matter of law that the trial court erred in denying defendant's motion for a new trial.

We have reviewed defendant's remaining assignments of error and we find no merit in them. For the reasons stated, the decision of the trial court is

Affirmed.

Judges LEWIS and WYNN concur.

RICHARD S. GRIFFIN, PETITIONER v. C. W. PRICE, JR. AND WIFE, MARGARET PRICE; DONALD EUGENE PRICE; MICHAEL EUGENE PRICE AND WIFE, KATHY LAMAR PRICE, RESPONDENTS

No. 9120SC1100

(Filed 5 January 1993)

1. Rules of Civil Procedure § 50.4 (NCI3d)— judgment notwithstanding verdict—renewal of motion for directed verdict—same test for sufficiency of evidence

A motion for a judgment notwithstanding the verdict under N.C.G.S. § 1A-1, Rule 50(b) is essentially a renewal of a motion for a directed verdict and the test governing the sufficiency of the evidence on a motion for JNOV is the same as the

test used on motions for directed verdicts. The question is whether the evidence, when viewed in the light most favorable to the nonmovant, giving the nonmovant the benefit of every reasonable inference, was sufficient to go to the jury.

Am Jur 2d, Trial § 862.

Practice and procedure with respect to motions for judgment notwithstanding or in default of verdict under Federal Civil Procedure Rule 50(b) or like state provisions. 69 ALR2d 449.

2. Highways, Streets, and Roads § 15 (NCI4th)— neighborhood public road—elements

Three types of roads are considered neighborhood public roads under N.C.G.S. § 136-67: (1) roads which were once part of a public road system but were not taken over by the State and which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families; (2) roads constructed or reconstructed with unemployment relief funds; and (3) roads outside a city or town which serve a public use and as a means of ingress or egress for one or more families. Any street, road, or highway that serves an essentially private use is specifically excluded. The third type of public road, at issue in this case, does not require that the road have ever been part of the public road system and need not be a necessary means of ingress or egress, but there must be a showing of substantial identity of the roadway. Under *Speight v. Anderson*, 226 N.C. 492, modified later in this opinion, the petitioner was also required to show continuous use of the road for the twenty years prior to 1941, when the third type of public road was added to the statute.

Am Jur 2d, Highways, Streets, and Bridges §§ 3, 5-6, 158, 184.

Way of necessity over another's land, where a means of access does exist, but is claimed to be inadequate, inconvenient, difficult or costly. 10 ALR4th 447.

Way of necessity where only part of land is inaccessible. 10 ALR4th 500.

3. Highways, Streets, and Roads § 15 (NCI4th)— neighborhood public road—sufficiency of evidence

The evidence of neighborhood public road was sufficient to go to the jury where the alleged road met three of the four requirements for the third type of neighborhood public road under N.C.G.S. § 136-67 in that it is outside town and city limits, has served as a means of ingress and egress for one or more families and substantial identity of the roadway was established, and petitioners presented evidence of public use but respondents presented evidence of essentially private use.

Am Jur 2d, Highways, Streets, and Bridges §§ 3, 5-6, 158, 184, 272.

4. Highways, Streets, and Roads § 15 (NCI4th)— neighborhood public roads—requirement of continuous use from 1921 to 1941—modified

Petitioner's evidence was sufficient to go to the jury on the issue of the existence of a neighborhood public road under the third part of N.C.G.S. § 136-67, despite petitioner's failure to show continuous use of the road from 1921 to 1941, as required by *Speight v. Anderson*, 226 N.C. 492. The effect of *Speight* is to create the first judicial sunset provision of a statute. It would surely be difficult for someone in 1991 to prove use of a roadway for a period of twenty years beginning in 1921, and to require such evidence would be to make proof virtually impossible in the future. Furthermore, *Speight* has not been adhered to consistently. Petitioner should be able to have the evidence on the existence of a neighborhood public road under N.C.G.S. § 136-67 go to the jury if he can show public use of the road in 1941 and continuous use since that time.

Am Jur 2d, Highways, Streets, and Bridges § 27.

Appeal by petitioner from order filed 3 July 1991 by Judge James M. Long of the Union County Superior Court. Heard in the Court of Appeals 20 October 1992.

Sanford L. Steelman, Jr. for petitioner-appellant.

Griffin & Brooks, by James E. Griffin, for respondent-appellees Donald Eugene Price, Michael Eugene Price, and Kathy Lamar Price.

Thomas, Harrington & Biedler, by Larry E. Harrington, for respondent-appellees C.W. Price, Jr. and Margaret Price.

LEWIS, Judge.

Petitioner and respondents own adjoining tracts of land in Union County, North Carolina. Respondents' land lies between petitioner's land and a public way, Sikes Mill Road. This case involves a 20-foot wide road which runs from petitioner's property over that of respondents to Sikes Mill Road. Petitioner filed suit against respondents upon their denying his request for a 60-foot wide right-of-way and the right to run a water line across respondents' property along the road.

Petitioner sought a declaration that he had acquired an easement by implication over the respondents' property, a declaration that the road crossing respondents' property was a neighborhood public road under N.C.G.S. § 136-67 (1986), and damages from respondents for blocking the road. Respondents alleged that petitioner had abandoned the road, and that the use of the road was essentially private and with the consent of respondents. The jury found in favor of petitioner on five issues, including the existence of an easement by implication over a portion of the road and that the whole road was a neighborhood public road. The jury awarded petitioner damages in the amount of $100.00. The trial judge, however, granted respondents' motion for judgment notwithstanding the verdict (JNOV) on the neighborhood public road issues. The only issue on appeal is the propriety of JNOV and the sufficiency of the evidence to establish a neighborhood public road under § 136-67.

The road in question can be split into several segments to clarify discussion: (1) the portion running from Sikes Mill Road across respondents' property to a fork in the road on respondents' property, about 6/10 of a mile, (2) the right fork of the road, which intersects the northwestern portion of petitioner's property about 900 feet from the fork and continues out to Baucom Road, and (3) the left fork of the road, which crosses the property of a neighbor and continues to Presson Cemetery and Camden Road. This case

mainly involves the portion up to the fork and the right fork of the road. An 1875 deed refers to the right fork of the road as an "old road" with the same location as the present road. The evidence indicates that in 1941 the right fork was also a through road, providing access to Baucom Road. The left fork has been used as a means of access to a residence since the 1930s and has also provided access to the cemetery. There was testimonial evidence that the road has been used as a public road and as a means of ingress and egress. There was also evidence that use of the road was permissive and essentially private. When petitioner purchased the property in 1973, he was informed that there was no deeded right-of-way across respondents' property.

---

[1] A motion for judgment notwithstanding the verdict (JNOV) under Rule 50(b) of the North Carolina Rules of Civil Procedure is essentially a renewal of a motion for a directed verdict. *Bryant v. Nationwide Mut. Fire Ins. Co.*, 313 N.C. 362, 368-69, 329 S.E.2d 333, 337 (1985); N.C.G.S. § 1A-1, Rule 50(b) (1990). The test governing the sufficiency of the evidence on a motion for JNOV is the same as the test used on motions for directed verdicts. *Northern Nat'l Life Ins. Co. v. Lacy J. Miller Mach. Co.*, 311 N.C. 62, 69, 316 S.E.2d 256, 261 (1984). Thus, if the directed verdict should have been granted, JNOV should be granted. *Bryant*, 313 N.C. at 369, 329 S.E.2d at 337. The question is whether the evidence, when viewed in the light most favorable to the nonmovant, giving the nonmovant the benefit of every reasonable inference, was sufficient to go to the jury. *Id.* at 369, 329 S.E.2d at 337-38.

I. Background law: N.C.G.S. § 136-67 and *Speight v. Anderson*

[2] This appeal revolves around N.C.G.S. § 136-67, which governs the creation of neighborhood public roads. It provides:

> All those portions of the public road system of the State which have not been taken over and placed under maintenance or which have been abandoned by the Department of Transportation, but which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families, and all those roads that have been laid out, constructed, or reconstructed with unemployment relief funds under the supervision of the Department of Human Resources, and all other roads or streets or portions of roads or streets whatsoever outside of the boundaries of any incor-

> porated city or town in the State which serve a public use and as a means of ingress or egress for one or more families, regardless of whether the same have ever been a portion of any State or county road system, are hereby declared to be neighborhood public roads . . .

N.C.G.S. § 136-67 (1986). In enacting this statute "the legislature intended to preserve the public right to use roads that would no longer be maintained by any government." *Jarvis v. Powers*, 80 N.C. App. 355, 364, 343 S.E.2d 195, 200 (1986). In 1929, the State, through the Highway Commission, began assuming the maintenance of some county roads. However, the Highway Commission was not required to maintain all local roads. Failure of the Commission to maintain a road thus did not render it a private way. *Smith v. Moore*, 254 N.C. 186, 189, 118 S.E.2d 436, 438 (1961).

The statute sets forth three types of roads which are considered neighborhood public roads. *West v. Slick*, 313 N.C. 33, 39, 326 S.E.2d 601, 605 (1985). The first type includes roads which were once part of a public road system but were not taken over by the State, and which remain open and in general use as a necessary means of ingress to and egress from the dwelling house of one or more families. The second includes roads constructed or reconstructed with unemployment relief funds. Third, roads outside a city or town which serve a public use and as a means of ingress or egress for one or more families are neighborhood public roads. A proviso to the statute specifically excludes from the category of neighborhood public road "any street, road or driveway that serves an essentially private use. . . ." § 136-67. It is important to note that although the first statutory definition of neighborhood public road was enacted in 1933, the third type of neighborhood public road was added to the statute in 1941 along with the private use proviso. *Jarvis*, 80 N.C. App. at 365, 343 S.E.2d at 202.

Only the third type of neighborhood public road is relevant to the case at hand. There are four elements to establishing a neighborhood public road under this third approach. The road must (1) be outside city or town limits, (2) serve a public use, and (3) serve as a means of ingress or egress, (4) for one or more families. *West*, 313 N.C. at 48, 326 S.E.2d at 610. Unlike the first type of neighborhood public road, the third type does not require that the road ever have been part of the public road system, and the

means of ingress and egress need not be "necessary." *Id.* Also, there must be a showing of substantial identity of the roadway. *Id.* at 41, 326 S.E.2d at 606 (citing *Speight v. Anderson*, 226 N.C. 492, 39 S.E.2d 371 (1946)).

The Supreme Court expressed concern over the third approach in *Speight v. Anderson*, 226 N.C. 492, 39 S.E.2d 371 (1946), stating that "[t]he General Assembly is without authority to create a public or private way over the lands of any citizen by legislative fiat, for, to do so, would be taking private property without just compensation." *Id.*, at 496, 39 S.E.2d at 373. The Court decided that this 1941 addition refers to roads which were "at the time established easements or roads or streets in a legal sense." *Id.* The statute does not encompass "ways of ingress and egress existing by consent of the landowner as a courtesy to a neighbor, nor . . . those adversely used for a time insufficient to create an easement." *Id.* The Court required a showing of an established easement, consisting of twenty years continuous use of a "definite and specific line," in order to establish a neighborhood public road under the third part of the statute. The relevant date to use is 1941, since "[t]he declaratory language used by the legislature in G.S. Sec. 136-67 indicates the legislature's intention for the status of roadways to be determined as of the enactment dates of the applicable statutory definitions and exceptions." *Jarvis*, 80 N.C. App. at 364, 343 S.E.2d at 201 (applying first part of statute) (citing *Dotson v. Payne*, 71 N.C. App. 691, 697, 323 S.E.2d 362, 366 (1984) (finding insufficient evidence of established easement in 1941 under third part of statute)). *But see Smith v. Moore*, 254 N.C. 186, 189, 118 S.E.2d 436, 438 (1961) (evidence supported finding that road served a public purpose and as a means of ingress and egress in 1951 and therefore a neighborhood public road). With 1941 as the determinative date the petitioner must show continuous use of the road for the twenty years prior to 1941: from 1921 to 1941.

II. Elements of § 136-67

[3] There is no dispute that the road in question meets three of the four elements set forth in *West*: it is outside town and city limits, and it has served as a means of ingress and egress, for one or more families. Substantial identity of the roadway was established at trial through exhibits, maps and testimony. The issue here is whether the road serves a public use.

Petitioner presented testimonial evidence of public use of the road. According to Clarence D. Baucom, who lived on the left fork of the road in the 1930s, the first portion of the road, from Sikes Mill Road up to the fork in the road, was used by the general public of Union County just like any other road at that time. The road was used by those who resided on the left and right forks, and also by people who did not reside on the road. Sim Dorton lived on the left fork from 1945 to 1949 and testified that people used the road to get to Presson Cemetery and Camden Road. Floyd Purser was familiar with the road from 1958 to 1965 and testified that people used it to get from Sikes Mill Road to the cemetery. There was at least one residence on the right fork of the road in the late 1930s and 1940s. Also, Carroll Taylor used the right fork of the road in the early 1940s to travel from Baucom Road to Sikes Mill Road.

Respondents, however, claim that the road serves an essentially private use and is thus excluded under the proviso to § 136-67. Clarence Baucom testified that in the 1930s the road was a wagon road and was used by residents, farmers, and their guests, all with the consent and good will of Conder Price, respondents' predecessor in title. He also testified that neither the school bus nor the mail carrier used the road. Sim Dorton testified that the road was "nothing but a driveway" when he lived there. Respondents claim that use of the road was always permissive, and that therefore no easement could have been established. *See Speight*, 226 N.C. at 496, 39 S.E.2d at 373. Clarence Baucom testified that Conder Price allowed them to use the road, saying that he "[n]ever heard no problem" about it and that "[Conder Price] didn't never complain."

Respondents point out that the evidence of public use in *West v. Slick* was much stronger than in the case at hand. In that case the public had consistently used a particular road for access to beaches on the outer banks since 1917. *West*, 313 N.C. at 51, 326 S.E.2d at 611-12. In contrast, the evidence in this case points to an "essentially private use" since the 1930s and does not indicate any different use prior to the 1930s.

Giving the nonmovant, petitioner, the benefit of every reasonable inference, the evidence would seem sufficient to go to the jury on the existence of a neighborhood public road under § 136-67. The evidence presented tends to show that the road was used

not only to access residences on either fork, but also to access Presson Cemetery, Camden Road, and Baucom Road.

III. Requirements of *Speight v. Anderson*

[4] Assuming the four elements necessary for the establishment of a neighborhood public road under § 136-67 have been met, the issue becomes whether *Speight's* additional requirement of proof of an established easement has been satisfied.

It is obvious from the evidence presented that petitioner has not shown 20 years continuous use of the road from 1921 to 1941. Petitioner did present evidence of the existence of the road prior to 1941. Petitioner points out that the right fork of the road was in existence and actually referenced in an 1875 deed as an "old road." He asserts that the rest of the road must also have been in existence at the time, since a road must "come from somewhere and lead to somewhere." C.W. Price, Jr. testified that respondents' family has owned the property over which the road runs since 1900, and that the road has been there as long as he can remember. Petitioner also presented evidence, which is summarized above, of use of the road since 1941. However, there is no evidence of any use prior to the 1930s.

Petitioner concedes these shortcomings in his evidence. He disputes the validity of this requirement, however, and claims that requiring a showing of twenty years continuous use from 1921 to 1941 goes beyond the legislative intent in enacting the 1941 amendments to § 136-67. It would surely be difficult for someone in 1991, at the time of the trial, to prove use of a roadway for a period of twenty years beginning in 1921. To require such evidence would be to make proof under this portion of the statute virtually impossible in the future.

Respondents rest on the fact that *Speight* is directly on point and the easement must be established by 1941. Respondents emphasize that no evidence has been presented regarding actual use of the road prior to the 1930s.

We recognize that petitioner has not shown continuous use of the road from 1921 to 1941. However, we believe that if petitioner can show public use of the road in 1941 and continuous use since that time, petitioner should be able to have such evidence go to the jury on the existence of a neighborhood public road under § 136-67. A statute "must be construed, if possible, to give

meaning and effect to all of its provisions." *HCA Crossroads Residential Centers, Inc. v. N.C. Dep't of Human Resources*, 327 N.C. 573, 578, 398 S.E.2d 466, 470 (1990). Also,

> [i]t is well established that a statute must be considered as a whole and construed, if possible, so that none of its provisions shall be rendered useless or redundant. It is presumed that the legislature intended each portion to be given full effect and did not intend any provision to be mere surplusage.

Porsh Builders, Inc. v. City of Winston-Salem, 302 N.C. 550, 556, 276 S.E.2d 443, 447 (1981). The effect of *Speight* is to have created the first judicial sunset provision of a statute. No evidence has been presented showing that this was the legislature's intent. In the absence of such intent, we should continue to give effect to the statute.

We also note that in a case decided since *Speight*, our Supreme Court utilized the statute without requiring evidence of continuous use from 1921 to 1941. In *Smith v. Moore*, 254 N.C. 186, 118 S.E.2d 436 (1961), the Supreme Court, applying § 136-67, determined the rights of the parties to the disputed road as of 1951, the date the affected land was conveyed to the children of the common owner. The Court did not explain which approach under § 136-67 it was using, but since the road had never been part of the public road system and had not been constructed with unemployment relief funds, the Court must have been proceeding under the third part of the statute. The Court noted that the road was in existence and used as a public way prior to 1929. The Court concluded

> [t]he evidence was sufficient to support but not to compel a finding that the road in question *in January 1951* served a public purpose and as a means of ingress and egress to people other than C. C. Smith, and because of such public service defendants had the right to use it as a neighborhood road.

Id. at 189, 118 S.E.2d at 438 (emphasis added). Thus, in denying the plaintiff's motion for directed verdict the Court did not mention the *Speight* requirement and did not find that there had been continuous use of the road from 1921 to 1941.

We hold that petitioner's evidence was sufficient to go to the jury on the issue of the existence of a neighborhood public road under the third part of § 136-67. Our decision is based on the fact that the statute must be construed in order to continue to give

it effect. Also, we note that the Supreme Court decided a case on this issue without imposing the requirement of showing 20 years continuous use from 1921 to 1941. Thus, *Speight* has not been adhered to consistently. The trial court's grant of the motion for JNOV was improper and is hereby reversed.

Reversed and remanded to trial court to enter judgment consistent with the jury's verdict.

Judges JOHNSON and COZORT concur.

STATE OF NORTH CAROLINA v. VESTER TERRY SNEEDEN

No. 9111SC820

(Filed 5 January 1993)

1. **Evidence and Witnesses § 345 (NCI4th)— rape twenty-three years earlier—admissibility to show intent and lack of consent**

Evidence of a 1967 rape committed by defendant was admissible in defendant's trial for a 1990 rape on questions of defendant's intent when the victim entered his automobile and the victim's lack of consent where both crimes were similar in that defendant gained the trust of both victims, lured them into an automobile, and then took them to a different location where they were sexually assaulted. The 1967 rape was not so remote as to have lost its probative value on the questions of intent and consent.

Am Jur 2d, Rape § 71.

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

2. **Evidence and Witnesses § 699 (NCI4th)— prior rape—admissibility to show intent and lack of consent—admission for other purposes—failure to request limiting instruction**

Where evidence of a prior rape was admissible for purposes of showing defendant's intent and the victim's lack of consent but defendant did not request a limiting instruction, any error in the trial court's instruction that evidence of the

prior rape was admitted to show "a plan, scheme, system or design involving the crime charged" was not so fundamental as to have a probable impact on the verdict.

Am Jur 2d, Appeal and Error §§ 549, 798, 810, 815; Trial §§ 430-434.

3. **Criminal Law § 520 (NCI4th)— prior rape—juror who worked with defendant—failure to declare mistrial**

The trial court did not abuse its discretion in failing to declare a mistrial in a rape case when a juror advised the court that he realized he had worked with defendant at the time defendant committed a rape twenty-three years earlier where the juror replied affirmatively when asked by the court whether he could pass upon defendant's guilt or innocence "without what went on . . . 23 years ago."

Am Jur 2d, Criminal Law § 679; Jury § 321; Trial §§ 1706-1712.

4. **Constitutional Law § 367 (NCI4th)— three consecutive life sentences—no cruel and unusual punishment**

The imposition on defendant of three consecutive life sentences and one nine-year sentence for two counts of first degree rape, one count of first degree sexual offense and one count of second degree kidnapping did not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law §§ 625, 626, 629.

Judge GREENE dissenting.

Appeal by defendant from judgment entered 1 February 1992 by Judge Wiley F. Bowen in Harnett County Superior Court. Heard in the Court of Appeals 16 October 1992.

Defendant was indicted on two counts of first degree rape, one count of first degree sexual offense and one count of first degree kidnapping. These charges arose from an alleged incident involving Angela Hatfield. At trial, the State's evidence tended to show that on 17 July 1990, Angela Hatfield was on her way to the Employment Security Office when she was approached by defendant. Hatfield testified that defendant told her he was looking for a secretary and that she should follow him to one of the "job sites" where she would be working. When they arrived at one

of these sites, defendant suggested that Hatfield leave her car and ride with him. According to Hatfield, when she got out of her car, defendant handcuffed her, forced her into his car, threatened her with a pistol and then blindfolded her. Hatfield was then taken to a house and forced to have oral and vaginal sex with defendant. Hatfield further testified that at some point defendant allowed her to get dressed, but then forced her to have vaginal sex again.

The trial court also allowed the testimony of Mary Jo Welch Thaxton and Carla Wood, over defendant's objections.

Thaxton testified that she met defendant in Raleigh in 1967 while waiting for a bus in order to go to Greenville. Defendant told Thaxton that he was a college student who was working for a rental car company and if she would follow him in one car while he delivered another to a client, he would give her a ride to Greenville. Thaxton further testified that upon arriving at the alleged client's house, she was knocked out and raped. On the basis of this incident defendant was sentenced to life imprisonment and was paroled in 1977 and discharged from parole in 1983.

Carla Wood testified that she met defendant in October 1989. At some point defendant told Wood that he was dying and gave her $300 so that she could go to the beach and have fun. Wood testified that later, on 14 July 1990, defendant invited her to his home in order to perform cleaning services. According to Wood, defendant then offered her money for sex and attacked her with a pistol when she refused. Eventually, Wood was able to break free and escape.

Defendant testified he had known Hatfield for some time before the alleged rape and that she agreed to have sex with him in exchange for money. Defendant acknowledged that Carla Wood had visited him at his house, but denied ever attempting to have sex with her.

The jury found defendant guilty and he was sentenced for two counts of first degree rape, one count of first degree sexual offense and one count of second degree kidnapping.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Grayson G. Kelley, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant.

WALKER, Judge.

[1] In his first assignment of error, defendant contends the trial court erred when it admitted evidence of the 1967 rape of Mary Jo Welch Thaxton. According to defendant, this evidence should not have been admitted because it occurred some twenty-three (23) years before the alleged assault upon Angela Hatfield. Because of this lapse of time, defendant argues the prior act is so remote in time that any probative value is outweighed by the prejudicial effect.

In overruling defendant's objection to the testimony of both Thaxton and Carla Wood, the trial court made detailed findings for the record. Included in these findings was the construction of a matrix listing similarities between the victims and the methodology of defendant in the three assaults. The trial court found twenty-one (21) factors which were substantially similar and concluded the evidence had probative value. The trial court also noted that even though prejudicial, the admission of this evidence was not so grossly shocking as to mislead the jury nor was it so unfairly prejudicial as to outweigh the probative value. We find that the trial court did not err in admitting this evidence.

Under Rule 404(b), evidence of other offenses is admissible if it is relevant to some fact or issue other than the character of the accused. *State v. Davis*, 101 N.C.App. 12, 398 S.E.2d 645 (1990), *disc. review denied*, 328 N.C. 574, 403 S.E.2d 516 (1991). As regards prior similar sex offenses, North Carolina liberally admits such evidence. *State v. White*, 331 N.C. 604, 612, 419 S.E.2d 557, 561 (1992). "This is particularly true where the fact sought to be proved is the defendant's intent to commit a similar sexual offense for which the defendant has been charged." *Id.* at 612, 419 S.E.2d at 561-562.

The test for admissibility of prior sexual offenses has two parts. *First*, whether the prior incidents are sufficiently similar; and *second*, whether the incidents are not too remote in time. *State v. Jones*, 322 N.C. 585, 589, 369 S.E.2d 822, 824 (1988); *State v. Wilson*, 106 N.C.App. 342, 348, 416 S.E.2d 603, 607 (1992). As to the first part of the admissibility test, a prior act or crime is "similar" if there are some unusual facts present indicating that the same person committed both the earlier offense and the present one. However, the similarities between the two incidents need not be "unique and bizarre." *State v. Stager*, 329 N.C. 278, 304, 406

S.E.2d 876, 891 (1991). "Rather, the similarities simply must tend to support a *reasonable* inference that the same person committed both the earlier and later acts." *Id.* (emphasis in original). Upon review, this Court finds the 1967 incident sufficiently similar to the incident giving rise to the present charges. The State's evidence shows that among the similarities both in 1967 and in 1990, defendant gained the trust of his victims, lured them into an automobile and then took them to a different location where they were sexually assaulted. This Court has previously found that similarities of this nature justify admitting the evidence of prior crimes to prove *modus operandi* and intent. *State v. Pruitt*, 94 N.C.App. 261, 380 S.E.2d 383, *disc. review denied*, 325 N.C. 435, 384 S.E.2d 545 (1989).

Defendant contends that irrespective of similarity, any evidence relating to the 1967 rape should not have been admitted since it was too remote in time. On this point, we find *State v. Stager*, 329 N.C. 278, 406 S.E.2d 876 (1991) instructive. In that case, our Supreme Court found evidence of the 1978 shooting death of defendant's first husband admissible in the prosecution arising from the 1988 shooting death of defendant's second husband. The Court noted that "remoteness in time . . . is more significant when the evidence of the prior crime is introduced to show that both crimes arose out of a common scheme or plan." *Id.* at 307, 406 S.E.2d at 893. This recognizes that with the passage of time, "[t]he probability of an ongoing plan or scheme . . . becomes tenuous." *State v. Jones*, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). In *Stager* the evidence was not admitted for the purpose of showing a common "plan or scheme," but rather was admitted for the purpose of proving "intent" and "motive." *State v. Stager* at 307, 406 S.E.2d at 892-893. "[R]emoteness in time is less significant when the prior conduct is used to show intent, motive, knowledge, or lack of accident; remoteness in time generally affects only the weight to be given such evidence, not its admissibility." *Id.* at 307, 406 S.E.2d at 893.

Here, even though defendant admits having sex with Angela Hatfield, he contends she consented. Accordingly, due to its close similarity, the 1967 rape is probative upon the question of defendant's intent when Hatfield entered his car and upon the question of Hatfield's consent. Since the 1967 rape was admissible for these purposes, it was not so remote as to have lost its probative value.

[2] Although not specifically raised by defendant, we note the trial court instructed the jury that the evidence of the 1967 rape was admitted in order to show "a plan, scheme, system or design involving the crime charged." While under *State v. Stager* and *State v. Jones*, 322 N.C. 585, 369 S.E.2d 822 (1988) remoteness in time becomes more significant when this evidence is admitted to show only an ongoing "plan" or "scheme," as our previous discussion indicates, evidence regarding the 1967 rape was admissible to show both defendant's intent and the victim's lack of consent. At no time after the trial court ruled that evidence of the 1967 rape was admissible did defendant request this evidence be limited to proving intent or lack of consent. Since defendant did not request such a limiting instruction and since this evidence was admissible for a proper purpose, any error in instructing the jury was not so fundamental as to have a probable impact on the verdict. *See State v. Odom*, 307 N.C. 655, 660-661, 300 S.E.2d 375, 378-379 (1983); *see also, State v. Stager*, 329 N.C. at 309-310, 406 S.E.2d at 894.

Defendant next contends the trial court committed plain error in instructing the jury on the testimony of both Mary Jo Welch Thaxton and Carla Wood. After each witness testified, the trial court instructed:

> [this] testimony . . . is received into evidence solely for the purpose of showing that there existed in the mind of the Defendant, Terry Sneeden a plan, scheme, system or design involving the crime charged in this case and for no other reason.

In its final mandate to the jury the trial court repeated this instruction and further instructed:

> If you believe their testimony, you may consider it, but only for that limited purpose.

Defendant argues this instruction was erroneous because (1) the jury was led to believe that there existed a conclusive presumption that evidence of similar bad acts is evidence of a scheme and (2) the instruction improperly suggested that the trial court believed a scheme existed. We find this contention has no merit since the instruction given accurately states existing North Carolina law. *See* N.C.P.I., Crim. 104.15.

[3] Defendant further contends the trial court erred in failing to declare a mistrial when it came to the trial court's attention that one of the jurors had been a co-worker of the defendant at

the time of the 1967 rape. After hearing the evidence, one juror came forward and advised the trial court that he realized he had worked with defendant in 1967. According to the juror, he and defendant never had any association since they worked different shifts, but he recalled defendant was either dismissed or resigned in connection with the 1967 rape of Mary Jo Welch Thaxton. Once advised, the trial court asked the juror whether he could pass upon defendant's guilt or innocence "without what went on . . . 24 or 23 years ago," to which the juror replied "yes, sir."

The decision to deny a motion for a mistrial will only be overturned where there is a showing of an abuse of discretion on the part of the trial court. *State v. Mills*, 39 N.C.App. 47, 249 S.E.2d 446 (1978), *disc. review denied*, 296 N.C. 588, 254 S.E.2d 33 (1979). Furthermore, not all knowledge on the part of a juror demands either disqualification or a mistrial. In *State v. Jones*, 50 N.C.App. 263, 273 S.E.2d 327, *disc. review denied*, 302 N.C. 400, 279 S.E.2d 354 (1981), three jurors learned through the newspaper of defendant's prior conviction. Similar to the present case, the trial court in *Jones* had admitted the evidence of this prior conviction only for the limited purpose of proving identity and common scheme or plan. At trial, the three jurors were questioned as to the effect their knowledge would have upon their continuing impartiality. This Court held that the trial court did not abuse its discretion when it denied defendant's motion for a mistrial. Based upon *Jones* and the circumstances in the present case, we cannot say the trial court abused its discretion in denying defendant's motion.

[4] In his final assignment of error, defendant contends the sentence imposed constituted a cruel and unusual punishment. Defendant received three consecutive life sentences and one nine year sentence as a result of his convictions. We find no merit in defendant's contention since our Supreme Court has previously determined that the imposition of consecutive life sentences for first degree rape and first degree sexual offense does not violate a defendant's constitutional rights. *State v. Ysaguire*, 309 N.C. 780, 309 S.E.2d 436 (1983).

No error.

Judge WYNN concurs.

Judge GREENE dissents.

Judge GREENE dissenting.

I cannot reconcile the majority's conclusion that the trial court properly admitted evidence of a twenty-three-year-old rape as being "probative of the question of defendant's intent" when the record clearly shows that the trial court admitted the evidence "solely for the purpose of showing that there existed in the mind of the defendant . . . a plan, scheme, system, or design involving the crime charged in this case," and admonished the jury to consider it only for this limited purpose.

Although it is undisputed that evidence of prior sexual offenses is liberally admitted in North Carolina, when the trial court expressly limits the admissibility of such evidence to a particular purpose, and instructs the jury accordingly, the reviewing court is not at liberty to analyze whether the evidence is admissible for *any* purpose. *Cf. State v. Haskins*, 104 N.C. App. 675, 683, 411 S.E.2d 376, 382-83 (1991), *disc. rev. denied*, 331 N.C. 287, 417 S.E.2d 256 (1992) (no prejudicial error when trial court admits prior act evidence for two purposes and reviewing court determines that evidence was properly admitted under only one of these purposes). In other words, if the record makes clear that the jury was instructed to consider the prior crime evidence for one purpose and for no other purpose, as in the instant case, the trial court's admission of the evidence can be upheld only if the record supports admission of the evidence for *that purpose*. Thus, in my view, the sole question presented with regard to the evidence of the 1967 rape is whether this evidence is admissible for the purpose for which it was offered by the State and admitted by the trial court—that is, for showing in defendant's mind a plan, scheme, system, or design (often referred to as "common plan or scheme") involving the crime with which he is charged.

As the majority correctly notes, the remoteness of a prior crime is more significant when evidence of the prior crime is introduced to show that both it and the crime with which the defendant is charged arose out of a common scheme or plan. *State v. Stager*, 329 N.C. 278, 307, 406 S.E.2d 876, 893 (1991). This is so because

> [t]he passage of time between the commission of the two acts slowly erodes the commonality between them. The probability of an ongoing plan or scheme then becomes tenuous. Admission of other crimes at that point allows the jury to convict defendant because of the kind of person he is, rather than because

the evidence discloses, beyond a reasonable doubt, that he committed the offense charged.

State v. Jones, 322 N.C. 585, 590, 369 S.E.2d 822, 824 (1988). Thus, despite the fact that some similarities exist between the two crimes at issue, the twenty-three-year lapse of time between the acts virtually negates any probative value which otherwise could be attributed to evidence of the 1967 rape.[1] Accordingly, the trial court erred in allowing the State to present, over defendant's objection, this evidence and, in my opinion, the error entitles defendant to a new trial. *See* N.C.G.S. § 15A-1443(a) (1988).

IN THE MATTER OF: THE APPEAL OF PHILIP MORRIS U.S.A. FROM THE DECISION OF THE CABARRUS COUNTY BOARD OF EQUALIZATION AND REVIEW FOR PERSONAL PROPERTY TAXES YEARS 1984-1989

No. 9110PTC762

(Filed 5 January 1993)

Taxation § 25.3 (NCI3d)— ad valorem taxes—property audit agreement—contingent fee—choice of audit sample—public policy violation

A county's business personal property audit agreement which gave the auditor the discretion to choose the audit sample and compensated the auditor at the rate of thirty-five percent of taxes discovered violated public policy and discoveries resulting from the contract were void.

Am Jur 2d, State and Local Taxation §§ 704, 720, 725.

Appeal by Cabarrus County from a Final Decision of the Property Tax Commission entered 24 May 1991. Appeal and cross-

---

1. I am aware that as a result of the 1967 rape, defendant was incarcerated until 1977, at which time he was released on parole. However, even discounting defendant's prison time, *see State v. Davis*, 101 N.C. App. 12, 20, 398 S.E.2d 645, 650 (1990), *disc. rev. denied*, 328 N.C. 574, 403 S.E.2d 516 (1991), approximately thirteen years elapsed from the time defendant was released until the commission of the crime with which he is charged. For the reasons previously discussed, this time lapse has eroded the probative value of the prior rape to a point where such value, if any, is substantially outweighed by the danger of unfair prejudice to the defendant.

appeal by Philip Morris U.S.A. from the same Final Decision. Heard in the Court of Appeals 26 August 1992.

Parker, Poe, Adams & Bernstein, by Charles C. Meeker, for Cabarrus County.

Hunton & Williams, by William S. Patterson, Jean Gordon Carter, James W. Shea, and David A. Agosto, for Philip Morris U.S.A.

James B. Blackburn III and S. Ellis Hankins, on behalf of the North Carolina Association of County Commissioners and the North Carolina League of Municipalities, amici curiae.

Poyner & Spruill, by Wilson Hayman, on behalf of Investment North Carolina, Inc., amicus curiae.

Floyd Allen & Jacobs, by Jack W. Floyd and Robert V. Shaver, Jr., on behalf of Guilford Mills, Inc., amicus curiae.

Johnson Gamble Mercer Hearn & Vinegar, by Charles H. Mercer, Jr. and M. Blen Gee, Jr., and Maupin Taylor Ellis & Adams, P.A., by Charles B. Neely, Jr. and Nancy S. Rendleman, on behalf of North Carolina Citizens for Business and Industry, amicus curiae.

Charles Ewart, Thomas W. Ramseur, Thomas W. Dayvault, and Carroll D. Gray, on behalf of the North Carolina Association of Chamber of Commerce Executives, the Concord-Cabarrus County Chamber of Commerce, the Kannapolis Chamber of Commerce, and the Charlotte Chamber of Commerce, amici curiae.

LEWIS, Judge.

The question posed to us by this appeal appears to be one of first impression in North Carolina. We are asked to determine whether a contingent fee contract between a county tax assessor and a private auditing firm is void as against public policy. We hold that, under the facts of this particular contract, it is, and affirm the Final Decision of the North Carolina Property Tax Commission.

In May 1988, the tax assessor of Cabarrus County entered into a Business Personal Property Audit Agreement ["agreement"] with Tax Management Associates, Inc. ("TMA"). The Cabarrus Coun-

ty Board of Commissioners accepted the contract on 16 January 1989. TMA agreed to provide Cabarrus County with audit services "on a reasonable sample of the County's business personal property taxpayers," in accordance with applicable North Carolina General Statutes, specifically §§ 105-283, 105-317.1, and 105-312. The fee arrangement set between the parties required Cabarrus County to pay to TMA thirty-five percent of taxes discovered, including penalty. Philip Morris U.S.A. ("Philip Morris") contends such a contract is (1) void as against public policy and (2) unconstitutional.

Philip Morris has a cigarette manufacturing facility in Cabarrus County which has the capacity to produce 83 billion cigarettes a year. The company is the largest taxpayer in Cabarrus County. In November 1988, TMA contacted Philip Morris to initiate an audit of its records.

In December 1989, following an audit of Philip Morris for the years 1983-1989, the Cabarrus County tax assessor proposed discovery for those years in the amount of $1,325,000,000.00 plus penalties. To discover property means to determine property that was not listed or property that was listed but was substantially undervalued in its listing by the taxpayer. *See* N.C.G.S. § 105-273(6b) (1992). On 8 May 1990, the assessor issued his final decision regarding discovery of Philip Morris' personal property. The discovery from this decision included the years 1984-1989, and totaled $923,339,510.00.

Pursuant to N.C.G.S. § 105-312(d) (1992), Philip Morris requested review by the Cabarrus County Board of Equalization and Review. After a hearing, the Board reduced the amount of the discovery to $599,426,934.00. Philip Morris, on 2 January 1991, filed an Application for Hearing before the Property Tax Commission ("Commission"), seeking review of the Board's decision. On 10 May 1991 Philip Morris filed a "Motion to Declare Discovery Null and Void." In both the appeal and the motion, Philip Morris contended that TMA had no legal standing or authority to conduct the audit because the agreement between Cabarrus County and TMA was "void, illegal, illusory and against public policy."

The Final Decision of the Property Tax Commission was entered 24 May 1991. In this 3-2 decision, the Commission concluded that the appeal was properly before it, and that it had the duty to rule upon all issues concerning listing, appraisal, and assessment of property, but not those of constitutional law. N.C.G.S. § 105-290(b)

(1992). The Commission then found that the contract between TMA and Cabarrus County was "void as against public policy from its inception," and therefore adjudged the discovery null and void.

The Commission reasoned that the contingent fee arrangement as set out in the agreement "so offended conventional standards requiring fair, impartial, and uniform treatment of this State's taxpayers that [the contract] could not stand." The Commission concluded:

> The fundamental rule of our system of property taxation is that the tax will be administered in a fair, impartial, and uniform manner, without regard to the identity of the property owner. This principle cannot be followed where a county enters into a contract such as the one presented here.

Cabarrus County appealed. In an effort to preserve its right to appellate review of the issues raised in the decision, Philip Morris filed a cross-notice of appeal to this Court.

The scope of our review of the Property Tax Commission's Final Decision is governed by N.C.G.S. § 105-345.2 (1992). *In re McElwee*, 304 N.C. 68, 73-74, 283 S.E.2d 115, 119 (1981), *appeal after remand*, 75 N.C. App. 658, 331 S.E.2d 265 (1985). The *McElwee* Court held that the provisions found in N.C.G.S. § 105-345.2 and N.C.G.S. § 150A-43 (now 150B) are

> remarkably identical. . . . Subsection (a) provides that the appellate court shall review the record and exception and assignments of error in accordance with the Rules of Appellate Procedure. Subsection (b) provides that the appellate court shall (1) decide all relevant questions of law, (2) interpret constitutional and statutory provisions, and (3) determine the meaning and applicability of the terms of any Commission action.
>
> More importantly, with respect to this appeal, G.S. 105-345.2(b) provides that the court may (1) affirm, (2) reverse, (3) declare null and void, (4) remand for further proceedings, or (5) reverse or modify the decision of the Property Tax Commission if the substantial rights of the appellants have been prejudiced because the Commission's findings, inferences, conclusions or decisions are:
>
> (1) In violation of constitutional provisions; or

(2) In excess of statutory authority or jurisdiction of the Commission; or

(3) Made upon unlawful proceedings; or

(4) Affected by other errors of law; or

(5) Unsupported by competent, material and substantial evidence in view of the entire record as submitted; or

(6) Arbitrary or capricious.

G.S. 105-345.2(c) provides that the court shall review the whole record and due account shall be taken of the rule of prejudicial error.

Id.

The question is whether the contingent fee arrangement for auditing services violates public policy. Chapter 105 of the North Carolina General Statutes answers neither yea nor nay on this particular issue. Section 299 does, however, allow county boards of commissioners to employ appraisal firms "or other persons or firms having expertise in one or more of the duties of the assessor to assist him or her in the performance of such duties." N.C.G.S. § 105-299 (1992). This provision, however, does not give authority for contingent fee compensation schemes.

We note that contingent fee contracts are prohibited in at least two instances: One, for lobbying fees pursuant to N.C.G.S. § 120-47.5 (1992); and two, for real estate appraisal assignments pursuant to N.C.G.S. § 93A-80(a)(3) (Cum. Supp. 1992). We cannot agree with Cabarrus County that in the absence of a specific bar, the Legislature intended to allow contingent fee auditor contracts. Conversely, we are aware of no instances where the General Statutes permit contingent fee arrangements for State business.

We find no North Carolina case law on point addressing a contingent fee contract for auditing services. There are cases dealing with other types of contingent fee contracts. It is well-settled in North Carolina that contingent fee contracts for representation in a divorce proceeding are void, *Thompson v. Thompson*, 313 N.C. 313, 328 S.E.2d 288 (1985), as are contingent fee contracts for representation for alimony or child support. *Davis v. Taylor*, 81 N.C. App. 42, 344 S.E.2d 19, *disc. rev. denied*, 318 N.C. 414, 349 S.E.2d 593 (1986). On the other hand, contingent fee arrangements

in equitable distribution actions are valid so long as they do not compensate the attorney for securing the divorce. *In re Cooper*, 81 N.C. App. 27, 344 S.E.2d 27 (1986). They are almost universally used by counsel in personal injury and wrongful death actions.

Contrary to Cabarrus County's arguments, the cases cited above do not directly guide our decision in the present case. However, one important proposition comes out of them. In a case dealing with attorney contingent fee contracts, this Court stated: "Contracts for contingent fees . . . are closely scrutinized by the courts where there is any question as to their reasonableness." *Harmon v. Pugh*, 38 N.C. App. 438, 444, 248 S.E.2d 421, 424 (1978), *disc. rev. denied*, 296 N.C. 584, 254 S.E.2d 33 (1979). We do so now.

North Carolina's tax policy is grounded in notions of fairness and equity, as mandated by the North Carolina Constitution. N.C. Const. Art. V, § 2 cl. (1) & cl. (2). " 'The principles of equality and uniformity are indispensable to taxation, whether general or local. Local taxation must be uniform upon the same class of subjects within the territorial limits of the authority levying the tax, and must be assessed upon all the property according to its just valuation.' " *Hajoca Corp. v. Clayton*, 277 N.C. 560, 569, 178 S.E.2d 481, 487 (1971) (citing Desty on Taxation, Vol 2, p. 1119).

We agree with the Property Tax Commission that the principle of fair, impartial administration of taxation is difficult at best with a contract such as this. Under the terms of the Business Personal Property Audit Agreement, TMA was given the authority to audit "a reasonable sample of the county's business personal property taxpayers." This language appears to give TMA the discretion to choose the sample. Furthermore, the contract compensates TMA at the rate of thirty-five percent of taxes discovered. These two provisions lead to the inescapable conclusion that it would be in TMA's best interest to audit the businesses which own the most property and which conceivably would provide the largest discovery. Clearly, the appearance of potential bias, overreaching, and abuse is substantial.

There is no North Carolina case law on point. In *Sears, Roebuck and Co. v. Parsons*, 260 Ga. 824, 401 S.E.2d 4 (1991), the Georgia Supreme Court examined a contract between a county board of tax assessors and a private auditing company whereby the company was to audit tangible personal property returns as provided by the county's chief assessor. The auditing company was to be paid

thirty-five percent of any additional amounts collected as a result of increased valuation as determined by the audit. The board designated Sears, Roebuck and Co. as a taxpayer to be audited under this contract. Sears brought a declaratory judgment action challenging the agreement.

The Georgia Supreme Court held the contract "void as against public policy, not because of the services performed, but because of the contingency scheme of compensation for those services." *Sears*, 401 S.E.2d at 4. The Court reasoned:

> In the exercise of th[e power to tax], the government by necessity acts through its agents. However, this necessity does not require nor authorize the creation of a contractual relationship by which the agent contingently shares in a percentage of the tax collected, and we hold that such an agreement offends public policy. The people's entitlement to fair and impartial tax assessments lies at the heart of our system, and, indeed, was a basic principle upon which this country was founded. Fairness and impartiality are threatened where a private organization has a financial stake in the amount of tax collected as a result of the assessment it recommends.

Id. at 5.

We find *Sears* to be generally on point and the principles applicable here. We believe the present facts to be more egregious to the notion of fair and impartial taxation than in *Sears*, because there the chief assessor determined who would be audited, while here TMA is given the discretion to choose its sample of taxpayers. We are persuaded by the reasoning and holding of *Sears*. While there is no evidence of abuse here, we nevertheless hold that the contingent fee arrangement, which gives TMA a financial stake in the auditing process, gives the appearance of bias and potential abuse and violates public policy.

Philip Morris' cross-appeal argues that the contract and resulting discovery are also violative of its due process and equal protection rights under both the federal and state constitutions. We do not agree. Upon our review of the entire record and the appellant and appellee briefs of both parties, we conclude that the matters raised and adjudicated in the Commission's Final Decision are not issues of constitutional concern, but are simply issues dealing with the appraisal, listing, or assessment of property. As such, they

were properly before the Property Tax Commission, and it is not necessary for us to review the constitutional questions Philip Morris raises in its cross-appeal.

We hold the agreement between Cabarrus County and TMA to be void as against public policy. The Property Tax Commission did not err when it held that the contract itself was null and void as was the discovery that resulted from the contract.

Affirmed.

Chief Judge HEDRICK and Judge WYNN concur.

JOHN DANIEL FERRELL v. MICHAEL REID FRYE

No. 9111SC911

(Filed 5 January 1993)

1. **Evidence and Witnesses § 233 (NCI4th); Trial § 6.1 (NCI3d)— stipulation of negligence and proximate cause—extent of injuries—accident details admissible**

Even though defendant stipulated that he was negligent in the operation of his vehicle and that his negligence was the proximate cause of any injuries sustained by plaintiff, the trial court did not err in admitting testimony of the details of the occurrence and severity of the collision where defendant testified that he didn't recall any actual collision and attempted to prove that plaintiff's injuries were negligible.

Am Jur 2d, Stipulations § 8.

Admission of liability as affecting admissibility of evidence as to the circumstances of accident on issue of damages in tort action for personal injury, wrongful death, or property damage. 80 ALR2d 1224.

2. **Damages § 117 (NCI4th)— expert testimony—sufficiency to show permanency of injuries**

Where plaintiff's two physicians testified as to their examination and treatment of plaintiff, and plaintiff testified that he continues to have pain and headaches he did not have

prior to an accident, opinion testimony by the physicians that "if relief of pain does not occur within 4-6 months of soft tissue injury . . . they will tend to have pain and discomfort and difficulties later on in their lives" and that plaintiff's pain was "unlikely to change in the future" and had proved to be "stable" was sufficient to show permanent injury although the phrases "more likely than not" and "more probable than not" were not used. Therefore, the trial court properly instructed the jury on the plaintiff's right to recover damages for permanent injuries.

Am Jur 2d, Damages §§ 244, 245.

Sufficiency of evidence to prove future medical expenses as result of injury to head or brain. 89 ALR3d 87.

3. Trial § 52.1 (NCI3d)— new trial motion—excessive verdict—denial not abuse of discretion

The trial court did not abuse its discretion in denying defendant's motion for a new trial on the ground that the jury verdict awarding plaintiff $12,500 for injuries received in a collision was excessive where plaintiff's evidence tended to show that plaintiff suffered soreness throughout his body; he continues to have pain in his neck more than two years after the accident; he has suffered daily headaches requiring medication since the accident and the headaches are likely to continue for the rest of his life; and plaintiff underwent treatment by two physicians over the course of two years, participated in physical therapy sessions, expended $944.82 in medical bills, and lost wages of more than $500.

Am Jur 2d, New Trial §§ 393-395, 549.

Excessiveness or adequacy of damages awarded for injuries to head or brain, or for mental or nervous disorders. 14 ALR4th 328.

Appeal by defendant from judgment entered 21 May 1991 by Judge A. Leon Stanback, Jr. in Harnett County Superior Court. Heard in the Court of Appeals 22 September 1992.

Bryan, Jones, Johnson & Snow, by James M. Johnson, for defendant-appellant.

J. Thomas West and W. Ty Sawyer for plaintiff-appellee.

JOHNSON, Judge.

Plaintiff-husband, John Daniel Ferrell, and wife sought to recover compensatory and punitive damages for personal injuries allegedly sustained by plaintiff on 1 January 1989 when he was involved in a collision in Benson, North Carolina. Mr. Ferrell was operating a police cruiser that was struck by a vehicle being driven by defendant, Michael Reid Frye, following a high speed chase during which plaintiff and other law enforcement officers were trying to stop and arrest defendant for traffic violations. Prior to trial, plaintiff's wife dismissed her claim for loss of consortium, and plaintiff dismissed his claim for punitive damages.

Before jury selection, defendant stipulated, through counsel, that he was negligent in the operation of his motor vehicle and that his negligence was the proximate cause of any injuries sustained by plaintiff in the 1 January 1989 accident. The case proceeded to trial only on the issue of damages. The jury returned a verdict of $12,500 for plaintiff. Defendant appeals.

On 1 January 1989, the date of the collision with defendant's vehicle, plaintiff was employed as a patrol officer with the police department in Benson, North Carolina. Defendant testified on direct examination by plaintiff's attorney that the accident occurred when he was "attempting to allude (sic) Mr. Ferrell in a high speed chase." He then stated that he did not recollect any collision actually taking place. Testimony also revealed that plaintiff attempted to block the intersection that defendant attempted to enter. Plaintiff believed the two cars were going to collide, so he drove into the adjacent parking lot where his car was struck on the right side by defendant, who had veered into the same direction as plaintiff. The impact pushed the left front tire over a concrete curb in the parking lot, punctured the tire, and caused plaintiff's car to enter the adjacent street.

Plaintiff was thrown from side to side in the car, although he was wearing his seat belt. The lap belt held the lower part of his body still, but the shoulder strap did not hold him from the waist up. Mr. Ferrell did not hit his head and had no broken bones or skin. Plaintiff became sore all over and went to see Dr. Hasham for neck and shoulder injuries and for persistent headaches. He continues to suffer from headaches and takes BC headache powders daily. Plaintiff consulted Dr. Hasham and Dr. Spanos about

his injuries and pain, participated in physical therapy and saw a chiropractor once.

Plaintiff missed time from work only to see medical care providers. His lost wages amounted to approximately $500-600, and his medical bills totaled $944.82. Mr. Ferrell also takes four BC powders per day at the cost of twenty-two cents per powder. Expert medical testimony from Dr. Spanos was that the pain and headaches experienced by plaintiff were consistent with the automobile accident being the cause of the injuries. When asked what was the reasonable probable duration of Mr. Ferrell's pain, Dr. Spanos stated that it is "unlikely to change in the future" and has proved to be "stable."

[1] On appeal, defendant-appellant first argues that the trial court "erred in admitting testimony of the details of the accident because defendant stipulated that he was negligent and that his negligence was a proximate cause of any injuries sustained by the plaintiff, and the admission of the details of the accident was not relevant to the issue of plaintiff's damages." We disagree because we find defendant's admission to be equivocal.

North Carolina General Statutes § 8C-1, Rule 401 (1992), states that relevant evidence is "evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The determination to be made in this action was the amount of damages. Therefore, any fact bearing on the degree or severity of injury sustained by plaintiff was properly admitted.

It is undisputed that before the evidence was presented, defendant admitted that he was negligent and that his negligence caused the accident. The defendant, however, attempted to prove that plaintiff's injuries were negligible and testified that "I don't recall any actual collision." Defendant went on to say that he was not denying that a collision occurred, but stated that he did not remember if there was a collision.

In light of defendant's testimony, which calls into question the occurrence of the collision, which is important in determining the severity of the injuries sustained by plaintiff, we find no error in the trial court's admission of the detailed evidence. Defendant's testimony that he did not recall the collision made relevant the

testimony as to events leading up to the collision and evidence of the collision itself.

Plaintiff testified that his automobile was struck by defendant's car on the right hand side, that his automobile was pushed against and over a cement gas pump island, then an additional 15 to 20 feet into the roadway after impact, and that he was thrown about the car because of the collision. He also stated that he was sore all over after the wreck and suffered from pain and headaches which he did not have before the accident.

G. R. Bain, a deputy sheriff for Johnston County and witness to the accident, testified that he was chasing defendant and was one or two car lengths behind him at the time of impact, traveling approximately forty to forty-five miles per hour. Mr. Bain then described the collision and the resulting damage to the right quarter panel of plaintiff's vehicle. He was not permitted to testify about the chase before or after the collision.

The testimony of plaintiff and Mr. Bain which was admitted into evidence was relevant in that it helped to prove that a collision occurred and that the impact therefrom was of sufficient force to cause injuries consistent with plaintiff's.

Defendant's reliance on *Davis v. Atlantic Coast Line Railroad Co.*, 145 N.C. 95, 58 S.E.2d 798 (1907), is misplaced. In *Davis*, plaintiff, who was a fireman, jumped from his train before it collided with another train. He was allowed to enter evidence showing the speed of the train immediately before it collided with the other train, and other facts "as to the effect and circumstances attending the collision." *Id.* at 96, 58 S.E.2d at 798. Although negligence was admitted in *Davis*, defendant presented evidence to minimize or negate the injuries and their cause. Defendant offered the evidence of two physicians who had examined plaintiff and believed that plaintiff had sustained no substantial injury and was feigning.

The Supreme Court allowed evidence of the circumstances of the collision because it "tended to corroborate the testimony of the plaintiff that he had in reality suffered an injury and was not feigning one." *Id.* at 97, 58 S.E.2d at 798. The fact that seventeen cars were derailed and one box car was on top of the engine was not offered to inflame the jury; it was admitted to show the reasonableness of the plaintiff's injuries. Likewise, the evidence in the case at bar, about the circumstances surrounding the col-

lision and the actual collision, was not admitted to inflame the jury. The evidence was admitted to show the fact of the injury, the proximate cause of that injury and the extent of the injury.

Defendant also cites *Parks v. Washington*, 255 N.C. 478, 122 S.E.2d 70 (1961), where the trial judge held that because the defendant's counsel's stipulation was equivocal, evidence of defendant-driver's intoxication was proper. Defendant seeks to distinguish his case from *Parks*, stating that his admission of negligence was unequivocal. We disagree, noting that here, as in *Parks*, it is unclear whether the admission also embraced the element of proximate cause. The issue of proximate cause was therefore before the jury, and evidence relating thereto was not improperly admitted or irrelevant. The jury was not improperly instructed to determine whether plaintiff's injuries were caused by plaintiff's negligence.

Moreover, even if the testimony admitted were irrelevant, a new trial would not be granted unless the objecting party was prejudiced thereby. *Parks* at 483, 122 S.E.2d at 73. In order to have the judgment set aside, defendant must show that a different result would have ensued in the absence of the evidence. *Id.* Defendant-appellant did not meet this burden.

[2] Defendant next contends that the trial court erred in admitting evidence of the permanent nature of plaintiff's injuries and in instructing the jury on plaintiff's right to recover damages for permanent injuries. Again, we disagree.

"There can be no recovery for a permanent injury unless there is some evidence tending to establish one with reasonable certainty." *Gillikin v. Burbage*, 263 N.C. 317, 326, 139 S.E.2d 753, 760 (1965). Where injuries are subjective, as in the case of pain, an expert witness must testify with reasonable medical certainty, from personal examination, knowledge of the history of the case, or from a hypothetical question, that plaintiff may be expected to experience future pain and suffering as a result of the injury proven. *Id.* at 326, 139 S.E.2d at 760-61.

In the case *sub judice*, evidence of pain was presented by Dr. Hasham and Dr. Spanos. Dr. Hasham, accepted as an expert in family medicine, took a history from plaintiff which indicated that plaintiff did not have persistent headaches prior to the accident. He testified that after the accident, and continuing into trial, plaintiff suffered from headaches and pain in his neck and shoulders.

Dr. Hasham further testified that the injury suffered by Mr. Ferrell was one which would cause pain. He also explained why it would cause pain and why the injury would probably cause headaches. When asked by plaintiff's attorney if he had an opinion based on reasonable medical certainty as to whether Dan Ferrell "will have problems with this injury in the future," Dr. Hasham responded that "if relief of pain does not occur within 4-6 months of soft tissue injury . . . they will tend to have pain and discomfort and difficulties later on in their lives."

By deposition, Dr. Spanos was offered as an expert in general medicine with a specialty in chronic pain. Dr. Spanos testified to the history given by plaintiff and the nature and extent of plaintiff's injuries which he observed by examination. He also described how injuries such as plaintiff's cause pain. When asked the reasonable duration of plaintiff's pain, Dr. Spanos responded that it was "unlikely to change in the future" and had proved to be "stable."

Defendant contends that the testimony offered by Dr. Hasham and Dr. Spanos was not sufficient to show evidence of permanent injury. Defendant argues that because the phrases "more likely than not" and "more probable than not" were not specifically used, the evidence of permanent injury is speculative.

Mitchem v. Sims, 55 N.C. App. 459, 285 S.E.2d 839 (1982), is controlling. In *Mitchem*, plaintiff asked the attending chiropractor, "Based upon your examination and treatment, what disability, if any, would you say John Mitchem will suffer from the injuries he related to you?" *Id.* at 460, 285 S.E.2d at 840. Defendant objected to the form of the question, arguing that it was not stated in terms of reasonable chiropractic certainty. This Court concluded "that the present question asking for a chiropractor's expert opinion based upon his personal examination and treatment necessarily called for an opinion based upon reasonable medical certainty. Defendant's argument raises only semantic technicalities." *Id.*

The *Mitchem* Court further held that the question asked was sufficiently phrased to show permanent injury since the chiropractor was a qualified expert and a proper foundation had been laid as to Mitchem's ongoing pain and headaches, as to examination and treatment, and as to the fact that Mitchem did not suffer from these difficulties prior to the accident. The case at bar is analogous to *Mitchem*. Dr. Hasham and Dr. Spanos were qualified experts who testified about plaintiff's treatment, and plaintiff testified

that he continues to have pain and headaches he did not have prior to the accident. *Compare Mitchem* at 460-61, 285 S.E.2d at 840. Accordingly, we find no error in the admission of the expert testimony nor in the instructions given to the jury on recovery of damages for permanent injuries.

[3] Lastly, defendant-appellant argues that the trial court abused its discretion in denying defendant's motion for a new trial on the ground that the jury awarded excessive damages. Defendant cites no authority to support his contention.

The motion to set aside a verdict and grant a new trial is directed "to the sound discretion of the trial judge, and his decision will not be disturbed absent obvious abuse." *Globe v. Helms*, 64 N.C. App. 439, 453, 307 S.E.2d 807, 817 (1983), *disc. review denied*, 310 N.C. 625, 315 S.E.2d 690 (1984).

The record contains evidence which shows that plaintiff suffered soreness throughout his body; that he continues to have pain in his neck more than two years after the accident; that he has daily headaches which require medication; and that the headaches have continued over two years and are likely to continue for the rest of his life. The evidence also shows that he underwent treatment by two physicians over the course of two years; participated in physical therapy sessions; expended $944.82 in medical bills; and suffered an additional $500-600 in lost wages.

What is fair compensation is a question of fact for the jury. *Parks* at 483, 122 S.E.2d at 74. In the case *sub judice*, the jury set the award in light of the evidence presented. We, therefore, find no "substantial miscarriage of justice" in the denial of defendant's motion to set aside the verdict and grant a new trial. *See Globe* at 453-54, 307 S.E.2d at 817.

No error.

Judges EAGLES and PARKER concur.

SYRO STEEL COMPANY, PLAINTIFF v. HUBBELL HIGHWAY SIGNS, INC., PROPST CONSTRUCTION COMPANY AND SEABOARD SURETY COMPANY, DEFENDANTS

No. 914SC1109

(Filed 5 January 1993)

1. **Estoppel § 25 (NCI4th)— equitable estoppel—misrepresentation—knowledge or means to acquire knowledge**

Defendant Propst Construction Company did not satisfy the essential elements necessary to assert a claim of estoppel, and summary judgment was properly granted for plaintiff, where defendant Propst was the contractor on a highway project; defendant Hubbell Highway Signs was a subcontractor; plaintiff Syro Steel Company supplied guardrail material to Hubbell for use on the project; Propst received notice that Hubbell owed Syro $37,231.25 for guardrail material; Propst contacted Syro's credit manager and inquired as to whether Propst could pay Hubbell the amount owed for the subcontract work; Propst was told that it was okay to pay Hubbell and Propst subsequently released payment to Hubbell; Syro initiated a contract action against Hubbell and sought recovery against Propst and Seaboard Surety under the payment bond upon failure to receive payment; and the trial court entered summary judgment for Syro for the full amount of its claim. The statement by Syro's credit manager that it would be okay to pay Hubbell cannot be construed as a misrepresentation because there is no evidence that Syro intended to relinquish its rights under Propst's payment bond if Hubbell failed to pay, there is no indication that Syro induced Propst to make payment to Hubbell, and Propst knew that its obligations under the contract payment bond would be invoked if Syro failed to receive payment.

Am Jur 2d, Estoppel and Waiver §§ 35, 40-41.

Comment note—Quantum or degree of evidence necessary to prove an equitable estoppel. 4 ALR3d 361.

2. **Liens § 21 (NCI4th); Principal and Surety § 9 (NCI3d)— highway construction—material delivered to site and to warehouse—recovery under contractor's payment bond**

The trial court did not err by granting summary judgment for plaintiff Syro and by denying defendants' motion for a

summary judgment where Syro brought an action on a payment bond for materials furnished to a subcontractor on a highway construction project and the contractor contended that Syro was not entitled to recover under the payment bond for materials which were neither delivered to the project site nor utilized under the prime contract. Neither actual delivery of material to the prime contract job site nor incorporation of the material into the work affects a materialman's right to recover under the contractor's payment bond. It is only necessary that the materialman sold and delivered the materials to the subcontractor in good faith and under the reasonable belief that these materials were for ultimate use under the prime contract. N.C.G.S. § 44A-25 *et seq.*

Am Jur 2d, Contractors' Bonds §§ 75, 77.

Labor or material furnished subcontractor for public work or improvement as within coverage of bond of principal contractor. 92 ALR2d 1250.

Appeal by defendants Propst Construction Company and Seaboard Surety Company from order and judgment entered 15 August 1991 by Judge Napoleon B. Barefoot in Duplin County Superior Court. Heard in the Court of Appeals 21 October 1992.

Propst Construction Company ("Propst") entered into a contract with the Department of Transportation to perform work on a highway project in Duplin County. In accordance with N.C.G.S. § 44A-25 *et seq.*, Propst provided a payment and performance bond for the project. Seaboard Surety Company was the surety under the bonds.

In March 1988 Propst entered into a subcontract with Hubbell Highway Signs, Inc., ("Hubbell") for the supply and installation of steel beam guardrails, highway signs and other highway materials necessary for the construction of the highway project. Plaintiff Syro Steel Company ("Syro") supplied guardrail material to Hubbell for use on the project. In September 1989 Syro delivered 6,250 feet of steel beam guardrails to Hubbell at Hubbell's Charlottesville warehouse. This material was not used on the Duplin County project. That same month, Syro delivered another 6,250 feet of steel beam guardrails to Hubbell at the project site.

In December 1989 Propst received notification from Syro that Hubbell owed Syro $37,231.25 for guardrail material, and that Syro was providing Propst with statutory notice of Syro's claim. Approximately one week later, Bill Beck of Propst contacted E.W. Cantor, Syro's credit manager and the author of Syro's notice of claim, and inquired as to whether Propst could pay Hubbell the amount owed for the subcontract work. At that time, Propst owed Hubbell an amount in excess of that claimed by Syro against Hubbell. In response, Mr. Cantor told Mr. Beck that it was "o.k." to pay Hubbell. Propst subsequently released payment to Hubbell.

Upon failure to receive payment, Syro initiated a contract action against Hubbell and also sought recovery against defendants under the payment bond. Both Syro and defendants moved for summary judgment. The trial court entered summary judgment in favor of Syro for the full amount of its claim, $37,231.25, to which defendants Propst and Seaboard Surety Company take exception.

Kennedy, Covington, Lobdell & Hickman, by Wayne P. Huckel and Cory Hohnbaum, for plaintiff appellee.

Johnston, Taylor, Allison & Hord, by John B. Taylor and Greg C. Ahlum, for defendant appellants Propst Construction Company and Seaboard Surety Company.

WALKER, Judge.

Defendants bring forward primarily two assignments of error for this Court to consider on appeal. They argue: (1) Syro is barred from recovering against Propst's payment bond on the grounds of equitable estoppel, since Syro authorized Propst to pay Hubbell; and (2) the trial court erred in determining that Syro is entitled to recover the full amount of its claim against Propst's payment bond when a genuine issue of material fact exists as to whether all of the materials for which payment is sought were actually delivered to the project.

[1] Defendants contend that Syro should be barred from recovering against Propst's payment bond on the grounds of equitable estoppel, since Propst sought and acquired authorization from Syro to pay Hubbell after becoming aware of Syro's claim against Hubbell. Defendants contend that they relied on the statement of Syro's credit manager, Mr. E.W. Cantor, that it was "o.k." for Propst

to pay Hubbell, and that if Syro had not given such an authorization, Propst would have retained the funds owed to Hubbell in order to honor Syro's claims against its payment bond. In this regard, Mr. Cantor's statement misled and prejudiced Propst by inducing Propst to release funds that it would have used to protect itself from Syro's claim against the payment bond. Furthermore, defendants argue that by allowing Syro to seek payment under the payment bond, they are in effect required to pay for the same materials twice.

The doctrine of equitable estoppel requires that the party sought to be estopped: "(1) misrepresented or concealed material facts; (2) intended that such misrepresentation or concealment be acted upon by the other party; and (3) had knowledge, actual or constructive, of the true facts." *Neal v. Craig Brown, Inc.*, 86 N.C.App. 157, 163-164, 356 S.E.2d 912, 916, *disc. review denied*, 320 N.C. 794, 361 S.E.2d 80 (1987). The party asserting estoppel must have: "(1) a lack of knowledge and the means to acquire knowledge as to the real facts in question; and (2) relied to his prejudice upon the conduct of the party sought to be estopped." *Id.* After having reviewed the record, however, we cannot conclude that the facts of this case satisfy the elements enunciated in *Neal* so as to raise a question of equitable estoppel.

The statement by Syro's credit manager that it was "o.k." for Propst to pay Hubbell cannot be construed as a misrepresentation. There is no evidence that, in making this statement, Syro intended to relinquish its rights under Propst's payment bond if Hubbell failed to pay, or that this statement raised an inference of any such intention. *See J.W. Cross Industries, Inc. v. Warner Hardware Company, Inc.*, 94 N.C.App. 184, 379 S.E.2d 649, *disc. review denied*, 325 N.C. 271, 384 S.E.2d 515 (1989). There is also no indication that Syro induced Propst to make payment to Hubbell. *See Neal v. Craig Brown, Inc., supra.* Propst was obligated to pay Hubbell under the subcontract for all work performed, and this duty was independent from any claim Syro had against Hubbell. Thus, Syro's assertion that it was "o.k." to pay Hubbell neither altered nor misrepresented Propst's pre-existing legal duty to Hubbell pursuant to the contract.

In addition, the party asserting estoppel must lack knowledge and the means to acquire knowledge as to the real facts in question. This Court has stated that estoppel is not available to protect

a party from the consequences of its own negligence. *Five Oaks Homeowners Association, Inc., v. Efirds Pest Control Co.*, 75 N.C.App. 635, 331 S.E.2d 296 (1985). In the instant case, Propst entered into the contract payment bond which provided in part that "if the principal shall promptly make payment to all persons supplying labor and material in the prosecution of the work provided for in said contract . . . then this obligation to be void; otherwise to remain in full force and virtue." Insofar as the language of this contract is unambiguous, Propst cannot deny knowledge of its terms. *Id.* Propst knew that its obligations under the contract payment bond would be invoked if Syro failed to receive payment for its materials and labor, and by the letter dated 18 December 1989, Syro informed Propst of its outstanding balance of $37,231.25. Thus, Propst cannot satisfy the essential elements necessary to assert a claim of estoppel.

[2] By their second argument, defendants contend that the trial court erred in granting summary judgment and in determining that Syro was entitled to recover the full amount of its claim against Propst's payment bond when a genuine issue of material fact existed as to whether all of the materials for which payment was sought were actually delivered to the project. The purchase order submitted by Hubbell to Syro called for 500 pieces of guardrail material (at 25 feet per piece) for a total of 12,500 linear feet of guardrail material. It is undisputed by Syro that 6,250 feet of steel beam guardrails were delivered to Hubbell's Charlottesville warehouse and that an additional 6,250 feet of steel beam guardrails were delivered to the project site. The question, then, is whether Syro is entitled to recover under the payment bond for materials which were neither delivered to the project site nor utilized under the prime contract.

Defendants analogize this case to those involving mechanics' liens pursuant to Article 2, Chapter 44A of the North Carolina General Statutes, which requires that material be delivered to the project site in order to enforce a lien on a private project. *See Queensboro Steel Corp. v. East Coast Machine & Iron Works, Inc.*, 82 N.C.App. 182, 346 S.E.2d 248, *disc. review denied*, 318 N.C. 508, 349 S.E.2d 865 (1986). They contend that any recovery under the payment bond should be limited to the 6,250 feet of guardrails actually delivered to the project site, and that Syro should not be allowed to assert a claim for the 6,250 feet of material delivered to the Charlottesville warehouse. Defendants argue,

therefore, that summary judgment was improperly granted in favor of Syro for the full amount of its claim because an issue of fact exists as to the amount of guardrail material supplied by Syro that was actually delivered to the project site.

North Carolina law prohibits the attaching of liens, such as mechanics' liens, on public projects. *American Bridge Division United States Steel Corp. v. Brinkley*, 255 N.C. 162, 120 S.E.2d 529 (1961). Article 3, Chapter 44A of the North Carolina General Statutes thereby requires a payment bond on public projects exceeding $50,000 in order to afford suppliers with a form of security equivalent to that of a lien. *See* N.C.G.S. § 44A-25 *et seq.* Although there is little North Carolina case law interpreting these statutes, this Court has noted that guidance can be obtained through federal case law, where the federal courts have interpreted a parallel statute, 40 U.S.C. § 270 *et seq.* (the "Miller Act"). *See Symons Corp. v. Insurance Company of North America*, 94 N.C.App. 541, 380 S.E.2d 550 (1989); *Noland Company, Inc. v. Poovey*, 58 N.C.App. 800, 295 S.E.2d 238 (1982).

Like its North Carolina counterpart, the Miller Act requires government contractors to furnish a payment bond for the protection of subcontractors and other persons supplying labor and materials for the project. *United States ex rel. Sherman v. Carter*, 353 U.S. 210, 1 L.Ed.2d 776 (1957). Federal case law interpreting this Act has consistently held that a materialman may recover under a payment bond regardless of whether the materials were actually delivered to the job site or used on the project. *See United States ex rel. Balzar Pacific Equipment Co. v. Fidelity & Deposit Company of Maryland*, 895 F.2d 546 (9th Cir. 1990); *United States ex rel. Lanahan Lumber Co., Inc. v. Spearin, Preston & Burrows, Inc.*, 496 F.Supp. 816 (M.D. Fla. 1980); ("[D]elivery to the jobsite or actual use in the prosecution of the work is immaterial to a right of recovery."); *United States ex rel. Carlson v. Continental Casualty Co.*, 414 F.2d 431 (5th Cir. 1969) ("It is immaterial to his right of recovery that the materialman deliver the materials to the jobsite or that such materials actually be used in the prosecution of the work."); *United States ex rel. Color Craft Corp. v. Dickstein*, 157 F.Supp. 126 (E.D.N.C. 1957) ("Neither delivery of the material to the prime contract job site nor actual incorporation of the material into the work is required.") Furthermore, these cases state that the appropriate test for determining if a supplier of materials on a public project can recover against the prime

contractor's payment bond is whether the supplier has sold and delivered material to the subcontractor in good faith and under the reasonable belief that it was intended for ultimate use under the prime contract. *See United States ex rel. Carlson v. Continental Casualty Co., supra; United States ex rel. Color Craft Corp. v. Dickstein, supra.*

In light of the similarities between and parallel purposes of the Miller Act and N.C.G.S. § 44A-25 *et seq.*, and the recognition of such by this Court, we find these federal cases to be instructive as to our analysis of N.C.G.S. § 44A-25 *et seq.* For this reason, we find that neither actual delivery of material to the prime contract job site nor incorporation of the material into the work affects a materialman's right to recover under the contractor's payment bond. In order for a materialman who furnishes a subcontractor with materials for use on a public project to recover against a prime contractor's payment bond pursuant to N.C.G.S. § 44A-25 *et seq.* it is only necessary that the materialman sold and delivered the materials to the subcontractor in good faith and under the reasonable belief that these materials were for ultimate use under the prime contract.

In the instant case, there is evidence from which the court could find that Syro delivered the material to Hubbell in good faith and under the reasonable belief that the material was intended for use on the project. The purchase order submitted by Hubbell to Syro states:

> Note: This material is for use on North Carolina Dept. of Transportation project #:8.1223348/49; our Job #: VN-808 in Duplin County and must conform to all standards and specifications thereof. Certifications must accompany material shipment.
>
> Delivery address will follow at a later date.

