NORTH CAROLINA COURT OF APPEALS REPORTS

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109 N.C. App.

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OF
NORTH CAROLINA

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CASES

ARGUED AND DETERMINED IN THE

COURT OF APPEALS

OF

NORTH CAROLINA

AT

RALEIGH

STATE OF NORTH CAROLINA v. THOMAS ELLIS POWELL

No. 9121SC969

(Filed 16 February 1993)

1. **Animals, Livestock, or Poultry § 18 (NCI4th)— dog control ordinance—safety ordinance—violation as involuntary manslaughter**

A Winston-Salem ordinance requiring that dogs left unattended outdoors be restrained and restricted to the owner's property by a tether, rope, chain, fence, or other device was a safety ordinance which could serve as the basis for a conviction of involuntary manslaughter. A thorough reading of the ordinance dictates the conclusion that it was designed to protect both the persons of Winston-Salem and their property and thus is a safety ordinance.

Am Jur 2d, Animals § 116.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR4th 994.

2. **Animals, Livestock, or Poultry § 18 (NCI4th)— dog control ordinance—intentional, willful, wanton violation**

There was ample evidence in an involuntary manslaughter prosecution that defendant had intentionally, willfully, and

wantonly violated a dog control ordinance where the ordinance required that dogs left unattended outdoors be restrained and restricted to the owner's property by a tether, rope, chain, fence, or other device; defendant's two dogs had been picked up by animal control officers on at least three occasions prior to the fatal attack; defendant admitted that the dogs had been out twice on the day of the victim's death; on one prior occasion the dogs escaped by digging out from underneath the fence and defendant simply covered the hole with a cooler; defendant's next door neighbor testified that the dogs were allowed to run loose on a regular basis and that defendant would often just open the door and let the dogs out; and defendant's ex-girlfriend testified that defendant let the dogs run free both day and night.

Am Jur 2d, Animals § 116.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR4th 994.

3. Homicide § 67 (NCI4th)— violation of dog control ordinance— dogs running loose—involuntary manslaughter

The trial court properly submitted the charge of involuntary manslaughter to the jury where the State presented evidence that defendant's dogs attacked and killed the victim while running loose in violation of a safety ordinance; the dogs were trained by defendant to be aggressive and to scare people; defendant had witnessed the dogs growl at people and bolt toward a young child; and defendant had been warned by a neighbor that the dogs were a liability. A reasonable juror could accept this evidence as supporting a conclusion that defendant's dogs caused the victim's death and that defendant should have foreseen that his dogs, if left to run at large in violation of the city ordinance, could cause serious injury to someone. Because the State in this criminal prosecution presented evidence that defendant intentionally violated an ordinance requiring all unattended dogs to be confined or restrained on the owner's property, the State is not required to prove that defendant's dogs had vicious propensities of which defendant had knowledge.

Am Jur 2d, Animals § 116.

Construction and application of ordinances relating to unrestrained dogs, cats, or other domesticated animals. 1 ALR4th 994.

Judge WYNN dissenting.

Appeal by defendant from judgment entered 21 September 1990 in Forsyth County Superior Court by Judge Melzer A. Morgan, Jr. Heard in the Court of Appeals 13 November 1992.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Debra C. Graves, for the State.

Appellate Defender Malcolm Ray Hunter, by Assistant Appellate Defender Teresa A. McHugh, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 21 September 1990, which judgment is based on a jury verdict convicting defendant of involuntary manslaughter, N.C.G.S. § 14-18 (1986), a Class H felony with a maximum term of ten years and a presumptive term of three years.

The evidence presented by the State established that at approximately nine o'clock on the evening of 20 October 1989, twenty-year-old Hoke Prevette (Prevette), an avid jogger, left his home at 805 Salisbury Road in Winston-Salem, North Carolina, to run. At approximately eleven o'clock on the same evening, James Fainter and his wife returned to their home at 701 Cascade Avenue and discovered Prevette's body in their front yard. An autopsy revealed that Prevette, who was five feet, one and a half inches tall and weighed ninety-four pounds, died as a result of wounds caused by multiple dog bites. At the time of the attack on Prevette, a Winston-Salem ordinance provided:

> (a) No dog shall be left unattended outdoors unless it is restrained and restricted to the owner's property by a tether, rope, chain, fence or other device. Fencing, as required herein, shall be adequate in height, construction and placement to keep resident dogs on the lot, and keep other dogs and children from accessing the lot. One (1) or more secured gates to the lot shall be provided.

Winston-Salem Code § 3-18 (1989).

David Moore (Moore), who lives two houses away from the Fainter residence on Cascade Avenue, testified that at approximately nine-thirty on the evening of 20 October 1989, he saw in his yard two rottweilers owned by defendant. Moore stated that the dogs, Bruno and Woody, approached him and his girlfriend and that one of them growled. Moore stamped his foot and the dogs ran down the street in the direction of the Fainter residence.

Winston-Salem police officer Jason Swaim went to defendant's house after the discovery of Prevette's body to investigate a report that defendant's dogs had been out that evening. When Officer Swaim told defendant that he wanted to discuss the dogs, defendant responded, "Oh my God, what have they done now?" Defendant admitted that his dogs had been out twice that day and that he had picked them up at approximately nine o'clock p.m. at the intersection of Cascade and Dinmont Streets, a location approximately forty feet from where Prevette's body was discovered. Defendant called his dogs, and they jumped in the back seat.

Officer Sandra Shouse conducted a consent search of defendant's home early on 21 October 1989, collecting a dog food bowl, a portion of the seat of defendant's car, and a portion of the wall from inside defendant's home. Officer Shouse had been dispatched on several occasions prior to 20 October 1989 to search for defendant's dogs. In July, 1989, defendant showed Officer Shouse where the dogs had dug out. Upon returning the dogs to the yard, defendant covered the escape hole with a cooler.

Robert Neill of the State Bureau of Investigation Crime Laboratory testified that six hairs removed from Prevette's clothing were canine; however, he could not match the hairs to a particular dog. An SBI forensic serologist found human blood on Woody's collar, on a sample of Woody's hair, on the dog dish, on a portion of the wall from defendant's home, and on defendant's car seat. According to the serologist, the blood could not be typed because of the presence of an inhibiting substance, possibly soap. A forensic odontologist testified that dental impressions taken from Bruno and Woody were compatible with some of the lacerations in the wounds pictured in scale photographs of Prevette.

Several witnesses testified to seeing Bruno and Woody running loose in the neighborhood prior to 20 October 1989. Jerry Parks (Parks), defendant's next-door neighbor, testified that the dogs were loose regularly, and that if the dogs were out in defendant's yard

and someone walked by, the dogs would "challenge" the person. Parks told defendant that his dogs were a liability, and warned defendant of the dogs' propensity for digging out.

Thomas Dooley (Dooley), another of defendant's neighbors, testified that he saw Bruno and Woody out frequently during the summer of 1989. On one occasion, Dooley was outside in his yard with his three-year-old granddaughter when defendant came outside with his dogs. The dogs bolted from defendant and ran toward Dooley's granddaughter. Dooley got between the dogs and the child, but had some difficulty keeping the dogs away from her. Dooley telephoned police on two occasions to report that the dogs were out.

Forsyth County animal control officers picked up defendant's rottweilers on at least three occasions prior to 20 October 1989. In July and August, 1989, defendant left the dogs in the animal shelter for two and four days, respectively, before retrieving them.

Shelby Walker (Walker) testified that she was living with defendant when he purchased the puppies in the summer of 1988, and that she took care of the dogs for four or five months until she broke up with defendant and moved out. Walker testified that during this time, defendant regularly let the dogs run free, both day and night, and abused the dogs by hitting them and kicking them. According to Walker, defendant would push the dogs at people and encourage them to growl. Defendant consulted with an attack school because he wanted the dogs to be aggressive.

Animal psychologist Donna Brown (Brown), who specializes in applied animal behavior, testified regarding an evaluation for aggressive propensities that she performed on Bruno and Woody on 8 November 1989. The tests, which included a "dominant stare test," a "kitten test," a "startle test," and a "jogger test," were videotaped and shown to the jury. When conducting the jogger test, Brown moved a stuffed model through the dogs' field of vision. When the model was still, the dogs did not show predation; however, when the model moved, Bruno lunged at it, tore it, and shook it. Woody also attacked the moving model, but used more holding, clawing, and dragging than tearing. Brown opined based on the tests that the dogs exhibited predatory tendencies, that they treated a stare as a threat and began to growl, and that both dogs were more aggressive when together than when each dog was alone. According to Brown, the dogs were easily intimidated by a threatening gesture or tone of voice, which indicated that the dogs had

probably been abused. Brown concluded that an attack on a person by Bruno and Woody would be consistent with her observations of their behavior.

Defendant presented several witnesses who testified that Bruno and Woody were friendly and playful and responded to defendant's commands to get down or sit. One witness's nine-month-old daughter played with the dogs and grabbed their tails, yet the dogs never growled or acted negatively toward the child. Several witnesses testified that they never saw defendant let the dogs outside of the fenced yard unattended, and that they never saw defendant abuse the dogs.

Animal behavioralist Peter Borthelt (Borthelt) testified that, although he had not evaluated defendant's dogs, the behavior displayed by the dogs in Brown's videotape was ambiguous. He also testified that the preferred method for evaluating animal behavior is to obtain background information regarding prior behavior of the dog, which allows the behavioralist to determine the appropriate tests to perform. Borthelt testified that dominance aggression in a pet dog occurs only in a social relationship such as a family, and that in order to determine whether Bruno or Woody manifested dominance aggression, one would have to study their behavior while with defendant. Borthelt also stated that the components of predatory behavior are the same as the components of play behavior—chasing, running, and grabbing.

Defendant's motions to dismiss made at the close of the State's evidence and at the close of all the evidence were denied. The jury found defendant "guilty of involuntary manslaughter on the basis of culpable negligence by leaving dogs unattended when not restrained and restricted to the owner's property by a fence adequate to keep the resident dogs on the lot." The trial court, after finding the existence of aggravating factors, sentenced defendant to a term of five years. Defendant appeals.

The issues presented are (I) whether Winston-Salem Code § 3-18 is an ordinance designed for the protection of human life or limb; if so, (II) whether the State presented substantial evidence that defendant intentionally, willfully, or wantonly violated the ordinance; and, if so, (III) whether the State presented substantial evidence that defendant's violation of the ordinance was the proximate cause of Prevette's death and, in this regard, whether the

State is required to show that defendant's dogs had vicious propensities of which defendant was aware. 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

[1] Defendant argues that Section 3-18 is not an ordinance designed for the protection of human life or limb and that, therefore, the violation of the ordinance is not an unlawful act that can serve as a basis for conviction of involuntary manslaughter. We disagree.

The intentional, willful, or wanton violation of any "safety" statute or ordinance, which proximately results in death, can support a conviction of involuntary manslaughter. *State v. Cope*, 204 N.C. 28, 31, 167 S.E. 456, 458 (1933); *State v. Wilkerson*, 295 N.C. 559, 582, 247 S.E.2d 905, 916-17 (1978). Safety statutes or ordinances are those which are designed for the protection of life or limb and "impose a duty on a person for the protection of others." *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992).

A thorough reading of the ordinance at issue in the instant case dictates our conclusion that it was designed to protect both the persons of Winston-Salem and their property, and thus is a safety ordinance. The ordinance specifically requires that the fencing used to confine dogs must also be adequate to keep "children from accessing the lot" where resident dogs are kept. We can conceive of no purpose, other than the protection of children from physical harm, for such a requirement, and we therefore reject defendant's contention that the ordinance is merely "a nuisance law."

II

[2] Having determined that Section 3-18 is a safety ordinance, we also conclude that there is ample evidence, when considered in the light most favorable to the State, that defendant intentionally, willfully, and wantonly violated the ordinance. Bruno and Woody had been picked up by animal control officers on at least three occasions prior to the fatal attack. The dogs had been taken by animal control officers to the animal shelter as recently as August, 1989, two months prior to the death of Prevette. Defendant admitted that his dogs had been out twice on the day of Prevette's death. On one occasion in July, 1989, after the dogs escaped by digging out from underneath the fence, defendant simply covered

the escape hole with a cooler after returning the dogs to the fence. Defendant's next-door neighbor testified that the dogs were allowed to run loose "on a regular basis," day and night, and that defendant would often "just open the door and let the dogs out." Defendant's ex-girlfriend testified that defendant let the dogs run free both day and night. Based on the foregoing, we conclude that the State presented substantial evidence of defendant's intentional, willful, and wanton violation of the ordinance.

III

[3] Defendant argues that, assuming he did violate Section 3-18, the State failed to show that such violation was the proximate cause of Prevette's death. Specifically, defendant contends that, in civil actions for injuries caused by dogs, absent a showing that the dog owner had actual or constructive knowledge of the vicious or dangerous propensities of his dog, there exists no owner liability for damages caused by the dog. It follows, according to defendant, that proof that the owner had knowledge or should have known of his animal's vicious propensities is a prerequisite to the imposition upon the owner of criminal liability for injuries caused by his dog. We disagree.

In the civil context, an owner of a domestic animal has the legal duty " 'to apportion the care with which he uses [the animal] to the danger to be apprehended from a failure to keep it constantly under control.' " *Lloyd v. Bowen*, 170 N.C. 216, 221, 86 S.E. 797, 799 (1915) (citation omitted). It is a breach of that legal duty, or negligence, to keep a domestic animal knowing that it has vicious propensities. *Id.* Proof that the owner had knowledge of his animal's vicious propensities is not, however, "always essential to a recovery" for damages caused by a domestic animal. *Id.* Negligence in the keeping of a domestic animal can be shown otherwise, for example, by an owner's violation of a safety ordinance requiring the fencing or leashing of domestic animals. *Id.; see also* 3 Fowler V. Harper *et al., The Law of Torts* § 14.11, at 274-75 (2d ed. 1986) (although animal not known to be vicious, there may still be liability to persons or goods if owner is negligent in his custody of it); *Lutz Indus., Inc. v. Dixie Home Stores*, 242 N.C. 332, 341, 88 S.E.2d 333, 339 (1955) (violation of statute designed for the protection of others is negligence *per se*). However, even if the owner of a domestic animal is in some manner negligent in the keeping of the animal, the owner may not be held civilly responsible for

any damage to persons or property caused by the animal unless " 'in the exercise of reasonable care, the [owner] might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.' " *Johnson v. Lamb*, 273 N.C. 701, 710, 161 S.E.2d 131, 139 (1968) (citations omitted); *Lloyd*, 170 N.C. at 221, 86 S.E. at 799. It is not necessary that the defendant should have foreseen the precise injury which occurs. *Johnson*, 273 N.C. at 710, 161 S.E.2d at 139. Although we agree with defendant that the requisite foreseeability can be established by showing that the owner had knowledge that his dog had vicious propensities, this is not the only evidence that will support a conclusion that the injury was foreseeable.

Accordingly, because in this criminal prosecution for involuntary manslaughter the State presented evidence that defendant intentionally violated an ordinance requiring all unattended dogs to be confined or restrained on the owner's property, the State is not required to prove that defendant's dogs had vicious propensities of which defendant had knowledge. Rather, the State is required, in order to meet its burden on the issue of proximate cause, to present substantial evidence that the dogs in fact caused Prevette's death and that "in the exercise of reasonable care, [defendant] might have foreseen that some injury would result" from his failure to abide by the ordinance. *Johnson*, 273 N.C. at 710, 161 S.E.2d at 139; *Kanoy v. Hinshaw*, 273 N.C. 418, 426, 160 S.E.2d 296, 302 (1968). The State presented evidence, including physical evidence, that defendant's dogs, running loose on the evening of 20 October 1989, attacked and killed Prevette. The evidence also established that Bruno and Woody, rottweilers weighing one hundred pounds and eighty pounds, respectively, were trained by defendant to be aggressive and to scare people. Defendant himself had witnessed the dogs growl at people and bolt toward a young child, and had been warned by a neighbor that the dogs were a liability. A reasonable juror could accept this evidence as supporting a conclusion that defendant's dogs caused Prevette's death and that defendant should have foreseen that his dogs, if left to run at large in violation of the city ordinance, could cause serious injury to someone. Therefore, there was substantial evidence that defendant's violation of the Winston-Salem ordinance was the proximate cause of Prevette's death.

Because the State presented substantial evidence that defendant intentionally violated a safety ordinance, and that such violation was the proximate cause of Prevette's death, the trial court properly submitted the charge of involuntary manslaughter to the jury. We have reviewed defendant's remaining assignments of error and have determined that either they are without merit, or they delineate errors which, in light of the overwhelming evidence of defendant's guilt, do not rise to the level of prejudicial error and therefore do not entitle defendant to a new trial.

No error.

Chief Judge ARNOLD concurs.

Judge WYNN dissents with separate opinion.

Judge WYNN dissenting.

For reasons other than those proffered by the majority, I believe the evidence was sufficient to be submitted to the jury, but, because I believe the trial judge failed to properly instruct the jury, I would grant the defendant a new trial.

The issues presented by this case are as follows: I. Whether the State presented sufficient evidence to require submission of the charge of involuntary manslaughter based on culpable negligence to the jury; and II. If so, whether the trial judge correctly instructed the jury on involuntary manslaughter based on culpable negligence.

I.

Involuntary manslaughter is a creature of common law defined as the unintentional killing of another human being without malice which killing proximately results from either 1) an unlawful act not amounting to a felony or not naturally dangerous to human life, or 2) a culpably negligent act or omission. *State v. McGill*, 314 N.C. 633, 637, 336 S.E.2d 90, 92 (1985); *State v. Everhart*, 291 N.C. 700, 702, 231 S.E.2d 604, 606 (1977). Typically, involuntary manslaughter convictions arising from the violation of a statute have been reviewed by our courts by first determining whether the statute at issue is a "safety" statute and, if so, examining the charge under the theory of culpable negligence. *See McGill*, 314 N.C. at 637, 336 S.E.2d at 92 (where the violation of a safety

statute or ordinance designed for the protection of life or limb is at issue, our courts examine a charge of involuntary manslaughter under a theory of culpable negligence). The violation of a safety statute constitutes negligence *per se*. *See Sellers v. CSX Transp., Inc.*, 102 N.C. App. 563, 566, 402 S.E.2d 872, 873 (1991). Such a violation can be elevated to culpable negligence in the criminal context where the violation is intentional, wilful, or wanton, evincing a reckless disregard of human life. *See State v. Cope*, 204 N.C. 28, 30, 167 S.E. 456, 458 (1933) (although criminal and culpable negligence are distinct concepts and should be recognized as such by the courts, culpable negligence has long been defined as "something more than actionable negligence in the law of torts"); *Everhart*, 291 N.C. at 702, 231 S.E.2d at 600 (same).

I disagree with the majority's characterization of the ordinance at issue here as a safety ordinance. Safety statutes and ordinances are those which "impose[ ] a duty on a person for the protection of others." *Hart v. Ivey*, 332 N.C. 299, 303, 420 S.E.2d 174, 177 (1992). The purpose of the subject Winston-Salem Code is to protect people from the minor annoyances posed from having someone else's pets roaming through your yard. There is no indication that the drafters of this ordinance contemplated that it would protect the lives and limbs of the citizens of Winston-Salem. The majority indicates that the protection of children from physical harm is a purpose of the statute that puts it in the realm of classification as a safety statute. However, this very type of limited protective classification was rejected in *Hart* wherein the Supreme Court found N.C.G.S. § 18B-302, a statute which prohibits the sale of alcohol to anyone under the age of twenty-one, to be a non-safety statute because it was not designed to protect the public. The Court held, "[i]f it was to protect the public, it should not be limited to persons under twenty-one years of age." *Id.* at 303-04, 420 S.E.2d at 177. Moreover, to hold that a violation of the subject leash law is negligence *per se* would require a trial judge to charge that even a minor violation by a domestic animal owner, even if it involves the meekest of domestic animals, is negligence *per se*. As in *Hart*, I do not believe the city council intended this result. I would therefore decline to classify this statute as a safety statute.

Having concluded that the subject statute is not a safety statute, it should be noted next that our appellate courts have not previously addressed the issue of how an involuntary manslaughter charge

arising from a non-safety statute should be analyzed. Nonetheless, it is clear that in the absence of a safety statute or ordinance, the analysis undertaken to prove involuntary manslaughter necessarily changes. Indeed, where there is a safety statute, the violation of the statute itself constitutes negligence *per se* and therefore no analysis of a common law duty and breach thereof must be undertaken. However, where there is a violation of a non-safety statute, no negligence is established by the mere violation of the statute, and the negligence, if any, must be established by proving common law negligence.

To meet its burden of establishing ordinary negligence, the State need not rely on elements that constitute a violation of the statute or ordinance. This point is clearly illustrated in *Hart* where the Supreme Court, after first finding that the statute in that case was not a safety statute, went on to find negligence under common law principles, without regard to the existence of the statute. *Id.* at 304-05, 420 S.E.2d at 177. "Actionable negligence is the failure to exercise that degree of care which a reasonable and prudent person would exercise under similar conditions." *Id.* at 305, 420 S.E.2d at 177-78. The *Hart* Court concluded that the jury could find that the defendants had done something a reasonable person would not do and were, therefore, negligent. *Id.* at 305, 420 S.E.2d at 178. The duty to others in such an instance is determined by the general common law principle that " '[t]he law imposes upon every person who enters upon an active course of conduct the positive duty to exercise ordinary care to protect others from harm, and calls a violation of that duty negligence.' " *Id.* (quoting *Council v. Dickerson's, Inc.*, 233 N.C. 472, 64 S.E.2d 551 (1951)).

It follows that, because no safety statute governing the present situation exists, the analysis here should follow from accepted principles of common law. In general, the prosecution of the charge of involuntary manslaughter based upon culpable negligence where there is no safety statute requires proof of the following elements beyond a reasonable doubt: (1) that the defendant had committed or omitted acts which constituted ordinary negligence which were the proximate cause of the death of the victim; and (2) that the defendant's ordinary negligence was elevated to culpable negligence because his activity was wilful or wanton, evincing a reckless disregard for human life.

It is well established that the elements of ordinary negligence are: "(1) defendant owed a duty to plaintiff, (2) defendant failed to exercise proper care in the performance of that duty, and (3) the breach of that duty was the proximate cause of plaintiff's injury, which a person of ordinary prudence should have foreseen as probable under the conditions as they existed." *Westbrook v. Cobb*, 105 N.C. App. 64, 67, 411 S.E.2d 651, 653 (1992). However, this typical ordinary negligence test has not traditionally been applied in cases seeking recovery for the injuries inflicted by a domestic animal. Rather, in such cases, the plaintiff must show "[t]hat the animal was dangerous, vicious, mischievous or ferocious, or one termed in law as possessing a vicious propensity[,] . . . and that the owner or keeper knew or should have known of the animal's vicious propensity, character, and habits." *Miller v. Snipes*, 12 N.C. App. 342, 343, 183 S.E.2d 270, 271, *disc. rev. denied*, 279 N.C. 619, 184 S.E.2d 883 (1971). The essence of such an action is not negligence, but the wrongful keeping of an animal with knowledge of its viciousness. *Id.* at 346, 183 S.E.2d at 273. The liability in such an action, however, centers on the owner's negligence in failing to confine or restrain his animals. *Id.* This more specific analysis for cases dealing with vicious domestic animals, however, can be stated in terms of an ordinary negligence analysis. These cases support the conclusion that there exists a common law duty to restrain domestic animals which are known or should be known to possess vicious propensities. Failure to restrain such animals constitutes a breach of that duty if a reasonable person in the position of the owner would not have believed the measures taken by the owner to be adequate. In making such a determination of reasonableness, all relevant circumstances known to the owner, such as the animals' past behavior, size, nature and habits, should be considered. *Id.* Thus, to prove involuntary manslaughter in cases involving domestic animals, the State must prove the following beyond a reasonable doubt: (1) the animals at issue possessed vicious propensities and the owner knew or should have known of these vicious propensities; (2) the defendant breached his duty to restrain the animals; (3) the defendant's actions were wilful or wanton, evincing a reckless disregard of human life; and (4) the defendant's actions were the proximate cause of the victim's death.

In the subject case, the evidence regarding the vicious propensities of the rottweilers, viewed in a light most favorable to the State, tended to show the following. The dogs were large, extreme-

ly strong animals of substantial weight, they were trained to be aggressive and would bark at people who passed by the defendant's yard. On one occasion the dogs entered the yard of a neighbor, frightening the neighbor and his granddaughter, and at another time jumped on a woman walking down the street, but did not harm her. The defendant's ex-girlfriend testified that she lived with the defendant in 1988, for the first four months that he owned the then rottweiler puppies. She said that the defendant abused the dogs by kicking and hitting them and wanted the dogs to be aggressive. This evidence, in my opinion, was sufficient evidence for the jury to find beyond a reasonable doubt that the dogs possessed vicious propensities and that the defendant knew or should have known of the dogs' vicious propensities.

The evidence, as aptly set out by the majority opinion, was likewise sufficient for the jury to find that the defendant breached his duty to restrain the animals and that such actions were wilful or wanton, evincing a reckless disregard of human life. Finally, the evidence was sufficient to allow the jury to find that the defendant's actions were the proximate cause of the victim's death. In short, I conclude that the state presented sufficient evidence to submit this case to the jury.

II.

The final issue which must be resolved in this appeal is whether the judge correctly instructed the jury on the charge of involuntary manslaughter. I conclude that he did not.

The trial court instructed the jury regarding culpable negligence as follows:

> Second, the State must prove beyond a reasonable doubt that the defendant's conduct constituted culpable negligence. The violation of a statute or ordinance governing the care of dogs constitutes culpable negligence if the violation is wilful, wanton, or intentional. But where there is an unintentional or inadvertent violation of such statute or ordinance, such violation standing alone does not constitute culpable negligence.
>
> The inadvertent or unintentional violation of such statute or ordinance must be accompanied by recklessness of probable consequences of a dangerous nature when tested by the rule of reasonable foresight amounting altogether to a thoughtless

disregard of consequences or a heedless indifference to the safety of others.

The defendant requested that the trial court instruct the jury as follows:

> You must look to the past conduct of the pets totally and completely unrelated to their locations and without any regard to any rules regarding running at large, and determine whether or not the past conduct of the pets cared for by the defendant Powell would give a person of ordinary intelligence notice that grievous bodily harm or death could occur by virtue of the pets being in the presence of humans. If you find that such evidence was submitted in the case, you may consider that evidence in reference to the question as to whether or not the defendant Powell should have reasonably been able to preview that probable consequences of a dangerous nature could occur by leaving his pets in an enclosed fence by virtue of their digging propensity.
>
> Violation of the County leash law does not negate the burden of claimants to show scienter in order to allege and prove that the defendant knew he was harboring vicious dogs prior to October 20, 1989.

The trial court is required to give a jury instruction requested by a party when such an instruction is correct and supported by the evidence. *Robinson v. Seaboard System Railroad, Inc.*, 87 N.C. App. 512, 526, 361 S.E.2d 909, 918 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 924 (1988). These requested instructions need not be given in the exact form and language in which they are submitted, however, so long as they are given in substance. *Id.*

While the instructions requested by the defendant are not completely accurate, the trial judge should have instructed the jury regarding the elements of the charge of involuntary manslaughter in cases involving domestic animals where a non-safety statute is involved. These elements which have been previously set forth, encompass the essence of the defendant's request that the vicious propensities of the rottweilers were relevant to a determination of involuntary manslaughter.

Moreover, the instruction given by the trial judge was apparently based on the characterization of the subject leash law as a safety statute. Since I have concluded that the subject statute

was a non-safety statute, I believe it was error for the trial judge to instruct on involuntary manslaughter based on a safety statute.

For the foregoing reasons, I respectfully dissent and vote that this case be remanded to the trial court for a new trial.

JAMES J. ANDERSEN, JR., INDIVIDUALLY, AND AS ADMINISTRATOR OF THE ESTATE OF SAUNDRA L. ANDERSEN, DECEASED, AND THE ESTATE OF JOHN LAURITS ANDERSEN, DECEASED v. MARILYN COMBS BACCUS, MURRAY ELTON BACCUS, AND AN UNKNOWN PERSON

No. 921SC155

(Filed 16 February 1993)

1. Insurance § 1165 (NCI4th)— uninsured motorist coverage— requirement of physical contact

Plaintiff was not entitled to recover from State Farm pursuant to the uninsured motorist statute, and the trial court erred by granting summary judgment for plaintiff on this issue, where the unidentified motor vehicle which allegedly caused the accident did not make physical contact, directly or indirectly, with plaintiff's vehicle. Although dicta in *Petteway v. South Carolina Ins. Co.*, 93 N.C. App. 776, indicated that the collision required by the statute was not restricted to particular vehicles, that statement conflicts with prior traditional interpretations requiring a collision, direct or indirect, between the insured's car and that of the hit-and-run driver. This interpretation is further supported by the fact that the legislature has amended the statute subsequent to the first interpretation requiring physical contact between the insured and the hit-and-run driver and has not chosen to indicate that physical contact is not required. Any shift away from the physical contact requirement must derive from legislative action or action by the Supreme Court. N.C.G.S. § 20-279.21.

Am Jur 2d, Automobile Insurance § 318.

Uninsured motorist indorsement: validity and construction of requirement that there be "physical contact" with unidentified or hit-and-run vehicle. 25 ALR3d 1299.

2. Negligence § 6 (NCI4th)— negligent infliction of emotional distress—automobile accident—spouse arriving after accident

The trial court erred by granting summary judgment for defendants on a claim for negligent infliction of emotional distress arising from an automobile accident where plaintiff was brought to the scene before his pregnant wife was freed from the wreckage, but did not witness the accident. Although this panel of the Court of Appeals felt that this claim goes beyond the holding in *Johnson v. Ruark Obstetrics*, 327 N.C. 283, nothing distinguishes this case from *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 108 N.C. App. 668, and the Court felt it must follow precedent.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 4-7.

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

Appeal by defendant insurance company from Orders entered 22 October 1991 and 4 November 1991, and by plaintiff from Order entered 4 November 1991 by Judge Howard R. Greeson, Jr. in Pasquotank County Superior Court. Heard in the Court of Appeals 14 January 1993.

D. Keith Teague, P.A., by D. Keith Teague and Joseph H. Forbes, Jr., and Bailey & Dixon, by Gary S. Parsons and Rodney B. Davis, for plaintiff.

Baker, Jenkins, Jones & Daly, P.A., by Robert C. Jenkins and R.B. Daly, Jr., for defendants Marilyn Combs Baccus and Murray Elton Baccus.

Hornthal, Riley, Ellis & Maland, by L.P. Hornthal, Jr. and John D. Leidy, for defendant State Farm Insurance.

WYNN, Judge.

The facts of the present case are as follows: just prior to the subject accident on 5 February 1988, Saundra Andersen stopped her automobile at a stop sign in the eastern lane of Simpson Ditch Road where it intersects with U.S. 17, a four-lane highway in Pasquotank County. Defendant, Marilyn Baccus, traveled north in the outside lane of U.S. 17 at approximately 55 miles per hour. As Mrs. Baccus approached the intersection of Simpson Ditch Road

and U.S. 17, Mrs. Andersen was on her right. A Ford station wagon, operated by an unidentified person, crossed the subject intersection west to east in front of Mrs. Baccus as she approached the Simpson Ditch Road intersection. Mrs. Baccus swerved to avoid the station wagon and ran off the road to the right, colliding with Mrs. Andersen's vehicle. The Ford station wagon continued through the intersection down Simpson Ditch Road and neither it nor its driver has ever been identified. The station wagon never made contact with either Mrs. Andersen's or Mrs. Baccus' vehicle.

Mrs. Andersen's husband, the plaintiff James Andersen, was brought to the scene of the accident before Mrs. Andersen was freed from the wreckage, but did not witness the accident. Once freed, Mrs. Andersen was taken to Albemarle Hospital, where on 6 February 1988 she gave birth to a stillborn son, John Laurits Andersen. Mrs. Andersen did not recover from her injuries and died on 26 March 1988.

Mr. Andersen brought suit for the wrongful death of his wife and unborn son and for negligent infliction of emotional distress. The complaint named as defendants Marilyn Combs Baccus; her husband and the registered owner of the vehicle, Murray Elton Baccus; and the Andersen's uninsured motorist carrier, State Farm Mutual Insurance Company [hereinafter State Farm].

After discovery and prior to trial, State Farm moved for summary judgment on its Counterclaim seeking a declaratory judgment that the insurance policy does not provide uninsured motorist coverage for this collision because there was no contact between the unknown person's car and any other car involved in the accident. State Farm and the Baccuses both moved for summary judgment on the issues of Marilyn Baccus' negligence and on the issue of negligent infliction of emotional distress. The trial court denied State Farm's motion for summary judgment on its Counterclaim for a declaratory judgment regarding the uninsured motorist coverage; entered summary judgment on that issue (holding that there was uninsured motorist coverage) in favor of Mr. Andersen; and granted State Farm and the Baccuses' motions with respect to negligent infliction of emotional distress.

State Farm and Mr. Andersen appeal from the Orders.

STATE FARM'S APPEAL

[1] The issue we address here is: Does N.C. Gen. Stat. § 20-279.21 [the uninsured motorist statute] provide for uninsured motorist coverage where a phantom vehicle allegedly caused a collision between two other automobiles, but made no physical contact with either of the other automobiles? As set forth below, upon a consideration of the existing statutory and case law, we must answer no.

The relevant portion of the State Farm policy provides as follows:

> "*Uninsured motor vehicle*" means a land motor vehicle or *trailer* of any type:
>
> * * * *
>
> 3. Which, with respect to damages for *bodily injury* only, is a hit and run vehicle whose operator or owner cannot be identified and which hits:
>
> a. you or any *family member*;
>
> b. a vehicle which you or any *family member* are *occupying;* or
>
> c. *your covered auto.*

(Italics in original, underlining added). The policy clearly requires that the unidentified vehicle make contact with the insured or the insured's auto. If that provision conflicts with the uninsured motorist (UM) statute, however, the statutory provision controls. *Hendricks v. United States Fidelity & Guaranty Co.*, 5 N.C. App. 181, 182-83, 167 S.E.2d 876, 877 (1969). The relevant portions of the UM statute require insurance companies to provide coverage in their policies for protecting those insured "who are legally entitled to recover damages from owners or operators of *uninsured motor vehicles and hit and run motor vehicles* . . . ." N.C. Gen. Stat. § 20-279.21(3) (1992) (emphasis added). The statute further provides that "[w]here the insured . . . has sustained bodily injury as the result of *a collision between motor vehicles* and asserts that the identity of the operator or owner of a vehicle (other than a vehicle in which the insured is a passenger) cannot be ascertained, the insured may institute an action directly against the insurer . . . ." *Id.* § 20-279.21(3)(b). These provisions are to be liberally construed to provide "some financial recompense to innocent per-

sons who receive bodily injury or property damage" due to the negligence of uninsured motorists or those unidentified drivers who leave the scene of an accident, *i.e.*, those who "cannot be made to respond to damages." *Hendricks*, 5 N.C. App. at 184, 167 S.E.2d at 878 (quoting *Moore v. Hartford Fire Ins. Co.*, 270 N.C. 532, 155 S.E.2d 128 (1967)). Despite the liberal construction to which the statute is entitled, it has traditionally been construed to require, where the claim arises from the negligence of an unidentified motorist, that physical contact be made between the plaintiff's vehicle and that of the unidentified motorist. *See, e.g., Hendricks*, 5 N.C. App. 181, 167 S.E.2d 876; *McNeil v. Hartford Accident & Indemnity Co.*, 84 N.C. App. 438, 352 S.E.2d 915 (1987).

In *Hendricks*, the plaintiff suffered serious injury when he was forced to drive onto the left shoulder of the road and into a ditch to avoid a head on collision with a second car that had been forced into his lane by a third car. The third car drove off and was never identified. The parties stipulated that the driver of the third car was negligent, that there was no contributory negligence on the plaintiff's part, and that *there was no physical contact between the plaintiff's vehicle and that of the third party. Hendricks*, 5 N.C. App. at 182, 167 S.E.2d at 877. The plaintiff's insurance policy provided that such physical contact must occur, and the issue resolved on appeal was whether the policy conflicted with the UM statute. *Id.* This Court recognized that there was no conflict between the statutory term "hit and run vehicle" and a policy requiring "physical contact of such automobile with the insured or with an automobile occupied by the insured." *Id.* at 184, 167 S.E.2d at 878. The term "hit and run vehicle" was deemed to unambiguously require contact between the insured's motor vehicle and that of the hit and run vehicle. *Id.*

This Court also recognized the "physical contact" requirement in *McNeil*. The *McNeil* Court noted that this requirement had developed in an effort to protect insurance companies from fraudulent hit-and-run claims that in reality occurred due to the insured's own negligence. *McNeil*, 84 N.C. App. at 442, 352 S.E.2d at 917. That case involved a hit-and-run automobile that hit, not the plaintiff's car, but a third car which was then propelled into the plaintiff's car. Consistent with the purpose of the "physical contact" requirement, the Court concluded that that requirement is met "where the physical contact arises between the hit-and-run vehicle and plaintiff's vehicle through intermediate vehicles involved in

an unbroken 'chain of collision' which involves the hit-and-run vehicle." *Id.*

It is Judge Phillips' decision in *Petteway v. South Carolina Ins. Co.*, 93 N.C. App. 776, 379 S.E.2d 80, *disc. rev. denied*, 325 N.C. 273, 384 S.E.2d 518 (1989), which apparently breaks from the traditional interpretation of the statute. In that case, the plaintiff was seriously injured after being run off the road by an unidentified motorist. Despite the fact that reliable witnesses testified that another car did exist and that it did run the plaintiff's car off the road, the trial court granted summary judgment in favor of the defendant insurance company. *Id.* at 777, 379 S.E.2d at 81. In so doing, however, the trial court apparently noted that "except for being constrained by the law there was sufficient evidence of independent verification of the unidentified motorist's existence and negligence to warrant the claim being made." *Id.*

In *Petteway*, this Court held that because the plaintiff's injuries did not result from a *collision between motor vehicles*, the lower court was correct in denying recovery. *Id.* at 777-78, 379 S.E.2d at 81. After resolving the issue before the Court, however, Judge Phillips went on to write that

> we do not approve the statements in the cited cases indicating that the "collision" required by the statute for uninsured motorist coverage is with the unidentified vehicle. In reaching that conclusion, the panel [in *Hendricks*] apparently gave more weight to the policy language about a "hit and run automobile" than it did to the statutory terms which no policy provision can override. The statutory phrase "collision between motor vehicles" is not restricted to any particular vehicles, restricting it by interpolation is not our office, and there is no reason to suppose that in using that unqualified phrase that the General Assembly intended to exclude from the statute's beneficent provisions victims of motor vehicle collisions caused by unidentified motorists whose vehicles have no collision.

Id. at 778, 379 S.E.2d at 81.

While we find Judge Phillips' dicta to be quite persuasive in that it appears to be consistent with the broad purpose of the statute, it conflicts with prior traditional interpretations by this Court requiring a collision, direct or indirect, between the insured's car and that of the hit-and-run driver. For that reason, we cannot

follow Judge Phillips' lead and hold in the present case that the collision between the Baccus and Anderson vehicles is sufficient for recovery under the uninsured motorist statute.

Our interpretation of the subject statute is further supported by the fact that the legislature has undertaken to amend the uninsured motorist statute subsequent to this Court's first interpreting it as requiring physical contact between the insured and the hit-and-run driver. To date, it has not chosen to amend the statute to indicate that that physical contact is not required. When the legislature acts, it is always presumed that it acts with full knowledge of prior and existing law; and where it chooses not to amend a statutory provision that has been interpreted in a specific, consistent way by our courts, we may assume that it is satisfied with that interpretation. *State v. Benton*, 276 N.C. 641, 658, 659, 174 S.E.2d 793, 804, 805 (1970); *Hewett v. Garrett*, 274 N.C. 356, 361, 163 S.E.2d 372, 375 (1969); *Whittington v. N.C. Dep't of Human Resources*, 100 N.C. App. 603, 606, 398 S.E.2d 40, 42 (1990). Thus, in consideration of the time-tested prior rulings of this Court, we are constrained to conclude that any shift away from the "physical contact" requirement must derive not from this Court, but from legislative action, or action by our Supreme Court which is the final arbiter for interpreting the statutes of this state. We hold, therefore, that Mr. Andersen is not entitled to recover from State Farm pursuant to the uninsured motorist statute because the unidentified motor vehicle did not make physical contact, directly or indirectly, with the Andersen vehicle.

ANDERSEN'S APPEAL

[2] Mr. Andersen assigns error to the trial court's granting summary judgment in favor of the defendants on his cause of action for negligent infliction of emotional distress.

A cause of action based on negligent infliction of emotional distress is controlled by our Supreme Court's decision in *Johnson v. Ruark Obstetrics and Gynecology Assoc., P.A.*, 327 N.C. 283, 395 S.E.2d 85, *reh'g denied*, 327 N.C. 644, 399 S.E.2d 133 (1990). That case set forth three elements that must be alleged and proven in order to recover damages for such a cause of action: "(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." *Id.* at 304, 395 S.E.2d at 97.

The issue here concerns the second element: Whether genuine issues of material fact exist regarding whether it was reasonably foreseeable that the plaintiff would suffer severe emotional distress due to the alleged negligence of the defendant Mrs. Baccus and/or the unknown defendant. It should be noted that although we have determined that the uninsured motorist statute precludes Mr. Andersen's recovery from State Farm for the negligence of the unknown defendant, plaintiff remains free to pursue an action against the unknown defendant and as such the issue here applies to both the unknown defendant and to Mrs. Baccus. Because of our holdings in *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992) (Eagles, J., dissenting) and in *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 108 N.C. App. 668, 424 S.E.2d 676 (1993), (Cozort, J., dissenting), we hold for the plaintiff and reverse the trial court.

Both *Gardner* and *Sorrells* rely on the *Ruark* decision which concluded that the foreseeability element "must be determined under all the facts presented, and should be resolved on a case by case basis by the trial court, and, where appropriate, by a jury." *Ruark*, 327 N.C. at 305, 395 S.E.2d at 98. The factors that should be considered in determining foreseeability "include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the other person for whose welfare the plaintiff is concerned, and whether the plaintiff personally observed the negligent act." *Id.*

Ruark involved two parents who sued a hospital for negligent infliction of emotional distress arising from the death of their unborn child. The parents had been assured throughout the mother's pregnancy that the fetus was healthy and that the pregnancy was normal. Both parents were present throughout the labor and delivery of their stillborn child. The *Ruark* Court held that, based on the parent-child relationship, the parents' allegations that the child died as the result of the defendant's negligence, and the parents' close proximity to and observation of many of the events surrounding the death and stillbirth of their child, the case could proceed to a jury for a resolution of the cause of action. *Id.* at 306, 395 S.E.2d at 98 ("If they can prove to a jury at trial that they have suffered severe emotional distress and otherwise prove the facts alleged as the basis for their claims, they are entitled to recover damages.")

In *Gardner*, the plaintiff was the mother of a thirteen-year-old boy killed in an automobile accident. The parties stipulated that the defendant, the child's father, was negligent in his operation

of the vehicle in which the child rode, and that the mother had suffered severe emotional distress as a result of the defendant's negligence and the death of her son. The only issue on appeal was whether the mother's emotional distress was a foreseeable result of the father's negligence. *Gardner*, 106 N.C. App. 638, 418 S.E.2d at 262. The *Gardner* Court found that there was no "close proximity" *requirement* for determining foreseeability, and the fact that the mother was never present at the scene of the accident did not work to bar recovery. *Id.* In holding that the proximity factor was not so narrow as to only allow recovery when the parent was at the scene of an accident, the *Gardner* Court concluded that a parent who sees a critically injured child soon after an accident "may be at no less risk of suffering a similar degree of emotional distress than that of a parent who is actually exposed to the scene of an accident." *Id.* at 639, 418 S.E.2d at 263.

In the present case, Mr. Andersen was brought to the scene of the accident after it had occurred, and did not witness the negligent act leading to the death of his wife and son. As such, it appears that his situation is analogous to the facts in the *Gardner* case. Indeed, upon examining both cases on their respective facts, we can discern only one distinguishing fact. In *Gardner*, the facts support the conclusion that the plaintiff's severe emotional distress was foreseeable in light of evidence that a family relationship existed not only between the victim and the plaintiff, but also between the plaintiff and the defendant. As such, the defendant knew of the plaintiff's relationship with the victim prior to the accident and, therefore, could reasonably foresee that negligent activity resulting in injury to the parties' son could cause the plaintiff severe emotional distress. In the present case, however, Mrs. Baccus was a stranger to both Mr. and Mrs. Andersen and, therefore, did not know of the relationship between the plaintiff and the decedent. (It would be mere speculation to draw this distinction with the unknown defendant.) This distinguishing fact also appears under the facts of *Ruark* where the defendants knew both of the plaintiff-parents and in fact had assured the parents that the fetus was healthy and that the pregnancy was normal.

But try as we have by our thorough consideration of *Sorrells*, we cannot distinguish the facts of that case from the case at hand. In *Sorrells*, this Court recognized a potential cause of action for severe emotional distress where a bartender negligently served alcohol to plaintiffs' intoxicated son, who was killed in a car accident

due to his intoxication, even though plaintiffs were not called to the scene and only "learned" of their son's accident and that his body had been mutilated. *Sorrells*, 108 N.C. App. at 672, 424 S.E.2d at 679. Indeed, the facts of *Sorrells* make no mention as to whether the parents ever actually saw their deceased son in a state of mutilation. Moreover, there was no evidence that the bartender either knew or knew of the plaintiff-parents. Nothing distinguishes *Sorrells* from this case.

While the limitations of *Ruark* have not yet been established by our Supreme Court, we believe that the plaintiff's contention goes beyond the holding of the *Ruark* Court. Plaintiff's urging that this Court find the family relationship between the plaintiff and the decedent sufficient to send the question of foreseeability in the present case to the jury, effectively asks us to recognize a cause of action based on negligent infliction of emotional distress in every instance where a family member learns, after the fact, of the injury or death of a relative resulting from a negligently caused accident. Nonetheless, while we do not believe that our Supreme Court's holding in *Ruark* was intended to have such an unlimited and all-encompassing effect, we must follow the precedent as currently set forth by this Court and find that it was error for the trial court to grant summary judgment on this issue. See *In re Civil Penalty*, 324 N.C. 373, 379 S.E.2d 30 (1989) ("Where a panel of the Court of Appeals has decided the same issue albeit in a different case, a subsequent panel of the same court is bound by that precedent").

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

Reversed as to summary judgment granted in favor of plaintiff on State Farm's Counterclaim for a declaratory judgment, and

Reversed as to summary judgment granted in favor of defendants on plaintiff's claim for negligent infliction of emotional distress.

Judges EAGLES and ORR concur.

JOHN C. BROOKS, COMMISSIONER OF LABOR OF NORTH CAROLINA, PETITIONER-APPELLEE v. BCF PIPING, INC., RESPONDENT-APPELLANT

No. 9110SC1000

(Filed 16 February 1993)

1. Administrative Law and Procedure § 67 (NCI4th)— standard of review—error of law—de novo review—sufficiency of evidence—whole record test

The Court of Appeals applied a de novo review in an occupational health and safety action to the issue of whether the trial court erred in ruling that BCF's reliance on a customer's qualified electrician was insufficient as a matter of law, and applied a whole record test to the issue of whether the court erred by ruling that BCF failed to train its employees to recognize the hazards associated with their working environment. 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. A review of whether an agency decision is supported by sufficient evidence requires the court to apply the whole record test and the whole record test is also applied when the court considers whether an agency decision is arbitrary or capricious. N.C.G.S. § 150B-51.

Am Jur 2d, Administrative Law §§ 697-705.

2. Labor and Employment § 26 (NCI4th)— North Carolina Occupational Health and Safety Act—electrocution—reliance on customer's electrician

The trial court did not err in an action arising under the North Carolina Occupational Safety and Health Act by ruling that defendant BCF's reliance on a customer's qualified electrician was insufficient as a matter of law where BCF was hired to perform refurbishing services in an area of Stowe-Pharr Mills' plant; BCF delivered a welding machine to the job site to be used by BCF's employees; it was inspected by a BCF employee prior to being delivered to the site and it was determined that the welder was properly wired internally and that its grounding circuit had been properly wired; the standard practice throughout the industry was to deliver the machine without an end plug because of various plug con-

figurations; the plug was wired to the power cord at the site by an employee of Stowe-Pharr; and a Stowe-Pharr employee was electrocuted when he touched the welding machine and another piece of grounded equipment while Stowe-Pharr employees used the machine to work on a project totally unrelated to BCF's work. Although it was proper and customary to send the male end plug and allow someone else to attach it, BCF's reliance on Stowe-Pharr's electrician to properly ground machinery and protect its employees from the existence of a hazard is unreasonable pursuant to the NCOSH Act which imposes a specific duty on BCF to inspect the arc welder to make sure it is properly grounded. Such a statutory duty is nondelegable. N.C.G.S. § 95-129(1); N.C.G.S. § 95-127(18).

Am Jur 2d, Plant and Job Safety §§ 34 et seq.

3. Labor and Employment § 26 (NCI4th)— NCOSH—welding machine—plug installed by customer's electrician—duty to check grounding

The trial court did not err in an action under the North Carolina Occupational Safety and Health Act by holding that reasonable diligence required BCF to train its employees to check the frame of an arc welder to insure that it was properly grounded. There is ample evidence in the whole record to conclude that BCF's employees were not properly trained to recognize and avoid hazards. The failure of BCF to train its employees to use a simple procedure to check the arc welder is indicative of BCF's failure to train its employees to recognize a hazard and its failure to instruct its employees on a specific regulation. The procedure to insure the safety of respondent's employees is a simple test that would not create chaos in the industry.

Am Jur 2d, Plant and Job Safety §§ 34 et seq.

Appeal by defendant from judgment entered 26 June 1991 by Judge A. M. Brannon, in Wake County Superior Court. Heard in the Court of Appeals 15 October 1992.

Attorney General, Lacy H. Thornburg, by Associate Attorney General H. Alan Pell, for plaintiff-appellee.

Smith Helms Mulliss & Moore, by James G. Middlebrooks, for defendant-appellant.

JOHNSON, Judge.

In 1989, Stowe-Pharr Mills (hereafter Stowe-Pharr) in McAdenville, North Carolina, hired BCF Piping, Inc. (hereafter BCF) to perform refurbishing services in one area of its plant. BCF delivered a welding machine to the job site to be used by BCF's employees. Before the welding machine was delivered to Stowe-Pharr, it was inspected by a BCF employee, Mr. Ellis. Mr. Ellis determined that the welder was properly wired internally and that its grounding circuit was properly wired.

The standard practice between BCF and Stowe-Pharr was for BCF to deliver the welding machine without a male end plug. It was not contested that this is the standard practice throughout the industry because of the various plug configurations.

At the site, the plug was wired to the power cord by Bill Fiddler, an employee of Stowe-Pharr. On Saturday, 27 May 1989, Stowe-Pharr employees used this particular welding machine to work on a project totally unrelated to BCF's work. A Stowe-Pharr employee was electrocuted when he touched both the welding machine and another piece of grounded equipment.

After an investigation by Safety Compliance officer, Mike Peak, BCF was issued a Citation for a violation of 29 CFR § 1926.21(b)(2) (1992), for failure to instruct each employee in the recognition and avoidance of unsafe conditions, and the regulations applicable to control or eliminate any hazards; a violation of 29 CFR § 1926.351(c)(5) (1992), for failure to ground the frame of an arc welder; and a second violation of 29 CFR § 1926.351(c)(5), for failure to check the grounding circuit of an arc welder, so as to ensure that the circuit between the ground and the grounded power conductor had resistance low enough to permit sufficient current to flow to cause the fuse or circuit breaker to interrupt the circuit.

BCF contested the Citation set forth above and prevailed in a 25 April 1990 hearing before the Administrative Law Judge (hereafter ALJ). The Commissioner petitioned the North Carolina Safety Health and Review Board (hereafter Board). After hearing evidence and hearing the arguments of counsel, the Board concluded that the ALJ's order dismissing the Citation should be affirmed. Pursuant to North Carolina General Statutes § 95-141 (1985) and North Carolina General Statutes § 150B-43 (1991), the Commissioner sought judicial review before the Superior Court of Wake

County. After considering arguments and briefs, Judge Brannon reversed the order of the Board dismissing the Citation; and held that the "three serious violations contained [in the Citation are] affirmed in all respects." BCF gave timely notice of appeal to this Court.

[1] This case is governed by the North Carolina Administrative Procedure Act, North Carolina General Statutes § 150B-1 (1991) which establishes a uniform system of administrative rule making and adjudicatory procedures for agencies. Accordingly, the applicable scope of judicial review is set forth in North Carolina General Statutes § 150B-51 (1991), which governs the judicial appeal from agency decisions in contested matters:

> The Court reviewing a final decision may affirm the decision of the agency or remand the case for further proceedings. It may reverse or modify the agency's decision if the substantial rights of the petitioner 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 lawful procedure;
>
> (4) Affected by other error of law;
>
> (5) Unsupported by substantial evidence admissible under G.S. 150B-29 (a), 150B-30, or 150B-31 in view of the entire record as submitted; or
>
> (6) Arbitrary or capricious.

"The proper standard to be applied depends on the issues presented on appeal. The nature of the contended error dictates the applicable scope of review." *Utilities Comm. v. Oil Company*, 302 N.C. 14, 21, 273 S.E.2d 232, 236 (1981).

Our courts have held that if it is alleged that an agency's decision was based on an error of law, then a de novo review is required. *Brooks, Comr. of Labor v. Grading Co.*, 303 N.C. 573, 281 S.E.2d 24 (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 580-81, 281 S.E.2d at 29, *quoting*

Savings and Loan League v. Credit Union Comm., 302 N.C. 458, 465, 276 S.E.2d 404, 410 (1981). A review of whether an agency decision is supported by sufficient evidence requires the court to apply the whole record test. *Thompson v. Board of Education*, 292 N.C. 406, 233 S.E.2d 538 (1977). The whole record test is also applied when the court considers whether an agency decision is arbitrary or capricious. *High Rock Lake Assoc. v. Environmental Management Comm.*, 51 N.C. App. 275, 276 S.E.2d 472 (1981).

The issues before this Court are (1) whether the trial court erred in ruling that BCF's reliance on the plant's qualified electrician was insufficient as a matter of law; and (2) whether the trial court committed reversible error in ruling that BCF failed to train its employees to recognize the hazards associated with their working environment.

In recognition of the issues, we will apply a de novo review for the first assignment of error and the "whole record test" for the second assignment of error.

> The whole record rule requires the court, in determining the substantiality of evidence supporting the Board's decision, to take into account whatever in the record fairly detracts from the weight of the Board's evidence. Under the whole evidence rule, the court may not consider the evidence which in and of itself justifies the Board's result without taking into account contradictory evidence or evidence from which conflicting inferences could be drawn.

Thompson, 292 N.C. at 410, 233 S.E.2d at 541.

[2] By BCF's first assignment of error, it contends that the trial court erred in ruling that BCF's reliance on the plant's qualified electrician was insufficient as a matter of law. The Commissioner's evidence, however, indicated that BCF had a specific non-delegable duty to inspect the arc welder, make sure it was grounded properly and to use reasonable diligence in protecting the safety and welfare of its employees. We find the ALJ and the Board were erroneous in their application of the law to the facts of this case.

North Carolina General Statutes § 95-126 (1989) is the article known as the North Carolina Occupational Safety and Health Act (hereafter NCOSH Act). This Act provides employers with certain rights as well as imposing certain duties which include but are not limited to those listed under North Carolina General Statutes

§ 95-129 (1989). North Carolina General Statutes § 95-129 (1) provides that "[e]ach employer shall furnish to each of his employees conditions of employment and a place of employment free from recognized hazards that are causing or are likely to cause death or serious injury or serious physical harm to his employees[.]" However, North Carolina General Statutes § 95-127(18) (1989) provides in pertinent part that an employer will be held liable for a serious violation pursuant to the Act ". . . unless the employer did not know, and could not, with the exercise of reasonable diligence, know of the presence of the violation."

The general rule as to employer culpability for safety violations is that each employer is responsible for the safety of his employees. *Anning-Johnson Co.*, 1975-1976 CCH OSHD ¶ 20,690 (1976); *Grossman Steel & Aluminum Corp.*, 1975-1976 CCH OSHD ¶ 20,691 (1976). The rule has been modified in cases involving multi-employer work sites. An employer is expected to make reasonable efforts to detect and abate any violation of safety standards of which it is aware and to which its employees are exposed despite the fact that the employer did not commit the violations. *Id.*

BCF cited several multi-employer work site cases in support of its contention that its reliance on a third party was sufficient as a matter of law. In *Brooks v. L. P. Cox Co. of Concord, Inc.*, 2 NCOSHD 836 (1986), L. P. Cox acted as a general contractor and hired a subcontractor to operate an oil-kettle to prepare a waterproofing compound. A ventilating hose clogged, ultimately causing the kettle to explode. The Hearing Examiner ruled L. P. Cox had not violated OSHA regulations because (1) the defect was not open and obvious; (2) there was no evidence that L. P. Cox knew of the hazardous condition created by the subcontractor; and (3) it had reasonably relied on the subcontractor to operate the oil-kettle. Similarly, in *Brooks v. Piping Plumbing Mechanical Contractors, Inc.*, 2 NCOSHD 1022 (1987), the Hearing Examiner ruled that a plumbing contractor's reliance on the architect's assurance that all asbestos had been removed was reasonable and that the plumber, therefore, was not liable for the asbestos that was not removed from the job site; and in *4 G Plumbing & Heating, Inc.*, 1978 OSHD CCH ¶ 22,658 (1978), the federal Review Commission concluded that a plumbing contractor reasonably relied on electrical receptacles being properly grounded by a subcontractor. The Review Commission held that the contractor who did not create or control the noncomplying condition may defend against the citation on

the ground that he neither knew, nor with the exercise of reasonable diligence could have known, that the condition was hazardous.

The ALJ and the Board concluded that pursuant to the above mentioned cases, BCF's duties to ground the arc welder and to inspect the equipment are delegable to a third party, here Stowe-Pharr. They also concluded that there was reasonable reliance by BCF under the circumstances, and that BCF had no actual knowledge nor reasonably should have had such knowledge of the hazard.

The multi-employer work site cases, however, cited by BCF, the ALJ and the Board are distinguishable from the case *sub judice* for the following reasons: the work site where the accident occurred did not comprise a multi-employer work site setting; the employers, in the above mentioned cases, neither created nor controlled the hazard involved; the safety of the employers' workers was not affected; and the cases did not involve a specific standard, as those at issue, which places a specific duty on an employer to inspect his equipment to insure its safe use by its employees.

In *4 G Plumbing & Heating, Inc.*, one of the cases cited by BCF, the federal Review Commission provided a significant factor which would alter their determination in finding the employer not responsible for the violation. The federal Review Commission stated:

> Respondent did not create the hazard; the receptacles were installed by the electrical contractor. Nor did respondent control the hazard such that it had the means to rectify the noncomplying condition in the manner contemplated by the standard; . . . Respondent did not know of the existence of the open ground; it was a non-obvious hazard detectable only through the use of a testing device. Therefore, respondent can be found in violation only if, in the exercise of reasonable diligence, it was required to test the electrical receptacles for proper grounding before using them.

4 G Plumbing & Heating, Inc., 1978 OSHD CCH at p. 27,340. Thus, the instant case involves the very facts which would have resulted in the federal Review Commission finding the employer responsible.

In the case *sub judice*, BCF controlled the situation in which the violation occurred and had a specific duty under the NCOSH Act to know whether the arc welder was properly grounded, therein insuring the safety of its workers who used the arc welder in

day to day operations. "When an employer is under a statutory duty and then entrusts its performance to his agent, he becomes responsible for the failure of that agent to comply with the law." *Lebanon Lumber Co.*, 1971-1973 OSHD CCH ¶ 15,111, at p. 20,179, *aff'd*, 1971-1973 OSHD CCH ¶ 15,530 (1973). "The effectiveness of this particular safety standard would be nullified and the manifest intent of the Act defeated if an employer could delegate a duty clearly enjoined upon him to another." *Id.*

BCF further argues that it could not have known of the violation and that it exercised reasonable diligence by having a reputable electrician check the machinery. We disagree.

"Whether or not a hazard exists is to be determined by the standard of a reasonably prudent person. Industry custom and practice are relevant and helpful but are not dispositive. If a reasonable and prudent person would recognize a hazard, the industry cannot eliminate it by closing its eyes." *Brooks, Com'r. of Labor v. Rebarco, Inc.*, 91 N.C. App. 459, 464, 372 S.E.2d 342, 345 (1988).

BCF was hired by Stowe-Pharr to provide welding services. The equipment that was improperly wired was owned by BCF, placed on the work site by BCF employees and was to be used by BCF's employees. Although it was proper and customary to send the male end plug and allow someone else to attach it, BCF's reliance on the Stowe-Pharr's electrician to properly ground machinery and protect its employees from the existence of a hazard is unreasonable pursuant to the NCOSH Act which imposes a specific duty on BCF to inspect the arc welder to make sure it is properly grounded. We believe that such a statutory duty is nondelegable.

This is not a case where an employer is not aware of the hazards of a particular situation. BCF was aware that the equipment that it used in its business utilized high voltages of electricity. BCF had someone check the internal wires before the equipment was dispersed to the work site but failed to have someone check the machinery at the site to make sure it was properly grounded. BCF's witness testified that BCF relied upon the company that had contracted with it for such services to have someone attach the male plug and at the very least, implied, if not directly stated, that BCF generally had no knowledge of who actually attaches the plug. Although it was an employee of Stowe-Pharr who was fatally injured, the employees of BCF were exposed to the same

dangerous condition that killed the Stowe-Pharr employee the entire week before the incident occurred. A reasonable effort to abate this potentially dangerous situation could have been achieved by having someone inspect the machinery after installation but before use by any employees. BCF had a non-delegable duty to inspect the grounding circuit and thereby protect the safety and welfare of its employees.

The NCOSH Act and public policy dictate that BCF be held responsible for its failure to make working conditions safe for its employees. BCF, with total disregard for NCOSH Act, delegated such a serious task as checking the grounding wire which would expose its employees to a hazardous condition to a third party. If an employer is allowed to "contract" away his responsibility in providing a safe workplace, the effectiveness of the safety standards employed by the legislative Act would be drastically diminished.

We are not seeking by this decision to impose strict liability on employers as BCF suggests. Instead, we are enforcing the regulations as stated pursuant to the NCOSH Act. Its primary purpose is to keep conditions in the workplace safe for workers. This purpose cannot possibly be accomplished where employers are allowed to delegate to a third party a specific duty promulgated under the Act that is designed to protect the safety of workers. Where an employer, on a regular basis, is not aware of the reputation of the electrician who grounds equipment emitting dangerous currents of electricity, this Court cannot ignore such blatant disregard for the safety of employees.

[3] BCF lastly contends that the Superior Court erred in ruling that reasonable diligence required BCF to train its employees to check the frame of the arc welder to insure that it was properly grounded. We disagree.

Contrary to BCF's assertion, there is ample evidence in the "whole record" to conclude that BCF's employees were not properly trained to recognize and avoid hazards. The failure of BCF to check the grounding circuit results directly from its reliance on the training and experience of a third party agent. BCF is required to ensure that the frame of the arc welder is grounded. The failure of BCF to train its employees to use a "simple procedure" to check the arc welder is indicative of BCF's failure to train its employees to "recognize a hazard" and its failure to instruct its employees on a specific regulation.

BCF further argues that it is unreasonable for the trial court to expect it to train each of its welders to be electrician's apprentices when it can rely on an experienced electrician. It cites to support its argument *Brooks v. L. P. Cox Co., Inc.*, 2 NCOSHD 637 (RB 1985), *aff'd*, 2 NCOSHD 645 (Sup. Ct. 1987), where the Review Board held that a concrete subcontractor was not responsible for a violation created by a structural engineer. The Review Board stated that respondent should have been able to reasonably rely on a professional and that to hold that the subcontractor was required to hire its own structural engineer to check the structural design prepared by a licensed professional would cause chaos in the industry.

This Court finds, however, that the procedure to insure the safety of respondent's employees is a simple test that would not create chaos in the industry but instead, prevent senseless accidents as in the case before us. The record reveals that the test could be performed with a simple OHM/Volt meter by any individual who has some training or experience with electrical equipment. Employees of BCF who would operate welding machines could perform such tests given access to an OHM/Volt meter and some instructions. Although BCF has an electrician who did a check on the machinery before it left BCF and when it returned from a work site to BCF, it did not provide its own personnel to inspect the equipment at the site and see if the machinery was properly grounded.

Based on the law and the evidence presented, we find the lower court properly reversed the decision of the Board. We affirm.

Judges COZORT and LEWIS concur.

FRANCES ALBRITTON, PLAINTIFF v. HARRY R. ALBRITTON, DEFENDANT

No. 915DC1246

(Filed 16 February 1993)

1. **Divorce and Separation § 142 (NCI4th)— equitable distribution—pension benefit—failure to determine value**

The trial court's failure in an equitable distribution action to put a specific value on defendant's pension plan was not error where it was plaintiff-appellant who failed to provide the trial court with the necessary information. Plaintiff, as the party claiming an interest in the pension plan, had the burden of proof as to the value of the pension plan on the date of the parties' separation. The trial court did the best it could with the information available.

Am Jur 2d, Divorce and Separation §§ 870, 905.

Pension or retirement benefits as subject to award or division by court in settlement of property rights between spouses. 94 ALR3d 176.

2. **Divorce and Separation § 144 (NCI4th)— equitable distribution—unequal division of marital property—no abuse of discretion**

The trial court did not abuse its discretion in an equitable distribution action by making an unequal division of the marital property where the court considered all of the factors listed in N.C.G.S. § 50-20(c), but gave particular weight to factors 1, 3, 11a, and 12. Defendant's declining health and inability to work were important to the court, as was the court's feeling that plaintiff had secreted funds, attempted to devalue the marital estate, and was less than truthful in much of her testimony.

Am Jur 2d, Divorce and Separation §§ 930 et seq.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

3. Divorce and Separation § 158 (NCI4th)— equitable distribution—distributional factors—defendant ill and unable to work—plaintiff hiding and secreting marital assets—evidence sufficient

The trial court did not err in an equitable distribution action by holding that defendant was ill and unable to work and that plaintiff had hidden and secreted marital assets where there was competent evidence supporting those findings. Defendant testified that he suffered from dizzy spells and also had recurring pain in his leg and side, defendant was under medical evaluation and awaiting test results at the time of the hearing, and defendant's daughter corroborated his testimony. Plaintiff initially testified that she did not use any of her own money in the purchase of her post-marital home, and later explained that she had been confused by the earlier questions and that she had actually paid the amount needed to purchase the home from her checking account, which she closed before separation, a former IRA account, and a loan from her sister. There were other contradictions in the record too numerous to mention.

Am Jur 2d, Divorce and Separation §§ 930 et seq.

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

Divorce: equitable distribution doctrine. 41 ALR4th 481.

4. Appeal and Error § 147 (NCI4th)— equitable distribution—exhibits—failure to object

Plaintiff's argument that defendant did not properly introduce exhibits in an equitable distribution action was not preserved for appeal where plaintiff made no objection at trial. N.C. R. App. P. 10(b).

Am Jur 2d, Appeal and Error § 553.

Appeal by plaintiff from judgment entered on 8 April 1991 by Judge Charles E. Rice III in New Hanover County District Court. Heard in the Court of Appeals 12 November 1992.

Charleene Wilson for Plaintiff-Appellant.

Carlton S. Prickett, Jr. and Nora Henry Hargrove for Defendant-Appellee.

LEWIS, Judge.

The issues presented by this appeal arise from an action for absolute divorce and equitable distribution initiated by Frances Albritton ("plaintiff") against her husband, Harry R. Albritton ("defendant"). Plaintiff and defendant were married 27 August 1949 and lived together for almost forty years until the date of their separation on 14 June 1988. The parties were granted an absolute divorce by the trial court on 28 July 1989, leaving only the issue of equitable distribution to be decided.

During the 5 March 1990 session of Civil District Court, a hearing was held on the question of equitable distribution. The evidence presented tended to show that at the time of the hearing, plaintiff was 61 years old and defendant was 62 years old. During the marriage, defendant had been employed by Southern Bell Telephone Company (now Bell South) from February of 1951, until his retirement in February, 1985. Upon defendant's retirement from Southern Bell, he began receiving a monthly payment from a pension plan that had been funded by contributions from Southern Bell while he was employed. At the time the parties separated in June of 1988, defendant's pension plan had a gross value of $1,341 per month, of which defendant received a net of $1,093. It is this pension plan that is the source of the dispute between the parties.

After defendant's retirement from Southern Bell, he worked on a part-time basis for R & E Electronics, but due to declining health, defendant had only been able to work a total of three days in the months preceding the hearing. Defendant's gross income from R & E Electronics for the taxable year 1989 was only $16,000. The Southern Bell pension plan therefore represented his only source of income.

In contrast, the trial court found that plaintiff was in relatively good health, with the exception of having had heart surgery in 1984, and that she was gainfully employed as a nurse at New Hanover Memorial Hospital in Wilmington, with an income of $33,666 in 1989.

The evidence presented at the hearing also showed that plaintiff had hidden marital property. The trial court noted in its findings of fact that plaintiff had a checking account registered in her name alone. On the day prior to the parties' separation plaintiff withdrew

the entire remaining balance of $6,802 from the account. In addition, evidence was presented that shortly after the parties' separation, plaintiff purchased a house in Wilmington, North Carolina. Although, the original "Offer to Purchase and Contract" was submitted by plaintiff, she transferred her interest in the "Offer to Purchase and Contract" to her sister and brother-in-law, Peggy Smith and Lloyd Smith, (the "Smiths"). Thereafter, on 29 August 1988, plaintiff and not the Smiths submitted a "Mortgage Loan Application" with which to purchase the house. However, at the closing, a mortgage was given to the Smiths for $39,132, leaving a difference of $11,658 from the purchase price of $50,790. After the closing on the house, it was plaintiff, and not the Smiths, who took up residence in the house and began paying "rent" to the Smiths in an amount almost identical to the monthly mortgage payment. On 29 December 1989, after plaintiff had been granted an absolute divorce, the Smiths transferred title to the property to plaintiff. At the hearing, plaintiff testified that her sister had given her the property in exchange for her assumption of the underlying debt.

The trial court, upon reviewing this peculiar transaction, concluded that the equity in the property, as well as the closing costs, were the result of plaintiff having additional cash monies at the time of the separation. As a result, the trial court concluded that the additional cash was a marital asset with a value of at least $12,000 as of the date of separation.

Based on all the evidence presented, the trial court concluded that an unequal division of the marital property in favor of defendant would be equitable. In reaching this conclusion, the trial court gave particular weight to factors 1, 3, 11a and 12 listed in N.C.G.S. § 50-20(c). Using these factors the trial court awarded an equal division of all marital assets except for defendant's pension plan which the trial court awarded entirely to defendant. Plaintiff has appealed from the trial court's division of the marital property and has assigned various errors to the distribution process.

I.

The rules regarding equitable distribution are well established. In making an equitable distribution of marital property, the trial court follows a three step process: 1) to determine which property is marital property, 2) to calculate the net value of the property, and 3) to distribute the property in an equitable manner. *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347, *disc. rev. denied*,

323 N.C. 171, 373 S.E.2d 104 (1988). Plaintiff has not excepted to the trial court's classification of property, but she has taken exception to the valuation of defendant's pension plan and the distribution of the marital property.

[1] Plaintiff's first assignment of error actually raises two issues; the first of which is the trial court's failure to determine the present value of defendant's pension plan. Although, we too are concerned that the trial court did not place a specific present value on defendant's pension plan, we find that the trial court's omission did not prejudice plaintiff and thus does not amount to a reversible error.

In its order signed 8 April 1991, the trial court specifically stated: "There was insufficient evidence to enable the Court to establish the present value of this pension at the time of the parties' separation." In its brief, however, plaintiff contends that the trial court should have used either the present discount method or the fixed percentage method to have arrived at a proper valuation of the pension plan. Plaintiff further argued that under the circumstances the present discount method was more appropriate since payment from defendant's pension had already begun and both parties were only a year apart in age. In order for the trial court to have used the present discount method, it was necessary for the trial court to have certain actuarial information as well as other specifics about the plan. However, plaintiff conceded in her brief that neither she nor defendant produced any actuarial evidence. To get around this deficiency, plaintiff contends that the trial court should have taken judicial notice of any "number of respected actuarial source books."

Judicial notice is governed by Rule 201 of the North Carolina Rules of Evidence. Specifically, Rule 201(c) provides that a court *may* take judicial notice of a fact whether requested or not. N.C.G.S. § 8C, Rule 201 (1992). This is a permissive rule. However, under Rule 201(d), a trial court is required to take judicial notice of an adjudicative fact if requested by a party and supplied with the necessary information. *Id.* Plaintiff made no such offer. We find no prejudicial error.

It is also noted by this Court that plaintiff, as the party claiming an interest in the pension plan, had the burden of proof as to the value of the pension plan on the date of the parties' separation. *See Atkins v. Atkins*, 102 N.C. App. 199, 401 S.E.2d 784 (1991). This same burden of proof applies whether we are dealing

with marital debts or marital assets. Also, in *Miller v. Miller*, 97 N.C. App. 77, 80, 387 S.E.2d 181, 184 (1990), this Court stated:

> The requirements that the trial court (1) classify and value all property of the parties, both separate and marital, (2) consider the separate property in making a distribution of the marital property and (3) distribute the marital property, necessarily exist only when evidence is presented to the trial court which supports the claimed classification, valuation, and distribution.

With this background, the burden was clearly on plaintiff, as the one seeking an interest in defendant's pension plan, to provide the trial court with evidence of the pension plan's value as of the date of separation. The record indicates that both parties submitted to pretrial depositions. In addition, defendant took the stand and was available for questioning as to the value of the pension plan. However, at no point were any questions asked as to the specifics of defendant's participation in the plan. Also, plaintiff had the opportunity to seek the necessary information as to defendant's participation in the pension plan from Southern Bell, but again plaintiff failed to pursue this opportunity.

We see no reason to remand this case on the basis that the trial court failed to make a specific finding as to the present discount value of the defendant's pension plan when it was plaintiff who failed to provide the trial court with the necessary information. "[R]emanding the matter for the taking of new evidence, [as to the value of the pension plan] in essence granting the party a second opportunity to present evidence, 'would only protract the litigation and clog the trial courts with issues which should have been disposed of at the initial hearing.'" *Miller*, 97 N.C. App. at 80, 387 S.E.2d at 184 (citation omitted). Under the circumstances, we feel that the trial court did the best it could with the information available. Therefore, the trial court's failure to put a specific value on defendant's pension plan was not error.

[2] The second issue raised by defendant's first assignment of error is whether the trial court erred in making an unequal division of the marital property. There is a statutory mandate in the distribution of marital property that an equal division is equitable. N.C.G.S. § 50-20(c) (Cum. Supp. 1991). However, a trial court may consider all the factors listed in section 50-20(c), and find that an equal division of the marital assets would not be equitable under the

circumstances. *White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). The court must make specific findings of fact setting forth the reasons for its conclusion. *Armstrong v. Armstrong*, 322 N.C. 396, 368 S.E.2d 595 (1988). Once the trial court decides that an unequal division of the marital property would be equitable, its decision will only be reversed for an abuse of discretion. *White*, 312 N.C. at 777, 324 S.E.2d at 833.

The trial court in this matter concluded that an equal division of the marital property would not be equitable and made specific findings of fact to support its conclusion. In so doing, the trial court considered all the factors listed in N.C.G.S. § 50-20(c), but gave particular weight to factors 1, 3, 11a and 12. Important to the trial court's decision was the defendant's declining health and inability to work. In addition, the trial court felt it important that the plaintiff had secreted funds, attempted to devalue the marital estate and was less than truthful in much of her testimony. We find the procedure acceptable and see no abuse of discretion.

In *White*, our Supreme Court held that when rulings are committed to the sound discretion of the trial court they will be accorded great deference and will not be set aside unless it can be shown that they were arbitrary and not the result of a reasoned decision. *Id.* Having reviewed the record, we find no evidence that the trial court's opinion was anything but a well reasoned decision and that it did not abuse its discretion.

II.

[3] Plaintiff's second, third, fifth and sixth assignments of error are all directed to the weight of the evidence. By these assignments of error, plaintiff argues that there was not sufficient evidence to uphold the trial court's determinations that defendant was ill and unable to work and that the plaintiff had hidden and secreted marital assets. Since the distribution of marital property is vested in the sound discretion of the trial court and only reversed for abuse of discretion, this Court will only reverse the trial court's distribution if its decision is unsupported by reason and not the result of competent inquiry. *Beightol v. Beightol*, 90 N.C. App. 58, 367 S.E.2d 347, *disc. rev. denied*, 323 N.C. 171, 373 S.E.2d 104 (1988). Accordingly, this Court will not reverse the trial court's findings of fact on appeal as long as they are supported by competent evidence. *Id.*

As to the trial court's finding that defendant was in poor health and unable to work, we are of the opinion that this finding was supported by competent evidence. At the hearing, the defendant testified that he suffered from dizzy spells and also had recurring pain in his leg and side. At the time of the hearing, defendant was under medical evaluation and was awaiting the results of recent tests. Defendant's own testimony was corroborated by his daughter who testified that she had observed a deterioration in her father's condition and she had often taken him to the doctor. Plaintiff contends that defendant's dizziness and other health problems are the result of abuse of alcohol. However, the trial court after hearing and weighing all the evidence concluded that defendant was disabled and we will not disagree with that finding on appeal.

In a similar manner, plaintiff argued in her brief that there was not sufficient evidence to find that she had secreted and hidden marital assets. The trial court engaged in a very painstaking and detailed analysis of plaintiff's financial status before it concluded that plaintiff was secreting funds for the purchase of her post-marital home. At the hearing, plaintiff initially testified that she did not use any of her own money in the purchase of her post-marital home. However, when plaintiff later resumed the stand, she explained that she had been confused by the earlier questions and that she had actually paid for the $12,000 needed to purchase the home from her checking account, which she closed before separation, a former IRA account and a loan from her sister. In light of this recanted testimony, and other contradictions in the record too numerous to mention, we hold that the trial court did not commit reversible error in holding that plaintiff had secreted and hidden marital assets. As a result, plaintiff's second, third, fifth and sixth assignments of error are overruled.

III.

[4] Plaintiff's final assignment of error raises the issue of whether the trial court committed reversible error in considering the defendant's exhibits since they were not properly moved into evidence. At the conclusion of his case, defendant's counsel stated he wanted "to make certain that all of my exhibits have been property [sic] marked and offered." Plaintiff argues that this was not sufficient to introduce the defendant's exhibits into evidence and that she has been prejudiced since the trial court's valuation of the marital property came straight from the defendant's exhibits.

Although we disagree with plaintiff's argument that this method is not sufficient, we need not reach the issue. Rule 10(b) of the North Carolina Rules of Appellate Procedure requires that for issues to be preserved for appeal, a party must make a timely request, objection or motion. At the very least defendant's counsel's statement was enough to put plaintiff on notice that he was attempting to offer the exhibits into evidence. However, plaintiff made no objection. Plaintiff's failure to properly preserve the issue prevents her raising the issue for the first time on appeal. *See In re Will of King*, 80 N.C. App. 471, 342 S.E.2d 394, *disc. rev. denied*, 317 N.C. 704, 347 S.E.2d 43 (1986). Plaintiff argues that the procedure happened so quickly that she did not have an opportunity to object. Nothing in the record nor in the argument suggests any reason why counsel could not make a timely objection or if unable to speak, some signal. This issue was not preserved at trial and is not properly before us now.

As to the rest of plaintiff's assignments of error these are deemed abandoned as per Rule 28(b)(5) of the North Carolina Rules of Appellate Procedure as they were not addressed in the brief. Similarly, defendant's first and second cross-assignments of error, are also deemed abandoned for having not been addressed in defendant's brief. For its third cross-assignment of error, defendant argues this Court committed reversible error in denying defendant's motion to dismiss for failure to comply with the Rules of Appellate Procedure. Although we appreciate defendant's familiarity with the Rules of Appellate Procedure, we see no need to revisit our previous decision especially in light of the fact that this matter has been resolved in favor of the defendant.

For the foregoing reasons the order of the trial court is

Affirmed.

Judges JOHNSON and COZORT concur.

LEONARD GLENN, EMPLOYEE, PLAINTIFF v. McDONALD'S, EMPLOYER, DEFENDANT; AMERICAN MOTORISTS INSURANCE COMPANY, CARRIER, DEFENDANT

No. 9210IC66

(Filed 16 February 1993)

Master and Servant § 88 (NCI3d)— workers' compensation— settlement—authority of Commission to set aside

The Industrial Commission was without power to set aside an order approving a settlement agreement in a Workers' Compensation action where the record did not disclose and the Commission did not find that the agreement was procured by fraud, misrepresentation, mutual mistake or undue influence as required by N.C.G.S. § 97-17. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission is immaterial.

Am Jur 2d, Workers' Compensation § 62.

Judge LEWIS dissenting.

Appeal by plaintiff from an opinion and award by the Industrial Commission issued 24 September 1991 by Commissioner J. Harold Davis. Heard in the Court of Appeals 4 January 1993.

Plaintiff instituted this workers' compensation action against defendant McDonald's Hamburger Restaurant (hereinafter McDonald's) to recover for injuries plaintiff allegedly sustained on 22 October 1988 while stocking defendant McDonald's walk-in freezer. Plaintiff's complaint indicated that boxes of frozen foods, which were piled up to the ceiling in the freezer, fell on his left leg and resulted in an injury to his knee.

Plaintiff testified that he immediately sought help from a co-worker and notified his manager, Ms. Christine Vance, of his injuries. As a result of his injury, plaintiff underwent surgery to repair torn ligaments in his knee. After subsequent treatment and rehabilitation, plaintiff's surgeon, Dr. Estwanik, assigned a twenty percent disability rating to plaintiff's left knee and further indicated that plaintiff had a partial tear to the anterior cruciate ligament in his "remote history" and that a "new episode" of recurrent problems in the knee was most likely caused by an "injury of a twisting nature on 10-22."

Plaintiff submitted his claim to the Industrial Commission on 18 February 1989. Thereafter, plaintiff and defendant McDonald's entered into a Compromise Settlement Agreement on 16 October 1989. Counsel for defendants submitted to the North Carolina Industrial Commission a Form 21 Agreement for Disability Benefits on 7 December 1989. The agreement was subsequently approved on 9 January 1990.

On 14 December 1989, prior to the Industrial Commission's approval but after the agreement was duly executed and submitted to the Commission, defense counsel attempted to contact the executive secretary of the Industrial Commission by telephone with regard to revocation of consent to the Compromise Settlement Agreement. On 18 December 1989, defense counsel submitted a letter to the Industrial Commission revoking defendant McDonald's consent to and requesting the return of the Compromise Settlement Agreement. The letter also indicated that the insurance carrier had obtained information which would require further investigation of plaintiff's claim and a reconsideration of defendant McDonald's admission of liability. The Commission never received this letter or the note of the telephone conversation.

On 12 January 1990, defense counsel forwarded a Motion to Set Aside Approval of the Compromise Settlement Agreement. On 7 June 1990, the Full Commission ordered that the approved agreement be set aside because neither defense counsel's letter nor the note of the telephone conversation was "matched" with the Commission file prior to the approval of the settlement agreement. The Full Commission further ordered a full hearing on the merits.

Plaintiff did not appeal the decision of the Full Commission but rather proceeded with a hearing on the issue of compensability. At the hearing, defendant McDonald's presented evidence rebutting plaintiff's contention that the injury in question occurred while plaintiff was at work. Based on the evidence presented, Deputy Commissioner Haigh, in an opinion and award dated 3 December 1990, found that plaintiff did not sustain an injury by accident arising out of and in the course of his employment with defendant and therefore denied plaintiff's claim.

Plaintiff appealed Deputy Commissioner Haigh's findings to the Full Commission, and for the first time, objected to the setting aside of the settlement agreement. On 24 September 1991, the

Full Commission reviewed the record in its entirety and found no reversible error. From this opinion and award of the Full Commission, plaintiff appeals.

Hoover & Williams, P.A., by David F. Williams, for plaintiff-appellant.

Hedrick, Eatman, Gardner & Kincheloe, by Mel J. Garofalo and Stephen D. Koehler, for defendant-appellees.

WELLS, Judge.

The dispositive question for our review is whether absent a showing of fraud, misrepresentation, mutual mistake, or undue influence, the Full Commission may set aside a settlement agreement duly executed by the parties, properly submitted to the Industrial Commission for approval, and approved by the Chairman of the Commission in accordance with N.C. Gen. Stat. §§ 97-17 and 97-82. We find that it may not.

N.C. Gen. Stat. §§ 97-17 and 97-82 permit employers and employees to settle an employee's workers' compensation claim and authorizes the Commission to approve such settlements as long as certain requirements are met. N.C. Gen. Stat. § 97-82 provides as follows:

> If after seven days after the date of the injury, or at any time in case of death, the employer and the injured employee or his dependents reach an agreement in regard to compensation under this Article, a memorandum of the agreement in the form prescribed by the Industrial Commission, accompanied by a full and complete medical report, shall be filed with and approved by the Commission; otherwise such agreement shall be voidable by the employee or his dependents.
>
> If approved by the Commission, thereupon the memorandum shall for all purposes be enforceable by the court's decree as hereinafter specified.

N.C. Gen. Stat. § 97-17 states that settlement agreements may be entered into so long as "the amount of compensation and the time and manner of payment are in accordance with the provisions of this Article." If an agreement is properly executed then a "copy of such settlement agreement shall be filed by the employer with and approved by the Industrial Commission." N.C. Gen. Stat. § 97-17.

In interpreting these provisions, the North Carolina Supreme Court has held that the Commission acts in a judicial capacity in approving a settlement agreement between parties, and the settlement agreement, once approved, becomes an award enforceable by court decree. *Pruitt v. Publishing Co.*, 289 N.C. 254, 221 S.E.2d 355 (1976). The jurisdiction of the Commission to act in such capacity is invoked at the time the voluntary settlement agreement is properly submitted for approval. *Tabron v. Farms, Inc.*, 269 N.C. 393, 152 S.E.2d 533 (1967). In this case, as soon as the settlement agreement had been duly executed by the parties and properly submitted by defense counsel, the Commissioner had the immediate authority to make an award.

Having established that the Commission had the authority to approve the settlement agreement, the question becomes upon what basis may the Commission make such an award. It is presumed that the Commission approves a settlement agreement only after a full investigation to determine whether the settlement is fair and just. However, the Commission may not look to records, files or evidence not presented to it for consideration and may not base its decision on information not contained in the record before it. *Biddix v. Rex Mills*, 237 N.C. 660, 75 S.E.2d 777 (1953). Therefore, where the Commission had not received defendant McDonald's revocation of consent, failure to consider it would not be reversible error. The Commission fully reviewed the file and gave "due consideration to all matters" of record. It then determined that the "compromise settlement agreement is fair and equitable, probably in the best interest of all parties, and should be approved." We find that, based upon the record before the Commission, its approval of the settlement agreement was proper.

Once the Commission does approve a settlement agreement, it is "as binding on the parties as an order, decision or award of the Commission unappealed from, or an award of the Commission affirmed upon appeal." *Pruitt, supra.* This approved compensation agreement will remain binding on the parties unless or until set aside by the Commission. *Id.*

Where the Commission had authority to approve the agreement and such approval was supported by the record of evidence before it, the remaining question is under what circumstances may approval of the settlement agreement be overturned. N.C. Gen. Stat. § 97-17 provides in pertinent part as follows:

> [N]o party to any agreement for compensation approved by the Industrial Commission shall thereafter be heard to deny the truth of the matters therein set forth, unless it shall be made to appear to the satisfaction of the Commission that there has been error due to fraud, misrepresentation, undue influence or mutual mistake, in which event the Industrial Commission may set aside such agreement.

Thus, where there is no finding that the agreement itself was obtained by fraud, misrepresentation, mutual mistake, or undue influence, the Full Commission may not set aside the agreement, once approved.

Here, the Full Commission found that the order approving the agreement should be set aside on the grounds that the Commission did not receive information regarding defense counsel's request for revocation of consent to the settlement agreement. Defense counsel's request for revocation of consent was based upon the fact that it had found new information tending to refute plaintiff's contention that he was injured in the course of his employment. The above statute, however, does not provide an exception allowing the Full Commission to set aside an agreement merely because one party to the agreement acquired new information or evidence. In other words, defendant may not now deny the truth of the matters asserted in the agreement based upon the acquisition of new information. The issue of whether plaintiff had a compensable injury was decided by the parties when the agreement was executed. *Mullinax v. Fieldcrest Cannon, Inc.*, 100 N.C. App. 248, 395 S.E.2d 160 (1990). Furthermore, defendant McDonald's had extensive time, almost one year, in which to investigate plaintiff's claim before it executed a settlement agreement.

Since the record did not disclose and the Full Commission did not find that the agreement was procured by fraud, misrepresentation, mutual mistake, or undue influence, as required by N.C. Gen. Stat. § 97-17, the Commission was without power to set aside the order approving the settlement agreement. The fact that defense counsel had attempted to revoke its consent to the agreement after it was submitted to the Commission is immaterial.

The decision of the Full Commission is hereby reversed and the matter is remanded to the Full Commission for reinstatement

of the Compromise Settlement Agreement entered into by the parties and approved by the Commission.[1]

Reversed and remanded.

Judge COZORT concurs.

Judge LEWIS dissents.

Judge LEWIS dissenting.

I respectfully dissent from the majority's decision to reverse and remand and I would vote to affirm the award of the Industrial Commission. In its opinion, the majority states that the authority of the Commission is invoked at the time a voluntary settlement is submitted for approval. I agree. However, the majority's opinion fails to address the issue of whether the Commission loses its authority to act if one of the parties withdraws its consent before the settlement agreement is approved. The answer to this question is essential to the resolution of this case because defendants strenuously argue that they withdrew their consent before the agreement was filed on 9 January 1990, leaving nothing to be approved.

It has been said by this Court that an agreement is binding on the parties when approved by the Industrial Commission. *Buchanan v. Mitchell County*, 38 N.C. App. 596, 248 S.E.2d 399 (1978), *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 35 (1979). Conversely, it has also been said that an agreement not approved by the Industrial Commission is not binding on the parties. *See Baldwin v. Piedmont Woodyards, Inc.*, 58 N.C. App. 602, 293 S.E.2d 814 (1982). It logically flows from these statements that until an agreement is approved by the Industrial Commission, either party is free to withdraw its consent. That is what one party believed it had done in this case.

The record indicates that defendants' counsel placed a phone call on 14 December 1989 and wrote a letter on 18 December 1989 to B. H. Whitehouse, Jr., Executive Secretary of the North

1. Defendant should also be required to pay interest on all sums which should have been paid since the parties entered into the settlement agreement. N.C. Gen. Stat. § 97-86.2.

Carolina Industrial Commission requesting that the settlement agreement not be approved and that the Form 21 Agreement be returned. For some reason unexplained, however, neither the telephone message nor the letter was matched with the Commission file which contained the settlement agreement. The phone call which defendants' counsel placed to Mr. Whitehouse was received by Mr. Whitehouse's secretary. I am of the opinion that Mr. Whitehouse's secretary was an agent of the Industrial Commission and that by communicating his clients' desire to withdraw their consent to the settlement agreement to Mr. Whitehouse's secretary, defendants' counsel acted sufficiently to put the Industrial Commission on notice that one of the parties no longer consented to the agreement. Having withdrawn their consent, and communicating such to the Industrial Commission, there was thus no settlement for the Commission to approve on 9 January 1990. *See Morgan v. Town of Norwood*, 211 N.C. 600, 191 S.E. 345 (1937) (establishing necessity of consent).

The majority's opinion has the effect of penalizing defendants for the faulty record keeping and the lapse in clerical assistance of the Industrial Commission. Defendants discovered new evidence indicating that Glenn's injury was not compensable and then made reasonable efforts to communicate with the Industrial Commission. It would be neither reasonable nor practical to require counsel to have gone to any further lengths. To so hold would mean that parties dealing with the Industrial Commission can never assume communications have been received unless they get a "filed" copy or speak directly with one of the Commissioners and record the conversation, with, of course, their knowledge.

For the foregoing reasons I respectfully dissent.

BOBBY GENE McMURRY v. COCHRANE FURNITURE COMPANY

No. 9227SC59

(Filed 16 February 1993)

1. Labor and Employment § 63 (NCI4th)— employment at will—termination—alleged bad faith promise to continue employment—no bad faith exception

Defendant employer's behavior was not sufficient to rise to the level of a public policy violation, assuming that plaintiff's allegations are true, where plaintiff alleged that he had become concerned about his job security as a result of a company acquisition and consolidation, that he turned down an offer from another company upon an oral promise that he would have continued employment with defendant, and that he was subsequently discharged by defendant. Our courts have to date refused to recognize an independent "bad faith" exception to the employment at will doctrine; any allegations of bad faith must rise to the level of a public policy.

Am Jur 2d, Master and Servant § 27.

Modern status of rule that employer may discharge at-will employee for any reason. 12 ALR4th 544.

2. Labor and Employment § 65 (NCI4th)— employment at will—termination—other employment refused—additional consideration exception—not applicable

Plaintiff's failure to accept a tentative offer of employment elsewhere in return for defendant's gratuitous offer of continued employment for an indefinite period was not sufficient additional consideration to create an enforceable and binding contract and remove this case from the employment at will doctrine. While plaintiff may have received a contract for permanent employment, a contract for permanent employment implies an indefinite general hiring, terminable at will, where there is no additional expression as to duration. The employee must provide some additional consideration beyond the obligation to perform services to change the nature of such a contract.

Am Jur 2d, Master and Servant § 33.

Appeal by plaintiff from Order entered 31 October 1991 by Judge Thomas W. Seay, Jr. in Lincoln County Superior Court. Heard in the Court of Appeals 10 December 1992.

Robert C. Powell for plaintiff-appellant.

Robinson, Bradshaw & Hinson, P.A., by D. Blaine Sanders, for defendant-appellee.

WYNN, Judge.

This appeal arises out of an action seeking compensatory damages for wrongful discharge and breach of an employment contract. Plaintiff was employed at Trendline Furniture Company (Trendline) as a traffic manager for their truck fleet. Defendant Cochrane Furniture Company, Inc. (Cochrane) acquired Trendline on 13 October 1989. On 1 January 1990, Cochrane consolidated their own truck fleet with that of Trendline. Plaintiff apparently became concerned about his job security as a result of the consolidation and looked for other employment in anticipation of being discharged by Cochrane. Plaintiff allegedly was offered employment with Pem-Kay Furniture Company (Pem-Kay) as a traffic manager in March of 1990. He contends that he turned down the offer with Pem-Kay based on an oral promise from defendant that he would have continued employment with Cochrane. Plaintiff was discharged from employment by defendant on 18 May 1990 and thereafter, filed a suit alleging wrongful discharge and breach of an employment contract based on the alleged oral promise. Defendant answered and moved for summary judgment. The trial court granted defendant's motion based upon a finding that the plaintiff "at most, [had] an employment agreement for an indefinite term and that his foregoing another job offer [did] not come within the public policy or special consideration exceptions to the employment at will doctrine." Plaintiff appealed.

By plaintiff-appellant's sole assignment of error, he contends that the trial court erred in granting the defendant's motion for summary judgment.

On a motion for summary judgment, the movant must show that based upon the pleadings, discovery documents and affidavits, there are no genuine issues of triable fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule

56; *Bolick v. Townsend Co.*, 94 N.C. App. 650, 381 S.E.2d 175, *disc. rev. denied*, 325 N.C. 545, 385 S.E.2d 495 (1989). All evidence is viewed in the light most favorable to the non-movant. *McLaughlin v. Barclays American Corp.*, 95 N.C. App. 301, 304, 382 S.E.2d 836, 838, *cert. denied*, 325 N.C. 546, 385 S.E.2d 498 (1989). The issue before us then is whether the evidence taken in a light most favorable to Mr. McMurry was sufficient to establish any genuine issue of material fact. We hold that, as a matter of law, it was not.

Defendant contends that the plaintiff at most had an employment contract for an indefinite term and thus was terminable at will. Plaintiff argues however, that he falls within two exceptions to the terminable at will doctrine: 1) the public policy exception; and 2) the additional consideration exception.

[1] The well-settled rule in this state is that "in the absence of an employment contract for a definite period, both employer and employee are generally free to terminate their association at any time and without any reason," *Salt v. Applied Analytical, Inc.*, 104 N.C. App. 652, 655, 412 S.E.2d 97, 99 (1991), *disc. rev. denied*, 331 N.C. 119, 415 S.E.2d 200 (1992) (citing *Still v. Lance*, 279 N.C. 254, 182 S.E.2d 403 (1971)), or for an irrational or arbitrary reason. *Id.*; *Coman v. Thomas Mfg. Co., Inc.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989). The burden to establish the specific duration of the employment contract lies with the employee. *Rosby v. General Baptist State Convention*, 91 N.C. App. 77, 80, 370 S.E.2d 605, 608, *disc. rev. denied*, 323 N.C. 626, 374 S.E.2d 590 (1988) (citing *Freeman v. Hardee's Food Systems, Inc.*, 3 N.C. App. 435, 165 S.E.2d 39 (1969)).

This general rule has become subject to two specific and strictly defined exceptions. Our Supreme Court, in *Coman*, carved out a public policy exception to the employment at will doctrine for employees who have been wrongfully discharged for an unlawful reason or for a reason which offends the public good. 325 N.C. 172, 381 S.E.2d 445. In *Coman*, plaintiff's employer wanted him to operate a truck in violation of federal law and falsify federally required records. Upon finding these actions offensive to the public policy of North Carolina, the Court stated, "there can be no right to terminate [a contract at-will] for an unlawful reason or purpose that contravenes public policy." *Id.* at 175, 381 S.E.2d at 447 (quoting *Sides v. Duke University*, 74 N.C. App. 331, 342, 328 S.E.2d 818, 826, *disc. rev. denied*, 314 N.C. 331, 333 S.E.2d 490 (1985)). Public

policy was defined as "the principle of law which holds that no citizen can lawfully do that which has a tendency to be injurious to the public or against the public good." *Id.* at 175 n.2, 381 S.E.2d at 447 n.2 (citation omitted). In *Sides*, this Court reinstated a wrongful discharge claim based on allegations that the plaintiff was discharged from her employment for her refusal to testify untruthfully or incompletely in a court action against her employer. Both *Coman* and *Sides* involved allegations that the employer affirmatively instructed the employee to violate the law. In both cases, our courts focused on the unlawful nature of the instructions and the potential harm to the public if those instructions were followed. This case does not present the same type of public policy implications.

Plaintiff's allegations of a public policy violation in the subject case are essentially based on the premise that Cochrane made a promise in bad faith to continue plaintiff's employment, in order to comply with federal plant closing regulations. To date, our courts have refused to recognize an independent "bad-faith" exception to the employment at will doctrine. *Salt*, 104 N.C. App. at 662, 412 S.E.2d at 103; *see also Amos v. Oakdale Knitting Co.*, 331 N.C. 348, 416 S.E.2d 166 (1992); *Thompkins v. Allen*, 107 N.C. App. 620, 421 S.E.2d 176 (1992); *Howell v. Town of Carolina Beach*, 106 N.C. App. 410, 417 S.E.2d 277 (1992). Rather, any allegations of bad faith must rise to the level of a public policy violation. *See Thompkins*, 107 N.C. App. 620, 421 S.E.2d 176 (where plaintiff's employer altered inventory records and then used those records to discharge plaintiff, this Court held that while the evidence tended to show bad faith, not to be condoned, such behavior did not rise to the level of a public policy concern). Plaintiff does not allege that he was instructed to perform any unlawful activity or that any unlawful activity occurred, but rather, that defendant's behavior constituted bad faith. Assuming *arguendo* that plaintiff's allegations are true, that he was retained by defendant in an effort to avoid violation of federal plant closing regulations, and that this behavior constituted bad faith, we do not find defendant's behavior sufficient to rise to the level of a public policy violation.

[2] Plaintiff contends that even if his case does not fall within the public policy exception to the employment at will doctrine, it does meet the requirements of the "additional consideration" exception. He argues specifically, that his act of turning down the offer of employment from Pem-Kay based on defendant's promise of continued employment, constituted special consideration in

addition to the usual obligation of service and thereby created a binding contract of employment.

The "additional consideration" exception to the employment at-will doctrine was established by this Court in *Sides v. Duke University*, 74 N.C. App. 331, 328 S.E.2d 818. The plaintiff in *Sides* moved from Michigan to Durham based on assurances from Duke that she could be discharged only for "incompetence." In recognizing the exception, this Court stated:

> Generally, employment contracts that attempt to provide for permanent employment, or "employment for life," are terminable at will by either party. Where the employee gives some special consideration in addition to his services, such as relinquishing a claim for personal injuries against the employer, removing his residence from one place to another in order to accept employment, or assisting in breaking a strike, such a contract may be enforced.

Id. at 345, 328 S.E.2d at 828 (quoting *Burkhimer v. Gealy*, 39 N.C. App. 450, 454, 250 S.E.2d 678, 682, *disc. rev. denied*, 297 N.C. 298, 254 S.E.2d 918 (1979)). The Court went on to hold that the plaintiff's move from Michigan was sufficient additional consideration to establish a binding employment contract under which she could not be discharged for reasons other than unsatisfactory performance. However, subsequent cases have narrowly construed the additional consideration exception and found that moving from one town to another is not always sufficient to constitute additional consideration. *See Salt*, 104 N.C. App. 652, 412 S.E.2d 97 (no additional consideration where plaintiff failed to show that her move from Greenville to accept employment by defendant in Wilmington was induced by assurances concerning the duration of her employment or discharge policies of defendant employer). *See also Buffaloe v. United Carolina Bank*, 89 N.C. App. 693, 366 S.E.2d 918 (1988) (Plaintiff's move from Charlotte to Lumberton for a promotion based on defendant employer's promise that employee would be fired only for "illegal, immoral or unethical conduct" did not create a binding contract because employer's promise was nothing more than gratuitous).

Thus, while plaintiff may have received a contract for permanent employment, where there is no "additional expression as to duration, a contract for permanent employment implies an indefinite general hiring, terminable at will." *Humphrey v. Hill*, 55 N.C. App.

359, 362, 285 S.E.2d 293, 295 (1982) (quoting *Malever v. Kay Jewelry Co.*, 223 N.C. 148, 149, 25 S.E.2d 436, 437 (1943)). To change the nature of such a contract, the employee must provide some additional consideration beyond the obligation to perform services. *Tuttle v. Kernersville Lumber Co.*, 263 N.C. 216, 219, 139 S.E.2d 249, 251 (1964). Our courts have not to date recognized the failure to accept a tentative offer of alternative employment as sufficient additional consideration to create a binding contract. With regard to this specific situation, this Court has previously stated, and we agree that:

> [t]hough the giving up of present or future jobs may be a detriment to the employee, it is also an incident necessary to place him in a position to accept and perform the contract. The abandonment of other activities and interest is "a thing almost every desirable servant does upon entering a new service, but which, of course, cannot be regarded as constituting any additional consideration to the master."

Humphrey, 55 N.C. App. at 362-63, 285 S.E.2d at 296 (plaintiff's failure to accept a tentative offer of employment elsewhere based on employer's promise of continued employment was insufficient to create an enforceable contract, where the period of time for continued employment was too indefinite and the plaintiff's waiver of his right to pursue other employment did not constitute sufficient consideration). *See also Tuttle*, 263 N.C. 216, 139 S.E.2d 249 (rejecting employee's contention that contract was for life).

In the subject case, plaintiff contends that upon seeking assurances of job security, he was told by a supervisor with defendant's company that he would have a job with defendant for "as long as [he] want[ed] it and as long as [his] job performance [was] adequate." Plaintiff admits however that he was not given a specific date of termination, but "assumed" that he could work for defendant "indefinitely."

These assurances may provide an offer for permanent employment, but provide no specific terms or conditions. As in *Buffaloe*, this defendant provided nothing more than a gratuitous promise of continued employment. Moreover, as in *Salt*, plaintiff can show no more than an offer of employment for an undetermined time. Plaintiff's failure to accept a tentative offer of employment elsewhere in return for defendant's gratuitous offer of continued employment for an indefinite period was therefore not sufficient additional con-

sideration to create an enforceable and binding contract and remove this case from the employment at will doctrine.

The trial court's order of dismissal is therefore

Affirmed.

Judges Cozort and Greene concur.

IN THE MATTER OF THE WILL OF OLA TURNER PRINCE

No. 9118SC1234

(Filed 16 February 1993)

1. **Wills § 21.4 (NCI3d)— caveat proceeding—undue influence—insufficient evidence**

Caveators' evidence was insufficient to warrant submission to the jury of an issue of undue influence by propounder where it tended to show that testatrix was old and at times suffered a memory loss; propounder, testatrix's brother, assisted testatrix with some of her affairs after the death of testatrix's husband; propounder's former daughter-in-law made an appointment at testatrix's request for testatrix to discuss the preparation of her will with an attorney; propounder drove testatrix to see the attorney and was present at her conference with the attorney; testatrix did not provide in her will for her illegitimate son and her two grandchildren; on occasions testatrix expressed to others that she was afraid of propounder; and propounder was a beneficiary under her will.

Am Jur 2d, Wills § 151.

2. **Wills § 19 (NCI3d)— caveat proceeding—exclusion of document in testatrix's handwriting—remoteness—probative value outweighed by prejudice**

The trial court in a caveat proceeding did not abuse its discretion in excluding a document handwritten by the testatrix fifteen years prior to the execution of her will when it was offered by caveators to prove testatrix's state of mind because it was remote in time, failed to specify to whom it referred,

and failed to show a susceptibility of testatrix to propounder's influence, and its probative value was substantially outweighed by its danger of prejudice.

Am Jur 2d, Wills § 152.

Appeal by respondent-caveator, Edna Jacqueline Prince Griffin, from judgment entered 10 June 1991 by Judge Thomas W. Seay, Jr., in Guilford County Superior Court. Heard in the Court of Appeals 12 November 1992.

Boddie & Bolton, by John H. Boddie, for respondent-caveator Edna Jacqueline Prince Griffin.

J. Sam Johnson, Jr., for petitioner-propounder Doyle Turner.

JOHNSON, Judge.

Respondent's appeal is from a judgment based upon a jury verdict that the paper writing offered for probate by the propounder, William Doyle Turner, Sr., was the last will and testament of Ola Turner Prince. Caveats were originally filed by respondents Edna J. Prince Griffin and Elbert Wayne Williams. Respondent, Edna J. Prince Griffin, gave written notice of appeal on 5 July 1991.

At the 5 June 1991 trial, propounder's evidence tended to show that: In 1988, testatrix lived alone and for the most part took care of herself and handled her own business affairs. During the summer of 1988, testatrix decided to change her will and on 25 July 1988, she visited the Guilford County office of attorney Sam Johnson to have a will prepared. On this visit, attorney Johnson met with testatrix for about one and one half hours. In addition to giving attorney Johnson the pertinent information to prepare her will, testatrix told the attorney her age, birth date, address, telephone number, the profession from which she retired, the date of her husband's death, the fact that her deceased husband is the biological father of respondent Edna, that she is the adopted mother of Edna, and that the adoption took place in Guilford County, North Carolina.

Testatrix gave attorney Johnson a copy of her prior will of 1987 and directed him to refer to the specific legacies contained therein for the purpose of placing those same legacies in the will he was to prepare. Testatrix returned to attorney Johnson's office on 28 July 1988 and confirmed the contents of the will. On 29

July 1988, testatrix returned and properly executed the will. Propounder accompanied testatrix to the attorney's office only on 29 July 1988. He drove her there at her request; however, he never sat in on a conference with testatrix and her attorney. Each time attorney Johnson met with testatrix, he conferenced with her alone.

The beneficiaries in the will of 29 July 1988 are: respondent Edna J. Prince Griffin, testatrix's sister Alice M. Turner, testatrix's brothers Lemuel Turner and propounder William Doyle Turner. Respondent Griffin was to receive testatrix's automobile, the property at 1511 Lincoln Street with its contents and furnishings, and the real property in Hopewell, Virginia. The property at 1010 Logan Street was to be placed in trust for the life of Alice, with the remainder to propounder and Lemuel; the property in Lee County was to go to the survivors of propounder, Lemuel and Alice; and the residue of the estate was to go to propounder, Lemuel and Alice.

Respondent's evidence tended to show that: During the summer of 1988, testatrix, seventy-six years old, suffered from various episodes of confusion and memory loss. Some of testatrix's confusion may have been due to her medication. Testatrix lived alone and for the most part, cared for herself and took care of her own affairs. Occasionally, she would get lost driving within the neighborhood. In September 1988, she was diagnosed as having a mental disorder called dementia. She was afraid of propounder, her brother, who visited her on regular basis. At times she was of the opinion that he was stealing property from her.

On 29 July 1988, testatrix visited the office of attorney Sam Johnson for the purpose of having a will prepared. She was accompanied by the propounder and propounder's former daughter-in-law, Elvira S. Turner. Elvira made the appointment with the attorney at testatrix's request. At the attorney's office, testatrix identified her property and named the relatives that she wanted to receive property in her will. Testatrix's illegitimate son, Elbert Wayne Williams, received nothing in her will. Elbert, a drifter, seldom contacted any of the family members and whenever he did contact a family member, it was usually when he needed money. Propounder and Elvira sat in the conference with testatrix and attorney Johnson on 29 July 1988. In that conference, propounder expressed concern over testatrix's intent to leave certain property to her daughter, respondent Edna J. Prince Griffin, and to testatrix's sister, Alice M. Turner. Despite propounder's expressed concern, testatrix in-

structed attorney Johnson as to various provisions she wanted to make in her will for her daughter, her sister and other relatives.

At the close of the evidence presented, the jury returned the following verdicts: (1) that at the time of the signing and executing the paper writing dated July 29, 1988, Ola Turner Prince had sufficient mental capacity to make and execute a valid last Will and Testament and (2) that the paper writing dated July 29, 1988, was in every part thereof, the Last Will and Testament of Ola Turner Prince.

[1] By her first assignment of error, respondent contends the trial court erred in denying respondent's request to instruct the jury on the issue of undue influence.

In a caveat proceeding, the burden of proof is upon the propounder to prove that the instrument in question was executed with proper formalities required by law. "Once this has been established, the burden shifts to the caveator to show by the greater weight of the evidence that the execution of the instrument was procured by undue influence." *In re Andrews*, 299 N.C. 52, 54, 261 S.E.2d 198, 199 (1980). It is our duty, on review of this first assignment of error, to consider all of the evidence in the light most favorable to the caveators, deem their evidence to be true, resolve all conflicts in their favor and give the caveators the benefit of every reasonable inference to be drawn in their favor. *Id.*

For the influence to be undue:

> [T]here must be something operating upon the mind of the person whose act is called in judgment, of sufficient controlling effect to destroy free agency and to render the instrument, brought in question, not properly an expression of the wishes of the maker, but rather the expression of the will of another. It is the substitution of the mind of the person exercising the influence for the mind of the testator, causing him to make a will which he otherwise would not have made. (citations omitted).

In re Will of Kemp, 234 N.C. 495, 498, 67 S.E.2d 672, 674 (1951).

Our Supreme Court has enumerated seven factors that are probative on the issue of undue influence:

1. Old age and physical and mental weakness.

2. That the person signing the paper is in the home of the beneficiary and subject to his constant association and supervision.

3. That others have little or no opportunity to see him.

4. That the will is different from and revokes a prior will.

5. That it is made in favor of one with whom there are no ties of blood.

6. That it disinherits the natural objects of his bounty.

7. That the beneficiary has procured its execution.

In re Will of Mueller, 170 N.C. 28, 30, 86 S.E. 719, 720 (1915).

In the case at hand, respondent contends that sufficient evidence was presented to support factors (1), (2), (4), (6), and (7) enumerated above to warrant submission of an issue of undue influence:

(1) During 1988, testatrix was mentally weak and suffered episodic confusion and loss of memory. She was on medication and had good days and bad days as far as remembering things. She was seventy-five years of age on 29 July 1988 when the will was executed. In September 1988, she was diagnosed as having a mental disorder of dementia.

(2) Propounder lived in Sanford, North Carolina and testatrix lived in Greensboro, North Carolina. After testatrix's husband died, testatrix would call upon propounder to drive her various places and to assist her with some of her affairs. During 1986, he saw testatrix at least twice each week. On occasions, propounder visited testatrix in her home without testatrix having invited him. After July 1988, testatrix only called upon propounder once or twice per month to help her. Testatrix expressed to others that she was afraid of propounder and that she thought he was taking some of her property.

(4) Testatrix had made prior wills, one in 1982 and one in 1987. Respondent was familiar with the 1982 and 1987 wills. The 1987 will left property to her and to propounder. She did not remember if the will contained any other devises.

(6) The 1988 will made no provision for testatrix's son, Elbert Wayne Williams, nor for her two grandchildren Olivia and Elizabeth Griffin.

(7) Propounder's former daughter-in-law made the appointment with the attorney for testatrix. She and the testatrix were driven to the attorney's office by propounder. Propounder told the attorney that they brought testatrix there at her request. Propounder was present during the discussions with the attorney, and asked testatrix why she wanted to leave the Logan Street property to her sister Alice.

The test for determining the sufficiency of the evidence of undue influence is usually stated as follows:

> [i]t is generally proved by a number of facts, each one of which standing alone may have little weight, but taken collectively may satisfy a rational mind of its existence. (citations omitted).

In re Andrews, 299 N.C. at 55, 261 S.E.2d at 200.

We do not believe respondent presented sufficient evidence of undue influence to have warranted submission of such an issue to the jury. Evidence that testatrix was old and at times suffered with memory loss; that propounder, testatrix's brother, assisted testatrix with some of her affairs after testatrix's husband's death; that propounder's former daughter-in-law at testatrix's request made the appointment with the attorney; that propounder drove testatrix to see her attorney and sat in the conference she had with her attorney; that testatrix did not make provisions in her will for her illegitimate son and her two grandchildren; that on occasions testatrix has expressed to others that she was afraid of propounder; and that propounder was a beneficiary under the will, are insufficient factors to support an inference of undue influence. This evidence fails "to support an inference that the will was the result of an overpowering influence exerted by propounder of testatrix which overcame testatrix's free will and substituted for it the wishes of propounder, so that testatrix executed a will that she otherwise would not have executed." *In re Coley*, 53 N.C. App. 318, 324, 280 S.E.2d 770, 774 (1981). This assignment of error is overruled. The trial judge correctly charged the jury on the proper issues.

[2] Respondent also contends that the trial court erred in its exclusion of respondent's exhibit #2 because it was relevant and material. We find this argument to be meritless.

"Although relevant, evidence may be excluded if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury, or by considerations of undue delay, waste of time, or needless presentation of cumulative evidence." North Carolina General Statutes § 8C-1, Rule 403 (1988).

The paper in question is a three-page document which respondents wished to enter into evidence to prove the state of mind of the testatrix. Although in the testatrix's handwriting, the document had the date of 17 October 1974 listed on the first page, fifteen years prior to the execution of the will; did not indicate it was addressed to anyone; spoke of a "relative" that was never named in the document; and did not describe anyone, except to refer to the person as "he".

Because the document was remote in time, failed to specify to whom the document was referring, and failed to definitely show a susceptibility of propounder to influence testatrix, its probative value is substantially outweighed by its danger of prejudice. The trial court properly exercised its discretion in excluding the evidence. We, therefore, affirm.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. CHARLIE ANDERSON McBRIDE, JR.

No. 9119SC994

(Filed 16 February 1993)

1. Automobiles and Other Vehicles § 790 (NCI4th)— murder—driving while impaired—evidence of malice—sufficient

There was sufficient evidence of malice in a second degree murder prosecution arising from an automobile accident where defendant drove his car knowing that his license was permanently revoked, indicating that he acted with a mind without regard for social duty and with recklessness of consequences; the fact that defendant used false license tags and lied to

inspection personnel to obtain an inspection sticker indicates a mind deliberately bent on mischief; and defendant's driving while substantially impaired after prior convictions for driving while impaired and while his license was revoked manifests a mind utterly without regard for human life and social duty.

Am Jur 2d, Automobiles and Highway Traffic §§ 340-344.

Alcohol-related vehicular homicide: nature and elements of offense. 64 ALR4th 166.

2. Evidence and Witnesses § 339 (NCI4th)— driving while impaired—second degree murder—prior driving convictions and false statements—admissible to show malice

The trial court did not err in a second degree murder prosecution arising from an automobile accident by allowing the State to present evidence of defendant's prior driving convictions and a false statement made to an inspection station a month earlier that his car was owned by his son's automobile business. The State offered the evidence to show the requisite mental state for a conviction of second-degree murder, not to show defendant's propensity to commit the crime.

Am Jur 2d, Automobiles and Highway Traffic § 368; Evidence §§ 320, 321, 324.

3. Appeal and Error § 317 (NCI4th)— murder—closing argument—not transcribed—issue not preserved for appeal

There was no prejudicial error in a second degree murder prosecution arising from an automobile collision where defendant contends that the court should not have allowed the State to argue that evidence which had been admitted for a limited purpose could be considered for another purpose, but failed to record or transcribe opposing counsel's closing argument for review. The Court of Appeals may not speculate as to prejudicial error when defendant fails to preserve an issue for review.

Am Jur 2d, Appeal and Error §§ 624, 625.

4. Criminal Law § 1098 (NCI4th)— murder—automobile accident—prior convictions as evidence of malice—improperly used as aggravating factor

The trial court erred in a second degree murder prosecution arising from an automobile accident by finding prior

convictions as an aggravating factor when those convictions were offered by the State as proof of malice. N.C.G.S. § 15A-1340.4(a)(1)o.

Am Jur 2d, Appeal and Error §§ 515, 516.

Appeal by defendant from judgment entered 3 May 1991 in Rowan County Superior Court by Judge Howard R. Greeson, Jr. Heard in the Court of Appeals 11 January 1993.

Defendant was indicted by the Rowan County grand jury for second-degree murder, driving while impaired in violation of G.S. § 20-138.1, driving while license permanently revoked in violation of G.S. § 20-28, and illegal transportation of spirituous liquor in violation of G.S. § 18B-401. The State's evidence at trial tended to establish the following factual circumstances.

On the night of 28 December 1987, three high school students were traveling down Faith Road within the posted speed limit at approximately 10:30 p.m. As they approached a hill, one boy saw lights from an approaching car weaving in and out of their lane. As they came closer to the car, the headlights remained in the wrong lane, facing them head on. When the driver saw the headlights in his lane, he turned the steering wheel to the right, in an attempt to avoid the collision. Despite the maneuver, the two cars collided. Brad Michael Patrick, one of the high school students involved, died as a result of the collision.

Immediately after the accident, witnesses noticed defendant exit the driver's side of his car. He had a strong odor of alcohol about him and slurred speech. When questioned by police, defendant denied having driven the car and told the officer that the driver had run away after the accident.

At the hospital, defendant underwent a blood alcohol test revealing an alcohol concentration of .183 grams of alcohol per 100 milliliters of blood. Upon investigation of the scene, the police found a broken vodka bottle on the passenger side floorboard of defendant's vehicle and a second vodka bottle on the road under the driver's side door. Defendant had been convicted of driving while impaired in 1981, 1982, and driving while license revoked in 1982, 1984 and 1986. The evidence at trial indicated defendant was driving while his license was permanently revoked the night of the collision. Defendant had also lied about the ownership of his car in order

to obtain an inspection sticker and had placed illegal license tags on the car.

At trial, the jury returned guilty verdicts for second-degree murder, driving while impaired, driving while license permanently revoked, and illegal transportation of spirituous liquor. Defendant was then sentenced to a prison term of life for second-degree murder plus four years for the other offenses. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Linda Anne Morris, for the State.

Glover & Petersen, P.A., by James R. Glover and Ann B. Petersen, for defendant-appellant.

WELLS, Judge.

Defendant sets forth three assignments of error for our review. First, defendant contends the trial court erred in failing to dismiss the second-degree murder charge because the State's evidence was insufficient to support a conviction. Second, defendant challenges the court's admission of certain evidence of bad character as proof of malice and its giving leave to the State to argue in closing that evidence of bad character tended to show defendant acted with malice. Finally, defendant argues that the trial court erred by improperly relying on factors prohibited by the Fair Sentencing Act as a basis for imposing a life sentence for the offense of second-degree murder.

[1] Defendant contends the court erred in failing to grant defendant's motion to dismiss because the State's evidence was insufficient to establish malice, proof of which is essential to support a charge of second-degree murder. We disagree.

Second-degree murder is the unlawful killing of a human being with malice but without premeditation and deliberation. *State v. Robbins*, 309 N.C. 771, 309 S.E.2d 188 (1983). What constitutes proof of malice will vary depending on the factual circumstances in each case. North Carolina courts have recognized at least three kinds of malice:

> One connotes a positive concept of express hatred, ill-will or spite, sometimes called actual, express, or particular malice. Another kind of malice arises when an act which is inherently dangerous to human life is done so recklessly and wantonly

> as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief. Both these kinds of malice would support a conviction of murder in the second degree. There is, however, a third kind of malice which is defined as nothing more than "that condition of mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification."

State v. Reynolds, 307 N.C. 184, 297 S.E.2d 532 (1982) (citations omitted.)

Our Court in *State v. Snyder*, 66 N.C. App. 358, 311 S.E.2d 379 (1984), applied the first and third definitions of malice to facts similar to the case at hand. In that case, defendant, while operating his vehicle in an impaired state, drove onto the highway at an excessive rate of speed and ultimately struck a car, killing three passengers. Upon reviewing the record, we found no evidence of malice consisting of hatred, ill-will or spite, nor did we find defendant to possess the "condition of the mind which prompts a person to take the life of another intentionally without just cause, excuse, or justification." *See State v. Snyder, supra.* The North Carolina Supreme Court reversed our decision, finding that we applied an inappropriate standard for determining the presence of malice in the context of motor vehicle death. *State v. Snyder*, 311 N.C. 391, 317 S.E.2d 394 (1984).

Following our Supreme Court's mandate, the test here is whether, from the facts presented, malice arose from "an act which is inherently dangerous to human life [and which] is done so recklessly and wantonly as to manifest a mind utterly without regard for human life and social duty and deliberately bent on mischief." *Reynolds, supra.* We find the evidence adduced at trial as set forth herein was sufficient to support a finding of malice.

Defendant drove his car knowing that his license was permanently revoked, indicating defendant acted with a mind without regard for social duty and with "recklessness of consequences." *State v. Byers*, 105 N.C. App. 377, 413 S.E.2d 586 (1992). The fact that defendant used false license tags and lied to inspection personnel to obtain an inspection sticker indicates a mind deliberately "bent on mischief." *Id.* Defendant's driving while substantially impaired after prior convictions for driving while impaired and driving while his license was revoked manifests "a mind utterly without regard for human life and social duty." *Reynolds, supra.*

Because such evidence supports a finding of malice sufficient for a conviction of second-degree murder, we find the trial court properly submitted the charge of second-degree murder to the jury.

[2] Defendant's second assignment of error is divided into two related arguments. First, defendant contends that the court erred by allowing the State to present evidence of defendant's prior driving convictions and of defendant's false statement made to an inspection station a month earlier that his car was owned by his son's automobile business, on the theory that it was evidence of malice. Defendant argues that prior conduct cannot be evidence of malice on the day of a fatal accident and is nothing more than improper evidence of bad character.

Our Court has held that prior conduct such as prior convictions and prior bad acts will be admissible under Rule 404(b) of the North Carolina Rules of Evidence as evidence of malice to support a second-degree murder charge. *See Byers, supra.* Where the State offers such evidence, not to show defendant's propensity to commit the crime, but to show the requisite mental state for a conviction of second-degree murder, admission of such evidence is not error. *Id.*

[3] Defendant next asserts that the court should not have given opposing counsel leave to argue that the evidence of bad character tended to show malice where the court had previously restricted the basis for admission of certain evidence. Specifically, defendant argues that when evidence is admissible for only a limited purpose, it is improper and prejudicial error for the State to argue in closing that it should be considered by the jury for another purpose. While this is a proper assessment of the law in North Carolina, we cannot review this assignment of error on its merits because defendant failed to record or transcribe opposing counsel's closing argument for review. When defendant fails to properly preserve an issue for review, our Court may not speculate as to any prejudicial error. *State v. Arnold*, 314 N.C. 301, 333 S.E.2d 34 (1985). Based on the record before us, we can find no prejudicial error and therefore overrule defendant's second assignment of error.

[4] Finally, defendant asserts that the trial court abused its discretion and improperly relied upon factors prohibited by the Fair Sentencing Act in imposing the maximum penalty—life imprisonment—for the offense of second-degree murder. The Fair

Sentencing Act, N.C. Gen. Stat. § 15A-1340.4, prohibits a court from considering certain factors in aggravating a crime covered by the Act. Generally, "a conviction may not be aggravated by prior convictions of other crimes which could have been joined for trial or by a contemporaneous conviction of a crime actually joined by or acts which form the gravamen of these convictions." *State v. Hayes*, 323 N.C. 306, 372 S.E.2d 704 (1988); N.C. Gen. Stat. § 15A-1340.4(a)(1)o. Furthermore, "evidence used to prove an element of a crime may not also be used to prove a factor in aggravation of that same crime." *Id.*; N.C. Gen. Stat. § 15A-1340.4(a)(1). Here, the trial court found one aggravating factor, prior convictions for criminal offenses punishable by more than 60 days confinement, and no mitigating factors. The State relied on these prior convictions in its case as proof of malice. Evidence offered at trial to prove malice, an element of second-degree murder, cannot be the basis for aggravating that crime. *See State v. Withers*, 311 N.C. 699, 319 S.E.2d 211 (1984) (prior convictions may be considered as an aggravating factor where prior convictions were not used to establish an element of the crime charged). *See also State v. Blackwelder*, 309 N.C. 410, 306 S.E.2d 783 (1983). Because defendant's prior convictions were offered by the State as proof of malice, the trial court's consideration of such convictions as a factor in aggravation was error.

We therefore vacate the sentence imposed for second-degree murder and remand for resentencing.[1]

No error in the trial; remand for resentencing on second-degree murder.

Judges COZORT and LEWIS concur.

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1. For purposes of resentencing, we also note that defendant's contemporaneous conviction for driving while license revoked may not be considered a factor in aggravation as it was a joined offense. N.C. Gen. Stat. § 15A-1340.4(a)(1)o.

CLARK TRUCKING OF HOPE MILLS, INC. v. LEE PAVING COMPANY

No. 9212SC148

(Filed 16 February 1993)

1. **Quasi Contracts and Restitution § 2.1 (NCI3d)— unjust enrichment—use of subcontractor's bid to win contract—subcontractor not used on project**

The trial court did not err by granting summary judgment for defendant, a general contractor, on plaintiff subcontractor's claim for unjust enrichment arising from defendant's failure to use plaintiff's services after including plaintiff's bid in the general contractor's bid on a road project. Plaintiff rendered no services to defendant, and subcontractor's bids in North Carolina are not viewed as sufficient consideration to support an implied contract between the contractor and subcontractor.

Am Jur 2d, Restitution § 3.

2. **Unfair Competition § 1 (NCI3d)— unfair trade practices—use of subcontractor's bid to win project—subcontractor not used on project**

The trial court did not err by granting summary judgment for defendant prime contractor in an action arising from a road construction project where plaintiff alleged unfair trade practices in that plaintiff submitted a bid to defendant as a Minority Business Enterprises (MBE) subcontractor; defendant was required to employ MBEs and Disadvantaged Business Enterprises (DBEs), which includes MBEs; defendant was required to list DBEs included and the total dollar volume in the bid; defendant discovered after winning the bid that it could obtain a better price for stone aggregates from a different quarry; plaintiff quoted a new, higher price, although the distance from both quarries to the job site was essentially the same; and defendant notified plaintiff and DOT that plaintiff would not act as subcontractor for the project. Defendant continued to meet DOT goals even without plaintiff's bid as an MBE, the general contractor is not obligated to award the job to a subcontractor listed in the general bid, and there was no evidence in this case of a contract in a prior agreement as to the bid price and the promise of the work to the subcontractor if the general contractor were awarded the project.

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

3. **Highways, Streets, and Roads § 7 (NCI4th)— highway construction—Minority Business Enterprise included in bid—not included in project—no statutory violation**

There was no violation of N.C.G.S. § 136-28.4 where plaintiff subcontractor, a Minority Business Enterprise, submitted a bid to defendant general contractor for a highway project; defendant included plaintiff's bid in the general bid; defendant discovered after winning the bid that stone aggregate could be obtained at a better price from a different quarry; plaintiff quoted a higher price, although the distance between the quarries and the project was essentially the same; and plaintiff was not included in the project. Although defendant is required by N.C.G.S. § 136-28.4 to use MBEs, an MBE/EEO Contract Compliance Review of this project was conducted by the External EEO Section of DOT and defendant was informed that it was in compliance.

Am Jur 2d, Civil Rights §§ 4, 261.

4. **Contracts § 140 (NCI4th)— highway construction—subcontractor's bid included in general bid—subcontractor not used on project—no contract between prime and sub**

The trial court did not err by concluding that there was no contract between defendant prime contractor and plaintiff Minority Business Enterprises (MBE) subcontractor where plaintiff submitted a bid which defendant included in the successful general bid, but plaintiff was not used on the project. MBEs may secure a contract for performance prior to the bidding process conditioned on the prime contract being awarded to the general contractor.

Am Jur 2d, Contracts §§ 115, 142, 172.

Appeal from order entered 13 September 1991, by Judge George R. Greene in Cumberland County Superior Court. Heard in the Court of Appeals 12 January 1993.

Safran Law Offices, by Perry R. Safran, for plaintiff-appellant.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Robert W. Kaylor, for defendant-appellee.

JOHNSON, Judge.

Plaintiff, Clark Trucking of Hope Mills, Inc. (Clark), instituted this action on 17 October 1990 for restitution in quasi-contract and for damages under North Carolina General Statutes § 75-1.1 (1988). Defendant, Lee Paving Company (Lee), filed for a motion of enlargement of time on 8 November 1990, and answered on 10 December 1990. On 29 August 1991, defendant filed a motion for summary judgment. On 13 September 1991, summary judgment was granted in defendant's favor. Plaintiff appeals.

On 17 April 1990, the North Carolina Department of Transportation (DOT) accepted bids on Project 8.T521201F-67-2(27) which is located at US-421 Bypass from north of US-64 to south of US-421 Business near Siler City. The Project is a public job which requires the employment of Disadvantaged Business Enterprises (DBE), which also include Minority Business Enterprises (MBE). Clark is a MBE under North Carolina law.

On or before 17 April 1990, Clark was asked by Lee to submit a bid for the hauling of stone aggregates from Martin Marietta's Lemon Springs Quarry to the Project. Clark submitted to Lee a bid of $2.60 per ton hauled. On 17 April 1990, Lee submitted a $4,984,713.31 bid to DOT for the Project. Lee attached to the bid the schedule of DBE's that would perform work on the Project, as contractors seeking to bid on DOT contracts are required to list the DBE's and the total dollar volume under the bid in order for the bid to be responsive. Clark was listed as an MBE on Lee's bid and its total volume properly noted.

On 8 May 1990, Lee was awarded the contract for the Project based on the bid submitted on 17 April 1990. While making arrangements for performance under the contract, Lee discovered that it could obtain a better price for stone aggregates from Moncure Quarry. Lee contacted Clark and asked whether Clark's bid was effective in light of the change in quarries. Although the distance from both quarries to the Project job site was essentially the same, Clark quoted a new bid price of $2.75 per ton. Lee then notified Clark and DOT that Clark would not act as subcontractor for the project. In spite of plaintiff's removal from the list of DBE's, Lee maintained sufficient DBE participation on the Project to meet the Special Provisions Goals.

[1] On appeal, plaintiff-appellant brings forth four assignments of error. Appellant first assigns as error the trial court's holding that there was a complete absence of law and fact necessary to support plaintiff's claim for restitution under the theory of unjust enrichment. Clark contends that Lee was unjustly enriched through the use of Clark's subcontractor bid in the general contractor bid. We disagree.

Unjust enrichment is "based upon the equitable principle that a person should not be permitted to enrich himself unjustly at the expense of another. However, this rule does not apply when the services are rendered gratuitously[.]" *Atlantic Coast Line R. Co. v. Highway Commission*, 268 N.C. 92, 96, 150 S.E.2d 70, 73 (1966). Moreover, quantum meruit is an equitable principle that allows for recovery for services based upon an implied contract. In order to recover in quantum meruit, plaintiff must show: (1) that services were rendered to defendants; (2) that the services were knowingly and voluntarily accepted; and (3) that the services were not given gratuitously. *Johnson v. Sanders*, 260 N.C. 291, 132 S.E.2d 582 (1963).

Plaintiff cannot recover on its claim because it has rendered no services to Lee, and subcontractors' bids in this State are not viewed as sufficient consideration to support an implied contract between the contractor and the subcontractor. *See Home Electric Co. v. Hall and Underdown Heating and Air Cond. Co.*, 86 N.C. App. 540, 358 S.E.2d 539 (1987), *aff'd*, 322 N.C. 107, 366 S.E.2d 441 (1988) (Subcontractor's alleged promise to perform duct work for contractor who submitted bid in reliance on promise was not an enforceable contract absent consideration.). In merely submitting his bid,

> the subcontractor does not rely on the general and suffers no detriment. A subcontractor submits bids to all or most of the general contractors that it knows are bidding on a project. The subcontractor receives invitations to bid from some generals and submits bids to others without invitation. The time and expense involved in preparing the bid is not segregated to any particular general. The total cost is part of the overhead of doing business. The same bid is submitted to each general. Thus, whether or not any particular general wins the contract is of little or no concern to the subcontractor.

Holman Erection Co. v. Orville E. Madsen & Sons, Inc., 330 N.W.2d 693, 698 (Minn. 1983).

Summary judgment is proper where there is an absence of law to support the claim made, there is an absence of fact sufficient to support the claim, or there is a disclosure of some fact which will defeat the claim. *Home Electric Co.*, 86 N.C. App. at 540, 358 S.E.2d at 539. In this case, the facts do not support a claim of unjust enrichment nor does the law of this State. This assignment is overruled.

[2] Plaintiff's second assignment of error alleges that there was a genuine issue of material fact in his claim for damages under North Carolina General Statutes § 75-1.1 for unfair trade practices. Plaintiff contends that "Lee unfairly asserted its position by adopting Clark's bid volume and MBE status to gain the prime contract and then changed quarries and refused to contract with Clark." Having reviewed the record, we find no cognizable claim of unfair or deceptive trade practices.

The record shows that even without Clark's bid as an MBE, Lee continued to meet the DOT goals. After Lee discovered that it could obtain stone cheaper at Moncure Quarry, which is essentially the same distance from the Project site as the quarry initially chosen, Lee asked Clark if its bid was still effective. Clark responded that it was not. Defendant-Lee then informed DOT and plaintiff that plaintiff-subcontractor would be replaced. The DOT found that defendant continued to meet the required goals, and no adverse action was taken against defendant. These facts and the surrounding circumstances do not support a claim of unfair trade practice, which is a practice that is immoral, unethical, oppressive, unscrupulous, or substantially injurious to consumers. *Jennings Glass Co. v. Brummer*, 88 N.C. App. 44, 52, 362 S.E.2d 578, 584 (1987), *review denied*, 321 N.C. 473, 364 S.E.2d 921 (1988).

The law also fails to support plaintiff's claim for unfair trade practices. Although a general contractor lists a subcontractor in its general bid, "the general contractor is not obligated to award the job to that subcontractor. The general contractor is still free to shop around between the time he receives the subcontractor's bid and the time he needs the goods or services, to see if he can obtain them at a lower price." *Home Electric Co.*, 86 N.C. App. at 545, 358 S.E.2d at 542.

We also note that plaintiff's reliance on *Bridgeport Restoration Co., Inc. v. A. Petrucci Constr. Co.*, 211 Conn. 230, 557 A.2d 1263 (1989), is misplaced. The *Bridgeport* Court affirmed the award of damages to the subcontractor for breach of contract and unfair and deceptive trade practices where the contractor, who listed the contractor as an MBE and won the bid, sought further adjustments in the subcontract. In *Bridgeport*, "[t]he court specifically found that the plaintiff's president and an authorized agent of the defendant agreed on a bid price of $400,000 in telephone negotiations before the defendant submitted its bid on the contract to the transit district. The court also found that at that point the defendant's project manager told the president of the plaintiff company that if the defendant were awarded the contract the plaintiff would get the subcontract. After the defendant was awarded the contract it sought further adjustments in the subcontract that were refused by the plaintiff. Thereafter, the defendant awarded the subcontract to a different qualified bidder." *Id.* at 231, 557 A.2d at 1264.

The case at bar is distinguishable, because, unlike *Bridgeport*, there is no evidence of a contract in a prior agreement as to the bid price and the promise of the work to the subcontractor if the general contractor were awarded the project. We find no reason to differentiate between Clark's bid as an MBE and any other subcontractor's bid. Both have the ability to protect themselves in the bidding process as did the plaintiff in *Bridgeport*. This assignment is overruled.

[3] Plaintiff's third assignment of error alleges that a genuine issue of material fact exists as to whether defendant's conduct violated North Carolina General Statutes § 136-28.4 (1986), which states that "[i]t is the policy of this State to encourage and promote the use of small, minority, physically handicapped and women contractors in the construction, alteration and maintenance of State roads, streets, highways, and bridges and in the procurement of materials for such projects." We have considered this assignment and find it meritless also.

The DOT, Office of Civil Rights, has in place, written procedures to implement the policy set forth in North Carolina General Statutes § 136-28.4. The document is entitled Program for Participation by Disadvantaged Business Enterprises in the North Carolina Department of Transportation's Federally Assisted Programs (1990).

In a letter dated 18 October 1990, L. Richard Chrisawn, Chief of the External EEO Section of the DOT, informed Lee that on 2 October 1990, an MBE/EEO Contract Compliance Review was conducted on the Project now in issue. The letter indicated that defendant Lee was in compliance with the DOT requirements. Accordingly, we do not find a statutory violation. No error.

[4] By his fourth assignment of error, plaintiff argues that the trial court erred in its conclusion of law that there was no contract between plaintiff and defendant. Further, plaintiff urges this Court to hold that "a contract should exist when the prime bid, that lists the MBE as a sub-contractor, is responsive and accepted by the State unless the sub-bid is not responsive to the plans and specifications embodied in the overall project or the subcontractor is shown to be unreliable or incapable of performing his side of the bargain." We decline to so hold, recognizing the MBE's ability to secure a contract for performance, prior to the bidding process, conditioned upon the prime contract being awarded to the general contractor. We also note that the argument appellant makes is better suited to the legislature of this State. This assignment is overruled.

The decision of the trial court is affirmed.

Judges GREENE and MARTIN concur.

KENNETH E. SMITH AND H. CLARICE SMITH, PLAINTIFFS v. STATE FARM FIRE AND CASUALTY COMPANY, AN ILLINOIS CORPORATION, DEFENDANT

No. 9118SC1030

(Filed 16 February 1993)

Insurance § 724 (NCI4th)— homeowner's policy—installation of new floor—asbestos dust—summary judgment for defendant

The trial court did not err by granting summary judgment for defendant insurance company where asbestos dust was spread throughout plaintiff's house during the removal of existing vinyl flooring; the homeowners sued the company which removed the old floor and installed the new and obtained a judgment which was paid; plaintiffs sued defendant under their

homeowner's policy; and that policy contains a workmanship exclusion. This case involves a homeowner's policy, unlike *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, which involved a commercial policy. A common sense reading of this policy excludes any loss to property caused by faulty workmanship, renovation, or remodeling and does not limit exclusion of damage to work product. The damage here falls into the workmanship exclusion of this policy.

Am Jur 2d, Insurance §§ 461, 504.

Property damage insurance: what constitutes "contamination" within policy clauses excluding coverage. 72 ALR4th 633.

Property damage resulting from inadequate or improper design or construction of dwelling as within coverage of "all risks" homeowner's insurance policy. 41 ALR4th 1095.

Appeal by plaintiffs from judgment entered 9 July 1991 by Judge W. Steve Allen in Guilford County Superior Court. Heard in the Court of Appeals 15 October 1992.

During the summer of 1988 Kenneth and Clarice Smith contracted with Carpets By Direct, Inc. (CBD) to, among other things, install a new vinyl floor in their kitchen. On 4 February 1989 workmen for CBD removed the existing vinyl flooring in the Smith's kitchen and used a belt sander to remove the remaining residual backing from the plywood subfloor. The backing contained asbestos. The sanding caused large amounts of asbestos dust to be spread throughout the Smith's home. Shortly after determining that asbestos dust had been dispersed throughout their home, the Smiths filed a claim against their homeowner's insurance policy issued by State Farm Fire and Casualty Company (State Farm). State Farm denied coverage. The Smiths ultimately hired a licensed asbestos abatement contractor to clean their home and personal property. The cleanup entailed removing the carpeting, drapes, appliances, furnace and the heating and air conditioning ducts. The cleanup also required that the majority of the Smith's personal property be disposed of as hazardous waste.

The Smiths sued CBD for breach of contract and recovered a jury verdict of $50,020 based on damages to real and personal property, loss of use of real and personal property, and for the cost of medical monitoring. CBD paid the Smiths the judgment.

On 2 February 1990 the Smiths sued State Farm under their homeowner's policy. On 16 May 1991 the Smiths made a motion for partial summary judgment seeking resolution of the liability issues. Four days later State Farm filed a cross motion for summary judgment. On 9 July 1991 the trial court denied the Smiths' motion and entered judgment in favor of State Farm.

The plaintiffs appeal.

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

Frazier, Frazier & Mahler, by James D. McKinney, for the defendant-appellee.

EAGLES, Judge.

In their first assignment, appellants argue that the trial court erred by granting the defendant's motion for summary judgment. Specifically, appellants argue that the asbestos damage was a physical loss to property which was not excluded from coverage. We disagree and affirm.

"In interpreting the relevant provisions of the insurance policy at issue, we are guided by the general rule that in the construction of insurance contracts, any ambiguity in the meaning of a particular provision will be resolved in favor of the insured and against the insurance company." *Maddox v. Colonial Life & Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). However,

> [n]o ambiguity . . . exists unless, in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend. If it is not, the court must enforce the contract as the parties have made it and may not, under the guise of interpreting an ambiguous provision, remake the contract and impose liability upon the company which it did not assume and for which the policy holder did not pay.

Waste Management of Carolinas, Inc. v. Peerless Ins. Co., 315 N.C. 688, 694, 340 S.E.2d 374, 379, *reh'g denied*, 316 N.C. 386, 346 S.E.2d 134 (1986) (quoting *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970)). This is so even though "[e]xclusionary clauses are not favored and must be narrowly construed. The court . . . must interpret

the policy as written and may not disregard the plain meaning of the policy's language." *Western World Ins. Co., Inc. v. Rodney Corp.*, 90 N.C. App. 520, 523, 369 S.E.2d 128, 129-30 (1988) (citations omitted). "[T]he goal of construction is to arrive at the intent of the parties when the policy was issued." *C.D. Spangler Constr. Co. v. Industrial Crankshaft & Eng'g Co., Inc.*, 326 N.C. 133, 142, 388 S.E.2d 557, 562-63 (1990) (quoting *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 505, 246 S.E.2d 773, 777 (1978)).

Here, State Farm's policy contains the following language:

SECTION I—EXCLUSIONS

* * *

2. We do not insure for loss to property described in Coverages A and B caused by any of the following. However, any ensuing loss to property described in Coverages A and B not excluded or excepted in this policy is covered.

* * *

c. **Faulty, inadequate or defective:**

(1) planning, zoning, development, surveying, siting;

(2) design, specifications, workmanship, repair, construction, renovation, remodeling, grading, compaction;

(3) materials used in repair, construction, renovation or remodeling; or

(4) maintenance;

of part or all of any property whether on or off the **residence premises.**

Appellants argue that this "workmanship" exclusion is inapplicable "because [they] are seeking to recover only for their ensuing losses and not for any loss directly due to the defective workmanship." In other words, the appellants argue that "[t]he exclusion itself makes a distinction between losses directly due to defective workmanship and those losses ensuing from such defective workmanship." To support their contention, appellants cite *Western World Ins. Co. v. Carrington*, 90 N.C. App. 520, 369 S.E.2d 128 (1988).

"Although it is possible to perceive ambiguity in the policy language, it strains at logic to do so." *Waste Management*, 315

N.C. at 695, 340 S.E.2d at 379. A common sense reading of that language reveals that the first paragraph of the disputed exclusion means that State Farm's policy does not provide coverage for property loss caused by any event listed under paragraph 2. However, the policy does provide coverage for any ensuing loss, one following entry into the contract, which is not excluded. We agree with State Farm's contention that "[t]he exclusion obviously contemplates that the person or company performing the faulty or negligent work should be the ones (sic) responsible for any resulting damages (sic)." Moreover, we note that that is exactly what has happened here. The appellants sued CBD and recovered for the damage caused by the faulty renovation.

Appellants argue, however, that *Western World* explains the difference between "losses directly due to defective workmanship and those losses ensuing from such defective workmanship."

In *Western World*, the defendant Carrington performed waterproofing work as a subcontractor on a building and parking deck project in which the defendant Clancy & Theys was the general contractor. Carrington was insured under a commercial liability insurance policy issued by the plaintiff at the time the waterproofing was performed. After completion of the project water was discovered leaking through the top level of the parking deck. The water caused damage to several cars in the lower deck and some cracking of concrete slabs. Clancy & Theys sued Carrington. Carrington, in turn, called upon the plaintiff to defend the lawsuit. The plaintiff argued that it did not provide coverage for the damage and filed a declaratory judgment action seeking determination of the parties rights under the policy.

On appeal, this court was faced with interpretation of a work product exclusion contained in the policy issued by the plaintiff. The policy exclusion at issue provided that the insurance involved did not apply:

> (o) to property damage to work performed by or on behalf of the named insured arising out of the work or any portion thereof, or out of materials, parts or equipment furnished in connection therewith.

Id. at 522, 369 S.E.2d at 129. In determining that no coverage was provided our Court stated:

> Here, the record shows that the damages sought against Carrington are those costs incurred in replacing his allegedly defective waterproofing system with an effective waterproofing system. Therefore, the claim is excluded from the policy's coverage.
>
> Defendants contend that exclusion (o) does not apply and cite several cases . . . in support of their argument.
>
> * * *
>
> In all of those cases, the damages claimed were for damage to property other than that of the insured, which was caused either by the defective work or product, or the need to repair or replace that work or product. In this case, from the record before us it is clear that Clancy & Theys is not seeking damages for diminution in the structure's value, or costs for repairing the cracking in the concrete, or costs for any damage to its own property caused by the allegedly defective waterproofing. Clancy & Theys only claim is for costs incurred in substituting or replacing the protective functions which Carrington's original waterproofing work should have provided. The damages sought are solely for bringing the quality of the insured's work up to the standard bargained for. Consequently, the policy provides no coverage for the claim.

Western World, 90 N.C. App. at 524-25, 369 S.E.2d at 130-31.

The case *sub judice*, unlike *Western World*, does not involve a commercial liability insurance policy. Rather, it involves interpretation of a homeowner's policy. Moreover, as we indicated above, a common sense reading of paragraph 2 of the State Farm policy does not limit exclusion of damage to work product, but rather excludes any loss to property caused by the faulty workmanship, renovation or remodeling. Accordingly, we hold that *Western World* does not control the instant case.

Having determined that the exclusion does not "itself make[ ] a distinction between losses directly due to defective workmanship and those losses ensuing from such defective workmanship[,]" and that *Western World* does not control this case, we must next determine whether the exclusion specifically covers the situation presented here. The appellants admit in their brief's statement of facts that they contracted to install a new vinyl floor in their kitchen because they were "in the process of renovating their home in order to

sell it the following summer." The asbestos damage occurred while the renovations were taking place and were directly caused by the improper removal of the original vinyl floor. Therefore, the damage falls into subparagraph c.(2) of the "workmanship exclusion" which excludes from coverage damages caused by faulty, inadequate, or defective "design, specifications, *workmanship*, repair, construction, *renovation*, *remodeling*, grading, [or] compaction[.]" (Emphasis ours.)

Because of our disposition of appellants' first assignment of error we do not reach their remaining arguments or assignments.

Affirmed.

Judges ORR and JOHN concur.

VIRGIL LOWRY, PLAINTIFF v. DUKE UNIVERSITY MEDICAL CENTER, STEPHEN PORT, M.D., NORMAN A. SILVERMAN, M.D., DEFENDANTS

No. 9116SC981

(Filed 16 February 1993)

Rules of Civil Procedure § 41.2 (NCI3d)— failure to obey court order regarding discovery and motions—dismissal of affirmative defense—no abuse of discretion

The trial court did not abuse its discretion in a medical malpractice action by striking defendants' affirmative defense based on the statute of limitations where the record clearly shows that defendants repeatedly failed to file a motion for summary judgment, thereby delaying the prosecution of this matter without adequate justification, and the correspondence between the parties' counsel indicates the absence of a misunderstanding. Although defendants argue that there were no findings or conclusions addressing less drastic sanctions, only the affirmative defense of the statute of limitations was stricken, not the entire action. Plaintiff sought the dismissal pursuant to the court's inherent ability to impose fines and sanctions for disobeying a court order, rather than pursuant to N.C.G.S. § 1A-1, Rule 41(b). Rule 41(b) does not apply because no judgment on the merits was rendered.

Am Jur 2d, Limitations of Actions § 470; Summary Judgment § 17.

Comment note—raising statute of limitations by motion for summary judgment. 61 ALR2d 341.

Appeal by defendants-appellants from order entered 10 June 1991 by Judge E. Lynn Johnson, in Robeson County Superior Court. Heard in the Court of Appeals 16 November 1992.

Russ, Worth, Cheatwood & Guthrie, by Rodney A. Guthrie, for plaintiff-appellee.

Newsom, Graham, Hedrick, Bryson & Kennon, by Lewis A. Cheek and Mark E. Anderson, for defendants-appellants.

JOHNSON, Judge.

This action was initially filed by plaintiff, Virgil Lowry, on 27 March 1986, in Robeson County Superior Court. The action was voluntarily dismissed without prejudice pursuant to Rule 41 of the North Carolina Rules of Civil Procedure on 19 October 1987. North Carolina General Statutes § 1A-1, Rule 41 (1990). Plaintiff refiled the action on 18 October 1988, alleging that defendants, Duke University Medical Center, Stephen Port, M.D., and Norman A. Silverman, M.D., were negligent in the insertion of an epicardial pacemaker and that such negligence caused permanent injury to plaintiff.

The trial court's findings adequately set forth the facts in this case.

1. This is an action brought by Plaintiff against Duke University Medical Center, Stephen Port, M.D. and Norman Silverman, M.D. for alleged negligence and medical malpractice arising out of the care and treatment of the Plaintiff while he was a patient at Duke University Medical Center in 1978.

2. A Complaint was filed herein on October 18, 1988, all Defendants were properly served, and all have filed responsive pleadings herein asserting, among other things the affirmative defense of the statute of limitations under G.S. § 1-15(c).

3. An amended discovery order was entered herein on June 25, 1990 by which the parties agreed to file all motions on or before November 29, 1990.

4. This matter was calendared during the September 24, 1990 Session of Robeson County Superior Court for the specific purpose of hearing Defendants' Motion for Summary Judgment based on the alleged defense of the statute of limitations or repose; that at the time of the call of the calendar for the September 24, 1990 Session of Robeson County Superior Court, the Defendants' Motion had not been filed and the motion could not be heard.

5. This matter was calendared by the Court for trial during the February 25, 1991 Session of Robeson County Civil Superior Court, but was continued upon Defendants' request and with the consent of the Plaintiff; that Defendants' counsel represented to the Court at that time that Defendants' Motion for Summary Judgment could be promptly filed and could be heard at any term satisfactory to the Plaintiff and his counsel.

6. This matter appeared on the trial calendar for the term of Court beginning April 1, 1991 before Judge E. Lynn Johnson, with an indication appearing on the written Court calendar that it had been added to the trial calendar at the request of the attorneys though neither of the attorneys had so requested. Upon request of the parties, Judge Johnson removed the case from the trial calendar, and directed that the Motion for Summary Judgment to be filed by the Defendants as soon as possible, and that it would be heard during the week of the April 8, 1991 Session of Robeson County Superior Court. That the attorney for the Defendant understood that the Motion might be heard by Judge Dexter Brooks or by Judge Johnson, but that it was anticipated that it would be heard by someone, somewhere that week. That the said attorney indicated by letter faxed to the attorney for the Plaintiff that he would stand by for further instructions as to the hearing.

7. Defendants' Motion for Summary Judgment was served on April 8, but not filed until April 9, 1991, but was inadvertently not forwarded to the Plaintiff's attorney by facsimile transmission on April 8 along with other materials, and was therefore not received by the Plaintiff's attorney until April 10, 1991, at which time said Motion could not be heard as the Civil Session of Robeson County Superior Court had already adjourned for the week.

8. Defendants, through counsel, have offered no adequate justification for their delay in filing and having their Motion for Summary Judgment directed specifically to the affirmative defense of statute of limitations heard, despite having ample opportunity to do so and despite having been directed to do so by the Court.

9. Proceedings in this case have been delayed as outlined within this Order at the request of counsel for the Defendants and due to his actions or failures to act. It is the opinion of the Court that the Defendants, through counsel, did not attempt to establish the defense of statute of limitations as asserted in their Answer and to seek to obtain summary judgment thereon, on a timely basis and therefore should not be permitted to assert such affirmative defense within the present action.

10. The conduct of the Defendants, through counsel, unduly delayed this action and said conduct should be remedied by the imposition of sanctions.

UPON THE FOREGOING FINDINGS OF FACT, THE COURT CONCLUDES AS A MATTER OF LAW:

1. That Defendants, through counsel, have failed to timely file and serve a Motion for Summary Judgment based upon the defense of the statute of limitations, and have therefore failed to exercise diligence in the assertion of that affirmative defense.

2. That Defendants' affirmative defense based upon the statute of limitations should be stricken.

On appeal, defendants-appellants, bring forth one assignment of error, arguing that "the trial court abused its discretion in striking defendants' affirmative defense where counsel was at all times acting in good faith and in compliance with what he understood to be the directives of the court." Defendants also argue that the order must be vacated as a matter of law because the trial court made no findings of fact or conclusions of law which address whether less drastic sanctions would best serve the interests of justice. We disagree, finding no abuse of discretion and no requirement that findings of fact or conclusions of law addressing less drastic sanctions be made under the facts of the instant case.

In order to vacate the order entered by the trial court in the case *sub judice*, this Court must find that the trial court abused its discretion in striking the appellants' affirmative defense. Defendants-appellants have the burden of proving abuse of discretion by the trial court; therefore, they must clearly show that the court acted capriciously or arbitrarily, without regard for the facts and circumstances presented. *See generally Skyes v. Blakey*, 215 N.C. 61, 200 S.E. 910 (1939). If, however, there is competent evidence to support the findings of the trial court, they are binding on appeal although there may be evidence to the contrary. *See Church v. Church*, 27 N.C. App. 127, 218 S.E.2d 223, *cert. denied*, 288 N.C. 730, 220 S.E.2d 350 (1975). Careful review of the record in the case at bar reveals adequate evidence supporting the trial court's findings of fact and conclusions of law.

This action was filed in Robeson County on 18 October 1988, having been previously dismissed without prejudice by plaintiff less than a year earlier. After defendants filed their answer, Judge Britt entered a discovery order establishing deadlines for discovery and motions. The parties agreed to extend those deadlines, and Judge Britt entered an amended order providing that all pre-trial motions be filed on or before 29 November 1990. Defendants failed to file a motion for summary judgment based upon the applicable statute of limitations within the alloted time. We also note that although the summary judgment motion had been calendared for hearing on two previous occasions, no motion was filed.

On 25 March 1991, Mr. E. C. Bryson, Jr., law partner of defendants' counsel called plaintiff's counsel and discussed the possibility of continuing the trial of the case which was scheduled for 1 April 1991, but leaving the matter on the calendar for the purpose of hearing defendants' motion for summary judgment. Judge Johnson agreed to continue the trial of the case on the condition that the motion be filed immediately. In a letter dated 28 March 1991, telefaxed to plaintiff's counsel the same day, Mr. Cheek indicated that he would have the motion to plaintiff's counsel by the first of the week. The letter indicated that the motion would be in plaintiff's hand by 1 April 1991. Noting that plaintiff had not received the motion by 1 April 1991, Judge Johnson set the matter over until Monday, 8 April 1991, for the purpose of hearing defendants' motion for summary judgment. Again, the motion was not filed. On 10 June 1991, Judge Johnson imposed sanctions because the defendants had intentionally delayed the matter.

Defendants argue that their conduct was not a willful or deliberate attempt to delay the judicial process; therefore, the imposition of sanctions was an abuse of discretion. We disagree, finding no misunderstanding in the case at bar which could have given rise to defendants' noncompliance. *Compare Green v. Eure*, 18 N.C. App. 671, 197 S.E.2d 599 (1973) (dismissal improper where failures to proceed did not arise out of a deliberate attempt to delay, but out of misunderstanding). Here, the record clearly shows that defendants repeatedly failed to file the motion for summary judgment and thereby delayed the prosecution of this matter without adequate justification. The correspondence between the parties' counsels also indicates the absence of a misunderstanding. The last letter written by defendants' counsel stated that he would have the motion in plaintiff's hands by the first of the week of 8 April 1991. Defendants' counsel failed to deliver the motion as promised, and for the third time failed to file the summary judgment in time for hearing. Under the facts and circumstances of this case, we find no abuse of discretion.

Alternatively, appellants argue that the trial court's order should be vacated as a matter of law because no findings of fact or conclusion of law which address whether less drastic sanctions would best serve the interests of justice are included in the order. To support its contention, defendants-appellants only cite cases where the entire action was dismissed. Here, only the affirmative defense of the statute of limitations was stricken.

Moreover, in the instant case, plaintiff did not request dismissal pursuant to Rule 41(b); he sought the striking of an affirmative defense pursuant to the court's inherent ability to impose fines and sanctions for disobeying a court order. *See Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987). Further, Rule 41(b) which involves involuntary dismissal, only requires findings as provided by Rule 52(a) if the court renders judgment on the merits against the plaintiff. *See Comment* to Rule 52 ("[t]he reference to Rule 41(b) has to do with the situation when the trial judge is dismissing an action at the close of the plaintiff's evidence with the determination that the dismissal shall be on the merits. In this situation, both Rules 41 and 52 contemplate that the judge shall make written findings and conclusions."). In the case before us, no judgment on the merits was rendered; therefore, Rule 41(b) does not apply. Appellants may still proceed with the case based on its merits.

The decision of the trial court is affirmed.

Chief Judge ARNOLD and Judge ORR concur.

ROBERT G. THOMPSON AND WIFE, LINDA THOMPSON, AND HANK'S GOURMET DESSERTS, INC., PLAINTIFFS v. HANK'S OF CAROLINA, INC., HANK'S HOMEMADE ICE CREAM, INC., CHRISTOPHER A. RISELY, JOSEPH KADANE AND SUSAN E. RITTENHOUSE, DEFENDANTS

No. 913SC934

(Filed 16 February 1993)

1. **Costs § 1 (NCI4th)— prosecution bond—security for costs—amount—discretion of court**

The trial court had the discretion to require a prosecution bond as security for costs in an amount greater than the $200 set forth in N.C.G.S. § 1-109, and plaintiffs' failure to post the $7,500 bond set by the court within 30 days subjected their action to dismissal.

Am Jur 2d, Costs § 40.

2. **Costs § 1 (NCI4th)— prosecution bond—failure to post—dismissal—consideration of other sanctions**

Although N.C.G.S. § 1-109 grants a trial court discretionary authority to dismiss an action as a sanction for violation of a court order imposing a prosecution bond, the court erred in imposing the sanction of dismissal without first considering less drastic sanctions.

Am Jur 2d, Costs § 43.

Appeal by plaintiffs from an order filed 25 April 1991 by Judge Paul M. Wright and an order filed 17 May 1991 by Judge George R. Greene in Pitt County Superior Court. Heard in the Court of Appeals 13 November 1992.

On 1 May 1990 plaintiffs filed a complaint against the defendants. Because a review of the complaint's allegations is not necessary to proper disposition of this appeal, we do not recount them here. On 6 February 1991 plaintiffs filed a motion to amend their complaint. Two days later the defendants filed a motion, pursuant

to G.S. § 1-109, seeking to have plaintiffs file a prosecution bond. On 22 February 1991, Judge Griffin entered an order allowing plaintiffs to amend the complaint. By the same order Judge Griffin allowed the defendants' motion for the prosecution bond and ordered that:

> pursuant to Section 1-109 of the General Statutes of North Carolina . . . the plaintiffs shall, within thirty days of the date of this order, either (a) give an undertaking with sufficient surety in the sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($7,500.00), with the condition that it will be void if the plaintiffs pay the defendants all costs which the defendants recover of them in this action, . . . or (b) deposit the sum of SEVEN THOUSAND FIVE HUNDRED AND NO/100 DOLLARS ($7,500.00) with such Clerk as security to the defendants for such costs.

On 5 April 1991 the defendants filed a motion to dismiss the plaintiffs' claims for failure to post the prosecution bond within the thirty day period. On 12 April 1991, the plaintiffs filed a motion for extension of time in which to post the prosecution bond. On 25 April 1991 Judge Wright filed an order granting the defendants' motion and dismissing plaintiffs' claims. On 18 April 1991 plaintiffs filed a motion to reconsider pursuant to N.C.R. Civ. P. 60(b). That motion was denied by Judge Greene in an order filed 17 May 1991.

Plaintiffs filed separate notices of appeal from the orders dismissing their claims and denying N.C.R. Civ. P. 60(b) relief.

Patterson, Dilthey, Clay, Cranfill, Sumner & Hartzog, by Susan K. Burkhart and Maxwell & Hutson, P.A., by John C. Martin, for the plaintiff-appellants.

Everett, Everett, Warren & Harper, by Edward J. Harper, II, for the defendant-appellees.

EAGLES, Judge.

[1] Plaintiffs argue that the trial court erred by dismissing their claims pursuant to G.S. § 1-109. Specifically, plaintiffs argue that the trial court lacked authority to dismiss their actions pursuant to G.S. § 1-109 and that dismissal was an inappropriate sanction.

G.S. § 1-109 allows a defendant in a civil action or special proceeding to seek a $200.00 prosecution bond. It also provides,

in pertinent part, that "failure to comply with such order within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding[.]"

In *Narron v. Union Camp Corp.*, 81 N.C. App. 263, 344 S.E.2d 64 (1986), Judge Brown "ordered plaintiffs to post the $200.00 bond specified in G.S. 1-109 and 'that such bond should be increased by the amount of $2,500.00 making a total of $2,700.00.' " *Id.* at 265, 344 S.E.2d at 65. The plaintiffs neither appealed from the order nor posted the bond. Judge Winberry, relying on G.S. § 1-109, dismissed the action *ex mero motu.* On appeal, and after quoting G.S. § 1-109, this Court held:

> Were we to apply G.S. 1-109 literally without the benefit of earlier decisions, we might conclude that plaintiffs are correct in their assertion that the court may require a bond of $200.00 and no more.
>
> However, our Supreme Court has construed this statutory language otherwise. The operative portions of G.S. 1-109 . . . have been in effect for many years. . . . A line of older authority, never overruled and unaffected by subsequent, merely formal amendments, has consistently construed these statutes as allowing the court in its discretion to require additional security for costs beyond the $200.00 statutory figure.
>
> * * *
>
> These precedents establish the court's authority to set bond in an amount above the $200.00 statutory limit. Defendant's motion for an additional bond was timely and plaintiffs have not disputed the facts found by the court to support the additional bond required. Judge Brown's order was proper. *It follows from the clear language of the statute that plaintiff's failure to post the bond subjected their action to dismissal.*

Id. at 266-67, 344 S.E.2d at 66-67 (citations omitted) (emphasis ours).

The instant case is factually similar to *Narron.* Here, as in *Narron,* the trial judge exercised his discretion by setting the amount of the bond above $200.00. Furthermore, as they concede in their reply brief, plaintiffs did not directly challenge the order setting the prosecution bond. (Plaintiffs did raise assignments of error challenging the findings and conclusions of Judge Griffin. However, plaintiffs waived those assignments by failure to offer reason, argu-

ment or authority to support them in their brief. N.C.R. App. P. 28(b)(5)). Finally, plaintiffs' claims were dismissed as a result of the plaintiff's failure to timely file the bond.

However, plaintiffs argue in their brief that the instant case is distinguishable from *Narron*.

> In this case, in contrast to Narron, the trial court did *not* recite in its order that the plaintiffs must post a $200.00 bond and that such bond be increased to (sic) $7,300.00. Rather, the court, in its discretion, ordered the posting of a bond in the sum of $7,500.00. Although the trial court could properly enter such an order, in its discretion, it could not do so pursuant to N.C. Gen. Stat. § 1-109.

We disagree with plaintiffs' interpretation of *Narron*. In *Narron*, our Court specifically held that the plaintiffs' claims were subject to dismissal *pursuant to G.S. § 1-109* because the plaintiffs failed to timely obtain a prosecution bond. Moreover, plaintiffs' attempt to distinguish Judge Griffin's order because it "did *not* recite . . . that the plaintiffs must post a $200.00 bond and that such bond be increased to (sic) $7,300.00" fails because the order itself specifically states that "the motion of the defendants, pursuant to Section 1-109 of the General Statutes of North Carolina be, and it is hereby, allowed . . . ." Clearly, Judge Griffin entered his order pursuant to G.S. § 1-109. Here, as in *Narron*, "[i]t follows from the clear language of the statute that plaintiffs' failure to post the bond subjected their action to dismissal." *Id.* at 267, 344 S.E.2d at 67.

[2] Plaintiffs next argue that the trial court erred by imposing the sanction of dismissal without first considering less stringent sanctions. We agree.

As stated above, G.S. § 1-109 provides that a party's failure to comply with an order imposing a prosecution bond "within 30 days from the date thereof shall constitute grounds for dismissal of such civil action or special proceeding[.]" G.S. § 1-109.

In *Daniels v. Montgomery Mut. Ins. Co.*, 320 N.C. 669, 360 S.E.2d 772 (1987) our Supreme Court noted that N.C.R. Civ. P. 41(b), which grants a trial court authority to dismiss an action with prejudice if a party fails to comply with a trial court's order, is identical to the federal rule. Then, after quoting *Rogers v. Kroger Co.*, 669 F.2d 317, 321-22 (5th Cir. 1982), our Supreme Court deter-

mined that a trial court also has inherent power to impose a sanction less harsh than dismissal. We think that holding applies with equal force here. Though G.S. § 1-109 grants a trial court discretionary authority to dismiss an action as the sanction for violation of a court order imposing a prosecution bond, the court retains its inherent discretionary authority to impose a lesser sanction.

In *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989) the trial court dismissed a complaint pursuant to N.C.R. Civ. P. 41(b) because the plaintiff failed to comply with a court order. On appeal this Court held "that sanctions may not be imposed mechanically. Rather, the circumstances of each case must be carefully weighed so that the sanction properly takes into account the severity of the party's disobedience." *Id.* at 420-21, 378 S.E.2d at 200-01. Our Court then concluded that a trial judge must consider whether a sanction less drastic than dismissal with prejudice would be effective in ensuring compliance with a court's order or would best serve the interest of justice before dismissing a complaint. The Court stated:

> Here the trial court made no findings of fact or conclusions of law which address whether less drastic sanctions would be effective in ensuring compliance with the court's order or would best serve the interests of justice. Accordingly, we vacate and remand that portion of the court's . . . order dismissing plaintiff's complaint.

Id. at 421, 378 S.E.2d at 201.

We believe that *Rivenbark's* holding applies with equal force in the context of G.S. § 1-109. Defendants argue, however, that the instant case is "strikingly similar" to the situation presented in *Sanford v. Starlite Disco, Inc.*, 66 N.C. App. 470, 311 S.E.2d 67 (1984). In *Sanford*, the plaintiff asserted that the trial court erred by dismissing his action, pursuant to N.C.R. Civ. P. 41(d), without taking into account the alleged excusable neglect of the plaintiff. Our Court held that language in N.C.R. Civ. P. 41(d) constitutes a "mandatory directive" to dismiss, and that the trial court was not required to consider the plaintiff's alleged excusable neglect. Unlike N.C.R. Civ. P. 41(d) which was at issue in *Sanford*, G.S. § 1-109 does not *mandate* dismissal upon failure to comply. Rather, it merely provides that failure to comply with the court's order constitutes a ground for dismissal. The decision to dismiss pursuant to G.S. § 1-109 lies in the sound discretion of the trial judge. *Narron*,

81 N.C. App. at 269, 344 S.E.2d at 67. Accordingly, *Sanford* is readily distinguishable.

The dispositive issue is whether the trial court considered imposition of a less drastic sanction. Here, the transcript of the hearing before Judge Wright contains no indication that Judge Wright considered lesser sanctions. Furthermore, as in *Rivenbark*, the trial court "made no findings of fact or conclusions of law which address whether less drastic sanctions would be effective . . . ." *Id.* at 421, 378 S.E.2d at 201. Accordingly, we vacate the order of the trial court dismissing the plaintiff's action and remand for further proceedings on defendant's motion for dismissal not inconsistent with this opinion. Our holding here does not affect the trial court's discretionary authority, on remand, to impose the sanction of dismissal after properly considering lesser sanctions. Finally, our decision to vacate the dismissal order renders Judge Greene's 17 May 1991 order denying plaintiff's N.C.R. Civ. P. 60(b) motion null. Accordingly, it must be vacated as well.

Because of our disposition of the foregoing issues, we need not reach any of the remaining arguments raised on appeal.

Vacated and remanded.

Judges ORR and JOHN concur.

JUDY TREMBLAY KEITH v. JACQUELINE D. POLIER, ADMINISTRATRIX FOR THE ESTATE OF PATRICK JOHN RAY

No. 9210SC139

(Filed 16 February 1993)

1. Evidence and Witnesses § 1974 (NCI4th)— accident report —admissible

An accident report was admissible in a negligence action arising from an automobile accident where the officer testified that, on the date of the accident, he completed the DMV-349 form based on information received from the two drivers and his own investigation of the accident; he prepared the report during the course and scope of his employment as a police

officer and further as a regularly conducted business activity; he reviewed the accident report with the parties at the accident and neither objected to his conclusions; and the officer subsequently filed the report with his immediate supervisor who in turn filed the report with the records division in the Raleigh Police Department. This testimony by the officer provided proper authentication and tends to show that the report was sufficiently trustworthy and was therefore admissible under N.C.G.S. § 8C-1, Rule 803(6) and (8).

Am Jur 2d, Evidence §§ 931, 934, 1002; Automobiles and Highway Traffic § 1046.

Admissibility in state court proceedings of police reports under official record exception to hearsay rule. 31 ALR4th 913.

2. Automobiles and Other Vehicles § 767 (NCI4th) — automobile accident — sudden stop in traffic — sudden emergency — evidence not sufficient

The trial court erred in a negligence action arising from a rear end collision by instructing the jury on sudden emergency where the evidence, even when viewed in the light most favorable to defendant, indicates that he had reason to anticipate that plaintiff could start moving her vehicle and then suddenly stop again. The alleged sudden emergency was not sudden, and, if an emergency did exist, the evidence indicates that it was brought about at least in part by defendant's failure to keep a proper lookout and reduce his speed in time to avoid an accident. Defendant should not have been given the benefit of an instruction on sudden emergency doctrine where the evidence was insufficient to support a finding that a sudden emergency did in fact exist.

Am Jur 2d, Negligence §§ 226-230.

Instructions on sudden emergency in motor vehicle cases. 80 ALR2d 5.

Appeal by plaintiff from Judgment entered 27 August 1991 by Judge Dexter Brooks in Wake County Superior Court. Heard in the Court of Appeals 7 January 1993.

E. Gregory Stott for plaintiff-appellant.

Walker, Young & Barwick, by Thomas E. Barwick, for defendant-appellee.

WYNN, Judge.

Plaintiff filed a claim in negligence against Jacqueline D. Polier, Administratrix for the estate of Patrick John Ray, seeking damages for personal injuries arising out of an automobile accident which occurred on 26 July 1990 involving plaintiff and the deceased Mr. Ray. Defendant answered denying negligence and asserting contributory negligence and sudden emergency as affirmative defenses. Over the plaintiff's objection the trial court instructed on contributory negligence and the doctrine of sudden emergency. The jury returned a verdict stating that plaintiff was not injured by the negligence of the deceased defendant. From judgment entered on the verdict, plaintiff appeals.

Plaintiff offered the following evidence at trial. On 26 July 1990 at approximately 5:30 p.m., the plaintiff, driving a 1986 Dodge automobile on New Hope Road in Raleigh, North Carolina, approached the intersection of New Hope Road and Louisburg Road. Plaintiff testified that she stopped her vehicle at the intersection in response to a steady red traffic signal light. While plaintiff was stopped, the decedent drove his 1984 Mazda pick-up truck into the rear-end of her vehicle. Plaintiff stated that upon impact, her vehicle moved forward and came to rest about two feet into the intersection. She further stated that traffic was very heavy, visibility was good and the weather was hot and sunny. Plaintiff's vehicle received damage to the left tail light, trunk and bumper.

Shortly after the accident, Officer David R. Simmons of the Raleigh Police Department arrived to investigate the accident and prepare a report. Defendant offered the testimony of Officer Simmons over the plaintiff's objection. Officer Simmons testified that after arriving on the scene, he questioned both parties as to the cause of the accident and prepared a standard automobile accident report on a Department of Motor Vehicles 349 form. No traffic citations were issued to either party and no witnesses were present. He testified, reading from the DMV-349 report, that "vehicle number 2 [plaintiff's vehicle] stopped suddenly, vehicle number 1 [defendant's vehicle] which was directly behind vehicle number 2, was unable to stop and struck vehicle number 2 in the rear." He further testified from the accident report as to "contributing circumstances," that "[f]or driver number 2 [plaintiff], I indicated no violation. [F]or driver number 1, which was Mr. Ray, I indicated failure to reduce

speed." Officer Simmons stated that he had no independent recollection of the accident, "other than what he refreshed by refreshing his memory by reviewing the accident report." He further stated that he did not recall which individual told him what, but that he shared views and opinions regarding how the accident occurred with both parties at the accident scene and neither party objected to his conclusions at that time.

I.

We note initially, that plaintiff sets out four assignments of error in the record, but in her brief presents only two arguments. As a result, the remaining two assignments of error are deemed abandoned pursuant to N.C.R. App. P., Rule 28(b)(5).

[1] By plaintiff's first assignment of error, she contends that the trial judge erred in admitting the testimony of Officer Simmons concerning statements made by the decedent, Patrick John Ray, at the scene of the accident. She argues that the testimony of Officer Simmons was offered "for the truth of the matter asserted" and was therefore inadmissible hearsay pursuant to N.C. Gen. Stat. § 8C-1, Rule 802 of the Rules of Evidence. Defendant asserts in response that Officer Simmons' investigative report was admissible pursuant to N.C. Gen. Stat. § 8C-1, Rule 803(6) of the North Carolina Rules of Evidence as a record of regularly conducted activity and Rule 803(8) as a public record and report. We agree.

This Court addressed this precise issue in *Wentz v. Unifi, Inc.*, 89 N.C. App. 33, 365 S.E.2d 198, *disc. rev. denied*, 322 N.C. 610, 370 S.E.2d 257 (1988), and held that highway accident reports may be admissible as a business records exception to the hearsay rule under N.C. Gen. Stat. § 8C-1, Rule 803(6) of the N.C. Rules of Evidence, "Records of Regularly Conducted Activity," if properly authenticated. To qualify for admissibility, the following requirements must be met:

> [S]uch reports must be authenticated by their writer, prepared at or near the time of the act(s) reported, by or from information transmitted by a person with knowledge of the act(s), kept in the course of a regularly conducted business activity, with such being a regular practice of that business activity unless the circumstances surrounding the report indicate a lack of trustworthiness. Such reports may also be admissible

as "official" reports under Rule 803(8), "Public Records and Reports," if properly authenticated.

Wentz, 89 N.C. App. at 39-40, 365 S.E.2d at 201 (citation omitted).

In the subject case, Officer Simmons testified that on the date of the accident, he completed the DMV-349 form based on information received from the two drivers and his own investigation of the accident. Officer Simmons prepared the report during the course and scope of his employment as a police officer and further as a regularly conducted business activity. Officer Simmons testified that he reviewed the accident report with the parties at the accident and neither objected to his conclusions. Subsequent to the accident, Officer Simmons filed the report with his immediate supervisor who in turn filed the report with the records division in the Raleigh Police Department. This testimony by Officer Simmons provided proper authentication and tends to show that the report was sufficiently trustworthy and was therefore admissible under Rules 803(6) and (8) of the North Carolina Rules of Evidence. Plaintiff's first assignment of error is overruled.

II.

[2] In plaintiff's second assignment of error she contends that the trial court erred by instructing the jury on the doctrine of "sudden emergency" on the grounds that the evidence was insufficient to support application of the doctrine. Plaintiff argues that quick traffic stops in heavy traffic are to be anticipated by drivers and therefore cannot create a sudden emergency. We agree.

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, 236, 360 S.E.2d 512, 514 (1987), *disc. rev. denied*, 321 N.C. 474, 364 S.E.2d 923 (1988) (citing *Rodgers v. Carter*, 266 N.C. 564, 146 S.E.2d 806 (1966)). In an emergency situation, defendant is not held to a standard of selecting the "wisest choice of conduct, but only to such choice as a person of ordinary care and prudence, similarly situated would have been." *Masciulli v. Tucker*, 82 N.C. App. 200, 205-06, 346 S.E.2d 305, 308 (1986) (quoting *Ingle v. Cassady*, 208 N.C. 497, 499, 181 S.E. 562, 563 (1935)). An "emergency situation" has been defined by our courts as that which "compels [defendant] to act instantly to avoid a collision or injury . . . ."

Schaefer v. Wickstead, 88 N.C. App. 468, 471, 363 S.E.2d 653, 655 (1988). For the doctrine to apply, the jury must first find that "in fact a sudden emergency did exist" and second, that "the emergency was in fact not brought on by the negligence of the defendant." *Masciulli*, 82 N.C. App. at 206, 346 S.E.2d at 308-09 (quoting *Lawson v. Walker*, 22 N.C. App. 295, 297, 206 S.E.2d 325, 327 (1974)).

As a general rule, every motorist driving upon the highways of this state is bound to a minimal duty of care to keep a reasonable and proper lookout in the direction of travel and see what he ought to see. *Id.* at 205, 346 S.E.2d at 308. Within this duty is a requirement that the motorist drive and anticipate dangers in a manner consistent with the circumstances and exigencies of traffic. Our North Carolina Supreme Court has stated:

> the law does not require a motorist to anticipate specific acts of negligence on the part of another. It does, however, fix him with notice that the exigencies of traffic may, at any time, require a sudden stop by him or by the motor vehicle immediately in front of him. Constant vigilance is an indispensable requisite for survival on today's highways . . . .

Beanblosson v. Thomas, 266 N.C. 181, 187, 146 S.E.2d 36, 41 (1966) (citation omitted). Drivers are therefore required in the exercise of ordinary care to expect sudden stops when driving in heavy traffic. In accord, such stops do not constitute an unexpected or emergency situation.

In the subject case, plaintiff testified that she had come to a complete stop at the traffic signal and that she had been stopped for some period of time when the defendant drove his vehicle into the rear of her vehicle. The testimony of Officer Simmons, which we have determined was properly admitted, tends to show to the contrary, that plaintiff's car had started and then stopped abruptly. Even when this evidence is viewed in the light most favorable to the defendant, it indicates that he had reason to anticipate, due to the circumstances, that the plaintiff could start moving her vehicle and then suddenly stop again.

The alleged emergency was not sudden, and if an emergency did in fact exist, the evidence indicates that it was brought about, at least in part, due to the defendant's potential failure to keep a proper lookout and failure to reduce his speed in time to avoid an accident. Defendant should not have been given the benefit

of an instruction on the sudden emergency doctrine where the evidence was insufficient to support a finding that a sudden emergency did in fact exist. For the foregoing reasons, it was error for the trial court to so instruct the jury and the plaintiff is entitled to a

New Trial.

Judges Eagles and Orr concur.

IN THE MATTER OF: CALVIN M. FREEMAN

No. 9229SC50

(Filed 16 February 1993)

1. **Administrative Law and Procedure § 53 (NCI4th)— dismissed teacher—constitutionality of search—raised for first time in superior court**

A dismissed teacher's objection to the constitutionality of a search was timely under N.C.G.S. § 150B-29 where the objection was not made before the Board of Education but was raised for the first time in superior court.

Am Jur 2d, Administrative Law § 565.

2. **Schools § 13.2 (NCI3d)— dismissal of teacher—marijuana—evidence obtained with illegal search—consideration**

The Court of Appeals affirmed a superior court order affirming a Board of Education's dismissal of respondent as a career teacher based on respondent's marijuana use where plaintiff contended that evidence from police officers should not have been considered because criminal proceedings against him had been dismissed on the grounds that the evidence had been obtained in violation of his Fourth Amendment guarantees, but there was nothing in the record before the Court of Appeals to reveal the reasons the criminal proceedings were dismissed.

Am Jur 2d, Administrative Law §§ 378-380.

Appeal by respondent from order entered 24 October 1991 in Rutherford County Superior Court by Judge C. Walter Allen. Heard in the Court of Appeals 10 December 1992.

Robert W. Wolf for petitioner-appellee Rutherford County Board of Education.

Kaylor, Bankhead & Luffman, by Stephen D. Kaylor, for respondent-appellant Calvin M. Freeman.

GREENE, Judge.

Respondent Calvin M. Freeman (Freeman) appeals from the trial court's order affirming his dismissal as a career teacher by the Rutherford County Board of Education (the Board).

Freeman was employed as a teacher by the Board, and was classified as a tenured career teacher pursuant to N.C.G.S. § 115C-325(a)(1). On 20 June 1989, Freeman was arrested at his home and charged with felonious maintaining of a dwelling to keep and store marijuana and felonious manufacture of a controlled substance. The Assistant Superintendent of the Rutherford County Schools suspended Freeman with pay the next day. On 1 September 1989, the Superintendent of the Rutherford County Schools notified Freeman that he planned to recommend to the Board that Freeman be dismissed effective 19 September 1989. Freeman and the Board agreed to delay any action on the dismissal until after the criminal charges were resolved. The criminal charges were dismissed at a subsequent session of superior court. Although Freeman maintains that the charges were dismissed because the trial court determined that the evidence against him had been unconstitutionally seized, there is nothing in the record to support this theory. The Superintendent, on 24 July 1990, notified Freeman that he intended to proceed with the dismissal procedure. At the hearing before the Board on 13 August 1990, three of the police officers who arrested Freeman testified that they had found marijuana plants, marijuana, a marijuana pipe, and papers for rolling marijuana cigarettes at or near the Freeman residence, and presented as evidence certain crime scene reports, photographs, and lab reports related to the criminal charges. Two of the officers also testified that during the search of the home, Freeman told them he smoked marijuana. Freeman did not object before the Board to the officers' testimony or make any motion to suppress the evidence. The Board made, among others, the following relevant findings of fact:

10. That the criminal charges against Freeman were dismissed without trial by the Superior Court of Rutherford County, however, the evidence before the Board does not indicate the nature, reason or basis for the dismissal;

. . . .

15. That on June 20, 1989 officers of the Rutherford County Sheriff's Department, pursuant to information received from various informants, conducted a search of the land owned jointly by Freeman and his wife, and with consent from Freeman's wife, also searched their jointly owned principal residence;

16. That as a result of the search, officers of the . . . Sheriff's Department discovered on Freeman's land and in his principal residence the following: [a detailed description of the drugs and other items found in the search of the residence];

17. That at the time of the search of Freeman's premises, Freeman stated that he smoked marijuana;

. . . .

19. That Freeman knew of the presence of the marijuana found on his land and in his residence prior to its discovery by the . . . Sheriff's Department;

20. That Freeman knew about and condoned the growth and use of the marijuana by his wife on his land and in his residence;

21. That Freeman himself has used and smoked marijuana and he had the intent of using or smoking some of the marijuana found on his land and in his residence;

. . . .

24. That Freeman unlawfully, willfully and feloniously maintained a dwelling house to keep and store marijuana[.]

Based on the foregoing findings of fact, the Board concluded, in part, that Freeman had:

6. . . . [U]sed for nonmedical purposes a controlled substance [marijuana] as defined in Article 5 of Chapter 90 of the North Carolina General Statutes[.]

The Board then ordered that Freeman be "dismissed as a career teacher with the Rutherford County School System." Freeman timely appealed to the superior court pursuant to N.C.G.S. § 115C-325(n) and argued in that court that the order of dismissal was based on evidence seized in violation of his Federal Fourth Amendment rights and therefore must be reversed. The superior court, in its review of the evidence before the Board, determined that the search of Freeman's residence did not violate Freeman's Fourth Amendment rights and that there was substantial evidence in the record to support the order of the Board. Accordingly, the superior court rejected Freeman's argument and entered an order affirming the Board's dismissal of Freeman.

Before this Court, Freeman assigns as error the Board's consideration of evidence which he claims was obtained in violation of his Federal Fourth Amendment rights. Without this evidence, he contends, there was not substantial evidence in the record to support the Board's decision to dismiss him.

The issue presented is whether the evidence before the Board reveals an unreasonable search and seizure in violation of the Fourth Amendment of the United States Constitution.[1]

The Fourth Amendment of the United States Constitution secures the "right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures . . . ." U.S. Const. amend. IV. This protection "applies in the civil [as well as the criminal] context . . . ." *Soldal v. Cook County, Illinois*, --- U.S. ---, ---, 121 L. Ed. 2d 450, 462 (1992). Separate and apart from the question of whether a party's Fourth Amendment rights have been violated is the question of whether a violation requires the exclusion, in any civil or criminal proceeding, of evidence obtained as a result of the violation. *Illinois v. Gates*, 462 U.S. 213, 223, 76 L. Ed. 2d 527, 538-39 (1983). Therefore, the exclusionary rule is not itself a constitutional right of the aggrieved party, but is instead "a judicially created remedy designed to safeguard Fourth Amendment rights . . . ." *United States v. Calandra*, 414 U.S. 338, 348, 38 L. Ed. 2d 561, 571 (1974). The

1. Freeman does not raise, and we therefore do not address, the issue of whether the search violates his rights under Article I, § 20 of the North Carolina Constitution.

exclusionary rule encourages compliance with the Fourth Amendment in that it deters police from breaching the Amendment by removing the incentive to disregard it. The exclusionary rule as a penalty for violation of the Fourth Amendment, however, is not absolute.[2] For example, in the context of a criminal proceeding, the benefits produced by the suppression of "evidence obtained in objectively reasonable reliance on a subsequently invalidated search warrant cannot justify the substantial costs of exclusion." *United States v. Leon*, 468 U.S. 897, 922, 82 L. Ed. 2d 677, 698 (1984). Also, in the context of a civil proceeding, evidence seized by a state criminal law enforcement officer in good faith, but nonetheless unconstitutionally, is admissible in a federal civil proceeding. *United States v. Janis*, 428 U.S. 433, 459-60, 49 L. Ed. 2d 1046, 1064 (1976). In general, the question of whether evidence obtained in violation of the Fourth Amendment must be excluded requires the balancing of the societal costs against the deterrent benefits of excluding the evidence. *See Immigration and Naturalization Serv. v. Lopez-Mendoza*, 468 U.S. 1032, 1041, 82 L. Ed. 2d 778, 787 (1984).

[1] Freeman did not, before the Board, object to the evidence offered by the police officers regarding the search of his premises. He did, however, object to the consideration of this evidence by the superior court in its review of whether the Board's decision was supported by "substantial evidence admissible under G.S. 150B-29(a) . . . in view of the entire record as submitted . . . ." N.C.G.S. § 150B-51(b)(5) (1991). This objection in the superior court was timely because N.C.G.S. § 150B-29(a) permits a party to raise, for the first time in the superior court, objections to evidence considered by an administrative agency.

[2] In this case, Freeman argued in the superior court, and now argues in this Court, that in determining if there was substantial evidence in the record to support the order by the Board, the

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2. Contrast the United States Supreme Court's construction of the Fourth Amendment of the United States Constitution with the North Carolina Supreme Court's construction of Article I, § 20 of the North Carolina Constitution. In *State v. Carter*, the Court rejected the "cost-benefit" test of the federal exclusionary rule as "simplistic" and not suited to the resolution of the issue. *State v. Carter*, 322 N.C. 709, 723, 370 S.E.2d 553, 561 (1988). The Court instead adopted an absolute test, holding that the "exclusionary sanction is indispensable to give effect to the constitutional principles prohibiting unreasonable search and seizure." *Id.* at 719, 370 S.E.2d at 559.

evidence from the police officers must not be considered because it was obtained in violation of his Fourth Amendment rights. Freeman does not, however, argue in what respect the search violated the Fourth Amendment. Freeman instead simply argues that because the criminal proceedings against him were dismissed by the trial judge on the grounds "the evidence had been obtained in violation of [Freeman's] Fourth Amendment guarantees," the evidence was not admissible before the Board. Without deciding the merit of Freeman's argument, we reject it because there is nothing in the record before this Court which reveals the reasons the criminal proceedings against Freeman were dismissed. Accordingly, the order of the superior court is

Affirmed.

Judges COZORT and WYNN concur.

STATE OF NORTH CAROLINA v. ALLEN STEPHON MARSHBURN

No. 918SC1002

(Filed 16 February 1993)

Criminal Law § 146 (NCI4th)— withdrawal of guilty plea before sentencing—failure to show fair and just reason

Defendant did not provide, prior to sentencing, a fair and just reason for withdrawing his plea of guilty to accessory after the fact of murder based on his contentions (1) that at the time he entered his plea he did not know whether he was guilty or not guilty, and (2) that he entered the plea with the understanding that it would not count as a conviction in a pending federal drug case when in fact it was considered by the federal court as a conviction where the motion to withdraw his plea was not made until eight months after the plea was entered; defendant had the benefit of counsel at all times; defendant does not assert his innocence; and his asserted misunderstanding does not relate to the direct consequences of the plea but relates only to a collateral matter.

Am Jur 2d, Criminal Law §§ 500-502.

Appeal by defendant from judgment entered 3 June 1991 in Lenoir County Superior Court by Judge Napoleon B. Barefoot. Heard in the Court of Appeals 12 January 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Thomas B. Wood, for the State.

Dal F. Wooten for defendant-appellant.

GREENE, Judge.

Allen Stephon Marshburn (Marshburn) appeals from the trial court's denial of his motion to withdraw his plea of guilty to accessory after the fact to murder.

Marshburn was arrested on 11 April 1990 and charged with being an accessory after the fact in the murder of Richard Ivey Sutton, who died of a gunshot wound on 10 April 1990. The State charged specifically that Marshburn aided the three men charged with Sutton's murder by assisting them in destroying the weapons used to kill Sutton and by making untruthful statements to the police about his knowledge of the murder and those charged with the murder. Marshburn was appointed an attorney at his first appearance on 12 April 1990, and the same attorney represented Marshburn throughout the proceedings against him. On 11 October 1990, Marshburn entered into a plea arrangement with the State under which he would plead guilty to accessory after the fact of a felony and provide truthful testimony against those accused of Sutton's murder. In exchange, the State agreed to inform the court of Marshburn's cooperation at his sentencing hearing. The trial court, after taking a transcript of plea, accepted Marshburn's plea of guilty and granted a prayer for judgment continued until such time as the State prayed judgment. Marshburn did thereafter testify at the trial of one of the men charged with the Sutton murder. The State prayed judgment and a sentencing hearing was held on 3 June 1991. At the sentencing hearing, Marshburn made a motion to withdraw his guilty plea. Through his attorney and without objection from the State, Marshburn gave as his reasons for seeking to withdraw his guilty plea that

> when he entered the plea he was under indictment for a federal drug case. He entered the plea with the understanding that prayer for judgement [sic] would not count as a conviction in his federal drug case. In reality, the report was done in

his federal drug case, and they did designate [the prayer for judgment] as a conviction and used it as an aggravating circumstance against him, giving him an additional three or four years in the federal court system.

At this time, his case in the federal court system is under appeal. And there is a possibility . . . that he may be retried and resentenced. And if they are going to consider this a conviction against him, it could have adverse effects against him.

Also, he indicates to me that he has had a change of thoughts as to whether he is legally liable or guilty in this particular charge because, I believe, the court has already heard his testimony [against the man charged in Sutton's murder]. And he indicated, as I understand, in his testimony that when [the men who were later charged in Sutton's murder] approached him; he did not really take them seriously at the time.

Marshburn, again without objection from the State, addressed the court as follows:

Sir, I was under the impression when I took the plea that the court would weigh my actual participation, if any, in the crime and then let me know if I was guilty or not. Because when I actually did take the screw out of the gun, which, you know, says that makes me an accessory; I had no idea there was a murder connected with the rifles. That's really one of the reasons.

I am just more or less asking the court to just look at the testimonies from the other [trial] and just make a decision about whether I did actually participate in the crime or not. That's more or less what I'm doing.

The defendant did not take the stand, was not cross-examined and did not offer any evidence. The trial court denied Marshburn's motion to withdraw his plea.

The dispositive issue is whether Marshburn provided, prior to sentencing, a fair and just reason for withdrawing his guilty plea.

Although there is no absolute right to withdraw a plea of guilty, a criminal defendant seeking to withdraw such a plea, prior to sentencing, is " 'generally accorded that right if he can show

any fair and just reason.' " *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990) (citation omitted). If the motion to withdraw is made at a "very early stage of the proceedings, [the motion] should be granted with liberality." *Id.* at 537, 391 S.E.2d at 162. The defendant has the burden of showing that his motion to withdraw is supported by some "fair and just reason." *State v. Meyer*, 330 N.C. 738, 743, 412 S.E.2d 339, 342 (1992). Whether the reason is "fair and just" requires a consideration of a variety of factors. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. Factors which support a determination that the reason is "fair and just" include: the defendant's assertion of legal innocence; the weakness of the State's case; a short length of time between the entry of the guilty plea and the motion to withdraw; that the defendant did not have competent counsel at all times; that the defendant did not understand the consequences of the guilty plea; and that the plea was entered in haste, under coercion or at a time when the defendant was confused. *Id.* If the defendant meets his burden, the court must then consider any substantial prejudice to the State caused by the withdrawal of the plea. *Id.* "Prejudice to the State is a germane factor against granting a motion to withdraw." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. Examples of substantial prejudice include: the destruction of important physical evidence, *United States v. Jerry*, 487 F.2d 600, 611 (3d Cir. 1973); death of an important witness, *United States v. Vasquez-Velasco*, 471 F.2d 294 (9th Cir.), *cert. denied*, 411 U.S. 970, 36 L. Ed. 2d 692 (1973); and other defendants with whom defendant had been joined for trial had been tried in a lengthy trial, *United States v. Lombardozzi*, 436 F.2d 878, 881 (2d Cir.), *cert. denied*, 402 U.S. 908, 28 L. Ed. 2d 648 (1971).

In reviewing a decision of the trial court to deny defendant's motion to withdraw, the appellate court does not apply an abuse of discretion standard, but instead makes an "independent review of the record." *Handy*, 326 N.C. at 539, 391 S.E.2d at 163. That is, the appellate court must itself determine, considering the reasons given by the defendant and any prejudice to the State, if it would be fair and just to allow the motion to withdraw.

In this case, Marshburn offers two reasons to support his motion to withdraw: (1) that at the time he entered his plea he did not know whether he was guilty or not guilty; and (2) that he entered the plea with the understanding that it would not count as a conviction in a pending federal drug case when in fact it was considered by the federal court as a conviction. We evaluate

these asserted reasons in the context of a motion made some eight months after the entry of the guilty plea and in light of the fact that no claim is made by Marshburn that he did not have full benefit of counsel at all times. This context requires that the reasons given by a defendant "must have considerably more force" than would be the case if the "motion comes only a day or so after the plea was entered" or if the defendant did not have competent counsel at the time he entered the plea. *Handy*, 326 N.C. at 539, 391 S.E.2d at 163 (citing *United States v. Barker*, 514 F.2d 208, 222 (D.C. Cir.), *cert. denied*, 421 U.S. 1013, 44 L. Ed. 2d 682 (1975)). In this context, we determine Marshburn has not asserted a fair and just reason for withdrawing the plea. Marshburn does not assert his innocence and the misunderstanding of which he complains relates to the effects of his plea on some unrelated criminal case. To be relevant, defendant must show that the misunderstanding related to the *direct consequences* of his plea, not a misunderstanding regarding the effect of the plea on some collateral matter.[1] *Cf. United States v. Fentress*, 792 F.2d 461, 465 (4th Cir. 1986) (in deciding whether criminal defendant's guilty plea made with full understanding of consequences, " 'no requirement to advise a defendant of every "but for" consequence' " (citation omitted)). Direct consequences are those having a " 'definite, immediate and largely automatic effect on the range of the defendant's punishment' " for the crime charged. *See Bryant v. Cherry*, 687 F.2d 48, 50 (4th Cir.), *cert. denied*, 459 U.S. 1073, 74 L. Ed. 2d 637 (1982) (quoting *Cuthrell v. Director, Patuxent Inst.*, 475 F.2d 1364, 1366 (4th Cir.), *cert. denied*, 414 U.S. 1005, 38 L. Ed. 2d 241 (1973)). Any effect Marshburn's plea had on the pending federal criminal proceedings was collateral and therefore not a basis for supporting a motion to withdraw the plea at issue. The order of the trial court denying Marshburn's motion to withdraw his guilty plea is therefore

Affirmed.

Judges JOHNSON and MARTIN concur.

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1. The facts of this case do not require us to determine, and we therefore do not address, what effect an active misrepresentation by the State as to collateral consequences would have on a defendant's right to withdraw a guilty plea entered prior to sentencing.

JUDY REYNOLDS AND KELLI LYNN REYNOLDS v. DAVID MELVIN REYNOLDS

No. 9210DC83

(Filed 16 February 1993)

Divorce and Separation § 377 (NCI4th)— visitation—order against the wishes of the child—no violation of child's constitutional rights

The constitutional rights of the minor plaintiff were not violated by an order specifying visitation with defendant, her father, where plaintiff Judy Reynolds and defendant David Reynolds were awarded joint custody of the minor plaintiff in an order dated 15 May 1989; a later order continued the joint custody but provided that visitation was to be determined by mutual agreement of the parties; defendant subsequently filed a motion in the cause for visitation, which resulted in an order being entered which set out a specific visitation schedule; and the court in making that order found that defendant had had limited contact with Judy Reynolds and the minor plaintiff since December 1990; that Judy Reynolds is very bitter about the divorce; that the minor plaintiff had testified that she loved defendant but did not want to have visitation or telephone contact with him; that defendant is a fit and proper person to exercise reasonable and liberal visitation; and that it is in the best interest of the minor plaintiff that there be a specified visitation schedule with defendant. Although the child expressed a desire not to visit her father, the trial court determined that such visitation would be in the child's best interests based on findings supported by evidence in the record. The order resulted from a hearing conducted in compliance with the parties' due process rights, and the provision providing that violation of the order shall be punishable by contempt is a valid declaration that one who violates the order will be subject to contempt proceedings in accordance with due process.

Am Jur 2d, Divorce and Separation § 999.

Necessity of requiring presence in court of both parties in proceedings relating to custody or visitation of children. 15 ALR4th 864.

Appeal by plaintiffs from Order entered 10 October 1991 in Wake County District Court by Judge Joyce A. Hamilton. Heard in the Court of Appeals 5 January 1993.

Judy Reynolds and Kelli Lynn Reynolds, pro se.

Stratas & Weathers, by Aida Fayar Doss, for defendant-appellee.

WYNN, Judge.

The plaintiff, Judy Reynolds, and the defendant, David Reynolds, are the divorced parents of the minor plaintiff, Kelli Lynn Reynolds, born 14 July 1980. In an Order dated 15 May 1989 the plaintiff, Judy Reynolds, and the defendant, David Reynolds, were awarded joint custody of the minor plaintiff. That Order provided that Judy Reynolds would have primary responsibility for Kelli Lynn Reynolds and that David Reynolds would have secondary responsibility and visitation. A subsequent Order entitled "Consent Order for Custody and Support" continued the joint custody but provided that visitation was to be determined by mutual agreement of the parties. On 9 August 1991 David Reynolds filed a "Motion in the Cause for Visitation," which motion was heard on 3-4 October 1991. That hearing resulted in an Order being entered on 10 October 1991 setting out a specific schedule of visitation between the defendant and the minor plaintiff. In entering the Order, the trial judge made the findings of fact contained in the following paragraphs.

David Reynolds has had limited contact with Judy Reynolds and Kelli Lynn Reynolds since December 1990. Judy Reynolds is very bitter about her divorce from David Reynolds and his affair and subsequent marriage to a former baby sitter, who is approximately twenty-five years younger than Mr. Reynolds. She believes that she and the defendant are not divorced "in the Biblical sense" and that the defendant and his new wife are not lawfully married "in the Biblical sense." Kelli Lynn Reynolds has been strongly influenced by Judy Reynolds' opinions in this regard. Judy Reynolds has denied Kelli Lynn Reynolds any visitation with Donna Campbell, the elder daughter of Judy and David Reynolds and elder sister of Kelli Lynn Reynolds, because Judy Reynolds is afraid of what Donna Campbell might say about her to Kelli Lynn Reynolds.

Kelli Lynn Reynolds testified at the hearing that she loved the defendant but did not want to have visitation or telephone

contact with him. The trial court believed this testimony, but found that David Reynolds is a fit and proper person to exercise reasonable and liberal visitation with Kelli Lynn Reynolds, and that it is in the best interest of Kelli Lynn Reynolds that there be a specified visitation schedule between her and the defendant and that such visitation be allowed to occur.

Based on the above findings of fact, the trial judge concluded as a matter of law that the specified visitation ordered between the defendant and the minor plaintiff is fair and reasonable and is in the best interests of the minor plaintiff, Kelli Lynn Reynolds. From this Order the plaintiffs appeal.

In response to the plaintiffs' appeal, the defendant filed a "Motion to Dismiss Appeal and for Sanctions," which motion this Court denies.

The plaintiffs' sole contention on appeal is that the Order for visitation violates the Constitutional rights of the minor plaintiff. We find no merit to the arguments presented in the plaintiffs' brief, and, for the reasons that follow, we affirm the Order of the trial court.

The trial judge, unlike the judges of the appellate courts, has the opportunity to hear first hand the testimony of the parties in matters of child custody, and is, therefore, vested with broad discretion in such matters. *In re Peal*, 305 N.C. 640, 645, 290 S.E.2d 664, 667 (1982). That discretion must be exercised in light of this Court's recognition that a parent has a "natural and legal right" to visitation with his child which should not be denied absent some conduct on the part of the parent constituting a forfeiture of the right or some finding that the exercise of the right would be detrimental to the best interests of the child. *In re Stancil*, 10 N.C. App. 545, 551, 179 S.E.2d 844, 849 (1971). The "paramount consideration" in matters of custody and visitation is the best interests of the child, and in determining such matters the trial judge may consider the wishes of a child of suitable age and discretion. *Peal*, 305 N.C. at 645, 290 S.E.2d at 667-68; *Clark v. Clark*, 294 N.C. 554, 576-77, 243 S.E.2d 129, 142 (1978); *James v. Pretlow*, 242 N.C. 102, 105, 86 S.E.2d 759, 761 (1955); *Mintz v. Mintz*, 64 N.C. App. 338, 340-41, 307 S.E.2d 391, 393 (1983). The child's wishes, however, are never controlling, "since the court must yield in all cases to what it

considers to be the child's best interests, regardless of the child's personal preference." *Clark*, 294 N.C. at 577, 243 S.E.2d at 142.

We recognize that Kelli Lynn Reynolds has expressed a desire not to visit her father. The trial court determined, however, based on findings of fact supported by the evidence in the record, that such visitation would be in her best interests. Despite Kelli Lynn Reynolds' desire to the contrary, "a trial judge has the power to make an order forcing a child to visit the noncustodial parent." *Mintz*, 64 N.C. App. at 341, 307 S.E.2d at 394. The Order involved in the *Mintz* case set out a specific visitation schedule which the minor son of the parties simply decided he did not want to follow. The plaintiff mother, who had primary custody of the child, did not insist that the child comply with the Order. Unlike the Order in the present case, the Order in *Mintz* provided that, upon noncompliance with the Order, the father was to take the Order to the sheriff's office and the sheriff was to immediately arrest the mother for contempt and place the son in the custody of the father. This Court found that such a provision denied the mother due process of law, and therefore held the visitation Order to be invalid. *Id.* This Court further concluded that, although the facts in *Mintz* failed to support a valid Order, an Order of "forced visitation" could be entered once the trial judge has (1) afforded the parties an opportunity for a hearing in accordance with due process, (2) created an Order setting out specific findings of fact and conclusions of law to justify and support the Order, and (3) made findings that include at a minimum that the drastic action of incarceration of a parent is reasonably necessary for the promotion and protection of the best interest and welfare of the child. *Id.*

The Order in the present case resulted from a hearing conducted in compliance with the parties' due process rights. The findings of fact and conclusions of law enumerated by the trial judge are sufficient to justify and support the Order as it was entered. The Order provides that "[v]iolation of this Order shall be punishable by Contempt." Such a provision is not analogous to the contempt provision in the *Mintz* case as it does not provide that the violator will be incarcerated upon the oral report of a violation to the sheriff. Rather, the provision is a valid declaration that one who violates the Order will be subject to contempt proceedings in accordance with due process. The Order is, therefore, binding on the parties, and the plaintiffs in the present case are required to comply with the visitation schedule contained therein.

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

Affirmed.

Judges EAGLES and ORR concur.

NORTH CAROLINA FARM BUREAU MUTUAL INSURANCE COMPANY, PLAINTIFF v. JON I. KNUDSEN, JUDITH A. KNUDSEN, AND SYDRA ANN KNUDSEN, DEFENDANTS

No. 9129SC1214

(Filed 16 February 1993)

Insurance § 527 (NCI4th)— school bus accident—stacking—school bus as underinsured highway vehicle

The trial court did not err by entering summary judgment for defendants where a school bus struck and seriously injured defendant Sydra Knudsen; the bus was not covered by any liability bond or insurance policy, but instead was subject to the North Carolina Tort Claims Act; defendants were covered by a personal automobile insurance policy issued by plaintiff which provides UIM coverage; defendants filed a claim with plaintiff for UIM coverage; and plaintiff filed a complaint seeking a declaratory judgment that its policy does not provide UIM coverage for claims arising out of an accident involving a school bus. It was not the intent of the legislature to deny claimants UIM coverage in accidents involving school buses when it determined that such claims may only be brought under the Tort Claims Act. The Tort Claims Act serves the same function as liability insurance for school buses and therefore the Tort Claims Act falls within the categories of "liability bonds" and "insurance policies" for the purpose of determining eligibility for UIM coverage. Moreover, the bus was not self-insured because there is no evidence that the Henderson County Board of Education has complied with the statutory requirements, and the bus was an "underinsured highway vehicle" because the amount available under the Tort Claims Act was much less than the stacked UIM limits of defendants' policy. N.C.G.S. § 20-279.21(b)(4) (1989); N.C.G.S. § 20-279.33.

Am Jur 2d, Automobile Insurance §§ 322, 329.

Right of insured precluded from recovering against owner or operator of uninsured motor vehicle because of governmental immunity, to recover uninsured motorist benefits. 55 ALR4th 806.

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 10 September 1991 by Judge John M. Gardner in Henderson County Superior Court. Heard in the Court of Appeals 1 December 1992.

Willardson & Lipscomb, by William F. Lipscomb, for plaintiff-appellant.

Long, Parker, Hunt, Payne & Warren, P.A., by Ronald K. Payne, for defendants-appellees.

LEWIS, Judge.

On 14 December 1990 plaintiff filed a complaint seeking a declaratory judgment that an automobile liability insurance policy issued by plaintiff does not provide underinsured motorist (UIM) coverage for claims arising out of an accident involving a school bus. On 23 January 1991 defendants answered the complaint, asking for a declaratory judgment that the insurance policy does provide UIM coverage in this case. The trial court entered summary judgment in favor of defendants on 10 September 1991. The court declared that the bus was an "underinsured highway vehicle," and that defendants were entitled to stack the per person limits of the underinsured coverage for each of their six vehicles covered under the policy.

Summary judgment is only appropriate when there are no genuine issues 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). There are no factual disputes involved in this declaratory judgment action. We agree with the trial court's interpretation of the statutes and its conclusion that defendants are entitled to summary judgment.

On 25 October 1989 a school bus driven by Wilma Angel Gordon and owned by the Henderson County Board of Education struck and seriously injured defendant Sydra Knudsen. In a separate tort action, defendants allege that Ms. Gordon negligently drove the bus over Sydra after she got off the bus and tripped and fell in front of it.

The bus was not covered by any liability bond or insurance policy, but was instead subject to the North Carolina Tort Claims Act (the Tort Claims Act or the Act). The State of North Carolina, Wilma Gordon, North Carolina Farm Bureau Mutual Insurance Company and defendants entered into an agreement allowing the Attorney General of North Carolina to provide legal defense to Ms. Gordon pursuant to N.C.G.S. § 143-300.1. The agreement authorizes the Attorney General to compromise and settle the claim for up to $100,000, the limit set forth in the Act. The agreement further provides that the State will pay $65,000 to Jon and Judith Knudsen and $35,000 to Sydra Knudsen as consideration for their release of Ms. Gordon from all liability for the accident subject to certain terms and conditions. The agreement acknowledges the declaratory judgment action and specifically states that the release of Ms. Gordon will not relieve the insurer of its obligations, if any.

At the time of the accident defendants were covered by a personal automobile insurance policy issued by plaintiff. Sydra Knudsen qualified as an insured under this policy. The policy covers six vehicles with liability limits for bodily injury of $100,000 per person and $300,000 per accident and provides UIM coverage with the same limits. Defendants filed a claim with plaintiff for UIM coverage, but plaintiff contends that such coverage is not available because a school bus insured under the Tort Claims Act is not an "underinsured highway vehicle" under N.C.G.S. § 20-279.21(b)(4) or under the policy in question.

Section 20-279.21(b)(4) states that a liability insurance policy must "provide underinsured motorist coverage," and that an "underinsured highway vehicle" is:

> 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.

N.C.G.S. § 20-279.21(b)(4) (1989) (the 1991 amendments to this section do not apply to this case). Plaintiff contends that since the bus is not covered by any "liability bonds" or "insurance policies" it is not an underinsured highway vehicle.

The Tort Claims Act specifically provides coverage for claims against county boards of education arising from school bus accidents. N.C.G.S. § 143-300.1 (1990). A local board of education may waive its governmental immunity by purchasing liability insurance according to section 115C-42. However, a proviso to that statute states that even if a local board of education has waived its immunity by purchasing its own liability insurance, such insurance does not apply to claims for damages caused by the negligent acts or torts of school bus drivers when the operation of the school bus is paid from the State Public School Fund. N.C.G.S. § 115C-42 (1991). Such claims must still be brought under section 143-300.1 of the Tort Claims Act. *See Smith v. McDowell County Bd. of Educ.*, 68 N.C. App. 541, 543, 316 S.E.2d 108, 110 (1984). Thus, it is nearly impossible for a school bus involved in a negligence action to ever be covered under an actual liability bond or insurance policy under existing law.

We do not believe it was the intent of the legislature to deny claimants UIM coverage in accidents involving school buses when it determined that such claims may only be brought under the Tort Claims Act. We find that the Tort Claims Act serves the same function as liability insurance for school buses. We therefore determine that the Tort Claims Act falls within the categories of "liability bonds" and "insurance policies" for the purpose of determining eligibility for UIM coverage.

Plaintiff also relies on the fact that the statute excludes self-insured vehicles from the definition of an "uninsured motor vehicle." § 20-279.21(b)(3)b. Because this definition applies to "underinsured highway vehicles" as well, § 20-279.21(b)(4), plaintiff claims the bus is self-insured through the Tort Claim's Act and is therefore excluded from the definition of "underinsured highway vehicle." Self-insurers, however, must meet the requirements of section 20-279.33, which states that "[a]ny person in whose name more than 25 vehicles are registered may qualify as a self-insurer by obtaining a certificate of self-insurance issued by the Commissioner [of Motor Vehicles]. . . ." N.C.G.S. § 20-279.33(a) (1989). There is no evidence that the Henderson County Board of Education has

complied with these requirements. We conclude that the bus was not self-insured.

Finally, plaintiff contends that the bus is not "underinsured" because the statute does not permit stacking of UIM coverages, and therefore the limits of liability are the same. The statute states that "underinsured" means "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." § 20-279.21(b)(4).

Our Supreme Court has recently addressed the issue of stacking. In *Harris v. Nationwide Mut. Ins. Co.*, 332 N.C. 184, 420 S.E.2d 124 (1992), the Court discussed two issues involved in determining whether a vehicle qualified as an "underinsured highway vehicle." First, the Court held that the proper comparison is between the tortfeasor's liability coverage and the claimant's UIM coverage, not the claimant's liability coverage. 332 N.C. at 188, 420 S.E.2d at 127. Second, the Court determined that the "applicable limits of liability" are the sum of all UIM limits under the policy. 332 N.C. at 191-2, 420 S.E.2d at 129. Thus, the comparison is between the aggregate liability coverage of the tortfeasor's vehicle and the stacked UIM limits of the claimant's policy. 332 N.C. at 192, 420 S.E.2d at 129.

Applying the law to the facts of this case, we find that the bus was an "underinsured highway vehicle." The aggregate liability coverage for the bus is $100,000, the amount available under the Tort Claims Act. This amount is much less than the stacked UIM limits of defendants' policy of $600,000, $100,000 per vehicle times six vehicles.

The trial court's order of summary judgment in favor of defendants declaring that the school bus is an "underinsured highway vehicle" is hereby

Affirmed.

Judges WELLS and EAGLES concur.

T. H. BLAKE CONTRACTING COMPANY, INC., PLAINTIFF-APPELLANT v. S. LEE SORRELLS AND SORRELLS PLUMBING AND HEATING CO., INC., DEFENDANTS-APPELLEES

No. 9218DC60

(Filed 16 February 1993)

1. **Appeal and Error § 138 (NCI4th)— directed verdict against plaintiff—counterclaim remaining—no right of appeal by plaintiff**

Plaintiff had no right to immediately appeal an interlocutory order directing verdict against him in his action against the individual defendant where plaintiff negotiated a settlement of defendants' counterclaim but withdrew consent to the settlement after the court dismissed the jury but before the judgment was signed.

Am Jur 2d, Appeal and Error § 110.

2. **Rules of Civil Procedure § 11 (NCI3d)— sanctions for action against individual defendant**

The trial court is directed to determine the appropriate Rule 11 sanction against plaintiff for bringing an action against the individual defendant where plaintiff alleged that the individual defendant guaranteed payment under the corporate defendant's contract with plaintiff; plaintiff made no showing at trial that the individual defendant independently undertook any personal liability to plaintiff, either as an original promise or as a guarantee; plaintiff did not resist the individual defendant's motion for a directed verdict at the close of plaintiff's evidence; and plaintiff's complaint as to the individual defendant was not well-grounded in fact or law when it was signed by plaintiff's president.

Am Jur 2d, Appeal and Error § 1024.

Procedural requirements for imposition of sanctions under Rule 11, Federal Rules of Civil Procedure. 100 ALR Fed. 556.

Appeal by plaintiff from judgments entered 23 May and 14 June 1991 in Guilford County District Court by Judge Thomas G. Foster, Jr. Cross appeal by defendants from judgment entered 28 August 1991 in Guilford County District Court by Judge Thomas G. Foster, Jr. Heard in the Court of Appeals 4 January 1993.

On 3 November 1988, plaintiff, T.H. Blake Contracting Company, instituted this breach of contract action against defendants, seeking to recover money damages for work it allegedly performed pursuant to a verbal agreement with corporate defendant Sorrells Plumbing and Heating, Inc. (hereinafter SP&H). Plaintiff also alleged that defendant S. Lee Sorrells personally "guaranteed" the payment of the money damages allegedly due under the agreement. Defendants answered with general denials and counterclaimed for malicious prosecution and abuse of process. At trial, the evidence tended to show the following facts and circumstances.

During the fall of 1987, plaintiff learned of a small construction project involving the demolition and removal of an existing cooling system and installation of new pipe work at the University of North Carolina at Chapel Hill. Plaintiff could not take advantage of this opportunity because it was not licensed as a heating contractor by the State. Plaintiff contacted defendant SP&H through defendant Mr. Sorrells, a licensed heating and plumbing contractor, and proposed that defendant SP&H bid on the project while allowing plaintiff to do the demolition and removal portion of the work. Plaintiff would remove existing piping, chiller, cooling tower and electrical conduit while defendant would perform the electrical and installation work and supervise the entire project. Their agreement provided that plaintiff would be paid its direct costs, that defendant SP&H would receive 15 percent for overhead and supervision, and that any profit would be divided equally.

Defendant SP&H submitted to the University its bid which was accepted during mid-December 1987. Plaintiff immediately began the demolition work, including removal of the pipe, without defendant SP&H's knowledge or supervision. After plaintiff completed the demolition work, defendant SP&H began the installation work with help from some of plaintiff's employees. Defendant SP&H completed the project but encountered unanticipated additional expenses. After completion, the University paid defendant SP&H its contract price.

When the time came for defendant SP&H to reimburse plaintiff, defendant SP&H asked that plaintiff provide it with a breakdown of its costs. The dispute arose when defendant SP&H refused to pay plaintiff for the demolition work because plaintiff's demands reflected inflated equipment costs and fabricated hours. Plaintiff testified that defendant SP&H unjustifiably refused to reimburse

plaintiff either for labor it provided to assist defendant SP&H or for demolition work it performed.

At the close of plaintiff's evidence, the court granted defendant S. Lee Sorrells' motion for directed verdict and judgment was entered 23 May 1991 dismissing the action against defendant S. Lee Sorrells. On 27 May 1991, at the close of all the evidence, the court granted defendant SP&H's motion for directed verdict against Blake Construction Company and dismissed that action.

At this point, the court was prepared to allow defendants' counterclaim to go to the jury. Instead, the parties engaged in settlement negotiations and agreed to settle the case. The general terms of the settlement were read in open court. The court then released counsel and the parties and dismissed the jury. As part of the settlement, plaintiff agreed not to appeal the court's directed verdict orders in favor of defendants.

After the court dismissed the jury but before the judgment was signed, plaintiff had changed its position and withdrew its consent to the settlement. Judgment was filed 14 June 1991 as to the action against defendant SP&H. On 24 June 1991, plaintiff, acting *pro se*, filed Notice of Appeal and a Motion for Extension of Time within which to contract with the court reporter for the production of the trial transcript. Defendants opposed plaintiff's motion and filed a Motion to Dismiss Appeal, Motion for Sanctions and Motion to Enforce Settlement Agreement and brought the same on for hearing along with plaintiff's Motion for Extension of Time. At the hearing, the court granted plaintiff's motion, finding good cause, and declined to rule on defendants' motions. Defendants have cross appealed from the court's order granting extension of time and its decision not to rule on defendants' Motion to Dismiss Appeal. In addition, defendants filed motions to dismiss the appeal and for sanctions in this Court.

Richard M. Dailey, Jr. and Jewel A. Farlow for plaintiff-appellant.

Adams, Kleemeier, Hagan, Hannah & Fouts, by David A. Senter and Betty P. Balcomb, for defendants-appellees.

WELLS, Judge.

[1] Plaintiff has abandoned its appeal as to defendant S. Lee Sorrells, and now sets forth a single assignment of error for our

review. Plaintiff contends the trial court erred in directing a verdict in favor of defendant SP&H, and claims it is entitled to recover damages for demolition work performed for defendant SP&H even though plaintiff was not a licensed heating contractor under N.C. Gen. Stat. § 97-21. We do not reach the merits but dismiss this appeal and remand for trial of defendants' counterclaim. Upon entry of final judgment, plaintiff may then pursue such appeal as appears appropriate.

This is clearly a "piecemeal" appeal from an interlocutory order. *See generally Oestreicher v. Stores*, 290 N.C. 118, 225 S.E.2d 797 (1976) and cases cited and discussed therein. The entire case below has not been tried to judgment, and the judgment from which plaintiff attempts to appeal can only be regarded as interlocutory. *See* N.C. Gen. Stat. §§ 1-277, 7A-27, and 1A-1; Rule 54 of the Rules of Civil Procedure. Plaintiff has no substantial right to pursue this appeal, having itself precipitated the events and circumstances which prevented entry of final judgment as to all claims in this action.

Additionally, in a separate order, we shall require plaintiff to show cause why it should not be appropriately sanctioned under Rule 34 of the North Carolina Rules of Appellate Procedure for pursuing this frivolous appeal.

[2] Further, upon our own motion, in a separate order, we shall direct the trial court to determine an appropriate sanction for plaintiff's obvious violation of Rule 11 of the Rules of Civil Procedure arising from its bringing this action against the individual defendant S. Lee Sorrells. At trial, plaintiff made no showing whatsoever that Mr. Sorrells independently undertook any personal liability to plaintiff, either as an original promise or as a guarantee under their agreement. Upon motion by defendant Sorrells that the trial court grant a directed verdict in his favor at the close of plaintiff's evidence, plaintiff did not even attempt to resist that motion. These circumstances show beyond question that plaintiff's complaint as to defendant Sorrells, verified by plaintiff's president Mr. Blake, was not well-grounded in fact or law when it was signed.

Appeal dismissed; case remanded for final disposition.

Judges EAGLES and LEWIS concur.

CHARLES IVEY, EMPLOYEE/PLAINTIFF v. FASCO INDUSTRIES, EMPLOYER, AND NATIONWIDE MUTUAL INSURANCE CO., CARRIER/DEFENDANTS

No. 9210IC112

(Filed 16 February 1993)

1. Master and Servant § 55.1 (NCI3d) — workers' compensation — remanded opinion — correction of inconsistencies

The Industrial Commission did not fail on remand to follow the Court of Appeals' directives to address inconsistencies in opinions by Deputy Commissioners. Although plaintiff asserts that an unaddressed inconsistency exists in that the Taylor opinion found that plaintiff suffered a compensable injury on 18 August to his neck and the subsequent Haigh opinion stated in the "Comment" section that "plaintiff's disability beginning in August, 1982 and continuing thereafter is due to the injury by accident which plaintiff sustained in February, 1978," there was no inconsistency because the Haigh opinion in no way altered the Taylor opinion. The Taylor opinion found that plaintiff was entitled to temporary total disability for the period between 27 August 1982 and 16 February 1983 due to the August 1982 injury and Haigh found, based on evidence not available to Taylor, that any disability plaintiff suffered after 16 February 1983 was not a result of the 1982 accident, but of a change of condition of the February 1978 accident.

Am Jur 2d, Workers' Compensation § 613.

2. Master and Servant § 93 (NCI3d) — workers' compensation — hearing by second Deputy Commissioner — scope of inquiry

Deputy Commissioner Haigh acted within the scope of his inquiry in a workers' compensation proceeding where another deputy commissioner had previously determined that plaintiff was entitled to temporary total disability for the period between 27 August 1982 and 16 February 1983 due to an August 1982 injury, but reserved judgment for the period following 16 February 1983; Deputy Commissioner Haigh heard this case to determine what disability compensation, if any, plaintiff was due after 16 February 1983; and Haigh found that plaintiff was not due any further compensation arising out of the August 1982 accident.

Am Jur 2d, Workers' Compensation §§ 602, 607, 616.

3. Master and Servant § 96.5 (NCI3d)— workers' compensation— findings of fact—supported by evidence

The findings of the full Industrial Commission in a workers' compensation action were supported by the evidence. The Court of Appeals is bound by the Industrial Commission's findings when they are supported by direct evidence or by reasonable inferences drawn from the record.

Am Jur 2d, Workers' Compensation § 612.

4. Master and Servant § 93 (NCI3d)— workers' compensation— Rule 701 motion—discretion of court

The plaintiff in a workers' compensation action failed to demonstrate that the Industrial Commission abused its discretion in denying plaintiff's Rule 701 motion.

Am Jur 2d, Workers' Compensation § 614.

Appeal by employee/plaintiff from an Opinion and Award by the Full Industrial Commission entered 10 December 1991. Heard in the Court of Appeals 6 January 1993.

Plaintiff sustained an injury to his back on 2 February 1978 arising out of and in the course of his employment. After surgery, his condition improved and he returned to work with some restrictions on 23 March 1982. On 18 August 1982, plaintiff injured his neck in the course of his employment.

On 30 April 1986, plaintiff's neck injury claim was heard by Deputy Commissioner Henry Burgwyn. Mr. Burgwyn left the Commission before entering a decision. The case was rescheduled for 15 June 1987 and was heard by Deputy Commissioner Scott M. Taylor. Prior to the newly scheduled hearing, the parties agreed to have the issues decided on the basis of the record and transcript of the 1986 hearing. On 25 November 1987, Deputy Commissioner Taylor entered an Opinion and Award finding that plaintiff suffered an injury as a result of an accident while in the course of his employment on 18 August 1982. Temporary total disability payments were ordered through 16 February 1983 and the matter was rescheduled for a determination of plaintiff's entitlement to compensation for any temporary total disability and permanent partial disability beyond 16 February 1983.

On 23 June 1988, Deputy Commissioner William L. Haigh presided over a second evidentiary hearing. At this hearing, the employee was the sole witness. The deposition of Dr. Robert H. Wilkins, taken on 17 October 1988, was also entered into evidence. On 3 February 1989, Deputy Commissioner Haigh entered an opinion denying plaintiff any further disability from and after 16 February 1983. Plaintiff appealed to the Full Commission and simultaneously filed a Rule 701 motion to present additional evidence to the Full Commission. On 3 April 1990, the Full Commission affirmed Deputy Commissioner Haigh's opinion but did not rule on the Rule 701 motion. Plaintiff appealed to the Court of Appeals.

In *Ivey v. Fasco Industries*, 101 N.C. App. 371, 399 S.E.2d 153 (1991), this Court reversed and remanded this case to the Full Commission with instructions to rule upon plaintiff's Rule 701 motion and to address any inconsistencies between the Taylor and Haigh opinions. Upon remand, the Full Commission denied plaintiff's Rule 701 motion and, without disturbing Deputy Commissioner Taylor's opinion, again affirmed Deputy Commissioner Haigh's opinion. From this decision, plaintiff appeals.

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

Marvin Schiller for employer/carrier-appellees.

WELLS, Judge.

[1] In his first argument, plaintiff contends that the Full Commission's second opinion fails to follow the Court of Appeals' directives in that it fails to adequately address inconsistencies between the Haigh and Taylor opinions, but rather merely affirms the Haigh opinion. Plaintiff asserts that an unaddressed inconsistency exists, in that the Taylor opinion found that plaintiff suffered a compensable injury on 18 August 1982 to his neck, and the Haigh opinion stated in the "Comment" section that "plaintiff's disability beginning in August, 1982 and continuing thereafter is due to the injury by accident which plaintiff sustained in February, 1978." The statements made in the "Comment" section of the Haigh opinion do not diminish Deputy Commissioner Haigh's findings with regard to any entitlements to plaintiff for temporary total disability or permanent partial disability after 16 February 1983.

We find that the Full Commission sufficiently addressed any inconsistency. The Taylor opinion found that plaintiff was entitled to temporary total disability compensation for the period between 27 August 1982 and 16 February 1983 due to the August 1982 injury. Based on Dr. Wilkins' deposition, evidence not available to Deputy Commissioner Taylor, Deputy Commissioner Haigh found that any disability plaintiff suffered after 16 February 1983 was not a result of the 1982 accident, but rather a change of condition of the February, 1978 injury. In essence, while the Haigh opinion found that plaintiff was entitled to no compensation for the 1982 accident after 16 February 1983, it in no way altered the Taylor opinion. Therefore, we find no inconsistency between the two opinions. To the extent that the Haigh opinion's "Comment" section seems inconsistent with the Taylor opinion, we agree with the Full Commission that the Taylor opinion does not act as *res judicata* as to the Haigh opinion where the Taylor opinion reserved judgment for the period following 16 February 1983. Therefore, we find plaintiff's first argument to be without merit.

[2] Next, plaintiff contends that the Full Commission erred in affirming the Haigh opinion because Deputy Commissioner Haigh's findings of fact were outside the limited scope of his inquiry. We do not agree. Deputy Commissioner Haigh heard this case to determine what disability compensation, if any, plaintiff was due after 16 February 1983. Based on plaintiff's testimony and Dr. Wilkins' deposition, he found plaintiff was not due any further compensation, arising out of the August 1982 accident. Thus, Deputy Commissioner Haigh acted within his scope of inquiry.

[3] Next, plaintiff contends that the findings of the Full Commission are not supported by competent evidence. The Industrial Commission is vested with exclusive authority to find facts and, on appeal, this Court is bound by the Commission's findings when they are supported by direct evidence or by reasonable inferences drawn from the record. *Kennedy v. Duke University Medical Center*, 101 N.C. App. 24, 398 S.E.2d 677 (1990). Thus, the issue becomes whether the record contains evidence from which a fact-finder could reasonably conclude that plaintiff was not due any disability compensation after 16 February 1983. After a careful review, we find that the record contains evidence which supports the findings of the Full Commission. Dr. Wilkins' testimony was to the effect that plaintiff's continuing disability after 1983 was due to his 1978 back injury and supports the Haigh opinion's findings.

[4] Next, plaintiff contends that the Full Commission erred in denying plaintiff's Rule 701 motion. As plaintiff acknowledges in his brief, the Rule 701 motion is addressed to the sound discretion of the Commission. Plaintiff has failed to demonstrate that the Commission abused its discretion in denying plaintiff's motion and, accordingly, we affirm.

Lastly, plaintiff reasserts its first argument, contending that the Full Commission made insufficient findings to support its denial of plaintiff's Rule 701 motion and its decision to affirm the Haigh opinion. For the reasons stated previously in this opinion, we disagree and find no merit in plaintiff's last argument.

The Full Commission's Opinion and Award is affirmed.

Judges COZORT and LEWIS concur.

GRACE WEST EUBANKS v. DAVID M. EUBANKS

No. 924DC186

(Filed 16 February 1993)

1. **Divorce and Separation § 143 (NCI4th)— equitable distribution—equal division of property—unequal division of liquid property**

The trial court did not abuse its discretion in an equitable distribution action by awarding plaintiff a disparate share of liquid assets where defendant does not allege that the total dollar value of the two halves are unfairly disparate. The division of marital property is within the discretion of the trial court and this distribution of marital assets did not create a manifest injustice.

Am Jur 2d, Divorce and Separation § 930.

2. **Divorce and Separation § 143 (NCI4th)— equitable distribution—equal division—use of distribution factors**

There was no error in an equitable distribution action where the court consulted N.C.G.S. § 50-20(c) before dividing the marital property equally. Any improper reliance on the

statute was harmless error because the property was divided equally. Equal distribution does not require that each party receive equal percentages of liquid assets.

Am Jur 2d, Divorce and Separation § 930.

3. **Divorce and Separation § 164 (NCI4th)— equitable distribution—written stipulation between attorneys—not signed by parties**

A stipulation was properly admitted in an equitable distribution proceeding where the parties' attorneys negotiated a stipulation of certain facts, conferring with the parties between meetings. This written stipulation was signed by the attorneys but not by plaintiff or defendant, and was read into the record without objection. Although defendant now contends that the court erred by not treating the stipulation as an oral stipulation and making the requisite inquiries before admitting the stipulation into the record, the parties played an active role in the negotiations before their attorneys signed the stipulation and the stipulation was offered into evidence by the parties' counsel, accepted by the trial court, and read into the record in the presence of the parties without objection.

Am Jur 2d, Stipulations §§ 2, 3.

Effectiveness of stipulation of parties or attorneys, notwithstanding its violating form requirements. 7 ALR3d 1394.

Appeal by defendant from judgment entered 23 July 1991 in Jones County District Court by Judge Leonard W. Thagard. Heard in the Court of Appeals 3 February 1993.

On 5 May 1989, plaintiff, Grace West Eubanks, filed a complaint, requesting a divorce from bed and board, temporary and permanent alimony, equitable distribution of marital property, a temporary restraining order, a preliminary injunction, and a protective order. The parties were married on 13 September 1947, separated on 30 April 1989, and divorced on 10 August 1990. On 13 May 1991, Judge Leonard W. Thagard entered an equitable distribution order, which was signed on 23 July 1991. Defendant gave notice of appeal on 6 August 1991.

J. Allen Murphy for plaintiff-appellee.

Judson H. Blount, III for defendant-appellant.

WELLS, Judge.

[1] In his first assignment of error, defendant contends that the trial court committed reversible error by awarding plaintiff a disparate share of liquid assets. In essence, defendant is alleging that plaintiff's "half" of the marital estate consists of a greater percentage of liquid assets than defendant's "half" of the marital estate. From the marital property, defendant received $49,114.05 and plaintiff received $48,763.37. Of the $49,114.05 worth of marital property defendant received, $23,998.76 was in the form of liquid assets.[1] Of plaintiff's $48,763.37 share, $40,518.37 consisted of liquid assets and $8,245.00 was in the form of personal property. While the defendant does not allege that the total dollar value of the two halves are unfairly disparate, he contends that it was unjust for the trial court to grant plaintiff more liquid assets than defendant was granted.

"The division of marital property is a matter within the discretion of the trial court. 'It is well established that where matters are left to the discretion of the trial court, appellate review is limited to a determination of whether there was a clear abuse of discretion.' " *Fox v. Fox*, 103 N.C. App. 13, 404 S.E.2d 354 (1991), *quoting White v. White*, 312 N.C. 770, 324 S.E.2d 829 (1985). Defendant cited no authority in support of the assertion that a trial judge must divide the marital estate into equal percentages of liquid assets. Contrary to defendant's assertion, the trial court's distribution of marital assets did not create a manifest injustice. We find no abuse of discretion. Therefore, we find no merit in defendant's first argument.

[2] In his next argument, defendant contends that the court committed reversible error by consulting N.C.G.S. § 50-20(c) before dividing the marital property equally. In pertinent part, N.C.G.S. § 50-20(c) states that there "shall be an equal division . . . unless the court determines that an equal division is not equitable [at which point the court shall] divide the marital property equitably." The statute then goes on to list twelve factors for the trial court to consider when dividing a marital estate unequally, but equitably. Obviously, if the court divided the property equally after referring

1. Defendant received $13,778.90 in securities, a $10,219.86 certificate of deposit, a 3.02 acre parcel of land valued at $3,317.29, personal property (mainly consisting of household furnishings) valued at $9,345.00, and a life estate in the marital home valued by the court at $12,453.00.

to N.C.G.S. § 50-20(c), any improper reliance upon the statute could only result in harmless error, as the property was in fact divided equally. Thus, it seems that defendant's assertion must be based on the proposition that the property was not divided equally. We disagree with that premise. Equal distribution does not require that each party receive equal percentages of liquid assets. Thus, we find no merit in this assignment of error.

[3] Lastly, defendant refutes the validity of a stipulation concerning the classification and valuation of certain property belonging to the parties. Prior to the start of the equitable distribution trial, the parties' attorneys negotiated a stipulation of certain facts, conferring with the parties between negotiation meetings. This written stipulation was signed by each party's attorney but was never signed by either plaintiff or defendant. Plaintiff's counsel advised the court that the parties had agreed to the stipulation and the stipulation was read into the record, absent any objection from either party. Defendant now asserts that, because the stipulation was not signed and acknowledged by the parties themselves, the court committed reversible error by not treating the stipulation as an oral stipulation and making the requisite inquiries before admitting the stipulation into the record. We disagree.

In *McIntosh v. McIntosh*, 74 N.C. App. 554, 328 S.E.2d 600 (1985), this Court noted that in cases where stipulations concerning marital property in an equitable distribution setting were not reduced to writing, duly executed, and acknowledged, the record must affirmatively demonstrate that the trial court read the stipulation terms to the parties and that they understood the effects of the agreement. While the written stipulation in the case at bar was not signed and acknowledged by the parties themselves, the parties played an active role in the negotiations before their attorneys signed the stipulation. The stipulation was offered into evidence by the parties' counsel, accepted by the trial court, and read into the record in the presence of the parties without objection. We therefore hold that the stipulation was properly admitted.

The trial court's judgment is affirmed.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. SAMUEL GRIFFIN

No. 914SC1067

(Filed 16 February 1993)

Criminal Law § 1057 (NCI4th)— second degree murder—sentencing—statement by judge

A life sentence imposed for second degree murder was vacated where the trial judge told defense counsel in a bench conference that "it would be a big mistake" to have the defendant testify. Although the trial judge later told defense counsel that he had made the statement because he was afraid the victim's relatives might cause a disturbance in the courtroom, the clear import at the time was that defendant would receive a longer sentence if he testified and the statement, regardless of the reasoning behind it, effectively chilled the defendant's right to testify in his own behalf. This holding vacating the sentence in no way limits the court's discretionary authority to impose a life sentence upon rehearing. N.C.G.S. § 15A-1334.

Am Jur 2d, Criminal Law § 527.

Prejudicial effect of trial judge's remarks, during criminal trial, disparaging accused. 34 ALR3d 1313.

Appeal by defendant from judgment entered 12 June 1991 by Judge William C. Griffin in Jones County Superior Court. Heard in the Court of Appeals 14 January 1993.

On 14 January 1991 defendant was indicted for murder in violation of G.S. § 14-17. On 10 June 1991, the defendant pled guilty to second degree murder. On 12 June 1991, after conducting a sentencing hearing, the trial judge sentenced defendant to life in prison with the North Carolina Department of Correction.

Defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Kathryn Jones Cooper, for the State.

Sumrell, Sugg, Carmichael & Ashton, P.A., by Rudolph A. Ashton, III, for the defendant.

EAGLES, Judge.

Defendant first argues that the trial judge erred at the sentencing hearing by telling defense counsel in a bench conference that it "would be a big mistake" to have the defendant testify. We agree with defendant.

In his brief, the defendant argues primarily that his statutory right to testify pursuant to G.S. § 8-54 and his constitutional right to testify were "chilled." We agree that the defendant's right to testify was "chilled," but the critical statute is G.S. § 15A-1334.

G.S. § 15A-1334 provides, in pertinent part:

15A-1334. The sentencing hearing.

* * *

> (b) Proceeding at Hearing.—The defendant at the hearing may make a statement in his own behalf.

" 'A judgment will not be disturbed because of sentencing procedures unless there is a showing of abuse of discretion, procedural conduct prejudicial to the defendant, circumstances which manifest inherent unfairness and injustice, or conduct which offends the public sense of fair play.' " *State v. Lane*, 39 N.C. App. 33, 38, 249 S.E.2d 449, 452-53 (1978) (quoting *State v. Pope*, 257 N.C. 326, 126 S.E.2d 126, 133 (1962)).

Here, during the sentencing hearing the defendant's attorney requested and was granted a bench conference. Although we do not have a verbatim transcript of what was said during that bench conference, the record does include a statement of proceedings made pursuant to N.C.R. App. P. 9(a)(3)(i). In that statement, the defendant's counsel asserts that he "told the trial judge that he was just about to call the defendant to the witness stand[,]" and the trial judge replied that that "would be a big mistake." The prosecutor recalled that during the bench conference "defense counsel told the trial judge that he was thinking about putting the defendant on the witness stand." The prosecutor also recalled that the "trial judge replied that having the defendant testify 'would be a big mistake.' " The defendant did not testify. After the hearing, the trial judge told defense counsel that he had said it "would be a big mistake" for the defendant to testify because he was afraid the victim's relatives might cause a disturbance in the courtroom.

Defendant argues that the trial judge's statement, regardless of the reasoning behind it, effectively chilled the defendant's right to testify in his own behalf. Defendant argues that the clear import of the court's statement, at the time it was made, was that if the defendant testified he would receive a longer sentence. We agree. Regardless of whether defense counsel told the trial judge that he "was just about to call the defendant to the witness stand" or "that he was thinking about putting the defendant on the witness stand[,]" defense counsel could have reasonably interpreted the trial judge's statement to mean that the defendant would receive a longer sentence if he testified. Accordingly, we find that the defendant's right to testify under G.S. § 15A-1334(b) was effectively chilled by the trial judge's comment. This constitutes "procedural conduct prejudicial to the defendant." *Lane*, 39 N.C. App. at 38, 249 S.E.2d at 452.

Accordingly, we vacate the sentence imposed upon the defendant and remand for a new sentencing hearing. Our holding in no way limits the trial court's discretionary authority to impose a life sentence upon re-hearing. Because of our holding we do not reach the remaining arguments or assignments raised on appeal.

Vacated and remanded for re-sentencing.

Judges ORR and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 FEBRUARY 1993

FISHER v. CITY OF CONCORD No. 9119SC1248	Cabarrus (91CVS00717)	Affirmed
HEDGEPETH v. CONSOLIDATED DIESEL CO. No. 9210IC58	Ind. Comm. (#614313)	Affirmed
HERITAGE HOSPITAL v. PEEK No. 917SC1011	Edgecombe (90CVS213)	Reverse in part & affirm in part
HODGE v. ADAM'S MARK HOTEL No. 9110IC784	Ind. Comm. (#631154)	Dismissed
McGUIRT v. APPLING REALTY No. 9227DC87	Gaston (90CVD2391)	Affirmed
STATE v. HOLLOMAN No. 9114SC893	Durham (90CRS33251)	No Error
STATE v. NOELL No. 9115SC1040	Orange (90CRS8258)	No Error
W. H. ODELL & ASSOC. v. GARLAND No. 9221SC17	Forsyth (90CVS6991)	1. Affirms the entry of summary judgment in favor of Garland as to the enforceability of the noncompetition provision; 2. Affirms the trial court's denial of Garland's motion to amend his Answer and Counterclaims to include a claim under the Wage and Hour Act; 3. Reverses the Order for summary judgment in favor of Odell on the issue of bonus payments; 4. Vacates the trial court's declaratory judgment regarding the bonus payments provision of

the Employment Agreement; and 5. Remands this case to the trial court for entry of summary judgment in favor of Garland on the issue of the bonus payments.

STATE OF NORTH CAROLINA v. DEBORAH MAE AINSWORTH, DEFENDANT AND DUNCAN GRAHAM AINSWORTH, DEFENDANT

No. 9223SC6

(Filed 2 March 1993)

1. **Criminal Law § 44 (NCI4th)— aider and abettor—guilt of first degree offense—no allegation of aiding and abetting required in indictment**

A person who aids or abets another in the commission of first degree rape is guilty of first degree rape, and it is not necessary that the indictment charge defendant with aiding and abetting.

Am Jur 2d, Rape § 28.

2. **Criminal Law § 45 (NCI4th)— mother guilty of first degree rape of son—aider and abettor**

A mother may be found guilty of first degree rape on a theory of aiding and abetting when her twelve-year-old child engaged in intercourse with an adult woman in her presence and the mother did not take any reasonable steps to prevent the intercourse.

Am Jur 2d, Rape § 28.

3. **Rape and Allied Offenses § 1 (NCI3d)— statutory rape—criminal mens rea not element**

There was no merit to defendant's contention that the State failed to show that defendant had any criminal *mens rea*, since criminal *mens rea* is not an element of statutory rape.

Am Jur 2d, Rape § 16.

4. **Rape and Allied Offenses § 19 (NCI3d)— indecent liberties with own child for own sexual gratification—sufficiency of evidence**

The jury could reasonably infer that defendant wilfully engaged in an immoral, improper, or indecent liberty with her child to arouse or gratify her own sexual desire where the State presented evidence which tended to show that defendant knowingly engaged in anal intercourse with her husband in the presence of her child, engaged in "vaginal intercourse" with another woman in the presence of her child,

and watched her child engage in vaginal intercourse with an adult woman; therefore, the court on appeal did not reach the State's argument that neither statute nor case law required that the sexual gratification required for indecent liberties be that of the defendant.

Am Jur 2d, Assault and Battery § 24.

5. **Rape and Allied Offenses § 7 (NCI3d)— first degree rape—mandatory life sentence—no cruel and unusual punishment**

The imposition of a mandatory life sentence for defendant's first degree rape conviction did not constitute cruel and unusual punishment.

Am Jur 2d, Rape § 115.

6. **Rape and Allied Offenses § 5 (NCI3d)— first degree rape of stepchild—aiding and abetting—sufficiency of evidence**

Evidence was sufficient to withstand defendant's motion to dismiss a charge of first degree rape based on aiding and abetting where it tended to show that a woman who shared the same bed with defendant and his wife heard defendant call his stepchild down to the bedroom; when the child walked into the room, defendant, his wife, and the woman were all lying naked on the bed; the child testified that defendant pulled his shorts and underwear halfway off; the woman heard defendant tell the child to go to her side of the bed; and when the child engaged in vaginal intercourse with the woman, defendant and his wife, lying in the same bed, were also engaged in a sexual act.

Am Jur 2d, Rape § 88.

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

The jury could reasonably infer that defendant wilfully engaged in taking an immoral, improper or indecent liberty with a child to arouse or gratify his own sexual desire where the evidence tended to show that defendant called the child into his bedroom to watch sexual activity between the child's mother and another woman; called the child over to the bed and then pulled the child's shorts and underwear halfway off; knowingly engaged in anal intercourse with the child's mother in front of the child; instructed the child to have the other

woman perform oral sex upon him; watched as the child engaged in vaginal intercourse with the other woman; and called the child over to him to observe while he (defendant) was ejaculating.

Am Jur 2d, Assault and Battery § 24.

8. **Criminal Law § 322 (NCI4th)— first degree rape—indecent liberties—charges against mother and stepfather—joinder proper**

The trial court did not abuse its discretion by granting the State's motion for joinder of first degree rape and indecent liberties cases against a mother and her husband who allegedly raped the mother's twelve-year-old son. N.C.G.S. § 15A-926(b)(2).

Am Jur 2d, Assault and Battery § 24.

9. **Criminal Law § 361 (NCI4th)— ruling on motions at trial—delay in signing orders and placing in record—defendant not prejudiced**

Where the trial court ruled on defendant's motions to suppress and for change of venue at trial, defendant was not prejudiced by the court's nearly four-month delay in signing the orders and placing them in the record.

Am Jur 2d, Motions, Rules and Orders § 22.

Appeal by defendants from judgments entered 6 June 1991 by Judge James A. Beaty in Wilkes County Superior Court. Heard in the Court of Appeals 10 February 1993.

Defendant Deborah Mae Ainsworth was indicted and convicted of first degree rape and taking indecent liberties with a minor child, her son. She was sentenced to consecutive prison terms of life plus three years. Defendant Duncan Graham Ainsworth was indicted and convicted of first degree rape, sexual activity by a substitute parent and taking indecent liberties with a minor child, Deborah Ainsworth's son. He was sentenced to consecutive prison terms of life plus seven and one half years.

The evidence presented by the State tends to show the following: Deborah Ainsworth's twelve year old son (hereinafter referred to as "the child") lived in a two story three bedroom home in Roaring River, North Carolina with his mother, his stepfather, Duncan Ainsworth, and a baby sitter, Jack Nunnary. In June or

July of 1990 the child's parents, both long-distance truck drivers, brought Brenda Morrell home with them from a trip. The child's stepfather introduced the child to Brenda as his "mom's girl friend." The child testified that Brenda was also a "babysitter" (sic). Deborah, Duncan and Brenda shared a common bedroom, containing one king size bed, on the first floor of the home. The child and Jack Nunnary slept in separate bedrooms located on the second floor. The child was able to see his parents' bed through a vent that passed between his room and his parents' room.

The child testified that late one evening in August 1990, his stepfather called him downstairs. The child was twelve years old at this time. The child got out of bed and went down to his parents' bedroom. The bedroom was dark, but the child was able to see because of an upstairs light that "would shine downstairs[.]" When the child walked into his parents' bedroom he sat down on a couch where he could see his mother, stepfather and Brenda because his "dad" said "me and your mom agreed" "that [he] could watch." All three were lying on the bed naked. His mother was lying face down, his stepfather was lying face up and Brenda was lying on her side rubbing lotion on his mother.

After a few minutes the child's stepfather "called" him over to the bed and pulled his shorts and underwear half way off. The child pulled them the rest of the way off, and then sat down on the corner of the bed where he watched his mother and Brenda having "intercourse." The child described the "intercourse" as his "mom stick[ing] her finger up Brenda's vagina." At the same time that Deborah was engaged in "intercourse" with Brenda, Duncan was engaged in anal intercourse with Deborah. After watching this, Duncan made a "fingering" motion to the child. The child duplicated the gesture in court by holding up his hand and using his thumb. He testified that his stepfather was pointing to his mouth while making this gesture. The child testified that he "didn't know what he was talking about[.]" His stepfather then mouthed something to the child who testified, "I could read and I read his lips kind of. . . . He said get on top of her, and then let her give you a blow job. . . . He just said it like in lips." The child then testified: "[a]fter my mom was done with Brenda, I got on top of Brenda and had intercourse." While the child was lying on top of Brenda and engaged in intercourse, Duncan was on his side facing Deborah, and Deborah was in the middle of the bed lying on her side facing Brenda. Neither Deborah, Duncan nor

Brenda said anything while the child was engaged in intercourse with Brenda. After the child completed this act, his stepfather called him by name and said, "[G]o take a cold shower." As he was leaving, his stepfather stopped him and said that he wanted to show him something. The child walked back over to his stepfather who showed him "some white stuff, which was semen that was coming out of his penis." His stepfather then said, "This is, this is white stuff that comes out of your penis, and that shows that, and that gets women pregnant and it makes them feel good." The child then left, took a cold shower and went to bed.

The child also testified that he had sexual intercourse with Brenda on two other occasions when neither of his parents were present. On a third occasion, Brenda got out of the shower and called the child over to the bathroom door and asked him "if [he] wanted to play house." The child understood that to mean to have sexual intercourse. He tried to tell her to be quiet because Jack Nunnary had come home. Brenda came out of the bathroom, rubbed up against the child, saw Jack and ran back into the bathroom. Early the next morning Deborah and Duncan returned home and learned what had happened. Deborah "got really, really mad" and told Brenda to "go get your own stuff and get out" of the house. Deborah told the child, "I was upset because Brenda was having sex with you behind my back." Duncan also "got real mad and backed [the child's] mom up about kicking [Brenda] out." He said, "I'm behind Deborah one hundred percent about why you was having sex behind our backs."

The child also testified that Brenda returned to the defendants' home a couple of weeks later. Brenda walked into the defendant's bedroom, took some of Deborah's clothes, and told the child to go pack because he was going on a long trip with her. Brenda packed some of the child's clothes, and the two hitchhiked for awhile eventually ending up in Maryland. The child was later picked up by the FBI and returned to North Carolina.

Finally, the child testified that he watched a pornographic "New Biker Video" with his parents. He also watched "Debbie Does Dallas" and "Pinocchio," both sexually explicit movies, with his stepfather. Deborah gave the child Playboy magazines which he kept under his bed.

Brenda Morrell, thirty years old at the time of trial, testified, under a grant of immunity, that in June of 1990 she met the defend-

ants while hitchhiking in Pennsylvania. She spent the night with the defendants in a motel room and engaged in an "orgy" involving sexual acts with the defendants. The next morning Brenda began travelling with the defendants and eventually returned to North Carolina with them. During the trip Duncan asked Brenda to be a housekeeper and Deborah asked her to take care of the child.