The address for Hubbell is listed as Charlottesville, Virginia. Syro's invoice to Hubbell for material shipped to Charlottesville recites Duplin County project 8.1223348/49 within its description. Defendants have failed to present any evidence which indicates that Syro should have had reasonable grounds to believe that materials shipped to the Charlottesville warehouse were not intended for the Duplin County project site. Neither the purchase order nor the invoices would put Syro on notice that the materials were intended for use other than on the project such that Syro could not have

acted in good faith. We therefore conclude that the trial court did not err in granting summary judgment in favor of Syro for the sum of $37,231.25, which includes materials shipped to Duplin County and to Charlottesville. Additionally, the trial court did not err in denying defendants' motion for summary judgment. We note, however, that the cross-claim alleged by defendant Propst against Hubbell remains viable.

AFFIRMED.

Judges GREENE and WYNN concur.

SHERRY S. BOYD, ADMINISTRATRIX D.B.N. OF THE ESTATE OF PATRICK C. BOYD, JR., DECEASED, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, L.G. DEWITT TRUCKING COMPANY, INC. AND CHARLIE HARTFORD LOCKLEAR, DEFENDANTS

No. 9120SC1216

(Filed 5 January 1993)

1. **Insurance §§ 487, 895 (NCI4th)— business auto policy—commercial umbrella policy—coverage of punitive damages**

Under the decision of *Collins & Aikman Corp. v. Hartford Accident & Indemnity Co.*, 106 N.C. App. 357, 416 S.E.2d 591 (1992), a trucking company's business auto policy and commercial umbrella policy both provided coverage for punitive damages awarded in a wrongful death action arising from a motor vehicle accident.

Am Jur 2d, Automobile Insurance § 427.

Liability insurance coverage as extending to liability for punitive or exemplary damages. 16 ALR4th 11.

2. **Insurance §§ 487, 895 (NCI4th)— business auto policy—commercial umbrella policy—punitive damages—public policy**

Public policy does not prohibit the coverage of punitive damages by a business auto policy and a commercial umbrella policy.

Am Jur 2d, Automobile Insurance § 427.

3. Insurance §§ 487, 895 (NCI4th)— business auto policy—commercial umbrella policy—coverage of punitive damages—decision not required to be prospective

A holding that a business auto policy and a commercial umbrella policy provided coverage for punitive damages is not constitutionally required to be given only prospective application since a prior decision that punitive damages were covered by medical malpractice insurance and the proposition that insurance policies are construed against the insurer who selected the policy language sufficiently warned defendant insurer that it might be subject to punitive damages in fields other than medical malpractice if its policies did not specifically exclude coverage for punitive damages.

Am Jur 2d, Automobile Insurance §§ 3, 425; Constitutional Law §§ 682, 685, 703.

Appeal by defendant Nationwide Mutual Insurance Company from entry of judgment on 26 August 1991 by Judge James C. Davis in Richmond County Superior Court. Heard in the Court of Appeals 1 December 1992.

On 1 July 1985 Nationwide Mutual Insurance Company (Nationwide) issued two policies to L.G. DeWitt Trucking Company Inc. (DeWitt), a "business auto policy," No. 61-BA-707-398-0001-L, and a "commercial umbrella liability policy," No. 61-CU-707-398-0004L. The parties stipulated that both policies were in full force and effect on 16 July 1985.

On 16 July 1985 the individual defendant, Charlie Locklear, was driving a tractor-trailer owned by DeWitt when he was involved in a collision with a vehicle operated by plaintiff's decedent, Patrick Boyd, Jr. As a result of the collision Patrick Boyd, Jr. and another passenger were killed. A third passenger was injured. The parties stipulated that Locklear was an agent of DeWitt acting within the course and scope of his authority at the time of the collision.

The plaintiff filed a wrongful death action against both DeWitt and Locklear. On 23 March 1990 a jury returned a verdict in favor of the plaintiffs awarding $869,200.00 in compensatory damages, $500,000.00 in punitive damages against DeWitt and Locklear jointly and severally and punitive damages of $3,500,000.00 against DeWitt. On 21 June 1990 the plaintiff filed a petition for declaratory judgment seeking determination of whether Nationwide's policies

provided coverage for punitive damages. Plaintiff later filed a motion for summary judgment on 29 July 1991. Nationwide filed its own motion for summary judgment on 2 August 1991. On 26 August 1991 the trial court entered summary judgment in favor of the plaintiff holding that Nationwide's policies afforded $2,689,222.00 coverage for punitive damages ($1,689,222.00 under the business auto policy and $1,000,000.00 under the commercial umbrella policy).

Nationwide appeals.

Leath, Bynum, Kitchin & Neal, P.A., by Henry L. Kitchin and Stephan R. Futrell; and Etheridge, Moser, Garner & Bruner, P.A., by Terry R. Garner, for the plaintiff-appellee, Sherry Boyd, Administratrix D.B.N. of the Estate of Patrick C. Boyd, Jr.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Kristin K. Eldridge, for the defendant-appellant Nationwide Mutual Insurance Company.

Webb, Lee, Gibson, Webb & Saunders, by Hugh Lee and William R. Webb, Jr., for the defendant-appellees L.G. DeWitt Trucking Company, Inc. and Charlie Hartford Locklear.

EAGLES, Judge.

I

[1] Nationwide first contends that the trial court erred by holding that its business auto policy provided coverage for punitive damages. We disagree.

This issue is controlled by *Collins and Aikman Corp. v. The Hartford Accident & Indemnity Co.*, 106 N.C. App. 357, 416 S.E.2d 591 (1992). In *Collins*, the insurance contract in issue provided:

> The company will pay on behalf of the insured ultimate net loss in excess of the total applicable limit . . . of underlying insurance . . . because of bodily injury, personal injury, property damage or advertising injury to which this insurance applies caused by an occurrence.

Id. at 359, 416 S.E.2d at 592. The *Collins* contract also included the following pertinent definitions: (1) "Ultimate net loss" meant "all sums which the insured and his or her insurers shall become legally obligated to pay as damages, whether by final adjudication

or settlement . . . ."; (2) " 'damages' include damages for [death] which result[s] at any time from bodily injury to which this policy applies. . . ."; and (3) "Bodily injury" was defined as "bodily injury, sickness or disease. . . ." *Id.* at 360, 416 S.E.2d at 592. Finally, the policy explicitly provided that " 'damages' do not include fines or penalties or damages for which insurance is prohibited by the law applicable to the construction of this policy." *Id.*

On appeal, this Court was faced with resolution of whether the insurance contract in *Collins* provided punitive damage coverage, and if so, whether the contract's express provision that damages did not include "fines or penalties or damages for which insurance is prohibited by the law" excluded punitive damages. In *Collins*, this Court held that "the punitive damages arose from and were in consequence of the bodily injuries suffered by the Howards." *Id.* at 363, 416 S.E.2d at 594. This Court also held there that the definition of damages did not operate to exclude punitive damages from coverage. The *Collins* opinion held that "[i]f Hartford 'intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating "this policy does not include recovery for punitive damages." ' " *Id.* at 364, 416 S.E.2d at 594 (quoting *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 630, 319 S.E.2d 217, 223 (1984)).

In the instant case Nationwide's business auto policy provides in pertinent part:

> **We** will pay all sums the **insured** legally must pay as damages because of **bodily injury** or **property damage** to which this insurance applies, caused by an **accident** and resulting from the ownership, maintenance or use of a covered **auto**.

The policy defines bodily injury as "bodily injury, sickness or disease including death resulting from any of these." The policy does not define the term "damages." Finally, an endorsement attached to the business auto policy provides that:

> the company agrees to pay, within the limits of liability prescribed herein, any final judgment recovered against the insured for bodily injury to or death of any person, . . . resulting from negligence in the operation, maintenance, or use of motor vehicles. . . .

Here, Nationwide argues (1) in the absence of a definition to the contrary, the term "damages" does not include punitive

damages and (2) the punitive damages awarded to the plaintiff were not damages "because of bodily injury" and (3) that the policy at issue in *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E.2d 217 (1984) is distinguishable from the policy issued here by Nationwide.

The insurance contract provisions at issue in this case are substantively identical to those at issue in *Collins.* The arguments raised here by Nationwide were addressed by *Collins*, and were decided against the position that Nationwide advocates. We are bound by the result in *Collins. In re Appeal from Civil Penalty*, 324 N.C. 373, 384, 379 S.E.2d 30, 37 (1989) (One panel of this Court is bound by a prior decision of another panel of this Court addressing the same issue, although in a different case, unless the prior decision has been overturned by a higher court). Accordingly, we hold that the business auto policy here provides coverage for punitive damages.

II

Nationwide next argues that its commercial umbrella policy does not provide coverage for punitive damages. Nationwide's commercial umbrella policy provides in pertinent part:

> I. **Coverage.** The Company will indemnify the Insured for all sums which the Insured shall become legally obligated to pay as damages and expenses, all as hereinafter defined as included within the term ultimate net loss, by reason of liability
>
> (a) imposed upon the Insured by law, . . . because of
>
> (a) personal injury, . . . caused by or arising out of each occurrence happening anywhere in the world.

The policy defines "ultimate net loss" as follows:

> "**ultimate net loss**" means the total of the following sums arising with respect to each occurrence to which this policy applies:
>
> (a) all sums which the Insured, or any organization as his insurer, or both, becomes legally obligated to pay as damages, whether by reason of adjudication or settlement, because of personal injury, property damage or advertising liability; and

(b) all expenses incurred by the Insured in the investigation, negotiation, settlement and defense of any claim or suit seeking such damages, excluding only the salaries of the Insured's regular employees.

The policy defines personal injury to include, among other things, "bodily injury, sickness, disease, disability or shock, including death arising at any time therefrom, or, if arising out of the foregoing, mental anguish and mental injury[.]" Finally, an endorsement to the policy provides:

> Subject to all other terms and conditions of the policy, it is understood and agreed that the policy stated below is hereby amended as follows:
>
> AUTOMOBILE LIABILITY—FOLLOWING FORM
>
> Except to the extent coverage is available to the Insured in the underlying policies as set forth in the Schedule of Underlying Insurance, this policy does not apply to Personal Injury or Property Damage arising out of the ownership, maintenance, operation, use, loading or unloading of any automobile while away from premises owned by, rented to, or controlled by the Insured.

Nationwide raises essentially the same arguments here that it raised under the business auto policy. Once again, it is clear that the language of the commercial umbrella policy at issue here is substantively identical to that at issue in *Collins*. Accordingly, this assignment is overruled as well.

III

Nationwide next argues that the parties to the insurance contracts "understood that the policies did not provide coverage for punitive damages; [and that] their manifestations of that understanding show that the policies are unambiguous." We have closely examined this argument and find it to be without merit. Accordingly, it is overruled.

IV

[2] Nationwide also argues that public policy requires that no punitive damage coverage be afforded, and that *Mazza* does not control this case. In *Collins*, this court stated:

> If the terms of an insurance contract provide coverage for punitive damages, public policy does not prohibit such coverage. *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 631, 319 S.E.2d 217, 223 (1984). Thus, the question presented is whether the terms of the Hartford policy provide coverage for punitive damages.

Collins, 106 N.C. App. at 362, 416 S.E.2d at 594. Here, based on the holding of *Collins*, we have determined that the insurance contracts at issue provide coverage for punitive damages. Accordingly, here, as in *Collins*, we find no public policy to prevent coverage for punitive damages.

V

[3] Nationwide further argues that both the United States Constitution and the North Carolina Constitution require that our holding be given prospective application only. We do not reach this issue because it is not properly before us.

Nationwide attempts to raise this issue under each of its three assignments of error. Those assignments provide:

> 1. The Trial Court's denial of Nationwide's Motion to Amend its Answer to allege that any ruling that the insurance policies at issue provide coverage for punitive damages should be applied prospectively only, on the grounds that leave to amend should be freely given when justice requires and amendment would not prejudice the Plaintiff in defending this action.
>
> 2. The trial Court's grant of Plaintiff's Motion under N.C.R.Civ.P. 56 for Summary Judgment, on the grounds that the pleadings, discovery and affidavits establish that the policies of insurance do not provide coverage for punitive damages and that the Plaintiff was therefore not entitled to judgment as a matter of law.
>
> 3. The Court's denial of Nationwide's Motion under N.C.R.Civ.P. 56 for Summary Judgment, on the grounds that the pleadings, discovery and affidavits establish that the policies of insurance do not provide coverage for punitive damages and that Nationwide was entitled to judgment as a matter of law.

None of Nationwide's assignments purports to raise a constitutional challenge concerning prospective application of the holding

of this Court. "[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal." *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991).

Assuming *arguendo* that Nationwide presented a proper assignment of error raising this issue, we believe that their argument fails. Our Supreme Court held in *Mazza v. Medical Mut. Ins. Co.*, 311 N.C. 621, 319 S.E.2d 217 (1984) that no public policy of this State precluded liability insurance coverage for punitive damages in medical malpractice cases and instructed that "[i]f the insurance carrier to this insurance contract intended to eliminate coverage for punitive damages it could and should have inserted a single provision stating 'this policy does not include recovery for punitive damages.' " *Id.* at 630, 319 S.E.2d at 223. The holding and instruction of *Mazza* combined with the time honored proposition that insurance policies are construed against the insurer who selected the language of the contract, sufficiently forewarned Nationwide that if it chose not to be explicit in its policies it might be subject to punitive damages in fields other than medical malpractice. Accordingly, this assignment is overruled.

VI

Because of our disposition of the foregoing issues, we do not reach the remaining arguments presented on appeal.

Affirmed.

Judges WELLS and LEWIS concur.

RUSSELL LAWRENCE AND EVELYN LAWRENCE, D/B/A CAROLINA VINYL SIDING & CONSTRUCTION, PLAINTIFFS-APPELLEES v. WILLIAM S. WETHERINGTON AND WIFE, JULIA WETHERINGTON, DEFENDANTS-APPELLANTS

No. 913DC1080

(Filed 5 January 1993)

1. Rules of Civil Procedure § 17 (NCI3d)— defendant's corporation—necessary party—ratification

The trial court did not err by failing to grant defendant's motion for a directed verdict at the close of plaintiffs' evidence

and ultimately entering judgment against defendant after failing to join plaintiffs' corporation as a necessary party where the question of whether Carolina Vinyl Siding was a proper and necessary party was raised by the defendant at trial and the parties attempted to cure any necessary party defect by stipulating that plaintiffs' participation in this suit would be binding upon the corporation. Carolina Vinyl Siding became a party plaintiff by ratification. N.C.G.S. § 1A-1, Rule 17(a).

Am Jur 2d, Parties §§ 236, 242.

2. **Evidence and Witnesses § 741 (NCI4th)— dispute over vinyl siding—letter claiming installation proper—testimony that repairs would be free—not prejudicial**

There was no prejudicial error in an action arising from the installation of vinyl siding where a witness identifying a letter stating that the work had been done properly was also allowed to testify that, if she had the opportunity to go back, she would not have charged for repairs to the house.

Am Jur 2d, Appeal and Error § 776; Witnesses § 747.

3. **Damages § 120 (NCI4th)— vinyl siding installation—damages—evidence sufficient**

Defendant homeowner's motion for judgment notwithstanding the verdict was properly denied in an action arising from installation of vinyl siding on their home where defendant alleged that the jury misunderstood the court's instructions and miscalculated her damages, but there was evidence in the record to support the jury's finding of damages. It was for the jury to determine defendant's damages and the jury was not bound to use defendant's exact figures.

Am Jur 2d, Damages §§ 989, 990.

4. **Costs § 33 (NCI4th)— action to collect fee for vinyl siding installation—attorney fees—effect of blank space in agreement**

The trial court acted properly by awarding attorney fees to plaintiffs under N.C.G.S. § 6-21.2 in an action to collect fees for vinyl siding installation where there was a blank space in the agreement providing for payment of the costs of collection, including attorney fees. Although defendant alleges that the blank space in the agreement makes all of the terms which follow unenforceable, it is clear that the parties intended to

incorporate the balance due figure into the part of the contract left blank.

Am Jur 2d, Contracts § 350; Costs § 52.

5. Judgments § 649 (NCI4th)— prejudgment interest—breach of contract—damages not obvious or easily ascertainable

The trial court erred by awarding prejudgment interest to plaintiffs in a breach of contract action arising from the installation of vinyl siding where the damages were neither obvious nor easily ascertainable.

Am Jur 2d, Interest and Usury § 339.

Appeal by defendant from judgment entered 7 March 1991 in Craven County District Court by Judge David A. Leech. Heard in the Court of Appeals 18 November 1992.

On 1 November 1989, plaintiffs individually brought this action doing business as Carolina Vinyl Siding and Construction (hereinafter Carolina Vinyl Siding) against William S. Wetherington and wife, Julia Wetherington. On 30 November 1989, defendants filed an answer and counterclaim. On 14 December 1989, a reply to the counterclaim was filed and on 28 January 1991, the case came on for jury trial before Judge David A. Leech. At the close of the evidence, plaintiffs voluntarily dismissed their compliant as to defendant William S. Wetherington, and the defendants voluntarily dismissed their counterclaim. The jury returned a verdict allowing partial recovery by the plaintiffs against defendant Julia Wetherington. On 8 April 1991, defendant Julia Wetherington filed notice of appeal.

This action arose after plaintiffs completed some home improvement work to a home owned by defendant Julia S. Wetherington. The work included the installation of vinyl siding, the replacement of six windows, and the placing of shingles on the roof of a carport. The cost for this work was $1,800.00 for the windows, $7,500.00 for the vinyl siding, and $100.00 for the shingles on the carport, for a total of $9,400.00.

The plaintiffs offered testimony during trial which indicated that all of the installations were properly completed. Defendant offered her own testimony and the testimony of an expert witness, Jeffrey Vaughn, a general contractor, that there were deficiencies in the plaintiffs' installation of the windows and siding. Mr. Vaughn

testified that, upon initial inspection of the property, he estimated that it would cost $1,420.00 to correct the shortcomings. Mr. Vaughn also testified that upon a closer inspection, he had revised his opinion after determining that it would be necessary to remove all of the siding and replace it at a cost of $6,500.00. He also later estimated the cost of repair of the windows to be $1,500.00. Defendant contended at trial that payment for the work was not made because the windows and siding were improperly installed. Both sides agreed that no shingles were placed upon the carport because of the "unsafeness" of the structure.

The jury found that the parties had entered into a contract which, if fully performed, would entitle the plaintiffs to be paid $8,400.00 and that the plaintiffs had substantially performed their obligations arising out of the contract. The jury found that defendant was damaged in the amount of $1,320.00 by plaintiffs' failure to fully perform. For their substantial performance of the contract, the court entered judgment for the plaintiffs in the amount of $7,080.00. The court also added pre-judgment interest from the date of the breach to the date of the verdict in the amount of $880.60 and attorney fees of $1,062.00 (15% of the outstanding balance of $7,080.00).

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

Henderson, Baxter & Alford, P.A., by B. Hunt Baxter, Jr., for defendant-appellant.

WELLS, Judge.

[1] In her first assignment of error, defendant contends that the court erred in failing to grant defendant's motion for a directed verdict at the close of plaintiffs' evidence and ultimately entering judgment against defendant after failing to join a necessary party. The defendant asserts that plaintiffs' corporation is a necessary party to this case and no valid judgment could be entered against defendant arising out of a contract between the defendant and the corporation without the corporation being joined in the action.

In her pleadings, defendant did not raise the issue of necessary parties, but contends it was reversible error for the court not to join the corporation on its own motion. At trial, at the close of evidence, the question of whether Carolina Vinyl Siding was a proper and necessary party was raised by the defendant, and

the parties attempted to cure any "necessary party" defect by stipulating that the plaintiffs' participation in this suit would be binding upon the corporation. The transcript indicates the following stipulation:

> [PLAINTIFFS' ATTORNEY] We would like to stipulate now that Russell Lawrence and Evelyn Lawrence, whether they are a corporation or individual doing business as that, they would all be bound by the decision in this case and that includes whether it is a corporation called . . . 'Carolina Vinyl Siding and Home Improvements, Inc.,' or 'Carolina Siding, Inc.' or 'Russell Lawrence and Evelyn Lawrence doing business as Carolina Siding.'
>
> THE COURT: And the plaintiffs are representing that they are the only shareholders of either of those corporations, or were, and that they'd be entitled to—that no one else would be entitled on behalf of either of those corporations to bring such a claim.
>
> [PLAINTIFFS' ATTORNEY] I agree with that, Judge. We have no problem with that.
>
> [DEFENDANT'S ATTORNEY] Thank you, Judge. I believe she testified they were the sole officers and directors and shareholders of those corporations.

We hold that by the foregoing trial events Carolina Vinyl Siding became a party plaintiff to this action by ratification. *See* N.C.G.S. § 1A-1, Rule 17(a) of the Rules of Civil Procedure. Carolina Vinyl Siding's rights under the contract between it and defendant are therefore finally determined by the judgment below. We therefore deem it unnecessary to disturb the judgment below pursuant to this assignment of error.

[2] Defendant also assigns error to the trial court's admission over objection of the testimony of plaintiff Evelyn Lawrence. Defendant had called Ms. Lawrence as an adverse witness to identify a letter in which the witness wrote that plaintiffs' work was done properly and disputed Mr. Vaughn's assessment of the installation. During cross-examination, by plaintiffs' attorney, the following exchange took place:

> [PLAINTIFFS' ATTORNEY] Q. Now, Ms. Lawrence, if you had the opportunity to go back, would you charge the Wetheringtons

to correct repairs to the house with the exception of the removal of the vinyl and reattaching it.

[DEFENDANT'S ATTORNEY]: Objection.

A. No, sir.

THE COURT: OVERRULED.

Defendant asserts that this testimony contradicts the written letter in which Ms. Lawrence denied the existence of any problems with the siding installations and amounts to a self-serving declaration which should not have been submitted into evidence by the trial court. We find that any error in admitting the statement into evidence amounts to harmless error and does not constitute sufficient prejudice to justify overturning the jury's verdict.

[3] Defendant alleges that the trial court erred in denying defendant's motion for judgment notwithstanding the verdict and defendant's motion for a new trial on the grounds that the jury misunderstood its instructions. Defendant's expert witness presented testimony which calculated defendant's damages to be $1,420.00. The contract price for the unperformed roof repair was $100.00. The jury's verdict included a finding for damages to defendant in the amount of $1,320.00. The defendant asserts that the jury mistakenly subtracted the contract price of the unperformed roof repairs from defendant's damages rather than added the $100.00 contract price to defendant's damages. Defendant further asserts that the jury verdict should be overturned because there is insufficient evidence in the record to support it. We disagree.

While it is possible that the jury miscalculated its findings for damages, the defendant mistakenly asserts that the jury was obligated to use defendant's estimates of damages as conclusive evidence. While a miscalculation may seem apparent to defendant, it was for the jury to determine defendant's damages and the jury was not bound to use defendant's exact figures. It is not for this court to speculate as to what weight the jury gave particular evidence when arriving at its verdict, but rather to determine whether there was evidence before the jury from which its verdict could reasonably be derived. There is evidence in the record before us that supports the jury's finding of damages. Therefore, we affirm the trial court's denial of defendant's motion for judgment notwithstanding the verdict and a new trial.

[4] Defendant asserts that the court committed reversible error when it awarded plaintiff attorney fees under N.C.G.S. § 6-21.2. In pertinent part, § 6-21.2 reads as follows:

> 6-21.2. Attorneys' fees in notes, etc., in addition to interest.
>
> Obligations to pay attorneys' fees upon any note, conditional sale contract or other evidence of indebtedness, in addition to the legal rate of interest or finance charges specified therein, shall be valid and enforceable, and collectible as part of such debt, if such note, contract or other evidence of indebtedness be collected by or through an attorney at law after maturity, subject to the following provisions:
>
> . . . .
>
> (2) If such note, conditional sale contract or other evidence of indebtedness provides for the payment of reasonable attorneys' fees by the debtor, without specifying any specific percentage, such provision shall be construed to mean fifteen percent (15%) of the 'outstanding balance' owing on said note, contract or other evidence of indebtedness.

The written agreement in the case at bar states, in part:

> The undersigned owner(s) agree(s) to pay Carolina Vinyl Inc. the sum of _____ in accordance with the terms shown to the right of this agreement for and in consideration of furnishing the materials for the construction of the work specified hereinabove by Carolina Vinyl Inc. . . . . The undersigned . . . agrees to pay all costs of collecting, or attempting to collect same including a reasonable attorney's fee.

To the right of the above agreement, the contract states, "Balance Payable $ 9,400.00."

Defendant alleges that the blank space in the agreement makes all of the terms that follow it unenforceable. We disagree. Taken as a whole, it is clear that the parties intended to incorporate the $9,400.00 balance due figure into that part of the contract left blank. Therefore, we find that the trial court acted properly when it awarded attorney fees to plaintiffs under N.C.G.S. § 6-21.2. Because the defendant did not object to the reasonableness of the awarded attorney fees, we need not reach that issue in this opinion.

[5] In her last assignment of error, the defendant contends that the trial court committed reversible error when it awarded plaintiffs pre-judgment interest. We agree. As a general rule, in breach of contract cases, pre-judgment interest (from the date of breach) may be allowed only where the amount of the claim is obvious or ascertainable from the contract itself. *See Rose v. Materials Company*, 282 N.C. 643, 194 S.E.2d 521 (1973). Since the damages in this case were neither obvious nor easily ascertainable, but rather had to be determined by the trier of fact resolving the disputed value of the work, we hold that the trial court erred when it awarded pre-judgment interest to the plaintiff in this case. The judgment must be modified accordingly.

No error in the trial.

Remanded for modification of judgment.

Judges EAGLES and LEWIS concur.

STATE OF NORTH CAROLINA v. JEFFERSON D. JOHNSON, III

No. 914SC987

(Filed 5 January 1993)

Embezzlement § 4 (NCI4th) — attorney — case settled without client's knowledge — money deposited to attorney's account upon forged signature of client — not embezzlement

The trial court erred by denying defendant's motion to dismiss an embezzlement charge arising from the settlement of a lawsuit where the indictment charged defendant only with embezzlement; defendant was an attorney; the evidence presented at trial established that defendant's client never authorized settlement of her personal injury claim; the client had never even discussed the possibility of settlement with anyone in defendant's law office; and defendant was able to gain possession of the check only after his secretary falsely represented to State Farm that the client had agreed to settle the claim and sign a release. Even in the light most favorable to the State, the evidence established that defendant's acquisi-

tion of the money was unlawful, thus rendering nonexistent an essential element of embezzlement.

Am Jur 2d, Embezzlement §§ 1, 15.

Appeal by defendant from judgment entered 23 May 1991 in Sampson County Superior Court by Judge Thomas W. Ross. Heard in the Court of Appeals 13 November 1992.

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

Tharrington, Smith & Hargrove, by Roger W. Smith and Douglas E. Kingsbery, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 23 May 1991, which judgment is based on a jury verdict convicting defendant of embezzlement, N.C.G.S. § 14-90 (1986), a Class H felony with a maximum term of ten years and a presumptive term of three years.

Defendant was indicted on 2 July 1990 for embezzlement of $20,000.00 in United States currency from Lillie Joyce McCoy (McCoy). At trial, the evidence for the State tended to establish that in February, 1987, defendant was an attorney licensed to practice law in North Carolina. McCoy went to defendant's law office in order to obtain legal assistance regarding an automobile accident in which she had been involved. The driver of the other car was insured by State Farm Mutual Insurance Company (State Farm). The accident caused McCoy to receive injuries requiring hospitalization and rendered her automobile a total loss. McCoy chose defendant to represent her because defendant had satisfactorily represented McCoy in a similar case in 1982.

Defendant was not present on the first day McCoy visited defendant's office, so McCoy discussed her case with defendant's secretary/assistant, Gloria Maynard (Maynard). Maynard told McCoy that "she would take my case." McCoy never met with or talked to defendant during the entire time her case was being handled by defendant's office, and, in fact, with one exception, defendant was not present during any of McCoy's visits to the office. Instead, McCoy would discuss the progress of her case with Maynard. On the one occasion when defendant was present in the office, Maynard told McCoy that defendant "was talking on the phone and . . .

[to] be quiet" when she came into the office. Maynard told McCoy not to try to talk to defendant, and McCoy had the impression that Maynard was trying to hide something from defendant about McCoy's case. During the entire time that McCoy's case was being handled by defendant's office, McCoy never discussed settlement with either defendant or Maynard, and never gave either of them the authority to settle or compromise any of her claims.

During the course of McCoy's case, State Farm determined that its insured was at fault in the accident and assigned the claim file to claims adjuster Brenda Matthews (Matthews). On 11 June 1987 and 7 July 1987, Matthews received letters from defendant's law office informing her that it represented McCoy in her claim against State Farm's insured. Thereafter, Matthews had several telephone conversations with Maynard regarding McCoy's case, but recalled speaking with defendant only once, on 2 December 1987.

On 5 October 1987, Matthews agreed to settle McCoy's property damage claim, and mailed a draft from State Farm made payable to "Lillie J. McCoy and [defendant], her attorney" for $800.00, along with a cover letter, to Maynard at defendant's law office. The cover letter stated:

> Gloria, attached is our draft for $800 along with a milage [sic] statement and receipt for settlement of Ms. McCoy's property damage claim. Please send me the title to her 1973 Buick along with the attached forms signed by her. Please give me a call when you are ready to discuss her injury claim.
>
> Thanks,
>
> Brenda Matthews, State Farm Insurance

The draft was endorsed in the names of McCoy and defendant and deposited into defendant's business account at First Citizens Bank. McCoy had not authorized a settlement, knew nothing about it, and did not endorse the draft. There was no evidence regarding who signed defendant's name to the draft. The bank records established that whoever forged McCoy's endorsement and deposited the $800.00 draft took $150.00 in cash out from the deposit. Beside the entry on the deposit slip showing the $150.00 cash withdrawal appeared to be the initials "G.M."

On 2 December 1987, during a telephone conversation, Matthews agreed to settle McCoy's personal injury claim for $20,000.00.

Matthews could not recall whether these settlement discussions were with Maynard or defendant. After reaching a settlement, Matthews prepared a draft on State Farm's account in the amount of $20,000.00 made payable to "Lillie J. McCoy and [defendant], her attorney." Matthews also prepared a cover letter stating: "Gloria, attached is a draft for $20,000 for settlement of Lillie McCoy's claim. A general release is also attached which includes the property damage payment of $800. Please send title to me with the release as per our discussion. Thank you, Brenda Matthews." Later that day, prior to mailing the release, draft, and cover letter, Matthews received a telephone call from defendant. Defendant asked Matthews not to mail the settlement check because he was going to send someone by Matthews' office to pick it up. Matthews put the letter, release, and draft in an envelope and left it at the front of her office where it was later picked up by defendant's wife.

The $20,000.00 draft was subsequently endorsed in the names of McCoy and defendant, and deposited into defendant's personal account at First Citizens Bank on 3 December 1987. McCoy again had not authorized the settlement of her personal injury claim, knew nothing about it, and had never seen the draft until trial. Defendant told an agent from the Financial Crimes Division of the State Bureau of Investigation that he "believe[d] it was my signature" on the $20,000.00 check. On 21 December 1987, Matthews received the executed release in the mail. The release bore the signature of Gloria Maynard and the forged signature of Lillie McCoy, but did not contain defendant's signature.

Defendant presented no evidence. At the end of the State's evidence defendant made a motion to dismiss the charge against him, which was denied. The jury convicted defendant, and defendant received a three-year suspended sentence and was placed on probation for five years. Defendant appeals.

The sole issue presented is whether the State met its burden of presenting substantial evidence that defendant committed the crime of embezzlement in order to survive defendant's motion to dismiss the charge.

A person accused of the statutory crime of embezzlement "must have been entrusted with and received into possession lawfully the personal property of another," specifically, his principal, "and thereafter with felonious intent must have fraudulently converted

the property to his own use." *State v. Griffin*, 239 N.C. 41, 45, 79 S.E.2d 230, 233 (1953); *State v. Kornegay*, 313 N.C. 1, 21-22, 326 S.E.2d 881, 897 (1985); N.C.G.S. § 14-90 (1986). Because of the requirement that the accused must have *lawfully* obtained the personal property *of his principal*, defendant argues that the State failed to meet its burden of producing substantial evidence of embezzlement on the part of defendant. Specifically, defendant argues that the $20,000.00 check from State Farm was obtained by defendant's law office through misrepresentation to State Farm that Lillie McCoy had agreed to settle her personal injury claim, and therefore was not "lawfully obtained." In addition, according to defendant, the check was not the personal property of McCoy, but rather of State Farm, because title never passed to McCoy due to the forged endorsement. Defendant argues that, therefore, the evidence at trial established only that the money was obtained from State Farm by false pretenses.

The indictment charges defendant only with embezzlement. Therefore, because obtaining property by false pretenses is not a lesser included offense of embezzlement, and because a defendant charged only with embezzlement cannot properly be convicted of obtaining property by false pretenses, the relevant question is whether the State presented substantial evidence to support the charge of embezzlement.[1] Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78, 265 S.E.2d 164, 169 (1980).

The evidence presented at trial established that defendant's client, Lillie McCoy, never authorized settlement of her personal injury claim with State Farm. In fact, McCoy had never even discussed the possibility of settlement with anyone in defendant's law office. Defendant was able to gain possession of the $20,000.00

1. The general rule is that a defendant may not be convicted of an offense which is not included within the offense charged in the bill of indictment. *State v. Overman*, 269 N.C. 453, 464, 153 S.E.2d 44, 54 (1967), *overruled on other grounds*, *State v. Hickey*, 317 N.C. 457, 346 S.E.2d 646 (1986); N.C.G.S. § 15-170 (1983) (defendant may be convicted of crime charged in indictment or of any lesser included offense). However, by statute, a defendant charged in an indictment with obtaining property by false pretenses may, upon proof at trial that he obtained the property in such a manner as to amount to embezzlement, be convicted of embezzlement. *See* N.C.G.S. § 14-100 (1986). No such statutory authority exists for allowing a defendant to be convicted of false pretenses upon an indictment charging him only with embezzlement.

check only after his secretary falsely represented to Brenda Matthews at State Farm that McCoy had agreed to settle the claim and sign a release. There is no question that, had McCoy agreed to the settlement and release, and after obtaining the check defendant placed the funds in his personal account for his own use, substantial evidence would exist that defendant had "initially . . . acquired lawfully, pursuant to a trust relationship, and then wrongfully converted" the property in question. *State v. Speckman*, 326 N.C. 576, 578, 391 S.E.2d 165, 166 (1990). However, even in the light most favorable to the State, the evidence established that defendant's acquisition of the money was unlawful, thus rendering nonexistent an essential element of embezzlement. For this reason, the trial court erred in denying defendant's motion to dismiss the charges. It is therefore unnecessary to determine whether the check, at the time that it was placed into defendant's personal account, was the property of defendant's principal (ownership by the principal being another essential element of embezzlement), or whether it remained the property of State Farm.

Based on the foregoing, the trial court's judgment must be

Reversed.

Judges WYNN and WALKER concur.

JOHN CARPENTER AND WIFE, DEBORAH CARPENTER, PLAINTIFFS v. MERRILL LYNCH REALTY OPERATING PARTNERSHIP, L.P., RYAN HOMES, INC., AND JAMES BARNETT, DEFENDANTS

No. 9126SC1071

(Filed 5 January 1993)

1. Fraud, Deceit, and Misrepresentation § 17 (NCI4th)— location of road widening—realtor's statement—insufficient evidence of fraud

Defendant realtor's statement to plaintiff home purchaser that an abutting road would be widened on the other side because the side on which the home was located already had curbs, gutters and sidewalks did not constitute fraud where a portion of the purchaser's lot was taken for widening the road since it is clear that the realtor was making a general

statement of opinion about the future probability that the road would be widened on the opposite side, and the statement does not support a reasonable inference that the realtor intended to deceive or mislead plaintiff.

Am Jur 2d, Fraud and Deceit §§ 45-47.

2. **Negligence § 2 (NCI3d)— location of road widening—realtor's statement—insufficient evidence of negligent misrepresentation**

Defendant realtor's statement to plaintiff home purchaser that an abutting road would be widened on the other side because the side on which the home was located already had curbs, gutters and sidewalks was insufficient to support a negligent misrepresentation claim where it is clear that plaintiff understood that defendant realtor was not attempting to supply her with information that he had obtained independently; plaintiff indicated that she had made the same assumption; and plaintiff failed to present evidence that she justifiably relied on the statement.

Am Jur 2d, Fraud and Deceit § 208.

3. **Unfair Competition § 1 (NCI3d)— location of road widening—realtor's statement—not unfair trade practice**

Defendant realtor's statement to plaintiff home purchaser that an abutting road would be widened on the other side because the side on which the home was located already had curbs, gutters and sidewalks did not rise to the level of oppressive, unscrupulous or deceptive conduct necessary to support a claim for an unfair or deceptive trade practice.

Am Jur 2d, Consumer and Borrower Protection §§ 280, 284, 287, 290.

Appeal by plaintiffs from judgments entered 18 July 1991 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 18 November 1992.

In the fall of 1987 the plaintiffs, Mr. and Mrs. Carpenter, were searching for a house to purchase in Charlotte. In September or October Mrs. Carpenter came across an advertisement listing a house for sale at 8001 Jamison Place. Mrs. Carpenter called Merrill Lynch Realty Operating Partnership, LP (Merrill Lynch), the agent listing the house, to obtain directions to the property. Her call was directed to James Barnett, a licensed real estate agent working for Merrill Lynch. Mrs. Carpenter received directions from Mr.

Barnett and drove out to look at the house at 8001 Jamison Place. The following day Mrs. Carpenter called Mr. Barnett back and arranged to go and see the inside of the house.

Mrs. Carpenter met Mr. Barnett at his office and the two rode in his car out to the site. As they approached the entrance to Jamison Place on Albemarle Road, Mrs. Carpenter, who had noticed that Albemarle Road had changed from four lanes to two, said, "I suppose they'll be widening Albemarle Road." Mrs. Carpenter testified that Mr. Barnett responded, "It'll be on the other side [of the road] because you've got curbs and gutters and sidewalks on yours already." After looking at the house at 8001 Jamison Place Mrs. Carpenter noticed another house for sale across the street at 8004 Jamison Place. That house, built by Ryan Homes, Inc., was also listed with Merrill Lynch and James Barnett. The Carpenters eventually purchased the house at 8004 Jamison Place for $88,750. Following their purchase the Carpenters made substantial improvements which included landscaping, construction of a garage and installation of a playhouse/shed. Albemarle Road abuts the 8004 Jamison Place property.

In May of 1988 Mrs. Carpenter learned from a local news reporter that a portion of her yard would be taken by a project to widen Albemarle Road. Sometime later the North Carolina Department of Transportation condemned approximately .28 acres of the Carpenters' .743 acre lot. As compensation for their property the Carpenters received $40,000, which the Carpenters' home mortgage company required them to apply toward the mortgage. The new right of way runs within a few feet of the Carpenters' home. Mrs. Carpenter later learned from Mr. Peacock, a state employee, that the plans to widen Albemarle Road had been "on paper" since 1979.

The Carpenters filed suit against the defendants alleging fraud, negligent misrepresentation and unfair and deceptive trade practices. On 18 July 1991 the trial court entered summary judgment in favor of each defendant. The Carpenters appeal.

Lisa G. Caddell for the plaintiff-appellants.

Golding, Meekins, Holden, Cosper & Stiles, by Ned A. Stiles, for the defendant-appellee, Ryan Homes, Inc.

Moore & Van Allen, by Sharon L. Moylan, for the defendant-appellees, Merrill Lynch and James Barnett.

EAGLES, Judge.

The Carpenters contend that the trial court committed reversible error by entering summary judgment in favor of the defendants on each of their claims, *i.e.*, fraud, negligent misrepresentation, and unfair and deceptive trade practices. We disagree and affirm.

> Summary judgment is granted in favor of the moving party where there is no genuine issue of material fact and the moving party is entitled to judgment as a matter of law. *Gore v. Hill*, 52 N.C. App. 620, 279 S.E.2d 102 (1981). A defending party is entitled to summary judgment if he can show that the claimant cannot prove the existence of an essential element of his claim or cannot surmount an affirmative defense which would bar the claim. *Dickens v. Puryear*, 302 N.C. 437, 276 S.E.2d 325 (1981).

Little v. National Service Industries, Inc., 79 N.C. App. 688, 690, 340 S.E.2d 510, 512 (1986).

[1] The Carpenters first argue that their fraud claim should have survived the defendants' motions for summary judgment.

> While fraud has no all-embracing definition and is better left undefined lest crafty men find a way of committing fraud which avoids the definition, the following essential elements of actionable fraud are well established: (1) False representation or concealment of a material fact, (2) reasonably calculated to deceive, (3) *made with the intent to deceive*, (4) which does in fact deceive, (5) resulting in damage to the injured party.

Myers & Chapman, Inc. v. Thomas G. Evans, Inc., 323 N.C. 559, 568-69, 374 S.E.2d 385, 391 (1988), *reh'g denied*, 324 N.C. 117, 377 S.E.2d 235 (1989) (quoting *Ragsdale v. Kennedy*, 286 N.C. 130, 138, 209 S.E.2d 494, 500 (1974)).

We believe *Warfield v. Hicks*, 91 N.C. App. 1, 370 S.E.2d 689, *disc. review denied*, 323 N.C. 629, 374 S.E.2d 602 (1988) controls here. In *Warfield*, the plaintiffs entered into a contract with the defendant under which the defendant agreed to build the plaintiffs a custom home. That contract called for installation of "heavy hand-hewn beams." *Id.* at 4, 370 S.E.2d at 691. However, the defendant refused to install "heavy hand-hewn beams[,]" and instead offered to substitute old beams from a tobacco barn. The plaintiffs, concerned about the presence of worm holes and beetles in the beams,

asked the defendant if the beetles would present a problem. The defendant responded, ". . . these beetles won't be a problem to you. They'll just make some sawdust." *Id.* The plaintiffs then agreed to the substitution of the beams. After experiencing problems with sawdust and a scratching noise the plaintiffs learned that there was an active infestation of old house bores and powder post beetles in the beams. The plaintiffs also learned that it would be difficult for them, as well as others, to obtain financing on the home because of the active infestation. The plaintiffs sued the defendant alleging *inter alia* fraud, misrepresentation and unfair and deceptive trade practices. After briefly discussing the elements of fraud as they related to the case, this Court held that the plaintiffs had not presented sufficient evidence to withstand the defendant's motion for summary judgment because "the plaintiffs' evidence taken in the most favorable light shows merely that Mr. Hicks made a general unspecific statement of opinion about the potential future consequences of using beetle infested beams and does not support a reasonable inference that he intended to deceive or mislead the Warfields." *Id.* at 8, 370 S.E.2d at 692.

Similarly, here, Mr. Barnett merely offered Mrs. Carpenter a statement of opinion. On cross examination at her deposition, Mrs. Carpenter testified as follows:

> Q. Now with respect to this first trip out to Jamison Place with Mr. Barnett, I know you discussed a number of things. Specifically as best you can recall what was said about widening Albemarle Road?
>
> A. Okay.
>
> Q. And if you would take it as best you can recall and the order in which anything was said.
>
> A. We were riding out and you know where the four lanes come into just two and as we got out to the property I said I suppose they'll be widening Albemarle Road. And he said they will but it'll be on the other side of the road, which is the North side of the road, and I wouldn't be affected because we had curbs and gutters and sidewalks in there.
>
> Q. Okay, so the first mention of anything about widening the road was when you said—
>
> A. When I said that.

Q. —I suppose they'll be widening Albemarle Road?

A. Uh-huh (yes).

Q. And specifically as best you can recall what did Mr. Barnett say?

A. He said it would be on the other side.

Q. He said—are those his exact words?

A. It'll be on the other side because you've got curbs and gutters and sidewalks on yours already.

Q. So after you said I suppose they'll be widening Albemarle Road he said it'll be on the other side because on your side there's curbs and sidewalks and so forth?

A. Yes, and I believed him. It made sense because the curbs are in and the sidewalks are in.

Q. Other than saying it'll be on the other side because you have sidewalks and curbs already put in, did Mr. Barnett say anything else at all about widening Albemarle Road?

A. That was it because it made sense so why question it. It made sense; the curbs were in, everything was complete on our side.

Q. And that's the extent of your conversation with Mr. Barnett about the widening of Albemarle Road?

A. That's correct, Uh-huh.

It is clear from this colloquy that Mr. Barnett was making a general unspecific statement of opinion about the future probability that Albemarle Road would be widened on the side of the road opposite from the Carpenters. Here, as in *Warfield*, the statement of the defendant simply does not support a reasonable inference that Mr. Barnett intended to deceive or mislead Mrs. Carpenter.

The Carpenters argue that the instant case is controlled by *Powell v. Wold*, 88 N.C. App. 61, 362 S.E.2d 796 (1987). Although a factual analogy may be drawn between the underlying facts of *Powell* and the instant case, *Powell* is not dispositive. In *Powell*, this Court was faced with resolution of whether the plaintiff had stated a claim sufficient to withstand the defendant's Rule 12(b)(6) motion. Unlike the instant case, *Powell* did not decide whether

the plaintiff presented sufficient evidence of each element to withstand a motion for summary judgment. This argument is overruled.

[2] The Carpenters next argue that the trial court erred by entering summary judgment against them on their negligent misrepresentation claim. Under North Carolina law

> [o]ne who in the course of his business or profession supplies information for the guidance of others in their business transactions is subject to liability for harm caused to them by their reliance upon information if
>
> (a) he fails to exercise that care and competence in obtaining and communicating the information which its recipient is justified in expecting, and
>
> (b) the harm is suffered
>
> (i) by the person or one of the class of persons for whose guidance the information was supplied, and
>
> (ii) because of his justifiable reliance upon it in a transaction in which it was intended to influence his conduct or in a transaction substantially identical therewith.

Powell v. Wold, 88 N.C. App. at 67, 362 S.E.2d at 799 (citations omitted).

Here, Mrs. Carpenter has failed to present evidence that she justifiably relied on the statement made by Mr. Barnett. It is clear from the colloquy extracted from Mrs. Carpenter's deposition, which we have quoted above, that she understood Mr. Barnett was not attempting to supply her with information that he had obtained independently. Rather, Mrs. Carpenter intimated that she understood that the sole basis for Mr. Barnett's opinion was that curbs, gutters and sidewalks were already in place on her side of Albemarle Road. Indeed, Mrs. Carpenter testified that Mr. Barnett's exact words were that "It'll be on the other side *because you've got curbs and gutters and sidewalks on yours already.*" (emphasis ours). She further testified that his statement "made sense" to her indicating that she had made the same assumption that Mr. Barnett made. This argument is overruled.

[3] Finally, the Carpenters claim their unfair and deceptive trade practices claim should have survived summary judgment. Once again, we find *Warfield v. Hicks* to be dispositive.

The standards governing determination of whether a defendant's statements or actions are sufficient to allow a plaintiff to maintain an unfair or deceptive trade practices claim were set out in full in *Warfield*. We need not restate them here. It is sufficient that we conclude here, as in *Warfield*, that the defendant's statements did not rise to the level of oppressive, unscrupulous or deceptive conduct necessary to support the claim brought by the Carpenters. Accordingly, we overrule this argument.

Because of our disposition of the Carpenters' first three arguments we need not reach any of the remaining arguments or assignments of error raised on appeal.

Affirmed.

Judges WELLS and LEWIS concur.

B. B. WALKER COMPANY, PLAINTIFF v. BURNS INTERNATIONAL SECURITY SERVICES, INC., DEFENDANT

No. 9119SC1146

(Filed 5 January 1993)

1. Labor and Employment § 230 (NCI4th)— thefts by security guards—respondeat superior inapplicable

Plaintiff's evidence was not sufficient to go to the jury on plaintiff's claim for conversion under the doctrine of *respondeat superior* where security guards supplied by defendant security firm to plaintiff manufacturer stole significant amounts of plaintiff's property which they had been assigned to protect since the acts of theft committed by the guards were not authorized or ratified by defendant, and the guards were not acting within the scope of their employment and in furtherance of defendant's business when the criminal acts occurred.

Am Jur 2d, Master and Servant §§ 417, 424, 426-427, 434, 437, 445.

Actions of security service company's employee as rendering company liable under contract to protect persons or property. 83 ALR4th 1150.

2. Labor and Employment § 189 (NCI4th)— thefts by security guards—insufficient evidence of negligent hiring or retention

Plaintiff manufacturer's evidence was insufficient for the jury on its claim against defendant security firm for negligent hiring, supervision and retention of two security guards who stole from plaintiff property which they had been assigned to protect where plaintiff failed to show that there was anything in the background of either guard which should have put defendant on notice that such guard was incompetent or otherwise unfit for the job, and there was no showing that defendant should have reasonably foreseen that more supervision was required to prevent deliberate criminal acts by its employees.

Am Jur 2d, Master and Servant §§ 422, 458-459.

Security guard company's liability for negligent hiring, supervision, retention, or assignment of guard. 44 ALR4th 620.

3. Negligence § 2 (NCI3d)— thefts by security guards—negligent breach of contract—insufficient evidence

Plaintiff's evidence was insufficient for the jury on its claim for negligent breach of contract where it tended to show that plaintiff hired defendant security firm to provide security for its facility and the security guards supplied by defendant stole property from plaintiff, but plaintiff was unable to show any wrongful act or omission for which defendant may be held liable.

Am Jur 2d, Contracts § 732.

4. Contracts § 41 (NCI4th)— thefts by security guards—contract limiting liability to negligence

Defendant security firm which agreed to furnish security services for plaintiff's facility could not be held liable under a breach of contract theory for the theft of plaintiff's property by security guards supplied by defendant where the parties' contract provides, "Client agrees that [defendant] shall be liable only for personal injury or property damage resulting directly from the sole negligence or the proportionate share of any concurrent negligence by [defendant] or its officers, agents or employees acting within the scope of their employment, and within the performance of services rendered hereunder,"

since this language protects defendant from liability for the deliberate criminal conduct of its employees.

Am Jur 2d, Master and Servant § 404.

Appeal by plaintiff from judgment entered 23 May 1991 in Special Civil Session of Randolph County Superior Court by Judge Russell G. Walker, Jr. Heard in the Court of Appeals 21 October 1992.

This is a civil action arising out of a contractual relationship in which defendant agreed to supply security guard service to plaintiff. Subsequent to their assignment at plaintiff's manufacturing facility, the security guards supplied by defendant stole significant amounts of plaintiff's property, which the guards had been assigned to protect.

Plaintiff brought this action seeking to recover damages resulting from defendant's alleged negligence in hiring, retaining, and supplying of security guards and alleged breach of contract. A trial ensued, and on 23 May 1991, Judge Walker allowed defendant's motion for a directed verdict against plaintiff on all of its claims and entered judgment dismissing plaintiff's action. On 18 June 1991, plaintiff gave notice of appeal.

Smith Helms Mulliss & Moore, by James A. Medford and Deborah L. Hayes, for plaintiff-appellant.

Petree Stockton & Robinson, by Daniel R. Taylor, Jr. and Donald M. Nielsen, for defendant-appellee.

WELLS, Judge.

Plaintiff contends that the trial court committed reversible error in directing a verdict for defendant on the following claims: (1) a tort claim under the doctrine of *respondeat superior*; (2) a negligent hiring, supervision and retention claim; (3) a negligent breach of contract claim; and (4) a breach of contract claim.

The Standard of Review

"A motion by a defendant for a directed verdict under G.S. 1A-1, Rule 50(a) tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff." *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1978). In determining whether a trial judge's ruling on defendant's motion

for a directed verdict was proper, "plaintiffs' evidence must be taken as true and all the evidence must be considered in the light most favorable to the plaintiffs, giving plaintiffs the benefit of every reasonable inference." *West v. King's Dept. Store, Inc.*, 321 N.C. 698, 365 S.E.2d 621 (1988). "A directed verdict is improper unless it appears, as a matter of law, that a recovery cannot be had by the plaintiff upon any view of the facts which the evidence reasonably tends to establish." *Id.* With these principles as our guide, we must determine whether the plaintiff's evidence, when considered in the light most favorable to plaintiff, was legally sufficient to withstand defendant's motion for a directed verdict as to any of its claims.

Respondeat Superior

[1] Plaintiff first contends that the damages which plaintiff suffered as a consequence of the security guards' thefts were a legally compensable result of defendant's breach of a duty of care owed to the plaintiff by the defendant and that defendant should be liable for the guards' thefts under the doctrine of *respondeat superior.* Although plaintiff has not clearly enunciated its position on this point, it appears that plaintiff's *respondeat superior* argument is directed toward the conversion of plaintiff's property by defendant's employees. As a general rule, a principal will be liable for its agent's wrongful act under the doctrine of *respondeat superior* when the agent's act is (1) expressly authorized by the principal; (2) committed within the scope of the agent's employment and in furtherance of the principal's business—when the act comes within his implied authority; or (3) ratified by the principal. *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990). Thus, in order for plaintiff to recover under this claim, the evidence presented must sufficiently establish that the conduct of defendant and/or its agent falls within one of these categories.

Plaintiff does not contend that the acts of theft committed by security guards Freedle and Albright were either authorized or ratified by defendant. Rather, plaintiff argues that the security guards were acting within the scope of their employment and in furtherance of defendant's business when the criminal acts occurred because defendant placed the guards in a unique position to steal plaintiff's property by hiring and assigning them to provide security at plaintiff's facility. The guards were alone on plaintiff's property at night and had access to the goods which they stole by nature

of their employment. Therefore, plaintiff argues, in essence, that the thefts committed by the two security guards were so very closely connected to their employment duties that they were able to steal the very items they were employed to protect. Plaintiff then concludes that such conduct was naturally incident to their employment. We disagree.

"To be within the scope of employment, an employee, at the time of the incident, must be acting in furtherance of the principal's business and for the purpose of accomplishing the duties of his employment." *Troxler v. Charter Mandala Center*, 89 N.C. App. 268, 365 S.E.2d 655, *disc. review denied*, 322 N.C. 838, 371 S.E.2d 284 (1988). "If an employee departs from that purpose to accomplish a purpose of his own, the principal is not [vicariously] liable." *Id.* Furthermore, this Court has stated that "intentional tortious acts are rarely considered to be within the scope of an employee's employment." *Brown v. Burlington Industries, Inc.*, 93 N.C. App. 431, 378 S.E.2d 232, *disc. review allowed*, 325 N.C. 270, 384 S.E.2d 514, *cert. granted*, 325 N.C. 704, 387 S.E.2d 55 (1989), *disc. review improvidently allowed*, 326 N.C. 356, 388 S.E.2d 769 (1990).

The security guards' acts of theft were clearly contrary to, and not in furtherance of, the business of defendant which was to provide security for the facility and the property contained therein. In fact, the employees' thefts were indirectly contrary to the principal's business. The thefts resulted from the guards' personal motives; therefore, they cannot be deemed an act of their employer. *Wegner v. Delicatessen*, 270 N.C. 62, 153 S.E.2d 804 (1967). (Employer not answerable in tort for deliberate assault committed by employee.) Accordingly, the trial court properly concluded that plaintiff's evidence was not legally sufficient to go to the jury and support a verdict for plaintiff for conversion under the doctrine of *respondeat superior*.

Negligent Hiring, Supervision and Retention

[2] Next, plaintiff contends that the evidence was legally sufficient to withstand defendant's motion for a directed verdict on plaintiff's claims of negligent hiring, supervision, and retention. We disagree.

As stated by our Supreme Court in *Medlin v. Bass*, *supra*, North Carolina recognizes a claim against an employer for the negligent hiring and retention of an employee where certain requirements are met. Drawing from *Medlin* and the cases cited

and relied upon therein, it appears that in order to prevail on its claim in this case, plaintiff would have to prove (1) the wrongful act on which the claim is founded (the theft); (2) the incompetency of the guards to perform their duty, either by inherent unfitness for the job, or by showing such incompetence by previous conduct; and (3) either actual or constructive notice to defendant of the guards' unfitness or bad conduct.

There was no such showing in this case. While plaintiff alleged that defendant was negligent in hiring the guards, there was no showing that there was anything in the background of either man which should have put defendant on notice that either man was incompetent or otherwise unfit for the job. Plaintiff centers its argument on retention and supervision, contending that had the guards been properly or adequately "supervised," their thefts could have been prevented. This amounts to no more than speculation that because defendant failed to adequately guard the guards, it was negligent. We see no showing here that defendant should have reasonably foreseen that more supervision was required to prevent these deliberate criminal acts which were the cause of plaintiff's loss. This argument must be rejected.

Negligent Breach of Contract

[3] For the reasons we have stated with respect to plaintiff's other negligence based claims, plaintiff's claim for negligent breach of contract was properly dismissed. Plaintiff was unable to show any wrongful act or omission in support of this claim for which defendant may be held liable.

Breach of Contract

[4] In its last assignment of error, plaintiff contends that its evidence of a breach of contract was legally sufficient to withstand defendant's motion for a directed verdict. We disagree.

In its contract with plaintiff, defendant agreed to furnish security personnel for plaintiff's facility, but the contract contained the following limiting language.

> **LIMITS OF LIABILITY**
>
> Client acknowledges that Burns is not an insurer. Burns makes no warranty, express or otherwise, that the services furnished shall avert or prevent occurrences or consequences therefrom.

> . . . Client agrees that Burns shall be liable only for personal injury or property damage resulting directly from the sole negligence or the proportionate share of any concurrent negligence by Burns or its officers, agents or employees acting within the scope of their employment, and within the performance of services rendered hereunder.

Under this explicit language, defendant could not be held answerable for the deliberate criminal conduct of its employees, and this argument is therefore rejected.

Defendant's Cross Appeal

In its purported cross appeal defendant attempts to challenge the trial court's admission of an insurance certificate contained in plaintiff's exhibit #1. We need not reach this question.

No error.

Chief Judge HEDRICK and Judge ARNOLD concur.

JAMES RONALD SEXTON, AS ANCILLARY ADMINISTRATOR FOR THE ESTATE OF MICHELE ANN SEXTON, PLAINTIFF v. CRESCENT LAND & TIMBER CORP. (NOW NAMED CRESCENT RESOURCES, INC.), DEFENDANT

No. 9126SC1304

(Filed 5 January 1993)

Negligence § 47 (NCI3d)— premises liability—actions of third party on premises causing injury to another—duty of landowner to inspect premises

The trial court did not err in its instructions on the law of negligence as it applies to landowners where plaintiff's intestate died of a gunshot wound at Carowinds Amusement Park; police determined that the shot was fired from a clearing on property owned by defendant and which was used for target practice by a number of individuals including, employees of defendant's parent company; the clearing was located 250 to 300 yards north of Carowinds Boulevard, which ran along the south side of defendant's property; a person driving along

Carowinds Boulevard could not see the clearing or the plywood target because of dense foliage surrounding the area; and neither defendant nor its employees were aware of target practice on the property. There is no law in negligence imposing a duty on a landowner to inspect its land merely because it had a procedure for inspection in the past, and the court correctly instructed that the law of North Carolina requires plaintiff to show that the landowner had actual knowledge of the conditions created by third persons or reason to anticipate that third persons would engage in such conduct, that the landowner has no duty to periodically inspect his premises to ascertain whether third persons might have created dangerous artificial conditions on the land, and that the landowner must have had a reasonable opportunity to prevent or control such conduct of third persons.

Am Jur 2d, Premises Liability § 508.

Breach of assumed duty to inspect property as ground of liability for damage or injury to third person. 6 ALR2d 284.

Appeal by plaintiff from judgment entered 24 July 1991 in Mecklenburg County Superior Court by Judge Shirley L. Fulton. Heard in the Court of Appeals 8 December 1992.

Plaintiff instituted this wrongful death action against defendant seeking compensatory damages in excess of $10,000.00. The facts and circumstances leading up to the death of plaintiff's intestate are as follows:

Plaintiff's intestate, Michele Ann Sexton, died of a gunshot wound on 7 June 1987 while in the Wave Pool at Carowinds Amusement Park. Shortly after the shooting, police determined that the shot was fired from property owned by defendant Crescent Land & Timber Corp. (hereinafter Crescent), located approximately .6 miles west of the Wave Pool. The police found a sheet of plywood filled with bullet holes propped up in front of several old tires and spent shells located in a grassy clearing on defendant Crescent's property. This particular area of the property had been used for target practice by a number of individuals including employees of defendant's parent company, Duke Power. Investigation revealed that the shot which killed plaintiff's intestate was fired during target practice and originated from the area where the plywood, tires, and shells were found.

Specifically, the target practice occurred in a grassy clearing which was part of a larger undeveloped, heavily-wooded tract owned by defendants. The entire area abutted Carowinds Boulevard, a road running along the south side of defendant's property. A person driving along Carowinds Boulevard could not see the clearing or the plywood target because of the dense foliage surrounding the area. Furthermore, the grassy area was located 250 to 300 yards north of Carowinds Boulevard. Neither defendant nor its employees were aware of target practice on the property, and the city police never received or responded to any complaints about gunshots in the Carowinds area.

Plaintiff filed a complaint against defendant alleging that defendant was negligent in failing to inspect its property and in failing to take reasonable measures to prevent third persons from engaging in dangerous activities on its property. A trial by jury ensued.

At the close of trial, the following issue was presented to and answered by the jury: "Was the death of Michele Anne Sexton a result of the negligence of the defendant?" The jury answered in the negative, returning a verdict in favor of defendant. From judgment entered on the jury's verdict, plaintiff appeals.

Weinstein & Sturges, P.A., by Fenton T. Erwin, Jr. and Michel C. Daisley, for plaintiff-appellant.

Caudle & Spears, P.A., by Lloyd C. Caudle, L. Cameron Caudle, Jr. and W. Edward Poe, Jr., for defendant-appellee.

WELLS, Judge.

Plaintiff presents five assignments of error for our review; however, we find only one assignment which merits our attention. Plaintiff argues that the trial court committed reversible error by improperly instructing the jury on the law of negligence as it applies to landowners. We find no error.

Plaintiff's basic contention is that because defendant Crescent had established a procedure for inspection of its property, it had an affirmative duty to inspect for dangerous activities conducted on its property in order to protect persons off the premises. Plaintiff asserts that the jury instructions should have included this specialized duty. We know of no law in negligence imposing a duty on a landowner to inspect its land merely because it had

a procedure for inspection in the past. Plaintiff's contention is unsupported.

The law in North Carolina in the area of landowner liability is well established:

> With reference to negligence of a landowner in controlling the activities of third persons on the land, where there is injury to persons outside the premises and where there is no vicarious liability, it is said in Harper and James—The Law of Torts—Vol. 2, s. 27.19, p. 1526: "It is not enough here, of course, to show that the third person's conduct foreseeably and unreasonably jeopardized plaintiff. Plaintiff must also show that the occupier (a) had knowledge or reason to anticipate that the third person would engage in such conduct upon the occupier's land, and (b) thereafter had a reasonable opportunity to prevent or control such conduct."

Benton v. Montague, 253 N.C. 695, 117 S.E.2d 771 (1961). The record of evidence reveals that plaintiff's intestate was injured off the premises by persons conducting dangerous activities on defendant's property. Thus, the law of landowner liability enunciated in *Montague* applies to these facts.

The trial court in this case gave the following charge to the jury:

> Now members of the jury, the law of negligence as it applies to landowners in the State of North Carolina requires that the plaintiff show, one, that the landowner had actual knowledge of the conditions created by third persons or reason to anticipate that the third persons would engage in such conduct upon the landowner's land.
>
> . . . .
>
> Under the law of North Carolina, the landowner has no duty to periodically inspect his premises in order to ascertain whether third persons might have created dangerous artificial conditions on its land.
>
> The second thing that the plaintiff must show is that the defendant Crescent had a reasonable opportunity to prevent or to control such conduct of third persons.

This instruction substantially conforms to the *Montague* rule of landowner liability and is supported by the evidence presented. *State v. Monk*, 291 N.C. 37, 229 S.E.2d 163 (1976). Therefore, we find no prejudicial error in the trial court's instruction.

In her brief, plaintiff has attempted to bring forward additional assignments of error: (1) as to the trial court's instructing the jury on insulating negligence; (2) as to the trial court's granting defendant's motion for a directed verdict on plaintiff's claim for punitive damages; (3) as to certain portions of defendant's closing argument to the jury; and (4) as to the trial court's denying plaintiff's Rule 59 motion for a new trial. Inasmuch as plaintiff failed to adequately support these arguments, we are unable to review them on their merits, and we therefore do not address them.

No error.

Judges EAGLES and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 5 JANUARY 1993

GAMMON v. LAWRENCE No. 9110SC650	Wake (90CVS13258)	Affirmed
GORDON v. MICRASEM, INC. No. 9118DC1309	Guilford (90CVD11488)	Affirmed
GRIFFIN v. GRIFFIN No. 9115DC790	Orange (85CVD75)	Affirmed
HOYLE v. CRAVEN No. 9118SC801	Guilford (89CVS5256)	Affirmed
IN RE KING No. 919DC1119	Granville (90J50)	Affirmed
J. B. WOLFE CONST. INC. v. HITCHCOCK No. 9118DC736	Guilford (90CVD9581)	Affirmed
PARSONS v. STEVENSON No. 9129SC1265	Henderson (88CVS600) (88CVD110)	Appeal Dismissed
STATE v. CAVINESS No. 9119SC766	Randolph (90CRS2060)	No Error
STATE v. DUNN No. 9120SC929	Moore (85CRS5425)	No Error
STATE v. PARKER No. 9120SC806	Union (90CRS4818) (90CRS4822) (90CRS4824) (90CRS4891) (90CRS4892) (90CRS3105) (90CRS3106) (90CRS3108) (90CRS3109)	No Error
STATE v. ROJA No. 9121SC734	Forsyth (90CRS23219) (90CRS23220)	Reversed & remanded for a new trial
STATE v. RORIE No. 9120SC974	Stanly (90CRS5614) (90CRS1438)	No Error

STATE EX REL. EMPLOYMENT SECURITY COMM. v. HUCKABEE No. 9112SC1211	Cumberland (91CVS3215)	Vacated & Remanded
TOWN OF CARRBORO v. TATE No. 9115DC754	Orange (90CVD208)	Affirmed

STATE OF NORTH CAROLINA v. JOHNNY WAYNE WILSON, DEFENDANT-APPELLANT

STATE OF NORTH CAROLINA v. RICHARD LEE CLARK, DEFENDANT-APPELLANT

No. 9114SC960

(Filed 8 January 1993)

1. **Criminal Law § 313 (NCI4th)— breaking or entering and robbery—one defendant, multiple offenses—consolidation of indictments for trial—no error**

The trial court did not err by permitting consolidation for trial of indictments against defendant Wilson arising from a series of break-ins and robberies where the evidence permitted the trial court to find a transactional connection between the three incidents, the trial court's instructions to the jury clearly separate the charges, and the offenses were not so separate in time and circumstance that consolidation was prejudicial to defendant.

Am Jur 2d, Actions § 159.5; Criminal Law § 20.

Consolidated trial upon several indictments or informations against same accused, over his objection. 59 ALR2d 841.

2. **Criminal Law § 324 (NCI4th)— two defendants—trials joined—no error**

The trial court did not abuse its discretion by joining defendant Wilson's trial for a series of break-ins and robberies with that of defendant Clark. The trial court properly instructed the jury that they could consider certain testimony only as to defendant Clark and not as to defendant Wilson, a remark by defendant Clark which was recounted by a witness was not in the nature of a confession, so that *Bruton v. United States*, 391 U.S. 123, did not apply, and, since a proper limiting instruction was given, defendant Wilson made no showing that he was prejudiced by this testimony.

Am Jur 2d, Trial §§ 157, 158.

Supreme Court's application of rule of Bruton v. United States (1968), holding that accused's rights under confrontation clause of Federal Constitution's sixth amendment are violated

where the codefendant's statement inculpating accused is admitted at joint trial. 95 L. Ed. 2d 892.

3. Indictment, Information, and Criminal Proceedings § 4 (NCI4th)— superseding indictment—not served until day of trial—counsel not served until day of trial—no error

There was no error in a prosecution for a series of breakins and robberies where counsel was not afforded a copy of a superseding indictment until the day of trial where the only difference between the two indictments is that the superseding indictment corrects the date of the alleged offense from 10 December 1989 to 10 December 1988, defendant Wilson was served with a copy of the indictment in open court more than eight months before trial, defense counsel was appointed on the same day for the remaining charges, and defendant was served with an indictment for conspiracy to commit the breaking and entering which referred to 10 December 1988.

Am Jur 2d, Indictments and Informations § 22.

4. Evidence and Witnesses § 3208 (NCI4th)— breaking and entering and robbery—cross-examination of State's witness—prior alcoholic rehabilitation

The trial court did not err in a prosecution for a series of break-ins and robberies by disallowing additional cross-examination regarding treatment received by a State's witness at the Alcoholic Rehabilitation Center. Defendant's counsel was allowed to cross-examine the witness concerning his substance abuse, two hospitalizations at ARC in 1984, treatment in a VA hospital in February 1989 for alcohol rehabilitation purposes, an arrest for drunk driving around the time he started "hanging around" defendant Wilson, use of other drugs, including marijuana, cocaine and LSD, when he was hanging around defendant Wilson, his hearing voices, his frequent blackout spells, and that during the time of the offenses he was drinking a case of beer, probably two liters of wine, and occasionally a pint or a fifth of liquor. Any further cross-examination would have been cumulative.

Am Jur 2d, Witnesses §§ 811, 812.

Impeachment of witness with respect to intoxication. 8 ALR3d 749.

5. Evidence and Witnesses § 761 (NCI4th)— recross-examination —witness's conversation with prosecutor or detective— admitted elsewhere

There was no error in a prosecution arising from a series of break-ins and robberies where defendant Wilson contended that he was denied the opportunity to cross-examine a State's witness about overnight conversations between the witness and the prosecutor or the detective in the case, but any error was cured when defendant Wilson's counsel was later allowed to again question the witness about any overnight conversations with the prosecutor or detective.

Am Jur 2d, Appeal and Error § 806.

6. Criminal Law § 632 (NCI4th)— breaking or entering, burglary and robbery—motion to dismiss—testimony of accomplice— evidence sufficient

There was sufficient evidence to withstand defendant Wilson's motion to dismiss all charges arising from a series of break-ins and robberies where, according to defendant, the case turned upon the testimony of an accomplice, which was replete with inconsistencies and self-contradictions. As a general rule, the uncorroborated testimony of an accomplice is sufficient to establish substantial evidence of each essential element.

Am Jur 2d, Evidence § 1151.

7. Criminal Law § 394 (NCI4th)— closing arguments—no expression of opinion by judge

The trial court did not express its opinion to the jury on the question of defendant's guilt during closing arguments in a prosecution arising from a series of break-ins and robberies.

Am Jur 2d, Judges §§ 166-170; Trial §§ 294, 312, 625.

8. Conspiracy § 43 (NCI4th)— instructions—use of and/or—no error

There was no error in a prosecution for conspiracy to commit armed robbery where the judge used "and/or" in instructing the jury and in submitting verdict sheets. Although defendant Wilson contended that the "and/or" phrase confused the jury and led the jury to believe that defendant Wilson could be convicted of conspiring with himself, the instruction required the jury to find that Wilson conspired with at least

one of the other named persons and there was no showing that the jury could have been confused by these instructions or jury sheets.

Am Jur 2d, Trial §§ 1131, 1151.

9. **Criminal Law § 497 (NCI4th)— jury—request to review written statements in jury room—denied—no error**

The trial court did not err in a prosecution arising from a series of robberies, burglaries, and larcenies by refusing to allow the jury to examine the written statements of a State's witness in the jury room. The consent of both parties is required by N.C.G.S. § 15A-1233(b), and the record reveals that the State did not give its consent.

Am Jur 2d, Trial § 1671.

10. **Criminal Law § 324 (NCI4th)— joinder of defendants—larcenies and robberies—error**

The trial court erred in a prosecution for several break-ins and robberies by joining the trial of defendant Clark with defendant Wilson where defendant Clark was prejudiced in that the jury first heard evidence as to charges from two separate incidents with which defendant Clark was not charged. Limiting instructions given by the trial court did not operate to dispel the resulting prejudice.

Am Jur 2d, Trial §§ 157, 158.

Appeal by defendants from judgments entered 25 March 1991 by Judge Orlando F. Hudson in Durham County Superior Court. Heard in the Court of Appeals 10 November 1992.

Defendant Johnny Wayne Wilson was indicted for the following: two counts of robbery with a dangerous weapon; two counts of felonious larceny; two counts of felonious possession of stolen goods; two counts of conspiracy to commit robbery with a dangerous weapon; one count of first degree burglary; one count of felonious breaking or entering; and one count of conspiracy to commit felonious breaking and entering. Defendant Richard Lee Clark was indicted for one count of robbery with a dangerous weapon and one count of conspiracy to commit robbery with a dangerous weapon.

The State's evidence showed that on 10 December 1988, a residence at 613 Pleasant Drive in Durham was broken into and a rifle, a pillow case and one set of silver flatware were taken.

Both Samuel Lynn and Barbara Lynn testified that on 17 December 1988, two men wearing ski masks and gloves broke into their house and robbed them at gunpoint. The taller robber held a rifle on Mr. Lynn while the shorter robber, who was carrying a pistol, rummaged through the house. At some point, the shorter robber fired a pistol shot into the wall above Mrs. Lynn's head and also fired a shot through Mr. Lynn's hair into the back of his reclining chair. Two used cartridge casings were later recovered. While holding the Lynns at gunpoint, the robbers took their wristwatches and rings. In addition, approximately $550 was missing from Mr. Lynn's wallet which was located in the pocket of his pants hanging in another room. Two officers of the Sheriff's Department who investigated this robbery also testified.

Durham Police Officer Kenneth Hall testified that on 21 December 1988, he and his partner were involved in a car chase with two white males in a green 1970's model car. Although the occupants of the car were not apprehended, a .25 calibre pistol was recovered from just outside the passenger door of this car. In January 1989, Officer Hall, after examining some photographs, believed that Vernon Wilson and Defendant Johnny Wilson were the occupants of the car. Eugene Bishop of the S.B.I. further testified that in his opinion the .25 calibre pistol found beside the car after the chase fired the two cartridge casings found at the Lynn residence.

Ezra Rigsbee testified that he is the owner of Rigsbee's Lounge, and that on the evening of 22 December 1988, three armed white men wearing ski masks and camouflage pants entered and robbed the lounge. About three shots were fired by these men and one of the robbers pointed a .22 calibre rifle at Rigsbee.

Patricia Ann Parks testified that in December 1988, she lived with her younger son and her daughter was married to Defendant Richard Lee Clark. Sometime in late December of 1988, Defendant Clark went up into the attic and returned with some ski masks and a camouflage suit. Two of the masks were dark in color and the third was red with blue around it. The next day, Ms. Parks heard Defendant Clark remark to her son "did he hear about Rigsbee getting knocked off." The following day, Defendant Clark returned and gave Ms. Parks either $94 or $96. In response to Ms. Parks'

question as to how this money was obtained, Defendant Clark stated that although he was unemployed, he had been paid for chopping down a tree.