Brenda testified that she slept in the same bedroom and in the same bed with the defendants. She also testified that her function as housekeeper and baby sitter was to clean, cook and take care of everybody, including the child. She was not paid, but did receive room and board.

Brenda further testified that one night, while Jack Nunnary was at work, Duncan called the child into their bedroom. Brenda was able to see the child come into the room because of a light coming into the room from the hall. At that time the child had on a pair of shorts. Brenda and both defendants were naked. Duncan told the child to go to Brenda's side of the bed. The child pulled off his clothes and walked over to Brenda's side of the bed. Brenda did not see the child have any contact or conversation with Duncan before going to her side of the bed. The child got on top of her and engaged in vaginal intercourse with her. At that time Deborah was lying beside Brenda watching while Duncan was behind Deborah having sex with her. After about fifteen minutes, Brenda heard Jack Nunnary pull up into the driveway. Duncan told the child to leave the room and to take a shower. At that time Deborah was still beside Brenda. Earlier in the same day, Duncan told Brenda in the presence of Deborah that the child wanted to watch Deborah and Brenda. Deborah did not say anything.

Brenda also testified that she engaged in other sexual acts with the child out of the presence of his parents, and that on another occasion, Jack Nunnary overheard her tell the child, "Let's play house[,]" by which she meant to engage in "sexual activity." Jack later told the defendants what he had seen and heard. As a result of this, Deborah hit Brenda and told Brenda to leave the house. Deborah also told Brenda that Brenda was not going to abuse her child. Finally, Deborah told Brenda, "I told you once before to be careful, and if you got caught that I had to put you out." Duncan was also upset.

Finally, Brenda testified that when she later returned to the defendants' home the child packed his clothes and on his own de-

cided to go with her on her trip. Brenda attempted to dissuade him from going.

In a separate trial Brenda was convicted of two counts of first degree sexual offense, two counts of first degree rape, two counts of indecent liberties and one count of abduction of a child. Each conviction related to misconduct with the twelve year old child. Brenda was sentenced to two consecutive life terms in prison.

Defendants appeal from entry of judgment.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James Peeler Smith, for the State.

Gregory J. Brewer for the defendant-appellant, Duncan Graham Ainsworth.

Dennis R. Joyce for the defendant-appellant, Deborah Mae Ainsworth.

EAGLES, Judge.

Deborah Mae Ainsworth's Appeal

I. Motion to dismiss

Defendant Deborah Ainsworth first argues that the trial court erred by denying her motion to dismiss the charges of first degree rape and indecent liberties. We disagree.

> In considering this motion, the trial court was required to view the evidence in the light most favorable to the State, giving the State the benefit of every reasonable inference to be drawn from it. If there was substantial evidence—whether direct, circumstantial, or both—to support a finding that the offense charged was committed and that defendant committed it, the case was for the jury and the motion to dismiss was properly denied.

State v. Degree, 322 N.C. 302, 307-08, 367 S.E.2d 679, 683 (1988) (citations omitted).

A. First Degree Rape

1.

[1] Defendant appears to argue in her brief that the first degree rape indictment was insufficient because it failed to charge her explicitly with aiding and abetting. Her brief states:

> Deborah Ainsworth was tried for this offense under an indictment which charged that she ". . . willfully and feloniously did carnally know and abuse [her son]." The question of abuse aside, Deborah Ainsworth did not carnally know her twelve year old son. . . . However, Brenda Morrell did. During one episode of vaginal intercourse between [the child] and Brenda Morrell, Deborah Ainsworth was in the same bed with them, having sex with her husband.
>
> The jury had to decide whether the defendant was "guilty of first degree rape because of aiding and abetting. . . ."

This issue, although addressed in the context of armed robbery, has already been resolved against the defendant. *State v. Ferree*, 54 N.C. App. 183, 184, 282 S.E.2d 587, 588 (1981) ("[A] person who aids or abets another in the commission of armed robbery is guilty under the provisions of N.C. Gen. Stat. § 14-87, and it is not necessary that the indictment charge the defendant with aiding and abetting."). Accordingly, this argument is overruled.

2.

[2] Defendant next questions whether a mother may be found guilty of first degree rape on a theory of aiding and abetting when her twelve year old child engaged in intercourse with an adult woman in her presence and the mother did not take any reasonable steps to prevent the intercourse. Defendant maintains that this conduct does not fall within the traditional definition of one who aids or abets another commit a crime.

The State argues that *State v. Walden*, 306 N.C. 466, 293 S.E.2d 780 (1982) controls resolution of this issue. In *Walden*, evidence was presented that a mother was present when her small child was hit repeatedly with a belt over an extended period of time. During the assault, the mother looked on but did not say or do anything to stop the beating. On appeal our Supreme Court was faced with the issue of "whether a mother may be found guilty of assault on a theory of aiding and abetting solely on the basis that she was present when her child was assaulted but failed to take reasonable steps to prevent the assault." *Id.* at 468, 293 S.E.2d at 782. Answering the question in the affirmative, our Supreme Court held:

> [W]e believe that to require a parent as a matter of law to take affirmative action to prevent harm to his or her child

or be held criminally liable imposes a reasonable duty upon the parent. Further we believe this duty is and has always been inherent in the duty of parents to provide for the safety and welfare of their children, which duty has long been recognized by the common law and by statute. This is not to say that parents have the legal duty to place themselves in danger of death or great bodily harm in coming to the aid of their children. To require such, would require every parent to exhibit courage and heroism which, although commendable in the extreme, cannot realistically be expected or required of all people. But parents do have the duty to take every step reasonably possible under the circumstances of a given situation to prevent harm to their children.

In some cases, depending upon the size and vitality of the parties involved, it might be reasonable to expect a parent to physically intervene and restrain the person attempting to injure the child. In other circumstances, it will be reasonable for a parent to go for help or to merely verbally protest an attack upon the child. What is reasonable in any given case will be a question for the jury after proper instructions from the trial court.

. . . . It remains the law that one may not be found to be an aider or abettor, and thus guilty as a principal, solely because he is present when a crime is committed. It will still be necessary, in order to have that effect, that it be shown that the defendant said or did something showing his consent to the criminal purpose and contribution to its execution. But we hold that the failure of a parent who is present to take all steps reasonably possible to protect the parent's child from an attack by another person constitutes an act of omission by the parent showing the parent's consent and contribution to the crime being committed.

Walden at 475-76, 293 S.E.2d at 786-87 (citations omitted).

Here, the defendant failed to take any steps to prevent the attack on her child. Indeed, the State's evidence shows that the defendant lay on the same bed as the one in which her twelve year old child was being raped without uttering a single word in his defense. Moreover, at that time there did not appear to be any danger to the defendant. This conduct clearly falls within the *Walden* holding.

Defendant argues that *Walden* is factually distinguishable from the instant case because, unlike *Walden*, "[t]here clearly is no physical harm, attack, small child or retarded child involved in this case." We disagree. While the threat of physical harm, including death, to the child in *Walden* was arguably more immediate than that here, it was no less severe. We would be blind to both the cold reality of today's world of sexually transmitted diseases and emotional damage resulting from sexual abuse if we were to hold that the child here was placed at any lesser risk than the child in *Walden*. Moreover, as was elicited during the sentencing hearing below, the child here was exposed to an event which could have severe psychological repercussions requiring long term treatment.

Furthermore, we note that our decision also comports with the more recent holding in *State v. Oliver*, 85 N.C. App. 1, 354 S.E.2d 527, *disc. review denied*, 320 N.C. 174, 358 S.E.2d 64 (1987). In *Oliver*, the victim, a sixteen year old girl with a full scale IQ of 66 or less, testified that her mother was in bed with her at the time that she was raped by another person, and that her mother was also touching her during that time. Our Court held that there was sufficient evidence to find that the mother had the opportunity to avert the rape but failed to do so. Our Court then concluded, based on *Walden*, that the mother was guilty of aiding and abetting the second degree rape of her child.

Defendant's argument is overruled.

3.

[3] Defendant next argues that the State failed to show that the defendant had any criminal *mens rea*. Criminal *mens rea* is not an element of statutory rape. *State v. Rose*, 312 N.C. 441, 445, 323 S.E.2d 339, 342 (1984) ("Consent is no defense if in fact the child was not [over the prescribed age], even if defendant, by reason of the child's appearance or representations, believed in good faith that the consenting child was over the prescribed age."). Defendant argues, however, that "[b]oth state and federal constitutions require that a crime punishable by life in prison require some *mens rea*, U.S. Const. Amend. XIV; N.C. Const. Art. I, §§ 19, 23, 24." We have carefully considered this argument and find it to be without merit.

4.

Finally, during oral argument defendant contended that the trial court's instruction on aiding and abetting incorrectly explained the duty of a parent to protect her child. This argument has been abandoned by defendant's failure to bring it forward in her appellate brief. N.C.R. App. P. 28(b)(5). Nevertheless, in our discretion and pursuant to N.C.R. App. P. 2, we have carefully reviewed the instruction and find it to be without error.

B. Indecent Liberties

[4] Defendant next argues that the trial court erred by failing to dismiss the indecent liberties charge. We disagree.

> In order to maintain a conviction for indecent liberties
>
> the State must prove (1) the defendant was at least 16 years of age, (2) he was five years older than his victim, (3) he wilfully took or attempted to take an [immoral, improper] or indecent liberty with the victim, (4) the victim was under 16 years of age at the time the alleged act or attempted act occurred, and (5) the action by the defendant was for the purpose of arousing or gratifying sexual desire.

State v. Rhodes, 321 N.C. 102, 104, 361 S.E.2d 578, 580 (1987). "[I]t is not necessary that there be a touching of the child by the defendant in order to constitute an indecent liberty within the meaning of N.C.G.S. 14-202.1." *State v. Truman*, 52 N.C. App. 376, 377, 278 S.E.2d 574, 575 (1981). Moreover, sexual gratification may be inferred from the evidence relating to the defendant's actions. *Rhodes*, 321 N.C. at 105, 361 S.E.2d at 580.

Defendant argues that the State failed to present evidence that she improperly, immorally or indecently touched the child, that she induced the child to touch her, or that she induced the child to touch Brenda in order to arouse and gratify her own sexual desire. The State argues that neither statute nor case law requires that the sexual gratification be that of the defendant. Because we find evidence from which a jury could find that Deborah's sexual desires were aroused or gratified, we do not reach the argument raised by the State.

Only two elements are even arguably at issue here: (1) that the defendant willfully took or attempted to take an immoral, improper or indecent liberty with a child (2) for the purpose of arous-

ing or gratifying sexual desire. The State presented evidence which tended to show that the defendant knowingly (1) engaged in anal intercourse with Duncan in the presence of her child; (2) engaged in "vaginal intercourse" with another woman in the presence of her child; and (3) watched her child engage in vaginal intercourse with an adult woman. We hold that the jury could reasonably infer from these acts that the defendant wilfully engaged in an immoral, improper or indecent liberty with the child to arouse or gratify her own sexual desire. This argument is overruled.

II. Sentencing

[5] Defendant next argues that the imposition of a mandatory life sentence for her first degree rape conviction constitutes cruel and unusual punishment. In *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), this Court said:

> Our Supreme Court has rejected such an argument on many occasions. *State v. Spaugh*, 321 N.C. 550, 556, 364 S.E.2d 368, 373 (1988) ("imposition of sentences of life imprisonment for such offenses [first degree rape and first degree sexual offense] does not violate the prohibition against cruel and unusual punishments")[.]

Id. at 23, 398 S.E.2d at 652. Accordingly, this assignment is overruled.

Duncan Graham Ainsworth's Appeal

I. Motion to Dismiss

Defendant Duncan Ainsworth first argues that the trial court erred by denying his motion to dismiss the charges of first degree rape, sexual activity by a substitute parent and indecent liberties. We disagree.

A. First Degree Rape

[6] Defendant argues that the trial court erred by failing to dismiss this charge because (1) there was insufficient evidence that the defendant aided or abetted Brenda and (2) the defendant did not have the requisite *mens rea*. We disagree.

> The mere presence of the defendant at the scene of a crime, even though he is in sympathy with the criminal act and does nothing to prevent its commission, does not make

> him guilty of the offense. To sustain a conviction of the defendant, as [a] principal . . ., the State's evidence must be sufficient to support a finding that the defendant was present, actually or constructively, with the intent to aid the perpetrator in the commission of the offense should his assistance become necessary and that such intent was communicated to the actual perpetrator. Such communication of intent to aid, if needed, does not, however, have to be shown by express words of the defendant, but may be inferred from his actions and from his relation to the actual perpetrator. "When the bystander is a friend of the perpetrator and knows that his presence will be regarded by the perpetrator as an encouragement and protection, presence alone may be regarded as encouragement."

State v. Amerson, 316 N.C. 161, 166-67, 340 S.E.2d 98, 101 (1986) (quoting *State v. Rankin*, 284 N.C. 219, 223, 200 S.E.2d 182, 185 (1973) (citations omitted).

Defendant, citing what could be viewed as exculpatory evidence, argues that the evidence presented at trial does not support his first-degree rape conviction. We disagree. The State presented the following evidence at trial: (1) Brenda heard the defendant call the child down to the bedroom; (2) when the child walked into the room the defendant was lying naked on the bed with Deborah and Brenda who were also naked; (3) the defendant and his wife, Deborah, had been sharing their bed with Brenda for some time; (4) the child testified that Duncan pulled his shorts and underwear half way off; (5) Brenda heard the defendant tell the child to go to her side of the bed; and (6) when the child engaged in vaginal intercourse with Brenda, Duncan and Deborah, lying in the same bed, were also engaged in a sexual act. We hold that this evidence, taken in the light most favorable to the State, is sufficient to withstand the defendant's motion to dismiss the charge of first degree rape based on aiding and abetting. *See State v. Amerson*, 316 N.C. 161, 340 S.E.2d 98 (1986).

B. Sexual Activity by a Substitute Parent

Defendant next argues that the trial court erred by denying his motion to dismiss the charge of sexual activity by a substitute parent under G.S. § 14-27.7. Defendant was convicted based on the theory of aiding and abetting.

Defendant did not object at trial to the trial court's jury instruction on this charge, and he does not argue that it was error. Indeed, defendant states in his brief that "the defendant does not assign as error any convoluted jury charge, the charge being perhaps the best possible effort under the circumstances. . . ." We have examined the evidence presented by the State, and we find it sufficient to prove each element of the offense charged. Accordingly, this argument is overruled.

C. Indecent Liberties

[7] Finally, defendant argues the trial court erred by denying his motion to dismiss the indecent liberties charge. We disagree.

We previously set out the requisite elements of the indecent liberties charge and relevant related rules in our discussion of Deborah Ainsworth's appeal, *supra*. We need not restate them here. It is sufficient to note that the defendant here argues the State failed to present evidence that (1) his conduct was for the purpose and in fact did arouse or gratify his sexual desires, or (2) that he acted wilfully. The State responds with the same arguments here it made in Deborah Ainsworth's appeal, *supra*.

At trial, the State's evidence tended to show, among other things, that the defendant (1) called the child into his bedroom to watch sexual activity between Deborah and Brenda; (2) called the child over to the bed and then pulled the child's shorts and underwear half way off; (3) knowingly engaged in anal intercourse with Deborah in front of the child; (4) instructed the child to have Brenda perform oral sex upon him; (5) watched as the child engaged in vaginal intercourse with Brenda; and (6) called the child over to him to observe while he (Duncan) was ejaculating. We hold that the jury could reasonably infer from this evidence that the defendant wilfully engaged in taking an immoral, improper or indecent liberty with the child to arouse or gratify his own sexual desire. This argument is overruled.

II. Sentencing

[5] Defendant next argues that the sentence of life imprisonment for first degree rape violates his constitutional rights to be free from cruel and unusual punishment. This issue has been decided contrary to the position advocated by the defendant. *State v. Davis*, 101 N.C. App. 12, 398 S.E.2d 645 (1990) (citing *State v. Spaugh*,

321 N.C. 550, 556, 364 S.E.2d 368, 373 (1988)). This assignment is overruled.

III. Joinder

[8] By his next assignment, defendant argues that the trial court committed prejudicial error by granting the State's motion to join his trial with the trial of Deborah Ainsworth.

G.S. § 15A-926(b)(2) provides in part:

> 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 others.

Clearly, defendant's case falls within the parameters of G.S. § 15A-926(b)(2). "When joinder is permissible under the statute, whether to sever trials or deny joinder is a question lodged within the discretion of the trial judge whose rulings will not be disturbed on appeal unless it is demonstrated that joinder deprived defendant of a fair trial." *State v. Ruffin*, 90 N.C. App. 712, 714, 370 S.E.2d 279, 280 (1988). We have examined the record here in light of defendant's arguments under this assignment and conclude that he was not deprived of a fair trial. Accordingly, we hold that the trial judge did not abuse his discretion by granting the State's motion for joinder.

IV. Motion to Suppress and Motion for Change of Venue

Defendant's sixth assignment of error reads as follows:

> 6. The trial court erred by not making timely findings of fact and conclusions of law prior to denying defendant's Motions to Suppress and Motion for Change of Venue, in violation of N.C.G.S. 15A-977(f).

[9] Under this assignment defendant argues that (1) the trial court did not make timely findings and conclusions; (2) that an x-rated video tape should have been suppressed; (3) that the day before trial a new superseding indictment was issued charging the defendant; and (4) that the findings and conclusions made by the trial court as to defendant's motion to suppress and motion for change of venue were insufficient.

" '[T]he scope of review on appeal is limited to those issues presented by assignment of error in the record on appeal.' " *Boyd v. Nationwide Mut. Ins. Co.*, 108 N.C. App. 536, 543, 424 S.E.2d 168, 172 (1993) (quoting *Koufman v. Koufman*, 330 N.C. 93, 98, 408 S.E.2d 729, 731 (1991)). Here, the defendant has only assigned error to the timeliness of the trial court's findings and conclusions. Accordingly, his other arguments are overruled.

In *State v. Horner*, 310 N.C. 274, 311 S.E.2d 281 (1984) the trial court ruled on the defendant's motion to suppress at trial and later reduced his ruling to writing, signed the order and filed it with the clerk. In concluding that the trial court's procedure was permissible, our Supreme Court said:

> Where the trial judge makes the determination after a hearing, as in this case, he must set forth in the record his findings of fact and conclusions of law. . . . The statute does not require that the findings be made in writing at the time of the ruling. Effective appellate review is not thwarted by the subsequent order. Defendant has not shown prejudice from the failure of the trial court to make the findings at the time that the rulings were made during the suppression hearing. The assignment of error is meritless.

Id. at 279, 311 S.E.2d at 285 (citations omitted).

Here, as in *Horner*, the trial judge ruled on defendant's motion to suppress at trial. After trial, the court reduced his ruling to writing, signed the order and placed it in the record.

Defendant argues, however, that *Horner* is distinguishable because in *Horner* the trial judge delayed only ten days after trial before signing his order while here the trial judge delayed nearly four months before signing his order and placing it in the record. We disagree. The determinative issue is whether defendant was prejudiced by the delay. The defendant has failed to show

that he was prejudiced by the failure of the trial court to make more prompt findings and conclusions on his motion to suppress.

Similarly, we hold that the defendant has failed to show any prejudice resulting from the trial court's failure to make more timely findings and conclusions on his motion for a change of venue. Accordingly, this assignment is overruled.

No error.

Judges COZORT and WYNN concur.

DURHAM CITY BOARD OF EDUCATION, PLAINTIFF v. NATIONAL UNION FIRE INSURANCE COMPANY OF PITTSBURGH, PENNSYLVANIA, BLAND HORACE WALKER, AVA HINTON, INDIVIDUALLY, AND AVA HINTON, GUARDIAN AD LITEM FOR LAKISHA HINTON, DEFENDANTS

AVA HINTON, INDIVIDUALLY AND AS GUARDIAN AD LITEM FOR LAKISHA HINTON, PLAINTIFF v. BLAND HORACE WALKER, INDIVIDUALLY AND AS EMPLOYEE OF DURHAM CITY BOARD OF EDUCATION, AND THE DURHAM CITY BOARD OF EDUCATION, DEFENDANTS

No. 9114SC779

(Filed 2 March 1993)

1. **Schools § 13 (NCI3d); Insurance § 896 (NCI4th)— student raped by coach—no duty of insurer to defend coach**

In an action alleging assault and battery, negligence, intentional infliction of emotional distress, and violation of federal constitutional rights brought by the mother of a middle school girl against the middle school's boys' basketball coach based upon a sexual assault, defendant was not required to defend the coach under a policy of insurance issued to plaintiff school board by defendant, since the coach was not employed in an administrative position and was not acting within the scope of his duties as an employee of the school district when he allegedly raped the eighth grader.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 534.

2. Schools § 4 (NCI3d); Insurance § 896 (NCI4th)— student raped by coach—duty of insurer to defend school board

Defendant insurer had a duty under its errors and omissions policy to defend plaintiff school board in an action by a mother whose child was allegedly raped by a middle school coach where the mother alleged that the superintendent, assistant superintendent, principal, and supervising athletic coach failed to exercise due care for the health and safety of the child, negligently failed to reprimand or counsel the coach when they knew he was likely to engage in improper sexual conduct with a student under his supervision, failed to properly and timely investigate a sexual incident involving the coach and another thirteen-year-old student, failed to deal with the incident in a confidential and professional manner, and failed to establish proper policies and procedures in order to deal with incidents involving sexual contact between students and teachers, since the acts alleged against plaintiff were within the scope of the duties of the four employees; the policy by specific language covered the superintendent, assistant superintendent, and principal and covered the supervising coach as an employee acting within the scope of his duties; and the alleged acts fell into the definition of "wrongful acts" covered by the policy.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 627, 632.

Personal liability of public school executive or administrative officer in negligence action for personal injury or death of student. 35 ALR4th 272.

3. Insurance § 896 (NCI4th)— liability policy issued to school board—exclusionary language inapplicable—money damages suffered as result of negligent supervision—negligent supervision as wrongful act

The exclusionary language of an errors and omissions policy provided by defendant to plaintiff school board did not apply to deny coverage to plaintiff since the allegations against plaintiff did not "involve a criminal act" or "arise out of" assault and battery or bodily injury; rather, the allegations against plaintiff's employees in the present case were for money damages suffered as a result of their negligent supervision

of a coach who allegedly raped a student, a wrongful act which this errors and omissions policy was designed to cover.

Am Jur 2d, Insurance § 708.

4. **Schools § 11 (NCI3d)— liability insurance purchased—governmental immunity waived**

Plaintiff school board effectively waived its governmental immunity to claims for negligent supervision by purchasing liability insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability § 60.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Appeal by defendant National Union Fire Insurance Company from order entered 3 April 1991 by Judge Henry W. Hight in Durham County Superior Court. Heard in the Court of Appeals 26 August 1992.

This is a declaratory action brought by the Durham Board of Education (the "Board") to determine whether an action brought by plaintiff Ava Hinton is covered under the Board's insurance policy (the "Policy") issued by National Union Fire Insurance Company ("National") and thus whether the Board has waived its sovereign immunity in the action. The action brought by Hinton alleges assault and battery, negligence, intentional infliction of emotional distress, and violation of federal constitutional rights against the Board and defendant Horace Bland Walker.

On 3 April 1991, the trial court entered a declaratory judgment and order finding the Policy does not provide coverage for the claims of assault and battery but does provide coverage for the claims of negligence, infliction of emotional distress, and violation of Hinton's civil rights. The trial court further held the Board waived sovereign immunity as to these three claims and National has a duty to defend Walker and the Board as to these three claims. From this judgment, National appeals. For the reasons stated below, we affirm in part and reverse in part the decision of the trial court.

Spears, Barnes, Baker, Wainio, Brown & Whaley, by Alexander H. Barnes, for plaintiff-appellee Durham City Board of Education.

Glenn, Mills & Fisher, P.A., by Stewart W. Fisher, for defendant-appellee Ava Hinton.

R. David Wicker, Jr. for defendant-appellee Bland Horace Walker.

Patton, Boggs & Blow, by C. Allen Foster and Eric C. Rowe, for defendant-appellant National Union Fire Insurance Company.

ORR, Judge.

This action arises out of the alleged rape of plaintiff Lakisha Hinton by defendant Walker who was an employee of Shephard Middle School ("Shephard") at the time of the alleged rape. Plaintiff Ava Hinton filed an action individually and as guardian ad litem against Walker and the Board seeking compensatory and punitive damages and alleging assault and battery, negligence, intentional infliction of emotional distress, and violation of federal constitutional rights. The Board filed an answer asserting the defense of governmental immunity.

Hinton alleges Walker raped Lakisha and the Board failed to take appropriate action to prevent this rape. Hinton also alleges certain actions of the Board after the rape caused Lakisha further harm. At the time of the alleged rape, Lakisha was an eighth grade student at Shephard, and Walker was the Shephard's boys basketball coach. Hinton argues the Policy covers her claim so that National has a duty to defend both Walker and the Board and that the Board effectively waived its sovereign immunity.

On 15 December 1989, plaintiff filed a summary judgment motion on the defense of sovereign immunity raised by the Board. On 2 February 1990, Judge Anthony M. Brannon ordered that a decision on the issues of insurance coverage and sovereign immunity be continued until National was joined in the action or companion action.

On 12 April 1990, the Board filed this action seeking a declaration as to whether the Policy provides coverage as to any of plaintiff's claims. Hinton and Walker were joined as co-defendants. On 16 May 1990, National filed an answer denying coverage exists.

Hinton filed an answer and cross-claim against National seeking a declaration that the Policy provides coverage to Walker. On 3 April 1991, the trial court entered a declaratory judgment and order finding the Policy does not provide coverage for claims of assault and battery but does provide coverage for negligence, infliction of emotional distress, and violation of Hinton's civil rights. The trial court further held the Board waived sovereign immunity as to these three claims and National has a duty to defend Walker and the Board as to these three claims. For the reasons stated below, we affirm in part and reverse in part the decision of the trial court.

[1] Hinton contends, and the trial court ruled, that National has a duty to defend Walker under the Policy. We disagree.

"An insurer's duty to defend suits against its insured is determined by the language in the insurance contract . . . ." *Brown v. Lumbermens Mutual Casualty Co.*, 326 N.C. 387, 392, 390 S.E.2d 150, 153 (1990) (citations omitted). The terms of an insurance policy govern the scope of its coverage, and "the intention of the parties controls any interpretation or construction of the contract . . . ." *Fidelity Bankers Life Ins. Co. v. Dortch*, 318 N.C. 378, 380, 348 S.E.2d 794, 796 (1986). The court must use the definitions given in the policy to determine the meaning of words contained in the policy. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). "In the absence of such definition[s], nontechnical words are to be given a meaning consistent with the sense in which they are used in ordinary speech. . . ." *Id.*

Any ambiguity in an insurance contract must be resolved in favor of the insured. *Maddox v. Colonial Life and Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). In addition, in North Carolina, "[e]xclusions from and exceptions to undertakings by the company are not favored, and are to be strictly construed to provide the coverage which would otherwise be afforded by the policy." *Id.*

When considering whether terms in an insurance policy create the duty to defend, the court may compare the pleadings to the terms of the policy. "When the pleadings state facts demonstrating that the alleged injury is covered by the policy, then the insurer has a duty to defend, whether or not the insured is ultimately liable." *Waste Management of Carolinas, Inc. v. Peerless Ins. Co.*,

315 N.C. 688, 691, 340 S.E.2d 374, 377 (1986). After analyzing the terms of the policy, "the pleadings are read side-by-side with the policy to determine whether the events as alleged are covered or excluded." *Id.* at 693, 340 S.E.2d at 378. "[T]he insurer's duty to defend the insured is broader than its obligation to pay damages incurred by events covered by a particular policy." *Id.* at 691, 340 S.E.2d at 377.

In the case *sub judice*, the Policy provides that National will "[d]efend any action or suit brought against the Insured alleging a Wrongful Act. . . ." The Policy defines a "Wrongful Act" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of duties for the School District. . . ." Under the Policy, "[i]nsured shall . . . mean any employee of the School District who holds a position of Superintendent or Assistant Superintendent, . . . Principal . . ., or any equivalent administrative position." Additionally, an endorsement in the Policy amends this definition of insured to include "any employee of the School District while acting within the scope of his or her duties as such."

To come under the coverage of the Policy, Walker must fall under the definition of "insured." Because he was not employed in an administrative position, the only definition for "insured" he could fall under in the Policy is the definition found in the endorsement. In order to come under the language in the endorsement, the acts alleged against Walker must have allegedly occurred while Walker was acting within the scope of his duties as an employee of the School District.

In the pleadings, Hinton alleges that Lakisha called the school and asked for a ride from the female athletic coach. Instead, Walker picked Lakisha up from her house and took her to his house where he engaged in sexual intercourse with her against her will. Although Hinton couches her claims in terms of negligence, intentional infliction of emotional distress, and violation of federal constitutional rights, the claims are still based solely on the alleged sexual assault of Lakisha by Walker.

As our Supreme Court held in *Medlin v. Bass*, 327 N.C. 587, 398 S.E.2d 460 (1990), a sexual assault by a school board employee upon a student is beyond the course of the employee's employment. Based on the holding in *Medlin*, the allegations against Walker would fall outside of the scope of his employment and outside

of the Policy coverage. Therefore, based on *Medlin*, National does not have a duty to defend Walker, and the trial court erred in so holding.

[2] Next, Hinton contends, and the trial court ruled, that the Policy covers the Board and creates a duty in National to defend the Board against Hinton's allegations. We agree. In order for National to have a duty to defend the Board, the Board must come under the definition of "insured" in the Policy, and the allegations against the Board must come under the definition of "Wrongful Act[s]."

In the pleadings, Hinton alleges the Superintendent of the Board, Dr. Cleveland Hammonds ("Hammonds"), the Assistant Superintendent of the Board, Mr. Lynn Smith ("Smith"), the Principal of Shephard, Mr. John Hunter ("Hunter"), and a supervising athletic coach at Shephard, Willie Bradshaw ("Bradshaw"), failed to exercise due care for the health and safety of Lakisha, negligently failed to reprimand or counsel Walker when they knew Walker was likely to engage in improper sexual conduct with a student under his supervision, failed to properly and timely investigate a sexual incident involving Walker and another thirteen-year-old student, failed to comply with the standard of conduct which a parent could reasonably expect from each of their respective positions within the school, failed to deal with the incident with Lakisha and Walker in a confidential and professional manner, and failed to establish proper policies and procedures in order to deal with incidents involving sexual contact between students and teachers. In addition, Hinton alleges Hammonds negligently hired Walker when he knew of Walker's propensity toward engaging in sexually provocative behavior with students.

As the Superintendent, the Assistant Superintendent, the Principal of Shephard, and a supervising athletic coach of Shephard, the duties of these four employees would include taking precautions to prevent sexually provocative behavior between a teacher and a student, investigating an alleged sexual incident between a teacher and a student, supervising an athletic coach, and exercising professionalism and confidentiality in the investigation of a sexual incident involving a teacher and a student. The acts alleged against the Board, are, therefore, within the scope of the duties of Hammonds, Smith, Hunter, and Bradshaw.

By its specific language, the Policy covers Hammonds, Smith, and Hunter as "insured" because they are the "Superintendent," the "Assistant Superintendent," and the "Principal" of Shephard. The Policy also covers Bradshaw as an "insured" by the language of the endorsement as any employee acting within the scope of his duties. Additionally, these alleged acts fall into the definition of "Wrongful Act[s]" as "any actual or alleged breach of duty, neglect, error, misstatement, misleading statement or omission committed solely in the performance of duties for the School District. . . ." We hold, therefore, that the Policy covers the Board for these alleged acts and that National has a duty to defend the Board.

National further contends the Policy does not cover the Board based on *Medlin, supra.* We disagree.

National argues that the holding in *Medlin* applies to the issue of National's duty to defend the Board; the *Medlin* Court, however, did not address this issue. In *Medlin*, the principal of a school in Franklin County sexually assaulted a student at the school where he was employed. The mother of the student asserted claims against the Franklin County Board of Education ("FCB") and its officials for negligent employment of the principal and negligent investigation of the facts relevant to the incident. The trial court granted FCB and the officials their motion for summary judgment to dismiss the claims against them. The plaintiff appealed.

The issues on appeal in *Medlin* were whether the trial court erred in granting summary judgment for the claims of negligent employment and whether the principal's alleged sexual assault on the student occurred in the scope of his employment to create liability for FCB based on a *respondeat superior* theory. Our Supreme Court held summary judgment was proper in that insufficient evidence was presented to show a genuine issue of material fact to prove negligent employment and that FCB was not liable on a *respondeat superior* theory for the principal's alleged sexual act. *Medlin*, 327 N.C. at 592, 594, 398 S.E.2d at 463-64.

In the present case, we are not deciding whether sufficient evidence exists to establish the allegations against the employees of the Board but instead whether these allegations fall under the language of the Policy as wrongful acts committed in the course of their employment. The *Medlin* Court did not address whether negligent employment and failure to investigate alleged sexual in-

cidents at the school fall within the scope of a school official's employment; *Medlin*, therefore, does not control.

[3] Next, National contends the exclusionary language of the Policy applies to deny coverage to the Board. The Policy specifically excludes from coverage "any claim involving allegations of . . . criminal acts . . .;" or "any claims arising out of . . . assault or battery;" or "any claim arising out of bodily injury. . . ." National argues that the allegations against the Board "involve" Walker's alleged rape of Lakisha, "arise out of" Walker's assault on Lakisha, and "arise out of" bodily injury to Lakisha. We disagree.

North Carolina courts disfavor exclusionary language in insurance policies and will construe such language strictly. *See Maddox*, 303 N.C. at 650, 280 S.E.2d at 908. Additionally, this Court has held that words in an insurance policy must be construed with reference to the purposes of the entire policy. *Blake v. St. Paul Fire and Marine Ins. Co.*, 38 N.C. App. 555, 557, 248 S.E.2d 388, 390 (1978). Applying these rules, the exclusionary language of the Policy does not work to exclude coverage for the Board.

Because the Policy does not define "involving," we must apply the ordinary meaning of this word. The American Heritage Dictionary defines "involve" as "[t]o have as a necessary feature. . . ." Applying this definition with a strict construction of the exclusionary language and in light of the purposes behind the Policy, the allegations against the Board do not involve a criminal act. The allegations against the employees of the Board are made up of supervisory acts. These employees had a duty to the students of Shephard to supervise the teachers, employ competent teachers, and to conduct themselves in a professional manner as to matters concerning the school. This duty arises out of their employment as the Superintendent, the Assistant Superintendent, the Principal, and the supervising athletic director. The allegations do not include the alleged criminal act of Walker as a "necessary feature." Additionally, the Policy is an errors and omissions policy designed to insure the Board against wrongful acts of Board employees performed in the scope of their employment. These alleged wrongful acts would fall into the category of the type of acts the Policy is designed to cover. Thus the language excluding acts "involving criminal acts" does not exclude the allegations against the employees of the Board.

National also argues the language excluding acts "arising out of" assault and battery or bodily injury prevents coverage for the acts of the employees of the Board. We disagree. Because the Policy does not define "arising out of" we again must apply the ordinary definition of this phrase. National argues that the Court should define this phrase broadly as we did in *Fidelity & Casualty Co. of N.Y. 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).

Fidelity is distinguishable, however, from the present case. "In *Fidelity & Casualty v. Farm Bureau*, we were interpreting an automobile liability policy in light of the established purpose of our mandatory financial responsibility laws to provide broad protection for the public. . . ." *Mastrom, Inc. v. Continental Casualty Co.*, 78 N.C. App. 483, 486, 337 S.E.2d 162, 164 (1985). We were not interpreting an exclusionary clause as we are in the present case.

The clause at issue in *Fidelity* provided, "To pay on behalf of the insured all sums which the insured shall become legally obligated to pay as damages because of bodily injury or destruction of property caused by accident *arising out of the ownership, maintenance or use* of the automobile." *Fidelity*, 16 N.C. App. at 195-96, 192 S.E.2d at 116. The issue there was whether the act of loading a tank truck came under this language in the policy. We stated, "Generally, an omnibus clause should be construed liberally in favor of the insured and in accordance with the policy of the clause to protect the public." *Id.* at 197, 192 S.E.2d at 117 (citation omitted). Based on this rule, we interpreted the words " 'arising out of' " as "broad, general, and comprehensive terms effecting broad coverage" such that the act of loading the tank truck arose out of the ownership, maintenance or use of the truck. *Id.* at 198, 192 S.E.2d at 118. We interpreted the language "arising out of" broadly in light of the policy of liberal construction of omnibus clauses to provide coverage under the policy.

The case before us does not involve an omnibus clause; instead it involves an exclusionary clause. The policy reasons for interpreting "arising out of" broadly are, therefore, not present. We thus will not apply a broad definition for "arising out of," as we did in *Fidelity*, but we will instead interpret the language strictly, following our decision in *Herndon v. Barrett*, 101 N.C. App. 636, 400 S.E.2d 767 (1991).

Herndon involved an errors and omissions insurance policy with an exclusionary clause similar to the one presently before us. The clause in *Herndon* excluded coverage for "any claim related to injury arising from 'bodily injury', . . . [or] 'assault or battery,'. . . ." *Id.* at 641-42, 400 S.E.2d at 770. National Union had issued this policy to the City of Kings Mountain to cover wrongful acts of law enforcement employees and the City of Kings Mountain. The issue before us was whether the allegations against the City arose out of either bodily injury or an assault and battery.

In *Herndon*, plaintiff Herndon was injured at work in the Magistrate's Office during a fight between two Kings Mountain police officers. Herndon alleged that the City of Kings Mountain and the three supervising officers were negligent in failing to supervise the officers. The defendant argued that the exclusions barred coverage for the City of Kings Mountain because the allegations arose out of the assault and battery committed by the two officers and the bodily injury to Herndon. We held:

> With respect to the City of Kings Mountain, its negligence, if any, was insured under Coverage B of the policy. The exclusions applicable would apply to claims for "bodily injury" or injury arising from ". . . assault or battery, ..." Plaintiff's cause of action against the City of Kings Mountain is also based on negligent supervision. Contrary to defendants' argument, plaintiff's claim does not arise from assault or battery. With respect to the "bodily injury" exclusion, plaintiff's claim is for money damages suffered as a result of defendant City's negligent supervision of the two officers.

Id. at 642, 400 S.E.2d at 771.

Based on our holding in *Herndon*, Hinton's allegations in the present case neither "arise out of" an assault or battery nor "arise out of" bodily injury. As in *Herndon*, the allegations against the Board employees in the present case are for money damages suffered as a result of their negligent supervision. The exclusionary language does not, therefore, deny coverage to the Board.

[4] Finally, we must address the issue of governmental immunity. The Board is a governmental agency which is entitled to governmental immunity. As National concedes, however, the Board is authorized to waive its governmental immunity pursuant to N.C.

Gen. Stat. § 115C-42 by purchasing liability insurance. N.C. Gen. Stat. § 115C-42 states:

> 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.

Because the Policy purchased by the Board covers Hinton's allegations against the Board, the Board has effectively waived its governmental immunity.

Affirmed in part and reversed in part.

Judges WELLS and GREENE concur.

MARK FRANCIS RILEY AND LILLIAN CANTRELL RILEY, PLAINTIFFS-APPELLEES v. KEN WILSON FORD, INC., DEFENDANT-APPELLANT

No. 9128DC844

(Filed 2 March 1993)

1. Automobiles and Other Vehicles §§ 254, 262 (NCI4th)— sale of automobile—breach of express and implied warranties—motion to dismiss properly denied

In an action for breach of express and implied warranties in the sale of an automobile, the trial court properly denied defendant dealer's Rule 41(b) motion to dismiss, since it was undisputed that defendant informed plaintiffs of a warranty; the car suffered from several defects; and plaintiffs attempted to have the car repaired within the warranty period, but to no avail.

Am Jur 2d, Automobiles and Highway Traffic §§ 728, 733.

2. Automobiles and Other Vehicles § 253 (NCI4th)— sale of automobile—existence of express warranty—sufficiency of evidence

Evidence was sufficient to support the trial court's conclusion that defendant dealer had made an express warranty to plaintiffs where it tended to show that plaintiffs were informed by defendant's sales agent that their car was subject to "a 12 month 12,000 mile warranty"; such a statement was an affirmation of fact relating to the goods which became a basis of the bargain; plaintiffs had no way of determining that such warranty was limited to the manufacturer, as there was no evidence that plaintiffs were told this was a manufacturer's warranty or that defendant excluded itself from the warranty; and plaintiffs were not even given a written copy of the warranty.

Am Jur 2d, Sales §§ 724, 727.

3. Automobiles and Other Vehicles §§ 259, 260 (NCI4th)— sale of automobile—express and implied warranties—timeliness of notice of claim

In an action for breach of express and implied warranties, a delay of just over two years between date of purchase and date of bringing an action was not unreasonable for the purposes of satisfying the notice requirement of N.C.G.S. § 25-2-607(3), since plaintiffs filed the suit well within the four-year statute of limitations applicable to sales contracts; plaintiffs fulfilled the policies behind the notice requirement by giving defendant adequate opportunities to repair their car; they repeatedly attempted to have the car repaired by defendant within the warranty period; upon defendant's refusal to perform further repairs, plaintiffs had the car towed to a dealership in another state; and plaintiffs eventually had to resort to consulting their own mechanic in an attempt to ascertain the car's various problems.

Am Jur 2d, Automobiles and Highway Traffic §§ 728, 733.

4. Automobiles and Other Vehicles § 254 (NCI4th)— sale of automobile—breach of express warranty—sufficiency of evidence

Where plaintiffs purchased a car from defendant, the oil warning light came on en route home from the dealership,

and plaintiffs shortly thereafter began having problems with excessive oil and anti-freeze consumption, there was competent evidence to support the trial judge's conclusion that defects existed at the time of purchase and that defendant breached its express warranty to plaintiffs when it refused to further repair plaintiffs' car only ten months after purchase and within the 12-month warranty period.

Am Jur 2d, Automobiles and Highway Traffic §§ 728, 733.

5. Automobiles and Other Vehicles § 255 (NCI4th)— purchase of automobile—failure to revoke acceptance

Though plaintiffs were entitled to revoke acceptance of a vehicle purchased from defendant, they failed to do so where they complained about the vehicle and took it in for repairs several times but they retained possession of the vehicle until after the lawsuit was filed and they were requested to return the vehicle to defendant's premises for discovery purposes; plaintiffs' complaint did not contain an allegation with regard to revocation; and the filing of the complaint itself did not constitute revocation. Therefore, plaintiffs were not entitled to damages under N.C.G.S. § 25-2-711, but were instead entitled to damages for breach of warranty under N.C.G.S. § 25-2-714 and to incidental and consequential damages under N.C.G.S. § 25-2-715.

Am Jur 2d, Automobiles and Highway Traffic §§ 728, 733.

6. Automobiles and Other Vehicles § 259 (NCI4th)— sale of automobile—breach of warranty—damages—insufficiency of trial court's findings as to value of automobile

In their action for breach of warranty, plaintiffs were entitled to recover the difference between the value of the vehicle accepted "at the time and place of acceptance" and the value of the goods as warranted; however, the trial court did not make a finding of fact as to the actual value of the car, and the case must therefore be remanded to determine this value and the appropriate amount of damages.

Am Jur 2d, Sales §§ 1277, 1285.

7. Automobiles and Other Vehicles § 259 (NCI4th)— sale of automobile—breach of express and implied warranties—seller allowed to "retain" title to vehicle—improper remedy

The trial court erred in an action for breach of express and implied warranties by allowing defendant seller to "retain" title and possession of the car in question, since plaintiffs had acquired title at the time of purchase; there was no rescission or revocation of acceptance; and there was thus no reason to transfer title from plaintiffs to defendant.

Am Jur 2d, Sales §§ 1277, 1285.

Appeal by defendant from judgment entered 19 March 1991 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 12 November 1992.

Stephen Barnwell for plaintiffs-appellees.

Ball, Kelley & Barden, P.A., by Stephen L. Barden, III, for defendant-appellant.

LEWIS, Judge.

On 1 March 1989 plaintiffs filed this action for breach of express and implied warranties and requested damages in the amount of $7,762.56 arising from the purchase of a new 1986 Yugo automobile. The case was tried without a jury, and on 19 March 1991 the trial court entered judgment for plaintiffs in the amount of $9,659.56. This amount represented the cash down payment, the amount financed, the amount paid for maintenance of liability and collision insurance, and a towing charge. Defendant was allowed an offset of $447.66 for payments still owing under the installment contract and were also given title to the vehicle. Defendant appeals.

On 17 January 1987 plaintiffs purchased a new 1986 Yugo automobile from defendant. The total credit price of $7,762.56 included license, title, registration fees, credit life insurance and credit disability insurance. Pursuant to the installment sales contract, plaintiffs maintained liability and collision insurance at a cost of $154.00 per six months. At the time of purchase, defendant's agent informed plaintiffs of a standard 12,000 mile, 12 month new car warranty. According to plaintiffs, defendant did not explain this was only a manufacturer's warranty and never excluded itself as a warrantor. Plaintiffs did not receive a written copy of the warranty.

The Yugo immediately began to give trouble; on the trip home from the dealer the oil light came on. Defendant made the necessary repair. According to plaintiffs, one month later they called defendant to complain of the same problem. Other problems included oil and coolant leaks. On 7 March 1987 defendant made repairs to the rear window washer, the speedometer cable, squeaking brakes, and adjusted the wipers. Defendant's service manager testified that plaintiffs had not complained of the oil and coolant leaks at that time. Plaintiffs continued to have problems with the oil and coolant systems requiring them to add a quart of oil weekly and a gallon of anti-freeze every other day. On 20 October 1987 plaintiffs again took the car to defendant with complaints regarding the air conditioner, oil leaks, squealing brakes, and paint problems on the hood. Defendant performed repairs including replacement of the air conditioner compressor and the head gasket. Defendant checked the cylinder head at that time and discovered it was flat. Plaintiffs continued to experience problems with excessive oil and anti-freeze consumption. When plaintiffs again contacted defendant they were informed that defendant had lost its Yugo dealership on 30 October 1987 and would no longer perform repairs on the automobile.

Plaintiffs' attorney contacted defendant and was referred to Yugo America and given a list of Yugo dealerships. Plaintiffs had the car towed to a Yugo dealership in South Carolina for further repairs, but were informed the car had no problems. On the trip home from the South Carolina dealership the car overheated and suffered loss of compression. Plaintiffs parked the Yugo and later had it towed to a mechanic who disassembled the engine and examined the car. He concluded that it had a blown head gasket, a warped cylinder head, and piston rings unsuitable for use. The car has since been moved to defendant's place of business for discovery purposes. In the opinion of both plaintiffs' mechanic and defendant's service manager the engine needs to be rebuilt. According to defendant there are parts available to repair the car. Plaintiffs have, at all times, complied with the terms of the installment contract and had only three payments remaining at the time of trial.

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[1] Defendant assigns error to the court's failure to dismiss under Rule 41(b) of the North Carolina Rules of Civil Procedure. An involuntary dismissal under Rule 41(b) is appropriate when the

"plaintiff has shown no right to relief." N.C.G.S. § 1A-1, Rule 41(b) (1990). It is undisputed that defendant informed plaintiffs of a warranty and that the car suffered from several defects. Plaintiffs attempted to have the car repaired within the warranty period, but to no avail. Based on these facts and other evidence, it would have been improper for the trial court to find that plaintiffs had shown "no right to relief" for their breach of warranty claims. The trial court properly denied the motion.

When the trial judge sits as trier of fact she has the duty to determine the credibility of the witnesses and weigh the evidence; her findings of fact are conclusive on appeal if supported by competent evidence. *Pake v. Byrd*, 55 N.C. App. 551, 286 S.E.2d 588 (1982); *Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 317 S.E.2d 5 (1984). However, a trial court's conclusions of law are reviewable de novo on appeal. *Ismael v. Goodman Toyota*, 106 N.C. App. 421, 417 S.E.2d 290 (1992).

I. Express warranty

[2] According to N.C.G.S. § 25-2-313, an express warranty is created when a seller makes "[a]ny affirmation of fact or promise . . . which relates to the goods and becomes part of the basis of the bargain. . . ." N.C.G.S. § 25-2-313(1)(a) (1986). Whether the parties have actually created an express warranty is a question of fact. *Muther-Ballenger v. Griffin Electronic Consultants, Inc.*, 100 N.C. App. 505, 509, 397 S.E.2d 247, 249 (1990); *Pake*, 55 N.C. App. at 552, 286 S.E.2d at 589.

Testimony at trial indicated that plaintiffs were informed by defendant's sales agent that their car was subject to "a 12 month 12,000 mile warranty." Such a statement is certainly an affirmation of fact relating to the goods which became a basis of the bargain. Furthermore, plaintiffs had no way of determining that such warranty was limited to the manufacturer. There is no evidence that plaintiffs were told this was a manufacturer's warranty or that defendant excluded itself from the warranty. Plaintiffs were not even given a written copy of the warranty. We find the above evidence competent to support the trial court's conclusion that defendant had made an express warranty to plaintiffs.

[3] To recover for breach of express warranty, the buyer must show compliance with his obligations and that he has taken the appropriate steps set forth in Article 2. *Stutts v. Green Ford*,

Inc., 47 N.C. App. 503, 511, 267 S.E.2d 919, 924 (1980). Article 2 provides that the buyer must notify the seller within a reasonable time of the breach. N.C.G.S. § 25-2-607(3)(a) (1986). What is a reasonable time depends upon the facts of each case and the policies underlying the notice requirement. *Maybank v. S.S. Kresge Co.*, 302 N.C. 129, 134, 273 S.E.2d 681, 684 (1981). The most important policy behind the notice requirement is to allow the seller the opportunity to cure the breach and minimize its damages. *Id.* Also, the seller must have a reasonable opportunity to discover facts and prepare for negotiation and his defense to a lawsuit. *Id.* However, if the buyer is a retail consumer and not a merchant, different standards are used to determine if reasonable notice was given; a consumer acting in good faith should not be deprived of a remedy. § 25-2-607, Official Comment 4. Thus,

> [w]hen the plaintiff is a lay consumer and notification is given to the defendant by the filing of an action within the period of the statute of limitations, and when the applicable policies behind the notice requirement have been fulfilled, . . . the plaintiff is entitled to go to the jury on the issue of seasonable notice.

Maybank, 302 N.C. at 136, 273 S.E.2d at 685.

There is no dispute that plaintiffs filed this suit well within the four-year statute of limitations applicable to sales contracts. N.C.G.S. § 25-2-725(1) (1986). Plaintiffs fulfilled the policies behind the notice requirement by giving defendant adequate opportunities to repair their car. They repeatedly attempted to have the car repaired by the defendant within the warranty period. Upon defendant's refusal to perform further repairs, plaintiffs had the car towed to a dealership in another state. Plaintiffs eventually had to resort to consulting their own mechanic in an attempt to ascertain the car's various problems. In *Maybank* the Court found that a delay of three years was not unreasonable in a case involving a lay consumer. 302 N.C. at 136, 273 S.E.2d at 685. Likewise, we find that a delay of just over two years was not unreasonable for the purposes of satisfying the notice requirement of section 25-2-607(3).

The burden is on the buyer to show breach. § 25-2-607(4). In a case involving a limited warranty to repair and replace defective parts, this Court held that a warrantor may be liable for breach of warranty "when it repeatedly fails within a reasonable

time to correct a defect as promised." *Stutts*, 47 N.C. App. at 511, 267 S.E.2d at 924. Other cases have held that in order to establish breach, the buyer must show that the defect existed at the time of purchase. *See Pake*, 55 N.C. App. at 554, 286 S.E.2d at 590. In a case similar to the case at hand, a purchaser of a truck noticed wiring problems affecting the lights and windshield wipers on the day of purchase. Within a month he noticed other problems in the transmission, the speedometer, and in steering. Within another month the purchaser observed, among other things, oil leakage and water overflow from the engine. The dealer repeatedly failed to repair the truck. The Court determined that directed verdicts in favor of defendant dealer and manufacturer were in error, since the evidence was sufficient to show the problems were caused by defects in the truck. The Court noted that "[t]he testimony of plaintiff and his witnesses concerning the persistent oil leak is sufficient to permit the inference that some defect in the truck was the cause, even though the precise cause has eluded discovery by [the] mechanics." *Stutts*, 47 N.C. App. at 513, 267 S.E.2d at 925.

[4] In this case, the fact that the oil warning light came on en route home from the dealership is evidence that certain problems existed at the beginning. Shortly thereafter plaintiffs began having problems with excessive oil and anti-freeze consumption. Based on these and other problems with the car, we find there was competent evidence to support the trial judge's conclusion that defects existed at the time of purchase. We therefore agree with the trial court that defendant breached its express warranty to plaintiffs when it refused to further repair plaintiffs' car only 10 months after purchase and within the 12 month warranty period. We decline to address the issue of any implied warranty of merchantability, because a finding of breach of express warranty is sufficient to entitle plaintiffs to damages.

II. Available remedies

[5] Because defendant did not limit its warranty to any specific remedy, plaintiffs were entitled to all remedies provided for in the Uniform Commercial Code. *Williams v. Hyatt Chrysler-Plymouth, Inc.*, 48 N.C. App. 308, 316, 269 S.E.2d 184, 189, *disc. rev. denied*, 301 N.C. 406, 273 S.E.2d 451 (1980). The general measure of a buyer's damages is the "difference at the time and place of acceptance between the value of the goods accepted and the value they would have had if they had been as warranted, unless special cir-

cumstances show proximate damages of a different amount." N.C.G.S. § 25-2-714(2) (1986). The buyer may also be entitled to incidental and consequential damages. § 25-2-714(3).

If, however, the buyer "rightfully rejects or justifiably revokes acceptance then with respect to any goods involved . . . the buyer may cancel and whether or not he has done so may . . . [recover] so much of the price as has been paid. . . ." N.C.G.S. § 25-2-711(1) (1986). Upon rejection or revocation, the buyer retains a security interest in the goods for any payments made and "any expenses reasonably incurred in their inspection, receipt, transportation, care and custody. . . ." § 25-2-711(3). Thus, upon revocation of acceptance the buyer may recover the full purchase price, if the goods have been fully paid for, and other reasonable expenses.

The trial court awarded plaintiffs the full purchase price based on its finding that plaintiffs successfully revoked acceptance of the Yugo. Revocation of acceptance is governed by section 25-2-608, which requires a showing of substantial impairment of value, and either a showing that (1) acceptance was made "on the reasonable assumption that [the] nonconformity would be cured and it has not been seasonably cured," or (2) acceptance occurred "without discovery of such nonconformity if [the] acceptance was reasonably induced either by the difficulty of discovery before acceptance or by the seller's assurances." N.C.G.S. § 25-2-608(1)(a), (b) (1986). Furthermore, revocation of acceptance must occur "within a reasonable time after the buyer discovers or should have discovered the ground for it and before any substantial change in condition of the goods which is not caused by their own defects. It is not effective until the buyer notifies the seller of it." § 25-2-608(2).

The facts support the trial court's conclusion that the defects existing in the Yugo substantially impaired its value to the plaintiffs so that they were entitled to revoke acceptance. We find that plaintiffs' acceptance was "reasonably induced" by both the difficulty of discovery before acceptance and by defendant's assurances that the vehicle was covered under a 12 month, 12,000 mile warranty. The real question, then, is whether plaintiffs notified defendant of their revocation, and whether revocation "occurred within a reasonable time." Because we conclude that plaintiffs never notified defendant of their revocation of acceptance, we find it unnecessary to address whether any purported revocation occurred within a reasonable time.

Formal notice of revocation of acceptance is not required. *Warren v. Guttanit, Inc.*, 69 N.C. App. 103, 109, 317 S.E.2d 5, 10 (1984). Rather, "any conduct by the buyer manifesting to the seller that he is seriously dissatisfied with the goods and expects redress or satisfaction is sufficient." *Id.; Roy Burt Enterprises v. Marsh*, 328 N.C. 262, 264, 400 S.E.2d 425, 427 (1991). In *Warren*, plaintiff's "many justifiable complaints" about the defects constituted notice of revocation. 69 N.C. App. at 109, 317 S.E.2d at 10. The Court also indicated that filing of the complaint would resolve any uncertainties the seller may have had regarding revocation of acceptance. *Id.* at 110, 317 S.E.2d at 10. The complaint filed in *Warren* specifically alleged revocation of acceptance. *Id.* at 105, 317 S.E.2d at 8. In *Performance Motors, Inc. v. Allen*, 280 N.C. 385, 186 S.E.2d 161 (1972), the Court found that the combination of complaints and cessation of payments constituted sufficient notice of revocation of acceptance. 280 N.C. at 397, 186 S.E.2d at 168.

In the case at hand, plaintiffs never indicated in their complaint or elsewhere that they were proceeding on the basis of revocation of acceptance. As in *Warren*, plaintiffs complained several times to defendant and took the car in several times for repairs. However, when defendant refused to make any further repairs after October 1987, plaintiffs acquiesced and took their car to a dealership in South Carolina. When that course also proved unsuccessful, plaintiffs had the car towed to their own mechanic. Plaintiffs did not return the car to defendant until after this lawsuit was filed and they were requested to do so for discovery purposes. We note that plaintiffs continued to make all the required payments under the contract. Plaintiffs' actions, therefore, did not indicate they were revoking acceptance. Their complaint contained allegations only of breach of warranty, and merely requested the purchase price, costs of the action, and "such other and further relief as the Court may seem (sic) just and proper." We cannot conclude, as the trial court did, that filing of this complaint constituted notice of revocation. *See Danjee, Inc. v. Addressograph Multigraph Corp.*, 44 N.C. App. 626, 633, 262 S.E.2d 665, 669-70, *disc. rev. denied*, 300 N.C. 196, 269 S.E.2d 623 (1980) (revocation of acceptance not available to plaintiff where plaintiff retained and used machines and issue of revocation of acceptance not raised in pleadings or evidence).

[6] Because plaintiffs did not properly revoke their acceptance, they were not entitled to damages under section 25-2-711. Instead,

plaintiffs are entitled to damages for breach of warranty as set forth in section 25-2-714. *See Lyon v. Shelter Resources Corp.*, 40 N.C. App. 557, 253 S.E.2d 277 (1979) (even though no rejection or revocation of acceptance can still recover for breach of warranty). They may recover the difference between the value of the goods accepted "at the time and place of acceptance," and the value of the goods as warranted as well as incidental and consequential damages. § 25-2-714(2), (3). The purchase price is strong evidence of the value of the goods as warranted. *See Warren*, 69 N.C. App. at 113, 317 S.E.2d at 12. The value of the goods accepted, however, is a more difficult determination. The trial court did not make a finding of fact as to the actual value of the car, but only found that several mechanics, including defendant's supervisor, had stated the engine needs to be rebuilt. Plaintiff testified at trial that the car was "worthless" to him, although there was other testimony that parts were available to fix the vehicle. There was no evidence, however, of the actual value of the car "at the time and place of acceptance." We must remand this case to the trial court to determine this value and the appropriate amount of damages under section 25-2-714.

Plaintiffs were also entitled to incidental and consequential damages as set forth in section 25-2-715. Incidental damages include, in pertinent part, "any . . . reasonable expenses incident to the delay or other breach." N.C.G.S. § 25-2-715(1) (1986). Consequential damages include "any loss resulting from general or particular requirements and needs of which the seller at the time of contracting had reason to know and which could not reasonably be prevented by cover or otherwise. . . . " § 25-2-715(2)(a). We find that the trial court properly awarded plaintiffs incidental and consequential damages for maintenance of liability and collision insurance, the towing charge to South Carolina, and interest since the date of filing.

The trial court also concluded that plaintiffs were entitled to rescission of the sales contract. Rescission of a contract is not addressed in the Uniform Commercial Code, but it has been treated as revocation of acceptance in the context of a sale of goods. *See Performance Motors*, 280 N.C. at 396, 186 S.E.2d at 167. Because we have determined that plaintiffs did not properly revoke their acceptance, we disagree with the trial court's conclusion that plaintiffs are entitled to rescission of the sales contract.

[7] The trial court apparently allowed defendant to "retain" title and possession of the car based on its finding of rescission. We note, however, that defendant had no title to "retain" since plaintiffs had acquired title at the time of purchase pursuant to the installment sales contract. Without either rescission or revocation of acceptance, we see no reason to transfer title of the car from plaintiffs to defendant. We therefore find the trial court's award of title to defendant improper.

Affirmed in part, reversed in part and remanded on the issue of damages for breach of warranty.

Judges JOHNSON and COZORT concur.

JOHN HENRY SPAINHOUR & SONS GRADING COMPANY, PLAINTIFF v. CAROLINA E. E. HOMES, INC., SOUTHERN SINGLE FAMILY HOMES, INC. AND BOBBY J. SHELTON, DEFENDANTS

No. 9117DC1151

(Filed 2 March 1993)

1. Judgments § 166 (NCI4th)— default judgment—allegation that three defendants jointly and severally liable—default judgment against one—improper

The trial court erred by not setting aside a default judgment against defendant Shelton where the complaint alleged that all three defendants were jointly and severally liable. Where a complaint alleges a joint claim against more than one defendant, a default judgment pursuant to N.C.G.S. § 1A-1, Rule 55 should not be entered against a defaulting defendant until all defendants have defaulted; or, if one or more do not default then, generally, entry of default judgment should await an adjudication as to the liability of the non-defaulting defendants.

Am Jur 2d, Judgments § 1192.

2. Judgments § 391 (NCI4th)— default judgment—motion to set aside—excusable neglect of defense counsel

An entry of default and default judgment against defendant Shelton were vacated where defendant Shelton was the

President of defendants Carolina E. E. Homes, Inc. and Southern Single Family Homes, Inc.; the parties to this action entered an agreement requiring Carolina E. E. Homes and Southern Single Homes to pay plaintiff $60,000 as the outstanding balance due plaintiff for work on a condominium project; defendant Shelton signed the agreement on the line reserved for Carolina E. E. Homes, Inc. and on the line reserved for Southern Single Family Homes; Shelton did not place any designation such as his office or title next to his signature; plaintiff filed a complaint alleging that the three defendants were jointly and severally liable for failure to pay according to the terms of the agreement; defendants' attorney filed an application for extension of time to file an answer; the application referred to Carolina E. E. Homes, Inc., by and through its President, Bobby Shelton; an entry of default and default judgment was filed against Bobby Shelton; and defendant argues that the application and the order for an extension of time, both contained in a single document, are ambiguous as to whether they apply only to Carolina Homes or to both Shelton and the corporation and that default was entered solely as the result of the excusable neglect of his counsel, rather than Shelton himself. Given that the law generally disfavors default judgments, there is no compelling reason for the neglect of defendant Shelton's attorney to be imputed to defendant Shelton.

Am Jur 2d, Judgments §§ 858, 1154.

Opening default or default judgment claimed to have been obtained because of attorney's mistake as to time or place of appearance, trial, or filing of necessary papers. 21 ALR3d 1255.

Appeal by defendant from orders filed 13 August 1991 by Judge Clarence W. Carter and 9 September 1991 by Judge O.M. Oliver in Stokes County District Court. Heard in the Court of Appeals 22 October 1992.

This case presents questions regarding the entry of default and the entry of a default judgment against defendant Bobby J. Shelton. Defendant Shelton is the President of defendants Carolina E.E. Homes, Inc. and Southern Single Family Homes, Inc. On 15 July 1988, the parties to this action entered the following agreement:

> This agreement entered into between John Henry Spainhour & Sons Grading Company and Carolina E.E. Homes Inc. & Southern Single Family Homes, Inc. and further described as pertaining to a 32 unit condominium project called Oakmont located on Deep River Rd. in High Point, N.C.
>
> Carolina E.E. Homes & Southern Single Homes agrees to pay John Henry Spainhour & Sons Grading Co. the sixty thousand dollars in addition to monies already received. This sixty thousand dollars is the full outstanding balance due John Henry Spainhour & Sons Grading Co. and his suppliers and subcontractors who have provided materials and labor for this Oakmont project. These supplies [sic] and subcontractors are Pyco (or A&P Pipe Co.), Jimmy Huffin, (dba as Duplin Controctor [sic]), and any others.
>
> This $60,000 will be paid not later than 30 days from the date of this agreement. In the avent [sic] these monies have not been paid in full in thirty days the balance will be increased by $5,000.00 five thousand dollars and interest will accrue at an annual rate of 12% and due in full in 120 days.
>
> /s/ Bobby J. Shelton
> Carolina E.E. Homes Inc.
>
> /s/ John Henry Spainhour
> John Henry Spainhour & Sons Grading Co.
>
> /s/ Bobby J. Shelton
> Southern Single Family Homes Inc.

Bobby J. Shelton's signature appeared twice on the agreement: once on the line reserved for defendant "Carolina E.E. Homes Inc." and once on the line reserved for "Southern Single Family Homes Inc." Shelton's signature was the only signature appearing on each of these lines, but Shelton did not place any designation such as his office or his title next to his signature. The agreement was sworn to and subscribed before a notary public.

Plaintiff filed a complaint on 30 May 1991, alleging that the three defendants, Carolina E.E. Homes, Inc., Southern Single Family Homes, Inc., and Bobby J. Shelton, were jointly and severally liable for their failure to pay according to the terms of the agreement. In his brief, Shelton claims that he signed "only in his capacity as an officer of the corporate defendants. . . . the identities

of which are disclosed on the face of the contract." On 8 July 1991, William G. Ijames, Jr., signing as "Attorney for the Defendants," filed an "application for extension of time to file answer to plaintiff's complaint." The application read as follows:

> THE DEFENDANT, CAROLINA E.E. HOMES, INC. by its President, BOBBY J. SHELTON, by and through counsel, show the Honorable Court that the time for filing an Answer to the Plaintiff's Complaint which was served on the Defendant, Bobby J. Shelton as agent for Carolina E.E. Homes, Inc. by the Davie County Sheriff's Dept. on June 13, 1991, has not expired and moves the Honorable Court for an Extension of thirty (30) days for the reason that counsel for the Defendant, CAROLINA E.E. HOMES, INC. has not had sufficient time to prepare the answers.
>
> The undersigned states that this action is made in good faith and not for the purposes of delay.

At the bottom of the application page, the Clerk of Stokes County Superior Court signed the following order:

> ORDER EXTENDING TIME
>
> FOR CAUSE shown in the foregoing application, it is therefore ORDERED that the applicant be allowed through and time be extended through the 8th day of August, 1991, to file Answer to Plaintiff's Complaint.

On 16 July 1991, plaintiff's attorney filed an affidavit containing the following statements:

> 3. That the time for filing Answer or other pleadings allowed by the North Carolina Rules of Civil Procedure has expired without any pleading or appearance by the defendant, Bobby J. Shelton, in this matter; that no Answer or other pleading has been filed and the plaintiff is otherwise entitled to a judgment by default against defendant Bobby J. Shelton;
>
> 4. That this suit is brought for compensatory damages in the amount $49,284.45, together with interest at the rate of one percent (1%) from May 15, 1991 through July 14, 1991 in the amount $985.68, the costs of this action, and such other and further relief as to the Court seems just and proper;

> 5. That the defendant, Bobby J. Shelton, is sui juris in all respects; and this defendant has failed and neglected to pay damages.

On 16 July 1991, an entry of default and a default judgment were entered against defendant Shelton by the Clerk of Stokes County Superior Court. On 2 August 1991, attorney William G. Ijames, Jr., filed an answer on behalf of defendant Shelton and filed a motion to set aside the entry of default and default judgment pursuant to G.S. § 1A-1, Rule 60(a) and (b). In the motion, Ijames stated that

> 2. The reason for the setting aside of the Entry of Default and the Default Judgment was due to the mistake or inadvertence of the attorney in filing for an extension of time in that the attorney intended to file an extension for Carolina E.E. Homes, Inc. and Bobby J. Shelton and did file an extension for Carolina E.E. Homes, Inc. and in fact thought he had filed an extension for Carolina E.E. Homes, Inc. and Bobby J. Shelton see [sic] Affidavit attached.
>
> 3. A second reason is that based on the pleadings there was no basis for there being an Entry of Default or Default Judgment being entered in that the defendant, Bobby J. Shelton, was not individually involved in the "Exhibit A" [the 15 July 1988 agreement] of the Complaint nor was he mentioned in the bill of plaintiff to Carolina E.E. Homes and Southern Single Homes which was attached to the Complaint. Based on the pleadings this was a void judgment.

Ijames attached an affidavit to the motion stating his belief that he had "properly filed an extension of time" for defendant Shelton and that his [Ijames'] "failure to say the extension of time was also for Bobby J. Shelton was a mistake and was inadvertent on my part." On 7 August 1991, Ijames filed an answer and counterclaim on behalf of defendant Carolina E.E. Homes, Inc. On 13 August 1991, defendant Shelton filed an affidavit which contained the following statements:

> 2. That I had requested my attorney, William G. Ijames, Jr., to file an extension in this matter on behalf of myself, Bobby J. Shelton, and I contacted him at the same time to do this that I contacted him to file an extension of time for Carolina E.E. Homes, Inc., which was mailed out on July 3, 1991.

3. That at the time of the making of the contract in Exhibit A of the Complaint of the plaintiff I was solely acting as the agent of the corporations in my capacity as President of said Corporations.

On 13 August 1991, the trial court denied defendant Shelton's motion to set aside the entry of default and default judgment, finding that there was no evidence of an effort by defendant Shelton to defend the case, that there was no showing of a meritorious defense, and that the neglect of the attorney should be imputed to defendant Shelton. On 9 September 1991, the trial court denied defendant Shelton's motion to alter or amend the trial court's 13 August 1991 order denying defendant Shelton relief from the 16 July 1991 entry of default and default judgment. Defendant Shelton appeals.

Theodore M. Molitoris and Robert S. Blair, Jr., for plaintiff-appellee.

Bailey & Dixon, by Gary S. Parsons, Patricia P. Kerner, and Kenyann Brown Flippin, for defendant-appellants.

EAGLES, Judge.

Defendant Shelton argues that the trial court erred by failing to set aside the default judgment and the entry of default. We agree.

I.

[1] Initially, we note that the entry of a default judgment against defendant Shelton by the Clerk of Stokes County Superior Court was improper. Plaintiff argues that the entry of default judgment was proper because defendant Shelton was acting individually rather than as an agent of the corporation and that the general rule on default judgments is applicable. However, plaintiff overlooks the fact that the complaint alleged that all three defendants were jointly and severally liable. In *Harris v. Carter*, 33 N.C. App. 179, 182-83, 234 S.E.2d 472, 474-75 (1977), this Court held:

> Default judgments in this jurisdiction are now groverned [sic] by G.S. 1A-1, Rule 55, which appears to be a counterpart of Rule 55 of the Federal Rules of Civil Procedure. Discussing the Federal Rule, the author of Moore's Federal Practice, after citing and quoting from *Frow v. De La Vega* [15 Wall. 552, 21 L.Ed. 60 (1872)], *supra*, said:

> "If, then, the alleged liability is joint a default judgment should not be entered against a defaulting defendant until all of the defendants have defaulted; or if one or more do not default then, as a general proposition, entry of judgment should await an adjudication as to the liability of the non-defaulting defendant(s). If joint liability is decided against the defending party and in favor of the plaintiff, plaintiff is then entitled to a judgment against all of the defendants—both the defaulting and non-defaulting defendants. If joint liability is decided against the plaintiff on the merits or that he has no present right of recovery, as distinguished from an adjudication for the non-defaulting defendant on a defense personal as to him, the complaint should be dismissed as to all of the defendants—both the defaulting and the non-defaulting defendants." 6 Moore's Federal Practice, 2nd Ed., Paragraph 55.06, pp. 55-81, 55-82.
>
> This Court has already held that, absent any specific provision in our North Carolina rules or statutes governing the situation where a default is entered or a default judgment is obtained in a case in which there are multiple defendants, we would follow the federal practice in this regard. *Rawleigh, Moses & Co. v. Furniture, Inc.*, 9 N.C. App. 640, 177 S.E.2d 332 (1970).

See Leonard v. Pugh, 86 N.C. App. 207, 210-11, 356 S.E.2d 812, 815 (1987) ("[w]here a complaint alleges a joint claim against more than one defendant, default judgment pursuant to G.S. 1A-1, Rule 55 should not be entered against a defaulting defendant until all defendants have defaulted; or if one or more do not default then, generally, entry of default judgment should await an adjudication as to the liability of the non-defaulting defendants."). Accordingly, the trial court erred by not setting aside the default judgment against defendant Shelton.

II.

[2] Next, we address the entry of default against defendant Shelton. Defendant Shelton argues that the application and the order for extension of time to answer (both contained in a single document) "are ambiguous as to whether they apply only to Carolina Homes or to both Shelton and the corporation" and that "default was entered solely as the result of the excusable neglect of his counsel, rather than Shelton himself. Shelton reasonably relied on counsel

to obtain an extension of time in which to plead, and his counsel's failure to do so should not be imputed to him." We agree.

"Entry of default and judgment by default would be improper where defendants showed 1) excusable neglect in failing to timely file a responsive pleading and 2) a meritorious defense to plaintiff's claim. *See* G.S. 1A-1, Rule 60(b)(1), North Carolina Rules of Civil Procedure." *N.C.N.B. v. McKee*, 63 N.C. App. 58, 61, 303 S.E.2d 842, 844 (1983). Regarding the term "excusable neglect," in *Norton v. Sawyer*, 30 N.C. App. 420, 424-25, 227 S.E.2d 148, 152, *disc. review denied*, 291 N.C. 176, 229 S.E.2d 689 (1976), this Court stated:

> Excusable neglect is something which must have occurred at or before entry of the judgment, and which caused it to be entered. What occurred after the entry of the default judgment is not to be considered except as it relates to whether the motion to vacate was made in "reasonable time."
>
> The distinction between the neglect of parties to an action and the neglect of counsel is recognized by our courts, and except in those cases in which there is a neglect or failure of counsel to do those things which properly pertain to clients and not to counsel, and in which the attorney is made to act as the agent of the client to perform some act which should be attended to by him, the client is held to be excusable for the neglect of the attorney to do those things which the duty of his office of attorney requires. *It was the duty of the attorney to file the defendant's answer. The client is not presumed to know what is necessary.* When he employs counsel and communicates the merits of his case to such counsel, and the counsel is negligent, it is *excusable* on the part of the client, who may reasonably rely upon the counsel's doing what may be necessary on his behalf.

(Emphasis added.) (Citations omitted.)

Here, defendant filed a motion to set aside the entry of default and default judgment pursuant to G.S. 1A-1, Rule 60. This motion included an explanation of the "mistake or inadvertence of the attorney in filing for an extension of time" and set forth the defense "that the defendant, Bobby J. Shelton, was not individually involved in the 'Exhibit A' of the Complaint nor was he mentioned in the bill of plaintiff to Carolina E.E. Homes and Southern Single Homes which was attached to the Complaint." Both defendant Shelton

and his attorney filed affidavits explaining the mistake. In the order denying the motion, the trial court stated that:

> 4. The record contains no information concerning the defendant's relationship with his attorney, no evidence of his effort or diligence in pursuit of the defense of this case prior to the entry of the Default Judgment and, therefore, there is insufficient evidence upon which to grant a Motion pursuant to Rule 60 concerning this defendant's excusable neglect and further the neglect of his attorney, if any, is imputed to him showing on this defendant's part of his own inexcusable conduct in handling the legal defense of this matter.

Thereafter, defendant filed a "motion to alter or amend order." This motion was verified by defendant Shelton and his attorney and was accompanied by another affidavit from defendant Shelton. The verified motion stated that 1) defendant had a meritorious defense; 2) the entry of default and default judgment arose from the excusable neglect of defendant's counsel; and 3) Shelton "diligently and assiduously responded to any and all requests for information and cooperation. . . . [and] kept himself fully advised of all information regarding the status of this proceeding through Movant's counsel and at no time has failed to respond appropriately and timely to any directions, inquiries, or instructions from Movant's counsel regarding appropriate measures to be taken in defense of this proceeding." Additionally, defendant Shelton's affidavit set forth his defense and stated the following:

> 3. In apt time before expiration of time for filing and service of answer, pleadings, or motions in response to Plaintiff's Complaint in this action, Affiant delivered copies of the summonses and the Complaint to Piedmont Legal Associates (PLA) and requested that PLA represent Affiant and Defendant, Carolina E.E. Homes, Inc., in this action.
>
> 4. PLA agreed to represent Affiant and Carolina E.E. Homes, Inc., and, according to Affiant's understanding, proceeded to obtain an extension of time in which to file and serve appropriate responsive pleadings in this proceeding.
>
> 5. Well before the extended deadline communicated to Affiant by PLA for filing and service of responsive pleadings, Affiant met with PLA and conveyed to them all necessary information to prepare an appropriate answer and other proper

responsive pleadings to this proceeding and was advised by PLA that these pleadings would be prepared and filed in a timely and appropriate manner.

6. In reliance upon his understanding that PLA would timely file and serve appropriate responsive pleadings, Affiant entrusted responsibility for filing and service of those pleadings to PLA.

. . . .

10. Affiant has timely responded to all requests for information to prepare responsive pleadings addressed to him by PLA, and has communicated regularly with PLA in preparation for his defense of his action.

11. PLA understood, according to information and belief supplied to Affiant, that PLA had obtained an appropriate extension of time on Affiant's behalf to plead beyond and including the date Affiant's Answer was filed. Affiant relied upon these representations and understanding and reviewing and supervising the defense of his individual interest in this action.

Given that the " 'law generally disfavors default judgments, [and] any doubt should be resolved in favor of setting aside an entry of default so the case may be decided on its merits,' " *Beard v. Pembaur*, 68 N.C. App. 52, 56, 313 S.E.2d 853, 855, *disc. review denied*, 311 N.C. 750, 321 S.E.2d 126 (1984) (citations omitted), we conclude that there is no compelling reason for the neglect of defendant Shelton's attorney to be imputed to defendant Shelton.

Accordingly, the entry of default and default judgment against defendant Shelton are vacated and this cause is remanded to District Court for further proceedings.

Vacated and remanded.

Judges ORR and JOHN concur.

STATE OF NORTH CAROLINA v. WILLIAM MACRAE WILLIS

No. 913SC1286

(Filed 2 March 1993)

1. **Evidence and Witnesses § 1756 (NCI4th)— murder—use of mannequin's head to illustrate testimony**

The trial court did not err in a murder prosecution by allowing the expert witness who had performed the autopsy to place a dowel through a mannequin's head to illustrate the path of the bullet where the expert did not testify that the mannequin head was identical to the head of the victim and admitted that the mannequin was not a cast of the victim's head. The use of the model was limited to illustrating the testimony of the witness and the jury was admonished by the court to consider the model in that respect only. Any discrepancies between the model and the victim go to the weight given the illustration by the jury, not its admissibility.

Am Jur 2d, Expert and Opinion Evidence § 39.

Propriety, in trial of criminal case, of use of skeleton or model of human body or part. 83 ALR2d 1097.

2. **Constitutional Law § 264 (NCI4th)— right to counsel—incriminating statements made after request for counsel—no custodial interrogation—no adversary proceedings—no attachment of right**

There was no violation of a murder defendant's Fifth and Sixth Amendment rights to counsel in the admission of incriminating statements where defendant maintains that he asked the district attorney whether he needed a lawyer prior to questioning and was told that he did not. Defendant was not in custody and therefore may not claim a Fifth Amendment right to counsel, and did not have a Sixth Amendment right to counsel because adversary proceedings had not begun when he made the inquiry regarding counsel.

Am Jur 2d, Evidence §§ 555, 556, 613, 614.

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.

3. Evidence and Witnesses § 1218 (NCI4th)— murder—defendant's statements—voluntary

The trial court did not err in a murder prosecution by failing to sustain defendant's objections to his written and oral statements, along with corresponding testimony by the officers to whom the statements were given, on the grounds that the State failed to prove that the statements were voluntarily and understandingly made. Contrary to defendant's contentions, the record provides ample evidence that defendant was informed prior to each interview that he was not in custody or under arrest and that the interviews would terminate upon his request; the uniformed officer escorting defendant was his brother, who drove him to and from the interviews, and there is nothing in the record to suggest he was involved in the investigation in any official capacity; the amount of medication defendant may or may not have been taking is in dispute, but nothing in his conduct during any of the interviews suggested that he did not comprehend what was occurring or that he did not understand the questions he was being asked; defendant's trial testimony that the district attorney misrepresented the location of the entry wound to him in an attempt to coerce his confessions was not offered during the voir dire hearing on admissibility and so cannot be the basis for assigning error to that ruling; standing alone, that misrepresentation does not show that an incriminating statement was involuntarily made; and defendant may not challenge the ruling based on his failure to read the statements prior to signing where undisputed testimony on voir dire confirmed that the officer transcribing the statements read each of them to defendant prior to his signing them.

Am Jur 2d, Evidence §§ 555, 612.

Comment Note: Constitutional aspects of procedure for determining voluntariness of pretrial confession. 1 ALR3d 1251.

4. Evidence and Witnesses § 2210 (NCI4th)— blood spatter interpretation—qualification of witness as expert—no abuse of discretion

The trial court did not abuse its discretion in a murder prosecution by permitting an S.B.I. agent to be qualified as an expert in blood spatter interpretation and then by allowing him to testify in that capacity. Although defendant contends

that the witness failed to provide evidence that the instructors at courses he had attended were experts, that the State did not show that blood spatter interpretation is commonly accepted in the scientific community, and that the court failed to make specific findings as to why the agent was considered an expert in this field, the designation of a witness as an expert and the admission of expert testimony are within the sound discretion of the trial court, the trial court is under no obligation to make findings of fact regarding its decision to designate a witness as an expert, and the expert is not required to have specific credentials.

Am Jur 2d, Expert and Opinion Evidence §§ 60, 62.

5. **Evidence and Witnesses § 1785 (NCI4th)— polygraph test—questions and answers used to impeach defendant—test not mentioned—agent's opinion as to truthfulness—not admissible**

The trial court erred in a murder prosecution by admitting a polygraph examiner's testimony concerning his interview with defendant where the agent described the interview, including three of his questions and defendant's answers, but did not mention the polygraph test itself. The examiner's sole basis for testifying that defendant lied in answering his questions was his interpretation of the polygraph test results, evidence which the Supreme Court has held to be inherently unreliable. The State was able to impeach defendant's testimony by showing his character for untruthfulness. Allowing this unreliable opinion testimony may have caused the jury to disbelieve defendant's testimony.

Am Jur 2d, Evidence § 296.

Propriety and prejudicial effect of informing jury that accused has taken polygraph test, where results of test would be inadmissible in evidence. 88 ALR3d 227.

Appeal by defendant from judgment entered 24 June 1991 by Judge Herbert O. Phillips, III, in Carteret County Superior Court. Heard in the Court of Appeals 9 February 1993.

Defendant was convicted of one count of second degree murder and was sentenced to fifteen years active imprisonment. The State's evidence tends to show the following facts and circumstances: The police were dispatched to defendant's home on 20 January 1991

where they found defendant's wife dead from a gunshot wound to the head. Defendant told officers that his wife had called him from the bedroom, and when he entered he saw her sitting on the bed holding a gun to her head. Defendant stated that she said, "Mac, I'm sorry," and pulled the trigger. Defendant gave rescue squad members a similar account en route to the hospital.

Police again interviewed defendant on 24 January 1991, where he gave another account of the events leading up to his wife's death. At this meeting, defendant was neatly dressed and appeared well. He was informed that he was not in custody or under arrest and that he was free to leave. During the interview, defendant told officers that his wife called out to him from the bedroom, and that when he entered the room she was kneeling or crouching between the bed and a couch. She said, "I'm sorry," and fired the gun. Defendant stated he had run toward her when he saw the gun and was just a few feet from her when it fired. He said she was coughing up blood and choking, and he laid her on the bed and called the rescue squad.

On 28 January 1991, defendant voluntarily submitted to a polygraph test. Defendant arrived with his brother, a Marine Fisheries Enforcement Officer. Again defendant was reminded that he was not in custody and that he could leave at any time. Prior to the test, investigators asked whether defendant was on any medication. He indicated that the last medication he had taken was 10mg of Valium on 26 January 1991 and an alka-seltzer that morning. Defendant took the polygraph test, answering "No" when asked whether he had shot his wife, whether he had fired the gun, and whether he was holding the gun when it went off. Afterwards, the agent administering the test told defendant that he felt defendant was not giving truthful answers to those three questions. The agent told defendant that he believed either that defendant was a cold-blooded killer, that he had intended to scare his wife and shot her accidentally, or that his wife put the gun to her head to scare him and he pulled the trigger thinking the gun was empty. Defendant stated that there was a little truth in all three scenarios.

After the test, defendant gave another account of the events leading up to his wife's death to investigators, admitting for the first time that there had been a struggle for the gun. He stated that he did not have his hand on the gun when it went off, and

that he thought it had fired accidentally during the struggle. He had not expected it to fire because it was his practice to keep the first chamber empty. He then altered his story, stating that he knew he had his hand on the gun just as he knew the sun had come up that morning. An officer read defendant's statement to him and it was transcribed and signed by defendant. He was neither in custody nor under arrest when the statement was signed.

Defendant was then asked if he would reenact the shooting at his home. He agreed and signed a consent form granting officers admission to his house. Prior to beginning the reenactment, defendant was again told that he was not under arrest and that the officers would leave upon his request. Defendant's brother was also present at this time. Defendant instructed the officer playing the role of his wife to kneel near the couch. Defendant moved the officer into several different positions and placed the gun in various positions as well. After the demonstration, one of the officers said to defendant, "You can't make it work the way you say it was." Defendant answered, "I know it."

Defendant's final interview was held on 29 January 1991 at his residence. Again, defendant's brother was present. Officers repeated that defendant was not in custody and that they would leave upon request. Defendant signed a form consenting to the officers' presence in his home and then made another statement which was read to him and transcribed by an officer. Defendant signed the statement, but testified at trial that he had not read it. In the statement, he said he and his wife had argued about one of them leaving the home. They struggled over the gun in the bedroom. Defendant stated he had the gun in his possession and meant to scare his wife with it. He had not known it was loaded and he had shot her by accident.

At trial, defendant testified in his own defense. Defendant was convicted of second degree murder and received the presumptive sentence of fifteen years in prison. Defendant appeals.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Marilyn R. Mudge, for the State.

Wheatly, Wheatly, Nobles & Weeks, P.A., by Stephen M. Valentine, for defendant-appellant.

WELLS, Judge.

[1] Defendant offers five assignments of error on appeal. By his first assignment of error, defendant contends the court erred in overruling his objection to the use of a mannequin's head to illustrate the testimony of expert witness Dr. Charles L. Garrett. Dr. Garrett performed the autopsy on the victim. At trial, he was permitted to place a dowel through the mannequin's head to illustrate the path of the bullet. Dr. Garrett testified that the exit and entrance wounds were fairly and accurately depicted by the model. Dr. Garrett did not, however, testify that the mannequin head was identical to the head of the decedent, and he admitted that the mannequin was not a cast of decedent's head. Defendant argues the failure of the State to use a model identical to the decedent's head constitutes prejudicial error. We disagree.

The general rule concerning the use of a model in a criminal case is that any object which is relevant is ordinarily admissible into evidence. *State v. Johnson*, 280 N.C. 281, 185 S.E.2d 698 (1972); Brandis, North Carolina Evidence, § 34 (3d Ed. 1988). The record indicates that the use of the model in this case was limited to that of illustrating the testimony of the witness, and the jury was admonished by the court to consider the model in that respect only. Any discrepancies between the model and the victim go to the weight given the illustration by the jury, not its admissibility. The admission of the model was proper, and we therefore overrule this assignment of error.

[2] Defendant argues in his second assignment of error that the court erred in admitting incriminating statements made by defendant after he requested counsel. At trial, defendant testified that prior to the interview held on 28 January 1991, he asked the district attorney if he needed a lawyer. Defendant maintains he was told he did not. Defendant contends that at that moment the continued questioning was in violation of his Fifth and Sixth Amendment rights under the Constitution. We disagree.

The Fifth Amendment right to counsel attaches during custodial interrogation. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). The record discloses that defendant was not in custody during the interviews by police, or when the request for counsel was made. Defendant may not, therefore, claim a Fifth Amendment right to counsel nor did defendant have a Sixth Amendment right to counsel at the time in question. The Sixth Amendment right

attaches when the State has committed itself to prosecute, whether by formal charge, indictment, preliminary hearing, or arraignment. *State v. Franklin*, 308 N.C. 682, 304 S.E.2d 579 (1983). Because defendant was not in custody and no adversary proceedings against him had begun when he made the inquiry regarding counsel, the right had not attached and no violation had occurred. This assignment of error is overruled.

[3] By his third assignment of error, defendant contends the court erred by failing to sustain his objections to the admission of his written and oral statements, along with corresponding testimony by the officers to whom the statements were given. Defendant maintains that the State failed to prove the statements were voluntarily and understandingly made. This argument is without merit.

In determining whether a statement was voluntarily and understandingly made, the court must look at the totality of the circumstances. *State v. Pruitt*, 286 N.C. 442, 212 S.E.2d 92 (1975). Defendant contends that the following circumstances at the time the statements were made indicate that they were not voluntarily given: (1) that he was in custody; (2) that he was driven to the interviews by a law enforcement officer; (3) that he was under the influence of prescription drugs; (4) that he was misled by false information given by the district attorney; (5) that he was never given his Miranda warnings; and (6) that he did not read the statements before signing them.

The trial court found that because defendant was not in custody, the State was under no obligation to administer Miranda warnings. We agree. The record provides ample evidence that defendant was informed prior to each interview that he was not in custody or under arrest and that the interviews would terminate upon his request. Defendant's contention that his presence at the interviews was not voluntary because he was escorted by a uniformed officer is without merit. The officer in question was defendant's brother who drove him to and from the interviews. There is nothing to suggest he was involved in the investigation of the case in any official capacity, but rather he was only doing a service for a family member.

The amount of medication defendant may or may not have been taking at the time of the interviews is in some dispute. However, when asked prior to the 28 January 1991 interview, defendant stated he had taken nothing that day but an alka-seltzer. Nothing

in defendant's conduct during any of the interviews suggested that he did not comprehend what was occurring or that he did not understand the questions he was being asked. There was no error by the court in determining that this was insufficient to warrant finding the statements to be involuntarily made.

At trial, defendant testified that the district attorney misrepresented the location of the entry wound to him in an attempt to coerce his confessions by showing that suicide was impossible. This testimony was not offered during the *voir dire* hearing on the admissibility of defendant's statements to police and so cannot be the basis for assigning error to that ruling. Even if the court had heard this testimony, the misrepresentation of evidence is but one circumstance which, standing alone, does not show an incriminating statement was involuntarily made. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983).

Finally, defendant may not challenge the ruling based on his failure to read the statements prior to signing them. Undisputed testimony on *voir dire* confirmed that the officer transcribing the statements read each of them to defendant prior to his signing them. On both occasions defendant assented to the statements as written. This is all that is necessary for the statements to be deemed admissible. *State v. Walker*, 269 N.C. 135, 152 S.E.2d 133 (1967). Our examination of the record as it relates to defendant's arguments reveals nothing which would support a finding that defendant's incriminating statements were not made voluntarily.

[4] By his fourth assignment of error, defendant contends that the court erred in permitting an S.B.I. agent to be qualified as an expert in blood spatter interpretation and then in allowing him to testify in that capacity. Defendant argues that while the agent testified that he attended law enforcement schools wherein blood spatter interpretation was taught, he failed to provide evidence that the instructors of these courses were experts nor did the State show that blood spatter interpretation is commonly accepted in the scientific community. Defendant also asserts the court failed to make specific findings as to why the agent was considered an expert in this field or why he was better qualified than members of the jury to arrive at the conclusions to which he testified. Defendant believed the witness was deemed an expert because he had been accepted as such in other trials.

The designation of a witness as an expert and the admission of expert testimony are within the sound discretion of the trial court and will not be upset absent a showing of abuse of discretion. *State v. Parks*, 96 N.C. App. 589, 386 S.E.2d 748 (1989). The trial court is under no obligation to make findings of fact regarding its decision to designate a witness as an expert. *State v. Wise*, 326 N.C. 421, 390 S.E.2d 142, *cert. denied*, 111 S.Ct. 146, 112 L.Ed.2d 113 (1990). The expert is not required to have specific credentials, *State v. Bullard*, 312 N.C. 129, 322 S.E.2d 370 (1984), and it is sufficient if the scientific technique supporting his testimony is reliable. *State v. Huang*, 99 N.C. App. 658, 394 S.E.2d 279, *cert. denied*, 327 N.C. 639, 399 S.E.2d 127 (1990). Further, there is nothing to indicate the trial court considered the witness's prior experience as an expert in qualifying him as such here. Our review of the record shows no abuse of discretion by the court in admitting this expert or his testimony. Accordingly, this assignment of error is overruled.

[5] By his final assignment of error, defendant contends the court erred in admitting the polygraph examiner's testimony, concerning his interview with defendant. The agent described the interview to the jury, including the three questions he had asked and defendant's answers to those questions. The polygraph test itself was never mentioned during testimony before the jury. Defendant contends the testimony constituted inadmissible polygraph evidence as defined under *State v. Grier*, 307 N.C. 628, 300 S.E.2d 351 (1983). We agree.

The North Carolina Supreme Court in *Grier*, ruled that because polygraph results are inherently unreliable, such evidence is inadmissible in any criminal or civil trial. Although not every reference to a polygraph test will necessarily result in prejudicial error, the admission of the test's results may be the basis of reversal on appeal. *See State v. Harris*, 323 N.C. 112, 371 S.E.2d 689 (1988). *See also State v. Singletary*, 75 N.C. App. 504, 331 S.E.2d 166 (1985).

In this case, the examiner's sole basis for his testimony was his interpretation of the polygraph test results, evidence which the Supreme Court has held to be inherently unreliable. The examiner's opinion regarding the truth or falsity of defendant's answers cannot be separated from the test results themselves. Our Court in *Singletary* noted the sensitive interrelationship between the

reliability of the examiner in interpreting the polygraph results and the reliability of the test itself. The *Singletary* court further interpreted the *Grier* decision as follows:

> In our view when our Supreme Court held that "polygraph evidence" is no longer admissible, they meant that all evidence concerning whether or not, in the operator's opinion, the defendant was being deceptive, is to be excluded. Our conclusion is supported by the Supreme Court's stated . . . concern about the reliability of the machine itself and the reliability of the examiner in interpreting these results.

Singletary, supra. (Emphasis added.) It matters not whether the parties have made reference to the polygraph test itself at trial. The fact remains that the State was presenting inherently unreliable polygraph evidence through the witness examiner's opinion testimony. In permitting the examiner to testify that in his opinion, defendant lied in answering his three questions, the State was able to impeach defendant's testimony by showing his character for untruthfulness. At trial, defendant testified in his own behalf that his wife shot herself and he was unable to reach her in time to stop her. Allowing the unreliable opinion testimony of the polygraph examiner may have caused the jury to disbelieve defendant's testimony, and we cannot say that absent the examiner's testimony a different result would not have been reached.

In light of *Grier* and *Singletary*, it is clear that defendant was convicted in this case, at least in part, on evidence our Supreme Court has held to be inherently unreliable. We therefore order a new trial.

New trial.

Judges ORR and MARTIN concur.

WATSON ELECTRICAL CONSTRUCTION CO., PLAINTIFF v. CITY OF WINSTON-SALEM, P.J. DICK CONTRACTING, INC., AND CRUTCHFIELD PLUMBING AND HEATING COMPANY, INC., DEFENDANTS AND CITY OF WINSTON-SALEM, DEFENDANT AND THIRD-PARTY PLAINTIFF v. CRUTCHFIELD PLUMBING AND HEATING COMPANY, INC.; ELLERBE BECKET, INC., FORMERLY ELLERBE ASSOCIATES, INC.; HARTFORD ACCIDENT AND INDEMNITY COMPANY; AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA; AND CONTINENTAL CASUALTY COMPANY, THIRD-PARTY DEFENDANTS AND P.J. DICK CONTRACTING, INC., DEFENDANT AND THIRD-PARTY PLAINTIFF AND AMERICAN CASUALTY COMPANY OF READING, PENNSYLVANIA, AND CONTINENTAL CASUALTY COMPANY, THIRD-PARTY DEFENDANTS AND THIRD-PARTY PLAINTIFFS v. CRUTCHFIELD PLUMBING AND HEATING COMPANY, INC., AND DEE SHORING COMPANY, INC., THIRD-PARTY DEFENDANTS AND P.J. DICK CONTRACTING, INC., DEFENDANT AND CROSS-PLAINTIFF v. CITY OF WINSTON-SALEM, DEFENDANT AND CROSS-DEFENDANT

No. 9221SC176

(Filed 2 March 1993)

1. Contracts § 144 (NCI4th)— breach of construction contract— unreasonable denial of time extension—genuine issue of material fact

The trial court erred in granting summary judgment for defendant city on plaintiff prime contractor's claim for damages for breach of a coliseum construction contract based on the unreasonable refusal of the city's architect to grant plaintiff a time extension where the contract clause regarding the architect's power to grant extensions is ambiguous as to the extent of the architect's discretion; plaintiff alleged that the city's changes in work orders and the failure of its project scheduler to properly coordinate the project significantly delayed the general contractor, which in turn delayed plaintiff and caused plaintiff to seek a time extension; the architect's denial of the extension caused plaintiff to incur acceleration costs consisting of additional manpower and overtime; and it was for the jury to determine whether plaintiff's remedy for delay was limited by the contract to time extensions.

Am Jur 2d, Contracts §§ 201, 531; Summary Judgment § 27.

2. Municipal Corporations § 405 (NCI4th)— contract action against city—notice of claim

Where a construction contract does not state what constitutes adequate notice of a claim for an increase in the con-

tract price, plaintiff's forecast of evidence that it provided timely written notice to defendant city's architect that it needed a change work order for extra time or it would incur acceleration costs for which it expected to be compensated was sufficient to raise a genuine issue of material fact regarding the sufficiency of notice given by plaintiff.

Am Jur 2d, Municipal Corporations § 739.

3. Municipal Corporations § 405 (NCI4th)— construction contract —damages for delays—timely notice not given—condition precedent to recovery

The trial court properly granted summary judgment for defendant city on defendant general contractor's claim for damages for delays caused by the city and those for whom it was responsible, since defendant contractor did not give timely notice that it was damaged by the city's delay, and timely notice was a condition precedent to recovery.

Am Jur 2d, Municipal Corporations § 691.

Appeals by plaintiff and defendant P.J. Dick Contracting, Inc. from judgment entered 9 October 1991 in Forsyth County Superior Court by Judge Peter W. Hairston. Heard in the Court of Appeals 1 February 1993.

Plaintiff instituted this action against defendants City of Winston-Salem (hereinafter the City) and P.J. Dick Contracting, Inc. (hereinafter P.J. Dick), seeking damages for breach of contract. Defendant P.J. Dick filed a cross-claim against the City for indemnity and for affirmative relief for damages based on the liability of one of the City's separate contractors. The pertinent factual and procedural history is as follows:

In March 1987, plaintiff and P.J. Dick entered into a contract with the City for the construction of Lawrence Joel Veterans Memorial Coliseum in Winston-Salem. Plaintiff was one of four prime contractors on the project including defendant P.J. Dick, which was the general contractor. Plaintiff's and P.J. Dick's contracts with the City, as well as the contracts of the other prime contractors, provided that construction on the Coliseum was to be completed within 24 months of the Notice to Proceed from the City, making the contract completion date 30 April 1989. The

project, however, was not completed until 28 September 1989, some five months later.

Under the contract, defendant P.J. Dick was assigned to coordinate all of the multiple prime contractors and prepare the project schedule. All prime contractors agreed to organize and perform their work in compliance with the project schedule. The contract provided extension of a prime contractor's time for completion if the progress of its work was delayed by any act or neglect of any other prime contractor, the City or the architect. Furthermore, the prime contractors agreed to accept, as a remedy for delay, such time extension and not damages.

After the City issued its notice to proceed with the work, it changed the contract work order protocol by employing an independent contractor, HICAPS, Inc., to prepare the progress schedule instead of P.J. Dick.

In its complaint, plaintiff asserted that the City's changes in work orders as well as its failure to properly coordinate and administer the project through its project scheduler significantly delayed the general contractor P.J. Dick, which in turn delayed plaintiff, requiring it to seek time extensions. Plaintiff alleges that the City, through its architect, breached the contract by denying plaintiff's requests for time extensions, thereby causing plaintiff to incur acceleration costs consisting of additional manpower and overtime.

Defendant P.J. Dick originally sought indemnification from the City for plaintiff's claim, but later amended its cross-claim asserting its own claim for damages. P.J. Dick alleged it should recover damages for delay caused by the City's independent project scheduler, when it devised a schedule that was significantly deficient and which allegedly misled the contractors into thinking they had more time in which to complete the project.

The City answered plaintiff's claim and P.J. Dick's amended cross-claim and thereafter filed motions for summary judgment on all claims asserted by both parties against the City. The trial court granted both of the City's motions. Plaintiff and P.J. Dick appeal.

Patton, Boggs & Blow, by C. Allen Foster, Richard D. Conner and James S. Schenck, IV, for plaintiff.

Adams, Kleemeier, Hagan, Hannah & Fouts, by David A Senter; and Smith, Currie & Hancock, by Randall F. Hafer; for defendant P.J. Dick Contracting, Inc.

City of Winston-Salem Attorney's Office, by Sherry R. Dawson; and Womble Carlyle Sandridge & Rice, by Roddey M. Ligon, Jr. and Karen Estelle Carey; for defendant City of Winston-Salem.

WELLS, Judge.

We note initially that this appeal is interlocutory as the judgment below did not resolve all disputes between all parties. However, it is our opinion that the appellants have a substantial right to have all their viable claims for relief heard by the same judge and jury, and therefore, we exercise our discretion to hear the appeals on their merits. *Hoke v. E.F. Hutton and Co.*, 91 N.C. App. 159, 370 S.E.2d 857 (1988).

Both plaintiff and defendant P.J. Dick assign as error the trial court's granting of summary judgment in favor of the City. Summary judgment is proper where there is no genuine issue of any material fact and the movant is entitled to judgment as a matter of law. N.C. Gen. Stat. 1A-1, Rule 56(c). In ruling on a motion for summary judgment, the evidence is viewed in a light most favorable to the non-moving party. *Hinson v. Hinson*, 80 N.C. App. 561, 343 S.E.2d 266 (1986).

[1] In reviewing plaintiff's appeal, the issue is whether there is a genuine issue of material fact as to whether the City breached its contract with plaintiff, entitling plaintiff to damages. The substance of plaintiff's argument on appeal is that the City, through its architect, failed to grant time extensions, that this failure was a breach of contract, and that as a result of the City's breach, plaintiff incurred substantial damages.

Viewing the forecast of evidence most favorably to the plaintiff, the evidence tends to establish that the City ordered a change work order affecting the timeliness of the project schedule, the City and the architect failed to render decisions in a timely manner, and the general contractor failed to manage the project or complete its work in a timely fashion. Further, plaintiff could not complete

its work in an efficient, timely manner unless the work, which by necessity had to precede plaintiff's work, was completed according to schedule. Plaintiff presented evidence that the other prime contractors' disorganization and delay hindered plaintiff's work, but that despite repeated notification of this fact and contrary to the contract terms, the City and architect denied all time extension requests. The City finally conceded that plaintiff was entitled to a 92-day time extension after the date originally scheduled for project completion had passed and plaintiff had already incurred damages in attempting to comply with the schedule.

The City contends that plaintiff's sole remedy for delays under the contract is for time extensions and not damages. The "no damages for delay" provision in section 8.3.4 of the contract provides as follows:

> If the Contractor is delayed by the Owner or Architect or any Agent or employee of either, the Contractor's sole and exclusive remedy for the delay shall be the right to a time extension for completion of the Contract and not damages.

(Emphasis added.) The City cites various cases supporting the validity of such contract provisions. Further, the City argues that the denial of its time extensions by the architect may not be considered a delay not contemplated by the parties or active interference by the owner so as to constitute an exception to the "no damages for delay" provision.

Plaintiff, however, is not seeking damages for delay, but rather it contends that the unreasonable, unjustified refusal to grant plaintiff the time extension is a breach of the contract in itself. The question then becomes whether the refusal to grant time extensions may be the basis of plaintiff's breach of contract claim. We find that it may.

Section 8.3.1 of the contract provides as follows:

> If the Contractor is delayed at any time in the progress of the Work by any act or neglect of the Owner or the Architect, or of any Agent or employee of either, by any Separate Contractor employed by the Owner, or by changes ordered in the Work, or by strikes, lockouts, fire, unusual delay in transportation, unusually adverse weather conditions not reasonably anticipated, unavoidable casualties, or by delay authorized by the Architect pending any legal proceeding, or by any cause which the Architect shall decide justifies the delay, then the

> time of completion shall be extended for such reasonable time as the Architect may decide.

(Emphasis added.) The City contends that this section gives the architect complete and unfettered discretion to deny time extensions for completion even for justifiable delay or delays not attributable to the contractor itself. Plaintiff argues that the "shall" language makes the time extension mandatory for any one of the listed causes for delay and that the architect's discretion is limited to the length of the time extension given. In addition, plaintiff asserts that it accepted the "no damages for delay" language because it believed it would be guaranteed a time extension for certain delays. We find the contract terms to be ambiguous on their face.

> When parties use clear and unambiguous terms, a contract can be interpreted by the court as a matter of law. The contract language is given the interpretation that the parties intended at the time of formation, as discerned from their writings and actions. While the intent of the parties is at the heart of a contract, intent is a question of law where the writing is free of any ambiguity which would require resort to extrinsic evidence or the consideration of disputed fact.

Martin v. Ray Lackey Enterprises, 100 N.C. App. 349, 396 S.E.2d 327 (1990) (Citations omitted.) In the case before us, the intent of the parties is not a question of law for the court, but a question of fact for the jury. Section 8.3.1 may be interpreted to give the architect either complete discretion in awarding time extensions or limited discretion to determine the length of the extension once there is "justifiable" delay under the contract. Therefore, the court must resort to extrinsic evidence in resolving this dispute.

The City maintains that the "no damages for delay" provision limits plaintiff's remedy for delay to time extensions; therefore, even if plaintiff could show a breach of contract, it could not recover damages for constructive acceleration. The contract, however, does not address the question of what remedy may be had for an unreasonable denial of a time extension. It does not follow that where the denial of a time extension is the cause in fact of plaintiff's damages, that the exclusive remedy is a time extension. At this point, damages have already been incurred in the form of acceleration costs. Because the contract does not address the issue of remedy for such a breach, the question is not one of law, but must be resolved by the finder of fact interpreting the intent of the parties.

In defense, the City raises the argument that plaintiff has failed to satisfy the notice requirements, a condition precedent to recovery under the contract. Specifically, the City alleges that plaintiff failed to give timely notice of its claims, and therefore waived the claims and is estopped from asserting them.

[2] Section 7.4.2 of plaintiff's contract with the City requires that any claims against the City be made in strict accordance with section 12.3.1 of the Supplementary Conditions. Section 12.3.1 of the Supplementary Conditions of the contract provides as follows:

> If the Contractor wishes to make a claim for an increase in the Contract Sum, he shall give the Architect written notice thereof within fifteen days after the occurrence of the event giving rise to such claim. . . . No such claim shall be valid unless so made.

Plaintiff's forecast of evidence shows plaintiff provided timely written notice that it needed a change work order for extra time or it would incur acceleration costs for which it expected to be compensated. The City contends that these letters sent by plaintiff do not constitute sufficient notice under the contract. Because the contract is not instructive as to what constitutes adequate notice, we find that there exists a disputed issue of material fact regarding the sufficiency of notice given to the architect.

Plaintiff has alleged facts which make out a prima facie case for breach of contract and the City has not asserted a legal defense which would prevent plaintiff from prevailing. Therefore, summary judgment against plaintiff was improper.

[3] We now address defendant P.J. Dick's cross-claim against the City. P.J. Dick alleges it was damaged by delays caused by the City and those for whom it is responsible. The City contends P.J. Dick's claims are barred by the terms of the contract, specifically citing the "no damages for delay provision" and the notice requirements as defenses.

Defendant P.J. Dick's forecast of evidence is insufficient to overcome the City's forecast that P.J. Dick failed to give timely notice of its claim as required by the contract terms. To satisfy the notice requirements, P.J. Dick should have given the architect notice that it was damaged by delay as soon as it knew of such delay or within 15 days thereafter. P.J. Dick's damages for delay were ascertainable as of the original date of completion, on 30

April 1989. P.J. Dick did not meet the 15-day window requirement, and, in fact, did not give "notice" to the City or the architect until September 1991, more than two years later. Because P.J. Dick failed to satisfy a condition precedent to recovery, it cannot prevail on its claim for damages. Therefore, summary judgment is proper. We need not reach the merits of any additional arguments regarding this claim.

Affirmed in part; reversed in part.

Judges LEWIS and JOHN concur.

UNITED CAROLINA BANK v. FIRST UNION NATIONAL BANK

No. 9113SC1274

(Filed 2 March 1993)

1. **Banks and Other Financial Institutions § 84 (NCI4th)— unindorsed check—final payment—presentment warranty of good title—breach by collecting bank**

A collecting bank breached the presentment warranty of good title by obtaining final payment from the payor bank on a check containing no payee indorsement. The payor bank made final payment on the check to the collecting bank when it completed the process of posting the item to the payor's account, made a provisional settlement for the item, and failed to revoke the settlement in the time and manner permitted by N.C.G.S. § 25-4-301(1). N.C.G.S. § 25-4-207(1)(a).

Am Jur 2d, Banks § 403.

2. **Banks and Other Financial Institutions § 81 (NCI4th)— presentment warranty of good title—bank's indorsement for customer—payee not bank customer**

Assuming arguendo that the collecting bank could have cured its breach of warranty of presentment of good title by supplying the missing indorsement of its "customer" on a check pursuant to N.C.G.S. § 25-4-205(1) after the check was returned by the payor bank, the collecting bank did not do

so where the payee had no account at the collecting bank and was thus not a "customer" of the bank.

Am Jur 2d, Banks § 700.

Construction and application of UCC sec. 4-205(1) allowing depository bank to supply customer's indorsement on item for collection. 29 ALR4th 631.

3. Banks and Other Financial Institutions § 84 (NCI4th)— breach of presentment warranty of good title—unilateral charge back—offsetting claims by payor and collecting banks

The payor bank's right to recover against the collecting bank for breach of the presentment warranty of good title does not negate the final payment made by the payor bank to the collecting bank, and the payor bank may not unilaterally charge the check back to the collecting bank on breach of warranty grounds but must seek a recovery against the collecting bank. While the collecting bank was entitled to recover on its claim that the payor bank unlawfully charged back the check to the collecting bank's account, the payor bank was entitled to recover on its counterclaim for breach of warranty, and the trial court properly held that these claims were offsetting in this case where neither party argued that the trial court failed to correctly account for any interest due.

Am Jur 2d, Banks § 404.

Construction and effect of UCC article 4, dealing with bank deposits and collections. 18 ALR3d 1376.

Appeal by plaintiff from judgment entered 11 June 1991 in Brunswick County Superior Court by Judge Gregory A. Weeks. Heard in the Court of Appeals 3 December 1992.

Prevatte, Prevatte & Campbell, by Kenneth R. Campbell and James R. Prevatte, Jr., for plaintiff-appellant.

Marshall, Williams & Gorham, by Lonnie B. Williams, and First Union Corporation Legal Division, by Staff Attorney Barbara J. Hellenschmidt, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an 11 June 1991 judgment of the trial court, sitting without a jury, granting defendant's motion to dismiss

made at the close of plaintiff's evidence pursuant to N.C.G.S. § 1A-1, Rule 41(b), on the ground that plaintiff established no right to relief.

The evidence before the trial court established that on 29 March 1989, Mary S. Wood (Wood) drew a check on defendant First Union National Bank (First Union) in the amount of $23,000.00 payable to the order of Eagle Construction Company. Jack S. Allen and Sylvia P. Allen were partners of Eagle Construction Company. On 3 April 1989, Jack Allen deposited the check with plaintiff United Carolina Bank (UCB) to the account of Sylvia P. Allen, No. 43-541-009-1. The check was not indorsed by payee Eagle Construction Company or by Sylvia or Jack Allen. At the time the check was deposited, Eagle Construction Company did not have an account at UCB. UCB gave immediate credit for the check to the Sylvia Allen account, and by 4 April 1989, Sylvia Allen had withdrawn the entire $23,000.00 from the account.

UCB sent the check through the Federal Reserve System, and on 4 April 1989, it was presented to payor First Union. Upon presentment to First Union, the check still contained no payee indorsement. UCB, however, had stamped on the back of the check, "United Carolina Bank, Monroe, N.C., pay any bank, P.E.G." ("P.E.G." meaning "prior endorsements guaranteed"). First Union posted the check to Wood's account and credited UCB's settlement account in the amount of $23,000.00. First Union sent the check to Wood with her monthly bank statement on 10 May 1989, whereupon she discovered the missing indorsement, returned the check to First Union, and asked First Union to credit her account in the amount of $23,000.00.

On 10 May 1989, First Union credited Wood's account in the amount of $23,000.00. First Union returned the check to UCB for lack of indorsement and debited UCB's settlement account in the amount of $23,000.00. On 12 May 1989, Wood issued to First Union a stop-payment order on the check. Upon receiving the check from First Union on 11 May 1989, UCB called Jack Allen to tell him that he needed to indorse the check. Jack Allen authorized UCB to indorse the check for him and to redeposit it. A UCB employee wrote on the back of the check "Eagle Construction Co., Deposit only to payee account 43-5410091 Sylvia P. Allen," and UCB sent the check back to First Union for payment. Upon receiving the

check on 16 May 1989, First Union honored Wood's stop-payment order and refused payment to UCB.

After First Union refused payment on the check, UCB brought the present action alleging that First Union "wrongfully had the check charged back against [UCB] after making final payment, and [First Union] is accountable to [UCB] under the provisions of N.C.G.S. Chapter 25." In its answer, First Union denied liability to UCB based in relevant part on UCB's alleged breach of presentment warranty of good title under N.C.G.S. § 25-4-207 and asserted in the alternative a counterclaim against UCB on the same basis. The matter was heard in Brunswick County Superior Court by Judge Gregory Weeks sitting without a jury on 10 June 1991, and at the close of UCB's evidence, First Union made a Rule 41(b) motion to dismiss plaintiff's complaint.

Judge Weeks after making findings of fact concluded in relevant part that UCB breached its warranties and guarantee of prior indorsement "by the lack of indorsement by the payee and the lack of good title in UCB," and that therefore "payment by First Union did not become final and First Union properly honored the stop payment order." The court also concluded that, if payment had become final, First Union nonetheless would be entitled to recover from UCB the amount of the check for breach of presentment warranties and guarantee of prior indorsement by UCB and could do so by returning the check to UCB and charging the check back to UCB. Finally, Judge Weeks concluded that UCB was without authority to supply the indorsement of Eagle Construction Company.

The dispositive issues are, under Chapter 25 of the North Carolina General Statutes, (I) whether UCB breached the presentment warranty of good title by obtaining payment from First Union on a check containing no payee indorsement; if so, (II) whether UCB cured its breach of warranty by supplying the indorsement of Eagle Construction Company before re-presenting the check for payment; and, if not, (III) whether UCB's breach of warranty entitled First Union to charge back to UCB the amount of the check.

A defendant in an action being tried without a jury may test the sufficiency of the plaintiff's evidence by moving at the close of plaintiff's evidence under N.C.G.S. § 1A-1, Rule 41(b) for involuntary dismissal on the ground that upon the facts and the law the plaintiff has shown no right to relief. *Tanglewood Land Co. v.*

Wood, 40 N.C. App. 133, 136, 252 S.E.2d 546, 549 (1979); W. Brian Howell, *Howell's Shuford North Carolina Civil Practice and Procedure* § 41-5 (4th ed. 1992). In ruling on a Rule 41(b) motion, the trial court must determine "whether the plaintiff's evidence, taken as true, would support findings upon which the trier of facts could properly base a judgment for the plaintiff." *Howell* at § 41-5.

I

[1] UCB argues that the trial court erroneously concluded that UCB breached the presentment warranty of good title by obtaining payment of the Wood check from First Union when the check did not contain the indorsement of the payee. Specifically, UCB argues that "the true test of whether one has good title to an instrument lies in how he came into possession of it, and not in the presence or absence of indorsements." We disagree.

Pursuant to N.C.G.S. § 25-4-207, each "collecting bank who obtains payment" of a check from a payor bank "warrants to the payor bank . . . that . . . he has good title" to the check. N.C.G.S. § 25-4-207(1)(a) (1986). This is known as a presentment warranty of good title whereby the collecting bank warrants that the check contains neither forged indorsements, *North Carolina Nat'l Bank v. Hammond*, 298 N.C. 703, 708, 260 S.E.2d 617, 621 (1979), nor missing indorsements. *See Witten Prods., Inc. v. Republic Bank & Trust Co.*, 102 N.C. App. 88, 90, 401 S.E.2d 388, 390 (1991) (indorsement of the payee is required in order to pass good title); *Chilson v. Capital Bank*, 701 P.2d 903, 906 (Kan. 1985) (collecting bank breached Article Four presentment warranty of good title by receiving final payment on check with missing payee's indorsement); *accord Stapleton v. First Sec. Bank*, 675 P.2d 83 (Mont. 1983). Indeed, it is well established that this presentment warranty of good title, guaranteeing prior indorsements, applies "regardless of the type of indorsement *or whether there was an indorsement.*" N.C.G.S. § 25-4-207 N.C. comment (emphasis added).

In this case, it is undisputed that the indorsement of the payee was missing when First Union initially received the check for payment. Therefore, if final payment was obtained by UCB, the collecting bank, from First Union, the payor bank, UCB breached the presentment warranty of good title. *See James J. White & Robert S. Summers, Uniform Commercial Code* § 17-2, at 722 (3d ed. 1988) (presentment warranty arises only when the collecting bank receives from the payor bank final payment for the check). Final payment

of a check by a payor bank occurs when the payor bank has done any of the following, whichever happens first:

> (a) paid the item in cash; or
>
> (b) settled for the item without reserving a right to revoke the settlement and without having such right under statute, clearing house rule or agreement; or
>
> (c) completed the process of posting the item to the indicated account of the drawer, maker or other person to be charged therewith; or
>
> (d) made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, clearing house rule or agreement.
>
> Upon a final payment under subparagraphs (b), (c) or (d) the payor bank shall be accountable for the amount of the item.

N.C.G.S. § 25-4-213(1) (1986).

It is undisputed that First Union made final payment on the check. The evidence before the trial court established that First Union completed the process of posting the item to Wood's account and that First Union made a provisional settlement for the item and failed to revoke the settlement in the time and manner permitted by statute, that is, before its midnight deadline. N.C.G.S. § 25-4-301(1) (1986); N.C.G.S. § 25-4-104(1)(h) (1986). Thus, because UCB presented the check to First Union without the required indorsement and because First Union paid the check under Section 25-4-213(1), Judge Weeks properly concluded that UCB, as a collecting bank, breached its presentment warranty of good title. We note, however, that the stamp which UCB placed on the back of the check, "P.E.G.," does not affect UCB's liability for breach of warranty. A specific guarantee of prior indorsements is not necessary under the UCC because, as previously discussed, the effect obtained by such words now arises automatically under the Code as a part of the bank collection process. N.C.G.S. § 25-4-207(3) & official comment 2; Henry J. Bailey & Richard B. Hagedorn, *Brady on Bank Checks* § 12.10 (6th ed. 1987 & Supp. 1992). In fact, the use of P.E.G. stamps by banks is discouraged as it "make[s] it more difficult to read the bank indorsements and identify the depositary bank in the event that the check is returned unpaid." *Id.*

II

[2] UCB argues that any breach of the presentment warranty of good title was cured when UCB supplied the missing indorsement after the check was returned by First Union. We acknowledge that a depositary bank such as UCB which has taken a check for collection may supply the indorsement of its "customer." N.C.G.S. § 25-4-205(1) (1986). In this case, however, assuming *arguendo* that UCB could have cured the breach of warranty by supplying the proper indorsement, UCB did not do so. Eagle Construction Company, the payee of the check, did not have an account at UCB and therefore was not a "customer" within the meaning of Section 25-4-205(1). *See* N.C.G.S. § 25-4-104(1)(e) (1986) ("customer" is any person having an account with the bank). Accordingly, we again agree with Judge Weeks that the indorsement provided by UCB was without effect and could not cure the breach of warranty.

III

[3] UCB finally argues that even if it breached the presentment warranty of good title, First Union became accountable for the check upon final payment and could not charge the check back to UCB. In support of its argument, UCB directs our attention to Section 25-4-213(1) which provides that, except for certain exceptions not here applicable, "upon final payment, the payor bank shall be accountable" for the amount of the check. First Union argues, based on N.C.G.S. § 25-3-418, that because UCB breached the presentment warranty of good title, payment of the check was not final and that, after discovering the missing indorsement, First Union had the legal right to return the check and to charge the amount of the check back to UCB.

North Carolina Gen. Stat. § 25-3-418 in relevant part provides that

> *except for liability for breach of warranty on presentment* under the preceding section [GS 25-3-417], [and under GS 25-4-207] payment . . . of any instrument is final in favor of a holder in due course, or a person who has in good faith changed his position in reliance on the payment.

N.C.G.S. § 25-3-418 & N.C. comment (1986) (emphasis added). This statute, on its face, seems to suggest that First Union is correct in its argument, that is, that a breach of warranty by the collecting bank prevents payment of a check by a payor bank from becoming

final. Because, however, the warranties under Section 25-4-207(1) arise *only* when there has already been final payment of the check, it defies logic to assert that when a breach of presentment warranty exists, payment of the check is not final. In addition, although under Section 25-4-207(4) a payor bank may "make a claim" within a reasonable time for breach of warranty, there is no explicit or implied provision in the Code authorizing a payor bank to unilaterally charge back to the collecting bank on breach of warranty grounds the amount of a check after the payor bank has "finally paid" the check under Section 25-4-213(1). Finally, other jurisdictions addressing the question before us have concluded, and we agree, that UCC Section 3-418 operates as an exception to the final payment rule in Section 4-213(1) only to the extent that it permits the payor bank which has made final payment to seek a recovery against the collecting bank for breach of presentment warranties. *See, e.g., First Nat'l Bank of Arizona v. Continental Bank*, 673 P.2d 938, 941 (Ariz. Ct. App. 1983). Damages in such an action include the consideration received by the collecting bank and finance charges and expenses related to the check, if any. N.C.G.S. § 25-4-207(3).

In sum, First Union's right to recover for breach of presentment warranties does not undo or negate the final payment made by First Union to UCB under Section 4-213(1). To read Section 25-3-418 as doing so "would be to introduce a great amount of uncertainty to the finality of payment rule in any case where the [i]ndorsements are questioned." *First Nat'l*, 673 P.2d at 941. Accordingly, the trial court was incorrect in determining that First Union had the right to unilaterally charge the check back to UCB. The trial court, however, was correct in its alternative ruling that First Union was entitled to judgment on its counterclaim for breach of the presentment warranty of good title. In other words, although UCB is entitled to recover on its claim that First Union unlawfully charged back the check to UCB's account, First Union is entitled to recover on its claim against UCB for breach of warranty. The trial court determined that these were offsetting claims. Although both parties in their pleadings sought recovery of interest on the $23,000.00, neither UCB nor First Union argues before this Court that the trial court failed to properly account for any interest due. Thus, we deem the interest claim abandoned by the parties. N.C.R. App. P. 28(a) (1992). Therefore, we agree that the parties' claims are offsetting and, accordingly, the order of the trial court is

Affirmed.

Chief Judge ARNOLD and Judge COZORT concur.

GENIE K. BLACK, PLAINTIFF v. WESTERN CAROLINA UNIVERSITY, AND JOHN F. McCREARY, IN HIS OFFICIAL CAPACITY AND INDIVIDUAL CAPACITY, DEFENDANTS

No. 9128SC899

(Filed 2 March 1993)

Colleges and Universities § 12 (NCI4th)— nonreappointment of assistant professor—fixed term contract—timeliness of notice

Where plaintiff was hired by defendant as an assistant professor under a fixed-term appointment, she was not entitled to notice of nonreappointment beyond the notice of the date of the expiration of her term found in her original contract, and provisions of the UNC Code and tenure policies and notice requirements of the American Association of University Professors were not expressly incorporated into plaintiff's contracts and therefore were not controlling.

Am Jur 2d, Colleges and Universities § 11.

Construction and effect of tenure provisions of contract or statute governing employment of college or university faculty member. 66 ALR3d 1018.

Appeal by plaintiff from judgment entered 16 July 1991 by Judge Robert D. Lewis in Buncombe County Superior Court. Heard in the Court of Appeals 13 November 1992.

Western Carolina University (WCU) employed the plaintiff as Director of Graduate Programs in Business with the rank of Assistant Professor during the 1988-89 school year. The plaintiff was also employed by WCU, with the rank of Assistant Professor, during the 1989-90 school year. On 30 June 1990, the Dean of WCU School of Business notified the plaintiff that WCU would not offer her a contract for the 1990-91 school year.

On 30 October 1990 the plaintiff filed suit against the defendants alleging that defendants breached their contract with her and

violated her 42 U.S.C. § 1983 civil rights by failing to give her timely notice that she would not be offered a contract for the 1991-92 school year. In her complaint, plaintiff alleged that she interviewed for a tenure track position with WCU. She claimed that she was informed that the only tenure track position available was one for a half-time administrative/half-time faculty member. Plaintiff also alleged that the combined duties of the position would have left her with little time for research and publishing, a major requirement for obtaining tenure. Accordingly, the Dean of the School of Business at WCU agreed to hire her under a "fixed term" contract at the rank of assistant professor so that her "anticipated lack of productivity during her initial employment would not become part of her record for subsequent evaluative purposes in terms of obtaining tenure at [WCU]."