As the result of a plea arrangement, Andrew Hyde agreed to testify against both defendants. Hyde testified that he has known Defendant Wilson for about 20 years and that in mid-December 1988, he and Defendant Wilson broke into a house located at 613 Pleasant Drive. Among the items taken was a .22 calibre rifle.

Hyde further testified that on 17 December 1988, he, Vernon Wilson and Defendant Wilson took part in the robbery of the Lynn residence. Only Defendant Wilson and Hyde entered the house; Vernon Wilson stayed outside in the car. Upon entering the house, Defendant Wilson was armed with a .25 calibre pistol while Hyde was armed with the .22 calibre rifle taken earlier from the house on Pleasant Drive. According to Hyde, he fired a shot into the wall above Mrs. Lynn's head and took Mr. Lynn's wallet with the money from pants located in the bedroom. Hyde then placed the rifle up to Mr. Lynn's head and at some point, another shot was fired. Hyde testified that Defendant Wilson threatened to cut off Mr. Lynn's fingers if he could not get his rings off.

Hyde further testified that following the Lynn robbery, he and Vernon Wilson were involved in a police chase. After they had gotten far enough in front of the police, Hyde threw the .22 rifle, the .25 calibre pistol and the ski masks out the window. According to Hyde, the .22 calibre rifle was the one taken from the house on Pleasant Drive, while the .25 calibre pistol was one of the weapons used in the Lynn robbery. Hyde returned later and retrieved the rifle.

One day, while Hyde was drinking, he heard Vernon Wilson and the two defendants discussing the possibility of robbing Rigsbee's Lounge. The three men decided to rob the lounge, but Hyde refused to enter the lounge since he had been a patron there on several occasions. Before undertaking the Rigsbee robbery, Hyde and Clark visited the house where Defendant Clark was staying and obtained some ski masks. On the day of the robbery, Hyde went into Rigsbee's Lounge to "scope it out" and then acted as the get-away driver. According to Hyde the Rigsbee robbery was committed by both defendants and Vernon Wilson and all three wore ski masks and gloves. During the robbery, Defendant Wilson was armed with the .22 calibre rifle stolen from the house on Pleasant Drive. Hyde

further testified that at some point after the Rigsbee robbery he threw the .22 calibre rifle and a ski mask over a bridge at Atlantic Beach.

On cross-examination, Hyde was questioned concerning his drinking habits at the time the robberies were committed. He testified that he would drink daily "a case of beer, probably two liters of wine" and occasionally a pint or a fifth of liquor. Hyde also acknowledged that he experienced "black-out spells."

After hearing the evidence presented, the jury found Defendant Wilson guilty of (1) two counts of robbery with a dangerous weapon, (2) two counts of conspiracy to commit robbery with a dangerous weapon, (3) one count of first degree burglary, (4) one count of felonious breaking and entering, (5) one count of felonious larceny, and (6) one count of conspiracy to commit felonious breaking and entering. Defendant Clark was found guilty of (1) one count of robbery with a dangerous weapon and (2) one count of conspiracy to commit robbery with a dangerous weapon.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Jacob L. Safron, for the State.

Loflin & Loflin, by Thomas F. Loflin III, for Defendant Appellant Wilson.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Craig B. Brown, for Defendant Appellant Clark.

WALKER, Judge.

Since this case involves two different defendants, and each has submitted a brief to this Court, we will examine each defendant's arguments separately.

I. Defendant Wilson.

[1] In his first assignment of error, Defendant Wilson argues the trial court erred in permitting consolidation of all the indictments for trial. According to defendant these indictments and the State's proof, indicate three separate and distinct criminal transactions, these being the breaking and entering of the house on Pleasant Drive and the two robberies involving the Lynn residence and Rigsbee's Lounge.

Joinder of offenses is governed by G.S. 15A-926(a) which provides:

> Two or more offenses may be joined . . . for trial when the offenses . . . are based on the same act or transaction or on a series of acts or transactions connected together or constituting parts of a single scheme or plan.

Under this statute, joinder is permissible if there is a "transactional connection" between the various criminal acts giving rise to the charges. *State v. Futz*, 92 N.C.App. 80, 373 S.E.2d 445 (1988). A transactional connection exists where the crimes are part of a single conspiracy or "because similarities of the crime constitute a fingerprint of the perpetrator." *State v. Church*, 99 N.C.App. 647, 652, 394 S.E.2d 468, 471 (1990). Whether joinder of offenses is permissible under this statute is a question addressed to the discretion of the trial court which will only be disturbed if the defendant demonstrates that joinder deprived him of a fair trial. *See State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981).

Here, the evidence permitted the trial court to find a transactional connection between the three incidents. All these offenses took place within a two week period in December of 1988. Two of the incidents were armed robberies where the perpetrators wore both ski masks and gloves and one perpetrator was armed with a rifle stolen from the house on Pleasant Drive. Furthermore, Hyde testified that both he and Defendant Wilson were involved in each incident.

Defendant Wilson has not shown that joinder deprived him of a fair trial. The trial court's instructions to the jury clearly separate the charges arising from each of the three incidents. Furthermore, we find that the offenses were not so separate in time and circumstance that consolidation was prejudicial to defendant. Accordingly, we hold that the trial court did not abuse its discretion in joining these offenses for trial.

[2] In his next assignment of error, Defendant Wilson argues the trial court erred in joining his trial with that of Co-defendant Clark. We first note that public policy compels consolidation as the rule rather than as the exception where each defendant is sought to be held accountable for the same crime or crimes. *State v. Paige*, 316 N.C. 630, 643, 343 S.E.2d 848, 857 (1986). A trial court's decision on the question of joinder of two defendants is a discretionary ruling. *State v. Paige* at 641, 343 S.E.2d at 855. Absent a showing that a defendant has been deprived of a fair trial by joinder, the trial court's decision on that matter will not be disturbed. *Id.*

According to Defendant Wilson, he was prejudiced by joinder of the two trials since certain testimony adduced was admissible only against his co-defendant. Patricia Ann Parks testified that sometime in late December of 1988, Defendant Clark entered her attic and returned with some ski masks. She also testified that Defendant Clark made the statement to her son, "did he hear about you know Rigsbee getting knocked off." The trial court instructed the jury that Ms. Parks' testimony was not admissible as against Defendant Wilson.

It is not uncommon where two defendants are joined for trial that some evidence will be admitted which is not admissible as against both defendants. Our Courts have recognized that "limiting instructions ordinarily eliminate any risk that the jury might have considered evidence competent against one defendant as evidence against the other." *State v. Paige*, 316 N.C. at 643, 343 S.E.2d at 857. Here, the trial court properly instructed the jury that they could consider Ms. Parks' testimony only as to Defendant Clark and not as to Defendant Wilson.

Despite the fact that the trial court gave a proper limiting instruction, Defendant Wilson contends that under *Bruton v. United States*, 391 U.S. 123, 20 L.Ed.2d 476 (1968), this instruction did not alleviate any prejudice. In *Bruton*, there was a joint trial and the trial court admitted a co-defendant's confession which implicated the defendant. The trial court instructed the jury that this confession could not be used as evidence in determining the defendant's guilt or innocence. The Supreme Court held that despite the curative instruction given, allowing the co-defendant's confession violated Defendant Bruton's Sixth Amendment right of cross-examination. In the present case, unlike *Bruton*, Defendant Clark's remark to Ms. Park's son is in the nature of a question asking whether Ms. Park's son had heard that a crime had been committed; this remark is not in the nature of a confession. Therefore, since there was no "confession" implicating Defendant Wilson, *Bruton* is inapplicable. *See Richardson v. Marsh*, 481 U.S. 200, 95 L.Ed.2d 176 (1987). Further, since a proper limiting instruction was given, Defendant Wilson has made no showing that he was prejudiced by this testimony. Accordingly, as to Defendant Wilson, the trial court did not abuse its discretion in joining the two defendants for trial.

[3] In his next assignment of error, Defendant Wilson argues the trial court erred in proceeding to trial when his counsel was not

afforded a copy of a superseding indictment until the day of trial in violation of G.S. 15A-943(b). The original indictment (90CRS2183) charged Defendant Wilson with (1) felonious breaking and entering, (2) felonious larceny, and (3) felonious possession of stolen goods. These charges relate to the break-in of the house located on Pleasant Drive. The only difference between the two indictments is that the superseding indictment, returned by the Grand Jury on 11 June 1990, corrects the date of the alleged offense from 10 December 1989 to 10 December 1988.

In *State v. Carson*, 320 N.C. 328, 357 S.E.2d 662 (1987) two defendants were tried and convicted upon superseding indictments. Similar to the present case, defendants there argued that they were improperly indicted and tried since the superseding indictments were not served on the defendants prior to trial. The trial court held that there was no error stating "[t]here was no requirement that these defendants be served with copies of the superseding indictments, however, since it is clear from the record before us that the defendants were represented by counsel at the time those indictments were returned by the grand jury." *State v. Carson*, 320 N.C. at 334, 357 S.E.2d at 666.

In the present case, Mr. Loflin had been appointed on 23 February 1990 to represent Defendant Wilson in the Lynn residence armed robbery case. The docket sheet in 90CRS17192 (relating to the robbery of the Lynn residence) reveals that Defendant Wilson was formally arraigned on 25 June 1990 and bond was set in the same amount as in case 90CRS2183 (the superseding indictment). This docket sheet further shows that on this same day, indictments were served on defendant in open court and Mr. Loflin was appointed in the remaining cases. In the pretrial motions conference, after examining this docket sheet, counsel for Defendant Wilson acknowledged:

> [A]pparently what happened [on 25 June 1990] is they brought him down to the [sic] arraign him on the superseding indictment and they appointed me at the same time that they arraigned him and he pled not guilty.

The purpose of an indictment is: (1) to give defendant notice of the charges against him so that he may prepare his defense; and (2) to enable the court to know what judgment to pronounce in case of conviction. *State v. Russell*, 282 N.C. 240, 192 S.E.2d 294 (1972). Since the record reveals Defendant Wilson was served a

copy of the superseding indictment in open court more than eight months before trial, defendant had adequate notice of the charges against him and the trial court did not err in proceeding to trial on the superseding indictment.

We further note that Defendant Wilson was served with an indictment in 90CRS17193 charging a conspiracy to commit the breaking and entering of the house on Pleasant Drive on 10 December 1988. This further supports the fact that Defendant Wilson had notice of the charges against him and that the superseding indictment only corrected the year of the offense.

[4] In his next assignment of error, Defendant Wilson contends the trial court erred in refusing to allow cross-examination of State's witness Andrew Hyde concerning (1) Hyde's prior treatment at the Alcoholic Rehabilitation Center (ARC) and (2) alleged conversations with the prosecution.

Regarding Hyde's treatment at ARC, Defendant Wilson contends it was error for the trial court to "totally deny Wilson the right and opportunity to cross-examine Hyde with respect to prior treatment he had received at the . . . [ARC]." While we agree with defendant that this information impacted directly upon Hyde's credibility, we find the trial court did not err by disallowing additional cross-examination regarding the treatment he received in 1984 at the ARC. Defendant's counsel was allowed to cross-examine Hyde concerning his substance abuse, two hospitalizations at ARC in 1984, treatment in a VA Hospital in February 1989 for alcohol rehabilitation purposes, his arrest for drunk driving around the time he started "hanging around" Defendant Wilson, his use of other drugs, including marijuana, cocaine and LSD, when he was "hanging around" Defendant Wilson, his hearing "voices," his frequent "blackout spells," and that during the time of the offenses charged, he was drinking "a case of beer, probably two liters of wine" and occasionally a pint or a fifth of liquor. Considering the information elicited by Defendant Wilson, any further cross-examination as to Hyde's treatment at ARC was merely cumulative. "[I]t is the duty of the trial judge to control the examination and cross-examination of witnesses." *State v. Greene*, 285 N.C. 482, 489, 206 S.E.2d 229, 234 (1974).

[5] We also find no merit in Defendant Wilson's contention that he was denied the opportunity to cross-examine Hyde concerning any overnight conversations between Hyde and the prosecutor or

the detective in the case. This question by Defendant Wilson's counsel came on recross-examination. On cross-examination, latitude is allowed in showing the bias, hostility, corruption, interest or misconduct of the State's witness. *State v. Roberson*, 215 N.C. 784, 786, 3 S.E.2d 277, 279 (1939). "Cross-examination would be of little value if a witness could not be freely interrogated as to his . . . conduct as connected with the parties or the cause of action." *Id.* at 786-787, 3 S.E.2d at 279. We note that later in the trial Defendant Wilson's counsel was allowed to again question Hyde concerning whether he engaged in any overnight conversations with the prosecutor or the detective. Any previous error on the part of the trial court was thus cured.

[6] In his next assignment of error, Defendant Wilson argues that the trial court erred in failing to grant his motion to dismiss all charges. This raises the question of sufficiency of the evidence to go to the jury. According to defendant, his motion should have been granted since the entire case turned upon the testimony of his accomplice, Andrew Hyde, and Hyde's testimony was replete with inconsistencies and self-contradictions.

When a defendant moves for dismissal, the trial court must determine whether there is substantial evidence of each essential element of the offenses charged. *State v. Vause*, 328 N.C. 231, 400 S.E.2d 57 (1991). In ruling upon a motion to dismiss, the trial court must consider the evidence presented in the light most favorable to the State, drawing every reasonable inference therefrom. *Id.* As a general rule, the uncorroborated testimony of an accomplice is sufficient to establish substantial evidence of each essential element. *See State v. Horton*, 275 N.C. 651, 170 S.E.2d 466 (1969), *cert. denied*, 398 U.S. 959, 26 L.Ed.2d 545 (1970). Here, there was sufficient evidence to withstand Defendant Wilson's motion to dismiss the charges.

[7] In his next assignment of error, Defendant Wilson contends the trial court impermissibly expressed its opinion to the jury on the question of defendant's guilt. Defendant Wilson points to certain instances during closing arguments in which the trial court allegedly expressed its opinion. Wide latitude is allowed to counsel in closing arguments and G.S. 15A-1222 prohibits a trial judge from expressing any opinion in any way in the presence of the jury. We have carefully examined each of Defendant Wilson's contentions and they are without merit.

[8] Next Defendant Wilson contends the trial court erred in using the phrase "and/or" in instructing the jury and in submitting verdict sheets on the two counts of conspiracy to commit armed robbery. According to Defendant Wilson, use of the phrase "and/or" confused the jury and erroneously led the jury to believe Defendant Wilson could be convicted of "conspiring" with himself. As to the charge of conspiracy to commit armed robbery of the Lynn residence, the trial court instructed:

> I further charge that if you find from the evidence beyond a reasonable doubt that on or about the 17th day of December, 1988, the defendant, Johnny Wayne Wilson, agreed with Vernon Forest Wilson and/or Lawrence Andrew Hyde and/or others to commit armed robbery against Samuel Lynn and Barbara Lynn and Chris Lynn and that the defendant, Johnny Wayne Wilson, and/or Vernon Forest Wilson, and/or Lawrence Andrew Hyde intended at the time that the agreement was made that it would be carried out, it would be your duty to return a verdict of guilty as charged.

The verdict sheets and instructions as to the conspiracy to commit armed robbery of Rigsbee's Lounge also used the phrase "and/or".

Before a defendant can be found guilty of criminal conspiracy, the State must prove and the jury must find that there was an agreement between two or more persons to do an unlawful act or to do a lawful act in an unlawful way. *State v. Ayudkya*, 96 N.C.App. 606, 386 S.E.2d 604 (1989). Here, in relevant part, the jury was also instructed:

> Both of the defendants are charged with the crime of conspiracy. A conspiracy is a combination or agreement of *two or more persons* to join together to attempt to accomplish some unlawful purpose. It is a kind of partnership in criminal purposes in which each member becomes the agent of every other member. The gist or essence of the offense is a combination or *mutual agreement by two or more persons* to disobey or to disregard the law.
>
> . . . .
>
> What the evidence in the case must show beyond a reasonable doubt is first that the defendant *and at least one other person* entered into an agreement; second, that the agreement was to commit the alleged offenses; and third, the State must prove

> that each defendant and at least one other person intended that the agreement be carried out at the time that it was made.

(emphasis added). These instructions required the jury to find that Defendant Wilson conspired with at least one of the other named persons. There is no showing that the jury could have been confused by these instructions or verdict sheets.

[9] In his final assignment or error, Defendant Wilson contends that the trial court erred by refusing to allow the jury to examine the State's evidence in the confines of the jury room after the jury so requested. The evidence in question is the written statements of State's witness Lawrence Andrew Hyde.

As to this question, G.S. 15A-1233(b) provides in pertinent part:

> Upon request by the jury *and with consent of all parties*, the trial judge may in his discretion permit the jury to take to the jury room exhibits and writings which have been received in evidence.

(emphasis added).

In the present case, the record reveals that the State did not give its consent for the jury to examine the evidence in the confines of the jury room. Accordingly, the trial court correctly denied the jury's request.

We have reviewed Defendant Wilson's remaining assignments of error and find them to be without merit.

II. Defendant Clark.

[10] In his first assignment of error, Defendant Clark contends the trial court erred in joining his offenses with those of Co-defendant Wilson. Joinder of defendants is governed by G.S. 15A-926(b)(2) which provides:

> Upon written motion of the prosecutor, charges against two or more defendants may be joined for trial:
>
> a. When each of the defendants is charged with accountability for each offense; or
>
> b. When, even if all of the defendants are not charged with accountability for each offense, the several offenses charged:

1. Were part of a common scheme or plan; or

2. Were part of the same act or transaction; or

3. 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.

As stated previously, a trial court's decision on the question of joinder of two defendants is a discretionary ruling and will only be disturbed if defendant demonstrates that joinder deprived him of a fair trial. *State v. Bracey*, 303 N.C. 112, 277 S.E.2d 390 (1981). A defendant may be deprived of a fair trial where evidence harmful to the defendant is admitted which would not have been admitted in a severed trial. *See State v. Lowery*, 318 N.C. 54, 61, 347 S.E.2d 729, 735 (1986).

Here, after reviewing the evidence, we find that joinder of the charges for trial with Defendant Wilson deprived Defendant Clark of a fair trial. By reason of the joinder, the jury first heard evidence as to charges from two separate incidents for which Defendant Clark was not charged. These offenses were the break-in of the house on Pleasant Drive and the armed robbery of the Lynn residence. No evidence adduced at trial connected Defendant Clark to these two incidents. By allowing the jury to consider evidence of these charges, Defendant Clark was prejudiced and deprived of a fair trial.

We further note that the limiting instructions given by the trial court did not operate to dispel the resulting prejudice. While the trial court did instruct the jury that evidence relating to the break-in of the house on Pleasant Drive and relating to the robbery of the Lynn residence was not admissible against Defendant Clark, he was, nevertheless, forced to sit through the testimony of eleven witnesses and two and one-half days of trial before any evidence was received as against him. Based upon these facts, we cannot say the limiting instructions guaranteed defendant a fair trial.

We decline to examine Defendant Clark's remaining assignments of error since they have been either addressed in that portion of this opinion dealing with Defendant Wilson or they may not arise again upon retrial.

In the trial below we find

No error as to Defendant Wilson.

Reversed and remanded for a new trial as to Defendant Clark.

Judges GREENE and WYNN concur.

BARR-MULLIN, INC. v. DOUGLAS M. BROWNING AND PRIMAVERA SYSTEMS, LTD.

No. 9110SC1117

(Filed 8 January 1993)

1. **Labor and Employment § 78 (NCI4th)— computer software—misappropriation of trade secret—preliminary injunction**

The trial court did not err by granting a preliminary injunction in an action for misappropriation of a trade secret in developing a competing product and customizing plaintiff's software. Plaintiff presented evidence that it took reasonable measures to maintain secrecy in that the software at issue was sold in the form of programmable read only memory chips (PROMS), with the source code not available to the public, and access to the software was limited to plaintiff's employees and consultants. Plaintiff also presented evidence that the secret was not readily ascertainable through reverse engineering in affidavits which indicate that it is practically impossible to make any modification to the software using only the object code contained in the PROMS.

Am Jur 2d, Labor and Labor Relations § 682; Master and Servant §§ 104-106.

Disclosure or use of computer application software as misappropriation of trade secret. 30 ALR4th 1250.

2. **Labor and Employment § 78 (NCI4th)— computer software—misappropriation of trade secret**

The trial court did not err by granting a preliminary injunction in an action for misappropriation of a trade secret in developing a competing product and customizing plaintiff's software. Plaintiff established a *prima facie* case of misappropriation in that defendant Browning helped develop the

software during his employ with plaintiff, Browning had access to the source code prior to his resignation, plaintiff had invested eight man-years in the development of the system, and access to the source code was required to make modifications.

Am Jur 2d, Labor and Labor Relations § 682; Master and Servant §§ 104-106.

Disclosure or use of computer application software as misappropriation of trade secret. 30 ALR4th 1250.

3. **Labor and Employment § 78 (NCI4th)— computer software —misappropriation of trade secret—preliminary injunction— irreparable loss**

There was sufficient evidence to satisfy the second inquiry in determining if a preliminary injunction should issue for the misappropriation of a trade secret. Misappropriation of a trade secret is an injury of such continuous and frequent recurrence that no reasonable redress can be had in a court of law. The very nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects. It is also significant that plaintiff seeks a permanent injunction.

Am Jur 2d, Labor and Labor Relations § 682; Master and Servant §§ 104-106.

Disclosure or use of computer application software as misappropriation of trade secret. 30 ALR4th 1250.

4. **Labor and Employment § 78 (NCI4th)— misappropriation of trade secret—preliminary injunction—motion for reconsideration—denied**

The trial court did not abuse its discretion by denying defendants' Motion for Reconsideration and Motion to Dissolve Preliminary Injunction in an action for misappropriation of trade secrets involving computer software.

Am Jur 2d, Injunctions §§ 291, 295, 329.

5. **Labor and Employment § 78 (NCI4th)— misappropriation of trade secrets—computer software—preliminary injunction— amount of bond**

An action for misappropriation of trade secrets involving computer software in which a preliminary injunction had been

granted was remanded where there was no evidence in the record as to whether the trial court considered the plaintiff's ability to respond in damages should defendants be found to have been wrongfully enjoined and no evidence that the court considered the likelihood of material damage and harm to defendants in setting the bond at $10,000. The trial court on remand should set bond in an amount that bears a rational relationship to the costs and damages which defendants may incur if it is later determined defendants were wrongfully enjoined.

Am Jur 2d, Labor and Labor Relations §§ 2175-2178.

Appeal by defendant from order entered 30 August 1991 and order entered 14 October 1991 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 21 October 1992.

Plaintiff instituted this action seeking both injunctive relief and damages alleging defendants misappropriated its trade secrets. Evidence in the record discloses that plaintiff is a corporation engaged in selling lumber processing equipment to customers in the woodworking industry. COMPU-RIP, a "lumber optimization system," is one of the processing systems sold by plaintiff. This system has a computer software program which acts as the "brain," taking in data regarding the approaching lumber and instructing the mechanical handling components as to how to guide the lumber through the saw. COMPU-RIP was first offered for sale in 1986 and has received the Challengers Award, an honor recognizing significant developments in the woodworking industry.

From March 1985 through December 1986, plaintiff employed Douglas Browning (defendant) as an independent consultant to develop the computer software for the COMPU-RIP system. In December of 1986, Browning was employed by plaintiff as its vice-president of engineering. From 1987 through 1989 Browning played a role in installing COMPU-RIP systems at various plant sites; his duties included installing the COMPU-RIP software and providing assistance to customers once the systems were installed.

In January of 1990, Browning informed plaintiff of his intention to resign from plaintiff's employ. Shortly thereafter, Browning incorporated defendant Primavera Systems. Around this same time, Browning entered into negotiations with plaintiff whereby defend-

ant proposed to remain associated as an independent consultant authorized by plaintiff to render computer systems service to COMPU-RIP owners. These negotiations failed and Browning resigned effective 23 August 1990.

After Browning's resignation, defendants began developing a lumber optimization system known as LumberScan. In addition, defendants also began to provide technical assistance to COMPU-RIP purchasers by customizing the COMPU-RIP computer software to meet the individual needs of the owner. Plaintiff filed the present suit alleging that the computer software used in COMPU-RIP is its trade secret and the aforementioned activities of defendants constitute misappropriation of a trade secret in violation of G.S. 66-152, *et seq.*

On 19 July 1991, the trial court entered a temporary restraining order enjoining defendants from selling or licensing any software product which uses the trade secrets of plaintiff and further enjoined defendants from modifying the COMPU-RIP software. At the preliminary injunction hearing, the trial court, after considering the pleadings, affidavits and arguments of counsel, entered an order on 30 August 1991 granting plaintiff's motion for preliminary injunction. By means of this order, defendants were prohibited from:

> (1) Marketing, offering for sale or license any software product relating to computer assistance or control of the operation of a gang rip saw;
>
> (2) Modifying in any manner any software product which has been sold by the Plaintiff to any third party, or offering to perform such services; and
>
> (3) Disclosing or attempting to disclose to any third party any information related to the software products of the Plaintiff, including, but not limited to the Plaintiff's product COMPU-RIP.

The trial court further ordered an injunction bond in the amount of $10,000. On 5 September 1991, defendant made a Motion for Reconsideration and Motion to Dissolve Preliminary Injunction. The trial court denied this motion by order entered 14 October 1991.

Graham & James, by John R. Rittelmeyer and Mark Anderson Finkelstein, for plaintiff appellee.

Poyner & Spruill, by Louis B. Meyer, III and Dianna W. Jessup, for defendants appellants.

WALKER, Judge.

[1] In their first assignment of error, defendants argue the trial court erred in granting the preliminary injunction. We first note the scope of appellate review in this matter is essentially *de novo*. *Robins & Weill, Inc. v. Mason*, 70 N.C.App. 537, 320 S.E.2d 693, *disc. review denied*, 312 N.C. 495, 322 S.E.2d 559 (1984). In reviewing a trial court's grant of a preliminary injunction, "an appellate court is not bound by the findings, but may review and weigh the evidence and find facts for itself." *A.E.P. Industries v. McClure*, 308 N.C. 393, 402, 302 S.E.2d 754, 760 (1983).

As a general rule, a court may issue a preliminary injunction "only (1) if a plaintiff is able to show *likelihood* of success on the merits of his case and (2) if a plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Community Investors, Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). As *Ridge Community Investor's* indicates, the first inquiry is whether plaintiff is able to show a likelihood of success on the merits. This involves an application of the trade secret doctrine to the rapidly expanding field of computer technology. "It is well settled that an injunction will issue to prevent unauthorized disclosure and use of trade secrets and confidential information." *Travenol Laboratories, Inc. v. Turner*, 30 N.C.App. 686, 692, 228 S.E.2d 478, 483 (1976).

Under the North Carolina Trade Secret Protection Act, a trade secret is defined as follows:

> [B]usiness or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

G.S. 66-152(3). "Misappropriation" occurs when there is:

> [A]cquistion, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret.

G.S. 66-152(1). In the present case, defendants contend the COMPU-RIP software is not a trade secret and that even if it is a trade secret, defendants' actions do not constitute "misappropriation."

Establishment of Trade Secrets

According to defendants, the COMPU-RIP software is not a trade secret since it is (1) not subject to reasonable efforts to maintain its secrecy and (2) defendants reverse engineered this software. In order to answer the question of whether plaintiff took reasonable efforts to maintain the secrecy of the COMPU-RIP software, it is necessary to be familiar with the form in which this software was distributed. The COMPU-RIP software is contained in the form of "programmable read-only memory chips" (PROMS) imbedded in the COMPU-RIP machinery. These PROMS contain only the "object code" version of the computer program. This is the version of the computer software which is "read" by the computer's machinery. Computer programmers do not write computer software in object code; rather, the software is written in "source code" and then translated into object code so that the computer can execute the program. *See* Comment, *The Incompatibility of Copyright and Computer Software: An Economic Evaluation and a Proposal for a Marketplace Solution*, 66 N. C. L. Rev. 977, 979 n.14 (1988). Since the COMPU-RIP software was sold in PROM form, the source code was not available to the general public. At least one court has found that as regards computer software, the secrecy component of a trade secret is not compromised when only the object code version of the software is distributed to customers. *Q-CO Industries, Inc. v. Hoffman*, 625 F.Supp. 608, 617-618 (S.D.N.Y. 1985).

Plaintiff presented additional evidence tending to show the COMPU-RIP software was subject to reasonable efforts to maintain its secrecy. The affidavit of A. G. Mullin, plaintiff's president, indicates that access to the software was limited to plaintiff's employees and consultants. The affidavits of Timothy Toombs and Gary Ruggles,

who holds a Ph.D in Electrical Engineering, indicate that because the COMPU-RIP software is distributed in object code form it is practically impossible to make any meaningful changes to the software. This evidence establishes the COMPU-RIP software was subject to reasonable efforts to maintain its secrecy. "Although information that is generally known cannot be a trade secret, . . . absolute secrecy is not required." *Q-CO Industries, Inc. v. Hoffman*, 625 F.Supp. at 617.

Defendants next argue the COMPU-RIP software was not a trade secret since defendant Browning rediscovered the COMPU-RIP source code by means of reverse engineering. A party asserting the existence of a trade secret does not have to establish the *impossibility* of reverse engineering. Plaintiff must merely show the alleged trade secret was not "*readily ascertainable* through . . . reverse engineering." G.S. 66-152(3) (emphasis added).

As to the question of reverse engineering, plaintiff presented the affidavits of Timothy Toombs and Gary Ruggles which indicate that it is practically impossible to make any modification to the COMPU-RIP software using only the object code contained in the PROMS. We find the evidence presented establishes the COMPU-RIP software was not "readily ascertainable" through reverse engineering.

Misappropriation of Trade Secrets

[2] Defendants next argue that plaintiff was not entitled to a preliminary injunction since it has not established misappropriation of its trade secret. A *prima facie* case of misappropriation is established where plaintiff presents substantial evidence that (1) defendant knows or should have known of the trade secret; and (2) defendant has had a specific opportunity to acquire the trade secret. G.S. 66-155. Here, a *prima facie* case of misappropriation exists since defendant Browning helped to develop the COMPU-RIP software during his employ with plaintiff and Browning had access to copies of the COMPU-RIP source code prior to his resignation. Further, according to its president, plaintiff invested eight man-years in the development of the COMPU-RIP system. Toombs and Ruggles stated in their affidavits that in order to make modifications to the COMPU-RIP software, access to the source code is required; it is practically impossible to make any substantial modification to COMPU-RIP possessing only the object code. After review-

ing the record from the preliminary injunction hearing, we find plaintiff has shown a likelihood of success on the merits of its case.

[3] The second inquiry in determining if a preliminary injunction should issue is whether "plaintiff is likely to sustain irreparable loss unless the injunction is issued, or if, in the opinion of the Court, issuance is necessary for the protection of a plaintiff's rights during the course of litigation." *Ridge Community Investors Inc. v. Berry*, 293 N.C. 688, 701, 239 S.E.2d 566, 574 (1977). Our Supreme Court has stated that "injury is irreparable where the damages are estimable only by conjecture, and not by any accurate standard." *A.E.P. Industries Inc. v. McClure*, 308 N.C. 393, 407, 302 S.E.2d 754, 762 (1983), *quoting* 42 Am. Jur.2d *Injunctions* § 49 (1969). To prove irreparable injury, "it is not essential that it be shown that the injury is beyond the possibility of repair or possible compensation in damages, but that the injury is one to which the complainant should not be required to submit or the other party permitted to inflict, and is of such continuous and frequent recurrence that no reasonable redress can be had in a court of law." *Barrier v. Troutman*, 231 N.C. 47, 50, 55 S.E.2d 923, 925 (1949); *see also A.E.P. Industries, Inc. v. McClure* at 407, 302 S.E.2d at 763.

In our belief, misappropriation of a trade secret is an injury of "such continuous and frequent recurrence that no reasonable redress can be had in a court of law." The very nature of a trade secret mandates that misappropriation will have significant and continuous long-term effects. The party wronged may forever lose its competitive business advantage or, at the least, a significant portion of its market share. Furthermore, the amount of actual damages awarded for misappropriation is measured "by the economic loss or the unjust enrichment . . . whichever is greater." G.S. 66-154(b). It is also significant that plaintiff seeks a permanent injunction. Our Courts have "consistently adhered to the proposition that where the principal relief sought is a permanent injunction, it is particularly necessary that the preliminary injunction issue." *A.E.P. Industries, Inc. v. McClure* at 408, 302 S.E.2d at 763. As plaintiff presented sufficient evidence to satisfy both tests for issuance of a preliminary injunction, we find the trial court acted correctly in issuing the preliminary injunction.

[4] By means of their second assignment of error, defendants argue the trial court erred in denying their Motion for Reconsideration

and Motion to Dissolve Preliminary Injunction. Defendants contend the additional evidence presented at the hearing on this motion establishes that the preliminary injunction should be dissolved.

We note that a refusal to dissolve a temporary injunction is addressed to the discretion of the trial court and can only be set aside if there is an abuse of discretion. *Conservation Council of North Carolina v. Costanzo*, 528 F.2d 250 (4th Cir. 1975). Here, defendants presented additional evidence on the questions of (1) reverse engineering of the COMPU-RIP software and (2) independent development of defendants' LumberScan system. However, in reviewing this additional evidence, we find that the trial court did not abuse its discretion in denying defendants' motion.

[5] In their final assignment of error, defendants argue that the trial court erred in setting the preliminary injunction bond at only $10,000. According to defendants, evidence presented at trial disclosed that this amount is insufficient to cover their damages in the event defendants succeed on the merits at trial.

Before a preliminary injunction will issue, a bond must be posted "in such sum as the judge deems proper, for the payment of such costs and damages as may be incurred or suffered by any party who is found to have been wrongfully enjoined." Rule 65(c), N.C. Rules of Civil Procedure. "Since the purpose of the security requirement is to protect the restrained party from damages incurred as a result of the wrongful issuance of the injunctive relief, the trial court has the discretion to determine what amount of security, if any, is necessary to protect the enjoined party's interests." *Keith v. Day*, 60 N.C.App. 559, 561, 299 S.E.2d 296, 297 (1983).

In the present case, evidence in the record reveals that defendants invested considerable resources in the development and marketing of LumberScan and that losses in sales would be substantial if the preliminary injunction remains in place. There is no evidence in the record as to whether the trial court considered the plaintiff's ability to respond in damages should defendants be found to have been wrongfully enjoined, nor is there any evidence that the trial court considered the likelihood of material damage and harm to defendants in setting the bond at $10,000. On remand, the trial court should, upon consideration of the above factors, set bond in an amount that bears a rational relationship to the

costs and damages which defendants may incur if it is later determined defendants were wrongfully enjoined.

Affirmed in part, reversed in part, and remanded with directions.

Judges GREENE and WYNN concur.

MARCELLA H. DUNGEE, ADMINISTRATRIX OF THE ESTATE OF KENNETH DUNGEE AND MARCELLA DUNGEE, PLAINTIFFS v. NATIONWIDE MUTUAL INSURANCE COMPANY, LEVERN ALLEN, JR., LEVERN ALLEN, III, STATE FARM MUTUAL INSURANCE COMPANY, WALTER BANNERMAN, DARIUS BANNERMAN, AND KENNETH NEWKIRK, DEFENDANTS

No. 9118SC581

(Filed 8 January 1993)

1. **Insurance § 514 (NCI4th)— uninsured motorist coverage—intrapolicy stacking—prohibited by policy**

Claimants could not stack uninsured motorist coverage arising from a hit and run accident where the policy language prohibiting intrapolicy stacking of UM coverage was clear and capable of only one interpretation. If the insurance policy clearly doesn't allow stacking, then the courts must enforce the contract as written.

Am Jur 2d, Automobile Insurance § 326.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by the same insurer to different insureds. 23 ALR4th 108.

2. **Insurance § 514 (NCI4th)— uninsured motorist coverage—two policies with UM coverage**

Plaintiffs were entitled to $50,000 in UM benefits, this amount representing the aggregate minimum statutorily required amount of UM coverage, where Kenneth Dungee was killed when a car driven by Levern Allen III and owned by his father was struck by a hit and run driver; the Allen policy with Nationwide provided UM coverage of $50,000 per person and $100,000 per accident; the Dungee policy with Nationwide

provided UM coverage of $25,000 per person with a limit of $50,000 per accident; and the Dungee policy contained a reduction clause and an other insurance clause. If plaintiffs Dungee receive less than $50,000 under the Allen policy, then the reduction clause in the Dungee policy takes effect and plaintiffs Dungee can then obtain that amount from the Dungee policy necessary for them to receive a total of $50,000 in UM benefits.

Am Jur 2d, Automobile Insurance § 326.

Combining or "stacking" uninsured motorist coverages provided in separate policies issued by the same insurer to different insureds. 23 ALR4th 108.

Appeal by defendant from judgment entered 20 February 1991 by Judge Joseph R. John, Sr. in Guilford County Superior Court. Heard in the Court of Appeals 9 April 1992.

This is an action brought to determine rights under two automobile insurance policies issued by defendant Nationwide Mutual Insurance Company (Nationwide). The pertinent facts are not in dispute.

On 23 December 1988, Levern Allen, III was driving his father's (Levern Allen, Jr.) automobile on Interstate 40 near Durham, North Carolina, when Kenneth Dungee, Darius Bannerman and Kenneth Newkirk were passengers. A "hit and run" driver, whose identity remains unknown, struck the Allen automobile and forced it off the road. All parties agree that a "hit and run" driver is classified as an uninsured motorist. As a result of this accident, Kenneth Dungee died, Levern Allen, III lost a leg and both Bannerman and Newkirk suffered bodily injuries. The parties have stipulated that the damages suffered by Levern Allen, III, Bannerman, Dungee and Newkirk total more than $100,000 and the damages suffered by the plaintiffs (Dungee) are in excess of $75,000.

At the time of the accident, Levern Allen, III resided in his father's household. Nationwide insured the Allen automobile involved in the accident under a policy issued to Levern Allen, Jr. (Allen Policy). The Allen policy covered three motor vehicles and provided uninsured motorist (UM) coverage in the amount of $50,000 per person with a limit of $100,000 per accident. A separate premium was paid for each Allen vehicle's UM coverage. Also in effect was a Nationwide personal automobile insurance policy issued to Marcella

H. Dungee (Dungee policy), the mother of the deceased Kenneth Dungee. The Dungee policy covered only one vehicle and provided UM coverage in the amount of $25,000 per person with a limit of $50,000 per accident. Prior to his death, Kenneth Dungee was a resident of his mother's household.

After receiving notice of the 23 December 1988 accident, Nationwide offered to pay $100,000 pursuant to the UM clause in the Allen policy. This amount was to be divided among the three injured youths and the Dungee estate. However, Nationwide refused to pay any amount to Marcella Dungee pursuant to her own Nationwide policy. Plaintiffs Dungee thereafter filed the present suit, naming Nationwide and all other claimants as defendants. Plaintiffs Dungee alleged that Nationwide was liable in the amount of $25,000 pursuant to the Dungee policy, and liable in the additional amount of $150,000 pursuant to the Allen policy. Plaintiffs Dungee also joined State Farm Mutual Insurance Company (State Farm) as a defendant, alleging that State Farm provided UM coverage for Darius Bannerman and Kenneth Newkirk under a policy issued to Walter Bannerman. However, the question of State Farm's liability is not before this Court since State Farm was dismissed from the action and this dismissal has not been appealed.

Defendants Levern Allen, Jr., Levern Allen, III, Walter Bannerman, Darius Bannerman and Kenneth Newkirk answered and cross-claimed against Nationwide. Based upon the fact that the Allen policy provided UM coverage on three automobiles, these claimants demand total UM benefits under the Allen policy in the amount of $150,000 per person with a limit of $300,000 per accident.

On 20 February 1991, the trial court entered partial summary judgment against Nationwide and ordered that plaintiffs Dungee are entitled to receive $25,000 per person in UM benefits under the Dungee policy. Further, Nationwide was liable collectively up to the amount of $150,000 per person and $300,000 total UM benefits under the Allen policy. Defendant Nationwide appeals this order.

Stern, Graham & Klepfer, by Donald T. Bogan, for plaintiff appellees.

Cheryl D. Jackson for defendants and cross-plaintiff appellees Walter Bannerman, Darius Bannerman and Kenneth Newkirk.

David M. Dansby, Jr. for defendants and cross-plaintiff appellees Levern Allen, Jr. and Levern Allen, III.

Paul D. Coates and ToNola D. Brown for defendant appellant.

WALKER, Judge.

The first question to be decided is whether all the claimants are entitled to aggregate or "stack" the UM coverage limits on each of the three vehicles insured under the Allen policy.

I.

[1] Defendant Nationwide contends the claimants are not entitled to stack the UM coverage limits under the Allen policy since (1) G.S. § 20-279.21 does not mandate UM stacking and (2) the language of the Allen policy does not allow stacking. According to defendant, the claimants are only entitled to UM coverage in the amount of $50,000 per person with a limit of $100,000 per accident, these amounts representing the amount of coverage on the Allen vehicle involved in the accident. We find merit in defendant's contentions.

Our Supreme Court has recently held that North Carolina law does not mandate intrapolicy stacking of UM insurance. *Lanning v. Allstate Insurance Co.*, 332 N.C. 309, 420 S.E.2d 180 (1992). According to the Court, while G.S. § 20-279.21 of the Motor Vehicle Safety and Financial Responsibility Act requires stacking of underinsured motorist (UIM) coverage, there is no corresponding statutory provision applicable to UM coverage. However, despite the fact that "the Act does not require intrapolicy stacking of UM coverages, neither does it prohibit such stacking." *Id.* at 316, 420 S.E.2d at 185.

Under *Lanning*, the claimants in the present case can stack the UM coverages in the Allen policy if its provisions allow stacking. When the meaning of a particular policy provision is uncertain or capable of several reasonable interpretations, the doubts will be resolved against the insurance company and in favor of the policyholder. *Woods v. Nationwide Insurance Co.*, 295 N.C. 500, 246 S.E.2d 773 (1978). Therefore, "[w]hen policies . . . contain language that may be interpreted to allow stacking of UM coverages on more than one vehicle in a single policy, insureds are contractually entitled to stack." *Lanning* at 316, 420 S.E.2d at 185. However, if the insurance policy clearly does not allow stacking, then the courts must enforce the contract as written. *Lanning v. Allstate, supra.* In the case *sub judice*, the Allen policy 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 . . . 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.

We believe that this language is clear and capable of only one interpretation: that intrapolicy stacking of the UM insurance in the Allen policy is prohibited. Our decision finds support in the recent *Lanning* decision. In that case, the Supreme Court considered language in an Allstate policy virtually identical to the language in the present Nationwide policy and the Court there held the policy prohibited intrapolicy UM stacking. Therefore, we find the claimants cannot stack the UM coverage in the Allen policy and the maximum UM coverage available under that policy is $50,000 per person with a limit of $100,000 per accident.

II.

[2] We now address the second issue of this appeal which is whether any amount payable under the Dungee UM policy is to be reduced by the amount paid pursuant to the Allen policy.

It is agreed that Kenneth Dungee was an "insured" for purposes of UM coverage under the Allen policy. Also, plaintiffs Dungee are one of four claimants to the $100,000 per accident coverage under the Allen policy.

Nationwide contends that its total liability to plaintiffs Dungee cannot exceed $50,000, an amount representing the aggregate statutorily required coverage under both the Allen and Dungee policies. According to Nationwide, any amount over $50,000 is subject to the terms of the insurance policy. Nationwide bases its

argument on two clauses in the Dungee policy. The first clause, known as a "reduction clause," provides:

> Any amount otherwise payable for damages under this coverage shall be reduced by all sums:
>
> 1. Paid because of the bodily injury or property damage by or on behalf of persons or organizations who may be legally responsible.

The second clause, known as an "other insurance clause" provides:

> 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.

This Court has recently addressed the application of two separate policies with UM coverage. In *Government Employees Insurance Company v. Herdon*, 79 N.C.App. 365, 339 S.E.2d 472 (1986) it was held that an insured could not stack the UM coverages in two policies. There, defendant's testate (Maria Gunther) died in an accident when an uninsured driver struck the car in which she was a passenger. On the date of the accident, Maria Gunther was an insured under two Government Employees Insurance Company (GEICO) policies. Each of these policies provided UM coverage in the amount of $100,000 per person and $100,000 per accident and contained the following language:

> OTHER INSURANCE
>
> 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.

Pursuant to this language, GEICO refused to pay more than $100,000.

In resolving the controversy, this Court noted the general rule that when a policy's terms are contrary to the minimum UM coverage required by statute, the statute controls. However, if the UM coverage in the policy exceeds the mandatory minimum amount, the additional coverage is voluntary and governed by the terms of the insurance contract. Based upon these principles, this Court found GEICO only liable for $100,000. "Since the highest limit of liability under either of the policies [$100,000] exceeds the

aggregate amount of statutorily required uninsured motorist coverage provided by both policies [$50,000], neither the Financial Responsibility Act nor the holding in *Moore* applies." *GEICO* at 368, 339 S.E.2d at 474.

The Court in *GEICO* referred to the earlier Supreme Court decision in *Moore v. Hartford Fire Insurance Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967). In *Moore*, UM coverage was provided under two policies; one covering the vehicle in which plaintiff was a passenger and the other covering a vehicle owned by plaintiff's husband. Both policies provided coverage in the statutory minimum amount. The Court found plaintiff was not limited to recovery under one policy where plaintiff's loss *was greater than the combined minimum statutory limits of the two policies.*

We find the rule in *GEICO* applicable here. Since there are two policies in effect, plaintiffs Dungee are entitled to $50,000 in UM benefits, this amount representing the *aggregate* minimum statutorily required amount of UM coverage. However, once plaintiffs receive this amount, any additional benefits are subject to the terms of the policies. As applied to the present case, if plaintiffs Dungee receive less than $50,000 under the Allen policy, then the reduction clause in the Dungee policy takes effect and plaintiffs Dungee can then obtain that amount from the Dungee policy necessary for them to receive a total of $50,000 in UM benefits.

Reversed and remanded.

Judges LEWIS and WYNN concur.

MARGARET B. ALMOND, EXECUTRIX OF THE ESTATE OF JESSE J. ALMOND, DECEASED, PLAINTIFF v. THOMAS A. RHYNE, JR., DEFENDANT

No. 9120SC1166

(Filed 8 January 1993)

1. Bills and Notes § 20 (NCI3d)— action on a note—evidence of discharge—summary judgment for plaintiff

The trial court did not err by entering summary judgment for plaintiff in an action to collect the amount owing on a

promissory note where defendant contended that his pleadings, depositions and affidavits showed that the deceased surrendered the note with the intent to cancel and discharge defendant's obligation, that this transaction constituted a gift, or that there had been an accord and satisfaction. Plaintiff's evidence established that defendant was in default on payments due on the note, the parties are in agreement that only defendant and the deceased were present when defendant obtained possession of the note, and all communications between the deceased and defendant were oral and neither party reduced any portion of the transaction to writing. While evidence of "conduct" would not be barred by the Deadman's Statute, N.C.G.S. § 8C-1, Rule 601(c), all of defendant's remaining evidence concerning discharge of the promissory note is in the nature of oral communications between himself and the deceased and would be expressly excluded under that statute. No admissible evidence can be introduced to support defendant's allegations that the deceased gave him the promissory note and stock certificate with intent to discharge the debt.

Am Jur 2d, Bills and Notes § 1316.

2. Bills and Notes § 15 (NCI3d) — note — surrender of document — not discharge

The trial court did not err by denying partial summary judgment for defendant in an action on a note where defendant contended that surrender of the note and stock certificate to him by the deceased extinguished the debt as a matter of law. N.C.G.S. § 25-3-605 applies only to negotiable instruments; this note is conditional because of language incorporating the terms of an agreement and therefore is not a negotiable instrument. The debtor's obligation under a note can be discharged when the note is surrendered to the debtor and there is ample evidence that the party surrendering the note intended to discharge the debtor; however, the operation of the Deadman's Statute in this case precludes evidence that the deceased intended to discharge defendant's obligation. Since defendant must prove not only surrender of the note but also an intent to discharge the debt on the part of the deceased, it cannot be said that a finding of one element raises a presumption that the other exists.

Am Jur 2d, Bills and Notes §§ 143, 948, 1316.

ALMOND v. RHYNE

[108 N.C. App. 605 (1993)]

Appeal by defendant from judgment entered 12 September 1991 by Judge Thomas W. Ross in Stanly County Superior Court. Heard in the Court of Appeals 23 October 1992.

On 1 May 1984, Thomas A. Rhyne, Jr. (defendant) executed an agreement whereby defendant agreed to purchase fifty (50) shares of stock in A & H Millwork, Inc. from Jesse J. Almond (the deceased). In addition to the terms of purchase, this agreement gave defendant an option to purchase an additional fifty (50) shares of stock. To secure the purchase price of $35,000, defendant also executed a document entitled "Promissory Note and Security Agreement."

In either June or September of 1988, after the deceased was diagnosed with cancer, defendant visited the deceased. During this visit, defendant obtained possession of the promissory note and a stock certificate representing the original fifty (50) shares of stock. Only defendant and the decedent were present during this time.

Plaintiff filed suit on 9 April 1990 to collect the balance owing on the promissory note. No payment has been made on the promissory note since 10 May 1988. On 12 September 1991, the trial court granted plaintiff's motion for summary judgment for the balance due on the note plus interest.

David A. Chambers for plaintiff appellee.

Ervin & Cohen, by Howard M. Cohen, for defendant appellant.

WALKER, Judge.

Defendant makes two arguments on appeal. He contends the trial court erred (1) in granting plaintiff's motion for summary judgment, and (2) in denying his motion for partial summary judgment. Summary judgment should be rendered only when the pleadings, depositions, answers to interrogatories, admissions and affidavits disclose no genuine issue of material fact and the moving party is entitled 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).

I.

[1] In his first assignment of error, defendant argues that the trial court erred when it entered summary judgment for plaintiff. Defendant contends that his pleadings, depositions and affidavits show the deceased surrendered the note with the intent to cancel and discharge defendant's obligation or in the alternative, this transaction constituted a gift and extinguished the debt, or in the alternative, Rhyne relinquished his claim to purchase additional shares of stock and this surrender of the note constituted an accord and satisfaction.

The uncontroverted evidence in the record indicates that defendant executed a promissory note for $35,000 in May of 1984 and payments were made on the note until May of 1988. In either June or September of 1988, defendant visited the deceased and obtained possession of the note and fifty shares of stock. The parties are in agreement that only defendant and the deceased were present when defendant obtained possession of the note. All communications between the deceased and defendant were oral and neither party reduced any portion of the transaction to writing.

Plaintiff's evidence established defendant was in default on payments due on the note. In order to defeat summary judgment, defendant must come forward with evidence to show the debt was discharged under one of his three theories. Our Supreme Court has recently stated:

> 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).

Since evidence of intent is necessary to support defendant's defense, this must be shown by oral communications between the deceased and defendant. In this action the executrix is a party

and Rule 601(c), N.C. Rules of Evidence must be examined. This statute, commonly referred to as the "Deadman's Statute," provides in essence that no person, interested in an event, can be examined as a witness in his own behalf against the executor of a deceased person, concerning any oral communication between the witness and the deceased. Prior to Rule 601(c) taking effect, the Deadman's Statute operated to exclude evidence of "a personal transaction or communication between the witness and the deceased person." *See* G.S. § 8-51 (repealed 1984); Rule 601 (official commentary). The current statute is narrower and only excludes "oral communication." 1 L. Brandis, *Brandis on North Carolina Evidence* § 73 (1988).

In the present case, defendant's evidence revealed that the deceased "delivered" the promissory note to him. While evidence of "conduct" would not be barred by operation of the Deadman's Statute, all of defendant's remaining evidence concerning discharge of the promissory note being in the nature of oral communication between himself and the deceased would be expressly excluded under Rule 601(c).

Under the facts presented, the debt was discharged only if the deceased surrendered the promissory note to defendant with the intent to discharge the debt. This is supported by the authorities cited by defendant in his brief. Since no admissible evidence can be introduced to support defendant's allegations that the deceased gave him the promissory note and stock certificate with intent to discharge the debt, summary judgment for plaintiff was proper.

II.

[2] Defendant next contends that his motion for partial summary judgment should have been granted since the deceased surrendered the promissory note and stock certificate to him and these documents remain in his possession. According to defendant, the surrender of these documents extinguished the debt as a matter of law.

Defendant argues that G.S. 25-3-605 of the Uniform Commercial Code (UCC) is dispositive of this issue. In relevant part this statute provides:

> (1) The holder of an instrument may even without consideration discharge any party
>
> . . . .

> (b) by renouncing his rights by a writing signed and delivered or *by surrender of the instrument to the party to be discharged.*

(emphasis added). However, this statute only applies to negotiable instruments. In the present case, the promissory note provides that the terms of the May 1984 Agreement "are incorporated herein by reference as though fully herein written." Because of this language, the promissory note is conditional and therefore not a negotiable instrument. *See* G.S. 25-3-105(2)(a); *Booker v. Everhart*, 294 N.C. 146, 240 S.E.2d 360 (1978).

Under the law of this state a debtor's obligation under a note can be discharged when the note is surrendered to the debtor and there is ample evidence that the party surrendering the note *intended* to discharge the debtor. *See Hood System Industrial Bank of High Point v. Dixie Oil Co.*, 205 N.C. 778, 172 S.E. 360 (1934) and *Picot v. Sanderson*, 12 N.C. 309 (1827). Here, the operation of Rule 601(c) (Deadman's Statute) precludes evidence that the deceased intended to discharge defendant's obligation.

Several jurisdictions have recognized that surrender of a note to the debtor will discharge the debtor's obligation if it is done with the intent to discharge. *In Re Union League Club of Chicago*, 203 F.2d 381 (7th Cir. 1953); *Lanham v. Meadows*, 72 W.Va. 610, 78 S.E. 750 (1913); *Connelly v. Bank of America National Trust & Savings Association*, 138 Cal.App.2d 303, 291 P.2d 501 (1956). Also, other authorities recognize that surrender of an instrument must be accompanied by an intent to discharge the debtor's obligation. *See* 5A A. Corbin, *Contracts* § 1250 (1964); 15 S. Williston, *The Law of Contracts* § 1876 (1972); Restatement (Second) of Contracts § 274 (1981). We find the approach advocated by these authorities is well reasoned and applicable to the present situation. Accordingly, having reviewed defendant's pleadings, depositions and affidavits, and since he has presented no admissible evidence in regards to the deceased's intent when surrendering the documents, we cannot say, as a matter of law, that the debt has been extinguished.

Defendant further contends that at a minimum, surrender of the note created a presumption of discharge. We first observe that cancellation or discharge of an obligation is an affirmative defense and defendant, as payor, bears the burden of proving a valid discharge. *See Hayes v. Hartford Accident and Indemnity*

Co., 274 N.C. 73, 82, 161 S.E.2d 552, 559 (1968); *Baillie Lumber Co. Inc. v. Kincaid Carolina Corp.*, 4 N.C.App. 342, 167 S.E.2d 85 (1969). Since defendant must prove not only surrender of the note but also an intent to discharge the debt on the part of the deceased, we cannot say that a finding of one element raises a presumption that the other exists. Accordingly, defendant's argument has no merit.

Affirmed.

Judges GREENE and WYNN concur.

AT&T FAMILY FEDERAL CREDIT UNION, PLAINTIFF v. BEATY WRECKER SERVICE, INC., DEFENDANT

No. 9127DC1096

(Filed 8 January 1993)

Uniform Commercial Code § 47 (NCI3d)— security interest in automobile—sale after wreck—notice

The trial court erred by granting summary judgment for plaintiff where Bonham purchased a vehicle with a loan from plaintiff and gave plaintiff a security interest in the vehicle; defendant towed the vehicle to its place of business after it was involved in an accident; defendant initiated procedures to enforce its lien for towing and storage costs; DMV was unable to secure delivery of notice on Bonham by certified mail and advised defendant of its right to petition the clerk of court for authorization to sell the vehicle; defendant obtained authorization and conducted an alleged public sale at which it purchased the vehicle; and plaintiff received a "Notice of Cancellation and Order to Surrender Certificate of Title," which it contends was the first notice it received concerning the sale. There was a genuine issue of fact as to whether the vehicle was sold pursuant to private or public sale and whether the relevant statutes were complied with.

Am Jur 2d, Secured Transactions § 602.

Appeal by defendant from order entered 17 September 1991 by Judge Timothy Lee Patti in Gaston County District Court. Heard in the Court of Appeals 19 November 1992.

On 5 April 1988 Debra P. Bonham purchased a 1988 Ford Escort using a loan from plaintiff, AT&T Family Federal Credit Union, and giving plaintiff a security interest in the vehicle. Plaintiff's security interest was noted on the Certificate of Title as a first lien on the vehicle. Plaintiff also carried "collateral protection insurance" as protection in the event Bonham neglected her personal insurance policy or the vehicle otherwise suffered physical damage. Subsequently, Bonham's automobile insurance terminated due to nonpayment of premiums.

On 20 February 1989, at the request of the Charlotte Police Department, defendant towed the vehicle to its place of business after it was involved in an accident. Thereafter, defendant initiated procedures to enforce its lien for towing and storage costs pursuant to N.C.G.S. § 44A-4. On or about 25 March 1989 defendant mailed a "Notice of Intent to Sell a Vehicle to Satisfy Storage and/or Mechanic's Lien" to the North Carolina Division of Motor Vehicles (DMV) pursuant to N.C.G.S. § 44A-4(b)(1). Unable to secure delivery of notice on Bonham by certified mail, DMV advised defendant of its right to petition the clerk of court for authorization to sell the vehicle. Defendant obtained authorization to sell the vehicle on 1 June 1989 and conducted an alleged public sale on 16 June 1989, at which time it purchased the vehicle for $386.00. Although it is unclear how many bidders were present at the sale, the second highest bid was $200.00, received from Don Gardner Body Shop.

Upon petition by defendant, the court directed DMV to transfer title to defendant. Plaintiff thereby received a "Notice of Cancellation and Order to Surrender Certificate of Title" to the vehicle on or about 23 August 1989, which it contends was the first notification received concerning sale of the vehicle. Prior to 12 January 1989, DMV automatically notified all lienholders of record whenever a garage asserted a mechanic's lien but had discontinued this policy at the time defendant asserted its lien. Plaintiff attempted to recover under its collateral protection policy but its carrier denied all coverage since the vehicle was unavailable for inspection.

Subsequently, plaintiff filed suit against defendant and Bonham, but took a voluntary dismissal against Bonham after it was unable to secure service on her. Plaintiff thereby alleges that defendant

failed to give the required notice of sale pursuant to N.C.G.S. § 44A-4 and that as a result, plaintiff suffered damages because it could not enforce its security interest in the vehicle. On 17 September 1991 the trial court granted plaintiff's motion for summary judgment and ordered defendant to pay $6,225.05 plus interest, and attorney fees in the amount of $750.00, from which defendant now appeals.

Whitesides, Robinson, Blue, Wilson and Smith, by David W. Smith, III and Terry Albright Kenny, for plaintiff appellee.

Waggoner, Hamrick, Hasty, Monteith, Kratt and McDonnell, by H. M. Whitesides, Jr., for defendant appellant.

WALKER, Judge.

Defendant brings forward two assignments of error for this Court to consider on appeal. It contends (1) the trial court erred in granting plaintiff's motion for summary judgment because a genuine issue of material fact existed and (2) the trial court erred in awarding damages, interest and attorney fees against defendant since there are issues of material fact as to damages which must be determined by a trier of fact.

N.C.G.S. § 44A-4 states with specificity the procedures which must be followed in order for a lienor such as defendant to enforce its lien on a motor vehicle by sale. Pursuant to this statute, the lienor must give notice within the requisite time period to the Division of Motor Vehicles (DMV) that a lien is asserted and that a sale is proposed. N.C.G.S. § 44A-4(b)(1). DMV shall then issue notice by registered or certified mail to the person having legal title to the property if reasonably attainable. *Id.* If DMV notifies lienor that this notice has been returned as undeliverable, lienor may institute a special proceeding by application to the clerk in the county where the vehicle is held for authorization to sell said vehicle. *Id.* However, lienor must still comply with the requisite statutory procedures for the purposes of conducting a public or private sale, including notice requirements. *In Re Ernie's Tire Sales & Service v. Riggs*, 106 N.C.App. 460, 417 S.E.2d 75 (1992).

In support of plaintiff's motion for summary judgment in the instant case, plaintiff's verified complaint alleges that defendant Beaty sold and purchased the vehicle in question at a private sale

pursuant to N.C.G.S. § 44A-4(c). Additionally, the affidavit of Bill Warren asserts that:

> 8. Plaintiff received no notice of the lien asserted by Beaty, of the amount of the lien, of the sale procedures initiated by Beaty, or any other information regarding the whereabouts or possession of the vehicle until it received a notice to surrender the title from the North Carolina Division of Motor Vehicles on or about August 23, 1989.

N.C.G.S. § 44A-4(c) mandates that where the property upon which the lien is claimed is to be sold at private sale, "the lienor shall cause notice to be mailed . . . to each secured party or other person claiming an interest in the property who is actually known to the lienor or can be reasonably ascertained." Thus, insofar as plaintiff's interest was noted on the Certificate of Title and easily ascertained, defendant's admission in its answer that it did not give notice of the sale to plaintiff would be dispositive of this issue should it be determined the sale was private.

Contrarily, defendant's answer and the affidavit of Shirley Jones state that the vehicle was sold to defendant at public sale, presumably under N.C.G.S. § 44A-4(e). Although N.C.G.S. § 44A-4(e)(1)a1 directs lienor to mail notice to a secured party, it provides that compliance with N.C.G.S. § 44A-4(e)(1)b, whereby a copy of the notice of sale is posted at the courthouse door in the county where the sale is to be held and is also published in a newspaper of general circulation in the county once a week for two consecutive weeks, may be sufficient for such notice requirement. Therefore, where the vehicle is sold at public sale, the fact that defendant did not cause notice to be served on plaintiff may be of no consequence. Our review of the record, however, fails to reveal any evidence that defendant complied with either of these notice requirements mandated by N.C.G.S. § 44A-4(e).

N.C.G.S. § 1A-1, Rule 56 provides that summary judgment is proper 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. *See Town of West Jefferson v. Edwards*, 74 N.C.App. 377, 329 S.E.2d 407 (1985). Though there is no dispute as to defendant's compliance with N.C.G.S. § 44A-4(a)-(b), we find a genuine issue of material fact exists as to whether the vehicle was sold pursuant to private or public sale, and whether the relevant statutes were

complied with thereunder. Summary judgment was therefore improper.

On remand, the question of whether the vehicle was sold pursuant to public or private sale is to be determined by the trial court as a matter of law, and will dictate the relevant statutory notice provisions to which defendant should have complied. If the court concludes that defendant bought the vehicle at private sale, N.C.G.S. § 44A-4(c) mandates that "such a sale to the lienor shall be voidable." If, however, the court determines that defendant conducted a public sale, then it must show compliance with the provisions of N.C.G.S. § 44A-4(e) *et seq.* In this regard, N.C.G.S. § 44A-4(g) provides:

> If the lienor fails to comply substantially with any of the provisions of this section, the lienor shall be liable to the person having legal title to the property or any other party injured by such noncompliance in the sum of one hundred dollars ($100.00), together with a reasonable attorney's fee as awarded by the court. Damages provided by this section shall be in addition to actual damages to which any party is otherwise entitled.

Where there is sufficient evidence to raise an inference, this Court has indicated that a determination of whether defendant failed to substantially comply with the provisions of either N.C.G.S. § 44A-4(c) or N.C.G.S. § 44A-4(e) in conducting the sale is a factual issue reserved for the jury. *Drummond v. Cordell*, 73 N.C.App. 438, 326 S.E.2d 292, *superseding* 72 N.C.App. 262, 324 S.E.2d 301 (1985), *aff'd*, 315 N.C. 385, 337 S.E.2d 850 (1986).

REVERSED and REMANDED.

Judges COZORT and GREENE concur.

EDDIE B. CLINTON v. WAKE COUNTY BOARD OF EDUCATION

No. 9110SC1107

(Filed 19 January 1993)

1. **Appeal and Error § 167 (NCI4th)— ruling that statute did not give plaintiff enforceable rights—no advisory opinion sought by appeal**

Plaintiff's request for review of the present case by the Court of Appeals did not constitute a request for an advisory opinion, since the trial court ruled that N.C.G.S. § 115C-326 created no enforceable rights in plaintiff; if plaintiff was in fact granted enforceable rights under that section, the trial court's ruling deprived him of a substantial right; and the issue involved in this appeal thus involved an actual controversy which affected plaintiff's rights.

Am Jur 2d, Appeal and Error §§ 761-763.

2. **Appeal and Error § 118 (NCI4th)— assignments of error based on denial of summary judgment—no consideration on appeal**

Those assignments of error alleged by plaintiff which are based on a denial of summary judgment, or which contend that because of the denial of summary judgment a directed verdict was improper, will not be reviewed by the court on appeal.

Am Jur 2d, Summary Judgment § 40.

Reviewability of order denying motion for summary judgment. 15 ALR3d 899.

3. **Schools § 13.1 (NCI3d)— failure of school board to follow proper evaluation procedures for principal—no independent right of action under N.C.G.S. § 115C-326**

Plaintiff school principal had no independent right of action under N.C.G.S. § 115C-326 for failure of defendant school board to evaluate him as required by its rules and regulations; rather, failure of the school board to comply with evaluation procedures established under N.C.G.S. § 115C-326 could be submitted as evidence in an action brought by a claimant pursuant to N.C.G.S. § 115C-325 to establish that his dismissal was arbitrary or capricious, a claim which plaintiff abandoned

when the trial court directed verdict in favor of defendant and plaintiff did not assign error to the order.

Am Jur 2d, Appeal and Error § 545; Schools § 161.

Appeal by plaintiff from order entered 26 June 1991 by Judge Anthony M. Brannon in Wake County Superior Court and from an order entered 13 June 1991, and judgment entered 27 June 1991 by Judge Coy E. Brewer, Jr. in Wake County Superior Court. Heard in the Court of Appeals 21 October 1992.

Edelstein and Payne, by M. Travis Payne, for plaintiff-appellant.

Maupin Taylor Ellis & Adams, P.A., by Thomas A. Farr and Frank J. Gordon, for defendant-appellee.

WYNN, Judge.

On 22 May 1989, the Wake County Board of Education (hereinafter "the Board") voted unanimously not to grant tenure or "career" status as a principal, to the plaintiff, Eddie B. Clinton. This decision came as plaintiff was completing his third year as a probationary principal at Vandora Springs Elementary School in Garner, North Carolina. The Board's decision was based upon the recommendation of its superintendent, Dr. Robert Bridges, as well as the unanimous recommendation of the superintendent's administrative cabinet.

Plaintiff's employment history with the Wake County School System is as follows: From 1972 until 1977, plaintiff was a teacher at Leroy Martin Junior High School. Plaintiff resigned from this position in 1977 because of circumstances related to a conviction for embezzlement while performing a part-time job. In 1979, plaintiff returned to employment with the school system as a teacher at Central Wake Optional School. He was subsequently promoted to the position of transportation supervisor at Ligon Middle School and then to assistant principal at North Garner Junior High. In 1986, plaintiff was appointed to serve as a "probationary principal" of Vandora Springs Elementary School, based upon a recommendation by Dr. Bridges.

Dr. Thomasine Hardy, an assistant superintendent with the Wake County schools, was assigned to serve as plaintiff's "designated evaluator." During plaintiff's first year, Dr. Hardy provided him with three written evaluation forms: a "mid year" Principals Per-

formance Based Appraisal Instrument ("PPAI"), a year-end PPAI and a year-end "Team Visitation Summary Report." These written forms completed by Dr. Hardy were a part of the Wake County Principal's Performance Based Evaluation Guide (hereinafter "Evaluation Guide"), which was a personnel manual for principals scheduled for implementation in the 1986-1987 school year. Dr. Hardy testified that notwithstanding her belief that the plaintiff was "struggling" in that first year, she gave plaintiff positive feedback in her written evaluations as a source of encouragement.

Toward the end of his first year, plaintiff conducted a personal survey of his teachers and staff, inviting anonymous criticism by them of his job performance. The survey results reflected a great deal of criticism and dissatisfaction by staff members and teachers with plaintiff's performance. In addition, Dr. Hardy made plaintiff aware of complaints by his staff concerning his leadership, absences from campus, failure to keep scheduled appointments and poor staff morale.

Dr. Hardy continued as plaintiff's evaluator during his second year as a probationary principal (1987-1988). In a letter dated 25 September 1987, Dr. Hardy warned plaintiff that he had violated a school policy by initiating a student fundraiser and cautioned that she remained concerned about his absences from campus, his failure to keep scheduled appointments and his relationship with his staff. She further warned that "the manner in which you respond in each of these areas and others will have a significant impact upon how you are able to function as a principal and, could jeopardize the likelihood of your becoming a tenured principal in this school system." During the course of plaintiff's second year, Dr. Hardy visited Vandora Springs "a couple" of times. On each occasion Dr. Hardy met with plaintiff to discuss complaints and criticisms she had heard from his staff. In May of 1988, Dr. Hardy, Assistant Superintendent Ann Denlinger, and Wake County Principal John Mallette conducted a two-day team visit at Vandora Springs Elementary. During this visit, the team members criticized plaintiff for his failure to prepare teacher observation reports in a timely fashion, for failing to educate his staff regarding the budget process and for poor relations and communications with his staff. At no time during the 1987-1988 school year did plaintiff receive a written PPAI evaluation form.

Early in the 1988-1989 school year, plaintiff's third year as a probationary principal, Dr. Hardy resigned from her position with the school system. Assistant Superintendent Ann Denlinger was assigned to replace Dr. Hardy as plaintiff's designated evaluator. Ms. Denlinger visited Vandora Springs for an evaluation and met with plaintiff in November of 1988 to discuss the evaluation process for his performance. She subsequently sent plaintiff a copy of the report she had submitted to the superintendent regarding that visit. This report indicated that plaintiff's performance needed improvement in the areas of care of the physical plant, completion of classroom observation reports, and knowledge of the instructional program.

In January of 1989, Ms. Denlinger visited Vandora Springs to conduct a mid-year evaluation of plaintiff's performance. She subsequently completed a "Report to the Superintendent" and a PPAI and provided copies of both to the plaintiff. Both reports contained criticisms regarding low staff morale, lack of leadership, lack of knowledge regarding elementary education, lack of oral and written communication with staff, insufficient feedback to staff and lack of knowledge by staff regarding the budget process. In April of 1989, Ms. Denlinger and two other evaluators conducted a team visit at Vandora Springs. Plaintiff was subsequently provided a written copy of the "Team Visitation Summary Report" and a written year-end PPAI.

The procedures for a probationary principal applying for career status at the end of a three year probationary period, require the principal to submit a "portfolio" of certain documents and items in support of the application. Plaintiff submitted his portfolio in April of 1989 and his interview by the superintendent's cabinet was conducted on 20 April 1989. Following this interview, the cabinet unanimously recommended that plaintiff not be given career status. Consistent with the views of his cabinet, Superintendent Bridges recommended to the Board that plaintiff be denied career status. On 22 May 1989 the Wake County Board of Education unanimously voted to accept the recommendation of the superintendent and his staff, denying plaintiff career status as a principal.

Plaintiff thereafter brought an action based on the failure of the Board to evaluate his performance during his second probationary year. Plaintiff's complaint alleged: 1) breach of contract; 2) breach of an alleged statutory right under N.C.G.S. § 115C-326

to be evaluated; 3) breach of state and federal constitutional due process rights; and 4) breach of a statutory right to be free from arbitrary and capricious personnel action by the school board under N.C.G.S. § 115C-325(m)(2). Plaintiff moved for summary judgment on all of his claims except the § 115C-325(m)(2) claim. Defendant moved for summary judgment on all of plaintiff's claims. All motions for summary judgment were denied by Judge Brannon and the case proceeded to trial before Judge Brewer. After the plaintiff presented his evidence, Judge Brewer directed a verdict in favor of defendant on all claims except the breach of contract claim. The jury subsequently returned a verdict in favor of the defendant, finding that defendant did breach its employment contract with the plaintiff by failing to perform the proper evaluations, but, that the breach was not the cause of plaintiff's failure to achieve career status and the resulting termination of his employment as a principal. Plaintiff appealed.

Plaintiff brings three assignments of error forward on appeal: 1) Judge Brannon erred in denying plaintiff's motions for summary judgment on his claims under N.C.G.S. § 115C-326 and the state and federal constitutions; 2) Judge Brewer erred in granting defendant's motion for a directed verdict on those same claims at the close of plaintiff's evidence; and 3) Judge Brewer erred in finding as a matter of law that N.C.G.S. § 115C-326 creates no enforceable rights in the plaintiff. Plaintiff does not appeal the jury's verdict nor the court's entry of a directed verdict in favor of defendant on his claim under N.C.G.S. § 115C-325(m)(2).

I.

[1] We begin by addressing the defendant Board's contention that this appeal by plaintiff should be dismissed because it seeks an advisory opinion regarding the meaning of N.C.G.S. § 115C-326.

It is clearly not the function of appellate courts to issue opinions on abstract or theoretical questions. *Kirkman v. Wilson*, 328 N.C. 309, 312, 401 S.E.2d 359, 361, *reh'g denied*, 328 N.C. 735, 404 S.E.2d 870 (1991). Rather, appellate courts are limited to deciding "actual controversies injuriously affecting the rights of some party to the litigation." *Id.* For the reasons stated below, we hold that the plaintiff's request for review of the present case by this Court does not constitute a request for an advisory opinion.

Plaintiff's complaint presented four theories of recovery as outlined above, based on the alleged lack of evaluations during his second probationary year. The defendant was granted a directed verdict on all of these claims except the breach of contract claim which went to the jury. In conjunction with granting the directed verdicts, the trial judge specifically concluded "as a matter of law that [N.C.G.S. § 115C-326] does not create any justiciable right inuring to the benefit of the plaintiff in the context of any employment dispute with the defendant."

Plaintiff's appeal assigns error to this characterization of Section 115C-326. If the plaintiff is, in fact, granted enforceable rights under that section, the trial court's ruling has deprived him of a substantial right. If this Court chooses to reverse the trial court, the plaintiff will be permitted to return to the trial court and seek damages for that violation. It follows that our review of the trial court's ruling regarding N.C.G.S. § 115C-326 does not constitute an advisory opinion because the issue involves an actual controversy which has affected the plaintiff's rights.