The employment contract governing the plaintiff's first year of employment (8/15/88—5/15/89) provided in part:

> 4. This appointment is subject to the WCU Tenure Policies and Regulations as found in the Faculty Handbook, dated 1988-89 , including any future amendments thereto. You agree to observe and promote WCU's rules, regulations, and ideals.
>
> * * *
>
> 7. This contract is the entire agreement between the University and the faculty member with respect to the subject matter hereof and supersedes any and all prior understandings and agreements, oral and written, relating hereto. Any amendment hereof must be made in writing and upon mutual agreement of the parties.
>
> 8. Type of Appointment
>
> XX a. Fixed-term appointment for the employment period specified above.
>
> ____ b. Probationary appointment for the employment period specified above; ____ year of maximum 7 year probationary period.
>
> ____ c. Continuation of employment in this position during the employment period specified above and any possibility of reappointment is contingent upon continued availability of grant funds and/or such funds described

in Section III.F. of the WCU Tenure Policies and Regulations and Section 602(7) of The Code of the University of North Carolina.

XX d. Full-time appointment

* * *

____ f. Appointment subject to cancellation if enrollment in course(s) is not sufficient.

____ g. The provisions of Section 604C of the UNC Code and Section III.B.3. of the WCU Tenure Policies and Regulations apply to this appointment.

The employment contract governing plaintiff's second year of employment (8/14/89—5/6/90) contained essentially the same language as that found in the first contract quoted above except: (1) paragraph four of the contract was changed to adopt the 1989-90 version of the Faculty Handbook, and (2) subparagraph f. of paragraph eight was also marked with an "X."

Section III.B.3. of the WCU Tenure Policies and Regulations provides:

3. Fixed-Term Appointments

All appointments of visiting faculty, [ ] adjunct faculty, or other special categories of faculty such as instructors, lecturers, artists-in-residence, or writers-in-residence shall be for a specified term of service only, except as noted below in the case of some instructors. That term shall be set forth in writing when the appointment is made, and the specification of the length of the appointment shall be deemed to constitute full and timely notice of nonreappointment when the term expires. The provisions of Sections 604 A and 602 (4) of The Code of The University of North Carolina shall not apply to these appointments. However, full-time employees at the rank of instructor shall be given the notice of nonreappointment specified in Section III H if the conditions of appointment to the rank of instructor include a provision that the appointment is subject to renewal. Fixed-term appointments may be used for part-time or full-time teaching and/or administrative positions with or without compensation. Normally persons serving at the instructor

rank will not be reappointed for more than seven consecutive years.

Finally, Section III.H. of the WCU Tenure Policies and Regulations provides:

H. Timely Notice of Nonreappointment

1. The decision not to reappoint a full-time instructor whose appointment contract includes a provision that the appointment is subject to renewal or a probationary faculty member when his term of employment expires shall be made by the Chancellor or his designee early enough to permit timely notice to be given. This decision is final except as it may later be reviewed in accordance with Sections VI and VII. For full-time faculty at the rank of instructor whose contracts specify that the appointment is renewable, and assistant professor, associate professor, or professor, the minimum requirement for timely notice of nonreappointment shall be as follows:

* * *

b. During his second year of continuous service at Western Carolina University, the faculty member shall be given notice not less than 180 calendar days before his employment contract expires; and,

* * *

2. . . . If the decision is not to reappoint, then failure to give timely notice of nonreappointment will oblige the Chancellor to offer a terminal appointment for one academic year.

On 10 May 1991 the plaintiff made a motion for summary judgment. On 31 May 1991 the plaintiffs took a voluntary dismissal on the 42 U.S.C. § 1983 claim. On 16 July 1991 after conducting a full hearing, the trial court entered summary judgment in favor of the defendants and against the plaintiff.

Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Michelle Rippon, for the plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Thomas J. Ziko, for the defendant-appellee.

EAGLES, Judge.

Plaintiff contends that the trial court erred by entering summary judgment in favor of the defendants. We disagree.

> The trial court's judgment is correct "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits . . . show that there is no genuine issue as to any material fact and that [defendant] is entitled to a judgment as a matter of law." G.S. 1A-1, Rule 56(c); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). "Summary judgment may not be granted if there is any genuine issue as to any material fact." *Gray v. American Express Co.*, 34 N.C. App. 714, 715, 239 S.E.2d 621, 623 (1977).

Meadows v. Cigar Supply Co., Inc., 91 N.C. App. 404, 406, 371 S.E.2d 765, 766 (1988). "Where the terms [of a contract] are plain and explicit the court will determine the legal effect of a contract and enforce it as written by the parties." *Church v. Hancock*, 261 N.C. 764, 766, 136 S.E.2d 81, 83 (1964).

Plaintiff argues that because she was a full-time Assistant Professor in her second year of service, she was entitled to 180 days notice that she would not be reappointed to the WCU faculty. More specifically, she argues that "[t]he language of her employment contract together with provisions of the WCU Faculty Handbook and UNC Code which are incorporated into and form a part of her contract provide the basis for [her] position."

Initially, we disagree with plaintiff's assertion that the UNC Code was incorporated into her contract. "[T]he law of North Carolina is clear that unilaterally promulgated employment manuals or policies do not become part of the employment contract unless expressly included in it." *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84, *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986) (citations omitted). Here, neither of the plaintiff's employment contracts expressly incorporated the provisions of the UNC Code. In fact, the only specific mention of the UNC Code found in her contracts is contained in paragraphs 8.c. and 8.g. However, neither the line adjacent to paragraph 8.c. nor the line adjacent to paragraph 8.g. was marked with an "X" to indicate that that provision became a part of the contract. Plaintiff also argues that the UNC Code was incorporated into her contract because the Foreword of the WCU Faculty Handbook states that

"[i]t is designed to supplement . . . *The Code of the University of North Carolina*[,]" which "contains the policies and operating procedures established by the Board of Governors of the University of North Carolina . . . ." We find this argument equally unpersuasive. The Handbook's Foreword does not say that the UNC Code is incorporated. Rather, it merely states that the Handbook is designed to be a supplement to policies and operating procedures found in the UNC Code. If the drafters of the Handbook had intended to incorporate the provisions of the UNC Code, they would have done so specifically. Accordingly, we hold that the UNC Code was not expressly incorporated into the contract, and, therefore, it is not a part of the contract.

Plaintiff also appears to argue that because paragraph 8.g. was not marked with an "X" that Section III.B.3. was not incorporated into her employment contracts. Her argument overlooks the specific provisions of paragraph 4. of both years' employment contracts. Paragraph 4. expressly incorporates all the provisions of the WCU Tenure Policies and Regulations. The question remaining for decision, then, is whether Section III.B.3. or Section H.1. of the WCU Tenure Policies and Regulations controls the length of notice of nonreappointment that the plaintiff was entitled to receive. We hold that Section III.B.3. controls here.

Both of plaintiff's employment contracts specifically provide that her appointment was a "[f]ixed-term appointment for the employment period specified" in the contract. Section III.B.3. of the WCU Tenure Policies and Regulations, quoted above, is entitled "Fixed-Term Appointments[.]" That section provides that visiting faculty, adjunct faculty and other special categories of faculty "*such as* instructors, lecturers, artists-in-residence, [and] writers-in-residence" (emphasis ours) must receive fixed-term appointments, and that "the specification of the length of the appointment shall be deemed to constitute full and timely notice of the nonreappointment when the term expires." However, the list of faculty qualifying for fixed-term appointments in Section III.B.3. does not purport to be all inclusive. The appellee's brief correctly states that "[n]othing in the WCU Tenure Policies prohibits the university from employing faculty who hold other ranks, such as Assistant Professor, under 'fixed-term appointments.' " Moreover, we note that although Section H.1. does provide specific notice requirements in case of nonreappointment, its application is limited. The first sentence of Section H.1. makes clear that its provisions only apply to (1) full-time in-

structors whose appointment contract includes a provision that the appointment is subject to renewal and (2) probationary faculty members. Here, the plaintiff was hired at the rank of Assistant Professor not Instructor. Furthermore, in the contract form paragraph 8. of the contract form dealing with "Type of Appointment," paragraph 8.a. was marked and paragraph 8.b. was not marked with an "X" indicating the appointment was "fixed-term" and was not a probationary appointment. Accordingly, we conclude the plaintiff was not hired under a probationary appointment.

Finally, the plaintiff argues that the tenure policies and notice requirements of the American Association of University Professors are consistent with her position that she was entitled to more timely notice. However, those policies and notice requirements were not expressly incorporated into the plaintiff's contracts. Accordingly, they were not a part of the contract and do not affect disposition of this case. *Walker v. Westinghouse Electric Corp.*, 77 N.C. App. 253, 259, 335 S.E.2d 79, 83-84, *disc. review denied*, 315 N.C. 597, 341 S.E.2d 39 (1986).

In sum, we conclude that the plaintiff negotiated for and was hired under a fixed-term appointment. As such, she was not entitled to notice of nonreappointment beyond the notice of the date of the expiration of her term found in the original contract. Accordingly, the trial court's entry of summary judgment in favor of the appellees is affirmed.

Affirmed.

Judges ORR and JOHN concur.

GARY SCHWARTZBACH, PLAINTIFF-APPELLEE v. APPLE BAKING COMPANY, DEFENDANT-APPELLANT

No. 9119SC786

(Filed 2 March 1993)

1. Corporations § 93 (NCI4th)— plaintiff as sole director of defendant—stock repurchase "agreement"—agreement not just and reasonable to defendant

In an action for enforcement of an alleged stock repurchase "agreement" between plaintiff and defendant corporation which purportedly required defendant to buy plaintiff's 167⅔ shares of stock at $1,000 per share in the event that plaintiff was removed as president of defendant, the trial court erred by not granting defendant's motion for judgment n.o.v., since plaintiff failed as a matter of law to carry his burden of showing that the "agreement" in question, adopted at a special meeting of defendant's "board of directors" at a time when plaintiff was the sole director of defendant, was just and reasonable to defendant within the meaning of N.C.G.S. § 55-30(b)(3). N.C.G.S. § 55-35.

Am Jur 2d, Corporations §§ 1736, 1744.

2. Corporations § 94 (NCI4th)— director's transaction involved—award of punitive damages not automatic

An award of punitive damages is not an automatic right of a party who successfully establishes the invalidity of an adversely interested director's transaction under N.C.G.S. § 55-30, and the trial court correctly instructed the jury that it must find aggravating circumstances in order to award punitive damages.

Am Jur 2d, Corporations § 1740.

Appeal by defendant from judgment entered 1 March 1991 in Rowan County Superior Court by Judge Thomas W. Seay. Heard in the Court of Appeals 26 August 1992.

Plaintiff filed this action on 20 November 1989, seeking enforcement of an alleged stock repurchase "agreement" between him and defendant corporation, Apple Baking Company. Defendant filed an answer and counterclaim. In its counterclaim, defendant sought

to void the alleged stock buy-back "agreement" and to require the plaintiff to pay back a $7,500 cash bonus which plaintiff had received in December of 1987. The counterclaim also sought punitive damages and the return of $23,400 of severance pay which plaintiff had received in September of 1988.

At the time the alleged buy-back "agreement" was entered into, plaintiff held approximately 16 percent of Apple Baking Company's 1,000 outstanding shares of stock. Besides being a major stockholder, at the time the alleged "agreement" was made, plaintiff was also both the president and the sole director of the corporation.

The alleged buy-back "agreement" in question purported to obligate defendant to buy back 167 and ⅔ shares of plaintiff's stock at $1,000 per share in the event that plaintiff was removed as president of defendant corporation. On 26 August 1988, the shareholders enacted a new slate of directors. On 8 September 1988, the new directors held a meeting and removed plaintiff from his position as president of the company. Subsequent to his removal, plaintiff informed the shareholders of his alleged buy-back "agreement." Defendant's newly-elected board of directors refused to honor the alleged "agreement," and plaintiff eventually filed this suit in an effort to obtain its enforcement.

At trial, at the close of plaintiff's evidence and at the close of all the evidence, defendant made a motion for directed verdict, which was denied. The jury returned a verdict enforcing the stock buy-back "agreement," but also awarded the company $7,500 on its counterclaim. Judge Seay denied defendant's motion for judgment notwithstanding the verdict or, alternatively, motion for a new trial. On 28 March 1991, defendant filed notice of appeal from the judgment filed 1 March 1991, and the order denying defendant's motion for judgment notwithstanding the verdict or, alternatively, motion for a new trial.

Kluttz, Hamlin, Reamer, Blankenship and Kluttz, by Malcolm B. Blankenship, Jr., for plaintiff-appellee.

Ferguson, Stein, Watt, Wallas, Adkins & Gresham, P.A., by James E. Ferguson, II, for defendant-appellant.

WELLS, Judge.

[1] In one of its assignments of error, defendant contends that the trial court erred by not granting its motion for judgment notwithstanding the verdict as to plaintiff's claim. We agree, and reverse that part of the trial judgment below. N.C. Gen. Stat. § 1A-1, Rule 50(b)(1) of the Rules of Civil Procedure provides that a motion for judgment notwithstanding the verdict "shall be granted if it appears that the motion for directed verdict could properly have been granted." The test for allowing a motion for judgment notwithstanding the verdict is essentially the same as that for allowing a motion for directed verdict. *Dickinson v. Pake*, 284 N.C. 576, 201 S.E.2d 897 (1974). A motion by a defendant for a directed verdict under N.C. Gen. Stat. § 1A-1 Rule 50(a) of the Rules of Civil Procedure tests the legal sufficiency of the evidence to take the case to the jury and support a verdict for the plaintiff. *Manganello v. Permastone, Inc.*, 291 N.C. 666, 231 S.E.2d 678 (1977); *see also Eifler v. Pyles*, 94 N.C. App. 349, 380 S.E.2d 149 (1989). On such a motion, the plaintiff's evidence must be taken as true and the evidence must be considered in the light most favorable to the plaintiff, giving the plaintiff the benefit of every reasonable inference to be drawn therefrom. *Id.* 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 that the evidence reasonably tends to establish. *Id.*

The "agreement" on which plaintiff's claim was founded was a resolution adopted at a special meeting of defendant's "Board of Directors" on 1 August 1988. As we have noted earlier, at that time plaintiff was the sole director of the defendant corporation. The resolution read as follows:

> A special meeting of the Board of Directors was held at the office on August 1, 1988 at 11:00 A.M.
>
> It was agreed that if Gary Schwartzbach should be removed as president, all his company stock must be bought by the Corporation at $1,000.00 each within thirty days of his removal. He will also receive six months severance pay.
>
> The meeting was adjourned, as there was no further business.
>
> Gary Schwartzbach

On 1 August 1988, the existing Business Corporation Act contained the following provisions:[1]

N.C. Gen. Stat. § 55-30 Director's Adverse Interest.

(b) No corporate transaction in which a director has an adverse interest is either void or voidable, if:

(1) With knowledge on the part of the other directors of such adverse interest, the transaction is approved in good faith by a majority, not less than two, of the disinterested directors present even though less than a quorum, irrespective of the participation of the adversely interested director in the approval, or if

(2) After full disclosure of all the material facts to all the shareholders, the transaction is specifically approved by the vote of a majority or by the written consent of all the voting shares other than those owned or controlled by the adversely interested directors, or if

(3) The adversely interested party proves that the transaction was just and reasonable to the corporation at the time when entered into or approved. In the case of compensation paid or voted for services of a director as director or as officer or employee the standard of what is "just and reasonable" is what would be paid for such services at arm's length under competitive conditions.

It is undisputed that plaintiff, the sole director at the time of the contested transaction, did not comply with either subsection (1) or (2) with respect to the transaction. Therefore, the only manner in which plaintiff could enforce the otherwise voidable transaction would be to satisfy the requirements of subsection (3).

It has long been the generally prevailing rule throughout the various courts of the United States and our State that directors and officers of a business corporation in charge of its management are, in the performance of their official duties, under obligations of trust to the corporation or its stockholders and must act in good faith and for the interest of the corporation or its stockholders.

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1. Chapter 55 of the General Statutes has been completely rewritten and recodified effective 1 July 1990.

See 18B Am Jur 2d, Corporations, § 1684. North Carolina law has been consistent with this rule. *See e.g. Alford v. Shaw*, 320 N.C. 465, 358 S.E.2d 323 (1987); *Meiselman v. Meiselman*, 309 N.C. 279, 307 S.E.2d 551 (1983); *Fulton v. Talbert*, 255 N.C. 183, 120 S.E.2d 410 (1961). At the time the case at bar arose, G.S. § 55-35 spoke very plainly on this aspect of our law of corporations:

> § 55-35 Duty of Directors and Officers to Corporation.
>
> Officers and directors shall be deemed to stand in a fiduciary relation to the corporation and to its shareholders and shall discharge the duties of their respective positions in good faith, and with that diligence and care which ordinarily prudent men would exercise under similar circumstances in like positions.

Speaking more directly to the specific transaction in this case, one leading authority has generally analyzed and explained the law of this State, as follows. Prior to the enactment of G.S. § 55-30(b), the applicable common law rule governing transactions between directors and officers and their corporations was one of presumptive invalidity, due to the good faith and undivided loyalty required of such persons serving the corporation in their fiduciary capacity. *See Robinson on North Carolina Corporation Law, 3rd Ed.*, § 12-11 and § 12-13. The purpose of the enactment of G.S. § 55-30(b) was to clarify the previously uncodified rules relating to transactions of interested directors. *Id.* § 12-11. Those seeking to sustain such a transaction must prove that it was openly and fairly made. *Id.*

In interpreting the provisions of G.S. § 55-30(b)(3), the 4th Circuit Court stated the rule as follows:

> It is a settled rule that a corporate officer acts in a fiduciary capacity and cannot profit at the expense of the corporation. . . . [T]he adversely influenced party must prove that the transaction was fair, just, and reasonable when entered into. *Smith v. Robinson*, 343 F.2d 793 (4th Cir. 1965).

Plaintiff's evidence in support of his claim included the resolution of 1 August 1988 and testimony from plaintiff relating to previous stock sales. The resolution on its face obviously cannot be said to be fair, just, or reasonable to the defendant under elemental principles of contract law; this transaction simply does not constitute an "agreement." The resolution does not reflect any consideration flowing to defendant, no promise by plaintiff to sell

his shares to defendant, no forbearance in the form of a promise not to sell his shares to others, and no giving up by plaintiff of any benefit. Under this resolution, defendant would be forced to buy at a fixed price. Plaintiff would not be required to sell at any price.

On its face, the resolution purports to establish a value on plaintiff's stock at some then undetermined time in the future, a time at which it could not then be possible to predict or establish the value of plaintiff's stock. The only evidence plaintiff offered to support his version of the value of his stock were past transactions, sales which took place in 1984 (original subscriptions for $1,000 per share) and several instances where investors paid $1,000 a share in 1986. Plaintiff's opinion—that the "value" the defendant was receiving consisted of his shares comprising 17 percent of the company's stocks—is meaningless in the context of the requirements of the statute.

We hold as a matter of law that plaintiff failed to carry his burden of showing the subject transaction to be just and reasonable to defendant, and we reverse that part of the judgment.

Defendant's Counterclaim

[2] In its last assignment of error, defendant corporation brings forward the trial court's refusal to instruct the jury that a finding against plaintiff on defendant's counterclaim concerning the $7,500 bonus he awarded himself necessarily dictated a finding of a breach of fiduciary duty and fraud as a matter of law. Defendant specifically takes exception to the trial court's instruction to the jury to award punitive damages only if they found aggravating circumstances. Defendant contends that plaintiff's failure to withstand G.S. § 55-30's "just and reasonable" test should lead to an assessment of punitive damages as a matter of law.

While there is arguable support for defendant's contention that a breach of a fiduciary duty is fraud as a matter of law,[2] we are unwilling to hold that every time a director is unable to carry his burden of proof in a G.S. § 55-30(b) analysis, he is automatically subject to punitive damages. A director might be biased in his assessment of the fairness of a self-dealing transaction,

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2. *See Stone v. Martin*, 85 N.C. App. 410, 355 S.E.2d 255, *disc. rev. denied*, 320 N.C. 368, 360 S.E.2d 105 (1987).

and therefore his acts could fail to withstand G.S. § 55-30's "just and reasonable" analysis. Such evidence would not necessarily qualify as being the type of reckless or intentional behavior which would justify punitive damages. For that reason, we hold that an award of punitive damages is not an automatic right of a party who successfully establishes the invalidity of an adversely interested director's transaction under G.S. § 55-30, and that the trial court correctly instructed the jury to find aggravating circumstances before awarding punitive damages in this case.

Plaintiff's Cross Appeal

In his purported cross appeal, plaintiff attempts to challenge the jury verdict awarding defendant the return of a $7,500 bonus that plaintiff awarded to himself as president of the company. Plaintiff has not perfected appeal from the judgment below, but attempts to bring forward this question under a "cross-assignment of error." This is not permissible. *See* Rule 10 of the North Carolina Rules of Appellate Procedure.

As to the plaintiff's recovery on his claim, the judgment below is reversed.

As to defendant's recovery on its counterclaim, no error.

Judges ORR and GREENE concur.

STATE OF NORTH CAROLINA, APPELLEE v. JIMMY STEVENSON MITCHELL, APPELLANT

No. 9117SC1017

(Filed 2 March 1993)

Burglary and Unlawful Breakings § 119 (NCI4th)— felonious breaking and entering of pharmacy and grill—felonious larceny—sufficiency of evidence

The evidence was sufficient to be submitted to the jury in a prosecution for felonious breaking or entering of a pharmacy and a grill and felonious larceny of property therefrom where it tended to show that on the night that a pharmacy

break-in occurred, defendant told his nephew that "he wanted some good drugs"; he left his mother's home shortly thereafter carrying a hammer; within hours after the break-in, accomplished by knocking out glass in the front door and kicking it in, defendant showed his nephew a bag bearing the name of the pharmacy which he had hidden in a creek bank and which contained items identical to those which had been taken from the pharmacy; a pill bottle, which the pharmacist identified as having been missing after the break-in, was found in the same wooded area where defendant had showed the pharmacy bag to his nephew; defendant was found in possession of cigarettes with the tax i.d. number assigned to the grill which was broken into; and defendant was found in possession of coins consistent with those taken from the grill during the break-in.

Am Jur 2d, Burglary §§ 45, 53.

Appeal by defendant from judgments entered 24 May 1991 by Judge Peter M. McHugh in Rockingham County Superior Court. Heard in the Court of Appeals 12 January 1993.

Defendant was charged in proper bills of indictment with two counts each of felonious breaking or entering in violation of G.S. 14-54(a), felonious larceny in violation of G.S. 14-72(b)(2) and felonious possession of stolen goods in violation of G.S. 14-72(c). The jury found defendant guilty of two counts of breaking or entering and two counts of felonious larceny, and the trial court entered judgments sentencing defendant to four consecutive ten-year prison terms. Defendant appealed.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Teresa L. White, for the State.

David F. Tamer for defendant-appellant.

MARTIN, Judge.

Defendant's sole contention on appeal is that the trial court erred in denying defendant's motion to dismiss the charges against him. We disagree.

In ruling on a motion to dismiss, the trial court must determine whether there is substantial evidence of each element of the offense charged and that defendant was the perpetrator of the offense.

State v. Odom, 99 N.C. App. 265, 393 S.E.2d 146, *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990). All evidence, whether direct or circumstantial, must be considered in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Primes*, 314 N.C. 202, 333 S.E.2d 278 (1985); *State v. Earnhardt*, 307 N.C. 62, 296 S.E.2d 649 (1982); *State v. Powell*, 299 N.C. 95, 261 S.E.2d 114 (1980). Circumstantial evidence is direct evidence which is indirectly applied by means of circumstances from which the existence of the principal fact may reasonably be deduced or inferred. 1 H. Brandis, *Brandis on North Carolina Evidence* § 76 (1988).

In the present case, defendant was charged and convicted of felonious breaking or entering and larceny of the Rite Aid Drug Store in Mayodan, North Carolina, and the County Line Grill in Rockingham County. The essential elements of felonious breaking or entering are (1) the breaking or entering (2) of any building (3) with the intent to commit any felony or larceny therein. *State v. Litchford*, 78 N.C. App. 722, 338 S.E.2d 575 (1986). "Larceny consists of (i) the wrongful taking and carrying away, (ii) of the personal property of another, (iii) without his consent, and (iv) with the intent to deprive permanently the owner thereof." *Odom*, at 269, 393 S.E.2d at 149.

The State offered evidence at trial tending to show that at approximately 5:45 a.m. on 7 September 1990, the manager of the Rite Aid Drug Store in Mayodan discovered that the glass was broken out of one of the front doors to the store. The Mayodan Police Department was contacted and Sergeant Richard Wright responded to the call. He observed the broken glass and noticed a large shoe print on a piece of the broken door "like someone put their foot against it and kicked it . . . ." The store manager and the pharmacist determined that ten or fifteen prescriptions which had been filled for customers on 6 September 1990 and left beside the cash register with their receipts were missing, as were some stock bottles of Valium and Tylenol with codeine. According to the pharmacist, the stock bottles of Valium and Tylenol with codeine were not dispensed directly to customers, but were used to fill prescriptions.

On 10 September 1990, at approximately 6:55 a.m., Thomas Aaron, the owner and operator of the County Line Grill in Madison, North Carolina, arrived at his store and discovered that the glass

in the left front door had been shattered, and that several cartons of Marlboro cigarettes were missing, along with a number of rolls of coins. Detectives J. D. Thomas and John Oakley of the Rockingham County Sheriff's Department investigated the break-in at the County Line Grill. From conversations with Mr. Aaron, the detectives learned that Jimmie Reid and defendant had been in the store on the previous day. The officers went to a trailer at the John Hall Trailer Park approximately two hundred yards from the store. The trailer was occupied by defendant's girlfriend, Martha Marr. After being admitted to the trailer by Ms. Marr, the officers observed empty Marlboro cigarette packs on the floor, and approximately seven Rite Aid prescription bottles on the kitchen counter, and numerous other medicine bottles on the floor and in the living room.

Detectives Thomas and Oakley then proceeded to defendant's mother's home where they spoke with defendant. Defendant denied any knowledge about the break-in or about any items which had been stolen from the store. Detective Thomas asked if defendant had any objection to his asking defendant's mother for permission to look around the house, and defendant stated that he would rather the officer did not. Nevertheless, Detective Thomas asked defendant's mother for permission to look around. Defendant became very agitated and told his mother not to permit the search unless the officers got a search warrant. Detective Thomas advised defendant that he would obtain a search warrant and return, at which point defendant went into his bedroom and brought out a suitcase. Defendant, however, denied any knowledge of how the suitcase, which contained a pillow case filled with rolls of coins, loose change, eight full cartons of Marlboro cigarettes and forty-eight individual packs, had gotten into his room. The cartons and packages of cigarettes were stamped with a state sales tax number assigned to the County Line Grill for identification purposes, and the change was consistent with what Mr. Aaron had reported stolen in the break-in. Detective Thomas acknowledged, however, that while these items were consistent with the items taken from the County Line Grill during the break-in, there was no way of knowing if the cigarettes were lawfully purchased or stolen, or whether or not the change had been stolen.

Several days after these events, as a result of an anonymous telephone call concerning the break-in at the Rite Aid Drug Store, Captain Rick Anderson of the Mayodan Police Department spoke

with Jimmie Reid, defendant's nephew, who lived next door to defendant's mother (Reid's grandmother) on Mountain Loop Road. Captain Anderson then conducted a search of the wooded area behind defendant's mother's home, and found a Tylenol with codeine bottle and another pill bottle, both bearing labels with the store number of the Mayodan Rite Aid Drug Store which had been broken into on 7 September 1990. The store manager identified both bottles as having come from the store, although he could not say how they had been removed from the store.

The State also offered the testimony of Jimmie Reid, who stated that during the early morning hours of 7 September 1990, he had been with defendant and Martha Marr in defendant's bedroom at his mother's home talking and smoking cigarettes. Reid testified that defendant said "he wanted some good drugs. Some morphine, codeine, or valium, or something like that." Reid left and went next door to the house where he lived. He returned to defendant's mother's house around 2:30 a.m. and met defendant and Martha Marr as they were leaving. Reid asked defendant where he was going, but he did not answer. Reid gave defendant some money to buy some beer. Approximately fifteen to twenty seconds later, defendant came back inside the house to get a hammer.

Reid stayed at defendant's mother's house waiting for defendant to return with the beer, but defendant did not return until daybreak. Upon defendant's return, Reid asked him "what he had been into," and defendant said he had met some people at the Times Turnaround Store, and they drank the beer. Defendant went into his bedroom, and Reid saw him remove a bottle of cough syrup from his pocket. At defendant's request, Reid followed him outside into the backyard and through the woods to a creek. Defendant went up the creek bank and returned with a Rite Aid bag. Reid testified that the bag was ripped, and he could see a bottle of Tylenol with codeine and some pill bottles inside the bag. Defendant replaced the bag underneath the creek bank. Reid then returned to his house next door and went to sleep. Later that same day, Reid went back to defendant's mother's home and saw four or five Rite Aid prescription bottles in defendant's bedroom.

At approximately 6:00 p.m. that evening, Reid left with defendant and Martha Marr to go to her trailer at the John Hall Trailer Park. As they were leaving, Reid noticed a Rite Aid bag laying in defendant's mother's backyard. Reid spent that evening and

the following day and night at Martha's trailer with her and defendant. He testified that he saw pill bottles from Rite Aid at the trailer.

On Sunday evening, 9 September 1990, at approximately 8:30 p.m., Reid and defendant walked from the trailer park to the County Line Grocery "to check it out." They were in the store for about ten minutes and then returned to the trailer. They listened to the radio, and Reid went to sleep around 10:00 or 11:00 p.m. At that time, defendant was still there. Reid awoke shortly after 6:00 a.m., the following morning. He discovered that defendant was wearing his shoes, and they began to argue. Reid then walked to a telephone booth outside the County Line Grill and called his mother to come pick him up. When she arrived, Reid got into the car, and defendant asked Reid's mother if he could get a ride also. Defendant went inside Martha Marr's trailer and returned to the car carrying a suitcase. When they arrived at defendant's mother's house, defendant took the suitcase inside with him. This was the same suitcase which defendant later showed to Detective Thomas.

Augusta Asper testified for the State that she was employed to care for defendant's elderly mother, and that her first day of work was 10 September 1990. She testified that she observed empty quarter wrappers lying on the floor and an empty Rite Aid medicine bottle in defendant's bedroom. She checked the bottle to see if it belonged to defendant's mother, but the label indicated that it did not belong to any member of the Mitchell family.

Defendant contends that the State relied solely on the doctrine of recent possession to establish his guilt and that the State's evidence failed to show that any of the items which the officers recovered from him were actually stolen during either of the break-ins. He bases his argument upon the fact that neither the manager of the pharmacy nor the owner of the grill could testify with certainty how the items which were found in his possession had left their respective establishments.

In *State v. Odom*, 99 N.C. App. 265, 393 S.E.2d 146, *disc. review denied*, 327 N.C. 640, 399 S.E.2d 332 (1990), this Court stated:

> To invoke the doctrine, the State must prove: (1) the property described in the indictment was stolen; (2) the stolen goods were found in defendant's custody and subject to his control

> and disposition to the exclusion of others . . . and (3) the possession was discovered recently after the larceny . . . .

Id. at 270, 393 S.E.2d at 150, *quoting*, *State v. Maines*, 301 N.C. 669, 674, 273 S.E.2d 289, 293 (1981). When invoked, the doctrine of recent possession permits an inference that the person in possession of recently stolen property is the perpetrator of the larceny.

While relying in some measure on the doctrine of recent possession, the State presented plenary additional circumstantial evidence to warrant submission of this case to the jury. On the very night that the pharmacy break-in occurred, defendant told his nephew that "he wanted some good drugs"; he left his mother's home shortly thereafter carrying a hammer; and within hours after the break-in he showed his nephew a bag bearing the name of the pharmacy which he had hidden in a creek bank and which contained items identical to those which had been taken from the pharmacy. A pill bottle, which the pharmacist identified from the name on the label as having been missing after the break-in, was found in the same wooded area where defendant had showed the pharmacy bag to his nephew. With respect to the break-in of the grill, defendant was found in possession of cigarettes with the tax identification number assigned to the grill, and coins consistent with those taken from the grill during the break-in. We believe the evidence is sufficient to permit not only the inference that the property with which defendant was found in possession was the same property that was stolen from the two break-ins, but also to permit the inference that defendant perpetrated each of the offenses with which he was charged. Therefore, we hold that there was substantial evidence in this case, both direct and circumstantial, of every element of each of the offenses charged and of defendant's guilt. The trial court did not err in denying defendant's motions to dismiss the charges against him.

No error.

Judges JOHNSON and GREENE concur.

CITIZENS FOR CLEAN INDUSTRY, INC., PETITIONER, AND CITY OF WILMINGTON, INTERVENOR-PETITIONER v. JAMES S. LOFTON, SECRETARY, NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, RESPONDENT, AND CAROLINA FOOD PROCESSORS, INC., INTERVENOR-RESPONDENT, AND COUNTY OF BLADEN, INTERVENOR-RESPONDENT. (91-CVS-3249)

CITIZENS FOR CLEAN INDUSTRY, INC., PETITIONER v. GEORGE T. EVERETT, DIRECTOR, NORTH CAROLINA DIVISION OF ENVIRONMENTAL MANAGEMENT, DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, RESPONDENT AND COUNTY OF BLADEN, INTERVENOR-RESPONDENT. (91-CVS-3250)

CITIZENS FOR CLEAN INDUSTRY, INC., PETITIONER, AND CITY OF WILMINGTON, INTERVENOR-PETITIONER v. WILLIAM W. COBEY, SECRETARY, DEPARTMENT OF ENVIRONMENT, HEALTH, AND NATURAL RESOURCES, [AND] GEORGE T. EVERETT, DIRECTOR, DIVISION OF ENVIRONMENTAL MANAGEMENT, RESPONDENTS, AND CAROLINA FOOD PROCESSORS, INC., INTERVENOR-RESPONDENT AND COUNTY OF BLADEN, INTERVENOR-RESPONDENT. (91-CVS-5409)

No. 9110SC1161

(Filed 2 March 1993)

1. Environmental Protection, Regulation, and Conservation § 71 (NCI4th)— NPDES permit application—environmental impact statement—DOA decision of no necessity—no right to contested case hearing

Petitioners did not have a right to an N.C.G.S. Ch. 150B, Art. 3 contested case hearing to challenge the decision of the Department of Administration that an environmental impact statement was not required in determining an application for a National Pollutant Discharge Elimination System (NPDES) permit because this decision did not automatically mean that a permit would be issued by the Department of E.H.N.R., and petitioners' action to challenge the decision did not become ripe until the Department of E.H.N.R. made its decision to issue the permit.

Am Jur 2d, Pollution Control §§ 153, 155.

2. Administrative Law and Procedure § 30 (NCI4th); Environmental Protection, Regulation, and Conservation § 71 (NCI4th)—NPDES permit—third parties—no right to contested case hearing—remedy by judicial review

The Office of Administrative Hearings did not have subject matter jurisdiction of a petition by third parties for a

contested case hearing concerning the issuance of an NPDES permit by the Department of E.H.N.R. since N.C.G.S. § 143-215.1(e) does not grant third parties the right to commence a contested case hearing under N.C.G.S. Ch. 150B, Art. 3. Rather, third parties may seek relief only under N.C.G.S. § 143-215.5 in the form of judicial review of the permitting decision.

Am Jur 2d, Administrative Law § 367; Pollution Control § 170.

3. Environmental Protection, Regulation, and Conservation § 71 (NCI4th)— issuance of NPDES permit—final decision—contested case—judicial review by third parties

A decision by the Department of E.H.N.R. issuing an NPDES permit was a "final decision" in a "contested case" so that no additional administrative hearing was required in order for aggrieved third parties to seek judicial review under N.C.G.S. Ch. 150B, Art. 4. The decision was "final" because it was not contested by the permittee, N.C.G.S. § 143-215.1(e), and the decision making process was a "contested case" because the rights of a party were determined. N.C.G.S. § 150B-43.

Am Jur 2d, Administrative Law § 583; Pollution Control § 179.

On Writ of Certiorari to review orders of dismissal entered 19 July 1991 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 30 November 1992.

This case arises from the issuance of a National Pollutant Discharge Elimination System (NPDES) permit by the Department of Environmental Health and Natural Resources (DEHNR) to Carolina Food Processors, Inc. (CFP). On 29 June 1990, Bladen County applied to the Division of Environmental Management (DEM), a division of DEHNR, for a permit to discharge water from a waste water treatment plant into the Cape Fear River. The treatment plant was to be used by CFP in its proposed hog slaughtering facility. Eventually the application process was abandoned by Bladen County and assumed by CFP.

A private consulting firm prepared an environmental assessment (EA) which was used by DEM in the permit decision making process. In December 1990, DEM made a finding of no significant

impact (FONSI). DEM submitted the EA/FONSI to the clearinghouse of the Department of Administration (DOA), the primary agency for ensuring compliance with the N.C. Environmental Protection Act (NCEPA). DOA determined that there was compliance with NCEPA and that no environmental impact statement (EIS) need be prepared. Citizens for Clean Industry (CCI) petitioned DOA to reconsider this decision. On 25 March 1991, DOA reaffirmed its decision not to require an EIS. Thereafter, on 27 March 1991, CCI filed a petition in the Office of Administrative Hearings (OAH), naming DOA as respondent and seeking a stay of the EA/FONSI and a direction to prepare an EIS. CCI filed an action in Wake County Superior Court seeking the same relief on the same day. On 11 April 1991, OAH stayed the effectiveness of the EA/FONSI.

On 28 March 1991, DEM issued the NPDES permit to CFP. CCI then filed a second petition in OAH, this time naming DEM and DEHNR as respondents, seeking a hearing concerning the lawfulness of the permit issuance and a stay of the effectiveness of the permit. On 24 May 1991, CCI filed another action in Wake County Superior Court seeking the same relief.

City of Wilmington (City) was allowed to intervene and CFP was joined as a necessary party in all the above actions. On 3 June 1991, CFP petitioned the superior court for a writ of certiorari, a writ of supersedeas, and a temporary stay of the OAH actions. The superior court granted the motion to stay on that day. On 19 July 1991, the superior court issued a Writ of Certiorari and Order in which it ordered OAH to dismiss the proceedings before it and to withdraw all orders, decrees, and stays entered therein on the ground that OAH lacked subject matter jurisdiction. Soon thereafter the corresponding superior court actions were dismissed.

John D. Runkle for petitioner, Citizens for Clean Industry, Inc. (John M. Memory, who was allowed to withdraw as counsel, filed the brief for petitioner prior to withdrawal.)

City Attorney, Thomas C. Pollard, for intervenor-petitioner, City of Wilmington.

Attorney General Lacy H. Thornburg, by Special Deputy Attorneys General Daniel F. McLawhorn and Daniel C. Oakley, for respondents state agencies.

Ward and Smith, P.A., by Richard C. De Young, III and I. Clark Wright, Jr., for intervenor-respondent Carolina Food Processors, Inc.

Johnson and Johnson, by W. Leslie Johnson, Jr., for intervenor-respondent Amicus Curiae Bladen County.

ARNOLD, Chief Judge.

Petitioners assign error to six of the various conclusions of law in Judge Cashwell's order. Basically though, petitioners present two questions: (1) whether they are legally entitled to an administrative hearing in OAH concerning the DOA decision, and (2) whether they are legally entitled to an administrative hearing in OAH concerning the permitting decision of DEHNR.

The purpose of an EA is to provide DEHNR with a decision making tool to determine if a planned project is of such significance or scope and impact on the environment as to require the preparation of an EIS. N.C. Admin. Code tit. 1, r. 25.0501 (Feb. 1986). Once the EA is prepared, DEHNR must decide if it is satisfied as to the completeness of its assessment. If no adverse environmental impacts are predicted, DEHNR then submits the EA/FONSI to the clearinghouse of DOA for review. N.C. Admin. Code tit. 1, r. 25.0504(a) (Feb. 1986). Pursuant to Chapter 25 of N.C. Admin. Code tit. 1, DOA is designated the primary agency for ensuring compliance with NCEPA and uses the clearinghouse for that purpose. N.C. Admin. Code tit. 1, r. 25.0211(a) (Feb. 1986). After circulating the environmental documents and receiving comments on them, the clearinghouse recommends to the secretary of DOA whether or not an EIS should be prepared. N.C. Admin. Code tit. 1, r. 25.0506 (Feb. 1986). If there are no significant comments, DOA notifies DEHNR of compliance with NCEPA. *Id.* Thereafter, any agency or citizen may request a reconsideration of DOA's decision. N.C. Admin. Code tit. 1, r. 25.0701 (Feb. 1986). DOA either affirms or reverses the decision at which point it is final. N.C. Admin. Code tit. 1, r. 25.0703 (Feb. 1986).

[1] DOA reconsidered its decision that an EIS was not required in this case and affirmed. CCI and City contend that they now have a right to commence a contested case hearing under N.C. Gen. Stat. § 150B to challenge that decision. The superior court judge determined that DOA's decision did not ripen into a contested case until DEHNR decided to issue a permit, and that the decision

is interlocutory and does not give rise to a contested case. Petitioners take issue with those conclusions.

Petitioners claim they have a right to a contested case hearing concerning DOA's decision. We disagree and therefore affirm the superior court's order to the extent that it precludes an N.C. Gen. Stat. § 150B Article 3 contested case hearing concerning the DOA decision.

The DOA decision that an EIS was not required did not automatically mean that a permit would be issued by DEHNR. Petitioners' action to challenge the decision did not become ripe until DEHNR made its decision to issue the NPDES permit to CFP. *See Orange County v. Department of Transp.*, 46 N.C. App. 350, 367, 265 S.E.2d 890, 903, *disc. review denied*, 301 N.C. 94 (1980) (action to challenge sufficiency of EIS not ripe until Department of Transportation approved location of highway corridor following the preparation of the EIS). Because petitioners' claim was not ripe at the time of DOA's decision, they did not have the right to a contested case hearing.

[2] Additionally, petitioners assign error to the portions of the order which preclude them from a contested case hearing concerning the issuance of the NPDES permit by DEHNR. The superior court determined that OAH did not have subject matter jurisdiction over the petition for contested case hearing. We agree and therefore affirm that portion of the superior court's order.

The NPDES permitting statute states: "Administrative Review—A permit applicant or permittee who is dissatisfied with a decision of the Commission may commence a contested case by filing a petition under G.S. 150B-23 within 30 days after the Commission notifies the applicant or permittee of its decision." N.C. Gen. Stat. § 143-215.1(e) (Cum. Supp. 1992). Within that same article is found the following language: "Article 4 of Chapter 150B of the General Statutes governs judicial review of a final decision of the Secretary or of an order of the Commission under this Article." N.C. Gen. Stat. § 143-215.5 (Cum. Supp. 1992).

Noticeably missing from the administrative review section, § 143-215.1(e), is any mention of the right of third parties to commence a contested case hearing. "Where a cause of action is created by statute and the statute also provides who is to bring the action, the person or persons so designated, and, ordinarily, only such

persons, may sue." *Yates v. Department of Human Resources*, 98 N.C. App. 402, 404, 390 S.E.2d 761, 762 (1990) (quoting *State ex rel. Lanier v. Vines*, 274 N.C. 486, 492, 164 S.E.2d 161, 164 (1968)). Because N.C. Gen. Stat. § 143-215.1(e) does not grant third parties the right to commence a contested case hearing under Article 3 of Chapter 150B, petitioners have no right to seek that particular relief. *Batten v. Department of Correction*, 326 N.C. 338, 342-43, 389 S.E.2d 35, 38 (1990). Petitioners may seek relief only under § 143-215.5 in the form of judicial review of the permitting decision.

[3] Article 4 of Chapter 150B requires a "final decision" in a "contested case" before an aggrieved party may seek judicial review. N.C. Gen. Stat. § 150B-43 (1991). There seems to be no dispute that CCI and City are aggrieved parties. N.C. Gen. Stat. § 143-215.1(e) provides that unless the decision of DEHNR is contested by the permittee or applicant, it becomes "final" and not subject to review. We hold that the permitting decision is "final" within the meaning of G.S. § 150B-43.

The remaining question is whether the permitting decision is a "contested case" so that no additional administrative hearing is required before seeking judicial review. Case law construing the term "contested case" indicates that the facts of the present case constitute a contested case, without resorting to a hearing under Article 3 of 150B. In *Tennessee v. Environmental Management Comm'n*, 78 N.C. App. 763, 338 S.E.2d 781 (1986), this Court dealt with a similar question arising under G.S. § 150A-43. The definition of contested case there and here is effectively the same. Notably, in that case Tennessee was granted the right to judicial review without an administrative hearing. The Court stated that a special consent order was a contested case even though no adjudicatory hearing was held. *Tennessee*, 78 N.C. App. at 768, 338 S.E.2d at 784. This Court later held, in *Community Psychiatric Centers v. Department of Human Resources*, 103 N.C. App. 514, 405 S.E.2d 769 (1991), that the term "contested case" as used in N.C. Gen. Stat. § 150B-43 is broader than the concept of "contested case hearing." *See also Charlotte Truck Driver Training School, Inc. v. Division of Motor Vehicles*, 95 N.C. App. 209, 381 S.E.2d 861 (1989) where this Court held that for the purpose of judicial review, a contested case only requires an agency proceeding which determines the rights of a party. *Charlotte*, 95 N.C. App. at 212, 381 S.E.2d at 862 (in person interview and investigation satisfactorily serves as a contested case). Finally, there is *Concerned Citizens*

v. Environmental Management Comm'n, 89 N.C. App. 708, 367 S.E.2d 13 (1988) which states that an aggrieved third party's relief in an NPDES decision making process is judicial review pursuant to G.S. 150B-45. *Citizens*, 89 N.C. App. at 710-11, 367 S.E.2d at 14-15.

In light of these decisions, we decide that the decision making process in this case is a "contested case" so that CCI and City are not entitled to an administrative hearing before seeking judicial review.

The order of the superior court is therefore affirmed.

Affirmed.

Judges JOHNSON and ORR concur.

STATE OF NORTH CAROLINA v. RAY NOBLE TUGGLE

No. 9117SC857

(Filed 2 March 1993)

1. Narcotics, Controlled Substances, and Paraphernalia § 208 (NCI4th) — sentences for related offenses — no double jeopardy

The trial court did not violate defendant's constitutional right against double jeopardy by (1) imposing sentences upon defendant for possession of marijuana with intent to sell and manufacturing marijuana by packaging; (2) imposing consecutive sentences upon defendant for possession of marijuana with intent to sell, manufacturing marijuana by packaging, and knowingly maintaining a vehicle for selling marijuana; or (3) imposing consecutive sentences upon defendant for trafficking in cocaine by possession of more than 28 grams and maintaining a dwelling for the purpose of selling cocaine.

Am Jur 2d, Criminal Law § 266; Drugs, Narcotics, and Poisons § 48.

Supreme Court's views as to application, in state criminal prosecutions, of double jeopardy clause of Federal Constitution's Fifth Amendment. 95 L. Ed. 2d 924.

Limitation under double jeopardy clause of Fifth Amendment upon state criminal prosecutions, Supreme Court cases. 67 L. Ed. 2d 831.

2. **Narcotics, Controlled Substances, and Paraphernalia § 103 (NCI4th)— unlawful possession of diazepam—insufficient evidence**

The State presented insufficient evidence to support defendant's conviction of unlawful possession of diazepam (Valium) where its evidence tended to show that officers found seventy-eight five milligram tablets of diazepam in a bottle in defendant's residence but there was no evidence that the tablets were not issued pursuant to a prescription or that this quantity was larger than amounts normally prescribed.

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

3. **Narcotics, Controlled Substances, and Paraphernalia § 181 (NCI4th)— instructions—control of premises—inference of possession of substance**

The trial court did not err in instructing the jury that it could infer that defendant had constructive possession of a substance if it found beyond a reasonable doubt that defendant exercised control over the premises in which the substance was found without also instructing the jury that it was not required to make such an inference.

Am Jur 2d, Drugs, Narcotics, and Poisons § 47.5.

4. **Narcotics, Controlled Substances, and Paraphernalia § 136 (NCI4th)— maintaining vehicle and dwelling for selling narcotics—sufficiency of evidence**

The State's evidence was sufficient to support defendant's convictions of knowingly maintaining a vehicle for selling marijuana and knowingly maintaining a dwelling house for the purpose of keeping and selling cocaine.

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

Appeal by defendant from judgments entered 21 February 1991 by Judge Peter M. McHugh in Rockingham County Superior Court. Heard in the Court of Appeals 20 October 1992.

The State's evidence tends to show the following: On 17 May 1988 officers from the Rockingham County Sheriff's Department

went to the defendant's residence to execute a search warrant which authorized the search of the defendant's home, its out-building and any vehicles on the property. Upon arrival, the officers knocked on the door of the residence and the defendant answered. The officers entered, read the search warrant to the defendant and proceeded to search the residence. While searching the master bedroom, the officers found $2,000 cash; a bottle of pills later identified as the Schedule IV controlled substance, diazepam (valium); a bag of marijuana and two straws of the type used to inhale cocaine. The officers found $763 cash and the defendant's automobile operator's license in a pair of jeans lying in the hallway. The officers also found a set of Ohaus scales in the living room. When the officers searched the basement, they found a large number of what appeared to be marijuana seeds and two plastic straws of the type used to inhale cocaine. They also found in the basement's wood stove a block of a hard white substance later identified as 103.6 grams of cocaine. The cocaine was inside a Tupperware©-like container which was inside a green plastic trash bag. After the cocaine field tested positive for cocaine, officers took defendant to the basement, advised him of his rights and questioned him about the cocaine. When asked if he had any more drugs, the defendant answered "No." When asked if he usually handled this quantity of drugs, he responded, "This is the most I've had."

The officers also searched both a 1976 Cadillac automobile and a van. The Cadillac, which was parked in the carport, was registered in the defendant's wife's name. However, the defendant told the officers that his wife did not live at his residence and that the reason the car was registered in her name was that when it was purchased, he did not have a driver's license. The defendant also told the officers that he did not know where the keys to the car were located. The officers found the keys in the bedroom. The officers found a .22 caliber Derringer in an armrest of the Cadillac and two and one-half kilograms of marijuana in the trunk. The officers obtained keys to the van from the defendant. When the officers searched the van parked in the yard, they found various drug paraphernalia items including: a sifter, plastic bags, scissors, bag ties, and Inositol, a white powder often used as a cutting agent for controlled substances.

Finally, Officer Lindsey Watkins of the Rockingham County Sheriff's Department testified that she has known the defendant for more than twenty years and that he has resided at the residence

searched for "twenty something years." S. E. Nelson, a captain with the Rockingham County Sheriff's Department, testified that he found letters addressed to defendant Tuggle at the residence searched.

After a jury trial, the defendant was convicted of the following: five counts of non-felonious possession of stolen goods (88 CRS 3889-3892 and 88 CRS 3894); (The underlying facts supporting these convictions are not an issue on appeal. Accordingly, we do not recount them here.); trafficking in cocaine by possession of more than 28 grams (88 CRS 3895); knowingly and intentionally keeping and maintaining a dwelling house for the purpose of keeping and selling cocaine (88 CRS 3896); possession with intent to sell cocaine (88 CRS 3897); possession with intent to sell marijuana (88 CRS 3900); manufacturing marijuana by packaging (88 CRS 3901); knowingly and intentionally maintaining a vehicle for selling marijuana (88 CRS 3902); and possession of diazepam (88 CRS 3903).

Based on the convictions the trial court imposed the following sentences. The convictions in 88 CRS 3889-3892 and 88 CRS 3894 were consolidated for judgment and sentence of two years imprisonment. The defendant received a fifteen year sentence for his conviction in 88 CRS 3895. Based on his conviction in 88 CRS 3896 the trial court imposed a five year sentence on the defendant to begin at the expiration of the sentence in 88 CRS 3895. The court imposed a five year sentence in 88 CRS 3900 to begin at the expiration of 88 CRS 3896. The court also imposed a five year sentence in 88 CRS 3901 to run concurrently with the sentence in 88 CRS 3900. The defendant was sentenced in 88 CRS 3902 to five years in prison to begin at the expiration of the sentence in 88 CRS 3900. The defendant also received a two year sentence in 88 CRS 3903 to run concurrently with the sentence in 88 CRS 3902. Judgment was arrested on the conviction in 88 CRS 3897. In sum, defendant was sentenced to active prison terms aggregating thirty years.

From judgment pronouncing sentence, defendant appeals.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General David M. Parker, for the State.

Mary K. Nicholson and Robert S. Cahoon for the defendant-appellant.

EAGLES, Judge.

I

[1] In his first assignment defendant raises a broadside challenge to the sentences imposed upon him by the trial court. Defendant's argument here, at best, is convoluted. Nonetheless, it appears that defendant argues that the trial court violated his constitutional right against double jeopardy by (1) imposing sentence upon the defendant for possession with intent to sell marijuana (88CRS3900) and manufacturing marijuana by packaging (88CRS3901); (2) imposing consecutive sentences for possession with intent to sell marijuana (88CRS3900), manufacturing marijuana by packaging (88CRS3901), and knowingly and intentionally maintaining a vehicle for selling marijuana (88CRS3902); and by (3) imposing consecutive sentences upon the defendant for trafficking in cocaine by possession of more than 28 grams (88CRS3895) and maintaining a dwelling for the purpose of selling cocaine (88CRS3896). Defendant relies on *State v. Mebane*, 101 N.C. App. 119, 398 S.E.2d 672 (1990) and *State v. McGill*, 296 N.C. 564, 251 S.E.2d 616 (1979), *disavowed by State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987).

Initially, we note that the defendant misstates that his sentence in 88 CRS 3901 runs consecutive to his sentence in 88 CRS 3900. The judgment in 88 CRS 3901 clearly states that it is "to run concurrently with 88 CRS 3900." Because the sentences run concurrently, the State argues that any error committed in sentencing was harmless error. In *State v. Barnes*, 324 N.C. 539, 380 S.E.2d 118 (1989) our Supreme Court, relying on reasoning in *Ball v. United States*, 470 U.S. 856, 84 L.Ed.2d 740 (1985), expressly overruled the previously existing general rule that "where concurrent sentences of equal length are imposed, any error in the charge relating to one count only is harmless." This *Barnes* holding, that separate convictions may give rise to adverse collateral consequences, is equally applicable here.

The dispositive issue here is whether the defendant's right against double jeopardy has been infringed by the sentences imposed upon him by the trial court. We have closely examined each of the arguments raised by the defendant, in light of *State v. Mebane* and *State v. McGill*, and find no error. *See State v. Steward*, 330 N.C. 607, 411 S.E.2d 376 (1992); *State v. Hurst*, 320 N.C. 589, 359 S.E.2d 776 (1987), *overruled on other grounds by State v. White*,

322 N.C. 506, 369 S.E.2d 813 (1988); and *State v. Perry*, 316 N.C. 87, 340 S.E.2d 450 (1986). Accordingly, this assignment is overruled.

II

[2] By his second, fifth and seventh assignments of error, the defendant argues that the trial court erred by denying his motion to dismiss the charge of possession of diazepam and in instructing the jury on possession of diazepam. Specifically, defendant argues that (1) the State failed to show that the defendant unlawfully possessed diazepam and (2) because diazepam has a currently acceptable medical use the trial court should have instructed the jury that the State had to show defendant's possession was unlawful.

> The law attending our review of denials of motions to dismiss in criminal trials is well settled. . . .
>
> > Upon defendant's motion for dismissal, the question for the Court is whether there is substantial evidence (1) of each essential element of the offense charged, or of a lesser offense included therein, and (2) of defendant's being the perpetrator of such offense. If so, the motion is properly denied.
> >
> > If the evidence is sufficient only to raise a suspicion or conjecture as to either the commission of the offense or the identity of the defendant as the perpetrator of it, the motion should be allowed.

State v. Benson, 331 N.C. 537, 544, 417 S.E.2d 756, 761 (1992) (citations omitted).

In order for defendant to be convicted of possession of diazepam the State must show that (1) the defendant possessed diazepam (2) in a manner not authorized by the North Carolina Controlled Substances Act. G.S. § 90-95(a)(3). Here, the State's brief cites portions of the trial transcript tending to show that officers, acting pursuant to a valid search warrant, found a white plastic bottle containing seventy-eight five milligram tablets of diazepam (valium) in the pocket of a coat located in the master bedroom. The State, however, does not point to any record evidence tending to show that the tablets were not issued pursuant to a prescription (the bottle was not submitted as an exhibit on appeal) or that the quantity of valium possessed by the defendant is larger than amounts normally prescribed. We conclude that the State has failed to pre-

sent substantial evidence that the defendant possessed the diazepam unlawfully. Accordingly, the defendant's conviction in 88 CRS 3903 is reversed.

III

[3] By his fifth and seventh assignments, defendant argues that the trial court erred by instructing the jury on constructive possession as follows:

> If you find, beyond a reasonable doubt, that a substance was found in certain premises, and that the defendant exercised control over those premises, whether or not he owned them, this would be a circumstance from which you may infer that the defendant was aware of the presence of the substance, and has the power and intent to control its disposition or use.

Defendant argues that the jury should have also been instructed that although they may infer possession by the defendant they are not required to do so. We disagree.

In *State v. Peek*, 89 N.C. App. 123, 365 S.E.2d 320 (1988), the defendant objected to the trial court's instruction that the jury could infer that the defendant had constructive possession of contraband if they found beyond a reasonable doubt that the defendant had control of the premises. This court held:

> The trial court may properly instruct the jury that it may infer a defendant's constructive possession of contraband from his control of the premises if the instruction clearly leaves it to the jury to decide whether to make the inference. Here, the trial court properly instructed the jury on the inference. Defendant's assignment of error is without merit.

Peek at 126-27, 365 S.E.2d at 323 (citation omitted). Here, too, we find the defendant's assignment to be without merit.

IV

[4] Finally, defendant argues through his second, third and fourth assignments that the trial court erred by failing to grant his motion to dismiss at the close of the evidence and his motion to set aside the jury verdict. Specifically, defendant argues that the State failed to present sufficient evidence to support (1) a constructive possession theory and (2) the convictions of knowingly and intentionally keeping and maintaining a vehicle for selling marijuana and know-

ing and intentionally keeping and maintaining a dwelling house for the purpose of keeping and selling cocaine.

After carefully examining the record on appeal we find more than ample evidence to support the trial court's ruling on each of the charges disputed by the defendant. Accordingly, this assignment is overruled.

V

Defendant's remaining assignments have been abandoned. N.C.R. App. Pro. 28(b)(5).

VI

In conclusion, the defendant's conviction in 88 CRS 3903 is reversed. The remaining convictions (88 CRS 3889, 88 CRS 3890, 88 CRS 3891, 88 CRS 3892, 88 CRS 3894, 88 CRS 3895, 88 CRS 3896, 88 CRS 3897, 88 CRS 3900, 88 CRS 3901 and 88 CRS 3902) are without error.

Reversed in part; no error in part.

Judges ORR and JOHN concur.

JON (JAKE) PHELPS, PLAINTIFF v. LISA B. PHELPS, DEFENDANT

No. 9115DC1063

(Filed 2 March 1993)

Divorce and Separation § 354 (NCI4th)— trial court's failure to take child's state of mind into consideration—age of father—award of custody to mother unsupported by evidence

The trial court erred in awarding sole custody of the parties' child to defendant mother where the court allowed plaintiff father to testify concerning the child's state of mind but the trial judge indicated that she probably would not give this testimony any weight in determining the child's best interests; the trial judge concluded that you "can't talk to five year olds"; and it was apparent that the twenty-two year age

difference between plaintiff and defendant was one of the fundamental bases for the trial court's custody award.

Am Jur 2d, Divorce and Separation §§ 974, 984; Infants §§ 42, 44.

Appeal by plaintiff from order entered 30 April 1991 in Orange County District Court by Judge Patricia S. Hunt. Heard in the Court of Appeals 18 November 1992.

Jake and Lisa Phelps were married on 9 September 1984. On 26 May 1986, Lisa gave birth to their son, Joshua. On 9 September 1988, the couple separated and cared for their son under a shared custody arrangement consented to by the parties. On 5 September 1989, the plaintiff filed a verified complaint which sought joint legal custody of their minor son. On 30 April 1991, Judge Hunt filed a child custody and support order placing Joshua in the sole custody of his mother, the party defendant. The order also set out plaintiff's visitation rights, laid out certain parameters of conduct for the parties and ordered plaintiff to pay child support in the amount of $702.00 a month from April through August of 1991 and $468.00 per month thereafter. Plaintiff filed notice of appeal on 10 May 1991.

James T. Bryan III for plaintiff-appellant.

Glenn, Mills & Fisher, P.A., by William S. Mills, for defendant-appellee.

WELLS, Judge.

This case dramatically illustrates the frustrating and difficult aspects of our adversarial method of determining child custody between separated or divorced parents.

Joshua Phelps' parents separated when he was two years old. For approximately two years following separation, Joshua was "shared" by his parents, spending alternate weeks with each parent. When this action was initiated, Joshua was three, and when the case came to trial, he was five. He will be seven years old on 26 May 1993.

The trial of this case lasted for six days. Plaintiff entered sixty-one assignments of error to the trial court's order, and filed a thirty-five page brief with an extensive appendix. These materials

reflect (1) that plaintiff is profoundly dissatisfied with the trial court's conduct of the trial and the resulting order; (2) defendant is convinced that the trial was fair and that the resulting order was just and correct; and (3) that these parents are profoundly antagonistic with each other as to this only child's education, religious training, general lifestyle, and the influence of each parent on Joshua during his formative years. Ironically, the record also reflects that both parents are well educated and financially secure, both parents being employed in responsible positions at Duke University. Just as ironically, the trial court found both parents to be loving and concerned for Joshua's welfare and both fit to have custody. However, for reasons which we cannot agree were valid, the trial court found and concluded that it was in Joshua's best interest that sole custody be awarded to defendant.

At the trial, each parent, by varied and diverse evidence, attempted to establish that he/she was better able and suited to have custody of Joshua, and, consistently with our adversarial system, attempted to emphasize the character and personality flaws of the other, including "bad" influence on Joshua. Joshua was not called as a witness, which brings us to one of the assignments of error aimed at what plaintiff contends was an erroneous ruling on the admission of crucial evidence. Although, as we have noted, Joshua was not called as a witness, the trial transcript makes it clear that plaintiff wanted to get across to the trial court that some of defendant's conduct, particularly comments by her to Joshua about his father, were having an unwholesome effect on Joshua, perhaps to the point of emotional disturbance. In this context, the following events transpired. Plaintiff's counsel put the following questions to plaintiff: "Jake, just tell the court what kind of relationship do you have with Joshua. Let me strike that your Honor. Just tell us about Joshua." Then plaintiff proceeded to describe Joshua, the child and the person, in extensive glowing terms, closing with this comment: "I don't want to go on too long for the Court . . . but I can talk about Joshua forever." The testimony continued:

Q. Let me ask you about some things you did say.

THE COURT: He can describe his concerns but I don't think he can tell me what Joshua said. . . .

MR. BRYAN: They're based on—

THE COURT: (Interposing) What he said. All right.

A. I am concerned—

MR. MILLS: (Interposing) Wait.

MR. BRYAN: I'm sorry.

THE COURT: That's fine.

A. Thank you, Your Honor. I am concerned about what he is concerned about. I am concerned that he seems troubled by interactions with his mother at times, often. I am concerned that he doesn't know how to treat them, and that I am caught between trying to reassure him that there is nothing wrong with his feeling troubled at the same time that I'm trying to nourish his positive relationship with his mother. It's a very difficult thing to do. It puts him in a position of not wanting to argue with me about how good he should feel towards his mother but he can't feel it and it's obvious and makes it a very hard thing and will keep me up at night even after he is able to go to sleep.

Q. Let me start, Jake, with how you handle these times when these things come up from Joshua.

A. I try to talk to him about the fact that we all have disagreements. I try to generalize to keep him from focusing in a negative way on his mother. I try to talk about—I try to divert him to something that's positive that happened in the same general area of activity or in the same general time period.

May I elaborate a little more? There is something that's deeper than that too. For example, when he finished talking to her about three Sundays ago and there were two witnesses there who saw this, he got off the phone and began to beat his big bear with a mallet in the left eye and said he was trying to get his eye out. And we were trying to talk to him about it and he was very upset after this conversation with Lisa and then he said it was because Lisa told him.—

MR. MILLS: (Interposing) Objection.

THE COURT: Sustained.

MR. BRYAN: Okay. Your Honor, we offer it not for the truth of the matter.

MR. MILLS: Your Honor, that's exactly why he's offering it. He's offering it for the truth of the matter, Your Honor.

Counsel then argued extensively about whether Joshua's statements to his father should be admissible under exceptions to the hearsay rule, plaintiff arguing generally that they should be admitted to show Joshua's "state of mind," *citing and relying upon* this Court's opinion in *Griffin v. Griffin*, 81 N.C. App. 665, 344 S.E.2d 828 (1986). At the close of arguments, the court made the following ruling:

THE COURT: Well, it's always been a huge problem especially with small children in any kind of custody case and when they get a little bit older, you can talk to them. But you can't talk to five year olds and I don't think it's proper to put them on the stand and cross examine them. And that's where the problem is that we would have to rely on what he has to say in a hotly contested custody case that he says the child says about his mother. And, you know, that goes to the weight of the evidence, that's clear. But, you know, it's Judge Becton's ruling. . . .

I have for some time believed 803 probably would lead me—allow some of the testimony of children in, and I think, on some of the sex abuse cases that we're seeing makes it very clear that the Supreme Court is leaning too in that direction.

I am going to allow him to say, realizing that I probably am opening a keg of worms, and I will strike it immediately if it does not rise to what I believe is implicit in Rule 803, especially those first three. It is a dangerous thing and I want Ms. Phelps to understand and Mr. Phelps too, it is a dangerous thing for judges to listen to what children—what you're quoting children as saying. Number one, you hear what you want to hear. I am now six times a grandmother, four times a mother, you hear what you want to hear. I listen to juvenile cases all the time, I've heard God knows how many custody cases, and it's rare to hear the same words spoken by one child, the same for both parents.

You may proceed.

Following this ruling, plaintiff was allowed to tell the Court in extensive terms about incidents between Joshua and his mother, which tended to reflect poor judgment on defendant's part, and that defendant was having an unwholesome and disturbing effect on Joshua's emotions and emotional well-being. Plaintiff now complains that the trial court erred in not allowing responses of a like kind to two other queries about Joshua's "state of mind." Without detailing these queries, our concern is that Judge Hunt, while allowing some of this type of testimony, and excluding some, had earlier indicated that she probably would not give this testimony any weight in weighing Joshua's best interest. This is a far cry from what transpired in *Griffin*. To broadly conclude that you "can't talk to five year olds" flies in the face of common experience, common sense, and reasoned judgment, especially in a custody case.

In another argument, plaintiff contends that the trial court incorrectly and unlawfully denied plaintiff custody because of his age. Although the trial court's order makes no finding or conclusion as to the respective age of plaintiff and defendant (fifty-five and thirty-three), during her wind up of the trial, the court made the following statement:

> One of the reasons, Mr. Phelps, I had to look at, there is just no way—as my eye doctor told me the other day, you know, time is working on your eye, lady. He didn't say age. He said time. But I think you have to take that into consideration. This is a young child, and you are not a young man, and I think that it is important that this child be raised in one home. And that that home has to be the one that is apparently going to last the longest.

We cannot ignore the invalid and unfortunate implications of the court's comments, and it appearing that age difference was one of the fundamental bases for the trial court's custody award, we cannot condone this reasoning. It, of course, must not be assumed in any case that fathers who are or were married to younger mothers should be considered disqualified, for that reason, from having custody of their child or children. There is no acceptable basis in law or reason for awarding custody simply to the youngest parent or party in a custody action.

Plaintiff has raised questions about evidentiary support for other findings and conclusions of the trial court. While we discern

merit in these arguments, we decline to embellish upon them because they are not determinative of our decision.

In this case, as in all other custody cases, the trial court's discretion is to be accorded great deference. *See, e.g. In re Peal*, 305 N.C. 640, 290 S.E.2d 664 (1982). This record reflects lapses in judgment which require a new trial. From our review of the transcript, we cannot say that plaintiff was undeserving of the custody of his son, and while we may agree that Joshua, now of school age, will be better served, for example, by having primary residence in one home and going to one school, we cannot agree that Joshua's best interest has been acceptably determined below.

For the reasons stated, there must be a

New Trial.

Judges EAGLES and LEWIS concur.

UNION GROVE MILLING AND MANUFACTURING CO., INC. v. MARY EDNA FAW

No. 9223SC64

(Filed 2 March 1993)

Mortgages and Deeds of Trust § 109 (NCI4th) — defaulting bidder — no right of judgment creditor to bring action — judgment creditor not real party in interest

A judgment creditor lacks standing to bring an action against a defaulting bidder as that term is used in N.C.G.S. § 45-21.30, since the trustee and not a judgment creditor is the real party in interest.

Am Jur 2d, Mortgages § 757.

Appeal from judgment entered 3 October 1991 by Judge William H. Freeman in Wilkes County Superior Court. Heard in the Court of Appeals 4 January 1993.

Eisele & Ashburn, P.A., by Douglas G. Eisele, for plaintiff-appellee.

John E. Hall for defendant-appellant.

LEWIS, Judge.

The sole issue we address in this appeal is whether a judgment creditor has standing to bring an action against a defaulting bidder as that term is used in N.C.G.S. § 45-21.30 (1991). We hold that a judgment creditor lacks standing to bring such an action and hereby reverse the decision of the trial court granting summary judgment in favor of the plaintiff.

The facts of this case are somewhat confusing. Mary Edna Faw, defendant in this action, was married to John A. Faw and during their marriage, they acquired property in Wilkes County as tenants by the entirety. Thereafter, in order to secure a promissory note, the Faws executed a deed of trust in favor of Federal Land Bank of Columbia. The Faws fell behind in their payments and eventually defaulted on their promissory note. As a result the Federal Land Bank initiated foreclosure proceedings on 5 December 1988. Shortly thereafter on 3 January 1989, but after the foreclosure proceedings had been initiated, the Faws were granted an absolute divorce.

The Faws' property was offered for sale on two occasions, but both times an upset bid was received, causing the trustee to conduct a third sale. At the third sale on 14 April 1989, Mary Faw was the highest bidder with a bid in the amount of $217,001. However, Mary Faw did not tender the amount of her bid causing the trustee to resell the property once again. At the final resale of the property, Randall Scott Faw, the son of Mary and John Faw, was the highest bidder with a bid of $197,001, leaving a difference of $20,000 from the amount originally bid by Mary Faw. The trustee however decided not to pursue an action against Mary Faw as a defaulting bidder under N.C.G.S. § 45-21.30. Instead the trustee sold the property to Randall Faw, for $197,001, which was in excess of the debt being foreclosed. As a result, the trustee paid one half of the surplus to Mary Faw and the other half of the surplus to the Wilkes County Clerk of Court.

During the Faws' marriage, John Faw had become indebted to Union Grove Milling and Manufacturing Co., Inc. ("Union Grove")

on a delinquent bill. Union Grove secured a judgment against John Faw in the principal amount of $34,981.09 plus costs and interest. As of 26 June 1991, the unpaid judgment amounted to $46,173.40. Due to the large amount of its judgment, Union Grove was very interested in John Faw's half of the surplus from the foreclosure sale which amounted to $35,687.77. When the trustee paid John Faw's half of the surplus to the clerk of court, Union Grove filed a special proceeding asserting that it had priority to John Faw's half of the proceeds.

That action eventually reached this Court where we determined that Union Grove had priority over any other creditors of John Faw and was entitled to the remaining one half of the proceeds. *See Union Grove Milling and Mfg. Co. v. Faw*, 103 N.C. App. 166, 404 S.E.2d 508 (1991). Pressing on for full satisfaction Union Grove also filed this action on 19 October 1989, claiming that if Mary Faw had honored her bid, then there would have been an additional $20,000 in surplus proceeds to which Union Grove would have been entitled to one-half.

In her Answer of 26 October 1989, Mary Faw denied Union Grove's claims and raised three defenses: (1) that the complaint failed to state a claim for which relief could be granted, (2) that Union Grove was not the real party in interest and had no standing to bring the action, and (3) that another prior action was pending between the parties. We will consider only whether or not Union Grove is the real party in interest.

On 13 August 1990, the trial court conducted a hearing on Mary Faw's Motion to Dismiss on the three theories previously asserted. In its order of 24 August 1990, the trial court denied defendant's motion on each basis.

Subsequently on 21 November 1990 the file in this case was ordered closed without prejudice by the Superior Court of Wilkes County on the basis that *Union Grove Milling and Mfg. Co. v. John A. Faw*, 103 N.C. App. 166, 404 S.E.2d 508 (1991), was then pending before this Court. On 1 July 1991, after this Court's ruling in the priority case, Union Grove moved to reopen this case. At approximately the same time Union Grove also filed a motion for summary judgment. The trial court granted Union Grove's motion to reopen this case and continued the motion for summary judgment until the next civil term. Thereafter, on 3 October 1991 Judge William Freeman signed an order granting summary judgment in

favor of Union Grove, entitling Union Grove to recover the sum of $10,340.24, the balance due on its debt. Defendant appeals from this order.

On appeal, defendant contends that the trial court erred in denying her motion to dismiss; however, we note that defendant has failed to properly raise this issue on appeal. Rule 3(d) of the North Carolina Rules of Appellate Procedure sets forth the contents of a Notice of Appeal and states that a party shall designate the judgment or order from which appeal is taken. In her Notice of Appeal, Mary Faw only designated the trial court's order granting summary judgment for Union Grove. She failed to designate the 24 August 1990 order denying her motion to dismiss on the basis of standing.

Even though defendant has failed to properly appeal the issue of standing, this Court, in its discretion will address it in order to provide guidance for future cases under N.C.G.S. § 45-21.30. In so doing we note that standing is a jurisdictional issue, *Davis v. City of Archdale*, 81 N.C. App. 505, 344 S.E.2d 369 (1986), and this Court may raise the question of subject matter jurisdiction on its own motion. *Bache Halsey Stuart, Inc. v. Hunsucker*, 38 N.C. App. 414, 248 S.E.2d 576 (1978) *disc. rev. denied*, 296 N.C. 583, 254 S.E.2d 32 (1979).

Rule 17(a) of the North Carolina Rules of Civil Procedure provides that every claim shall be prosecuted in the name of the real party in interest. N.C.G.S. § 1A-1, Rule 17 (1990). This Court has previously stated that "[t]he real party in interest is the party who by substantive law has the legal right to enforce the claim in question." *Reliance Ins. Co. v. Walker*, 33 N.C. App. 15, 234 S.E.2d 206, *disc. rev. denied*, 293 N.C. 159, 236 S.E.2d 704 (1977). In addition we have also said that a real party in interest must have an interest in the subject matter of the litigation and not merely an interest in the action. *Id.*

Union Grove's only interest in the foreclosure action is the amount which it stands to profit as a result of any increase in the amount of surplus proceeds. Union Grove completely lacks any interest in the Faws' property which is the real subject matter of the litigation and has no substantive right to enforce a claim in foreclosure. As such, the real party in interest is the trustee in foreclosure and not Union Grove.

Under the facts of this case, Union Grove is merely a third party and potential beneficiary. At the time Mary Faw's bid was accepted by the trustee as the highest and last bid, a contract existed between Mary Faw and the trustee. *See In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 364 S.E.2d 723, *disc. rev. denied*, 322 N.C. 480, 370 S.E.2d 222 (1988). Union Grove became a third party beneficiary of that contract to the extent of one-half of any surplus proceeds as a result of its status as a judgment creditor of John Faw. However, a third party beneficiary is not entitled to maintain an action for breach of contract when the contract is not made for the direct benefit of the third party and any benefit accruing to him is incidental. *Crosrol Carding Dev., Inc. v. Gunter & Cooke, Inc.*, 12 N.C. App. 448, 183 S.E.2d 834 (1971). It is clear that Union Grove was not an intended beneficiary of the foreclosure sale and that the only benefits flowing to Union Grove are due to circumstances previously arising. As a result Union Grove is not the real party in interest and has no standing to bring this action.

Union Grove contends that its standing derives from N.C.G.S. § 45-21.30. We disagree. N.C.G.S. § 45-21.30 (1991) provides in pertinent part:

> (d) A defaulting bidder at any sale or resale is liable on his bid, and in case a resale is had because of such default, he shall remain liable to the extent that the final sale price is less than his bid plus all costs of such resale or resales.
>
> (e) Nothing in this section deprives any person of any other remedy against the defaulting bidder.

It is clear from the facts of this case that Mary Faw has potential liability under section (d) as a defaulting bidder. The question is who has the right to bring an action against her as a defaulting bidder. Union Grove claims that it falls within the language of section (e) and is entitled to sue Mary Faw because it is "any person" bringing "any other remedy." While we agree that Union Grove is "any person," we disagree that Union Grove meets the requirement of "any other remedy."

In interpreting statutes, this Court seeks to give the statutory language the meaning which the legislature intended. The legislature's use of the language "any other remedy" suggests that the legislature intended that a remedy being brought under section

(e) must be one that is not already provided for in § 45-21.30. The remedy against a defaulting bidder is already provided for in section (d). As a result, Union Grove is not maintaining "any other remedy" but instead is maintaining a remedy already provided for by N.C.G.S. § 45-21.30(d). We do not believe that it was the intent of the legislature to allow judgment creditors, such as Union Grove, to use § 45-21.30 as a vehicle to circumvent the normal process for the collection of debts.

Union Grove has not been harmed in any way by our decision. Union Grove is still first in priority and our decision has done nothing to take that status away. As such, Union Grove is entitled to satisfy its judgment out of any property which John Faw has or may acquire in the future. However, Union Grove's judgment is against John Faw, not Mary Faw. To allow Union Grove to maintain this action against Mary Faw as a defaulting bidder would give judgment creditors a role in the foreclosure process which we do not think the legislature intended.

As further support for our decision that Union Grove is not the real party in interest, we take note of what this Court has already said in *In re Foreclosure of Allan & Warmbold Constr. Co.*, 88 N.C. App. 693, 364 S.E.2d 723, *disc. rev. denied*, 322 N.C. 480, 370 S.E.2d 222 (1988). Therein, this Court refused to let an individual withdraw his upset bid because no equitable basis existed to allow the bidder to withdraw his bid. In remanding the decision to the superior court to determine the amount the bidder was indebted to the trustee, this Court said that heed should be given to N.C.G.S. § 45-21.30 sub paragraphs (d) and (e). This language provides additional support for our holding that it is the trustee and not Union Grove who is the real party in interest in this matter.

For the foregoing reasons, we reverse the decision of the trial court granting plaintiff's motion for summary judgment and remand this case to the trial court for the entry of an order dismissing plaintiff's action.

Reversed and Remanded

Judges WELLS and COZORT concur.

HOPE SIDNEY, GUARDIAN AD LITEM FOR DUWAYNE SIDNEY, MINOR, JERRY L. HORTON, DECEASED, EMPLOYEE, PLAINTIFF v. RALEIGH PAVING & PATCHING, INCORPORATED, EMPLOYER; AND NATIONWIDE MUTUAL INSURANCE COMPANY, CARRIER, DEFENDANTS

No. 9210IC110

(Filed 2 March 1993)

1. **Master and Servant § 58 (NCI3d)— workers' compensation— intoxication of employee—showing required**

To defeat a workers' compensation claim based on intoxication, the employer does not have to disprove all other causes or prove that intoxication was the sole cause of the injury; instead, the employer only has to show that it is more probable than not that intoxication was a cause in fact of the injury.

Am Jur 2d, Workers' Compensation § 256.

2. **Master and Servant § 58 (NCI3d)— workers' compensation— claim denied based on employee's intoxication—sufficiency of evidence**

Competent evidence existed in the record to establish the defense of intoxication and to justify the Industrial Commission's conclusion that plaintiff's claim was not compensable under the Workers' Compensation Act where the evidence tended to show that decedent drove a truck for his employer; at least twice during the day defendant stopped and bought alcohol; at the end of the workday when decedent was on his way back to the office, he attempted to pass another vehicle, lost control of the truck, and was thrown out as it ran off the road; at the time of the accident, decedent was driving approximately 70 m.p.h. in a 55 m.p.h. zone; and approximately one hour after the accident decedent had a blood alcohol level of .20.

Am Jur 2d, Workers' Compensation § 256.

Appeal from opinion and award by Commissioner J. Harold Davis, for the Full Industrial Commission filed 24 September 1991. Heard in the Court of Appeals 6 January 1993.

Charles R. Hassell, Jr. for plaintiff-appellant.

Carol M. Schiller for defendants-appellees.

LEWIS, Judge.

The plaintiff in this action, Hope Sidney, is the mother and guardian ad litem for DuWayne Sidney, the minor child of the decedent, Jerry L. Horton. The decedent, who worked as a driver and laborer for Raleigh Paving & Patching, Inc. ("Raleigh Paving"), was seriously injured in a traffic accident on 9 April 1986, when the truck he was driving ran off the road. Decedent was diagnosed with a brain stem contusion and died 13 April 1986. It is undisputed that Raleigh Paving was the employer of decedent at the time of the accident and that the parties are covered by the Workers' Compensation Act.

On 15 April 1986, notice of the accident was given to Raleigh Paving pursuant to N.C.G.S. § 97-22. Raleigh Paving defended the worker's compensation claim on the basis that decedent was intoxicated at the time of the accident and thus, barred from recovery by N.C.G.S. § 97-12. A hearing was initially held before Deputy Commissioner Scott Taylor who denied plaintiff's claim on 13 September 1990. In his opinion Deputy Commissioner Taylor specifically found that the decedent was intoxicated at the time of the accident and that the decedent's intoxication was a cause of the decedent's death.

On 3 October 1990, plaintiff appealed to the Full Industrial Commission from the opinion and award entered by Deputy Commissioner Taylor on the ground that there was no evidence that the decedent's intoxication was a proximate cause of the accident. The case came before the Full Commission for review on 11 September 1991 and on 24 September 1991 the Full Commission issued its opinion and award affirming and adopting the opinion of Deputy Commissioner Taylor. Plaintiff appealed to this Court on 15 October 1991.

The sole issue presented by this appeal is whether the defendants presented sufficient competent evidence to establish the defense of intoxication. N.C.G.S. § 97-12 (1991) provides in pertinent part:

> No compensation shall be payable if the injury or death to the employee was proximately caused by:
>
> (1) His intoxication, provided the intoxicant was not supplied by the employer or his agent in the supervisory capacity to the employee;. . . .

We find that competent evidence existed in the record to establish the defense of intoxication and to justify the Commission's conclusion that plaintiff's claim was not compensable under the Workers' Compensation Act. Therefore, we affirm the decision of the Full Commission.

[1] It has been said by our Supreme Court that:

> In passing upon an appeal from an award of the Industrial Commission, the reviewing court is limited in its inquiry to two questions of law, namely: (1) Whether or not there was any competent evidence before the Commission to support its findings of fact; and (2) whether or not the findings of fact of the Commission justify its legal conclusions and decision.

Inscoe v. DeRose Indus., Inc., 292 N.C. 210, 216, 232 S.E.2d 449, 452 (1977). Therefore, the opinion of the Industrial Commission in this matter is conclusive on this Court if it is supported by any competent evidence, *Priddy v. Cone Mills Corp.*, 58 N.C. App. 720, 294 S.E.2d 743 (1982), and can only be set aside if there is a complete lack of competent evidence. *Carrington v. Housing Auth.*, 54 N.C. App. 158, 282 S.E.2d 541 (1981). It is well established that the burden of proof for the defense of intoxication is on the employer. *Harvey v. Raleigh Police Dept.*, 85 N.C. App. 540, 355 S.E.2d 147, *disc. rev. denied*, 320 N.C. 631, 360 S.E.2d 86 (1987). However, the employer does not have to disprove all other causes or prove that intoxication was the sole cause of the injury. *Anderson v. Century Data Sys., Inc.*, 71 N.C. App. 540, 322 S.E.2d 638 (1984), *disc. rev. denied*, 313 N.C. 327, 327 S.E.2d 887 (1985). Instead, the employer only has to show that it is more probable than not that intoxication was a cause in fact of the injury. *Id.* In light of the standard by which we review matters from the Industrial Commission, we now look to the evidence that was heard by the Deputy Commissioner and reviewed by the Full Commission.

[2] The evidence presented at the hearing before Deputy Commissioner Taylor tended to show that on the morning of the accident the decedent was driving a truck for Raleigh Paving from the office to a job site. During the day the decedent was responsible for performing work at several job sites. On at least one trip between job sites, the decedent stopped and bought alcohol. At the end of the day, while returning to the office, the decedent again stopped at a store to purchase alcohol. With the decedent were fellow employees Malcolm Wilkerson and Frank Farrar. All

three of the employees drank from the pint that was purchased, but Farrar testified that the decedent and Wilkerson drank the most.

After the employees' brief frolic, they resumed their journey back to the office. At approximately 6:00 p.m., while attempting to pass another vehicle, the decedent lost control of the truck and was thrown out as it ran off the road. Testimony revealed that at the time of the accident, the decedent was operating the truck at a speed of approximately 70 m.p.h. on a highway with a posted speed of 55 m.p.h. Immediately after the accident, the decedent was taken to a nearby hospital where blood samples were taken. These blood samples indicated that the decedent had a blood alcohol level of 202 milligrams per decaliter approximately one hour after the accident. In addition, the medical examiner's certificate noted that a significant condition contributing to the immediate cause of death was decedent's intoxication. Based on this evidence Deputy Commissioner Taylor concluded that the decedent was intoxicated at the time of the accident and that the decedent's intoxication was a cause in fact of the accident.

Plaintiff takes exception with the Commission's finding that the decedent was intoxicated, claiming that there was not competent evidence in the record to support such a finding. We disagree. Plaintiff bases its contention largely on the fact that Deputy Commissioner Taylor disregarded the uncontradicted testimony of Farrar and Wilkerson. The transcript reveals both Farrar and Wilkerson rode in the truck with the decedent at the time of the accident and that both testified that the decedent did not seem impaired.

The Industrial Commission possesses the powers of a court. *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 340 S.E.2d 111 (1986). As such, it is the province of the Commission, and not this Court, to determine the credibility of witnesses and the weight to be given the evidence. *Id.* Despite the uncontradicted testimony of Wilkerson and Farrar, it can only be assumed that Deputy Commissioner Taylor found their credibility lacking in choosing to disregard their testimony. This Court will not set aside the findings of the Industrial Commission simply because there is competent evidence in favor of both sides that would have allowed the Deputy Commissioner to find either way.

Plaintiff also takes exception with the testimony of the defendants' expert, Dr. Kanich who testified that it was his opinion that

the decedent was impaired. When pressed, Dr. Kanich felt unable to express a legal opinion as to whether the decedent was intoxicated. However, Dr. Kanich did express his personal opinion that with the decedent's blood alcohol level he would have been driving while impaired. Dr. Kanich also testified that with a blood alcohol level of .202, the decedent would have been borderline between simple impairment and extreme excitement and confusion. Though, Dr. Kanich did not feel qualified to express an opinion as to a legal definition of intoxication, we feel there is competent evidence in the record to support a finding by the Deputy Commissioner that the deceased was intoxicated.

Plaintiff further takes exception with the Deputy Commissioner's finding that the decedent's intoxication proximately caused his death. Instead, plaintiff contends that excessive speed was the cause of the accident. In support of this argument, plaintiff relies on the testimony of Officer Dudley, the investigating officer, and Mr. Arnold, the driver of the car which the decedent passed. Officer Dudley testified that when he arrived at the scene of the accident he did not smell any alcohol in the truck or on the decedent. As further support that speed and not intoxication was the proximate cause of decedent's death, plaintiff relies on the fact that Officer Dudley charged the decedent only with exceeding a safe speed and exceeding the speed limit and not an alcohol related offense. Arnold, who was familiar with the curve, also expressed his opinion that the accident was caused by excessive speed.

Though it is clear that excessive speed may have been a cause of the accident, plaintiff's argument misses the mark when it states that there is not competent evidence to establish that intoxication was a cause of the accident. As stated previously, intoxication does not have to be the sole proximate cause. *Anderson v. Century Data Sys., Inc.*, 71 N.C. App. 540, 322 S.E.2d 638 (1984), *disc. rev. denied*, 313 N.C. 327, 327 S.E.2d 887 (1985). Instead it only has to be more probable than not that intoxication was a cause in fact of the accident. *Id.* In today's society, where alcohol related fatalities are all too common, the relationship between alcohol consumption and driving at excessive speeds is common sense and need not be documented. Therefore, even though the plaintiff has made a well wrought argument that excessive speed was a proximate cause we find competent evidence to exist in the record that would support the Commission's finding that the decedent

was intoxicated and that the decedent's intoxication was a cause in fact of his death.

We find the facts of this case indistinguishable from those in *Torain v. Fordham Drug Co.*, 79 N.C. App. 572, 340 S.E.2d 111 (1986), and affirm on the basis thereof.

For the foregoing reasons, we

Affirm.

Judges WELLS and COZORT concur.

CREATIVE HOMES AND MILLWORK, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF v. R. LARRY HINKLE AND MARY HINKLE, DEFENDANTS

No. 9130SC964

(Filed 2 March 1993)

1. **Arbitration and Award § 40 (NCI4th)— deposition of arbitrator—untimely request**

The trial court did not err in failing to order the deposition of an arbitrator where defendants neither noticed the deposition of the arbitrator nor filed a motion requesting the court to order his deposition. Assuming *arguendo* that defense counsel's statement at the hearing of defendants' motion to vacate the award that "I cannot request but you can order a deposition of [the arbitrator] to just find out what did happen" constituted an oral request for discovery, it was untimely.

Am Jur 2d, Arbitration and Award §§ 184, 187.

2. **Arbitration and Award § 40 (NCI4th)— communication between arbitrator and witness—no misconduct requiring vacation of award**

An *ex parte* communication between an arbitrator and a witness for the plaintiff did not constitute misconduct requiring vacation of the arbitration award pursuant to N.C.G.S. § 1-567.13(a)(2) where the arbitrator, a contractor, merely asked the witness whether he did any business in the area and gave the witness his business card.

Am Jur 2d, Arbitration and Award § 177.

Appeal by defendants from order entered 25 April 1991 by Judge J. Marlene Hyatt in Jackson County Superior Court. Heard in the Court of Appeals 13 October 1992.

Robert E. Dungan, P.C., by Robert E. Dungan and Michael E. Smith, for plaintiff-appellee.

Safran Law Offices, by Perry R. Safran, for defendant-appellants.

JOHN, Judge.

Defendants appeal from Judge Hyatt's order confirming an arbitration award requiring payment to plaintiff of $40,086.00 plus interest, costs and expenses for breach of contract. Defendants allege arbitrator misconduct in violation of G.S. § 1-567.13(a)(2) justifying vacation of the award, and further contend error by the court in failing to order the deposition of an arbitrator. We affirm.

On 24 October 1988, plaintiff contracted with defendants for construction of a home in Cashiers, North Carolina. Under the contract, all disputes were to be submitted for arbitration under the rules and regulations of the American Arbitration Association. Problems arose; plaintiff filed a demand for arbitration on 26 September 1989, and thereafter filed suit on 3 November 1989 to enforce and foreclose on a lien in the amount of $77,534.47. By consent order, litigation was stayed pending arbitration.

The arbitration hearing, lasting seven days, was held in September 1990. The parties selected as neutral arbitrators a panel consisting of: Henry Southworth, a general contractor; Joe K. Matheson, Jr., a structural engineer; and John C. Kersten, an attorney. After taking evidence, including viewing photographs and videotapes, and hearing the arguments of counsel for the parties, the panel found that defendants had breached the construction contract and on 22 October 1990 awarded plaintiff $40,086.00 plus interest, costs and expenses.

On 6 November 1990, plaintiff filed a motion for confirmation of the arbitration award pursuant to G.S. § 1-567.12. On 17 January 1991, defendants responded by filing a motion to vacate the award pursuant to G.S. § 1-567.13(a)(2), (3), and (4).

The motions were heard on 27 March 1991. Defendants produced the affidavit of Alfred F. Platt, Jr., an architect who had

testified on their behalf before the arbitration panel, which affidavit provided in pertinent part:

> During a recess in one of the afternoon sessions in Asheville, in the hotel lobby outside the hearing room, just after Avery Ashe, a Creative Homes, Inc. witness, had testified, Henry Southworth, one of the arbitrators, approached Mr. Ashe, who was talking with Clair Knapp, a representative of Creative, and Eddie Ensley, another Creative witness, who had not yet testified, introduced himself, asked Mr. Ashe whether he 'did work in Asheville,' gave Mr. Ashe his business card, and asked him to contact him.

I

[1] We turn first to defendants' argument that the trial court erred in failing to order the deposition of arbitrator Southworth. An arbitrator's deposition may be allowed "*when some objective basis exists for a reasonable belief that misconduct has occurred.*" *Carolina-Virginia Fashion Exhibitors, Inc. v. Gunter*, 291 N.C. 208, 218, 230 S.E.2d 380, 387 (1976) (emphasis in original).

Here, defendants neither noticed the deposition of Southworth nor filed a motion requesting the court to order his deposition. In fact, defendants made no mention of taking Southworth's deposition until the court hearing on 27 March 1991. Although the arbitration award was made 22 October 1990, defendants' motion to vacate was not filed until 17 January 1991, and the Platt affidavit in support thereof was not filed until 22 March 1991 (five days prior to the hearing). Defendants, then, had five months either to notice the deposition of Southworth according to Rule 30 of the North Carolina Rules of Civil Procedure or to file a motion with the court, or, if unsure about which course to follow, to make inquiry of the court about the proper procedure to be utilized subsequent to an arbitration hearing.

At the 27 March 1991 hearing, counsel for defendants stated that "I cannot request but you can order a deposition of Mr. Southworth to just find out what did happen, if anything. The case law in North Carolina does not permit me to demand . . . a deposition of Mr. Southworth. It would have to come at this Court's direction." *Gunter*, however, specifically cited in the annotation to G.S. § 1-567.13, suggests an appropriate procedure. The defendants there deposed the arbitrators after "timely notice

of their intention to take the depositions," and then filed their motion to vacate the award. *Id.* at 210-11, 230 S.E.2d at 383.

Rule 10(b) of the North Carolina Rules of Appellate Procedure provides:

> In order to preserve a question for appellate review, a party must have presented to the trial court a timely request, objection or motion, stating the specific grounds for the ruling the party desired the court to make if the specific grounds were not apparent from the context. It is also necessary for the complaining party to obtain a ruling upon the party's request, objection or motion.

Here, no such request, objection or motion was made prior to the hearing. Neither the motion to vacate nor the affidavit of Platt (the only documents filed by defendants during this time span) make any reference to deposing the arbitrator. Assuming *arguendo* that defense counsel's statement at the hearing constitutes an oral request for discovery, it was untimely. Accordingly, this assignment of error is without merit.

II

[2] Defendants also contend that the trial court erred in upholding the arbitration award because arbitrator Southworth's actions in making *ex parte* contact with a witness for the plaintiff constituted misconduct in violation of G.S. § 1-567.13(a)(2). This statute provides:

> (a) Upon application of a party, the court shall vacate an award where:
>
> . . . .
>
> (2) There was evident partiality by an arbitrator appointed as a neutral or corruption in any of the arbitrators or misconduct prejudicing the rights of any party.

G.S. § 1-567.13(a)(2) (1983).

An arbitration award is ordinarily presumed valid and the burden of proving specific grounds for vacating an award rests on the party attacking it. *Thomas v. Howard*, 51 N.C. App. 350, 353, 276 S.E.2d 743, 745 (1981). The public policy behind this reasoning is sound. "A foundation of the arbitration process is that by mutual consent the parties have entered into an abbreviated adjudicative procedure, and to allow 'fishing expeditions' to search

for ways to invalidate the award would tend to negate this policy." *Fashion Exhibitors v. Gunter*, 291 N.C. at 217, 230 S.E.2d at 387.

Defendants rely on the American Arbitration Association's Rules and Code of Ethics in asking this Court to adopt the "appearance of impropriety" standard seemingly enunciated by the United States Supreme Court in *Commonwealth Coatings Corp. v. Continental Casualty Co.*, 393 U.S. 145, 21 L.Ed.2d 301 (1968), *reh'g denied*, 393 U.S. 1112, 21 L.Ed.2d 812 (1969). Rule 29 states that "[t]here shall be no direct communication between the parties and a neutral arbitrator other than at oral hearings . . . ." American Arbitration Association, Construction Industry Arbitration Rules § 29 (1991). Canon II establishes a continuing duty to disclose, at any stage of the arbitration, "[a]ny existing or past financial, business, professional, family or social relationships which are likely to affect impartiality or which might reasonably create an appearance of partiality or bias." American Arbitration Association Code of Ethics, Canon II (1977).

Defendants contend that the *ex parte* communication between Southworth and Ashe constituted "misconduct" warranting vacation of the arbitration award. The contact, however, was trivial. Significantly, Southworth's casual remark was made to a witness and not to a party. *See* Rule 29. The remark itself, moreover, discounts the existence of a past or current relationship of any sort between the two men. *See* Canon II. In addition, at no point in these proceedings has there been allegation that the actions of the arbitrator actually prejudiced defendants. *See* G.S. § 1-567.13(a)(2). Next, this Court has previously considered the U.S. Supreme Court holding in *Commonwealth Coatings* and determined it to be too narrow with respect to the intent and public policy purposes of our North Carolina General Assembly. *Ruffin Woody and Associates, Inc. v. Person County*, 92 N.C. App. 129, 140, 374 S.E.2d 165, 172 (1988), *disc. review denied*, 324 N.C. 337, 378 S.E.2d 799 (1989). "Other jurisdictions that have considered the issue favor disclosure, but the majority view appears to be that an award will not be disturbed where the undisclosed relationship is not substantial." *Id.* at 140, 374 S.E.2d at 172; *see* Annotation, *Setting Aside Arbitration Award on Ground of Interest or Bias of Arbitrators*, 56 A.L.R.3d 697 (1974).

Finally, in those cases in which arbitrator misconduct has led to the vacation of an award, the arbitrators' actions and behavior

have been different in kind and degree from the casual comments of arbitrator Southworth here. *See Fashion Exhibitors v. Gunter*, 291 N.C. at 221-22, 230 S.E.2d at 389 (holding that actions of arbitrators in gathering evidence outside the scheduled hearings and without notice to the parties constituted misconduct sufficient to vacate the award); *Ruffin Woody v. Person County*, 92 N.C. App. at 140-41, 374 S.E.2d at 172 (holding that arbitrator's failure to disclose his prior business dealings with defendant some twenty years earlier did not amount to misconduct); *Wildwoods of Lake Johnson Associates v. L. P. Cox Co.*, 88 N.C. App. 88, 92-94, 362 S.E.2d 615, 618-19 (1987), *disc. review denied*, 322 N.C. 838, 371 S.E.2d 285 (1988) (holding that uncouth, sarcastic and critical comments by arbitrators during the hearing amounted to misconduct under G.S. § 1-567.13 sufficient to vacate the award); *Turner v. Nicholson Properties, Inc.*, 80 N.C. App. 208, 211, 341 S.E.2d 42, 44, *disc. review denied*, 317 N.C. 714, 347 S.E.2d 457 (1986) (holding that arbitrator's appearance as expert witness for clients of opposing counsel's former law firm was insufficient to establish an objective basis for believing the arbitrator was biased); and *In re Arbitration Between State and Davidson & Jones Construction Co.*, 72 N.C. App. 149, 154-55, 323 S.E.2d 466, 469-70 (1984), *disc. review denied*, 313 N.C. 507, 329 S.E.2d 396 (1985) (holding that arbitrators were not guilty of misconduct by receiving evidence from one party and using it in their deliberations when it was not properly before them).

Defendants have failed to carry their burden of proving that the arbitrator was partial, corrupt or acted in a way constituting misconduct, thus prejudicing the rights of defendants. This assignment of error, therefore, fails.

III

In its brief, plaintiff asserts two arguments that this case is not properly before this Court. We have considered each carefully and find them to be without merit.

The order of the trial court is affirmed.

Judges EAGLES and ORR concur.

PROFESSIONAL FOOD SERVICES MANAGEMENT, INC. v. NORTH CAROLINA DEPARTMENT OF ADMINISTRATION, AND THE NORTH CAROLINA SCHOOL OF SCIENCE AND MATHEMATICS

No. 9210SC70

(Filed 2 March 1993)

Public Works and Contracts § 27 (NCI4th)— bidding on public contracts—whether bid is nonresponsive

The Secretary of Administration's final decision characterizing a bid for food services at the North Carolina School of Science and Mathematics as nonresponsive was reversed where the Request for Proposals (RFP) required separate prices for small, medium, and large sizes of tea and a lump sum price for tossed salad, and petitioner's bid was for tossed salad at $.10 per ounce and iced tea at $.50, "all you can drink." The RFP did not specify or provide any guidance as to the desired weight or size of these items, so that two bidders might list the same price but provide different sizes. Petitioner's bid was actually more responsive than the winning bid, which quoted the prices for tossed salad and for small, medium and large tea with no size or weight indicated. N.C.G.S. § 143-52.

Am Jur 2d, Public Works and Contracts §§ 58, 59.

Differences in character or quality of materials, articles, or work as affecting acceptance of bid for public contracts. 27 ALR2d 917.

Appeal by petitioner from order entered 22 November 1991 in Wake County Superior Court by Judge Knox V. Jenkins. Heard in the Court of Appeals 5 January 1993.

Patton, Boggs & Blow, by Robert G. McIver, for petitioner-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General D. David Steinbock, for respondent-appellee.

GREENE, Judge.

Petitioner appeals from an order of the trial court affirming a final agency decision of the Secretary of Administration rejecting petitioner's bid.

This case involves the award of the food services contract at the North Carolina School of Science and Mathematics (the School) in Durham, North Carolina. In March, 1990, a request for proposals (RFP) was issued by the School and the Division of Purchase and Contract of the Department of Administration (the Department) seeking bids for the new food services contract at the School. In addition to proposals for cafeteria items, the RFP sought prices from contractors for items to be sold in the snack bar, which is operated by the food services provider on a cash basis with a fifteen percent commission on gross sales accruing to the School. In relevant part, the RFP sought prices for the following snack bar items: tossed salad and iced tea.

Included in the bids submitted was one from petitioner Professional Food Services Management, Inc. (Professional), the incumbent food services provider at the School. Professional in its bid listed prices for tossed salad and iced tea in the manner in which it had been selling these items at the School's snack bar for several years: "tossed salad—$.10 per ounce"; "iced tea—$.50, all you can drink." Professional's bid for the basic twenty-one meal cafeteria plan and the alternates requested by the School was the lowest among the bidders ($3.62 per student), and the School's chief fiscal officer and business manager recommended to the Department that the new food services contract be awarded to Professional. However, the Department concluded that Professional's bid was not responsive to the RFP based on the price quotations given by Professional for tossed salad and iced tea. According to the Department, the RFP required that separate prices be furnished for small, medium, and large sizes of tea and that a lump sum price be given for a tossed salad. The Department refused to consider Professional's bid and directed that the contract be awarded to the lowest bidder among those considered, TWM Services, Inc. (TWM).

After the award to TWM, Professional met with Department officials to protest the Department's decision; however, Professional's attempt to persuade the Department to change its mind regarding the award was unsuccessful. On 31 July 1990, Professional, pursuant to N.C.G.S. § 150B-23, filed a petition for a contested case in the

Office of Administrative Hearings in Wake County. In response, the School and the Department filed a motion to dismiss the petition, which was denied. A notice of hearing issued and the contested case proceeded to trial on 17 October 1990 in the Office of Administrative Hearings. After receiving testimony from five witnesses and other documentary evidence, the presiding Administrative Law Judge (ALJ) ruled in favor of Professional, concluding that Professional's bid was responsive to the RFP. The ALJ issued a recommended decision that Professional be reinstated as the food services provider at the School.

The matter was thereafter referred to the Department for final agency action in accordance with N.C.G.S. § 150B-36. On 1 February 1991, a final agency decision was rendered by the Secretary of Administration which rejected the ALJ's recommended decision and affirmed the Department's award of the contract to TWM. The Secretary of Administration in his final agency decision found that the RFP "required specific price information to be provided for various sizes of ice tea sold at the snack bar," and that Professional had provided no information on medium and large servings. In addition, the Secretary found that Professional "provided insufficient and inadequate information in its bid for the price of a tossed salad." The Secretary concluded based on these findings that the bid submitted by Professional was nonresponsive, and upheld the award of the contract to TWM. On 11 March 1991, Professional sought review of the final agency decision pursuant to N.C.G.S. § 150B-43 in Wake County Superior Court by filing a petition for judicial review of the final agency decision. Professional argued that the final agency decision was not supported by substantial evidence, was affected by error of law, and was arbitrary and capricious. The court, after hearing, affirmed the final agency decision in an order signed 22 November 1991. Professional appeals.

The issue presented is whether the Secretary of Administration's decision that Professional's bid was nonresponsive to the RFP is supported by substantial evidence in view of the entire record as submitted.

The standard of review for an appellate court in reviewing an order of the superior court affirming or reversing a decision of an administrative agency is the same as that used by the superior court. *Jarrett v. North Carolina Dep't of Cultural Resources*, 101

N.C. App. 475, 478-79, 400 S.E.2d 66, 68 (1991). The appellate court may reverse or modify the final agency decision if the substantial rights of the petitioner 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). Our review is further limited to those grounds for reversal or modification argued by the petitioner before the superior court, and properly assigned as error on appeal to this Court. *Watson v. North Carolina Real Estate Comm'n*, 87 N.C. App. 637, 639, 362 S.E.2d 294, 296 (1987). Professional argues that the final agency decision rejecting Professional's bid as being nonresponsive to the RFP is not supported by substantial evidence in view of the record as a whole. The substantial evidence required to justify a final agency decision is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State ex rel. Comm'r of Ins. v. North Carolina Fire Ins. Rating Bureau*, 292 N.C. 70, 80, 231 S.E.2d 882, 888 (1977). Professional also argues that the decision is affected by error of law and is arbitrary and capricious. Because we agree with the first basis asserted by Professional for reversal of the final agency decision, we do not address Professional's remaining arguments.

State contracts for the purchase of supplies "shall be based on competitive bids and acceptance made of the lowest and best bid(s) most advantageous to the State as determined upon consideration of [certain criteria]." N.C.G.S. § 143-52 (1990); *see also* 1 NCAC 5D .0300 to .0500 (July 1988) (delineating competitive bidding procedure for procurement by State of service contracts). It is the duty of the Secretary of Administration under the competitive bidding procedure to solicit bids from qualified sources of supply. N.C.G.S. § 143-52. In the context of public contract bid-

ding, a "responsive" bid is one which conforms substantially with the terms of the request for bids. 64 Am. Jur. 2d *Public Works and Contracts* § 58 (1972); *see also* N.C.G.S. § 143-52 ("substantial conformity with the specifications and other conditions set forth in [State's] request for bids" is among the criteria considered in determining acceptance of bid). Whether a bid conforms substantially with the request for bids or whether, instead, it contains a material variance depends on "whether the bidder's proposal gives him an advantage or benefit which is not enjoyed by other bidders." *Am. Jur. 2d* at § 59. However, where a contract can be let only to the lowest responsible bidder after advertising for bids, "the specifications must be so framed as to secure fair competition upon equal terms to all bidders." Annotation, *Bidder's Variation From Specifications On Bid For Public Work*, 65 A.L.R. 853 (1930).

In the instant case, paragraph 2.7 of the RFP, dealing with snack bar pricing, states that

> [o]fferors shall provide a price list for snack bar items listed on page 31. Menu prices and operating hours of the snack bar will be established and changed by mutual agreement of the contractor and the school.

The snack bar items pricing list appears in the RFP in relevant part as follows:

> The contractor agrees to provide the snack bar items listed below at the price indicated:
>
> Tossed salad _____
>
> Tea Small _____
>
> Medium _____
>
> Large _____

Based on the manner in which the RFP requested prices for tossed salad and iced tea, and, for that matter, many of the snack bar items (e.g., "soup _____" "milk _____," and "french fries _____"), the Secretary of Administration's determination that Professional's bid was nonresponsive is not supported by substantial evidence. The RFP simply asked bidders to provide tossed salad and tea "at the prices indicated," without specifying or providing any guidance as to the desired weight of these items. Thus, while two bidders might each have listed the price of a tossed

salad as $1.50, one bidder might be planning to provide a ten-ounce salad for that price and the other a twenty-ounce salad. Viewed from such a perspective, it appears to us that Professional's tossed salad pricing was actually more responsive than that of TWM, which quoted the price for a tossed salad as $1.25 with no size or weight indicated. In fact, the Secretary of Administration at the hearing before the ALJ admitted, in the face of his conclusion that Professional's tossed salad price made its bid nonresponsive, that nothing in the RFP precluded a potential contractor from pricing salad by the ounce. A similar analysis applies to Professional's pricing of iced tea at $.50, all you can drink. TWM quoted iced tea at the following prices: "small—$.50, medium—$.60, large—$.70." However, it is impossible without speculation to determine what constitutes a "small," a "medium," or a "large." One bidder's "small" tea might contain eight ounces while another bidder's may contain ten ounces. Professional offered to provide iced tea in the snack bar at one price, regardless of the amount consumed by the student.

Thus, in our view all of the evidence establishes that Professional's bid on the snack bar items at issue substantially conformed to the RFP, as it was written. Accordingly, the Secretary of Administration's final decision characterizing Professional's bid as nonresponsive must be reversed because it has prejudiced the substantial rights of Professional in that it is unsupported by substantial evidence. This case is remanded with the mandate that Professional's bid be deemed responsive to the RFP and that it therefore be considered to determine whether it meets the requirement of being the lowest and best bid most advantageous to the State.

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

F. MICKEY ANDREWS v. ROBERT M. ELLIOT

No. 9221DC74

(Filed 2 March 1993)

1. Libel and Slander § 37 (NCI4th)— defamation per se—allegations sufficient

The trial court erred in a defamation action by granting defendant's motion to dismiss under N.C.G.S. § 1A-1, Rule 12(b)(6) where plaintiff alleged that defendant mailed a copy of a letter to the *Winston-Salem Chronicle*, that the letter was seen and read by at least three persons at the *Chronicle*, and set forth the alleged defamatory portions of the letter, including alleged accusations by defendant that plaintiff lied to a reporter, violated the Rules of Professional Conduct, and is guilty of criminal and unethical conduct. Keeping in mind that the issue on a Rule 12(b)(6) motion is whether the claimant is entitled to offer evidence to support the claims, plaintiff adequately alleged the essential elements of a claim for defamation *per se*.

Am Jur 2d, Libel and Slander §§ 9, 435.

2. Libel and Slander § 24 (NCI4th)— judicial proceeding—letter to newspaper—not privileged

A complaint alleging slander and libel in a letter to a newspaper did not disclose on its face the affirmative defense of absolute or qualified privilege. Although an attorney in North Carolina is absolutely privileged to publish defamatory matter in communications preliminary to a proposed judicial proceeding, this privilege applies only when the material is relevant to the anticipated litigation and only when it is published to persons significantly interested in the litigation. The complaint discloses that defendant may have a qualified privilege but is sufficient to overcome the defense of qualified privilege at the pleading stage because it alleges that defendant acted with malice.

Am Jur 2d, Libel and Slander §§ 429, 437.

Pleading or raising defense of privilege in defamation action. 51 ALR2d 552.

Appeal by plaintiff from order filed 26 September 1991 in Forsyth County District Court by Judge Margaret L. Sharpe. Heard in the Court of Appeals 5 January 1993.

F. Mickey Andrews, pro se.

Elliott, Pishko, Gelbin & Morgan, P.A., by J. Griffin Morgan, for defendant-appellee.

GREENE, Judge.

Plaintiff appeals from an order of the trial court filed 26 September 1991, granting defendant's motion to dismiss plaintiff's complaint pursuant to N.C.G.S. § 1A-1, Rule 12(b)(6).

On 28 August 1991, plaintiff, a Winston-Salem attorney, filed a complaint alleging that defendant, a licensed attorney, "maliciously, willfully and wantonly made and published slanderous and libelous statements about the Plaintiff to persons other than the Plaintiff by mailing a copy of a letter to the newspaper, the Winston-Salem Chronicle" which was seen and read by at least three persons who worked at the newspaper. Paragraph seven of plaintiff's complaint provides that the statements in the letter included, but are not limited to, the following:

a. [Defendant's] clients intend to file a complaint against [plaintiff] with the North Carolina State Bar.

b. [Defendant] accused [plaintiff] of misleading the reporter by not informing the reporter of vital facts.

c. [Defendant] accused [plaintiff] of lying to the reporter.

d. [Defendant] says the "State Bar thoroughly investigated the issue" (perjury and unethical conduct by Legal Aid lawyers) at [plaintiff's] request.

e. [Defendant] says [plaintiff] has not produced "a shred of evidence" to support charges of fraud and perjury by Legal Aid lawyers in Court proceedings.

f. [Defendant] accuses [plaintiff] of unethical conduct in talking to a reporter.

g. [Defendant] accuses [plaintiff] of criminal conduct in talking to a reporter.

h. [Defendant] says [plaintiff] has committed libel and slander per se.

i. [Defendant] threatens [plaintiff] (apparently with criminal action and civil suit) if [plaintiff] again communicates with the reporter.

j. [Defendant] says his clients will file a complaint against [plaintiff] (for his talking to the reporter) with the North Carolina State Bar.

k. [Defendant] says [plaintiff] has violated Rule 7.7 and other rules of the Rules of Professional Conduct.

According to plaintiff's complaint, defendant allegedly talked to additional individuals and repeated the aforementioned accusations. Plaintiff further alleges that defendant's statements were false and made with actual malice, tended to subject plaintiff to ridicule, contempt, public hatred, and disgrace and to impeach plaintiff in his profession, and charged offenses on the part of plaintiff involving moral turpitude. According to plaintiff's complaint, plaintiff suffered "nervousness, headaches, anxiety, loss of self esteem and depression and other physical injury for which he received medical treatment" as a direct and proximate cause of defendant's statements, as well as pecuniary losses, mental suffering, humiliation, and embarrassment and injury to his reputation. Plaintiff did not attach the alleged defamatory letter or a copy of it as an exhibit to his complaint.

On 13 September 1991, defendant filed a motion to dismiss plaintiff's complaint pursuant to Rule 12(b)(6) of the North Carolina Rules of Civil Procedure. On 23 September 1991, defendant filed an answer to plaintiff's complaint, in which he denied the allegations in paragraph seven of plaintiff's complaint regarding the statements made by defendant "to the extent that such allegations are literally or contextually inconsistent with defendant's letter." Defendant also asserted in his answer that the letter was written in the performance of defendant's professional duties as attorney for his clients, and was therefore protected by an absolute or qualified privilege. Defendant's motion to dismiss was heard during the 23 September 1991 session of Forsyth County District Court, The Honorable Margaret L. Sharpe presiding. Judge Sharpe granted defendant's motion to dismiss. Nothing in the record indicates that

Judge Sharpe considered anything other than the complaint in ruling on the motion.

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[1] The sole issue is whether plaintiff's complaint states a claim upon which relief can be granted against defendant for defamation.

A motion made pursuant to Rule 12(b)(6) tests the legal sufficiency of the plaintiff's complaint. *Renwick v. The News and Observer Publishing Co.*, 310 N.C. 312, 315, 312 S.E.2d 405, 408, *cert denied*, 469 U.S. 858, 83 L. Ed. 2d 121 (1984). Dismissal under Rule 12(b)(6) is proper when on its face the complaint reveals either no law supports the plaintiff's claim or the absence of fact sufficient to make a good claim, or when some fact disclosed in the complaint necessarily defeats the plaintiff's claim. *Johnson v. Bollinger*, 86 N.C. App. 1, 4, 356 S.E.2d 378, 380 (1987) (citation omitted). A plaintiff's complaint should not be dismissed under Rule 12(b)(6) "unless it affirmatively appears plaintiff is entitled to no relief under any state of facts which could be presented in support of the claim." *Id.* (citation omitted).

In North Carolina, publications or statements which are susceptible of but one meaning, when considered alone without innuendo, colloquium, or explanatory circumstances, and that tend to "disgrace and degrade the party or hold him up to public hatred, contempt, or ridicule, or cause him to be shunned and avoided" are defamatory *per se*. *Flake v. Greensboro News Co.*, 212 N.C. 780, 786, 195 S.E. 55, 60 (1938). To be actionable, a defamatory statement must be false and must be communicated to a person or persons other than the person defamed. *Morrow v. Kings Dep't Stores, Inc.*, 57 N.C. App. 13, 20, 290 S.E.2d 732, 736, *disc. rev. denied*, 306 N.C. 385, 294 S.E.2d 210 (1982). In an action for libel or slander *per se*, "malice and damages are presumed from the fact of publication and no proof is required as to any resulting injury." *Flake*, 212 N.C. at 785, 195 S.E. at 59; *Morrow*, 57 N.C. App. at 20, 290 S.E.2d at 736. The alleged defamatory statement or statements made or published by the defendant need not be set out verbatim in plaintiff's defamation complaint if alleged "substantially *in haec verba*, or with sufficient particularity to enable the court to determine whether the statement was defamatory." *Stutts v. Duke Power Co.*, 47 N.C. App. 76, 83-84, 266 S.E.2d 861, 866 (1980); *accord Morrow*, 57 N.C. App. at 21, 290 S.E.2d at 737.

In the instant case, plaintiff in his complaint alleges that defendant mailed a copy of a letter to the *Winston-Salem Chronicle* and that the letter was "seen and read by at least three persons at the Chronicle," specifically, the publisher, the managing editor, and a reporter. Plaintiff's complaint sets forth the alleged defamatory portions of the letter, including alleged accusations by defendant that plaintiff lied to a reporter, violated the Rules of Professional Conduct, and is guilty of criminal and unethical conduct. Keeping in mind that on a Rule 12(b)(6) motion, " '[t]he issue is not whether a plaintiff will ultimately prevail but whether the claimant is entitled to offer evidence to support the claims,' " *Johnson*, 86 N.C. App. at 4, 356 S.E.2d at 381 (citation omitted), we conclude that because plaintiff adequately alleged the essential elements of a claim for defamation *per se*, the trial court erroneously granted defendant's motion to dismiss.

[2] In doing so, we reject defendant's contention that plaintiff's complaint on its face discloses in defendant's favor the affirmative defense of absolute or qualified privilege. Although defendant correctly states that in North Carolina an attorney is absolutely privileged to publish defamatory matter in communications preliminary to a proposed judicial proceeding, *see Harris v. NCNB Nat'l Bank*, 85 N.C. App. 669, 674, 355 S.E.2d 838, 842 (1987), this privilege applies only when the material is relevant to the anticipated litigation and only when it is published to persons significantly interested in the litigation. *Id.* at 675, 355 S.E.2d at 842-43; *see also* 50 Am. Jur. 2d *Libel and Slander* § 283 (1970) (privilege lost if defendant adopts a method of communication which gives unnecessary publicity to statements defamatory of plaintiff); *accord DeVivo v. Ascher*, 550 A.2d 163, 165 (N.J. Super Ct. App. Div. 1988), *cert. denied*, 555 A.2d 607 (N.J. 1989); Vitauts M. Gulbis, Annotation, *Libel and Slander: Attorneys' Statements, To Parties Other Than Alleged Defamed Party Or Its Agents, In Course Of Extrajudicial Investigation Or Preparation Relating To Pending Or Anticipated Civil Litigation As Privileged*, 23 A.L.R.4th 932, 935 (1983). "It is clear, however, that statements given to the newspapers concerning the case are no part of a judicial proceeding, and are not absolutely privileged." W. Page Keeton, *Prosser and Keeton on The Law of Torts* § 114, at 820 (5th ed. 1984). The complaint at issue does disclose that defendant may have a qualified privilege. *See Harris*, 85 N.C. App. at 673, 355 S.E.2d at 842 (qualified privilege exists for communications made in good faith and without actual malice

about a subject in which the communicator has an interest or duty). However, because plaintiff's complaint alleges that defendant "acted with actual malice" in making the alleged defamatory statements, the complaint is sufficient to overcome at the pleading stage the defense of qualified privilege. *Presnell v. Pell*, 298 N.C. 715, 720, 260 S.E.2d 611, 614 (1979).

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

E. DELISA SMITH, PLAINTIFF v. STATE FARM FIRE AND CASUALTY COMPANY, DEFENDANT

No. 9110SC1215

(Filed 2 March 1993)

Insurance § 831 (NCI4th)— renter's insurance—material misrepresentation as to items stolen—coverage precluded

A provision as originally written in plaintiff's renter's insurance policy precluding coverage for "any" material misrepresentation "relating to this insurance" precluded coverage whether the alleged misconduct occurred before or after a loss; therefore, the trial court properly granted summary judgment for defendant where plaintiff's apartment was burglarized, and she made a material misrepresentation in that she did not own or possess a computer and printer at the time of the burglary, yet she included those items on her personal property inventory form listing the items stolen.

Am Jur 2d, Insurance §§ 1012, 1013.

Fraud or misrepresentation by insured's agent after loss as within provision avoiding policy for fraud or attempted fraud of insured. 24 ALR2d 1220.

Appeal by plaintiff from order entered 5 September 1991 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 10 November 1992.

Teague, Campbell, Dennis & Gorham, by C. Woodrow Teague and John A. Tomei, for plaintiff-appellant.

Yates, McLamb & Weyher, by R. Scott Brown and O. Craig Tierney, Jr., for defendant-appellee.

LEWIS, Judge.

Defendant issued a renter's insurance policy to plaintiff effective 10 November 1988 to 10 November 1989. Plaintiff's apartment was burglarized the weekend of 23-24 September 1989. Upon notification of the theft by plaintiff, defendant issued a $1,000 check to her which she promptly cashed. On 13 October 1989 plaintiff submitted a personal property inventory form listing the items stolen, including an Epson computer and printer valued at $2,000. Plaintiff submitted a sworn statement in proof of loss on 3 November 1989 in the amount of $18,144.35, which included the claim for the computer and printer. On 15 December 1989, in an examination under oath in accordance with the insurance policy, plaintiff represented that she was in the process of purchasing the computer and printer from Mr. Jeff Warren in Raleigh when it was stolen from her apartment. Investigation by defendant revealed that plaintiff did not own the computer at the time of the burglary nor was she in possession of it. In January 1990, Mr. Warren informed State Farm that he owned an Epson computer and printer, that this equipment had never left his possession, and that he had never loaned or sold a computer to plaintiff.

On 6 April 1990 defendant denied plaintiff's theft claim due to plaintiff's misrepresentation of material facts and circumstances. On 19 April 1990 plaintiff herself informed defendant's agent, Ken Davis, that she had made a material misrepresentation to them in that she did not own or possess the computer and printer at the time of the burglary. Thereafter, on 30 May 1990, plaintiff filed a complaint against defendant seeking damages for the value of the items actually stolen. She also alleged that defendant's refusal to pay constituted an unfair and deceptive trade practice under N.C.G.S. § 75-1.1 (1988). Defendant answered that her material misrepresentations voided its coverage under the policy pursuant to a "Concealment or Fraud" provision contained in the policy, and counterclaimed for return of the $1,000 advance payment.

On 16 July 1991 defendant filed for summary judgment on the issues of material misrepresentation, unfair and deceptive

trade practices, and its counterclaim for recovery of insurance proceeds. Judge Barnette granted defendant's motion on 5 September 1991 on all three issues. Plaintiff now appeals to this Court.

Summary judgment is appropriate only if there is no genuine issue of material fact to be decided 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). Because there are no genuine issues of material fact in this case we affirm summary judgment in favor of defendant.

When the policy was issued to plaintiff it contained the following provision:

> 2. **Concealment or Fraud.** We do not provide coverage for an **insured** who has:
>
> a. intentionally concealed or misrepresented any material fact or circumstance; or
>
> b. made false statements or engaged in fraudulent conduct;
>
> relating to this insurance.

Two years later the policy was supplemented and made retroactively effective to plaintiff's policy, according to defendant. The amended provision reads as follows:

> 2. **Concealment or Fraud.** The entire policy will be void if, whether before or after a loss, an **insured** has:
>
> a. intentionally concealed or misrepresented any material fact or circumstance;
>
> b. engaged in fraudulent conduct; or
>
> c. made false statements;
>
> relating to this insurance.

Plaintiff contends that the amended provision does not apply to her since her original policy did not contain it. She claims that the original version only pertained to activities that occurred before a loss because it did not contain the language "before or after." Therefore her misrepresentations after a loss did not void coverage under her policy.

Defendant argues that even under the original provision plaintiff was not entitled to recover damages for her lost property due to her misrepresentations. Defendant's arguments in the trial court and on this appeal are based on the original version only. If we should find in favor of plaintiff, defendant has expressly reserved the right to argue that the amended provision was in effect at the time of the burglary.

Plaintiff first argues that the "Concealment or Fraud" provision applies only to an insured's application for insurance coverage and other pre-loss conduct. Plaintiff notes that another portion of the policy sets forth "Duties After Loss." She also asserts that defendant cannot take advantage of the fact that it changed the provision two years later to specifically encompass conduct which occurs "before or after" a loss. Finally, plaintiff argues that the provision is ambiguous and cannot be used by defendant to defeat coverage under the policy. She claims defendant conceded the ambiguity by its later amendment to that provision, because the amendment would have been unnecessary if the original provision was unambiguous.

We are not persuaded by plaintiff's arguments. First, we dispose of plaintiff's contention that defendant may not rely on later changes to its policy, because for the purposes of this appeal defendant bases its argument on the original wording of the "Concealment or Fraud" provision. Second, we see no reason why the language of the original policy would only pertain to pre-loss conduct. The policy itself states that coverage is not provided for an insured who has made "any" material misrepresentation "relating to this insurance." Defendant points to decisions from other jurisdictions interpreting similar clauses since there are no North Carolina decisions on point. *See, e.g., Longobardi v. Chubb Ins. Co. of New Jersey*, 582 A.2d 1257, 1261 (N.J. 1990) (post-loss misrepresentations voided the policy under a similar concealment or fraud provision even though did not contain language "whether before or after a loss"); *American Employers' Ins. Co. v. Taylor*, 476 So. 2d 281, 283 (Fla. Dist. Ct. App.), *cause dismissed by, Taylor v. American Employers' Ins. Co.*, 485 So. 2d 426 (Fla. 1985) (in policy referring to "misrepresentation of any material fact," "any means any"). We agree the policy in question clearly informed the policyholder that any material misrepresentations made at any time would void the entire policy.

Plaintiff's contention that the provision in question is limited to pre-loss conduct since another portion of the policy covers duty after loss is without merit. The policy is structured so that Section I governs Property Coverage and Section II governs Liability Coverage. Both of these sections contain a provision on an insured's "Duties After Loss." In her brief plaintiff cites the provision contained in Section II on property coverage. The "Concealment or Fraud" provision at issue in this case appears in a portion of the policy entitled "Sections I and II—Conditions." The provisions under this section apply to both Section I and Section II, and apply to all losses covered by the insurance policy. The "Conditions" are completely different from the "Duties After Loss" provisions contained in Sections I and II.

Finally, we agree with defendant that the provision is unambiguous. As stated above, we believe the original language clearly informs the policyholder that any misrepresentations at any time will void the policy. *See Chubb*, 582 A.2d at 1263 (held similar provision not ambiguous); *American*, 476 So. 2d at 283 ("any means any"). We hold that the provision in question, as originally written in plaintiff's policy, precludes coverage whether the alleged misconduct occurs before or after the loss. This holding is consistent with public policy since to hold otherwise would be to encourage policyholders to misrepresent losses. Such misconduct would carry no consequences if those policyholders were still permitted to recover in full under their policies. *See American*, 476 So. 2d at 284. Because we reject both of plaintiff's arguments, we do not address defendant's statutory argument.

The trial court's grant of summary judgment for defendant is hereby

Affirmed.

Judges JOHNSON and COZORT concur.

NATIONWIDE MUTUAL INSURANCE COMPANY, PLAINTIFF v. STATE FARM MUTUAL AUTOMOBILE INSURANCE COMPANY, DEFENDANT

No. 9114SC1208

(Filed 2 March 1993)

Insurance § 464 (NCI4th)— underinsured motorist coverage—rights of carrier advancing policy limits

The trial court did not err by granting summary judgment for defendant where Linda Reavis was injured in an automobile collision between her vehicle and a vehicle driven by Barbara Swartz; Reavis was covered by a liability policy issued by plaintiff which provided for liability insurance limits and underinsured limits of $100,000 per claimant and $300,000 per accident; Swartz was insured by a policy issued by defendant which provided liability coverage of $25,000 per claimant and $50,000 per occurrence; defendant tendered its policy limits of $25,000; plaintiff agreed to advance $25,000 on behalf of defendant toward the settlement of the claim in order to preserve its right to subrogation; Reavis' claim was settled for $40,000; and defendant refused to reimburse plaintiff for the $25,000 advancement, claiming that plaintiff had acquired by subrogation only the rights of its insured and was thus barred by the statute of limitations. Although plaintiff asserts that defendant's tender created a direct and independent relationship between the insurance companies, N.C.G.S. § 20-279.21(b)(4) mentions only the rights of assignment and subrogation and *State Farm Mut. Auto. Ins. Co. v. Blackwelder*, 332 N.C. 135, does not at any point address any right other than subrogation.

Am Jur 2d, Automobile Insurance §§ 322, 442.

Appeal by plaintiff from summary judgment granted 18 September 1991 by Judge Coy E. Brewer in Durham County Superior Court. Heard in the Court of Appeals 10 November 1992.

Reynolds, Bryant, Patterson & Covington, P.A., by Lee A. Patterson, II, for plaintiff-appellant.

DeBank, McDaniel & Anderson, by Douglas F. DeBank, for defendant-appellee.

LEWIS, Judge.

The sole issue raised by this appeal is whether a provider of underinsured motorist coverage who advances the policy limits of the liability carrier obtains an independent and separate right of reimbursement or is limited to the rights of the claimant to which it is subrogated. On the facts presented, we hold that an underinsured motorist carrier does not obtain an independent and separate right of reimbursement and we thereby affirm the decision of the trial court.

The facts of this case are that on 5 March 1987, Linda Carol Reavis ("Reavis") was injured in an automobile collision between the vehicle she was driving and a vehicle driven by Barbara Joyce Swartz ("Swartz"). Reavis, at the time of the accident, was covered by a liability insurance policy issued by Nationwide Mutual Insurance Company ("Nationwide") which provided for liability insurance limits and underinsured motorist coverage limits of $100,000 per claimant and $300,000 per accident. Swartz was insured by a policy issued by State Farm Mutual Automobile Insurance Company ("State Farm") which provided liability coverage in the amount of $25,000 per claimant and $50,000 per occurrence.

State Farm, after conducting an investigation of the accident, tendered its policy limits of $25,000. Nationwide was subsequently notified of State Farm's tender and Nationwide, thereafter, agreed to advance $25,000 on behalf of State Farm toward the settlement of Reavis' claim in order to preserve its right to subrogation pursuant to N.C.G.S. § 20-279.21(b)(4). On 24 February 1988, Reavis' claim was finally settled for $40,000. The settlement amount consisted of the $25,000 advanced by Nationwide on behalf of State Farm and an additional $15,000 of underinsured motorist coverage. Contemporaneous with the settlement, Reavis executed a Release and Trust Agreement in favor of Nationwide, releasing all of her claims against Nationwide, promising to undertake any action deemed necessary by Nationwide for the recovery of damages suffered due to the accident, and agreeing to hold in trust for Nationwide any sums received from State Farm as a result of the accident.

After the execution of the Release and Trust Agreement, representatives of Nationwide and State Farm engaged in correspondence regarding the reimbursement of Nationwide by State Farm. On 21 February 1991, after State Farm had refused to reimburse Nationwide for the $25,000 advancement, Nationwide filed

this action. State Farm filed its answer on 27 March 1991, asserting that Nationwide acquired by way of subrogation, only the rights of its insured, Reavis, and that Nationwide was thus barred by the appropriate statute of limitations for having failed to bring its action on or before 5 March 1990. Both parties moved for summary judgment and on 18 September 1991, the trial court granted summary judgment in favor of State Farm and dismissed the action. Nationwide gave notice of appeal on 9 October 1991.

The rules regarding summary judgment are well established and need not be repeated here, because as Nationwide conceded in its brief, if the claim of an underinsured motorist carrier arises only by subrogation then it is barred by the statute of limitations. However, Nationwide asserts that State Farm's tender created a direct and independent relationship between the insurance companies. In support of its argument, Nationwide directs our attention to § 20-279.21(b)(4) and asserts that this section presumes reimbursement by the liability carrier.

N.C.G.S. § 20-279.21(b)(4) (Cum. Supp. 1992) provides in pertinent part:

> An underinsured motorist insurer may at its option, upon a claim pursuant to underinsured motorist coverage, pay moneys without there having first been an exhaustion of the liability insurance policy covering the ownership, use, and maintenance of the underinsured highway vehicle. In the event of payment, the underinsured motorist insurer shall be either: (a) entitled to receive by assignment from the claimant any right or (b) subrogated to the claimant's right regarding any claim the claimant has or had against the owner, operator, or maintainer of the underinsured highway vehicle, ... 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 before 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 that notice. Further, the insurer shall have the right, at its election, to pursue its claim by assignment or subrogation in the name of the claimant, and the insurer shall not be

> denominated as a party in its own name except upon its own election.

We have reviewed this statutory language and we find nothing that would support Nationwide's assertion that an independent relationship arose between insurers as a result of State Farm's tender. Nor do we agree with Nationwide that reimbursement by the liability carrier is presumed within the statute. Instead, we find the language of § 20-279.21(b)(4) mentions only the rights of assignment and subrogation, and the only right at issue in the present case is that of subrogation.

As additional support for its argument that an independent cause of action arises upon the advancement of policy limits, Nationwide relies on *State Farm Mut. Auto. Ins. Co. v. Blackwelder*, 332 N.C. 135, 418 S.E.2d 229 (1992). In *Blackwelder*, our Supreme Court addressed the question of whether an underinsured motorist carrier is barred from pursuing its own claim against the liability carrier once a release is obtained on the underlying claim of the insured. In answering the question in the negative, the Supreme Court held that the underinsured motorist carrier was pursuing its own subrogated claim which had passed by operation of law. At no point in the Court's opinion did the Supreme Court address any right other than subrogation. In addition, the *Blackwelder* Court did not even address the statute of limitations. As a result, we find the only right which Nationwide could have asserted was its right to subrogation.

Subrogation has been defined as an "equitable remedy in which one steps into the place of another and takes over the right to claim monetary damages to the extent that the other could have." *Payne v. Buffalo Reinsurance Co.*, 69 N.C. App. 551, 554, 317 S.E.2d 408, 410 (1984). This Court has also stated that "in a subrogation action, the rights of the insurer succeed only to the rights of the insured and no new cause of action is created. . . ." *Harris-Teeter Super Markets, Inc. v. Watts*, 97 N.C. App. 101, 103, 387 S.E.2d 203, 205 (1990). By advancing the primary insurance limits to Reavis, Nationwide became subrogated to the rights of Reavis and stepped into her shoes.

Reavis' cause of action accrued on 5 March 1987, the date of the accident, but was barred by the statute of limitations as of 5 March 1990. We, therefore, affirm the order of the trial

court granting summary judgment in favor of State Farm and dismissing the action.

For the foregoing reasons we

Affirm.

Judges JOHNSON and COZORT concur.

IN THE MATTER OF THE TRISCARI CHILDREN: DAVID ANTHONY TRISCARI AND JESSICA ANNE TRISCARI

No. 9226DC175

(Filed 2 March 1993)

Parent and Child § 1.5 (NCI3d)— termination of parental rights— petitions not verified—no jurisdiction over subject matter

Petitions to terminate respondent's parental rights were defective on their face and should have been dismissed because they failed to comply with N.C.G.S. § 7A-289.25 in that they were not verified, and the trial court therefore had no jurisdiction over the subject matter of this case.

Am Jur 2d, Parent and Child § 7; Pleading § 340.

Appeal by respondent father from Orders entered 10 December 1991 by Judge Resa L. Harris in Mecklenburg County District Court. Heard in the Court of Appeals 14 January 1993.

John H. Cutter, III, for petitioner-appellee.

Katherine S. Holliday for respondent-appellant.

Richard A. Lucey, guardian ad litem for the minor children.

WYNN, Judge.

The present action was brought by petitioner Laura Anne (Triscari) Costello to terminate the parental rights of her former husband, respondent Jerry Triscari. Ms. Costello and Mr. Triscari are the parents of two minor children, David Anthony Triscari, born 13 May 1980, and Jessica Anne Triscari, born 2 January 1985.

In 1985, an Order from the Superior Court of Riverside County, California granted Ms. Costello custody of the children and required Mr. Triscari to pay child support in the amount of $250 per child per month ($6000 per year). Mr. Triscari paid $545 for child support in 1986, $2630 in 1987, $1875 in 1988, and nothing in 1989, 1990 and 1991 (as of the 1 August 1991 hearing date).

At the hearing, Mr. Triscari testified that he was suffering from diabetes, cirrhosis of the liver, tumors on his bladder, and problems with his spleen and kidneys, and he had been hospitalized twice in 1990 and 1991. He also testified that he has been unable to work and has been collecting welfare since 1987. He currently lives in Rochester, New York with his mother, where he does the household chores and yardwork, walks for exercise, attends club functions in his community, and goes on fishing trips to New York and Canada.

Mr. Triscari saw the children a few times in 1987 and 1988 and not at all in 1989. In August 1990, Mr. Triscari and his mother drove to Charlotte, North Carolina, where the children have resided with Ms. Costello since 1985, and visited with the children for three days. Mr. Triscari sent greeting cards and small gifts to the children on their birthdays and at Christmas and telephoned them every three to five months, until the petitions at issue were filed and petitioner changed her telephone number.

Ms. Costello married Mark Vincent Costello, III in August 1988. Ms. Costello indicated that her current husband intends to adopt the children if Mr. Triscari's parental rights are terminated. Mark Costello did not testify at the hearing, nor did the children or their guardian ad litem.

The trial court entered two separate Orders terminating Mr. Triscari's parental rights with respect to David Anthony Triscari and Jessica Anne Triscari, on the grounds that he abandoned and wilfully failed to support his children. From these Orders, Mr. Triscari appeals.

By his first assignment of error, Mr. Triscari contends that the petitions to terminate his parental rights are defective on their face and should be dismissed because they fail to comply with N.C. Gen. Stat. § 7A-289.25 (1989). In support of this contention, he argues that the petitions were not verified and, therefore, the

trial court had no jurisdiction over the subject matter of this case. We agree.

Unless specifically provided for by rule or statute, it is unnecessary for pleadings to be verified or accompanied by an affidavit. N.C. Gen. Stat. § 1A-1, Rule 11(a) (1990). The pleading relevant to the termination of parental rights is a petition, and it is specifically provided by statute that "[t]he petition *shall be verified* by the petitioner . . . ." *Id.* § 7A-289.25 (1989) (emphasis added). A verified pleading "shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification, except as to those matters stated on information and belief, and as to those matters he believes them to be true." *Id.* § 1A-1, Rule 11(b) (1990). The specific procedure that must be followed in a termination of parental rights case is set forth in Article 24B, chapter 7A of the North Carolina General Statutes. *In re Allen*, 58 N.C. App. 322, 329, 293 S.E.2d 607, 612 (1982). The rules of Civil Procedure set forth in chapter 1A are not to be superimposed upon these cases, but nor should they be ignored. *Id.* Thus, because the procedure set forth in the termination of parental rights provisions requires a verified petition, and verification is not defined in chapter 7A, the requirements for verification established in chapter 1A, Rule 11(b) should determine whether the pleading has been properly verified.

The petitions in the present case were signed and notarized, the notarization reading "[s]worn and subscribed to before me this the 8th day of October, 1990." Our Supreme Court long ago established that such notarization is insufficient to constitute verification. *See Martin v. Martin*, 130 N.C. 27, 28, 40 S.E. 822, 822 (1902) (holding that the phrase "sworn and subscribed to" is defective as a verification). Thus, the petitions requesting the termination of Mr. Triscari's parental rights were not in compliance with the statute requiring them to be verified.

The petitioner contends that the failure to verify the petitions is not fatal to these proceedings. In support of this contention, she relies primarily on *Alford v. Shaw*, 327 N.C. 526, 398 S.E.2d 445 (1990). In that case, the plaintiff failed to properly verify the complaint in a shareholder derivative suit, as required by N.C. Gen. Stat. § 1A-1, Rule 23 (1990). The *Alford* Court, however, determined that the verification requirement was not jurisdictional in nature because the rule requiring verification addressed only the

procedure to be followed in, not the substantive elements of, the shareholder derivative suit. *Id.* at 531, 398 S.E.2d at 448. Rather, the *Alford* Court determined that the purpose of the verification requirement is to discourage "strike suits" by people interested in earning easy money by bringing charges against a corporation, without regard to the truth of those charges. *Alford*, 327 N.C. at 532, 398 S.E.2d at 448. Because that purpose had been met in the *Alford* case, as evidenced by the seven years of litigation, massive amounts of discovery, and four trips to the appellate division of our courts, the lack of verification was found not to be fatal to the bringing of a shareholder derivative suit. *Id.*

The shareholder derivative suit appears to be the only situation where a specific requirement that the pleadings be verified is not considered jurisdictional in nature. Actions for divorce also require a verified complaint, *see* N.C. Gen. Stat. § 50-8 (1987), and in such an action, verification is mandatory for jurisdiction. *Boyd v. Boyd*, 61 N.C. App. 334, 336, 300 S.E.2d 569, 570 (1983). Failure to properly verify a complaint in a divorce action is cause for dismissal because the verification is an "indispensable, constituent element[ ] of a divorce action." *Id.* at 335, 336, 300 S.E.2d at 570 (quoting *Eudy v. Eudy*, 288 N.C. 71, 74, 215 S.E.2d 782, 785 (1975)). In juvenile actions, the requirement that petitions be verified is "essential to both the validity of the petition and to establishing the jurisdiction of the court." *In re Green*, 67 N.C. App. 501, 504, 313 S.E.2d 193, 195 (1984).

We find that, like the verified pleadings in divorce and juvenile actions, verified petitions for the termination of parental rights are necessary to invoke the jurisdiction of the court over the subject matter. The court's lack of subject matter jurisdiction cannot be waived and can be raised at any time, including for the first time on appeal to this Court. *Id.* We hold, therefore, that the petitions in the present case were not properly verified and failed to invoke the jurisdiction of the court over the subject matter.

Because of our holding with regard to verification and jurisdiction, we find it unnecessary to address the respondent's remaining assignments of error.

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

Vacated.

Judges EAGLES and ORR concur.

NYE, MITCHELL, JARVIS & BUGG, A NORTH CAROLINA GENERAL PARTNERSHIP
v. JOYCE R. OATES, A/K/A JOYCE OATES THOMAS

No. 9214DC149

(Filed 2 March 1993)

1. **Rules of Civil Procedure § 60.1 (NCI3d)— consent judgment entered six years earlier—motion timely—lack of personal jurisdiction alleged**

Defendant's motion to set aside a consent judgment, although made more than six years after its entry, was not untimely, since it was based on the argument that the trial court did not have personal jurisdiction over her, and a judgment entered without personal jurisdiction over a party is void and may be attacked at any time.

Am Jur 2d, Judgments §§ 753, 765, 1081.

2. **Judgments § 399 (NCI4th)— consent judgment signed by attorneys—authority of attorneys at issue—question not addressed by trial judge—setting aside of consent judgment improper**

The trial court erred in setting aside a consent judgment against defendant on the ground that the court entering the consent judgment did not have jurisdiction over defendant, since the dispositive question was whether the attorneys who signed the consent judgment, representing themselves as the attorneys for defendant, had the authority to appear and approve a judgment on behalf of defendant, and the trial court did not address that issue, even though it was properly before that court.

Am Jur 2d, Judgments § 724.

Appeal by plaintiff from order entered 20 December 1991 in Durham County District Court by Judge Carolyn D. Johnson. Heard in the Court of Appeals 12 January 1993.

Nye, Phears & Davis, by William J. Wolf and C. Howard Nye, for plaintiff-appellant.

Poe, Hoof & Reinhardt, by G. Jona Poe, Jr., for defendant-appellee.

GREENE, Judge.

Plaintiff Nye, Mitchell, Jarvis & Bugg, a North Carolina general partnership, appeals from the trial court's order setting aside a consent judgment against defendant Joyce R. Oates.

Joyce R. Oates (Mrs. Oates) and Timothy E. Oates (Mr. Oates), an attorney, were married in 1970 and separated in 1981. On 3 March 1981, Mr. and Mrs. Oates deeded two condominium units to plaintiff. Mr. and Mrs. Oates were divorced on 5 August 1982.

At the time of the delivery of the deed to plaintiff, the plaintiff alleges that the parties agreed that the city and county ad valorem taxes on the two units for the year 1982 would be prorated between them. Plaintiff later learned that city and county ad valorem taxes for the years 1979, 1980, and 1981 had not been paid. Plaintiff paid the taxes for these years and also the full amount of the taxes for 1982. Plaintiff filed a complaint against Mr. and Mrs. Oates on 4 November 1983, seeking as damages the amount of the delinquent taxes plaintiff was forced to pay and the prorated share of the 1982 taxes which plaintiff alleges that Mr. and Mrs. Oates refused to pay. Plaintiff attempted to serve Mrs. Oates, but the summons and complaint were returned unserved and she was not subsequently served with process. On 27 June 1985, Mr. Oates and another attorney, B. J. Sanders (Sanders), signed a consent judgment, each signing as "Attorney for Defendants." Under the terms of the consent judgment Mr. Oates and Mrs. Oates agreed, jointly and severally, to pay plaintiff the sum of approximately $5,400.00. In that judgment the trial court found as a fact that "[t]his court has jurisdiction over all the parties . . . [to] this action." Mrs. Oates did not sign the consent judgment.

On 14 November 1991, Mrs. Oates filed a motion to set aside the judgment pursuant to N.C.G.S. § 1A-1, Rule 60(b)(4). In that motion she asserted that the trial court did not have personal jurisdiction over her and that she had not consented to the entry of the judgment. In support of her claim that she never consented to the judgment, Mrs. Oates presented her own and Mr. Oates'

affidavits denying that consent was ever given by Mrs. Oates to the attorneys who signed the consent decree on her behalf. The trial court set aside the judgment against Mrs. Oates after determining that the court entering the consent judgment "did not have jurisdiction over Joyce R. Oates because she was never served with the summons and complaint in the original cause and she never accepted service of process." The trial court made no determination on the question of whether the attorneys who signed the consent judgment on behalf of Mrs. Oates had authority to do so.

The issues presented are (I) whether defendant's Rule 60(b)(4) motion to set aside the judgment was timely filed; (II) whether the trial court correctly concluded that plaintiff's failure to serve defendant rendered the court without personal jurisdiction over defendant; and (III) whether the trial court erred in failing to address the issue of the authority of Mrs. Oates' attorneys to consent to the judgment.

I

[1] N.C.G.S. § 1A-1, Rule 60(b) provides, in pertinent part:

> (b) . . . . On motion and upon such terms as are just, the court may relieve a party or his legal representative from a final judgment, order, or proceeding for the following reasons:
>
> . . .
>
> (4) The judgment is void;
>
> . . .
>
> The motion shall be made within a reasonable time . . . .

N.C.G.S. § 1A-1, Rule 60(b) (1990). The requirement that the motion be made within a reasonable time is not enforceable with respect to motions made pursuant to Rule 60(b)(4) to set aside a judgment as void, "because a void judgment is a legal nullity which may be attacked at any time." *Allred v. Tucci*, 85 N.C. App. 138, 141, 354 S.E.2d 291, 294, *disc. rev. denied*, 320 N.C. 166, 358 S.E.2d 47 (1987); 7 James W. Moore & Jo Desha Lucas, *Moore's Federal Practice* ¶ 60.25[4] (2d ed. 1992).

Mrs. Oates' motion to set aside the consent judgment, although made more than six years after its entry, is based on the argument that the trial court did not have personal jurisdiction over her.

Because a judgment entered without personal jurisdiction over a party is void, *In re Finnican*, 104 N.C. App. 157, 161, 408 S.E.2d 742, 745 (1991), *cert. denied, disc. rev. denied*, 330 N.C. 612, 413 S.E.2d 800 (1992), *and overruled on other grounds by Bryson v. Sullivan*, 330 N.C. 644, 412 S.E.2d 327 (1992), Mrs. Oates' motion was not untimely.

II

It is undisputed that Mrs. Oates neither accepted service of process nor was served with process. Nothing else appearing, the trial court would be correct in setting aside the judgment because where there is no jurisdiction over the parties, the judgment is void. *Allred*, 85 N.C. App. at 142, 354 S.E.2d at 294. Because, however, there is an issue of whether she consented to the jurisdiction of the court, the fact that she was not served with process is not dispositive.

III

[2] If Mrs. Oates consented to the jurisdiction of the court "such consent operates to prevent the invalidity of the judgment on the ground of absence of jurisdiction over the person." 46 Am. Jur. 2d *Judgments* § 27 (1969); *see Swenson v. Thibaut*, 39 N.C. App. 77, 89, 250 S.E.2d 279, 287 (1978), *disc. rev. denied*, 296 N.C. 740, 254 S.E.2d 181 (1979). The fact that Mrs. Oates' signature does not appear on the consent judgment is not conclusive on the issue of her consent. There is a presumption that the attorneys, who signed the consent judgment and represented themselves to the court as the attorneys for Mrs. Oates, did so with authority and with her consent. *In re Certain Tobacco*, 52 N.C. App. 299, 302, 278 S.E.2d 575, 577 (1981). Unless this presumption is rebutted, the consent of the attorney to a judgment of the court precludes any challenge by the represented party to the validity of the judgment on the ground of absence of jurisdiction over the person. *See* 46 Am. Jur. 2d *Judgments* § 27. The party challenging the actions of the attorney as being unauthorized has the burden of rebutting the presumption, *Owens v. Voncannon*, 251 N.C. 351, 354, 111 S.E.2d 700, 702 (1959), and absent estoppel by that party, a determination by the trial court that the presumption is rebutted destroys the essential element upon which the validity of the judgment depends. *See Howard v. Boyce*, 254 N.C. 255, 263, 118 S.E.2d 897, 903 (1961). The party attacking the validity of a judgment for want of consent is not required to show a meritorious defense

as a prerequisite to vacating the judgment. *Howard*, 254 N.C. at 265, 118 S.E.2d at 905. Although "positive acts amounting to ratification, or unreasonable delay after notice, resulting in prejudice to innocent parties would under certain circumstances work an estoppel," mere lapse of time between the entry of the consent judgment and the motion to set it aside will not. *Id.* at 266, 118 S.E.2d at 905.

Accordingly, in this case the dispositive question is whether the attorneys who signed the consent judgment, representing themselves as the attorneys for Mrs. Oates, had the authority to appear and approve a judgment on behalf of Mrs. Oates. The trial court did not address that issue, even though it was properly before that court. This was error and requires reversal and remand for determination of this issue. *Lynch v. Lynch*, 74 N.C. App. 540, 543, 329 S.E.2d 415, 416-17 (1985).

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

CHRISTOPHER LEON JONES, PLAINTIFF v. SABRINA GWENDOLYN ENGLISH JONES, DEFENDANT

No. 915DC1307

(Filed 2 March 1993)

Divorce and Separation § 460 (NCI4th)— change of child custody— no notice to parties—not properly before court

The issue of primary custody of a child was not properly before the trial court where plaintiff's request for sole custody in his April 1990 motion did not contemplate or give notice of a possible change in custody because plaintiff already had primary custody and merely wanted to completely suspend defendant's visitation privileges; in his response to defendant's February 1991 motion plaintiff prayed for the relief requested in the April 1990 motion only as to child support; and defendant did not ask for a change of custody in her motion, but only moved to enforce her visitation rights. Because there was no motion for custody before the trial court, there was

no notice of a motion for custody as required by N.C.G.S. § 50-13.5(d)(1).

Am Jur 2d, Divorce and Separation §§ 1006, 1008.

Power of court, on its own motion, to modify provisions of divorce decree as to custody of children, upon application for other relief. 16 ALR2d 664.

Appeal by plaintiff from orders entered 2 May 1991 (*nunc pro tunc* for 19 April 1991) and 27 June 1991 (*nunc pro tunc* for 30 May 1991) by Judge Elton G. Tucker in Pender County District Court. Heard in the Court of Appeals 8 December 1992.

James K. Larrick for plaintiff-appellant.

Lanier & Fountain, by Lori A. Gaines, for defendant-appellee.

LEWIS, Judge.

This dispute arose in August 1987 when plaintiff-father filed for custody of his only child, Heather Beth Jones ("Beth"), alleging that she had been sexually abused by one of her mother's boyfriends. Primary custody of Beth had been given to her mother, defendant in this action, pursuant to a separation agreement. The court entered a temporary emergency order on the date of plaintiff's filing placing custody with plaintiff. Subsequent court orders placed custody with maternal and paternal grandparents on an alternating basis, and later only with paternal grandparents. In June 1988 plaintiff and defendant entered into a consent order awarding primary custody to plaintiff and secondary custody to defendant. The consent order stipulated that when defendant had custody of Beth she could not stay overnight with a boyfriend.

In April 1990 plaintiff filed a motion alleging that defendant was not fit to have any custody at all, due to overnight visits with boyfriends while Beth was in the house, and seeking suspension of her visitation rights. Defendant filed a response and countermotion. No hearing was held at this point, however, because defendant's attorney withdrew from the case due to a conflict of interest. In February 1991 defendant filed a motion for contempt and enforcement of visitation rights. She had previously orally agreed to suspend visitation as recommended by Dr. Nancy Peters, a child psychologist who had counselled Beth. The record indicates very serious problems were created by the mother's behavior. When

it appeared that visitation would be suspended indefinitely, defendant filed the motion to enforce visitation. Plaintiff responded to defendant's motion, incorporating the allegations of his April 1990 motion and requesting the relief prayed for in that motion as to child support.

Judge Tucker held a hearing on these motions, both plaintiff's April 1990 motion and defendant's February 1991 motion, and entered an order on 2 May 1991 modifying the consent order and changing primary custody from plaintiff to defendant due to a "substantial change in circumstances." Plaintiff appealed this order as well as the denial of his Rule 52, 59 and 62 post-trial motions. Plaintiff's petition for writ of supersedeas and motion for temporary stay were also denied.

Plaintiff brings forth two arguments on appeal. First, he argues the trial court improperly changed custody *ex mero motu*, because neither party had raised the issue of custody and plaintiff did not receive notice that custody would be an issue at the 2 May 1991 hearing. Second, plaintiff contends the trial court's judgment was not supported by competent findings of fact and conclusions of law.

N.C.G.S. § 50-13.7(a) provides that "an order of a court of this State for custody of a minor child may be modified or vacated at any time, upon motion in the cause and a showing of changed circumstances by either party or anyone interested." § 50-13.7(a) (1987). Furthermore, a party is entitled to 10 days notice of a motion for custody in a pending action. § 50-13.5(d)(1) (Cum. Supp. 1992).

The case of *Clayton v. Clayton*, 54 N.C. App. 612, 284 S.E.2d 125 (1981), is instructive on this issue. In that case defendant husband filed a restraining order to prevent plaintiff, his former wife, from taking their child out of the state. Plaintiff had primary custody of the child at the time. Questions were raised concerning service of the temporary restraining order upon the plaintiff. On the day the order was left at her primary residence, plaintiff and the child left the state to move to Oklahoma. The trial court found that plaintiff had been properly served and awarded temporary custody to defendant. Plaintiff appealed to this Court after denial of her Rule 60 motion for appropriate relief based on insufficient notice and service. 54 N.C. App. at 613-14, 284 S.E.2d at 126.

This Court reversed the trial court, holding that the order changing custody was in error. Defendant's petition only alleged potential violations of his visitation rights; he did not ask for a change in custody. Thus, the petition and restraining order were inadequate notice of a change in custody under N.C.G.S. § 50-13.5(d)(1). The Court noted that "[b]efore divesting plaintiff of custody of her son, she was entitled to the notice set forth in the statute." 54 N.C. App. at 614, 284 S.E.2d at 127.

We will consider what issues were raised in the motions before Judge Tucker at the time of the hearing to determine whether primary custody was in issue and whether adequate notice was given. In his order, Judge Tucker recites that the hearing was held "upon Motion filed by Plaintiff on April 20, 1990 wherein the Plaintiff sought among other things that the Defendant's rights for visitation be suspended, and Motion filed by Defendant on February 22, 1991 wherein Defendant sought to enforce visitastion [sic] rights and such other relief as the Court deemed just and proper."

In his April 1990 motion plaintiff requested that he be awarded sole custody of Beth, that the court determine defendant was not fit, proper or suitable to have custody, that defendant's visitation rights be suspended, and that defendant pay child support to plaintiff. In her February 1991 motion, defendant asked the court to find plaintiff in contempt for failure to abide by the consent order, and asked the court to award reasonable attorney's fees and order reasonable visitation. Plaintiff's response incorporated by reference his motion filed in April 1990, and requested that defendant's motions be denied, and that he be granted the relief prayed for in the April 1990 motion as to child support.

We find that the issue of primary custody was not properly before the trial court. Plaintiff's request for sole custody in his April 1990 motion did not contemplate or give notice of a possible change of custody, because plaintiff already had primary custody. He merely wanted to completely suspend defendant's visitation privileges. Furthermore, in his response to defendant's February 1991 motion plaintiff prayed for the relief requested in the April 1990 motion only *as to child support*. Decisively, in her motion defendant did not ask for a change of custody, but only moved to enforce her visitation rights. Because there was no motion for custody before the trial court, there was no notice of a motion

for custody as required by § 50-13.5(d)(1). Neither party knew the trial court would be deciding the issue of primary custody. The hearing revolved around defendant's visitation rights, as the trial judge indicated in the first paragraph of his judgment.

Because we are reversing the judgment of the trial court, we find it unnecessary to address plaintiff's other argument. We remand with instructions to reinstate plaintiff's custody and for further proceedings as may be appropriate.

Reversed and remanded.

Judges WELLS and EAGLES concur.

PHILLIP AMERSON AND JANET BROWN AMERSON, PLAINTIFFS v. BRUCE LAVON WILLIS AND DENARD THURMAN POTTER, DEFENDANTS

No. 913SC985

(Filed 2 March 1993)

Damages § 42 (NCI4th)— damaged vehicle—no ownership interest—lost profits recoverable

Plaintiff was not required to prove that he held an actual ownership interest in the damaged vehicle in order to recover for lost profits due to loss of use; rather, it was sufficient that he had the vehicle in his possession at the time of the accident, and that he normally used it in the course of his business with the permission of its owner, his wife.

Am Jur 2d, Damages §§ 624, 636.

Appeal by defendants from judgment and order entered 10 May 1991 by Judge Herbert O. Phillips, III in Craven County Superior Court. Heard in the Court of Appeals 17 November 1992.

Ward, Ward, Willey & Ward, by J. Michael Mills, for plaintiffs-appellees (brief filed and signed by former counsel James C. Mills).

Ward and Smith, P.A., by Kenneth R. Wooten and Leigh A. Allred, for defendants-appellants.

LEWIS, Judge.

On 28 March 1989 a tractor trailer dump truck operated by defendant Willis and owned by defendant Potter tipped over onto its side and hit a ten-wheel spreader body truck operated by plaintiff Phillip Amerson. At the time of the accident the spreader truck was owned by and titled in the name of plaintiff Janet Amerson, Phillip Amerson's wife. Plaintiff husband used this truck in his lime-fertilizer spreading business. The cab of the truck was destroyed, but the spreader body of the truck was not damaged. Plaintiff immediately began searching for a suitable truck to rent. Upon learning that there were no available rental trucks, he began searching for a replacement truck on which he could attach the undamaged spreader. Plaintiff was unable to locate a replacement truck until sometime prior to 27 April 1989. Plaintiff kept a record of those days on which he could have been working had a truck been available, and testified at trial as to how much money he could have made on each of those days.

On 18 July 1989 plaintiffs filed suit against defendants, alleging negligence and seeking monetary relief for the damage to the truck and for Phillip Amerson's lost profits. In their answer defendants claimed Phillip Amerson should be dismissed as a party because he had no ownership interest in the vehicle, denied negligence, and alleged contributory negligence. The jury found defendants negligent and plaintiffs free from contributory negligence. On 24 January 1991 the jury awarded plaintiff wife $7,500 for damage to her personal property, and awarded plaintiff husband $9,500 for lost profits. On 10 May 1991 the trial judge entered judgment according to the verdict. Defendants appeal on the issue of damages for lost profits, claiming that only someone with an ownership interest may recover for lost profits due to damage to personal property. After reviewing the relevant cases, we conclude that plaintiff properly recovered damages for lost profits.

In *Reliable Trucking Co. v. Payne*, 233 N.C. 637, 65 S.E.2d 132 (1951), our Supreme Court noted that lost profits are recoverable if they are the "direct and necessary result of the defendant's wrongful conduct," and can be shown with "a reasonable degree of certainty." *Id.* at 639, 65 S.E.2d at 133. Loss of use of a business vehicle may be the basis of a claim for lost profits. *See Roberts v. Pilot Freight Carriers, Inc.*, 273 N.C. 600, 160 S.E.2d 712 (1968). If the vehicle is totally destroyed or parts are unavailable, the

damaged party must purchase another vehicle as soon as possible. *Id.* at 606, 160 S.E.2d at 717. Damages for loss of use may be recovered only for that period reasonably necessary to acquire another vehicle. *Id.* Usually, recovery is limited to the cost of renting a substitute vehicle while the damaged vehicle undergoes repairs. *Id.* at 607, 160 S.E.2d at 718. However, if no substitute vehicle is located, damages for lost profits may be available providing two prerequisites are met: (1) plaintiff must show he or she made a reasonable effort to obtain a substitute vehicle in the interim, and (2) plaintiff must show such vehicle was not available "in the area reasonably related to his [or her] business." *Id.*

Appellants point to several cases as support for their position that an actual ownership interest in the vehicle is required before recovery for lost profits is allowed. *See Ponder v. Budweiser of Asheville, Inc.*, 30 N.C. App. 200, 226 S.E.2d 539, *disc. rev. denied*, 291 N.C. 176, 229 S.E.2d 690 (1976) (in personal injury suit corporation's lost profits not recoverable by driver/shareholder where question of proximate cause existed); *Ling v. Bell*, 23 N.C. App. 10, 207 S.E.2d 789 (1974) (plaintiff could recover for loss of use of vehicle owned by him but usually operated by his wife); *Gillespie v. Draughn*, 54 N.C. App. 413, 283 S.E.2d 548 (1981), *disc. rev. denied*, 304 N.C. 726, 288 S.E.2d 805 (1982) (plaintiff failed to meet burden of proof for loss of use damages, because he failed to show that he was the owner, that the vehicle could have been promptly repaired, and that the cost of a substitute vehicle was $20 per day). None of these cases directly addresses the issue, and none of them hold that an ownership interest is necessary for recovery of lost profits due to loss of use of a vehicle.

Appellants also look to *American Jurisprudence 2d* for support, citing it for the proposition that ownership or some legal interest is required. 22 Am. Jur. 2d, *Damages*, § 443 (1988). However, that source states that an ownership or possessory interest can be a basis for loss of use damages. *Id.* Clearly, Phillip Amerson had a possessory interest in the vehicle. At the time of the accident he was using it in his lime-fertilizer spreading business. It is not disputed that he had his wife's permission to do so. Moreover, Phillip Amerson's use of the truck was to his wife's benefit since it enabled him to work and produce income.

We hold that plaintiff was not required to prove that he held an actual ownership interest in the damaged vehicle in order to

recover for lost profits due to loss of use. It was sufficient that he had the vehicle in his possession at the time of the accident, and that he normally used it in the course of his business with the permission of its owner, his wife. The judgment of the trial court is

Affirmed.

Judges WELLS and EAGLES concur.

ELIJAH TOM TURNAGE, GUARDIAN AD LITEM FOR THOMAS PAUL TURNAGE, AND ELIJAH TOM TURNAGE, INDIVIDUALLY, PLAINTIFF v. NATIONWIDE MUTUAL INSURANCE COMPANY, DEFENDANT

No. 913SC995

(Filed 2 March 1993)

Costs § 35 (NCI4th)— defense by UM carrier—liability for attorney's fees and costs

An uninsured motorist carrier which defended the uninsured motorist in a tort action pursuant to N.C.G.S. § 20-279.21(b)(3)a may be required to pay attorney's fees under N.C.G.S. § 6-21.1 and other costs in the action even though not named a defendant since the UM carrier was a party to the action pursuant to N.C.G.S. § 20-279.21(b)(3)a though not named in the caption of the pleadings.

Am Jur 2d, Automobile Insurance § 311.

Appeal by defendant from order granting plaintiff's motion for summary judgment entered 22 July 1991 by Judge G. K. Butterfield in Craven County Superior Court. Heard in the Court of Appeals 17 November 1992.

Hiram J. Mayo, Jr. for plaintiff-appellee.

LeBoeuf, Lamb, Leiby & MacRae, by Peter M. Foley and Stephanie Hutchins Autry, for defendant-appellant.

LEWIS, Judge.

The question presented by this appeal is whether or not under these facts an uninsured motorist carrier is liable for attorney's fees and costs in tort actions though not a named defendant in those tort actions. We answer in the affirmative.

The plaintiff, individually and as guardian ad litem for his son, brought tort actions against Phines James McDowell for bodily injuries and for medical bills. Thomas Paul Turnage, who was a minor at the time, was involved in an automobile accident with McDowell, an uninsured motorist. Thomas Paul Turnage and his father Elijah Tom Turnage were insured under a policy by Nationwide Mutual Insurance Company (hereinafter "Nationwide"). This policy provided uninsured motorist coverage ("UM") with limits of $50,000.00 per person, $100,000.00 per accident.

Nationwide defended McDowell in the tort actions pursuant to N.C.G.S. § 20-279.21 (Cum. Supp. 1992). The jury found for plaintiff and awarded damages for both the personal injuries and the resulting medical bills. Plaintiff also sought to recover his attorney's fees under N.C.G.S. § 6-21.1 (1986). On 19 September 1990 Judge Herbert O. Phillips, III entered an order allowing the plaintiff to recover his attorney's fees and costs.

Nationwide paid the damages ordered by the court in the tort actions, but refused to pay the attorney's fees and costs. Therefore, on 8 November 1990 plaintiff brought a declaratory action against Nationwide, seeking a ruling that the defendant was liable for the fees and costs assessed against it in the tort actions. Both parties in the action filed motions for summary judgment with the court. The trial court denied defendant's motion and granted the plaintiff's motion. The defendant appeals.

Defendant argues that the policy it issued to the Turnages—policy number 61 J 307239—controls the disposition of this case. Defendant's argument focuses on a rather narrow and literal reading of the language of the policy. In the "Liability Coverage" section of the policy, Nationwide specifically agreed to pay for costs incurred in the defense of suits seeking damages for bodily injury or property damage. However, no such language exists in the "Uninsured Motorist Coverage" section. Nationwide contends the contract obligates it only for "damages which a covered person is legally entitled to recover."

Further, defendant argues, the UM section of the policy does not include a "Supplementary Payments" provision as does the liability section. "Supplementary payments" include other costs additional to its limit of liability such as bail bonds and premiums on appeal bonds, interest, loss of earnings up to $50.00 a day, emergency first aid expenses to others at the accident, and other reasonable expenses. Defendant argues that because the UM section includes neither this provision nor the language obligating it to pay costs, the parties clearly did not intend that Nationwide be liable for anything other than damages in a UM action.

Nationwide argues that it is the language of the policy and the underlying intention of the parties that are controlling, not N.C.G.S. § 6-21.1. This statute allows attorney's fees to be awarded in "suit[s] against an insurance company under a policy issued by the *defendant insurance company* and in which the insured or beneficiary is the plaintiff." N.C.G.S. § 6-21.1 (1986) (emphasis added). Nationwide contends that it was not a defendant in the tort actions, and therefore attorney's fees pursuant to N.C.G.S. § 6-21.1 cannot be assessed against it.

In this case Nationwide utilized N.C.G.S. § 20-279.21(b)(3)a to provide a defense to the uninsured defendant. Under that statute, an insurer, if given proper notice, "shall be a party to the action between the insured and the uninsured motorist though not named in the caption of the pleadings and may defend the suit in the name of the uninsured motorist or in its own name." N.C.G.S. § 20-279.21(b)(3)a (Cum. Supp. 1992). It is clear to us that Nationwide was indeed a party, and can properly be characterized as a defendant de facto and de jure, though *unnamed*. The trial court did not err when it held that N.C.G.S. § 6-21.1 applies and controls this case. Defendant contends that it was error for the trial court to hold it responsible for fees, costs, and interest because the order held "the Defendant" liable therefor. We reiterate that pursuant to N.C.G.S. § 20-279.21(b)(3)a Nationwide was a party in the tort actions, although unnamed. Nationwide was not required to defend the lawsuit, but chose to do so, and by so doing became a defendant.

The award of attorney's fees under N.C.G.S. § 6-21.1 is discretionary with the trial judge, and such an award will not be overturned absent a showing of abuse. *Whitfield v. Nationwide Mut. Ins. Co.*, 86 N.C. App. 466, 358 S.E.2d 92 (1987). Even though the trial judge erroneously concluded in his order that Nationwide

was *not* a defendant in the tort actions, this cannot be construed as an abuse of discretion. We therefore, for the foregoing reasons, uphold the trial court's award of attorney's fees and costs against Nationwide.

Affirmed.

Judges WELLS and EAGLES concur.

RUTH A. EURY v. NATIONWIDE MUTUAL INSURANCE COMPANY

No. 9220SC170

(Filed 2 March 1993)

Insurance § 1140 (NCI4th)— underinsured motorist coverage— ownership of vehicle—evidence insufficient to determine— summary judgment improper

The trial court erred by granting summary judgment for defendant in a declaratory judgment action to establish rights to underinsured motorist coverage where plaintiff was injured while riding in an automobile driven by her husband and insured by a policy issued by defendant to herself and her husband. Although plaintiff argues that the language of the policy does not exclude her from coverage because only those vehicles which are jointly owned by the named insured and the named insured's spouse are excluded from coverage, it could not be determined from the record whether the vehicle was owned by the plaintiff individually, by the plaintiff's husband (Mr. Eury) individually, by plaintiff and Mr. Eury jointly, or by someone else. Assuming that plaintiff has stated a viable claim, summary judgment is inappropriate because a material fact necessary to the plaintiff's claim remains in issue.

Am Jur 2d, Automobile Insurance § 322.

Appeal by plaintiff from judgment filed 30 December 1991 by Judge William H. Helms in Union County Superior Court. Heard in the Court of Appeals 14 January 1993.

On 16 August 1990 Nationwide Mutual Insurance Company issued to the plaintiff and her husband, Donald Eury, a personal automobile liability insurance policy. The policy provided coverage for four vehicles, including a 1983 Chevrolet pickup truck, with limits of $50,000 liability for bodily injury to one person and $50,000 underinsured motorist (UIM) coverage for bodily injury to one person.

On 7 October 1990 plaintiff was riding as a passenger in the 1983 Chevrolet truck driven by Mr. Eury and insured by Nationwide. Mr. Eury failed to stop and yield the right of way at a stop sign on rural road 1758 and collided with another car. Plaintiff alleged that she received "extremely serious and permanent physical injuries" in the accident which "would exhaust the limits of all of the coverages under the [Nationwide] policy. . . ." At the time of the collision the premiums had been paid and the Nationwide policy was in full force and effect.

Plaintiff demanded that Nationwide pay "underinsured motorist coverage to her in excess of the $50,000 limit for bodily injury liability coverage" for her damages. Nationwide refused. Plaintiff then filed this declaratory judgment action to establish her rights to underinsured motorist coverage. Plaintiff has also filed suit against Mr. Eury to recover for her personal injuries. That action is pending in Union County Superior Court. On 9 September 1991 and 11 December 1991, respectively, Nationwide and plaintiff filed motions for summary judgment. On 20 December 1991 the trial court signed an order allowing summary judgment in favor of the defendant. The order provided in part:

> [T]he Court finds that the insurance policy issued by the Defendant does not provide underinsured motorist coverage to the Plaintiff in connection with the automobile accident of October 7, 1990 involving Plaintiff and her husband Donald E. Eury (currently the subject of a Union County Superior Court Civil action entitled Ruth A. Eury vs. Donald E. Eury, 91-CVS-631) and Plaintiff's Complaint in this action is hereby dismissed with prejudice.

From entry of summary judgment, plaintiff appeals.

Smith, Follin & James, by J. David James and Norman B. Smith, for the plaintiff-appellant.

Baucom, Claytor, Benton, Morgan, Wood & White, P.A., by Rex C. Morgan, for the defendant-appellee.

EAGLES, Judge.

Plaintiff first argues that the trial court erred by denying her motion for summary judgment and entering summary judgment in favor of the defendant. Specifically, plaintiff argues that the specific terms of defendant's insurance policy do not exclude her from UIM coverage and that North Carolina's UM/UIM statutes provide her with UIM coverage.

> Summary judgment should be granted when a party establishes that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56 of the Rules of Civil Procedure; *Ipock v. Gilmore*, 73 N.C. App. 182, 326 S.E.2d 271, *disc. rev. denied*, 314 N.C. 116, 332 S.E.2d 481 (1985).

Ward v. Turcotte, 79 N.C. App. 458, 459-60, 339 S.E.2d 444, 446 (1986).

Plaintiff argues that the language of Nationwide's insurance policy does not exclude her from coverage because "[t]hat language can only be read as excluding from the definition of an uninsured motor vehicle [which includes an underinsured motor vehicle] those vehicles which are owned jointly by the named insured and the named insured's spouse."

Plaintiff next argues that she is afforded coverage pursuant to G.S. § 20-279.21(b)(3). That statute provides, in part, "[t]he term 'uninsured motor vehicle' shall not include: a. A motor vehicle owned by the named insured. . . ." Plaintiff contends that because defendant's policy lists both her and her husband as the named insured, that the statutory exclusion from coverage would require a vehicle to be jointly owned by both her and her husband.

We are unable to discern, from the record before us, whether the vehicle in question is owned by the plaintiff individually, by Mr. Eury individually, by the plaintiff and Mr. Eury jointly, or by someone else. In this record there is no automobile certificate of title and no stipulation, admission or similar proof to establish who owns the vehicle in question. Assuming *arguendo*, that the plaintiff has asserted a viable claim, summary judgment is inappropriate because a material fact necessary to the plaintiff's claim remains in issue. Accordingly, we must reverse the trial court's order of summary judgment and remand for appropriate proceedings below.

Reversed and remanded.

Judges ORR and WYNN concur.

BEVERLY PRESSLEY COSTON, PLAINTIFF v. DAVID FRANK COSTON, DEFENDANT

No. 9125DC1275

(Filed 2 March 1993)

1. **Divorce and Separation § 165 (NCI4th)— equitable distribution—distributive award—amount of interest on note**

The trial court did not err in an equitable distribution action by assigning a ten per cent interest rate to a note securing cash payments. The order which the parties signed and designated as a binding contract for the division of property included language which plainly constituted an agreement granting the trial court the power to set whatever interest rate it found supported by the evidence. There was ample evidence to support the court's findings and conclusions on this issue in the testimony of the manager of the Clyde Savings Bank. Although defendant complains that the court did not consider evidence of different interest rates, defendant did not present any evidence from which the court could find a different rate.

Am Jur 2d, Divorce and Separation § 931.

Divorce: Equitable distribution doctrine. 41 ALR4th 481.

2. **Divorce and Separation § 166 (NCI4th)— equitable distribution—distributive award—use of lien to secure payment—rights of third parties**

The trial court did not err in an equitable distribution action in which plaintiff was given a distributive cash award by ordering defendant to obtain a release from his parents of their right of first refusal sufficient to insure plaintiff a first deed of trust and first lien of record on the residence. Although the court was powerless to enter an order binding people who were not parties to the action, defendant had stated at the hearing that he believed his parents would agree to

subordinate their rights to plaintiff and the court merely ordered defendant to take steps which he believed he was capable of taking. Plaintiff may seek further relief if defendant is unable to comply with the judgment.

Am Jur 2d, Divorce and Separation § 934.

Appeal by defendant from judgment entered 29 August 1991 by Judge Donald Fred Coats in Henderson County District Court. Heard in the Court of Appeals on 3 December 1992.

Plaintiff, Beverly Coston, filed complaints for absolute divorce and equitable distribution. On 24 September 1990, judgment was entered awarding plaintiff a divorce and reserving equitable distribution for a hearing at a later date. Prior to the equitable distribution hearing, the parties agreed on how to divide all of the marital property. However, the parties did not agree on the method of distribution of a distributive cash award to plaintiff in the amount of one hundred thousand dollars ($100,000.00). The method of distribution was left for determination by the court.

On 22 July 1991 the judge entered an order which the parties signed and designated as a binding contract for the division of property as provided for by N.C. Gen. Stat. § 50-20. The order preserved one issue for hearing, that being the time and manner in which plaintiff would receive the distributive award, including whether it would bear interest, and if so in what amount. Both parties signed the order, signifying their consent to its provisions. The final judgment ordered defendant to pay fifty thousand dollars ($50,000.00) in lump sum to plaintiff, to execute a promissory note bearing ten percent (10%) interest for the remainder, and to give plaintiff a first deed of trust on the defendant's primary residence. From this judgment defendant appeals.

Robert E. Riddle, P.A., by Robert E. Riddle, for plaintiff appellee.

Prince, Youngblood, Massagee & Jackson, by Boyd B. Massagee, Jr. and Sharon B. Ellis, for defendant appellant.

ARNOLD, Chief Judge.

[1] Defendant first assigns error to the ten percent interest rate assigned to the note. Defendant argues that the trial court cannot set an interest rate higher than the legal rate of eight percent

codified at N.C. Gen. Stat. § 24-1 (1991). Most of the cases cited by defendant involve actions for breach of contract. We are not concerned here with a breach of contract, but the reasoning from those cases applies to this case. In *Interstate Equip. Co. v. Smith*, 292 N.C. 592, 234 S.E.2d 599 (1977), our Supreme Court stated: "In the absence of an agreement, the injured party is entitled to interest at the legal rate . . . ." *Interstate*, 292 N.C. at 602, 234 S.E.2d at 604. Implicit in this statement is the idea that if the parties do have an agreement concerning interest, that agreement will control. Such is the case here. The order entered 22 July 1991 states in reference to the distributive award:

> 6. The time of making the payment of the $100,000.00 and whether or not this is to be by cash due at this time, or paid over a period of time (and if so upon what terms, whether or not the obligation bears interest and if so at what rate, and the amount of such payments), is to be determined by the court.
>
> 9. On the 25th day of July, 1991 . . . the court shall receive evidence and argument from the parties as to how the Plaintiff shall receive the distributive award . . . .
>
> 13. The parties stipulate that their signature upon this order shall also constitute the same as a binding contract for the division of property . . . .

Plainly this language constituted an agreement granting the trial court the power to set whatever interest rate it found supported by the evidence. Because defendant agreed to let the trial court set the rate of interest, he cannot on appeal argue that the trial court lacked authority to set the interest rate above the legal rate.

Defendant also contends that the court's decision was not supported by the evidence and was an abuse of discretion. After examining the transcript, we find ample evidence in the testimony of plaintiff's witness, the manager of Clyde Savings Bank, to support the trial judge's findings and conclusions on this issue. Defendant complains that the court erred in not considering evidence of different interest rates, but defendant did not present any evidence from which the court could find a different rate. For these reasons, we hold that the trial judge did not err or abuse his discretion in ordering the promissory note to bear interest at ten percent.

[2] Defendant also claims the judgment must be reversed because it affects the rights of third parties who were not subject to the jurisdiction of the court. As part of the judgment, defendant was ordered to give plaintiff a first priority deed of trust on the defendant's primary residence. To accomplish this end, the judgment ordered defendant to obtain a release from his parents of their right of first refusal sufficient to ensure plaintiff of a first deed of trust and first lien of record on the residence.

Unquestionably the court was powerless to enter an order binding people who were not parties to the action. However, that is not the situation before us. At the hearing, in response to a question by the court, defendant stated that he believed his parents would agree to subordinate their rights to plaintiff. Based on this admission, the court entered its judgment. The court did not attempt to bind the parents by its judgment. It merely ordered defendant to take the steps he believed he was capable of taking to ensure first priority for plaintiff's deed of trust. If defendant is unable to comply with the judgment, plaintiff may seek further relief. We find no reversible error in the judgment.

Affirmed.

Judges COZORT and GREENE concur.

RICHARD SCHUMACHER, PLAINTIFF/APPELLANT v. MARY ELIZABETH SCHUMACHER, DEFENDANT/APPELLEE

No. 9128DC1303

(Filed 2 March 1993)

Courts § 107 (NCI4th)— district court—civil motion session—trial on merits—absence of jurisdiction

A district court judge had no jurisdiction to hold a trial on the merits at a civil motion session.

Am Jur 2d, Courts § 87; Trial § 60.

Appeal by plaintiff from judgment entered 30 August 1991 by Judge Shirley H. Brown in Buncombe County District Court. Heard in the Court of Appeals 8 December 1992.

Robert E. Riddle, P.A., by Robert E. Riddle, for plaintiff/appellant.

Marvin P. Pope, Jr., P.A., by Marvin P. Pope, Jr., for defendant/appellee.

LEWIS, Judge.

Plaintiff filed a civil summons and complaint against defendant on 10 June 1991 seeking a judgment of absolute divorce and modification of child support previously set forth in a separation agreement. In her answer defendant counterclaimed for anticipatory breach of the separation agreement and asserted that only upward modification of child support payments was permissible. After several continuances and extensions of time, a hearing was held on 26 and 27 August 1991. The parties stipulated that "the August 27-28, 1991 session of the District Court Division of the General Court of Justice, Buncombe County, was properly organized to hear civil motions. . . ." Both parties testified and submitted exhibits at the hearing.

The court rendered judgment on 30 August 1991, finding that the amount of child support set forth in the separation agreement was reasonable and ordering plaintiff to pay money withheld from previous support payments. The judgment does not address the parties' mutual requests for absolute divorce. Defendant's attorney explains in his brief that he "accidentally" forgot to include the divorce findings of fact, conclusions of law and order of absolute divorce when he prepared the order.

Plaintiff appeals the amount of his support obligation, the award of clothing expenses and back child support, and the failure of the judge to enter a judgment of absolute divorce. Most importantly, plaintiff challenges the authority of the district judge to hold a trial on the merits when only authorized to conduct a civil motions session. We will address the latter issue first.

Plaintiff correctly points out that in this case the district judge was only authorized to hear civil motions, and the parties have so stipulated. Page one of the Record states that this case came before "the Honorable Shirley H. Brown, District Court Judge presiding at the August 27-28, 1991 Buncombe County District Court

#3 Civil Session, a motion term, pursuant to plaintiff's motion for modification of child support. . . ."

The district judges have the powers set forth in the General Statutes and are subject to the supervision of the chief district judge. It is the duty of the chief district judge, among other things, to arrange the schedules of the district judges, and assign them to sessions of district court, arrange the calendaring of noncriminal matters for trial. N.C.G.S. § 7A-146(1), (2) (Cum. Supp. 1992). According to N.C.G.S. § 7A-190,

> [t]he district courts shall be deemed always open for the disposition of matters properly cognizable by them. But all trials on the merits shall be conducted at trial sessions regularly scheduled as provided in this Chapter.

N.C.G.S. § 7A-190 (1989). A district judge has the authority to hear motions and enter interlocutory orders in "causes regularly calendared for trial or for the disposition of motions, at any session to which the district judge has been assigned to preside." N.C.G.S. § 7A-192 (1989).

Although it is clear from section 7A-192 that a judge may hear motions at any scheduled session of court, it is unclear whether the converse is true: whether a judge may conduct a trial at a session specifically designated only for civil motions. We note that the language of section 7A-190 is unambiguous: "all trials on the merits shall be conducted at *trial sessions* regularly scheduled as provided in this Chapter." § 7A-190 (emphasis added). No matter how broadly we interpret the word "session," as defendant urges, we cannot ignore the preceding word "trial" in the statute. From the evidence before us, we can only conclude that the trial was not conducted during a trial session of the district court.

Furthermore, we note the General Assembly specifically addressed the issue of pending motions and bestowed the authority to hear such motions upon district judges "at any session to which the district judge has been assigned to preside." § 7A-192. We believe the General Assembly would have specifically stated if they intended to authorize district judges to conduct trials at motion sessions. Though all parties may consent, jurisdiction cannot be conferred.

We conclude that it was improper for the district judge to have held a trial on the merits at a civil motion session. It is

unnecessary to address plaintiff's other arguments since this issue is dispositive. Because the judge had no jurisdiction, the judgment is void. *See Stroupe v. Stroupe*, 301 N.C. 656, 273 S.E.2d 434 (1981).

Vacated and remanded.

Judges WELLS and EAGLES concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 2 MARCH 1993

BOWEN v. PINNIX No. 9121DC1310	Forsyth (89CVD4000)	Affirmed
BOYD v. BOYD No. 9217DC24	Surry (90CVD786)	Dismissed
IN RE HOPKINS No. 913DC850	Pitt (88J11) (88J103)	Affirmed
JOHNSON v. CLARK No. 9221SC117	Forsyth (90CVS2678)	Affirmed
JOHNSON v. COMER No. 9218SC290	Guilford (90CVS6956)	New Trial
LAW BUILDING OF ASHEBORO, INC. v. CITY OF ASHEBORO No. 9119SC1256	Randolph (90CVS1213)	Dismissed
PERFORMANCE CHEVROLET v. MANSOUR No. 9215SC147	Orange (90CVS00876)	Affirmed
SERVPRO INDUSTRIES, INC. v. BULLINGTON No. 915SC1191	New Hanover (90CVS3937)	Affirmed
SPARROW v. ALEXANDER No. 9127SC1025	Cleveland (90CVS174)	Affirmed
STATE v. McKOY No. 9212SC34	Cumberland (90CRS3780) (90CRS3781) (90CRS3782)	Vacated & remanded with instructions
STATE v. SIMMONS No. 914SC887	Onslow (90CRS19061)	No Error
STATE v. WHITLEY No. 9118SC1136	Guilford (90CRS72684)	No Error
TAYLOR v. BAKER No. 9226DC181	Mecklenburg (90CVD9234)	Reversed

BARBARA SIMPSON, EXECUTRIX OF THE ESTATE OF WILLIAM SIMPSON, M.D. v. HATTERAS ISLAND GALLERY RESTAURANT, INC. v. WILLIE R. ETHERIDGE SEAFOOD CO., INC.

No. 9227SC51

(Filed 16 March 1993)

1. **Food § 1 (NCI3d)— tuna eaten in restaurant—death from poisoning—implied warranty of merchantability—breach by tuna supplier**

The evidence in a wrongful death action was sufficient to support the jury verdict finding that defendant tuna supplier breached its implied warranty of merchantability when it sold tuna to a restaurant where it tended to show that decedent became ill after eating tuna at the restaurant; decedent died as a result of scombroid fish poisoning, which results from elevated levels of histamine in the scombroid fish family; an autopsy revealed no other explanation for decedent's death; the restaurant purchased the tuna from defendant supplier in the form of four loins; the histamine level in tuna immediately after it is caught is not above one milligram per 100 grams of fish tissue; a level of ten milligrams or more of histamine per 100 grams of fish is an indication that the fish has been temperature abused and mishandled; the restaurant stored, handled, and prepared the tuna properly; after decedent's death, three tuna loins remained in the refrigeration units of the restaurant; and the histamine levels of those loins were 4.16, 7.96 and 13.73 milligrams per 100 grams of fish.

Am Jur 2d, Food §§ 84, 89, 93-96, 100, 103, 105.

Liability for injury or death allegedly caused by spoilage, contamination or other deleterious condition of food or food product. 2 ALR5th 1.

2. **Indemnity § 2 (NCI4th)— death from tuna poisoning—no negligence by restaurant or supplier—failure to submit indemnity issue—harmless error**

In an action for wrongful death allegedly caused by poisoning from tuna consumed in defendant restaurant, the trial court's failure to instruct and submit an issue on defendant restaurant's claim against defendant tuna supplier for indemnity with respect to the issue of negligence was harmless where

the jury found no negligence by either defendant and thus would not have reached the issue of indemnity.

Am Jur 2d, Indemnity §§ 15 et seq.

Validity, construction, and effect of agreement, in connection with real estate lease or license by railroad, for exemption from liability or for indemnification by lessee or licensee for consequences of railroad's own negligence. 14 ALR3d 446.

Subrogation of employer's liability insurer to employer's right of indemnity against negligent employee. 55 ALR3d 631.

3. **Food § 3 (NCI3d)— death from tuna poisoning—implied warranty of merchantability—breach by restaurant and supplier—primary and secondary liability—restaurant's right to indemnity by supplier**

In an action for wrongful death allegedly caused by poisoning from tuna eaten in defendant restaurant, defendant restaurant was entitled to indemnification from defendant tuna supplier as a matter of law, and the trial court did not err in failing to submit a separate issue to the jury on indemnification with regard to defendant's breach of warranty of merchantability, where the jury found that both the restaurant and the tuna supplier breached the warranty of merchantability of the tuna; the jury found that the restaurant was not negligent in preparing the tuna and thus effectively found that the restaurant had not tampered with or contaminated the tuna in any way; the liability of the restaurant is analogous to the liability of a retailer selling a product in a sealed container; any breach by the restaurant necessarily derives from the supplier's original breach; and the breach of warranty by the supplier is primary and that of the restaurant is secondary.

Am Jur 2d, Food § 97; Indemnity §§ 19, 20, 25.

Products liability: seller's right to indemnity from manufacturer. 70 ALR4th 278.

4. **Limitations, Repose, and Laches § 150 (NCI4th)— addition of party defendant—motion to amend before limitation expired—ruling on motion after expiration**

Plaintiff's wrongful death action against a food supplier was not barred by the two-year statute of limitations where

plaintiff filed a motion to amend the complaint to add the supplier as a defendant within the two-year period but the motion was heard and allowed after the limitation period had expired, since the relevant date for measuring the statute of limitations is the date of the filing of the motion to amend, not the date the court rules on that motion.

Am Jur 2d, Limitation of Actions §§ 232 et seq.; see Am Jur 2d, Limitation of Actions §§ 217 et seq.

Judge GREENE concurring.

Appeal by third-party defendant from Judgment entered 12 July 1991 by Judge John Mull Gardner in Cleveland County Superior Court. Heard in the Court of Appeals 10 December 1992.

Hedrick, Eatman, Gardner & Kincheloe, by Gregory C. York and G. Lee Martin, for third-party plaintiff.

Waggoner, Hamrick, Hasty, Monteith, Kratt & McDonnell, by S. Dean Hamrick and Michael J. Rousseaux, for third-party defendant.

WYNN, Judge.

This appeal arises from a personal injury and wrongful death action brought by the plaintiff, Barbara Simpson, originally against the defendant and third-party plaintiff, Hatteras Island Gallery Restaurant, Inc. [hereinafter Restaurant], for the death of her husband, Dr. William Simpson. Dr. Simpson's death was determined to be the result of scombroid fish poisoning, which results from elevated levels of histamine in the scombroid fish family, allegedly incurred from his eating tuna at the Restaurant.

Mrs. Simpson filed her complaint against the Restaurant on 29 September 1989, claiming causes of action in negligence and breach of warranty of merchantability. The Restaurant subsequently filed a third-party complaint for indemnity against the Willie R. Etheridge Seafood Co., Inc. [hereinafter Etheridge] as the supplier of the tuna served to Dr. Simpson, and Mrs. Simpson was permitted to amend her complaint to file a direct action against Etheridge.

At trial, after the close of all the evidence, Etheridge moved for a directed verdict, which motion was denied. The jury then

returned a verdict indicating that neither Etheridge nor the Restaurant was negligent in its handling of the tuna, and that both Etheridge and the Restaurant had breached an implied warranty of merchantability in their respective sales of the tuna. Because of the breach of warranty, the jury found that Mrs. Simpson was entitled to recover damages in the amount of $400,000.

On 24 May 1991 Etheridge filed a motion for a judgment notwithstanding the verdict. That motion was denied and on 12 July 1991, the trial court entered a written judgment on the verdict against Etheridge and the Restaurant in the total amount of $400,000 and entered a judgment against Etheridge in favor of the Restaurant in the amount of $400,000. Following the judgment, the Restaurant paid $400,000 to Mrs. Simpson, and thus neither Mrs. Simpson nor the Restaurant appealed the judgment. However, Etheridge gave notice of appeal on 31 July 1991.

I.

The third-party defendant, Etheridge, first assigns error to the trial court's denial of its motion for a directed verdict and subsequent motion for a judgment notwithstanding the verdict. Etheridge argues that the evidence is too remote and speculative to support a finding by the jury that Etheridge breached its implied warranty of merchantability. We disagree.

The issue presented by a motion for a directed verdict is whether the evidence is sufficient to go to the jury. The trial court, in ruling on such a motion, must examine the evidence in a light most favorable to the non-moving party, drawing all reasonable inferences from that evidence and resolving all discrepancies in favor of the non-movant. *Goodman v. Wenco Foods, Inc.*, 333 N.C. 1, 9, 423 S.E.2d 444, 447 (1992). A motion for a judgment notwithstanding the verdict essentially requests that judgment be entered in accordance with an earlier requested motion for a directed verdict, despite a contrary verdict entered by the jury. Testing the sufficiency of the evidence in such a motion involves a process identical to that for a directed verdict. *Taylor v. Walker*, 320 N.C. 729, 733-34, 360 S.E.2d 796, 799 (1987).

The sale of food or drink constitutes a sale of goods, and a warranty of merchantability is implied in all contracts for the sale of goods. *See* N.C. Gen. Stat. § 25-2-314(1) (1986). In order for a jury to find a breach of this implied warranty of merchantabili-

ty the purchaser must prove (1) that the goods in question were subject to the implied warranty of merchantability, (2) that the goods were defective at the time of the sale, and as such did not comply with the warranty, (3) that the resulting injury was caused by the defective nature of the goods, and (4) that damages were suffered. *Goodman*, 333 N.C. at 10, 423 S.E.2d at 447-48.

The important issue in determining the defective nature of a food product is whether an ordinary consumer would expect the defect to be present and, thus, take precautions to avoid injury from that defect. *Id.* at 15, 423 S.E.2d at 450-51 (*Goodman* represents a clarification of the standard for determining whether a food product is defective at the time of sale such that it breaches the implied warranty of merchantability, and the Court steered away from an analysis based on whether the defect is natural or foreign to the product in question). Whether the defect should reasonably be expected by the ordinary consumer is usually a question for the jury. *Id.* at 16, 423 S.E.2d at 451.

[1] The evidence presented at trial, viewed in a light most favorable to the non-movants, tended to show the following: Dr. Simpson was an active individual with no physical health problems that would prevent him from engaging in physical activity. Both Dr. Simpson and Mr. James Havens ate tuna at the Restaurant on the night of Dr. Simpson's death. Prior to dinner, Dr. Simpson had exhibited no signs of illness or stomach problems. Upon returning from dinner, Dr. Simpson was very flushed and began experiencing shortness of breath, a rapid pulse, vomiting and diarrhea. Mr. Havens also became ill, his face, neck and ears were extremely flushed, his pulse was rapid, he became nauseated, and his ileostomy bag began to fill rapidly, an indication of diarrhea. Medical testimony indicated that Dr. Simpson died as a result of scombroid fish poisoning, the most striking characteristic of such poisoning being red or flushed coloring. The report of the autopsy on Dr. Simpson's body concluded that signs of other causes of death, such as a heart attack, blood clots, or acute bleeding into the brain were nonexistent and no explanation other than scombroid fish poisoning could be found for Dr. Simpson's death. There was also testimony that the histamine level in tuna immediately after it is caught is not above one milligram per 100 grams of fish tissue, and a level of ten milligrams or more of histamine per 100 grams of fish is an indication that the fish has been temperature abused and mishandled. The Restaurant purchased the tuna in question from Etheridge,

receiving it in sealed plastic cryovak bags, and placed it in the freezer without breaking the seals. In preparing the tuna to be served, the employees of the Restaurant followed proper procedures, washing their hands and cleaning their knives in bleach before and after cutting the tuna into steaks. All refrigeration units in the Restaurant were in proper working condition. The tuna had been received by the Restaurant from Etheridge in the form of four loins. After Dr. Simpson's death, there were three loins remaining in the refrigeration units at the Restaurant, and tests indicated the histamine levels to be 4.16 milligrams, 7.96 milligrams, and 13.73 milligrams per 100 grams of fish.

Etheridge contends in its brief that "[i]n order to establish liability on . . . [its part], there must be a showing by more than mere conjecture and speculation that at the time the tuna left . . . [its] possession eleven days prior to Dr. Simpson's death, the fresh tuna sold by it contained more than 50 milligrams of histamine per 100 grams of fish." This contention is based on testimony by Dr. Stephen Taylor that, in his opinion, if Dr. Simpson died of scombroid fish poisoning he would have had to have ingested more than 50 milligrams of histamine per 100 grams of fish. Dr. Taylor's testimony does not, however, clearly establish the level of histamine necessary to render tuna unmerchantable. In fact, Dr. Taylor's indication that a histamine level of ten milligrams per 100 grams of fish is evidence of temperature abuse and mishandling supports the conclusion that food products with this level of histamine exceed the standard of merchantability. This evidence was properly presented to the jury so that it could evaluate the testimony of Dr. Taylor and the other witnesses, weigh the evidence regarding the circumstances surrounding Dr. Simpson's death, consider the evidence of the histamine levels in the other tuna received by the Restaurant, and come to a conclusion regarding the merchantability of the tuna sold by Etheridge to the Restaurant and ultimately served to Dr. Simpson, based on the expectations of a reasonable consumer. We therefore find that the evidence viewed in a light most favorable to the non-moving parties warranted its submission to the jury, and further that the evidence was sufficient to uphold the jury verdict that Etheridge breached an implied warranty of merchantability when it sold the tuna to the Restaurant.

II.

Etheridge next assigns error to: (1) the trial court's failure to submit an issue on the Restaurant's claim for indemnification

against Etheridge and (2) the trial court's failure to instruct the jury that a finding that both Etheridge and the Restaurant breached a warranty of merchantability would result in the court entering judgment for the entire amount of Mrs. Simpson's damages against Etheridge.

The trial judge refused Etheridge's request to submit an issue regarding indemnification to the jury. Instead, the jury was presented with four questions: (1) Was the death of William Simpson caused by the negligence of the defendant, Gallery Restaurant? (2) Was the death of William Simpson caused by the negligence of the defendant, Etheridge Seafood? (3) Did the Gallery Restaurant breach an implied warranty of merchantability to William Simpson that the tuna was not injurious to human health, resulting in the death of William Simpson? and (4) Did Etheridge Seafood breach an implied warranty of merchantability to William Simpson that the tuna was not injurious to human health, resulting in the death of William Simpson? The jury answered "No" to the first two questions, finding neither Etheridge nor the Restaurant liable to Mrs. Simpson in negligence, and "Yes" to the third and fourth questions, finding both liable for breach of an implied warranty of merchantability. With regard to the third and fourth issues, the jury had been instructed as follows:

> The third issue, did the Gallery Restaurant breach an implied warranty of merchantability to William Simpson that the tuna was not injurious to human health, resulting in the death of William Simpson?
>
> Issue four, did Etheridge Seafood breach the implied warranty of merchantability to William Simpson that the tuna was not injurious to human health, resulting in the death of William Simpson?
>
> The burden of proof on each of these two issues is on the plaintiff. This means that as to each issue, for you to find in favor of the plaintiff, she must prove by the greater weight of the evidence the following three things:
>
> First, that there was an implied warranty of merchantability that the food would not be injurious to human health.
>
> Second, that the implied warranty was breached.

> And third, that *William Simpson died as a proximate result of the breach.*
>
> * * * *
>
> Finally, as to the third issue, I instruct you that if the plaintiff has proved by the greater weight of the evidence that there was an implied warranty of merchantability that the food would not be injurious to human health, that the warranty was breached and that the breach was the proximate cause of William Simpson's death, then you would answer the issue "yes" in favor of the plaintiff.
>
> On the other hand, if you fail to so find, then you would answer this issue "no" in favor of the defendant, Gallery Restaurant.
>
> As to the fourth issue, I instruct you that if the plaintiff has proved by the greater weight of the evidence that there was an implied warranty of merchantability and that the food—that the food would not be injurious to human health, that the warranty was breached, *that the breach was the proximate cause of William Simpson's death*, then you would answer this issue "yes" in favor of the plaintiff.
>
> On the other hand, if you fail to so find, then you would answer this issue "no" in favor of the defendant, Etheridge Seafood.

(Emphasis added).

The jury further assessed a total of $400,000 in damages against Etheridge and the Restaurant. The trial judge then ordered Etheridge to pay $400,000 to the Restaurant, effectively granting a directed verdict in favor of the Restaurant on the issue of indemnification. The issue we must decide, then, is whether the Restaurant was entitled to indemnification as a matter of law.

[2] Etheridge contends that the trial court should have presented the jury with the issue of indemnification and that the jury should have been instructed regarding that issue. We agree that it was error for the trial judge not to instruct on indemnity, but only in light of the *negligence* issues. Generally joint tort-feasors are not entitled to indemnity from one another. *Nationwide Mutual Ins. Co. v. Chantos*, 293 N.C. 431, 442, 238 S.E.2d 597, 604 (1977), *appeal after remand*, 298 N.C. 246, 258 S.E.2d 334 (1979). An excep-

tion to that rule provides, however, that "a party secondarily liable is entitled to indemnity from the party primarily liable even where both parties are denominated joint tort-feasors." *Id.* This concept of primary-secondary liability is illustrated where "the active negligence of one tort-feasor and the passive negligence of another combine to proximately cause injury to a third party, the passively negligent tort-feasor who is compelled to pay damages to the injured party is entitled to indemnity from the actively negligent tort-feasor." *Id.* Thus, in the present case, if the jury had returned a verdict finding both the Restaurant and Etheridge negligent in proximately causing Dr. Simpson's death, then the jury would have to have determined further whether the Restaurant's negligence constituted "passive negligence" which merely derived from the active negligence of Etheridge, or if the Restaurant had also been actively negligent such that it was not entitled to indemnity for paying its share of the joint and several judgment. However, the jury in this case returned a verdict of no negligence on the part of either party. Because the jury found no negligence, it would not have reached the issue of indemnification. We, therefore, find that the failure to instruct on indemnity with regard to the issue of negligence was harmless error.

[3] Etheridge further argues that the trial court erred in failing to instruct on indemnity with regard to the breach of warranty issues. We disagree. When goods are sold to a dealer with a warranty, it is assumed that the dealer can resell them to his customers with a similar warranty. *Davis v. Radford*, 233 N.C. 283, 286, 63 S.E.2d 822, 825 (1951); *Aldridge Motors, Inc. v. Alexander*, 217 N.C. 750, 755, 9 S.E.2d 469, 472-73 (1940) (citing Williston on Contracts). Accordingly, if such sales occur and the customer recovers damages from the dealer, the latter has a *prima facie* right to recover those damages against the original supplier of the goods. *Davis*, 233 N.C. at 286, 63 S.E.2d at 825; *Alexander*, 217 N.C. at 755, 9 S.E.2d at 473. The *Davis* Court articulated that rule in the context of food sold for human consumption as follows:

> [W]here the distributor or wholesale dealer sells to the retail dealer articles in original packages for human consumption with warranty of wholesomeness and the retail dealer sells under the same warranty to a customer, for the injury resulting the retail dealer may properly charge the wholesaler with *primary liability* for the loss sustained.

Davis, 233 N.C. at 287, 63 S.E.2d at 826 (emphasis added).

The concept of primary-secondary liability, as discussed *supra* with regard to negligence, is illustrated in breach of warranty cases such as *Davis*, where the product at issue was in a sealed container. In instances where the product comes from a supplier in a sealed container, and the seller has not removed the product from its sealed package, it necessarily passes to the customer in exactly the same form in which it originally came from the supplier. Therefore, if the supplier has breached a warranty of merchantability, the retailer necessarily also breaches a warranty of merchantability. The retailer, however, has done nothing except act as a middleman and any liability it incurs for a customer's damages is merely derived from the supplier's original breach of warranty.

In situations such as the case at bar, however, where the retailer removes the product from its sealed package to prepare it for sale to a customer, the retailer may be subject to liability independent of the supplier's liability. That is, if the supplier had breached no warranty in its sale to the retailer but the retailer had, for instance, been negligent in its handling of the product and in some way contaminated it, the retailer would have breached a warranty of merchantability to the customer independent of any action by the supplier. In the case at bar, Etheridge impliedly warranted that the tuna was fit for human consumption. The Restaurant relied on that warranty and prepared the tuna for sale to Dr. Simpson. The jury found that the Restaurant was not negligent in preparing the tuna, effectively finding that the Restaurant had not tampered with or contaminated the tuna in any way. Therefore, the liability of the Restaurant is analogous to the liability of a retailer selling a product in a sealed container.

The jury in this case was afforded an opportunity to find that either the Restaurant or Etheridge had breached the warranty of merchantability, *or* that both of those entities had breached the warranty. Had the jury chosen to find that only one of the parties had breached the warranty, then no issue of primary and secondary liability, and thus no issue of indemnity, would exist. The jury found, however, that *both* the Restaurant and Etheridge had breached their respective warranties. The instructions indicate that each such breach was the proximate cause of Dr. Simpson's death. It follows that, based on the jury determination that Etheridge breached a warranty of merchantability which breach was the proximate cause of Dr. Simpson's death, any breach by the Restaurant necessarily derives from Etheridge's original breach.

We conclude that, while the Restaurant's breach of warranty of merchantability is separate and distinct from Etheridge's breach of the warranty of merchantability, in accordance with the jury instructions only one such breach was necessary to cause Dr. Simpson's death. Accordingly, the Restaurant, having committed the secondary breach, is entitled to indemnification from the primary obligor, Etheridge, as a matter of law.

We note in passing that the concurring opinion, in essence, concludes that the record reflects no evidence of negligence on the part of the Restaurant. In light of the jury's unchallenged resolution of the negligence issue, however, we find it unnecessary, and in fact impermissible, to examine the record for evidence of the Restaurant's lack of reasonable care in its handling of the tuna.

III.

[4] Etheridge next assigns error to the trial court's failure to dismiss Mrs. Simpson's claim against it and its failure to enter a judgment notwithstanding the verdict on the grounds that the claim was barred by the two-year statute of limitations. In support of this contention, Etheridge argues that Mrs. Simpson's amendment to her complaint against the Restaurant to include Etheridge Seafood as a defendant was allowed after the two year period had expired and did not act to relate back to the original claim. We find no merit to this contention.

Etheridge argues that the requirements for an amendment to relate back to the original complaint are not met in the present case. The relation back principle, however, only applies where the complaint is amended outside the relevant statute of limitations. It need not be considered where a pleading is amended before the statute of limitations expires.

In the present case, because a responsive pleading had already been entered, Mrs. Simpson could only amend her complaint by leave of the court. She filed a motion to amend, and an amended complaint, on 6 April 1990, which date was within the two year statute of limitations. The motion was scheduled to be heard first on 23 April 1990 and again on 11 June 1990, but was continued from both dates at the request of Etheridge's counsel. Consequently, the motion was not heard and the Order allowing the amendment to the complaint was not entered until 12 November 1990, which date was after the two-year statute of limitations had expired.

The relevant date for measuring the statute of limitations where an amendment to a pleading is concerned, however, is the date of the *filing of the motion*, not the date the court rules on that motion. *Mauney v. Morris*, 316 N.C. 67, 71, 340 S.E.2d 397, 400 (1986). "The timely filing of the motion to amend, if later allowed, is sufficient to start the action within the period of limitations." *Id.*

Thus, we find no merit to Etheridge's claim that the cause of action against it was barred by the statute of limitations.

IV.

We have examined the third-party defendant's final assignment of error and find it to be without merit.

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

Affirmed.

Judge Cozort concurs.

Judge Greene concurs with separate concurring opinion.

Judge GREENE concurring.

I agree with the majority that, under the facts of this case, the trial court did not err in refusing to submit a separate issue to the jury on indemnification with regard to the defendants' breach of warranty. I reach this result, however, for somewhat different reasons.

In order to recover indemnity from Etheridge Seafood, the supplier of the fish, Hatteras Restaurant, the retailer of the fish, must allege and prove (1) that the supplier is liable to the plaintiff, and (2) that the retailer's liability to the plaintiff is derivative, that is, based solely upon the breach of the supplier. *See Kim v. Professional Business Brokers Ltd.*, 74 N.C. App. 48, 51, 328 S.E.2d 296, 299 (1985). A retailer's liability for breach of the implied warranty of merchantability is derivative if the retailer (1) acquires and sells a product in a sealed container, provided that the retailer does not damage or mishandle the product while it is in his possession, or (2) acquires and sells a product under circumstances in which he was afforded no reasonable opportunity to inspect the product in such a manner that would have or should have, in the

exercise of reasonable care, revealed the existence of the condition complained of, again provided that the retailer does not damage or mishandle the product while in his possession. N.C.G.S. § 99B-2(a) (1989); *see also Morrison v. Sears, Roebuck & Co.*, 319 N.C. 298, 303, 354 S.E.2d 495, 498-99 (1987). The retailer's liability is not derivative, and therefore is independent, if the retailer (1) acquires a product in a sealed container, but damages or mishandles the product before selling it, or (2) because of a failure to use reasonable care, fails to discover a defective condition in a product acquired from a supplier which a reasonable inspection would have revealed, or damages or mishandles the product while it is in his possession. *Id.*

In the instant case, the "sealed container" defense to breach of the implied warranty of merchantability, *see Morrison*, 319 N.C. at 303, 354 S.E.2d at 498-99, has no application. The restaurant after acquiring the fish from Etheridge froze it, thawed it, marinated it, put it on ice, then cooked and served it to Dr. Simpson. Rather, the restaurant's independent liability for breach of implied warranty depends on whether the restaurant was afforded a reasonable opportunity to inspect the fish in a manner that would have or should have, in the exercise of reasonable care, revealed the toxicity level of the fish, or, if not, whether the restaurant mishandled or damaged the fish while it was in its possession. Based upon my reading of the record, there is no evidence that the restaurant damaged or mishandled the fish such that it contributed to or increased its defective condition. In addition, the evidence indicates that no reasonable inspection would have revealed the deadly defect. There is no evidence that the elevated histamine level produced any unusual odor, color, or texture. Accordingly, there was no substantial evidence requiring submission to the jury of a separate issue of indemnity on the breach of warranty issues, as all of the evidence supports a conclusion that the restaurant's liability was derivative. Because its liability is derivative, the restaurant is entitled to full indemnification from the supplier and the trial court correctly ordered Etheridge to pay the full amount of the $400,000.00 judgment.

HOMEBUILDERS ASSOCIATION OF CHARLOTTE, INC. v. THE CITY OF CHARLOTTE

No. 9126SC986

(Filed 16 March 1993)

Municipal Corporations § 346 (NCI4th)— user fees—mandated regulatory services—no statutory authorization

The trial court erred by granting declaratory judgment in favor of the City of Charlotte where plaintiff had brought an action challenging a section of the Charlotte City Code providing user fees. A municipality has only such powers as the legislature confers upon it and there is no enabling legislation that expressly authorizes municipalities to charge these user fees. Although the City argues that it had the implied power to charge user fees by virtue of the General Assembly's enactment of various statutes, the implementation of user fees goes beyond the permissible bounds of the authority granted in those statutes and authority for a municipality to charge user fees of the type involved here cannot be implied as reasonably necessary or expedient to the regulatory powers delegated by these statutes. The argument that imposition of user fees against individuals or groups demanding or creating the need for the service is a policy question is without merit in the absence of enabling legislation from the General Assembly. While the General Assembly may have the power to authorize municipalities to impose user fees should it choose to do so in the future, municipalities may not unilaterally impose these fees absent a grant of authority from the General Assembly.

Am Jur 2d, Municipal Corporations, Counties, and Other Political Subdivisions §§ 579 et seq.

Appeal by plaintiff from declaratory judgment entered 18 July 1991 by Judge Robert D. Lewis in Mecklenburg County Superior Court. Heard in the Court of Appeals 9 December 1992.

On 25 May 1990, plaintiff Home Builders Association of Charlotte, Inc., filed a complaint seeking a declaratory judgment pursuant to G.S. 1-253 *et seq.* to declare invalid and unenforceable § 2-4 of the Code of the City of Charlotte (hereinafter "City"). That section of the Code provides:

Sec. 2-4. Schedule of user fees for services by city departments.

There is hereby established a schedule of user fees for services performed by city departments. Fees shall be set by user fee policies established by the city council and shall be computed in accordance with the methodology set forth in the Arthur Young "User Fees Study of August, 1987," a copy of which is available for inspection in the city's budget and evaluation office. This schedule may be revised from time to time by the city manager, or his designee, to reflect additional costs to the city for providing these services.

Whenever any user fee on the schedule referred to above may be found to be in conflict with a fee for the same or a similar service set out elsewhere, the fees in the user fee schedule shall supersede any prior existing fee.

The complete schedule of user fees shall be available for inspection in the office of the city clerk, and a schedule of user fees for each department shall be conspicuously posted in the appropriate department.

(Ord. No. 2553, § 1, 12-12-88)

On 16 April 1991, the parties stipulated to the following:

1. The Association is a non-profit corporation organized pursuant to the laws of the State of North Carolina having a principal office in Charlotte, Mecklenburg County, North Carolina. The Association has standing to bring this cause of action.

2. The City is a municipal corporation organized pursuant to N.C.G.S. § 160A-1 et seq.

3. This Court has jurisdiction over this matter pursuant to N.C.G.S. § 7A-245 and venue is proper pursuant to N.C.G.S. § 1-77.

4. On or about August 22, 1988, the City Council of the City of Charlotte (the "Council") passed a resolution implementing a policy whereby fees would be charged for a number of City services ("User Fees"). . . .

5. The implementation of the User Fees is codified in § 2-4 of the Code of the City of Charlotte (the "Code"). . . .

6. User Fees have been imposed and are being collected by the City, on, among others, the following City services:

(a) Commercial Driveway Permit Review

(b) Commercial Drainage Plan Review and Inspection

(c) Commercial Inspection (Building Permit Site Inspection)

(d) Erosion Control Review and Inspection and Issuance of Grading Permit

(e) 100 + 1 Foodplain [sic] Analysis

(f) Rezoning Review

i. Single-family districts

ii. Multi-family districts

iii. All other districts

(g) Right-of-Way Abandonment (Permanent Street Closing)

(h) Right-of-Way Encroachment

(i) Special Use Permit (Minor)

(j) Special Use Permit (Major)

(k) Storm Drainage Problem Study

(l) Subdivision Reviews

i. Preliminary Review: Single family (No Streets)

ii. Preliminary Review and Inspection: Single Family (With Streets)

iii. Preliminary Review and Inspection: (Non-residential)

iv. Planned Multi-Family Review and Inspection

v. Final Plat Review

vi. Final Plan Revisions

vii. Final Condominium Plat Review

(m) Tree Ordinance Review

(n) UMUD Review

7. A right-of-way lease is rent charged for the use of the City's right-of-way and is not a "User Fee" as contemplated by § 2-4 of the Code of the City of Charlotte and is, therefore, not before this Court for review.

8. The City has express authority pursuant to N.C.G.S. § 160A-371 and 381 to regulate the zoning and subdivision of land.

9. The City has express authority pursuant to N.C.G.S. § 160A-296 and 299 to regulate its streets and alleys.

10. The City has express authority pursuant to N.C.G.S. § 160A-458 to enact and enforce erosion and sedimentation control ordinances as authorized by Article 4 Chapter 113A of the General Statutes.

11. The City has express authority pursuant to Chapter 115 of the 1975 Session Laws to enact and enforce ordinances regulating removal, replacement, and preservation of trees.

12. The issue before the Court is whether the City had legislative authority to enact § 2-4 of the Code of the City of Charlotte.

13. The Court may grant either party summary judgment pursuant to Rule 56 of the North Carolina Rules of Civil Procedure.

A hearing was held on 18 April 1991 and 16 May 1991. On 18 July 1991, a declaratory judgment was entered. The declaratory judgment provided the following:

CONCLUSIONS OF LAW

1. The parties are properly before the Court and there is a justiciable controversy between them.

2. The Court has jurisdiction of this matter under the Declaratory Judgment Act, N.C.G.S. § 1-253 et seq.

3. Section 2-4 of the Code of the City of Charlotte was duly and validly adopted on December 12, 1988, by the Council of the City of Charlotte.

4. The services provided by the City are regulatory measures designed to protect public health, safety, and welfare

and the imposition of fees to defray the cost of regulating is incidental to the primary purpose of guarding the public.

5. The fees charged for regulatory services pursuant to the ordinance are reasonably related to the cost of providing the services.

6. The Council of the City of Charlotte, in adopting the ordinance, did not act arbitrarily or capriciously, but its action was in good faith, reasonable, and a valid exercise of the police power granted to the City by the General Assembly.

NOW, THEREFORE, based upon the foregoing Findings of Fact and Conclusions of Law, IT IS ORDERED, ADJUDGED AND DECREED as follows:

1. Section 2-4 of the Code of the City of Charlotte, effective December 12, 1988, was adopted in accordance with law and is valid;

2. The user fees which have been and continue to be charged and collected in order to defray the cost of regulatory services are legal;

3. The Plaintiff is not entitled to injunctive relief or any other relief prayed for in the complaint.

4. The costs of this action shall be taxed against the plaintiff.

Plaintiff appeals.

Murchison, Guthrie, Davis & Henderson, by Alton G. Murchison, III, for plaintiff-appellant.

Assistant City Attorney Cynthia Cline Reid, for defendant-appellee.

EAGLES, Judge.

Plaintiff argues that the trial court erred by granting declaratory judgment in favor of the City of Charlotte. We agree and reverse.

I.

Initially, we note that both parties stipulated that the trial court had jurisdiction over this matter. A municipality may have its rights and obligations determined in a declaratory judgment

action. *Board of Managers v. Wilmington*, 237 N.C. 179, 74 S.E.2d 749 (1953).

II.

Plaintiff argues that the trial court erred "because the City did not have the authority to impose 'user fees' for mandated regulatory services." We agree.

"A municipality has only such powers as the legislature confers upon it." *Koontz v. City of Winston-Salem*, 280 N.C. 513, 520, 186 S.E.2d 897, 902 (1972) (citing *Moody v. Transylvania County*, 271 N.C. 384, 156 S.E.2d 716 (1967); *Shaw v. Asheville*, 269 N.C. 90, 152 S.E.2d 139 (1967)). Our Supreme Court has stated:

> The legislature has specifically provided that the powers granted to municipalities in chapter 160A "shall be broadly construed and grants of power shall be construed to include any additional and supplementary powers that are reasonably necessary or expedient to carry them into execution and effect." N.C.G.S. § 160A-4 (1987). *See Grace Baptist Church v. City of Oxford*, 320 N.C. 439, 443, 358 S.E.2d 372, 374 (1987); *Smith v. Keator*, 285 N.C. 530, 534, 206 S.E.2d 203, 205-06, *appeal dismissed*, 419 U.S. 1043, 42 L. Ed. 2d 636 (1974); *Town of West Jefferson v. Edwards*, 74 N.C. App. 377, 385, 329 S.E.2d 407, 412-13 (1985); *City of Durham v. Herndon*, 61 N.C. App. 275, 278, 300 S.E.2d 460, 462 (1983). Thus, the subject of inquiry is the scope of the enabling legislation on which [the City] relies in enacting its ordinance.

River Birch Associates v. City of Raleigh, 326 N.C. 100, 107-08, 388 S.E.2d 538, 542 (1990). Hence, our inquiry commences with an examination of the enabling legislation upon which the City of Charlotte relies in its attempt to enforce § 2-4 of its Code.

In its brief, the City concedes that "no statute expressly provides that cities and towns are authorized to charge the cost of a regulatory service to those who use that service." Simply stated, there is no enabling legislation that expressly authorizes municipalities to charge the user fees that are contained in § 2-4 of the Code of the City of Charlotte. Nevertheless, the City argues that "the authority for such ordinances and, in particular, for Section 2-4 of the Code of the City of Charlotte can be fairly and necessarily implied from the regulatory powers expressly granted in the statutes. The ordinance adopted by the City Council is a

permissible means through which the City can carry out its duties to regulate the development of land within city limits." We disagree.

The City of Charlotte contends that it has the implied power to impose the user fees found in § 2-4 of its Code by virtue of its general police powers. However, "[a] city or town in this State has no inherent police power. It may exercise only such powers as are expressly conferred upon it by the General Assembly or as are necessarily implied from those expressly so conferred." *Town of Conover v. Jolly*, 277 N.C. 439, 443, 177 S.E.2d 879, 881 (1970) (citations omitted). Statutory delegations of power to municipalities are to be strictly construed, resolving any ambiguity against the municipal corporation's authority to exercise the power in question. *Builders, Inc. v. City of Winston-Salem*, 302 N.C. 550, 554, 276 S.E.2d 443, 445 (1981); *In re Incorporation of Indian Hills*, 280 N.C. 659, 662, 186 S.E.2d 909, 910 (1972) ("Any fair, reasonable doubt concerning the existence of [a municipal corporation's] power is resolved by the courts against the corporation, and the power is denied.").

In support of its contention, the City argues that G.S. 160A-175(a) grants to local governments the authority to "impose fines and penalties for violations of its ordinances." However, we conclude that the implementation of user fees goes beyond the permissible bounds of the authority granted in G.S. 160A-175(a). This statute clearly reflects the desire of the General Assembly to grant to municipalities a mechanism, the power to impose fines and penalties, to enforce its ordinances by penalizing those who violate them. G.S. 160A-175(a) does not apply here. The City itself argues that "[a] reasonable means of providing a regulatory program is to require the person being regulated to meet some of the costs occasioned by his actions." Here, the City is attempting to impose a fee for the mere use of its services, most of which are required and are provided exclusively by the City. The City is not attempting to impose user fees to enforce an ordinance because the ordinance has been violated. The user fees proposed would be assessed against every user of services without regard for whether any ordinance had been violated. Accordingly, we conclude that the General Assembly did not authorize the City of Charlotte to impose user fees by its enactment of G.S. 160A-175(a).

The City further argues that

> North Carolina municipalities have express authority to regulate matters which concern the development of land and use of streets within their corporate limits. N.C. Gen. Stat. §§ 160A-296 ["Establishment and control of streets; center and edge lines"], -299 ["Procedure for permanently closing streets and alleys"], -371 ["Subdivision regulation"], -381 ["Grant of power" for zoning], -458 ["Erosion and sedimentation control"] . . . . The primary purpose of the statutes (N.C. Gen. Stat. §§ 160A-296, -299, -371, -381, -458) is to provide for regulation of urban development and to control use of city streets.

The City argues that it has the implied power to charge user fees by virtue of the General Assembly's enactment of G.S. 160A-296, G.S. 160A-299, G.S. 160A-371, G.S. 160A-381, and G.S. 160A-458. We disagree.

Even under the broad construction mandated by G.S. 160A-4, we conclude that authority for a municipality to charge user fees of this type cannot be implied as "reasonably necessary or expedient" to the regulatory powers delegated by these statutes. We note that the City contends that the fees are designed to help meet the costs of the regulation of development. G.S. 160A-209(c) provides that:

> (c) Each city may levy property taxes for one or more of the following purposes subject to the *rate limitation* set out in subsection (d).
>
> (25) Planning—To provide for a program of planning and *regulation of development* in accordance with Article 19 of this Chapter.

(Emphasis added.) *See e.g.*, G.S. 160A-209(c)(30) (streets); G.S. 160A-209(c)(10c) (drainage); G.S. 160A-209(c)(31a) (urban redevelopment). G.S. 160A-363 (entitled "Supplemental powers") of Article 19 (entitled "Planning and Regulation of Development") of Chapter 160A provides "Any city council is authorized to make any appropriations that may be necessary to carry out any activities or contracts authorized by this Article . . . and *to levy taxes for these purposes as a necessary expense*." (Emphasis added.) To meet the costs of regulating development, the General Assembly has expressly authorized cities the power to "levy taxes"; a power which is, in turn, pursuant to G.S. 160A-209(c) subject to the "rate limitations" set forth in G.S. 160A-209(d). Conversely, G.S. 160A-363

does not grant cities any authority to impose the user fees in issue here. To allow the City unilaterally to impose its own user fees subject to no limitations would clearly circumvent the intent of the General Assembly.

Given that the City's own policy "is to charge and impose regulatory fees for certain services which directly benefit the individual or group who demand or create the need for the service," the City argues that "[t]he issue of whether developer-related regulatory services should be subsidized by all citizens through property taxes or by the persons who necessitate the regulation is a policy question." We find that this argument is without merit in the absence of enabling legislation for user fees from the General Assembly.

Finally, we conclude that the City's contentions regarding its right to impose user fees draw no support from the perspective of legislative history. We note, for example, that the General Assembly has expressly authorized sewer districts to charge "user fees" for furnished services. G.S. 162A-88; *see McNeill v. Harnett County*, 327 N.C. 552, 569, 398 S.E.2d 475, 485 (1990). *See also* G.S. 159G-6(b)(2); G.S. 159G-18(a). Yet the General Assembly has not enacted a comparable statute expressly authorizing the type of user fees proposed by the City which encompass virtually any regulatory stage in the development process. While the General Assembly may have the power to authorize municipalities to impose user fees should it choose to do so in the future, we conclude that municipalities may not unilaterally impose these fees absent a grant of authority from the General Assembly. Currently, there is no legislative authority for municipalities to impose user fees as proposed by the ordinance in issue here.

III.

Plaintiff argues that the trial court erred by granting a declaratory judgment for the City of Charlotte "in that the 'user fees' imposed are an unreasonable exaction and are therefore unenforceable." Given our holding that these user fees are invalid absent enabling legislation from the General Assembly, we need not address this issue.

IV.

In sum, if user fees are to be permitted in North Carolina, the authority for municipalities to impose these fees must be

granted by our General Assembly. There being no such authority here, user fees shall not be collected under the authority of § 2-4 of the Code of the City of Charlotte from and after the certification date of this opinion. Accordingly, the trial court's declaratory judgment in favor of the City of Charlotte is reversed and the cause is remanded for entry of declaratory judgment in favor of plaintiff.

Reversed and remanded.

Judges WELLS and LEWIS concur.

D. E. MUNIE AND WIFE, PATRICIA A. MUNIE v. TANGLE OAKS CORPORATION, A NORTH CAROLINA CORPORATION, AND WATERWAY PROPERTIES, A NORTH CAROLINA GENERAL PARTNERSHIP

No. 915SC1268

(Filed 16 March 1993)

1. **Rules of Civil Procedure § 15.2 (NCI3d)— complaint raising rescission and fraud—tried on breach of contract—consent**

A breach of contract issue was properly tried with the consent of defendants where plaintiffs' complaint only raised issues of rescission and fraud, plaintiffs shifted to a theory of breach of contract in preparation for trial, and defendants did not specifically object to the breach of contract evidence on the grounds that it wasn't pertinent to an issue raised in the pleadings but did object to evidence on unfair and deceptive trade practices for that reason. Furthermore, failure to amend the pleadings to conform to the issues at trial does not affect the result of the trial of these issues.

Am Jur 2d, Trial § 1930.

2. **Appeal and Error § 111 (NCI4th)— denial of motion to dismiss—denial of motion for summary judgment—appealability after trial**

It is improper to appeal the denial of a motion to dismiss or the denial of a motion for summary judgment if there has been a trial on the merits.

Appeal and Error §§ 105 et seq.

3. Limitations, Repose, and Laches § 55 (NCI4th)— contract action—statute of limitations—motion for directed verdict properly denied

The trial court properly denied defendants' motion for a directed verdict based on the statute of limitations where plaintiffs filed an action raising fraud and rescission in the sale of a townhouse and boat slip, the action was eventually tried on breach of contract issues, defendants allege that the breach occurred on the date of the closing, when plaintiffs were informed that they would not actually own the boat slip, and plaintiffs claim that the breach of contract occurred in January of 1986, when they discovered that the boat slip was difficult to access and not constructed according to plans agreed upon in January 1985. Although plaintiffs and defendants entered into the original contract in 1982, they had reached a new agreement, or a modification of their original agreement, in January 1985 concerning the construction of the boat slip. Plaintiff husband discovered the discrepancies in January of 1986 and filed the complaint in June 1988, well within the three year period beginning in January 1986.

Am Jur 2d, Limitation of Actions §§ 92, 126.

4. Rules of Civil Procedure § 50.4 (NCI3d)— motion for JNOV—grounds not raised in motion for directed verdict

The trial court properly denied defendants' motion for JNOV where defendants argued both the statute of limitations and insufficiency of evidence even though only the statute of limitations was previously raised on the directed verdict motion. A movant cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion, and the statute of limitations had not run.

Am Jur 2d, Pleading § 62.

5. Rules of Civil Procedure § 59 (NCI3d)— sale of townhouse and boat slip—breach of contract—damages—new trial

The trial court abused its discretion by remitting a jury award only to $60,000 in an action arising from the sale of a townhouse and boat slip where the jury returned an award of $125,000, evidence at trial indicated that the boat slip would have been worth $60,000 if constructed according to the plans, plaintiff husband testified that the difference in value between

the boat slip as promised and the boat slip as it existed was $45,000, there was no evidence of the value of the boat slip as it now exists, and plaintiff testified on cross-examination that his boat was in the slip at the time of trial and that he was able to get the boat in and out.

Am Jur 2d, Appeal and Error § 939.

Appeal by defendants from judgment entered 1 July 1991, *nunc pro tunc* for 12 June 1991, by Judge William H. Helms in New Hanover County Superior Court. Heard in the Court of Appeals 2 December 1992.

Shipman & Lea, by Gary K. Shipman and Joel R. Rhine, for plaintiffs-appellees.

Pennington & Wicks, by Robin S. Wicks, for defendants-appellants.

LEWIS, Judge.

On 23 May 1988 plaintiffs filed a complaint against defendant Tangle Oaks Corporation (hereinafter "Tangle Oaks"), and its successor, defendant Waterway Properties (hereinafter "Waterway"). Plaintiffs claimed rescission of a contract entered into on 22 November 1982 for the sale of a townhouse and accompanying boat slip at the Tangle Oaks Club Marina. They alleged that the boat slip was not constructed according to specifications and that it did not accommodate their boat. Plaintiffs requested cancellation of the deed and refund of the purchase price plus interest from the closing date along with incidental expenses. They also claimed punitive damages due to defendants' allegedly fraudulent representation that plaintiffs would actually own the boat slip. On 8 June 1988, plaintiffs filed a voluntary dismissal without prejudice, and then filed a second complaint identical to the first except that it included the entire Agreement of Sale as an exhibit.

On 1 September 1988 the court denied Tangle Oaks' motion to dismiss under Rule 12(b)(6) and Waterway's motion to dismiss on the grounds that it was not a necessary and proper party. Defendants filed a joint answer on 16 September 1988, asking that the complaint be dismissed for failure to state a claim and asserting the statute of limitations as an affirmative defense. Defendants also alleged that plaintiffs had failed to join the Tangle Oaks Yacht

Club (hereinafter "the Yacht Club") as a necessary party. The Yacht Club is the Homeowners' Association with jurisdiction over the boat slip. Defendants admitted in their answer that they had agreed to the sale of a townhouse and boat slip, and acknowledged the payment of an extra $8,000 for the slip. The court denied defendants' motions for summary judgment on 14 March 1990.

At a trial concerning breach of contract issues, the jury found that Waterway had assumed the obligation of Tangle Oaks to plaintiffs, and that Waterway had breached the contract with plaintiffs by failing to build the boat slip according to the agreed plans. The jury awarded plaintiffs $125,000 in damages. The trial court denied defendants' motions for judgment notwithstanding the verdict (hereinafter "JNOV") and for a new trial under Rule 59. On its own motion, however, and with the consent of plaintiffs, the trial court entered remittance, reducing the amount awarded to $60,000. Defendants appealed.

[1] We note that the complaint only raised issues of rescission and fraud. However, plaintiffs shifted to a theory of breach of contract in preparation for trial. In their brief plaintiffs contend that the breach of contract action was tried by consent, referring to Rule 15(b) of the North Carolina Rules of Civil Procedure. According to this rule, "[w]hen issues not raised by the pleadings are tried by the express or implied consent of the parties, they shall be treated in all respects as if they had been raised in the pleadings." N.C.G.S. § 1A-1, Rule 15(b) (1990). Plaintiffs emphasize that defendants did not specifically object to the breach of contract evidence on the grounds that it wasn't pertinent to an issue raised in the pleadings, whereas defendants did object to evidence on unfair and deceptive trade practices for that reason. *See id.* Furthermore, failure to amend the pleadings to conform to the issues at trial "does not affect the result of the trial of these issues." *Id.* We agree with plaintiffs that the breach of contract issue was properly tried with the consent of defendants.

In their brief defendants argue that plaintiffs' claim for fraud due to defendants' failure to convey ownership of the boat slip was barred by the statute of limitations. This issue is now immaterial because the judge only submitted contract issues to the jury and the plaintiffs were only awarded damages for breach of contract. We find it unnecessary to address this claim.

The evidence indicates that plaintiffs were looking for a place to retire that could accommodate their large sailboat. On 19 November 1982, plaintiffs sent a letter to Tangle Oaks, and the Tangle Oaks Club Marina, with a $10,000 deposit to reserve a unit, and an additional $8,000 for alterations to the harbor for their boat. The Agreement of Sale (hereinafter "the Agreement"), dated 22 November 1982, states that the "[p]urchase price [will] include boat slip to accommodate Purchaser's boat. . . ." The Agreement further provides that amenities such as the boat slip would be completed within 24 months after closing on the property.

Plaintiffs arrived at their new home in April 1984, at which time the boat slip was not constructed. In January 1985 plaintiffs agreed to a modification of the plans which would give them a 60-foot slip. However, when the slip was finally completed in January 1986, plaintiffs discovered that access was tight and experienced difficulties moving their boat in and out. Plaintiffs point out that the marina was not actually built according to the dimensions set forth in the plans. Specifically, defendants moved the western-most T-dock 9 inches westward, thereby causing access to the slip to be difficult and dangerous. Plaintiffs allege that they would not be able to enter their slip at all if a 35-foot boat was docked across from them. Plaintiffs also claim that they cannot access the slip in either a strong wind or an active current. For these reasons, plaintiffs contend the marina does not accommodate their boat. Defendants emphasize that plaintiffs can and do get their boat in and out of the slip.

On appeal defendants challenge the denial of their Rule 12(b)(6) motion to dismiss, the denial of their Rule 56 motion for summary judgment, the denial of their Rule 50 motions for directed verdict and JNOV, and the denial of their Rule 59 motions for new trial. Defendants also allege the trial court erred in signing and entering judgment on the grounds that error of law appears on the face of the record, the evidence does not support the facts, and the facts found do not support the judgment.

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[2] It is improper to appeal the denial of a motion to dismiss or the denial of a motion for summary judgment if there has been a trial on the merits. *Harris v. Walden*, 314 N.C. 284, 286, 333 S.E.2d 254, 256 (1985) (summary judgment); *Berrier v. Thrift*, 107 N.C. App. 356, 359, 420 S.E.2d 206, 208 (1992), *disc. rev. denied*,

333 N.C. 254, 424 S.E.2d 918 (1993) (motion to dismiss). Thus, these issues are not properly before this Court. We will address the Rule 50 motions for directed verdict and JNOV, and the Rule 59 motions for a new trial.

[3] A motion for directed verdict tests the legal sufficiency of the evidence to go to the jury. *Goodwin v. Investors Life Ins. Co. of North America*, 332 N.C. 326, 329, 419 S.E.2d 766, 767 (1992); N.C.G.S. § 1A-1, Rule 50(a) (1990). The evidence must be viewed in the light most favorable to the non-movant. *Maintenance Equipment Co. v. Godley Builders*, 107 N.C. App. 343, 348, 420 S.E.2d 199, 201 (1992). A directed verdict is appropriate if the defendant establishes an affirmative defense as a matter of law and there are no issues to submit to the jury. *Goodwin*, 332 N.C. at 329, 419 S.E.2d at 767-68. Appellate review of a motion for directed verdict is limited to those grounds asserted before the trial judge. *Warren v. Canal Indus., Inc.*, 61 N.C. App. 211, 213, 300 S.E.2d 557, 559 (1983). A specific ground not stated in the motion, including a challenge to the sufficiency of the evidence, cannot be raised for the first time on appeal. *Lee v. Keck*, 68 N.C. App. 320, 328, 315 S.E.2d 323, 329, *disc. rev. denied*, 311 N.C. 401, 319 S.E.2d 271 (1984).

On their motion for directed verdict, defendants argued the statute of limitations had run on plaintiffs' contract action by the time they filed their complaint. N.C.G.S. section 1-52(1) sets forth a 3-year statute of limitations for contract actions, which accrue at the time of the breach giving rise to the cause of action. N.C.G.S. § 1-52(1) (Cum. Supp. 1992). Defendants, proceeding on the fraud theory originally plead by plaintiffs, allege that the breach occurred on the date of closing, 18 May 1983, when plaintiffs were informed that they would not actually own the boat slip but would only have the right to use it. Plaintiffs, on the other hand, claim that the breach of contract occurred in January 1986, when they discovered the boat slip was difficult to access and not constructed according to the plans agreed upon in January 1985.

We agree with plaintiffs that a breach of contract occurred in January 1986. Although plaintiffs and defendants entered into the original contract in 1982, they had reached a new agreement, or a modification of their original agreement, in January 1985 concerning the construction of the boat slip. Plaintiff husband testified he thought they had reached an "acceptable solution" at that point.

He discovered the discrepancies in January 1986, and filed the complaint in June 1988, well within the three year period beginning in January 1986. Thus, the statute of limitations had not run and the trial court correctly denied the motion for directed verdict.

[4] A motion for JNOV is treated as a renewal of the motion for directed verdict. *Maintenance*, 107 N.C. App. at 353, 420 S.E.2d at 204; § 1A-1, Rule 50(b)(1) (1990). A movant cannot assert grounds on a motion for JNOV that were not previously raised in the directed verdict motion. *Carter v. Parsons*, 61 N.C. App. 412, 418, 301 S.E.2d 405, 409 (1983). Although defendants argue both the statute of limitations and insufficiency of the evidence as grounds for JNOV, only the statute of limitations argument was previously raised on the directed verdict motion. Defendants' JNOV arguments are therefore limited to the statute of limitations. The standard for testing the sufficiency of the evidence under a motion for JNOV is the same as that used in directed verdict motions. *Allen v. Pullen*, 82 N.C. App. 61, 64, 345 S.E.2d 469, 472 (1986), *disc. rev. denied*, 318 N.C. 691, 351 S.E.2d 738 (1987). For the reasons stated upholding the denial of the motion for directed verdict, we find the trial court properly denied the motion for JNOV.

[5] Defendants assert the trial court erred in several respects in denying their motion for a new trial. They argue a new trial is warranted on five of the grounds listed in Rule 59:

> (5) Manifest disregard by the jury of the instructions of the court;
>
> (6) Excessive . . . damages appearing to have been given under the influence of passion or prejudice;
>
> (7) Insufficiency of the evidence to justify the verdict or that the verdict is contrary to law;
>
> (8) Error in law occurring at the trial and objected to by the party making the motion, or
>
> (9) Any other reason heretofore recognized as grounds for new trial.

N.C.G.S. § 1A-1, Rule 59(a)(5)-(9) (1990). The decision to grant or deny a new trial is within the discretion of the trial court, and may not be reviewed on appeal absent a manifest abuse of discretion. *Blow v. Shaughnessy*, 88 N.C. App. 484, 493-94, 364 S.E.2d

444, 449 (1988). For the reasons stated below, we find the trial judge abused his discretion.

When the jury returned its award of $125,000, the trial court acknowledged the unreasonableness of the jury's verdict. Thus, with the plaintiffs' consent, the court reduced the award to $60,000. Defendants contend, however, that even the judgment entered constitutes excessive damages, and that the evidence was insufficient to justify the award. *See* § 1A-1, Rule 59(a)(6)-(7).

Plaintiffs were entitled to damages based on the jury's finding of breach of contract. The trial judge properly instructed the jury that a party is "entitled to be placed . . . in the same position he would have occupied if the contract had been performed." *See Coble v. Richardson Corp. of Greensboro*, 71 N.C. App. 511, 517, 322 S.E.2d 817, 822 (1984) (injured party should be placed in position he would have occupied absent breach). The judge further instructed that plaintiffs would be entitled to the difference between the value of the boat slip as promised, and the value of the boat slip received. *See Mason v. Yontz*, 102 N.C. App. 817, 819, 403 S.E.2d 536, 538 (1991) (proper measure of damages for breach of contract to build pool included difference between value of pool as contracted for and value as actually built).

Evidence presented at trial indicated the boat slip would have been worth $60,000 if constructed according to the plans. Plaintiff husband testified that the difference in value between the boat slip as promised and the boat slip as it existed was $45,000. Plaintiff said he reached this result by comparing the price for a 60-foot slip, $60,000, with that of a 35-foot slip, $15,000. There was no evidence, however, of the value of plaintiffs' 60-foot boat slip as it now exists. Plaintiff testified on cross-examination that his boat was in the slip at the time of trial and that he was able to get the boat in and out.

We cannot see how the evidence supports a judgment of $60,000 for plaintiffs. An award for the full value of a 60-foot boat slip would be appropriate if the existing boat slip had no value at all. Plaintiff husband testified, however, that they are presently able to use their boat slip. Plaintiffs were entitled to damages resulting from the difficulties they experience in using the slip. The trial court was correct in concluding that the jury's award of $125,000 was excessive. Upon hearing the jury's verdict, the trial judge remarked that "the maximum amount of damages that

could have been available under the evidence presented was $45,000." However, the judge only remitted the award to $60,000, which we believe is still excessive under the evidence presented and constituted a manifest abuse of discretion.

Because we find error we must remand this case for a new trial on the issue of damages. With consent, further remittitur could be ordered to conform the award to the evidence. We need not address defendants' remaining arguments.

Affirmed in part, reversed in part, and remanded for a partial new trial on the issue of damages.

Judges WELLS and EAGLES concur.

STATE OF NORTH CAROLINA v. FORREST EJAY SURRETT

No. 9128SC1087

(Filed 16 March 1993)

1. **Kidnapping and Felonious Restraint § 21 (NCI4th)—kidnapping—for the purpose of terrorizing victim—evidence sufficient**

The trial court did not err in a kidnapping prosecution by denying defendant's motion to dismiss based on insufficient evidence where the indictment charged kidnapping for larceny and for terrorizing the victim, the trial judge only instructed on terrorizing the victim, larceny from the person was a separate offense for which defendant received a separate instruction, and the evidence tended to show that defendant forced the victim into his car despite her screaming, fighting, and struggling, he demanded that she lie down and be quiet, her screams were heard by others in the parking lot and she stated that she was scared to death, she was so frightened that she crawled out the window of defendant's moving vehicle, and defendant attempted to prevent her escape by driving at a speed between fifteen and twenty miles an hour and struggling to hold the victim in the car. Considered in the light most favorable to the State, this evidence would support a finding that the defendant intended by his actions and commands to put the

victim in a state of intense fright or apprehension and that he grabbed her and threw her into his car for that purpose; the fact that he did not have the opportunity to fully carry out his intentions because of her fortunate and speedy escape is of no avail.

Am Jur 2d, Abduction and Kidnapping § 32.

2. **Kidnapping and Felonious Restraint § 26 (NCI4th)—kidnapping—failure to instruct on common law false imprisonment as lesser offense—no error**

The trial court did not err in a kidnapping prosecution by refusing to instruct the jury on common law false imprisonment as a lesser included offense of second degree kidnapping where the evidence pointed to the purpose of terrorizing the victim and there was no evidence indicating that defendant acted for any other purpose. The fact that the victim's purse was left in the defendant's vehicle does not show that he acted for the purpose of committing larceny. Moreover, the court instructed on felonious restraint and the jury could have found defendant guilty of felonious restraint if it had concluded that defendant did not act for the purpose of terrorizing the victim.

Am Jur 2d, Abduction and Kidnapping § 21; False Imprisonment § 9; Trial §§ 1430-1433.

Coercion, compulsion, or duress as defense to charge of kidnapping. 69 ALR4th 1005.

False imprisonment as included offense within charge of kidnapping. 68 ALR3d 828.

Appeal by defendant from judgments entered 25 April 1991 by Judge C. Walter Allen in Buncombe County Superior Court. Heard in the Court of Appeals 14 January 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jane L. Oliver, for the State.

Assistant Public Defender Curtiss A. Graham for the defendant-appellant.

WYNN, Judge.

Defendant was indicted on 5 November 1990 for second degree kidnapping pursuant to N.C. Gen. Stat. § 14-39 and larceny. The case was tried by a jury and defendant was found guilty of second degree kidnapping and misdemeanor larceny. The trial judge entered judgment on the verdicts and sentenced defendant to thirty years imprisonment on the kidnapping charge and two years imprisonment on the misdemeanor larceny charge, sentences to be served consecutively.

The State's evidence tended to show the following. On 22 September 1990, sixteen year old Cathy Jean Brooks stopped at the Ingles grocery store on Patton Avenue in Mt. Carmel, North Carolina while on her way to work. Ms. Brooks was loading groceries in her car when defendant drove his car behind hers and stopped. Defendant initiated a conversation with Ms. Brooks by asking whether she was a certain person. Ms. Brooks stated that she was not that person and continued to load her car. Defendant told Ms. Brooks that he did construction work and offered to give her his business card in case she knew of anyone who may need such work done. Defendant got out of his car and reached toward Ms. Brooks as if to give her his business card. Instead, defendant grabbed Ms. Brooks and pushed her into his car through the driver's side door. Ms. Brooks resisted by kicking and fighting, but defendant forced her into the car and followed in behind her. Defendant drove his car across the parking lot toward the exit onto Patton Avenue.

Ms. Brooks testified that defendant instructed her to "lay down and be quiet," as she struggled with him, continuing to kick and hit defendant. Ms. Brooks testified further that she realized the car window on the passenger's side was open. As defendant attempted to hold her, Ms. Brooks escaped by jumping through the open window while the car was traveling at a speed of approximately fifteen to twenty miles per hour. Ms. Brooks escaped from the car just before it reached the exit to Patton Avenue. Ms. Brooks left her purse in the car and defendant sped away. As Ms. Brooks ran toward the Ingles store, she looked back and got the license tag number from defendant's car.

Denise Swims was exiting her own vehicle when she heard Ms. Brooks' screams and saw her climbing out of the moving car. Ms. Swims was already on the pay telephone in front of Ingles,

reporting the incident to the Buncombe County Sheriff's Department when Ms. Brooks ran up to the telephone booth to use the phone. Ms. Swims reported the license tag number given to her by Ms. Brooks and described the car to the dispatcher. Officer Brian Tucker of the Buncombe County Sheriff's Department testified that when he arrived at the scene, Ms. Brooks was "very distraught, crying."

Ms. Brooks testified that she was in defendant's car for approximately forty-five seconds to one and one-half minutes before she was able to escape. She stated that she was "scared to death" during the incident. Dale Lewis, another eyewitness, and Ms. Swims both testified that they heard Ms. Brooks' loud screams coming from defendant's car. Mr. Lewis stated that he saw Ms. Brooks fighting with the defendant and screaming the entire time she was in the car.

Defendant was thereafter apprehended by officers from the Buncombe County Sheriff's Department. Upon searching defendant, officers found a high school class ring in his right front pocket which Ms. Brooks later identified as belonging to her. Several other items belonging to the victim were found in defendant's car. Defendant offered no evidence. Defendant moved to dismiss the charges at the close of the State's evidence and again at the close of all the evidence. The trial judge denied defendant's motions. Upon judgment and sentencing, defendant appeals.

I.

[1] By defendant's first assignment of error he contends that the trial court erred in denying his motion to dismiss at the close of the State's evidence. Defendant contends that the facts submitted by the State were insufficient to show that he committed a kidnapping either for the purpose of committing a felony larceny or for the purpose of terrorizing the victim. We find defendant's contentions to be without merit.

On a motion to dismiss, the trial court must determine whether there is substantial evidence of each essential element of the offense charged. *State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986). The reviewing court may consider all of the evidence actually admitted, both competent and incompetent. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975). The evidence is to be considered in the light most favorable to the

State, and the State is to be given the benefit of every reasonable inference to be drawn therefrom. *State v. Robbins*, 309 N.C. 771, 775, 309 S.E.2d 188, 190 (1983). Substantial evidence is "such relevant evidence as a reasonable mind might accept as adequate to support a conclusion." *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). If the State has offered substantial evidence of each essential element of the crime charged, the defendant's motion to dismiss must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

N.C. Gen. Stat. § 14-39 (1986) defines kidnapping as follows:

> (a) Any person who shall unlawfully confine, restrain, or remove from one place to another, any other person 16 years of age or over without the consent of such person,. . . shall be guilty of kidnapping if such confinement, restraint or removal is for the purpose of:
>
> (1) Holding such other person for ransom or as a hostage or using such other person as a shield; or
>
> (2) Facilitating the commission of any felony or facilitating flight of any person following the commission of a felony; or
>
> (3) Doing serious bodily harm to or terrorizing the person so confined, restrained or removed or any other person.
>
> (4) Holding such other person in involuntary servitude in violation of G.S. 14-43.2.
>
> (b) There shall be two degrees of kidnapping as defined by subsection (a). If the person kidnapped either was not released by the defendant in a safe place or had been seriously injured or sexually assaulted, the offense is kidnapping in the first degree and is punishable as a Class D felony. If the person kidnapped was released in a safe place by the defendant and had not been seriously injured or sexually assaulted, the offense is kidnapping in the second degree and is punishable as a Class E felony.

Kidnapping is a specific intent crime, therefore the State must prove that the defendant unlawfully confined, restrained, or removed the victim for one of the specified purposes outlined in the statute. *State v. Moore*, 315 N.C. 738, 743, 340 S.E.2d 401, 404 (1986). Although an indictment may allege multiple purposes, the State need only prove one of the alleged purposes in order

to sustain a conviction of kidnapping. *Id.* (citing *State v. Sellers*, 52 N.C. App. 380, 278 S.E.2d 907, *appeal dismissed and cert. denied*, 304 N.C. 200, 285 S.E.2d 108 (1981)).

The indictment against defendant charged that he kidnapped Cathy Jean Brooks, "by unlawfully confining her and removing her from one place to another, without her consent, and for the purpose of facilitating the commission of a felony, to wit: Larceny from the person, and for terrorizing her." Defendant argues that the evidence presented by the State was insufficient to prove that the defendant acted for either of these stated purposes.

The trial judge only instructed on one of the purposes alleged in the indictment, that of terrorizing the victim. Larceny from the person was a separate offense for which defendant received a separate instruction. Thus, we need not determine the sufficiency of the evidence as to the charge of kidnapping *for the purpose of* committing a larceny from the person.

"Terrorize" is defined as "more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension." *Moore*, 315 N.C. at 745, 340 S.E.2d at 405. Defendant contends that the evidence that the victim was only in defendant's vehicle for from 45 seconds to one and one-half minutes, and that the only statement made to the victim was to "lay down and be quiet" is insufficient to prove a purpose to terrorize.