II.

[2] By plaintiff's first two assignments of error, he contends that Judge Brannon erred by denying his motion for summary judgment as to his constitutional claims and his claim under N.C.G.S. § 115C-326 and, that because Judge Brannon so ruled, it was error for Judge Brewer to subsequently direct verdicts in favor of the defendant on the same claims. The defendant, in response, contends that a denial of summary judgment is not reviewable on appeal, and therefore, to the extent that the plaintiff's appeal is based on the denial of summary judgment it should be dismissed. We agree with the defendant's assertion.

"[T]he denial of a motion for summary judgment is not reviewable during appeal from a final judgment rendered in trial on the merits." *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985). Moreover, a pretrial order denying summary judgment has no effect on a later order granting or denying a directed verdict on the same issue or issues. *See Edwards v. Northwestern Bank*, 53 N.C. App. 492, 495, 281 S.E.2d 86, 88, *disc. rev. denied*, 304 N.C. 389, 285 S.E.2d 831 (1981). Therefore, those assignments of error alleged by the plaintiff in this case, which are based on a denial of summary judgment, or that contend that because of

the denial of summary judgment a directed verdict was improper, will not be reviewed by this Court.

III.

[3] Having concluded that plaintiff's arguments based on the denial of summary judgment must be dismissed, the only issue remaining on appeal is whether the trial court erred when it concluded as a matter of law that N.C.G.S. § 115C-326 creates no rights enforceable by the plaintiff and granted the defendant's motion for a directed verdict.

Section 115C-326(a) provides in pertinent part as follows:

> The State Board of Education, in consultation with local boards of education, shall develop uniform performance standards and criteria to be used in evaluating professional public school employees. It shall develop rules and regulations to recommend the use of these standards and criteria in the employee evaluation process. The performance standards and criteria shall be adopted by the Board by July 1, 1982, and may be modified in the discretion of the Board.
>
> *Local boards of education shall adopt rules and regulations by July 1, 1982, to provide for annual evaluation of all professional employees* defined as teachers by G.S. 115C-325(a)(6). Local boards may also adopt rules and regulations requiring annual evaluation of other school employees not specifically covered in this section; however, the standards and criteria used by local boards are not to be limited by those adopted by the State Board of Education.

N.C. Gen. Stat. § 115C-326(a) (1991). As defined in Section 115C-325(a)(6), "teacher" includes those who "directly supervise teaching." This Court has found "principals" to be included within this definition. *Warren v. Buncombe County Board of Education*, 80 N.C. App. 656, 658, 343 S.E.2d 225, 226 (1986). Thus, plaintiff is clearly covered under any protection Section 115C-326 provides.

Plaintiff contends that Section 115C-326 in combination with the "implementing regulations and policies [established by the Board] create[s] a reasonable expectation and entitlement on [his] behalf to continue in the position of a principal, unless and until he has received the evaluations required by law and has had a reasonable opportunity to correct any deficiencies."

Pursuant to Section 115C-326, the State Board of Education has adopted regulations and established evaluation guidelines requiring local school boards to evaluate professional employees annually. 16 N.C.A.C. Section .0501. The Wake County Board of Education has complied with the State's regulations and guidelines by developing an evaluation process requiring that probationary employees, such as plaintiff, be evaluated twice yearly and provided a written copy of such evaluation.

The evidence presented at trial tended to show that plaintiff was not provided with the required written evaluations during his second year as a probationary principal. Mr. Clinton contends that, because the Board failed to evaluate him on the proper number of occasions during his three year probationary period, they could not dismiss him from his position as principal until such evaluations were completed and he was allowed to respond. We note that a potential underlying issue within plaintiff's contention is, what if any recourse do employees have to ensure that they are being properly evaluated. While we acknowledge that there should be some remedy to ensure compliance with the requirement that employees are properly evaluated, we do not reach that issue today because the present case presents a different issue. That is, even if an employee is entitled to an evaluation, what effect does the absence of that evaluation have on the subsequent dismissal of that employee by the school board?

North Carolina General Statute Section 115C-325(m)(2) provides:

> The board, upon recommendation of the superintendent, may refuse to renew the contract of any probationary teacher or to reemploy any teacher who is not under contract for any cause it deems sufficient: Provided, however, that the cause may not be arbitrary, capricious, discriminatory or for personal or political reasons.

"Any claim of an arbitrary or capricious denial of renewal of a probationary [principal's] contract under the statute gives rise to a right of action [under Section 115C-325]." *Sigmon v. Poe*, 528 F.2d 311, 312 (4th Cir. 1975) (citing *Taylor v. Crisp*, 286 N.C. 488, 212 S.E.2d 381 (1975)). The plaintiff contends that Section 115C-326(b) grants a right of action independent of any right available under Section 115C-325. Section 115C-326(b) provides:

> If any claim is made or any legal action is instituted against an employee of a local school administrative unit on account of an act done or an omission made in the course of the employee's duties in evaluating employees pursuant to this section, the local board of education, if the employee is held not liable, shall reimburse the employee for reasonable attorney's fees.

This section, however, only contemplates the possibility of a suit against an employee of a school system for acts or omissions made by that employee in evaluating another employee. The defendant did not sue an employee, but rather sued the school board.

While there is no independent right of action against a school board pursuant to Section 115C-326, the failure of the school board to comply with evaluation procedures established under that section, may be submitted as evidence in an action brought by a claimant pursuant to Section 115C-325, to establish that his dismissal was arbitrary or capricious. Plaintiff brought a claim at the trial level alleging Section 115C-325 violations. The trial court directed a verdict in favor of the defendant on that claim. The plaintiff did not assign error to that order and as a result, the trial court's action is not subject to review on this appeal.

We conclude that the plaintiff has no independent right of action under Section 115C-326 and therefore overrule plaintiff's assignment of error and hold that the trial court properly directed a verdict in favor of the defendant.

For the foregoing reasons,

Plaintiff's appeal based on the denial of summary judgment is dismissed.

The directed verdict entered by the trial court against the plaintiff is affirmed.

Judges GREENE and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

SARAH J. PARTRIDGE v. ASSOCIATED CLEANING CONSULTANTS & SERVICES, INC.

No. 9126SC1029

(Filed 19 January 1993)

1. **Rules of Civil Procedure § 4 (NCI3d)— no knowledge by plaintiff of defendant's correct address—service on Secretary of State effective**

The record supported the trial court's finding that plaintiff's attorney did not have actual knowledge of defendant's correct address where defendant could be served; therefore, the substituted service on the Secretary of State was effective, and the trial court did not err in denying defendant's motion to set aside default judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4).

Am Jur 2d, Process §§ 278-281.

2. **Process § 13 (NCI3d); Rules of Civil Procedure §§ 4, 60.2 (NCI3d)— failure of foreign corporation to appoint registered agent—inexcusable neglect—no relief from default judgment**

Evidence was sufficient to support the trial court's findings of fact which in turn supported its conclusion that defendant foreign corporation's failure to appoint a registered agent and to notify the Secretary of State of its address change was inexcusable neglect and led to the entry of default where defendant did business in at least six states and could reasonably expect that claims might be filed against it in any of these states; defendant failed for more than eight years to maintain a registered agent in North Carolina to receive service of process and failed for eight years to notify the Secretary of State that its address had changed; defendant was contacted on at least three occasions by the City of Charlotte, with which defendant had a contract, demanding that defendant accept responsibility for plaintiff's claim; when defendant acquired knowledge of a claim and therefore a possible suit, defendant did not appoint an agent or notify the Secretary of State of its changed address; and six months before defendant received notice from the city of the claim, an unrelated default judgment was entered against defendant in a North

Carolina court, again giving defendant notice of the need to ensure that it received notice of claims pending against it.

Am Jur 2d, Judgments § 723.

3. **Rules of Civil Procedure § 60.2 (NCI3d)— setting aside default judgment—failure to show mistake as basis**

There was no merit to defendant's contention that the judgment against it should be set aside because of a mistake made by the clerk of court in determining whether defendant had been served, since evidence supported the trial court's finding that no mistake occurred.

Am Jur 2d, Judgments § 720.

4. **Rules of Civil Procedure § 60.2 (NCI3d)— refusal to set aside default judgment—defendant's inexcusable neglect of business affairs**

The trial court did not abuse its discretion in failing to set aside default judgment against defendant pursuant to N.C.G.S. § 1A-1, Rule 60(b)(6), since the court concluded, based on findings supported by competent evidence, that defendant's failure to appear was due to its own inexcusable neglect of its business affairs rather than to extraordinary circumstances.

Am Jur 2d, Judgments § 730.

Appeal by defendant from order entered 28 June 1991 and order entered 31 July 1991 in Mecklenburg County Superior Court by Judge Claude S. Sitton. Heard in the Court of Appeals 17 November 1992.

Moore & Van Allen, by James P. McLoughlin, Jr. and P. Weston Musselman, Jr., for plaintiff-appellee.

Parker, Poe, Adams & Bernstein, by Irvin W. Hankins III and Josephine H. Hicks, for defendant-appellant.

GREENE, Judge.

Defendant Associated Cleaning Consultants & Services, Inc. (Associated) appeals from the trial court's denial of its Rule 60(b) motion to set aside a default and default judgment in favor of plaintiff Sarah J. Partridge (Partridge).

Associated, a Pennsylvania corporation, qualified to do business in North Carolina in 1980, at which time its registration with the Secretary of State listed its address as 34 Penn Circle West, Pittsburgh. From 1986 until 1990, Associated performed cleaning services at Charlotte's Douglas International Airport (the Airport) under contract with the City of Charlotte (the City). On 29 December 1986, Partridge slipped and fell in a rest room at the Airport and sustained serious injuries, allegedly because the rest room floor was wet. Partridge's attorney notified the City of her injuries on 26 April 1988. In November, 1988, the City wrote Associated demanding indemnification pursuant to Associated's contract to clean the rest room where Partridge's fall took place. Partridge's attorney received a copy of this correspondence, which listed Associated's address as 431 Davidson Road, Pittsburgh. In August, 1989, the City again wrote to Associated demanding indemnification, and Partridge's attorney again was sent a copy which listed the Davidson Road address.

Partridge filed a complaint against Associated and the City on 21 February 1990, more than three years after her fall. Two summons were issued against Associated. First, a summons was sent to James Barlow (Barlow) by certified mail. Barlow was designated in the Secretary of State's office as Associated's registered agent for service of process, but he had had no contact with Associated since March, 1981. This summons was returned unserved. Second, on 22 March 1990, another summons was issued and served on the Secretary of State, who forwarded the summons to 34 Penn Circle West, Pittsburgh, the address on record with the Secretary of State. Associated had in fact moved to 431 Davidson Road, Pittsburgh, in 1981 and failed to inform the Secretary of State of this change of address. This second summons was returned, forwarding order expired. Associated never received actual notice of the suit against it through either of the summonses.

On 4 April 1990, the City informed Associated that Partridge had filed a suit, but that the suit was barred by the statute of limitation. On 6 April 1990, the City filed a motion to dismiss the claim against it on the statute of limitation ground. A copy of this motion was sent to Associated. On 18 April 1990, Partridge voluntarily dismissed her action against the City. On 20 April 1990, Associated requested from the City's attorney a copy of the complaint and other pertinent pleadings. Associated was informed by the City's attorney that the court file for the case contained a

copy of the first summons directed to Barlow, which had been returned unserved.

At 9:13 a.m., 1 May 1990, Partridge filed an affidavit of service which asserted that Associated had been served with process through substituted service on the Secretary of State. Partridge was granted a default. On that same day, Associated's attorney called the Assistant Clerk of Court for Mecklenburg County and asked if Associated had been served. The clerk told Associated's attorney that service had not yet been made. On 14 September 1990, the court entered a default judgment for Partridge in the amount of $135,015.00. In April, 1991, a writ of execution was issued by the Pennsylvania court pursuant to the default judgment. On 26 April 1991, Associated moved pursuant to Rule 60(b) that the default and default judgment be set aside. The motion was denied.

Associated argues that the trial court lacked jurisdiction over it, and therefore the judgment is void and must be set aside under Rule 60(b)(4). Associated admits that all statutory requirements governing service of process on foreign corporations were met. They argue, however, that because Partridge knew of another address where Associated might be served, her chosen method of service was not reasonably calculated to provide Associated with timely notice of the suit and thereby violated Associated's due process rights. Associated also argues that the trial court abused its discretion in failing to set aside the default judgment pursuant to Rule 60(b)(1) because its failure to maintain a registered agent in the state and notify the Secretary of State of its changed address was excusable neglect and the judgment is the result of mistake. In the alternative, Associated contends that due to the extraordinary circumstances of the case, the trial court abused its discretion by failing to set aside the default judgment under Rule 60(b)(6).

The issues presented are whether (I) the record supports a finding that Partridge's attorney did not have actual knowledge of Associated's correct address; (II) findings of fact based on competent evidence support the trial court's conclusion that Associated's neglect was not excusable and that no mistake occurred; and (III) findings of fact based on competent evidence support the trial court's conclusion that extraordinary circumstances did not exist.

I

[1] As a general rule compliance with the Rules of Civil Procedure relating to service of process satisfies the due process requirements of the Federal and North Carolina Constitutions. *See Royal Business Funds Corp. v. South E. Dev. Corp.*, 32 N.C. App. 362, 368, 232 S.E.2d 215, 218, *disc. rev. denied*, 292 N.C. 728, 235 S.E.2d 784 (1977). Compliance with these statutes, however, does not in every instance satisfy due process. *Mullane v. Central Hanover Bank & Trust Co.*, 339 U.S. 306, 318, 94 L. Ed. 865, 875 (1950) (statutory provision for notice to trust beneficiaries by publication violates due process when whereabouts of beneficiary known to trustee). If due process is denied, then service is invalid. *Anderson Trucking Serv., Inc. v. Key Way Transp., Inc.*, 94 N.C. App. 36, 44, 379 S.E.2d 665, 670 (1989). Associated argues that because Partridge's attorney had knowledge of Associated's correct address, service of process on it through the Secretary of State's office pursuant to N.C.G.S. § 55-5-04 violates the due process clause. Although this argument may have merit, we need not address it. *See Perkins v. TSG, Inc.*, 568 A.2d 665, 666, 390 Pa. Super. 303, 306 (1990) (substitute service where plaintiff actually knew defendant's true address violative of due process).

The trial court found as a fact that no evidence in the record showed that Partridge's attorney had actual knowledge of Associated's correct address at the time of substitute service on the Secretary of State.[1] The findings of fact made by the trial court are binding on appeal if there is any evidence in the record upon which to base such a finding. *Norton v. Sawyer*, 30 N.C. App. 420, 422, 227 S.E.2d 148, 151, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 689 (1976). Because our review of the record supports the trial court's finding that there is no evidence that Partridge's attorney had actual knowledge of Associated's current address, we are not confronted with the situation that Associated suggests.

There is no evidence of any direct correspondence or contact between Associated and Partridge's attorney. The record reveals, however, that Partridge's attorney was sent copies of two letters

1. Although denominated by the trial court as a conclusion of law, determination of the existence of actual knowledge is reached by natural reasoning rather than the application of fixed rules of law, and is therefore a finding of fact. *Quick v. Quick*, 305 N.C. 446, 451-52, 290 S.E.2d 653, 657-58 (1982).

which contained an address for Associated, one over fifteen months and the other over six months prior to the service on the Secretary of State. Nothing in the record suggests that Partridge's attorney knew that the address on the copies was Associated's principal place of business or that it was the proper address at which to seek service of process. Partridge's attorney stated that he had no way of knowing if the address was correct. Nor is there any evidence to suggest that Partridge's attorney knew that the address on file with the Secretary of State's office was not correct for service of process. Partridge's attorney testified that he had no idea that Associated's business address as listed with the Secretary of State was not current. Indeed, he did not even know to what address the Secretary of State would attempt to forward service, or that that address was different from the return address on the copied correspondence. Thus, the record supports the trial court's finding that there is no evidence to show that Partridge's attorney had actual knowledge of an address where Associated could be served and the trial court's finding of fact will not be disturbed. Accordingly, the substituted service on the Secretary of State was effective and the trial court did not err in denying Associated's motion to set aside the judgment pursuant to Rule 60(b)(4).

II

A party seeking to set aside a judgment pursuant to Rule 60(b)(1) must show that the judgment resulted from mistake, inadvertence, surprise, or excusable neglect and must make a *prima facie* showing of a meritorious defense. *East Carolina Oil Transp., Inc. v. Petroleum Fuel and Terminal Co.*, 82 N.C. App. 746, 748, 348 S.E.2d 165, 167 (1986), *disc. rev. denied*, 318 N.C. 693, 351 S.E.2d 745 (1987).

Excusable Neglect

Whether neglect is "excusable" or "inexcusable" is a question of law, and the trial court's conclusion that neglect is "inexcusable" will not be disturbed on appeal if competent evidence supports the trial court's findings of fact and these findings support the conclusion. *Anderson Trucking*, 94 N.C. App. at 41, 379 S.E.2d at 668. Only if "excusable" neglect has been shown does our inquiry shift to a determination of whether, given the excusable neglect, the trial court abused its discretion by not granting relief. *Id.*

[2] Associated asserted that the failure to appoint a registered agent and notify the Secretary of State of the address change was excusable neglect. The trial court concluded that Associated's failures constituted inexcusable neglect and that these failures led to the entry of default. The trial court's findings of fact show that Associated does business in at least six states, including North Carolina, and could reasonably expect that claims might be filed against it in any of these states. Associated failed for more than eight years to maintain a registered agent in North Carolina to receive service of process. Associated also failed, for over eight years, to notify the Secretary of State, who is statutorily required to forward process to Associated if its agent cannot be found, that its address had changed. Associated was contacted by the City on at least three occasions demanding that Associated accept responsibility for Partridge's claim. When it acquired knowledge of a claim and therefore a possible suit, Associated did not appoint a registered agent or notify the Secretary of State of its changed address. On 24 May 1988, an unrelated default judgment was entered against Associated in a North Carolina court, again giving Associated notice of the need to ensure that it received notice of claims pending against it.

A corporation doing business in North Carolina "which fails to pay due attention to the possibility that it could be involved in litigation . . . by failing to take steps to ensure that it is notified of claims pending against it, is guilty of inexcusable neglect." *Id.* at 41, 379 S.E.2d at 668. Thus, there existed competent evidence in the record to support the trial court's findings of fact, and these findings support the conclusion that Associated's failure to appoint a registered agent and to notify the Secretary of State of the address change were inexcusable neglect and led to the entry of the default.[2]

---

2. Associated also argues that it is entitled to relief because of the excusable neglect of its counsel. We note that the relief afforded by Rule 60(b)(1) is exceptional, and will not be granted when the litigant's own actions amount to inexcusable neglect. *Holcombe v. Bowman*, 8 N.C. App. 673, 676, 175 S.E.2d 362, 364 (1970). Because we hold that the trial court's conclusion of law that Associated's own neglect was inexcusable and led to their failure to appear was supported by competent evidence in the record, we need not address the issue of the neglect of Associated's counsel.

Mistake

[3] Associated also contends that the judgment should be set aside because of a mistake made by the clerk of court in determining whether or not Associated had been served. The trial court concluded that no mistake had been made, and this conclusion will not be disturbed if supported by findings of fact based on evidence in the record. *Norton*, 30 N.C. App. at 422, 227 S.E.2d at 151. The trial court found as a fact that Thomas J. Madigan (Madigan), an attorney representing Associated, spoke to the Assistant Clerk of Court for Mecklenburg County sometime during the day on 1 May 1990, and she informed him that "the court file in the matter of Partridge v. ACCS [Associated] indicates that service has not been made upon [Associated]." An affidavit of service stating that Associated had been served through the Secretary of State's office was filed at 9:13 a.m. on 1 May 1990. The record reveals, through the affidavit of Madigan and a file memorandum from Madigan's office, that no evidence was presented as to the time at which Madigan made his call to the assistant clerk. Thus, nothing in the record indicates that the call from Madigan was placed after 9:13 a.m. Therefore, the trial court's conclusion that no mistake occurred is based on findings of fact supported by competent evidence in the record.

III

[4] Associated also contends that the trial court abused its discretion in failing to grant relief under Rule 60(b)(6), which allows the trial court to set aside the judgment if the judgment is the result of "[a]ny other reason justifying relief from the operation of the judgment." N.C.G.S. § 1A-1, Rule 60(b)(6) (1990). A judgment should be set aside under Rule 60(b)(6) only if the movant can show (1) that extraordinary circumstances exist and (2) justice demands that the judgment be set aside. *Huggins v. Hallmark Enters., Inc.*, 84 N.C. App. 15, 24-25, 351 S.E.2d 779, 785 (1987). Rule 60(b)(6) is equitable in nature, and if the required showing is made, the granting or withholding of relief is entirely within the discretion of the trial court. *Id.* at 25, 351 S.E.2d at 785.

The trial court concluded that Associated's failure to appear was due to its own inexcusable neglect of its business affairs rather than to extraordinary circumstances. The findings of fact, based on competent evidence in the record, support this conclusion. Ac-

cordingly, the trial court's conclusion that extraordinary circumstances did not exist will not be disturbed.

Affirmed.

Judges COZORT and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

O'HENRY LYON, PLAINTIFF v. WILLIS D. MAY, JR., DEFENDANT

No. 918SC1056

(Filed 19 January 1993)

1. **Contracts § 187 (NCI4th)— former lessee's contract for crop loss insurance—interference by landlord—no justification**

Plaintiff landowner was not justified in interfering with the contract between an insurance company which wrote a policy of crop loss insurance and defendant who rented and farmed plaintiff's land, since plaintiff was not named as loss payee or coinsured; there was no assignment to plaintiff of rights under the policy; the security agreement executed by defendant did not establish an obligation that defendant obtain insurance on the crops; defendant took out insurance on the crops at the insistence of and for the benefit of the Farmer's Home Administration; and to the extent that the insurance proceeds may have exceeded the debt owed to FmHA, plaintiff was still not entitled to make a demand for payment of those proceeds until they fell into the hands of defendant debtor.

Am Jur 2d, Insurance § 1737; Interference § 27.

2. **Contracts § 187 (NCI4th)— crop loss insurance—partial assignment—existence of defendant's contractual right against insurance company—plaintiff's interference**

There was no merit to plaintiff's contention that defendant did not possess a valid contractual right against an insurance company which wrote a crop loss policy on defendant's crops because defendant assigned the indemnity rights to FmHA

and therefore defendant could not claim plaintiff's interference with the contract, since defendant did not make a complete assignment of the proceeds, but only of the amount required to satisfy defendant's remaining indebtedness to FmHA; and defendant, as named insured, had an enforceable right to force the payment of the insurance proceeds.

Am Jur 2d, Insurance § 1902; Assignments § 76.

3. **Process § 19 (NCI3d)— abuse of process—insufficiency of evidence**

Plaintiff was entitled to judgment notwithstanding the verdict on defendant's counterclaim for abuse of process where the record did not reflect any evidence of an ulterior motive on the part of plaintiff in attempting to attach insurance proceeds, but instead showed that plaintiff was attempting to prevent the transfer of money to which plaintiff believed he was entitled, albeit mistakenly.

Am Jur 2d, Abuse of Process §§ 6, 22.

4. **Contracts § 183 (NCI4th)— interference with contract—punitive damages—judgment n.o.v. denied**

The trial court did not err in denying plaintiff's motion for judgment notwithstanding the verdict on the issue of punitive damages awarded to defendant where plaintiff intentionally interfered with defendant's contract with his insurance carrier.

Am Jur 2d, Damages §§ 739, 747; Interference § 61.

Punitive damages for interference with contract or business relationship. 44 ALR4th 1078.

5. **Conversion § 10 (NCI4th)— changing of name on contract—insufficiency of evidence**

The trial court did not err in granting plaintiff's motion for judgment notwithstanding the verdict on defendant's conversion counterclaim where defendant claimed that the act constituting conversion was the changing by plaintiff of the name on a contract with the federal Agricultural Stabilization and Conservation Service, but the evidence presented at trial failed to establish ownership in defendant of the federal funds at the time of the alleged conversion.

Am Jur 2d, Conversion §§ 75, 80.

Appeal by plaintiff and defendant from judgment entered 29 May 1991 by Judge Herbert Small in Greene County Superior Court. Heard in the Court of Appeals 18 November 1992.

This appeal arises from an action filed by plaintiff, O'Henry Lyon to recover money allegedly owed by defendant Willis D. May, Jr. on three promissory notes. Defendant May, for several years prior to 1986, cash leased land from plaintiff's parents. In 1985, plaintiff inherited the land and continued to lease it to defendant. Apparently in 1985 no agreement was reached as to rent, so no payments were made by defendant for the use of the land for that year. In 1986, plaintiff and defendant agreed on an amount for the 1985 and 1986 rent, and the first of the three notes between plaintiff and defendant was signed for that amount. This note did not include money intended for financing the 1986 farming year.

Defendant was in need of substantial funds to finance his 1986 crop. He approached the United States Farmer's Home Administration (FmHA) to obtain a loan for 1986. FmHA could not provide sufficient funds to meet defendant's needs, so plaintiff agreed to participate in a FmHA lending program which would allow defendant to farm in 1986.

Through the FmHA program, plaintiff loaned defendant $30,000, and FmHA subordinated its secured liens on defendant's crops to plaintiff's security interest. In conjunction with this loan, defendant signed a $26,000 note and a $4,000 note and signed security agreements for both notes which included the crops grown by defendant on three different farms.

FmHA required defendant to obtain crop loss insurance for crops grown by defendant, and to assign the right to indemnity under the policy to FmHA. The insured crops were included in plaintiff's security agreement with defendant and were subject to the subordination agreement with FmHA. The assignments of indemnity given to FmHA were limited to the extent of defendant's indebtedness to FmHA.

Defendant suffered damage to his crops in 1986 and became entitled to proceeds from the crop loss insurance policy. When plaintiff learned of the crop damage he contacted the insurance agency which placed the crop loss insurance with defendant and demanded to be included in the distribution of proceeds because he held a security interest in the crops. Plaintiff contacted FmHA

and made similar demands on them. Plaintiff went further and contacted the Department of Insurance and questioned the insurance company's solvency which initiated a minor investigation into the insurance company. This investigation led to a letter from the insurance company's attorney to the Department of Insurance informing them that plaintiff was not a party to the policy. The Department informed plaintiff of this. During the time plaintiff was fighting for the proceeds of the insurance policy, defendant was negotiating for new leases. He was unable to obtain financing for the leases due to the nonpayment of proceeds resulting from the dispute initiated by plaintiff.

Plaintiff persisted in his pursuit of the proceeds until finally, on 18 February 1987, the insurance company filed a declaratory judgment action to have the court determine who should receive payment. Defendant's motion for judgment on the pleadings was heard in July 1987 at which time the superior court judge indicated that he was going to rule that FmHA and defendant were entitled to the insurance proceeds, but that he would delay signing the judgment until 24 July 1987.

On 22 July 1987, plaintiff filed the lawsuit leading to this appeal in which he sought payment on the three notes and also filed for attachment of the insurance proceeds. Defendant counterclaimed for intentional interference with a contract, abuse of process, conversion, and sought punitive damages.

FmHA intervened and removed the case to federal court, requesting the attachment be dissolved. On 25 March 1988, the federal court dissolved the attachment pursuant to FmHA's and plaintiff's motions, and ordered the proceeds disbursed to FmHA and defendant. The case was later transferred to Greene County Superior Court where a jury found defendant liable on the notes and found for defendant on all his counterclaims. Plaintiff moved for judgment notwithstanding the verdict on all defendant's counterclaims. The trial judge granted plaintiff's motion on the conversion counterclaim but denied all others. Plaintiff appeals the denial of his motions for judgment notwithstanding the verdict. Defendant appeals the motion for judgment notwithstanding the verdict on his conversion counterclaim.

Hunton & Williams, by Michael L. Unti, for plaintiff appellant.

Ward and Smith, P.A., by John M. Martin, for plaintiff appellant-appellee.

Hunton & Williams, by Michael L. Unti and James L. Hunt, for plaintiff appellee.

Lonnie Carraway for defendant appellant-appellee.

Law Offices of Roland C. Braswell, by Roland C. Braswell, for defendant appellee.

ARNOLD, Chief Judge.

In plaintiff's first assignment of error, he claims the trial court erred in denying his motion for judgment notwithstanding the verdict on defendant's counterclaim for intentional interference with a contract. The elements of this tort are: (1) a valid contract between plaintiff and a third party that confers upon plaintiff a contractual right against the third party; (2) defendant's knowledge of the contract; (3) defendant's intentional inducement of a third party not to perform; (4) defendant acting without justification; and (5) resulting actual damage to plaintiff. *United Lab., Inc. v. Kuykendall*, 322 N.C. 643, 661, 370 S.E.2d 375, 387 (1988) (citation omitted). Plaintiff argues that defendant failed to establish two of the elements, and he was therefore entitled to judgment notwithstanding the verdict.

[1] First, plaintiff declares that he was justified in interfering with the contract between the insurance company and defendant because he had a legally protected interest in the insurance proceeds. It is true that FmHA subordinated their rights in the crops to plaintiff and that plaintiff had a security interest in the crops. From there, plaintiff asserts that pursuant to N.C. Gen. Stat. § 25-9-306(1) he also had an interest in and was entitled to participate in the distribution of the crop loss insurance proceeds. G.S. § 25-9-306(1) reads:

> "Proceeds" includes whatever is received upon the sale, exchange, collection or other disposition of collateral or proceeds. Insurance payable by reason of loss or damage to the collateral is proceeds, except to the extent that it is payable to a person other than a party to the security agreement.

N.C. Gen. Stat. § 25-9-306(1) (1986).

Authority for the above proposition is found, and relied upon by plaintiff, in *Zorba's Inn, Inc. v. Nationwide Mut. Fire Ins. Co.*, 93 N.C. App. 332, 377 S.E.2d 797 (1989) wherein this Court stated:

"Article 9 clearly gives the secured party a security interest in insurance proceeds which is enforceable against the debtor upon default. In other words, the secured party's interest in damaged or destroyed collateral continues in the insurance proceeds payable because of that damage or loss." *Zorba's*, 93 N.C. App. at 334-35, 377 S.E.2d at 799. That decision goes on to state however, that:

> If the secured party is not named as a loss payee or coinsured, or if the security agreement does not require the debtor to obtain insurance on the collateral for the benefit of the secured party, and there has been no assignment of rights to the insurance policy, then the secured party has no right, legal or equitable, enforceable against the insurer with respect to the proceeds of the policy.

Zorba's, 93 N.C. App. at 335, 377 S.E.2d at 799. Plaintiff was not named as loss payee or coinsured, nor was there an assignment to plaintiff of rights under the policy. The only question is whether the security agreement required defendant to obtain crop loss insurance.

The only mention of insurance in the security agreement is the following boilerplate language: "Debtor will have and maintain insurance at all times with respect to all collateral against risks of fire (including so-called extend coverage), theft and such *other risks as Secured Party my [sic] require . . .*" (emphasis added). This language is the only evidence relied upon by plaintiff to establish a requirement that defendant obtain crop loss insurance under the security agreement. Plainly though, this does not establish an obligation that defendant obtain insurance on the crops when the agreement states that the debtor will maintain insurance against such risks "as Secured Party my [sic] require," and no action was ever demanded of defendant. Defendant took out insurance on the crops at the insistence of, and for the benefit of, FmHA. Therefore, plaintiff had no claim, legal or otherwise against the insurer and was not justified in interfering with the insurer's payment of the proceeds.

To the extent that the insurance proceeds may have exceeded the debt owed to FmHA, plaintiff was still not entitled to make a demand for payment of those proceeds until they fell into the hands of the defendant debtor. *Zorba's*, 93 N.C. App. at 335, 337 S.E.2d at 799. Accordingly, plaintiff's first argument fails.

[2] Next, plaintiff argues that defendant did not possess a valid contractual right against the insurance company because he assigned the indemnity rights to FmHA, and therefore cannot claim interference with the contract. Although it is true that an assignment ordinarily passes the rights of the assignor to the assignee, that does not divest defendant of his cause of action in this case.

The transaction between defendant, FmHA, and the insurance company wherein the right to indemnity under the insurance policy was transferred to FmHA was labelled an assignment, but plainly this was not a complete assignment of rights in the sense plaintiff would have us see it. More accurately, the assignment was security for the loan made by FmHA to defendant, and FmHA's rights in the proceeds were limited to the amount of defendant's remaining indebtedness. To hold otherwise would be to ignore the reality of the transaction.

Defendant was the insured under the policy. Any check written as a result of a loss under the policy would be payable to both defendant and FmHA according to the testimony of the insurance company's agent. Being named as the insured under the policy, defendant unquestionably can maintain an action against the insurance company as the named insured. *Wachovia Bank & Trust Co. v. Currin*, 244 N.C. 102, 107, 92 S.E.2d 658, 662 (1956). Even though defendant's debt to FmHA exceeded the amount of the proceeds from the insurance company, that does not alter the fact that defendant had an enforceable right to force the payment of the proceeds. To hold otherwise would leave an insured with no recourse to the funds to which he is entitled in a case where the insurance company refuses to pay after an assignment has been made and the assignee/creditor chooses not to pursue the insurance proceeds.

[3] Plaintiff's second assignment of error involves the defendant's counterclaim for abuse of process. Plaintiff claims that there was insufficient evidence presented to establish the elements of abuse of process and he is therefore entitled to judgment notwithstanding the verdict.

The elements of abuse of process are (1) an ulterior motive in the use of process and (2) an act in the misuse of process after issuance to accomplish some purpose not warranted by the writ. *Stanback v. Stanback*, 297 N.C. 181, 200, 254 S.E.2d 611, 624 (1979). In our opinion, the record does not reflect any evidence of an

ulterior motive on the part of plaintiff. There is no evidence that plaintiff tried to use the attachment for anything other than its real purpose—to prevent the transfer of money which plaintiff believed he was entitled, albeit mistakenly. Plaintiff was not entitled to attachment of the proceeds, but that does not change the fact that plaintiff used the attachment for its true purpose. Possibly an action for wrongful attachment fits these facts, but defendant chose not to use that theory.

Since defendant did not establish the elements of abuse of process, plaintiff was entitled to judgment notwithstanding the verdict on that issue.

[4] Finally, plaintiff assigns error to the trial court's denial of his motion for judgment notwithstanding the verdict on the issue of punitive damages. We have examined the record and find sufficient evidence to support the jury's verdict awarding punitive damages. Of course we limited our examination to evidence which is relevant to the claim of intentional interference with a contract since that is the only claim which remains and which will support an award of punitive damages.

[5] In his cross appeal, defendant assigns as error the granting of plaintiff's motion for judgment notwithstanding the verdict on the conversion counterclaim. Conversion is defined as the "unauthorized assumption and exercise of right of ownership over goods or personal property belonging to another to the alteration of their condition or the exclusion of the owner's rights." *Marina Food Assocs. v. Marina Restaurant Inc.*, 100 N.C. App. 82, 93, 394 S.E.2d 824, 831, *disc. review denied*, 327 N.C. 636, 399 S.E.2d 328 (1990). The act which defendant claims constitutes conversion is the changing by plaintiff of the name on a contract with the federal Agricultural Stabilization and Conservation Service (ASCS) signifying who would receive funds for the setting aside of a certain number of acres of plaintiff's land which was enrolled in the federal feed grain program.

The evidence presented at trial fails to establish ownership in defendant of the federal funds at the time of the alleged conversion, therefore the granting of plaintiff's motion for judgment notwithstanding the verdict was proper. Testimony of the director of the Greene County ASCS and one of his employees establishes that the paperwork for the feed grain program was signed by Mr. May on 1 April 1986, and on 24 April 1986 plaintiff signed

the contract and changed it to direct full payment of the funds to himself. In addition, the ASCS personnel presented uncontradicted testimony that a farmer has no right to participate in the feed grain program until the contract contains the signature of the landowner. There was some testimony that seems to indicate that a farmer with a signed lease may enroll the farm in the program, but by defendant's own admission, he did not have a signed lease until 2 May 1986. Since defendant did not have the authority to enroll the farm in the program, he did not have an ownership interest in the funds until plaintiff authorized enrollment. As previously pointed out, the complained of act took place before plaintiff authorized enrollment and accordingly before defendant had any ownership interest in the funds. Therefore, plaintiff could not have unlawfully converted the ASCS funds at the time he altered the contract. Granting of judgment notwithstanding the verdict on this issue was proper.

In summary, the judgment of the trial court is affirmed in all respects except that the denial of plaintiff's motion for judgment notwithstanding the verdict on the abuse of process counterclaim is reversed. Upon remand the superior court should recalculate damages which may be necessary due to the decision in favor of plaintiff on the abuse of process issue.

Affirmed in part, reversed in part, and remanded.

Judges Johnson and Orr concur.

CHARLES E. NELSON v. BATTLE FOREST FRIENDS MEETING, AN UNINCORPORATED ASSOCIATION, AND STEVE WOOD

No. 9118SC670

(Filed 19 January 1993)

1. Railroads § 3 (NCI3d)— abandoned railroad easement— adjoining public road—ownership of title to part of abandoned easement

Because a public road right-of-way was located within an abandoned railroad easement, the two adjoined, and the exception in the second sentence of N.C.G.S. § 1-44.2(a) applied to

vest title to the disputed 30-foot strip of land between the railroad tracks and the public road right-of-way in defendant church as adjacent property owner.

Am Jur 2d, Easements § 103; Highways, Streets, and Bridges § 184.

2. **Appeal and Error § 453 (NCI4th)— constitutional questions—issue not raised and passed upon in trial court—question not considered on appeal**

Plaintiff's argument that, if N.C.G.S. § 1-44.2(a) vests title to a designated strip of land in defendant church, the statute is unconstitutional because it divests him of his property is not considered on appeal because it does not affirmatively appear in the record that the constitutional issue was both raised and passed upon in the trial court.

Am Jur 2d, Appeal and Error § 574.

3. **Appeal and Error § 495 (NCI4th)— propriety of TRO—requirement that TRO exist for court to review**

In order for the Court of Appeals to review the propriety of a temporary restraining order, there must be an existing TRO presented for review.

Am Jur 2d, Appeal and Error § 761.

Judge ORR dissenting.

Appeal by defendants from judgment filed 24 January 1991 and amended 19 February 1991 in Guilford County Superior Court by Judge W. Steven Allen. Heard in the Court of Appeals 25 August 1992.

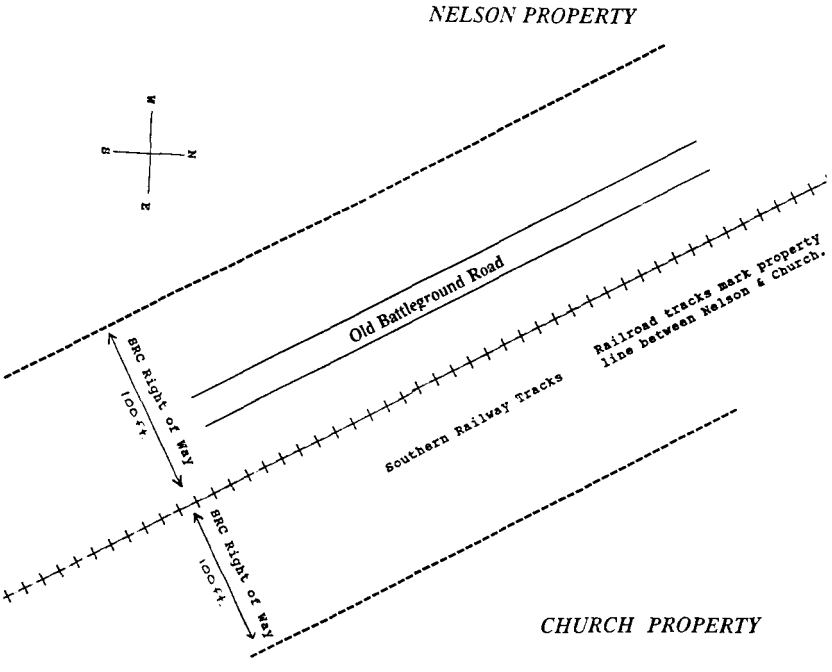
Adams Kleemeier Hagan Hannah & Fouts, by M. Jay DeVaney and Trudy A. Ennis, for plaintiff-appellee.

Elrod & Lawing, P.A., by Frederick K. Sharpless, for defendant-appellants.

GREENE, Judge.

Appeal by defendants Battle Forest Friends Meeting (the Church), an unincorporated association operating a church in Guilford County, and their minister Steve Wood (Wood) from grant of summary judgment in favor of plaintiff Charles E. Nelson (Nelson).

The property at the heart of this dispute is a portion of what was formerly an easement belonging to the Southern Railway Company (SRC). SRC's tracks ran roughly north-south through Greensboro. The original easement extended 100 feet on either side from the center of the SRC tracks. The railroad tracks mark the property line between property owned by the Church and Nelson. The Church's property lies to the east of the tracks and Nelson's property to the west. Both property lines run to the center of the tracks, with the SRC easement extending 100 feet into the property of each. To the west of the tracks, crossing the land owned by Nelson, lies Old Battleground Road (OB Road), a public road which runs roughly parallel to the tracks. The railroad easement completely envelops the right-of-way of OB Road. The distance between the SRC tracks and the OB Road right-of-way is approximately thirty feet. The disputed property is this narrow strip that lies between OB Road and the SRC tracks.[1] The diagram below



1. The Church initially contested Nelson's property line based on a deed in the Church's chain of title dated 17 November 1970, which purported to place the Church's property line at OB Road rather than at the center line of the railroad.

is closely patterned after one of Nelson's exhibits presented at trial and reflects the general location of OB Road in relation to the railroad.

SRC's attorney, by affidavit, stated that SRC ceased using the easement for railroad purposes sometime in the early 1980's. The parties agree that the tracks were removed in 1981. After the tracks were removed, Nelson mowed the grass on the property, but neither party did anything else to indicate ownership. Late in the summer of 1989, Nelson observed Dwight Osborne, a Church member, standing on the disputed property. A bulldozer was parked on the Church property. Osborne informed Nelson that the Church was going to build a driveway across the disputed property. Nelson then told Osborne that he claimed ownership of the property. At a subsequent meeting, Nelson showed Osborne and Wood his deed to the property. Unsuccessful negotiations between Nelson and Wood followed, including an offer by Nelson to sell the property to the Church. On 12 October 1990, Nelson noticed that a truckload of dirt had been spread across the disputed property. Wood was present at the Church when Nelson discovered the dirt, and upon Nelson's inquiry, Wood informed Nelson that the Church intended to go ahead with construction of the driveway.

Nelson filed a complaint for trespass and to quiet title, alleging that the Church and Wood were trespassing on the property. Two more truckloads of dirt were subsequently dumped on the property. Four days later, 21 December 1990, the superior court granted Nelson a Temporary Restraining Order (TRO) which prohibited the Church and Wood from entering the property for ten days. The TRO was later extended until 22 January 1991, the date of the hearing in superior court. Prior to hearing, all parties moved for summary judgment. Summary judgment for Nelson was granted 24 January 1991, which quieted title in Nelson and permanently enjoined the Church and Wood from trespassing on the property. The Church's and Wood's motions for summary judgment were denied. Nelson's damages claim was reserved for a later hearing on the merits. After motion by the Church and Wood, an amended judgment was filed 19 February 1991 certifying the grant of Nelson's

---

Nelson's chain of title dates back to 1957. The Church has now conceded Nelson's chain of title and argues in its brief only that N.C.G.S. § 144.2(a) gives it title to the disputed property.

motion for summary judgment on the title issue as a final judgment pursuant to N.C.G.S. § 1A-1, Rule 54.

The issues presented are (I) whether N.C.G.S. § 1-44.2(a) vests title to the disputed land in the Church; (II) if so, whether the provisions of N.C.G.S. 1-44.2(a) are unconstitutional; and (III) whether the question of the propriety of the trial court's grant of Nelson's request for a TRO is moot.

I

[1] N.C.G.S. § 1-44.2 controls the ownership of abandoned railroad easements by presumptively vesting ownership of the abandoned easement according to the statute. N.C.G.S. § 1-44.2(a) provides in pertinent part

> [w]henever a railroad abandons a railroad easement, all right, title and interest in the strip, piece or parcel of land constituting the abandoned easement shall be presumed to be vested in those persons . . . owning lots or parcels of land adjacent to the abandoned easement, with the presumptive ownership of each adjacent landowner extending to the centerline of the abandoned easement. In cases where the railroad easement *adjoins* a public road right-of-way, the adjacent property owner's right, title and interest in the abandoned railroad easement shall extend to the nearest edge of the public road right-of-way.

N.C.G.S. § 1-44.2(a) (Supp. 1992) (emphasis added). Neither party disputes, and we therefore assume, that ownership of the abandoned easement is controlled by N.C.G.S. § 1-44.2(a). Furthermore, there is no dispute that record title to the property is in Nelson.

The Church argues, however, that the second sentence of N.C.G.S. § 1-44.2(a) vests title to the disputed property in it. The Church is correct if the abandoned SRC easement "adjoins" the OB Road right-of-way. If it does not, the exception in the second sentence of N.C.G.S. § 1-44.2(a) does not apply, and ownership of the strip remains vested in Nelson. Nelson contends that in order for the abandoned easement to "adjoin" the OB Road right-of-way the two must share a common boundary. The Church contends that the two "adjoin" if the abandoned easement and the OB Road right-of-way touch at some point.

In applying statutes we must presume that the legislature intended that the words used in statutes be given the meaning they have in ordinary speech. *LaFayette Transp. Serv., Inc. v. County of Robeson*, 283 N.C. 494, 500, 196 S.E.2d 770, 774 (1973). Courts use the dictionary to determine the ordinary meaning of words. *State v. Martin*, 7 N.C. App. 532, 533, 173 S.E.2d 47, 48 (1970). Objects "adjoin" when they are "close to or in contact with one another." *Webster's New Collegiate Dictionary* 56 (9th ed. 1984). Therefore, the word "adjoin," as used in the second sentence of N.C.G.S. § 1-44.2(a), applies whenever the abandoned easement touches a public road right-of-way, whether within the abandoned easement or at its boundary.

Because the OB Road right-of-way is located within the abandoned easement, they adjoin, and the exception in the second sentence of N.C.G.S. § 1-44.2(a) applies. Title to the disputed strip therefore is vested in the Church as adjacent property owner. Accordingly, summary judgment in favor of Nelson was error.

II

[2] Nelson argues, in the alternative, that if N.C.G.S. § 1-44.2(a) vests title to the disputed strip in the Church, the statute is unconstitutional because it divests him of his property. Specifically, Nelson argues that divesting him of his property violates Article I, Section 19 of the North Carolina Constitution and the Fifth and Fourteenth Amendments of the United States Constitution. However, because it does not affirmatively appear in the record that the constitutional issue was both raised and passed upon in the trial court, we will not address it for the first time on appeal. *Midrex Corp. v. Lynch*, 50 N.C. App. 611, 618, 274 S.E.2d 853, 858, *disc. rev. denied*, 303 N.C. 181, 280 S.E.2d 453 (1981). Although Nelson did raise the constitutional issue in the trial court, the record does not indicate that the trial court considered the issue in granting summary judgment for Nelson.

III

[3] The Church and Wood contend that the grant of a TRO without a showing of immediate and irreparable injury by Nelson was improper. They also contend that the judge's failure to define the injury and state why it was irreparable was error under North Carolina Rule of Civil Procedure 65(b). We need not reach these issues because the propriety of granting the TRO is a moot question.

In order for this court to review the propriety of a TRO there must be an existing TRO presented for review. *State ex rel. Moore v. Doe*, 19 N.C. App. 131, 136, 198 S.E.2d 236, 240, *cert. denied*, 284 N.C. 121, 199 S.E.2d 663 (1973) (appeal from grant of TRO dismissed because TRO terminated slightly thirty days before appeal docketed). The TRO expired by its own terms on 22 January 1991, thirty days after it was issued, and the appeal is therefore dismissed.

We also dismiss Wood's appeal of the trial court's denial of his partial summary judgment motion. The denial of a motion for summary judgment is a nonappealable interlocutory order. *Watson Ins. Agency, Inc. v. Price Mechanical, Inc.*, 106 N.C. App. 629, 631, 417 S.E.2d 811, 812 (1992). This is so "even if the trial court has [as it did here] attempted to certify it for appeal under Rule 54(b) of the North Carolina Rules of Civil Procedure." *Henderson v. LeBauer*, 101 N.C. App. 255, 264, 399 S.E.2d 142, 147, *disc. rev. denied*, 328 N.C. 731, 404 S.E.2d 868 (1991).

In conclusion, summary judgment in favor of Nelson is reversed, and this case is remanded to the superior court for consideration of the question of the constitutionality of N.C.G.S. § 1-44.2(a).

Reversed and remanded.

Judge WELLS concurs.

Judge ORR dissents with separate opinion.

Judge ORR dissenting.

I respectfully dissent on the grounds that my interpretation of N.C. Gen. Stat. § 1-44.2 does not divest Nelson of ownership of the property in dispute. Summary judgment for Nelson is, therefore, proper, and I would affirm the ruling of the trial court.

"When property is taken for railroad purposes, the fee remains with the owner. . . ." *Sparrow v. Tobacco Co.*, 232 N.C. 589, 593, 61 S.E.2d 700, 703 (1950).

> [W]hen land is devoted to railroad purposes it is immaterial whether the railway company acquired it by virtue of an easement, by condemnation, right-of-way deed, or other conveyance.

> If or when it ceases to be used for railway purposes, the land concerned returns to its prior status as an integral part of the free-hold to which it belonged prior to the subjection to use for railway purposes.

Harvest Queen Mill & Elevator Co. v. Sanders, 370 P.2d 419, 423 (1962). I do not believe the Legislature intended to change this result by enacting G.S. § 1-44.2, especially in light of the wording contained in subsection (b) of this statute.

Here the parties agree that the railroad right-of-way was abandoned no later than 1982 and, therefore, the railroad's easement was extinguished. Title to the property within the easement therefore vested in the adjacent landowners extending to the centerline of the abandoned easement, in this case Nelson whose chain of title to the land extends back to 1970.

The statute in question, G.S. § 1-44.2, was passed in 1987 and specifically did not "apply to pending litigation." 1987 N.C. Sess. Laws ch. 433 § 2. Nelson thus had title vested in him when the statute was passed. I cannot imagine that the General Assembly intended for a property owner to be divested of title to land by the enactment of this statute. The prospective application of the statute is one matter, but to reach back and divest a property owner of title to land acquired by the acknowledged abandonment of railroad easement would be neither fair nor logical, and though not properly raised in this case a violation of our state and federal Constitutions.

STATE OF NORTH CAROLINA v. JAMES STEWART McCLEES

No. 912SC819

(Filed 19 January 1993)

1. Rape and Allied Offenses § 19 (NCI3d) — taking indecent liberties with minor — secretly filming child who undressed — what "with" a minor means

Defendant was "with" a minor within the context of N.C.G.S. § 14-202.1(a)(1), and there was no merit to his contention that the statute and subsequent case law required that the victim and defendant have physical contact or be in one

another's physical presence and that the victim must be aware of the perpetrator's presence before an indecent liberty could be taken "with" a child, where defendant, the headmaster of a school, took advantage of an authoritative position of trust by asking the victim to try on basketball uniforms; he strategically placed a camera such that she was unaware of its presence, thereby secretly filming the child as she changed clothes several times; as a result, defendant essentially had the same capability of viewing the victim in a state of undress as he would have had were he physically present in the room; and defendant was therefore constructively present and took immoral, improper or indecent liberties "with" the minor victim.

Am Jur 2d, Infants §§ 15, 17.5.

2. **Rape and Allied Offenses § 19 (NCI3d)— taking indecent liberties with minor—secretly filming child—sufficiency of evidence**

The evidence was sufficient to show that defendant took or attempted to take an immoral, improper, or indecent liberty with a child for the purpose of arousing or gratifying sexual desire by secretly filming the child as she tried on basketball uniforms in his office where the evidence tended to show that the video tape in question also contained a number of other scenes including those of a student using the bathroom and defendant masturbating in the school bathroom; pictures from a file taken from defendant's desk showed a former student sunbathing and pictures of students' faces taped over faces in lingerie ads; and a former student whom defendant also asked to try on uniforms once caught defendant as he appeared to be looking through the key-hole.

Am Jur 2d, Infants § 17.5.

Appeal by defendant from judgment entered 14 March 1991 by Judge William C. Griffin, Jr. in Beaufort County Superior Court. Heard in the Court of Appeals 16 October 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General David N. Kirkman, for the State.

Maynard A. Harrell, Jr. for defendant-appellant.

WYNN, Judge.

Defendant was indicted on 22 October 1990, pursuant to North Carolina General Statute § 14-202.1, for taking and attempting to take immoral, improper, or indecent liberties with N. B., a minor child.

The State's evidence tends to show that in April of 1984, some six years prior to the indictment, defendant was the headmaster of Pongo Christian Academy, located outside of Belhaven, North Carolina. Defendant asked N. B., a fifteen year old female student at the school, to try on some basketball uniforms so he could evaluate them and determine whether to purchase sets for the school team. Defendant placed the uniforms on a desk in his office then left the office while Ms. B. changed. Resting on a shelf in the office, pointed in the direction of the desk, was a video tape camera which was recording at the time. The camera recorded Ms. B. as she removed all of her clothing except her underwear and tried on the uniforms.

Ms. B. testified that she was not aware of the presence of the video camera nor of the tape it produced until 1990 when police showed her the tape. Other evidence submitted by the State will be discussed within the context of our opinion below.

Defendant presented no evidence. At the close of all of the evidence, the defendant moved to dismiss the charges in the indictment. The trial judge denied the motion. Upon the jury verdict of guilty and sentencing to three years imprisonment, defendant appeals.

I.

Defendant's sole assignment of error alleges that the trial court erred in denying his motion for a directed verdict. Defendant contends that the evidence was insufficient to find him guilty of taking indecent liberties with a minor under the North Carolina statute. As a preliminary matter, we note that the defendant did not in fact move for a directed verdict in this criminal action but did move for a dismissal at the close of the State's evidence and again at the close of all evidence.

The test of the sufficiency of the evidence in a criminal prosecution is the same whether the issue is raised by a motion to dismiss, directed verdict or nonsuit. *State v. Moser*, 74 N.C. App. 216,

219, 328 S.E.2d 315, 317 (1985) (citing *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980)). The question before the court is whether, considering the evidence, both competent and incompetent, in the light most favorable to the state, there is substantial evidence of all material elements of the offense charged. *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, 265 S.E.2d 164, 169 (1980).

Defendant contends that the State presented insufficient evidence to prove a violation of N.C.G.S. § 14-202.1(a)(1), which defines the crime of taking indecent liberties with a minor as follows:

> (a) A person is guilty of taking indecent liberties with children if being 16 years of age or more and at least five years older than the child in question, he:
>
> (1) Willfully takes or attempts to take any immoral, improper, or indecent liberties with any child of either sex under the age of 16 years for the purpose of arousing or gratifying sexual desire.

N.C. Gen. Stat. § 14-202.1 (1986). In order to obtain a conviction under this statute, the State must prove (1) the defendant was at least 16 years of age, and more than five years older than the victim, (2) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (3) the defendant willfully took or attempted to take an immoral, improper, or indecent liberty with the victim for the purpose of arousing or gratifying sexual desire. *State v. Strickland*, 77 N.C. App. 454, 456, 335 S.E.2d 74, 75 (1985).

The first two elements are clearly established by the evidence. With respect to the third element, defendant makes two arguments: (1) that the State failed to show that he took an indecent liberty "with" a minor; and (2) that the State failed to show that the taping of the minor in this case was "for the purpose of arousing or gratifying sexual desire." We address each of the defendant's contentions in turn below and conclude that the offensive acts in this case fall within the purview of the statute.

1. Was The Defendant "With" A Minor Within The Context Of N.C.G.S. § 14-202.1 (a)(1)?

[1] The defendant first contends that the statute and subsequent case law require either physical contact or that the victim and the alleged perpetrator be in one another's physical presence and further that the victim must be aware of the perpetrator's presence before an indecent liberty may be taken "with" a child.

This Court has firmly rejected the notion that the words "with any child" require that a defendant actually touch his victim to commit an immoral, improper, or indecent liberty under the statute. *State v. Turman*, 52 N.C. App. 376, 278 S.E.2d 574 (1981). Thus, activity found to fall within the purview of the statute includes the photographing of a naked child in a sexually suggestive pose, *State v. Kistle*, 59 N.C. App. 724, 297 S.E.2d 626 (1982), *disc. rev. denied*, 307 N.C. 471, 298 S.E.2d 694 (1983), masturbation within a child's sight, *Turman*, 52 N.C. App. 376, 278 S.E.2d 574, and a defendant's act of exposing his penis and placing his hand upon it while in close proximity to a child. *State v. Hicks*, 79 N.C. App. 599, 339 S.E.2d 806 (1986). Furthermore, this Court has refused to hold that the words "with any child" require a defendant to be "within a certain distance of, or in close proximity to the child." *Strickland*, 77 N.C. App. at 456, 335 S.E.2d at 75. In *Strickland*, the defendant was masturbating about 62 feet away from two boys and invited them to come over and imitate his activity. This Court held that where the distance was close enough for the children "to see what he was doing and to hear his invitation; and it was close enough for [the] defendant to see them and invite them to imitate his own activity," this was activity contemplated by the statute. *Id.* at 456, 335 S.E.2d at 76.

These decisions recognize the legislative policy inherent in the statute, to provide "children broader protection than available under other statutes proscribing sexual acts." *State v. Etheridge*, 319 N.C. 34, 49, 352 S.E.2d 673, 682 (1987) (citing *State v. Harward*, 264 N.C. 746, 142 S.E.2d 691 (1965)). Moreover, they demonstrate that a variety of acts may be considered indecent and may be performed at varied distances from the victim, yet still be considered "with" a child "for the purpose of arousing or gratifying sexual desire."

Both the North Carolina Supreme Court and the Court of Appeals have addressed the purpose and scope of the indecent liberties statute. The Supreme Court has stated that:

> The evil the legislature sought to prevent in this context was the defendant's performance of any immoral, improper, or indecent act in the presence of a child "for the purpose of arousing or gratifying sexual desire." *Defendant's purpose for committing such an act is the gravamen of this offense*; the particular act is immaterial. It is important to note that the statute does not contain any language requiring a showing of intent to commit an unnatural sexual act. Nor is there any requirement that the State prove that a touching occurred. Rather the State need only prove the taking of any of the described liberties for the purpose of arousing or gratifying sexual desire.

State v. Hartness, 326 N.C. 561, 567, 391 S.E.2d 177, 180-81 (1990) (citation omitted) (emphasis added). *See also State v. Banks*, 322 N.C. 753, 370 S.E.2d 398 (1988). In discussing the protection against sexual deviates the statute seeks to afford children and the reasons for it, this Court stated:

> Undoubtedly [the statute's] breadth is in recognition of the significantly greater risk of psychological damage to an impressionable child from overt sexual acts. We also bear in mind the enhanced power and control that adults, even strangers, may exercise over children who are outside the protection of home or school.

Hicks, 79 N.C. App. at 603, 339 S.E.2d at 809. Applying these principles and considering the wording of the statute, it is clear that the legislature had in mind indecent liberties taken *with* children. "Indecent liberties" are defined as "such liberties as the common sense of society would regard as indecent and improper." Black's Law Dictionary, (6th ed.). The word "with" in the connection in which it is employed in the statute indicates "in the company of: as companion of," Webster's Third New International Dictionary (Unabridged 1968), or "denoting a relation of proximity, contiguity or association." Black's, *supra*. Thus, "indecent liberties *with*" a minor implies an inherent liberty committed in the *presence of the minor*. However, Black's Law Dictionary defines "presence" as:

> [t]he existence of a person in a particular place at a given time particularly with reference to some act done there and then. Besides actual presence, the law recognizes *constructive presence*, which latter may be predicated of a person who, though not on the very spot, was near enough to be accounted

present by the law, or who was actively cooperating with another who was actually present.

Id. (emphasis in original).

In the subject case, defendant took advantage of an authoritative position of trust by asking the victim to try on uniforms so that he could secretly film, and later observe her in a state of undress. Certainly defendant's behavior was such as the common sense of society would regard as indecent and improper. Although the defendant was not actually located in the room with his victim, he strategically placed a camera such that she was unaware of its presence, thereby secretly filming the child as she changed clothes several times at his direction. As a result, he essentially had the same capability of viewing her in a state of undress as he would have had, were he physically present in the room. Through the forces of modern electronic technology, namely the video camcorder, one can constructively place himself in the "presence" of another. Thus we find that defendant was "constructively present" and thereby took immoral, improper or indecent liberties "with" the minor victim.

2. Did The State Present Sufficient Evidence To Establish That The Acts Of The Defendant Were Done For The Purpose Of "Arousing Or Gratifying Sexual Desire"?

[2] Defendant next argues that since no evidence was presented showing that he ever actually viewed the video tape which depicted N. B. changing clothes, there was no evidence proving that he acted "for the purpose of arousing or gratifying sexual desire." However, the video tape in question also contained a number of other scenes which were admitted into evidence over the defendant's objection. Among those, was a scene showing the defendant setting up the camera in a small bathroom in the school. It showed an unidentified young woman rushing in the bathroom and using the toilet. The tape also contained two scenes showing the defendant masturbating, one of which showed him calling out the name "Donna" while viewing a video tape, and the other as he sat on the toilet in a school bathroom. Another scene showed a female student's buttocks as she used the telephone in defendant's office. Moreover, the State introduced evidence of pictures taken from a file in defendant's desk at the school. One picture showed a former student, D. B., sitting beside a river wearing a bathing suit. Some of the pictures were from pages of the lingerie section

of an Avon products catalogue, with pictures of the faces of certain female students from the school taped over the faces of the lingerie models. One of the faces taped over the face of a model was D. B.'s, a 1985 graduate of Pongo Academy, who testified that the defendant often asked her to go into the coach's office or the headmaster's office for the purpose of trying on uniforms. The State elicited further testimony that the defendant had frequently asked other female students at the school to try on uniforms. One student testified that in the process of trying on a uniform she opened the door to ask the defendant a question and was stunned to find the defendant leaning over as if looking through the key-hole.

This evidence may be considered to determine whether the defendant acted for the purpose of arousing or gratifying sexual desire. "A defendant's purpose being a mental attitude, is seldom provable by direct evidence and must ordinarily be proved by inference." *State v. Campbell*, 51 N.C. App. 418, 421, 276 S.E.2d 726, 729 (1981). *See Etheridge*, 319 N.C. at 49, 352 S.E.2d at 682 (jury could properly infer that defendant did certain acts for the purpose of arousing or gratifying his sexual desire). Given all of the State's evidence introduced at trial, the jury could properly infer that defendant set up a video camera in his office, placed uniforms on his desk in front of the camera and asked the child to go into his office and try on uniforms to film her in a state of undress for the purpose of arousing or gratifying his sexual desire.

We conclude that the State's evidence, taken in the light most favorable to the State, fell within the purview of the statute and sufficed to show that defendant took or attempted to take an immoral, improper, or indecent liberty with a child for the purpose of arousing or gratifying sexual desire. Accordingly, the trial court properly denied defendant's motion to dismiss.

No error.

Judges GREENE and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

WILLIAM R. MOORE, PLAINTIFF v. BETTY EVANS MOORE, DEFENDANT

No. 9115DC1015

(Filed 19 January 1993)

1. **Divorce and Separation § 4 (NCI4th) — separation agreement — proper acknowledgment**

In a declaratory judgment action brought by plaintiff to have a separation agreement declared null and void on the ground that the agreement had not been properly acknowledged in violation of the requirements of N.C.G.S. § 52-10.1 and N.C.G.S. § 52-10(b), the trial court properly entered summary judgment for defendant, even though the parties did not agree on whether the notary was present in the room at the time of the signing, since, to impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred, and plaintiff never asserted that the actual signature on the agreement was other than his own.

Am Jur 2d, Divorce and Separation § 820.

2. **Divorce and Separation § 37 (NCI4th); Estoppel § 15 (NCI4th) — validity of notarization on separation agreement — acceptance of benefits under agreement — estoppel to assert invalidity**

Even if the notarization on the parties' separation agreement could be deemed invalid due to a technical statutory violation, plaintiff was estopped from asserting its invalidity, since he treated it as valid for two years without complaint and enjoyed the benefits of the agreement.

Am Jur 2d, Divorce and Separation § 836.

Judge GREENE dissenting.

Appeal by plaintiff from order entered 14 May 1991 by Judge William A. Vaden in Alamance County District Court. Heard in the Court of Appeals 17 November 1992.

Tuggle Duggins & Meschan, P.A., by Carolyn J. Woodruff and J. Reed Johnston, Jr., for plaintiff appellant.

Abernathy, Roberson & Huffman, by G. Wayne Abernathy, for defendant appellee.

COZORT, Judge.

Plaintiff-husband, William J. Moore, originally filed a declaratory judgment action on 18 June 1987 to have a separation agreement entered into with defendant-wife, Betty Evans Moore, declared null and void on the grounds that the agreement had not been properly acknowledged in violation of the requirements of N.C. Gen. Stat. § 52-10.1 and N.C. Gen. Stat. § 52-10(b). Plaintiff claims the agreement violated these statutory provisions because a notary public did not witness him sign the agreement, nor did plaintiff acknowledge his signature to the notary. Defendant denied the invalidity of the agreement and raised affirmative defenses of estoppel, waiver, and ratification. Defendant counterclaimed for specific performance of the agreement.

The trial court granted defendant's motion for partial summary judgment against plaintiff on the issue of the validity of the separation agreement on 17 November 1987. The plaintiff appealed the ruling to this Court. The appeal was dismissed as being interlocutory. On 14 May 1991, an order and final judgment was entered on defendant's counterclaim to specifically enforce the separation agreement. Plaintiff again appeals the trial court's entry of summary judgment in defendant's favor and claims that the separation agreement was invalid.

Summary judgment is properly rendered where the pleadings, depositions, interrogatories, admissions, and submitted affidavits demonstrate there is no genuine issue as to a material fact and that a party is entitled to judgment as a matter of law. *Johnson v. Phoenix Mut. Ins. Co.*, 300 N.C. 247, 266 S.E.2d 610 (1980).

The pleadings, affidavits, and other documents before the court for summary judgment purposes show that plaintiff and defendant married on 18 March 1967. On 2 April 1985, they entered into a separation and property settlement agreement. The separation agreement was prepared by attorney Robert J. Wishart who represented the defendant throughout the negotiation and preparation of the agreement. The parties went together to Wishart's office in Burlington, North Carolina, on 2 April 1985 to execute the agreement. The parties met with Mr. Wishart in a conference room to review and sign several documents. According to all of the submitted affidavits, Mr. Wishart was accompanied by Tracey King, an employee in his office.

Plaintiff's affidavit and two supplemental affidavits indicate that Ms. King, the notary, was in and out of the conference room preparing additional paperwork necessary to execute one of the quit-claim deeds the parties were to sign. Plaintiff's affidavit states:

> I further did not acknowledge my signature of any separation and property settlement agreement to any person. . . . The notary public who notarized the purported separation and property settlement agreement was not present at any time during the signing of the purported separation and property settlement agreement by either Ms. Moore or myself, nor did I at any time acknowledge the due execution and/or execution of the document to said notary public nor to any notary public.

Defendant's affidavit and that of Tracey King indicate that Ms. King was physically present when the separation and property settlement agreement was signed by the parties. Defendant's affidavit states, "I clearly remember Ms. King being in the room when we each signed the Separation and Property Settlement Agreement. She notarized these documents as well as other property documents which were dealt with in the Separation and Property Settlement Agreement." Ms. King's affidavit states: "I remember taking my notary seal into the law firm conference room and witnessing both Mr. and Mrs. Moore sign several documents. To the best of my recollection, the documents included some real estate documents and two copies of a Separation Agreement."

N.C. Gen. Stat. § 52-10.1 (1991) states that a separation agreement "must be in writing and acknowledged by both parties before a certifying officer as defined in G.S. 52-10(b). Such certifying officer must not be a party to the contract." A certifying officer "shall be a notary public, or a justice, judge, magistrate, clerk, assistant clerk or deputy clerk of the General Court of Justice . . . ." N.C. Gen. Stat. § 52-10. If a separation agreement is improperly executed, it is void *ab initio*. *Lawson v. Lawson*, 321 N.C. 274, 362 S.E.2d 269 (1987).

[1] We find the trial court's entry of summary judgment for defendant was not error even though the parties do not agree on whether the notary was present in the room at the time of signing. Plaintiff has failed to advance a *genuine* issue of material fact which would justify going forward with a trial on the issue of the validity of the separation agreement.

Plaintiff's evidence does not overcome the presumption of legality of execution created by the notarization of the separation agreement. North Carolina recognizes a presumption in favor of the legality of an acknowledgment of a written instrument by a certifying officer. *See, i.e., Skinner v. Skinner*, 28 N.C. App. 412, 222 S.E.2d 258, *disc. review denied*, 289 N.C. 726, 224 S.E.2d 674 (1976). To impeach a notary's certification, there must be more than a bare allegation that no acknowledgment occurred. In *Skinner*, for example, the defendant challenged the plaintiff's verification of his Rule 11 complaint. This Court stated:

> There was no showing that plaintiff did not in fact sign the verification, and nothing in the record suggests that the signature which appears thereon was not in fact his signature. The certificate to the verification signed by the notary public and attested by her seal certifies that the verification was "[s]worn to and subscribed" before her, and nothing in the record impeaches that certification.

Id. at 414, 222 S.E.2d at 261. Here, plaintiff never asserts that the actual signature on the agreement is other than his own—he suggests only a technical violation of N.C. Gen. Stat. § 52-10.1. He does not bring forth sufficient evidence to overcome the presumption created in favor of the validity of the acknowledgment.

[2] Finally, even if the notarization could be deemed invalid due to the technical statutory violation, plaintiff is estopped from asserting its invalidity.

> The doctrine of estoppel rests upon principles of equity and is designed to aid the law in the administration of justice when without its intervention injustice would result. The rule is grounded in the premise that it offends every principle of equity and morality to permit a party to enjoy the benefits of a transaction and at the same time deny its terms or qualifications.

Thompson v. Soles, 299 N.C. 484, 486-87, 263 S.E.2d 599, 602 (1980) (citations omitted). Having chosen to recognize the agreement by treating it as valid for two years without complaint, plaintiff has been permitted to enjoy the benefits of the agreement. He now pursues a course to overturn it. Equity dictates the result consistent with the trial court's judgment.

Affirmed.

Judge WALKER concurred in the opinion prior to 8 January 1993.

Judge GREENE dissents.

Judge GREENE dissenting.

I agree that there exists a presumption that a notary acknowledgment, if complete and regular on its face, is true as to the facts stated therein. *Lee v. Rhodes*, 230 N.C. 190, 193, 52 S.E.2d 674, 676 (1949). This presumption, however, does not arise until the person executing the instrument has appeared before the certifying officer and made an acknowledgment of the instrument. *Id.; see also Lawson v. Lawson*, 321 N.C. 274, 278, 362 S.E.2d 269, 272 (1987). Herein lies the source of my disagreement with the majority's conclusion that the trial court properly granted summary judgment in favor of defendant.

Plaintiff's evidence establishes that, although a notary public was present when he and defendant executed *some* documents in connection with their separation, the notary was not present when the parties executed the purported separation agreement, nor did either party thereafter, before the notary, acknowledge his signature on it. Nevertheless, a certificate of acknowledgment appears on the document. "A certificate of acknowledgment may always be impeached . . . by showing that the grantor or other person executing the instrument in question never appeared before the officer purporting to take the acknowledgment, and never actually acknowledged the instrument." 1 Am. Jur. 2d, *Acknowledgments* § 99 (1962); *cf. Lee*, 230 N.C. at 193, 52 S.E.2d at 676 (general rule is that *where grantor has appeared and made some kind of acknowledgment before certifying officer*, a certificate regular in form cannot be impeached by merely denying that acknowledgment was taken in manner certified (emphasis added)). Thus, because proper acknowledgment by both parties before a certifying officer is a prerequisite to the validity of a separation agreement, N.C.G.S. § 52-10.1 (1991), plaintiff's evidence presents a genuine issue of material fact as to the validity of the separation agreement at issue, and therefore summary judgment for defendant was improperly granted by the trial court.

I also disagree with the majority's conclusion that plaintiff is estopped from asserting the invalidity of the purported separation agreement by virtue of his "having chosen to recognize the agreement by treating it as valid for two years without complaint." An improperly executed separation agreement is void *ab initio*, *Lawson*, 321 N.C. at 277, 362 S.E.2d at 271, and provides no basis for estoppel. *Bolin v. Bolin*, 246 N.C. 666, 669, 99 S.E.2d 920, 922-23 (1957). I am, however, of the opinion that, if on remand the purported agreement was determined to be void for lack of proper acknowledgment, plaintiff would, under the general principles set forth in *Harroff v. Harroff*, 100 N.C. App. 686, 692, 398 S.E.2d 340, 344-45 (1990), *disc. rev. denied*, 328 N.C. 330, 402 S.E.2d 833 (1991), be estopped from pleading N.C.G.S. § 50-11 as a bar to any claim by plaintiff for alimony or equitable distribution.

Based on the foregoing, I would reverse the order of the trial court granting summary judgment for defendant.

STATE OF NORTH CAROLINA v. LONNIE DWAYNE O'NEAL

No. 9119SC940

(Filed 19 January 1993)

1. Arrest and Bail § 151 (NCI4th)— pretrial release—written record for basis not required

The law concerning pretrial release does not require a written record by the judicial official imposing pretrial release, though it does require the official to consider specific factors in determining which condition is appropriate for a particular defendant. N.C.G.S. § 15A-534.

Am Jur 2d, Bail and Recognizance § 7; Criminal Law § 419.

Application of state statutes establishing pretrial release of accused on personal recognizance as presumptive form of release. 78 ALR3d 780.

2. Arrest and Bail § 196 (NCI4th)— amount of bond not excessive

A $50,000 secured bond was not excessive and violative of defendant's constitutional rights where defendant was arrested for selling cocaine to an undercover detective; his bond

had been reduced on one occasion; the "Official Policies on Pretrial Release" provided only suggested bonds, not mandatory guidelines for determining the amount of a bond; and nothing in the record indicated that the trial judge abused his discretion in refusing to further reduce the bond.

Am Jur 2d, Bail and Recognizance §§ 73, 77, 84.

Supreme Court's construction and application of provision of Federal Constitution's Eighth Amendment that excessive bail shall not be required. 95 L. Ed. 2d 1010.