Our Supreme Court in construing this statute has noted that "it was clearly the intent of the legislature to make resort to a tape measure or a stop watch unnecessary in determining whether the crime of kidnapping has been committed." *State v. Fulcher*, 294 N.C. 503, 522, 243 S.E.2d 338, 351 (1978). In *Fulcher* the Supreme Court specifically rejected the notion that " 'confinement' or 'restraint,' as used in this statute, means confinement or restraint 'for a substantial period' and that 'removal,' as used in this statute, requires a movement 'for a substantial distance.' " *Id.* The Court concluded that no asportation whatsoever is necessary where the requisite confinement or restraint for any one of the specified purposes is present. *Id.* Further, "intent for the purpose of this statute, may be inferred from the circumstances surrounding the event and must be determined by the jury." *State v. Moore*, 77 N.C. App. 553, 558, 335 S.E.2d 535, 538 (1985), *aff'd per curiam*, 317

N.C. 144, 343 S.E.2d 430 (1986) (citing *State v. White*, 307 N.C. 42, 296 S.E.2d 267 (1982)).

The evidence herein tends to show that defendant forced Ms. Brooks into his car despite her screams, fighting, and struggling with him. He demanded that she lie down and be quiet. Ms. Brooks' screams were heard by others in the parking lot and she stated that she was "scared to death." Ms. Brooks was so frightened that she crawled out of the window of defendant's moving vehicle. Defendant attempted to prevent her escape by driving the vehicle at a speed of between fifteen and twenty miles per hour and struggling to hold the victim in the car. Considered in the light most favorable to the State, this evidence would support a finding that the defendant intended by his actions and commands to put the victim in a state of intense fright or apprehension and that he grabbed her and threw her into his car for that purpose. The fact that he did not have the opportunity to fully carry out his intentions because of her fortunate and speedy escape is of no avail. The defendant's assignment of error is without merit.

II.

[2] Defendant's second and final assignment of error contends that the trial court erred in refusing to instruct the jury on common law false imprisonment as a lesser included offense of second degree kidnapping. We disagree.

The difference between kidnapping and the lesser included offense of false imprisonment is the *purpose* of the confinement, restraint, or removal of another person. *State v. Pigott*, 331 N.C. 199, 210, 415 S.E.2d 555, 562 (1992) (citing *State v. Whitaker*, 316 N.C. 515, 520, 342 S.E.2d 514, 518 (1986)). If the purpose of the restraint was to accomplish one of the purposes enumerated in the kidnapping statute then the offense is kidnapping. *Id.* If, however, an unlawful restraint occurs without any of the purposes specified in the statute the offense is false imprisonment. Thus, the State must prove that the defendant kidnapped with the intent to commit the particular felony charged in the indictment. *Id.* at 211, 415 S.E.2d at 562. "Intent is a condition of the mind ordinarily susceptible of proof only by circumstantial evidence. Evidence of a defendant's actions following restraint of the victim is some evidence of the reason for the restraint." *Id.* (Citations omitted).

The necessity for instructing as to a lesser included offense arises only when there is evidence from which the jury could find that the crime of lesser degree was committed. *State v. Franks*, 74 N.C. App. 661, 662, 329 S.E.2d 717, 718, *disc. rev. denied*, 314 N.C. 333, 333 S.E.2d 493 (1985) (citing *State v. Bradshaw*, 27 N.C. App. 485, 487, 219 S.E.2d 561, 562, *disc. rev. denied*, 289 N.C. 299, 222 S.E.2d 699 (1976)). Where the State presents evidence of every element of the offense charged and there is no evidence negating these elements other than the defendant's denial that he committed the offense, then no lesser included offense need be submitted. *State v. Shaw*, 106 N.C. App. 433, 439, 417 S.E.2d 262, 266, *disc. rev. denied*, 333 N.C. 170, 424 S.E.2d 914 (1992). "The mere contention that the jury might accept the State's evidence in part and might reject it in part is not sufficient to require submission to the jury of a lesser offense." *Franks*, 74 N.C. App. at 662, 329 S.E.2d at 718 (quoting *Bradshaw*, 27 N.C. App. at 487-88, 219 S.E.2d at 562). Therefore it is not error to fail to instruct on false imprisonment if there is no evidence tending to show that the victim was kidnapped for some purpose other than terrorizing, or for no purpose. *See id.* at 663, 329 S.E.2d at 718-19. *See also, State v. Nicholson*, 99 N.C. App. 143, 147, 392 S.E.2d 748, 751 (1990) (where all evidence shows intent to terrorize, failure to instruct on lesser included offense of false imprisonment is not error).

As stated previously, the evidence in this case pointed to a purpose to terrorize the victim where defendant forced Ms. Brooks into his vehicle and instructed her to lie down and be quiet as she struggled and screamed. There was no evidence indicating that defendant acted for any purpose other than to terrorize. The fact that the victim's purse was left in the defendant's vehicle does not show that he acted *for the purpose of* committing larceny. The trial judge recognizing this fact, refused to instruct on kidnapping for the purpose of committing larceny. Rather, he instructed on larceny as a separate offense. In addition, the trial judge instructed on felonious restraint as follows:

> for you to find the defendant guilty of felonious restraint, the State must prove three things beyond a reasonable doubt. First that the defendant intentionally and unlawfully restrained a person; and second, that the defendant did so without that person's consent; and third, that the defendant moved the per-

son from the place of the initial restraint by transporting him or her in a motor vehicle.

If the jury had concluded in this case, as the defendant argues, that the defendant did not act for the purpose of terrorizing the victim by his unlawful restraint, it could have found defendant guilty of felonious restraint instead of kidnapping. The jury did not so find. While other cases involving terrorization may involve more egregious facts, the uncontradicted evidence shows that the defendant confined, restrained and removed the prosecuting witness with the intent to terrorize her.

Defendant's denial of the charge of kidnapping for the purpose of terrorizing is insufficient to require an instruction on the lesser included offense of false imprisonment. There being no evidence supporting the lesser included offense, the trial court did not err in not submitting the lesser included offense of false imprisonment. For the foregoing reasons, we find

No Error.

Judges Eagles and Orr concur.

WACHOVIA BANK & TRUST COMPANY, N.A. v. TEMPLETON OLDSMOBILE-CADILLAC-PONTIAC, INC. (FORMERLY TEMPLETON OLDSMOBILE-CADILLAC, INC., D/B/A TEMPLETON DODGE

No. 9121SC946

(Filed 16 March 1993)

1. **Trial § 3.2 (NCI3d)— absence of lead counsel from trial—co-counsel unprepared—denial of continuance**

The trial court did not abuse its discretion in denying defendant's motions for a continuance when defendant's lead counsel failed to appear for trial where the lead counsel and co-counsel appeared at the calendar call on Monday; the trial court advised counsel that the case was subject to call for trial at any time during the session of court; after calendar call, defendant's lead counsel was advised that the case was likely to be reached during the week; on Tuesday the deputy clerk left messages for the lead counsel that the case would

be tried at 2:00 p.m. that day and was informed that such counsel was in another county and would not return until late that day; the co-counsel moved for a continuance at the pretrial conference and renewed the motion at the beginning of the summary judgment hearing; after the trial court granted partial summary judgment for plaintiff and plaintiff presented evidence on damages, co-counsel asked for a continuance as to defendant's counterclaim on the ground that he was unable to go forward with evidence; there is nothing in the record to indicate that lead counsel requested to be excused in advance by the judge scheduled to hear the case or that he gave prior notice to plaintiff that he would not be prepared to try the case as calendared; and there is nothing in the record to indicate that defendant did not receive notice of the hearing. Rule 2(e), General Rules of Practice for the Superior and District Courts.

Am Jur 2d, Continuance § 24.

2. **Attorneys at Law § 38 (NCI4th)— attorney's absence from trial—no withdrawal**

The failure of defendant's lead counsel to appear for the trial did not constitute a withdrawal from the case so as to require the trial court to allow a continuance where such counsel continued to represent defendant and filed a motion on defendant's behalf to set aside the judgment.

Am Jur 2d, Attorneys at Law §§ 168-177.

Legal malpractice in connection with attorney's withdrawal as counsel. 6 ALR4th 342.

Rights and duties of attorney in a criminal prosecution where client informs him of intention to present perjured testimony. 64 ALR3d 385.

3. **Rules of Civil Procedure § 56.4 (NCI3d)— absence of defendant's counsel from hearing—summary judgment for plaintiff not improper**

The failure of defendant's lead counsel to appear at a summary judgment hearing did not affect the propriety of the summary judgment entered for plaintiff where defendant failed to respond to plaintiff's summary judgment motion or to present any materials opposing the motion, defendant's

answer was not verified, plaintiff presented materials in support of the motion, and plaintiff was entitled to judgment as a matter of law.

Am Jur 2d, Summary Judgment § 20.

4. **Jury § 12 (NCI4th)— waiver of jury trial—presumption of attorney's authority—failure to rebut**

Defendant failed to rebut the presumption that his co-counsel had authority to waive a jury trial on the issue of damages where co-counsel's waiver of a jury trial was not cited as error in defendant's motion to set aside the judgment, and counsel failed to move to amend the record on appeal to include affidavits indicating that defendant desired a jury trial and did not consent to the waiver.

Am Jur 2d, Jury §§ 61 et seq.

Appeal by defendant from order and judgment entered *nunc pro tunc* 26 February 1991 by Judge Judson D. DeRamus, Jr., in Forsyth County Superior Court. Heard in the Court of Appeals 13 October 1992.

Davis & Harwell, P.A., by Fred R. Harwell, Jr., for plaintiff appellee.

Herman L. Stephens and Howard C. Jones, II, for defendant appellant.

COZORT, Judge.

On 13 February 1990 plaintiff filed a complaint alleging breach of contract. Defendant answered denying the essential allegations of the complaint and filed a counterclaim also alleging breach of contract. On 14 February 1991 plaintiff moved for summary judgment. Defendant did not respond.

The case was calendared for 25 February 1991. John Hall, attorney of record for defendant, appeared at calendar call with attorney Richard Badgett. At that time, Mr. Hall informed the court that he had not received transcripts of previously taken depositions. The trial court advised the attorneys that the case was subject to call for trial at any time during the session of the court. After calendar call, the deputy clerk telephoned Mr. Hall's office to advise him that the matter was likely to be reached during

the week. On Tuesday, 26 February 1991, Mr. Badgett gave written notice that he was attorney of record for defendant as co-counsel with Mr. Hall. That morning the deputy clerk again called Mr. Hall's office and left a message that the case would be called for trial at 2:00 p.m. that day. The deputy clerk was informed that Mr. Hall was in another county. At 1:45 p.m. the deputy clerk made a second telephone call to Mr. Hall's office and was informed again that Mr. Hall was in another county and would not return until late that day.

Mr. Badgett appeared at the pre-trial conference and moved for a continuance. The trial court denied the motion. Mr. Badgett renewed the motion at the beginning of the summary judgment hearing. The following exchange occurred between the court and counsel:

> THE COURT: Mr. Hall was here at calendar call on Monday.
>
> MR. BADGETT: Yes, he was.
>
> THE COURT: And the Court has notified his office, isn't that right Mr. Moore—
>
> THE CLERK: Yes, sir.
>
> THE COURT: —this morning and told him that we're—
>
> MR. BADGETT: All right, sir.
>
> THE COURT: —we're ready to try and ready to be tried, to come on down. The motion to continue is denied.

The superior court granted partial summary judgment to plaintiff as to defendant's contract liability. After plaintiff presented evidence on damages, Mr. Badgett stated that he could not go forward with evidence and asked for a continuance as to the counterclaim. The trial court responded:

> The motion to continue is denied. This matter has been on the calendar approximately seven weeks with no motions to continue before today or yesterday, I guess I should say, no reason adequate cause shown for a continuance. In the Court's discretion it's denied.

The trial court entered an order awarding plaintiff damages totaling $386,701.78, denying plaintiff's motion for attorneys' fees, and

granting plaintiff's motion for directed verdict on defendant's counterclaim. Defendant appeals.

[1] On appeal, defendant argues that the superior court erred in (1) denying defendant's motions to continue, and (2) granting partial summary judgment to plaintiff. We affirm.

N.C. Gen. Stat. § 1A-1, Rule 40(b) (1990) provides that "[n]o continuance shall be granted except upon application to the court. A continuance may be granted only for good cause shown and upon such terms and conditions as justice may require." In *Shankle v. Shankle*, 289 N.C. 473, 483, 223 S.E.2d 380, 386 (1976) (quoting 17 C.J.S. *Continuances* § 97 (1963)), the North Carolina Supreme Court set forth the standards the trial court must consider in ruling on a motion to continue:

> In passing on the motion the trial court must pass on the grounds urged in support of it, and also on the question whether the moving party has acted with diligence and in good faith. In reaching its conclusion the court should consider all the facts in evidence, and not act on its own mental impression or facts outside the record, although . . . it may take into consideration facts within its judicial knowledge. . . . The motion should be granted where nothing in the record controverts a sufficient showing made by the moving party, but since motions for continuance are generally addressed to the sound discretion of the trial court . . . a denial of the motion is not an abuse of discretion where the evidence introduced on the motion for a continuance is conflicting or insufficient. . . . The chief consideration to be weighed in passing upon the application is whether the grant or denial of a continuance will be in furtherance of substantial justice.

Specifically, defendant argues that the superior court erred in denying the motions by (1) not considering whether defendant acted with diligence and good faith in requesting the continuance, (2) not inquiring as to the presence of defendant's representative in the courtroom, and (3) not treating counsel's failure to appear as a withdrawal from the case. We disagree.

The General Rules of Practice for the Superior and District Courts, Rule 2(e) (1992) provides that

> [w]hen an attorney is notified to appear for the setting of a calendar, pretrial conference, hearing of a motion or for

> trial, he must, consistent with ethical requirements, appear or have a partner, associate or another attorney familiar with the case present. Unless an attorney has been excused in advance by the judge before whom the matter is scheduled and has given prior notice to his opponent, a case will not be continued.

(Emphasis added). Although Mr. Hall indicated at calendar call that he had not yet received transcripts from previously taken depositions, there is nothing in the record to indicate that Mr. Hall requested to be excused in advance by the judge scheduled to hear the case or that he gave prior notice to plaintiffs that he would not be prepared to try the case as calendared. Mr. Badgett, co-counsel of record, appeared on behalf of defendant and moved for a continuance solely on the grounds that he was not prepared to try the case. Under Rule 2(e) Mr. Badgett was not entitled to a continuance.

In *Chris v. Hill*, 45 N.C. App. 287, 262 S.E.2d 716, *disc. review denied*, 300 N.C. 371, 267 S.E.2d 674 (1980), this Court addressed a similar factual situation on appeal from the denial of a Rule 60 motion for a new trial. There, plaintiffs filed a breach of contract action. On 18 January, defendants' counsel received a final trial calendar which indicated that jurors were to report on 23 January and that defendants' case was the fifth case calendared. Also on 18 January defendants' counsel received a letter from plaintiffs' counsel indicating that the case was the fourth case scheduled and there was a substantial likelihood the case would be heard during the 22 January session of the court. Based upon his experience as a trial attorney, defendants' counsel concluded that the case would not be heard on the same day that jurors were ordered to appear. Defendants' counsel failed to appear for calendar call. Both defendants' counsel and defendants failed to appear for the trial. After inquiring if either counsel or defendants were present, the trial court proceeded to select the jury, called for defendants to present evidence, and dismissed the counterclaim when defendants failed to appear. Plaintiffs then presented evidence, and the jury returned a verdict in plaintiffs' favor.

On appeal from the trial court's denial of a motion for a new trial, this Court disapproved of the trial court's failure to make any attempts to determine the reason for the absence of defendants and their counsel; however, we concluded that the trial court did

not abuse its discretion in failing to do so. Since "a party to a lawsuit must give it the attention a prudent man gives to his important business," *id.* at 290, 262 S.E.2d at 718, and defendants received adequate notice, this Court concluded that the evidence supported the trial court's conclusion that defendants' failure to appear for trial was not excusable. *Id.* at 290-91, 262 S.E.2d at 719.

Similarly, in the case now before us, we do not find the trial court abused its discretion in denying the motion to continue. The record is clear that Mr. Hall had notice that the case was calendared for the 25 February session of court and was likely to be reached during that week. The deputy clerk attempted to reach Mr. Hall on 26 February and left a message that the case would be called. Mr. Hall did not appear. Although not inquiring as to Mr. Hall's whereabouts, the trial court did inquire whether Mr. Hall had notice of the trial. As to the presence of defendant's representative, there is nothing in the record to indicate that defendant did not receive notice of the hearing. In fact, it is admitted that defendant's president was "on stand-by" in Florida. We find the evidence before the trial court was sufficient to support a finding that the moving party did not act with diligence and good faith and failed to show good cause in requesting the continuance.

[2] Defendant further contends that the trial court had no discretion to deny the continuance because Mr. Hall's absence was tantamount to a withdrawal from the case. The record indicates that Mr. Hall did not withdraw as counsel for defendant. After the hearing, Mr. Hall continued to represent defendant and later filed a motion to set aside the judgment on behalf of defendant. We note also that defendant was represented by counsel of record during the proceedings. We find defendant's argument to be without merit.

[3] We also find that Mr. Hall's absence had little effect on the summary judgment issue. Plaintiff filed a motion for summary judgment on 14 February 1991. Defendant did not respond to the motion and presented no affidavits or depositions in opposition to the motion. Defendant's answer and counterclaim were not verified. Summary judgment is appropriate "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a

matter of law." N.C. Gen. Stat. § 1A-1, Rule 56(c) (1990). If a moving party presents materials in support of the motion, the opposing party "may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him." N.C. Gen. Stat. § 1A-1, Rule 56(e) (1990). Since defendant failed to respond to plaintiff's motion or present any materials opposing the motion to the trial court, and plaintiff is entitled to judgment as a matter of law, summary judgment was properly entered for plaintiff. Mr. Hall's absence does not appear to have had any effect on the propriety of summary judgment.

[4] Finally, defendant argues that the trial court erred in waiving defendant's right to a jury trial on the damages issue since Mr. Badgett was unfamiliar with the case and obviously had not sought the consent of his client to waive the jury trial. N.C. Gen. Stat. § 1A-1, Rule 38(d) (1990) provides that "[a] demand for trial by jury . . . may not be withdrawn without the consent of the parties who have pleaded or otherwise appear in the action." Although Rule 38 requires the consent of the *parties*, "there is a presumption that an attorney has authority to act for his client and one challenging the attorney's actions as being unauthorized has the burden of rebutting the presumption." *Gillikin v. Pierce*, 98 N.C. App. 484, 488, 391 S.E.2d 198, 200, *disc. review denied*, 327 N.C. 427, 395 S.E.2d 677 (1990) (citations omitted). "This presumption applies to both procedural and substantive aspects of a case." *Matter of R. J. Reynolds Tobacco Co.*, 52 N.C. App. 299, 302, 278 S.E.2d 575, 577 (1981). The presumption is reflected in N.C. Gen. Stat. § 1A-1, Rule 39(a)(1) (1990) which permits "parties who have pleaded or otherwise appeared in the action *or their attorneys of record . . . by an oral stipulation made in open court and entered in the minutes*, [to] consent to trial by the court sitting without a jury . . . ." (Emphasis added.) In the present case, when defendant filed a motion to set aside the judgment, counsel failed to cite Mr. Badgett's waiver of jury trial as error. Counsel also failed to move to amend the record on appeal to include affidavits indicating that defendant desired a jury trial and did not consent to the waiver. Accordingly, we find that defendant has not presented any evidence to rebut the presumption that Mr. Badgett was authorized to waive the jury trial.

We have reviewed defendant's remaining assignments of error and find them to be without merit.

The judgment below is

Affirmed.

Judges JOHNSON and LEWIS concur.

STATE OF NORTH CAROLINA v. VERNON JUNIOR WOODS

No. 9129SC988

(Filed 16 March 1993)

1. Arson and Other Burnings § 8 (NCI4th) — burning of outhouse — storage building

The trial court did not err by denying defendant's motion to dismiss an indictment for burning an uninhabited storage building in violation of N.C.G.S. § 14-62 where the verdict sheet shows that the jury found defendant guilty of burning an "outhouse." Although defendant argues that an "outhouse" is an outdoor toilet or privy and not a storage building, there is little doubt that the storage building at issue falls within the modern definition of an outhouse. The intent of the legislature in 1875, which ratified the predecessor to the current version of the statute, is also illuminating. The jury heard evidence from several witnesses as to the contents of the storage building, there was no evidence that the building burned was an outdoor toilet, and there could not have been any confusion by the jury as to the manner of structure the defendant burned. Although the exact distance from the house to the storage building is not in the record, it was described as half the length of the courtroom and was within the curtilage of the house.

Am Jur 2d, Arson and Related Offenses §§ 16 et seq.

2. Arson and Other Burnings § 29 (NCI4th) — burning of storage building — sufficiency of evidence

The trial court properly denied defendant's motion to dismiss a charge of burning an uninhabited storage build-

ing for insufficient evidence where the evidence tended to show that defendant escaped from the North Carolina Department of Correction while working on a road crew; a passer-by saw a trail of fire proceeding from the roadway to a storage building located adjacent to a nearby house; the passer-by called the authorities; he and others returned to the scene and found defendant standing in the middle of the road; defendant replied to their questions merely by saying that he lived "up the road"; he later took a car and fled; the storage building was completely destroyed by fire; and a member of the arson investigation team for the fire department concluded that the fire was incendiary in origin. Viewed as a whole, there was substantial circumstantial evidence in that defendant was the only person seen in close proximity to the fire after it started, the fire was not accidental, defendant failed to warn near-by residents, lied about his identity, and attempted to flee the scene in a stolen car.

Am Jur 2d, Arson and Related Offenses § 55.

Appeal by defendant from judgment entered 13 June 1991 by Judge Herbert O. Phillips, III, in McDowell County Superior Court. Heard in the Court of Appeals 11 January 1993.

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

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

LEWIS, Judge.

The defendant was charged in a proper bill of indictment on 21 October 1989, among other crimes, with wantonly and willfully burning "an uninhabited storage building located at 607 Old Highway 10, Marion, North Carolina" in violation of N.C.G.S. § 14-62. A trial was held on the charges beginning on 10 June 1991, in McDowell County before the Honorable Herbert O. Phillips, III. At trial the evidence presented tended to show that on 18 October 1989, defendant was an inmate in the North Carolina Department of Correction. While working on a road crew in McDowell County between Marion and Old Fort, the defendant escaped.

On 21 October 1989, around 5:00 a.m. Dennis Butner ("Butner") was driving his car in Marion on Old Highway 10 when he saw a "trail of fire" proceeding from the roadway to a "storage building" located adjacent to a nearby house. Butner testified that when he first saw the fire, the flames had not yet reached the storage building. Upon seeing the fire, Butner called the authorities. When Butner and others returned to the scene of the fire, they found the defendant standing in the middle of the road. To their questions the defendant merely replied that he "lived up the road." He later took Butner's car and fled, only to be recaptured.

The storage building, which was owned by Edith Sowers ("Sowers"), was completely destroyed by the fire. Sowers and her children had used the storage building to store lawn mowers, weed eaters, gasoline, furniture, tools and other items. The building was often referred to as a "garage," even though it did not house an automobile.

Charles Presnell, an engineer and a member of the arson investigation team for the Marion Fire Department conducted an investigation as to the cause and origin of the fire. As a result of his investigation, Presnell concluded that the fire was incendiary in origin.

The defendant testified at trial that he had escaped from the road squad and that he had stolen Butner's car. However, the defendant denied having set fire to the storage building.

Upon hearing all the evidence, the jury convicted the defendant on three counts of assault with a deadly weapon, two counts of traffic violations, one count of felony larceny, one count of felony escape from prison and one count of burning an uninhabited storage building. The only conviction from which defendant appeals is the burning of the uninhabited storage building or "outhouse."

[1] As his first assignment of error, the defendant argues that the trial court erred in denying his motion to dismiss on the grounds that N.C.G.S. § 14-62 "does not prohibit the burning of the structure that is alleged to have been burned in this case." We disagree. Defendant was charged pursuant to N.C.G.S. § 14-62 (1986) which provides:

> If any person shall wantonly and willfully set fire to or burn or cause to be burned, or aid, counsel or procure the burning of, any uninhabited house, any church, chapel, or meetinghouse,

> or any stable, coach house, outhouse, warehouse, office, shop, mill, barn or granary, or any building, structure, or erection used or intended to be used in carrying on any trade or manufacture, or any branch thereof, whether the same or any of them respectively shall then be in the possession of the offender, or in the possession of any other person, he shall be punished as a Class E felon.

The verdict sheet shows that the jury found the defendant guilty of burning an "outhouse." It is the defendant's contention that the building which was burned does not come within the purview of N.C.G.S. § 14-62, and that he should have been charged with violating N.C.G.S. § 14-67.1 (1986) which provides:

> If any person shall wantonly and willfully set fire to or burn . . . any building or other structure of any type not otherwise covered by the provisions of this Article, he shall be punished as a Class H felon.

The defendant and the State agree that the building which was burned was a storage building. However, the defendant and the State disagree as to whether such a storage building is an "outhouse" within the meaning of N.C.G.S. § 14-62. Defendant argues that an "outhouse" is an outdoor toilet or privy and not a storage building. The State contends that the definition of "outhouse" is not limited to outdoor toilets and that it also encompasses any "outbuilding." We hold that all privies are outhouses but not all outhouses are privies.

In interpreting statutes, where the words of a statute have not gained a technical meaning, they must be given their common and ordinary meaning unless a different meaning is apparent or required by the context. *Pelham Realty Corp. v. Board of Transp.*, 303 N.C. 424, 279 S.E.2d 826 (1981). In Black's Law Dictionary an "outhouse" is defined as follows:

> A building subservient to, yet distinct from, the principal dwelling, located either within or without the curtilage. A smaller or subordinate building connected with a dwelling, usually detached from it and standing at a little distance from it, not intended for persons to live in, but to serve some purpose of convenience or necessity; as a barn, outside privy, a dairy, a toolhouse, and the like.

Black's Law Dictionary 993 (5th ed. 1979). Similarly, Webster's defines an "outhouse" as any "outbuilding." Webster's Third New International Dictionary 1602 (1968). There is little doubt that the storage building at issue falls within the modern definition of an outhouse.

However, the predecessor to the current version of N.C.G.S. § 14-62 was first ratified 22 March 1875 and the term "out-house" has since been a part of N.C.G.S. § 14-62. 1874-75 N.C. Sess. Laws Chap. 228. Therefore, we feel that the intent of the legislature in 1875 is illuminating in interpreting the meaning that should be attached to the word "outhouse." *See State ex rel. Comm'r of Ins. v. North Carolina Auto. Rate Admin. Office*, 294 N.C. 60, 241 S.E.2d 324 (1978) (primary function of court in construing legislation is to insure that purpose of the enacting legislature is accomplished). In a case decided less than ten years after the enactment of N.C.G.S. § 14-62, our Supreme Court held that the term "out-house" has a technical meaning: "An out-house is one that belongs to a dwelling-house, and is in some respect parcel of such dwelling-house and situated within the curtilage." *State v. Roper*, 88 N.C. 656, 658 (1883). This definition shows that the term "out-house" in 1883 was not limited to an outdoor toilet. In fact, the defendant in *Roper* was charged with burning an "out-house used as a store-house." When the *Roper* definition of "out-house" is applied to the present case, it is clear that the storage house which the defendant burned falls within the statutory definition of "outhouse."

We are also guided by other uses of the term "outhouse" during this same period of time. Webster's Unabridged Dictionary, 1853, defines "outhouse" as: "Small house or building at a little distance from the main house." "Privy" is defined as: "secret," "a necessary house;" "necessary" is defined as "a privy."

On 15 October 1880 a fire of unknown origin destroyed buildings in the northwest corner of Capitol Square. A belfry, wood and coal house and the "old closets" were destroyed. Governor Thomas Jarvis of Pitt County and a founder of East Carolina University stated in his message of 3 January 1883 to the Legislature that "[t]he old closets in the northwest corner of the Capitol Square, which were destroyed by fire some two years ago, have not been rebuilt. . . . This rendered it necessary to make other arrangements for closets and sewerage for the Capitol. This necessity will soon

be met by the completion of suitable closets in the rear of the Agricultural building, with proper sewerage, which are now in process of construction."

The jury heard evidence from several witnesses as to the contents of the storage building and knew that it contained lawn mowers and other yard implements. Therefore, there could not have been any confusion on the part of the jury as to what manner of structure the defendant allegedly burned. Never did the jury hear any evidence that the building burned was an outdoor toilet.

The only question remaining under defendant's first assignment of error is whether the storage building was within the curtilage of the Sowers' house. Similar to the term "out-house," the term "curtilage" has been defined by case law. In *State v. Twitty*, 2 N.C. 102 (1794), curtilage was defined as meaning "a piece of ground, either enclosed or not, that is commonly used with the dwelling-house." *See also, State v. Browning*, 28 N.C. App. 376, 221 S.E.2d 375 (1976) (building described as "little shack," "shed" or "garage" located twenty feet from house found to be "within the curtilage of the home").

Though the exact distance which the storage house was situated from the house is not reflected in the Record, the distance was described as about half the length of the courtroom. Even considering the commodious main courtrooms of Richmond, Buncombe, Lenoir and Yadkin Counties, we know of no courtroom in North Carolina half the length of which would be beyond the curtilage of any house in the state. The late Professor Albert Coates, creator of the Institute of Government, said: It was an early unwritten maxim of municipal law that "no man's privy should be closer to his neighbor's house than to his own."

[2] In his second assignment of error, defendant argues that the trial court erred by denying his motion to dismiss because there was insufficient evidence that he set the storage building on fire. We disagree.

A motion to dismiss should be denied where there is substantial evidence, whether direct, circumstantial, or both, to support a finding that the offense charged was committed and that the defendant committed it. *State v. Locklear*, 322 N.C. 349, 368 S.E.2d 377 (1988). The evidence must be considered in the light most favorable to the State, and the State is entitled to every reasonable

inference to be drawn from the evidence. *Id.* Substantial evidence has been defined as an amount of relevant evidence a reasonable mind might accept as adequate to support a conclusion. *State v. Cox*, 303 N.C. 75, 277 S.E.2d 376 (1981).

The essential elements of N.C.G.S. § 14-62 are: (1) the fire; (2) that the fire was of an incendiary origin; and (3) that the defendant was connected with the crime. *State v. Sheetz*, 46 N.C. App. 641, 265 S.E.2d 914 (1980). As discussed above, the storage building which the defendant burned falls within the list of buildings specified in N.C.G.S. § 14-62. The occurrence of a fire is not in dispute and the testimony of Presnell, when taken in the light most favorable to the State, is sufficient to conclude that the fire was of an incendiary origin.

The defendant contends the evidence is not sufficient to show that the defendant was connected to the fire. However, when the evidence is viewed as a whole, we feel there is substantial circumstantial evidence for the jury to have found him guilty. The defendant was the only person seen in close proximity to the fire after it started. The defendant also failed to warn the nearby residents, lied about his identity, and attempted to flee the scene in a stolen car. "The wicked flee when no man pursueth." Proverbs 28:1; *State v. Irick*, 291 N.C. 480, 231 S.E.2d 833 (1977); *State v. Swift*, 105 N.C. App. 550, 414 S.E.2d 65 (1992).

The facts of this case are substantially similar to *State v. Clark*, 90 N.C. App. 489, 369 S.E.2d 607 (1988), where this Court held that even though the evidence was entirely circumstantial, that it was still sufficient to connect the defendant with the fire. Therefore, based on the circumstantial evidence and the fact that the fire was not accidental, it was proper for the trial court to have denied defendant's motion to dismiss.

We hold defendant had a fair trial free from prejudicial error.

No error.

Chief Judge ARNOLD and Judge COZORT concur.

STATE OF NORTH CAROLINA v. THOMAS BATTLE, JR.

No. 918SC1053

(Filed 16 March 1993)

Searches and Seizures § 12 (NCI3d)— DWI—investigatory stop—communication from another officer

An investigatory stop of a vehicle was constitutional and the trial court erred by suppressing evidence obtained therefrom in a DWI prosecution where the first officer, Officer Harmon, observed defendant sitting in the driver's seat of a red four door Pontiac in the parking lot of a washerette; Officer Harmon believed defendant was impaired by alcohol based on tests given defendant and the odor of alcohol on his person; Officer Harmon told defendant not to drive and drove his vehicle from the parking lot, leaving defendant and other men standing near defendant's vehicle; Officer Harmon radioed Officer Beekin to be on the lookout for a red four door Pontiac with the license plate number of defendant's automobile; Officer Beekin saw an automobile fitting that description leave the parking lot and drive onto a public street; Officer Beekin followed the vehicle for approximately four blocks and did not observe anything unusual about the operation of the automobile; and Officer Beekin stopped the automobile and arrested defendant for driving while impaired. Although Officer Beekin did not have the reasonable suspicion necessary to make the stop of defendant's vehicle based either on his own observations or on any particular information communicated to him by Officer Harmon, the instructions to "be on the lookout" for the vehicle were tantamount to a request "to stop" the vehicle and the stop was therefore constitutional.

Am Jur 2d, Automobiles and Highway Traffic § 304.

Appeal by State from order entered 8 August 1991 in Wayne County Superior Court by Judge Cy A. Grant. Heard in the Court of Appeals 13 January 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Joseph P. Dugdale, for the State.

Barnes, Braswell, Haithcock & Warren, P.A., by Glenn A. Barfield, for defendant-appellee.

GREENE, Judge.

The State appeals, prior to trial and pursuant to N.C.G.S. § 15A-979(c), from the trial court's order granting defendant Thomas Battle, Jr.'s motion to suppress evidence obtained by the State as a result of an investigatory stop of his vehicle.

On 9 December 1990, defendant was arrested for driving while impaired following an investigatory stop of his vehicle by Goldsboro Police Officer Jeff Beekin (Officer Beekin), who stopped defendant pursuant to a radio report from fellow Officer Dennis Harmon (Officer Harmon). After his arrest defendant was transported to the police station for a breathalyzer test. The results of this test showed a blood alcohol level of .16. Defendant was tried and found guilty of driving while impaired in district court, and gave notice of appeal to the superior court. Defendant entered a plea of not guilty in superior court and filed a motion in limine to suppress the evidence from the breathalyzer test and all other evidence obtained from the stop of his vehicle by Officer Beekin. After hearing *voir dire* testimony on 5 August 1991, the trial court made the following pertinent findings of fact:

> 4. That Officer Dennis Harmon of the Goldsboro Police Department responded to the radio dispatch to go to the washerette . . . to investigate a public disturbance.
>
> 5. That Officer Harmon went to the washerette and noticed that the defendant was seated behind the steering wheel of a red colored four-door Pontiac automobile parked in the parking lot of the washerette.
>
> 6. That Officer Harmon went up to where the defendant was parked and asked the defendant [to get] out of the vehicle and the defendant complied.
>
> 7. That Officer Harmon noticed an odor of alcohol on the defendant's breath.
>
> 8. That Officer Harmon had the defendant perform two field sobriety tests: Finger-to-nose test and a sway test.
>
> 9. That the defendant performed poorly on both tests.
>
> 10. That Officer Harmon told the defendant not to drive the automobile because in the officer's opinion, the defendant was impaired by alcohol.

11. That there were at least three other people standing in and about the vehicle [in] which the defendant was seated while the officer was present.

12. That Officer Harmon then drove his vehicle from the washerette parking lot leaving the defendant and the other men standing near the defendant's vehicle.

13. That Officer Harmon radioed . . . Officer Jeff Beekin, who was on routine patrol, and informed Officer Beekin to be on the lookout for a red four-door Pontiac automobile with the license plate number of the automobile in which the defendant was sitting.

14. That approximately five to seven minutes after receiving the call, Officer Beekin, while on patrol, saw an automobile fitting the description given by Officer Harmon leave the parking area of the washerette and drive onto a public street.

15. That Officer Beekin drove his patrol vehicle up behind the red Pontiac and noticed the vehicle had the same license plate number as the automobile described by Officer Harmon.

16. That Officer Beekin followed the automobile for approximately four blocks and did not observe anything unusual about the operation of the automobile.

17. That Officer Beekin observed four people riding in the automobile.

18. That Officer Beekin stopped the automobile and found the defendant to be the driver and placed him under arrest for driving while impaired.

Based on these findings of fact, the trial court made the following conclusions of law:

1. Officer Beekin did not have any reason to believe or suspect that the person operating the automobile was the defendant or was in any way engaged in criminal activity.

2. That the defendant's federal and state constitutional rights were violated by the stop of the automobile.

The trial court then allowed the defendant's motion to suppress the evidence obtained as a result of the stop of defendant's vehicle.

The State argues that the collective knowledge of Officer Beekin and Officer Harmon was sufficient to create a reasonable suspicion on the part of Officer Beekin of criminal activity, thus justifying the stop. Defendant argues that Officer Beekin did not have the reasonable suspicion of criminal activity needed to justify the stop of defendant's vehicle, and therefore all evidence that resulted from that stop was correctly suppressed by the trial court.

The dispositive issue is whether Officer Beekin had the requisite reasonable suspicion to justify the stop of defendant's vehicle.

A police officer may conduct a brief investigatory stop of a vehicle, even though there is no probable cause for the stop, when justified by specific, articulable facts which would lead a police officer "reasonably to conclude in light of his experience that criminal activity may be afoot." *Terry v. Ohio*, 392 U.S. 1, 30, 20 L. Ed. 2d 889, 911 (1968); *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 778, *cert. denied*, 444 U.S. 907, 62 L. Ed. 2d 143 (1979) (officer's conduct in investigatory stops governed by standard set forth in *Terry*). In determining whether an officer has the necessary reasonable suspicion of criminal activity, the court must examine both the articulable facts known to the officer at the time he determines to stop the vehicle and the rational inferences the officer was entitled to draw from those facts. *Thompson*, 296 N.C. at 706, 252 S.E.2d at 779. These facts and inferences must yield the "substantial possibility that criminal conduct has occurred, is occurring, or is about to occur" in order for an investigatory stop to be valid. 3 Wayne R. LaFave, *Search and Seizure* § 9.3(b), at 432 (2d ed. 1987); *see also United States v. Cortez*, 449 U.S. 411, 417, 66 L. Ed. 2d 621, 628 (1981) ("stop must be justified by some objective manifestation that the person stopped is, or is about to be, engaged in criminal activity"); *State v. Jones*, 96 N.C. App. 389, 395, 386 S.E.2d 217, 220 (1989), *disc. rev. denied*, 326 N.C. 366, 389 S.E.2d 809 (1990) (quoting *Cortez*). In determining whether there exists the requisite reasonable suspicion, the court must view the totality of the circumstances through the eyes of a reasonable and cautious police officer at the scene. *Jones*, 96 N.C. App. at 395, 386 S.E.2d at 221.

If the officer making the investigatory stop (the second officer) does not have the necessary reasonable suspicion, the stop may nonetheless be made if the second officer receives from another

officer (the first officer) a request to stop the vehicle, and if, at the time the request is issued, the first officer possessed a reasonable suspicion that criminal conduct had occurred, was occurring, or was about to occur. *United States v. Hensley*, 469 U.S. 221, 232, 83 L. Ed. 2d 604, 614 (1985); *see State v. Zuniga*, 312 N.C. 251, 260, 322 S.E.2d 140, 145 (1984) (second officer may rely on bulletin from first officer calling for defendant's detention as probable cause for arrest when "originating [first] officer himself had probable cause"); *State v. Tilley*, 44 N.C. App. 313, 317, 260 S.E.2d 794, 797 (1979) (arrest of defendant by second officer justified based on first officer's request to take into custody where first officer had probable cause for arrest).

Where there is no request from the first officer that the second officer stop a vehicle, the collective knowledge of both officers may form the basis for reasonable suspicion by the second officer, if and to the extent the knowledge possessed by the first officer is communicated to the second officer. *State v. Gray*, 55 N.C. App. 568, 570, 286 S.E.2d 357, 359 (1982) (officer's investigatory stop of vehicle justified when officer observed defendant's vehicle being operated on highway and shortly thereafter heard radio report from another officer that defendant's vehicle had expired license tags); *see United States v. Nafzger*, 974 F.2d 906, 914-15 (7th Cir. 1992) (investigatory stop of vehicle justified without request that vehicle be stopped where local officer had been told by FBI that defendant was suspected in stolen car ring and local officer recognized defendant as he drove on highway).

In summary, an investigatory stop by a police officer is constitutional, under the principles of *Terry*, only if: (1) the officer making the stop has a reasonable suspicion, based on his personal observations, that criminal conduct has occurred, is occurring, or is about to occur; (2) the officer making the stop has received a request to stop the defendant from another officer, if that other officer had, prior to the issuance of the request, the necessary reasonable suspicion; (3) the officer making the stop received, prior to the stop, information from another officer, which, when combined with the observations made by the stopping officer, constitute the necessary reasonable suspicion. A *Terry* stop made outside the scope of these rules is an unconstitutional stop and any evidence obtained as a result of the stop is subject to exclusion. *State v. Carter*, 322 N.C. 709, 712-13, 370 S.E.2d 553, 555 (1988) (Article I, Section 20 of the North Carolina Constitution requires exclusion

of evidence obtained as a consequence of unconstitutional stop); *Terry*, 392 U.S. at 12, 20 L. Ed. 2d at 900 (Fourth Amendment of the United States Constitution may require exclusion of evidence obtained from unreasonable search and seizure); *see also United States v. Leon*, 468 U.S. 897, 913, 82 L. Ed. 2d 677, 692 (1984) (adopting good-faith exception to exclusionary rule in some circumstances).

The findings of fact in this case, which are not in dispute, reveal that: (1) Officer Harmon observed defendant sitting in the driver's seat of a red four-door Pontiac in the parking lot of a washerette; (2) based on tests given defendant and the odor of alcohol on his person, Officer Harmon believed defendant was impaired by alcohol; (3) at the time of the radio message to Officer Beekin to "be on the lookout" for the red Pontiac, Officer Harmon had not observed anything to indicate that criminal activity had occurred or was occurring; (4) Officer Harmon did not communicate to Officer Beekin the information he gained from his conversation with and personal observation of defendant; and (5) Officer Beekin did not see the defendant's vehicle make any movement that indicated that criminal activity had occurred, was occurring, or was about to occur.

Therefore, Officer Beekin did not have the reasonable suspicion necessary to make the stop of defendant's vehicle, based either on his own observations or on any particular information communicated to him by Officer Harmon. A reasonable and cautious officer in the position of Officer Harmon, however, would have thought that there existed a substantial possibility that defendant would leave the parking lot driving the automobile. Accordingly, prior to the time Officer Harmon communicated his request to "be on the lookout" for the red four-door Pontiac, he did have the requisite reasonable suspicion that criminal activity was about to occur, specifically that defendant, whom Officer Harmon believed to be impaired, would leave the parking lot operating the vehicle. The fact that Officer Harmon did not instruct Officer Beekin "to stop" the vehicle is not material because the instructions to "be on the lookout" for the vehicle were tantamount to a request "to stop" the vehicle. The fact is that Officer Beekin did stop the vehicle in response to the communication from Officer Harmon. The stop was therefore constitutional, and the evidence obtained as a consequence of the stop was admissible.

The order of the trial court suppressing the evidence obtained as a result of the stop is therefore

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. ANGELA CAPES SUITES

No. 9118SC1130

(Filed 16 March 1993)

Criminal Law § 51 (NCI4th)— murder—accessory before the fact—plea before trial of principal—principal acquitted—plea set aside

The trial court erred by denying defendant's motion to set aside her plea of guilty of accessory before the fact to second degree murder where defendant was indicted for first degree murder and conspiracy to commit first degree murder; the State acknowledged at a pretrial hearing that defendant would be tried on the theory of accessory before the fact; defendant entered a plea of guilty to accessory before the fact to second degree murder pursuant to plea negotiations; the court accepted the plea but deferred sentencing until the district attorney should pray judgment; the principal was tried and acquitted of murder and convicted of conspiracy; the State prayed judgment against defendant and defendant filed a motion to set aside her plea because the principal had been acquitted; and the court denied the motion and sentenced defendant. N.C.G.S. § 14-5.2 cannot be read as altering the long-standing rule that the acquittal of the named principal is an acquittal of the accessory before the fact. This rule must prevail whether the defendant, prior to the acquittal of the principal, has been tried and found guilty of a felony on the theory that he was an accessory before the fact, or has pled guilty to being an accessory before the fact to the felony.

Am Jur 2d, Criminal Law § 172.

Appeal by defendant from judgment entered 22 March 1991 in Guilford County Superior Court by Judge Joseph R. John. Heard in the Court of Appeals 2 February 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General E. H. Bunting, Jr., for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Constance H. Everhart, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 22 March 1991, which judgment is based on a plea of guilty by defendant to accessory before the fact to second-degree murder, N.C.G.S. §§ 14-5.2 and 14-17 (1986), a Class C felony with a maximum term of life in prison and a presumptive term of fifteen years.

Defendant was indicted on 21 December 1987 on the charges of first-degree murder and conspiracy to commit first-degree murder. Upon motion of defendant, the State on 6 July 1989 filed a bill of particulars in the conspiracy case alleging that defendant conspired with Henry Roberson to commit the murder of Dickie Ray Suites, defendant's husband. At a hearing conducted on 10 July 1989 on defendant's motion to suppress, the State acknowledged that defendant would be tried in the murder case on the theory of accessory before the fact, with the named principal being the individual identified in the conspiracy bill of particulars—Henry Roberson. Defendant, pursuant to plea negotiations with the prosecutor, entered a plea of guilty to accessory before the fact to second-degree murder. After examining defendant under oath pursuant to N.C.G.S. § 15A-1022 regarding the voluntariness of her plea, the court accepted defendant's guilty plea, finding, *inter alia*, that there was a factual basis for the plea and that the plea was freely, voluntarily, and understandingly made and the informed choice of defendant. The transcript of plea was filed 12 July 1989.

Upon the court's acceptance of defendant's guilty plea, defendant withdrew her motion to suppress and the State entered a voluntary dismissal of the conspiracy charge. Under the terms of the plea agreement with the State, defendant promised to testify truthfully for the State at the trial of Henry Roberson in exchange for a twelve-year active prison sentence. Accordingly, sentencing

was deferred until the District Attorney should pray judgment following the trial of Roberson.

Roberson was indicted and tried for the first-degree murder of Dickie Ray Suites and for conspiracy with defendant to murder Suites. On 22 January 1991, the jury returned verdicts finding Roberson not guilty of first-degree murder, but guilty of conspiracy to commit murder. Roberson was sentenced to three years on the conspiracy conviction. The following day, the State prayed judgment in the murder case against defendant, which the trial court continued.

On 14 February 1991, defendant filed a motion to set aside her guilty plea, contending that her plea of guilty to accessory before the fact to a murder alleged to have been committed by Henry Roberson could not stand because Roberson had been acquitted of first-degree murder and all lesser included offenses. In ruling on defendant's motion to set aside her guilty plea, the trial court found in pertinent part that, at the time of defendant's plea, (1) she was represented by counsel, (2) there existed a factual basis for the entry of her plea, and (3) defendant stated under oath that she was in fact guilty. The court also found that defendant had not asserted in any way at the hearing on her motion to set aside the plea that she was not a participant in the murder of her deceased husband. The court concluded that defendant had not shown a fair and just reason to be allowed to withdraw her plea, and denied the motion. Thereafter, defendant was sentenced to a twelve-year active term in accordance with her plea agreement. She appeals.

The issue presented is whether the acquittal of the named principal on charges of first-degree murder requires as a matter of law that defendant's plea of guilty to accessory before the fact to second-degree murder be set aside.

A criminal defendant is generally accorded the right to withdraw a plea of guilty upon motion made prior to sentencing if he meets his burden of showing that his motion is supported by a fair and just reason and the court determines that withdrawal of the plea will not cause substantial prejudice to the State. *State v. Handy*, 326 N.C. 532, 536, 391 S.E.2d 159, 161 (1990). When a defendant seeks to withdraw a guilty plea after sentencing, his motion should be granted only where necessary to avoid manifest injustice. *Id.*

The stricter standard applied to post- versus pre-sentence motions to withdraw is warranted by the likelihood that, after sentencing, the defendant will view the plea bargain as a tactical mistake or that other portions of the plea bargain agreement already will have been performed by the prosecutor, such as the dismissal of additional charges, and by " 'the settled policy of giving finality to criminal sentences which result from a voluntary and properly counseled guilty plea.' " *Id.* at 537, 391 S.E.2d at 161 (citation omitted). "In reviewing a decision of the trial court to deny defendant's motion to withdraw, the appellate court . . . makes an 'independent review of the record.' " *State v. Marshburn*, 109 N.C. App. 105, 108, 425 S.E.2d 715, 718 (1993) (citation omitted).

In the instant case, defendant argues that the trial court correctly applied the "fair and just reason" standard to her motion to set aside her plea of guilty, but that the court erroneously determined that defendant had failed to show a fair and just reason to set the plea aside. Specifically, defendant argues that an acquittal by a fact-finder of the person charged as principal to a felony has the legal effect of an acquittal as to an alleged accessory before the fact, and therefore defendant's plea to being an accessory before the fact to a murder allegedly committed by Henry Roberson was contrary to law once Roberson was tried and acquitted by a jury. The State argues that the trial court properly denied defendant's motion, but that it applied the wrong standard in doing so. According to the State, the stricter "manifest injustice" standard applies to defendant's motion because even though defendant had not been sentenced when she made the motion, defendant knew, based on her plea bargain with the State, that she would be sentenced to a twelve-year active term when the State prayed judgment. In addition, the State had already carried out its portion of the plea bargain by dismissing defendant's conspiracy charge. According to the State, the existence of the aforementioned circumstances made defendant's motion equivalent to a post-sentence motion to withdraw. We need not determine, however, whether the trial court applied the correct standard in ruling on defendant's motion to set aside her guilty plea because, under either standard, defendant's motion should have been granted.

An accessory before the fact to murder is one who counsels, procures, commands, encourages, or helps the principal to murder the victim, but who is not present when the principal commits the murder. *State v. Oliver*, 302 N.C. 28, 54-55, 274 S.E.2d 183,

200 (1981). At common law, conviction and judgment of the principal had to precede the conviction of the accessory. *State v. Duncan*, 6 Ired. 98, 28 N.C. 98, 102 (1845). In 1854, legislation was enacted in North Carolina which provided that any person who counseled, procured, or commanded any other person to commit any felony was guilty of a felony and could be indicted and convicted either as an accessory before the fact to the principal felony or as a substantive felon, "whether the principal felon shall or shall not have been previously convicted or shall or shall not be amenable to justice." N.C. Rev. Code ch. 34, sec. 53 (1854). Thus, the new legislation alleviated the requirement that conviction of the principal had to precede conviction of the accessory. *State v. Ludwick*, 61 N.C. 400, 404 (1868). In cases decided after the enactment of this statute, however, our Supreme Court held that the new law, eventually codified at N.C.G.S. § 14-5, did not change the common law rule "[t]hat an acquittal of the principal is an acquittal of the accessory." *Ludwick*, 61 N.C. at 404; *accord State v. Jones*, 101 N.C. 719, 721-22, 8 S.E. 147, 148 (1888).

In 1981, the General Assembly repealed Section 14-5 and enacted N.C.G.S. § 14-5.2, which provides in relevant part that

> [a]ll distinctions between accessories before the fact and principals to the commission of a felony are abolished. Every person who heretofore would have been guilty as an accessory before the fact to any felony shall be guilty and punishable as a principal to that felony.

N.C.G.S. § 14-5.2 (1986). Thus, both the accessory before the fact and the perpetrator of the crime are treated as principals and, as such, are both punishable for the substantive crime. It would appear, therefore, that the acquittal of the alleged principal would not require acquittal of the accessory before the fact, since pursuant to Section 14-5.2, they are both "principals." *See State v. Whitt*, 113 N.C. 716, 718-19, 18 S.E. 715, 716 (1893) (what another jury has decided as to one coprincipal inadmissible for or against another charged as a principal). Indeed, this is the view expressed by the majority of courts in jurisdictions which have enacted statutes permitting accessories before the fact to be indicted, tried, and convicted as principals. *See, e.g., Kott v. State*, 678 P.2d 386 (Alaska 1984); *State v. McAllister*, 366 So. 2d 1340 (La. 1978); *State v. Massey*, 229 S.E.2d 332 (S.C. 1976); *Singletary v. State*, 509 S.W.2d 572 (Tex. Crim. App. 1974); *cf. Standefer v. United States*, 447

U.S. 10, 64 L. Ed. 2d 689 (1980) (under federal statute providing that person who aids or abets commission of federal offense is punishable as principal, aider and abettor may properly be convicted after named principal has been acquitted of the offense); *see also generally* 21 Am. Jur. 2d *Criminal Law* § 176 (1981); *but see Pierce v. State*, 168 S.W. 851 (Tenn. 1914) (conviction of an accessory before the fact requires proof of the commission of the crime by the principal and acquittal of the alleged principal constitutes a failure of proof that the crime was committed, thereby requiring reversal of the conviction of the accessory before the fact).

However, our Supreme Court has whenever faced with the question consistently held that the acquittal of the named principal operates as an acquittal of the accessory before the fact. *See Ludwick*, 61 N.C. at 404; *Jones*, 101 N.C. at 721-22, 8 S.E. at 148; *State v. Mooney*, 64 N.C. 54, 55 (1870); *cf. State v. Gainey*, 273 N.C. 620, 623, 160 S.E.2d 685, 686 (1968) (because the conviction of principal on charges of carrying a concealed weapon was improper, the conviction of two other defendants for aiding and abetting the principal must also fail); *State v. Robey*, 91 N.C. App. 198, 208, 371 S.E.2d 711, 716-17, *disc. rev. denied*, 323 N.C. 479, 373 S.E.2d 874 (1988) (conviction of an accessory after the fact to a felony committed by a named principal not permitted if that named principal is acquitted); *cf. State v. Beach*, 283 N.C. 261, 269, 196 S.E.2d 214, 220 (1973), *overruled on other grounds, State v. Adcock*, 310 N.C. 1, 310 S.E.2d 587 (1984) (acquittal of one *not* named as principal not a sufficient basis for dismissal of charges against one charged as an aider and abettor). Although this issue has not specifically been addressed since the enactment of Section 14-5.2, former N.C.G.S. § 14-5 (allowing indictment and conviction of accessories before the fact as substantive felons) was construed by our Supreme Court in 1917 as abolishing "all distinction between principals and accessories before the fact." *State v. Bryson*, 173 N.C. 803, 806, 92 S.E. 698, 699-700 (1917). Thus, the enactment of Section 14-5.2 created no new law; rather, it merely codified a concept that had previously been adopted by our Supreme Court and clarified the law that accessories before the fact are punishable as principal felons. Accordingly, we cannot read Section 14-5.2 as altering the long-standing rule that the acquittal of the named principal is an acquittal of the accessory before the fact. Because this rule is so fundamental to the jurisprudence of our State, it must prevail whether the defendant, prior to the acquittal of the

principal, has been tried and found guilty of a felony on the theory that he was an accessory before the fact, or has pled guilty to being an accessory before the fact to the felony.

In light of the acquittal in the instant case of the only named principal, setting aside defendant's plea of guilty is not only supported by a fair and just reason, but is necessary in order to prevent manifest injustice. We therefore reverse the order of the trial court denying defendant's motion and remand for entry of an order allowing the motion.

Reversed and remanded.

Judges JOHNSON and MARTIN concur.

GINGER YORK WHITAKER, ADMINISTRATRIX OF THE ESTATE OF JONATHAN WESLEY WHITAKER, PLAINTIFF v. JIM CLARK, KAREN SMITH AND JUDI CASTERLINE, DEFENDANTS

No. 9222SC68

(Filed 16 March 1993)

1. **Appeal and Error § 103 (NCI4th)— action against State— governmental immunity—denial of judgment on pleadings— immediate appeal**

An immediate appeal will lie from the trial court's refusal to grant a judgment on the pleadings for the State on the ground of governmental immunity.

Am Jur 2d, Appeal and Error § 103.

2. **Public Officers § 9 (NCI3d); State § 4.2 (NCI3d)— action against social workers—official capacities—governmental immunity**

Defendants, employees of the Davie County DSS, were entitled to judgment on the pleadings on the ground of governmental immunity in plaintiff's action for the wrongful death of her son where plaintiff failed to designate in the caption of her complaint whether defendants were being sued in their official or individual capacities; the complaint used the phrases "in the performance of their official duties" and "in their official capacity" and contained allegations pertaining only to

defendants' actions or inactions in their official capacities with DSS; the complaint thus failed to state a claim against defendants individually; and plaintiff failed to allege a waiver of governmental immunity by the purchase of insurance.

Am Jur 2d, Municipal, County, School, and State Tort Liability §§ 85, 86, 149, 663, 664, 672.

Liability or indemnity insurance carried by governmental unit as affecting immunity from tort liability. 68 ALR2d 1437.

Appeal by defendants from order entered 3 December 1991 by Judge William H. Helms in Davie County Superior Court. Heard in the Court of Appeals 4 January 1993.

Hall, Vogler & Fleming, by E. Edward Vogler, Jr., and Beverly S. Murphy, for plaintiff appellee.

Womble Carlyle Sandridge & Rice, by Allan R. Gitter, Thomas M. Van Camp, and J. Daniel McNatt, for defendant appellants.

COZORT, Judge.

Plaintiff filed a wrongful death action against defendants to recover damages for the death of her son. Defendants are employees of the Davie County Department of Social Services (DSS). In their answer defendants asserted the defense of governmental immunity. Defendants then filed a motion for judgment on the pleadings, which was denied by the trial court. Defendants appeal. We find the plaintiff's complaint contained allegations pertaining only to the defendants' actions or inactions in their official capacities with DSS and that defendants were entitled to judgment based on governmental immunity. We reverse.

Plaintiff Ginger York Whitaker filed a complaint against Jim Clark, Karen Smith, and Judi Casterline to recover for the wrongful death of her son, Jonathan Whitaker. Defendants were employed by the DSS when Jonathan's death occurred. Plaintiff claims that defendants' negligent failure to investigate claims of child abuse and neglect, coupled with their failure to remove her son from the custody of his abusive father, Bruce Whitaker, caused her son's death. In the complaint, plaintiff alleged that she repeatedly contacted the defendants and reported incidents of her estranged husband's drunkenness. Mr. Whitaker had custody of Jonathan. On 2 April 1991, Mr. Whitaker was involved in an automobile accident

while driving under the influence of alcohol. Both he and Jonathan died as a result of the accident.

Defendants filed a motion for judgment on the pleadings on 1 November 1991. On 26 November 1991, plaintiff voluntarily dismissed her claim pursuant to N.C. Gen. Stat. § 1A-1, Rule 41(a) against defendant Jim Clark; Ms. Smith and Ms. Casterline remained as defendants. On 3 December 1991, the trial court entered an order denying the defendants' motion for judgment on the pleadings. On appeal, defendants contend the trial court erred in denying defendants' motion on the pleadings.

[1] Rule 12(c) of the North Carolina Rules of Civil Procedure permits any party to move for judgment on the pleadings after the pleadings are closed but within such time as not to delay the trial. N.C. Gen. Stat. § 1A-1, Rule 12(c) (1990). Judgment on the pleadings is not favored by the law and the pleadings must be liberally construed in the light most favorable to the nonmoving parties. *DeTorre v. Shell Oil Co.*, 84 N.C. App. 501, 504, 353 S.E.2d 269, 271 (1987). The movant under section (c) must show, even when viewing the facts and permissible inferences in the light most favorable to the nonmoving party, that he is clearly entitled to judgment as a matter of law. *Id.* Although normally an appeal does not lie from the denial of a motion for judgment on the pleadings, *Barrier v. Randolph*, 260 N.C. 741, 743, 133 S.E.2d 655, 657 (1963), an immediate appeal will lie under subsection (c), as well as subsection (b), where the trial court refuses to grant a judgment on the pleadings for the state on the grounds of governmental immunity. *See, i.e., Huyck Corp. v. C.C. Mangum, Inc.*, 58 N.C. App. 532, 293 S.E.2d 846 (1982).

[2] Defendants claim they deserved a judgment on the pleadings because even taken in the light most favorable to the plaintiff, her complaint indicates she sued the defendants in their official capacities and not individually. Services provided by local Departments of Social Services are governmental functions to which governmental immunity applies. *Hare v. Butler*, 99 N.C. App. 693, 698, 394 S.E.2d 231, 235, *disc. review denied*, 327 N.C. 634, 399 S.E.2d 121 (1990). *See also, Coleman v. Cooper*, 102 N.C. App. 650, 403 S.E.2d 577, *disc. review denied*, 329 N.C. 786, 408 S.E.2d 517 (1991). It is also well-settled that when an action is brought against individual officers in their official capacities the action is one against the state for the purposes of applying the doctrine of sovereign

immunity. *Corum v. University of North Carolina*, 97 N.C. App. 527, 389 S.E.2d 596 (1990), *aff'd in part, rev'd in part, and remanded*, 330 N.C. 761, 413 S.E.2d 276 (1992). In consequence, if plaintiff's complaint demonstrates that she has sued the defendants only in an official capacity, rather than as individuals, defendants would be potentially shielded from plaintiff's cause of action by governmental immunity.

At the outset, an examination of plaintiff's complaint reveals a failure to designate in what capacity defendants are being sued. As for substance, the body of the complaint includes the following:

> 4. That Defendants are employees of the Davie County Department of Social Services and, as a result, may be subjected to liability *in the performance of their official duties.*
>
> * * * *
>
> 7. That the decedent, Bruce Earl Whitaker, Sr. neglected and abused the decedent, Jonathan Wesley Whitaker on many occasions before April 2, 1991. That said neglect and abuse consisted of Bruce Earl Whitaker, Sr. creating or being allowed to create a substantial risk of physical injury to the decedent Jonathan Wesley Whitaker by other than accidental means which would likely cause death, disfigurement or impairment of bodily organs by driving while under the influence of impairing substances on many occasions while the decedent Jonathan Wesley Whitaker was present in the same automobile and therefore allowing the said Jonathan Wesley Whitaker to be in an environment injurious to his welfare; and further by supervising the decedent, Jonathan Wesley Whitaker while said Bruce Earl Whitaker, Sr. was in a state of intoxication.
>
> 8. That Plaintiff repeatedly contacted the Defendants, *in their official capacity*, and reported incidents of drunkeness [sic] of Bruce E. Whitaker, Sr. and his abusive and neglectful conduct toward his son, Jonathan Wesley Whitaker.
>
> * * * *
>
> 11. That the Defendant's [sic] were negligent in their failure to adequately investigate Plaintiff's reports and respond to the abuses and neglect by Bruce E. Whitaker, Sr. of Jonathan Wesley Whitaker; and as a result of the Defendant's [sic]

negligent failure to properly investigate, Jonathan Wesley Whitaker continued to reside with Bruce Earl Whitaker, Sr.

12. That Plaintiff's intestate would not have been with Bruce E. Whitaker, Sr. on the night of April 2, 1991, at the time of the accident, but for the Defendant's [sic] negligent failure to investigate Plaintiff's reports.

* * * *

14. That, this action is filed pursuant to the Wrongful Death Statute of North Carolina, N.C.G.S. §§ 28A-18-1 and 2 and other applicable statutes of North Carolina in effect on the date of intestate's death, and pursuant to relevant North Carolina case law. (Coleman v. Cooper, 1991 Lawyer's Weekly No. N A 0668-12)

(Emphasis added.) Nowhere in the complaint does plaintiff specify that she has sued defendants in both their individual and official capacities. As a general practice, plaintiffs designate in the caption of the complaint whether the defendants have been sued in their "official" or "individual" capacity.

Since the plaintiff has made no such distinction in the present case, we must examine the text of the complaint to determine whether the defendants were sued individually or solely as officials. *See Lynn v. Clark*, 254 N.C. 460, 119 S.E.2d 187 (1961). The complaint never employs the words "individual" or "individual capacity"; however, the phrases "in the performance of their official duties," and "in their official capacity" are used. Furthermore, the overall tenor of the complaint indicates that plaintiff's allegations are centered solely on the defendants' official duties as employees of the DSS. Plaintiff has failed to advance any allegations against defendants other than those relating to their official duties as employees of the DSS. In *Stancill v. City of Washington*, 29 N.C. App. 707, 225 S.E.2d 834 (1976), this Court upheld the trial court's dismissal of a complaint in which the defendant was sued in an "individual" capacity, but the language of the complaint revealed only allegations based on an "official" capacity. The analysis used in *Stancill* is instructive in the present case. Plaintiff urges us to find that she has sued defendants as individuals, yet after careful review of the complaint, we find that she has asserted claims against defendants in an official capacity alone. Absent any allegations in the complaint separate and apart from official duties which would

hold a nonofficial liable for negligence, the complaint cannot be found to sufficiently state a claim against defendants individually.

As noted, if defendants are found to have been sued only in an official capacity, the doctrine of sovereign immunity would be applicable. Plaintiff admits to having failed to allege a waiver of sovereign immunity by the purchase of insurance. As required by law, if the plaintiff fails to allege a waiver of immunity by the purchase of insurance, the plaintiff has failed to state a claim against a governmental unit or employee. *See Fields v. Durham City Bd. of Educ.*, 251 N.C. 699, 701, 111 S.E.2d 910, 912 (1960). Accordingly, the defendants were entitled to a judgment on the pleadings as a matter of law, and the trial court erred in denying their motion.

The trial court's order denying defendants' motion is reversed and the matter is remanded for entry of judgment for defendants.

Reversed and remanded.

Judges WELLS and LEWIS concur.

KEENE CONVENIENT MART, INC., PLAINTIFF v. SSS BAND BACKERS AND JACKIE HAWLEY, DEFENDANTS

No. 9111SC1226

(Filed 16 March 1993)

Gambling § 29 (NCI4th)— raffle—invalidated—disposition of proceeds

The trial court did not err by invalidating a raffle, but erred by allowing defendant SSS to retain the proceeds, where defendant SSS organized a raffle offering a new automobile or its cash equivalent as a grand prize; the name of all ticket holders appeared on a wall and names were removed as tickets were taken from a cage; it was discovered that four names remained on the wall when only three tickets remained in the cage; defendant Hawley's name remained on the wall but her ticket was not in the cage; a ticket containing defendant Hawley's name was placed in the cage; the ticket containing

defendant Hawley's name was the last to be drawn from the cage; SSS refused to award the automobile to anyone; a complaint was filed; and the court granted summary judgment for defendant SSS, ruling that the event lost its random character when the Hawley ticket was put in the basket and ordering that SSS was entitled to keep all funds received as charitable contributions, with a provision by which ticket holders could reclaim the purchase price less the value of the meal. The randomness of the drawing required by N.C.G.S. § 14-309.15(b) was destroyed once the discrepancy was discovered and the event no longer qualified as a lawful raffle. Under N.C.G.S. § 14-299, the trial court should have ordered that the proceeds be paid to the county's general fund with a deduction for the cost of provision of meals. There is no "charitable contribution" exception in N.C.G.S. § 14-299 or in N.C.G.S. § 14-309.15.

Am Jur 2d, Gambling §§ 5, 17-19, 41, 170, 264.

Validity and construction of statute exempting gambling operations carried on by religious, charitable, or other nonprofit organizations from general prohibitions against gambling. 42 ALR3d 663.

Appeal by defendant Jackie Hawley from order filed 17 July 1991 by Judge Robert H. Hobgood in Johnston County Superior Court. Heard in the Court of Appeals 10 November 1992.

Defendant SSS Band Backers (hereinafter "SSS") organized a raffle offering a new automobile or its equivalent value in cash as a grand prize. Tickets were sold for $100.00 each. The raffle was conducted 17 November 1989. The name of all ticket holders appeared on a wall. As each ticket was taken out of a cage, the name of the person to whom that ticket belonged was taken off the wall.

When only three tickets remained in the cage, it was discovered that four names remained on the wall. Defendant Hawley's name remained on the wall but defendant Hawley's ticket was not in the cage. At that point, the raffle managers placed a ticket containing defendant Hawley's name in the cage. When drawing was resumed, the ticket containing defendant Hawley's name was the last ticket to be drawn from the cage. After various protests, defendant SSS refused to award the automobile to anyone. A repre-

sentative of plaintiff was not present and the regulations of the drawing did not require a ticket holder to be present to win.

On 17 September 1990, plaintiff Keene Convenient Mart, Inc., filed a complaint seeking to recover the value of the car by alleging breach of contract, negligence, and unfair and deceptive trade practices against defendant SSS. The complaint further alleged that a conspiracy existed between defendant SSS and defendant Hawley. Defendant Hawley answered and crossclaimed. In its answer, defendant SSS admitted drawing Hawley's name and failing to award the prize to defendant Hawley.

On 20 May 1991, defendant Hawley filed a motion for summary judgment pursuant to G.S. 1A-1, Rule 56. On 16 July 1991, the trial court granted summary judgment in favor of defendant SSS by entering the following order:

> . . . the events that occurred are not in dispute. General Statute 14-309.15 defines an authorized raffle as "A game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances." The court rules as a matter of law that the defendant, SSS Band Backers, by putting the ticket of Jackie Hawley in the basket, after some of the names already had been drawn, changed the character of the event. The event lost its character of a random drawing and from that point forward constituted a slanted game of chance which did not comply with the term "raffle" as defined in North Carolina General Statute 14-309.15, and is void as against public policy. The vehicle, or its value cannot go to any ticket holder. The court orders that all money was in effect, a charitable contribution as of that point, less the value of the meal.
>
> IT IS THEREFORE ORDERED, ADJUDGED AND DECREED that summary judgment is granted in favor of defendant, SSS Band Backers, and denies the defendant Jackie Hawley's motion for summary judgment.
>
> IT IS FURTHER ORDERED that the defendant, SSS Band Backers is entitled to keep all funds received from this event as charitable contributions to be used to support the SSS Band. Each ticket holder may, however, reclaim his or its $100, less the value of the meal, upon providing to SSS Band Backers a notarized statement that each such ticket holder intends

to file an amended income tax return deleting any charitable contribution deduction claimed for purchase of the ticket.

IT IS FURTHER ORDERED that this action is dismissed with the costs to be taxed against the defendant, Jackie Hawley, and plaintiff, Keene Convenient Mart, Inc.

Defendant Hawley appeals.

No brief filed for plaintiff-appellee.

Armstrong & Armstrong, P.A., by L. Lamar Armstrong, Jr., for defendant-appellant Jackie Hawley.

Lucas, Bryant & Denning, P.A., by Robert V. Lucas and Alan B. Hewett, for defendant-appellee SSS Band Backers.

EAGLES, Judge.

Defendant Hawley contends that the trial court erred by invalidating the raffle and by allowing defendant SSS to retain the proceeds of the tickets sold for the raffle since the grand prize was never awarded due to mistakes arising from defendant SSS's internal procedures and decisions. We agree in part and affirm the trial court's decision invalidating the raffle. However, we vacate the portion of the order authorizing defendant SSS to retain the proceeds and remand for entry of an order consistent with this opinion.

G.S. 14-292 provides that "Except as provided in Part 2 of this Article, any person or organization that operates any game of chance or any person who plays at or bets on any game of chance at which any money, property, or other thing of value is bet, whether the same be in stake or not, shall be guilty of a misdemeanor." G.S. 14-291 provides that

> Except in connection with a lawful raffle as provided in Part 2 of this Article [37], if any person shall sell, barter or otherwise dispose of any lottery ticket or order for any number of shares in any lottery, or shall in anywise be concerned in such lottery, by acting as agent in the State for or on behalf of any such lottery, to be drawn or paid either out of or within the State, such person shall be guilty of a misdemeanor, and shall be punished as provided for in G.S. 14-290.

See also G.S. 14-289; G.S. 14-290.

Each of these statutes refer to exceptions set forth in Part 2 of Article 37. Under Part 2 of Article 37, G.S. 14-309.15(a) provides that "It is lawful for any nonprofit organization or association, recognized by the Department of Revenue as tax-exempt pursuant to G.S. 105-130.11(a), to conduct raffles in accordance with this section." G.S. 14-309.15(b) defines a raffle as "a game in which the prize is won by random drawing of the name or number of one or more persons purchasing chances." Accordingly, by using a "raffle" with a car as the grand prize as an inducement for people to buy tickets at a price of $100.00 each, defendant SSS was obligated by virtue of G.S. 14-309.15(b) to ensure that: (1) the designated prize would be given to a ticket holder, and (2) the method of selecting that ticket holder would be random. Here, neither occurred.

We agree with the trial court that once the discrepancy was discovered, the randomness of the drawing required by G.S. 14-309.15(b) was destroyed from that point forward and the event no longer qualified as a lawful raffle under the statutory definition. The randomness required by G.S. 14-309.15(b) could not be restored by simply placing defendant Hawley's ticket into the cage. The only way to have restored randomness at that point would have been by commencing a new drawing with *all* names being placed in the cage once again. Since the event as conducted no longer qualified as a lawful raffle, the trial court properly declared the event void pursuant to G.S. 14-292. *See Animal Protection Society v. State of North Carolina*, 95 N.C. App. 258, 264, 382 S.E.2d 801, 805 (1989) ("The 'bingo statutes' in Part 2 [of Article 37] permit charitable, civic, religious, and certain other tax exempt organizations to conduct bingo games and *raffles*, but only under *strictly* limited circumstances." (Emphasis added.)).

However, we hold that the trial court erred in its disposition of the proceeds. G.S. 14-299 provides:

> All moneys or other property or thing of value exhibited for the purpose of alluring persons to bet on any game, or used in the conduct of any such game, including any motor vehicle used in the conduct of a lottery within the purview of G.S. 14-291.1, shall be liable to be seized by any court of competent jurisdiction or by any person acting under its warrant. Moneys so seized shall be turned over to and paid to the treasurer of the county wherein they are seized, and placed in the general

> fund of the county. Any property seized which is used for and is suitable only for gambling shall be destroyed, and all other property so seized shall be sold in the manner provided for the sale of personal property by execution, and the proceeds derived from said sale shall . . . be turned over and paid to the treasurer of the county wherein the property was seized, to be placed by said treasurer in the general fund of the county.

Accordingly, the trial court should have ordered that the proceeds be paid to the county's general fund rather than to defendant SSS, whose mistakes ultimately prohibited the proper awarding of the promised grand prize that had served as an inducement in the sale of tickets.

The trial court stated that at the time the randomness of the event ended, "all money was in effect, a charitable contribution as of that point." We find no "charitable contribution" exception in G.S. 14-299 or in G.S. 14-309.15. "The intent of the Legislature controls the interpretation of a statute." *Jolly v. Wright*, 300 N.C. 83, 86, 265 S.E.2d 135, 139 (1980). The phrase "[a]ll moneys or other property or thing of value" in G.S. 14-299 is comprehensive. Similarly, we note that when the General Assembly enacted G.S. 14-309.15 (entitled "Raffles") in 1983, they did not provide an exception to G.S. 14-299 (which was enacted prior to G.S. 14-309.15), despite the fact G.S 14-309.15(a) specifically authorizes "any nonprofit organization or association, recognized by the Department of Revenue as tax-exempt" to conduct raffles. Although tax-exempt nonprofit entities are expressly authorized to conduct raffles by G.S. 14-309.15, there is no "charitable contribution" exception to G.S. 14-299. G.S. 14-299 controls when the procedure used in a raffle violates the "randomness" provision of G.S. 14-309.15.

Finally, we recognize that each ticket entitled its holder to a meal provided by defendant SSS as well as an entry in the raffle. Accordingly, the cost of the provision of these meals may be deducted from the total proceeds that shall be paid to the county's general fund pursuant to G.S. 14-299. Accordingly, the portion of the trial court's order dealing with the disposition of the proceeds is vacated and the cause is remanded for entry of an order consistent with this opinion.

Affirmed in part; vacated in part and remanded.

Judges ORR and JOHN concur.

SHEILA N. BLAZER v. ROBERT L. BLAZER

No. 923DC65

(Filed 16 March 1993)

1. **Divorce and Separation § 334 (NCI4th)— alimony and child support—maintenance of medical insurance—change of employment—attempt to provide insurance unsuccessful—willful contempt**

The trial court did not err by finding defendant in civil contempt where defendant was required by a consent order to maintain the plaintiff and their minor children as beneficiaries of the hospitalization and medical insurance policy on the current policy or a policy providing similar benefits until the parties were divorced, at which time the obligation to provide plaintiff with insurance would terminate; defendant subsequently anticipated accepting a job in Saudi Arabia; plaintiff and defendant went to an insurance company to take out an additional policy; plaintiff believed she was going to receive a policy that was the same as the previous policy with the exception of a $500 deductible; defendant paid the agent the first premium with the application and accepted employment in Saudi Arabia; the insurance company declined to cover plaintiff because she had pre-existing medical problems; plaintiff obtained a temporary policy from another company and underwent surgery; and the medical bills were not covered by the temporary policy. Although defendant acknowledged his obligation to provide insurance for his wife and children and did not anticipate a rejection of coverage due to plaintiff's pre-existing medical condition, his efforts prior to leaving for Saudi Arabia do not meet his duty to secure insurance similar to the insurance he had before quitting his civil service job.

Am Jur 2d, Divorce and Separation § 630.

2. Appeal and Error § 329 (NCI4th)— exhibit—not offered at hearing—included in record on appeal

There was no prejudice in the inclusion of an insurance policy in a record on appeal even though the policy was not offered at the contempt hearing below.

Am Jur 2d, Appeal and Error §§ 526 et seq.

Appeal by defendant from order entered 25 July 1991 by Judge James E. Ragan III, in Craven County District Court. Heard in the Court of Appeals 4 January 1993.

Kafer & Hunter, by Charles William Kafer, for plaintiff appellee.

David P. Voerman, P.A., for defendant appellant.

COZORT, Judge.

Defendant appeals the trial court's order holding him in civil contempt of court for violating a consent order entered 14 March 1989 directing him to provide medical insurance for his estranged wife and their children. We conclude that defendant willfully violated the terms of the court order and thus affirm.

On 14 March 1989, defendant Robert L. Blazer and plaintiff Sheila N. Blazer signed a consent order addressing plaintiff's claims for alimony *pendente lite*, alimony, child custody, and child support. The consent order was adopted on that date as the court's determination of the parties' respective rights. The order required in part that defendant "maintain the plaintiff and the minor children of the parties as the beneficiaries of the hospitalization and medical insurance policy that he presently has on them or a policy providing similar protection and benefits." Defendant's obligation to maintain plaintiff's insurance was to terminate upon divorce of the parties; his duty to maintain the children's insurance would continue.

Defendant was employed by the United States Government at the Marine Corps Air Station in Cherry Point, North Carolina, at the time the consent order was entered. Defendant had an insurance policy with Mail Handlers Benefit Plan which was to cover plaintiff until the parties were divorced. In 1989, defendant began exploring the possibility of securing employment in a non-civil service position. Since defendant anticipated accepting a job outside of the United States, and because plaintiff had expressed her con-

cern about having adequate health insurance coverage, the couple went together to Union Bankers Insurance Company (Union) to take out an additional policy. After a meeting with a Union agent, plaintiff believed she was going to receive a policy that was the same as the Mail Handlers policy with the exception of a $500.00 deductible. Defendant paid the agent for the first premium which was submitted with the insurance application. Defendant later quit his civil service job on 5 August 1989, and accepted employment with Lockheed-Arabia in Jeddah, Saudi Arabia.

Following defendant's departure for Saudi Arabia in September of 1989, plaintiff learned that a problem had surfaced with obtaining the insurance policy with Union. Union declined to cover plaintiff because she had pre-existing medical problems. Plaintiff obtained coverage through American Republic Insurance Company (American Republic) through a temporary policy. Plaintiff underwent laser surgery in November of 1989 and had a partial hysterectomy in April of 1990. The medical bills exceeded $7,400.00 and were not covered by the American Republic policy. The parties were divorced on 24 September 1990. On 21 August 1990, following plaintiff's motion for show cause order to find defendant in contempt, the trial court entered an order directing defendant to appear and "show cause why he should not be punished as for contempt of court" for violating the provision in the consent order requiring defendant to maintain insurance for plaintiff and the children. The matter was not heard until February of 1991 due to defendant's relocation to Saudi Arabia. Plaintiff attended the hearing with her attorney; defendant gave testimony over the telephone from Saudi Arabia with his counsel present in court. On 24 July 1991, the trial judge entered an order finding defendant in contempt. Defendant appeals.

[1] Defendant contends the trial court erred by finding him in civil contempt, alleging he did not willfully fail to maintain insurance for his wife. Our standard of review in contempt proceedings is limited to whether there is competent evidence to support the findings of fact and whether the findings support the conclusions of law. *Koufman v. Koufman*, 97 N.C. App. 227, 230, 388 S.E.2d 207, 209 (1990), *rev'd on other grounds*, 330 N.C. 93, 408 S.E.2d 729 (1991). The trial court's order included the following finding of fact:

> 31. *The defendant's failure to ascertain that the plaintiff and the children had medical insurance coverage which would provide coverage equivalent to the Mail Handlers coverage previously provided to them was in willful contempt of the above quoted provisions of the 14 March 1989 order of Judge Rountree.* The defendant could easily have continued his job with civil service but he intentionally terminated his employment. He knew when he terminated his employment that he would lose this medical insurance coverage but he terminated his employment anyway. The job that he presently has is not appreciably better than the job he quit and, in fact, may be less economically beneficial. Accordingly, he did not substantially improve his economic position by terminating his employment with civil service but, instead, may have taken a position that was financially detrimental. . . . Furthermore, he did not make arrangements before terminating his employment and terminating his insurance to obtain medical insurance which would have provided coverage equivalent to the coverage provided by the Mail Handlers policy.

(Emphasis added.) We are required to examine the record to determine whether competent evidence is present to support this key finding and the corresponding conclusion of law holding that defendant was in willful contempt of the 14 March order. Our Court has held that one may not be held in civil contempt for failure to comply with an order of the court unless his or her failure is willful. *Powers v. Powers*, 103 N.C. App. 697, 705, 407 S.E.2d 269, 273-74 (1991) (*citing Jones v. Jones*, 52 N.C. App. 104, 278 S.E.2d 260 (1981)). Accordingly, we must determine from the evidence presented whether defendant's actions were willful or unintentional.

Defendant testified that he understood when he quit civil service that the Mail Handlers policy would stay in effect for 30 days and then would lapse. Because defendant knew the Mail Handlers policy would terminate, he and his wife procured a policy from Union Bankers Insurance Company on 3 August 1989. Defendant gave the Union agent a payment for the premium and thought he had purchased a policy which would cover his wife and children once the Mail Handlers policy terminated. Defendant quit his job with civil service on 5 August and left for Saudi Arabia in September. Evidence of defendant's salary and expenses indicates that the job in Saudi Arabia was less lucrative than his civil service position.

We find this evidence supports the finding that defendant willfully avoided his obligation to procure insurance in contravention of the consent order. Defendant's actions are analogous to a situation where a defendant takes a job with lower pay and avoids his obligation to pay spousal or child support. *See i.e., Bennett v. Bennett*, 21 N.C. App. 390, 204 S.E.2d 554 (1974). This case is also comparable to *Powers v. Powers*, in which the defendant was found to be in civil contempt for not complying with a separation agreement provision requiring him to provide a college education for his child. *Powers*, 103 N.C. App. 697, 407 S.E.2d 269. We realize defendant acknowledged his obligation to provide insurance for his wife and children and did not anticipate a rejection of coverage due to plaintiff's pre-existing medical condition. Nonetheless, defendant's efforts prior to his leaving for Saudi Arabia do not meet his duty to secure insurance similar to what he had before he quit his civil service job. There is competent evidence to support the court's finding that defendant's failure to secure satisfactory arrangements concerning medical insurance was in willful disregard of his obligation pursuant to the consent order. Consequently, the trial court properly issued the civil contempt order.

[2] Defendant also assigns as error (1) the trial court's finding that defendant was required to maintain "equivalent" medical insurance for plaintiff and the children, when the consent order required him to provide only "similar" insurance; and (2) the trial court's inclusion in the record of the 1989 Mail Handlers policy which was not admitted during the proceedings, but later sent to the court by plaintiff's counsel. Because we find that defendant failed to obtain successfully *any* insurance coverage before he left the United States, it is unnecessary for us to consider if the insurance was similar to the insurance under the Mail Handlers policy. With respect to the inclusion of the Mail Handlers policy in the record on appeal, there was no error. Plaintiff's attorney requested that a copy of the 1989 Mail Handlers policy be included as one of the exhibits in the record on appeal, although the document was not offered during the hearing. The policy's addition to the record on appeal resulted in no prejudice to defendant. The order of the trial court finding defendant in civil contempt is therefore

Affirmed.

Judges WELLS and LEWIS concur.

CAMERON W. CANTWELL v. JANET A. CANTWELL

No. 9228DC184

(Filed 16 March 1993)

Divorce and Separation § 203 (NCI4th)— alimony—adultery—privilege against self-incrimination

The trial court properly gave defendant the choice of shielding herself from criminal charges by refusing to answer questions regarding her alleged adultery and in so doing abandon her alimony claim, or waiving her privilege and pursuing her claim where plaintiff-husband filed an action for divorce; defendant-wife asserted a counterclaim for alimony based on abandonment and adultery; plaintiff-husband asserted defendant's adultery as an affirmative defense; and defendant asserted her privilege against self-incrimination while being deposed. A party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim.

Am Jur 2d, Divorce and Separation §§ 641, 643-647.

Adulterous wife's right to permanent alimony. 86 ALR3d 97.

Allowance of permanent alimony to wife against whom divorce is granted. 34 ALR2d 313.

Fault as consideration in alimony spousal support, or property division awards pursuant to no-fault divorce. 86 ALR3d 1116.

Appeal by defendant from Order entered 2 December 1991 by Judge Gary S. Cash in Buncombe County District Court. Heard in the Court of Appeals 2 February 1993.

Dennis J. Winner, P.A., by Dennis J. Winner, for plaintiff-appellee.

Gum & Hillier, P.A., by Howard L. Gum, and Carter & Kropelnicki, P.A., by Steven Kropelnicki, Jr., for defendant-appellant.

WYNN, Judge.

The plaintiff, Cameron Cantwell, filed an action for absolute divorce against the defendant, Janet Cantwell, in June 1991. The defendant, in turn, filed an Answer admitting the divorce allegations and asserting a counterclaim for alimony. In her counterclaim, she alleged that she had been a dutiful and faithful wife to the plaintiff and that without excuse or provocation he had abandoned her on 3 October 1983. The defendant also alleged, in support of her right to alimony, that the plaintiff had committed adultery.

The plaintiff denied the allegations contained in the defendant's counterclaim and also asserted, as an affirmative defense, that the defendant was barred from receiving alimony because of her own adulterous activity. While being deposed by the plaintiff's counsel in September 1991, the defendant was asked: "Since the time of the separation with what male person have you socialized with in any way on an individual basis." In response, she asserted her privilege against self-incrimination and refused to answer that question or any other questions attempting to establish that she had committed adultery. The plaintiff then filed a motion to compel her to answer.

At a hearing on the motion to compel, the parties stipulated that counsel for the plaintiff intended to continue his attempt to elicit from the defendant evidence of her adultery and that the defendant intended to continue to assert her privilege against self-incrimination. The trial court entered an Order in which it found that the defendant had a right to invoke her privilege but that in so doing she waived her right to assert a claim for alimony. Consequently, the trial court ordered that the alimony claim be stricken from the defendant's counterclaim and dismissed.

From that Order, the defendant appeals.

The sole issue on appeal is whether the trial court committed reversible error in striking the defendant's alimony counterclaim and dismissing that claim. The defendant argues that she has the right to exercise her privilege against self-incrimination, and that the action by the trial court violates her rights under the Constitution of the United States and the North Carolina Constitution. We agree that the defendant had a right to exercise her privilege,

but disagree that the trial court's action violated her constitutional rights.

The constitutional privilege against self-incrimination assures all individuals that they will not be compelled to give testimony which will tend to incriminate them or which will tend to subject them to fines, penalties or forfeiture. *Allred v. Graves*, 261 N.C. 31, 35, 134 S.E.2d 186, 190 (1964). Under the laws of our state, adultery constitutes a misdemeanor, and testimony from the defendant regarding her alleged adulterous relationships could subject her to criminal prosecution. *See* N.C. Gen. Stat. § 14-184 (1986). Therefore, the defendant could properly invoke the privilege in the course of her deposition testimony. *See* N.C. Gen. Stat. § 1A-1, Rule 26(b)(1) (1990) (in a civil action parties may obtain discovery regarding relevant matters except those that are privileged).

While we recognize that the defendant in the present case had the right to invoke her privilege against self-incrimination, "[t]he interests of the other party and regard for the function of courts of justice to ascertain the truth become relevant, and prevail in the balance of considerations determining the scope and limits of the privilege . . . ." *Brown v. United States*, 356 U.S. 148, 156, 2 L.Ed.2d 589, 597 *reh'g denied*, 356 U.S. 948, 2 L.Ed.2d 822 (1958) (a party witness in a criminal case cannot present testimony on direct examination and then invoke the privilege on cross-examination); *see also Pulawski v. Pulawski*, 463 A.2d 151, 157 (R.I. 1983) (as between private litigants, the privilege against self-incrimination must be weighed against the right of the other party to due process and a fair trial). The privilege against self-incrimination is intended to be a shield and not a sword. *Pulawski*, 463 A.2d at 157; *Christenson v. Christenson*, 162 N.W.2d 194, 200 (Minn. 1968). Therefore, "if a plaintiff seeks affirmative relief or a defendant pleads an affirmative defense[,] he should not have it within his power to silence his own adverse testimony when such testimony is relevant to the cause of action or the defense." *Christenson*, 162 N.W.2d at 200 (citation omitted).

No North Carolina case speaks directly to this issue at bar. However, the *Christenson* decision contains an extensive examination of the relevant case law from various other jurisdictions, and for that reason, we find it persuasive. In that case, the plaintiff brought an action in divorce charging the defendant with cruel and inhuman treatment and seeking custody of the parties' minor

children, alimony, support money, property division and attorney's fees. During the discovery period, the plaintiff refused to answer oral deposition questions regarding her alleged adultery on the grounds that her answers might incriminate her. The *Christenson* Court recognized that "[w]hile plaintiff cannot be compelled to waive her privilege against self-incrimination, . . . she must either waive it or have her action dismissed." *Id.* at 204. To find otherwise and "permit plaintiffs to invoke the powers of this court for the purpose of seeking redress and, at the same time, . . . permit plaintiffs to fend off questions, the answers to which may constitute a valid defense or materially aid the defense" would constitute "uneven justice." *Id.* at 202 (citation omitted). Likewise, we recognize that a party has a right to seek affirmative relief in the courts, but if in the course of her action she is faced with the prospect of answering questions which might tend to incriminate her, she must either answer those questions or abandon her claim.

Consequently, the defendant in the present case was properly given the choice to either shield herself from criminal charges by refusing to answer questions regarding her alleged adultery, and in so doing abandon her alimony claim, or waive her privilege and pursue her claim. As such, an equitable balance was created between the defendant's right to assert her privilege and the plaintiff's right to defend himself from the defendant's counterclaim.

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

Affirmed.

Judges Eagles and Martin concur.

CAPITAL OUTDOOR ADVERTISING, INC., CAROLINA POSTERS CORPORATION, HARRIS SIGNS, INC., HOGAN OUTDOOR OF RALEIGH, INC., AND WHITECO INDUSTRIES, INC., T/A WHITECO METROCOM, INC. v. THE CITY OF RALEIGH, A NORTH CAROLINA MUNICIPAL CORPORATION

No. 9210SC180

(Filed 16 March 1993)

Judgments § 44 (NCI4th)— 12(b)(6) dismissal—signed out of session—stipulation of consent in record on appeal—not sufficient

A dismissal under N.C.G.S. § 1A-1, Rule 12(b)(6) was null and void where the motion to dismiss was heard at the 28 October 1991 session of civil superior court in Wake County; the trial court did not render a decision on the motion until 4 November 1991, the date on which the trial judge signed the order of dismissal and the date on which the order was filed with the clerk of superior court; the 28 October session was adjourned on 1 November; the same judge was assigned to hold the 4 November session in Wake County, a single-county district; and the record in the trial court reveals nothing to indicate that the trial judge extended the 28 October session pursuant to N.C.G.S. § 15-167 or that the parties or their attorneys consented to entry of the order in a session of court other than the session in which the motion was heard. Although there was a stipulation in the record on appeal, filed three months after the entry of the order, stating that the "trial court had jurisdiction over the parties and of the subject matter," a valid consent must affirmatively appear in the record of the trial court. Moreover, the broad stipulation in the record on appeal does not specifically address the issue of the trial court's authority to enter the order out of session.

Am Jur 2d, Judgments § 60.

Judge JOHNSON concurs in the result.

Appeal by plaintiffs from order entered 4 November 1991 in Wake County Superior Court by Judge Henry W. Hight, Jr. Heard in the Court of Appeals 2 February 1993.

Hafer, Day & Wilson, P.A., by Betty S. Waller, and Van Winkle, Buck, Wall, Starnes and Davis, P.A., by Albert L. Sneed, Jr., for plaintiff-appellants.

City Attorney Thomas A. McCormick, by Deputy City Attorney Ira J. Botvinick, for defendant-appellee.

GREENE, Judge.

Plaintiffs appeal from the entry of an order dismissing, pursuant to Rule 12(b)(6), their complaint. The motion to dismiss was heard at the 28 October 1991 session of civil superior court in Wake County, specifically on 29 October 1991. The trial court did not render a decision on the motion until 4 November 1991, the date on which the trial judge signed the order of dismissal. The order was filed on 4 November 1991 with the clerk of the superior court.

The dispositive issue is whether the trial court had jurisdiction to enter the order dismissing plaintiffs' action.

Plaintiffs argue that the trial court was without jurisdiction to enter the order and that the order must be vacated. We agree.

The general rule, consistently applied in both criminal and civil cases, is that, except by agreement of the parties, an order of the superior court must be entered "during the term, during the session, in the county and in the judicial district where the hearing was held." *State v. Boone*, 310 N.C. 284, 287, 311 S.E.2d 552, 555 (1984).[1] It "is well settled that such practice is not inconsistent with the constitution and statutes of the state." *Shackelford v. Miller*, 91 N.C. 181, 185 (1884). An order entered inconsistent

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1. The words "session" of court and "term" of court are often used interchangeably. *Black's Law Dictionary* 1318 (5th ed. 1979). "When used with reference to a court, ['term'] signifies the space of time during which the court holds a session." *Id.* "A *session* signifies the time during the term when the court sits for the transaction of business . . . ." *Id.* Although 1962 amendments to the North Carolina Constitution changed the word "term" to "session" when referring to the period of time during which superior court judges are assigned to court, *see* N.C. Const. art. IV, § 9(2); 1 Dickson Phillips, *McIntosh North Carolina Practice and Procedure* § 107 (2d ed. Supp. 1970), the continued use of both "term" and "session" is proper. *See, e.g., Boone*, 310 N.C. at 287, 311 S.E.2d at 555. The use of "term" refers to the typical six-month assignment of superior court judges, and "session" to the typical one-week assignments within the term.

with this rule is "null and void and of no legal effect." *Boone*, 310 N.C. at 287, 311 S.E.2d at 555. The consent to entry of an order outside the term, session, county, or district, to be valid, must appear "in a writing signed by the parties or their counsel, or the judge should recite the fact of consent in the order or judgment he directs to be entered of record—which is the better way; or such consent should appear by fair implication from what appears in the record." *Godwin v. Monds*, 101 N.C. 354, 355, 7 S.E. 793, 794 (1888). Failure to object to the entry of an order out of the session does not, however, constitute consent. *See Boone*, 310 N.C. at 288, 311 S.E.2d at 555-56. Likewise, preparation of a proposed order for the trial judge to sign out of the session cannot infer consent. *Turner v. Hatchett*, 104 N.C. App. 487, 490, 409 S.E.2d 747, 749 (1991).

Taking judicial notice of the assignment of trial judges to hold court, *Baker v. Varser*, 239 N.C. 180, 186, 79 S.E.2d 757, 761-62 (1954), we notice the following: During the fall term of 1991 (1 July 1991 to 1 January 1992), Judge Henry W. Hight, Jr., was assigned to the 10th Judicial District (a single-county district consisting of Wake County); he was assigned to hold the 28 October 1991 session of Wake County Superior Court, a one-week session; this session of superior court was adjourned by Judge Hight on 1 November 1991; and Judge Hight was assigned to hold the 4 November 1991 session of Wake County Superior Court, a one-week session. Our review of the record of this proceeding in the trial court reveals nothing to indicate that Judge Hight extended the 28 October 1991 session pursuant to N.C.G.S. § 15-167, or that the parties or their attorneys consented to entry of the order of dismissal in a session of court other than the session in which the motion was heard. This lack of consent was not cured, contrary to defendant's contention, by a stipulation in the record on appeal, filed in this Court some three months after the entry of the order, stating that the "trial court had jurisdiction over the parties and of the subject matter." The consent, to be valid, must affirmatively appear in the record of the trial court and it does not in this case. In any event, we do not read the broad stipulation in the record on appeal as specifically addressing the issue of the trial court's authority to enter the order out of session. Therefore, because the order of dismissal was not entered during the 28 October 1991 session of Wake County Superior Court, the session in which the

motion was heard, and because the parties did not consent to the entry of the order outside that session, the order is null and void.

The situation faced by Judge Hight is not uncommon among the trial judges of this state, both superior court and district court. The complicated nature of issues presented to the trial court often requires time for consideration that extends beyond the assigned session. Furthermore, judgments and orders, prepared by attorneys, often are not received by the trial judge until after the adjournment of the session in which the matter was heard, thus preventing, in some instances, entry of the order or judgment during that session. *See Cobb v. Rocky Mount Bd. of Educ.*, 102 N.C. App. 681, 683, 403 S.E.2d 538, 540 (1991), *aff'd*, 331 N.C. 280, 415 S.E.2d 554 (1992) (entry of judgment occurs, in some instances, when judgment rendered in open court and later reduced to writing and signed). Of course, the trial court can always request that the parties consent to the entry of orders and judgments outside the term, outside the session, outside the district, or outside the county. However, even assuming that the parties would consent, this appears to be a problem that deserves legislative inquiry. For now, our trial judges are faced with a very strict rule which, for the most part, does not seem to serve any useful purpose and in fact often interferes with the proper administration of justice, as in this case.

The order of the trial court dismissing the complaint is

Vacated.

Judge MARTIN concurs.

Judge JOHNSON concurs in the result.

HOLLOWAY v. WACHOVIA BANK AND TR. CO.

[109 N.C. App. 403 (1993)]

HALLIE K. HOLLOWAY, SUE HOLLOWAY AND MINORS: DAMIEN LEE HOLLOWAY AND SWANZETT HOLLOWAY, PLAINTIFFS-APPELLANTS v. WACHOVIA BANK & TRUST COMPANY, N.A., AND JEAN DAWSON, DEFENDANTS-APPELLEES

No. 9114SC1271

(Filed 6 April 1993)

1. **Pleadings § 33.3 (NCI3d)— denial of motion to amend—no abuse of discretion**

The trial court did not abuse its discretion in denying plaintiffs' motion to amend their complaint to assert claims for negligent hiring and gross negligence where the motion was filed four months after plaintiffs filed their complaint; plaintiffs provided no justifiable excuse for the delay in the motion; and allowance of the motion to amend would have transformed a relatively straightforward unfair debt collection case coupled with intentional tort claims into far more complex litigation requiring increased discovery and trial preparation.

Am Jur 2d, Pleading §§ 322, 324.

2. **Pleadings § 33.3 (NCI3d)— denial of second motion to amend—previous dismissal—barred claims—delay**

The trial court did not abuse its discretion in denying plaintiffs' second motion to amend their complaint on grounds that the motion seeks to reassert matters previously dismissed in this action by another judge, seeks to plead claims barred by the statute of limitations, and was unduly delayed.

Am Jur 2d, Pleading § 322; Limitation of Actions § 218.

3. **Trespass § 2 (NCI3d)— intentional infliction of emotional distress—assault and battery—future harm**

The trial court properly dismissed plaintiffs' claim for the intentional infliction of emotional distress arising from an alleged assault and battery where there was no allegation of any threat of future harm by defendants.

Am Jur 2d, Fright, Shock, and Mental Disturbance § 17.

Recovery by debtor, under tort of intentional or reckless infliction of emotional distress, for damages resulting from debt collection method. 87 ALR2d 201.

4. Courts § 83 (NCI4th)— dismissal of claims—failure of another judge to reinstate

The trial court did not err by refusing to reinstate plaintiffs' claims for the intentional infliction of emotional distress which had been dismissed by another judge since one superior court judge may not overrule a judgment previously made by another superior court judge in the same action.

5. Consumer and Borrower Protection § 42 (NCI4th)— unfair debt collection acts—statutory protection of consumer—others not protected

The legislative intent of the statutes prohibiting unfair debt collection acts, N.C.G.S. Ch. 75, Art. 2, is to protect the consumer, not bystanders or those who happen to accompany the consumer at the time of the alleged violation of the statutes. Therefore, the trial court properly dismissed N.C.G.S. § 75-51 claims of persons who accompanied the debtor at the time of the alleged unfair debt collection acts. N.C.G.S. § 75-50(1).

Am Jur 2d, Consumer and Borrower Protection § 221.

6. Consumer and Borrower Protection § 44 (NCI4th)— unfair debt collection acts—damages

The trial court properly limited plaintiff debtor's N.C.G.S. § 75-51 claim for unfair debt collection acts to $1,000 and properly struck the complaint's prayer for treble damages. N.C.G.S. § 75-56.

Am Jur 2d, Consumer and Borrower Protection § 222.

7. Evidence and Witnesses § 1041 (NCI4th)— spoliation of evidence—admission by conduct—instruction not required

The trial court in an unfair debt collection case did not err by failing to instruct the jury on spoliation of evidence because the individual defendant failed to produce a pistol at trial in response to a subpoena *duces tecum* where defendants admitted at trial that a .22 caliber pistol was in the individual defendant's possession at the time of the incident in question, the pistol was described to the jury, and the individual defendant testified at trial that the pistol had been thrown away by her husband without her knowledge.

Am Jur 2d, Evidence §§ 623 et seq.

Admissibility, in civil action, of disposal of property as bearing on question of liability. 38 ALR3d 996.

8. Consumer and Borrower Protection § 44 (NCI4th)— unfair debt collection act—financial records excluded—limited damages

The trial court did not err in refusing to allow evidence of the financial records of defendant bank on the issue of damages where the only issue submitted to the jury was plaintiff's claim for an unfair debt collection act, the maximum award for that claim is $1,000, and punitive damages are not available.

Am Jur 2d, Consumer and Borrower Protection §§ 222, 223.

9. Assault and Battery § 2 (NCI4th)— claims by infant—assault evidence insufficient—battery evidence sufficient

The evidence was insufficient to support the infant plaintiff's claim for assault where the infant's mother testified that the infant was either asleep or too young to understand what was going on at the time of a confrontation and the evidence failed to show that the infant experienced any apprehension of harmful or offensive contact. However, the infant plaintiff's evidence was sufficient for submission to the jury on his claim for battery where the infant's mother testified that she was holding the infant while sitting in the driver's seat of an automobile which the individual defendant attempted to repossess, and that such defendant had her elbow in the infant's back as she reached to take the key from the ignition and tried to pull the mother's hands off the key.

Am Jur 2d, Assault and Battery §§ 198 et seq.

10. Assault and Battery § 2 (NCI4th)— pointing gun at another—transferred intent—assault of plaintiff

The ten-year-old plaintiff's evidence was sufficient to support her claim for assault under the concept of transferred intent where her evidence tended to show that she was sitting in the back seat of an automobile when defendant bank employee pointed a gun at the driver while attempting to repossess the vehicle and that she was afraid of being shot by defendant.

Am Jur 2d, Assault and Battery §§ 198 et seq.

11. Damages §§ 104, 138 (NCI4th)— punitive damages—absence of request in prayer for relief—minor victims

The minor plaintiffs' failure to specifically request punitive damages in their prayer for relief in an assault and battery complaint arising from defendant bank employee's attempt to repossess a car did not preclude the jury's consideration of punitive damages where the conduct alleged and proved at trial was outrageous, and where plaintiffs' prayer for "treble damages," albeit erroneous, put defendants on notice that plaintiffs were demanding more than compensatory damages. Moreover, plaintiffs were entitled to an instruction on punitive damages because the complaint alleged defendants' assault with a dangerous weapon and battery upon minors who had nothing to do with the underlying debt leading to the repossession.

Am Jur 2d, Damages §§ 994, 995.

12. Appeal and Error § 505 (NCI4th)— error cured by verdict

Any error by the trial court in the admission and exclusion of evidence and instructions relating to the liability issue in an unfair debt collection action was harmless where plaintiff prevailed on the liability issue.

Am Jur 2d, Appeal and Error § 805.

Judge LEWIS dissenting.

Appeal by plaintiffs from judgment entered 17 June 1991 by Judge Henry V. Barnette, Jr., in Durham County Superior Court. Heard in the Court of Appeals 2 December 1992.

In April 1985, plaintiff Hallie Holloway purchased a car financed by defendant Wachovia Bank & Trust Co., N.A. (hereinafter "Wachovia"). She defaulted on the loan. On 21 May 1986, defendant Jean Dawson, an employee of defendant Wachovia, attempted to repossess the car in the parking lot outside of a Durham laundromat. At the laundromat with Hallie Holloway were: 1) Sue Holloway, who is Hallie Holloway's mother; 2) Swanzett Holloway, who is Hallie Holloway's 10 year old niece; and 3) Damien Holloway, who is Hallie Holloway's 4 month old son. Plaintiffs left the scene driving the car defendant Dawson sought to repossess.

In their 27 April 1988 complaint, plaintiffs alleged that defendant Dawson aimed a gun at them in her attempt to repossess

the car. Each plaintiff sought recovery for assault, for intentional infliction of emotional distress, and for violations of G.S. 75-51 and G.S. 75-56 (hereinafter "G.S. Chapter 75 claims"). Additionally, plaintiffs Hallie Holloway and Damien Holloway sought recovery for battery arising from defendant Dawson's touching them while "reach[ing] through the window of the car" to take the car keys from the ignition.

Defendants filed separate answers. On 1 July 1988, defendant Wachovia filed an answer with a counterclaim against Hallie for the amount owed on the underlying debt ($1,933.74), interest, and attorney's fees. Defendant Wachovia denied that "at the time of the alleged incident complained of the Defendant Dawson was acting as an agent of Wachovia." In her 13 July 1988 answer, defendant Dawson denied plaintiffs' allegations and pleaded *inter alia* self-defense.

On 12 September 1988, Judge Anthony Brannon entered a default judgment against plaintiff Hallie Holloway as to defendant Wachovia's counterclaim. On 27 December 1988, Judge Brannon entered an amended default judgment against plaintiff Hallie Holloway for $1,933.74, interest, and attorney's fees.

On 25 August 1988, plaintiffs moved to amend their complaint to add a claim of negligent hiring and a claim of gross negligence with a prayer for punitive damages. On 19 January 1989, Judge Robert F. Farmer denied plaintiffs' 25 August 1988 motion to amend.

On 22 August 1989, Judge Samuel T. Currin issued an order (1) dismissing with prejudice plaintiffs' claims for the intentional infliction of emotional distress; (2) dismissing with prejudice the assault claims of Hallie Holloway and Sue Holloway; (3) dismissing with prejudice Hallie Holloway's battery claim; (4) dismissing with prejudice the G.S. Chapter 75 claims of Sue Holloway, Swanzett Holloway, and Damien Holloway; (5) limiting any potential recovery by Hallie Holloway under her G.S. Chapter 75 claim to $1000, and; (6) barring treble damages and striking that part of the complaint's prayer for relief.

On 15 December 1989, plaintiffs filed another motion to amend their complaint. On 19 January 1990, Judge Henry W. Hight, Jr., denied this motion because it sought "to reassert matters previously dismissed in this action and to plead claims which are barred by the applicable Statute of Limitations" and because it was "un-

duly delayed and to allow it at this time would be unfairly prejudicial to the Defendants."

Thereafter, in regard to their previously dismissed intentional infliction of emotional distress claims, on 5 February 1991 plaintiffs filed a "motion for relief from summary judgment order with respect to the plaintiff's [sic] claim for reinstatement" pursuant to G.S. 1A-1, Rule 56 and G.S. 1A-1, Rule 60. On 14 February 1991, Judge J. Milton Read, Jr., denied the motion.

At trial, directed verdicts in favor of defendants were entered on Damien Holloway's battery claim and both Swanzett Holloway's and Damien Holloway's assault claims. As to plaintiff Hallie Holloway's G.S. Chapter 75 claim, the jury found that (1) defendant Jean Dawson had "commit[ted] an unfair act of debt collection" and (2) Hallie Holloway was entitled to recover $1,000.00. On 17 June 1991, Judge Henry V. Barnette, Jr. entered a judgment awarding Hallie Holloway a total of $1,000.00 on her G.S. Chapter 75 claim. However, this amount was "offset against the Defendants' [27 December 1988 Amended Default] Judgment on the [1 July 1988] counterclaim herein against Hallie Holloway in the amount of $1,933.75 together with interest and attorney's fees so that the Plaintiff Hallie Holloway shall recover nothing of the Defendants and the Defendants [sic] [27 December 1988 Amended] Default Judgment shall be reduced by $1,000.00 as of the date of this Judgment." Plaintiffs appeal.

Michaux and Michaux, P.A., by Eric C. Michaux, for plaintiff-appellants.

Poe, Hoof & Reinhardt, by J. Bruce Hoof, for defendant-appellee Wachovia Bank & Trust Company, N.A.

Poe, Hoof & Reinhardt, by James T. Bryan, III, for defendant-appellee Jean Dawson.

EAGLES, Judge.

Plaintiffs bring forward fifteen assignments of error. We affirm in part and reverse in part.

I.

In their first and sixth assignments of error, plaintiffs contend that the trial court erred by denying their motions to amend pursuant to G.S. 1A-1, Rule 15(a). We disagree.

A.

[1] Plaintiffs filed their original complaint on 27 April 1988. On 25 August 1988, nearly four months later, plaintiffs filed their first motion to amend. In this motion, they sought to assert (1) a claim for negligent hiring with a prayer "for judgment in excess of $10,000 against the Defendants for their damages," and (2) a claim for gross negligence with a prayer "for judgment against the Defendant for punitive damages in excess of $10,000."

In *Chicopee, Inc. v. Sims Metal Works*, 98 N.C. App. 423, 430, 391 S.E.2d 211, 216, *disc. review denied*, 327 N.C. 426, 395 S.E.2d 674, *reconsid. denied*, 327 N.C. 632, 397 S.E.2d 76 (1990), this Court stated:

> Amendment of pleadings after a response has been served is only by "leave of court . . . and leave shall be freely given when justice so requires." N.C. Gen. Stat. § 1A-1, Rule 15(a). A motion for leave to amend is addressed to the sound discretion of the trial judge and the denial of such motion is not reviewable absent a clear showing of abuse of discretion. *Martin v. Hare*, 78 N.C. App. 358, 360-1, 337 S.E.2d 632, 634 (1985). Although a trial court is not required to state specific reasons for denial of a motion to amend, *see id.* at 361, 337 S.E.2d at 634, reasons that would justify a denial are "(a) undue delay, (b) bad faith, (c) undue prejudice, (d) futility of amendment, and (e) repeated failure to cure defects by previous amendments." *Id.*

(Alteration in original.)

In its 19 January 1989 order, the trial court did not state its specific reasons for denying plaintiffs' motion to amend. "When the trial court fails to state specific reasons for denial of a motion to amend or when the trial court states inconsistent and incomplete reasons, this Court *may* nonetheless examine any apparent reasons for such denial." *Chicopee*, 98 N.C. App. at 431, 391 S.E.2d at 216 (emphasis in original). From our review of the record, there are several apparent reasons for the trial court's denial of plaintiffs' motion. The motion was filed nearly four months after plaintiffs filed their complaint (and more than two years after the incident at issue), and plaintiffs provided no justifiable excuse for the delay in the motion, in their subsequent answers to interrogatories, or at the hearing itself. *See Caldwell's Well Drilling, Inc. v. Moore*,

79 N.C. App. 730, 340 S.E.2d 518 (1986). Furthermore, plaintiffs' original complaint only sought recovery for: 1) a violation of G.S. Chapter 75 and; 2) the intentional torts of assault, battery, and the intentional infliction of emotional distress. Allowance of this motion to amend would have transformed a relatively straightforward unfair debt collection case coupled with intentional tort claims into far more complex litigation based on newly pleaded negligent hiring and gross negligence theories, requiring greatly increased discovery and trial preparation. On this record, plaintiffs have failed to make "a clear showing of abuse of discretion," *Chicopee*, 98 N.C. App. 430, 391 S.E.2d at 216, by the trial court. Accordingly, plaintiffs' first assignment of error is overruled.

B.

[2] In their sixth assignment of error, plaintiffs contend that the trial court erred in denying plaintiffs' second motion to amend filed 15 December 1989. There, plaintiffs alleged a seventh claim for relief that defendants had violated eight different statutes, including five criminal statutes, with each "constitut[ing] a separate and distinct negligent act on the part of the defendants." Furthermore, plaintiffs alleged that these acts "placed the plaintiffs in fear of great bodily harm caused [sic] them mental suffering and anguish." The motion also included an eighth claim for relief alleging that "the acts of the Defendants were grossly negligent and done with heedless disregard of the legal rights of the Plaintiffs or others. Further that such acts of negligence were willful, [sic] wanton amounting to gross negligence and thereby entitling the plaintiffs to exemplary or punitive damages."

In his order, Judge Henry W. Hight, Jr., listed the following reasons for his denial of plaintiffs' second motion to amend:

> 3. On August 24, 1988 the Plaintiffs filed a Motion to Amend their Complaint attempting to allege a theory of negligence;
>
> 4. This motion was denied by the Order of the Honorable Robert F. Farmer, Superior Court Judge, entered herein on January 19, 1989;
>
> 5. On December 27, 1988 a Default Judgment was entered in this action by the Honorable Anthony Brannon, Superior Court Judge, in favor of the Defendant Wachovia on its

Counterclaim against the Plaintiff Hallie Holloway in the amount of $1,933.74 together with interest and costs.

6. On April 12, 1989 the plaintiffs filed a new and separate lawsuit entitled Holloway v. Wachovia, et al., 89 CVS 01356 which Complaint purported to allege negligence theories in addition to the theories asserted in their Complaint filed herein and relating to the same alleged incident as is the subject of this action;

7. The second lawsuit (89 CVS 01356) was dismissed by the Order of the Honorable I. Beverly Lake, Jr., Superior Court Judge, entered in that action on July 11, 1989;

8. This action was first called for trial at the July 24, 1989 term of Durham County Civil Superior Court. This action was not reached for trial at that term but was heard by the Honorable Samuel T. Currin, Superior Court Judge, upon the Defendants' Motion to Dismiss. These Motions were allowed and pursuant to Judge Currin's Order on those Motions entered herein on August 21, 1989 the causes of action of the Plaintiffs Hallie Holloway and Sue Holloway alleging assault; the cause of action of the Plaintiff Hallie Holloway alleging battery; the causes of action of all the Plaintiffs alleging intentional infliction of emotional distress and the causes of action of all of the Plaintiffs except the Plaintiff Hallie Holloway alleging violation of N.C.G.S. Secs. 75-51 and 75-56, were dismissed. In addition, Judge Currin's Order limited any recovery by the Plaintiff Hallie Holloway pursuant to her claim under G.S. Secs. 75-51 and 75-56 to the sum of $1,000.00 which is less than the amount of the Judgment and off-set previously entered [on 27 December 1988] against said Plaintiff herein on the [1 July 1988] Counterclaim. Under the Orders of Judge Currin and Judge Brannon entered herein, therefore, the Plaintiff Hallie Holloway is arithmetically precluded from a recovery in this action. Judge Currin's Order left for trial only the claims of the Plaintiffs Swanzett and Damien Holloway alleging assault and the claim of the Plaintiff Damien Holloway alleging a battery; and

9. This action was next set for trial at the December 4, 1989 term of Durham County Civil Superior Court at which term it was scheduled as the first case for trial. The case was not tried at that term upon the Motion of the Plaintiffs.

> The Court therefore rules that the Plaintiffs' Second Motion to Amend their Complaint in this cause which Motion was filed on or about December 13, 1989 and which came on for hearing on January 16, 1990 be and the same hereby is denied because:
>
> 1. The Court finds that said Motion seeks to reassert matters previously dismissed in this action and to plead claims which are barred by the applicable Statute of Limitations and therefore said Motion is denied based upon the futility of said proposed amendment; and
>
> 2. The Court also finds as an independent and separate ground for denying Plaintiffs' Motion that said Motion is unduly delayed and to allow it at this time would be unfairly prejudicial to the Defendants.

Again, plaintiffs have failed to present a clear showing of an abuse of discretion. Additionally, as this motion contained matters previously dismissed in a prior order decided by a different trial court judge, we note that the trial court exercised proper deference towards that initial ruling. *See Calloway v. Motor Co.*, 281 N.C. 496, 505, 189 S.E.2d 484, 490 (1972) ("when one Superior Court judge, in the exercise of his discretion, has made an order denying a motion to amend, absent changed conditions, another Superior Court judge may not thereafter allow the motion."). Accordingly, plaintiffs' sixth assignment of error is overruled.

II.

In their second and seventh assignments of error, plaintiffs contend that the trial court erred (1) by dismissing plaintiffs' intentional infliction of emotional distress claims, and; (2) by failing to reinstate these claims. We disagree.

[3] Our Supreme Court has provided that when one seeks to recover damages for the intentional infliction of emotional distress arising from an incident in which the defendant is alleged to have committed the acts of assault and battery, the plaintiff must show that there was a *threat of future harm. Dickens v. Puryear*, 302 N.C. 437, 454-55 & n.11, 276 S.E.2d 325, 336 (1981). Plaintiffs' complaint did not allege that there was any threat of future harm by defendants. There is no evidence in this record that any threat of future harm was made. Both Hallie Holloway and Sue Holloway testified

in their depositions that no threat of future harm was made. Accordingly, plaintiffs' second assignment of error fails.

[4] Plaintiffs also contend that the trial court erred "when it failed to grant plaintiffs' motion for reinstatement of [the intentional infliction of emotional distress] claims and for appropriate relief under [G.S. 1A-1,] Rule 60 and [G.S. 1A-1, Rule] 56 of the North Carolina Rules of Civil Procedure." One superior court judge may not overrule a judgment previously made by another superior court judge in the same action. *Calloway*, 281 N.C. at 501, 189 S.E.2d at 488. Further, we have closely examined plaintiffs' argument and conclude that this assignment of error has no merit.

III.

[5] In their third assignment of error, plaintiffs claim that the trial court erred by dismissing the G.S. Chapter 75 claims of Sue Holloway, Swanzett Holloway, and Damien Holloway. We disagree.

G.S. 75-50(1) defines a "consumer" as "any natural person who has incurred a debt or alleged debt for personal, family, household or agricultural purposes." As this definition indicates, the legislative intent of the statute is to protect the consumer, not bystanders or those who happen to accompany the consumer at the time of an alleged G.S. Chapter 75, Article 2 violation. Accordingly, the trial court correctly dismissed these claims. *Cf. Fisher v. Eastern Air Lines, Inc.*, 517 F. Supp. 672 (M.D.N.C. 1981).

IV.

[6] In their fourth and fifth assignments of error, plaintiffs contend that the trial court erred by limiting the G.S. Chapter 75 claim of Hallie Holloway to $1,000.00 and by striking the complaint's prayer for treble damages. We find no error.

G.S. 75-56 provides that:

> The specific and general provisions of this Article shall exclusively constitute the unfair or deceptive acts or practices proscribed by G.S. 75-1.1 in the area of commerce regulated by this Article. Notwithstanding the provisions of G.S. 75-15.2 and 75-16, in private actions . . . *civil penalties in excess of one thousand dollars ($1,000) shall not be imposed, nor shall damages be trebled* for any violation under this Article.

(Emphasis added.) Accordingly, this assignment of error fails.

V.

[7] In their eighth assignment of error, plaintiffs argue that "the trial court committed reversible error in failing to give appropriate instructions on the issue of spoilation of evidence" because defendant Dawson failed to present the gun at trial despite the trial court's issuance of a subpoena *duces tecum*. We disagree.

At trial, defendants admitted that "a .22 caliber Astro pistol" was in defendant Dawson's possession at the time of the incident and the gun was described to the jury. Plaintiffs' counsel asked defendant Dawson whether or not she had fully complied with the subpoena *duces tecum*. Defendant Dawson admitted that she had received the subpoena and that she (Dawson) had not complied with the subpoena. Thereafter, Dawson testified that the gun had been inadvertently thrown away by defendant Dawson's husband unbeknownst to defendant Dawson. This assignment of error fails.

VI.

[8] In their ninth assignment of error, plaintiffs argue that "the trial court committed reversible error when it refused to allow evidence of the financial records of Wachovia Bank and Trust Company on the issues of damages." We disagree.

The only issue that went to the jury was plaintiff Hallie Holloway's G.S. Chapter 75 claim. As discussed *supra*, the maximum award for that claim is $1,000.00 and punitive damages are not available. Accordingly, this assignment of error fails.

VII.

[9] In their tenth assignment of error, plaintiffs argue that the trial court erred by granting defendants' motions for directed verdict. As to Damien Holloway's assault claim, we affirm. As to Damien Holloway's battery claim and Swanzett Holloway's assault claim, we reverse and remand for a new trial on these two claims only.

A.

Regarding the tort of assault, this Court has stated:

> The interest protected by the action for assault is freedom from apprehension of a harmful or offensive contact with one's person. *McCracken v. Sloan*, 40 N.C. App. 214, 216, 252 S.E.2d 250, 252 (1979). In *Dickens v. Puryear*, 302 N.C. 437, 445, 276 S.E.2d 325, 330 (1981), our Supreme Court stated assault re-

> quires the plaintiff's reasonable apprehension of an immediate harmful or offensive contact. The *Dickens* Court further quoted the Comment to Section 29(1) of Restatement (Second) of Torts (1965): "[T]he apprehension created must be one of imminent contact, as distinguished from any contact in the future. Imminent does not mean immediate, in the sense of instantaneous contact . . . it means rather that there will be no significant delay." 302 N.C. at 445-46, 276 S.E.2d at 331.

Johnson v. Bollinger, 86 N.C. App. 1, 5, 356 S.E.2d 378, 381 (1987). At trial, plaintiff Hallie Holloway answered "yes" to the question "throughout this he [Damien Holloway] was either asleep or too young to understand what was going on throughout this confrontation; isn't that correct?" Plaintiffs have failed to show that the infant Damien experienced any apprehension of harmful or offensive contact. Accordingly, we find no merit in plaintiffs' argument. *See McCraney v. Flanagan*, 47 N.C. App. 498, 267 S.E.2d 404 (1980); Restatement (Second) of Torts § 22 (1965).

B.

However, there was sufficient evidence to permit a jury to consider the infant Damien Holloway's battery claim. "The elements of battery are intent, harmful or offensive contact, causation, and lack of privilege. 1 Haynes [North Carolina Tort Law] § 4-2 [(1989) (hereinafter "Haynes")]. As with assault, a showing of actual damage is not an essential element of battery. 1 Haynes § 4-5." *Hawkins v. Hawkins*, 101 N.C. App. 529, 533, 400 S.E.2d 472, 475 (1991), *aff'd*, 331 N.C. 743, 417 S.E.2d 447 (1992).

Hallie Holloway testified that while she was sitting in the driver's seat of the automobile, she had the infant Damien "up on my chest." She further testified that as defendant Dawson reached to take the keys from the ignition on the right hand side of the steering wheel, defendant Dawson "had her elbow in my baby's back. She was trying to pull my hands off the key."

Defendants argue that the trial court "allowed a directed verdict on Damien Holloway's battery claim because there was clearly no intent to touch Damien. Rather his touching was inadvertent, incidental, and unintentional." However, "[t]he gist of the action for battery is not the hostile intent of the defendant, but rather the absence of consent to the contact on the part of the plaintiff." *McCracken*, 40 N.C. App. at 216-17, 252 S.E.2d at 252. *See N.C.*

Farm Bureau Mut. Ins. Co. v. Stox, 330 N.C. 697, 707, 412 S.E.2d 318, 324 (1992) (" '[t]he intent with which tort liability is concerned is not necessarily a hostile intent, or a desire to do any harm. Rather it is an intent to bring about a result which will invade the interests of another in a way that the law forbids.' Prosser, [Law of Torts] § 8, p.36 [(5th ed. 1984) (hereinafter "Prosser")].");
see also Dickens, 302 N.C. 437, 276 S.E.2d 325; Prosser, § 10. Based upon the record before us, the issue of whether the infant Damien was entitled to recover upon a claim of battery should have been submitted to the jury.

C.

[10] Next, we address Swanzett Holloway's assault claim. "An assault is an offer to show violence to another without striking him." *Dickens*, 302 N.C. at 444, 276 S.E.2d at 330. "The elements of assault are intent, offer of injury, reasonable apprehension, apparent ability, and imminent threat of injury. 1 Haynes § 3-3. Plaintiff establishes a cause of action for assault upon proof of these technical elements without proof of actual damage. 1 Haynes § 3-5." *Hawkins*, 101 N.C. App. at 533, 400 S.E.2d at 475.

At the time that Jean Dawson had the gun in her hand, Swanzett Holloway was sitting in the back seat of the automobile. At trial, Swanzett Holloway gave the following testimony:

Q [Plaintiffs' counsel]: Did you see the gun?

A [Swanzett Holloway]: Yes.

Q: And how did you see the gun?

A: It was in her [defendant Dawson's] hand.

Q: All right. And where did she have—where was she when you saw her with the gun?

A: She was outside the car on the driver's side.