3. Constitutional Law § 367 (NCI4th)— consecutive sentences for maximum terms—no cruel and unusual punishment

Consecutive sentences for the maximum term for each of two convictions did not constitute cruel and unusual punishment.

Am Jur 2d, Criminal Law § 629.

Appeal by defendant from Judgment entered 2 January 1991 in Cabarrus County Superior Court by Judge James C. Davis. Heard in the Court of Appeals 12 November 1992.

Attorney General Lacy H. Thornburg, by Associate Attorney General Robert R. Gelblum, for the State.

Plummer, Belo & Russell, P.A., by Vernon A. Russell, for defendant-appellant.

WYNN, Judge.

The defendant was arrested on 4 June 1990 on two counts of Possession With Intent to Sell or Deliver Cocaine, two counts of Sale or Delivery of Cocaine, and two counts of Conspiracy to Sell or Deliver Cocaine. Bail was originally set at $75,000, secured, and later, pursuant to a motion by the defendant on 9 July 1990, was reduced to $50,000, secured. The defendant was unable to post the required bond and, therefore, made subsequent motions to have his bond reduced further, alleging that his incarceration interfered with his ability to develop his defense. These motions were denied and, consequently, the defendant remained incarcerated under the $50,000 secured bond until trial on 2 January 1991.

A jury found the defendant guilty of Possession With Intent to Sell or Deliver less than one gram of Cocaine and Sale or Delivery of less than one gram of Cocaine. He was sentenced to two consecutive ten-year prison terms and fined $20,000.

I.

The defendant first assigns error to the amount of bail set as a condition of his pretrial release, alleging that it was excessive and his motions to reduce it should have been allowed. In support of this contention he argues that A) the trial court improperly applied the law concerning pretrial release, and B) the amount of the bond violated both the North Carolina and United States Constitutions. We disagree.

A. The Law Concerning Pretrial Release

[1] Defendants who are charged with noncapital offenses "must have conditions of pretrial release determined, in accordance with G.S. 15A-534." N.C. Gen. Stat. § 15A-533(b) (1988). Section 15A-534 requires the judicial official who is determining pretrial release to impose one of four conditions:

> (1) Release the defendant on his written promise to appear.
>
> (2) Release the defendant upon his execution of an unsecured appearance bond . . . .
>
> (3) Place the defendant in the custody of a designated person or organization agreeing to supervise him.
>
> (4) Require the execution of an appearance bond in a specified amount secured by a cash deposit . . ., by a mortgage . . ., or by at least one solvent surety.

Id. § 15A-534(a)(1-4) (1992). If the judicial official imposes the fourth option, a secured bond, he must first determine that the other options "will not reasonably assure the appearance of the defendant as required; will pose a danger of injury to any person; or is likely to result in destruction of evidence, subornation of perjury, or intimidation of potential witnesses." *Id.* § 15A-534(b). The statute further requires the judicial official to consider the following in determining which of the four conditions is appropriate for a particular defendant:

> the nature and circumstances of the offense charged; the weight of the evidence against the defendant; the defendant's family

> ties, employment, financial resources, character, and mental condition; whether the defendant is intoxicated to such a degree that he would be endangered by being released without supervision; the length of his residence in the community; his record of convictions; his history of flight to avoid prosecution or failure to appear at court proceedings; and any other evidence relevant to the issue of pretrial release.

Id. § 15A-534(c). While it is clear from the statute that the judicial official imposing pretrial release must consider these factors, it is less certain what record he must make of his considerations. In *State v. Knoll*, 322 N.C. 535, 369 S.E.2d 558 (1988), the record appears to have contained specific findings of fact by the trial court regarding the conduct of the magistrate in setting bail. Based on these findings, our Supreme Court concluded that the statute had been violated to the detriment of the defendants. *Id.* at 545-47, 369 S.E.2d at 564-65. This Court, in *State v. Overton*, 60 N.C. App. 1, 298 S.E.2d 695 (1982), *disc. rev. denied, appeal dismissed*, 307 N.C. 580, 299 S.E.2d 652, 307 N.C. 581, 299 S.E.2d 652, and 307 N.C. 581, 299 S.E.2d 653 (1983), noted that the judicial official determining the conditions of pretrial release was required to consider the factors in N.C. Gen. Stat. § 15A-534(c), but made no indication that a *written* record of that consideration existed, nor that the lack of such a writing would warrant the conclusion that the factors had not been properly considered. *Id.* at 32-33, 298 S.E.2d at 714 (based on the statutory factors, $1 million bail was not unreasonable for conspiracy to manufacture, to sell or deliver, or to possess heroin).

The only statutory reference to a written record provides that a judicial official who determines that a secured bond is the appropriate condition of pretrial release is required to record his reasons for making such a determination "in writing *to the extent provided in the policies or requirements issued by the senior resident superior court judge* pursuant to G.S. 15A-535(a)." N.C. Gen. Stat. § 15A-534(b) (emphasis added). Section 15A-535(a) requires each senior resident superior court judge to "devise and issue recommended policies to be followed . . . in determining whether, and upon what conditions, a defendant may be released before trial . . . . " *Id.* § 15A-535(a). The statute does not require these policies to mandate a written record of the reasons a secured bond was imposed, but rather that the senior resident superior court judge "*may* include in such policies, or issue separately, a requirement

that each judicial official who imposes condition (4) in G.S. 15A-534(a) must record the reasons for doing so in writing." *Id.* (emphasis added).

The defendant in the present case correctly asserts that the record is devoid of any written findings regarding the imposition of the secured bond, and there is no indication that the trial judge considered the factors in N.C. Gen. Stat. § 15A-534(c) when he established the conditions of the defendant's pre-trial release. The "Official Policies on Pretrial Release" relevant to the present case, however, require no written record of the reasons for imposing a secured bond, and, thus, no such record exists for our review. Moreover, section 15A-534(c) requires the judicial official to consider the factors listed but does not require him to keep a written record of such consideration. We are, therefore, not willing to conclude, as the defendant contends, that the absence of such findings in the record indicates noncompliance with the statute. The defendant offers only the trial judge's comments at a pretrial hearing on 4 December 1990 in support of his contention that the trial judge failed to consider all required statutory factors when ruling on the defendant's motions to reduce his bond. These comments were made as a result of the judge's decision that the defendant had not been deprived of his constitutional right to a speedy trial. Neither the transcript from that hearing, nor anything else in the record, indicates that the judge *did not* consider the appropriate factors in either the initial establishment of the bond, in the later modification, or in subsequent refusals to modify. Absent some evidence to the contrary from the defendant, we must conclude that the law relating to pretrial release was properly applied to him.

B. Constitutional Prohibition Against Excessive Bail

[2] The defendant also argues that the bond violates the North Carolina and United States Constitutions. Both provide that "[e]xcessive bail shall not be required." N.C. Const., Art. 1, sec. 27; U.S. Const., 8th Amend. The defendant contends that because the $50,000 secured bond was higher than would have been calculated according to the recommendations in the "Official Policies on Pretrial Release" it was higher than necessary to reasonably assure the defendant's appearance and, therefore, necessarily violated his constitutional rights. The "Official Policies on Pretrial Release," however, provide *suggested* bonds, not mandatory guidelines for determining

the amount of a bond. In fact, the "Official Policies on Pretrial Release" specifically state that "[t]he circumstances of each individual case will govern each decision; and the magistrate will select a bond amount that is appropriate and indicated by using the same [criteria set forth in N.C. Gen. Stat. § 15A-534(c)] used to determine the form of release." Again, the defendant points to no evidence in the record, nor does this Court find any, in support of his contention that the statutory criteria were not considered in setting the amount of the bond.

In *State v. Jones*, 295 N.C. 345, 245 S.E.2d 711 (1978), our Supreme Court determined that a $30,000 appearance bond did not violate the Constitutional provision against excessive bail where the defendant was charged with armed robbery and, if convicted, faced a sentence of at least five years in prison and at most life imprisonment. The *Jones* Court recognized that $30,000 was much higher than the usual bond in such cases but cited the evidence in the case, two eyewitnesses to the crime and the defendant's possession of the fruits of the robbery, and the fact that the bond had been reduced twice pursuant to earlier motions by the defendant, in determining that the motion to reduce the bond had been given fair consideration and was not arbitrarily denied. *Id.* at 355-56, 245 S.E.2d at 717. The defendant in the present case was arrested for selling cocaine to an undercover detective and his bond had been reduced on one prior occasion. Nothing in the record indicates that the trial judge abused his discretion in refusing to further reduce the bond. We, therefore, find no basis upon which to conclude the $50,000 bond was excessive and violative of the defendant's constitutional rights.

Moreover, while the defendant asserts that "his inability to meet the bond requirements imposed by the court substantially interfered with the preparation of a defense to the charge against him," such a claim of prejudice "will not be sustained on mere 'unsupported and conclusory allegations.' " *Id.* (quoting *McCabe v. North Carolina*, 314 F.Supp. 917 (M.D.N.C. 1970)). Thus, even assuming *arguendo* that the law of pretrial release was not properly applied to the defendant's case or that the amount of his bond exceeded constitutional limits, the defendant would still not be entitled to have his conviction overturned. The defendant having set forth no support for his contentions in the record, this Court is required to overrule his assignment of error.

II.

[3] The defendant also assigns error to the sentence imposed by the trial court, alleging that consecutive sentences for the maximum term for each conviction constitutes cruel and unusual punishment. We disagree. There is ample case law to support such sentencing by the trial court. "[S]entences that are within the statutory limits and impose consecutive sentences do not constitute cruel and unusual punishment." *State v. Handsome*, 300 N.C. 313, 317, 266 S.E.2d 670, 674 (1980) (defendant sentenced to life for kidnapping, twenty years for assault with intent to kill inflicting serious bodily injury and not less than ten years, nor more than fifty years for robbery with a firearm, the latter two sentences to begin upon completion of the life sentence). The defendant in the case at bar received sentences that were within the relevant statutory limits. *See* N.C. Gen. Stat. §§ 90-95(b)(1), 14-1.1(a)(8). There is, therefore, no merit to his contention that the sentences constitute cruel or unusual punishment. This assignment of error is overruled.

The defendant failed to address his remaining assignment of error in his brief. This Court, therefore, deems it abandoned.

For the foregoing reasons we find

No Error.

Judges GREENE and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

LINDA SORRELLS AND HUSBAND, RONALD E. SORRELLS v. M.Y.B. HOSPITALITY VENTURES OF ASHEVILLE, D/B/A RHAPSODY'S FOOD AND SPIRITS

No. 9130SC1016

(Filed 19 January 1993)

1. **Intoxicating Liquor § 43 (NCI4th); Negligence § 19 (NCI3d)—alcohol consumed by son—son killed—parents' action against server for emotional distress—no derivative action—son's negligence not imputed to parents**

A claim for negligent infliction of emotional distress suffered by plaintiff parents when their son consumed alcoholic beverages at defendant's place of business and subsequently died when the car he was driving crashed was an independent claim of the plaintiffs, not a claim belonging to the decedent and asserted by the plaintiffs; therefore, the claim was not derivative, and the negligence of decedent accordingly was not imputed to plaintiffs and did not bar their claim against defendant.

Am Jur 2d, Negligence §§ 1781, 1782.

2. **Intoxicating Liquor § 43 (NCI4th); Negligence § 1.1 (NCI3d)—alcohol served to son—son killed—emotional distress to parents—foreseeability**

In plaintiffs' action for negligent infliction of emotional distress resulting from their son's death and mutilation in an automobile accident which occurred after the son consumed alcohol at defendant's place of business, it was for the jury to determine whether any emotional distress sustained by plaintiffs was foreseeable by defendant.

Am Jur 2d, Negligence § 443.

Judge COZORT dissenting.

Appeal by plaintiffs from order entered 5 July 1991 in Haywood County Superior Court by Judge Joseph R. John, Sr. Heard in the Court of Appeals 17 November 1992.

McLean & Dickson, P.A., by Russell L. McLean, III, for plaintiff-appellants.

Harrell & Leake, by Larry Leake, for defendant-appellee.

GREENE, Judge.

Plaintiffs appeal from the entry of an order of dismissal granting defendant's Rule 12(b)(6) motion to dismiss their complaint for negligent infliction of emotional distress.

In the complaint, plaintiffs allege that they are the parents of Travis Cain Sorrells (Travis), who was killed in an automobile accident on or about 21 May 1990. At the time of his death he was twenty-one years old and a student at Haywood Community College. On the evening Travis was killed, he and several of his friends had been drinking "beer and . . . tequila" at Rhapsody's Food and Spirits, defendant's place of business. Plaintiffs allege that defendant was negligent in that its employees continued to serve alcoholic beverages to Travis after they were made aware that Travis had had too much to drink and would be driving himself home. Travis was killed in a one-car accident as he was driving home from defendant's business. Plaintiffs further allege that when they learned of their son's accident and that "his body [had been] mutilated," it "had a devastating emotional effect upon [them] and constitutes mental anguish and suffering." Plaintiffs, alleging negligent infliction of emotional distress, claim they "have suffered such injury as sickness, helplessness, frailty and have undergone much grief, worry, loss of enjoyment of life, a wrecked nervous system, depression and emotional grief." Finally, plaintiffs allege that it was reasonably foreseeable that defendant's conduct would cause plaintiffs emotional distress.

The defendant argues on appeal that the dismissal of the complaint can be supported on either of two grounds. First, that the negligence of Travis, who drove his vehicle upon the highways after voluntarily consuming alcohol, is imputed to plaintiffs and thus bars their claim for emotional distress. Second, that any emotional distress sustained by plaintiffs was not reasonably foreseeable by defendant and thus not recoverable against defendant.

The issues presented are (I) whether the negligence of the decedent driver is imputed to the plaintiffs in their action for emotional distress, thus barring their claim; and (II) whether any emotional distress sustained by the plaintiffs, as alleged in the complaint, was foreseeable by defendant.

I

[1] Our Supreme Court has recently made clear that "a willing consumer of alcohol [who drives] his vehicle while highly intoxicated" is contributorily negligent as a matter of law, thus barring any claim by the "willing consumer" against the server of the alcohol for injuries sustained while operating the vehicle. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 332 N.C. 645, 648, 423 S.E.2d 72, 73-74 (1992). Furthermore, because any wrongful death action on behalf of the decedent driver is derivative, the negligence of the decedent driver is imputed to the fiduciary of the estate of the decedent, and thus bars any wrongful death claim on behalf of the decedent. *Carver v. Carver*, 310 N.C. 669, 673, 314 S.E.2d 739, 742 (1984). Whether the parents of this decedent are likewise barred from claiming emotional distress sustained as a consequence of the death of their child is a matter of first impression in North Carolina.

The general rule is that a party's action for damages "will not be barred by the negligence of any third person who may have contributed to them." W. Page Keeton et al., *Prosser and Keeton on the Law of Torts* § 74, at 529 (5th ed. 1984) [hereinafter *Prosser and Keeton*]; Restatement (Second) of Torts § 485 (1965). Thus, the general rule rejects the doctrine of imputed contributory negligence. Many jurisdictions, however, including North Carolina, continue to recognize the wrongful death action as an exception to this general rule. *Carver*, 310 N.C. at 673, 314 S.E.2d at 742 (negligence of decedent imputed to fiduciary of estate in wrongful death action); *see* Restatement (Second) of Torts § 485 cmt. b, illus. 4 (1965). Another common exception imputes the negligence of the servant to the master. *See Olympic Products Co. v. Roof Systems, Inc.*, 88 N.C. App. 315, 335, 363 S.E.2d 367, 378-79, *disc. rev. denied*, 321 N.C. 744, 366 S.E.2d 863 (1988); Restatement (Second) of Torts § 485 cmt. b, illus. 1 (1965). Although there does not exist a formal test for determining when to deviate from the general rule against imputation of negligence, some commentators have observed that contributory negligence should be imputed only when "the relation between [the plaintiff and the third party] is such that the plaintiff would be vicariously liable as a defendant to another who might be injured [by the third party]." *Prosser and Keeton* at 530.

In this case, the pleadings do not suggest that plaintiffs would have had any vicarious liability for the negligence of Travis had Travis caused harm to some third person. Furthermore, plaintiffs' claim for emotional distress is an independent claim of the plaintiffs, not a claim belonging to the decedent and asserted by the plaintiffs. Therefore, the claim is not derivative. *See* 4 Fowler V. Harper et al., *The Law of Torts* § 23.8, at 445-46 (1986). Accordingly, the negligence of Travis is not imputed to the plaintiffs and does not bar their claim against the defendant for emotional distress.[1] To hold otherwise would be a "questionable extension of the least defensible rule (contributory negligence) among the concepts associated with fault." *Id.* at 447. Therefore, the order of the trial court dismissing the complaint on this ground must be reversed.

II

[2] In order to state a claim for negligent infliction of emotional distress, plaintiffs must allege that "(1) the defendant negligently engaged in conduct, (2) it was reasonably foreseeable that such conduct would cause the plaintiff severe emotional distress . . . , and (3) the conduct did in fact cause the plaintiff severe emotional distress." *Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A.*, 327 N.C. 283, 304, 395 S.E.2d 85, 97 (1990). Although the question of whether an injury was foreseeable is for the jury, the trial judge, where it is contended that plaintiff's injuries are too remote, must make an initial determination that the injury was not too remote as a matter of law. *See Johnson v. Ruark Obstetrics and Gynecology Assocs., P.A.*, 89 N.C. App. 154, 164, 365 S.E.2d 909, 915 (1988), *aff'd*, 327 N.C. 283, 395 S.E.2d 85 (1990). In making this determination, the trial judge is required to decide whether the defendant was legally exempt from foreseeing the plaintiff's injuries. *Id.* Factors to be considered by the trial judge include whether the injury is reasonably close in both time and location to the defendant's act, the relationship between the plaintiff and the person for whom the plaintiff is concerned, whether the plaintiff actually observed the negligent act, whether recovery would place an unreasonable burden upon those engaged in ac-

1. As it is not raised by the parties in this appeal, we need not address the defendant's possible right to seek contribution from Travis' estate. *See* N.C.G.S. § 1B-1 to -7 (1983) (right of pro-rata contribution among parties jointly and severally liable for same tort injury).

tivities similar to that of the defendant, whether recovery would likely open the way for fraudulent claims, and whether, in retrospect, it is too highly extraordinary that the act of the tort-feasor caused the injury. *See Wyatt v. Gilmore*, 57 N.C. App. 57, 62, 290 S.E.2d 790, 793 (1982); *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98.

In this case, plaintiffs allege that defendant was negligent, that they sustained emotional distress as a proximate cause of defendant's negligence, and that the emotional distress was reasonably foreseeable by defendant. The pleadings further reveal that plaintiffs learned of their son's death sometime soon after the accident. Although there are no allegations that plaintiffs were present at the scene of the accident or that they saw the body soon after death, *see Gardner v. Gardner*, 106 N.C. App. 635, 639, 418 S.E.2d 260, 263 (1992) (mother allowed to recover damages for emotional distress where she saw mortally injured child soon after accident), the pleadings are adequate to withstand the motion to dismiss. We are not prepared to hold as a matter of law that any severe emotional distress sustained by the parents of a twenty-one-year-old son, after learning that their son had been killed in a serious automobile accident and his body mutilated, is not foreseeable by a defendant who negligently serves alcohol to the son, which was a proximate cause of the son's death. Consequently, the question of foreseeability is one for the jury in this case. The trial judge therefore erred in dismissing the claim on the ground that plaintiffs' injury was not foreseeable by the defendant as a matter of law.

Accordingly, the order dismissing the complaint is

Reversed and remanded.

Judge WALKER concurs.

Judge COZORT dissents with separate opinion.

Judge WALKER concurred in this opinion prior to 8 January 1993.

Judge COZORT dissenting.

I vote to affirm the trial court's order dismissing the complaint. I agree that plaintiffs' claim for emotional distress is an independ-

ent claim of plaintiffs and not derivative, and I also concur with the majority that Travis' negligence is not imputed to the plaintiffs. Nonetheless, I do not find it proper to allow such a claim when plaintiffs' alleged emotional distress is caused as much by their son's negligence as it is alleged to have been caused by the negligence of defendant. I believe plaintiffs' claim is barred by their son's contributory negligence.

In coming to this conclusion, I am not unmindful of the broad language describing the claim of negligent infliction of emotional distress found in our Supreme Court's opinion in *Johnson v. Ruark*, 327 N.C. 283, 395 S.E.2d 85 (1990). I believe, though, that there must be some limitation to that cause of action, and I find that the decedent's contributory negligence puts his parents' claim beyond the limit.

STATE OF NORTH CAROLINA v. ALTON EARL MORGAN

No. 9118SC830

(Filed 19 January 1993)

1. **Criminal Law § 991 (NCI4th)— setting aside guilty verdict— entry of not guilty verdict improper**

Though the district court could properly set aside a guilty verdict, it could not thereafter enter a verdict of not guilty; rather, the case must be remanded for a new trial.

Am Jur 2d, Appeal and Error § 963.

2. **Criminal Law § 1680 (NCI4th)— sentence unsupported by evidence—authority of judge to vacate and resentence**

Upon a determination that defendant's original sentence was not supported by the evidence, the sentencing district court judge clearly had the authority, two days after sentence was imposed, to vacate the sentence pursuant to N.C.G.S. § 15A-1414(b)(4) and to resentence defendant pursuant to N.C.G.S. § 15A-1417(c).

Am Jur 2d, Criminal Law § 580.

Appeal by the State from Orders entered 16 November 1990 and 7 March 1991 by Judge Joseph E. Turner in Guilford County District Court. Heard in the Court of Appeals 16 October 1992.

Lacy H. Thornburg, Attorney General, by Isaac T. Avery, III, Special Deputy Attorney General, for the State.

Mark B. Campbell for defendant-appellee.

WYNN, Judge.

The defendant Alton Earl Morgan was arrested for Driving While Impaired ("DWI") on 12 May 1990 at 11:30 p.m. He was taken before a magistrate where he signed a written promise to appear and surrendered his license as conditions of his pretrial release. Upon being released Mr. Morgan drove his truck and was charged, on 13 May 1990 at 1 a.m., with a second DWI and also with Driving While License Revoked ("DWLR").

The defendant pleaded not guilty to all three charges, but on 14 November 1990 was convicted of all three in district court. He received a Level Five punishment with respect to the first DWI, a Level Two punishment for the second DWI, and was sentenced to thirty days in jail for the DWLR, which sentence was suspended for three years conditioned on his paying a two-hundred dollar fine and not operating a motor vehicle without a valid driver's license. He immediately appealed these convictions to the Superior Court.

On 16 November 1990, the district court judge signed an Order which 1) set aside the verdict and judgment entered in the second DWI charge and entered a not guilty verdict for that charge, and 2) set aside the judgment in the DWLR charge and resentenced the defendant by entering a Prayer for Judgment Continued on that charge. On 4 December 1990, the State filed a motion to set aside the Order Setting Aside the Verdict and Judgments. This motion alleged that the district court did not have jurisdiction to hear the original motion because the defendant had filed a notice of appeal and also alleged that the State was not given proper notice nor an opportunity to be heard prior to the district court decision. In response to this motion, the district court judge held a hearing and, on 7 March 1991, denied the State's motion and entered an Order identical to the one entered on 16 November 1990.

On 10 May 1991 this Court entered an Order denying the State's petition for writ of mandamus and allowing the petition for writ of certiorari to the orders entered by the district court judge on 16 November 1990 and 7 March 1991.

I.

[1] The State first assigns error to the district court judge's entering a not guilty verdict after he had set aside the original verdict of guilty with respect to the second DWI charge. In support of this contention, the State argues that the district court judge did not have the authority to take such action. We find that, while a trial court may set aside properly a guilty verdict, it is improper under the facts of this case for the trial court to thereafter enter a verdict of not guilty.

A trial judge may set aside a guilty verdict that is contrary to the weight of the evidence pursuant to a motion by the defendant, N.C. Gen. Stat. § 15A-1414(a) (1988), or upon its own motion whenever the defendant is entitled to relief. *Id.* § 15A-1420(d). The record offers conflicting explanations regarding how the motion in the instant case came about, but regardless of whether the defendant moved for appropriate relief or the district court judge granted such relief on his own motion, the action taken was proper. A motion to set aside a verdict on the grounds that it is contrary to the weight of the evidence is within the discretion of the trial court. *State v. Pratt*, 306 N.C. 673, 681, 295 S.E.2d 462, 468 (1982). This Court, therefore, may review such a decision only if the trial court has abused that discretion. *Id.* We find no such abuse of discretion in the instant case.

Although the district court judge acted properly in vacating the judgment, this Court has specifically held that "[a] district court judge does not have authority to enter verdicts of not guilty after setting aside previous guilty verdicts it has entered sitting as a jury; upon setting the verdicts aside, the cases must be remanded for new trials." *State v. Surles*, 55 N.C. App. 179, 185, 284 S.E.2d 738, 741 (1981), *disc. rev. denied*, 305 N.C. 307, 290 S.E.2d 707 (1982). We find no significant distinguishing factors between *Surles* and the present case, and, therefore, hold that the trial court in the case at bar was without authority to enter a not guilty verdict. This case, therefore, must be remanded for a new trial on the second DWI charge.

II.

[2] The State's second and final assignment of error asserts that the trial court did not have the authority to change the sentence imposed for the DWLR charge. In support of this contention, the State argues that the trial court did not have the authority to resentence the defendant absent some showing that the original sentence was illegal or unconstitutional. We disagree and, for the reasons that follow, conclude that the trial judge had the authority to vacate the original sentence and resentence the defendant upon the motion for appropriate relief.

Early case law from our Supreme Court indicates that trial judges, at one time, had the discretionary power to modify or vacate a judgment only prior to the adjournment of the session in which it was entered. Once that session ended, so, too, did the trial judges' discretionary power. *See State v. Bonds*, 45 N.C. App. 62, 64, 262 S.E.2d 340, 342, *disc. rev. denied, appeal dismissed*, 300 N.C. 376, 267 S.E.2d 687, *cert. denied*, 449 U.S. 883, 66 L.Ed.2d 107 (1980) (citing *State v. Duncan*, 222 N.C. 11, 21 S.E.2d 822 (1942); *State v. Godwin*, 210 N.C. 447, 187 S.E. 560 (1936)). A trial court judge could vacate a judgment subsequent to the end of the session only pursuant to a writ of habeas corpus and, later in the legislature's history, pursuant to a motion for appropriate relief. *See id.*

The issue in the instant case concerns the application of the trial court's discretionary powers in disposing of a motion for appropriate relief regarding sentencing. In *State v. Arnette*, 85 N.C. App. 492, 355 S.E.2d 498 (1987), this Court clearly stated that "[a]s a post trial motion, the disposition of a motion for appropriate relief is subject to the sentencing judge's discretion and will not be overturned absent a showing of abuse of discretion." *Id.* at 498, 355 S.E.2d at 502. The State, however, cites *Bonds* and *State v. Cameron*, 55 N.C. App. 263, 284 S.E.2d 724 (1981) for the proposition that the trial court has no discretionary authority, absent an error of law, to modify a sentence after the close of the session of court in which the sentence was entered.

North Carolina General Statute section 15A-1414 concerns motions for appropriate relief made within ten days after the entry of judgment. Subdivision (b)(1) of that section, providing that motions for appropriate relief may be brought for "[a]ny error of law," N.C. Gen. Stat. § 15A-1414(b)(1), was enacted so that the motion for appropriate relief statute could be used to correct errors

of law. Official Commentary to N.C. Gen. Stat. § 15A-1414. Subdivisions (b)(2) and (b)(3), providing for appropriate relief where the *verdict* is contrary to the weight of the evidence and for any other cause of the defendant's not receiving a fair and impartial trial, preserve the trial court's discretionary authority. *Id.* There is nothing to indicate that the discretion reserved in subsections (b)(2) and (b)(3) is excluded from (b)(4), which was added to section 15A-1414 after the other subsections. That subsection (b)(4) is subject to the discretionary authority of the trial court is further evident when one considers that 1) a motion pursuant to this section has to be made within ten days of judgment, thus ensuring that the information regarding the verdict and the sentence is easily recalled, 2) said motion must be made before the sentencing judge, indicating that an entirely new sentence based on another judge's evaluation of the evidence is prohibited, and 3) the evidence at trial must be examined to determine if it supports the sentence, thus granting this Court no right to re-evaluate the evidence and come to a different conclusion, but rather requiring only a determination as to whether the trial judge's decision is supported by the evidence.

Both *Bonds* and *Cameron*, relied upon by the State, dealt with motions for appropriate relief pursuant to section 15A-1415(b)(8). Section 15A-1415 provides grounds upon which motions for appropriate relief may be made more than ten days after judgment has been entered. Subsection 15A-1415(b)(8) allows such a motion when "[t]he sentence imposed was unauthorized at the time imposed, exceeded the maximum authorized by law, was illegally imposed, *or is otherwise invalid as a matter of law.*" (Emphasis added). While the *Arnette* Court clearly stated that a motion for appropriate relief is discretionary, *Bonds* and *Cameron* both indicate that the trial judge could only exercise that discretion if an error of law existed in the sentencing. The parties in the present case agree that no such error of law exists in the original sentence imposed by the trial judge. However, section 15A-1414(b)(4) provides that a motion for appropriate relief can be brought where the sentence was not supported by the evidence, thus providing another means, besides an error of law, pursuant to which a motion for appropriate relief regarding sentencing may be brought. That section became effective on 1 July 1981 and applies only to those offenses committed on or after that date. 1979 N.C. Sess. Laws ch. 760, § 6, *amended by* 1979 N.C. Sess. Laws, 2d Sess., ch. 1316,

§ 47, 1981 N.C. Sess. Laws ch. 63, § 1(c), 1981 Sess. Laws ch. 179, § 14. In both *Bonds* and *Cameron*, the offenses at issue occurred before 1 July 1981. Thus, while the State is correct under section 15A-1415(b)(8) in its assertion that a motion for appropriate relief pursuant to section 15A-1415(b)(8) can only be granted if an error of law exists in the sentence, it fails to recognize the later legislative development of section 15A-1414(b)(4). That later section allows the trial court to exercise its discretion in ruling on a motion for appropriate relief where there is no error of law, but where the sentence is contrary to the weight of the evidence.

We acknowledge that a trial may end with some uncertainty regarding the sentence if the trial judge has the authority to bring a motion for appropriate relief *sua sponte*, set aside the sentence pursuant to section 15A-1414(b)(4), and then resentence the defendant pursuant to section 15A-1417(c) ("If resentencing is required, the trial division may enter an appropriate sentence.") The statute, however, clearly does not authorize the trial court to arbitrarily change the sentence, rather the original sentence must be unsupported by the evidence. If the trial judge abuses his discretion, his disposition of the motion can be reviewed by this Court. No such abuse of discretion has occurred in the case at bar. Upon a determination that the original sentence was not supported by the evidence, the district court judge clearly had the authority to vacate the sentence pursuant to section 15A-1414(b)(4) and to resentence the defendant pursuant to section 15A-1417(c).

For the foregoing reasons the decision of the district court is,

Reversed as to the entry of the Not Guilty verdict and Remanded for a new trial on the second DWI charge, and

Affirmed as to the entry of the Prayer for Judgment Continued on the charge of DWLR.

Judges GREENE and LEWIS concur.

ANGEL v. TRUITT

[108 N.C. App. 679 (1993)]

HARRY W. ANGEL AND WIFE, DONNA G. ANGEL; DAVID McNEILL MELVIN; JOHN E. PALMER AND WIFE, ILENE C. PALMER; JOHN A. HODGIN; JAMES DARYL FLOYD AND WIFE, TAMMY R. FLOYD; DENNIS J. LENAHAN AND WIFE, PAMELA LENAHAN v. JOEY W. TRUITT AND WIFE, CYNTHIA A. TRUITT

No. 9118SC1169

(Filed 19 January 1993)

Deeds § 74 (NCI4th)— restrictive covenants—modular home not mobile home

A structure placed by defendants on their land did not fall within their restrictive covenant's ban against mobile homes, since the structure was a "modular home," constructed in three pieces at a factory; the three units had no axles and did not have the capacity to travel on the public roads on their own attached wheels like mobile homes; the units had to be lifted by crane onto a dolly; and once lifted off the dolly by crane and placed on a permanent foundation, the structure could only be moved in the manner in which site-built homes are built.

Am Jur 2d, Covenants, Conditions and Restrictions § 213.

Appeal by plaintiffs from judgment entered 20 August 1991 in Guilford County Superior Court by Judge James M. Webb. Heard in the Court of Appeals 23 October 1992.

Coggin, Hoyle, Blackwood & Brannan, by W. Scott Brannan, for plaintiff-appellants.

Wilson & Evans, by Ralph A. Evans, for defendant-appellees.

GREENE, Judge.

Plaintiffs appeal from the entry of summary judgment in favor of defendants Joey W. Truitt and Cynthia A. Truitt (the Truitts) in plaintiffs' action to enforce a restrictive covenant.

Plaintiffs and the Truitts own property within a subdivision known as the Joseph L. Berry Subdivision. Both plaintiffs and the Truitts acquired their respective properties subject to certain restrictive covenants within their chain of titles. The restrictive covenants were placed in the Truitts' chain of title in 1981. One of these covenants provides that "[n]o mobile home shall be allowed to remain on the property for over twelve (12) months during

house construction." In February, 1991, Steve Chandler, agent for a development company, was authorized by the Truitts to obtain a building permit from Guilford County to allow a structure to be placed on their property. The building permit issued refers to the structure as a three-bedroom "modular home." Upon learning of the Truitts' plans, plaintiffs hired an attorney, who wrote a letter to the Truitts demanding that they cease efforts to place the structure on their property because it would violate the restrictive covenant against "mobile home[s]." When the Truitts did not respond, plaintiffs sought a temporary restraining order, and ultimately a permanent injunction, to prevent the structure from being placed in the subdivision. The Truitts answered that the structure was not a "mobile home," and therefore not violative of the restrictive covenant. Both parties moved for summary judgment, and the plaintiffs filed a notice of *lis pendens*.

Both parties offered evidence in support of their motions for summary judgment. Included in the evidence was the affidavit of Joseph L. Berry (Berry), one of the grantors in the deed establishing the restrictive covenants. In the affidavit, Berry states that it was his intention and that of the other grantors "that the term 'mobile home' include 'modular homes' as well as [the structure at issue]." Other evidence offered reveals that in late February or early March the structure was placed on the Truitts' lot. The structure is a pre-fabricated dwelling unit containing 1849 square feet, with vinyl siding, an asphalt shingle roof, dry wall interior, and constructed in compliance with the North Carolina Uniform Residential Building Code, adopted pursuant to the State Building Code (*see* N.C.G.S. § 143-138 (1990)). The structure was delivered to the Truitts' lot in three sections, each section being over thirteen feet wide and forty feet long. Each section, or module, has a permanent steel flooring system which is designed to both provide longitudinal support for transport over the public highways and to hold up the air ducts, insulation, water lines, and sewer lines after the structure is affixed to its permanent foundation. Each module was transported from the factory by lifting the module onto a dolly. A removable tongue was extended from the front of each module, which allowed the module and dolly to be pulled by a tractor or truck. The modules could not be attached directly to axles, and could not be transported as constructed without being placed on the dolly. Temporary taillights were attached to each module and all three modules were delivered to the Truitts' lot.

The tongue and taillights were removed and the individual modules were lifted from the dollies by a construction crane. Each module was placed on previously constructed support piers and a brick, load-bearing foundation. In addition to the piers and brick foundation, the on-site construction work consisted of bolting the three modules together, connecting the mechanical, electrical, and plumbing systems between the three modules and to the outside, installation of the molding and trim work, and finishing and painting the sheetrock where the modules are connected.

Dennis Lee Jones, co-owner of R-Anell Custom Homes, the builder of the structure, testified that the structure on the Truitts' lot is a "modular home," and must be placed on a permanent foundation in order to be used as a dwelling. The affidavits of two professional house movers reveal that if the structure were to be moved, the exact same procedures would be required as are required for moving a site-built house. The trial court granted summary judgment for the Truitts on 20 August 1991, thus permitting the placement of the structure on the property.

Plaintiffs contend that the structure on the Truitts' lot is a "mobile home" and therefore violates the restrictive covenant. In the alternative, they argue that the structure is a "manufactured home," and therefore, by statute, a "mobile home" within the meaning of the restrictive covenant. N.C.G.S. § 160A-383.1(f) (1987). The Truitts argue that the structure is neither a "mobile home" nor a "manufactured home," and therefore not barred by the restrictive covenant.

The dispositive issue is whether the structure falls within the restrictive covenant's ban against "mobile home[s]."

In interpreting ambiguous terms in restrictive covenants, the intentions of the parties at the time the covenants were executed "ordinarily control," and evidence of the situation of the parties and the circumstances surrounding the transaction is admissible to determine intent. *Stegall v. Housing Auth.*, 278 N.C. 95, 100, 178 S.E.2d 824, 828 (1971). "But it . . . is not primarily the intention of the parties which the court is seeking, but the meaning of the words at the time and place when they were used." 4 Samuel Williston, *A Treatise on the Law of Contracts* § 613 (Walter H.E. Jaeger ed., 3d ed. 1961); *J.T. Hobby & Son, Inc. v. Family Homes of Wake County, Inc.*, 302 N.C. 64, 71, 274 S.E.2d 174, 179 (1981)

(equivocal words in covenant interpreted "according to the natural meaning of the words"); 7 George W. Thompson, *Commentaries on the Modern Law of Real Property* § 3160 (John S. Grimes ed., 1962 Repl.) [hereinafter *Thompson*] ("language used will be read in its ordinary sense"). Thus, "[n]either the testimony nor the declarations of a party is competent to prove intent." *Stegall*, 278 N.C. at 100, 178 S.E.2d at 828. Intent is instead properly discovered from the language of the document itself, the circumstances attending the execution of the document, and the situation of the parties at the time of execution. *Smith v. Smith*, 249 N.C. 669, 675, 107 S.E.2d 530, 534 (1959). Surrounding circumstances include relevant "statutes and rules of law" existing at the time of execution of the document, as these give context to the words used by the parties. 3 Arthur L. Corbin, *Corbin On Contracts* § 551 (1960); *Poole & Kent Corp. v. C.E. Thurston & Sons, Inc.*, 286 N.C. 121, 129, 209 S.E.2d 450, 455 (1974) ("contracting parties are presumed to contract in reference to the existing law"); *Thompson* (parties are presumed to have considered surrounding circumstances); *Tull v. Doctors Bldg., Inc.*, 255 N.C. 23, 40, 120 S.E.2d 817, 829 (1961) (restrictive covenant not affected by subsequently enacted zoning ordinance). Any doubts regarding the intention of the parties must be resolved "in favor of the unrestricted use of the property." *Stegall*, 278 N.C. at 100, 178 S.E.2d at 828.

The restrictive covenant in question was executed in December, 1981, and prohibits the placement of a "mobile home" on the property, except while a house is being constructed on the property and then for a period of time not to exceed twelve months. Because "mobile home" is not a clearly defined term, it is necessary to determine the intentions of the parties as of 30 December 1981, the day of the execution of the covenants. In this record the only evidence offered which directly bears on intent was the affidavit of Berry that it was his intention as a party to the covenant to interpret "mobile home" as including structures of the type in question. The Truitts objected to the admission of this evidence and we agree. As earlier noted, a declaration of a party to an agreement is not competent evidence to prove intent. *Stegall*, 278 N.C. at 100, 178 S.E.2d at 828. Furthermore, the record is devoid of any evidence of the circumstances surrounding the execution of the agreement or any evidence regarding the situation of the parties at the time of the execution of the document. The fact that the structure may have been constructed on or about January,

1991 in compliance with provisions enacted under the State Building Code is not relevant. *Starr v. Thompson*, 96 N.C. App. 369, 371, 385 S.E.2d 535, 536 (1989) (statutes and ordinances in effect at time of trial are "irrelevant"). Likewise, the declaration by the Legislature in 1987 that any "manufactured home" as defined in N.C.G.S. § 143-145(7) shall be a "mobile home," is not material to the issue of the parties' intent in 1981.[1] N.C.G.S. § 160A-383.1(f) (1987).

In the absence of any evidence of intent regarding the meaning of "mobile home," courts must interpret the term consistent with its "natural meaning." *J.T. Hobby & Son, Inc.*, 302 N.C. at 71, 274 S.E.2d at 179. That is, the term will be assigned its customary definition as it existed in 1981. A dictionary with the copyright date on or about 1981 is an appropriate place to ascertain the then customary definitions of words and terms. *See State v. Martin*, 7 N.C. App. 532, 533, 173 S.E. 2d 47, 48 (1970). The 1982 edition of *The American Heritage Dictionary* defines "mobile home" as "[a] house trailer that is used as a permanent home and is usually hooked up to utilities." *American Heritage Dictionary* 805 (2d ed. 1982). Trailer is defined in the same dictionary as "[a] large transport vehicle designed to be hauled by a truck or tractor." *Id.* at 1285.[2] Using these accepted definitions, the evidence, which is not disputed, supports summary judgment for the Truitts. *Rose v. Guilford County*, 60 N.C. App. 170, 172, 298 S.E.2d 200, 202 (1982) (summary judgment appropriate if no genuine issue of material fact and moving party entitled to judgment as a matter of law). The structure placed on the Truitts' lot is not designed for transport. The modules are not constructed with a permanent chassis nor do they have the same capacity to travel on the public roads on their own attached wheels as do mobile homes. In order to transport the modules they must be lifted by crane onto a dolly. The modules themselves have no axles to which wheels could be attached and could not travel without the dolly. Once lifted off the dolly by crane and placed on a permanent foundation, they can be moved only in the

1. Because N.C.G.S. § 160A-383.1(f) is not relevant, we need not determine whether the structure in question is a "manufactured home."

2. A similar meaning may be found in *American Jurisprudence 2d*, which defines mobile home as "a movable or portable dwelling built on a chassis, connected to utilities, designed without a permanent foundation, and intended for year-round living . . . ." 54 Am. Jur. 2d, *Mobile Homes, Trailer Parks, and Tourist Camps* § 1 (1971).

manner in which site-built homes are moved. The affidavits of professional house movers reveal that in order to move the structure the modules are not separated and placed back on the dolly, but are moved as one unit in exactly the same manner that a house built on-site is moved. Therefore, the structure at issue is not a "mobile home" within the meaning of the restrictive covenant.

Accordingly, the summary judgment is

Affirmed.

Judges WYNN and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

ADA DALTON RUDISAIL AND HOWARD RUDISAIL v. CONNIE ALLISON AND MAUDINE O. ALLISON

No. 9129DC1084

(Filed 19 January 1993)

1. **Ejectment § 42 (NCI4th)— laches no defense—summary judgment on ground of laches improper**

Because the pleadings revealed that both parties claimed title to the disputed property in question, which defendants possessed and plaintiffs sought to recover, plaintiffs' action was one in ejectment; consequently, the defense of laches is not a recognized defense in this ejectment action, and the trial court's summary judgment order on the ground of laches was therefore error.

Am Jur 2d, Ejectment § 61.

2. **Limitations, Repose, and Laches § 158 (NCI4th)— trespass to land—three-year statute of limitations—laches no defense**

Laches could not support summary judgment for defendants on plaintiffs' claim for damages for trespass to land, since this claim for damages was governed by a three-year statute of limitations.

Am Jur 2d, Trespass § 78.

Appeal by plaintiffs from judgment entered 31 May 1991 and corrected judgment entered 26 June 1991 in Henderson County District Court by Judge Thomas N. Hix. Heard in the Court of Appeals 17 November 1992.

James H. Toms & Associates, P.A., by James H. Toms and Christopher A. Bomba, for plaintiff-appellants.

Prince, Youngblood, Massagee & Jackson, by Sharon B. Ellis and Frank B. Jackson, for defendant-appellees.

GREENE, Judge.

Plaintiffs Ada Dalton Rudisail and Howard Rudisail (the Rudisails) appeal from the trial court's grant of summary judgment in favor of defendants Connie and Maudine O. Allison (the Allisons).

Mrs. Rudisail and the Allisons own adjoining property in Henderson County. Mr. Rudisail has a marital interest in Mrs. Rudisail's property. In 1961 the Allisons constructed a house on their property. In 1967 the Rudisails erected a fence which they allege is inside the boundary line of their property. The Rudisails built the fence inside their property line because "it was a rough barbed wire fence and we didn't want it up there next to [the Allisons'] house . . . ." The Allisons allege that the fence is the true property line. In approximately 1974, the Allisons began construction of a garage next to the fence. The construction work was done by Mr. Allison, and took several years to complete. The Rudisails became aware of the construction in 1976 or early 1977, and believed that the construction encroached on their property. The Rudisails did not at that time hire a surveyor to establish a property line because of financial difficulty. They did not contact the Allisons or in any way inform them of their belief that the garage encroached upon the Rudisail property. Mr. Allison began construction on an addition to the garage in the early 1980s. During this period the Rudisails allege that the Allisons dumped dirt on the fence, destroying a section of approximately thirty feet. In 1983 or 1984 the Allisons constructed a driveway leading to the garage addition and piled building and other materials in the area of the fence. The Rudisails hired a surveyor, who completed a survey of the property in 1984. The survey showed that the garage and the garage addition encroached on the Rudisails' property. A later survey obtained by the Allisons supports their claim of title. Shortly after the 1984

survey, Mr. Rudisail informed Mr. Allison that the garage and garage addition encroached on the Rudisails' property.

On 8 January 1986, Mrs. Rudisail filed a complaint alleging that the Allisons were encroaching on property to which she had title. She sought to have the Allisons removed from the land and damages in the amount of $2500.00. The Allisons answered, denying encroachment and claiming title to the property in question by deed and, in the alternative, by adverse possession. They also asked that Mr. Rudisail be made a party, counterclaimed for damages of $3500.00 because of harassment by the Rudisails in wrongfully asserting claim to the property, and asked for a determination that they were the true owners of the property. The Allisons subsequently amended their complaint to include the defense of laches. Both parties moved for summary judgment. The trial court granted summary judgment in favor of the Allisons on all of the Rudisails' claims. The court denied the Allisons' motion for summary judgment as to their counterclaims.

The dispositive issues are (I) whether the defense of laches can be pled in an action for ejectment; and (II) whether the defense of laches can be pled in this action for damages.

The Allisons' counterclaims were not determined by the trial court in its order granting summary judgment. Thus, the summary judgment order is not final, and therefore interlocutory, because it fails to determine the entire controversy between the parties. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). Such interlocutory orders are generally not appealable. *Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982). However, an interlocutory order may be appealed if it affects a substantial right of the appellant and has the potential to work an injury to the appellant if not reviewed before final judgment. *Goldston v. American Motors Corp.*, 326 N.C. 723, 728, 392 S.E.2d 735, 737 (1990). The substantial right most often addressed is the right to avoid separate trials on the same issues. *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5-6, 362 S.E.2d 812, 815 (1987). Denial of this substantial right creates the possibility of prejudice if different fact-finders could render inconsistent verdicts on the same issues. *T'ai Co. v. Market Square Ltd. Partnership*, 92 N.C. App. 234, 236, 373 S.E.2d 885, 886 (1988).

The Rudisails' initial complaint sought to have the Allisons removed from property owned by the Rudisails. The Allisons counterclaimed that they were damaged because the Rudisails wrongfully asserted a claim to land which actually belonged to the Allisons and also prayed that they be determined the true owners of the property. Consequently, the issue of ownership of the land in question is fundamental in both the determination of the Allisons' counterclaims and the determination of whether removal of the Allisons is warranted. Because different fact-finders could render inconsistent verdicts on these issues, failure to hear this appeal before final judgment could prejudice the Rudisails' substantial right to avoid separate trials on the same issues. Accordingly, we will address the issues raised in this interlocutory appeal.[1]

I

[1] In order to determine the defenses available to a defendant, we must first decide the nature of the action brought by the plaintiff. *Scott Poultry Co. v. Bryan Oil Co.*, 272 N.C. 16, 18, 157 S.E.2d 693, 695 (1967). The nature of the action is not determined by what either party calls it, but by the issues arising out of the pleadings. *Id.* at 19, 157 S.E.2d at 696. Where the pleadings reveal that title to land is controverted and a plaintiff seeks to recover possession of that land from a defendant, the action is one in ejectment. *Id.* at 18, 157 S.E.2d at 696. The defense of laches is not available in an ejectment action. *Ramsey v. Nebel*, 226 N.C. 590, 593, 39 S.E.2d 616, 618 (1946); *see Sparrow v. Dixie Leaf Tobacco Co.*, 232 N.C. 589, 595, 61 S.E.2d 700, 704 (1950); *Scott Poultry Co.*, 272 N.C. at 22, 157 S.E.2d at 698 (ejectment action is legal in nature and laches not recognized as proper defense); *Young v. Young*, 43 N.C. App. 419, 422, 259 S.E.2d 348, 349-50 (1979) (action in ejectment is "so legal in its nature and origin as to make untenable the equitable defense of laches"); *Phipps v. Robinson*, 858 F.2d 965, 970 (4th Cir. 1988) ("the equitable defense of laches may not be raised as a defense in an action at law of ejectment"); *but see McRorie v. Query*, 32 N.C. App. 311, 232 S.E.2d 312, *disc. rev. denied*, 292 N.C. 641, 235 S.E.2d 62 (1977). Indeed, in the

1. The Rudisails also assign as error the trial court's refusal to grant their motion for partial summary judgment on the Allisons' counterclaim for damages. Denial of a motion for summary judgment is an interlocutory order and not immediately appealable. *Watson Ins. Agency, Inc. v. Price Mechanical, Inc.*, 106 N.C. App. 629, 631, 417 S.E.2d 811, 812 (1992).

context of an ejectment proceeding, title to property can be defeated only by possession for seven years under color of title or adverse possession for twenty years. N.C.G.S. §§ 1-38, -40 (1983).

Because the pleadings reveal that the Rudisails and the Allisons both claim title to the disputed property in question, which the Allisons possess and the Rudisails seek to recover, the Rudisails' action is one in ejectment. Consequently, the defense of laches is not a recognized defense in this ejectment action, and the trial court's summary judgment order on the ground of laches was therefore error. The issue of adverse possession has been raised by the Allisons in their answer and will be before the trial court on remand.

II

[2] In addition to the Rudisails' ejectment claim seeking possession of the real estate in question, they also claim damages for trespass on their land. This is a proper and recognized remedy. "Ejectment is only one form of the trespass action, and, in addition to rents and profits for dispossession, the plaintiff may recover all other damages appropriate to the trespass suit, such as damage for permanent or temporary injury to the land itself." Dan B. Dobbs, *Handbook on the Law of Remedies* § 5.8, at 365 (1973). This claim for damages is governed by a three-year statute of limitation and laches is not a tenable defense to this action. N.C.G.S. § 1-52(3) (1983); *Coppersmith v. Upton*, 228 N.C. 545, 548, 46 S.E.2d 565, 567 (1948); *United States v. Mack*, 295 U.S. 480, 489, 79 L. Ed. 1559, 1565 (1935) (laches within the term of the statute of limitation is not a defense to action at law); 30A C.J.S. *Equity* § 128, at 351-52 (1992). Therefore, laches cannot support summary judgment for the Allisons on the Rudisails' claim for damages for trespass to land.

Accordingly, the decision of the trial court is

Reversed and remanded.

Judges COZORT and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

JUDY TEAGUE, PETITIONER-APPELLEE v. WESTERN CAROLINA UNIVERSITY, RESPONDENT-APPELLANT

No. 9130SC951

(Filed 19 January 1993)

State § 12 (NCI3d)— State employee—job application—statutory right to priority consideration—no denial

The trial court erred in concluding that plaintiff was denied her statutory right to priority consideration as a State employee under N.C.G.S. § 126-7.1 when she was passed over for a position at defendant University where the evidence tended to show that plaintiff's resume was not up to date with regard to her education or work experience, while her competitor who was not a State employee did include this information on her resume; during the course of interviews plaintiff did not discuss her relevant experience and explain why she was the best candidate for the position, while the non-State employee candidate did; and the person with hiring authority, after considering both resumes and both candidates' interviews, could legitimately conclude that plaintiff's qualifications were not "substantially equal" to her competitor's.

Am Jur 2d, Public Officers and Employees § 38.

Judge COZORT concurring.

Appeal by respondent from order entered 5 July 1991 by Judge Beverly T. Beal in Jackson County Superior Court. Heard in the Court of Appeals 13 October 1992.

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

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Thomas J. Ziko, for respondent-appellant.

LEWIS, Judge.

Petitioner-appellee, Judy Teague, claims she was denied her statutory right to priority consideration as a State employee under N.C.G.S. § 126-7.1 when she was passed over for a position at Western Carolina University's [hereinafter WCU] Center for Improving Mountain Living [hereinafter Center]. Ms. Teague had been

employed by WCU for seven years when she applied for the position of Social Research Assistant II at the Center in 1989. Rita Murchison, who was not a State employee at the time, also applied for the position. After reviewing the applications and interviewing the candidates, WCU chose Ms. Murchison to fill the position. Ms. Teague appealed to the Office of Administrative Hearings after exhausting her on-campus administrative remedies. Although the Administrative Law Judge recommended that the State Personnel Commission [hereinafter Commission] find Ms. Teague had been denied her statutory priority consideration, the Commission determined that she was not entitled to relief. The superior court reversed the Commission's decision on the basis that it was arbitrary and capricious, and ordered back pay, back benefits, reasonable attorney fees, and placement in a comparable position. WCU appeals to this Court, asserting that the superior court erred in finding that the Commission's decision was arbitrary and capricious.

Requirements for the position of Social Research Assistant II, as advertised, included a B.S. or B.A. degree in business, economics or accounting, one year full-time experience in a business field or economic development research, as well as interpersonal and communications skills. The position involved supervision of graduate students' research projects, individual research projects and economic development projects.

Ms. Teague held a B.S.B.A. degree from WCU in accounting and computer information systems and an M.B.A. degree from WCU. She had extensive research and marketing experience dating back to 1966, including seven years operating a small family business owned by her ex-husband. Ms. Murchison held a B.S.B.A. degree from WCU in computer information systems and had completed several courses towards her M.B.A. degree. She had had ten months experience as a graduate assistant to the head of the business school, and worked as a part-time instructor in a community college teaching computer literacy and small business management. She had worked on other relevant projects in her capacity as a graduate student, and had owned her own craft shop for four years.

Ms. Teague, as a State employee, was not required to file a new or updated application and did not do so. Her application, originally submitted for the position of Computer Applications Programmer II in 1987, did not contain all of her experience pertinent to this particular position and did not emphasize her relevant skills.

It contained no references to business research experience. Ms. Teague conceded that her application was seriously deficient in describing her qualifications for this position. Ms. Murchison's application, on the other hand, was up to date and tailored to the Social Research Assistant II position.

Thomas V. McClure, Associate Director of the Center for Improving Mountain Living, interviewed the candidates. Although he had been told that no one qualified for the State employee priority consideration, he was aware that State employees had that right. During her interview Ms. Teague informed Mr. McClure that she had an M.B.A. degree, which was not listed on her application. She failed, however, to mention any of her business research experience. Ms. Murchison, in contrast, had listed her research experience on her application and elaborated on it during her interview.

Ms. Murchison was hired for the position in July 1990. Ms. Teague immediately sought relief through the appropriate administrative channels, the Commission, and the courts.

Section 126-7.1 states that a current State employee applying for another position in State employment, and who has "substantially equal qualifications" as another applicant who is not a State employee, will receive priority consideration for the position. N.C.G.S. § 126-7.1(c) (1991). "Qualifications" is defined to include training or education, years of experience, and other relevant skills and abilities that "bear a reasonable functional relationship" to the vacant position. § 126-7.1(d).

Review of an administrative decision is governed by § 150B-51 of the Administrative Procedure Act, which states that a court may reverse or modify an agency decision that is, among other things, arbitrary and capricious. § 150B-51(b)(6) (1991). Under this statute, the standard of review for appellate courts is the same as that for superior courts. *Jarrett v. N.C. Dep't of Cultural Resources*, 101 N.C. App. 475, 478, 400 S.E.2d 66, 68 (1991). This Court has stated: "While our review is limited to assignments of error to the superior court's order, this Court is not required to accord any particular deference to the superior court's findings and conclusions concerning the Commission's actions." *Watson v. N.C. Real Estate Comm.*, 87 N.C. App. 637, 640, 362 S.E.2d 294, 296 (1987), *cert. denied and temporary stay denied*, 321 N.C. 746,

365 S.E.2d 296 (1988). This Court will certainly treat with respect and carefully consider any findings of a trial court though we are not bound by them.

An appellate court may not, however, disturb an agency's assessment of the credibility of the witnesses and the weight and sufficiency to be given to the testimony, *Commissioner of Ins. v. N.C. Rate Bureau*, 300 N.C. 381, 406, 269 S.E.2d 547, 565 (1980), and may not override decisions within the agency's discretion if made in good faith and in accordance with the law. *Jarrett* at 479, 400 S.E.2d at 68 (citation omitted).

The arbitrary and capricious standard is very difficult to meet. *Id.* (citation omitted). When reviewing a final administrative decision, courts must apply the "whole record" test to determine whether the decision was arbitrary and capricious. *Webb v. N.C. Dep't of Environment, Health, and Natural Resources*, 102 N.C. App. 767, 770, 404 S.E.2d 29, 32 (1991). A decision is arbitrary and capricious if it was "patently in bad faith," "whimsical," or if it lacked fair and careful consideration. *Lewis v. N.C. Dep't of Human Resources*, 92 N.C. App. 737, 740, 375 S.E.2d 712, 714 (1989) (citations omitted). In applying the whole record test the court must consider all of the evidence, both supportive and contradictory, *Mount 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), to determine whether the agency decision has a rational basis. *Bennett v. Hertford County Bd. of Educ.*, 69 N.C. App. 615, 618, 317 S.E.2d 912, 915 *cert. denied*, 312 N.C. 81, 321 S.E.2d 893 (1984).

The evidence presented in the case at hand does not lead this Court to the conclusion that the Commission's decision to uphold Mr. McClure's determination was "patently in bad faith" or "whimsical." *Lewis*, 92 N.C. App. at 740, 375 S.E.2d at 714. Mr. McClure had to make his decision based on the qualifications he found in the applications and elicited during the interviews. Ms. Teague's application did not state that she held an advanced degree, nor did it contain any references to her relevant and substantial experience. Even so, she had an opportunity to discuss such experience during her interview. Although Mr. McClure testified that he gave all the applicants ample opportunity to describe related experiences and explain why they were best qualified for the position, Ms. Teague failed to do so. Based upon the information he had before

him, Mr. McClure reasonably concluded that Ms. Teague's qualifications were not "substantially equal" to Ms. Murchison's.

After reviewing all of the evidence, both supportive and contradictory, this Court holds that the Commission's decision to uphold Mr. McClure's findings had a rational basis in the evidence and was not arbitrary and capricious. We reverse the decision of the superior court and reinstate the opinion of the Commission.

Reversed.

Judge JOHNSON concurs.

Judge COZORT concurs with a separate opinion.

Judge COZORT concurring.

I agree with the majority that, based on the information presented to Mr. McClure at the time he made the decision to hire Ms. Murchison, petitioner Teague did not possess substantially equal qualifications and was thus not entitled to priority consideration. The evidence available after that point in time demonstrates that Ms. Teague did possess substantially equal qualifications and should be entitled to priority. However, it is the duty of the applicant to make all qualifications known at the appropriate time, and petitioner Teague must bear the burden of failing to present all her qualifications to Mr. McClure. I write only to emphasize this point.

MARANTZ PIANO COMPANY, INC. v. JOE G. KINCAID AND KINCAID ENTERPRISES, INC.

No. 9125DC1083

(Filed 19 January 1993)

Ejectment § 12 (NCI4th)— vendor-vendee relationship not terminated—magistrate without jurisdiction

Where the parties entered into an agreement whereby plaintiff was to sell and defendant was to purchase a manufacturing plant, defendant was to lease the facility for one year

with lease payments going toward the purchase price, and closing was to take place on a specified date, even assuming the failure to close the transaction on the named date was a material breach of the written agreement, plaintiff did not cancel the agreement, and the relationship of vendor and vendee continued in effect; therefore, because the parties were not in a simple landlord and tenant relationship, the magistrate's court was without jurisdiction in plaintiff's summary ejectment proceeding, and its order of summary ejectment must be vacated.

Am Jur 2d, Ejectment § 36.

Appeal by defendant Kincaid Enterprises, Inc. from order entered 12 December 1989 in Burke County District Court by Judge Nancy L. Einstein. Heard in the Court of Appeals 19 November 1992.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by C. Scott Whisnant and Sam J. Ervin, IV, for plaintiff-appellee.

Stephen T. Daniel & Associates, P.A., by Stephen T. Daniel and M. Alan LeCroy, and Simpson Aycock Beyer & Simpson, P.A., by Samuel Aycock, for defendant-appellant Kincaid Enterprises, Inc.

GREENE, Judge.

Defendant Kincaid Enterprises, Inc. (Kincaid, Inc.) appeals from the district court's order granting summary ejectment in favor of plaintiff Marantz Piano Company, Inc. (Marantz).

On 10 June 1988, Marantz and Joe Kincaid entered into a Lease With Offer to Purchase and Contract (hereinafter "the written agreement"). The written agreement provided that Marantz agreed to sell and Joe Kincaid agreed to buy a manufacturing plant located in Burke County. The closing would take place on 10 June 1989, and in the event closing did not take place on that date, Marantz had the right to sue for specific performance of the contract or to re-enter the premises. Joe Kincaid would rent the plant for one year prior to closing, with rental payments of $45,000.00 for the first two months and $10,000.00 for each of the ten months thereafter. The $145,000.00 in rental payments would be applied to the purchase price of $1,100,000.00. Sixty days prior to closing Joe Kincaid would escrow $50,000.00 to be applied to

the purchase price. If closing did not occur by 10 June 1989, this amount would be forfeited as liquidated damages.

On 11 October 1988, Joe Kincaid and his brother formed Kincaid, Inc. for the purpose of producing furniture at the plant. From August, 1988, until 10 June 1989, the rental payments were paid and the $50,000.00 was timely placed in escrow. The majority of the rental payments and the escrow payment were made by Kincaid, Inc. At the time the money was placed in escrow, Joe Kincaid's brother informed Marantz's real estate agent that Kincaid, Inc. had applied for a Farmers Home Guaranteed Loan, and that additional time would be needed for closing. Although the parties disagree as to whether an agreement was reached to extend the date of closing and to forego the forfeiture of the $50,000.00 as liquidated damages if the closing did not take place on 10 June 1989, the trial court found as a fact that there were no such agreements. Kincaid, Inc. subsequently obtained a commitment for financing from Farmers Home, subject to an environmental assessment. The assessment revealed that the plant is listed by the State of North Carolina and the Environmental Protection Agency as a hazardous waste site.

On 24 May 1989, Joe Kincaid executed an assignment of the written agreement to Kincaid, Inc. When closing did not take place on 10 June 1989, Marantz instructed Kincaid, Inc. to vacate the plant, which Kincaid, Inc. refused to do. Marantz then commenced, on 21 August 1989, an action in magistrate's court seeking to have Kincaid, Inc. summarily ejected from the premises. The magistrate's court granted summary ejectment for Marantz, and Kincaid, Inc. appealed to district court. The district court, sitting without a jury, made findings of fact, conclusions of law, and entered judgment ordering that Kincaid, Inc. be ejected from the premises.

In relevant part the trial court concluded that Kincaid, Inc.'s

> failure to close on or before June 10, 1989, constituted a breach of the written agreement; [and that] following that breach, [Kincaid, Inc.] had no additional right to remain in possession of the plant which it did not have prior to June 10, 1989. The only right which [Kincaid, Inc.] had to occupy [Marantz]'s facility prior to June 10, 1989, arose under the lease portions of the written agreement; after June 10, 1989, [Kincaid, Inc.] occupied the status of a tenant holding over after the expira-

tion of a lease term. As a result, [Marantz] and [Kincaid, Inc.] were in a "pure" landlord/tenant relationship after June 10, 1989.

The dispositive issue is whether Marantz effectively cancelled its contract with Kincaid, Inc., thereby terminating the relationship of vendor and vendee that existed under the contract.

Summary ejectment proceedings are purely statutory, and jurisdiction of the magistrate's court to hear such cases is limited to situations where only a simple landlord and tenant relationship exists between the parties. *Hauser v. Morrison*, 146 N.C. 248, 248-50, 59 S.E. 693, 694-95 (1907). The summary ejectment remedy is not available where the relationship between the parties is that of vendor and vendee. *Id.* If the agreement establishes a landlord and tenant relationship and additionally provides for a later purchase of the leased premises by the tenant, the relationship is one of vendor and vendee, for the purpose of summary ejectment. *Id.* Nonetheless, if the vendee breaches a *material* provision of the contract to lease/purchase, the vendor, as the aggrieved party, may cancel the contract. *See* John D. Calamari and Joseph M. Perillo, *The Law of Contracts* § 11-18, at 458 (3d ed. 1987). If the contract is properly cancelled, it is annulled from the beginning and the parties are restored to their respective positions as they existed prior to the contract. 12 Samuel Williston, *A Treatise on the Law of Contracts* § 1469 (Walter H.E. Jaeger ed., 3d ed. 1970) [hereinafter *12 Williston on Contracts*]. If the vendee, after cancellation, continues in possession of the property, he is regarded as a tenant at sufferance, *see* 49 Am. Jur. 2d *Landlord and Tenant* § 81 (1970), and is properly subject to ejectment under N.C.G.S. § 42-26 (1984). In order to cancel the contract there must be, within a reasonable time after knowledge of the material breach, an election by the aggrieved party to cancel. *12 Williston on Contracts*. " 'Within reasonable time, too, knowledge of, from unmistakable act or notice manifesting, such election must be conveyed [to the breaching party] . . . and the [aggrieved party] must restore, or offer to restore, the status quo. . . .' " *Id.* (quoting *Butler Mfg. Co. v. Elliott & Cox*, 211 Iowa 1068, 233 N.W. 669 (1930)).

In this case, there is no evidence in the record that Marantz gave any notice to Kincaid, Inc. of its intent to cancel the written agreement. Marantz did request on three different occasions after the breach that Kincaid, Inc. vacate the premises. This request,

however, was a right granted Marantz in the written agreement, which gave Marantz the right to re-enter the property if Kincaid, Inc. breached any of the terms of the written agreement, and was not therefore an unmistakable manifestation of intent to cancel the written agreement. Accordingly, even assuming the failure to close the transaction on 10 June 1989 was a material breach of the written agreement, Marantz has not cancelled the agreement and the relationship of vendor and vendee continues in effect. Therefore, because the parties were not in a simple landlord and tenant relationship, the trial court was without jurisdiction and the order of summary ejectment must be vacated.

Vacated.

Judges COZORT and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

CAROLYN SELLERS, PLAINTIFF v. NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, DEFENDANT

No. 9124SC1105

(Filed 19 January 1993)

Insurance § 1109 (NCI4th)— release of tortfeasor—right of carrier to remain unnamed defendant

A release or settlement of an action against a tortfeasor does not vitiate the express statutory terms of N.C.G.S. § 20-279.21(b)(4) so that the action can continue with the UIM insurance carrier remaining as the unnamed defendant, and the trial court erred in substituting the unnamed defendant-UIM carrier for the named defendant in the action.

Am Jur 2d, Automobile Insurance §§ 453, 454.

Appeal by defendant from order signed 8 August 1991 by Judge Claude S. Sitton in Madison County Superior Court. Heard in the Court of Appeals 20 October 1992.

Ball, Kelley & Barden, P.A., by Ervin L. Ball, Jr., for plaintiff-appellee.

Willardson & Lipscomb, by William F. Lipscomb, for defendant-appellant.

LEWIS, Judge.

Plaintiff was injured in a car accident on 4 June 1988. She filed a complaint against defendant Betty Morefield Morgan on 23 April 1991, alleging that Morgan's negligence caused the collision. On 19 June 1991, plaintiff filed an amended complaint, in which she added a second claim for relief for underinsured motorist coverage ("UIM").

Plaintiff's vehicle was insured under an automobile liability insurance policy issued by the defendant in the present action, North Carolina Farm Bureau Mutual Insurance Company ("Farm Bureau"). Under the policy, plaintiff had UIM coverage in the amount of $150,000.00. Plaintiff's amended complaint further alleged that defendant Morgan was the owner and operator of an underinsured vehicle within the meaning of N.C.G.S. § 20-279.21, and that her own injuries exceeded the liability limits of Morgan's policy.

On 2 July 1991, plaintiff admitted, in response to defendant Morgan's request for admissions, that she settled and released her claim against Morgan when Morgan's insurance carrier paid her the sum of $50,000.00. Pursuant to N.C.G.S. § 20-279.21 (1989), Farm Bureau on 5 July 1991, filed its "Motions and Answer of North Carolina Farm Bureau (Unnamed Defendant)." On 8 July 1991, defendant Morgan filed her Answer and motions for summary judgment and for judgment on the pleadings. The Superior Court granted Morgan's motion for summary judgment on 1 August 1991, and dismissed the action as to Morgan. On 8 August 1991, the Superior Court signed an order which substituted the unnamed defendant, Farm Bureau, for the named defendant in the action. Farm Bureau appeals from this order.

The defendant assigns error to the court's having substituted it as a named defendant in the action. Defendant relies on N.C.G.S. § 20-279.21(b)(4), which states in pertinent part:

> A party injured by the operation of an underinsured highway vehicle who institutes a suit for the recovery of moneys for those injuries and in such an amount that, if recovered,

> would support a claim under underinsured motorist coverage shall give notice of the initiation of the suit to the underinsured motorist insurer as well as to the insurer providing primary liability coverage upon the underinsured highway vehicle. *Upon receipt of notice, the underinsured motorist insurer shall have the right to appear in defense of the claim without being named as a party therein, and without being named as a party may participate in the suit as fully as if it were a party.*

N.C.G.S. § 20-279.21(b)(4) (Cum. Supp. 1992) (emphasis added).

We find no cases that interpret the above-quoted statutory provision. There are, however, cases which demonstrate its applicability. For instance, in *Manning v. Tripp*, 104 N.C. App. 601, 410 S.E.2d 401 (1991), *aff'd*, 332 N.C. 341, 420 S.E.2d 123 (1992), the liability carrier paid out the limits of the defendant tortfeasor's liability insurance coverage to plaintiff. The plaintiff's husband's claim was dismissed, and the action was converted into a declaratory action whereby the plaintiff sought a determination of her rights to UIM benefits from the unnamed defendant, the UIM carrier. The case went forward, without a substitution of the company as a named defendant. In *Beaver v. Hampton*, 106 N.C. App. 172, 416 S.E.2d 8, *review allowed* (Nov. 18, 1992), the defendant's liability carrier withdrew from the case after it tendered its policy limits. On appeal, the UIM carrier for the plaintiffs remained unnamed as defendant-appellee.

The statutory language is, to us, clear and unambiguous. The underinsured motorist insurer, upon receipt of notice of the initiation of an action, "*shall* have the right to appear in defense of the claim *without being named as a party therein, and without being named as a party may participate* in the suit as fully as if it were a party." N.C.G.S. § 20-279.21(b)(4) (emphasis added). This language and the cases which demonstrate its application convince us that even if the tortfeasor is released from the action, the case can continue, if requested, in the tortfeasor's name only.

A jury would more likely concentrate on the facts and the law as instructed, rather than the parties, if this interpretation is followed.

We hold that a release or settlement of an action against the tortfeasor does not vitiate the express statutory terms of N.C.G.S.

§ 20-279.21(b)(4) such that the action can continue with the insurance carrier remaining as an unnamed defendant.

Reversed and remanded.

Judges JOHNSON and COZORT concur.

RICHMOND COUNTY v. THE NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY, A BODY CORPORATE, AND CHEM-NUCLEAR SYSTEMS, INC.

CHATHAM COUNTY AND WAKE COUNTY v. THE NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND CHEM-NUCLEAR SYSTEMS, INC.

RICHMOND COUNTY v. NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND CHEM-NUCLEAR SYSTEMS, INC.

CHATHAM COUNTY AND WAKE COUNTY v. NORTH CAROLINA LOW-LEVEL RADIOACTIVE WASTE MANAGEMENT AUTHORITY AND CHEM-NUCLEAR SYSTEMS, INC.

Nos. 9120SC1231
9115SC1239
9220SC158
9215SC159

(Filed 2 February 1993)

1. **Administrative Law and Procedure § 52 (NCI4th)— low-level radioactive waste—selection of disposal site—no final agency decision—no justiciable controversy**

Where plaintiffs sought declaratory and injunctive relief regarding the selection and testing of potential sites for a disposal facility for low-level radioactive waste, the trial court properly dismissed claims based on failure to comply with applicable state law, flawed process of site selection, and violation of due process, since these actions were commenced when the selection process had been narrowed to two sites; no final decision had been made; and in matters of this nature which seek solutions to extremely urgent problems, where the solu-

tions are essential to protect the public health and safety, the court should be reluctant to interfere until the administrative decision has been finalized.

Am Jur 2d, Administrative Law §§ 583-594.

What constitutes agency "action," "order," "decision," "final order," "final decision," or the like, within the meaning of federal statutes authorizing judicial review of administrative action—Supreme Court cases. 47 L. Ed. 2d 843.

2. **Appeal and Error § 175 (NCI4th)— necessity for environmental impact statement prior to "characterization" of land—moot issue—"characterization" substantially complete**

Whether defendants were required to prepare an environmental impact statement prior to the characterization of potential sites for a low-level radioactive waste disposal facility was a moot issue, since, at the time of oral argument, both parties informed the Court that characterization of both sites had been proceeding for a substantial period of time and was virtually complete.

Am Jur 2d, Pollution Control §§ 46-49.

Judge COZORT dissenting in part and concurring in part.

Appeal by plaintiffs Richmond, Chatham, and Wake Counties and defendants North Carolina Low-Level Radioactive Waste Management Authority and Chem-Nuclear Systems, Inc. from orders entered in open court on 2 May 1991 and 5 September 1991 in Richmond County Superior Court and Chatham County Superior Court (sitting by agreement of the parties in Chatham County) by Judge James M. Long. Heard in the Court of Appeals 1 December 1992.

James, McElroy & Diehl, P.A., by Gary S. Hemric, Mark T. Calloway, and John S. Arrowood, for plaintiff-appellant/appellee Richmond County.

Tharrington, Smith & Hargrove, by J. David Farren, Michael Crowell, Douglas A. Ruley, Gunn & Messick, by Robert L. Gunn, for plaintiff-appellant/appellee Chatham County.