Q: On the driver's side. Where did she have it pointed?

A: Toward Hallie [Holloway] and her baby [Damien Holloway].

. . . .

Q: Now, but for Hallie would the gun have been pointed at you the way you described it on here?

A: Yes.

Mr. Hoof [defendants' counsel]: Objection to leading.

Court: Sustained.

Q: Could you see the barrel of the gun?

A: Yes, I saw the gun, black and brown.

Q: . . . What did you think or what did you feel when you saw the gun?

A: I was scared.

Q: What were you afraid of?

A: She could have shot either one of us.

Q: . . . Were you afraid of being shot?

A: Yes.

Since Swanzett Holloway testified that the gun was not pointed directly at her, she relies on the concept of transferred intent to recover on this assault claim. The Restatement (Second) of Torts explains the concept of transferred intent as follows: "If an act is done with the intention of affecting a third person . . . but puts another in apprehension of a harmful or offensive contact, the actor is subject to liability to such other as fully as though he intended so to affect him." *Id.* § 32(2). *See generally*, Prosser, § 8, pp. 37-39; Daye and Morris, North Carolina Law of Torts § 2.31.2, pp. 8-10 (1991) (hereinafter "Daye and Morris").

Our research indicates that the concept of transferred intent has not been applied in a civil case in North Carolina. However, at least four criminal cases have tacitly recognized transferred intent principles. *See State v. Cates*, 293 N.C. 462, 238 S.E.2d 465 (1977); *State v. Wynn*, 278 N.C. 513, 180 S.E.2d 135 (1971); *see also State v. Locklear*, 331 N.C. 239, 415 S.E.2d 726 (1992); *State v. Correll*, 38 N.C. App. 451, 248 S.E.2d 451, *disc. review denied*, 296 N.C. 107, 249 S.E.2d 805 (1978); *see generally* Daye and Morris, § 2.31.2, pp. 8-9 (stating three reasons why transferred intent should be applied in tort actions: "First, in the intentional torts area, North Carolina law tends to be consistent with the general rules of American jurisprudence. Second, North Carolina courts have applied transferred intent concepts in criminal cases. Third, the use of the concept of transferred intent in civil cases

was originally adapted from the criminal law. As has been shown, courts have applied criminal concepts of intent to analyze civil liability.").

"North Carolina follows common law principles governing assault and battery. . . . Common law principles of assault and battery as enunciated in North Carolina law are also found in the Restatement (Second) of Torts (1965)." *Dickens*, 302 N.C. at 444-45, 276 S.E.2d at 330-31. Prosser notes that the concept of transferred intent existed at common law, first appearing

> in criminal cases at a time when tort and crime were still merged in the old trespass form of action. It represents an established rule of the criminal law, in cases in which shooting, striking, throwing a missile or poisoning has resulted in unexpected injury to the wrong person. The criminal cases have been understandably preoccupied with moral guilt, and the obvious fact that if the defendant is not convicted there is no one to hold liable for the crime. *But the same rule was applied to tort cases arising in trespass* [which "was the progenitor not only of battery, but also of assault and false imprisonment"]. This may possibly have been due to a considered feeling that the defendant could not sustain a burden of proof of freedom from fault when the defendant had at least intended to injure another person. But a better explanation may lie in nothing more than the mere proximity of the criminal law to the trespass action, with its criminal tradition and the similarity of the fact situations. It is quite probable, however, that the persistence of the principle has been due to a definite feeling that the defendant is at fault, and should make good the damage. The defendant's act is characterized as "wrongful," and the fault is regarded as absolute toward all the world, rather than relative to any one person. Having departed from the social standard of conduct, the defendant is liable for the harm which follows from the act, although this harm was not intended.

Prosser, § 8, pp. 37-38 (emphasis added) (footnotes omitted). Since the concept of transferred intent was recognized at common law, we hold that on the facts presented in this case, the issue of whether Swanzett Holloway was entitled to recover for a claim of assault should have been submitted to the jury.

VIII.

In their eleventh assignment of error, plaintiffs argue that the trial court erred by not submitting the issues of punitive damages to the jury. As to Hallie Holloway's G.S. Chapter 75 claim, we disagree and find no error. However, as to Damien Holloway's battery claim and Swanzett Holloway's assault claim, upon remand the jury should not be precluded from considering the issue of punitive damages.

A.

The only issue that the jury considered was Hallie Holloway's G.S. Chapter 75 claim. Since punitive damages are not among the exclusive remedies listed in G.S. 75-56, this assignment of error has no merit as to Hallie Holloway's claim.

B.

[11] As discussed *supra*, the trial court committed reversible error by entering directed verdicts against Damien Holloway's battery claim and Swanzett Holloway's assault claim. Defendants argue that plaintiffs' failure to specifically request punitive damages by name in their prayer for relief bars any potential entitlement of the minor plaintiffs to punitive damages at trial. We disagree.

"Under the 'notice theory' of pleading contemplated by Rule 8(a)(1) of the Rules of Civil Procedure, the complaint need no longer allege facts or elements showing aggravating circumstances which would justify an award of punitive damages." *Huff v. Chrismon*, 68 N.C. App. 525, 527, 315 S.E.2d 711, 712, *disc. review denied*, 311 N.C. 756, 321 S.E.2d 134 (1984). Furthermore,

> "[b]y enactment of G.S. 1A-1, the legislature adopted the 'notice theory of pleading.' " *Roberts v. Memorial Park*, 281 N.C. 48, 56, 187 S.E.2d 721, 725 (1972).
>
> In our first case which considered the "notice pleading" theory of the new Rules of Civil Procedure, Justice Sharp (later Chief Justice) wrote:
>
> > A pleading complies with the rule if it gives sufficient notice of the events or transactions which produced the claim to enable the adverse party to understand the nature of it and the basis for it, to file a responsive pleading, and—by using the rules provided for obtaining pretrial

discovery—to get any additional information he may need to prepare for trial.

Sutton v. Duke, 277 N.C. 94, 104, 176 S.E.2d 161, 167 (1970). *Accord: Presnell v. Pell*, 298 N.C. 715, 260 S.E.2d 611 (1979); *Brewer v. Harris*, 279 N.C. 288, 182 S.E.2d 345 (1971).

Shugar v. Guill, 304 N.C. 332, 337, 283 S.E.2d 507, 510 (1981) (wherein plaintiff alleged in his complaint that the defendant, "without just cause, did intentionally, willfully and maliciously assault and batter the plaintiff, inflicting upon him serious and permanent personal injuries.").

Here, the relevant portions of plaintiffs' complaint state:

2. That Damien Lee Holloway is the son of Hallie K. Holloway and is two (2) years of age.

3. That Swanzett Holloway is the daughter of Connie Thorpe and is twelve (12) years of age.

4. That Hallie K. Holloway has been appointed Guardian ad litem for minor Damien Lee Holloway.

5. That Connie Thorpe has been appointed Guardian ad litem for minor Swanzett Holloway.

. . . .

FIRST CLAIM FOR RELIEF

. . . .

10. That on or about 21 May 1986 at approximately 1:00 p.m., at New Way Laundry & Dry Cleaners, Main Street in Roxboro, North Carolina, defendant employer by and through said defendant employee did *violently, willfully, and intentionally* assault the plaintiffs by displaying and *aiming a firearm* at the plaintiffs intending by such act to put plaintiffs in apprehension of an immediate harmful contact, and plaintiffs as a direct result of such act, were put in such apprehension.

11. That the natural results of said intentional actions of the defendant's agent caused plaintiffs severe mental suffering and wounded feelings. They were rendered highly nervous, frightened and upset and were forced to flee the area of the danger in a hasty manner further frightening endangering [sic] them. The conduct of the defendant's agent frightened the

plaintiffs so that they were in a state of fear and apprehension so great they were afraid to leave the confines of their homes for several days for fear of being accosted and harassed by defendant's agent again.

SECOND CLAIM FOR RELIEF

12. The allegations contained in paragraphs 1-11 of this Complaint are incorporated herein and pled as if fully set forth.

13. That immediately following the acts complained of in the claim for relief, the defendant's agent reached through the window of the car in which the plaintiffs Hallie K. Holloway and Damien Lee Holloway were sitting, battering them by pressing her elbow, forearm and then upper arm against Hallie K. Holloway's neck, chest, and facial area in a forceful, aggressive and intentional manner, resulting in a harmful and offensive touching; and against the arm, leg and head of plaintiff Damien Lee Holloway in a *forceful, aggressive and intentional* manner, resulting in a harmful and offensive touching causing him to cry.

14. By reason thereof, plaintiffs Hallie K. Holloway and Damien Lee Holloway suffered severe emotional trauma accompanied by uncontrollable nervous tremors and crying.

. . . .

WHEREFORE, Plaintiffs pray the Court as follows:

1. That a judgment be entered in favor of each individual plaintiff against the defendant.

2. That each judgment amount assessed be increased by *treble* the amount fixed.

(Emphasis added.) We note initially that plaintiffs' complaint included a prayer, albeit erroneous, for treble damages. This prayer for treble damages was clearly sufficient to put defendants on notice that plaintiffs were demanding more than compensatory damages and to allow defendants to prepare for trial accordingly. In sum, we decline to hold that the words "punitive damages" must appear in a complaint's prayer for relief where the conduct alleged and *proved* at trial is outrageous. Furthermore, we do not believe that parties' rights to punitive damages should be waived by mere technical pleading errors, such as stating "treble

damages" instead of "punitive damages," where defendants are given sufficient notice of the events that could support a jury award of punitive damages.

Furthermore, plaintiffs were entitled to, and defendants could reasonably expect, an instruction on punitive damages because the complaint alleged *inter alia* defendants' assault with a dangerous weapon and battery upon *minors* who had nothing to do with the underlying debt leading to the repossession. "Obviously, the *age*, sex, relationship of the parties, or *the type of weapon used* may be important in determining if the assault was of such a nature as to warrant an allowance of punitive damages. Where the plaintiff is a woman, a feeble or infirm person, *a child*, or a disabled person, these factors will be taken into consideration by the jury in determining punitive damages." 1 Haynes, § 3-5, p.70 (emphasis added); 1 Haynes, § 4-5 (battery).

Finally, we note that our Supreme Court has stated:

> It is well established in this jurisdiction that punitive damages may be recovered for an assault and battery but are allowable *only* when the assault and battery is accompanied by an element of aggravation such as malice, or oppression, or gross and willful wrong, or a wanton and reckless disregard of plaintiff's rights.
>
> . . . .
>
> To justify the awarding of punitive damages in North Carolina, there must be a showing of *actual* or *express* malice, that is, a showing of a sense of personal ill will toward the plaintiff which activated or incited a defendant to commit the alleged assault and battery.

Shugar, 304 N.C. at 335, 338, 283 S.E.2d at 509, 511. Plaintiffs must make this showing to receive a punitive damage instruction upon remand.

IX.

[12] In their last four assignments of error, plaintiffs argue that the trial court committed reversible error by the following: (1) admitting character evidence by allowing defendant Dawson to testify that a car salesman told her [Dawson] that Hallie Holloway was "unstable," that the Holloway family was "dangerous," and to be wary of the Holloway family in dealing with them; (2) excluding

evidence that Jean Dawson was fired by Wachovia because of the acts committed against plaintiffs; (3) instructing the jury "that Jean Dawson as Wachovia's agent could repossess the plaintiff Hallie Holloway's automobile without a court order unless a reasonable person in her position would have reasonably anticipated that to continue the effort to repossess would have created a hostile confrontation," and; (4) instructing the jury that "if the use of the pistol by Jean Dawson as you find that she used it was entirely for the purpose—for a purpose other than repossession such as self-protection then this would not be an unfair debt collection act." We have carefully reviewed these assignments of error.

Plaintiff Hallie Holloway prevailed on the liability issue of her G.S. Chapter 75 claim. If, assuming *arguendo*, there was any error as to any of these assignments, the error was harmless because Hallie Holloway prevailed on the liability issue. G.S. 1A-1, Rule 61. Accordingly, these assignments of error are overruled.

X.

In conclusion, we reverse and remand as to the trial court's rulings dismissing Damien Holloway's battery claim and Swanzett Holloway's assault claim. On remand, if the jury finds the existence of one or both of these claims, the jury should also have the opportunity to consider the issue of punitive damages. In all other respects the judgments are affirmed.

Affirmed in part; reversed in part and remanded.

Judge WELLS concurs.

Judge LEWIS concurs in part and dissents in part.

Judge LEWIS dissenting.

I respectfully dissent from Part VIII of the majority opinion, which allows Damien Holloway and Swanzette Holloway to go forward on the issue of punitive damages as to Damien Holloway's battery claim and Swanzette Holloway's assault claim. In their Prayer for Relief, plaintiffs requested judgment in their favor and "[t]hat each judgment amount assessed be increased by treble the amount fixed." Never did plaintiffs indicate they were seeking punitive damages anywhere in their Complaint or Prayer for Relief. Under the "notice theory" of pleading, I believe plaintiffs should

specifically request punitive damages to put defendants on notice of the possibility of unlimited damages.

The majority cites *Huff v. Chrismon*, 68 N.C. App. 525, 315 S.E.2d 711, *disc. rev. denied*, 311 N.C. 756, 321 S.E.2d 134 (1984), for the position that under notice pleading it is no longer necessary to allege the specific aggravating circumstances giving rise to a claim for punitive damages. However, in that case the plaintiffs specifically requested punitive damages in their complaint, thus leaving no question that defendants were on notice plaintiffs were seeking punitive damages. *Id.* at 528, 315 S.E.2d at 713. In *Holley v. Hercules, Inc.*, 86 N.C. App. 624, 359 S.E.2d 47 (1987), this Court stated that "our courts have usually not required the pleader to specifically plead, by name, punitive damages; they have rather held that it is enough that the facts tending to establish the aggravated character of the wrong are alleged . . . ." 86 N.C. App. at 627, 359 S.E.2d at 49. On the other hand, in *Warren v. Colombo*, 93 N.C. App. 92, 377 S.E.2d 249 (1989), another panel of this Court stated that under the notice theory of pleading, plaintiff "need not allege circumstances justifying recovery of punitive damages." 93 N.C. App. at 102, 377 S.E.2d at 255. The Court, however, found plaintiff's allegations insufficient even under notice pleading standards. The allegation of willful and wanton conduct was "buried among negligence allegations," and plaintiff did not request punitive damages against that defendant in any claim or prayer for relief. *Id.*

The law is less than clear on the requisites for properly pleading punitive damages under notice pleading standards. From the cases mentioned it appears that punitive damages must be mentioned by name in the complaint, or the language of the complaint must clearly set forth the aggravating factors entitling plaintiffs to punitive damages. The majority relied on the latter method in allowing the claim for punitive damages to go forward.

I would hold that plaintiffs must specifically claim punitive damages in their complaint or prayer for relief in order to put defendants on notice of the possibility of unlimited damages. In this case, plaintiffs' request for treble damages was consistent with their Chapter 75 claim for unfair and deceptive trade practices. A request for treble damages is for a specific and limited amount, whereas a request for punitive damages is for an unlimited amount of damages. Defendants would certainly prepare for trial much differently if they knew they were potentially subject to punitive

damages. Moreover, there is no authority for the proposition that pointing a gun at someone automatically gives rise to a claim for punitive damages where there is no alleged injury, either physical or emotional. Punitive damages should not be sprung on unsuspecting defendants at the instruction conference. They should be clearly pled without "hidden" notice.

For this reason, I respectfully dissent as to Part VIII of the majority opinion; I concur with all other sections.

CENTURY DATA SYSTEMS, INC., A NORTH CAROLINA CORPORATION, PLAINTIFF/APPELLEE v. CHARLES McDONALD, JR.; DENNIS HENDERSON; FRANK N. PERKINS AND ROMAINE BARKER, JR., JOINTLY AND SEVERALLY, DEFENDANTS/APPELLANTS

No. 9210SC318

(Filed 6 April 1993)

1. **Rules of Civil Procedure § 4 (NCI3d)— nonresident defendants—personal jurisdiction under long-arm statute**

In an action to enforce covenants not to compete, each nonresident defendant fell within reach of the long-arm statute, N.C.G.S. § 1-75.4, where each travelled from South Carolina to this state for job training, corporate meetings, and management discussions and each defendant thus accepted and ratified the rendition of services (meetings and training) provided by plaintiff in this state; furthermore, two of the defendants promoted and sold products which were shipped from Raleigh to defendants in South Carolina who then filled customer orders.

Am Jur 2d, Process §§ 175, 178, 184, 185.

2. **Process § 9.1 (NCI3d)— nonresident defendants—sufficient minimum contacts with North Carolina—personal jurisdiction properly exercised by North Carolina**

In an action to enforce covenants not to compete, there was no merit to the nonresident defendants' contention that they lacked sufficient minimum contacts with the state for North Carolina courts to exercise jurisdiction over them consistent with due process, since each of the defendants' contracts was entered in North Carolina; each of the defendants

was provided bi-weekly payroll services out of plaintiff's North Carolina office; each defendant attended sales meetings or training sessions or management discussions in North Carolina; and two of the defendants placed purchase orders with plaintiff's North Carolina office.

Am Jur 2d, Process §§ 186-195.

Appeal by defendants from order signed 7 February 1992 by Judge Narley L. Cashwell in Wake County Superior Court. Heard in the Court of Appeals 5 March 1993.

On 27 September 1991 Century Data Systems, Inc. (CDS) filed suit to enforce covenants not to compete against the defendants, Charles McDonald, Jr., Dennis Henderson, Frank Perkins and Romaine E. Barker, Jr. The covenants were part of employment contracts between CDS and the defendants. Each defendant was a resident of South Carolina at the time they entered into their respective employment contracts with the plaintiff. On 12 November 1991 the defendants filed motions to dismiss the suit based on (1) lack of subject matter jurisdiction; (2) lack of personal jurisdiction; and (3) failure to state a claim for relief. Defendants' motions to dismiss because of lack of subject matter jurisdiction and personal jurisdiction were heard on 3 February 1992. On 7 February 1992 the trial court signed an order denying both motions.

Defendants appeal pursuant to G.S. § 1-277(b).

Lee A. Patterson, II and Henry A. Mitchell, III for the plaintiff-appellee.

Harris, Shields and Creech, P.A., by C. David Creech; and David S. Morris, for the defendant-appellants.

EAGLES, Judge.

The sole issue presented by this appeal is whether the trial court correctly determined that it had personal jurisdiction over each of the defendants. We agree with the trial court and affirm.

To decide the issue of whether or not personal jurisdiction exists over an out-of-state defendant, we must make a two-part inquiry. First, we must decide if the transaction at issue is covered by a "long arm" statute. If so, we must then decide

if exercise of the statutory grant of jurisdiction violates the federal due process clause.

Liberty Finance Co. v. North August Computer Store, 100 N.C. App. 279, 282, 395 S.E.2d 709, 711 (1990) (citations omitted). " '[When] jurisdiction is challenged, plaintiff has the burden of proving *prima facie* that a statutory basis for jurisdiction exists.' " *Cherry Bekaert & Holland v. Brown*, 99 N.C. App. 626, 629-30, 394 S.E.2d 651, 654 (1990) (citation omitted).

> We note that the trial court did not make any findings of fact to support his ruling denying defendant's motion to dismiss. However, when there is no request of the trial court to make such findings, "we presume that the judge found facts sufficient to support the judgment. . . ." *Church v. Carter*, 94 N.C. App. 286, 289, 380 S.E.2d 167, 169 (1989). "[If the] presumed findings are supported by competent evidence in the record, [they] are conclusive on appeal, notwithstanding other evidence in the record to the contrary." *Id.*, at 289-90, 380 S.E.2d at 169.

Id. at 630, 394 S.E.2d at 654.

Long-Arm Statute

[1] Defendants first argue that North Carolina's long-arm statute, G.S. § 1-75.4, does not reach the defendants. We disagree.

"Our [long-arm] statute is designed to extend jurisdiction over nonresident defendants to the fullest limits permitted by the Fourteenth Amendment's due process clause. We thus give a broad and liberal construction to the provisions of the statute, within the perimeters established by federal due process." *Church v. Carter*, 94 N.C. App. 286, 290, 380 S.E.2d 167, 169 (1989) (citations omitted).

G.S. § 1-75.4 provides, in pertinent part:

> A court of this State having jurisdiction of the subject matter has jurisdiction over a person served in an action pursuant to Rule 4(j) or Rule 4(j1) of the Rules of Civil Procedure under any of the following circumstances:
>
> * * *
>
> (5) Local Services, Goods or Contracts.—In any action which:
>
> * * *

b. Arises out of services actually performed for the plaintiff by the defendant within this State, or services actually performed for the defendant by the plaintiff within this State if such performance within this State was authorized or ratified by the defendant; or

c. Arises out of a promise, made anywhere to the plaintiff or to some third party for the plaintiff's benefit, by the defendant to deliver or receive within this State, or to ship from this State goods, documents of title, or other things of value. . . .

Each of the defendants filed separate affidavits together with a joint motion to dismiss. In their respective affidavits the defendants make the following admissions: Defendant McDonald admitted making approximately four trips to North Carolina to meet with corporate personnel; defendant Henderson admitted returning to North Carolina on two separate occasions for training; defendant Barker admitted coming to North Carolina two times to attend five day training seminars; and finally, defendant Perkins admitted coming to North Carolina once a year for sales meetings until he quit working for the plaintiff. Record evidence indicates that defendant Perkins worked for the plaintiff from 1987 to 1991.

Kenneth Wertz, the plaintiff's Vice-President of Finance, filed an affidavit in which he stated that: defendant McDonald came to North Carolina for six separate meetings between October 1990 and July 1991; defendant Henderson attended two meetings in North Carolina between December 1990 and February 1991; defendant Perkins attended a meeting on 13 December 1990 in North Carolina; and defendant Barker, on information and belief, returned to North Carolina on at least one occasion. Mr. Wertz's affidavit further states: "That Defendants personally appeared in North Carolina to take advantage of job training, provided by C.D.S. for corporate meetings and management discussions."

Plaintiff argues that these meetings constituted "services actually performed for the defendant[s] by the plaintiff within this state where such performance within this state was authorized or ratified by the defendant. . . ." At least one defendant, Henderson, alleges that he came to the North Carolina meetings at the request of the plaintiff. However, regardless of whether the plaintiff requested the defendants to attend, when we construe the provisions of G.S. § 1-75.4 liberally in favor of jurisdiction, as we must do, it becomes clear that each defendant accepted and ratified the

rendition of services (meetings and training) provided by the plaintiff in this State. Accordingly, each defendant falls within reach of our long-arm statute.

Moreover, we note that the employment contracts of both defendant McDonald and Perkins provide that it was their duty to "sell and promote all of the products marketed, sold, or leased by the" plaintiff in their respective sales areas. Mr. Wertz's affidavit provides in part:

> That goods were shipped and services were provided from North Carolina to the Defendants in South Carolina including, but not limited to:
>
> * * *
>
> d. Customer order processing and all contacts with vendors:
>
> Purchasing takes place in Raleigh, N.C. Salesmen from South Carolina call with a proposal from their South Carolina customer. They requisition the products from Raleigh, and if the Raleigh headquarters office does not have the product in stock, CDS Raleigh makes an order with the vendor for the goods that are required by the proposal. Customarily (99% of the time) the products ordered form [sic] the vendors came directly to Century Data Systems Raleigh headquarters [sic] office. The products were then shipped from Raleigh to South Carolina to fulfill the customers order. Infrequently, an order may be shipped direct from the vendor to the customer.

Accordingly, we hold that defendants McDonald and Perkins also fall within the reach of paragraph (5)c. of the North Carolina long-arm statute.

Due Process

[2] Defendants next argue that defendants lack sufficient minimum contacts with the State of North Carolina for our courts to exercise jurisdiction over them consistent with due process. We disagree.

> To satisfy the requirements of the due process clause, there must exist "certain minimum contacts [between the non-resident defendant and the forum] such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice. . . .'" In each case, there must be some act by which the defendant purpose-

> fully avails himself of the privilege of conducting activities within the forum state, thus invoking the benefits and protections of its law . . . This relationship between the defendant and the forum must be "such that he should reasonably anticipate being haled into court there."

Tom Togs, Inc., at 365, 348 S.E.2d at 786 (citations omitted). The forum state may exercise jurisdiction over a defendant if there are "sufficient 'continuous and systematic' contacts between the defendant and the forum state." *Williams*, at 427, 355 S.E.2d at 181 (citation omitted).

> Factors for determining existence of minimum contacts include " '(1) quantity of the contacts, (2) nature and quality of the contacts, (3) the source and connection of the cause of action to the contacts, (4) the interest of the forum state, and (5) convenience to the parties.' " *New Bern Pool & Supply Co. v. Graubart*, 94 N.C. App. 619, 624, 381 S.E.2d 156, 159, *affirmed per curiam*, 326 N.C. 480, 390 S.E.2d 137 (1990) (citations omitted).

Cherry Bekaert & Holland, 99 N.C. App. at 632, 394 S.E.2d at 655-56. "No single factor controls, but they all must be weighed in light of fundamental fairness and the circumstances of the case." *B.F. Goodrich Co. v. Tire King of Greensboro, Inc.*, 80 N.C. App. 129, 132, 341 S.E.2d 65, 67 (1986) (citations omitted).

(1) Quantity of Contacts

A. Defendant McDonald: The record indicates that the defendant entered three successive contracts with the plaintiff: In October 1986 the defendant, then a resident of New Hanover County, North Carolina, entered a contract with the plaintiff whereby he agreed to sell and promote the plaintiff's products and to serve as sales manager of the plaintiff's Wilmington office; in July 1988 the defendant, still a resident of New Hanover County, North Carolina, entered into a contract with the plaintiff to sell and promote the plaintiff's products and to serve as Branch Manager of both plaintiff's Charleston, South Carolina and Savannah, Georgia, offices; and, finally, in September 1990 the defendant, then a resident of South Carolina, entered a contract (effective January 1990) with the plaintiff under which he agreed to sell and promote the plaintiff's products and serve as the Branch Manager of plaintiff's Charleston, South Carolina, office.

The record also discloses, according to Mr. Wertz's affidavit, that the defendant was employed in plaintiff's Wilmington office until July 1988. Mr. Wertz's affidavit also states that the defendant attended three meetings in North Carolina in 1990 and three meetings in North Carolina in 1991. Indeed, the defendant admits in his affidavit that he has come to North Carolina on four separate occasions since December of 1988 to meet with corporate personnel. Finally, as discussed above, Mr. Wertz's affidavit discloses that the defendant placed purchase orders with plaintiff's North Carolina office.

B. Defendant Henderson: The record indicates that this defendant entered into two contracts with the plaintiff. In May 1990 the defendant, then a South Carolina resident, entered a contract (effective March 1990) with plaintiff whereby he agreed to install, program and support the plaintiff's products. In February 1991 defendant, still a South Carolina resident, entered a second contract (effective January 1991) under which he agreed to maintain and service all of the plaintiff's products as well as serve as Manager of Field Engineering of plaintiff's Charleston office. Further, according to Mr. Wertz's affidavit the defendant also attended at least one two day meeting in North Carolina in 1990 and one two day meeting in North Carolina in 1991. Defendant admits attending two training meetings in North Carolina.

C. Defendant Barker: The record indicates that defendant Barker, a resident of South Carolina, entered into a contract (effective November 1990) with the plaintiff in December of 1990 under which he agreed to install, program and support plaintiff's products. Mr. Wertz's affidavit provides that this defendant came to North Carolina on at least one occasion. However, the defendant, in his affidavit, admits attending two five day sessions of programming school sponsored by CDS in North Carolina during 1991.

D. Defendant Perkins: According to the record, defendant Perkins also entered into a number of contracts with the plaintiff: In February 1987 defendant, then a resident of New Hanover County, North Carolina, entered a contract (effective January 1987) whereby he agreed to sell and promote the plaintiff's products. In September 1987, September 1989 and September 1990, the defendant, then a resident of South Carolina, also entered contracts (respectively effective July 1987, August 1989, and July 1990) to sell and promote the plaintiff's products.

Mr. Wertz's affidavit states that between May 1984 and February 1987 the defendant was employed in the plaintiff's Wilmington, North Carolina, office; that in December 1990 the defendant attended a CDS meeting in Charlotte, North Carolina, on customer installation; and that as discussed above the defendant placed purchase orders with the plaintiff's North Carolina office. Defendant admits coming to North Carolina once a year for annual one day sales meetings.

E. All Defendants: Mr. Wertz's affidavit states that each of the defendants was provided bi-weekly payroll services out of plaintiff's North Carolina office. Finally, each of the defendants' contracts was entered in North Carolina. "Under North Carolina law, a contract is made in the place where the last act necessary to make it binding occurred." *Tom Togs, Inc. v. Ben Elias Industries Corp.*, 318 N.C. 361, 365, 348 S.E.2d 782, 785 (1986) (citation omitted).

Furthermore, there is evidence in the record to support the plaintiff's argument that each of the defendants breached the covenants not to compete. Plaintiff's verified complaint alleges (1) that prior to terminating their employment with the plaintiff, the defendants formed a South Carolina corporation for the purpose of soliciting plaintiff's existing and prospective customers; (2) that defendants have advertised in business periodicals and newspapers to lure plaintiff's existing and prospective customers to defendants' new corporation; (3) that the defendants personally solicited two South Carolina accounts; (4) that the defendants have sent direct mail to plaintiff's current customers; and (5) that defendant McDonald has solicited and encouraged three of plaintiff's employees to terminate their employment with the plaintiff and to go to work for the new South Carolina corporation. Mr. Clarence Wiggins, plaintiff's president, submitted an affidavit in which he described solicitations etc. that each of the defendants have been involved in. In addition, Sue Halsema, a South Carolina resident, submitted an affidavit that defendants McDonald and Perkins acted in direct and open competition with the plaintiff by soliciting her employer's business. Finally, Martha Sessoms, a North Carolina resident, submitted an affidavit which stated *inter alia*: (1) that she met defendant McDonald in Wilmington to discuss business; (2) that defendant McDonald was in Wilmington making sales calls on existing CDS clients; (3) that defendant McDonald offered her a job in the Wilmington area; and (4) that defendants McDonald and Perkins were

selling the products while defendants Henderson and Barker were servicing and maintaining the products, all in direct competition with the plaintiff.

Defendants argue that under their most recent contracts they were employed by the plaintiff to work in South Carolina, and that the contracts do not require the defendants to perform services in North Carolina. "In light of modern business practices, the quantity, *or even the absence of actual physical contacts with the forum state*, merely constitutes a factor to be considered and is not of controlling weight." *Ciba-Geigy Corp. v. Barnett*, 76 N.C. App. 605, 607-08, 334 S.E.2d 91, 93 (1985) (emphasis added). Defendants' argument overlooks the actual contacts, both physical and non-physical, set out above that each of the defendants had with North Carolina. Moreover, defendants' argument overlooks the fact that each of the contracts was entered into in North Carolina. *Tom Togs, Inc.*, 318 N.C. at 365, 348 S.E.2d at 785.

(2) Nature and Quality of Contacts

Plaintiff's evidence, most notably the verified complaint, indicates that each of the defendants was engaged in an ongoing relationship with the plaintiff at the time that the South Carolina corporation was formed, and that the defendants began open competition with the plaintiff in alleged violation of the non-competition agreements. Plaintiff's evidence also indicates that defendants relied on plaintiff's North Carolina offices for training, meetings, issuance of pay checks, receipt of purchase orders and even shipment of goods.

(3) Source and Connection of Cause of Action

"The cause of action arose directly out of [defendants'] activities for which [they were] compensated by [the plaintiff]." *B.F. Goodrich Co.*, 80 N.C. App. at 133, 341 S.E.2d at 68. The defendants were compensated both for their sales and maintenance as well as for their agreements to refrain from violating their respective non-competition agreements.

(4) Interest of the Forum State

"It is generally conceded that a state has a 'manifest interest' in providing its residents with a convenient forum for redressing injuries inflicted by out-of-state actors." *Tom Togs, Inc.*, 318 N.C. at 367, 348 S.E.2d at 787. This principle holds true where as here the defendants are alleged to have purposefully violated their con-

tracts to engage in open competition with the plaintiff. *See Ciba-Geigy Corp.*, 76 N.C. App. at 608, 334 S.E.2d at 93 (Our court noted the "powerful public interest of a forum state in protecting its citizens against out-of-state tortfeasors" where the defendant committed fraud upon a North Carolina corporation without physically coming into this state.).

(5) Convenience

We are unable to discern any relevant convenience factors from the record other than the unavoidable inconvenience of a party being required to litigate outside its home state. *B.F. Goodrich Co.*, 80 N.C. App. at 133, 341 S.E.2d at 68.

Moreover, we note that the defendants could reasonably foresee having their contract disputes resolved in North Carolina and that it is fair to all parties concerned to have them resolved here.

> The "crucial" foreseeability of being subject to litigation in the forum court is whether defendant could reasonably anticipate being haled into court. "In making this determination, the interest of, and fairness to, both the plaintiff and the defendant must be considered and weighed."
>
> 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.

Cherry, Bekaert & Holland, 99 N.C. App. at 635, 394 S.E.2d at 657. Here, each of the contracts provides: "the law of the State of North Carolina will govern this Contract and . . . the terms and provisions thereof shall be construed and interpreted under the Law of the State of North Carolina."

Conclusion

"Upon review of these factors and the relevant cases, we conclude that [the defendants have] sufficient minimum contacts, purposefully made, with North Carolina and that exercise of jurisdiction over [their] person by our courts does not offend due process." *B.F. Goodrich Co.*, 80 N.C. App. at 133, 341 S.E.2d at 68. Accordingly, we hold that there is competent evidence of record to support the presumed findings of the trial court.

Affirmed.

Judges COZORT and WYNN concur.

IN RE: PETITION FOR JUDICIAL REVIEW BY E. I. DuPONT DE NEMOURS AND COMPANY, INC.

No. 9210SC253

(Filed 6 April 1993)

Environmental Protection, Regulation, and Conservation § 75 (NCI4th)— wastewater treated in elementary neutralization systems—no solid waste—no hazardous waste—assessment of tonnage fee improper

The legislature did not intend for wastewater treated in elementary neutralization systems and discharged pursuant to NPDES permits to be assessed the tonnage fee set forth in N.C.G.S. § 130A-294.1(g), since that statute applies to any facility which generates the requisite amount of hazardous waste, and in order for a substance to be classified as a hazardous waste, a substance must first be considered a "solid waste" as defined in N.C.G.S. § 130A-290(8) and N.C.G.S. § 130A-290(35).

Am Jur 2d, Pollution Control §§ 185, 248 et seq., 277 et seq.

Appeal by respondent from order entered 13 December 1991 by Judge Henry V. Barnette, Jr. in Wake County Superior Court. Heard in the Court of Appeals 13 January 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Judith Robb Bullock, for the State.

Hunton and Williams, by Charles D. Case, William D. Dannelly and Ethan S. Naftalin, for E.I. du Pont de Nemours & Company, Inc.

LEWIS, Judge.

The question presented by this most amenable appeal is whether the legislature intended for wastewater treated in elementary neutralization systems and discharged pursuant to NPDES permits

to be assessed a tonnage fee as per N.C.G.S. § 130A-294.1(g). We do not think that the legislature so intended and we hereby affirm the decision of the superior court.

N.C.G.S. § 130A-294.1(g) was enacted in 1987 and provides:

> A person who generates one kilogram or more of acute hazardous waste or 1000 kilograms or more of hazardous waste in any calendar month during the calendar year shall pay, in addition to any fee under subsections (e) and (f) of this section, a tonnage fee of fifty cents ($0.50) per ton or any part thereof of hazardous waste generated during that year up to a maximum of 25,000 tons.

Concerned that it might be subject to N.C.G.S. § 130A-294.1(g), Du Pont filed a request for a declaratory ruling with the North Carolina Department of Environment, Health, and Natural Resources (formerly Department of Human Resources, "DEHNR" will be used to refer to both) on 12 September 1989 addressing the question of whether Du Pont's four facilities in North Carolina were covered by N.C.G.S. § 130A-294.1(g). The two specific questions posed by Du Pont were:

> 1. Are materials contained in properly permitted wastewater discharges at DuPont facilities . . . not subject to reporting in a hazardous waste generator's annual hazardous waste generation report?
>
> 2. Are materials contained in properly permitted wastewater discharges at DuPont facilities . . . not subject to hazardous waste generator fees under N.C. Gen. Stat. § 130A-294.1?

Du Pont filed supporting documentation with its request and urged DEHNR to answer both of the above questions in the affirmative.

On 22 October 1990, Ronald H. Levine, the State Health Director, issued his Declaratory Ruling answering both of the above questions in the negative. As the basis for his ruling, Mr. Levine found that the fee schedule in N.C.G.S. § 130A-294.1(g) did not contain an exemption for wastewaters and that wastewaters are not excluded from the definition of solid waste while they are being generated, collected, stored or treated before discharge. Mr. Levine further concluded that Du Pont was required to report its wastewater hazardous waste even if the wastewater was man-

aged in exempt units such as elementary neutralization tanks or in totally enclosed tanks.

Thereafter, on 26 November 1990, Du Pont filed a Petition for Judicial Review in Wake County Superior Court. Judge Henry V. Barnette heard the matter on 14 October 1991 and issued his ruling on 13 December 1991 effectively reversing the Declaratory Ruling. In his order, Judge Barnette held that wastewaters in elementary neutralization units, wastewater treatment facilities and totally enclosed treatment units were exempt from regulation under N.C.G.S. § 130A-294.1(g). Judge Barnette further concluded that wastewater discharged under permits issued under Section 402 of the Clean Water Act was excluded from the definition of hazardous waste. Judge Barnette also concluded that because the fees assessed under N.C.G.S. § 130A-294.1(g) were intended to support the North Carolina hazardous waste management program, the General Assembly did not intend that such fees should be assessed on wastewater treated in units not regulated under that program. DEHNR gave notice of appeal from Judge Barnette's ruling on 10 January 1992.

To understand the positions of the parties, it is important to understand the neutralization processes as well as the regulatory background under which Du Pont operates. Du Pont has several facilities throughout North Carolina, and four of these facilities produce acid-caustic neutralized water through their operations: Kinston, Cape Fear, Brevard and Fayetteville. The acid-caustic neutralized water from these four facilities is produced in one of four different methods: Demineralized Water Ion Exchange, DMT Polymerization Vessel Cleaning, Vapor and Raw Material Scrubbing, and Nitric Acid Cleaning. Du Pont uses various acids and caustic solutions as cleaning agents. Once the acids and caustic solutions are used, they are collected in totally enclosed tanks where they are neutralized. The resulting wastewater is then discharged by Du Pont pursuant to NPDES permits. Admittedly this is an oversimplification of the entire process, but it is all that is required for the purposes of this opinion.

The regulatory background is also important to a complete understanding of the parties' positions. Hazardous wastes are regulated under a dual system of federal and state enactments. The federal statutes are contained in the Resource Conservation and Recovery Act ("RCRA") and the State counterpart is the North

Carolina Solid Waste Management Law contained in Article 9 of Chapter 130A of the North Carolina General Statutes. For the most part, the North Carolina Rules have been adopted verbatim from the RCRA Rules. Since the North Carolina Rules are consistent with those adopted under RCRA, North Carolina has been allowed to operate its own hazardous waste management program in lieu of the federal program. It is for this reason that DEHNR argues so strenuously in favor of reversing the trial court's ruling. DEHNR claims that North Carolina must adhere to the federal interpretation in order to maintain the necessary equivalency and consistency to operate a state program. DEHNR further claims that to uphold the trial court's ruling would risk potential revocation of North Carolina's own hazardous waste program.

With the stage set, we now turn to the arguments of the parties. The essence of Du Pont's argument is that all the wastewater it discharges is covered by NPDES permits and therefore it is not subject to the tonnage fee in N.C.G.S. § 130A-294.1(g). Du Pont's logic has substantial merit especially in light of the language of N.C.G.S. § 130A-290 which provides that the definitions there are to be applied throughout the Article. Therefore, it is necessary to look at the statutory definitions provided by the legislature.

N.C.G.S. § 130A-294.1(g) applies to any facility which generates the requisite amount of *hazardous waste*. The definition of hazardous waste is contained in N.C.G.S. § 130A-290(8) and provides in pertinent part:

> "Hazardous waste" means a solid waste, or combination of solid wastes, which because of its quantity, concentration, or physical, chemical or infectious characteristics may:
>
> a. Cause or significantly contribute to an increase in mortality or an increase in serious irreversible or incapacitating reversible illness; or
>
> b. Pose a substantial present or potential hazard to human health or the environment when improperly treated, stored, transported, disposed of or otherwise managed.

(Emphasis added). Thus, it is clear that in order for a substance to be classified as a hazardous waste, a substance must first be considered a "solid waste." The term solid waste is defined by N.C.G.S. § 130A-290(35) and specifically excludes:

b. Solid or dissolved material in . . .

3. Wastewater discharges and the sludges incidental to and generated by treatment which are point sources subject to permits granted under Section 402 of the Water Pollution Control Act, as amended (P.L. 92-500), and permits granted under G.S. 143-215.1 by the Environmental Management Commission.

There is no dispute that Du Pont operates its facilities with NPDES permits granted under Section 402 of the Water Pollution Control Act. As a result, Du Pont claims that its wastewaters are exempt from the definition of a solid waste and thus cannot be hazardous wastes subject to the tonnage fee in N.C.G.S. § 130A-294.1(g).

In opposition, DEHNR contends that the terms of N.C.G.S. § 130A-294.1(g) are clear and unambiguous. As such, anyone who generates the requisite amount of waste is required to pay the tonnage fee. DEHNR further disagrees with Du Pont's argument that it is excluded from the definition of hazardous waste. In so doing, DEHNR attempts to draw a distinction between wastewater discharges and wastewater. In support of this distinction DEHNR cites to several federal authorities. *See* 45 Fed. Reg. 33098(1980); 40 C.F.R. 261.4(a)(2). More specifically, it is the comment to 40 C.F.R. 261.4(a)(2) which DEHNR urges has been incorporated by reference in 15A NCAC 13A .0006. This comment states as follows: "This exclusion applies only to the actual point source discharge. It does not *exclude* industrial wastewaters while they are being collected, stored, or treated before discharge. . . ." DEHNR concedes in its brief that this comment does not appear in the North Carolina statutory language, but argues that it does support the position urged by DEHNR. We agree that the comment to 40 C.F.R. 261.4(a)(2) is supportive of DEHNR's position, but we also recognize that a C.F.R. comment is not binding on this Court, especially when interpreting a statute that is purely a creature of North Carolina law and one that has no federal counterpart.

We have given careful consideration to the arguments of counsel and note that there is merit to both sides of this appeal. However, in deciding this appeal, we are bound by two firmly established rules of jurisprudence. The first of these is the standard of review which governs our review of the trial court's decision. In this matter our review is governed by N.C.G.S. § 150B-52, controlling appeals of agency decisions from the Superior Court to the Court

of Appeals. Under § 150B-52, this Court is limited in its review to whether the trial court committed any errors of law in light of its application of the standard of review in N.C.G.S. § 150B-51. *Sherrod v. North Carolina Dep't of Human Resources*, 105 N.C. App. 526, 414 S.E.2d 50 (1992).

The trial court held in its order that DEHNR had committed an error of law in interpreting N.C.G.S. § 130A-294.1(g) so as to apply to Du Pont's facilities. The trial court in reviewing the decision of DEHNR was required to follow N.C.G.S. § 150B-51(b) which provides in pertinent part:

> After making the determinations, if any, required by subsection (a), 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 or jurisdiction of the agency;
>
> (3). Made under unlawful procedure;
>
> (4). Affected by other error of law;
>
> (5). Unsupported by substantial evidence . . .; or
>
> (6). Arbitrary or capricious.

An error in interpreting a statute comes under subsection (4) of N.C.G.S. § 150B-51. *In re North Carolina Savings and Loan League*, 302 N.C. 458, 276 S.E.2d 404 (1981). Since DEHNR's ruling involved an interpretation of the terms of N.C.G.S. § 130A-294.1(g), it was not error for the trial court to substitute its interpretation N.C.G.S. § 130A-294.1(g) for that of DEHNR. *Id.* Thus under the circumstances, it was proper for the trial court to have applied a de novo review and we in turn review the decision of the trial court by looking to see if there were any errors of law.

Having reviewed the record as a whole, we conclude that no errors of law were committed by the trial court. In so doing, we are guided by our second firmly established rule of jurisprudence, that in interpreting statutes it is the role of this Court to ascertain

the intent of the enacting legislature. *Electric Supply Co. v. Swain Elec. Co.*, 328 N.C. 651, 403 S.E.2d 291 (1991). DEHNR argues that the statute is clear on its face and that we need not look to the legislative intent, but the fact that both the trial court and DEHNR reached opposite conclusions on the interpretation of the same statute is ample evidence that N.C.G.S. § 130A-294.1(g) is not as clear as DEHNR would have us believe.

In arguing that it was not the intention of the legislature for Du Pont's facilities to be subject to the tonnage fee, Du Pont has cited us to two strong pieces of evidence. The first of these is the 1988 Fee Bill. *1987 N.C. Sess. Laws ch. 1020, s. 6.* The 1988 Fee Bill provided that:

> [DEHNR] shall study the application of tonnage fees imposed by Section 2 of this act to wastewaters. The study shall include an analysis of wastewater tonnage fees in the context of tonnage fees or [sic] other waste forms, alternate rates, and methods of calculation of wastewater tonnage fees and the effect of any recommended charges on the overall fee schedule.

This directive from the legislature to DEHNR indicates that the legislature intended N.C.G.S. § 130A-294.1(g) to have only prospective application. Since the 1988 Fee Bill, however, there has been no affirmative act by the legislature directing DEHNR to begin applying the tonnage fees to wastewater. The only communication between the legislature and DEHNR in response to the 1988 Fee Bill was DEHNR's *North Carolina Waste Water Study for 1989 General Assembly* ("Study"). In the Study, DEHNR expressed concern that it may not have the authority to require reporting of wastewater and further whether or not the tonnage fees should even be imposed on wastewater. In the Study, DEHNR also told the General Assembly that "[i]ncluding this waste [hazardous wastewater] in our total generation figure is necessary in order to receive funds needed to manage the hazardous waste program." Even in light of the reservations expressed by DEHNR, the legislature still did not take any affirmative action authorizing DEHNR to begin collecting the tonnage fee on wastewater. As a result, we find the 1988 Fee Bill and DEHNR's response to be more than ample evidence that it was not the intent of the legislature for totally enclosed neutralization facilities such as those at Du Pont to be subject to the tonnage fee in N.C.G.S. § 130A-294.1(g).

DEHNR contends, however, that its Study to the General Assembly put the legislature on notice as to DEHNR's trepidation to collect tonnage fees from wastewater facilities and the fact that the legislature did not act showed its acquiescence to the collection of these fees. Inaction is a poor basis upon which to infer consent, and we believe that the failure of the legislature to take that action was not a directive for DEHNR to begin collecting tonnage fees as DEHNR would suggest.

The second piece of strong evidence for Du Pont is the use to which the tonnage fee is put. N.C.G.S. § 130A-294.1(a) provides: "It is the intent of the General Assembly that the fee system established by this section is solely to provide funding in addition to federal and State appropriations to support the State's hazardous management program." The uses for these funds are set forth in section (b) of N.C.G.S. § 130A-294.1 which provides:

> Funds collected pursuant to this section shall be used for personnel and other resources necessary to:
>
> (1) Provide a high level of technical assistance and waste minimization effort for the hazardous waste management program;
>
> (2) Provide timely review of permit applications;
>
> (3) Insure that permit decisions are made on a sound technical basis and that permit decisions incorporate all conditions necessary to accomplish the purposes of this Part;
>
> (4) Improve monitoring and compliance of the hazardous waste management program;
>
> (5) Increase the frequency of inspections;
>
> (6) Provide chemical, biological, toxicological, and analytical support for the hazardous waste management program; and
>
> (7) Provide resources for emergency response to imminent hazards associated with the hazardous waste management program.

Du Pont's wastewater is currently treated in units that are not regulated by North Carolina's hazardous waste management program. Therefore, any fees collected from Du Pont would have gone

to the operation of the hazardous waste management program of North Carolina, of which Du Pont's discharges would not have been a part. We do not think that the legislature intended to impose a double fee on Du Pont. Therefore, the decision of the trial court holding that Du Pont is not required to pay the tonnage fee in N.C.G.S. § 130A-294.1(g) is affirmed.

In so doing, we also affirm the trial court's decision that Du Pont is not required to report its wastewater. We further feel that our decision does not harm the North Carolina regulatory scheme since the statute at issue in this case is entirely a creature of the North Carolina General Assembly and has nothing to do with North Carolina maintaining equivalency and consistency with federal statutes.

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

Affirmed.

Judges WELLS and COZORT concur.

JOANNA COWAN, EXECUTRIX OF THE ESTATE OF JAMES DOUGLAS JACOBS v. BRIAN CENTER MANAGEMENT CORPORATION, BRIAN CENTER OF ASHEBORO, INC., ASHEBORO FAMILY PHYSICIANS, INC., LAWRENCE E. PERRY AND ROBERT VANDENBERG

No. 9215SC140

(Filed 6 April 1993)

1. Death § 31 (NCI4th)— wrongful death statute—gross negligence—definition

"Gross negligence" as that term is used in the wrongful death statute is something less than willful and wanton conduct, and includes the absence of even slight care, indifference to the rights and welfare of others, and negligence of an aggravated character. N.C.G.S. § 28A-18-2(b)(5).

Am Jur 2d, Death §§ 1 et seq.

Modern status of rule denying a common-law recovery for wrongful death. 61 ALR3d 906.

2. Damages § 132 (NCI4th)— wrongful death—punitive damages—genuine issues of fact as to gross negligence—summary judgment improper

In an action to recover for the wrongful death of a patient in defendant skilled nursing care facility, the trial court erred in granting the motion of defendant facility and defendant attending physicians for partial summary judgment on the issue of punitive damages, since the evidence on file indicated the existence of genuine issues of material fact regarding gross negligence on the part of defendants in continuing diuretics with no evidence of congestive heart failure, failure to monitor decedent's weight on a weekly basis, failure to monitor blood values to determine the state of hydration, failure to investigate weight loss, failure to monitor fluid and nutrition status, failure to monitor pulse and blood pressure on a weekly basis, failure to maintain accurate food consumption charts, failure to make an adequate physical assessment of decedent, and failure to timely contact physicians.

Appeal by plaintiffs from order entered 12 November 1991 by Judge J.B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 11 January 1993.

Law Offices of Grover C. McCain, Jr., by Grover C. McCain, Jr. and Martin A. Rosenberg, for plaintiff-appellant.

Tuggle Duggins & Meschan, P.A., by J. Reed Johnston, Jr. for defendants-appellees Brian Center Management Corporation and Brian Center of Asheboro, Inc.

Yates, McLamb & Weyher, by Bruce W. Berger and George B. Autry, Jr., for defendants-appellees Asheboro Family Physicians, Inc., Lawrence E. Perry and Robert Vandenberg.

LEWIS, Judge.

On 7 June 1990 plaintiff, executrix for the estate of her father, Dr. Jacobs, filed this action seeking compensatory and punitive damages for the wrongful death of her father pursuant to N.C.G.S. § 28A-18-2. The defendants are Brian Center of Asheboro, Inc., a skilled nursing care facility, Brian Center Management Corporation, its parent company (both hereinafter referred to as "Brian Center"), the physicians assigned to care for Dr. Jacobs, and their

professional association, Asheboro Family Physicians, Inc. (hereinafter collectively referred to as "the physicians"). In October 1991 both the physicians and Brian Center filed a motion for partial summary judgment on the issue of punitive damages. Judge Allen held a hearing on 4 November and granted defendants' motions on 12 November. Plaintiff appeals from this partial summary judgment order.

The evidence, viewed in the light most favorable to plaintiff as it must be on this motion for summary judgment, *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *appeal dismissed and disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984), indicates that on 17 March 1989 Dr. Jacobs, then 91 years old, was taken to the emergency room at Alamance Memorial Hospital with "complaints of progressive weakness and somnolence for a period of three days." Dr. Jacobs was admitted to the hospital and treated by Dr. Javed Masoud for congestive heart failure, pleural effusion and dehydration. He was given diuretics to remove the fluid from his body tissues and lungs. In April 1989 blood testing performed at the hospital indicated upward fluctuation in Dr. Jacobs' blood, urine and nitrogen (BUN) levels. Such fluctuation indicates possible renal insufficiency, and thus requires careful attention to diuretic medications in order to maintain proper body fluid levels.

On 24 April 1989, Dr. Masoud discharged Dr. Jacobs to the Brian Center skilled nursing facility. The discharge summary listed, among other medications, two diuretics to be administered twice daily. Dr. Vandenberg, Dr. Jacobs' primary physician at the Brian Center, reviewed Dr. Jacobs' condition upon admission and recommended a continuation of the diuretic medications. Dr. Jacobs weighed 119 pounds when he was admitted to the Brian Center.

Nursing notes maintained by the Brian Center staff from April 24 to May 24 revealed no symptoms of congestive heart failure or pleural effusion. However, Dr. Jacobs' BUN levels during that period increased "to a dangerously high level of 84." Plaintiff points out that for the month of May the daily records of Dr. Jacobs' meal consumption were incomplete and sometimes inconsistent with the nurse's handwritten notes. Records of his meal consumption for the month of June were also incomplete. During this time Dr. Jacobs' was losing weight, so that by June 14 he only weighed 109½ pounds.

On June 19 Dr. Perry, Dr. Jacobs' other attending physician at the Brian Center, was informed of an acute episode of elevated blood pressure, respiratory difficulty and an inability to swallow. Dr. Jacobs' blood tests and elevated BUN levels revealed continuing dehydration. Dr. Perry ordered "Force Fluids." Dr. Jacobs continued on the same diuretics, and no further blood tests were ordered at the Brian Center.

In July and August the nurses noted problems with swollen, darkened feet, indicating possible circulatory and fluid problems, and early bed sores, but failed to inform the physicians of these developments. Dr. Vandenberg saw Dr. Jacobs on 24 August, but did not reassess weight loss, hydration status, or medication levels. Dr. Jacobs' condition deteriorated in early September, and on 8 September he was transferred to Randolph Hospital. Upon admission his BUN levels were at 136 and he was suffering from "profound dehydration." Dr. Jacobs died from pneumonia on 17 September 1989.

Plaintiff presents three arguments on appeal. First, she alleges defendants, who had the burden of proof on their motions for summary judgment, could not have been entitled to summary judgment since the only evidence before the court consisted of the documents on file, which included plaintiff's complaint, the expected testimony of plaintiff's experts, and an affidavit of Dr. Irving Vinger. Second, plaintiff contends that genuine issues of material fact existed on the issue of gross negligence based on the admissions and arguments of defense counsel. Finally, plaintiff objects to the admission of the deposition of Dr. Javed Masoud after the close of the 4 November hearing without giving plaintiff the opportunity to respond.

Initially, we must determine what level of conduct must be shown to entitle plaintiff to punitive damages in a wrongful death action. We will then ascertain whether defendants met their burden of proof on their summary judgment motions.

A. Wrongful Death Statute: N.C.G.S. § 28A-18-2

A wrongful death action must be brought pursuant to the wrongful death statute, because no such cause of action existed at common law. *See Cole v. Duke Power Co.*, 81 N.C. App. 213, 217, 344 S.E.2d 130, 132, *disc. rev. denied*, 318 N.C. 281, 347 S.E.2d 462 (1986). According to the statute, punitive damages may be

recovered "for wrongfully causing the death of the decedent through maliciousness, wilful or wanton injury, or gross negligence . . . ." N.C.G.S. § 28A-18-2(b)(5) (Cum. Supp. 1992).

Defendant physicians strenuously argue that proof of gross negligence is not enough to recover punitive damages. Finding no definition in the statute, the physicians contend the legislature intended the term "gross negligence" to be synonymous with wanton conduct. *See Hinson v. Dawson*, 244 N.C. 23, 92 S.E.2d 393 (1956). Brian Center, relying on *Hinson*, contends that the term "gross negligence" is too vague unless it is defined as willful and wanton conduct, meaning "conscious and intentional disregard of and indifference to the rights and safety of others." *Id.* at 28, 92 S.E.2d at 396-97. Defendants highlight the case of *Robinson v. Duszynski*, 36 N.C. App. 103, 243 S.E.2d 148 (1978), wherein the Court addressed the definition of gross negligence under the wrongful death statute. The Court, citing *Hinson*, stated "[i]n cases where plaintiff's action was grounded on negligence, our courts have referred to gross negligence as the basis for recovery of punitive damages, using that term in the sense of wanton conduct." *Id.* at 106, 243 S.E.2d at 150.

Brian Center challenges the constitutionality of a gross negligence standard under two recent cases, *Pacific Mutual Life Ins. Co. v. Haslip*, 499 U.S. ---, 111 S. Ct. 1032, 113 L. Ed. 2d 1 (1991) and *Mattison v. Dallas Carrier Corp.*, 947 F.2d 95 (4th Cir. 1991). We decline to address this issue, because it is well settled that a constitutional issue may not be raised for the first time on appeal. *Commissioner of Ins. v. Rate Bureau*, 300 N.C. 381, 428, 269 S.E.2d 547, 577 (1980); *Rivenbark v. Southmark Corp.*, 93 N.C. App. 414, 378 S.E.2d 196 (1989) (although complaint dismissed with prejudice, cannot raise constitutional question for first time on appeal).

We note that the caselaw is somewhat contradictory on the definition of gross negligence. Defendants acknowledge the cases cited by plaintiff, including *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), and *Beck v. Carolina Power & Light Co.*, 57 N.C. App. 373, 291 S.E.2d 897, *aff'd per curiam*, 307 N.C. 267, 297 S.E.2d 397 (1982). *Cole* and *Beck* hold that gross negligence is distinct from willful and wanton conduct. In *Cole* the Court stated that "[b]y providing for recovery of punitive damages upon a showing

of 'maliciousness, wilful or wanton injury, *or* gross negligence' it appears that the General Assembly intended to establish three separate categories of conduct which would afford a recovery." 81 N.C. App. at 218, 344 S.E.2d at 133. Thus, "gross negligence is something less than wilful and wanton conduct," and is "negligence of an aggravated character." *Id.* at 218-19, 344 S.E.2d at 133 (approving jury instructions). *Beck* defines gross negligence as the "absence of even slight care," and approved jury instructions describing it as "indifference to the rights and welfare of others." 57 N.C. App. at 384-85, 291 S.E.2d at 904.

Recently, in *Henderson v. LeBauer*, 101 N.C. App. 255, 399 S.E.2d 142, *disc. rev. denied*, 328 N.C. 731, 404 S.E.2d 868 (1991), this Court specifically recognized that recovery may be had under the wrongful death statute on the basis of gross negligence even in the absence of willful or wanton conduct. *Id.* at 262, 399 S.E.2d at 146 (*citing Cole*, 81 N.C. App. 213, 344 S.E.2d 130). The Court defined gross negligence as "negligence of an aggravated character." *Id.*

On the other hand, *Hinson* and *Robinson* both hold that gross negligence is equivalent to willful and wanton conduct. *Hinson*, 244 N.C. at 28, 92 S.E.2d at 396-97; *Robinson*, 36 N.C. App. at 106, 243 S.E.2d at 150. In *Berrier v. Thrift*, 107 N.C. App. 356, 420 S.E.2d 206 (1992) *disc. rev. denied*, 333 N.C. 254, 424 S.E.2d 918 (1993), this Court did not distinguish between gross negligence and willful and wanton conduct. It lumped all three terms together as one standard in approving the following jury instruction:

> In a case of alleged negligence, punitive damages may be awarded upon the showing that the negligence was gross, willful or wanton. Negligence is gross, willful or wanton when the wrongdoer acts with a conscious and intentional disregard of and indifference to the rights and safety of others.

107 N.C. App. at 360, 420 S.E.2d at 208.

[1] In order to give effect to the wording of the wrongful death statute, we must treat gross negligence as something distinct from willful and wanton conduct. *See Cole*, 81 N.C. App. at 218, 344 S.E.2d at 133. We are guided by the more recent decisions of *Cole*, *Beck*, and *Henderson* in holding that gross negligence is "something less than willful and wanton conduct," *Cole*, 81 N.C. App. at 218, 344 S.E.2d at 133, and includes "the absence of even

slight care," *Beck*, 57 N.C. App. at 384, 291 S.E.2d at 904, "indifference to the rights and welfare of others," *id.*, and "negligence of an aggravated character." *Cole*, 81 N.C. App. at 219, 344 S.E.2d at 133; *Henderson*, 101 N.C. App. at 262, 399 S.E.2d at 146. We note that *Hinson*, decided in 1956, did not address the issue of punitive damages under the wrongful death statute.

B. Summary Judgment

[2] Summary judgment is only appropriate where there are no genuine issues of material fact. N.C.G.S. § 1A-1, Rule 56(c) (1990). The party moving for summary judgment has the burden of proof, and the evidence must be viewed in the light most favorable to the nonmovant. *Snipes v. Jackson*, 69 N.C. App. 64, 316 S.E.2d 657, *appeal dismissed and disc. rev. denied*, 312 N.C. 85, 321 S.E.2d 899 (1984). In the absence of supporting affidavits, the motion for summary judgment is based upon "the pleadings, depositions, answers to interrogatories, and admissions on file . . . ." § 1A-1, Rule 56(c). Plaintiff points out it is for the jury to decide whether gross negligence existed. *See Berrier*, 107 N.C. App. at 360, 420 S.E.2d at 208 (the approved jury instructions included a statement that "[u]pon a showing of gross, willful or wanton negligence, whether to award punitive damages, and within reasonable limits, the amount to be awarded are matters within the sound discretion of the jury").

Plaintiff contends defendants, in order to be successful on their motion, must produce a forecast of their evidence which would be sufficient to compel a verdict in their favor at trial. *Coats v. Jones*, 63 N.C. App. 151, 303 S.E.2d 655, *aff'd*, 309 N.C. 815, 309 S.E.2d 253 (1983). In this case, defendants did not submit any affidavits in support of their motion. The court, therefore, could only have considered the documents on file, which consisted of the allegations in plaintiff's complaint, the expected testimony of plaintiff's experts set forth in a Designation of Experts, and an affidavit of Dr. Irving Vinger originally filed on 8 October 1990. Plaintiff maintains that the court could not have decided in favor of defendant based on this evidence, unless the court impermissibly considered the oral arguments of defendant as evidence, *Gebb v. Gebb*, 67 N.C. App. 104, 312 S.E.2d 691 (1984), and considered the documents cited in response to plaintiff's opposition to the motion.

We agree with plaintiff that the evidence on file indicated the existence of genuine issues of material fact regarding gross negligence on the part of defendants. The jury should be allowed

to determine whether defendants' conduct, although probably not willful and wanton, amounted to, among other things, "the absence of even slight care," "indifference to the rights and welfare of others," or "negligence of an aggravated character."

Plaintiff's expert, Dr. Vinger, stated in his affidavit that defendants' conduct amounted to gross negligence. Rather than relying upon this conclusion, however, plaintiff emphasizes that Dr. Vinger listed the specific breaches in his affidavit and subsequent deposition. These breaches include failure to make an adequate physical assessment of Dr. Jacobs, failure to monitor intake and output levels, failure to monitor weight loss, failure to monitor diuretic medications and recognize dehydration and fluid volume depletion, failure to keep accurate records, and failure to timely contact physicians. Dr. Vinger felt that Dr. Jacobs was in a life-threatening position on 4 September 1989, and that it was an "outrageous deviation of the standard of care and reckless disregard for the decedent's needs" to fail to notify a physician until 8 September.

Plaintiff contends the depositions of Dr. Haber and Dr. Miller corroborate Dr. Vinger's position, as do the depositions of nurses Karen McDonald and Linda Dury. Dr. Miller referred to the following deviations from the proper standard of care: continuation of diuretics with no evidence of congestive heart failure, failure to monitor decedent's weight on a weekly basis, failure to monitor blood values to determine the state of hydration, failure to investigate weight loss, and failure to monitor fluid and nutrition status. Dr. Haber agreed that the foregoing were breaches of the standard of care.

The nurses noted further deviations from the standard of care, such as chart discrepancies in food consumption and failure to monitor pulse and blood pressure on a weekly basis. Also, Nurse Dury stated the Brian Center was understaffed and had a history of negligent treatment of residents. Plaintiff refers to investigative reports which put Brian Center on notice of certain problems, such as prior failure to maintain proper documentation.

Defendants contend that plaintiff's evidence at the most shows only ordinary negligence. Defendants point out that the experts disagree on what would have been the proper course of treatment for Dr. Jacobs, and also disagree over whether gross negligence was involved. We believe that such disagreement shows the necessi-

ty of allowing the jury to decide the existence of gross negligence in this case. Furthermore, we note that matters regarding the credibility and weight of the evidence are for the jury. *Burrow v. Westinghouse Elec. Corp.*, 88 N.C. App. 347, 351, 363 S.E.2d 215, 218, *disc. rev. denied*, 322 N.C. 111, 367 S.E.2d 910 (1988).

Because we are reversing the order of partial summary judgment, we need not address plaintiff's remaining arguments.

Reversed and remanded.

Chief Judge ARNOLD and Judge COZORT concur.

EDWARD J. GLOVER, JR., PLAINTIFF v. FIRST UNION NATIONAL BANK OF NORTH CAROLINA AND FIRST UNION NATIONAL BANK OF NORTH CAROLINA, TRUSTEE OF THE RETIREMENT PLAN AND TRUST FOR EMPLOYEES OF FIRST UNION NATIONAL BANK OF NORTH CAROLINA AND ITS AFFILIATED COMPANIES, DEFENDANTS

No. 9216SC169

(Filed 6 April 1993)

1. **Contracts § 50 (NCI4th)— merger agreement between banks— employee retirement fund provisions—ambiguity—summary judgment inappropriate**

The merger agreement executed between Scottish Bank, which first employed plaintiff, and First Union was ambiguous and unclear and therefore did not establish as a matter of law that former employees of Scottish Bank were entitled to receive retirement benefits under the First Union Plan based upon total years of service to both Scottish Bank and First Union, as well as their accrued benefits under the previously existing Scottish Bank Plan, and the trial court therefore erred in entering summary judgment for plaintiff.

Am Jur 2d, Contracts §§240 et seq.; Building and Construction Contracts §§ 8 et seq.

2. Limitations, Repose, and Laches § 58 (NCI4th)— action to recover additional retirement benefits—accrual of cause of action—time of bank mergers or time of retirement—action within three years of retirement timely

Plaintiff's action to recover certain additional retirement benefits was not barred by the three-year statute of limitations since plaintiff did not become eligible for retirement benefits until his retirement on 31 October 1988; until that date he was not entitled to demand and could not be injured by a refusal of the retirement benefits which he claimed; the alleged breach therefore could not have occurred until plaintiff's retirement; plaintiff was therefore not at liberty to sue at any time prior to his retirement; and plaintiff brought this action within three years of defendants' refusal of his demand for benefits.

Am Jur 2d, Limitation of Actions §§ 127, 128.

Appeal by defendants from partial summary judgment entered 13 May 1991 and final judgment entered 26 September 1991 by Judge E. Lynn Johnson in Robeson County Superior Court. Heard in the Court of Appeals 13 January 1993.

Plaintiff, Edward J. Glover, Jr., brought this civil action seeking the recovery of certain additional retirement benefits to which he claims he is entitled pursuant to a 1963 merger agreement between First Union National Bank of North Carolina and The Scottish Bank in Lumberton, North Carolina. The record establishes the following pertinent facts: Plaintiff became an employee of The Scottish Bank in Lumberton, North Carolina (hereinafter "Scottish Bank") on 14 February 1955. On or about 20 September 1963, the Scottish Bank merged into First Union National Bank of North Carolina (hereinafter "First Union"). After the merger, plaintiff continued as an employee of First Union until his retirement on 31 October 1988.

At the time of the merger, the Scottish Bank had a profit sharing plan and trust (hereinafter "Scottish Bank Plan") under which plaintiff was a covered participant. First Union also had a Pension Plan and Trust (hereinafter "First Union Plan"). Section 11 of the Merger Agreement between the banks provided as follows:

> All employees of SB [Scottish Bank] under the age of 65 years on the effective date of the merger and who would

otherwise qualify under the requirements for qualifications in the pension Plan of FUNB [First Union] shall become participants in the Pension Plan of FUNB. All employees of SB regardless of age on the effective date of the merger and who would otherwise qualify under the requirements for qualification in the Profit Sharing Plan of FUNB shall become participants in the Profit Sharing Plan of FUNB. Past service with SB shall be considered past service with FUNB in determining eligibility and benefits under both plans of FUNB. In determining allocation of any contribution to FUNB's Profit Sharing Plan for the year in which falls the effective date of the merger, only compensation paid by FUNB shall be given consideration.

SB has an existing Profit Sharing Plan copy of which has been initialed by the signatories hereto for identification which on the effective date of the merger shall become 100% vested in its then participants. The accounts of the participants of this Plan under the age of 65 years shall be operated in conjunction with the Pension Plan of FUNB, provided, however, that the participants in the Profit Sharing Plan of SB shall be entitled to all benefits provided by the Pension Plan of FUNB, which shall in no case be less than provided by, and vested interest resulting from, the Profit Sharing Plan of SB, but adjusted to provide the greater of the said plans. Although the Profit Sharing Plan of SB shall be operated in conjunction with the Pension Plan of FUNB the trust conferred by the SB Plan shall continue and remain inviolate, except as amended hereby, and separate records shall be maintained for these accounts so that at all times it will be possible to determine the accounts of each participant in the Profit Sharing Plan of SB together with appropriate accruals thereto.

Upon termination of employment for any reason the former participants under the Profit Sharing Plan of SB shall have the same rights as to benefits and payments thereof as are prescribed in the Pension Plan of FUNB. Provided, however, that with respect to their vested interest resulting from former participation in the Profit Sharing Plan of SB they shall have the right to payment of such vested interest in accordance with the provisions of the plan.

> The account of any participant in the Profit Sharing Plan of SB who is age 65 or over on the effective date of the merger shall be segregated and held for the benefit of such participant and subject to his direction as to distribution.
>
> The provisions of this Section shall be subject to the approval of the United States Internal Revenue Service. (Emphasis added.)

When plaintiff retired on 31 October 1988, defendants computed his retirement benefit by comparing his Scottish Bank Plan balance (for which First Union maintained a separate accounting record) with the value or cost of "funding" the equivalent amount for plaintiff's service for the Scottish Bank under the First Union Plan. Defendants determined the value of plaintiff's 8.4167 years of Scottish Bank service in the First Union Plan to be $32,647.60 and under the Scottish Bank Plan balance to be $28,315.33. Thus, because the value or cost of funding plaintiff's Scottish Bank service in the First Union Plan exceeded his Scottish Bank Plan balance, defendants paid plaintiff $32,647.60 in addition to $139,300.70 (which represented plaintiff's 25.4166 years at First Union) for a total retirement benefit of $171,948.30. Plaintiff elected to receive that amount as a lump sum benefit and then filed this action contending that according to the language of Section 11 of the Merger Agreement, he was also entitled to receive the benefits and vested interest which he had accumulated under the Scottish Bank Plan prior to the merger. Defendants answered, contending that Section 11 of the Merger Agreement clearly defines plaintiff's retirement benefit and that the $171,948.30 payment to plaintiff represented the full amount due him upon his retirement. The trial court granted plaintiff's motion for summary judgment on the issue of liability and, following additional evidentiary hearings, entered judgment for plaintiff on 26 September 1991 in the amount of $38,754.00 plus interest and attorneys' fees. Defendants appealed.

McLean, Stacy, Henry & McLean, P.A., by William S. McLean, for plaintiff-appellee.

Tharrington, Smith & Hargrove, by Randall M. Roden, for defendant-appellants.

MARTIN, Judge.

[1] The dispositive issue on appeal is whether the Merger Agreement executed between Scottish Bank and First Union is so clear

and unambiguous as to establish, as a matter of law, that former employees of Scottish Bank are entitled to receive retirement benefits under the First Union Plan based upon total years of service to both Scottish Bank and First Union, as well as their accrued benefits under the previously existing Scottish Bank Plan. We conclude that the Merger Agreement is ambiguous and unclear as to this point, requiring resolution of the issue by the fact finder rather than by summary judgment. Accordingly, we must vacate the trial court's judgments and remand this case for trial.

[2] Preliminarily, we consider defendants' contention that plaintiff's claim is barred by the statute of limitations. Defendants asserted as an affirmative defense that the acts giving rise to plaintiff's claim occurred at the time of the merger between the Scottish Bank and First Union in 1963 when the Merger Agreement became effective and the Scottish Bank Plan was terminated, or in any event, no later than 1 September 1968, when defendants executed another document which merged the Scottish Bank Plan funds into the First Union Plan funds. Thus, defendants contend that plaintiff's action is barred by the applicable three-year statute of limitations.

The statute of limitations for an action for breach of contract is three years from the accrual of the cause of action. N.C. Gen. Stat. § 1-52(1). The statute begins to run on the date the promise is broken. *Penley v. Penley*, 314 N.C. 1, 332 S.E.2d 51 (1985). In no event can the limitations period begin to run until the injured party is at liberty to sue. *Id.; Wheeless v. Insurance Co.*, 11 N.C. App. 348, 181 S.E.2d 144 (1971). Additionally, "[i]t is well settled that where a fiduciary relation exists between the parties, with respect to money due by one to the other, the statute of limitations does not begin to run until there has been a demand and refusal." *Efird v. Sikes*, 206 N.C. 560, 562, 174 S.E. 513, 513-14 (1934).

Here, plaintiff did not become eligible for retirement benefits until his retirement on 31 October 1988. Accordingly, until that date he was not entitled to demand and could not be injured by a refusal of the retirement benefits which he claims. Since defendants' performance under the Merger Agreement could not take place until plaintiff retired; the alleged breach could not have occurred until that time, and plaintiff was therefore not at liberty to sue at any time prior to his retirement. Because plaintiff brought this action within three years of defendants' refusal of his demand

for benefits under the Scottish Bank Plan, his action is not barred by the statute of limitations.

The central issue presented in this case is whether the language of Section 11 of the Merger Agreement so clearly establishes that defendants intended to pay plaintiff benefits under the First Union Plan based upon his service at both institutions, and in addition, separate benefits which had accrued under the Scottish Bank Plan, as to entitle him to judgment as a matter of law. We conclude that the merger agreement does not clearly establish plaintiff's position and that genuine issues of material fact exist precluding summary judgment.

A party moving for summary judgment must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. N.C. Gen. Stat. § 1A-1, Rule 56; *Hagler v. Hagler*, 319 N.C. 287, 354 S.E.2d 228 (1987); *International Paper Co. v. Corporex Constrs.*, 96 N.C. App. 312, 385 S.E.2d 553 (1989). Summary judgment is a drastic measure which should be used with caution. *Williams v. Power & Light Co.*, 296 N.C. 400, 250 S.E.2d 255 (1979); *Kessing v. Mortgage Corp.*, 278 N.C. 523, 180 S.E.2d 823 (1971). All evidence before the court must be construed in the light most favorable to the non-moving party, and the slightest doubt as to the facts entitles the non-moving party to a trial. *Ballenger v. Crowell*, 38 N.C. App. 50, 247 S.E.2d 287 (1978).

A court's primary purpose in interpreting a contract is to ascertain the intention of the parties. *International Paper Co., supra.* If a contract is plain and unambiguous on its face the court may interpret it as a matter of law, but where it is ambiguous and the intention of the parties is unclear, interpretation of the contract is for the jury. *Id.* An ambiguity exists where the language of a contract is fairly and reasonably susceptible to either of the constructions asserted by the parties. *St. Paul Fire & Marine Ins. v. Freeman-White Assoc.*, 322 N.C. 77, 366 S.E.2d 480 (1988). "The fact that a dispute has arisen as to the parties' interpretation of the contract is some indication that the language of the contract is, at best, ambiguous." *Id.* at 83, 366 S.E.2d 484.

Plaintiff's claims are based upon the language in the third paragraph of Section 11, stating that "with respect to their vested interest resulting from former participation in the profit sharing plan of SB [Scottish Bank] they shall have the right to payment

of such vested interest in accordance with the provisions of the plan," and upon the proposition that the words "termination of employment for any reason," clearly includes retirement. Therefore, plaintiff asserts the language was insurance that the Scottish Bank employees would have the right to payment of their vested interest in the Scottish Bank Plan in addition to the benefits paid to them under the First Union Plan (which were based upon total years of service with both First Union and Scottish Bank) regardless of the reason for termination.

Defendants respond that the third paragraph of Section 11 quoted above does not address the issue of retirement benefits upon termination of employment. Rather, defendants contend that the purpose of the third paragraph of Section 11 is to specify the employee's right to payment if his employment is terminated for any other reason prior to retirement, while the second paragraph of Section 11 describes the benefits to which a participant in the Scottish Bank Plan would be entitled upon retirement from First Union. Thus, defendants argue that the trial court misconstrued the third paragraph of Section 11 to be a separate and unconditional requirement to pay the employee his vested interest in the Scottish Bank Plan upon retirement.

Defendants argue further that the plain language of the second paragraph of Section 11 of the Merger Agreement bars plaintiff's claim that he is entitled to retirement benefits under both the First Union Plan and the Scottish Bank Plan as that language provides that benefits shall be "adjusted to provide the greater of said plans." Thus, defendants contend that the express language of the Merger Agreement guarantees that as participants in the First Union Plan, the former Scottish Bank employees would be entitled to a payment of benefits that would be equal to or exceed the vested interest they had acquired in the Scottish Bank Plan.

In response, plaintiff argues that the failure to provide a formula for calculation of the Scottish Bank benefits in either the Merger Agreement or the First Union Plan is evidence that all parties reasonably interpreted the Merger Agreement as recognizing separate and inviolate trusts on behalf of Scottish Bank employees, and that the First Union Plan is an additional benefit for the vested employees of the Scottish Bank.

Finally, plaintiff asserts that "adjusted to provide the greater of the said plans" was inserted to address the First Union pension plan provision that an employee terminated during his first ten years of employment had zero vested rights. Plaintiff states that a bank such as Scottish Bank may have a large number of employees without ten years of service at any given point in time. Thus, argues plaintiff, this provision insured that all such employees were to receive their Scottish Bank account even though they might not be entitled to any additional First Union benefit because they had worked for less than ten years.

In this case, we believe that the language from Section 11 of the Merger Agreement quoted previously creates an ambiguity as to the true intention of the parties. As demonstrated by the parties' dispute, the language of the Merger Agreement is fairly and reasonably susceptible to either of the constructions asserted. Based upon the contract language alone, we cannot say that as a matter of law defendants owed plaintiff his accumulated retirement benefits under the Scottish Bank Plan in addition to the benefits paid to him under the First Union Plan which included credit for his years of service with the Scottish Bank. Nor can we say as a matter of law that plaintiff is entitled to recover only under the First Union Plan. While there may be evidence in the record to support both parties contentions, ambiguities in contracts must be resolved by a trier of fact upon consideration of a range of factors including the expressions used, the subject matter, the end in view, the purpose and the situation of the parties. *International Paper Co. supra; Silver v. Board of Transportation*, 47 N.C. 261, 267 S.E.2d 49 (1980).

In summary, we conclude that the language in the Merger Agreement is ambiguous as to the parties' intent regarding the benefits to which former Scottish Bank employees are entitled upon their retirement from First Union. Thus, the trial court's finding as a matter of law that defendants were liable to plaintiff under both the Scottish Bank Plan and the First Union Plan was error. In order to resolve this ambiguity, we must remand this case for trial. Because we vacate the judgments, we do not deem it necessary to address defendants' assignments of error relating to the award of attorneys' fees.

The partial summary judgment and final judgment are vacated, and this case is remanded to the Superior Court for further proceedings consistent with this opinion.

Vacated and Remanded.

Judges JOHNSON and GREENE concur.

E. THOMAS ABERNETHY, SR., E. THOMAS ABERNETHY, JR., ANN T. ABERNETHY, KIMBERLY ABERNETHY AND MEMORY SAVERS, INC., PETITIONERS v. TOWN OF BOONE BOARD OF ADJUSTMENT, RESPONDENT

No. 9224SC185

(Filed 6 April 1993)

1. **Municipal Corporations § 30.11 (NCI3d); Limitations, Repose, and Laches § 160 (NCI4th)— municipality's enforcement of sign ordinance—reasonable delay—no disadvantage due to delay—laches inapplicable**

Laches cannot be asserted against a municipality to prevent it from enforcing its own ordinances when the delay is reasonable and plaintiff has suffered no disadvantage due to the delay.

Am Jur 2d, Equity § 156; Zoning and Planning § 1089.

2. **Municipal Corporations § 30.11 (NCI3d); Limitations, Repose, and Laches § 160 (NCI4th)— municipal sign ordinance—failure to enforce for four years—great disadvantage to sign owner because of delay—doctrine of laches applicable**

The doctrine of laches applied in this case to prevent defendant town from enforcing its own sign ordinance where plaintiff agreed to give up a leasehold interest and purchase space in an adjacent shopping center for $250,000 if it could keep its freestanding sign; plaintiff was concerned that without the freestanding sign its business would suffer; without assurances from two town officials that the sign was in compliance with the town ordinance, plaintiff would never have given up its leasehold interest and purchased the property; the town delayed for almost four years before it attempted

to enforce the sign ordinance; the town would not even have sought to enforce the sign ordinance when it did, except for complaints of the shopping center owner, the very person from whom plaintiff purchased the property; four years was an unreasonably long time to wait to enforce the ordinance; and the unreasonable wait caused plaintiff to suffer great disadvantage.

Am Jur 2d, Zoning and Planning § 1089.

Appeal by respondent from order entered 24 October 1991 by Judge Claude Sitton in Watauga County Superior Court. Heard in the Court of Appeals 3 February 1993.

Randal S. Marsh for petitioners.

Paletta & Hedrick, by David R. Paletta, for respondent.

LEWIS, Judge.

The procedural issue presented by this appeal is whether the trial court erred in reversing the decision of the Town of Boone Board of Adjustment. In reaching the procedural issue however we must first decide whether the defense of laches can be asserted so as to prevent a municipality from enforcing its own ordinances. We hold that on the facts of this case the defense of laches is applicable and that the trial court did not err in reversing the decision of the Boone Board of Adjustment.

The facts of this case show that in 1983, Memory Savers, Inc. ("Memory Savers") was originally granted a sign permit by the Town of Boone for a freestanding sign located on Blowing Rock Road. At the time the sign permit was originally issued, Memory Savers was leasing its business premises for its express photo finishing business from E. F. Coe. Thereafter, Memory Savers was informed that Mr. Coe wanted to sell the premises which Memory Savers was leasing to the Shaw-Furman Partnership, but that Memory Savers' leasehold interest in the property was delaying the transaction. As a concession to get Memory Savers to vacate their existing premises, Mr. Coe and the Shaw-Furman Partnership agreed to sell Memory Savers a new location in Southgate II, an adjacent shopping center. As a further concession, it was agreed that Memory Savers would be allowed to keep its freestanding sign. Memory Savers felt this additional concession was necessary

to insure the vitality of its business since its new location would not be readily visible from the road.

Cognizant of an existing town ordinance which might interfere with Memory Savers' sign, Memory Savers conditioned the entire transaction on it being allowed to retain possession of its existing freestanding sign. The reason for the potential conflict was section 7.8.10 of the Town of Boone Zoning Ordinance. Under section 7.8.10, businesses located within shopping centers, malls, and unified business establishments are only allowed two signs which must be either attached, canopy or projecting signs. According to section 7.8.10(c), a business within a shopping center is not allowed a freestanding sign unless "the business has an exterior frontage in the commercial development of eighty (80) linear feet or more." There is no dispute that Memory Savers lacks the requisite amount of exterior frontage.

Therefore, with this ordinance in mind, Memory Savers required that the deed of conveyance contain the language: "[p]resent freestanding sign may remain 'as is' subject to City of Boone approval." Memory Savers sought approval prior to the consummation of the transaction from two different town officials. In its Petition for a Writ of Certiorari, Memory Savers claims that it contacted Carolyn Aldridge, Zoning Enforcement Officer of the Town of Boone, and Neil Hartley, Building Inspector of the Town of Boone, both of whom informed Memory Savers that the sign in question was in compliance and that the sign permit was still valid. Relying on these statements, in late 1987 Memory Savers purchased the building in the Southgate II shopping center for $250,000.

Thereafter, in 1991, the Town of Boone began to receive complaints about the Memory Savers' sign from members of the shopping center as well as from the owner of the shopping center. As a result, the Town of Boone Department of Planning and Inspections conducted an investigation and concluded that the Memory Savers' sign violated section 7.8.10(c) of the Town of Boone Zoning Ordinance. A letter was sent to Memory Savers on 4 April 1991 informing it that its sign was not in compliance and that it must be removed. Memory Savers appealed the decision to the Boone Board of Adjustment. A hearing was held before the Boone Board of Adjustment on 6 June 1991, at which time the Board of Adjustment voted to uphold the decision of the Planning Department.

Memory Savers filed a petition for Writ of Certiorari in the Watauga County Superior Court on 10 July 1991 alleging that it was not a part of the shopping center and therefore not governed by section 7.8.10 of the Boone Zoning Ordinance. Memory Savers also raised the defenses of estoppel and laches claiming that it had relied on previous representations of the town to its detriment. At oral argument before Judge Sitton, the Town of Boone admitted that it should have taken action against Memory Savers as early as 1987 but that it had not. On the basis of the evidence presented, Judge Sitton reversed the decision of the Boone Board of Adjustment holding that the Town of Boone was guilty of laches. The Town of Boone has appealed the decision of the superior court.

The standard by which this Court reviews the decisions of a town board of adjustment sitting as a quasi-judicial body involves:

1) Reviewing the record for errors in law,

2) Insuring that procedures specified by law by both statute and ordinance are followed,

3) Insuring that appropriate due process rights of a petitioner are protected including the right to offer evidence, cross-examine witnesses, and inspect documents,

4) Insuring that decisions of town boards are supported by competent, material and substantial evidence in the whole record, and

5) Insuring that decisions are not arbitrary and capricious.

Allen v. City of Burlington Bd. of Adjustment, 100 N.C. App. 615, 617-18, 397 S.E.2d 657, 659 (1990). When a superior court reviews the decision of a board of adjustment on certiorari, the superior court sits as an appellate court. *CG&T Corp. v. Board of Adjustment*, 105 N.C. App. 32, 411 S.E.2d 655 (1992). The superior court does not act as the trier of fact. *Coastal Ready-Mix Concrete Co. v. Board of Comm'rs*, 299 N.C. 620, 265 S.E.2d 379, *reh'g denied*, 300 N.C. 562, 270 S.E.2d 106 (1980). Therefore, this Court's role in reviewing the sufficiency and the competency of the evidence at the appellate level, is not whether the evidence before the superior court supported that court's ruling, but whether the evidence before the town board supported its decision. *Id.* In determining the sufficiency of the evidence which supports the town board's decision, this Court applies the whole record test, considering not just the

evidence that supports the board's decision but also the evidence that detracts from it. *Ghidorzi Constr. Inc. v. Town of Chapel Hill*, 80 N.C. App. 438, 342 S.E.2d 545, *disc. rev. denied*, 317 N.C. 703, 347 S.E.2d 41 (1986). In applying the whole record test neither this Court nor the superior court is allowed to replace the decision of the town board if there are two reasonably conflicting views of the evidence. *Id.*

Having reviewed the whole record in this matter, we hold that the trial court was correct in reversing the decision of the Boone Board of Adjustment. In its Writ of Certiorari, Memory Savers raised the legal defenses of laches and estoppel. These issues were not raised before the Board of Adjustment and the superior court was therefore the first to hear these matters. As these are legal defenses they necessarily come under part one of this Court's standard of review to determine whether an error of law occurred. When the question is whether an error of law occurred, this Court is free to undertake a *de novo* review. CG&T Corp. v. Board of Adjustment, 105 N.C. App. 32, 411 S.E.2d 655 (1992).

The defenses of estoppel and laches are both equitable in nature and there is often substantial overlap in their application. As a result, the Town of Boone cites *City of Raleigh v. Fisher*, 232 N.C. 629, 635, 61 S.E.2d 897, 902 (1950), where our Supreme Court stated "a municipality cannot be estopped to enforce a zoning ordinance against a violator by the conduct of its officials in encouraging or permitting such violator to violate such ordinance in times past." Providing the rationale for its decision, the Supreme Court held that a contrary decision would allow citizens to acquire immunity to the law by habitually breaking it with the consent of unfaithful public servants. *See also, City of Winston-Salem v. Hoots Concrete Co.*, 47 N.C. App. 405, 267 S.E.2d 569, *disc. rev. denied*, 301 N.C. 234, 283 S.E.2d 131 (1980).

Although there is substantial overlap between the doctrines of laches and estoppel, we do not feel that *Fisher* adequately addresses the current situation because the issue in this case is laches and not estoppel. As the Town of Boone has correctly pointed out there are no cases in North Carolina which answer the question of whether laches can be asserted against a municipality to prevent a municipality from enforcing its own ordinances. However, there are several cases in North Carolina where a municipality has been allowed to raise the defense of laches against a property holder

and we have found substantial guidance in those previous decisions. *Taylor v. City of Raleigh*, 290 N.C. 608, 227 S.E.2d 576 (1976); *Stutts v. Swaim*, 30 N.C. App. 611, 228 S.E.2d 750, *disc. rev. denied*, 291 N.C. 178, 229 S.E.2d 692 (1976).

Our Supreme Court has stated that laches will apply "where lapse of time has resulted in some change in the condition of the property or in the relations of the parties which would make it unjust to permit the prosecution of the claim." *Taylor*, 290 N.C. at 622, 227 S.E.2d at 584. The mere passage of time does not by itself entitle a party to the defense of laches. *Cieszko v. Clark*, 92 N.C. App. 290, 374 S.E.2d 456 (1988). Instead, the facts of each case must be looked at on a case by case situation. *Taylor*, 290 N.C. at 622, 227 S.E.2d at 584. In addition, laches will only work as a bar when the claimant knew of the existence of the grounds for the claim. *Allen v. City of Burlington Bd. of Adjustment*, 100 N.C. App. 615, 397 S.E.2d 657 (1990).

Specifically, in *Taylor*, our Supreme Court addressed the situation of a city asserting the defense of laches against a property holder where two years and twenty-two days had elapsed since the city's adoption of a rezoning ordinance and the property holder's challenge to the ordinance. On those facts, the Supreme Court held the delay was unreasonable and had worked to the disadvantage and prejudice of the City of Raleigh. Whereas the delay in *Taylor* was only two years, the delay in the present matter has been closer to four years, leaving no doubt that the delay on the part of the Town of Boone has been unreasonable.

In addition, there is no doubt that the Town of Boone was aware of the potential violation, because Memory Savers called it to the attention of two officials for the Town of Boone. The Town of Boone has been aware of the violation for close to four years and even admitted that it should have taken action as early as 1987. However, instead of taking action, the Town of Boone gave assurances to Memory Savers that there was no violation with the sign. Based on these assurances, Memory Savers relinquished its leasehold interest and incurred substantial debt to acquire space in the Southgate II shopping center.

[1] Clearly, all the requisite elements for laches are present in this case. However, this still does not answer the fundamental question of whether laches can be asserted against a municipality, such as the Town of Boone, to prevent the municipality from enforc-

ing its own ordinances. In answering this question, we find guidance in a passage in C.J.S.:

> Delay in initiating injunction proceedings does not necessarily estop a city or zoning authority from maintaining such proceeding, and *generally speaking, the defense of laches may not be asserted against it, at least where the delay is reasonable, and defendant has not suffered any disadvantage as a result thereof.*

101A C.J.S. *Zoning & Land Planning* § 342 (1979) (emphasis added). Therefore, we believe the general rule to be that laches cannot be asserted against a municipality to prevent it from enforcing its own ordinances when the delay is reasonable and defendant has suffered no disadvantage due to the delay.

[2] However, on the facts of this case we feel that the doctrine of laches is applicable. As we stated previously, the Town of Boone delayed for almost four years before it attempted to enforce the sign ordinance. If the two years and twenty-two days in *Taylor* was unreasonable, then four years is clearly unreasonable as well. There is also evidence in the record, that the Town of Boone would not even have sought to enforce the sign ordinance when it did, except for the complaints of the owner of the shopping center; the very person from whom Memory Savers purchased the property.

Further, the unreasonable delay on the part of the Town of Boone has caused Memory Savers to suffer great disadvantage. Only after Memory Savers was assured by the two town officials that its sign was in compliance did Memory Savers spend $250,000 to purchase the adjacent property. Throughout the process, Memory Savers was concerned that without the existing freestanding sign its business would suffer. Without assurances from the Town of Boone that it could keep its freestanding sign, Memory Savers would have never given up its leasehold interest nor would it have made the initial capital investment to procure the adjacent property. As a result, we hold that the unreasonable delay on the part of the Town of Boone has worked an unreasonable disadvantage to Memory Savers and that it would be unjust to allow the Town of Boone to now enforce its sign ordinance. For the foregoing reasons, the superior court's decision that the doctrine of laches was applicable is

Affirmed.

Judges WELLS and COZORT concur.

BRENDA GRAVITTE, PLAINTIFF v. MITSUBISHI SEMICONDUCTOR AMERICA, INC., DEFENDANT

No. 9114SC967

(Filed 6 April 1993)

1. **Handicapped Persons § 1 (NCI4th)— back problems—inability to do particular job—no major life activity limited—plaintiff not handicapped—employer not required to reasonably accommodate "handicap"**

Plaintiff was not a "handicapped person" within the meaning of N.C.G.S. § 168A-1 *et seq.* (the "North Carolina Handicapped Persons Protection Act"), and the trial court therefore properly granted defendant's summary judgment motion on plaintiff's claim that defendant employer failed to make reasonable accommodation to her handicap in violation of N.C.G.S. § 168A-4, since plaintiff would be unable to show at trial that her physical impairment limited a "major life activity" where evidence in the record indicated that plaintiff experienced some pain in her lower back and that she was under a physician's order not to lift more than 40 pounds, to avoid repetitive bending at the waist, and to avoid prolonged sitting or standing without changing position; the activities which caused plaintiff pain and discomfort were not those essential tasks one must perform on a regular basis in order to carry on a normal existence; and plaintiff was not "handicapped" merely because she could not perform one particular type of job. N.C.G.S. § 168A-3(4)(i).

2. **Labor and Employment § 63 (NCI4th)— at-will employee—resignation—no claim for wrongful discharge**

The trial court properly granted defendant's motion for summary judgment on plaintiff's claim for wrongful discharge where plaintiff, an at-will employee, tendered her resignation after asking to be transferred to another position and being

told that none was currently available, since a plaintiff who voluntarily resigns defendant's employ cannot bring a claim for wrongful discharge.

Am Jur 2d, Master and Servant §§ 27-33.

Modern status of rule that employer may discharge at-will employee for any reason. 12 ALR4th 544.

Modern status as to duration of employment where contract specifies no term but fixes daily or longer compensation. 93 ALR3d 659.

Right of corporation to discharge employee who asserts rights as stockholder. 84 ALR3d 1107.

Reduction in rank or authority or change of duties as breach of employment contract. 63 ALR3d 539.

Employer's termination of professional athlete's services as constituting breach of employment contract. 57 ALR3d 257.

Appeal by plaintiff from order entered 15 May 1991 by Judge J.B. Allen, Jr., in Durham County Superior Court. Heard in the Court of Appeals 13 October 1992.

McCreary & Read, by Daniel F. Read, for plaintiff-appellant.

Poyner & Spruill, by Cecil W. Harrison, Jr. and Laura Broughton Russell, for defendant-appellee.

JOHN, Judge.

Plaintiff appeals from summary judgment dismissing her claims against defendant for violation of G.S. § 168A-1 *et seq.* (the "North Carolina Handicapped Persons Protection Act") and for wrongful discharge. We affirm the trial court.

The pleadings, depositions, answers to interrogatories, affidavits, and other materials before the trial court indicate the following:

While working for defendant in 1988, plaintiff sustained a back injury and subsequently took several leaves of absence. During her absence, plaintiff received worker's compensation benefits and defendant paid her medical bills. According to plaintiff, defendant

"put me on leave until their doctor, the physical therapist, and my doctor agreed that it was okay for me to come back."

By letter dated 20 March 1990, Dr. Peter Bronec (plaintiff's physician) advised defendant that plaintiff could return to work if certain restrictions were followed. In pertinent part his letter provides:

> Brenda Gravitte is suffering from chronic musculoligamentous strain of the lumbar spine which is also associated with mild degenerative disease o[f] the lumbar spine. This is usually the result of excessive stress to the lower lumbar region as is encountered with heavy lifting and repetitive bending at the waist. She is able to do well as long as she stays within certain activity restrictions. Specifically, I have recommended that she not lift more than 40 pounds, avoid repetitive bending at the waist, and avoid prolonged sitting or standing in one place . . . . I expect her to remain under these restrictions permanently. As long as she can remain within these restrictions, I see no reason why she cannot work.
>
> . . . .
>
> It is my understanding that there is an aspect of her current job which requires more lifting than the restrictions. This seems to have been giving her the most trouble. I understand . . . that this weight could be broken up into smaller weights. However this has apparently caused some discord among the other employees, therefore Brenda has felt compelled to lift the entire weight. If this problem cannot be rectified then she would not be able to continue performing that job. If there is no other job currently available under these guidelines, than [sic] it might be appropriate to place her on medical leave until such time that a satisfactory job becomes available. I do not feel that any length of medical leave will allow her to return to a job which exceeds these restrictions as she has proven in the past.

On 6 April 1990 plaintiff returned to her position as an Operator in defendant's Plating Department. Before doing so, plaintiff, as well as Sheila Barnes, her supervisor, and E. L. Fricke, defendant's human relations supervisor, signed a "Memorandum of Understanding" which provided *inter alia* that plaintiff's return was "contingent upon [her] compliance with the stipulations as set down

by Dr. Peter Bronec" and listed several "restrictions and conditions" which comport with those set forth in the physician's letter.

Plaintiff thereafter sought transfer to other positions, but was told there were no openings. On 18 May 1990 she resigned. In her letter of resignation plaintiff stated:

> It is with regret that I am turning in my two weeks' notice. As you and human resources are aware and have been, the medical problems that I have had in plating [sic]. After coming back from medical leave this last time I was informed that modifications were made in plating to accom[mo]date my situation with working in the plating department. The only modifications were two temporary people were added, only one remains. One was discharged 4-26-90. With the amount of work that we have it's hard for the other operator to stop what she's doing and do the heavy part of my job. Also if I lift one magazine at the time to load the oven or carry it . . . to plating the increased amount of twisting at the waist gives me a lot of pain in my back. I've discussed this with Dr. Bronec and he has advised me that if the problems with this particular job cannot be rectified then if the company does not see fit to put me in another job that is not so strenuous on me that I should seek employment else where [sic]. As I have stated I've been through channels and ask[ed] for something else but have been told there is nothing else in the plant for me to do. I had planned to stay with MSAI until retirement, being as I have been employed here 5 years [on] May 13, 1990. But my health will not permit me to remain in this job, and the company says there's nothing else that I can do.

Plaintiff contends the trial court erred by granting defendant's motion for summary judgment. Under Rule 56(c), N.C. Rules of Civil Procedure, summary judgment should be granted only "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." The party moving for summary judgment bears the burden of establishing the lack of any triable issue, *Roumillat v. Simplistic Enterprises, Inc.*, 331 N.C. 57, 414 S.E.2d 339 (1992), and may meet this burden by (1) proving that an essential element of the opposing party's claim

is nonexistent; (2) showing through discovery that the opposing party cannot produce evidence to support an essential element; or (3) showing that the opposing party cannot surmount an affirmative defense. *Roumillat* at 63, 414 S.E.2d at 342.

I.

[1] In her first claim, brought under the North Carolina Handicapped Persons Protection Act, G.S. § 168A-1, *et seq.* [hereinafter the Act], plaintiff alleges that she is a "qualified handicapped person" within the meaning of the Act and that defendant failed to make reasonable accommodation to her handicap in violation of G.S. § 168A-4.

The question of whether one is a "qualified handicapped person" under the Act must be preceded by a determination that one is a "handicapped person." G.S. § 168A-3(9). The Act defines a "handicapped person" as "any person who (i) has a physical or mental impairment which *substantially limits one or more major life activities*; (ii) has a record of such an impairment; or (iii) is regarded as having such an impairment. G.S. § 168A-3(4) (emphasis added). "Major life activities" are defined as "functions such as caring for one's self, performing manual tasks, walking, seeing, hearing, speaking, breathing, and learning." G.S. § 168A-3(4)b.

In *Burgess v. Your House of Raleigh, Inc.*, 326 N.C. 205, 388 S.E.2d 134 (1990), the North Carolina Supreme Court recently considered what constitutes a "major life activity" under the Act. In *Burgess*, the plaintiff was discharged from his position as a short order cook after testing positive for the Human Immunodeficiency Virus (HIV), the agent currently recognized as responsible for Acquired Immune Deficiency Syndrome (AIDS). Although the plaintiff was asymptomatic for the AIDS disease itself, he nevertheless contended that, because he was discharged due to his affliction, he was regarded as having an impairment that limited a major life activity, "working." In upholding the trial court's grant of defendant's motion to dismiss made pursuant to Rule 12(b)(6), N.C. Rules of Civil Procedure, the *Burgess* Court noted that the Act is narrower in scope than the federal act which specifically encompasses "working." *Burgess* at 213-214, 388 S.E.2d at 138-139. "As an asymptomatic carrier of HIV, plaintiff has failed to show that he has any condition that would substantially limit his ability to perform any of the physical or mental tasks listed in the . . . Act as major life activities." *Id.* at 214, 388 S.E.2d at 139. The

Court also rejected the argument that (1) the ability to bear a healthy child or (2) the ability to engage in sexual relationships constitute "major life activities." *Id.* "Major life activities" encompass only those "essential tasks one must perform on a regular basis in order to carry on a normal existence." *Id.*

Under *Burgess* then, plaintiff's condition must limit more than her mere ability to work a particular job in order for it to affect a "major life activity." The functions which are limited must be those listed in G.S. § 168A-3(4)b or "of the same nature as those listed." *Burgess* at 214, 388 S.E.2d at 139.

Evidence in the record here indicates that plaintiff experienced some pain in her lower back and that she was under a physician's order not to "lift more than 40 pounds, [to] avoid repetitive bending at the waist, and [to] avoid prolonged sitting or standing in one place without the opportunity to move around and change position." In her deposition, plaintiff asserted that repetitive lifting of objects weighing 40 pounds did not bother her, but rather it was the repetitive "twisting, turning, reaching, stooping, bending." Of further note is a physician's evaluation from 29 May 1990, 11 days after plaintiff's employment ceased, that "[s]ince she has been out of work . . . the discomfort is slowly improving." This physician assessed plaintiff's condition as "[m]ild recurrent low back pain. Probable musculoligamentous strain." Based upon the foregoing, we conclude that plaintiff at trial will be unable to produce evidence in support of an essential element of her claim, that is, that her physical impairment limits a "major life activity" so as to bring her under the purview of G.S. § 168A-3(4)(i). The activities which cause plaintiff pain and discomfort simply are not those "essential tasks one must perform on a regular basis in order to carry on a normal existence." Plaintiff is not "handicapped" merely because she cannot perform one particular type of job. We further note there is no evidence indicating plaintiff is a "handicapped person" as defined in either G.S. §§ 168A-3(4)(ii) or (iii). Since plaintiff is not a "handicapped person" as contemplated in the Act, the trial court properly granted defendant's motion for summary judgment as to plaintiff's first claim.

II.

[2] Plaintiff's second contention is that the trial court erred in dismissing her claim for wrongful discharge. We disagree.

In North Carolina, the general rule is that, absent an employment contract for a definite period of time, both employer and employee are generally free to terminate their association at any time and without reason. *Salt v. Applied Analytical, Inc.*, 104 N.C.App. 652, 655, 412 S.E.2d 97, 99 (1991), *disc. review denied*, 331 N.C. 119, 415 S.E.2d 200 (1992). This typical working relationship is known as "employment-at-will." It is uncontroverted that plaintiff was an "at-will" employee.

An exception to the employment-at-will doctrine exists where an employee is discharged for "an unlawful reason or purpose that contravenes public policy." *Coman v. Thomas Manufacturing Co., Inc.*, 325 N.C. 172, 175, 381 S.E.2d 445, 447 (1989), *quoting Sides v. Duke Hospital*, 74 N.C.App. 331, 342, 328 S.E.2d 818, 826, *disc. review denied*, 314 N.C. 331, 333 S.E.2d 490 (1985). Plaintiff argues this exception is applicable to her. We disagree.

To proceed under this exception, plaintiff must allege facts which indicate that she was in fact "discharged." If plaintiff voluntarily resigned defendant's employ, she cannot bring a claim for wrongful discharge.

Here, plaintiff *tendered her resignation* after asking to be transferred to another position and being told that none was currently available. There is no evidence that she was ever subjected to a reduction in wages, and there is no indication that defendant suggested, much less threatened, that she would be terminated for any reason. Instead, the record shows: (1) that defendant paid plaintiff workers' compensation benefits including medical bills and disability compensation; and (2) that defendant attempted to accommodate plaintiff's medical condition. On these facts, it is clear plaintiff was not "discharged" by any act of defendant. Accordingly, the trial court properly granted defendant's motion for summary judgment on plaintiff's claim for wrongful discharge.

The trial court's order granting defendant's motion for summary judgment is affirmed.

Judges EAGLES and ORR concur.

IN THE MATTER OF: DANIEL WEST, JUVENILE

No. 9225DC615

(Filed 6 April 1993)

Infants or Minors § 130 (NCI4th)— juvenile sex offender—in-state dispositional alternatives inadequate—no authority of court to order out-of-state treatment—best in-state alternative ordered—order proper

The trial court did not err in its dispositional order which placed the juvenile, who was developmentally disabled and had a history of sexual abuse, at the Whitaker School, an in-state residential treatment program which had available to it the services of a sexual offender specific treatment professional on at least a once a week basis, though the court found that none of the options available in this State met the juvenile's needs, that facilities in South Carolina could meet the juvenile's needs, and that the court was bound by the Supreme Court's decision in *In re Brownlee*, 301 N.C. 532, and so could not direct the local DSS to pay for that placement, since the placement which the lower court did make was the best dispositional order it could make under the circumstances of the case.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 29-33.

Liability of parent for support of child institutionalized by juvenile court. 59 ALR3d 636.

Appeal by the juvenile from order entered 28 February 1992 by Judge Jonathan L. Jones in Caldwell County District Court. Heard in the Court of Appeals 8 February 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General, Jane Rankin Thompson, for the State.

Beach, Correll & Beach, P.A., by N. Douglas Beach, Jr., for the juvenile appellant.

COZORT, Judge.

In this appeal, a fourteen-year-old juvenile contends the trial court erred in its dispositional order which placed the juvenile at the Whitaker School. We affirm.

In September 1991, the juvenile was adjudicated delinquent based on his admission that he had committed a felony sexual assault upon his younger half-sister. Disposition was deferred pending completion of an evaluation of the juvenile by the local sex offender program. In the interim, the juvenile was placed in the physical custody of his grandparents and prohibited from being around the victim.

The evaluation showed that the juvenile was developmentally disabled and had a history of sexual abuse. The evaluator concluded that the juvenile's risk of re-offending was moderate to high and that therefore treatment of the juvenile in a residential setting was recommended. The evaluator recommended that the juvenile be placed in a residential setting appropriate for the care of developmentally disabled sex offenders, that the juvenile receive sex offender specific treatment, and that the juvenile be placed on probation for a sufficient term to exceed his treatment by at least one year. The projected length of the juvenile's treatment was three to five years.

By order entered 1 November 1991, the district court committed the juvenile to the Division of Youth Services for an indefinite term not to exceed his eighteenth birthday, suspended that commitment and placed the juvenile on probation, and directed the juvenile court counselor to immediately seek a residential placement setting for the juvenile appropriate for the care of a developmentally disabled sex offender. In the interim, the juvenile was to continue residing with his grandparents. The case was thereafter continued several times as efforts were made to locate a suitable placement for the juvenile and to secure funding for the placement considered most appropriate.

On 28 February 1992, the court entered a dispositional order resolving the issue of the appropriate placement for the juvenile. In its order, the court made lengthy findings of fact regarding the history of the case and the efforts made to locate an appropriate placement and funding for that placement. The court found the available options to be:

> (1) Continued placement of the juvenile at his grandparents' home combined with continued treatment through the local outpatient sexual offender specific program;

(2) Attempted placement at the Whitaker School, which is an in-state residential treatment program that has available to it the services of a sexual offender specific treatment professional on at least a once a week basis;

(3) Commitment to the Division of Youth Services training schools, which offer limited treatment for sexual offenders;

(4) Continuing the case for further review of the possibility of placement in a hospital setting probably out-of-state on a short-term basis for treatment of sexual offenders with possible funding by the North Carolina Medicaid program; and

(5) Directing that the juvenile be considered for placement at the New Hope Center in South Carolina, which is a residential treatment program for sex offenders on a long-term basis.

The court noted, however, that there was no available funding for placement of the juvenile at the New Hope Center in South Carolina, and that because of the Supreme Court's decision in *In re Brownlee*, 301 N.C. 532, 272 S.E.2d 861 (1981), it could not direct the local department of social services to pay for that placement. In *Brownlee*, our Supreme Court held that the district court exceeded its authority when it ordered Wake County to pay for the treatment of a delinquent juvenile at a facility in another State.

The trial court below stated that it found the *Brownlee* decision to be "without basis in logic or reason," but recognized nonetheless that it was bound by the decision. The court also expressed its frustration over the alternatives available to it, finding that none of the options available in this state ever come close to meeting the juvenile's need for treatment or the need of the community for protection from further misconduct. The court found that placement at the New Hope Center in South Carolina was the only program known to the court that would meet the specific needs of the juvenile but because of the *Brownlee* decision, it could not order that option. The court found that the best *available* alternative was placement of the juvenile at the Whitaker School, and that if that placement was not possible, then the next best option was to look further into the possibility of intensive treatment for the juvenile at an out-of-state hospital.

The court ordered that "an attempt be made to immediately place the juvenile at the Whitaker School with provision for treatment on a regular basis for his developmental disability and sexual

offending behavior"; that an attempt be made to establish the treatment program on a long-term basis and to intensify the sexual offender portion of the treatment as intensely as possible under the circumstances and given the resources available; and that, in the meantime, the juvenile continue to receive treatment through the local outpatient sexual offender specific program. The court also directed the Department of Social Services to continue to inquire into other possible appropriate treatment programs for the juvenile and sources of funding for placements available.

As a further expression of its disagreement with *Brownlee* and frustration over its inability to place the juvenile in the South Carolina program, the court stated that it was "unable to enter an order which is in the best interest of this juvenile," or "which meets the needs of this child or the needs of the community for protection," or that "meets the guidelines and directives and purposes set forth in Chapter 7A of the General Statutes." The court concluded that the order entered is one "which comes closest to meeting the needs of the juvenile with the resources available to the court." From the order entered 28 February 1992, the juvenile appeals.

The juvenile contends the trial court erred by failing to enter an order which is in the juvenile's best interest and which meets the needs of the juvenile and the objectives of the State. He contends that because of the North Carolina Supreme Court's decision in *Brownlee* and the lack of response by our legislature to the need for adolescent sexual offender treatment programs in this state, the district court was unable to enter an order which is in the best interest of the juvenile and that meets the needs of the State, and that, as a result, his statutory right to rehabilitation and constitutional right to due process have been denied. As support, the juvenile relies primarily upon the dissent of Justice Carlton, joined in by Justice (now Chief Justice) Exum, in *Brownlee*.

In its brief, the State recognizes the need for adolescent sex offender treatment in this state and the frustration of the district court in the present case. The State contends, however, this Court is bound by *Brownlee*. The State further contends the district court properly recognized the limitations on its authority and entered the best dispositional order it could under the circumstances of the case. Lastly, the State contends the order entered was in the juvenile's best interest, allows for change and modification as

new information becomes available, and should be affirmed. We agree.

We are, of course, bound by the majority opinion in *Brownlee*, as is the trial court. The trial court here was charged with the duty of determining the *appropriate* disposition for the juvenile. *See Brownlee*, 301 N.C. 532, 272 S.E.2d 861. In making this determination, the district court was required to consider the particular needs and the best interest of the juvenile. *Id.* But the court was also required to weigh the best interest of the State, including the best interest of the State in the utilization of its resources, and was required to select a disposition consistent with public safety and within the court's statutorily granted authority. *Id.; In re Bullabough*, 89 N.C. App. 171, 365 S.E.2d 642 (1988). In weighing these interests and determining the appropriate disposition, the court was vested with broad discretion. *In re Groves*, 93 N.C. App. 34, 376 S.E.2d 481 (1989).

The disposition ordered here, while obviously not the one preferred by the trial judge, does reflect a proper balancing of the pertinent interests, is a proper application of the law, and does not constitute an abuse of discretion. It is therefore affirmed.

Lastly, we note the juvenile included in his argument a reference to an alleged violation of his constitutional rights. The record does not reveal that any constitutional issue was presented to the trial court; therefore, no constitutional issue is properly before this Court. *Midrex Corp. v. Lynch, Sec. of Revenue*, 50 N.C. App. 611, 274 S.E.2d 853, *disc. review denied*, 303 N.C. 181, 280 S.E.2d 453 (1981).

Affirmed.

Judges LEWIS and JOHN concur.

THOMAS L. HICKMAN, A MINOR, BY AND THROUGH HIS GUARDIAN AD LITEM, T. DANIEL WOMBLE, AND DARLENE HICKMAN PRUITT, PLAINTIFFS v. ANGELA LYNN McKOIN, TERRY LEE McKOIN, AND JUDY PASS McKOIN, DEFENDANTS

No. 9221SC67

(Filed 6 April 1993)

Negligence § 6 (NCI4th)— mother injured in auto accident— emotional distress of children who did not see accident— foreseeability—emotional distress claim improperly dismissed

The trial court erred in dismissing plaintiffs' emotional distress claim arising from an automobile accident involving their parents and defendants, though plaintiffs did not see the accident, since their emotional distress could have been foreseeable to defendants when it arose from seeing their injured mother in the hospital shortly after the accident and continued to be caused by the mother's severe injuries and ongoing difficulties.

Am Jur 2d, Fright, Shock, and Mental Disturbance §§ 1 et seq.

Relationship between victim and plaintiff-witness as affecting right to recover damages in negligence for shock or mental anguish at witnessing victim's injury or death. 94 ALR3d 486.

Appeal by plaintiffs from order entered 28 October 1991 by Judge Julius A. Rousseau in Forsyth County Superior Court. Heard in the Court of Appeals 4 January 1993.

Robert A. Lauver, P.A., by Robert A. Lauver, for plaintiffs-appellants.

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

LEWIS, Judge.

On 6 June 1991, plaintiffs filed this action seeking damages for negligent infliction of emotional distress arising from an automobile accident involving their parents and defendants. Plaintiffs each claimed in excess of $10,000 in damages. Defendants

filed a motion to dismiss and an answer on 26 July 1991. Plaintiffs took a voluntary dismissal as to defendant Judy Pass McKoin on 25 October 1991. On 28 October 1991, Judge Rousseau entered an order dismissing plaintiffs' complaint with prejudice. Plaintiffs appeal from this order dismissing their complaint.

In considering a motion to dismiss under Rule 12(b)(6) of the North Carolina Rules of Civil Procedure, the court must view the allegations in the complaint as true. *Peele v. Provident Mut. Life Ins. Co.*, 90 N.C. App. 447, 368 S.E.2d 892, *disc. rev. denied and appeal dismissed*, 323 N.C. 366, 373 S.E.2d 547 (1988). A complaint may not be dismissed unless it appears that plaintiffs are entitled to no relief under any state of facts which could be proven. *Id.*

Taken as true, the allegations in plaintiffs' complaint show that on 7 June 1988 plaintiffs' parents were involved in a head-on collision with defendants. Plaintiffs allege that defendant Angela Lynn McKoin, the driver of defendants' vehicle, "was negligent and operated her vehicle in a careless, reckless, and negligent manner . . . ." Plaintiffs, aged 12 and 15 at the time of the accident, were not in the vehicle nor did they actually see the accident. They were "close by at the family home," and first heard about the accident from a neighbor. Upon arrival at the hospital, they were informed their mother would probably not survive her injuries, and were permitted to see their mother briefly.

According to their complaint, plaintiffs "suffered shock, severe emotional distress, and mental anguish upon being informed of the injuries . . ." and that their mother probably would not survive. They suffered "great emotional anguish" upon seeing their mother in the intensive care unit. They have suffered further distress from "high risk surgery" on their mother, from witnessing her "long and agonizing recovery," from being told she may not survive, from watching her "suffer tremendous pain," and from seeing her "attached to feeding tubes and intravenous medication tubes."

Plaintiff Darlene Hickman Pruitt ("Darlene") dropped out of school after the tenth grade. She suffered mental anguish "due to the frequent absences of her mother necessitated by her mother's hospitalizations," and will suffer anxiety in the future each time her mother undergoes surgical procedures. As a result of her emotional distress, Darlene experiences headaches, insomnia, extreme nervousness and acute depression. Plaintiff Thomas L. Hickman ("Thomas") dropped out of school at age 15 and "has suffered a

tremendous emotional loss." He "feels angry, bitter and depressed because of the injuries to his mother and the uncertainty of whether his mother will live or die," and experiences "severe[ ] shock, emotional and mental distress." His symptoms include insomnia, extreme nervousness, and acute depression. Thomas has been referred for medical counseling.

The outcome of this case is governed by two recent decisions of this Court. In *Gardner v. Gardner*, 106 N.C. App. 635, 418 S.E.2d 260 (1992) (oral argument heard in Supreme Court on 14 January 1993) a panel of this Court held that a mother's emotional distress, arising from seeing her son on a stretcher in the hospital after an automobile accident, was foreseeable to defendant. Thus, the emotional distress claim was improperly dismissed by the trial court. In *Gardner* plaintiff did not actually observe the accident and was not in close proximity to the accident. In *Sorrells v. M.Y.B. Hospitality Ventures of Asheville*, 424 S.E.2d 676 (N.C. App. 1993), another panel of this Court reversed the trial court's dismissal of a claim for negligent infliction of emotional distress. In that case, plaintiffs alleged defendants were negligent in continuing to serve their son alcohol after it had been brought to defendants' attention that he had had too much to drink and would be driving home. Their son was killed in a one-car accident on his way home that night. Plaintiffs were not at the scene of the accident and did not allege that they had seen the body soon after the death. This Court reversed the trial court's dismissal of the claim, relying on the parent-child relationship and stating that foreseeability is a question for the jury in such a case. *Id.* at 679-80.

Both cases refer to the Supreme Court's decision in *Johnson v. Ruark Obstetrics*, 89 N.C. App. 154, 365 S.E.2d 909 (1988), *modified and aff'd*, 327 N.C. 283, 395 S.E.2d 85 (1990), wherein plaintiffs were found to have stated valid claims for negligent infliction of emotional distress. The *Ruark* Court stated that:

> Where a defendant's negligent act has caused a plaintiff to suffer mere fright or temporary anxiety not amounting to severe emotional distress, the plaintiff may not recover damages for his fright and anxiety on a claim for infliction of emotional distress. Where, however, such a plaintiff has established that he or she has suffered severe emotional distress as a proximate result of the defendant's negligence, the plaintiff need not allege or prove any physical impact, physical injury, or physical

> manifestation of emotional distress in order to recover on a claim for negligent infliction of emotional distress.

327 N.C. at 303-4, 395 S.E.2d at 97.

Generally, "[a] plaintiff may recover for severe emotional distress arising from concern for another person if the plaintiff can prove that he or she has suffered such severe emotional distress as a proximate and foreseeable result of the defendant's negligence." *Gardner*, 106 N.C. App. at 637, 418 S.E.2d at 262; *Ruark*, 327 N.C. at 304, 395 S.E.2d at 97. In *Ruark*, the Court listed several factors to consider in examining the element of foreseeability. These factors include the plaintiff's proximity to the negligent act, the relationship between the plaintiff and the injured person, and whether plaintiff personally observed the incident. *Id.* at 305, 395 S.E.2d at 98. Foreseeability and proximate cause questions must be resolved on a case by case basis. *Id.*

The *Gardner* Court rejected a narrow interpretation of *Ruark's* proximity test. Instead, the Court stated that "a parent who sees its mortally injured child soon after an accident, albeit at another place, perceives the danger to the child's life, and experiences those agonizing hours preceding the awful message of death may be at no less risk of suffering a similar degree of emotional distress than that of a parent who is actually exposed to the scene of the accident." 106 N.C. App. at 639, 418 S.E.2d at 263. The Court found plaintiffs' emotional distress to be foreseeable to defendants, emphasizing the existence of a parent-child relationship. *Id. See also Sorrells*, 424 S.E.2d at 679-80 (foreseeability a question for jury when parents alleging emotional distress arising from death of 21-year old son sued defendant for negligently serving alcohol to son).

As in *Gardner* and *Sorrells*, this case involves a parent-child relationship, although the positions are switched: the children are attempting to recover for emotional distress arising from injuries to their mother. In neither *Gardner* nor *Sorrells* were plaintiffs present at the scene of the automobile accident. Plaintiffs heard about the accident from a third party, and, in *Gardner* and the case at hand, later observed the family member in the hospital. In *Sorrells* plaintiffs did not even allege that they had gone to the hospital or had seen the body after the accident.

We must follow this Court's broad interpretation of the proximity test, and hold that plaintiffs' emotional distress could have been foreseeable to defendants when it arose from seeing their injured mother in the hospital shortly after the accident and continues to be caused by her severe injuries and ongoing difficulties.

Reversed and remanded.

Judges WELLS and COZORT concur.

THADDUS C. LITTLE, PLAINTIFF v. ESTIE BENNINGTON, IN HER CAPACITY AS CLERK OF SUPERIOR COURT; JANET C. GODWIN, IN HER CAPACITY AS ASSISTANT CLERK OF SUPERIOR COURT, DEFENDANTS

No. 9218SC358

(Filed 6 April 1993)

Executors and Administrators § 183 (NCI4th)— order of contempt and commitment—no appeal—attack in separate action properly dismissed

Where plaintiff was found in contempt and incarcerated for failure to file a proper accounting as executor of his mother's estate and failure to appear and show cause, plaintiff's proper course of action in contesting the court order would have been to appeal the order itself rather than to attack the order by seeking declaratory relief and the expunction of his records in a wholly separate action; therefore, the trial court properly dismissed plaintiff's claim since the court had no authority to grant plaintiff the relief sought in that it had no power to collaterally vacate the order of contempt and commitment.

Am Jur 2d, Executors and Administrators §§ 960 et seq.

Appeal by plaintiff from judgment entered 29 January 1992 in Guilford County Superior Court by Judge Thomas W. Ross. Heard in the Court of Appeals 10 March 1993.

Central Carolina Legal Services, Inc., by Stanley B. Sprague and Ronald B. Halpern, for plaintiff-appellant.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Alexander McC. Peters and June S. Ferrell, for defendants-appellees.

WELLS, Judge.

Plaintiff instituted this action against defendants Clerk of Superior Court, Estie Bennington and Assistant Clerk of Court, Janet Godwin by filing a complaint and an application for writ of habeas corpus on 1 August 1991. The facts leading up to this action are as follows: In April 1990, the mother of plaintiff Thaddus Little died, leaving a will that gave all her property to her son. Plaintiff was named executor of her estate and was made collector by affidavit, pursuant to G.S. § 28A-25-1.

On 13 March 1991, plaintiff personally appeared before defendant Godwin, and, with her assistance, completed and filed an affidavit of collection, disbursement and distribution, listing the assets of his mother's estate and the disbursements in payments of debts.

On 28 May 1991, plaintiff was personally served with an order to file account, which stated that he had failed to file a sufficient and satisfactory account, and that he was required to file such account within 20 days or show good cause for failure to do so. The order further stated that failure to comply could result in attachment for contempt. Plaintiff never responded to this order. On 20 June 1991, plaintiff was personally served with an order, issued by defendant Godwin, stating he was in default of the 28 May 1991 order, and ordering him to appear at a hearing set for 2 July 1991, to show cause, if any, why he should not be removed as fiduciary and attached for contempt for failure to comply with the court's order. Plaintiff made no response and did not appear at the hearing. Defendant Godwin waited one week before issuing an order of contempt and commitment, pursuant to G.S. § 28A-25-4, on 9 July 1991. During that time, neither plaintiff nor anyone on his behalf, contacted defendant Godwin's office to explain plaintiff's absence.

In the 9 July order, defendant Godwin found that the order to appear and show cause had been personally served on plaintiff, that plaintiff had willfully and without just cause failed and re-

fused to file a proper accounting, that plaintiff was in default of a court order and in willful contempt, and that plaintiff failed to show cause why he should not be so adjudged. The order further provided that plaintiff would be placed in the county jail "where he shall remain until he files the required account."

Pursuant to the commitment order, plaintiff was arrested on 22 July 1991, and served 11 days in jail, until he exhibited the necessary documents, at which time he was released. On 1 August 1991, while still incarcerated, plaintiff filed a complaint and application for writ of habeas corpus, claiming he was jailed unjustly, and praying for injunctive and declaratory relief. By amended complaint, plaintiff abandoned his claim for injunctive relief and sought instead only declaratory relief and expunction of all his records. Pursuant to Rules 12(b)(1) and (6), defendants filed a motion to dismiss which was heard and granted. Plaintiff appeals.