Wake County Attorneys Office, by Michael Ferrell and Corrine Russell, for plaintiff-appellant/appellee Wake County.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Terry Richard Kane, Smith Helms Mulliss & Moore, by Richard W. Ellis, Gary R. Govert, and Mathew W. Sawchak, for defendant-appellant/appellee North Carolina Low-Level Radioactive Waste Management Authority.

Moore & Van Allen, by Charles D. Case and David E. Fox, for defendant-appellant/appellee Chem-Nuclear Systems, Inc.

GREENE, Judge.

Plaintiffs in these consolidated cases, *see* N.C.R. App. P. 40 (1992) (Court on its own initiative may consolidate cases which involve common questions of law), appeal from orders dismissing all but one of plaintiffs' claims. Defendants, upon this Court's grant of defendants' petition for writ of certiorari, appeal from interlocutory orders denying defendants' motion to dismiss plaintiffs' remaining claim on the ground that it fails to state a claim upon which relief can be granted, N.C.G.S. § 1A-1, Rule 12(b)(6) (1990), and on ripeness grounds.

In 1987, the North Carolina General Assembly determined that "the generation of low-level radioactive waste is an unavoidable result of the needs and demands of a modern society." N.C.G.S. § 104G-3 (1989). The General Assembly further found that

> the safe and efficient management of low-level radioactive waste, including the timely establishment of adequate facilities for the comprehensive management and permanent disposal of low-level radioactive waste, presents urgent problems for North Carolina; and that solutions to these problems are essential to the State's continued economic growth and to protection of the public health and safety and the environment.

Id. Prompted by these findings, the General Assembly enacted the North Carolina Low-Level Radioactive Waste Management Authority Act, N.C.G.S. § 104G-1 *et seq.*, establishing the North Carolina Low-Level Radioactive Waste Management Authority (the Authority) and mandating that it site, design, construct, and operate a safe and efficient low-level radioactive waste disposal facility somewhere within the State. The operation of such a facility for twenty years or until thirty-two million cubic feet of waste has been received for storage will fulfill North Carolina's obligation,

as a member of the eight-member Southeast Interstate Low-Level Radioactive Waste Management Compact, of serving as a "host state."

In late November, 1988, the Authority, along with contractor Ebasco Services, Inc., designated 116 potential suitable site areas for the facility. In March, 1989, this list of candidate areas was narrowed to approximately 3.2 million acres located in seventy counties in North Carolina. In late July, 1989, a second contractor, Chem-Nuclear Systems, Inc. (Chem-Nuclear) began its part of the site selection activities. On 8 November 1989, Chem-Nuclear recommended, and the Authority agreed, that areas in Union, Rowan, Richmond, and Wake/Chatham Counties be designated as the four favorable sites for precharacterization studies. "Characterization" is a lengthy environmental study intended to determine, among other things, whether a particular site is suitable for a low-level radioactive waste disposal facility.

From mid-December, 1989, to 1 February 1990, Chem-Nuclear performed precharacterization studies of the four site areas, and on 21 February 1990 recommended that the sites in Richmond and Wake/Chatham Counties be designated for characterization. After eliminating from consideration the Union and Rowan County sites based on Chem-Nuclear's representation that large portions of those sites had shallow ground water, the Authority selected the Richmond and Wake/Chatham County sites for characterization.

On 27 February 1990, Richmond County filed a complaint against the Authority. In its complaint, Richmond County alleged that the Authority, working with Chem-Nuclear, had failed to comply with applicable law in its evaluation of potential suitable sites for placement of a low-level radioactive waste disposal facility. On 6 June 1990, Richmond County filed an amended complaint adding Chem-Nuclear as a defendant. In Count I of its amended complaint, Richmond County alleged a failure by defendants to comply with the provisions of Chapter 104G with regard to the site selection process, and that such failure constituted a violation of North Carolina law and procedural due process. Richmond County sought preliminary and permanent injunctive relief against defendants to stop the violations of law, and a declaratory judgment that the provisions of Chapter 104G were being disregarded. Count II of Richmond County's complaint alleged that the process of site selection as it had been undertaken by defendants was flawed, primarily due

to defendants' reliance upon incorrect, incomplete, or outdated information, and because of substantive errors in the precharacterization report. Count III of Richmond County's amended complaint alleged that an environmental impact statement (EIS) is required by North Carolina law prior to the performance of the characterization study, and requested the prohibition of all characterization activity at the Richmond County site.

On 31 October 1990, Chatham County filed an action against the Authority, alleging in Counts I and III of its complaint claims similar to those alleged in Counts I and III of Richmond County's complaint. In Count II of its complaint, Chatham County alleged that the Authority's vice-chairman, Dr. Constance Walker, had failed to disclose that her husband owned stock in the grandparent company of Chem-Nuclear and in various low-level radioactive waste generators which would use the proposed facility. According to Chatham County, Dr. Walker's actions evidenced a bias on her part which infected the selection process and violated the county's due process rights. On 31 December 1990, Richmond County amended its amended complaint in order to allege in Count IV a claim similar to that alleged in Count II of Chatham County's complaint.

Defendants filed various motions to dismiss the claims of all plaintiffs. On 14 February 1991, the trial court signed an order denying defendants' motions to dismiss the Richmond and Chatham County actions, which motions were based on the plaintiffs' alleged lack of standing. On 16 August 1991, defendants filed a joint motion to dismiss the Richmond County and Chatham County actions, asserting that the lawsuits were nonjusticiable and therefore the court lacked subject matter jurisdiction under N.C.R. Civ. P. 12(b)(1), and that plaintiffs' complaints failed to state a claim upon which relief can be granted under N.C.R. Civ. P. 12(b)(6). On 4 September 1991, the trial court granted a motion made by Wake County pursuant to N.C.R. Civ. P. 24 to intervene as a plaintiff in the Chatham County action.

After hearing on defendants' joint motion to dismiss, the trial court, in its Chatham/Wake County order, granted defendants' motion to dismiss Counts I and II of plaintiffs' complaint (i.e., the state law claim and the Constance Walker due process claim) on the ground that such claims "are premature and nonjusticiable because no genuine controversy exists until a final site is selected for the construction of a low level radioactive waste disposal facili-

ty." In its Richmond County order, the trial court granted defendants' motion to dismiss Counts I, II, and IV (i.e., the state law claim, the flawed information claim, and the Constance Walker due process claim) on the same grounds. In both orders, the trial court refused to grant defendants' motion to dismiss plaintiffs' Count III (the EIS claim), finding in both cases that the claim "is not premature and that it states a justiciable controversy." Plaintiffs appeal from the dismissal of their respective claims. Defendants appeal from the denial of their motion to dismiss plaintiffs' EIS claim.

PLAINTIFFS' APPEALS

The dispositive issue in plaintiffs' appeals is whether the claims dismissed by the trial court are justiciable. After thorough consideration of the records, briefs, reply briefs, memoranda of additional authority, and oral arguments of the parties, we conclude that the resolution of plaintiffs' appeals is controlled by *Granville County Board of Commissioners v. North Carolina Hazardous Waste Management Commission*, 329 N.C. 615, 407 S.E.2d 785 (1991), and affirm the trial court's dismissal of plaintiffs' claims on the ground that such claims do not present justiciable issues and no genuine controversy exists between the parties.

Granville County involved an action by the Granville County Board of Commissioners seeking a temporary restraining order and a preliminary and a permanent injunction to enjoin the North Carolina Hazardous Waste Commission (the Commission) from conducting further testing of, and siting a hazardous waste treatment facility on, a parcel of land in Granville County known as the "Henderson 8" site. The Commission had selected Granville County, pursuant to its authority established in Chapter 130B of the North Carolina General Statutes, as one of two "suitable" sites for further evaluation. At the time the action was commenced, the Commission had selected two suitable sites which were to receive additional site-specific geological evaluation. The Commission had made no final decision regarding a location for the facility, and additional steps may or may not have resulted in the selection of the Henderson 8 site. Granville County alleged in its complaint that the Commission had violated various statutory provisions and its own administrative rules in selecting Granville County as a suitable site.

The trial court entered a preliminary injunction prohibiting the Commission from taking any further action, including entry

onto the land, with regard to the siting of a hazardous waste facility at the Henderson 8 location. The court based its injunction on the court's determination that a regional agreement regarding the disposal and management of hazardous waste, of which North Carolina was a member, violated Article 1, Section 6 of the North Carolina Constitution. The North Carolina Supreme Court granted the Commission's petition for discretionary review.

The Supreme Court determined that the case was moot due to a number of significant events which had occurred after the initiation of the litigation, primarily, the Commission's downgrading of the Henderson 8 site from a "suitable" site to one of sixteen "potentially acceptable/high priority" sites and the expulsion of North Carolina from the regional agreement for failure to meet a required deadline. Nevertheless, the Court chose to address as "a matter of public interest . . . deserv[ing] prompt resolution" the issue of our courts becoming "prematurely involved in the administrative process and interfer[ing] in a decision-making process by the Commission which has not yet culminated in a final agency decision." *Granville County*, 329 N.C. at 623, 407 S.E.2d at 789-90. The Court determined that the trial court's issuance of the preliminary injunction "interfered with the exercise of discretion and judgment on the part of an important administrative agency in performing a function mandated by the legislature, that being the evaluation and selection of a final site for a hazardous waste facility." *Id.* at 624, 407 S.E.2d at 790. Further, it recognized that

> [o]ur legislature has determined that the management of hazardous waste is *essential* to protect the public health, safety, and environment and that the *timely* establishment of a hazardous waste facility is one of the *most urgent* problems facing North Carolina. In matters of this nature which seek solutions to extremely urgent problems, where the solutions are essential to protect the public health and safety, the courts should be reluctant to interfere until the administrative decision has been finalized.

Id. (citation omitted). The Court determined that a final site selection could not be made until the Commission completed two additional steps, and stated that "[u]nless and until the Commission makes a final site selection decision, there is no justiciable issue and no genuine controversy between the parties." *Id.* at 625, 407 S.E.2d at 791. The Court concluded that the Commission could

not be preliminarily enjoined in its process of site selection until the final site selection has been made. *Id.* at 625-26, 407 S.E.2d at 791.

[1] The conformity in essential points between the facts in *Granville County* and those in the instant cases dictates our conclusion that plaintiffs' claims are nonjusticiable. Like in *Granville County*, plaintiffs in the instant case seek declaratory and injunctive relief regarding the selection and testing of potential sites for a disposal facility for dangerous waste. Like in *Granville County*, the legislature has characterized the timely establishment of the disposal facility at issue as an "urgent problem" for North Carolina, the solution to which is essential to the protection of the public health and safety. Like in *Granville County*, the actions in the instant case were commenced when the selection process had been narrowed to two sites; no final decision has been made, and additional steps may or may not result in the selection of the Richmond County site over the Chatham/Wake County site, and vice versa. Like in *Granville County*, plaintiffs in the instant case have alleged violations of state law in the selection process. In addition, plaintiffs in the instant case have raised due process claims. *See Granville County*, 329 N.C. at 625, 407 S.E.2d at 791 (the rule prohibiting premature intervention of the courts "applies with special force to prevent the premature litigation of constitutional issues").

Accordingly, the decision of the trial court dismissing Counts I and II of Chatham and Wake Counties' complaint, and Counts I, II, and IV of Richmond County's complaint, is affirmed.

DEFENDANTS' APPEALS

[2] The dispositive question is whether defendants' contention that applicable law does not require the preparation by defendants of an environmental impact statement prior to the characterization of the Richmond County and Chatham/Wake County sites is a moot issue.

Plaintiffs alleged in Count III of their complaints that defendants are required, pursuant to Chapter 104G and N.C.G.S. § 113A-4(2), to prepare a detailed environmental impact statement assessing potential environmental harm *prior to* the characterization of the Richmond County and Chatham/Wake County sites. According to plaintiffs, the invasive nature of the characterization work, including trench-digging, well-drilling, entry onto the properties by four-wheel drive vehicles, cutting and removal of trees,

and removal of surface and subsoil samples for analysis, will have a significant impact on the ecological system of plants and animals which occupy the area. Defendants argue that Chapter 104G requires that only one EIS be prepared, *after* the characterization of both sites, because the characterization process itself yields the information on which the EIS must be based.

The trial court determined that plaintiffs' EIS claim presented a justiciable issue, and, after hearing on 4 and 5 September 1991, denied defendants' motion to dismiss the claim. Plaintiffs subsequently applied for preliminary injunctions restraining defendants from performing characterization work at both sites. The trial court conducted separate evidentiary hearings on each application. With regard to Chatham and Wake Counties' application, the trial court, after considering the evidence, found in pertinent part that there would be no "significant effect on the environment or any potential lasting environmental effect resulting from the planned testing activities," and denied plaintiffs' application for a preliminary injunction. With regard to Richmond County's application, the trial court determined that characterization of the site could proceed in all respects, with the following exception: the court enjoined defendants from disturbing by machine any land on the site within any wetland, or within fifty feet of any hillside seep or plants listed on the state or federal protected species lists. At oral argument, the parties informed this Court that characterization of both the Richmond County and Chatham/Wake County sites had been proceeding for a substantial period of time and was virtually complete.

In light of the foregoing, we find *Granville County* instructive:

> When, pending an appeal to this Court, a development occurs, by reason of which the questions originally in controversy between the parties are no longer at issue, the appeal will be dismissed for the reason that this Court will not entertain or proceed with a cause merely to determine abstract propositions of law or to determine which party should rightly have won in the lower court.

Granville County, 329 N.C. at 622, 407 S.E.2d at 789 (quoting *Benvenue Parent-Teacher Ass'n. v. Nash County Bd. of Educ.*, 275 N.C. 675, 679, 170 S.E.2d 473, 476 (1969)). Because the characterization of both sites is virtually complete, plaintiffs' claim seeking to require the preparation by defendants of a *precharacterization*

EIS is moot. At this point, plaintiffs' only recourse with regard to defendants' alleged unlawful failure to prepare a precharacterization EIS is an action for damages, a remedy not sought in plaintiffs' complaints. Accordingly, defendants' appeals from the denial of their motion to dismiss the EIS claim are moot and are therefore dismissed.

Disposition of plaintiffs' appeals: Affirmed.

Disposition of defendants' appeals: Dismissed.

Judge LEWIS concurs.

Judge COZORT dissenting in part and concurring in part with separate opinion.

Judge COZORT dissenting in part and concurring in part.

I disagree with the majority's conclusion that *Granville County Board of Commissioners v. North Carolina Hazardous Waste Management Commission*, 329 N.C. 615, 407 S.E.2d 785 (1991) compels the affirmance of the trial court's dismissal of plaintiffs' claims that the Authority violated the General Statutes and its own rules. In *Granville*, plaintiff sought injunctive and declaratory relief on the basis that the North Carolina Hazardous Waste Commission had violated North Carolina statutes and its own administrative rules. The trial court *ex mero motu* granted a preliminary injunction on the basis that the Regional Agreement violated Article I, Section 6 of the North Carolina Constitution. The trial court never ruled on, and the Supreme Court never considered, the plaintiff's claims on statutory and rule violations. After finding the case moot, the North Carolina Supreme Court addressed the justiciability of the issue before the trial court. The Court noted that the rule prohibiting court intervention unless there is a genuine controversy existing between the parties applies "with special force to prevent the premature litigation of constitutional issues." *Id.* at 625, 407 S.E.2d at 791.

In this case, plaintiffs' claims are based on, and the trial court is asked to rule on, whether the Authority has "violated pertinent provisions of N.C.G.S. §104G-1, *et seq.*" In *Granville*, neither the trial court nor the North Carolina Supreme Court addressed plaintiff's claim that the Commission had violated state law and its

own administrative rules. I believe the distinction is significant. If *Granville* is interpreted to mean that the counties can bring no claim in court until after the final site selection, which may take several years, then obvious and apparent defects in the proceedings could not be corrected for many years. Under that scenario, the selection process must begin again, perhaps doubling or trebling the time to resolve a problem the legislature found urgent. Surely, the Supreme Court did not intend such a result. *Granville* seeks to prevent *premature* court intervention on constitutional grounds. I do not believe it was intended to be a total bar to timely access to the courts to cure obvious defects in administrative proceedings. Court intervention would not be premature when there is such a genuine controversy between the parties. To hold otherwise runs perilously close to violating Article I, Section 18 of the Constitution of North Carolina, which mandates that "(a)ll courts shall be open; every person for an injury done to him in his lands, goods, person or reputation shall have remedy by due course of law; and right and justice shall be administered without favor, denial, or delay."

Allowing such timely review of claims based on excess of lawful authority does not run afoul of the primary case relied upon by the Supreme Court in the *Granville* decision. The *Granville* court quoted extensively from *Pharr v. Garibaldi*, 252 N.C. 803, 115 S.E.2d 18 (1960) for the proposition that " 'Courts will not undertake to control the exercise of discretion and judgment on the part of the members of a commission in performing the functions of a State agency.' " *Granville*, 329 N.C. at 625, 407 S.E.2d at 791 (quoting *Pharr*, 252 N.C. at 811, 115 S.E.2d at 24). The same passage quoted, however, leaves an opening for the type of claim brought by plaintiffs below. The *Pharr* court continued by stating that the court has no power to intervene "in the absence of fraud, manifest abuse of discretion or *conduct in excess of lawful authority . . . .*" *Granville*, 329 N.C. at 625, 407 S.E.2d at 791 (quoting *Pharr*, 252 N.C. at 811-12, 115 S.E.2d at 25) (emphasis added). The plaintiff counties' claims below alleged conduct in excess of lawful authority, and I believe they should be heard in accordance with the exception recognized by *Pharr* and quoted by *Granville*.

I further believe that allowing plaintiffs' claims regarding adherence to statutes and rules would not create a risk that the administrative process would be improperly delayed by frivolous claims for injunctive relief. No plaintiff would be entitled to

preliminary injunctive relief unless evidence was presented which demonstrated probable cause plaintiff will be able to establish the rights asserted and a reasonable apprehension of irreparable loss unless immediate relief is granted. *Williams v. Greene*, 36 N.C. App. 80, 85, 243 S.E.2d 156, 159 (1978).

I therefore dissent from the portion of the majority opinion which affirms the trial court's dismissal of the plaintiffs' claims alleging that the Authority failed to follow statutes and regulations. I vote to reverse that portion of the trial court's orders and remand the matters for an evidentiary hearing on those claims.

I concur with the majority's opinion that the claims relating to the environmental impact statement (EIS) issue are now moot. I believe, however, that plaintiffs' claims regarding the EIS were justiciable, since they likewise dealt with whether the Authority followed state law. In my opinion the trial court did not err in denying defendants' motions to dismiss plaintiffs' EIS claims.

NORTH CAROLINA ELECTRIC MEMBERSHIP CORPORATION, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF ECONOMIC AND COMMUNITY DEVELOPMENT, NORTH CAROLINA RURAL ELECTRIFICATION AUTHORITY, EVERETT ROBERSON, IN HIS OFFICIAL CAPACITY AS ADMINISTRATOR OF THE NORTH CAROLINA RURAL ELECTRIFICATION AUTHORITY, DEFENDANTS, AND DUKE POWER COMPANY, INTERVENOR

No. 9110SC1173

(Filed 2 February 1993)

1. Appeal and Error § 109 (NCI4th)— release of documents—denial of request for preliminary injunction—interlocutory appeal properly heard

It was proper for the Court of Appeals to hear plaintiff's interlocutory appeal from the denial of its request for a preliminary injunction, since, without the preliminary injunction, plaintiff would be required to release the very documents in issue, and, with that done, there would be no reason to proceed with trial on the merits, the whole basis for such action already having been decided by plaintiff's compliance with the court order.

Am Jur 2d, Appeal and Error § 80.

Appealability of order pertaining to pretrial examination, discovery, interrogatories, production of books and papers or the like. 37 ALR2d 586.

2. **Injunctions § 16 (NCI4th)— jurisdiction to issue injunctions to prevent disclosure of documents**

There was no merit to defendant intervenor's contention that the courts have no jurisdiction to issue injunctions to prevent the disclosure of documents.

Am Jur 2d, Injunctions § 69.

Appealability of order refusing to grant or dissolving temporary restraining order. 19 ALR3d 403.

3. **Unfair Competition § 4 (NCI3d)— no common law right to protection of trade secrets**

Plaintiff failed to show a common law right to protection of trade secrets.

Am Jur 2d, Monopolies, Restraints on Trade, and Unfair Trade Practices § 704.

Discovery or inspection of trade secret or the like. 17 ALR2d 383.

4. **Unfair Competition § 4 (NCI3d)— documents containing trade secrets—no evidence of misappropriation of secrets—no protection under Trade Secrets Protection Act**

Though plaintiff electric membership corporation offered sufficient evidence to show that it was likely to succeed in establishing that documents it filed with the Rural Electrification Authority contained trade secrets, it offered no evidence of misappropriation of those secrets, and plaintiff therefore was not entitled to protection under the Trade Secrets Protection Act of 1981 from disclosure of those documents to a competitor. N.C.G.S. §§ 66-1522(3), 66-154(a).

Am Jur 2d, Monopolies, Restraints on Trade, and Unfair Trading Practices § 704.

Discovery or inspection of trade secret or the like. 17 ALR2d 383.

5. State § 1.2 (NCI3d)— protection of documents under Public Records Act—no retroactive application

Where plaintiff electric membership corporation sought to protect documents filed with the Rural Electrification Authority in 1980, 1983 and 1987, applying an exemption of the Public Records Act enacted in 1989 which protected trade secrets would not constitute a retroactive application of the statute because the right at issue arose pursuant to defendant intervenor's request for disclosure in 1991, after enactment of the amendment, and not at the time the documents were originally submitted. N.C.G.S. § 132-1.2.

Am Jur 2d, Records and Recording Laws § 19.

6. State § 1.2 (NCI3d)— documents containing trade secrets—protection under Public Records Act

Plaintiff electric membership corporation produced sufficient evidence to establish a likelihood of success on the merits on its claim of protection under the trade secrets exemption of the Public Records Act for documents filed with the Rural Electrification Authority where plaintiff produced evidence that the documents likely contained trade secrets; the documents constituted the property of a private person as defined in N.C.G.S. § 66-152(2); the documents were furnished to a public agency in connection with the owner's application for federal funding; and the facts and circumstances surrounding this case could likely support a conclusion that the documents were "indicated," rather than "designated," to contain trade secrets at the time of their initial submission to the Rural Electrification Authority.

Am Jur 2d, Records and Recording Laws § 27.

What constitutes "trade secrets" exempt from disclosure under state freedom of information act. 27 ALR4th 773.

7. Injunctions § 9 (NCI4th)— denial of preliminary injunction—irreparable harm

Where it might ultimately be determined that plaintiff's documents should not be disclosed, the denial of a preliminary injunction and subsequent disclosure of such documents would obviously result in irreparable harm.

Am Jur 2d, Injunctions § 48.

Appeal by the plaintiff from Order entered 26 August 1991 by Judge Henry W. Hight, Jr. in Wake County Superior Court. Heard in the Court of Appeals 23 October 1992.

Moore & Van Allen, by Joseph W. Eason and Denise Smith Cline, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by William W. Finlator, Jr., Associate Attorney General, and Jo Anne Sanford, Special Deputy Attorney General, for defendants-appellees.

Kennedy, Covington, Lobdell & Hickman, by James P. Cooney III and Myles E. Standish, for intervenor-appellee.

WYNN, Judge.

The basis of this appeal concerns documents filed by the plaintiff, North Carolina Electric Membership Corporation ("NCEMC"), with the defendant, North Carolina Rural Electrification Authority ("NCREA"), which documents the intervenor, Duke Power Company ("Duke"), has requested be disclosed pursuant to the Public Records Act. *See* N.C. Gen. Stat. § 132-6 (1991).

NCEMC is a cooperative electric membership corporation which provides electric energy at wholesale prices to twenty-seven members, which in turn supply electricity to approximately 500,000 North Carolina retail customers. Electric membership corporations such as NCEMC, when applying for federal funds, are required by statute to apply through NCREA rather than with the federal agencies directly. *See* N.C. Gen. Stat. § 117-26 (1986). Pursuant to this requirement, NCEMC filed certain documents with NCREA over a period of years. Duke requested disclosure of these documents alleging that they are public records and as such must be disclosed pursuant to North Carolina's Public Records Act.

Duke and NCEMC are competitors in the wholesale purchase and sale of bulk power, and Duke, in fact, provides some power and related services to NCEMC. Duke constructed the Catawba Nuclear Station ("Catawba") in the 1970's and 1980's. In an agreement which required Duke to buy back a portion of the power generated, Duke sold part of Catawba to NCEMC. In one of many arbitration proceedings to which the two are adverse parties, Duke and NCEMC have been arbitrating a contractual dispute arising out of the purchase and sale of Catawba. In that proceeding, the arbitrator entered a protective order to resolve a dispute regarding

documents similar to those in the present case. The protective order granted a limited number of Duke personnel authority to review certain documents, but prohibited the use or disclosure of the documents for any purpose other than the arbitration. In the course of this arbitration Duke requested that the federal Rural Electrification Authority release, pursuant to the Freedom of Information Act, certain documents deposited with it by NCEMC. From refusal of that request, Duke appealed. That appeal is currently pending in the federal district court for the Western District of North Carolina.

On 11 January 1991, NCREA received a request from Duke for disclosure of the three documents which are the subject of the present appeal: 1) NCEMC Long Range Financial Forecast and Member Rate Forecast for Mobile Substation Programs (October 1987); 2) Summary of Feasibility Studies in Support of Deficiency Loan for Participation in Catawba (June 1983); 3) Financial Forecast for NCEMC-Catawba (September 1980). The Financial Forecast for NCEMC-Catawba was the only one of the three documents specifically designated as "Confidential" when it was submitted to NCREA.

NCREA notified NCEMC of Duke's request and asked for a response. NCEMC expressed its belief that the documents were protected because they contained trade secrets which are exempt from the Public Records Act. Duke, in turn, was permitted to respond to NCEMC's claim. To resolve the dispute over the documents, NCREA, through the Office of the Attorney General, held a meeting of all parties involved and conducted an item by item review of the documents in question. Subsequent to this meeting, NCREA issued its decision that the NCEMC Long Range Financial Forecast and Member Rate Forecast for Mobile Substation Programs (October 1987) and the Summary of Feasibility Studies in Support of Deficiency Loan for Participation in Catawba (June 1983) could be disclosed but that the Financial Forecast for NCEMC-Catawba (September 1980) was exempted from disclosure as containing trade secrets.

NCREA set 12 July 1991 as the disclosure date, but on 11 July 1991 NCEMC obtained a temporary restraining order barring such disclosure. At that time Duke intervened as a party defendant. On 2 August 1991 a hearing was held on NCEMC's Motion for a Preliminary Injunction. From denial of that motion, NCEMC appealed.

I.

[1] The denial of a preliminary injunction is interlocutory and as such an appeal to this Court is not usually allowed prior to a final determination on the merits. However, review is proper if "such order or ruling deprives the appellant of a substantial right which he would lose absent a review prior to final determination." *A.E.P. Indus., Inc. v. McClure*, 308 N.C. 393, 400, 302 S.E.2d 754, 759 (1983). The present case involves a substantial right that the appellant may lose if review is not undertaken at this time. Without the preliminary injunction, the NCREA would be required to release the NCEMC documents at issue to Duke. With that done, there would be no reason to proceed with a trial on the merits, the whole basis for such action already having been decided by the appellant's compliance with the court order. It is proper, therefore, for this Court to hear the interlocutory appeal from the denial of NCEMC's request for a preliminary injunction.

[2] The defendant intervenor, Duke, asserts that there is no jurisdictional provision which allows NCEMC to bring this action. We cannot agree with Duke that the courts have no jurisdiction to issue injunctions to prevent the disclosure of documents. While we recognize the strong policy in favor of disclosure, we must also be cognizant of the protection given certain documents that would otherwise be considered Public Records. The fact that the statute provides an exemption for certain documents leads this Court to the logical conclusion that those claiming that their documents are exempt must have some recourse in our court system. To conclude otherwise, we believe, would offer no protection from agency error or from an agency's abuse of its discretion. We, therefore, hold that this issue is properly presented for resolution in the court system.

II.

Although the appellant, NCEMC, sets forth seven assignments of error, there is but one issue that this Court must resolve on appeal. That is, did the trial court properly deny appellant's motion for a preliminary injunction. For the reasons that follow, we conclude that it did not.

The burden of proof in a case regarding a preliminary injunction is on the plaintiff, the presumption being that the decision of the trial court is correct. *Huggins v. Wake County Bd. of Ed.*,

272 N.C. 33, 41, 157 S.E.2d 703, 708 (1967). This Court is not, however, bound by the findings of the trial court and may essentially review the case *de novo*. *Iradell Digestive Disease Clinic v. Petrozza*, 92 N.C. App. 21, 26, 373 S.E.2d 449, 452 (1988), *aff'd*, 324 N.C. 327, 377 S.E.2d 750 (1989).

In general, a preliminary injunction will issue where 1) the plaintiff is able to show a likelihood of success on the merits of the case, *and* 2) the plaintiff is likely to suffer irreparable harm, or, in the opinion of the court, the injunction is necessary to protect the plaintiff's rights during the course of the litigation. *McClure*, 308 N.C. at 401, 302 S.E.2d at 759-60.

In determining whether the plaintiff in the case at bar has shown a likelihood of success on the merits, we must examine the law related to the disclosure of public documents. The appellant basically sets forth three bases upon which it believes it has a substantial likelihood of success on the merits: 1) The documents are protected under common law; 2) The documents are protected under statutory trade secret law prior to 1989; and 3) The documents are protected under the 1989 exception to the Public Records Act. We examine each of these in turn and conclude that the appellant has met its burden of showing that it is likely to succeed on the merits.

1. Common Law Protection

[3] With regard to common law protection, the plaintiff contends that, based on the decision in *S.E.T.A. UNC-CH, Inc. v. Huffines*, 101 N.C. App. 292, 399 S.E.2d 340 (1991), protection for trade secrets existed at common law. While our research indicates that some type of protection for trade secrets may have existed at common law, the extent of that protection is not clearly defined. *See generally North Carolina Trade Secrets Protection Act*, 18 Wake Forest L. Rev. 823 (1982). Appellant argues that *S.E.T.A.* recognizes a common law right to protection of trade secrets. We, however, find appellant's analysis of that case to be erroneous, in that any rights recognized by the *S.E.T.A.* Court derived from the trade secret exemption under the Public Records Act. We likewise conclude that if appellant in the case at bar has any right to block the disclosure of alleged trade secrets, that right arises under the Public Records Act.

2. Trade Secrets Protection Act

[4] Appellant next contends that it enjoyed protection under the Trade Secrets Protection Act of 1981. N.C. Gen. Stat. §§ 66-152—66-162 (1992). Specifically, appellant contends that its documents contain "trade secrets" as defined by N.C. Gen. Stat. § 66-152(3), which provides:

> "Trade secret" means business or technical information, including but not limited to a formula, pattern, program, device, compilation of information, method, technique, or process that:
>
> a. Derives independent actual or potential commercial value from not being generally known or readily ascertainable through independent development or reverse engineering by persons who can obtain economic value from its disclosure or use; and
>
> b. Is the subject of efforts that are reasonable under the circumstances to maintain its secrecy.

In support of its motion for a preliminary injunction, appellant submitted evidence including an affidavit of its consultant, Anis Sherali, and a verified complaint. This evidence tends to show that the documents at issue contain valuable business information such as NCEMC's projections of its electric rates for sales to its members and its methodologies for forecasting such price information. Moreover, NCEMC contends that this information would be of actual value to Duke and to its other competitors and would cause irreparable competitive harm to NCEMC.

We find that this evidence was sufficient to show that appellant is likely to succeed in establishing that the documents at issue contain trade secrets. However, a cause of action under the Trade Secrets Protection Act requires proof of a "misappropriation" of trade secrets. *See id.* § 66-154(a).

N.C. Gen. Stat. § 66-152(1) defines "misappropriation" as the "acquisition, disclosure, or use of a trade secret of another without express or implied authority or consent, unless such trade secret was arrived at by independent development, reverse engineering, or was obtained from another person with a right to disclose the trade secret." The elements of an action for misappropriation are "(1) [the defendant] knows or should have known of the trade secret; and (2) [the defendant] has had a specific opportunity to acquire it for disclosure or use or has acquired, disclosed, or used it without

the express or implied consent or authority of the owner." *Id.* § 66-155(1)—(2). While the appellant presented sufficient evidence that it is likely to succeed in showing that the documents at issue contain trade secrets, it offered no evidence of misappropriation. Because appellant bears the burden of proof on the issuance of a preliminary injunction, this Court must conclude that appellant has failed to show a likelihood of success on the merits with respect to any claim brought pursuant to the Trade Secret Protection Act.

3. Public Records Act

[5] The Public Records Act, enacted in 1935, provides broad public access to certain documents classified as public records which are defined as documents "made or received pursuant to law or ordinance in connection with the transaction of public business by any agency of North Carolina government or its subdivisions." N.C. Gen. Stat. § 132-1 (1991). Prior to 1989, the statute made no mention of confidential documents or trade secrets. In 1989 the General Assembly amended the act to exclude trade secrets from disclosure requirements. Pursuant to the 1989 amendment, public agencies were neither required nor authorized to disclose a document which:

> (1) Constitutes a "trade secret" as defined in G.S. § 66-152(3);
>
> (2) Is the property of a private "person" as defined in G.S. § 66-152(2) (1985);
>
> (3) Is disclosed or furnished to the public agency in connection with the owners performance of a public contract or in connection with a bid, application, proposal, or industrial development project; and
>
> 4) Is designated as "confidential" and/or as a "trade secret" at the time of its initial disclosure to the public agency.

N.C. Gen. Stat. § 132-1.2 (1989).

Generally, "a statute will be given retroactive application only when it clearly appears that to do so was the intent of the legislature." *Perry v. Perry*, 80 N.C. App. 169, 172, 341 S.E.2d 53, 55, *dis. rev. allowed*, 317 N.C. 336, 346 S.E.2d 502 (1986), *appeal dismissed*, 320 N.C. 170, 357 S.E.2d 925 (1987). Although the documents at issue here were filed with NCREA in 1980, 1983 and 1987, applying this exemption does not constitute a retroactive application of the statute because the right at issue arose pursuant to Duke's

request for disclosure in 1991, after enactment of the amendment, and not at the time the documents were originally submitted. To find otherwise would put entities in the illogical position of having to recover and resubmit documents filed with state agencies prior to 1989 in order to obtain the protection of the 1989 amendment.

[6] Appellant contends that the documents at issue meet the requirements of the exemption. As discussed previously, appellant has shown a likelihood of success in establishing that the documents contain "trade secrets" as defined by N.C.G.S. § 66-152(3), thereby meeting the first prong of the exemption requirements. Further, there is no dispute regarding the second and third prongs, that the documents constitute the "property of a private person as defined in G.S. § 66-152(2)", and that they were "furnished to the public agency . . . in connection with [the owner's] . . . application [for federal funding]." Finally, appellant argues that it has met the fourth prong of the exemption requirements: that the document was "designated as 'confidential' and/or as a 'trade secret' at the time of its initial disclosure to the public agency." This prong was amended in July 1991, altering the language to read that a document be "designated *or indicated* as 'confidential or as a 'trade secret'. . . ."

Amendments to a statute either act to change the law or to clarify the law. *Childers v. Parker's Inc.*, 274 N.C. 256, 260 162 S.E.2d 481, 483 (1968). While the presumption is that the legislature intended to change the law through its amendments, where the language of the original statute is ambiguous such amendments may be deemed, not as a change in the law, but as a clarification in the language expressing that law. *Id.* at 260, 162 S.E.2d at 483-84. In the present case, the addition of the language "or indicated" acts to clarify the otherwise ambiguous word "designated." As such, any application of this statute either before or after 1991, should interpret the word "designated" as meaning "designated or indicated."

Appellant argues that the documents at issue, upon initial disclosure to NCREA, were "indicated" as containing "trade secrets." We find, as alleged by NCEMC, that the facts and circumstances surrounding this case may be likely to support a conclusion that the documents were "indicated" to contain trade secrets at the time of their initial submission to NCREA. This is further evidenced by NCREA's request for a response from NCEMC regard-

ing Duke's petition for disclosure. By requesting a response, NCREA acknowledged that the documents may contain trade secrets or other confidential information that could prove damaging to NCEMC if disclosed to Duke.

We conclude that the appellant has produced sufficient evidence to establish a likelihood of success on the merits on its claim of protection under the Public Records Act as amended in 1989 and 1991.

III.

[7] We also conclude that the appellant has shown that it is likely to suffer irreparable harm if the preliminary injunction does not issue. In examining this second requirement for a preliminary injunction, the courts of North Carolina have "consistently adhered to the proposition that where the principal relief sought is a permanent injunction, it is particularly necessary that the preliminary injunction issue." *McClure*, 308 N.C. at 408, 302 S.E.2d at 763. It is clear that the disclosure of the documents, which will result from the denial of the preliminary injunction, will cause irreparable harm to the appellant. The merits of the case will be decided without a hearing and the appellant will be deprived of any remedy or relief it may have received at trial if the preliminary injunction is granted. The whole basis of a trial on the merits in the case at bar regards whether the documents in question should be released. Once those documents are released they cannot be unreleased. Where it might ultimately be determined that appellant's documents should not be disclosed, the denial of a preliminary injunction and subsequent disclosure of such documents would obviously result in irreparable harm.

For the foregoing reasons, the decision of the trial court denying appellant's motion for a preliminary injunction is reversed and remanded for entry of a preliminary injunction pending a trial on the merits.

Judges GREENE and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

LORIS M. PIEPER v. GARY L. PIEPER

No. 9126DC1111

(Filed 2 February 1993)

1. **Divorce and Separation § 564 (NCI4th)— Iowa judgment for child support beyond age eighteen—judgment entitled to full faith and credit**

The enforcement of an Iowa judgment for continued child support payments beyond the age of eighteen did not violate the public policy of North Carolina, and the trial court correctly found the Iowa judgment entitled to full faith and credit in this State.

Am Jur 2d, Divorce and Separation §§ 1022, 1130.

Divorce decrees and full faith and credit—Supreme Court cases. 14 L. Ed. 2d 917.

2. **Divorce and Separation § 564 (NCI4th)— dismissal of prior URESA action—money judgment obtained in Iowa—prior dismissal not res judicata—money judgment entitled to full faith and credit**

The trial court's dismissal of plaintiff's prior URESA action was not res judicata in this subsequent action to enforce a money judgment where plaintiff's earlier action sought to enforce an Iowa child support order requiring support payments past the child's majority; that action was dismissed for failure to state a claim upon which relief could be granted; plaintiff then returned to Iowa to seek a final money judgment based on the previous Iowa order; defendant was at liberty to present any defenses to the subsequent Iowa action, but failed to do so; and plaintiff was then free to return to North Carolina to seek enforcement of that judgment pursuant to the Full Faith and Credit Clause of the United States Constitution.

Am Jur 2d, Divorce and Separation § 1130.

Divorce decrees and full faith and credit—Supreme Court cases. 14 L. Ed. 2d 917.

3. Divorce and Separation § 418 (NCI4th)— past due child support—foreign judgment—no credit for sums given directly to child

An Iowa judgment for past due child support was entitled to full faith and credit as to the amount owed up until the time of the judgment, and the trial court was without authority to allow defendant credit toward the judgment for sums given to the child outside the Iowa order even though Iowa law would not allow a credit for direct payments made by defendant but North Carolina recognizes this defense. N.C.G.S. § 50-13.10(a).

Am Jur 2d, Divorce and Separation §§ 1130, 1133.

Divorce decrees and full faith and credit—Supreme Court cases. 14 L. Ed. 2d 917.

Appeal by defendant from judgment entered 21 May 1991 by Judge L. Stanley Brown in Mecklenburg County District Court. Heard in the Court of Appeals 21 October 1992.

Waggoner, Hamrick, Hasty, Monteith, Kratt & McDonnell, by Richard L. Huffman, for plaintiff-appellant.

Petree Stockton & Robinson, by David B. Hamilton and B. David Carson, for defendant-appellant.

WYNN, Judge.

Plaintiff and defendant were divorced on 19 March 1975 in Iowa. Plaintiff was awarded custody of the parties' son, Mark Pieper, born of the marriage on 7 November 1965. Upon divorce, an Order was entered by the Iowa Courts ordering defendant to pay to plaintiff the sum of $65.00 per week in child support until Mark reached the age of eighteen. Defendant made such payments until Mark's eighteenth birthday.

On 20 December 1983, plaintiff petitioned the Iowa Courts for an increase in, and continuance of, child support for Mark. On 1 August 1984, an Order was entered by the Iowa Courts increasing the amount of child support to the sum of $85.00 per week and ordering that defendant make such payments directly through the courts until Mark reached the age of twenty-two, so long as he in good faith attended a college, university or area

school. Defendant appealed the Iowa Order to the Iowa Supreme Court which affirmed the trial court's judgment. By Order dated 1 October 1985, the $85.00 per week child support order was made retroactive to 20 December 1983, the date plaintiff first filed her application seeking an increase and continued child support.

Defendant made no child support payments pursuant to the above Orders. In 1986, plaintiff petitioned for Registration and Confirmation in North Carolina pursuant to N.C. Gen. Stat. Ch. 52A, the Uniform Reciprocal Enforcement of Support Act (URESA), seeking to enforce the Iowa Orders in North Carolina, where defendant has resided since 1975. Defendant moved to vacate the registration and to dismiss the action. By Order dated 29 July 1987 the district court granted defendant's motion to dismiss. Plaintiff appealed the dismissal to the North Carolina Court of Appeals and to the North Carolina Supreme Court, both of which affirmed the trial court's action. *Pieper v. Pieper*, 90 N.C. App. 405, 368 S.E.2d 422, *aff'd*, 323 N.C. 617, 374 S.E.2d 275 (1988) (hereinafter *Pieper I*).

Having failed to obtain relief in this State under URESA to enforce the Iowa Orders, plaintiff returned to Iowa to have the Orders of that State reduced to a money judgment. On 5 June 1989, an "Enrolled Order" was entered in the Iowa District Court adjudging defendant to be in arrears for support payments pursuant to the earlier Iowa Orders, in the sum of $17,085.00 plus interest of $5,990.12 which had accumulated thereon through the date of hearing, 26 May 1989. Interest on said judgment was to continue to accumulate at the rate of $4.68 per day.

Thereafter, in August of 1989, plaintiff filed a complaint in North Carolina seeking enforcement of the June 1989 Iowa Judgment. The subject action was tried without a jury and on 21 May 1991 judgment was entered in favor of plaintiff. The trial judge held that the Iowa Judgment was valid and entitled to full faith and credit in the State of North Carolina and further that the dismissal of the prior URESA action brought by plaintiff did not bar this claim by *res judicata*. The trial court found the total due by defendant pursuant to the Iowa Judgment, with accumulated interest through the date of judgment, to be $26,468.12. Additionally, the trial judge found that defendant, subsequent to the original Iowa Order dated August 1984, had given Mark a number of checks, totaling $5,650 to cover various college expenses. The court gave

defendant a credit for this amount, deducting $5,650 from the total amount due. Judgment was entered in favor of plaintiff in the amount of $20,818.12 plus interest accumulating from the date of judgment at 8%. Defendant appealed from entry of judgment and, plaintiff appealed from the judgment as to the credits awarded to defendant.

I.

By defendant-appellant's first assignment of error, he contends that the Iowa Judgment is not entitled to full faith and credit because enforcement of such judgment is contrary to statutory law in North Carolina and thus violates public policy. We disagree.

Under the Full Faith and Credit Clause of Article IV, Sec. 1 of the United States Constitution, a judgment rendered by a court of one state is, in the courts of another state, binding and conclusive as to the merits adjudicated. *Fleming v. Fleming*, 49 N.C. App. 345, 350, 271 S.E.2d 584, 587 (1980). Therefore, we are with limited exceptions, bound to recognize and enforce a valid judgment rendered by a sister state. A foreign "judgment may be collaterally attacked only upon the following grounds: (1) lack of jurisdiction; (2) fraud in procurement; or (3) that it is against public policy." *McGinnis v. McGinnis*, 44 N.C. App. 381, 388, 261 S.E.2d 491, 496 (1980) (citing *Howland v. Stitzer*, 231 N.C. 528, 58 S.E.2d 104 (1950)).

[1] Defendant does not contend that the Iowa court, entering the June 1989 judgment, lacked jurisdiction nor that there was fraud in the procurement of the decree. His contention is that since our statutes do not recognize a duty of support beyond the age of eighteen, enforcement of the Iowa court's Order for his continued child support payments violates North Carolina law and is therefore contrary to the public policy of this state. *See* N.C. Gen. Stat. § 50-13.4(c) ("[p]ayments ordered for the support of a child shall terminate when the child reaches the age of 18 . . ." with two exceptions inapplicable in this case).

"[T]he mere fact that the law of the forum differs from that of the other jurisdiction does not mean that the foreign statute is contrary to public policy of the forum." *Boudreau v. Baughman*, 322 N.C. 331, 342, 368 S.E.2d 849, 857 (1988). To justify a court in refusing to enforce a right which accrued under foreign law, on the basis that it is contrary to the public policy of our laws,

"it must appear that it is against good morals or natural justice, or that for some other reason the enforcement of it would be prejudicial to the general interest of our own citizens." *Ellison v. Hunsinger*, 237 N.C. 619, 627, 75 S.E.2d 884, 891 (1953).

This Court made it clear in *MGM Desert Inn v. Holtz*, 104 N.C. App. 717, 411 S.E.2d 399 (1991), that public policy is an extremely narrow exception to the granting of full faith and credit. In *MGM*, the plaintiff sought enforcement of a Nevada judgment predicated on a gambling debt. The defendant argued that the judgment was void and not enforceable as being contrary to the public policies and statutes of our state which prohibit gambling. Judge Parker, writing for this Court, explained the special nature of a foreign judgment:

> A cause of action on a judgment is different from that upon which the judgment was entered. In a suit upon a money judgment for a civil cause of action the validity of the claim upon which it was founded is not open to inquiry, whatever its genesis. Regardless of the nature of the right which gave rise to it, the judgment is an obligation to pay money in the nature of a debt upon a specialty.

Id. at 721, 411 S.E.2d at 401 (quoting *Milwaukee County v. White Co.*, 296 U.S. 268, 275-76, 80 L. Ed. 220, 227 (1935)). Because of the virtual finality of a foreign judgment and the mandates of the Full Faith and Credit Clause, "it is rare that we will disregard a sister state judgment on public policy grounds." *Id.* at 723, 411 S.E.2d at 402 (quoting *Mottu v. Davis*, 151 N.C. 237, 65 S.E. 969 (1909)). This Court concluded in *MGM*, that notwithstanding North Carolina's anti-gambling statutes, no public policy exception to the Full Faith and Credit Clause existed to prohibit enforcement of the Nevada judgment. *Id.*

In the subject case, we agree with the trial court's conclusion that, "[g]iving full faith and credit to Iowa law is not contrary to North Carolina public policy, in that, continued child support beyond the age of eighteen is not against good morals, natural justice or prejudicial to the interest of North Carolina citizens." Clearly, no injustice accrues to the people of North Carolina by enforcement of the Iowa Order. In fact, this Court has recognized that "a parent can by contract assume an obligation to his child greater than the law otherwise imposes and by contract bind himself to support his child after emancipation and past majority." *Carpenter*

v. Carpenter, 25 N.C. App. 235, 238, 212 S.E.2d 911, 913, *cert. denied*, 287 N.C. 465, 215 S.E.2d 623 (1975) (citations omitted). By recognizing these contracts as valid, we, in effect, held that such action is not against public policy. Moreover, we have held that,

> a decree for the future payment of alimony or child support is, as to installments past due and unpaid, within the protection of the full faith and credit clause of the Constitution unless by the law of the state in which the decree was rendered its enforcement is so completely within the discretion of the courts in that state that they may annul or modify the decree as to overdue and unsatisfied installments.

Fleming, 49 N.C. App. at 349-50, 271 S.E.2d at 587 (citations omitted).

We conclude that enforcement of the Iowa judgment for continued child support payments beyond the age of eighteen does not violate the public policy of North Carolina. We therefore hold that the trial court correctly found the Iowa judgment entitled to full faith and credit in this State.

II.

[2] Defendant secondly contends that the trial court erred in entering judgment against him because plaintiff's claim is barred under the doctrine of *res judicata* by the Order entered 29 July 1987 dismissing plaintiff's claim in *Pieper I*. He argues that the trial court's dismissal of plaintiff's previous action for failure to state a claim upon which relief could be granted acted as an adjudication on the merits under Rule 41(b). *Dawson v. Allstate Ins. Co.*, 106 N.C. App. 691, 417 S.E.2d 841 (1992) (unless the court in its order for dismissal otherwise specifies, a dismissal for failure to state a claim operates as an adjudication on the merits). While defendant's statement of the law regarding a 12(b)(6) dismissal is correct, his application of that principle to the facts of this case is misplaced.

North Carolina General Statute Section 52A-4 states that the Uniform Reciprocal Enforcement of Support Act remedies "are in addition to and not in substitution for any other remedies." The legislative intent by enactment of URESA was thus to "provide authority to the courts of this State to apply the URESA so as to provide for the support of a minor child independent of and without regard for any other support judgments . . . ." *Stephens v. Hamrick*, 86 N.C. App. 556, 558, 358 S.E.2d 547, 548 (1987) (quoting *County of Stanislaus v. Ross*, 41 N.C. App. 518, 522, 255 S.E.2d

229, 231 (1979)). In *Stephens*, this Court held that a plaintiff did not abandon her rights to child support payments awarded under a South Carolina support order by accepting payments under a North Carolina URESA order. *Id.* Chapter 52A simply provides an additional means of "enforcing" support obligations. *Blake v. Blake*, 34 N.C. App. 160, 161, 237 S.E.2d 310, 311 (1977). Thus the Order dismissing plaintiff's prior action brought in North Carolina is conclusive only as to its finding that the plaintiff is not entitled to enforce the Iowa Orders pursuant to our URESA statute.

In the subject case, plaintiff's first action was dismissed because the Iowa Order was not enforceable pursuant to our URESA statute against defendant. Plaintiff thereafter returned to Iowa and filed an Application for Determination of Amount Due, under the previously issued Orders. According to the "Enrolled Order," defendant was properly served in that matter but failed to appear in person or by counsel at the hearing. Plaintiff presented evidence from which the court made findings of fact and concluded that defendant was indebted to plaintiff in the amount of $ 17,085 plus interest. Any defenses to this action, asserted by defendant should have been brought by him in Iowa at that time. Having reduced the amount of arrearage to valid judgment, absent any applicable exceptions, we are bound to apply the Full Faith and Credit Clause and provide full enforcement of the judgment in North Carolina. *Silvering v. Vito*, 107 N.C. App. 270, 275, 419 S.E.2d 360, 364 (1992). We note that our holding on this issue is consistent with the opinion of this Court in *Pieper I*. In affirming the dismissal, this Court stated:

> Petitioner contends that child support payments are within the protection of the full faith and credit clause of the federal constitution unless the rendering state has the power to annul or modify the decree as to overdue and unsatisfied installments. We do not disagree. *While there is no question that petitioner remains free to seek enforcement of her foreign judgment via alternative, well-trodden legal routes, see, e.g., Sistare v. Sistare*, 218 U.S. 1, 30 S.Ct. 682, 54 L.Ed. 905 (1910); *Fleming v. Fleming*, 49 N.C. App. 345, 271 S.E.2d 584 (1980), plaintiff did not pursue such routes in this case.

Pieper, 90 N.C. App. at 407, 368 S.E.2d at 424 (emphasis added).

We find that following the dismissal of the URESA action by the trial judge in *Pieper I*, plaintiff could properly return to

Iowa and seek a final money judgment based on the previous Iowa order. Likewise, defendant was at liberty to present any defenses to the subsequent Iowa action, but he chose not to do so. Once obtaining the valid judgment, plaintiff was free to return to North Carolina to seek enforcement of that judgment pursuant to the Full Faith and Credit Clause of the United States Constitution. We therefore conclude that the trial court's dismissal of plaintiff's previous claim does not bar the present action under the doctrine of *res judicata.*

III.

[3] Defendant next contends that he was entitled to a credit in an amount greater than that awarded by the trial court. By plaintiff's appeal she contends that the trial court erred in allowing the defendant any credits against the Iowa Order, arguing that the Order was entitled to full faith and credit and was *res judicata* as to the amount owed by defendant up to the date of judgment. We agree with plaintiff and thereby find defendant's argument to be without merit.

As stated previously, pursuant to the Full Faith and Credit Clause, "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." *Silvering*, 107 N.C. App. at 274, 419 S.E.2d at 363 (quoting *Cannon v. Cannon*, 223 N.C. 664, 669, 28 S.E.2d 240, 243 (1943)). Defendant makes no argument that the Iowa Order was entered without jurisdiction, we therefore assume that the court had jurisdiction. *Thomas v. Frosty Morn Meats, Inc.*, 266 N.C. 523, 526, 146 S.E.2d 397, 400 (1966).

Rather, defendant asserts two contentions for allowing him credits: 1) that payment may be raised collaterally as a defense to an action based upon a foreign order or judgment; and 2) that since Iowa law would not allow a credit for direct payments made by defendant, but North Carolina recognizes this defense, he has the right to raise it as a defense which could not have been asserted in the original action. Defendant cites *Cresent Hat Company v. Chizick*, 223 N.C. 371, 26 S.E.2d 871 (1983) and *Roberts v. Pratt*, 158 N.C. 50, 73 S.E.2d 129 (1911) in support of his first contention. However, in those cases the defendants were permitted to "plead as a counter-claim payment made *since the rendition of judgment.*"

Cresent Hat, 223 N.C. at 374, 26 S.E.2d at 872 (emphasis added). Thus, those decisions are inapposite to the facts of this case in which defendant seeks credit for payments made prior to entry of the Iowa judgment on 5 June 1989.

The trial court in this case, awarded credits to defendant based on his second contention, that he could not raise this defense in Iowa and thus should not be denied the defense in this State. We hold however, that even under North Carolina law, defendant is not entitled to any credits. Under N.C.G.S. § 50-13.10(a), "if the supporting party is not disabled or incapacitated as provided by subsection (a)(2), a past due, vested child support payment is subject to divestment only as provided by law, and 'if but only if, a written motion is filed, and due notice is given to all parties . . . [b]efore the payment is due . . . .'" *Craig v. Craig*, 103 N.C. App. 615, 619, 406 S.E.2d 656, 658 (1991) (quoting N.C. Gen. Stat. § 50-13.10(a) (1987)). Where defendant made no motion for modification, the trial court was without authority to "modify in any way for any reason" the past due child support payments and defendant is not entitled to credit for any sums given directly to Mark outside of the Iowa Order. N.C. Gen. Stat. § 50-13.10(a) (1987).

In a factually similar case, the plaintiff registered an Arizona judgment for arrearage in North Carolina. *Fleming*, 49 N.C. App. 345, 271 S.E.2d 584. At trial, the defendant in *Fleming* sought credit for payments made, subsequent to entry of the original order but prior to entry of the money judgment. This Court refused to permit such credits, holding that "a final judgment [is] entitled to full faith and credit, and is conclusive on the amount owed by defendant." *Id.* at 350, 271 S.E.2d at 587 (citation omitted). Therefore, "[i]t is improper to permit an alteration or re-examination of the judgment, or of the grounds on which it is based." *Id.; see also Glatz v. Glatz*, 98 N.C. App. 324, 390 S.E.2d 763, *cert. denied*, 327 N.C. 427, 395 S.E.2d 677 (1990) (fully enforceable judgment of another state was entitled to enforcement according to its terms in this state, therefore, to allow defendant a credit against the child support obligation violated the Full Faith and Credit Clause).

In this case, defendant sought, and was given, credits by the trial court for payments made prior to entry of the 5 June 1989 Iowa judgment. Whereas that judgment was not subject to modification, the trial court erred in failing to treat the Iowa judgment for $17,085 plus interest as *res judicata* on the issue of arrearage

due to plaintiff up to 25 May 1989. We therefore reverse the judgment as to the credits awarded defendant.

IV.

Defendant finally argues that he should have been ordered to make payments directly to the parties' son rather than to plaintiff. As discussed previously, we are bound under the dictates of full faith and credit to enforce the Iowa judgment as entered. Defendant should have raised this issue before the Iowa Courts.

For the foregoing reasons we affirm the trial court's entry of judgment against the defendant. As to the credits awarded defendant, we reverse and remand to the trial court for entry of judgment in accordance with this opinion.

Judges GREENE and WALKER concur.

Judge WALKER concurred in this opinion prior to 8 January 1993.

MYRA JOYCE P. REBER, ADMINISTRATRIX OF THE ESTATE OF APRIL LOVE REBER, DECEASED, PLAINTIFF v. EDNA WINDOM BOOTH AND JACK C. BOOTH, JR., DEFENDANTS

No. 911SC1300

(Filed 2 February 1993)

1. Trial § 7 (NCI3d)— stipulations as to issues at pretrial conference—no issue of last clear chance raised—refusal to submit issue at trial proper

The trial court did not err in refusing to submit to the jury an issue as to last clear chance, since plaintiff waived this issue by stipulating at pretrial conference that the issues to be submitted to the jury were whether the decedent was killed by defendant's negligence and how much the compensatory damages should be, and the stipulation did not raise the doctrine of last clear chance.

Am Jur 2d, Automobiles and Highway Traffic §§ 438-441; Pretrial Conference and Procedure §§ 26-29, 73-77.

Sufficiency of evidence to raise the last clear chance doctrine in cases of automobile collision with pedestrian or bicyclist—modern cases. 9 ALR5th 826.

2. **Automobiles and Other Vehicles § 616 (NCI4th)— thirteen-year-old standing in road—contributory negligence—sufficiency of evidence**

Evidence was sufficient to support the jury's verdict that plaintiff's decedent was contributorily negligent where it tended to show that decedent, who was thirteen years old, crossed a highway at least three times late at night; decedent's friends, who were on the opposite side of the road from her, called to decedent who then stopped and put her hands on her hips; decedent looked at her friends; defendant driver and a passenger in her car both testified that decedent was standing in the travel lane; the investigating officer testified that the skid mark on the highway was in such a position that both wheels of defendant's car would have been in the travel portion of the highway; and such evidence was sufficient for the jury to find that decedent was standing in the travel portion of the highway, not paying attention to oncoming traffic, and not exercising the due care that a child of her age, capacity, discretion, knowledge, and experience would ordinarily have exercised under the same or similar circumstances.

Am Jur 2d, Automobiles and Highway Traffic §§ 513-516.

Modern trends as to contributory negligence of children. 32 ALR4th 56.

Judge WELLS dissenting.

Appeal by plaintiff from judgment filed 17 May 1991 by Judge Cy A. Grant in Dare County Superior Court. Heard in the Court of Appeals 8 December 1992.

On 11 August 1986 at approximately 11:30 p.m. Mrs. Edna Booth was driving her car South on U.S. Highway 158 By-Pass (Hwy 158) near Kitty Hawk Kites and Shops in Nags Head, North Carolina when her vehicle collided with the plaintiff's decedent, April Love Reber. April Reber died intestate on 12 August 1986 as a proximate result of the injuries she received in the collision. Plaintiff's intestate was thirteen years old at the time of her death.

The vehicle driven by Mrs. Booth was titled jointly in the names of Mrs. Booth and her husband, Jack C. Booth, Jr.

At trial, Heather Hunt, April Reber's first cousin, testified that on 11 August 1986 she, April Reber and Angela Long decided to walk to a 7-Eleven store on the east side of Hwy 158. Kitty Hawk Kites is adjacent to the south side of the 7-Eleven store. The three walked into the 7-Eleven store, picked up various items and entered the checkout line. While in line April said she would like to purchase some doughnuts. The three did not have enough money to purchase the doughnuts so April left the store. After she left, Heather and Angela put back one of their items and bought the doughnuts that April wanted. As Angela was paying the clerk, Heather saw April cross the road, then cross back. When Heather and Angela walked outside, Heather saw April crossing Hwy 158 again. After she crossed the third time, Heather saw April standing on the west side of Hwy 158 approximately twenty feet from a pedestrian crosswalk and between the fog line and the shoulder of the road. Both Heather and Angela called to April who stopped and put her hands on her hips. Heather was talking to April across Hwy 158 when she saw headlights from an approaching southbound vehicle approximately 50 feet away. Heather saw the car strike and throw April into the air. When April landed, her body was lying across the fog line. At the time of the accident the area was very well lighted. Lights were on at the 7-Eleven store, Kitty Hawk Kites and a nearby miniature golf course. April was wearing a white sweater and a jean skirt.

Angela testified that when she exited the 7-Eleven store April was about twenty feet south of the pedestrian crosswalk walking away from her and Ms. Hunt. Angela and Heather yelled at April. April stopped, put her hands on her hips, turned around and looked at them. At that time April was standing between the fog line and the shoulder of the road. Shortly thereafter, Angela saw a car strike April and then heard brakes squeal. When April's body landed, her head was lying next to the shoulder of the road and her feet were next to the fog line. Angela also testified that "[y]ou could see very well. . . . almost perfectly from where we were standing." April was wearing a white sweater and a denim skirt.

Several other witnesses testified as to the light conditions. Richard Fulcher, a passenger in a northbound vehicle testified that the area "was fairly well lit[,]" that he spotted people standing

on the side of the road "a long time before we got to them[;]" and that if he had known any of the people on the side of the road, he could have identified them. Iris Perry, a passenger in a southbound vehicle, testified that "[t]he light was well." Ms. Sheila Thames, Heather Hunt's mother, testified that "[t]he light was good[,]" and that "[t]he lights were coming from the golf course and from Kitty Hawk Kites and the 7-Eleven." Ms. Perry also testified that there was a misty rain earlier that evening.

Doug White, an officer employed by the Town of Nags Head, testified that he received a call about the accident at approximately 11:23 p.m. As he approached the accident scene he saw a young girl lying with her feet in the travel lane and her head just across the fog line. Lights were on in the parking lot of the 7-Eleven store but not at Kitty Hawk Kites or the golf course. "[T]he accident scene, except for the emergency vehicle light, it was very dark. And it being overcast made it seem darker." In fact, it was dark enough that the lights from the rescue vehicles had to be used so that Officer White could see what he was doing. Officer White also testified that the pedestrian crosswalk located directly in front of Kitty Hawk Kites was marked with painted white lines and a traffic sign to warn southbound motorists. Officer White further testified that a southbound motorist would be required to negotiate a right curve before getting to the accident scene. He described the curve: "I am not saying it's sharp, but it's what we call a [sic] easy curve as you ease into it." The decedent's father testified that he measured the distance from the curve to the pedestrian crosswalk and that it was one tenth of a mile between the pedestrian crosswalk and the end of the curve. The decedent's father also testified that the road was perfectly straight.

Wayne Aidoock, then a police officer for the Town of Nags Head, testified that he and Officer White drove to the accident scene together. As he approached the accident scene Officer Aidoock noticed glass fragments in the travelled portion of the highway. April was lying with her head somewhat in the sand and her feet in the travel portion of the highway. Officer Aidoock determined that the Booth's car had been moved off the road, but that a skid mark was on the pavement in the vicinity of where the Booth's vehicle had been moved from. The skid mark, 73.1 feet long, was parallel to the left hand line demarking the southbound travel lane and was in such a position that the right wheel of the vehicle would also have been in the travel lane and not to the right of

the fog line. "[I]t was straight down the travel portion. I mean it wasn't slanted. And it wasn't off to one side and it wasn't kind of like you would normally get if a car has the brakes applied to it and they lock and it slides around. The skid mark was straight down the travel portion of the highway." Officer Aidoock did not find any skid marks in the fog lane or marks in the sand to indicate that a car had swerved off the road. Officer Aidoock did find automotive debris north of the skid mark and body fluids north of the debris. The body fluids were 68 feet south of the crosswalk and also in the travel portion of the southbound lane. The pedestrian crosswalk was marked by reflective white paint which had been painted in the form of a ladder. The right front quarter panel and the windshield of the Booth's vehicle was damaged. Mrs. Booth told Officer Aidoock that, "We struck somebody . . . . We never saw her."

Mrs. Lola Windom, the mother of Mrs. Booth and a passenger in the front seat of the Booth's car, testified that she saw April standing in the travel lane, and said, "[W]atch out" at about the time the car struck April. Either just before or when Mrs. Windom said "[W]atch out," Mrs. Booth applied the brake. When Mrs. Windom stepped out of the car she saw "little girls running up calling somebody's name saying, 'Why were you standing in the road? Why were you in the road?' "

Mrs. Booth testified that as her vehicle came out of the curve and straightened, her headlights shined on a woman standing in the travel lane of the road facing her approaching vehicle. Her mother yelled, "[W]atch out" and Mrs. Booth "went for [her] brakes at the same time everything happened." Mrs. Booth also testified "[W]hen I seen her I hit her[,]" and that the accident occurred "Spontaneously." Mrs. Booth further testified that the accident scene was very dark, and that she was driving approximately 35 to 40 miles per hour.

A jury found that Mrs. Booth was negligent and that April was contributorily negligent. Plaintiff appeals from entry of judgment on the verdict.

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

Baker, Jenkins, Jones & Daly, P.A., by Ronald G. Baker and Roger A. Askew, for the defendant-appellant.

EAGLES, Judge.

[1] Plaintiff first argues that the trial court erred by refusing to instruct the jury on the doctrine of last clear chance. Because the plaintiff has waived this issue, we do not reach its merits.

> "Unless and until the court is persuaded to modify its pretrial order, the parties are bound by their admissions and stipulations included in the order, and may not contradict its terms. They are bound by their agreement to limit the issues, and may not introduce at trial issues not among those included in the order."

Fowler v. Johnson, 18 N.C. App. 707, 711, 198 S.E.2d 4, 7 (1973) (quoting 3 J. Moore, Federal Practice Par. 16.19 (2nd ed. 1948), p. 1130).

In *Dawson v. Sugg*, 32 N.C. App. 650, 233 S.E.2d 639 (1977) the trial court entered an order establishing a boundary line in a property dispute by adopting the report of a court appointed surveyor. No exception or appeal was taken from the order. Subsequently, the parties entered into an "ORDER ON PRETRIAL CONFERENCE" which stipulated that the court had established the property line between the parties by adopting the report of the surveyor. The "ORDER ON PRETRIAL CONFERENCE" also contained a paragraph which set out the issues the defendants contended were pertinent to the case. Prior to introduction of evidence at trial, the trial court ruled that there was no question of fact to be submitted to the jury concerning the boundary line between the parties. The defendants excepted to the court's ruling. The report of the surveyor and the order adopting the report were read to the jury without objection. On appeal to this Court the defendants argued that the trial court erred by refusing to allow the jury to hear evidence governing the boundary dispute. This Court held:

> Had defendants properly followed through on the denials set forth in their answer, they would have been entitled to present evidence with regard to, and have the jury pass upon, the location of the boundary line. But we think the defendants waived that right.
>
> . . . [T]he fact remains that the trial court's order of 30 September 1975 adopting the report of the surveyor and establishing the true boundary line became a valid and binding order when it was not challenged by defendants. They did

not except to or appeal from the order. Furthermore, they stipulated the provisions of the Order in the "ORDER ON PRETRIAL CONFERENCE." In addition to that, at the pretrial conference they did not contend that they were entitled to an issue on the question of boundary location and the court submitted issues as contended by defendants.

We hold that defendants waived the rights they now attempt to claim. . . .

Id. at 654-55, 233 S.E.2d at 642.

Here, the "ORDER ON PRE-TRIAL CONFERENCE" states in pertinent part:

Pursuant to the provisions of Rule 16 of the North Carolina Rules of Civil Procedure, and Rule 7 of the North Carolina Rules of General Practice, a final Pre-Trial Conference was held in the above-entitled cause at which the undersigned counsel for all parties appeared; and as a result of this conference, stipulations were entered and matters were determined as follows:

* * *

16. The Plaintiff contends that the contested issues to be tried by the jury are as follows:

(a) Was the death of the Plaintiff's intestate, April Love Reber, caused by the negligence of the Defendants?

(b) What amount of compensatory damages is the Plaintiff entitled to recover from the Defendants?

This stipulation does not raise the doctrine of last clear chance. The trial court submitted issues to the jury as requested by the plaintiffs, together with an instruction on contributory negligence. Accordingly, we find no abuse of discretion or error of law in the trial court's refusal to submit an issue to the jury based on the doctrine of last clear chance. *E.g., Dawson v. Sugg*, 32 N.C. App. 650, 233 S.E.2d 639 (1979); and *Fowler v. Johnson*, 18 N.C. App. 707, 198 S.E.2d 4 (1973).

[2] Plaintiff next argues that the evidence at trial was insufficient to support the jury's verdict. Specifically, plaintiff argues that a child between the ages of 7 and 14 is presumed to be incapable of contributory negligence and may not be held contributorily

negligent as a matter of law, and that the defendants failed to present evidence from which the jury could have found that April "did not in fact use that care which a child of [her] age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances." We disagree.

Heather testified that she saw April cross Hwy 158 at least three times. Heather and Angela both testified that when they called April, April stopped and put her hands on her hips. Angela also testified that April looked at them. Mrs. Booth and Mrs. Windom both testified that April was standing in the travel lane. Officer Aidoock testified that the skid mark on the highway was in such a position that both wheels of Mrs. Booth's vehicle would have been in the travel portion of the highway. This evidence was sufficient for the jury to find that April was standing in the travel portion of the highway, not paying attention to oncoming traffic, and not exercising the due care that a child of her age, capacity, discretion, knowledge and experience would ordinarily have exercised under the same or similar circumstances. This assignment is overruled.

Affirmed.

Judge LEWIS concurs.

Judge WELLS dissents.

Judge WELLS dissenting.

The majority opinion illustrates the tension between the useful and commendable resort to pretrial orders to help chart the course of civil trials, and the more universal principle that the outcome of trials should reflect the real merits of the case.

In the case now before us, the "stipulation" referred to by the majority was the contention by the plaintiff of the issues of negligence and damages, which was followed by the contention of the defendants of the issue of contributory negligence. There was no contention by plaintiff of an issue of last clear chance.

At the charge conference, however, there was extensive discussion between counsel and the court as to whether the issue of last clear chance should go to the jury. Counsel for defendants

did not mention the pretrial issues contentions, but vigorously argued that the evidence would not support an instruction as to last clear chance. Thus, there was no suggestion of unfair disadvantage to defendants by this aspect of potential variance from the contentions in the pretrial order. Under these circumstances, the pretrial order should not preclude the question of whether last clear chance was an appropriate issue to be submitted in this trial.

The evidence tended to show that after defendant Edna Booth rounded the last curve in the road between her car and the point at which April Reber was struck, there was a distance of one-tenth of a mile (i.e., at least 500 feet). The evidence also tended to show that there were no obstructions in the roadway between the Booth car and Ms. Reber. The evidence is conflicting as to the "lighting" conditions at the scene. All this leads me to conclude that the jury could have reasonably determined that Mrs. Booth could have seen Ms. Reber in her position of peril in time to avoid striking her, but failed to do so. In my opinion, all the elements of last clear chance were present in this case. *See Vernon v. Crist*, 291 N.C. 646, 231 S.E.2d 591 (1977); *McMahan v. Stogner*, 95 N.C. App. 764, 384 S.E.2d 60 (1989), *rev. denied*, 326 N.C. 49, 389 S.E.2d 91 (1990), and cases cited and relied upon therein.

For the failure of the trial court to submit and instruct upon last clear chance, there should be a new trial.

LEONARD F. WINTER v. TONY ANTHONY WILLIAMS

No. 9210SC14

(Filed 2 February 1993)

Process § 10.2 (NCI3d)— sufficiency of service of process— publication— sufficiency as to diligence to ascertain defendant's whereabouts

The trial court erred in granting defendant's motion to dismiss based on lack of jurisdiction over the person, insufficient process, and insufficient service of process, where plaintiff's counsel attempted service at both of defendant's available addresses, consulted the local telephone directory and the Department of Motor Vehicles to obtain information, contacted

defendant's insurer and attorney seeking information as to defendant's whereabouts, and finally wrote the California Department of Motor Vehicles based on a statement by defendant's sister that he was "out west, possibly California"; plaintiff subsequently served notice on defendant via publication in the local newspaper and sent notification to defendant's counsel; and plaintiff thus showed that he exercised due diligence in attempting to ascertain the address or whereabouts of defendant before serving by publication. N.C.G.S. § 1A-1, Rule 4(j1).

Am Jur 2d, Process §§ 147, 241-242.

Appeal by plaintiff from order entered 6 September 1991 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 8 December 1992.

Brady, Schilawski, Earls & Ingram, by John Randolph Ingram, II and Michael F. Schilawski, for plaintiff-appellant.

Bailey & Dixon, by Steven M. Fisher, for defendant-appellee.

WYNN, Judge.

Appellant filed a complaint against defendant on 6 April 1990 to recover damages for injuries arising out of an automobile accident which occurred on 8 April 1987 in Wake County, North Carolina. A civil summons appears to have been issued the same day and returned upon certification that defendant was not to be found in Wake County. Summons was endorsed on 25 April 1990, and on 14 June 1990 an Alias and Pluries summons was issued. Plaintiff published service of process in *The Cary News* on 2, 9, and 16 September 1990. Defendant answered filing a motion to dismiss the complaint pursuant to N.C.G.S. § 1A-1, Rules 12(b)(2), 12(b)(4), and 12(b)(5) for lack of jurisdiction over the person, insufficient process and insufficient service of process. From the trial court's grant of defendant's motion, plaintiff appeals.

By plaintiff-appellant's sole assignment of error, he contends that the trial court erred in granting the defendant's motion to dismiss based upon lack of jurisdiction over the person, insufficient process and insufficient service of process because jurisdiction was properly obtained over the person of the defendant utilizing service by publication pursuant to N.C.G.S. § 1A-1, Rule 4(j1). We agree.

The trial judge entered the order dismissing plaintiff's action without making any findings of fact. "[O]n a motion to dismiss for insufficiency of process where the trial court enter[s] an order without making findings of fact, the Court of Appeals will determine as a matter of law if the manner of service of process was correct." *Philpott v. Johnson*, 38 N.C. App. 380, 381, 247 S.E.2d 781, 782 (1978) (citing *Sherwood v. Sherwood*, 29 N.C. App. 112, 223 S.E.2d 509 (1976)). Where there is no dispute as to the manner of service of process, we may examine the service to see if a correct service of the summons occurred. *Id.*

North Carolina General Statute Section 1A-1, Rule 4, which governs service of process provides:

> (j) *Process—Manner of service to exercise personal jurisdiction.*—In any action commenced in a court of this State having jurisdiction of the subject matter and grounds for personal jurisdiction as provided in G.S. 1-75.4, the manner of service of process . . . shall be as follows:
>
> (1) Natural Person.—Except as provided in subsection (2) below, upon a natural person:
>
> a. By delivering a copy of the summons and of the complaint to him or by leaving copies thereof at the defendant's dwelling house or usual place of abode with some person of suitable age then residing therein; or
>
> b. By delivering a copy of the summons and of the complaint to an agent authorized . . . to be served.
>
> c. By mailing a copy of the summons and of the complaint, registered or certified mail, return receipt requested, addressed to the party to be served, and delivering to the addressee.

N.C. Gen. Stat. § 1A-1, Rule 4 (j)(1)a (1990).

If a party cannot with due diligence be served by one of the above enumerated methods, or in the alternative, a party's address, whereabouts, dwelling house or usual place of abode is unknown and cannot with due diligence be ascertained, then service by publication is permissible. *Emanuel v. Fellows*, 47 N.C. App. 340, 267 S.E.2d 368, *disc. rev. denied*, 301 N.C. 87 (1980); N.C. Gen. Stat. § 1A-1, Rule 4 (j1). Defendant contends that the plaintiff failed

to exercise due diligence in determining the whereabouts of defendant before serving by publication.

"Due diligence dictates that plaintiff use all resources reasonably available to her [or him] in attempting to locate defendants. Where the information required for proper service of process is within plaintiff's knowledge or, with due diligence, can be ascertained, service of process by publication is not proper." *Fountain v. Patrick*, 44 N.C. App. 584, 587, 261 S.E.2d 514, 516 (1980) (citing N.C. Gen. Stat. § 1A-1, Rule 4(j)(9)c and *Thomas v. Thomas*, 43 N.C. App. 638, 260 S.E.2d 163 (1979)). In determining what constitutes due diligence for the purpose of permitting service by publication, this Court has declined to formulate a "restrictive mandatory checklist." Rather, a case by case method of analysis has been adopted. *Emanuel*, 47 N.C. App. at 347, 267 S.E.2d at 372.

The facts of the subject case closely resemble those in *Emanuel*. In *Emanuel*, the plaintiff attempted service at the address shown for the defendant in the telephone directory. After delivery proved impossible at that address, plaintiff placed a call to the number listed in the directory and found it to be no longer in service and found that no other listing was available. Counsel for plaintiff then contacted the defendant's insurer who also could not provide an address. Plaintiff commenced service by publication at that point. This court held these efforts to constitute due diligence in attempting to ascertain the defendant's address or whereabouts. *Id.*

Other cases have recognized the significance of checking public records to determine the address or whereabouts of a party to be served. *See In re Clark*, 76 N.C. App. 83, 87-88, 332 S.E.2d 196, 199-200, *disc. rev. denied*, 314 N.C. 665, 335 S.E.2d 322 (1985) (no due diligence where petitioner in a termination of parental rights case knew respondent's name and his county of residence, but had not checked the public records to determine his location; rather petitioner relied solely on information supplied by the mother of respondent's child); *Williamson v. Savage*, 104 N.C. App. 188, 408 S.E.2d 754 (1991) (due diligence found where trustee attempted several times to contact co-petitioner, who knew the address of the other party entitled to notice and trustee knew that Bank had also attempted unsuccessfully to contact the co-petitioner to obtain the address).

The record on appeal tends to show the following. Counsel for plaintiff undertook to locate defendant's address in the local

telephone directory, the Greater Raleigh Cross Reference Directory and by checking the records of the North Carolina Department of Motor Vehicles. According to the date written in by the Deputy Clerk of Court for Wake County, the original summons was issued on 5 April 1990, however, the date stamped on the document is 6 April 1990. The record tends to show that the differing dates was the result of a clerical error and that the true date of issuance was 6 April 1990 the same date that the complaint was filed. The summons was issued to the Wake County Sheriff's Department for service on defendant at 2149 Stonehenge Drive, Apt. 4 in Raleigh, North Carolina. This was the address provided by defendant on the Motor Vehicle Traffic Accident Report and the address indicated on a North Carolina Division of Motor Vehicles Drivers License Record Check obtained by plaintiff. The Sheriff's Department returned the summons unserved with the notation, "did not locate at address."

Based on information gathered by the Wake County Sheriff's Department, the original summons was then endorsed by the Clerk of Superior Court of Wake County and delivered to the Sheriff of Granville County, North Carolina for service on defendant at 611 28th Street in Butner, North Carolina. The summons was returned unserved on 2 May 1990 with the notation "2nd attempt did not locate. Has moved out West. Possibly California according to sister."

Upon plaintiff's request, the Wake County Clerk of Court issued an Alias and Pluries Summons on 14 June 1990. Based upon the information supplied by the Granville County Sheriff's Department, counsel for plaintiff wrote to the Department of Motor Vehicles in Sacramento, California, twice requesting information on the whereabouts of defendant. Attached to the requests were the collision report and the defendant's driving record. Counsel received a response from the California Department of Motor Vehicles indicating that there was no record on the defendant based on the information provided.

On 18 July 1990, plaintiff's counsel wrote to defendant's insurer, Nationwide Mutual Insurance Company, seeking information as to the defendant's whereabouts. Nationwide did not respond. However, on 3 August 1990, counsel for plaintiff received a letter from counsel for defendant indicating that his firm had been retained by Nationwide to represent the defendant, that he was

trying to obtain defendant's address and that he would contact plaintiff's counsel when he did so. Plaintiff subsequently served notice on defendant via publication in *The Cary News* and sent notification of the service to defendant's counsel.

Plaintiff's counsel filed an affidavit of service by publication pursuant to the requirements of N.C.G.S. § 1A-1, Rule 4(j1) and Rule 4(j2)(3) on 28 September 1990 which outlined the efforts undertaken to locate the defendant. Counsel for defendant filed an answer on 13 November 1990 which included a motion to dismiss pursuant to N.C.G.S. § 1A-1, Rules 12(b)(2), 12(b)(4), and 12(b)(5). According to the affidavit of defendant's counsel, she did not obtain defendant's current address until 16 November 1990.

This evidence is sufficient to find that the plaintiff exercised due diligence in attempting to ascertain the address or whereabouts of the defendant. Plaintiff's counsel attempted service at both available addresses, consulted the local telephone directory and the department of motor vehicles to obtain information, contacted the defendant's insurer and attorney seeking information as to defendant's whereabouts and finally wrote to the California Department of Motor Vehicles based on a statement by defendant's sister that he was "out west, possibly California." "A showing on the face of the record of compliance with the statute providing for service of process raises a rebuttable presumption of valid service." *Poole v. Hanover Brook, Inc.*, 34 N.C. App. 550, 555, 239 S.E.2d 479, 482, *disc. rev. denied*, 294 N.C. 183, 241 S.E.2d 479 (1977) (citations omitted).

Defendant contends further that even if service by publication was permissible in this case, the plaintiff failed to meet the mandates of the statute for valid publication by failing to publish notice of service in "an area where plaintiff believed defendant to be located."

The manner of service by publication consists of publishing a notice once a week for three consecutive weeks in a newspaper qualified for legal advertising and circulated in an area where the party to be served is believed by the serving party to be located. If there is no reliable information as to the location of the party, then the publication is to be made in the county where the action is pending. N.C. Gen. Stat. § 1A-1, Rule 4 (j1).

Defendant asserts that because the plaintiff had information that the defendant may be out west, possibly California, notice should have been published there. The evidence as discussed previously, indicates however, that plaintiff's counsel attempted to obtain reliable information from the California Department of Motor Vehicles regarding the defendant's presence in that state. No information was obtained. Whereas defendant's last known address was in Wake County and despite reasonable efforts, plaintiff had no "reliable information" as to the defendant's whereabouts, publication was proper in the county in which the action was pending.

For the reasons stated in this opinion, we hold that the defendant was properly served by publication and the order granting the defendant's motion to dismiss is

Reversed.

Judges COZORT and GREENE concur.

LARRY E. STANCIL, JR. AND WIFE, MARY JANE STANCIL v. MICHAEL W. BROCK AND WIFE, TERESA LYNN BROCK

No. 9119DC1276

(Filed 2 February 1993)

1. Adoption or Placement for Adoption § 60 (NCI4th)— child placed with plaintiffs for possible adoption—child not "left with" plaintiffs—applicability of Interstate Compact on the Placement of Children

Because the record established that defendants sent their child to plaintiffs in North Carolina as a preliminary to a possible adoption by plaintiffs and did not simply "leave the child with" plaintiffs, the Court rejects plaintiffs' argument that Article VIII(a) of the Interstate Compact on the Placement of Children excluded this case from the operation of the Compact. N.C.G.S. § 110-57.1, art. VIII(a).

Am Jur 2d, Adoption §§ 32-34, 48 et seq.

2. Adoption or Placement for Adoption § 39 (NCI4th)— child sent by parents to plaintiffs in North Carolina for adoption—no order of adoption—control over child still held by parents

Because defendants are persons who sent their child to North Carolina for possible adoption by plaintiffs, they are the "sending agency" as that term is used in Article II(b) of the Interstate Compact on the Placement of Children, and, as such, pursuant to Article V, they retain jurisdiction, that is, authority or control, over the child until his adoption, which has not occurred. N.C.G.S. § 110-57.1, art. II(b).

Am Jur 2d, Adoption §§ 32-34, 48 et seq.

Appeal by plaintiffs from order entered 2 August 1991 in Cabarrus County District Court by Judge Jerry C. Martin. Heard in the Court of Appeals 3 December 1992.

Knox, Knox & Freeman, by Bobby L. Bollinger, Jr., for plaintiff-appellants.

Legal Services of Southern Piedmont, Inc., by Vernon J. Cahoon, for defendant-appellees.

GREENE, Judge.

Plaintiffs appeal from an order entered in open court 2 August 1991, dismissing with prejudice plaintiffs' custody action against defendants.

The facts pertinent to this appeal are as follows: On 28 October 1990, a male infant was born in Richmond, Kentucky. The child's birth parents, defendants Teresa and Michael Brock, are residents of Berea, Kentucky. Defendants have two other children, ages eight and five. Defendants were having marital problems and were considering divorce at the time Teresa Brock learned that she was pregnant with the child. They decided to place the child for adoption with plaintiffs Mary Jane and Larry Stancil of Cabarrus County, North Carolina. Defendants' contacts with plaintiffs were arranged by defendants' neighbor in Kentucky, Debra Bryant, who is a cousin of Mary Jane Stancil.

Defendants placed the child utilizing the procedures for the private, or independent, placement of children across state lines set forth in the Interstate Compact on the Placement of Children

(the Compact), to which both North Carolina and Kentucky are party states. *See* N.C.G.S. § 110-57.1 *et seq.* (1991); K.R.S. 615.030 *et seq.* (1992). With the help of the Kentucky Compact Administrator, defendants on 7 September 1990 executed an "Interstate Compact Placement Request" stating their intent to place their then-unborn child with plaintiffs in North Carolina. On 2 November 1990, several days after the child's birth, defendants executed North Carolina consent to adoption forms. The forms stated that the parents' consent to adoption could not be revoked after entry of an interlocutory decree or final order of adoption, or, pursuant to then-existing N.C.G.S. § 48-11(a)(3), after three months from the giving of the consent.

Plaintiffs traveled to Kentucky on 28 October 1990, after being informed by Debra Bryant that Teresa Brock was in labor. Approximately seventeen hours after the child's birth, he was transported to Berea, Kentucky, where he lived temporarily with Mary Jane Stancil's brother and sister-in-law, Robert and Vickie Short. On 9 November 1990, plaintiffs, after obtaining approval to do so, took the child from Kentucky and brought him to their home in Cabarrus County, North Carolina. Although the record does not specifically reflect it, plaintiffs apparently filed a petition for adoption of the child in Cabarrus County; however, no interlocutory or final order of adoption has been entered.

During late January, 1991, a North Carolina social worker informed plaintiffs that defendants might attempt to revoke their consent to the adoption. On 24 January 1991, plaintiffs filed a complaint in Cabarrus County District Court seeking temporary and permanent custody of the child. The trial court entered an *ex parte* emergency order giving plaintiffs temporary custody of the child. On 28 January 1991, the order and complaint were served on defendants, and defendants filed revocation of consent to adoption forms with the Cabarrus County Clerk of Superior Court the same day. Defendants, in their answer to the complaint, moved to dismiss plaintiffs' custody action. On 7 March 1991, defendants filed an action against plaintiffs in Kentucky entitled "Petition For Immediate Entitlement to Custody," and on the following day filed a "Motion for Assumption of Jurisdiction and for Temporary Custody." The Kentucky court "overruled" the motion; however, defendants' action was not dismissed.

On 2 August 1991, the Cabarrus County District Court, after hearing on defendants' motion to dismiss plaintiffs' custody action, found that the child lived "from birth" in Kentucky with Robert and Vickie Short (Mary Jane Stancil's brother and sister-in-law) until 9 November 1990, at which time plaintiffs transported the child to North Carolina. The court also found that defendants are the persons who caused the child to be sent from Kentucky to North Carolina for placement. The court concluded that defendants are the "sending agency" as that term is used in the Compact, and that therefore, pursuant to Article V of the Compact, defendants retained statutory jurisdiction over the child to effect or cause his return to Kentucky. The court concluded that, as a result, it had no jurisdiction to hear the custody action. The court also concluded that it lacked jurisdiction to hear the custody action because under the Uniform Child Custody Jurisdiction Act, N.C.G.S. § 50A-1 *et seq.* (UCCJA), Kentucky, not North Carolina, is the home state of the child. The court dismissed the action with prejudice on the ground that it lacked subject matter jurisdiction and vacated all previously-entered orders. Plaintiffs appeal.

The issues presented are (I) whether the Compact applies to the facts of this case; and, if so, (II) whether the trial court properly concluded that defendants are the "sending agency," as that term is used in the Compact, and thus retain jurisdiction over the child to effect or cause his return to Kentucky. Because our resolution of these issues is determinative of plaintiffs' appeal, we do not address whether the trial court erred in determining that the child lived "from birth" with the Shorts in Kentucky and that, therefore, Kentucky is the child's "home state" as that term is defined in the UCCJA for the purpose of determining jurisdiction of plaintiffs' custody action.

I

[1] The legislature enacted the Compact in 1971, and its provisions govern *inter alia*, independent adoptions of children between states which are parties to the Compact. *See generally* Bernadette W. Hartfield, *The Role of the Interstate Compact on the Placement of Children in Interstate Adoption*, 68 Neb. L. Rev. 292 (1989) [hereinafter *Hartfield*]. Plaintiffs argue that the Compact is inapplicable to the instant case based on the following provision in Article VIII of the Compact:

> This Compact shall not apply to: (a) the sending or bringing of a child into a receiving state by his parent, stepparent, grandparent, adult brother or sister, adult uncle or aunt, or his guardian and leaving the child with any such relative or nonagency guardian in the receiving state.

N.C.G.S. § 110-57.1, art. VIII(a) (1991). Plaintiffs argue that they are "nonagency guardians" as that term is used in Article VIII(a), and that, because the child was sent to North Carolina by his parents, the provisions of the Compact do not apply. We disagree.

When the Compact is read in its entirety, it is apparent that Article VIII(a) contemplates the exclusion from the operation of the Compact of the sending of a child by a parent, relative, or guardian who possesses the full legal right to plan for the welfare of the child, *see Hartfield*, 68 Neb. L. Rev. at 311, and simply *leaving the child* with a relative or nonagency guardian in another state. The plain meaning of the phrase "and leaving the child with" in Article VIII(a) contemplates an arrangement made for care of the child of a family character, and does not encompass placement of the child for adoption, which the provisions of the Compact expressly govern. Even if plaintiffs are "nonagency guardians" as they contend, because the record establishes that defendants sent the child to plaintiffs in North Carolina as a preliminary to a possible adoption by plaintiffs, and did not simply "leav[e] the child with" plaintiffs, we reject plaintiffs' argument that Article VIII(a) excludes the instant case from the operation of the Compact.

II

[2] Plaintiffs argue that defendants are not the "sending agency" as that term is used in the Compact, and thus the retention of jurisdiction provisions do not apply to defendants. We disagree.

> The Compact defines the term "sending agency" as
>
> a party state officer or employee thereof; a subdivision of a party state, or officer or employee thereof; a court of a party state; a *person*, corporation, association, charitable agency or other entity *which sends*, brings, *or causes to be sent* or brought *any child to another party state.*

N.C.G.S. § 110-57.1, art. II(b) (1991) (emphasis added). "The definition of sending agency is broad enough to include any individual or entity, including a parent . . . , that causes a child to be moved

interstate." *Hartfield, 68 Neb. L. Rev. at 309.* The Compact in pertinent part provides that, prior to sending any child into a receiving state as a preliminary to a possible adoption, the sending agency shall furnish the appropriate public authority in the receiving state (which in North Carolina is the Department of Human Resources, *see id.* art. II(e)) with written notice of the intention to send the child into the receiving state. *Id.* art. III(b). The Compact further provides that

> [t]he sending agency shall retain jurisdiction over the child sufficient to determine all matters in relation to the custody, supervision, care, treatment and disposition of the child which it would have had if the child had remained in the sending agency's state, *until the child is adopted* . . . . Such jurisdiction shall also include the power to effect or cause the return of the child or its transfer to another location and custody pursuant to law.

Id. art. V(a) (emphasis added).

In the instant case, the record indicates that defendants executed an Interstate Compact Placement Request giving notice of their intent to place their unborn child with "Larry and Mary Jane Stancil [of] Midland, North Carolina." At the end of the placement request, in the blank specified for the "signature of sending agency or person," appears the signatures "Teresa Brock, Michael W. Brock." We conclude that, because defendants are persons who sent the child to North Carolina for possible adoption by plaintiffs, they are the "sending agency" as that term is used in Article II(b) of the Compact. As such, pursuant to Article V, they retain jurisdiction, that is, authority or control, *see The American Heritage Dictionary* 694 (2d ed. 1982), over the child until his adoption, which has not occurred. *See Department of Health and Rehabilitative Servs. v. J.M.L.*, 455 So. 2d 571 (Fla. Dist. Ct. App. 1984) (trial court's relinquishment of jurisdiction over children prior to their adoption violated Article V(a) of Compact); *In re Walker*, 87 A.D.2d 435 (N.Y. App. Div. 1982), *rev'd on other grounds sub nom. In re Kim*, 445 N.E.2d 645 (N.Y. 1983) (until children are adopted or meet other criteria specified in Article V, sending agency possesses ongoing jurisdiction over them). This authority includes the power to effect or cause the return of the child to Kentucky, and "to determine all matters in relation to the custody" of the child.

N.C.G.S. § 110-57.1, art. V(a) (1991). The trial court properly determined that it "ha[d] no jurisdiction to hear this matter."

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

CECIL KING D/B/A TWIN REAL ESTATE COMPANY v. GEORGE KOUCOULIOTES

No. 9226SC16

(Filed 2 February 1993)

1. **Rules of Civil Procedure § 26 (NCI3d)— trial witnesses and exhibits not revealed at deposition—matters not discoverable at deposition**

Trial witnesses and trial exhibits are not discoverable under the provisions of N.C.R. Civ. P. 26; therefore, defendant's failure to provide such information at deposition could not preclude him from presenting witnesses and exhibits at the trial.

Am Jur 2d, Depositions and Discovery § 36.

Identity of witnesses whom adverse party plans to call to testify at civil trial, as subject of pretrial discovery. 19 ALR3d 1114.

2. **Trial § 38.1 (NCI3d)— request for jury instructions—instructions not given—instructions pertaining to issues not reached by jury**

The trial court did not err in failing to give seven jury instructions sought by plaintiff, since those instructions related only to issues which the jury never reached.

Am Jur 2d, Trial § 1093.

3. **Unfair Competition § 1 (NCI3d)— entrapment to pay real estate commission—directed verdict on unfair and deceptive trade practices claim proper**

The trial court properly granted a directed verdict for plaintiff on defendant's counterclaim for unfair and deceptive

trade practices allegedly based on plaintiff's designing of a plan to entrap defendant into paying a real estate commission where none was due.

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

Appeal by plaintiff and cross-appeal by defendant from judgment filed 25 September 1991 in Mecklenburg County Superior Court by Judge Beverly T. Beal. Heard in the Court of Appeals 8 December 1992.

Newitt & Bruny, by John G. Newitt, Jr. and Roger H. Bruny, for plaintiff-appellant/appellee.

Eugene C. Hicks, III, for defendant-appellee/appellant.

GREENE, Judge.

Plaintiff appeals from the entry of judgment based on a jury verdict denying a claim for real estate commissions. Defendant cross-appeals from the entry of a directed verdict denying his counterclaim for unfair and deceptive trade practices.

Prior to trial, plaintiff's attorney took the deposition of defendant. The deposition was taken on 31 October 1990, and the trial was conducted at a 16 September 1991 session of superior court. During the deposition, the plaintiff's attorney tendered to the defendant the following questions and received the following answers:

Q. . . . . Who are your witnesses at the trial of this case going to be?

A. Witnesses? We don't have any witnesses, of course, you know. Just—really just my television set, of course, was in there, in my place. . . . I don't have any, I mean any witnesses, you know.

Q. Okay. Do you have any documents or exhibits that you might be interested in introducing at trial?

A. No. Just—only just what we're doing here. You know, nothing else.

At trial defendant sought to introduce the testimony of Nick J. Miller (Miller), the attorney who represented defendant in the

leasing of his property. Defendant also sought to introduce as exhibits a photograph of the Hardee's built on defendant's leased property, a photograph of the site taken before the Hardee's was built, and an artist's rendition of a strip mall defendant had originally planned to build on the site before the negotiations with Hardee's were undertaken. Plaintiff objected to the introduction of both the testimony and the exhibits. The trial court overruled the objections and allowed both the testimony and the introduction of the exhibits.

The plaintiff's trial evidence tended to show that he was a licensed real estate broker and that he contacted the defendant about the possibility of leasing or selling some property owned by the defendant. On 25 March 1988, plaintiff wrote defendant a letter outlining a possible lease of the property to Burger King and defendant subsequently gave plaintiff authority to submit a lease proposal to Burger King. Burger King rejected the offer on 28 March 1988. Defendant decided to make a proposal to Hardee's, and it was agreed that plaintiff would assist defendant in the negotiations, and if a lease was signed, plaintiff would be entitled to his full commission. On 6 September 1988, defendant and Hardee's did sign a lease.

The defendant's evidence tended to show that he did allow plaintiff to seek a lease agreement with Burger King and was agreeable to paying a six-percent commission to plaintiff if such a lease were signed. He did not, however, agree to pay plaintiff any commission for any assistance in obtaining the lease from Hardee's and understood that any assistance provided by plaintiff was a "favor."

On the counterclaim for unfair and deceptive trade practices, the evidence tended to show that plaintiff, without defendant's permission or knowledge, on 24 March 1988, wrote to Hardee's and informed them of the availability of the defendant's land at a lease payment of $2,500 per month. Hardee's rejected the offer from plaintiff. Other relevant evidence was that plaintiff had been in seven other law suits relating to the collection of real estate commissions where he did not have a written agreement with the land owner regarding the commission.

At the close of all the evidence, the trial court directed a verdict for the plaintiff on defendant's counterclaim. At the instruction conference, plaintiff requested the trial court give the jury

eight special instructions. The first of the proposed instructions stated that the contract between broker and owner need not be in writing in order to be valid. The other seven instructions concerned when a broker under valid contract with an owner would be entitled to collect a commission. Defendant objected to the last seven instructions on the grounds that they assumed the existence of a contract and that there was a genuine dispute as to the existence of a contract. In response, plaintiff suggested a prefatory statement to each of the seven instructions, to the effect that the instructions need be considered only if the jury answered the first issue in favor of the plaintiff, thereby finding the existence of a contract. The trial court agreed to give the first instruction, but denied the request for the remaining seven instructions.

The following three issues were submitted to the jury:

1. Did the defendant enter into an express oral contract for payment of real estate commission to the plaintiff?

. . . .

2. If so, did defendant breach said contract?

. . . .

3. If so, what amount, if any, is plaintiff entitled to recover from the defendant for the breach of said contract?

. . . .

The jury found that no contract existed and the trial court entered judgment on the verdict denying plaintiff any relief upon the complaint.

Plaintiff contends that the trial court erred in allowing Miller to testify and in allowing the introduction of defendant's exhibits because defendant stated in his deposition that he had no witnesses or exhibits for trial and these incorrect responses were never supplemented or amended. Plaintiff also contends that the trial court erred in failing to include his seven proposed special instructions in the jury charge. Defendant contends that the trial court should not have directed a verdict for the plaintiff on his counterclaim for unfair and deceptive trade practices.

The issues presented are whether (I) trial witnesses and trial exhibits are discoverable under the provisions of N.C. R. Civ. P.

26; (II) the trial court's failure to give the requested jury instructions was prejudicial error; and (III) the trial court properly granted a directed verdict for the plaintiff on defendant's counterclaim for unfair and deceptive trade practices.

I

[1] The recognized primary purpose of discovery "is to facilitate the disclosure prior to trial of any unprivileged information that is relevant and material to the lawsuit so as to permit the narrowing and sharpening of the basic issues and facts that will require trial." *Bumgarner v. Reneau*, 332 N.C. 624, 628, 422 S.E.2d 686, 688-89 (1992). Specifically, a party can discover, provided it is not privileged, through any accepted method of discovery, "the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter." N.C.G.S. § 1A-1, Rule 26(b)(1) (1990). Therefore, Rule 26 requires the disclosure of all persons " 'having knowledge of [some] discoverable matter' . . . ." 4 James W. Moore et al., *Moore's Federal Practice*, ¶ 26.57[4], at 26-172 (2d ed. 1991) [hereinafter *Moore*] (quoting Fed. R. Civ. P. 26(b)). However, with the exception of expert trial witnesses, whose identities are discoverable under the provisions of Rule 26(b)(4), "a party is not entitled to find out, by discovery, which witnesses his opponent intends to call at the trial . . . ." 8 Charles A. Wright & Arthur R. Miller, *Federal Practice and Procedure*, § 2013, at 106 (1970) [hereinafter *Wright & Miller*]; *Moore*, ¶ 26.57[4], at 26-173 (discovery rules do not require a party to identify before trial the witnesses it plans to call); *see also Brock v. R.J. Auto Parts and Serv., Inc.*, 864 F.2d 677, 679 (10th Cir. 1988) ("discovery is not the state of litigation at which a party identifies its prospective witnesses"); *Wirtz v. B.A.C. Steel Prods., Inc.*, 312 F.2d 14, 16 (4th Cir. 1962). Similarly, a listing of the documents and exhibits a party opponent intends to present at the trial is not discoverable under Rule 26. *See Wright & Miller*, § 2012, at 98 ("courts have drawn a distinction between learning that a document exists and learning that it will be used [at trial] and have refused to allow the latter"). Instead, the names of witnesses and lists of exhibits a party opponent intends to use at trial are obtainable through the pretrial conference. N.C.G.S. § 1A-1, Rule 16 (1990); N.C. Gen. Prac. R. 7 (1992) (providing for disclosure of witnesses and exhibits at pretrial conference). Nonetheless, if the party requesting the names of trial witnesses and the list of trial

exhibits can show a particular need for a deviation from this general rule of nondiscoverability, the trial court may, within its discretion, require such production through discovery and in advance of the pretrial conference. *See Brock*, 864 F.2d at 679 (allowing deviation if case is particularly complex).

In this case, the plaintiff in a deposition specifically requested from defendant the names of his trial witnesses and a list of his trial exhibits. Plaintiff has made no showing that he had a special need for the defendant's list of witnesses and exhibits ten months prior to the trial. Accordingly, the information sought was not discoverable and defendant's failure to provide such information cannot preclude him from presenting witnesses and exhibits at the trial. *See* N.C.G.S. § 1A-1, Rule 37(b)(2)(b) (1990) (judge may prohibit party disobeying discovery order from presenting evidence). Therefore, the trial court did not err in permitting the defendant to call Miller as a witness and to introduce into evidence the photographs and diagram at issue.

II

[2] Assuming that the seven jury instructions sought by the plaintiff should have been given by the trial court, there was nonetheless no prejudicial error. The plaintiff correctly concedes that the omitted instructions relate only to issues two and three, in that they assume the existence of a contract. The jury determined that there was no contract and therefore issues two and three were not reached. Thus, there is no reason to believe that a different outcome would have occurred had the alleged correct instructions been given. *See Gregory v. Lynch*, 271 N.C. 198, 203, 155 S.E.2d 488, 492 (1967).

III

[3] Defendant's counterclaim for unfair and deceptive trade practices is based, so argues the defendant, on the fact that plaintiff designed a plan to entrap defendant into paying a real estate commission where none was due. Assuming that, if true, this theory would be an unfair and deceptive trade practice, there is not substantial evidence in the record, considered in the light most favorable to the defendant, to support this theory. *See Garrett v. Overman*, 103 N.C. App. 259, 262, 404 S.E.2d 882, 884, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 519 (1991) (directed verdict proper where no substantial evidence to support claim). Accordingly, the trial

court was correct in directing a verdict for the plaintiff on this claim.

No error.

Judges COZORT and WYNN concur.

FRANCES LINDLER, PLAINTIFF v. DUPLIN COUNTY BOARD OF EDUCATION, DEFENDANT

No. 924SC127

(Filed 2 February 1993)

Schools § 11 (NCI3d)— injury sustained in school building—non-school related function—no liability of school

In plaintiff's action to recover for injuries sustained when she fell as a result of wet or excessive wax on the floor of a school during the course of a non-school related fundraiser, the trial court properly determined that the plain language of N.C.G.S. § 115C-524(b) explicitly precludes liability from attaching to schools when the school facilities are being used for non-school purposes.

Am Jur 2d, Schools § 323.

Tort liability of public schools and institutions of higher learning for accidents due to condition of buildings or equipment. 34 ALR3d 1166.

Appeal by plaintiff from order filed 14 November 1991 by Judge Herbert Phillips in Duplin County Superior Court. Heard in the Court of Appeals 7 January 1993.

This is an appeal from an order dismissing plaintiff's claim pursuant to N.C.R. Civ. P. 12(b)(6). The plaintiff's complaint alleges the following: The plaintiff, a teacher in the Duplin County school system for approximately twenty-seven years, requested and received the permission of the principal of Wallace-Rose Hill School to use the school building, including rest room facilities, in the evening for a fundraising auction to be conducted by Alpha Delta Kappa, an honorary teacher's sorority. On 17 November 1987, the day

of the fundraiser, one of the defendant's employees waxed the corridor floor leading to the school's rest rooms, left an excessive amount of wax on the corridor floor and failed to post a sign warning that the floor was wet or recently waxed. During the fundraiser two women asked the plaintiff about using the rest room. The door on the corridor leading to the rest rooms was locked. The plaintiff went to Casey Sharpless' office and asked Mr. Sharpless if he would unlock the door. Mr. Sharpless, director of the James Sprunt Community College's evening class program at Wallace-Rose Hill School, unlocked the door for the plaintiff. As the plaintiff walked toward the light switch located just inside the door she slipped and fell because of the excessive amount of wet wax on the corridor floor. Mr. Sharpless tried to help the plaintiff but slipped on the floor as well. However, Mr. Sharpless was able to avoid falling by grabbing the door.

The plaintiff was taken to Pender Memorial Hospital where it was discovered that as a result of the fall she had fractured one of her lumbar vertebrae and her left wrist. Because of her injuries, the plaintiff was unable to work for nearly two months and required the assistance of a home health nurse for four hours a day through January of 1988.

The plaintiff also alleged that she was required to use all nineteen days of her accrued sick leave as wage compensation for time lost because of the accident; that the defendant failed to inform her that she was eligible for three months of disability leave and that one of defendant's employees "informed [her] that she would have to pay a substitute out of her own salary for every day of work that she missed after her sick leave had expired." Because the plaintiff believed she had no financial alternative, she returned to work on 5 January 1988 before she had fully recovered from her injuries. Her early return caused additional pain and emotional and mental suffering.

Plaintiff appeals from the order dismissing her claims.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by John Gresham and S. Luke Largess, for the plaintiff-appellant.

Richard Schwartz & Associates, by Richard A. Schwartz and Laura E. Crumpler, for the defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the trial court erred by granting the defendant's Rule 12(b)(6) motion. Specifically, plaintiff argues that the defendant, Duplin County Board of Education (Board), waived its sovereign immunity pursuant to G.S. § 115C-42 by purchasing liability insurance which allegedly covered the plaintiff's injuries. The defendant, on the other hand, argues that G.S. § 115C-524(b) and *Plemmons v. City of Gastonia*, 62 N.C. App. 470, 302 S.E.2d 905, *disc. review denied*, 309 N.C. 322, 307 S.E.2d 165, 166 (1983) prevent liability from attaching to the Board because the school was not being used for a school purpose at the time of the plaintiff's accident. We agree with the defendant.

G.S. § 115C-42 provides, in pertinent part:

> Any local board of education, by securing liability insurance as hereinafter provided, is hereby authorized and empowered to waive its governmental immunity from liability for damage by reason of death or injury to person or property caused by the negligence or tort of any agent or employee of such board of education when acting within the scope of his authority or within the course of his employment. Such immunity shall be deemed to have been waived by the act of obtaining such insurance, but such immunity is waived only to the extent that said board of education is indemnified by insurance for such negligence or tort.

G.S. 115C-524(b) provides in pertinent part:

> Notwithstanding the provisions of G.S. 115C-263 and 115C-264, local boards of education shall have the authority to adopt rules and regulations by which school buildings, including cafeterias and lunchrooms, may be used for other than school purposes so long as such use is consistent with the proper preservation and care of the public school property. *No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property.*

(Emphasis ours.)

In *Plemmons*, a minor allegedly sustained serious and permanent brain damage as the result of a fall from gymnasium bleachers to the floor. The defendant Board of Education argued that because

of the express language of G.S. § 115C-524(b) and the fact that the gymnasium was leased to the City of Gastonia at the time of the accident, the Board was immune from liability. The plaintiff, on the other hand, argued "as a policy matter, that G.S. § 115C-524 should be construed to include an active negligence caveat and that . . . the statute's operation [should be limited] to circumstances in which liability is sought to be imposed on a Board of Education solely by reason of its status as landlord." *Id.* at 473, 302 S.E. 2d at 907. Our court held that "the clear, specific mandate of the statute categorically bars liability[.]" *Id.* at 472, 302 S.E.2d at 906. The Court observed that although the construction proffered by the plaintiff "would be the more humane, we simply cannot read into a statute a requirement that is not there. G.S. § 115C-524 provides no chink in its armor of immunity, even for the sword of active negligence. To accept plaintiffs' argument would render the statute superfluous." *Id.* at 473, 302 S.E.2d at 907.

The plaintiff argues that *Plemmons* does not control the instant case because (1) the court did not directly address the effect of G.S. § 115C-42 on G.S. § 115C-524(b) and (2) that the language regarding active negligence was mere *obiter dicta.* We disagree and find that we are bound by *Plemmons.* But even assuming, *arguendo,* that the *Plemmons* decision does not control the instant case, we nevertheless believe that the *Plemmons* Court's analysis is equally valid here. The clear intent of the legislature was set out in the plain language of G.S. § 115C-524(b) which explicitly precludes liability from attaching to schools when the school facilities are being used for non-school purposes.

In any event, we also note that other well established principles of statutory construction support our holding. First, "[i]t is always presumed that the legislature acted with care and deliberation and with full knowledge of prior and existing law." *State v. Benton,* 276 N.C. 641, 658, 174 S.E.2d 793, 804 (1970) (citations omitted). The General Assembly originally adopted the statutes now codified as G.S. § 115C-42 (1955 N.C. Sess. Laws c. 1256) and G.S. § 115C-524(b) (1955 N.C. Sess. Laws c. 1372, art. 15, s.9) in 1955. However, it was not until 1963 that our legislature enacted the portion of G.S. § 115C-524(b) which provides: "No liability shall attach to any board of education, individually or collectively, for personal injury suffered by reason of the use of such school property." 1963 N.C. Sess. Laws c. 253. If in 1963 the General Assembly had intended for sovereign immunity to be waived to

the extent of liability insurance for personal injury resulting from non-school use of school property, they would not have added to G.S. § 115C-524(b) the unambiguous language quoted above. To have done so would have been unnecessary in light of the well established rule that schools enjoy the right of sovereign immunity absent a statute to the contrary. *Smith v. Hefner*, 235 N.C. 1, 68 S.E.2d 783 (1952) ("a subordinate division of the state, or agency exercising statutory governmental functions like a city administrative school unit, may be sued only when and as authorized by statute"). Obviously, the General Assembly intended to prevent liability from attaching to boards of education under these specific circumstances.

We also note that the *Plemmons* Court's interpretation of G.S. § 115C-524(b), whether *obiter dicta* or not, was published in the *Plemmons* opinion in 1983. However, in the ensuing four biennial sessions since 1983 the General Assembly has not seen fit to change the pertinent language of G.S. § 115C-524(b). This argument is bolstered by the General Assembly's most recent amendment of G.S. § 115C-524(b). While the 1992 amendment did modify that portion of G.S. § 115C-524(b) dealing with non-school use of school property, it retained unchanged the portion of the statute precluding liability to boards of education because of personal injury arising from non-school use. G.S. § 115C-524(b) (1992).

Finally, our court, interpreting G.S. § 115C-42, has said: " 'Waiver of sovereign immunity may not be lightly inferred and State statutes waiving this immunity, being in derogation of the right to sovereign immunity, must be strictly construed.' " *Overcash v. Statesville City Bd. of Educ.*, 83 N.C. App. 21, 25, 348 S.E.2d 524, 527 (1986) (citations omitted). These principles of statutory construction when applied to the case *sub judice* impel our holding that the Board is immune from liability here.

As in *Plemmons*, we are "not unmindful that this interpretation is likely to produce harsh results in many cases[.]" *Id.* at 472, 302 S.E.2d at 906. Even so, the General Assembly's clear intent as evidenced by the plain language of G.S. § 115C-524(b) mandates this result.

Affirmed.

Judges WYNN and ORR concur.

THOMAS N. RUSSELL v. LOWES PRODUCT DISTRIBUTION AND FRED S. JAMES COMPANY

No. 9210IC12

(Filed 2 February 1993)

Master and Servant § 69.1 (NCI3d)— injured employee—total disability award sought—employee able to work—showing of reasonable effort to find other employment required

An injured employee seeking an award of total disability under N.C.G.S. § 97-29, who is unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable, must produce evidence of a reasonable effort to find other employment.

Am Jur 2d, Workers' Compensation § 398.

Appeal by plaintiff from Opinion and Award for the North Carolina Industrial Commission entered 17 October 1991. Heard in the North Carolina Court of Appeals 8 December 1992.

Franklin Smith and Brian Flatley for plaintiff-appellant.

Teague, Campbell, Dennis & Gorham, by George W. Dennis III and Richard L. Pennington, for defendant-appellee.

GREENE, Judge.

Plaintiff Thomas N. Russell (Russell) appeals from Opinion and Award for the North Carolina Industrial Commission (the Commission) denying total disability payments from Russell's employer, Lowe's Product Distribution (Lowe's), and the administrator of its self-insurance plan, the Fred S. James Company.

Russell, at the time of the initial hearing on this dispute, was thirty-five years old and had a high-school equivalency degree. Prior to 1988, he had been employed as a house painter, an assembly line worker, and a textile worker. Russell began working for Lowe's in February, 1988, as a forklift operator on the first shift. His job responsibilities included manually removing merchandise from tractor-trailer trucks. Russell was injured on 10 August 1988, when he fell from the top of a row of boxes while unloading a truck for Lowe's. Russell landed on the bed of the truck, striking his back and shoulders and causing him severe pain. Lowe's admitted

liability for Russell's injury under the Workers' Compensation Act (the Act), and voluntarily paid Russell temporary total disability from 11 August 1988 until 9 August 1989. Shortly after his injury, Russell saw Dr. John Bond, who hospitalized Russell for twenty-two days for traction therapy. When this did not alleviate his pain, Russell was referred to Dr. Ernesto de la Torre, who performed surgery on Russell's neck on 28 November 1988 to remove a ruptured disk. On 8 March 1989, Dr. de la Torre released Russell to return to work with no restrictions.

On 13 March 1989, Russell spoke with Thomas Oakes, personnel manager of Lowe's, about returning to work. As no jobs were available on the first shift, Oakes offered Russell a second-shift position which involved loading trucks. Russell refused the position and Lowe's agreed to send Russell to Dr. Craig Bennett, an orthopedic specialist, for further medical evaluation. Dr. Bennett treated Russell and referred him for more tests. The tests failed to show any definitive physical problems except for mild arthritic changes and scar tissue. Dr. Bennett testified that because of his injury, Russell is unable to perform the type of heavy manual work required in the position he held at Lowe's at the time of his injury. Dr. Bennett found that Russell had reached maximum medical improvement on 27 July 1989. He rated Russell's disability at 20% permanent impairment of the back, and released him to work with certain permanent restrictions. These restrictions included no forward bending, no overhead activity, no standing or sitting for prolonged periods of time, and no prolonged lifting greater than twenty-five pounds.

After release with these restrictions, Russell again reported to Lowe's for work. Upon seeing the work restrictions, Lowe's informed Russell that no job in its distribution center could be performed within the restrictions. Russell attempted to find work at other jobs, but was unsuccessful. On 12 August 1989, Russell filed with the Commission seeking permanent total disability under Section 97-29 of the Act. A hearing was held, at which the Commission made the following pertinent findings of fact:

> 10. . . . Dr. Bennett rated plaintiff with a 20 percent permanent partial disability to the back and on July 27, 1989 released him to return to work with the restrictions of no forward bending, no overhead activity, no lifting greater than 25 pounds, and no prolonged standing or sitting. These restrictions would

be permanent for the plaintiff as pertains to prolonged manual labor or repetitive-labor activity.

. . . .

12. Subsequent to being released by Dr. Bennett on July 27, 1989, plaintiff returned to [Lowe's]. However, [Lowe's], upon seeing the restrictions that had been placed upon plaintiff by Dr. Bennett, informed him that there was no work available and further informed him that he was released from his employment with Lowe's Products Distribution.

13. Plaintiff obtained maximum medical improvement on July 27, 1989 and returned to work but no work was available with [Lowe's]. Thereafter, plaintiff sought work at various locations. Plaintiff made seven or eight job applications according to his testimony . . . . Plaintiff was refused jobs at two locations because of his medical restrictions. At the other locations, plaintiff was not sure why he was refused. He did not know whether it was because there was no work available or whether it related to his restrictions and/or job training.

14. Plaintiff was vague in his testimony about work he had sought and was unable to name the exact names of employers to whom he had made application nor the dates upon which he had made application nor for what jobs he had applied nor how he represented himself to the prospective employers except for the limited number of applications heretofore noted. Thus, the undersigned [Deputy Commissioner] does find as fact that plaintiff reached maximum medical improvement and thereafter, even though he was unable to return to work with [Lowe's], did not vigorously seek other employment nor has he demonstrated that he has any disability other than as noted by Dr. Bennett which would prevent him from seeking other employment.

Based on these findings, the Commission made the conclusion of law that Russell was not entitled to permanent total disability because he had not carried his burden of producing evidence of disability within the meaning of the Act. Russell appeals.

The dispositive issue is whether an injured employee seeking an award of total disability under N.C.G.S. § 97-29, who is unemployed, medically able to work, and possesses no preexisting

limitations which would render him unemployable, must produce evidence of a reasonable effort to find other employment.

The standard of review on appeal to this Court of a workers' compensation case is whether there is any competent evidence in the record to support the Commission's findings of fact, and whether these findings support the conclusions of the Commission. *Watson v. Winston-Salem Transit Auth.*, 92 N.C. App. 473, 475, 374 S.E.2d 483, 485 (1988). In weighing the evidence, the Commission is the sole judge of the credibility of witnesses and the weight to be given their testimony, and may reject entirely the testimony of a witness if warranted by disbelief of the witness. *Anderson v. Northwestern Motor Co.*, 233 N.C. 372, 376, 64 S.E.2d 265, 268 (1951).

An employee injured in the course of his employment is disabled under the Act if the injury results in an "incapacity . . . 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). Accordingly, disability as defined in the Act is the impairment of the injured employee's earning capacity rather than physical disablement. *Peoples v. Cone Mills Corp.*, 316 N.C. 426, 434, 342 S.E.2d 798, 804 (1986).

The burden is on the employee to show that he is unable to earn the same wages he had earned before the injury, either in the same employment or in other employment. *Hilliard v. Apex Cabinet Co.*, 305 N.C. 593, 595, 290 S.E.2d 682, 684 (1982). The employee may meet this burden in one of four ways: (1) the production of medical evidence that he is physically or mentally, as a consequence of the work related injury, incapable of work in any employment, *Peoples*, 316 N.C. at 443, 342 S.E.2d at 809; (2) the production of evidence that he is capable of some work, but that he has, after a reasonable effort on his part, been unsuccessful in his effort to obtain employment, *id.* at 444, 442 S.E.2d at 809; 1C Arthur Larson, *The Law of Workmen's Compensation* § 57.61(d) (1992); (3) the production of evidence that he is capable of some work but that it would be futile because of preexisting conditions, i.e., age, inexperience, lack of education, to seek other employment, *Peoples*, 316 N.C. at 444, 342 S.E.2d at 809; or (4) the production of evidence that he has obtained other employment at a wage less than that earned prior to the injury. *Tyndall v. Walter Kidde*

Co., 102 N.C. App. 726, 730, 403 S.E.2d 548, 550, *disc. rev. denied*, 329 N.C. 505, 407 S.E.2d 553 (1991).

Lowe's argues that Russell did not present sufficient evidence to satisfy his burden. Specifically, Lowe's contends that Russell did not present adequate evidence of a reasonable effort on his part to obtain other employment. There is no dispute between the parties, and the record evidence establishes, that Russell is capable of doing some work, that he does not have a job, and that seeking employment is not futile because of some preexisting condition. Therefore, the only question is whether Russell presented sufficient credible evidence that he made a reasonable effort to obtain employment. He testified, and the Commission found, that he sought work at "various locations." Specifically, Russell testified that he made seven or eight job applications and was refused employment in each instance. The Commission, however, rejected this testimony as not credible on the grounds that Russell "was unable to name the exact names of employers to whom he had made application nor the dates upon which he had made application nor for what jobs he had applied . . . ." Because the Commission is the sole judge of the credibility of the witnesses and has rejected as not credible Russell's evidence that he made a reasonable effort to obtain other employment, Russell did not meet his burden of showing the existence of a disability. Accordingly, the decision of the Commission is

Affirmed.

Judges COZORT and WYNN concur.

ROBBIN LYNN TAYLOR v. MICHELLE ANN BRINKMAN AND THOMAS WALTER BRINKMAN

No. 9114SC921

(Filed 2 February 1993)

1. **Appeal and Error § 119 (NCI4th)— summary judgment granted—not a final disposition of all claims—substantial right prejudiced**

The granting of a summary judgment motion which was not a final disposition of all claims in an automobile collision was immediately appealable where defendant Brinkman's negligence was a fundamental issue in plaintiff Taylor's claim against Brinkman and her imputed negligence claim against Brinkman's father. Taylor must seek to prove Brinkman's negligence in her case against Brinkman's father and, if summary judgment against Brinkman is later reversed, could again have to prove Brinkman's negligence in her action against Brinkman. A substantial right would be prejudiced because dismissal of this appeal could result in two trials on the same issues and create the possibility of inconsistent verdicts.

Am Jur 2d, Appeal and Error § 104.

2. **Rules of Civil Procedure § 4 (NCI3d)— service of process—Rule 4(j2)(2)—default judgment not sought—60 day saving provision not applicable**

A complaint arising from an automobile accident was filed outside the statute of limitations and was correctly dismissed where an order extending the time to file was granted one day before the three year statute of limitations would have run; the complaint, filed on the last day of the extension, was against Brinkman and Brinkman's father; plaintiff attempted to serve both parties by sending copies of the complaint in separate envelopes by certified mail, return receipt requested, to Brinkman's father's address; Brinkman's father's signature appears on both receipts; plaintiff did not know that Brinkman's father and mother were separated at the time; Brinkman was living with her mother at another address and had never lived at the address where service was attempted; service upon her was declared invalid; an alias and pluries summons was served on her by certified mail in Georgia; her answer raised

the statute of limitations; and summary judgment was granted for her. The sixty day saving provision of N.C.G.S. § 1A-1, Rule 4(j2)(2) was not applicable because plaintiff was not seeking the imposition of a judgment by default.

Am Jur 2d, Process §§ 117, 227.

Appeal by plaintiff from judgment entered 16 May 1991 in Durham County Superior Court by Judge Henry V. Barnette, Jr. Heard in the Court of Appeals 23 September 1992.

Clayton, Myrick, McClanahan & Coulter, by Robert D. McClanahan and Gregory L. Hughes, for plaintiff-appellant.

Haywood, Denny, Miller, Johnson, Sessoms & Patrick, by James H. Johnson, III and Andrew T. Landauer, for defendant-appellees.

GREENE, Judge.

In this civil action Robbin Lynn Taylor (Taylor) seeks to recover damages from Michelle Ann Brinkman (Brinkman) and her father, Thomas Walter Brinkman (Brinkman's father), for injuries sustained in an automobile accident. The trial court entered summary judgment in favor of Brinkman on the ground that the statute of limitation barred Taylor's action against Brinkman. Taylor appeals.

This action arose when an automobile driven by Brinkman collided with an automobile in which Taylor was a passenger on 17 May 1986. The automobile was owned by Brinkman's father. Taylor sustained serious injuries in the accident. On 16 May 1989, one day before the three-year statute of limitation would have run under N.C.G.S. § 1-52(16), Taylor was granted an order extending the time in which to file her complaint until 5 June 1989. Taylor filed a complaint against Brinkman on 5 June 1989, alleging that Brinkman was negligent in her operation of the vehicle, and against Brinkman's father, alleging that the vehicle was being operated under the family purpose doctrine and Brinkman's alleged negligence could therefore be imputed to Brinkman's father. Taylor attempted to serve both parties on 5 June 1989 by mailing copies of the complaint in separate envelopes, certified mail with return receipt requested, to Brinkman's father's address. Brinkman's father's signature appears on the receipts for both himself and his daughter. Unknown to Taylor, at the time the complaint was mailed Brinkman's

father and mother were separated and Brinkman was living with her mother at another address. Brinkman had never resided at her father's address where service of process by certified mail was attempted. Upon motion by Brinkman, service of process as to her was declared invalid by Judge F. Gordon Battle on 20 August 1990 pursuant to N.C.G.S. § 1A-1, Rule 12(b)(5). No appeal was taken from this order.

On 20 September 1990, an "Alias and Pluries" summons was issued as to Brinkman and was served on her by certified mail, return receipt requested, in Smyrna, Georgia. Brinkman signed the return receipt on 27 September 1990. In her answer, Brinkman pleaded the affirmative defense that the action against her was barred by the three-year statute of limitation. Brinkman's motion for summary judgment was granted by Judge Henry V. Barnette, Jr. on 16 May 1991.

The issues presented are (I) whether the appeal must be dismissed as interlocutory; and (II) if not, whether the benefit of the sixty-day saving provision arising pursuant to N.C.G.S. § 1A-1, Rule 4(j2)(2) is limited to parties seeking a default judgment.

I

[1] The trial court's summary judgment was a final disposition of Taylor's claims against Brinkman, but Taylor's claims against Brinkman's father were not adjudicated. The trial court's summary judgment is therefore an interlocutory order because it does not determine the entire controversy between all the parties. *Veazey v. City of Durham*, 231 N.C. 357, 361-62, 57 S.E.2d 377, 381 (1950). An interlocutory order is generally not appealable. *Love v. Moore*, 305 N.C. 575, 578, 291 S.E.2d 141, 144 (1982). Two avenues do exist, however, whereby an interlocutory order may be appealed. *Baker v. Rushing*, 104 N.C. App. 240, 245, 409 S.E.2d 108, 110 (1991). First, if there has been a final disposition as to one or more but fewer than all of the claims or parties in a case, the trial judge may certify that there is no just reason to delay appeal. N.C.G.S. § 1A-1, Rule 54(b) (1990). If the judge expressly so certifies, immediate appeal is available. *Brown v. Brown*, 77 N.C. App. 206, 207, 334 S.E.2d 506, 507-08 (1985), *disc. rev. denied*, 315 N.C. 389, 338 S.E.2d 878 (1986). Here the trial court did not make a certification, so no appeal is available under Rule 54(b). Second, an interlocutory order not appealable under Rule 54(b) may nevertheless

be appealed pursuant to N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d). *J & B Slurry Seal Co. v. Mid-South Aviation, Inc.*, 88 N.C. App. 1, 5, 362 S.E.2d 812, 815 (1987). The most common reason for permitting immediate appeal of an interlocutory order under these statutes is the prejudice of a substantial right of the appellant if appeal is delayed. *Davidson v. Knauff Ins. Agency, Inc.*, 93 N.C. App. 20, 24, 376 S.E.2d 488, 490, *disc. rev. denied*, 324 N.C. 577, 381 S.E.2d 772 (1989).

Our Supreme Court has held that the right to avoid the possibility of two trials on the same issues is a substantial right that may support immediate appeal under N.C.G.S. § 1-277 and N.C.G.S. § 7A-27(d). *Green v. Duke Power Co.*, 305 N.C. 603, 606, 290 S.E.2d 593, 595 (1982). In the instant case, Brinkman's negligence is a fundamental issue in both Taylor's claim against Brinkman and her imputed negligence claim against Brinkman's father. Identical factual issues are present in both claims. If summary judgment for Brinkman stands, Taylor's only remaining claim is against Brinkman's father. Taylor must seek to prove Brinkman's negligence in her case against Brinkman's father. If, at a later time, summary judgment in favor of Brinkman is reversed, Taylor must again seek to prove Brinkman's negligence in her action against Brinkman. Because our dismissal of this appeal could result in two different trials on the same issues, thereby creating the possibility of inconsistent verdicts, a substantial right is prejudiced and the summary judgment is immediately appealable.

II

[2] The parties do not dispute that the "Alias and Pluries" summons issued along with the complaint on 20 September 1990 was timely served on Brinkman by certified mail on 27 September 1990. It is also not disputed that because the issuance of the "Alias and Pluries" summons did not occur within ninety days after the issuance of the first summons, the action was deemed filed on the date of the "Alias and Pluries" summons. *See Long v. Fink*, 80 N.C. App. 482, 485, 342 S.E.2d 557, 559-60 (1986). Furthermore, because this action accrued on 17 May 1986, its filing in September, 1990 is outside the applicable three-year statute of limitation. Nonetheless, Taylor argues that because the action was initially commenced on 16 May 1989, which was within the period of limitation, and because proper service was had on Brinkman "within 60 days from the date the service [on Brinkman was] declared

invalid" by Judge Battle, N.C.G.S. § 1A-1, Rule 4(j2)(2) precludes Brinkman from pleading the statute of limitation. N.C.G.S. § 1A-1, Rule 4(j2)(2) (1990). We disagree.

With two exceptions, service of process attempted by registered or certified mail, as permitted by N.C.G.S. § 1A-1, Rule 4(j)(1)(c), is "complete on the day the summons and complaint are delivered to the address thereon." *Lynch v. Lynch*, 303 N.C. 367, 370, 279 S.E.2d 840, 843 (1981). The two exceptions occur when the plaintiff seeks a judgment by default and when the defendant appears in the action and challenges the service. *Lynch*, 303 N.C. at 370, 279 S.E.2d at 843. In these two situations, the plaintiff is required to show proof of service by filing with the court an affidavit consistent with N.C.G.S. § 1-75.10(4). *Id.*; N.C.G.S. § 1-75.11 (1990); N.C.G.S. § 1A-1, Rule 4(j2)(2) (1990). The filing of an affidavit consistent with N.C.G.S. § 1-75.10(4) raises a rebuttable presumption of valid service consistent with N.C.G.S. § 1A-1, Rule 4(j)(1)(c). *Lewis Clarke Assocs. v. Tobler*, 32 N.C. App. 435, 438, 232 S.E.2d 458, 459, *disc. rev. denied*, 292 N.C. 641, 235 S.E.2d 60 (1977); N.C.G.S. § 1A-1, Rule 4(j2)(2) (1990). If the plaintiff, in seeking judgment by default, presents an affidavit giving rise to the presumption of valid service and this presumption is later rebutted, "the statute of limitation may not be pleaded as a defense if the action was initially commenced within the period of limitation and service of process is completed within 60 days from the date the service is declared invalid." N.C.G.S. § 1A-1, Rule 4(j2)(2) (1990); W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 4-12 (4th ed. 1992).

Because Taylor was not seeking the imposition of a judgment by default, the sixty-day saving provision of Rule 4(j2)(2) was not applicable. Therefore, Taylor's complaint was filed outside the statute of limitation and was correctly dismissed by Judge Barnette by summary judgment.

Affirmed.

Judges WELLS and ORR concur.

WEN CHOUH LIN, PLAINTIFF v. ANITA C.S. LIN, DEFENDANT

No. 9114DC1082

(Filed 2 February 1993)

Divorce and Separation § 204 (NCI4th)— alimony—living separate and apart—abandonment—condonation

The trial court did not err in a divorce action by finding that plaintiff-husband's actions constituted abandonment and that defendant is entitled to alimony where the parties lived with their children in an apartment from 1968 to 1978; the parties rented an additional apartment in 1978 and lived as one family in both apartments; they gave up one apartment in 1979 and rented the other adjacent apartment; defendant moved into one and plaintiff remained at the original apartment; the parties ceased having sexual relations; both parties and their children had full and free access to both apartments; defendant did the grocery shopping and cooked the family meals; family meals were usually eaten in the apartment occupied by plaintiff; defendant frequently used the kitchen in that apartment to cook and did the laundry for the parties and their children using the washing machine in that apartment; plaintiff and defendant jointly entertained overnight house guests once or twice, on several occasions had their meals together with mutual friends, traveled together to purchase items for the business which they jointly ran and slept in the same room on those trips; both apartments shared a common telephone number and used the same mailbox for much of the time from 1979 to 1990; the parties shared a joint checking account at least until 1983 and had joint credit cards until 1987; plaintiff paid defendant's automobile and health insurance, rent, telephone, utilities, and other expenses, but did not pay any money directly to defendant after July of 1989; and in 1990, just as defendant was entering the hospital to undergo major surgery, plaintiff moved into another section of the apartment complex and stopped paying defendant's rent and other expenses. Although plaintiff contends that the separation occurred in 1979 and that the interaction between the parties was necessitated purely by economics, the trial court's finding that the separation of the parties occurred in 1990 is fully supported by the evidence presented.

Am Jur 2d, Divorce and Separation §§ 567, 647.

Fault as consideration in alimony, spousal support, or property division awards pursuant to no-fault divorce. 86 ALR3d 1116.

Appeal by plaintiff from judgment signed and entered 11 October 1991 in Durham County District Court by Judge Richard G. Chaney. Heard in the Court of Appeals 18 November 1992.

Maxwell & Hutson, P.A., by Robert A. Beason and John A. Bowman, for plaintiff-appellant.

Upchurch & Galifianakis, by Roger S. Upchurch, for defendant-appellee.

LEWIS, Judge.

By this appeal, the plaintiff-husband challenges the trial court's judgment which held that his actions in September 1990 constituted abandonment and that as a consequence defendant is entitled to alimony. Although plaintiff filed a complaint for absolute divorce on 13 November 1990, there is no evidence in the record indicating that any divorce has been granted between the parties.

The facts of this case are unusual. Plaintiff-husband and defendant-wife were married in 1964 and had three children, all of whom have reached the age of majority. The parties lived in an apartment at 920 Lambeth Circle in Durham from 1968 until 1978.

In 1978 plaintiff rented an additional apartment, 922 Lambeth Circle. The parties lived together with their children as one family in both apartments. Thereafter, in 1979, the parties gave up 922 Lambeth Circle and began renting 918 Lambeth Circle. These were adjacent apartments which shared a common porch. The defendant moved into 918 Lambeth Circle, and plaintiff remained at 920 Lambeth Circle. In September 1990 the plaintiff moved to a different apartment in the same apartment complex.

The parties ceased having sexual relations in May of 1979. The parties and their children had full and free access to both of the apartments, with plaintiff "usually" sleeping in 920 Lambeth and defendant "usually" sleeping in 918 Lambeth. The testimony showed that the sleeping arrangements of the three children were

more fluid, with the children moving from one apartment to the other and back.

The record and the court's order reflect that during the period from 1979 to 1990, the defendant did the grocery shopping and cooked the family meals, which were usually eaten in apartment 920. Defendant frequently used the kitchen in apartment 920 to cook, and did the laundry for the parties and their children using the washing machine in apartment 920.

Plaintiff and defendant jointly entertained overnight house guests once or twice in the early 1980s. There was also testimony that on several occasions the parties had meals together with mutual friends. The defendant testified as well that the parties sometimes traveled together, to Washington, D.C. and to New York City, and slept in the same room. The purpose of these trips was to purchase items for the business which they jointly ran.

Both apartments 918 and 920 shared a common telephone number and used the same mailbox for much of the period between 1979 and 1990. The parties shared a joint checking account at least until 1983, and had joint credit cards until 1987. Plaintiff paid defendant's automobile and health insurance until the time of trial. In addition, plaintiff also paid defendant's rent, telephone, utilities, and other expenses, but after July 1989 plaintiff did not pay any money directly to defendant.

Defendant testified, and the court found, that there was never any consent or acquiescence on the part of the defendant to the plaintiff's leaving. The defendant was under the impression that the move into two apartments was to accommodate the size of the family, given that the children, two girls and one boy, were getting older. In late September or early October of 1990, just as defendant was entering the hospital to undergo major surgery, the plaintiff moved away from apartments 918 and 920 and into another section of the apartment complex. At this time, plaintiff stopped paying defendant's rent and other expenses. The trial court concluded that, based upon the evidence, the parties lived together as husband and wife "in the usually accepted sense" until September 1990, at which time plaintiff abandoned defendant.

Plaintiff assigns error to the trial court's holding that the separation of the parties occurred in 1990. Plaintiff argues that the parties, by living in different apartments, lived "separate and

apart" as contemplated in N.C.G.S. § 50-6 (1987). Plaintiff contends that the parties separated in 1979 when he moved into apartment 920 and terminated the sexual relationship between the parties. He claims that his move was an effort at living apart from his wife, and it was economically necessary to move to an adjacent, as opposed to a completely separate apartment, as the latter would be "more expensive for him to provide for his wife and minor children."

Plaintiff also argues that he and defendant did not hold themselves out as husband and wife. He contends that the "incidents of interaction" between the parties were merely isolated events that have no bearing on whether or not the parties actually separated. In fact, plaintiff contends some of these factors, such as the single telephone number and the joint checking and credit card accounts, were necessitated purely by economics. Plaintiff argues that virtually every action he has taken since 1979 was influenced by economics.

Our standard of review is set forth in *In re Estate of Trogdon*, 330 N.C. 143, 409 S.E.2d 897 (1991). When there has been a trial by judge without a jury, the court's findings of fact are conclusive on appeal if there is evidence to support them, even if there is contrary evidence. *Id.* at 147, 409 S.E.2d at 900. If the evidence allows different inferences to be drawn therefrom, the trial judge determines which inferences shall be allowed, and this determination is binding on the appellate courts. *Id.* at 148, 409 S.E.2d at 900.

This case raises the question of what is meant by "living separate and apart." It is well-settled that there is no separation where "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." *In re Estate of Adamee*, 291 N.C. 386, 392, 230 S.E.2d 541, 546 (1976). Neither we nor counsel found any North Carolina cases on point.

We note that the cessation of sexual relations does not alone constitute separation. In *Dudley v. Dudley*, 225 N.C. 83, 33 S.E.2d 489 (1945), the Supreme Court held that a separation "implies something more than a discontinuance of sexual relations. . . . It implies the living apart for such period in such a manner that

those in the neighborhood may see that the husband and wife are not living together." *Id.* at 86, 33 S.E.2d at 491. A situation very similar to the one at bar is found in *Ponder v. Ponder*, 32 N.C. App. 150, 230 S.E.2d 786 (1977).

In *Ponder* the parties, after allegedly separating, continued to reside in the same dwelling house but occupied separate bedrooms. The wife in *Ponder* prepared meals for the husband, which they consumed in the dwelling house. The wife used the same automobile, registered in the husband's name, that she had used for years, and except for the eight months before trial the husband paid all of the wife's automobile expenses. In addition, other family members visited the parties in the residence occupied by them. Under the facts of *Ponder*, the Court of Appeals affirmed the trial court's decision that the parties had not lived separate and apart for one year as contemplated under N.C.G.S. § 50-6. We hold that in the present case, the findings of fact by the trial court are fully supported by the evidence presented.

The trial court also found that plaintiff abandoned the defendant in September 1990. One spouse abandons another when "he or she brings their cohabitation to an end without justification, without the consent of the other spouse and without the intent of renewing it." *Panhorst v. Panhorst*, 277 N.C. 664, 671, 178 S.E.2d 387, 392 (1971). The evidence shows that the plaintiff simply moved out of his adjacent apartment and stopped supporting his wife at the same time defendant's earnings ceased and she was entering the hospital to undergo surgery. The record shows no evidence by which it could be said that defendant condoned her husband's departure or that plaintiff had any justification for leaving his wife.

Affirmed.

Judges WELLS and EAGLES concur.

EDGAR L. BRITT, EMPLOYEE, PLAINTIFF v. NORTH CAROLINA DEPARTMENT OF CRIME CONTROL & PUBLIC SAFETY, EMPLOYER, SELF-INSURED, DEFENDANT

No. 9110IC1267

(Filed 2 February 1993)

Master and Servant § 49.1 (NCI4th)— workers' compensation— National Guard member—employee of state

A member of the National Guard receiving the initial training required by the federal government was an employee of the State, so that he was covered by the Workers' Compensation Act. The statutory language providing that National Guard members shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duties under orders of the Governor includes the period of "initial active duty for training" that plaintiff was required to perform pursuant to 10 U.S.C. 511(d). N.C.G.S. § 97-2(2).

Am Jur 2d, Workers' Compensation § 181.

Appeal from opinion and award of the North Carolina Industrial Commission filed by the Full Commission on 18 September 1991. Heard in the Court of Appeals 2 December 1992.

On 19 July 1989, a Deputy Commissioner of the Industrial Commission determined that plaintiff had suffered a compensable back injury from an accident arising out of and in the course of his employment. The Deputy Commissioner made the following findings of fact: In August of 1986 plaintiff enlisted in the North Carolina National Guard ("National Guard"). Because plaintiff had not previously served in the military, plaintiff was required to attend and successfully complete basic Army training camp pursuant to 10 U.S.C. 511(d). The National Guard had an "arrangement" with the U.S. Army to provide the necessary initial training required by 10 U.S.C. 511(d). On 19 August 1986, plaintiff received orders from the Department of Defense directing that, "[w]ith the consent of the Governor of North Carolina," he report to Fort McClellan, Alabama for initial active duty for training (IADT) from 2 January 1987 to 7 May 1987. On 12 January 1987, plaintiff injured his back during warfare training after jumping across a drag line ditch.

On 11 October 1990, the Deputy Commissioner reaffirmed his earlier opinion and awarded plaintiff compensation for temporary total disability at a rate of $308.00 per week for the period of 1 July 1988 to 19 June 1989. Additionally, plaintiff received "commencing immediately thereafter an additional 60 weeks of compensation at the same rate on account of his retained twenty (20%) percent permanent-partial disability." Defendant was ordered to pay "all reasonable and necessary medical expenses" and expert witness fees. On 18 September 1991, the Full Commission affirmed and adopted the Deputy Commissioner's opinion and award as filed. Defendant appeals.

Bruce & Bryant, P.A., by R. Michael Bruce, for plaintiff-appellee.

Attorney General Lacy H. Thornburg, by Assistant Attorney General William H. Borden, for defendant-appellant.

EAGLES, Judge.

Defendant argues that the Industrial Commission erred by finding that plaintiff was an "employee" under the Workers' Compensation Act. G.S. 97-1 *et seq.* We disagree and affirm.

The second sentence of G.S. 97-2(2) provides:

> The term "employee" shall include members of the North Carolina national guard, except when called into the service of the United States, and members of the North Carolina State guard, and members of these organizations shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duty under orders of the Governor.

Defendant argues that plaintiff is not covered under the Workers' Compensation Act because he was "called into the service of the United States" when he attended the mandatory initial training at Fort McClellan pursuant to 10 U.S.C. 511(d). We disagree and affirm the Industrial Commission's decision.

The second sentence of G.S. 97-2(2), *supra*, arose from an amendment to the statute in 1943. However, the federal mandatory initial training requirement arose from an amendment to 10 U.S.C. 511 in 1963. See Pub.L. 88-110, § 3, 77 Stat. 135 (1963) (adding subsection (d) to 10 U.S.C. 511). 10 U.S.C. 511(d) provides:

> Under regulations to be prescribed by the Secretary of Defense . . . a non-prior-service person who is qualified for induction for active duty in an armed force and who is not under orders to report for induction into an armed force under the Military Selective Service Act (50 U.S.C.App. 451 *et seq.*), except as provided in section 6(c)(2)(A)(ii) and (iii) of such Act, may be enlisted in the Army National Guard . . . . Each person enlisted under this subsection shall perform an initial period of active duty for training of not less than twelve weeks to commence insofar as practicable within 270 days after the date of that enlistment.

Therefore, the issue before us is whether plaintiff was an employee of the State when he was injured at this mandatory initial training required by 10 U.S.C. 511(d) (which did not exist when the second sentence of G.S. 97-2(2) was written) and accordingly was entitled to compensation under the Workers' Compensation Act.

Our Supreme Court has previously stated "that the National Guard is an organization of the State militia, which does not become a part of the United States Army until the Congress declares an emergency to exist which calls for its services in behalf of the nation." *Baker v. State*, 200 N.C. 232, 234, 156 S.E. 917, 918 (1931). It is undisputed that this type of emergency situation did not exist when plaintiff was ordered to initial training. Rather, plaintiff was *required* by federal statute to attend and successfully complete this initial training. Further, we note that it is a duty of a North Carolina National Guard member to perform this mandatory training when ordered. Accordingly, had plaintiff, a North Carolina National Guard member, disobeyed this order, he would have been subject to a court martial. *See* G.S. 127A-52 (jurisdiction of courts-martial of the national guard); G.S. 127A-53 (Manual for Courts-Martial); Manual for Courts-Martial, United States, Article 92 (one who fails to obey order or regulation "shall be punished as a court-martial may direct").

The General Assembly amended G.S. 97-2(2) in 1943 to provide workers' compensation coverage to North Carolina National Guard members. Specifically, the legislature provided that National Guard members "shall be entitled to compensation for injuries arising out of and in the course of the performance of their duties at drill, in camp, or on special duties under orders of the Governor." We hold that this statutory language includes the period of "initial

active duty for training" that plaintiff was required to perform pursuant to 10 U.S.C. 511(d).

At the time of his injury, plaintiff was a member of the National Guard. His injury arose out of and in the course of his employment with the National Guard. Accordingly, we affirm the Industrial Commission's opinion and award.

Affirmed.

Judges WELLS and LEWIS concur.

WILLIAM MICHAEL HERRING v. BRANCH BANKING & TRUST COMPANY

No. 924SC133

(Filed 2 February 1993)

Appeal and Error § 14 (NCI4th)— extension of time to file appeal— prohibited—motion in interest of justice denied

The Court of Appeals denied plaintiff's request to suspend the Rules of Appellate Procedure under Rule 2 of the Rules of Appellate Procedure so that an untimely filed appeal could be heard. Rule 27(c) of the Rules of Appellate Procedure expressly prohibits the Court from enlarging the time necessary for taking an appeal.

Am Jur 2d, Appeal and Error § 292.

Appeal by plaintiff from judgment filed 15 January 1992 by Judge Paul M. Wright in Duplin County Superior Court. Heard in the Court of Appeals 7 January 1993.

On 26 September 1991 the plaintiff, William Michael Herring, filed suit against the defendant, Branch Banking & Trust Company, alleging *inter alia* breach of fiduciary duty, constructive fraud, violation of fair trade laws, and damages for infliction of emotional and mental distress. On 18 November 1991 the trial court granted the defendant's motion for summary judgment, dismissed the action with prejudice and taxed the plaintiff with costs. On 19 December 1991 the plaintiff filed notice of appeal. On 15 January 1992 the

trial court dismissed the plaintiff's appeal as having been untimely filed.

Plaintiff appeals from the order dismissing his appeal.

Bruce H. Robinson, Jr. for the plaintiff-appellant.

Dees, Smith, Powell, Jarrett, Dees & Jones, by Tommy W. Jarrett, for the defendant-appellee.

EAGLES, Judge.

Plaintiff argues that Judge Wright's 15 January 1992 order dismissing plaintiff's appeal from the 18 November 1991 judgment for failure to timely file notice of appeal should be reversed. We disagree and affirm.

"Rule 25 of the North Carolina Rules of Appellate Procedure allows the trial court to dismiss an appeal if the appellant failed to give notice of appeal within the time allowed by the Appellate Rules." *Landingham Plumbing and Heating of N.C., Inc. v. Funnell*, 102 N.C. App. 814, 815, 403 S.E.2d 604 (1991).

N.C.R. App. P. 3 provides in part:

> (a) **Filing the Notice of Appeal.** Any party entitled by law to appeal from a judgment or order of a superior or district court rendered in a civil action or special proceeding may take appeal by filing notice of appeal with the clerk of superior court and serving copies thereof upon all other parties within the time prescribed by subdivision (c) of this rule.
>
> * * *
>
> (c) **Time for Taking Appeal.** Appeal from a judgment or order in a civil action or special proceeding must be taken within 30 days after its entry.

"Appellate Rule 3 is jurisdictional and if the requirements of this rule are not complied with, the appeal must be dismissed." *Currin-Dillehay Bldg. Supply, Inc. v. Frazier*, 100 N.C. App. 188, 189, 394 S.E.2d 683, *disc. review denied*, 327 N.C. 633, 399 S.E.2d 326 (1990) (citation omitted).

Here, the trial court entered an order dismissing the plaintiff's appeal because the plaintiff's notice of appeal was untimely filed. The plaintiff admits in his brief that he did not properly file notice

of appeal. However, plaintiff requests this court to suspend the rules pursuant to our powers under N.C.R. App. P. 2. Plaintiff's request overlooks the mandate of Rule 2 and Rule 27(c).

Rule 2 provides:

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

(Emphasis ours).

Rule 27 provides:

> (c) **Extensions of Time; By Which Court Granted.** Except as herein provided, courts for good cause shown may upon motion extend any of the times prescribed by these rules or by order of court for doing any act required or allowed under these rules; or may permit an act to be done after the expiration of such time. *Courts may not extend the time for taking an appeal or for filing a petition for discretionary review or a petition for rehearing prescribed by these rules or by law.*

(Emphasis ours).

Because Rule 27(c) expressly prohibits this Court from enlarging the time necessary for taking an appeal, we must deny plaintiff's request to vary the rules. *Cf. Giannitrapani v. Duke University*, 30 N.C. App. 667, 670, 228 S.E.2d 46, 48 (1976).

Finally, we note that the plaintiff has filed a petition for a writ of *certiorari*. After carefully examining the substance of the underlying appeal, we find it to be without merit. Accordingly, the petition for writ of *certiorari* is denied.

Affirmed.

Judges ORR and WYNN concur.

JOSEPH W. KELLER, III, PLAINTIFF v. HAZEL A. COCHRAN AND DAVID S. WHITE AND WIFE, JEAN C. WHITE, DEFENDANTS

No. 9129DC1070

(Filed 2 February 1993)

Rules of Civil Procedure § 11 (NCI3d)— reasonable use of right of way—question of fact—no Rule 11 violation

The trial court improperly imposed sanctions under N.C.G.S. § 1A-1, Rule 11 against plaintiff where defendants had begun to clear and excavate for a retaining wall upon a portion of plaintiff's property subject to a right of way for ingress and egress to defendants' property. Whether a specific use of an easement constitutes a reasonable use is a question of fact and plaintiff presented evidence which would support the conclusion that there were several alternate methods by which defendants' easement could be kept reasonably accessible. Plaintiff's pleadings were sufficiently grounded in law and fact and there was no sufficient basis to support the finding that plaintiff brought this action in bad faith.

Am Jur 2d, Courts § 82.

Appeal by plaintiff from order entered 17 June 1991 in Transylvania County District Court by Judge Robert S. Cilley. Heard in the Court of Appeals 18 November 1992.

Plaintiff and defendants own adjacent tracts of real property located in Brevard, North Carolina. Defendants own a forty-foot wide right-of-way for purposes of ingress and egress across plaintiff's property to defendants' property. Defendants' right-of-way runs north for several car lengths, then angles left by about 55 degrees. The right-of-way had a slope, being higher on its west side than its east side. Also, the entrance of the right-of-way was higher than its interior portion. In December of 1988, in an effort to deal with the sideways slope, defendants began to clear and excavate plaintiff's property subject to the right-of-way and prepared to erect a retaining wall upon plaintiff's property.

On 20 December 1988, plaintiff filed a complaint seeking to permanently restrain defendants from excavating upon plaintiff's land and from constructing any structure. The defendants filed an answer and counterclaim and made a motion for Rule 11 sanc-

tions. The court had granted plaintiffs a temporary restraining order, but after a hearing found that the defendants should not be restrained from the construction which they had undertaken and dissolved most of the terms of the temporary restraining order.

After a trial on the merits, the jury returned a verdict for the defendants, finding that plaintiff had wrongly interfered with defendants' use and enjoyment of their right-of-way and awarding defendants actual and punitive damages. Following entry of judgment on the jury's verdict, defendants renewed their motion for sanctions pursuant to Rule 11 of the North Carolina Rules of Civil Procedure. On 17 June 1991, Judge Cilley found that plaintiff had violated Rule 11 and sanctioned plaintiff ordering plaintiff to pay defendants' attorney fees in the amount of $6,547.73. Plaintiff gave notice of appeal. Only the order finding a violation of Rule 11 and awarding sanctions is appealed.

Prince, Youngblood, Massagee & Jackson, by Sharon B. Ellis and Roy D. Neill, for plaintiff-appellant.

Ramsey, Hill, Smart, Ramsey & Pratt, P.A., by Michael K. Pratt and Angela M. Skerrett, for defendants-appellees.

WELLS, Judge.

The sole issue of this appeal is to determine whether the trial court committed reversible error when it found plaintiff in violation of N.C. Gen. Stat. § 1A-1, Rule 11 of the North Carolina Rules of Civil Procedure and imposed a sanction. The trial court's decision to grant or deny motions to impose sanctions under Rule 11 is "reviewable *de novo* as a legal issue." *Turner v. Duke University*, 325 N.C. 152, 381 S.E.2d 706 (1989). A pleading violates Rule 11 if (1) it is not "well grounded in fact," (2) it is not "warranted by existing law or [by] a good faith argument for the extension, modification, or reversal of existing law" or (3) it is interposed for an "improper purpose." Rule 11 of the North Carolina Rules of Civil Procedure.

In North Carolina, it is an established principle that the possessor of an easement has all rights that are necessary to the reasonable and proper enjoyment of that easement. *Shingleton v. State*, 260 N.C. 451, 133 S.E.2d 183 (1963) (*quoting* 12A Am. Jur., Easements, s. 113, pp. 720, 721). "[A]n easement in general terms is limited to a use which is reasonably necessary and convenient

and as little burdensome to the servient estate as possible for the use contemplated." *Id.* Whether a specific use of an easement constitutes a reasonable use is a question of fact and is not a matter of law. *Id.*

Because the determination of reasonable use is a question for a fact-finder, plaintiff's attempt to limit defendants' use of their easement is well-founded in law, if plaintiff presented competent evidence which could lead a reasonable fact-finder to determine that defendants' excavations and construction of a retaining wall do not constitute a reasonable use of the easement. Although the jury in this case determined that the construction of the restraining wall was, in fact, a reasonable use, Rule 11 sanctions would not be appropriate unless it can be said that the evidence dictated a finding of reasonableness as a matter of law.

At trial, plaintiff presented evidence which would support the conclusion that there were several alternative methods by which defendants' easement could be kept reasonably accessible. The evidence showed that the uneven slope could have been corrected by either excavation or fill and that, while some approaches offered more benefits than others, the access could have been made or kept accessible without the construction of a retaining wall. While the jury found the construction of the retaining wall to be a reasonable approach to maintaining use of the right-of-way, the existence of other less obtrusive options established that a valid issue of fact existed and that the plaintiff was not in violation of Rule 11 when he pursued this case.

Therefore, we hold that it was error for the trial court to reach the conclusion that plaintiff's pleadings were not well grounded in fact or warranted by existing law.

Having found plaintiff's pleadings to be sufficiently grounded in law and fact, we discern no sufficient basis in the record to support the finding that plaintiff brought this action in bad faith. We therefore hold that plaintiff's pleadings were not interposed for an improper purpose.

The trial court's imposition of Rule 11 sanctions are

Reversed.

Judges EAGLES and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 8 JANUARY 1993

ACCELERATED PERSONNEL, INC. v. D. H. DAGLEY ASSOC. No. 9128DC875	Buncombe (91CVD1347)	Affirmed
DUKE POWER CO. v. CLINE No. 9125SC927	Catawba (90SP17)	Affirmed
ELECTRICAL SOUTH, INC. v. GORZ No. 9218SC35	Guilford (91CVS8773)	Appeal Dismissed
GENERAL ELECTRIC CAPITAL CORP. v. THRIFT No. 9121SC1036	Forsyth (91CVS2191)	Affirmed
HALVERSON v. HALVERSON No. 9121DC604	Forsyth (86CVD1793)	Reversed & Remanded
KIRKHART v. SAIEED No. 915SC836	New Hanover (88CVS2919)	Affirmed
McCRARY v. SMITH No. 9124SC909	Watauga (90CVS152)	Reversed & Remanded
SMITH v. SMITH No. 9119DC939	Cabarrus (88CVD1653)	Reversed & Remanded
STROUD v. MORRIS No. 918SC842	Lenoir (90CVS282)	Affirmed
WHITE v. JONES No. 915SC760	New Hanover (89CVS2630)	Reversed
WILKIE v. N.C. DEPT. OF JUSTICE No. 9110SC913	Wake (90CVS13475)	Affirmed

FILED 19 JANUARY 1993

COLLINS v. SMITH No. 9123SC1045	Yadkin (90CVS63)	Affirmed
FITCH v. FITCH No. 9126DC1133	Mecklenburg (91CVD633 U-IVD)	Affirmed
FRANKLIN v. SHERRILL FURNITURE CO. No. 9110IC979	Ind. Comm. (705212)	Vacated & Remanded

HOME SAVINGS & LOAN ASSN. v. NYE No. 9114SC648	Durham (83CVS1451)	New Trial
IN RE HINSHAW No. 9219DC31	Randolph (90J105)	Affirmed. The supersedeas & temporary stay are vacated.
INVESTORS TITLE INS. CO. v. HUTCHINGS No. 9114SC731	Durham (86CVS3151)	Affirmed
KINSER v. BATTLE No. 9228DC75	Buncombe (88CVD209)	Affirmed
McLEMORE v. McLEMORE No. 9128DC1259	Buncombe (87CVD2345)	Affirmed
SAFFEL v. UNIQUE FURNITURE MAKER, INC. No. 9110IC492	Ind. Comm. (910300)	Affirmed
SHOLAR v. HAMBY No. 9221SC25	Forsyth (91CVS2910)	Dismissed
SMITH v. N.C. CRIM. JUSTICE EDUC. & TRAINING STDS. COMM. No. 913SC1014	Pitt (90CVS1722)	Affirmed
STATE v. CARMON No. 912SC924	Beaufort (90CRS4169) (90CRS6042) (90CRS6043) (90CRS6044) (90CRS6045) (90CRS6943)	No Error
STATE v. PARKER No. 915SC971	New Hanover (90CRS17384) (90CRS17385)	No Error

FILED 2 FEBRUARY 1993

COOKE v. STATE AUTOMOBILE MUTUAL INS. CO. No. 925DC537	New Hanover (91CVD15)	Dismissed
FRANKLIN v. SANDERS No. 9227SC120	Lincoln (91CVS4)	Dismissed
GRAFTON v. BAKER No. 924DC113	Onslow (88CVD2876)	Affirmed

HEATH v. HEATH No. 928DC663	Greene (90CVD104)	Appeal Dismissed
IN RE CARTER v. HODGES No. 9225SC643	Catawba (91CVS2859)	Affirmed
IN RE ESTATE OF LEVY v. BROADWELL No. 9212SC48	Cumberland (90CVS1851)	Affirmed
IN RE TRIPP No. 9111DC1306	Harnett (89J48)	Affirmed
McDERMOTT v. McDERMOTT No. 9220DC305	Moore (88CVD435)	Affirmed
MERRITT v. TOWN OF DOVER No. 923SC42	Craven (89CVS1165)	Vacated & remanded
SECURITY PACIFIC HOUSING SERVICES v. METROPOL No. 9120SC1005	Richmond (90CVS660)	Affirmed
SMITH v. McCULLEN No. 928SC108	Wayne (89CVS352)	Affirmed
STATE v. ADAMS No. 9227SC401	Gaston (90CRS032179) (90CRS032180)	No Error
STATE v. ANGLON No. 922SC512	Martin (91CRS1090)	No Error
STATE v. BOWSER No. 925SC489	New Hanover (91CRS8398)	No Error
STATE v. DAVENPORT No. 922SC568	Tyrrell (91CRS567)	No Error
STATE v. INMAN No. 9230SC536	Haywood (91CRS3401)	No Error
STATE v. KIRKLAND No. 9230SC575	Swain (91CRS591) (91CRS592) (91CRS608)	No Error
STATE v. LEWIS No. 9215SC460	Orange (91CRS3777) (91CRS3778) (91CRS3779)	Affirmed
STATE v. MILLER No. 9218SC474	Guilford (91CRS4668)	Affirmed

STATE v. PHIPPS No. 924SC385	Duplin (91CRS3452) (91CRS3453)	No Error
STATE v. REID No. 9226SC487	Mecklenburg (90CRS40745)	Affirmed
STATE v. RICHARDSON No. 924SC511	Sampson (91CRS1124) (91CRS1125)	No Error
STATE v. SAUNDERS No. 9118SC229	Guilford (88CRS61830) (88CRS61833) (88CRS61878) (88CRS61880)	88CRS61830 possession with intent to sell a controlled substance—no error; 88CRS61833 trafficking in drugs—no error; 88CRS61878 possession with intent to sell a controlled substance—no error; 88CRS61880 trafficking in drugs—no error
STATE v. TATE No. 9218SC481	Guilford (91CRS55503)	No Error
STATE v. TORAIN No. 9210SC540	Wake (91CRS92248)	Affirmed
STATE v. WEAVER No. 926SC333	Northampton (91CRS1669)	No Error
TRUESDELL v. TRUESDELL No. 9214DC437	Durham (91CVD3156)	Reversed
WACHOVIA BANK & TRUST CO. v. OVERMAN No. 9221DC46	Forsyth (90CVD6941)	Reversed
WORLEY v. WORLEY No. 9111DC829	Johnston (84CVD583)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

Titles and section numbers in this Index correspond with titles and section numbers in the N.C. Index 3d or superseding titles and sections in N.C. Index 4th as indicated.

TOPICS COVERED IN THIS INDEX

ADMINISTRATIVE LAW AND PROCEDURE

§ 52 (NCI4th). Prerequisites to court action; exhaustion of administrative remedies

The trial court properly dismissed claims for declaratory and injunctive relief regarding the selection and testing of potential sites for a disposal facility for low-level radioactive waste where no final site decision has been made. *Richmond County v. N.C. Low-Level Radioactive Waste Mgmt. Auth.*, 700.

§ 56 (NCI4th). What are "contested cases" subject to judicial review

A contested case commenced when plaintiff State employee, on 14 November 1984, appealed to the Board of Trustees of the State Employees' Medical Plan from the claim processor's decision to deny coverage for a radial keratotomy procedure, and the dispute was governed by the former APA, G.S. Ch. 150A, but the Board was not prejudiced by the trial court's consideration of the case under G.S. Ch. 150B. *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 251.

§ 57 (NCI4th). What is a "decision" or "final decision" subject to judicial review

An order of the chairman of the Coastal Resources Commission denying petitioners' request for a contested case hearing of a permit decision was a final agency decision subject to judicial review. *Ballance v. N.C. Coastal Resources Comm.*, 288.

§ 58 (NCI4th). What meets requirement of exhaustion of administrative remedies

Plaintiffs' failure to pursue their rights using the administrative process was not fatal to their case where plaintiffs specifically alleged inadequacy and futility of administrative review in their complaint by stating that the person who would conduct the administrative review does not have the jurisdiction or authority to rule upon the constitutionality of the statute. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

Plaintiffs did not need to exhaust their administrative remedies where they specifically alleged inadequacy and futility of administrative review. *Woodard v. Local Governmental Employees' Retirement System*, 378.

ADOPTION OR PLACEMENT FOR ADOPTION

§ 60 (NCI4th). Applicability of Interstate Compact on Placement of Children

Where defendants sent their child to plaintiffs in North Carolina as a preliminary to a possible adoption by plaintiffs and did not simply "leave the child with" plaintiffs, Article VIII(a) of the Interstate Compact did not exclude this case from the operation of the Compact. *Stancil v. Brock*, 745.

Because defendants are persons who sent their child to North Carolina for possible adoption by plaintiffs, they are the "sending agency" as that term is used in Article II(b) of the Interstate Compact, and, as such, they retain authority or control over the child until his adoption. *Ibid.*

ADVERSE POSSESSION

§ 5 (NCI4th). Character of ownership; exclusive control

The trial court did not err in an action to quiet title by denying plaintiff's motion for a new trial based on an inconsistent jury verdict where the jury found that plaintiff did not have superior record title and that defendants had been in adverse possession for more than 20 years. *Lake Drive Corp. v. Portner*, 100.

APPEAL AND ERROR

§ 14 (NCI4th). Extension of time

The Court of Appeals denied plaintiff's request that an untimely filed appeal be heard under the authority of Rule 2 of the Rules of Appellate Procedure. *Herring v. Branch Banking and Trust Co.*, 780.

§ 44 (NCI4th). Supervisory power of Court of Appeals generally; power of Court of Appeals to issue remedial writs

The Court of Appeals exercised its supervisory discretion to address an appeal on the merits where defendants appealed from the denial of their motion to dismiss under G.S. 1A-1, Rule 12(b)(6) claims for breach of contract and breach of fiduciary duty in connection with a statutory change in the calculation of disability benefits. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

An appeal from an order granting certification of a class was interlocutory, but the Court of Appeals granted certiorari due to the importance of the case and the fact that appeals were permitted on other issues. *Ibid.*

§ 63 (NCI4th). Appeals involving question of jurisdiction

The appropriate route of appeal for issues involving personal jurisdiction of a German court over defendant and the amount of a judgment was through German courts. Defendant presented no basis to disturb the German court's ruling on the amount of the judgment, and even if the issue of the German court's jurisdiction could be addressed, such a discussion would be barred by the Superior Court's dismissal of plaintiff's original appeal. *Lang v. Lang*, 440.

§ 109 (NCI4th). Appealability of preliminary injunctions and restraining orders; appeal allowed

It was proper for the Court of Appeals to hear plaintiff's interlocutory appeal from the denial of its request for a preliminary injunction prohibiting the release of certain documents. *N.C. Electric Membership Corp. v. N.C. Dept of Econ. & Comm. Dev.*, 711.

§ 112 (NCI4th). Orders denying motion to dismiss; jurisdiction over person or property of defendant, or subject matter, generally

The trial court's refusal to dismiss a contempt proceeding against a state agency on the ground of governmental immunity was immediately appealable. *N.C. Dept. of Transportation v. Davenport*, 178.

§ 114 (NCI4th). Orders denying motion to dismiss based on failure to state claim; failure to join necessary party

An appeal from the denial of a motion to dismiss a § 1983 claim under G.S. 1A-1, Rule 12(b)(6) was not interlocutory where the defense was based on the doctrines of qualified and official immunity, whether defendants were persons within the meaning of § 1983, and whether the doctrine of sovereign immunity bars suit against defendants. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

§ 118 (NCI4th). Appealability when summary judgment denied

The denial of a motion for summary judgment is immediately appealable when immunity is raised as a basis in the summary judgment motion. *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 24.

Those assignments of error based on a denial of summary judgment will not be reviewed by the court on appeal. *Clinton v. Wake County Bd. of Education*, 616.

APPEAL AND ERROR — Continued

§ 119 (NCI4th). Appealability when summary judgment granted

The granting of a summary judgment motion which was not a final disposition of all claims arising from an automobile collision was immediately appealable where dismissal of the appeal could result in two trials on the same issues and create the possibility of inconsistent verdicts. *Taylor v. Brinkman*, 767.

§ 156 (NCI4th). Effect of failure to make motion, objection, or request; civil actions

Review of defendant insurance company's assignment of error to the instructions on bad faith refusal to settle was precluded; failure to timely object to jury instructions constitutes a waiver of any objection and special instruction requests are required to be submitted in writing. *Lovell v. Nationwide Mutual Ins. Co.*, 416.

§ 167 (NCI4th). Advisory opinions

Plaintiff's appeal does not constitute a request for an advisory opinion as to the meaning of a statute where the trial court ruled that the statute created no enforceable rights in plaintiff. *Clinton v. Wake County Bd. of Education*, 616.

§ 175 (NCI4th). Mootness of other particular questions

Whether defendants were required to prepare an environmental impact statement prior to the characterization of potential sites for a low-level radioactive waste disposal facility was a moot issue where the characterization of the two sites being considered was virtually complete. *Richmond County v. N.C. Low-Level Radioactive Waste Mgmt. Auth.*, 700.

§ 176 (NCI4th). Effect of appeal on power of trial court

Although the general rule is that the lower court is divested of jurisdiction once an appeal is perfected, plaintiffs' voluntary dismissal without prejudice as to two of the defendants after notice of appeal by defendants was proper. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

Plaintiffs successfully dismissed their action as to defendant Boyles in his individual capacity after notice of appeal. *Woodard v. Local Governmental Employees' Retirement System*, 378.

§ 206 (NCI4th). Tolling of time for appeal

The time period for filing and serving a notice of appeal is tolled by a timely motion under Rule 52(b), and plaintiff's notice of appeal was properly given on 27 December after the trial court's order denying plaintiff's Rule 52(b) motion to amend the judgment was entered on 27 November. *Nobles v. First Carolina Communications*, 127.

§ 344 (NCI4th). Assignments of error; sufficiency of evidence

A defendant waived the right to appeal the denial of his motion to dismiss at the close of the State's evidence where he introduced evidence after the close of the State's evidence. *State v. Burton*, 219.

§ 418 (NCI4th). Assignments of error omitted from brief; abandonment

An argument that the three year statute of limitations applies to a constitutional impairment claim arising from a statutory change in disability benefits was not argued and was deemed abandoned. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

APPEAL AND ERROR — Continued

§ 453 (NCI4th). Review of constitutional issues generally

The constitutionality of a statute will not be considered on appeal where this issue was not raised and passed upon in the trial court. *Nelson v. Battle Forest Friends Meeting*, 641.

§ 495 (NCI4th). Injunctions

In order for the appellate court to review the propriety of a temporary restraining order, there must be an existing order presented for review. *Nelson v. Battle Forest Friends Meeting*, 641.

ARBITRATION AND AWARD

§ 2 (NCI4th). Requirement that agreement to arbitrate exist

There was no valid agreement to arbitrate where a dealership termination agreement containing an arbitration clause was not signed by plaintiff on the line designated for his signature but was signed by him only below an addition to the agreement whereby plaintiff agreed to repay defendant corporation $1,000 per month until the balance he owed was paid. *Routh v. Snap-On Tools Corp.*, 268.

§ 6 (NCI4th). Application of Federal Arbitration Act

A dancer's employment contract requiring performances in twelve states and containing an arbitration clause was "a contract evidencing a transaction involving commerce" within the meaning of the Federal Arbitration Act, and the trial court thus erred in failing to enter an order compelling arbitration. *Bennish v. N.C. Dance Theater*, 42.

§ 11 (NCI4th). Appointment of arbitrators by court

The trial court is ordered to substitute a neutral third arbitrator for one of the two representatives of defendant required by a dancer's employment contract. *Bennish v. N.C. Dance Theater*, 42.

§ 43 (NCI4th). Appeals generally

A trial court's interlocutory order denying arbitration is immediately appealable. *Bennish v. N.C. Dance Theater*, 42.

ARREST AND BAIL

§ 96 (NCI4th). Right to resist use of excessive force during arrest

A jury in a prosecution for assaulting an officer could reasonably conclude that officers did not use excessive force in arresting defendant for resisting an officer and that defendant was not entitled to resist in any manner. *State v. Burton*, 219.

§ 151 (NCI4th). Pretrial release orders

The law concerning pretrial release does not require a written record by the judicial official imposing pretrial release, but it does require the official to consider specific factors in determining which condition is appropriate for a particular defendant. *State v. O'Neal*, 661.

§ 196 (NCI4th). Amount of bail required

A $50,000 secured bond for a defendant arrested for selling cocaine was not excessive and violative of defendant's constitutional rights although it exceeded the amount that would have been calculated according to the recommendations in the "Official Policies on Pretrial Release." *State v. O'Neal*, 661.

ASSAULT AND BATTERY

§ 2 (NCI4th). Civil assault and battery; sufficiency of evidence

The trial court properly directed a verdict for plaintiff on defendant's counterclaim for civil assault where plaintiff had brought an action for civil assault against defendant. A person in plaintiff's situation would feel a reasonable apprehension of apparent danger and, if plaintiff retaliated against defendant, he was entitled to do so in self-defense. *Juarez-Martinez v. Deans*, 486.

§ 3 (NCI4th). Civil assault and battery; accident or misadventure; self-defense

The trial court did not err by directing a verdict for plaintiff on the issue of self-defense in a civil assault action; merely jumping backwards did not adequately inform plaintiff that defendant was withdrawing from the fight. *Juarez-Martinez v. Deans*, 486.

§ 10 (NCI4th). Civil assault; damages

Plaintiff in a civil assault action clearly presented sufficient evidence that he was entitled to punitive damages; the appellate court cannot substitute its judgment for that of the trial court and the Court of Appeals could not say as a matter of law that the trial court erred in denying defendant's motion for a new trial based on excessive punitive damages. *Juarez-Martinez v. Deans*, 486.

§ 60 (NCI4th). Assault on law enforcement officer generally

Assaults on off-duty police officers working as security guards for a restaurant constituted assaults on the officers in the performance of their duties. *State v. Lightner*, 349.

A jury in a prosecution for assaulting an officer could reasonably conclude that officers were attempting to lawfully arrest defendant for resisting, delaying, and obstructing a police officer when the assault occurred where officers had probable cause to believe that defendant willfully prevented an officer from performing his duties concerning a traffic stop. *State v. Burton*, 219.

There was no plain error in a prosecution for assault on an officer arising from an attempted arrest for obstructing an officer where the jury requested an additional instruction on the definition of "obstruct" and the definition given at that point did not include the necessary element of willfulness. *Ibid.*

AUTOMOBILES AND OTHER VEHICLES

§ 426 (NCI4th). Intervening negligence of other drivers; miscellaneous circumstances

The evidence at trial was sufficient to submit to the jury the question of whether defendant Abrahamson's intervening negligence was concurring or insulating where plaintiff collided with Abrahamson while Abrahamson was swerving around defendant Barwick's disabled car. *Reed v. Abrahamson*, 301.

§ 531 (NCI4th). Driver's creation of dangerous condition; blocking road with vehicle

The evidence was sufficient to go to the jury on defendant Barwick's negligence where Barwick's car became disabled one morning and she pushed the car as far to the right as possible; 50 to 60 percent of the car remained on the paved portion of the road; no towing service was then available; Barwick went on to attend her college classes and attempted to call another towing service at approximately 5:15 p.m.; in the meantime, defendant Abrahamson rounded a curve and found defendant Barwick's vehicle blocking her path; and defendant Abrahamson swerved into the opposite lane, where she collided with plaintiff. *Reed v. Abrahamson*, 301.

CONSPIRACY

§ 43 (NCI4th). Instructions; other matters

There was no error in a prosecution for conspiracy to commit armed robbery where the judge used "and/or" in instructing the jury and in submitting verdict sheets. *State v. Wilson*, 575.

CONSTITUTIONAL LAW

§ 119 (NCI4th). Religious freedom generally

Any constitutional violation by the trial court's daily prayer "that what we do might be equitable to our fellow man" was harmless. *Hill v. Cox*, 454.

§ 367 (NCI4th). Cruel and unusual punishment; consecutive sentences

The imposition on defendant of three consecutive life sentences and one nine-year sentence for two counts of first degree rape, one count of first degree sexual offense and one count of second degree kidnapping did not constitute cruel and unusual punishment. *State v. Sneeden*, 506.

The imposition on defendant of two consecutive life sentences for two counts of first degree rape of a child, two counts of first degree sexual offense against a child, two counts of taking indecent liberties with a child, and one count of child abduction did not constitute cruel and unusual punishment. *State v. Morrell*, 465.

Consecutive sentences for the maximum term for each of two convictions did not constitute cruel and unusual punishment. *State v. O'Neal*, 661.

CONTRACTS

§ 41 (NCI4th). Contracts limiting liability

Defendant security firm could not be held liable under a breach of contract theory for the theft of plaintiff's property by security guards supplied by defendant where the parties' contract provided that defendant would be liable only for negligence. *B. B. Walker Co. v. Burns International Security Services*, 562.

§ 183 (NCI4th). Interference with contractual rights; damages considerations

Punitive damages were properly awarded to defendant where plaintiff intentionally interfered with defendant's contract with his insurance carrier. *Lyon v. May*, 633.

§ 187 (NCI4th). Sufficiency of interference allegations generally

Plaintiff landowner was not justified in interfering with the contract between an insurance company which wrote a policy of crop loss insurance and defendant who rented and farmed plaintiff's land. *Lyon v. May*, 633.

There was no merit to plaintiff's contention that defendant did not possess a valid contractual right against an insurance company which wrote a crop loss policy on defendant's crops because defendant assigned the indemnity rights to the Farmer's Home Administration and that defendant thus could not claim plaintiff's interference with the contract. *Ibid.*

CONVERSION

§ 10 (NCI4th). Sufficiency of evidence to take civil conversion case to jury

The evidence was insufficient for the jury on defendant's conversion counterclaim where defendant claimed that the act constituting conversion was the changing

CRIMINAL LAW — Continued

§ 324 (NCI4th). Joinder or consolidation of charges against multiple defendants; breaking and entering and related offenses

The trial court did not abuse its discretion by joining defendant Wilson's trial for a series of break-ins and robberies with that of defendant Clark. *State v. Wilson*, 575.

The trial court erred in a prosecution for several break-ins and robberies by joining the trial of defendant Clark with defendant Wilson where the jury first heard evidence as to two separate incidents with which Clark was not charged. *Ibid.*

§ 394 (NCI4th). Court's questions, remarks, and other conduct during trial; argument to jury generally

The trial court did not express its opinion to the jury during closing arguments in a prosecution arising from a series of break-ins and robberies. *State v. Wilson*, 575.

§ 399 (NCI4th). Comment by court on failure to produce certain witnesses or evidence

A defendant in a prosecution for conspiracy to sell and deliver crack failed to show that the trial court's denial of his motion to sever deprived him of a fair trial. *State v. Cunningham*, 185.

§ 438 (NCI4th). Miscellaneous comments by court on defendant's general character and truthfulness

There was no prejudicial error in a prosecution for assault on an officer where the prosecutor commented in his closing argument on the lack of use of sirens in stopping cars for traffic violations and on defendant's snickering as officers described his conduct and their injuries, and that defendant's testimony was consistent with that of the officers except for two parts he "made up" and how victims ended up becoming the defendant. *State v. Burton*, 219.

§ 497 (NCI4th). Deliberations; use of evidence by the jury

The trial court did not err by refusing to allow the jury to examine the written statements of a witness in the jury room where the State did not give its consent. *State v. Wilson*, 575.

§ 520 (NCI4th). Mistrial; knowledge of persons or court officers involved in suit

The trial court did not abuse its discretion in failing to declare a mistrial in a rape case when a juror advised the court that he realized he had worked with defendant at the time defendant committed a rape twenty-three years earlier. *State v. Sneeden*, 506.

§ 632 (NCI4th). Particular aspects of sufficiency of evidence; testimony of accomplice

There was sufficient evidence to withstand a motion to dismiss charges arising from a series of break-ins and robberies where defendant contended that the case turned upon testimony from an accomplice which was filled with inconsistencies and self-contradictions. *State v. Wilson*, 575.

§ 868 (NCI4th). Additional instructions; repetition of instructions relating to other features of case

Where the jury requested a restatement of law of acting in concert, the trial court's reinstruction which was almost verbatim of the original, proper instruction on acting in concert was not needlessly repetitious or erroneous. *State v. Buchanan*, 338.

CRIMINAL LAW — Continued

§ 869 (NCI4th). Requirement of notice of additional instructions

The trial court was not required to consult with counsel prior to giving a reinstruction at the jury's request because the reinstruction was not an additional instruction within the meaning of G.S. 15A-1234(c). *State v. Buchanan*, 338.

§ 959 (NCI4th). Motion for appropriate relief by defendants; newly discovered evidence

Defendant waived his right to assert on appeal a motion for appropriate relief seeking to reopen a suppression hearing based upon the discovery of new evidence consisting of four letters where the letters were discovered prior to sentencing, and defendant failed to make an appropriate motion in the trial court. *State v. Smothers*, 315.

§ 991 (NCI4th). Setting aside verdict; remand; vacation of judgment

Though the district court could properly set aside a guilty verdict, it could not thereafter enter a verdict of not guilty but had to remand the case for a new trial. *State v. Morgan*, 673.

§ 1097 (NCI4th). Use of uncontested evidence to support finding of aggravating factor

The trial court did not err when sentencing defendant for conspiracy to sell or deliver crack by finding as an aggravating factor that defendant had a prior conviction punishable by more than sixty days confinement where, in response to the prosecutor's statement at sentencing that defendant has prior convictions of loitering and resisting a public officer, defense counsel stated, "Judge, we'd object to the loitering. That doesn't carry sixty days." *State v. Cunningham*, 185.

§ 1244 (NCI4th). Strong provocation or extenuating relationship mitigating factor; girlfriend/boyfriend relationship

The trial court did not err in failing to find as a mitigating factor for felonious assault that the relationship between defendant and the victim was an extenuating circumstance where defendant contended that his actions were due to distress over the breakup of his relationship with the victim. *State v. Neville*, 330.

§ 1599 (NCI4th). Restitution with parole recommended by court with active sentence

The court's recommendation of restitution as a condition of work release or parole was proper, but the amount recommended by the court as restitution was not supported by competent evidence where it was based upon unsworn statements by the prosecutor. *State v. Buchanan*, 338.

§ 1680 (NCI4th). Modification and correction of judgment or sentence by court in term

Upon a determination that defendant's original sentence was not supported by the evidence, the sentencing district court judge had the authority, two days after the sentence was imposed, to vacate the sentence and to resentence defendant. *State v. Morgan*, 673.

DAMAGES

§ 21 (NCI4th). Mental and emotional anguish and suffering

The trial court did not err in a retaliatory discharge action by submitting the issue of emotional distress damages to the jury. *Abels v. Renfro Corp.*, 135.

§ 114 (NCI4th). Sufficiency of evidence of pain, suffering, and mental anguish, generally

The evidence was sufficient in an automobile accident case to support the jury's award of $50,000 and the court correctly denied plaintiff's motion to set aside the verdict. *Reed v. Abrahamson*, 301.

DAMAGES — Continued

§ 117 (NCI4th). Sufficiency of evidence of permanent injuries; expert testimony

Testimony by two physicians that plaintiff's pain was unlikely to change in the future was sufficient to show permanent injury although the phrases "more likely than not" and "more probable than not" were not used. *Ferrell v. Frye*, 521.

§ 120 (NCI4th). Sufficiency of evidence of injury to residence

Defendant homeowner's motion for j.n.o.v. was properly denied in an action arising from the installation of vinyl siding where defendant alleged that the jury miscalculated damages but there was evidence to support the jury's finding. The jury was not bound to use defendant's exact figures. *Lawrence v. Wetherington*, 543.

§ 135 (NCI4th). Punitive damages; insurer's bad faith refusal to settle

The evidence of bad faith refusal to settle a med pay insurance claim arising from an automobile accident was sufficient to withstand a motion for directed verdict, and the trial court correctly denied defendant's motion for a new trial based on an excessive punitive damages award. *Lovell v. Nationwide Mutual Ins. Co.*, 416.

DEEDS

§ 74 (NCI4th). Restrictive covenants; mobile homes

A modular home did not violate a restrictive covenant prohibiting mobile homes. *Angel v. Truitt*, 679.

DIVORCE AND SEPARATION

§ 4 (NCI4th). Writing and acknowledgment of separation agreements

Even though the parties disagreed as to whether a notary was present in the room at the time a separation agreement was signed, plaintiff's forecast of evidence was insufficient to overcome the presumption of legality of execution created by the notarization of the agreement where plaintiff never asserted that the signature on the agreement is other than his own. *Moore v. Moore*, 656.

§ 15 (NCI4th). Construction of separation agreements, generally

A 1986 handwritten agreement between the parties which concerned the distribution of marital assets and which provided that defendant would pay plaintiff $15,000 upon her remarriage or upon her sale of specific marital property was superseded by a 1988 agreement fully and finally settling the distribution of marital property. *Rosania v. Rosania*, 58.

§ 22 (NCI4th). Modification of separation agreement generally

The trial court erred by modifying without the parties' consent a provision of a separation agreement which had not been incorporated into the divorce decree. *Rose v. Rose*, 90.

§ 37 (NCI4th). Enforcement of separation agreements generally

Plaintiff was estopped from asserting the invalidity of a separation agreement on the ground of improper notarization where he treated the agreement as valid and enjoyed the benefits thereof for two years without complaint. *Moore v. Moore*, 656.

DIVORCE AND SEPARATION — Continued

§ 119 (NCI4th). Classification of property; marital property generally

The trial court erred in an equitable distribution action by classifying and distributing as marital property post-separation rental income from marital property. *Chandler v. Chandler*, 66.

§ 135 (NCI4th). Court's duty to value marital property

The trial court in an equitable distribution action made sufficient findings as to the value of marital property, post-separation payment of debt, appreciation, and gifts, but did not make required findings as to depreciation and made insufficient findings to show that it considered evidence presented under the distributional factors. *Chandler v. Chandler*, 66.

§ 204 (NCI4th). Alimony; consent to separation

The trial court did not err in a divorce action by finding that plaintiff husband abandoned defendant wife in 1990 and that defendant was entitled to alimony where the plaintiff moved into an adjacent apartment in 1979, the parties ceased having sexual relations, the parties continued to operate a business together, both parties and their children had full and free access to both apartments, defendant cooked and did laundry for the family in plaintiff's apartment, and plaintiff moved into another apartment and stopped paying defendant's expenses in 1990. *Lin v. Lin*, 772.

§ 392.1 (NCI4th). Child support guidelines

The trial court did not err by deviating from the Child Support Guidelines in an action to enforce a separation agreement where there was no notice of a request for a child support hearing but defendant did not object when evidence was presented on this issue. *Rose v. Rose*, 90.

The trial court's findings were sufficiently specific to support a child support order which deviated from the Guidelines. *Ibid.*

§ 418 (NCI4th). Past due child support entitled to full faith and credit

An Iowa judgment for past due child support was entitled to full faith and credit as to the amount owed up until the time of the judgment, and the trial court was without authority to allow defendant credit toward the judgment for sums given to the child outside the Iowa order. *Pieper v. Pieper*, 722.

§ 564 (NCI4th). Alimony and child support orders; full faith and credit

The enforcement of an Iowa judgment for continued child support payments beyond the age of eighteen did not violate the public policy of North Carolina, and the Iowa judgment was entitled to full faith and credit in this state. *Pieper v. Pieper*, 722.

The trial court's dismissal of plaintiff's prior URESA action was not res judicata in this subsequent action to enforce an Iowa judgment for past due child support. *Ibid.*

EJECTMENT

§ 12 (NCI4th). Jurisdiction of magistrate

The magistrate's court was without jurisdiction in plaintiff's summary ejectment proceeding where defendant agreed to purchase a manufacturing plant from plaintiff, defendant was to lease the facility for one year with lease payments going toward the purchase price, and the transaction was not closed on the date

EVIDENCE AND WITNESSES — Continued

§ 233 (NCI4th). Nature of personal injuries, generally

Even though defendant stipulated that his negligence was the proximate cause of plaintiff's injuries, the trial court properly admitted testimony of the details of the occurrence and severity of the collision where defendant attempted to prove that plaintiff's injuries were negligible. *Ferrell v. Frye*, 521.

§ 345 (NCI4th). Admissibility of rape and other sex offenses to show intent

Evidence of a 1967 rape committed by defendant was admissible in defendant's trial for a 1990 rape on questions of defendant's intent when the victim entered his automobile and the victim's lack of consent. *State v. Sneeden*, 506.

§ 369 (NCI4th). Other crimes, wrongs, or acts; admissibility to show common plan, scheme, or design; armed robbery

The trial court did not err in an armed robbery prosecution by admitting evidence of a conversation between defendant and another man, prior to the robbery with which defendant is charged, in which defendant suggested that they commit armed robberies to obtain money or by admitting evidence of a prior robbery and prior break-in. *State v. Wilson*, 117.

§ 699 (NCI4th). Necessity of request that use of evidence be restricted

Where evidence of a prior rape was admissible to show intent and lack of consent but defendant did not request a limiting instruction, any error in the trial court's instruction permitting the evidence to be considered for other purposes was not prejudicial. *State v. Sneeden*, 506.

§ 741 (NCI4th). Prejudicial error in the admission of evidence; miscellaneous evidence in civil cases

There was no prejudicial error in an action arising from the installation of vinyl siding where a witness identifying a letter was allowed to testify that she would not have charged for repairs to the house if she had the opportunity to go back. *Lawrence v. Wetherington*, 543.

§ 743 (NCI4th). Miscellaneous evidence in criminal cases; error prejudicial

There was prejudice in a child sexual abuse prosecution in the erroneous admission of testimony from an expert that this child showed no signs of coaching and testimony from her teacher relating specific instances of truthful conduct. *State v. Baymon*, 476.

§ 761 (NCI4th). Miscellaneous evidence; substantially similar evidence admitted without objection

There was no error where one defendant contended that he was denied the opportunity to cross-examine a State's witness about overnight conversations between the witness and a prosecutor or a detective, but that defendant's counsel was later allowed to again question that witness about overnight conversations. *State v. Wilson*, 575.

§ 1227 (NCI4th). Impropriety of prior or subsequent confession

Defendant's confession to a detective after proper Miranda warnings was not rendered inadmissible by defendant's prior inadmissible confession to a social worker without Miranda warnings where the earlier statement was not coerced or made under circumstances calculated to undermine defendant's free will. *State v. Morrell*, 465.

EVIDENCE AND WITNESSES — Continued

§ 1233 (NCI4th). Confession made to person other than police officer

Defendant's confession to a social worker without the benefit of Miranda warnings was obtained in violation of her Fifth Amendment right against self-incrimination where the social worker's interview of defendant amounted to custodial interrogation and the social worker was acting as an agent of the Wilkes County Sheriff's Department. *State v. Morrell*, 465.

§ 1380 (NCI4th). Use of finding of fact in one proceeding as evidence in another court

The trial court did not err in a retaliatory discharge action arising from a Workers' Compensation claim by excluding the Industrial Commission's findings that plaintiff's alleged injuries were not compensable. *Abels v. Renfro Corp.*, 135.

§ 1708 (NCI4th). Photographs of crime scene generally

The trial court did not err in an armed robbery prosecution by admitting photographs of the scene. *State v. Wilson*, 117.

§ 2176 (NCI4th). Scientific evidence; acceptability of methods used in examination or analysis; new and established methods

The trial court did not err in sustaining the State's objection to a question asking the State's DNA expert his opinion concerning the exactness required of a scientific test used to deprive someone of his liberty since the N. C. Supreme Court has already adopted such standard. *State v. Bruno*, 401.

§ 2211 (NCI4th). Expert testimony; DNA analysis

If a proper foundation is laid, DNA sampling may be admissible as "dependable evidence to the contrary" to rebut the presumption that a child born of a married woman is her husband's child. *Batcheldor v. Boyd*, 275.

DNA test results were not inadmissible because the FBI's testing procedure is still changing. *State v. Bruno*, 401.

Where two DNA experts reached differing results based on independent analyses, it was for the jury to weigh the DNA evidence. *Ibid.*

Where defendant's DNA expert testified by deposition that the FBI has admitted making errors in two cases which he named, any error committed by the trial court in excising the expert's testimony about a specific third case was harmless. *Ibid.*

§ 2332 (NCI4th). Experts in child sexual abuse; characteristics and symptoms of abuse generally

The trial court did not err in a prosecution for sexually abusing a child by allowing an expert to testify that sexually abused children do not lie, but erred by allowing the expert to testify that she had seen no signs of coaching in this child. *State v. Baymon*, 476.

§ 2972 (NCI4th). Basis for impeachment; character generally

The trial court erred in a prosecution for sexually abusing a child by allowing the victim's teacher to testify on direct examination regarding specific instances of conduct tending to establish truthfulness where her character for truthfulness was not "in issue." *State v. Baymon*, 476.

EVIDENCE AND WITNESSES — Continued

§ 2973 (NCI4th). Basis for impeachment; character for truthfulness or untruthfulness

Two questions asked of an officer on cross-examination were properly excluded because they dealt with complaints and discipline against the officer and did not address his character for truthfulness or untruthfulness. *State v. Burton*, 219.

§ 3208 (NCI4th). Credibility of witnesses; effect of use of drugs or alcohol

The trial court did not err in a prosecution for a series of break-ins and robberies by disallowing additional cross-examination regarding treatment received by a State's witness at the Alcoholic Rehabilitation Center where further cross-examination would have been cumulative. *State v. Wilson*, 575.

FORGERY

§ 18 (NCI4th). Indictment

An indictment for forgery does not support a plea to uttering. *State v. Neville*, 330.

FRAUD, DECEIT, AND MISREPRESENTATION

§ 14 (NCI4th). Concealment

Plaintiff's evidence was insufficient for submission to the jury on the issue of fraud by defendants in the sale of an airplane. *Ace, Inc. v. Maynard*, 241.

§ 17 (NCI4th). Intent to deceive

Defendant realtor's statement to plaintiff home purchaser that an abutting road would be widened on the other side because the side on which the home was located already had curbs, gutters and sidewalks did not constitute fraud since there was no intent to deceive. *Carpenter v. Merrill Lynch Realty Operating Partnership*, 555.

FRAUDULENT CONVEYANCES

§ 33 (NCI4th). Sufficiency of evidence; family relationship

A marital home did not lose its character as entireties property when defendant husband and his wife executed a separation agreement whereby the husband received the home and the wife received a lump sum payment from the husband, and the husband's subsequent conveyance of the home to his parents for no consideration thus did not defraud his individual creditors. *Dealer Supply Co. v. Greene*, 31.

GUARANTY

§ 21 (NCI4th). Enforcement of guaranty; summary judgment

The trial court did not err in granting plaintiff's motion for summary judgment in an action on a guaranty where the evidence supported plaintiff's allegation as to the amount of defendants' indebtedness. *Symons Corp. v. Quality Concrete Construction*, 17.

HIGHWAYS, STREETS, AND ROADS

§ 15 (NCI4th). Neighborhood roads generally

The evidence of neighborhood public road was sufficient to go to the jury where the alleged road met three of the four requirements for the third type of neighborhood public road under G.S. 136-67. *Griffin v. Price*, 496.

HOSPITALS

§ 5 (NCI3d). Regulation of nurses

The Board of Nursing does not have authority to determine what constitutes a "lawfully qualified nurse" who may administer intraoral injections of anesthetics to dental patients pursuant to G.S. 90-29(b)(6). *Best v. N.C. State Board of Dental Examiners*, 158.

INDICTMENT, INFORMATION, AND CRIMINAL PLEADINGS

§ 3 (NCI4th). Waiver of indictments

The trial court had no jurisdiction to accept a guilty plea to uttering where defendant was indicted for forgery, and neither defendant nor his attorney signed the waiver of a bill of indictment attached to the bill of information for uttering. *State v. Neville*, 330.

§ 4 (NCI4th). Superseding indictments and informations

There was no error in a prosecution for a series of break-ins and robberies where counsel was not afforded a copy of a superseding indictment until the day of trial but the only difference in the two indictments was the correction of a date. *State v. Wilson*, 575.

§ 50 (NCI4th). Variance between averment and proof generally

There was not a fatal variance between warrant allegations and the evidence presented at trial where defendant was charged with resisting, obstructing and delaying an officer and three counts of assault on an officer; the resisting, obstructing, and delaying charge was dismissed prior to jury selection; and defendant was convicted of three counts of assault on a police officer. *State v. Burton*, 219.

INDIGENT PERSONS

§ 14 (NCI4th). Scope of entitlement to counsel

The trial court is not required to engage in the due process "complexity" analysis in every civil contempt case and then make a determination of whether counsel should be appointed whether or not counsel is requested. *McBride v. McBride*, 51.

INFANTS OR MINORS

§ 72 (NCI4th). Jurisdiction as governed by juvenile's age; retention of jurisdiction

An appeal of an order committing a juvenile to training school was dismissed where the juvenile attained the age of 18 while the appeal was pending. *In re Cowles*, 74.

INJUNCTIONS

§ 9 (NCI4th). Irreparable injury; destruction of property rights

Where it might ultimately be determined that plaintiff's documents should not be disclosed, the denial of a preliminary injunction and subsequent disclosure of such documents would obviously result in irreparable harm. *N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev.*, 711.

§ 16 (NCI4th). Restraint to protect personal or property rights from irremediable injuries

The courts have jurisdiction to issue injunctions to prevent the disclosure of documents. *N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev.*, 711.

INSURANCE

§ 338 (NCI4th). Hospital expenses policy; what expenses are covered

The evidence did not support a conclusion by defendant Board of Trustees that plaintiff's radial keratotomy was not a covered procedure under the State Employees' Medical Plan. *Vass v. Bd. of Trustees of State Employees' Medical Plan*, 251.

§ 487 (NCI4th). Automobile insurer's liability for punitive damages assessed against insured

A trucking company's business auto policy provided coverage for punitive damages awarded in a wrongful death action arising from a motor vehicle accident. *Boyd v. Nationwide Mutual Ins. Co.*, 536.

Public policy does not prohibit the coverage of punitive damages by a business auto policy. *Ibid.*

A holding that a business auto policy provided coverage for punitive damages is not constitutionally required to be given only prospective application. *Ibid.*

§ 514 (NCI4th). Stacking uninsured motorist coverage

Claimants could not stack uninsured motorist coverage arising from a hit and run accident where the policy language prohibiting intrapolicy stacking of UM coverage was clear and capable of only one interpretation. *Dungee v. Nationwide Mutual Insurance Co.*, 599.

Plaintiffs, the victims of a hit and run driver, were entitled to $50,000 in UM benefits, the aggregate minimum statutorily required amount of UM coverage. *Ibid.*

§ 527 (NCI4th). Underinsured motorist coverage generally

The trial court erred in considering the entire amount available to all persons injured in a collision in determining whether plaintiff was entitled to underinsured motorist coverage under a Tennessee automobile policy. *Johnson v. American Economy Ins. Co.*, 47.

Where the South Carolina tortfeasor's automobile policy had a liability limit of only $15,000 when he injured plaintiff North Carolina resident in a South Carolina accident, the tortfeasor was both an uninsured and an underinsured motorist under North Carolina statutes, and plaintiff is entitled to seek recovery under either the uninsured or the underinsured provisions of his policy but not both. *Monti v. United Services Automobile Assn.*, 342.

INSURANCE — Continued

LABOR AND EMPLOYMENT

§ 75 (NCI4th). Retaliatory discharge for filing workers' compensation claim

The trial court did not err in a retaliatory discharge action arising from a workers' compensation claim by denying defendant's motion for a judgment n.o.v. or by refusing to order an independent medical examination after a verdict was returned for plaintiff where defendant had chosen not to compel an examination during pretrial discovery. *Abels v. Renfro*, 135.

§ 78 (NCI4th). Use of confidential information by former employee

The trial court did not err by granting a preliminary injunction in an action for misappropriation of a trade secret in developing a competing product and customizing plaintiff's software. *Barr-Mullin, Inc. v. Browning*, 590.

An action for misappropriation of trade secrets involving computer software in which a preliminary injunction had been granted was remanded with instructions that the trial court should set bond in an amount that bears a rational relationship to the costs and damages which defendants may incur if it is later determined that defendants were wrongfully enjoined. *Ibid.*

§ 189 (NCI4th). Liability of independent contractor for negligent hiring

Plaintiff manufacturer's evidence was insufficient for the jury on its claim against defendant security firm for negligent hiring, supervision and retention of two security guards who stole from plaintiff property which they had been assigned to protect. *B. B. Walker Co. v. Burns International Security Services*, 562.

§ 230 (NCI4th). Liability of employer; respondeat superior; criminal acts

Plaintiff's evidence was insufficient for the jury on plaintiff's claim for conversion under the doctrine of respondeat superior where security guards supplied by defendant security firm to plaintiff manufacturer stole plaintiff's property which they had been assigned to protect. *B. B. Walker Co. v. Burns International Security Services*, 562.

LIENS

§ 21 (NCI4th). Entitlement and extent of lien

The trial court did not err by granting summary judgment for a materialman to a subcontractor on a highway project in an action on the contractor's payment bond for materials furnished to the subcontractor where the subcontractor contended that plaintiff was not entitled to recover for materials which were neither delivered to the project site nor utilized under the prime contract. *Syro Steel Co. v. Hubbell Highway Signs, Inc.*, 529.

§ 32 (NCI4th). Dealing with one other than owner; grant of lien; subrogation and perfection

The lessor of a crane for use by a second tier subcontractor on "various jobs" was not entitled to a G.S. Ch. 44A lien on a construction project for which the crane was used. *Southeastern Steel Erectors v. Inco, Inc.*, 429.

LIMITATIONS, REPOSE, AND LACHES

§ 44 (NCI4th). False imprisonment and false arrest

Plaintiff's claims against a police officer for false imprisonment and assault were barred by the one-year statute of limitations of G.S. 1-54(3). *Fowler v. Valencourt*, 106.

LIMITATIONS, REPOSE, AND LACHES — Continued

§ 111 (NCI4th). Liability created by statute; civil rights actions

The three year statute of limitations of G.S. 1-52 as applied to 42 U.S.C. § 1983 was not tolled where plaintiffs asserted that the equitable doctrine of demand and refusal estops defendants from asserting the statute of limitations as a defense. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

The statute of limitations ran on plaintiffs' claim under 42 U.S.C. § 1983 arising from a change in disability benefit calculations because plaintiffs suffered from the continuing effect of the original change rather than suffering a new violation with each payment. *Ibid.*

The denial of defendants' motion to dismiss on the basis that the statute of limitations had run on plaintiffs' 42 U.S.C. § 1983 claim was reversed. *Woodard v. Local Governmental Employees' Retirement System*, 378.

§ 158 (NCI4th). Laches generally

Laches could not support summary judgment for defendants on plaintiff's claim for damages for trespass to land since the claim for damages was governed by a three-year statute of limitations. *Rudisail v. Allison*, 684.

MALICIOUS PROSECUTION

§ 19 (NCI4th). Sufficiency of evidence of probable cause

Summary judgment was improperly entered for defendant police officer in plaintiff's action for malicious prosecution of plaintiff on a charge of willfully obstructing the officer in the arrest of plaintiff's brother. *Fowler v. Valencourt*, 106.

The trial court correctly granted summary judgment for plaintiff on defendant's counterclaim for malicious prosecution where defendant's own testimony revealed that plaintiff had probable cause to institute the prior prosecution for criminal assault. *Juarez-Martinez v. Deans*, 486.

MASTER AND SERVANT

§ 49.1 (NCI3d). "Employees" within the meaning of the Workers' Compensation Act; status of particular persons

A member of the National Guard receiving the initial training required by the federal government was an employee of the State, so that he was covered by the Workers' Compensation Act. *Britt v. N.C. Dept. of Crime Control and Public Safety*, 777.

§ 65.2 (NCI3d). Back injuries

The evidence supported the Industrial Commission's finding that plaintiff was temporarily totally disabled and entitled to future medical care where plaintiff injured and re-injured his back while working for defendant. *Matthews v. Petroleum Tank Service, Inc.*, 259.

§ 69.1 (NCI3d). Meaning of "incapacity" and "disability"

An injured employee seeking an award of total disability who is unemployed, medically able to work, and possesses no preexisting limitations which would render him unemployable must produce evidence of a reasonable effort to find other employment. *Russell v. Lowes Product Distribution*, 762.

MASTER AND SERVANT — Continued

§ 79 (NCI3d). Persons entitled to compensation payment generally

Plaintiff was not entitled to receive workers' compensation disability payments for the period of his incarceration. *Parker v. Union Camp Corp.*, 85.

§ 95 (NCI3d). Right to appeal or review, mode of review

An order dismissing a subcontractor's insolvent former compensation carrier, the general contractor and the general contractor's compensation carrier from a workers' compensation action instituted by an employee of the subcontractor on the ground that they were not liable for any compensation benefits which might be payable to plaintiff was an unappealable interlocutory order. *Plummer v. Kearney*, 310.

§ 99 (NCI3d). Costs and attorneys' fees

The trial court properly awarded plaintiff attorneys' fees under G.S. 97-88.1 where defendant accepted liability, received evidence of medical causation, and defended the case without reasonable grounds, and plaintiff is awarded additional attorneys' fees under G.S. 97-88 for appeals to the Full Commission and to the Court of Appeals. *Poplin v. PPG Industries*, 55.

The portion of a motion in the Court of Appeals for attorney fees in defending a workers' compensation appeal before the Industrial Commission was remanded, and the portion dealing with attorney fees for the appeal to the Court of Appeals was granted. *Matthews v. Petroleum Tank Service, Inc.*, 259.

MUNICIPAL CORPORATIONS

§ 6 (NCI3d). Municipal governing boards, meetings, and records

The third notice of a public hearing concerning the abolition of the old Board of Adjustment for the Town of Swansboro and the appointment of a new Board of Adjustment sufficiently apprised plaintiffs of the nature and character of the action proposed by defendants. *Bd. of Adjmt. of the Town of Swansboro v. Town of Swansboro*, 198.

The abolition of the Board of Adjustment by the Town of Swansboro and the creation of a new Board did not violate G.S. 160A-388(a) in that the terms of three members were effectively shortened. *Ibid.*

Although plaintiff contended that the abolition of the old Board of Adjustment and the creation of a new Board by the Board of Commissioners was arbitrary and capricious, defendants are authorized by statute to abolish and create boards of adjustment and the reason for defendants' actions are immaterial. *Ibid.*

A provision of an ordinance of the Town of Swansboro prohibiting dual service as an elected official and a member of the Board of Adjustment is invalid because it makes unlawful an act expressly made lawful by G.S. 128-1.1. *Ibid.*

§ 12 (NCI3d). *Liability as determined by nature of functions; governmental or proprietary functions*

The trial court erred by denying defendant City's motion for summary judgment based on governmental immunity where plaintiff was injured while crossing the street after attending a free tennis clinic offered by the City and a private nonprofit corporation at high school tennis courts adjacent to a public park. *Hickman v. Fuqua*, 80.

MUNICIPAL CORPORATIONS — Continued

§ 12.3 (NCI3d). Waiver of governmental immunity

Defendant city is liable for a tort committed by defendant police officer to the extent it has waived governmental immunity by purchasing liability insurance. *Fowler v. Valencourt*, 106.

§ 30.6 (NCI3d). Special permits and variances

One zoning board member's bias against petitioner did not require reversal of the board's decision denying petitioner's application for a special exception permit to construct a housing development where the proposed development did not meet objective criteria of the zoning ordinance. *Rice Associates v. Town of Weaverville Bd. of Adjust.*, 346.

§ 30.9 (NCI3d). Comprehensive plan; spot zoning

The trial court correctly granted plaintiff's motion for summary judgment and denied defendant's motion for summary judgment on the contention that a conditional use zoning constituted spot zoning. *Covington v. Town of Apex*, 231.

§ 30.11 (NCI3d). Particular requirements and restrictions; specific businesses, structures, or activities

Plaintiffs provided sufficient evidence that a zoning change was unreasonable, arbitrary, and not in the public interest where the rezoning was sought to permit electronic assembly by a prospective tenant; the owners of the building terminated their lease with their former tenant; the only benefit to the community was that the new tenant would have to provide streetscaping for the general area around the property; and the express statutory goal of conservation of buildings could have been accomplished without the rezoning necessary to accommodate the prospective tenant. *Covington v. Town of Apex*, 231.

NEGLIGENCE

§ 1.1 (NCI3d). Elements of actionable negligence

It was for the jury to determine whether any emotional distress sustained by plaintiffs from their son's death and mutilation in an automobile accident which occurred after the son consumed alcohol at defendant's place of business was foreseeable by defendant. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 668.

§ 2 (NCI3d). Negligence arising from the performance of a contract

A tort action does not lie against a party to a contract who simply fails to properly perform the terms of the contract, even if the failure to perform was due to the negligent or intentional conduct of that party, when the injury resulting from the breach is damage to the subject matter of the contract. *Spillman v. American Homes*, 63.

Defendant realtor's statement to plaintiff home purchaser that an abutting road would be widened on the other side because the side on which the home was located already had curbs, gutters and sidewalks was insufficient to support a negligent misrepresentation claim. *Carpenter v. Merrill Lynch Realty Operating Partnership*, 555.

Plaintiff's evidence was insufficient for the jury on its claim for negligent breach of contract by defendant security firm where security guards supplied by defendant stole property from plaintiff. *B. B. Walker Co. v. Burns International Security Services*, 562.

NEGLIGENCE — Continued

§ 19 (NCI3d). Imputed negligence

Plaintiffs' claim for negligent infliction of emotional distress resulting from their son's death in an automobile accident which occurred after the son consumed alcohol at defendant's place of business was an independent claim of the plaintiffs and not derivative, and the negligence of decedent accordingly was not imputed to plaintiffs and did not bar their claim against defendant. *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 668.

§ 47 (NCI3d). Negligence in condition or use of lands and buildings in general

The trial court did not err in its instructions on the law of negligence as it applies to landowners. The law in North Carolina requires plaintiff to show that the landowner had actual knowledge of conditions created by third persons or reason to anticipate that third persons would engage in dangerous conduct, the landowner has no duty to periodically inspect his premises to ascertain whether third persons might have created dangerous artificial conditions on the land, and the landowner must have had a reasonable opportunity to prevent or control such conduct of third persons. *Sexton v. Crescent Land & Timber Corp.*, 568.

PARENT AND CHILD

§ 1.1 (NCI3d). Presumption of legitimacy

The trial court did not err in an action to determine paternity and inheritance rights by permitting the exhumation of a corpse for DNA testing. *Batcheldor v. Boyd*, 275.

PARTIES

§ 5 (NCI3d). Representation by members of a class

An appeal from an order granting certification of a class was interlocutory but the Court of Appeals granted certiorari. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

PENSIONS

§ 1 (NCI3d). Generally

The trial court should have granted a motion to dismiss a claim for breach of fiduciary duty in an action arising from a change in the disability benefit calculation for teachers and state employees. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

PHYSICIANS, SURGEONS, AND ALLIED PROFESSIONS

§ 5 (NCI3d). Licensing and regulation of dentists

The State Board of Dental Examiners has authority to determine what constitutes a "lawfully qualified nurse" who may administer intraoral injections of anesthetics to dental patients pursuant to G.S. 90-29(b)(6). *Best v. N.C. State Board of Dental Examiners*, 158.

The issue of whether the Board of Dental Examiners was correct in ruling that a "lawfully qualified nurse" who may administer intraoral injections of anesthetics under G.S. 90-29(b)(6) means a certified registered nurse anesthetist was rendered

of a lease of office space by the professional solicitor. *Kirkland v. National Civic Assistance Group*, 326.

PROCESS

§ 10.2 (NCI3d). Service by publication; diligence to ascertain defendant's whereabouts

Plaintiff showed that he exercised due diligence in attempting to ascertain the address or whereabouts of defendant before serving defendant by publication. *Winter v. Williams*, 739.

§ 13 (NCI3d). Service of process on agent of foreign corporation

The evidence was sufficient to support the trial court's findings which in turn supported its conclusion that defendant foreign corporation's failure to appoint a registered agent and to notify the Secretary of State of its address change was inexcusable neglect and led to an entry of default and a default judgment against defendant. *Partridge v. Associated Cleaning Consultants*, 625.

§ 14.3 (NCI3d). Minimum contacts test; sufficiency of evidence; contacts within this state

The trial court properly denied defendant's motion to dismiss for lack of personal jurisdiction where defendant was a college located in Georgia, plaintiff was a Mississippi company with its principal place of business in North Carolina, plaintiff and defendant entered into a contract for plaintiff to provide food services in Georgia, and defendant subsequently attempted to terminate the contract. *Shaw Food Services Co. v. Morehouse College*, 95.

§ 19 (NCI3d). Actions for abuse of process

Plaintiff was entitled to judgment n.o.v. on defendant's counterclaim for abuse of process where the record showed that plaintiff was attempting to prevent the transfer of money to which plaintiff mistakenly believed he was entitled. *Lyon v. May*, 633.

PUBLIC OFFICERS

§ 9 (NCI3d). Personal liability of public officers to private individuals

The director of a local health department was a public officer who was immune from suit except upon a showing of malice, and plaintiff failed to show malice in the director's refusal to issue plaintiff an unrestricted permit for installation of his innovative sewage disposal system. *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 24.

Two employees of the Department of Environment, Health, and Natural Resources were public employees rather than public officers and were thus subject to liability for mere negligence in the performance of their jobs, but plaintiff failed to show any negligence on their part in failing to issue a permit for installation of plaintiff's sewage disposal system. *Ibid.*

Summary judgment was improperly entered for defendant policeman on the issue of qualified immunity in plaintiff's 42 U.S.C. § 1983 action based on defendant's alleged false arrest and malicious prosecution of plaintiff for willfully obstructing the officer. *Fowler v. Valencourt*, 106.

Plaintiff's forecast of evidence was insufficient to support her 42 U.S.C. § 1983 claim that defendant police officer assaulted her at the time of her arrest in violation of her constitutional rights. *Ibid.*

be served, and substituted service on the Secretary of State was thus effective. *Partridge v. Associated Cleaning Consultants*, 625.

A complaint arising from an automobile accident was filed outside the statute of limitations and was correctly dismissed where the sixty day saving provision of G.S. 1A-1, Rule 4(j2)(2) was not applicable because plaintiff was not seeking the imposition of a judgment by default. *Taylor v. Brinkman*, 767.

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court did not err by refusing to enter judgment for sanctions against defendant where plaintiff was a subcontractor and defendant Skyland the contractor; plaintiff filed an action for payment of its final invoices; and Skyland's answer denied the complaint and stated that the owner had raised allegations that the work failed to meet contract requirements. At this early stage in the proceedings, Skyland was not required to undertake discovery to determine the merit of the owners' claim and objections. *Jerry Bayne, Inc. v. Skyland Industries, Inc.*, 209.

The trial court improperly imposed sanctions under Rule 11 against plaintiff where plaintiff's pleadings were sufficiently grounded in law and fact and there was no sufficient basis to support the finding that plaintiff brought this action in bad faith. *Keller v. Cochran*, 783.

§ 17 (NCI3d). Parties plaintiff and defendant; capacity

The trial court did not err by failing to grant defendant's motion for a directed verdict after failing to join plaintiffs' corporation as a necessary party where the parties had stipulated that plaintiffs' participation in the suit would be binding on the corporation and the corporation became a party by ratification. *Lawrence v. Wetherington*, 543.

§ 23 (NCI3d). Class actions

An order denying certification of a class action is appealable. *Nobles v. First Carolina Communications*, 127.

The trial court's order denying class certification was inadequate where the court merely found that "there are not sufficient elements present to justify certification of a class." *Ibid.*

The trial court properly certified plaintiffs' suit as a class action where plaintiffs brought a suit arising from a change in the calculation of the disability benefit for teachers and state employees. *Faulkenbury v. Teachers' and State Employees' Retirement System*, 357.

§ 26 (NCI3d). Depositions in a pending action

Trial witnesses and trial exhibits are not discoverable under the provisions of Rule 26, and defendant's failure to provide such information at deposition could not preclude him from presenting witnesses and exhibits at the trial. *King v. Koucouliotes*, 751.

§ 50.4 (NCI3d). Judgment notwithstanding verdict

A motion for a judgment notwithstanding the verdict is essentially a renewal of a motion for a directed verdict and the test governing the sufficiency of the evidence is the same. *Griffin v. Price*, 496.

§ 52 (NCI3d). Findings by court; generally

Plaintiff's request for findings and conclusions in orders ruling on class certification was untimely where it was made after the entry of the orders. *Nobles v. First Carolina Communications*, 127.

RULES OF CIVIL PROCEDURE — Continued

§ 56 (NCI3d). Summary judgment generally

The trial judge's entry of summary judgment for plaintiff on the issue of damages did not contravene or modify a previous order by another superior court judge which granted plaintiff summary judgment on the issue of liability and preserved the issue of damages for later determination. *Symons Corp. v. Quality Concrete Construction*, 17.

§ 56.1 (NCI3d). Timeliness of summary judgment motion; notice

The trial court did not err in granting summary judgment for plaintiff because plaintiff failed to give timely notice of its summary judgment motion where defense counsel stated at the summary judgment hearing that he was prepared for trial. *Symons Corp. v. Quality Concrete Construction*, 17.

§ 60.2 (NCI3d). Grounds for relief from judgment or order

The trial court correctly denied defendant's motion to vacate or modify a judgment in Henderson County arising from failure to make support payments under a German judgment. *Lang v. Lang*, 440.

The evidence was sufficient to support the trial court's determination that defendant foreign corporation's failure to appoint a registered agent and to notify the Secretary of State of its address change was inexcusable neglect and led to an entry of default and a default judgment against defendant. *Partridge v. Associated Cleaning Consultants*, 625.

A default judgment against defendant was not required to be set aside on the ground that the clerk of court had made a mistake in determining whether defendant had been served where the evidence supported the trial court's finding that no mistake occurred. *Ibid.*

The trial court did not abuse its discretion in failing to set aside a default judgment against defendant pursuant to Rule 60(b)(6) where the court determined that defendant's failure to appear was due to its own inexcusable neglect of its business affairs rather than to extraordinary circumstances. *Ibid.*

§ 60.3 (NCI3d). Relief from judgment or order; relation to other rules

A motion under G.S. 1A-1, Rule 60(b) is not to be used as a substitute for appellate review. *Lang v. Lang*, 440.

SCHOOLS

§ 11 (NCI3d). Liability for torts

G.S. 115C-524(b) explicitly precludes liability from attaching to schools when the school facilities are being used for non-school purposes. *Lindler v. Duplin County Bd. of Education*, 757.

§ 13.1 (NCI3d). Principals and teachers; election and re-election

Plaintiff school principal had no independent right of action under G.S. 115C-326 for failure of defendant school board to evaluate him as required by its rules and regulations, but failure of the school board to comply with evaluation procedures established under the statute could be submitted as evidence in an action brought by plaintiff under G.S. 115C-325 to establish that his dismissal was arbitrary or capricious. *Clinton v. Wake County Bd. of Education*, 616.

SEARCHES AND SEIZURES

§ 1 (NCI3d). Scope of protection generally

An officer's statutory right to conduct a warrantless search of an ABC permittee's licensed premises for violations of the ABC laws, and the permittee's waiver of his Fourth Amendment rights for inspections incident to enforcement of the ABC regulations by his application for an ABC permit, did not extend to searches of closed film canisters observed by the officer on the licensed premises. *State v. Sapatch*, 321.

§ 24 (NCI3d). Cases where evidence is sufficient to show probable cause; information from informers

Although an officer's affidavit contained no showing of a named informant's reliability and veracity, the affidavit was sufficient under the totality of the circumstances test to sustain the magistrate's finding of probable cause for the issuance of a warrant to search defendant's home for narcotics. *State v. Smothers*, 315.

§ 33 (NCI3d). Plain view rule

An officer's search of two closed film canisters observed by the officer on an ABC permittee's premises while conducting an administrative search for ABC violations was not justified under the plain view doctrine. *State v. Sapatch*, 321.

STATE

§ 1.2 (NCI3d). Public records

Where plaintiff Rural Electric Corporation sought to protect documents filed with the Rural Electrification Authority in 1980, 1983 and 1987, application of the exemption of the Public Records Act enacted in 1989 protecting trade secrets would not constitute a retroactive application of the statute because the right at issue arose pursuant to a request for disclosure after enactment of the amendment. *N.C. Electric Membership Corp. v. N.C. Dept. of Econ. & Comm. Dev.*, 711.

Plaintiff Electric Membership Corporation produced sufficient evidence to establish a likelihood of success on the merits on its claim of protection under the trade secrets exemption of the Public Records Act for documents filed with the Rural Electrification Authority which were "indicated" to contain trade secrets at the time of their initial submission. *Ibid.*

§ 4 (NCI3d). Actions against the State; sovereign immunity

A suit against the Department of Environment, Health, and Natural Resources was a suit against the State which was barred by the doctrine of governmental immunity. *EEE-ZZZ Lay Drain Co. v. N.C. Dept. of Human Resources*, 24.

Local health departments are agents of the State which are immune from suit. *Ibid.*

§ 12 (NCI3d). State employees; State Personnel Commission authority and actions

Plaintiff was not denied her statutory right to priority consideration as a state employee under G.S. 126-7.1 when she was passed over for a position at defendant university where the evidence tended to show that plaintiff's resume was not up to date with regard to her education or work experience while her competitor did include this information on her resume. *Teague v. Western Carolina University*, 689.

TAXATION

§ 25.3 (NCI3d). Property subject to discovery

A county's business personal property audit agreement which gave the auditor the discretion to choose the audit sample and compensated the auditor at a rate of thirty-five percent of taxes discovered violated public policy. *In re Appeal of Philip Morris U.S.A.*, 514.

§ 25.7 (NCI3d). Assessment and levy of ad valorem taxes generally; valuation at market rates

The Tax Commission did not err by reversing the County Board's valuation where the property in question was held by a trust which forbade the sale of the real estate but allowed leasing and the sale of timber and the County valued the land based upon the assumption that the land was subject to development and sale as residential and recreational property. *In re Appeal of Perry-Griffin Foundation*, 383.

There is no statutory proscription against the Tax Commission's declining to use the highest and best use valuation provided it has considered both the specifically enumerated factors of G.S. 105-317(a) and any other factors that may affect the land's value. *Ibid.*

§ 25.11 (NCI3d). Ad valorem taxes; judicial redress

Where plaintiff taxpayer failed to assert a valid defense in its initial letter protesting the valuation of unlisted machinery, equipment and fixtures, it could not proceed against the county in a civil action seeking a refund. *Kinro, Inc. v. Randolph County*, 334.

TRIAL

§ 6.1 (NCI3d). Particular stipulations

Even though defendant stipulated that his negligence was the proximate cause of plaintiff's injuries, the trial court properly admitted testimony of the details of the occurrence and severity of the collision where defendant attempted to prove that plaintiff's injuries were negligible. *Ferrell v. Frye*, 521.

§ 7 (NCI3d). Pretrial

Plaintiff waived the issue of last clear chance by stipulating at pretrial conference the issues to be submitted to the jury where the stipulation did not raise the doctrine of last clear chance. *Reber v. Booth*, 731.

§ 13 (NCI3d). Allowing the jury to visit exhibits or scene

There was no prejudice in an automobile accident case where the trial court permitted the jury to take exhibits into the jury room and retain them during deliberations without the consent of the parties. *Reed v. Abrahamson*, 301.

§ 38.1 (NCI3d). Disposition of request for instructions

The trial court did not err in failing to give seven jury instructions sought by plaintiff since those instructions related only to issues which the jury never reached. *King v. Koucouliotes*, 751.

§ 52 (NCI3d). Setting aside verdict for excessive or inadequate award generally

The trial court did not abuse its discretion in setting aside the jury's verdict that defendant was not indebted to plaintiff for the purchase of logging equipment and in ordering a new trial. *Gregory Poole Equipment Co. v. Davis*, 61.

WORD AND PHRASE INDEX

Printed By
COMMERCIAL PRINTING COMPANY, INC.
Raleigh, North Carolina