Plaintiff contends the trial court erred in granting defendant's motion to dismiss plaintiff's complaint and application for writ of habeas corpus. Initially, we note that the habeas corpus issue is moot. Plaintiff asserts that the trial court's findings—that plaintiff alleged no actual controversy, that the complaint sought to have the court issue an advisory opinion, and that the court did not have the authority to expunge plaintiff's records—are unsupported by fact and applicable law. Specifically, plaintiff alleges that he was jailed improperly, being unable to attend the 2 July 1991 hearing because he did not have a driveable car and he did not have money to hire a taxicab. He was physically incapable of walking to the courthouse. He had no telephone in his home, but claims he did ask a neighbor to call defendant Godwin and explain why he was unable to attend. Plaintiff also contends defendant Godwin issued the contempt and commitment order without investigating why plaintiff failed to appear. While we might agree with plaintiff that his incarceration under these circumstances was questionable, we perceive this action as nothing more than an impermissible collateral attack on the order of contempt and commitment.

"It is settled law that a judgment which is regular and valid on its face may be set aside only by motion in the original cause in the court in which the judgment was rendered." *Jeffreys v. Snipes*, 45 N.C. App. 76, 262 S.E.2d 290, *disc. rev. denied*, 300 N.C. 197, 269 S.E.2d 624 (1980). Such judgment may not be attacked collaterally or directly by independent action. *Id.*

In the present case, the order of contempt and commitment was a valid court order pursuant to G.S. § 28A-25-4. In contesting this court order, plaintiff's proper course of action would have been to appeal the order itself. Instead, plaintiff attacked the order by seeking declaratory relief and the expunction of his records in a wholly separate action. The trial court had no authority to grant plaintiff the relief sought in that it had no power to collaterally vacate the order of contempt and commitment. Therefore, we find the trial court's dismissal of plaintiff's claim under Rules 12(b)(1) and (6) was proper.

Having determined on the merits that plaintiff may not prevail in this case, we are nevertheless constrained to note our concern that, in a case of this kind, the clerk did not first use her authority under G.S. § 7A-103(4) to compel plaintiff's attendance at a hearing on her show cause order before resorting to the severe imposition of incarceration. We cannot help but surmise that had such attendance first been compelled, incarceration could have been avoided.

Affirmed.

Judges ORR and MARTIN concur.

STATE OF NORTH CAROLINA v. TONY BARNES, DEFENDANT

STATE OF NORTH CAROLINA v. RAY KANICKI, DEFENDANT

No. 915SC1042

(Filed 6 April 1993)

Appeal and Error § 88 (NCI4th)— denial of motion to remand—interlocutory order—dismissal proper

Defendants' appeal from an order denying their motion to remand to district court for entry of appropriate judgment is dismissed, since it is an appeal from an interlocutory order.

Am Jur 2d, Appeal and Error §§ 47 et seq.; §§ 50 et seq.

Comment note: Formal requirements of judgment or order as regards appealability. 73 ALR2d 250.

Appeal by defendants from order entered 9 May 1991 by Judge James D. Llewellyn in New Hanover Superior Court. Heard in the Court of Appeals 13 January 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Evia L. Jordan, for the State.

James K. Larrick for Tony Barnes, and Herbert P. Scott for Ray Kanicki, defendant appellants.

COZORT, Judge.

Defendants appeal from the superior court's order denying defendants' motion to remand to district court for entry of appropriate judgment. We dismiss the appeal.

On 6 November 1990, New Hanover County District Court Judge Charles E. Rice, III, found each defendant guilty of two counts of simple assault. Each defendant received two thirty-day active sentences to run consecutively. Both defendants appealed both judgments to the superior court. On 7 December 1990, defendants filed a motion in superior court for remand to district court for entry of appropriate judgment. At the motion hearing, defendants argued that the district court had originally imposed two-day active sentences on the first counts and entered prayers for judgment continued (PJCs) on the second counts. When defendants gave notice of appeal from the two-day active sentences, Judge Rice changed the two-day active sentences to thirty-day active sentences and changed the PJCs to thirty-day active sentences. Defendants withdrew their motion for remand as to the first counts, but not as to the second counts and sought to have the second counts remanded to the district court for the imposition of the PJCs.

By order dated 9 May 1991 and amended on 29 May 1991, Judge James Llewellyn found: the judgments entered on the record appeared to be regular; that defendants withdrew the motion for remand as to the first counts of assault and their convictions on those counts were before the superior court for trial de novo; that as to the judgments on the second counts, defendants had failed to show that there was any irregularity on the record upon which relief could be granted. On 6 June 1991, defendants gave notice of appeal from Judge Llewellyn's order.

Although neither party raises the issue, it is our duty to dismiss appeals which are prematurely before this Court. "There is no

provision for appeal to the Court of Appeals as a matter of right from an interlocutory order entered in a criminal case." *State v. Henry*, 318 N.C. 408, 409, 348 S.E.2d 593, 593 (1986). Defendants appeal from an order denying their motion to remand the judgments on the second counts. The order is interlocutory because it does not dispose of the case; it leaves further action for determination. Defendants appealed as a matter of right from the judgments entered in district court to the superior court for a trial de novo. Therefore, the cases involved in this appeal remain before the superior court for trial de novo. Defendants may appeal to this Court after final judgment is entered.

The appeals are

Dismissed.

Judges WELLS and LEWIS concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 16 MARCH 1993

BULLOCK v. NEWMAN No. 9212SC53	Cumberland (86CVS1697)	Affirmed in part; reversed in part & remanded for entry of findings of fact & conclusions of law on plaintiff's motion for sanctions.
CAROLINA SOLVENTS, INC. v. PERRY No. 9225DC664	Catawba (82CVD220)	Affirmed
DARNELL v. AETNA CASUALTY & SURETY CO. No. 9223SC1043	Wilkes (91CVS1776)	Dismissed
EATMON v. JOYNER No. 927DC142	Wilson (89CVD35)	No Error
GRAYSON v. CLARK No. 9127DC1047	Gaston (91CVD1444)	Affirmed
IN RE REID No. 9226DC273	Mecklenburg (90J487)	Dismissed
IN RE SINGLETON No. 9219DC707	Randolph (92J68)	Appeal Dismissed
INSIDE DESIGNS, LTD. v. IRWIN No. 913SC858	Craven (88CVS853)	No Error
MANNING v. COMR. OF MOTOR VEHICLES No. 9211SC788	Harnett (91CVS1391)	No Error
PENLEY v. PENLEY No. 9128DC1038	Buncombe (89CVD3224)	Affirmed
PRICE v. PRICE No. 9223DC297	Wilkes (90CVD58)	Appeal Dismissed
ROWAN CO. DEPT. OF SOCIAL SERVICES v. LONG No. 9219DC947	Rowan (83CVD12335)	Affirmed
SECTION 51 ASSOC. v. WARREN No. 913SC950	Carteret (90CVS259)	Affirmed

SLOAN v. MILLER BLDG. CORP. No. 915SC1198	New Hanover (89CVS2891)	Affirmed
SOUTH ATLANTIC DREDGING CO. v. T. A. LOVING CO. No. 9210SC71	Wake (89CVS12234)	Affirmed
STATE v. BARRETT No. 9129SC371	Henderson (89CRS7815) (89CRS8266) (89CRS8267) (90CRS788) (90CRS792) (90CRS793) (90CRS1796)	Affirmed in part; vacated in part & remanded
STATE v. BIZZELL No. 922SC888	Tyrrell (91CRS970) (91CRS971)	Affirmed
STATE v. BURKE No. 9222SC857	Iredell (91CRS17958)	No Error
STATE v. FLOYD No. 925SC812	New Hanover (91CRS6608)	No Error
STATE v. GRISSETTE No. 9226SC890	Mecklenburg (91CRS9554)	No Error
STATE v. LITTLEJOHN No. 9229SC930	Polk (88CRS000940) (88CRS000941) (88CRS000942)	No Error
STATE v. McCORMICK No. 9214SC777	Durham (91CRS2326)	Dismissed
STATE v. MICHAELIS No. 9228SC4	Buncombe (90CRS9945) (90CRS9946)	No Error
STATE v. MONTEITH No. 9226SC733	Mecklenburg (91CRS54114)	No Error
STATE v. RESPER No. 9228SC795	Buncombe (91CRS17584) (91CRS57024)	No Error
STATE v. TAYLOR No. 928SC785	Wayne (91CRS10829)	No Error
STATE v. THOMPSON No. 926SC779	Bertie (91CRS2215)	No Error

STATE v. WILLIAMS No. 928SC895	Wayne (91CRS6356) (91CRS6357)	No Error
WINSTON v. WINSTON No. 9228DC255	Buncombe (89CVD499) (90J204)	Vacated & Remanded

STATE OF NORTH CAROLINA v. JERRY RONALD ROGERS

No. 9115SC1160

(Filed 6 April 1993)

1. **Constitutional Law § 349 (NCI4th)— child sex abuse—victim unable to testify—admission of victim's statements—Confrontation Clause**

Where a child sex abuse victim was unavailable to testify at trial due to her incompetency as a courtroom witness, thus making necessary the admission of her statements to her mother, a pediatrician, an expert in child psychology, and the mother of a playmate, the first prong of the Confrontation Clause test of the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution was satisfied and the inquiry became whether the trial court properly admitted the out-of-court statements under one or more of the firmly rooted exceptions to the hearsay rule.

2. **Evidence and Witnesses § 929 (NCI4th)— child sex abuse victim—unable to testify—out of court statements—excited utterances**

Statements of a child sex abuse victim to a playmate's mother were properly admitted under N.C.G.S. § 8C-1, Rule 803(2) where the child was incompetent as a witness and the testimony indicated that the child's statements were spontaneous and not in response to any questioning on the part of the adult to whom they were made; related to an alleged sexual assault, a "startling event," particularly to a young child; and were made only three days after the assault.

3. **Evidence and Witnesses § 961 (NCI4th)— child sexual abuse victim—unable to testify—out of court statements—medical diagnosis exception—statements to doctor**

Out of court statements to a pediatrician by a child sexual abuse victim who was not competent to testify were admissible under N.C.G.S. § 8C-1, Rule 803(4) where the victim's mother summoned help from the police on the day after the alleged sexual encounter; after a brief interview, the police recommended that the victim be taken to the hospital; the victim was examined at the hospital by the pediatrician to determine whether she had been sexually molested; the victim made

statements to the pediatrician during the examination; and, although the pediatrician's examination revealed no physical findings consistent with allegations of sexual abuse, he opined that the victim was a sexually molested child based on his interview during the examination. The doctor used the statements to make his diagnosis and his testimony was admissible.

4. **Evidence and Witnesses § 961 (NCI4th)— child sexual abuse victim—unable to testify—out of court statements—medical diagnosis exception—statements to mother**

The out of court statements of a child sexual abuse victim, who was not competent to testify, to her mother were admissible under N.C.G.S. § 8C-1, Rule 803(4) where the victim had acted strange and withdrawn, would not talk, and cried a lot on the day of the incident and the following day, her mother repeatedly asked what was wrong on the day after the incident, the victim finally told her that "[defendant] hurt me" and pointed to her chest and between her legs, the mother immediately located a police officer and told him that she wanted the victim's comments investigated, and police questioning resulted in the victim, her mother, and police social workers being taken to the hospital, where the victim was diagnosed as having been sexually abused. The key factor is whether the statements resulted in the child receiving medical treatment and/or diagnosis; despite the fact that the victim's mother first found a police officer, the statements resulted in the victim being taken to the hospital the same day and receiving a medical diagnosis.

5. **Evidence and Witnesses § 961 (NCI4th)— child sexual abuse victim—unable to testify—out of court statements—medical diagnosis exception—statements to psychologist**

Statements by a child sexual abuse victim, who was not competent to testify, to a psychologist were admissible under N.C.G.S. § 8C-1, Rule 803(4) where the witness testified as an expert in clinical and child psychology and stated that the purpose of the victim's visits with her was to obtain therapy due to behavior problems that she had been exhibiting, that the statements in question were made during these sessions, and that the treatment continued until the behavior improved. Although the visits undoubtedly prepared the psychologist

for her testimony at trial and contributed to the prosecution of defendant, these were not the primary purposes of the treatment.

6. Rape and Allied Offenses § 19 (NCI3d) — indecent liberties — evidence sufficient

The trial court properly submitted the charge of indecent liberties to the jury where the State presented evidence that the victim told her mother that "[defendant] touched me," pointing to her chest and between her legs; that she told a playmate's mother that defendant hurt her, pointing to "her vagina type thing"; and that she told Dr. Runyan that something bad had happened in the bathroom, pointed to her crotch, said "he hurt me here," indicating that defendant had touched her chest as well, and mentioned defendant's "ding-dong." The Court of Appeals rejected any contention that a child's failure to say expressly that a defendant touched a particular place on her body (as opposed to pointing to the body part at issue and saying she was touched, or hurt, there), or that the child was unclothed when the touching occurred, renders the State's evidence insufficient on the touching element of indecent liberties. Evidence that defendant touched the victim's chest and vaginal area while alone in the bathroom with her was sufficient to permit the jury to infer that defendant's purpose in doing so was to arouse himself or to gratify his sexual desire.

Am Jur 2d, Assault and Battery §§ 24 et seq.

Appeal by defendant from judgment entered 13 May 1991 in Orange County Superior Court by Judge J. Milton Read, Jr. Heard in the Court of Appeals 3 February 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General James C. Gulick, for the State.

Public Defender James E. Williams, Jr., by Assistant Public Defender M. Patricia DeVine, for defendant-appellant.

GREENE, Judge.

Defendant appeals from a judgment entered 13 May 1991, which judgment is based on jury verdicts convicting defendant of taking indecent liberties with a child, N.C.G.S. § 14-202.1 (1986), a Class H felony with a maximum term of ten years and a presumptive

term of three years, and of being an habitual felon, N.C.G.S. § 14-7.1 (1986), a Class C felony with a maximum term of fifty years or life and a presumptive term of fifteen years.

Defendant was indicted on charges of first-degree sexual offense, first-degree rape, being an habitual felon, and taking indecent liberties with a child. These charges stemmed from defendant's alleged encounter with five-year-old A.E., who at the time was living with her mother at the same homeless shelter as defendant in Chapel Hill, North Carolina. The cases were consolidated for trial.

On 21 April 1991, upon motion by the State, the trial court conducted a pre-trial hearing to determine the competency of A.E. to be a courtroom witness. The court, after hearing, made the following pertinent findings:

> 2. From the testimony of [A.E.], the Court finds as a fact that she . . . has seen a Bible but does not know what it is used for. That she does not know the difference between right and wrong. That she does not know what a lie is. And that she does not know what it means to tell the truth. But that she "always tells the truth." That she does not know what it means to testify. That she told her mother what happened to her, but she forgot what she told her mother. That she did not now remember any of what happened and that she does not know what happened to her. She does not remember what she told others about what happened to her and that she forgets what she told them. That she knows [defendant], and that she told her mother that [defendant] hurt her but not that any other people hurt her. That she likes to talk and that she is not scared.
>
> 3. The Court finds as a fact that [A.E.] is incapable of understanding and appreciating the meaning of an oath or affirmation and the duty of a witness in court with regard to testifying under oath or affirmation. That she is incapable of expressing herself in court concerning these matters as to be understood and that she is incapable of understanding the duty of a witness in court to tell the truth. That she is unable to articulate and express herself in court and has a lack of memory of the subject matter and that she is not competent to be a witness in these proceedings (NC GS 8C-1,

Rule 601B, and 603) and is also unavailable (NC GS 8C-1, Rule 804).

. . . .

That in this order . . . the Court notes that the special meaning of "competency" with regard to Rule 601[(b)] and Rule 603 relates to the qualifications of a witness to testify at trial and not the ability of the declarant to intelligently and truthfully relate personal information. The Court's ruling . . . in no way addresses the qualifications of the child as a declarant out of court to relate truthfully personal information and belief.

The court ordered that A.E. could not testify at trial.

At trial, the State presented the testimony of A.E.'s mother, who stated that on 4 September 1990, at approximately 4:00 p.m., she and A.E. and three men were at Sutton's drugstore in Chapel Hill when defendant arrived. A.E. and her mother had known defendant since they began staying at the homeless shelter approximately one week earlier. Defendant sat down and talked for a few minutes, and when A.E. said that she had to go to the bathroom, defendant walked with her. A.E.'s mother testified that when A.E. went into the bathroom, defendant was in the hallway. She assumed when she looked again and did not see defendant that he was in the men's room. After five or ten minutes, A.E.'s mother went to the bathroom area, knocked on the bathroom door, and asked A.E. if she was all right. A.E. "said she was fine." When A.E. came back to the table, she was "fidgety and jumpy," and said she was "okay." Her demeanor was slightly different. Approximately five minutes after A.E. returned to the table, defendant returned and then left the drugstore.

That night, A.E. acted strange and was withdrawn, would not talk, and cried a lot. She did not want to take a bath, had nightmares, and "just latched onto" her mother. The next day, A.E. was still acting strange and withdrawn, and her mother kept asking her what was wrong. Finally, A.E. said that "[defendant] hurt" her. When asked how she had been hurt, A.E. said that [defendant] "touched her chest." According to A.E.'s mother, A.E. then "pointed down between her legs . . . then started to say something about a ding-a-ling." At that point, A.E.'s mother "cut [A.E.] off and told her to hold it," that she was going to get a police officer. A.E.'s mother encountered officer Melvin Smith on

the street and told him that she wanted her daughter's comments investigated. Officer Smith called the crisis unit. A.E. and her mother were taken to the police station, where A.E. was questioned and then taken to the hospital. The trial court, over defendant's objection, ruled the foregoing testimony regarding A.E.'s statements to her mother admissible pursuant to North Carolina Rule of Evidence 803(4), the hearsay exception for statements made for the purpose of medical diagnosis or treatment.

A.E.'s mother also testified that, prior to the alleged incident, A.E. had had nightmares and was afraid of the dark. She testified that both A.E. and A.E.'s brother had been physically and sexually abused by their father. When they began living at the shelter, the entire family was being treated by a therapist for traumas occurring during the past year. On the night of the alleged incident, A.E.'s mother did not notice any bleeding or injuries, but A.E. told her that "it hurt to go pee."

Other evidence presented by the State included the testimony of pediatrician Desmond Runyan, supervisor of the child abuse clinic at the University of North Carolina Hospital and an expert in the area of pediatrics and child abuse. Dr. Runyan testified that he examined A.E. on the afternoon of 5 September 1990, and that when he asked the child what had happened, she said that she "had been touched by [defendant]," pointing to her genital area and her chest. A.E. also demonstrated sexual intercourse with anatomically correct dolls, which surprised Dr. Runyan because no one had ever indicated to him that intercourse had occurred. A.E. told Dr. Runyan that her "private part" had been penetrated by defendant's penis and that she had been bleeding; however, his physical examination revealed no evidence of trauma, bruising, or abrasion. The trial court, over defendant's objection, admitted the testimony of Dr. Runyan regarding the statements made to him by A.E. pursuant to Rule 803(4). Dr. Runyan testified that in his opinion, A.E. had been sexually abused.

Marjorie Dekeersgieter testified that she had "heard what had happened" to A.E. and had approached A.E.'s mother, whom she did not know, to ask if she could keep A.E. two afternoons a week to play with her young children. On one of these visits, A.E. volunteered to Dekeersgieter that "she had been hurt," mentioning defendant's name and pointing to her vaginal area. The trial court, over defendant's objection, admitted this testimony re-

garding A.E.'s statements pursuant to evidence Rule 803(2), the hearsay exception for excited utterances.

Jane Tillotson, an expert in the field of clinical and child psychology, testified that she began to work with A.E. on 7 November 1990, meeting once per week for one hour. On 19 December 1990, A.E. mentioned defendant for the first time, telling Tillotson that "[defendant] hurt me. He put his ding-dong in my private parts." A.E. said that only defendant and her father ever hurt her that way. The court admitted this testimony pursuant to Rule 803(4). Tillotson stated that A.E.'s family "has lived in a chronic chaotic environment." In Tillotson's opinion, A.E. had been sexually abused.

At the close of the State's evidence, the trial court denied defendant's motion to dismiss the charges. Defendant presented evidence, in relevant part, which established that A.E.'s mother had given inconsistent accounts of the alleged 4 September 1990 incident to the Department of Social Services. A.E.'s mother told one social worker that on the day of the alleged incident, she herself had to use the bathroom at the drugstore and asked a friend to watch A.E. When she returned, A.E. was gone and the friend said that defendant had walked off with her. Defendant's evidence also established that when she was four years old, A.E. spent seven months in foster care due to her brother's physically abusive behavior toward her, and that A.E. at that time manifested symptoms of being sexually abused by her father, including the insertion of Barbie dolls into her vagina and frequent masturbation.

At the close of all the evidence, the trial court granted defendant's motion for a directed verdict on the charge of first-degree sexual offense, but denied defendant's motion to dismiss all remaining charges. The jury found defendant not guilty of first-degree rape, guilty of taking indecent liberties with a child, and guilty of being an habitual felon. The trial court consolidated these offenses for judgment and sentenced defendant to a term of eighteen years. Defendant appeals.

The issues presented are whether the trial court (I) properly admitted evidence of out-of-court statements made by A.E., whom the trial court declared incompetent to testify, to A.E.'s mother, Dr. Runyan, Marjorie Dekeersgieter, and Jane Tillotson; and (II) erred in denying defendant's motion to dismiss the charge of indecent liberties for lack of substantial evidence.

I

[1] Defendant argues that the trial court committed prejudicial error by allowing A.E.'s mother, Dr. Runyan, Marjorie Dekeersgieter, and Jane Tillotson to testify regarding out-of-court statements made by A.E., including statements that "[defendant] hurt me." According to defendant, the statements are hearsay, not falling within any statutory exception to the hearsay rule, and were therefore inadmissible. Defendant also argues that, even if this Court determines that A.E.'s statements fall within a hearsay exception, due to the circumstances of this case, the statements are inherently unreliable and their admission violated the Confrontation Clause of the United States Constitution and Article I, Section 23 of the North Carolina Constitution.

We reject at the outset defendant's intimation that the trial court's finding that A.E. was incompetent as a witness renders A.E.'s out-of-court statements per se, or even presumptively, unreliable. We also reject that a finding of incompetency under the standards set forth in Rule 601(b) is inconsistent as a matter of law with a finding that the child may nevertheless be qualified as a declarant out-of-court to relate truthfully personal information and belief. Rule 601(b), as the trial court in the instant case properly found, addresses the competency of a witness to "express[ ] himself concerning the matter as to be understood, either directly or through interpretation by one who can understand him," or to "understand[ ] the duty *of a witness* to tell the truth." N.C.G.S. § 8C-1, Rule 601(b) (1992) (emphasis added). Although a child's inability to communicate to the jury at the time of trial "might be relevant to whether [an] earlier hearsay statement possessed particularized guarantees of trustworthiness, a per se rule of exclusion would . . . frustrate the truth-seeking purpose of the Confrontation Clause . . . ." *Idaho v. Wright*, 497 U.S. 805, 825, 111 L. Ed. 2d 638, 658 (1990).

Statements, other than ones made by the declarant while testifying at trial, offered in evidence to prove the truth of the matter asserted are hearsay and are inadmissible except as provided by statute or the rules of evidence. N.C.G.S. § 8C-1, Rules 801 and 802 (1992).

> However, in a criminal trial where the person making the out-of-court statements does not testify, the State is prohibited, by virtue of the Confrontation Clauses of the State (Article I, Section 23) and Federal (Sixth Amendment) Constitutions,

> from introducing hearsay evidence unless the proponent of the testimony shows "the necessity for using the hearsay declaration" and "the inherent trustworthiness of the declaration."

In re Lucas, 94 N.C. App. 442, 446, 380 S.E.2d 563, 565-66 (1989) (citations omitted); *see also Ohio v. Roberts*, 448 U.S. 56, 66, 65 L. Ed. 2d 597, 608 (1980); *Wright*, 497 U.S. at 814-15, 111 L. Ed. 2d at 651-52. Thus, even if an out-of-court statement properly falls within an exception to the hearsay rule, it nonetheless must be excluded at a criminal trial if it infringes upon the defendant's constitutional right to confrontation. *See Lucas*, 94 N.C. App. at 447, 380 S.E.2d at 566; *accord Wright*, 497 U.S. at 814, 111 L. Ed. 2d at 651.

With regard to the first prong of the Confrontation Clause test—necessity—our Courts have held consistently that the unavailability of a child witness in a sexual abuse trial due to incompetency adequately demonstrates the necessity for using the child's hearsay declaration. *See, e.g., State v. Deanes*, 323 N.C. 508, 525, 374 S.E.2d 249, 260 (1988), *cert. denied*, 490 U.S. 1101, 104 L. Ed. 2d 1009 (1989); *State v. Gregory*, 78 N.C. App. 565, 568, 338 S.E.2d 110, 112-13 (1985), *disc. rev. denied*, 316 N.C. 382, 342 S.E.2d 901 (1986); *State v. Jones*, 89 N.C. App. 584, 589-90, 367 S.E.2d 139, 143 (1988); *Lucas*, 94 N.C. App. at 447, 380 S.E.2d at 566; *accord Wright*, 497 U.S. at 814-15, 111 L. Ed. 2d at 651-52. Our Courts also have held that statements admissible under a traditional, or "firmly rooted," hearsay exception are deemed inherently trustworthy and thus, without further inquiry, satisfy the reliability prong of the Confrontation Clause test. *Jones*, 89 N.C. App. at 598, 367 S.E.2d at 147-48; *see also Roberts*, 448 U.S. at 66, 65 L. Ed. 2d at 608. However, because the residual exception to the hearsay rule, N.C.G.S. § 8C-1, Rule 803(24), is not firmly rooted in our jurisprudence, the admissibility under this exception of out-of-court statements of a child determined to be unavailable to testify at trial "require[s] a case-by-case examination of the facts" to ensure that the elements of the Confrontation Clause are fully satisfied. *Deanes*, 323 N.C. at 526, 374 S.E.2d at 261; *State v. Holden*, 106 N.C. App. 244, 248-52, 416 S.E.2d 415, 418-20, *disc. rev. denied*, 332 N.C. 669, 424 S.E.2d 413 (1992); *accord Wright*, 497 U.S. at 817, 111 L. Ed. 2d at 653 (residual exception to hearsay rule not firmly rooted); *but cf. State v. Stutts*, 105 N.C. App. 557, 562-63, 414 S.E.2d 61, 64-65 (1992) (finding witness unavailable to testify *because of an inability to tell truth from fantasy* prevents

as a matter of law the admission of that witness's out-of-court statements under residual exception to hearsay rule). This is so because hearsay evidence which does not fall within a firmly rooted hearsay exception is presumptively unreliable for Confrontation Clause purposes, although it may "meet Confrontation Clause reliability standards if it is supported by a 'showing of particularized guarantees of trustworthiness.' " *Lee v. Illinois*, 476 U.S. 530, 543, 90 L. Ed. 2d 514, 528 (1986) (citation omitted).

In the instant case, because A.E. was unavailable to testify at trial due to her incompetency as a courtroom witness, thus rendering the admission of her statements necessary, the first prong of the Confrontation Clause test of the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution is satisfied. The dispositive inquiry, therefore, is whether the trial court properly admitted A.E.'s out-of-court statements under one or more of the firmly rooted exceptions to the hearsay rule. If so, the evidence satisfies both prongs of the Confrontation Clause test and defendant's assignment of error in this regard must be rejected.

The trial court admitted the challenged testimony under the following exceptions to the hearsay rule, which are firmly rooted in our jurisprudence:

> (2) Excited utterance.—A statement relating to a startling event or condition made while the declarant was under the stress of excitement caused by the event or condition.
>
> . . . .
>
> (4) Statements for Purposes of Medical Diagnosis or Treatment.—Statements made for the purposes of medical diagnosis or treatment and describing medical history, or past or present symptoms, pain, or sensations, or the inception or general character of the cause or external source thereof insofar as reasonably pertinent to diagnosis or treatment.

N.C.G.S. § 8C-1, Rule 803 (1992); *see also Wright*, 497 U.S. at 820-21, 827, 111 L. Ed. 2d at 655-56, 660 (circumstances that surround making of statements admissible under the firmly rooted excited utterance and medical treatment exceptions to hearsay rule render declarant particularly worthy of belief).

Statements Admitted Under Rule 803(2)

[2] Defendant argues that the trial court erred in admitting A.E.'s statements to Marjorie Dekeersgieter under the hearsay exception for excited utterances. Statements properly within the purview of this exception require, from the subjective standpoint of the declarant, "(1) a sufficiently startling experience suspending reflective thought and (2) a spontaneous reaction, not one resulting from reflection or fabrication." *State v. Smith*, 315 N.C. 76, 86, 337 S.E.2d 833, 841 (1985). With regard to statements made by young children, our Courts have adopted "a broad and liberal interpretation," and in doing so recognize that "the stress and spontaneity upon which the exception is based is often present for longer periods of time in young children than in adults." *Id.* at 87, 337 S.E.2d at 841. Thus, statements made by young children three days after an alleged sexual assault, which relate to the assault, have been deemed admissible under the excited utterance exception. *See id.*

In the instant case, the alleged encounter between A.E. and defendant occurred on 4 September 1990. On 7 September 1990, A.E. volunteered to Marjorie Dekeersgieter that "someone had hurt her; and she did mention [defendant], the name [defendant] and then pointed to her, you know, her vagina type thing." Because this testimony indicates that A.E.'s statements were (1) spontaneous and not in response to any questioning on the part of the adult to whom they were made, (2) related to an alleged sexual assault, a "startling event," particularly to a young child, and (3) were made only three days after such assault, under established law in North Carolina the testimony was properly admitted pursuant to Rule 803(2).

Statements Admitted Under Rule 803(4)

[3] Defendant argues that the trial court erroneously admitted A.E.'s out-of-court statements to her mother, therapist Jane Tillotson, and Dr. Runyan under Rule 803(4).

Dr. Runyan

It is well established that statements made to a physician for the purpose of receiving medical diagnosis or treatment are admissible as an exception to the hearsay rule. *See, e.g., Smith*, 315 N.C. at 83-86, 337 S.E.2d at 839. Where children are examined by physicians for diagnosis and treatment of alleged sexual abuse, details of the offense, including the identity of the offender, pro-

vided by the child during such examination are generally admissible at trial. *Smith*, 315 N.C. at 85, 337 S.E.2d at 840; *State v. Aguallo*, 318 N.C. 590, 594-597, 350 S.E.2d 76, 80-81 (1986); *but see United States v. Narciso*, 446 F.Supp. 252, 289 (E.D. Mich. 1977) (if declarant identifies perpetrator while under the impression that he is being asked to indicate the responsible party, the identification may be accusatory in nature and would thus destroy any inherent reliability). Statements made to a physician for the sole purpose of preparing and presenting the State's case at trial are not admissible under the medical treatment exception. *State v. Stafford*, 317 N.C. 568, 574, 346 S.E.2d 463, 467 (1986); *Lucas*, 94 N.C. App. at 449, 380 S.E.2d at 567-68.

In the instant case, on the day after A.E.'s alleged sexual encounter with defendant, A.E.'s mother summoned help from police, who, after a brief interview, recommended that A.E. be taken to the hospital. At the hospital, A.E. was examined by Dr. Runyan for the purpose of determining whether she had been sexually molested. During the examination, A.E. told Dr. Runyan that "a man named [defendant]" who lived at the shelter had touched her, pointing to her "pee pee" and her chest, and had had sexual intercourse with her, causing her to bleed. Although Dr. Runyan's examination revealed no physical findings consistent with allegations of sexual abuse, he opined, based on his interview with A.E. during the examination, that A.E. was a sexually abused child. Contrary to defendant's contention, the fact that A.E. did not specifically complain of pain to Dr. Runyan is immaterial in determining the admissibility of her statements to the doctor under Rule 803(4). Dr. Runyan used the statements made by A.E. to make his diagnosis, and, accordingly, Dr. Runyan's challenged testimony was admissible. *See Lucas*, 94 N.C. App. at 449, 380 S.E.2d at 567.

A.E.'s Mother

[4] The trial court deemed admissible A.E.'s out-of-court statements to her mother under the medical treatment exception to the hearsay rule. Defendant contends that the trial court erred in doing so because the statements made by A.E. to her mother "led directly and immediately to a criminal report, not to medical treatment."

As our Supreme Court noted in *Smith*, under the medical treatment exception, "[s]tatements to hospital attendants, ambulance drivers, or even members of the family might be included." N.C.G.S. § 8C-1, Rule 803(4) commentary (1992). The Court emphasized that

statements made by a young child to a family member may be admissible under this exception even where the child did not specifically request medical attention because "young children cannot independently seek out medical attention, but must rely on their caretakers to do so." *Smith*, 315 N.C. at 84, 337 S.E.2d at 840. The key factor in determining the admissibility of such statements is whether the statements resulted in the child receiving medical treatment and/or diagnosis. *See id.* at 84-85, 337 S.E.2d at 840; *Jones*, 89 N.C. App. at 590-91, 367 S.E.2d at 143-44; *Lucas*, 94 N.C. App. at 446, 380 S.E.2d at 566.

In the instant case, A.E.'s mother testified that on the evening of the drugstore incident on 4 September 1990, and the following day, A.E. acted strange and withdrawn, would not talk, and cried a lot. While on a downtown Chapel Hill street on the day after the alleged incident, A.E.'s mother repeatedly asked her daughter what was wrong, and A.E. finally told her that "[defendant] hurt me," pointing to her chest and between her legs. A.E.'s mother immediately located a police officer and told him that she wanted her daughter's comments investigated. Police questioning resulted in A.E., along with her mother and police social workers, being taken to the hospital in order for A.E. "to get checked," after which she was diagnosed as having been sexually abused. Despite the fact that A.E.'s mother, upon hearing her daughter's statement, first found a police officer and requested assistance, A.E.'s statements to her mother resulted in A.E. being taken to the hospital the same day and receiving a medical diagnosis. Therefore, the statements were properly admitted under Rule 803(4).

Jane Tillotson

[5] The trial court admitted under Rule 803(4) out-of-court statements made by A.E. to Jane Tillotson two months after the alleged incident. Defendant contends that Tillotson's testimony was inadmissible under the medical treatment exception because A.E.'s conversations with Tillotson "were never intended to assist Tillotson in making a diagnosis, but were, in significant part, to facilitate the child's participation in and contribution to the criminal prosecution" of defendant.

"[S]tatements made by a victim of child sexual abuse to a psychologist during the course of diagnosis and treatment are admissible under Rule 803(4)." *State v. Bullock*, 320 N.C. 780, 783, 360 S.E.2d 689, 690 (1987). Tillotson testified at trial as an expert

in the field of clinical and child psychology, and stated that the purpose of A.E.'s visits with her was to obtain therapy due to behavior problems that she had been exhibiting, such as nightmares, bed wetting, frequent masturbation, temper outbursts, clinging behavior, aggressive behavior, and fearfulness. A.E. received therapy from Tillotson for one hour per week beginning on 7 November 1990. During a session on 19 December 1990, A.E. told Tillotson that "[defendant] hurt me at that restaurant in the bathroom" and "[defendant] put his ding-dong in my private part," and that "only Dad and [defendant]" had ever hurt her like that. Tillotson continued treating A.E. until April, 1991, during which time A.E.'s behavior improved.

Although undoubtedly Tillotson's visits with A.E. did prepare Tillotson for her testimony at trial and did contribute to the prosecution of defendant, these clearly were not the primary purposes of Tillotson's treatment of A.E. Tillotson testified that A.E.'s mother brought A.E. to Tillotson for help with behavioral problems. The statements admitted at trial were made by A.E. during the course of her diagnosis by Tillotson as a sexually abused child and her treatment therefor, which lasted several months. Accordingly, A.E.'s statements to Tillotson were properly admitted by the trial court under Rule 803(4). *See Lucas*, 94 N.C. App. at 449, 380 S.E.2d at 567 (upholding trial court's admission of doctor's testimony under medical treatment exception despite fact that doctor's examination of child in part prepared him for trial).

II

[6] Defendant argues that the trial court erred in denying defendant's motions to dismiss the charge of indecent liberties. According to defendant, the State failed to meet its burden of producing substantial evidence of the essential elements of the offense. 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).

A person is guilty of taking indecent liberties with a child under the age of sixteen if he either "willfully takes or attempts to take any immoral, improper, or indecent liberties . . . for the purpose of arousing or gratifying sexual desire," or "willfully commits or attempts to commit any lewd or lascivious act upon or with the body or any part or member of the body" of the child. N.C.G.S. § 14-202.1 (1986). In the instant case, the specific theory

upon which the State's case rested with regard to the indecent liberties charge was that on 4 September 1990, defendant touched A.E. with his hand on her chest and placed his hand on her vaginal area for the purpose of arousing or gratifying sexual desire. The State presented evidence that A.E. told her mother that "[defendant] touched me," pointing to her chest and between her legs; that she told Marjorie Dekeersgieter that defendant hurt her, pointing to "her vagina type thing"; and that she told Dr. Runyan that something bad had happened in the bathroom and pointed to her crotch and also said that "he hurt me here," indicating that defendant had touched her chest as well. A.E. also mentioned defendant's "ding-dong."

Defendant argues that there was no evidence that A.E. told anyone that "defendant had placed his hand or hands anywhere on her body . . . or that defendant had removed her clothes." However, we reject any contention that a child's failure to say expressly that a defendant touched a particular place on her body (as opposed to pointing to the body part at issue and saying she was touched, or hurt, there), or that the child was unclothed when the touching occurred, renders the State's evidence insufficient on the touching element of indecent liberties. The evidence presented in the instant case adequately supports a reasonable conclusion that defendant touched A.E.'s chest and her vaginal area. And although we find meritorious defendant's contention at oral argument that evidence of A.E.'s reference to defendant's penis could have resulted merely from A.E. observing defendant urinating, particularly in light of the fact that Dr. Runyan made no physical findings of penetration, this evidence has no bearing on the indecent liberties charge. Moreover, the jury obviously did not believe the evidence of sexual intercourse and acquitted defendant of the rape charge.

With regard to evidence that the touching by defendant was for the purpose of arousal or sexual gratification, this Court has held that a " 'defendant's purpose, being a mental attitude, is seldom provable by direct evidence and must ordinarily be proven by inference.' " *Jones*, 89 N.C. App. at 597-98, 367 S.E.2d at 147 (citation omitted). Here, the evidence established that, while alone in a bathroom with A.E., defendant touched her chest and her vaginal area. Such evidence is sufficient to permit the jury to infer that defendant's purpose in doing so was to arouse himself or to gratify

his sexual desire. The trial court properly submitted the charge of indecent liberties to the jury.

For the foregoing reasons, in the instant case we discern

No error.

Judges JOHNSON and MARTIN concur.

GERARD M. GUYTHER AND ROXY M. GUYTHER v. NATIONWIDE MUTUAL FIRE INSURANCE COMPANY

No. 9227SC168

(Filed 6 April 1993)

1. Insurance § 132 (NCI4th)– homeowners insurance– ambiguity–definition of collapse

The term "collapse" in a homeowners insurance policy was ambiguous where the homeowners contend that the term includes any sudden damage which materially impairs the basic structure or integrity of the building; defendant insurance company argues that the term must be given the meaning "falling, reduction to flattened form or rubble"; the policy does not define collapse; our courts have not defined the term and there is a difference of opinion in the courts of other jurisdictions; and the term is fairly and reasonably susceptible to either of the constructions asserted by the parties. In giving the ambiguous term the reasonable definition which favors plaintiffs, the term "collapse" includes the sudden material impairment of the basic structure or integrity of a building which remains standing.

Am Jur 2d, Insurance § 271.

Division of opinion among judges on same court or among other courts or jurisdictions considering same question, as evidence that particular clause of insurance policy is ambiguous. 4 ALR4th 1253.

2. Insurance § 724 (NCI4th)— homeowners insurance—collapse of residence—sufficiency of evidence

The trial court did not err by denying defendant's motion for a directed verdict and judgment n.o.v. where defendant claimed that the evidence failed to show that a collapse occurred to defendant's residence but the record reflects evidence that part of the house "was dropped, considerable" and one of the doors of the house would not open; the floor had fallen away from the baseboards in some sections of the house and the floor was so uneven that "you actually had to walk downhill in the hall"; the ceiling in the downstairs area of the house was bowed and "the exterior portion of the [roof] had started to push down and out instead of being just a straight flat roof"; the changes in the house on 1 April 1988 occurred suddenly; the kitchen cabinets had pulled away from the wall and the upstairs floor had dropped to the extent that "it's just like a stepoff from the balcony to the hall"; the "molding [was] split loose from the top of [plaintiffs'] ceiling in the kitchen area"; and the floor in the upstairs portion of the house "had collapsed down. . . . It was like walking downhill."

3. Appeal and Error § 147 (NCI4th)— alleged error in instruction—failure to object at trial—right to challenge on appeal waived

Defendant waived the right to challenge on appeal instructions on the collapse of a homeowner's roof by not objecting to the instructions at trial.

Am Jur 2d, Appeal and Error §§ 545 et seq.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial. 76 ALR Fed 619.

4. Evidence and Witnesses § 2162 (NCI4th)— homeowners insurance—damage to house—expert witnesses—failure to tender as experts

Two contractors properly testified as experts even though plaintiffs never formally tendered them where the trial court ruled that they were experts by implication when it permitted them to give expert testimony after hearing their qualifications.

Am Jur 2d, Expert and Opinion Evidence §§ 60 et seq.

5. Evidence and Witnesses § 2372 (NCI4th)— homeowners insurance—damage to home—contractors as experts

The trial court did not abuse its discretion by allowing expert testimony from two contractors in an action to determine liability under a homeowners insurance policy for a collapsed roof and structural damage. The record reveals that the two witnesses had been in the construction business for many years and had constructed and repaired hundreds of houses. The fact that they did not personally witness the snow which accumulated on the roof did not render their testimony inadmissible, as an expert can base opinion testimony on other than first-hand knowledge. Although one contractor testified that he was not qualified to say what caused the collapse and it was error to admit his opinion on that subject, the error was harmless in light of the other contractor's unequivocal testimony that the collapse of the house was caused by the weight of the snow.

6. Appeal and Error § 147 (NCI4th)— instructions—failure to object at trial—request to alter instruction refused—issue preserved for appeal

An assignment of error to instructions on damages was preserved for appeal even though defendant failed to formally object where defendant submitted a request to alter an instruction and the court refused to instruct as requested.

Am Jur 2d, Appeal and Error §§ 545 et seq.

Sufficiency in federal court of motion in limine to preserve for appeal objection to evidence absent contemporary objection at trial. 76 ALR Fed 619.

7. Insurance § 724 (NCI4th)— homeowners policy—measure of damages

The trial court did not err by denying defendant insurer's requested instruction on the measure of damages under a homeowner's policy in an action arising from the collapse of a roof and structural damage from accumulated snow where the policy contains a "Loss Settlement" provision which provides that the policy will pay the replacement cost for the building with certain limitations and a provision whereby the insured may disregard the replacement cost provisions and make a claim for loss or damage on an actual cash value basis;

actual cash value is not defined in the policy but is generally determined by subtracting the fair market value of the property after the damage from the fair market value of the property before the damage; defendant requested an instruction that the correct measure of damages is the difference in fair market value before and after the damage occurred; and plaintiffs sought to recover the replacement cost under the Loss Settlement section of the policy, not the actual cash value of the damage to their home. The instruction requested by defendant was not the correct measure of damages.

Appeal by defendant from judgment and order entered 5 August 1991 in Gaston County Superior Court by Judge Marcus Johnson. Heard in the Court of Appeals 13 January 1993.

Alala Mullen Holland & Cooper, P.A., by H. Randolph Sumner and Raboteau T. Wilder, Jr., for plaintiff-appellees.

Stott, Hollowell, Palmer & Windham, by Grady B. Stott and Jeffrey A. Taylor, for defendant-appellant.

GREENE, Judge.

Defendant Nationwide Mutual Fire Insurance Company (Nationwide) appeals from the trial court's order denying its motions for a directed verdict, judgment notwithstanding the verdict, and a new trial, and from the trial court's judgment in favor of plaintiffs, Gerard M. Guyther and Roxy M. Guyther (the Guythers), entered after a jury trial.

The Guythers are the owners of a house in Bessemer City which they purchased in 1986. The house is covered by a "homeowners insurance" policy issued by Nationwide. Prior to their purchase of the house, the Guythers were aware of a noticeable "dip" in the left side of the roof. A snowfall of approximately fourteen inches occurred in the area in February, 1988. On 1 April 1988, the second floor of the Guythers' house dropped by two to three inches. The Guythers submitted a claim to Nationwide for the damage to the house, which was denied. The Guythers filed a complaint on 27 October 1988, seeking to recover the cost of repairs. The complaint alleged that the roof and much of the upper structure of the Guythers' house had collapsed, causing severe damage, and that Nationwide was liable for the damage under the terms of the insurance policy it issued to the Guythers. Nation-

wide answered that the damage was not covered by the policy because the damage resulted from latent defects in the construction of the house or, in the alternative, that the collapse, if any occurred, was not covered by the policy.

The pertinent policy provisions are:

8. **Collapse.** We insure for direct physical loss to covered property involving collapse of a building or any part of a building caused only by one or more of the following:

   a. Perils Insured Against in Coverage C—Personal Property. These perils apply to covered building and personal property for loss insured by this additional coverage; [Perils insured against under Coverage C include fire, lightning, windstorm, hail, explosion, etc.]

   b. hidden decay;

   c. hidden insect or vermin damage;

   d. weight of contents, equipment, animals or people;

   e. weight of rain which collects on a roof; or

   f. use of defective material or methods in construction, remodeling or renovation if the collapse occurs during the course of the construction, remodeling or renovation.

   . . . .

   Collapse does not include settling, cracking, shrinking, bulging or expansion.

The case was tried before a jury on 15 July 1991. The Guythers presented their own testimony and that of Edith Lingerfelt and Marlene Strommer as to the condition of the house on 1 April 1988. This evidence showed that, as a result of the second floor dropping two to three inches, the floor sloped noticeably in several areas of the house, the ceiling in the downstairs area of the house was bowed, the floor separated from the baseboards in some places, a door in the house was wedged shut, and the kitchen cabinets pulled away from the walls. Mr. Guyther also testified that shortly after 1 April 1988, he noticed that the roof had begun to "push down and out instead of being just a straight flat roof." Two experienced contractors who had examined the house, Kendall Cribb (Cribb) and Thomas Jeffries (Jeffries), testified. Cribb presented

opinion evidence that the damage to the house and roof was caused by the weight of snow which accumulated on the roof in the February snowstorm, and also presented an estimate of $49,669.65 for the cost of repairs. Jeffries testified that a possible cause of the damage was the weight of snow which collected on the roof and the ultimate cause was poor construction. He gave a repair estimate of $73,462.26, which he stated was the amount required to "bring [the house] up to current building codes." Nationwide moved for a directed verdict at the end of the Guythers' evidence, and also at the end of all evidence. The motion was denied.

During the jury instruction conference, Nationwide requested, in writing, that "collapse" be defined for the jury as "falling, reduction to flattened form or rubble." The trial court gave that definition as part of its instruction to the jury, but also provided several other possible definitions for "collapse," including "settling, crackling [sic], shrinking, bulging or expansion which materially impairs [the] basic structure or substantial integrity of the building."

The jury found that a "collapse" covered by the policy had occurred, and awarded damages of $52,500.00. The Guythers consented to a remittitur of the verdict to $49,669.65, and the court entered judgment for that amount. Motions by Nationwide for judgment notwithstanding the verdict and for a new trial were denied.

The issues presented are whether (I) the undefined term "collapse" within the meaning of an insurance policy requires the total destruction of a structure; (II) the trial court properly denied Nationwide's motions for a directed verdict and judgment notwithstanding the verdict; (III) Nationwide waived its right to challenge on appeal the trial court's instructions to the jury on the hidden decay and weight of rain provisions set forth in the policy; (IV) the trial court properly admitted the opinion testimony of Cribb and Jeffries as to the cause of the damage to the Guythers' house; and (V) the trial court erred in failing to instruct the jury that the proper measure of damages was the difference between the fair market value of the house before the damage and the fair market value of the house after the damage.

I

[1] Nationwide argues that the term "collapse" is unambiguous, and must be given the meaning "falling, reduction to flattened

form or rubble." The Guythers contend that the term is ambiguous, and must be given the meaning more favorable to them, which would include any sudden damage which materially impairs the basic structure or integrity of the building. As our initial inquiry, therefore, we must determine what constitutes a "collapse" within the meaning of the policy.

The question of the meaning of language used in an insurance policy is a matter of law. *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518, 522 (1970). Where no definition for a term is contained in the policy, unambiguous terms will be given the meaning afforded them in ordinary speech unless the context indicates that another meaning was intended. *Woods v. Nationwide Mut. Ins. Co.*, 295 N.C. 500, 506, 246 S.E.2d 773, 777 (1978). When a term is ambiguous, in that it is susceptible to several reasonable definitions, the rule is that doubt as to which definition to accept will be resolved against the insurance company and in favor of the insured. *Maddox v. Colonial Life and Accident Ins. Co.*, 303 N.C. 648, 650, 280 S.E.2d 907, 908 (1981). The fact that a dispute has arisen between the parties as to the meaning of a term contained in a policy is some evidence that a term is ambiguous, *St. Paul Fire & Marine Ins. Co. v. Freeman-White Assocs., Inc.*, 322 N.C. 77, 83, 366 S.E.2d 480, 484 (1988), as is the fact that courts in various jurisdictions have a difference of opinion regarding what definition to give a policy term. *Thomasson v. Grain Dealers Mut. Ins. Co.*, 103 N.C. App. 475, 478, 405 S.E.2d 808, 810 (1991). Courts may use the dictionary to determine the definition of words. *Nelson v. Battle Forest Friends Meeting*, 108 N.C. App. 641, 646, 425 S.E.2d 4, 7 (1993).

The policy in question does not define "collapse," and our courts have not defined the term. The parties sharply dispute the meaning of "collapse" and there is a difference of opinion in the courts of other jurisdictions as to the proper definition to be given "collapse" when used in insurance policies. Annotation, *What Constitutes "Collapse" of a Building Within Coverage of Property Insurance Policy*, 71 A.L.R. 3d 1072 (1976). Because such evidence exists that the term is ambiguous, and because we believe the term "collapse" is fairly and reasonably susceptible to either of the constructions asserted by the parties, we deem "collapse" to be ambiguous. *See Thomasson*, 103 N.C. App. at 478, 405 S.E.2d at 810.

Among the accepted definitions of "collapse" is "to break down completely: fall apart in confused disorganization: crumble into insignificance or nothingness." *Webster's Third New International Dictionary* 443 (1966). Another accepted definition is "to suddenly lose force . . . effectiveness, or worth." *Id.* Although both these definitions encompass the total destruction of a structure, the second definition can include less than total destruction. A building has lost its "effectiveness" or "worth" when its basic structure or integrity is materially impaired. Accordingly, in giving the ambiguous term the reasonable definition which favors the Guythers, the term "collapse" includes the sudden material impairment of the basic structure or integrity of a building which remains standing. *See Beach v. Middlesex Mut. Assurance Co.*, 532 A.2d 1297, 1300 (Conn. 1987) (collapse occurs when structural integrity of house impaired).

Nationwide contends that the above definition of the term "collapse" is in direct conflict with the provision of the policy which provides that collapse does not include "settling, cracking, shrinking, bulging or expansion." We do not agree. The policy purports to provide coverage for collapse, and may be reasonably read to exclude coverage for "settling, cracking, shrinking, bulging or expansion" only when they do not suddenly and materially impair the structure or integrity of the building. *See Government Employees Ins. Co. v. DeJames*, 261 A.2d 747, 751 (Md. 1970) (in construing insurance policy which provides coverage for collapse but excludes coverage for settling, cracking, etc., collapse encompasses settling, cracking, etc., which materially impairs structural integrity of building).

II

[2] Nationwide argues that the trial court erred in failing to grant its motion for a directed verdict and its motion for judgment notwithstanding the verdict because the Guythers' evidence failed to show that a collapse occurred to their residence. Our task, identical to that of the trial court, is to determine if there is substantial relevant evidence in the record, in the light most favorable to the non-movant, that a reasonable mind might accept to support the non-movant's claim. *Garrett v. Overman*, 103 N.C. App. 259, 262, 404 S.E.2d 882, 883, *disc. rev. denied*, 329 N.C. 787, 408 S.E.2d 519 (1991). If such evidence exists, the motion for a directed verdict must be denied. *Id.* at 263, 404 S.E.2d at 883. Because a motion

for judgment notwithstanding the verdict is essentially a renewal, after the jury's verdict, of a motion for a directed verdict, *Penley v. Penley*, 314 N.C. 1, 10, 332 S.E.2d 51, 57 (1985), the scope of our review is the same as that for a motion for a directed verdict. *Id.*

Nationwide contends that the evidence presented does not show a collapse as that term is used in the policy and the case therefore should not have been submitted to the jury. We disagree. The record reflects the following evidence on the condition of the house: part of the house "was dropped, considerable" and one of the doors of the house would not open; the floor had fallen away from the baseboards in some sections of the house and the floor was so uneven that "you actually had to walk downhill in the hall;" the ceiling in the downstairs area of the house was bowed and "the exterior portion of the [roof] had started to push down and out instead of being just a straight flat roof;" the changes in the house on 1 April 1988, occurred suddenly; the kitchen cabinets had pulled away from the wall and the upstairs floor had dropped to the extent that "it's just like a step-off from the balcony to the hall;" the "molding [was] split loose from the top of [the Guythers'] ceiling in the kitchen area;" and the floor in the upstairs portion of the house "had collapsed down. . . . It was like walking downhill." This evidence, when considered in the light most favorable to the Guythers, is such substantial evidence that a reasonable mind might accept to support a conclusion that the Guythers' house had collapsed, as that term has been herein defined. Accordingly, Nationwide's motions for judgment notwithstanding the verdict and for a directed verdict were properly denied.

III

[3] Nationwide contends that the trial court erred in instructing the jury that a verdict could be returned in favor of the Guythers if they determined that the collapse was caused by hidden decay or by the weight of rain which collected on the roof. Specifically, Nationwide contends that the Guythers failed to present any evidence that damage occurred due to rain or hidden decay. However, Nationwide failed to object at trial to these instructions, and has therefore waived the right to challenge them on appeal. N.C. R. App. P. 10(b)(2) (1993).

IV

[4] Nationwide argues that the testimony of Cribb and Jeffries should have been excluded because they were not experts or other-

wise qualified as lay witnesses to offer an opinion on the cause of the collapse of the house. In matters such as causation, which require skill and knowledge which is outside the ordinary experience of jurors, and about which a person of ordinary experience would not generally be capable of forming an opinion, the testimony of an expert witness who is qualified by special skill and knowledge to give an opinion is admissible. *Teague v. Duke Power Co.*, 258 N.C. 759, 763, 129 S.E.2d 507, 510 (1963). Because a lay person does not possess the technical knowledge and skill required to form an opinion concerning the cause of the collapse of a building, lay opinion testimony on the subject is not admissible. *See* N.C.G.S. § 8C, Rule 701 (1992) (lay opinion testimony must be rationally related to the witness' perception); 31A Am. Jur. 2d *Expert and Opinion Evidence* § 344 (1989) (opinion of lay witness as to causation not admissible where technical knowledge necessary to formation of opinion). Therefore, it was necessary that Cribb and Jeffries be experts in order for them to offer their opinions as to the causation of the damage to the Guythers' house.

Nationwide argues that because the Guythers never formally tendered Cribb and Jeffries as experts, their testimony must be considered that of lay witnesses, and therefore not admissible to show the cause of the damage to the house. Although these witnesses were not formally tendered nor recognized by the court as experts, the trial court by implication ruled that they were experts when, upon hearing their qualifications, the trial court permitted them to give expert testimony. *Whedon v. Whedon*, 68 N.C. App. 191, 193-94, 314 S.E.2d 794, 796 (1984), *rev'd on other grounds*, 313 N.C. 200, 328 S.E.2d 437 (1985).

[5] Nationwide nonetheless argues that Cribb and Jeffries did not possess the necessary skill and expertise to give expert testimony as to causation, and, therefore, it was error for the trial court to accept them as experts. A witness is qualified to offer expert opinion testimony if it is shown that the witness is trained, skilled or experienced in the subject area in question. *Morris Speizman Co., Inc. v. Williamson*, 12 N.C. App. 297, 304, 183 S.E.2d 248, 252, *cert. denied*, 279 N.C. 619, 184 S.E.2d 113 (1971). The decision to qualify a witness as an expert is within the discretion of the trial court, and will be reversed only if there is no evidence to support it. *State v. Parks*, 96 N.C. App. 589, 592, 386 S.E.2d 748, 750 (1989). The record reveals that Cribb and Jeffries had been in the construction business for many years and had constructed

and repaired hundreds of houses. The trial court therefore did not abuse its discretion in allowing their expert testimony. Furthermore, their testimony was not rendered inadmissible, as Nationwide suggests, by the fact that they did not personally witness the snow which accumulated on the Guythers' roof, as an expert can base opinion testimony on other than first-hand knowledge. *See State v. Purdie*, 93 N.C. App. 269, 276, 377 S.E.2d 789, 793 (1989) (expert need not testify from "first[-]hand personal knowledge"). "The fact that an expert's opinion is not based on personal observation . . . affects the *weight* to be accorded the testimony, not its admissibility." *Id.* at 277, 377 S.E.2d at 793 (emphasis in original).

We do agree with Nationwide that because Jeffries testified that he was "not qualified to say . . . what caused" the collapse, it was error to admit his opinion on the subject. This error, however, was harmless in light of Cribb's unequivocal testimony that the collapse of the house was caused by the weight of the snow.[1] *See Cook v. Southern Bonded, Inc.*, 82 N.C. App. 277, 281, 346 S.E.2d 168, 171 (1986), *disc. rev. denied*, 318 N.C. 692, 351 S.E.2d 741 (1987).

V

[6] Nationwide argues that the correct measure of damages in this case is the difference in the fair market value of the house before and after the damage occurred, and that the trial court's failure to instruct the jury accordingly was error. The Guythers contend that the trial court correctly instructed that the measure of damages was

> the reasonable cost of repair and/or replacement as necessary . . . to bring that structure back up to a condition of structural quality and general appearance at least equal to that structural quality and general appearance enjoyed by this structure or residence immediately preceding the occurrence, or the damage or loss.

In the alternative, the Guythers contend that Nationwide's failure to formally object to this instruction before the jury retired, appellate Rule 10(b)(2), precludes it from now raising the issue on appeal. No formal objection, however, is required under Rule 10(b)(2)

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1. The policy states that coverage is provided for collapse caused by the weight of rain that collects on a roof, and does not mention the weight of snow. Nonetheless, the defendant did not raise this issue at trial and we will not address it for the first time on appeal.

if a party submits a request to alter an instruction during the charge conference and the trial judge considers and refuses the request to alter. *Wall v. Stout*, 310 N.C. 184, 188-89, 311 S.E.2d 571, 574 (1984). The record reveals that Nationwide's attorney made the following statement to the trial judge during the jury instruction conference:

> [Nationwide's Attorney]: I contend that the measure of damages is the difference in the fair market value of this house before the [sic] April 1, 1988, and after April 1, 1988, and there's no evidence to that effect; and therefore, I'd be entitled to a peremptory instruction to the jury on the issue of damages that there has been no evidence to that effect.

The trial court refused to instruct as requested, and thus the assignment of error is preserved for appeal even though no formal objection was made by Nationwide after the judge gave his instructions to the jury.

[7] Having determined that Nationwide's objection is properly preserved, we address the issue of the propriety of the instruction requested by Nationwide. The language contained in the insurance policy controls the measure of damages upon proof of a covered loss. *Andrews v. Great American Ins. Co.*, 223 N.C. 583, 586-87, 27 S.E.2d 633, 635 (1943). The policy issued by Nationwide to the Guythers contains a "Loss Settlement" provision which provides that, with certain limitations, the policy will pay the "replacement cost" for the covered building. Replacement cost under the "Loss Settlement" provision is determined by the application of a formula set forth in the policy which limits coverage based on the relationship between the dollar amount of insurance coverage issued and the replacement cost of the building. In addition, the policy contains a provision whereby the insured may disregard the replacement cost provisions and "make a claim under this policy for loss or damage to buildings on an actual cash value basis." Although the term "actual cash value" is not defined in the policy, it is generally determined by subtracting the fair market value of the property after the damage from the fair market value of the property before the damage. *See Black's Law Dictionary* 33 (5th ed. 1981); 15 George J. Couch, *Couch Cyclopedia of Insurance Law* § 54:127 (Mark S. Rhodes ed., 2d ed. rev. vol. 1983). Thus, if the Guythers had sought to recover under the "actual cash value" provision of the policy, Nationwide's proposed instruction would

have been correct. However, the record reveals that the Guythers sought to recover not the "actual cash value" of the damage to their home but the replacement cost under the "Loss Settlement" section of the policy. The instruction requested by Nationwide was, therefore, not the correct measure of damages, and it was not error for the court to refuse to so instruct.

We have considered the other assignments of error raised by the defendant and find that they are without merit. Accordingly, we find

No error.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA v. ROGER DALE SUMMEY

No. 9127SC1057

(Filed 6 April 1993)

1. **Evidence and Witnesses §§ 441, 460, 501 (NCI4th)— robbery, rape, kidnapping—identification—stray mark on photograph—observation at probable cause hearing—viewing while in custody—in court identification not tainted**

The trial court did not err in a prosecution for robbery, rape, and kidnapping by denying defendant's motion to suppress identification testimony from Ms. Hannah and Little, the victims, where Ms. Hannah became a dispatcher and clerk for the Sheriff's Department after the incident; she saw defendant as he was being brought into the sheriff's office and had access to booking cards; Ms. Hannah and Little saw defendant seated at the defense table during the probable cause hearing; a picture of defendant shown to Ms. Hannah and Little in a photographic array four days after the incident had an unexplainable ink mark on its plastic cover which the other pictures in the array did not have; and the trial judge determined that the ink mark on the plastic covering the photograph was merely an idle scratch and was not suggestive, that the observation of defendant at the defense table during the probable cause hearing was not impermissibly suggestive, and that the

viewing of defendant by Ms. Hannah at the jail where she worked was harmless because of previous identifications. Under the totality of circumstances, the pretrial identification procedures were not so impermissibly suggestive as to give rise to a substantial likelihood of mistaken identification. Both witnesses had ample opportunity to view defendant for several minutes; each of them demonstrated attentiveness to his physical characteristics; each of their prior descriptions of defendant was accurate and conformed to each other's testimony; each demonstrated certainty at all times in identifying defendant's photograph and person; and the length of time between the crime and the confrontation was relatively brief, there being only four days between the crime and the photographic array.

Am Jur 2d, Criminal Law §§ 802, 974; Evidence §§ 371-373.

2. Criminal Law § 687 (NCI4th)— instructions—identification testimony—requested instruction not given

The trial court properly instructed the jury on identification testimony in a prosecution for robbery, rape, and kidnapping where defendant requested an instruction on eyewitness testimony taken nearly verbatim from the 1986 Pattern Jury Instructions which included a list of factors for the jury to consider, the trial court declined the request, and the court gave instead the Pattern Jury Instruction on eyewitness identification as it was revised in 1989, which did not include the list of factors.

Am Jur 2d, Trial §§ 185-188.

3. Evidence and Witnesses § 2209 (NCI4th)— rape—semen testing inconclusive—testimony that defendant could not be excluded

The trial court did not err in a prosecution for robbery, kidnapping, and rape by allowing an expert in forensic serology to testify that tests on semen taken from the victim were inconclusive and that defendant could not be excluded. The expert had testified earlier that she had no opinion as to the identity of the person whose spermatozoa she found and defendant failed to demonstrate a reasonable possibility that the jury would have reached a different result at trial had the testimony been excluded.

Am Jur 2d, Expert and Opinion Evidence § 300.

Admissibility and weight of blood-grouping tests in disputed paternity cases. 43 ALR4th 579.

4. **Robbery § 4.3 (NCI3d)— armed robbery—pellet pistol and BB gun—armed robbery and common law robbery submitted—no error**

The trial court did not err by denying defendant's motion to dismiss charges of armed robbery where there was evidence that it appeared to the victims that the robbery was committed with dangerous weapons as well as evidence tending to show that the weapons in question were not dangerous weapons within the contemplation of N.C.G.S. § 14-87. It was for the jury to determine the nature of the weapon used, and the jury was given instructions as to both armed and common law robbery and a definition of "dangerous weapon" as "one which is likely to cause death or serious bodily injury."

Am Jur 2d, Robbery §§ 6 et seq.

Stationary object or attached fixture as deadly or dangerous weapon for purposes of statute aggravating offenses such as assault, robbery, or homicide. 8 ALR5th 775.

Appeal by defendant from judgments entered 15 July 1991 by Judge Marcus L. Johnson in Gaston County Superior Court. Heard in the Court of Appeals 13 January 1993.

Defendant was charged in proper bills of indictment with two counts of robbery with a dangerous weapon, three counts of first degree rape, and two counts of first degree kidnapping. At trial, the State's evidence tended to show the following pertinent facts: On the night of 28 July 1989, Joy Haney Hannah rode with Alfred Little, her friend and co-worker, in Little's automobile to Lineberger Park in Gastonia. Little parked his car in a parking lot by a swimming pool where he and Ms. Hannah sat and talked.

Sometime thereafter, a black male appeared at the passenger window of Little's car holding a gun while two white males appeared on the driver's side of Little's car. One of the two white men was bearded, had long dark hair, and was also armed with a gun. The three men ordered Ms. Hannah and Little to get out of the car and lie on the ground. The men took money and jewelry from both Hannah and Little.

The bearded white male then took Ms. Hannah by the back of her shirt and forced her to walk with him to a building near the swimming pool on the park grounds. The bearded man then had sexual intercourse with Ms. Hannah twice. The black male then appeared at the building and had sexual intercourse with Ms. Hannah while the bearded white male pointed his gun at her. Subsequently, the third man alerted the two men with Ms. Hannah that he thought the police were coming, and all three men ran off.

After the three men left, Ms. Hannah ran to a nearby store where she telephoned the police. She was taken to a hospital and examined.

At a photographic array held four days later on 1 August 1989, both Ms. Hannah and Little identified defendant as the bearded white male assailant. After hearing and denying defendant's motions to suppress the identification testimony the trial court permitted, both Ms. Hannah and Little identified defendant in court as the bearded white male involved in the 28 July 1989 incident.

State Bureau of Investigation forensic serologist Lucy Milks testified that her attempts to apply blood grouping analysis to determine the origin of spermatozoa taken from Ms. Hannah's body and underwear were "inconclusive."

George Turner testified that he had gone with defendant and three other men to Lineberger Park on the night of 28 July 1989 and later saw defendant and a black man holding guns at people in a car. Turner also testified that he saw defendant in the area of the building by the swimming pool and saw a girl lying beside the building tied up. Turner stated that defendant came to Turner's house later that evening with some jewelry which he hid under a board and also told Turner that he had "raped that girl down in the park." Turner also testified that the weapons which defendant and the black man had were a pellet pistol and a BB rifle with a broken stock.

At the close of the State's evidence, the trial court dismissed one count of rape and one count of kidnapping. The jury found defendant guilty of all remaining charges; however, the trial court allowed defendant's post-trial motion to reduce the first degree kidnapping conviction to second degree kidnapping. The trial court entered judgments sentencing him to two consecutive life sentences, a concurrent term of forty years for robbery with a dangerous

weapon, and thirty years for second degree kidnapping to run concurrently with the second life sentence. Defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Sue Y. Little, for the State.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant-appellant.

MARTIN, Judge.

Defendant contends that the trial court erred (1) by denying defendant's motions to suppress the identification testimony by the prosecuting witnesses, (2) by failing to give defendant's requested instruction on eyewitness identification testimony, (3) by allowing the SBI serologist to testify that she could not exclude defendant as the person who deposited semen in the sample taken from the prosecuting witness, and (4) by denying defendant's motion to dismiss the charges of armed robbery. We find no prejudicial error in defendant's trial.

[1] By his first and second assignments of error, defendant contends that the trial court committed reversible error in denying his motion to suppress the identification testimony of witnesses Ms. Hannah and Little as there was a substantial risk of misidentification of defendant. Specifically, defendant contends that the pre-trial identification procedures were impermissibly suggestive and tainted the in-court identification testimony because (1) defendant's picture included in a photographic array contained an ink mark, (2) both Ms. Hannah and Little observed defendant at the probable cause hearing, and (3) Ms. Hannah had an opportunity to view defendant while he was in custody, as well as his booking cards at the Sheriff's Department.

A court must exclude pre-trial identification evidence, as well as any in-court identification testimony derived therefrom, as violating due process where the facts reveal a pre-trial identification procedure so impermissibly suggestive that there is a substantial likelihood of irreparable misidentification. *State v. Pigott*, 320 N.C. 96, 357 S.E.2d 631 (1987); *State v. Harris*, 308 N.C. 159, 301 S.E.2d 91 (1983). Whether there is a substantial likelihood of misidentification depends upon a totality of the circumstances. *Id.* In such a review, the Court must consider:

(1) The opportunity of the witness to view the criminal at the time of the crime; (2) the witness' degree of attention; (3) the accuracy of the witness' prior description; (4) the level of certainty demonstrated at the confrontation; and (5) the time between the crime and the confrontation.

Pigott, at 99-100, 357 S.E.2d at 634.

When the facts found by the trial judge after *a voir dire* hearing on a motion to suppress identification testimony are supported by competent evidence, they are binding on the appellate courts. *State v. Freeman*, 313 N.C. 539, 330 S.E.2d 465 (1985). A determination by the trial judge that the identification testimony had an independent source must be clear and convincing. *Id.* at 544, 330 S.E.2d at 471. For a photographic lineup to be fair, the officers conducting it must do nothing to induce the witness to select one picture over another. *Id.* at 545, 330 S.E.2d at 471.

At *voir dire* hearing on defendant's motion to suppress the identification testimony, the evidence disclosed: Sometime after the incident of 28 July 1989, Ms. Hannah became a dispatcher and clerk for the Gaston County Sheriff's Department. During this time and before defendant's trial, she saw defendant a couple of times as he was brought into the sheriff's office. Ms. Hannah also had access to booking cards kept by the Sheriff's Department including several on defendant. She also testified that she had seen defendant seated at the defense table during the probable cause hearing and identified him at that time.

Ms. Hannah's initial description of her assailant was that he was white, fairly tall, and had long, shoulder-length dark brown hair and a bushy beard, two to three inches long. She has also described him as dirty, wearing blue jeans, a bandanna tied around his head, and having either rotten teeth or no front teeth. Ms. Hannah testified he had "a dark mouth and droopy eyes . . . kind of sunk-in eyes." She could not remember whether the assailant wore a shirt.

Additionally, Ms. Hannah testified as to the conditions surrounding her viewing of the perpetrator. There were lights on in the tennis court to the right of the parking lot, a street light to the left of the car and lights all the way around the pool house located beside the parking lot. Ms. Hannah was in the parking lot area approximately ten minutes during which time she observed

defendant. Although there were no lights on at the building where Ms. Hannah was later raped, the lights from the pool could still be seen, and she spent approximately fifteen minutes with the perpetrator at that building.

Little repeated his initial description of the assailant on *voir dire* as having long hair, a long beard, being skinny and ugly. Little stated the man wore jeans, no shirt and a brimmed "bush hat." Little testified that the lighting conditions were not optimum in the park at the time of the encounter but that he was able to make out the facial features of the perpetrators. Little also observed defendant at the probable cause hearing. Little observed Hannah's assailant for approximately forty-five seconds to a minute and testified that his in-court identification of defendant came from independently recalling seeing his face in Lineberger Park and not from the probable cause hearing or the photographic array.

Detective James Anderson testified on *voir dire* that a picture of defendant shown to Ms. Hannah and Little at a photographic array held four days after the incident and identified by both as their assailant had an unexplainable ink mark on its plastic cover which the other pictures shown to Ms. Hannah and Little did not. Anderson did not believe that the mark had been there at the time of the identification and had never noticed it before. Ms. Hannah took twelve seconds and Little fourteen seconds to identify the photograph of defendant as the perpetrator at the photographic array.

At the conclusion of the *voir dire* hearing, the trial court entered findings of fact and concluded that the evidence supported the findings that both Ms. Hannah and Little had ample opportunity to observe defendant at the time of the crimes and that the pre-trial identification procedures were not impermissibly suggestive.

The trial judge determined that the ink mark on the plastic covering over defendant's picture in the photographic array was not suggestive, but was merely an idle pen scratch and, in any event, was not an indicative mark. The trial judge found that the photographic array was not impermissibly suggestive. The trial judge also concluded that the fact that Ms. Hannah and Little observed defendant seated at the defense table during the probable cause hearing was not impermissibly suggestive. Finally, the court found that the pre-trial identification procedure was not impermissibly suggestive merely because Ms. Hannah had the opportuni-

ty to view defendant, as well as his booking cards, while he was in custody. The trial judge concluded that defendant could come into the view of a prosecuting witness anywhere and that because of Ms. Hannah's previous identifications through admissible photos and at the probable cause hearing, the viewing of defendant by Ms. Hannah at the jail where she worked was harmless and not prejudicial.

We find no error in the denial of defendant's motion and hold that under the totality of circumstances, the pre-trial identification procedures in this case were not so impermissibly suggestive as to give rise to a substantial likelihood of mistaken identification. Both witnesses had ample opportunity to view defendant for several minutes, each of them demonstrated attentiveness to his physical characteristics, each of their prior descriptions of defendant was accurate and conformed to each other's testimony, each demonstrated certainty at all times in identifying defendant's photograph and person, and the length of time between the crime and confrontation was relatively brief, there being only four days between the crime and the photographic array. While defendant points to several instances of conflicting testimony, such as the failure to observe defendant's tatoos and the type of headgear worn by the assailant, a witness does not have to be able to describe with perfect accuracy a person he observes in the process of committing a crime. *State v. Daniels*, 35 N.C. App. 85, 239 S.E.2d 880 (1978). Merely because defendant was the only bearded person in the courtroom at the time and because he was seated at the defense table is not on its face impermissibly suggestive. Our Supreme Court has specifically held that the viewing of a defendant in a courtroom during varying stages of a criminal proceeding is not in and of itself such a confrontation as will taint an in-court identification. *State v. Hannah*, 312 N.C. 286, 322 S.E.2d 148 (1984) (merely because the witness observed the defendant at the preliminary hearing seated at the defense table wearing prison clothes was not impermissibly suggestive). Nor does the fact that Ms. Hannah saw defendant, and his booking cards, in the course of her employment at the Sheriff's Department taint her identification. Our courts have held repeatedly that confrontations between a victim or witness and a suspect following a crime are not automatically so suggestive as to violate a defendant's constitutional rights. *State v. Thomas*, 292 N.C. 527, 234 S.E.2d 615 (1977); *State v. Jordan*, 49 N.C. App. 561, 272 S.E.2d 405 (1980). The findings of the trial court are supported by clear

and convincing competent evidence and are thereby binding on this Court. We find no error in the denial of defendant's motions to suppress the identification testimony of Little and Ms. Hannah.

[2] By defendant's next assignment of error, he contends that the trial court erred when it failed to give his requested jury instruction regarding eyewitness identification testimony. Defendant contends that because the instruction he requested was supported by the law and not given in substance, the trial court erred. We disagree.

Defendant submitted a written request for instructions on eyewitness identification testimony taken nearly verbatim from the 1986 North Carolina Pattern Jury Instructions. This requested instruction included a list of factors for the jury to consider in evaluating eyewitness testimony as to observations of the perpetrator before, at the time of and after the offense. The trial court declined the request and instead gave the Pattern Jury Instruction on eyewitness identification as it was revised in 1989. The instruction as given instructed the jury that the State had the burden of proving the identity of the defendant as the perpetrator of the crime beyond a reasonable doubt, but did not include the list of factors.

A trial court is not required to give a requested instruction in the exact language of the request, but where the request is correct in law and supported by the evidence in the case, the court must give the instruction in substance. *State v. Green*, 305 N.C. 463, 290 S.E.2d 625 (1982). In *Green*, the defendant requested an instruction similar to that requested in this case, and the trial court actually gave an instruction virtually identical to that given in the case *sub judice*. In response to defendant's assignment of error to the failure to grant the requested instruction, the Supreme Court held:

> We think the trial court here gave in substance that portion of the requested instruction which was correct in law. The instruction clearly emphasized the importance of proper identification of the defendant and emphasized that the burden of proving such identity beyond a reasonable doubt was on the State. Read contextually, the charge adequately explained to the jury the various factors they should consider in evaluating the testimony of witnesses. . . . no further instructions were necessary.

Id., at 477, 290 S.E.2d at 633. We conclude that the trial court in this case properly instructed the jury with respect to the identification testimony.

[3] Defendant next assigns as error the admission of testimony by Agent Milks, an expert witness in the area of forensic serology, that she could not exclude defendant as the person who deposited the semen in a sample taken from Ms. Hannah. During the State's case the following exchange took place between the prosecutor and Milks:

> Q. You said that—Agent Milks, you said that they [the serology tests] were inconclusive?
>
> A. That's Correct.
>
> Q. Well, what was it that—did you obtain anything from your analysis that was less than conclusive?
>
> A. I detected the presence of spermatozoa, but I have no opinion as to who that originated from.
>
> . . .
>
> Q. And from your examination of the semen and the blood, you were unable to exclude the blood of [the defendant]—that was submitted for your analysis as the person who deposited the semen.
>
> MR. MORRIS: OBJECTION.
>
> Q. Is that correct?
>
> THE COURT: OVERRULED.
>
> A. That's correct. I cannot exclude him.

Defendant contends that Milks' testimony that she could not "exclude" defendant as the source of the semen was not helpful to the jury and was prejudicially worded to give the impression that Milks believed that defendant was the donor of the semen, but could not establish that fact through use of the serology tests.

A trial court's ruling on an evidentiary point is presumed to be correct. *State v. Herring*, 322 N.C. 733, 370 S.E.2d 363 (1988). Whether a judge's actions amount to reversible error is a question to be considered in light of all of the circumstances. *State v. Heath*, 77 N.C. App. 264, 335 S.E.2d 350 (1985), *rev'd on other grounds*,

316 N.C. 337, 341 S.E.2d 565 (1986). In this case, Agent Milks had earlier testified, without objection, that she had no opinion as to the identity of the person whose spermatozoa she found. Defendant has failed to demonstrate a reasonable possibility that the jury would have reached a different result at trial had the challenged testimony been excluded. N.C. Gen. Stat. § 15A-1443(a) (1988); *State v. Martin*, 322 N.C. 229, 367 S.E.2d 618 (1988). In light of Agent Milks' testimony taken as a whole and the opportunity of defendant to cross-examine Agent Milks at trial, the challenged testimony was not prejudicial nor was there a reasonable possibility that a different result would have been reached if the trial court had excluded the statement. *State v. Ward*, 93 N.C. App. 682, 379 S.E.2d 251, *disc. review denied*, 325 N.C. 276, 384 S.E.2d 528 (1989).

[4] Defendant's final assignment of error is the trial court's denial of defendant's motion to dismiss the charges of armed robbery. Defendant was convicted of robbery with a dangerous weapon. The statutory crime of robbery with a dangerous weapon requires that the dangerous weapon be one which endangers or threatens life. N.C. Gen. Stat. § 14-87 (1986). Defendant contends that because evidence was presented that the victims in this case were robbed with a pellet pistol and a BB rifle with a broken stock, no dangerous weapon was used and the charge of armed robbery should have been dismissed. We disagree.

Our Supreme Court has established rules with which to resolve sufficiency of evidence questions in armed robbery cases where the instrument used appears to be, but may not in fact be a dangerous weapon capable of endangering or threatening life. *State v. Joyner*, 312 N.C. 779, 324 S.E.2d 841 (1985). A summary of those rules relevant to the present case includes:

> In an armed robbery case the jury may conclude that the weapon is what it appears to the victim to be in the absence of any evidence to the contrary. If, however, there is any evidence that the weapon was, in fact, not what it appeared to the victim to be, the jury must determine what, in fact, the instrument was.

State v. Allen, 317 N.C. 119, 125, 343 S.E.2d 893, 897 (1986).

Ms. Hannah testified that one of the perpetrators "had a big gun, [i]t looked like a shotgun," and that another perpetrator whom

Ms. Hannah identified as defendant had a gun in his hand that "looked like a long barrel pistol." Alfred Little described the pistol as "huge" and said that it appeared to be a revolver. The other assailant had a "rifle or shotgun." The only other descriptive evidence regarding the weapons came from witness Turner who testified that he observed defendant and another perpetrator at Lineberger Park on the evening in question from about five or ten feet away. Turner testified that the two men were "holding two guns at the people in the car," and that defendant had a ".357 pellet, CO-2 cartridge gun" and that the other man had "a rifle, a Crossman BB gun. The stock on it was broke off." Turner testified that he owned both guns.

Thus, there is evidence that it appeared to the victims that the robbery was committed with dangerous weapons as well as evidence tending to show that the weapons in question were not dangerous weapons within the contemplation of G.S. 14-87. *State v. Alston*, 305 N.C. 647, 290 S.E.2d 614 (1982). Therefore, the trial court was required to submit the case to the jury on the lesser included offense of common law robbery, as well as armed robbery, and it was for the jury to determine the nature of the weapon used. *Id.; State v. Allen*, 317 N.C. 119, 343 S.E.2d 893 (1986). In this case, the jury was given instructions as to both armed and common law robbery and a definition of "dangerous weapon" as "one which is likely to cause death or serious bodily injury." We find no error in the trial court's denial of defendant's motion to dismiss the charges of armed robbery.

We conclude that defendant received a fair trial free from prejudicial error.

No error.

Judges JOHNSON and GREENE concur.

STATE OF NORTH CAROLINA, ON RELATION OF JAMES E. LONG, COMMISSIONER OF INSURANCE OF NORTH CAROLINA v. AMERICAN SECURITY LIFE ASSURANCE COMPANY OF NORTH CAROLINA

No. 9210SC130

(Filed 6 April 1993)

1. Insurance § 37 (NCI4th)— petition for liquidation—costs of defending

The trial court did not abuse its discretion in awarding respondent costs and fees pursuant to N.C.G.S. § 58-30-95 where an audit revealed that American Security Life Assurance Company (ASLAC) was insolvent within the meaning of N.C.G.S. § 58-30-10(13); the Commissioner of Insurance petitioned for an order of rehabilitation and injunctive relief; the parties entered a consent order in which ASLAC agreed that it would cause its capital and surplus to meet the statutory minimums and that an order of rehabilitation could be entered without further notice if ASLAC failed to meet statutory standards; the order of rehabilitation was entered; the Commissioner as rehabilitator subsequently petitioned for an order of liquidation, declaration of insolvency and injunctive relief; ASLAC filed a response to the request for liquidation asking that the petition be denied, that one disinterested individual be appointed to serve as rehabilitator of ASLAC, and that the order of rehabilitation be continued; after a hearing, the court entered an order of liquidation and injunctive relief; ASLAC subsequently filed a motion for costs and expenses of defense; the North Carolina Life and Health Insurance Guaranty Association filed a brief opposing the motion; and the court ordered the liquidator to pay respondent $149,426.67 of its requested $243,508.09. The directors of an insolvent company are not, as a matter of law, disallowed from defending a petition for liquidation; rather, all of the facts and circumstances of a particular case should be examined in determining whether the defense to liquidation was brought in good faith, with the solvency of the company examined as one of many factors and not as the sole factor in the ultimate decision to award fees and costs. The trial court had ample competent evidence from which it could conclude that the directors of

ASLAC acted in good faith in defending against the petition for liquidation.

Am Jur 2d, Insurance §§ 88 et seq.

2. Insurance § 37 (NCI4th)— insolvent insurer—opposition to petition for liquidation—costs—failure to award full amount

The trial court did not abuse its discretion by failing to award the full amount of requested expenses for opposing a petition to liquidate an insurance company where there was ample evidence with regard to the reasonableness of certain claimed expenses from which the court could make this award. An award of costs and fees pursuant to N.C.G.S. § 58-30-95 is within the discretion of the trial court and will not be overturned absent an abuse of discretion.

Am Jur 2d, Insurance §§ 88 et seq.

Appeal by Petitioner and by Respondent from Order entered 20 November 1991 by Judge L. Bradford Tillery in Wake County Superior Court. Heard in the Court of Appeals 7 January 1993.

Attorney General Lacy H. Thornburg, by Associate Attorney General Anita LeVeaux Quigless, for petitioner.

Hatch, Little & Bunn, by David H. Permar and Michelle Bradshaw, for respondent.

Hunton & Williams, by William S. Patterson, for the North Carolina Life and Health Insurance Guaranty Association, amicus curiae.

WYNN, Judge.

The American Security Life Assurance Company of North Carolina ("ASLAC") is an insurance company licensed and incorporated under the laws of North Carolina. It is a wholly owned subsidiary of the American Security Life Assurance Company of Florida ("ASLAC-Florida"), which in turn is a wholly owned subsidiary of Rebuilding Services, Inc. ("RSI").

In 1990, the North Carolina Department of Insurance ("DOI") conducted a routine audit of ASLAC at its executive offices in Jacksonville, Florida, which audit yielded financial data current through 31 March 1990. This data revealed that ASLAC was insol-

vent within the meaning of N.C. Gen. Stat. § 58-30-10(13). Based on this information, the State of North Carolina, on relation of James E. Long, Commissioner of Insurance of North Carolina, petitioned for an Order of Rehabilitation and Injunctive Relief asking, *inter alia*, that James E. Long, as Commissioner of Insurance, be appointed rehabilitator of ASLAC and that all agents, employees, officers, directors, and stockholders of ASLAC be enjoined from disposing of, wasting or impairing any property of ASLAC and from transacting any business on behalf of ASLAC unless supervised and approved by the rehabilitator.

Subsequent to the aforementioned petition, the parties entered into a Consent Order, dated 1 October 1990, in which ASLAC agreed that it would "cause its capital and surplus to meet the statutory minimums required by N.C. Gen. Stat. § 58-7-75 on or before December 15, 1990 . . . ." If ASLAC failed to do so, the Consent Order provided that an Order of Rehabilitation, already drafted and attached to the Consent Order, could be entered by the trial court without further notice to ASLAC. The determination of whether ASLAC had met the statutory minimums was left to the sole discretion of the DOI.

The Order of Rehabilitation was in fact entered on 17 December 1990. In it the trial court concluded as a matter of law that the Petitioner had demonstrated grounds for entry of the Order and that "[g]ood and sufficient cause justifying the appointment of a rehabilitator for [ASLAC] exists and the interests of its policyholders, creditors, and the public will best be served by the appointment of James E. Long, Commissioner of Insurance of the State of North Carolina as rehabilitator of said [ASLAC]." Commissioner Long appointed Deputy Commissioner Raymond Martinez to supervise the rehabilitation of ASLAC. *See* N.C. Gen. Stat. § 58-30-85 (1991) (the rehabilitator has the power to appoint a special deputy to act for him).

On 8 April 1991, the rehabilitator petitioned for an Order of Liquidation, Declaration of Insolvency, and Injunctive Relief citing as one reason for its petition its belief "that an orderly liquidation of the business of [ASLAC] is in the best interest of policyholders and that the Respondent's financial condition is such that its further transaction of business will be hazardous to its policyholders and to the public . . . ." ASLAC filed a response to the Petitioner's request for liquidation asking, *inter alia*, that the petition be denied,

that one disinterested individual be appointed to serve as rehabilitator of ASLAC, and that the Order of Rehabilitation be continued in effect. On 26 July 1991, after a hearing on the Petition for Liquidation, the trial judge entered an Order of Liquidation and Injunctive Relief. At the aforementioned hearing, Attorney William Patterson testified on behalf of the DOI concerning the merits of the Respondent's recapitalization/rehabilitation plan which involved a plan to transfer ASLAC's shares of common and preferred stock in the Tesoro Petroleum Company ("the Tesoro Plan").

Subsequently, ASLAC filed a Motion for Costs and Expenses of Defense pursuant to N.C. Gen. Stat. § 58-30-95 (1991). William Patterson, this time as counsel for the North Carolina Life and Health Insurance Guaranty Association ("Guaranty Association"), filed a brief opposing the Respondent's motion. Attorney Patterson was also allowed, over the Respondent's objection, to testify on behalf of the Guaranty Association at the hearing. The trial court made findings of fact and conclusions of law and ordered the liquidator to pay to the Respondent $149,426.67 of its requested $243,508.09. From this 20 November 1991 Order both parties appeal.

PETITIONER'S APPEAL

[1] The Petitioner's sole argument on appeal is that the trial court committed reversible error by ordering the payment of costs and other expenses of defending against the Petition for Liquidation from the insolvent estate of ASLAC. We disagree.

The fees and costs at issue in the present case were awarded pursuant to N.C. Gen. Stat. § 58-30-95(a) (1991), which provides that:

> The Court *shall* permit the directors of the insurer to take such actions as are *reasonably necessary* to defend against the petition and *may* order payment from the estate of the insurer of such costs and other expenses of defense *as justice may require.*

(Emphasis added). This provision has not previously been interpreted by our appellate courts. The language contained in the statute, "reasonably necessary to defend," "may order payment," and "as justice may require," however, indicates that the trial court has been granted broad discretion to award the fees and costs incurred in defending against a petition for liquidation. Such broad discretion is clearly consistent with North Carolina case law dealing with

similar issues. *See State ex rel. Ingram v. All American Assurance Co.*, 34 N.C. App. 517, 239 S.E.2d 474 (1977) (in rehabilitation proceedings the trial judge has broad ministerial and initiative authority). Because of the discretionary nature of section 58-30-95, our standard of review on appeal is whether the award constitutes an abuse of the trial court's discretion. Thus, we are bound by the trial court's findings of fact if they are supported by competent evidence. *Nobles v. First Carolina Commun. Inc.*, 108 N.C. App. 127, 423 S.E.2d 312 (1992).

In the Order granting attorney's fees to the Respondent, the trial judge specifically found as fact that:

> 8. The allowed expenses were *reasonably necessary for the defense of the Petition to Liquidate*, and the services performed by the attorneys and consultants, to the extent reimbursement is allowed by this Order, were beneficial to [ASLAC], its creditors and this Court in rendering its decision herein.
>
> 9. The directors of [ASLAC], *in good faith*, believed that the rehabilitation of [ASLAC] was feasible during the entire period [ASLAC] was in rehabilitation.
>
> 10. The former officers and directors made a genuine and reasonable effort at the rehabilitation of [ASLAC].

(Emphasis added).

The Petitioner, relying on case law from other jurisdictions, contends that the trial court's findings are not supported by the evidence because the record clearly establishes that ASLAC was insolvent, its directors did not dispute its insolvency, and, therefore, no reasonable defense to the Petition for Liquidation could be mounted. *See, e.g., O'Malley v. Continental Life Ins. Co.*, 121 S.W.2d 834 (Mo. 1938); *In re Ambassador Ins. Co.*, 571 A.2d 54 (Vt. 1989). That is, the Petitioner would have this Court adopt a rule limiting the trial court's discretion to award fees and costs from the liquidated estate to those instances where the Respondent challenges a Petition for Liquidation based on a reasonable belief that the company was solvent. *See Ambassador*, 571 A.2d at 59 (citing *O'Malley*, 121 S.W.2d at 840-41) ("good faith must be manifested in two ways: (1) the opposition efforts must be made for the benefit of the policyholders, stockholders, and creditors, and (2) the resulting fees must be incurred with the good faith belief, based on reasonable grounds, that the company is actually solvent"). This would narrow

an otherwise broad general rule which allows such fees and costs to be awarded where they are incurred in good faith and upon reasonable grounds, not limited to the solvency of the company. *See Anderson v. Great Republic Life Ins. Co.*, 106 P.2d 75, 80 (Cal. 1940). Clearly our legislature has conformed to the general rule in enacting section 58-30-95, and, if it had intended to confine the trial court's discretion to instances where the Respondent had a good faith belief that the company was solvent, it was within its power to include language to that effect in the provision.

No party to this action disputes that N.C. Gen. Stat. § 58-30-95 contains an implied element of good faith. Moreover, no trial court awarding costs and fees "as justice may require" could allow an award of attorney's fees based on a bad faith defense without abusing the broad discretion granted it by the statute. We find, however, that the parameters of good faith proposed by the Petitioner are an unwarranted infringement on the trial court's discretionary power, as well as a grant of unbridled decision-making power to the DOI. *See Anderson*, 106 P.2d at 82 (if attorney's fees and costs were not allowed for a good faith defense, "the hands of [the company's] directors would be tied and there would be no effective recourse from unwarranted official action"). We conclude, therefore, that the directors of an insolvent company are not, as a matter of law, disallowed from defending against a Petition for Liquidation. Rather, all of the facts and circumstances of a particular case should be examined in determining whether the defense to liquidation was brought in good faith, with the solvency of the company examined as one of many factors, and not as the sole factor, in the ultimate decision to award fees and costs. *See id.* at 80 (the allowance of attorneys fees and costs rests in the sound discretion of the trial court in view of all the facts and circumstances).

The Guaranty Association, *amicus curiae* in the present case, argues that, even assuming that solvency is not the deciding factor in allowing attorney's fees and costs, the Respondent still cannot recover because no viable plan for the rehabilitation of ASLAC exists. In support of this, it points to the trial court's findings of fact in the Order for Liquidation:

> 8. On February 22, 1991 Mr. T. Keith Perry as Treasurer of Rebuilding Services, Inc., advised Mr. Martinez that Mr. Raymond K. Mason met with Mr. Peter V. Hadley of

> Metropolitan Life Insurance Company in New York and presented to him a written proposal to purchase the Tesoro voting securities, preferred and common stock of the Tesoro Corporation. The holder of Tesoro Securities is the Metropolitan Life Insurance Company. As of February 22, 1991 he had not received a response from Metropolitan with respect to the Tesoro stock;
>
> 9. On May 29, 1991 Mr. Raymond Martinez, Special Deputy and rehabilitator of [ASLAC] received a letter from John S. Boritas of Metropolitan Life Insurance. Mr. Boritas informed Mr. Martinez that . . . [Metropolitan Life Insurance Company had] declined the purchase proposal put forward by Mr. Raymond K. Mason and have informed him of our decision. . . . The Court finds by the greater weight of the evidence presented in this proceeding that the unchallenged letter of Mr. John Boritas dated May 29, 1991 is an unequivocal rejection of the so-called schematic plan for recapitalization as presented by representatives of the Respondent. . . .
>
> . . . .
>
> 11. The only letter received by the Court into evidence, specifically referencing to the Tesoro securities consisting of preferred and common stock of Tesoro Petroleum Company has been a letter of May 29, 1991;
>
> 12. The Court finds that [ASLAC] never had a recapitalization plan in place or a plan which would make [ASLAC] solvent or which would make it possible to rehabilitate [ASLAC] within the requirements of Chapter 58 of the North Carolina General Statutes;
>
> 13. The Court finds that there has never been a recapitalization plan in place during the period of rehabilitation nor does it find that there was such a plan in place as of July 9, the date the decision was announced in open court.
>
> . . . .
>
> 16. . . . [T]he recapitalization schematic as presented was inadequate and insufficient.

The trial court's ultimate decision that the Tesoro Plan was not sufficient to rehabilitate ASLAC, however, is very different from its finding that the plan was presented in good faith. Good faith

is not measured by the outcome of the litigation, and even an unsuccessful defense can be presented in good faith. *See Anderson*, 106 P.2d at 80 ("[e]ven if it turns out that a case is made for the interference of the state, so long as the defense was made in good faith and upon reasonable grounds, there is apparent justice in subjecting the property and fund involved in the litigation to expenses incurred in discharging a general duty cast upon the corporation and its trustees to take all reasonable means for its protection").

The trial court had ample competent evidence from which it could conclude that the directors of ASLAC acted in good faith in defending against the Petition for Liquidation. The trial court heard evidence with regard to the Tesoro Plan which tended to show that, although the plan had originally been rejected, it could be put into effect with the support of the Petitioner. The Respondent also presented evidence which showed that, while the Petitioner calculated ASLAC's insolvency at $12 million, the Respondent's calculations showed that insolvency to be $3 million. We find that there is competent evidence in the record to support the trial court's finding that the Respondent acted in good faith in defending against the Petition for Liquidation.

Moreover, we note that counsel for the Petitioner, at the hearing on the Motion for Costs and Fees, presented to the court an itemized list which denoted the costs and fees that it deemed reasonable and unreasonable. At no point during the hearing did the Petitioner argue that the Respondent was not entitled to be compensated, and in fact made the following remarks to the court:

> Your Honor, certainly you know that this is a determination in the discretion of Your Honor as set out by 58-30-95. There's nothing mandating payment. It's a determination made after, we would submit, an assessment of how reasonable the expenses submitted may be.
>
> . . . .
>
> We would further submit that, while the General Statutes have provided a means for reasonable expenses to be paid—and we submit, Your Honor, *that certainly the expenses should be paid.* We submit that 58-30-95 should not be a medium by which lengthy litigation and its costs, win or lose, be borne by the troubled company.
>
> . . . .

> I don't want to impress upon the Court the importance of other delinquency proceedings being viewed a win/win situation for attorneys in defense of these delinquent companies. *I certainly submit that these attorneys should be paid.*

(Emphasis added).

Rather, it was the counsel for the Guaranty Association, the *amicus curiae* in the case at bar, who presented the trial court with the case law from other jurisdictions to support his contention that, because ASLAC was insolvent, the Respondent could not in good faith challenge the Petition for Liquidation. In response the trial judge stated:

> I don't accept the definition of solvent, it's good faith; insolvent, it's bad faith as in the cases you have cited.
>
> . . . .
>
> The whole idea of rehabilitation is to take a company which admittedly is insolvent and, through your own bootstraps or in some fashion or the infusion of new capital, will pull it back into a solvent state. In the same order that you quoted from, as I remember it, as an observation by the Court, it has found that the directors did make a good-faith effort in their dealings with the Insurance Commissioner.

This Court finds the trial court's conclusion to be sound, made with full knowledge of the law as it exists in other jurisdictions, and based upon competent evidence. We, therefore, conclude that the trial court did not abuse its discretion in awarding the Respondent costs and fees pursuant to N.C. Gen. Stat. § 58-30-95.

RESPONDENT'S APPEAL

The Respondent first argues that the trial court should have sustained its objection to the appearance of William S. Patterson as counsel for the Guaranty Association because the appearance violated Rule 5.2 of the Rules of Professional Conduct. The Respondent, at oral argument, however, agreed that it had suffered no prejudicial error as a result of Mr. Patterson's testimony. In light of our holding in the Petitioner's Appeal, we too find that no prejudice was suffered by the Respondent and, therefore, find it unnecessary to pass on the merits of this argument.

[2] The Respondent's second and final argument contends that the trial court abused its discretion by failing to award the full

amount of requested expenses, based on the uncontested affidavits in support of the award which established that these expenses were reasonably necessary to defend against the petition to liquidate. We disagree. As we have stated, *supra*, with regard to the Petitioner's Appeal, an award of costs and fees pursuant to N.C. Gen. Stat. § 58-30-95 is within the discretion of the trial court and will not be overturned absent an abuse of that discretion. There was ample evidence presented by the Petitioner with regard to the reasonableness of certain expenses claimed by the Respondent from which the trial court could have awarded the fees and costs in the amounts in which it did.

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

Affirmed.

Judges EAGLES and ORR concur.

IN RE: BECK, JEANNE ANNE, MINOR CHILD

No. 9129DC1221

(Filed 6 April 1993)

1. Searches and Seizures § 32 (NCI3d)— termination of parental rights—videotapes and other sexually explicit materials—criminal charges dismissed—disposition of materials

Videotapes and other sexually explicit materials were admissible in a termination of parental rights hearing where deputies went to respondents' house to measure the temperature of the water heater; they seized approximately 1,100 videotapes and other sexually explicit materials dealing with female bondage; respondents were arrested and charged with sexual exploitation of a minor and taking indecent liberties with a minor; DSS petitioned to terminate respondents' parental rights; the criminal charges were dismissed; and the Sheriff's Department transferred the seized materials to DSS. Although respondents argue that the North Carolina Constitution prohibits the State from depriving a person of property, that DSS is not a law enforcement agency, that the transfer of goods was not permitted under N.C.G.S. § 15A-258, and that the materials were

inadmissible in the termination of parental rights hearing because they were illegally held and transferred, there is nothing to indicate that respondents ever requested that the materials be returned and, even if they had been returned, DSS could have obtained them by subpoena.

2. **Evidence and Witnesses § 1732 (NCI4th)— termination of parental rights—1,100 sexual videotapes—all placed in courtroom—no error**

There was no error in a termination of parental rights proceeding where DSS brought 1,100 alleged sexual videotapes into the courtroom. Although respondents argued that not all of the tapes had been viewed by a DSS caseworker, that some of the tapes did not involve sexual subject matter, that some of the tapes were mislabeled, and that permitting all of the tapes to be placed in the courtroom overwhelmed the trial court, it is presumed that the judge disregarded any incompetent evidence. The trial court's finding of fact focuses on the labeling of the videotapes rather than the actual content and was not dependent upon the number of videotapes actually viewed by the DSS caseworker.

3. **Evidence and Witnesses § 1732 (NCI4th)— termination of parental rights—sexual videotapes—relevant**

Videotapes and other sexual materials were relevant and admissible in a termination of parental rights proceeding where the materials were found in respondents' bedroom or underneath their bed and not in the children's bedroom. A psychologist testified that the seven-year-old child told her that she had seen two videotapes involving sexually explicit material, including female bondage, in the presence of her parents and that she could be heard asking in a videotape made by her father, "What are those girls doing in those pictures? I want to be in those pictures." Respondent answered "I'll put you in those pictures later." The materials were relevant to show the home environment of the children and to show the nature of respondents' supervision of the children.

4. **Parent and Child § 1.6 (NCI3d)— termination of parental rights—prior order—evidence sufficient**

There was no error in a termination of parental rights proceeding based on neglect in the denial of respondents' motion to dismiss where the court correctly admitted a prior

order adjudicating the child to be an abused juvenile and considered evidence of the circumstances before and after the prior adjudication of abuse, and evidence was presented that respondents had refused to submit to psychological evaluation and treatment and that there was no improvement in respondents' living and employment conditions from August 1990 to March 1991.

Am Jur 2d, Parent and Child § 34.

Physical abuse of child as ground for termination of parent's right to child. 53 ALR3d 605.

5. **Parent and Child § 1.6 (NCI3d)— termination of parental rights—findings—supported by evidence**

The trial court did not err in a termination of parental rights proceeding by finding that the child had observed sexually explicit photographs being videotaped by her father or by correlating respondents' interest in sexual bondage and torture and respondents' treatment of their children. Erroneous findings that respondents had taught the child to use the term "lolly pop" when referring to a penis and that she had seen a sexually explicit movie on television at her parents' house were not prejudicial.

Am Jur 2d, Parent and Child § 34.

Sexual abuse of child by parent as ground for termination of parent's right to child. 58 ALR3d 1074.

Appeal by respondents from judgment entered 21 May 1991 by Judge Robert S. Cilley in McDowell County District Court. Heard in the Court of Appeals 1 December 1992.

Goldsmith & Goldsmith, P.A., by James W. Goldsmith, for petitioner appellee, McDowell County Dept. of Social Services; and Story, Hunter & Evans, P.A., by W. Hill Evans, for Guardian Ad Litem of Minor Child appellee.

Stephen R. Little for respondent appellant Robert Leon Beck; and Yancey and Pool, by C. Randy Pool, for respondent appellant Denise B. Beck.

COZORT, Judge.

Respondents appeal from an order terminating parental rights to their two minor children on the grounds of neglect. We affirm.

Respondents are the parents of Jeanne Anne Beck, born 8 November 1985, and Susan Diane Beck, born 1 October 1973. On 15 January 1990 respondents took Jeanne to the McDowell Hospital for burns suffered from hot water. Respondents claimed that Jeanne burned herself when she fell into the bathtub. The physician who examined Jeanne concluded that the burns were consistent with the child having been dipped into hot water. Jeanne was placed in foster care on that date. On 26 January 1990, she was adjudicated an abused juvenile as defined by N.C. Gen. Stat. § 7A-517(1) (1989). On 1 February 1990, pursuant to a search warrant, deputies from the McDowell County Sheriff's Department, went to respondents' house to measure the temperature of the water heater. While there, the officers discovered and seized approximately 1,100 videotapes and other sexually explicit materials dealing with female bondage. Susan was placed in foster care on 2 February 1990 and subsequently adjudicated a dependent juvenile pursuant to N.C. Gen. Stat. § 7A-517(13) (1989).

Respondents were arrested and charged with sexual exploitation of a minor and taking indecent liberties with a minor. Respondents remained incarcerated from 5 February 1990 to 17 August 1990 pending the disposition of the criminal charges. On 20 June 1990, the McDowell County Department of Social Services (DSS) petitioned to terminate respondents' parental rights. The criminal charges were dismissed on 11 February 1991. The Sheriff's Department then transferred the seized materials to DSS after the charges were dismissed. After respondents' release, DSS offered numerous services to respondents to improve their living and employment conditions. Respondents did not seek any counseling or treatment. The termination of parental rights (TPR) hearing began on 13 May 1991, with Judge Robert S. Cilley presiding. After the three-day hearing, Judge Cilley found both children to be neglected and that there was a reasonable likelihood that the neglect would reoccur if the children were placed back in the care of respondents. Judge Cilley then ordered the termination of respondents' parental rights. From the order, respondents appeal.

We note initially that respondents' appeal as to Susan is now moot since she has reached the age of majority. As to Jeanne,

respondents argue that the trial court erred: (1) by permitting witnesses to testify about materials unconstitutionally seized from respondents and which were not relevant to the issues before the court; (2) in failing to grant the motion to dismiss or in concluding that the child was neglected; (3) in finding that a homemade video was made "with the child apparently observing the photographs being videotaped by her father"; (4) (a) in finding that "if the parents have kept their interests and activities private and isolated to themselves, then the children's well-being is not impaired. As it happens, the contrary is the case" and (b) in finding that "[t]he younger child, Jeanne, was taught to call the penis a lolly pop"; (5) in finding that Jeanne "had seen a picture on T.V. at her parents' house which showed a boy's penis"; (6) in concluding that all the findings of fact were supported by clear, cogent, and convincing evidence; and (7) in concluding that respondents' lifestyle created a reasonable likelihood that the neglect would reoccur if the children were placed back in the respondents' care.

[1] Respondents make three arguments pertaining to their first assignment of error. First, respondents argue that the Sheriff's Department had a duty to return to respondents all the seized videotapes and other material after the criminal charges had been dismissed. Respondents cite no North Carolina case law on point. They argue, however, that the North Carolina Constitution prohibits the State from depriving a person of property. Respondents further cite N.C. Gen. Stat. § 15A-258 (1988) which provides that seized materials shall be held by the person applying for or executing the search warrant, or the agency by whom that person is employed, or any other law enforcement agency or person for evaluation or analysis, unless the court orders the materials to be retained by the court or delivered to another court. Respondents argue that DSS is not a law enforcement agency and that the transfer of goods was not permitted under § 15A-258. Since the materials were illegally held and transferred, respondents argue, the materials were inadmissible as evidence in the termination of parental rights hearing. We are unpersuaded by respondents' argument and decline to find that the Sheriff's Department acted unconstitutionally or illegally in transferring the materials to DSS. In support of our conclusion, we note that there is nothing in the record or briefs to indicate that respondents ever requested that the materials be returned. We further note that even if the materials had been returned immediately after respondents' release,

DSS could have obtained the materials for use in the TPR hearing by way of subpoena.

[2] Second, respondents argue that DSS should not have been permitted to bring all 1,100 alleged sexual videotapes into the courtroom because not all the tapes had been viewed by a DSS caseworker, some of the tapes did not involve sexual subject matter, and some of the tapes were mislabeled. Permitting all the videotapes to be placed in the courtroom, respondents argue, overwhelmed the trial court, thereby prejudicing respondents. We disagree. In a bench trial, it is presumed that the judge disregarded any incompetent evidence. *In re Paul*, 84 N.C. App. 491, 497, 353 S.E.2d 254, 258, *cert. denied*, 319 N.C. 673, 356 S.E.2d 779 (1987), *cert. denied*, 484 U.S. 1004, 98 L.Ed.2d 646 (1988). The trial court found that the Sheriff's deputies had seized "[a]pproximately 1,100 videotapes of various movies, including a catalog of the tapes, with a substantial number of the tapes being titled and cataloged consistent with explicitly sexual themes, especially sexual bondage." The trial court's finding of fact does not focus on the actual content of the videotapes, but rather the labeling of the videotapes. The finding of fact is not dependent upon the number of videotapes actually viewed by the DSS caseworker. Respondents' argument is without merit.

[3] Third, respondents argue that the materials were irrelevant to the TPR hearing. Respondents rely upon the testimony of DSS caseworker Lisa Greene that all of the videotapes or other sexual material were found in the respondents' bedroom or underneath the respondents' bed and not in the children's bedroom. Since the children did not have access to the materials, respondents argue, the materials were irrelevant to the issue of neglect. Relevant evidence is such evidence "having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401 (1992). In the present case, DSS petitioned the court to terminate parental rights on the grounds of neglect of the minor children. A neglected juvenile is one who "does not receive proper care, supervision . . .; or . . . lives in an environment injurious to his welfare . . . ." N.C. Gen. Stat. § 7A-517(21) (Cum. Supp. 1992). Petitioner argues, and we agree, that the materials were relevant to show the home environment of the children. We find the materials also relevant to show the nature of respondents' supervision of the

children. Madolyn Tyson, a psychologist, testified that Jeanne, the seven-year-old child, told her that in the presence of her parents she had seen two videotapes involving sexually explicit material, including female bondage. In addition, in one of the videotapes made by Jeanne's father and introduced into evidence, Jeanne can clearly be heard asking her father: "What are those girls doing in those pictures. I want to be in those pictures." Respondent answered, "I'll put you in those pictures later." We find the evidence relevant and admissible. Respondents' first assignment of error is overruled.

[4] In their second assignment of error, respondents argue that the trial court erred in failing to grant the motion to dismiss, arguing there was insufficient clear, cogent, and convincing evidence to prove that Jeanne was abused or neglected. Specifically, respondents contend that the prior adjudication of abuse should not be dispositive of the issue of neglect in the TPR hearing. The respondents are correct that in a termination proceeding neglect must be proven by clear, cogent, and convincing evidence, *see In re Matter of Montgomery*, 311 N.C. 101, 316 S.E.2d 246, 252 (1984), and that the trial court may not base a finding of neglect justifying termination of parental rights solely on a prior adjudication of abuse or neglect. *See In the Matter of Ballard*, 311 N.C. 708, 714, 319 S.E.2d 227, 231-32 (1984). Although not determinative of the ultimate issue, a prior adjudication of abuse or neglect is admissible in a termination proceeding. *Id.* at 713-14, 319 S.E.2d at 231.

> The trial court must also consider any evidence of changed conditions in light of the evidence of prior neglect [or abuse] and the probability of a repetition of neglect [or abuse]. The determinative factors must be the best interests of the child and the fitness of the parent to care for the child *at the time of the termination proceeding*. . . .
>
> * * * *
>
> [T]he trial court must admit and consider all evidence of relevant circumstances or events which existed or occurred *either before or after the* prior adjudication of neglect [or abuse].

Id. at 715-16, 319 S.E.2d at 232-33 (citations omitted) (emphasis in the original).

In the case at bar, the trial court correctly admitted the prior order adjudicating Jeanne to be an abused juvenile. The order contained detailed findings of fact concerning the abuse. In finding that Jeanne was neglected, the trial court did not rely solely upon the prior adjudication of abuse. It also considered evidence of the circumstances before and after the prior adjudication of abuse. Evidence was presented to the trial court that the respondents had refused to submit to psychological evaluation and treatment and that there was no improvement in the respondents' living and employment conditions from August 1990 to March 1991. Based upon the evidence, the trial court concluded that Jeanne was neglected and that such neglect was likely to reoccur if she were placed back in the care of the respondents. We find no error. Respondents' second assignment of error is without merit.

[5] In their third, fourth, and fifth assignments of error, respondents argue that the trial court erred in making the following findings of fact:

> [15.](e) Among the videotapes found in the respondents' possession, was a videotape showing photographs apparently cut out from magazines, depicting nude women that are bound and gagged. During the course of this video, the voice of the child, Jeanne Anne Beck, is recognizable, said child asking her father questions as the video is being made with the child apparently observing the photographs being videotaped by her father.
>
> * * * *
>
> [16.] Mental activity is significant only to the extent that it has practical consequences; in other words, what doesn't matter, doesn't matter. If the parents have kept their interests and activities private and isolated to themselves, then the children's well-being is not impaired. As it happens, the contrary is the case. The interest of the respondents—and the Court finds no grounds to distinguish between them as to this—in seeing women in postures of humiliation and degradation, and in simulated situations of torture and rape, finds reflection in the respondents' treatment of their girl children.
>
> * * * *
>
> The younger child, Jeanne, was taught to call the penis a lolly pop, a type of candy consumed by licking and sucking,

which (in light of her having been made to kiss her father's organ, as to which "he was happy, I was sad) cannot be mere happenstance.

Women are not respected by the respondents, and that attitude is detectable in the way they treated their girl children, Jeanne's burn being perfectly consistent with this analysis. Their obsession with seeing women abused and degraded had an effect on how they treated their children. It was a bad effect, and the Beck household was at the time the petition for termination was taken was an environment injurious to the children's welfare.

* * * *

19. . . . The child also reported to the psychologist that she had seen a picture on T.V. at her parents' house which showed a boy's penis, or, in the child's terms, "lolly pop," boys with "rubber bands" on their heads, and girls tied up.

We address each finding of fact sequentially. As to finding of fact 15(e), respondents argue that there was no evidence that Jeanne was actually observing the pictures her father was videotaping. A social worker, Lori Reel, testified that she had observed the videotape in question and recalled hearing Jeanne on the videotape ask her father a question such as, "What are those girls doing in those pictures? I want to be in those pictures." She further testified that she recalled Jeanne's father saying, "Don't get on the bed, you are going to mess that up." We find that the trial court could reasonably infer from the evidence that Jeanne had observed the photographs being videotaped by her father. Respondents' argument is without merit.

As to finding of fact 16, respondents argue that (1) there was no evidence they had not kept their interest in bondage to themselves because all the videotapes and materials were found in the respondents' bedroom; and (2) the fact that respondents had a strong interest in sexual bondage was not a basis for finding that such interest had a bad effect on the children or that the environment was injurious to the children's welfare. We disagree. The following evidence was presented to the court. The trial court found that, during a search of the respondents' home, deputies seized (1) approximately 1,100 movies and a catalog of the tapes indicating the tapes had sexually explicit themes; (2) a quantity of photographs

of nude women, many being bound and gagged, including photographs of Mrs. Beck; (3) two trunks full of pictures showing, or altered to show, women gagged, tied up, or both; and (4) at least two Barbie-type dolls, both of the dolls being bound and gagged. In addition to the physical evidence, witnesses gave the following testimony. Ms. Reel, a social worker, testified that she heard Jeanne's voice on a homemade sexually explicit videotape. Both Ms. Reel and Dr. Tyson, the psychologist, testified that Jeanne had made statements that she had seen sexually explicit videotapes. Dr. Tyson also testified that Jeanne had stated that in her mother's presence she had kissed her father's "lolly pop" and her mother had laughed. Jeanne also told Dr. Tyson that Jeanne's father had touched and kissed Jeanne's vagina. In addition to the evidence of sexual abuse, there was evidence of physical abuse set forth in the prior order adjudicating Jeanne to be an abused juvenile. In that order the trial court found that Jeanne suffered burns consistent with having been dipped in scalding water. We find ample evidence to support the trial court's correlation between the respondents' interest in sexual bondage and torture and the respondents' treatment of their children. The trial court did not err.

In regard to finding of fact 16, respondents also argue that there was insufficient evidence to support a finding that respondents taught Jeanne to use the term "lolly pop" when referring to a penis. Petitioner concedes, and we agree, that there was no direct evidence that respondents taught her to use the word. If the erroneous finding is deleted, there remains an abundance of clear, cogent, and convincing evidence to support a finding of neglect. We find no prejudicial error.

As to finding of fact 19, respondents argue that there was no evidence presented that Jeanne had seen a sexually explicit movie on television "at her parents' house." Respondents are correct, but we find the error to be harmless. As petitioner argues, the fact that Jeanne saw a sexually explicit movie in her parents' presence is the core of the finding which supports a conclusion that Jeanne was neglected. Where Jeanne saw the movie is irrelevant to the issue of proper care and supervision.

We have reviewed respondents' remaining assignments of error and find them to be merely repetitive and without merit. The order below is

Affirmed.

Judges GREENE and LEWIS concur.

BOGUE SHORES HOMEOWNERS ASSOCIATION, INC. AND THE BOARD OF DIRECTORS OF BOGUE SHORES HOMEOWNERS ASSOCIATION, INC. v. TOWN OF ATLANTIC BEACH

No. 923SC191

(Filed 6 April 1993)

1. **Municipal Corporations § 185 (NCI4th)— water rates—motel-condominium—minimum monthly charge**

The trial court did not err by granting summary judgment for defendant on the issue of whether a minimum monthly charge assessed a motel-condominium was arbitrary or discriminatory where title was acquired to a motel in 1981; the rooms were modified by the addition of permanent kitchen facilities and by combining rooms; a Declaration of Unit Ownership was recorded which established a homeowner's association; the rooms were sold as condominium units; the majority of owners choose to participate in a rental program whereby a manager is employed to rent rooms on a nightly to weekly basis; a front desk is staffed and maid and linen service is provided; plaintiffs advertise as Bogue Shores Motel-Condominiums; defendant annexed the property; defendant had a multi-rate water schedule which established a minimum monthly rate for single residential or commercial users depending on the size of the meter, or service line; the monthly minimum for customers with multiple units served by a single service line is based on the number of units in the development, with motels paying $8.00 for every three rooms and residential condominiums paying $8.00 per unit or usage, whichever is greater; and defendant advised plaintiffs that they would be charged at the rate for residential condominiums. It is apparent that Bogue Shores Motel-Condominiums fits the common, ordinary definition of both "condominium" and "motel," however, plaintiffs' property is a condominium complex within the context of defendant's water ordinance. The fact that many

of the individual condominium owners choose to operate like a motel is not determinative.

2. **Municipal Corporations § 185 (NCI4th)— water rates—motel-condominium—multi-rate schedule—not discriminatory**

The trial court properly granted summary judgment for defendant on the issue of whether a multi-rate water schedule based on the size of the service line was discriminatory or arbitrary where plaintiffs, the owners of Bogue Shores Motel-Condominiums, contended that defendant's water policy is discriminatory because it does not uniformly charge for minimum monthly water service. Defendant's schedule charges multiple unit residential customers with one service line a monthly minimum per unit, as if each unit was equipped with a separate line. Charging a condominium complex based only on the size of the service line rather than on the number of residential units in the complex would unfairly discriminate against single residential customers because it would place an unfair portion of the cost of water service on them.

3. **Municipal Corporations § 185 (NCI4th)— water rates—impact fee—summary judgment premature**

Summary judgment for plaintiffs was premature on the issue of whether an impact fee for connecting a three-inch water service line was arbitrary and capricious where defendant waived the fee pursuant to an unwritten policy for newly annexed areas, the record does not specifically indicate whether defendant determined at any point that plaintiffs were no longer eligible for the impact fee waiver, plaintiffs do not challenge the right of defendant to charge or waive an impact fee, there is no evidence that defendant has demanded payment of the fee, and plaintiffs have not sought declaratory relief.

Appeal by plaintiffs and defendant from order entered 26 November 1991 in Carteret County Superior Court by Judge James Llewellyn. Heard in the Court of Appeals 3 February 1993.

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

Richard L. Stanley for defendant-appellee.

GREENE, Judge.

Plaintiffs appeal from an order of the trial court entered 26 November 1991, in part granting defendant's motion for summary judgment. Defendant appeals from the same order in part granting summary judgment in favor of plaintiffs.

The evidence before the trial court at the summary judgment hearing established that in 1981, Morris and Mary Lucy Cherry acquired title to a 150-room motel located near the town of Atlantic Beach, North Carolina. The Cherrys modified the rooms, which contain either 488 or 282 square feet, by adding to each permanent kitchen facilities and by combining two of the rooms to make one unit, and pursuant to N.C.G.S. §§ 47A-2 and -13, recorded in the Carteret County Registry a "Declaration of Unit Ownership of Bogue Shores Condominiums" dated 5 October 1991 (the Declaration). The Declaration established Bogue Shores Homeowner's Association, Inc., a plaintiff herein along with its board of directors. The individual rooms were then sold as condominium units. Pursuant to the Declaration, each owner of one of the 149 Bogue Shores condominium units also owns an interest in common areas, including a swimming pool, utility areas, parking areas, an office and manager's apartment, and grassed areas. The Declaration states that the use of each unit is restricted to "single-family residential purposes."

Even though the individual rooms are separately owned, a majority of the owners choose to participate in a rental program whereby a manager is employed to rent rooms on a nightly to weekly basis. A "front desk" is staffed with clerks who register guests. The rooms, which open directly onto the parking area, are furnished, and maid and linen service is provided. Plaintiffs advertise as "Bogue Shores Motel-Condominiums." The Declaration provides that "the office and manager's apartment building or any portion thereof may be used by the association for any lawful purpose which benefits the members thereof" and that the unit owners may lease their units. The owners, however, are not required to lease their units.

On 28 February 1987, the town of Atlantic Beach, defendant herein, annexed the property owned by plaintiffs. As a result, plaintiffs in the summer of 1988 had the option of connecting to defendant's water supply system, and were so informed by defendant. Defendant's water policy, established in 1986 pursuant to the authority granted in N.C.G.S. § 160A-311 *et seq.* and amended

in 1989 and 1991, contains a multi-rate schedule which establishes a minimum monthly rate for single residential or commercial users depending on the size of the customer's meter, or service line. For example, the minimum monthly rate for a single customer with a three-inch line is $125.00; those with a three-quarter inch line pay a minimum of $8.00. The policy also establishes a rate for customers with multiple units which are served by a single service line, such as condominium and apartment complexes and hotels and motels. The monthly minimum for such customers is based, not on the size of the service line, but on the number of units in the development.

Section 22 of defendant's water policy requires payment of an "impact fee" for new or modified services which, according to the policy, shall be used to fund system improvements and modifications. For connection of a three-inch line, the impact fee is $15,000.00. According to plaintiffs, it is defendant's unwritten policy to waive the impact fee for customers in newly annexed areas, and, in fact, when defendant notified plaintiffs that water service was available, it informed plaintiffs that they had thirty days to apply in order to avoid the impact fee.

After receiving notification from defendant, plaintiffs immediately applied for water service and requested to be charged either according to the size of the building's service line (i.e., three inches, for a minimum monthly bill of $125.00), or at the rate for hotels and motels, which, pursuant to defendant's water policy, is $8.00 per every three rooms in the establishment. Defendant, however, advised plaintiffs that they would be charged at the rate for residential condominiums. This rate is a monthly minimum of $8.00 multiplied by the number of units in the complex, or usage, whichever is greater. For plaintiffs, this amounts to $8.00 times 149 units, or $1,192.00 per month, for an annual minimum total water bill of $14,304.00. Plaintiffs unsuccessfully appealed this decision to the Board of Commissioners of the Town of Atlantic Beach in October, 1988, and on 25 August 1989, filed the complaint in the instant action.

Plaintiffs' complaint alleges that their property is "substantially similar to a motel for purposes of water service and billing by defendant" and that therefore they are entitled to connect to defendant's water system and be billed at the rate for hotels and motels. Plaintiffs further allege that defendant's water rate schedule is arbitrary and discriminatory in violation of its ordinances and

in violation of the Equal Protection Clause of Article I, Section 19 of the North Carolina Constitution and of the provisions of N.C.G.S. § 160A-314.

Plaintiffs and defendant filed cross-motions for summary judgment. The trial court, after consideration of the pleadings, a deposition, affidavits, exhibits to the deposition and affidavits, briefs, and arguments of the attorneys for the parties, entered an order on 26 November 1991, in part granting summary judgment in favor of defendant on plaintiffs' claims. The court, however, in part granted summary judgment for plaintiffs on the ground that the portion of defendant's water policy which would require that plaintiffs pay an "impact fee" of $15,000.00 for a three-inch service line connection is arbitrary and capricious. Both parties appeal.

The issues are whether the evidence presented at the summary judgment hearing established that (I) defendant pursuant to its water policy properly charged plaintiffs for water service at the rate established for condominiums; (II) defendant's water ordinance is not arbitrary or discriminatory; and (III) whether defendant required payment by plaintiffs of a $15,000.00 "impact fee" for connection of plaintiffs' three-inch service line, and, if not, whether the trial court's granting of summary judgment on this issue was premature.

Summary judgment is proper "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that any party is entitled to a judgment as a matter of law." N.C.G.S. § 1A-1, Rule 56 (1990).

PLAINTIFFS' APPEAL

I

[1] Plaintiffs argue that the evidence presented by the parties establishes that the property at issue is for all practical purposes a motel and that defendant violated its water policy by charging plaintiffs for water at the rate for condominiums. In the alternative, plaintiffs argue that the evidence conflicts and that there is a genuine issue of material fact with regard to the status of their property as a motel or a condominium complex and, therefore, that summary judgment was improperly granted on this issue.

Contrary to plaintiffs' contention, the facts are not in dispute; rather, all of the evidence establishes that the rooms were in 1981 modified by adding kitchens and then individually sold as condominium units for "single-family residential purposes" pursuant to a declaration of unit ownership; that plaintiffs, however, continued a traditional motel operation, with the majority of owners renting out their furnished units by the day or week, and the provision of a manager, and linen and maid service; that plaintiffs advertise as "Bogue Shores Motel-Condominiums"; and that owners are not required to lease their units.

It is apparent based on the evidence in the record that "Bogue Shores Motel-Condominiums" fits the common, ordinary definition *both* of "condominium" and "motel." *See Webster's Third New International Dictionary* 473, 1474 (1968) (defining condominium as "individual ownership of a unit in a multi-unit structure," and motel as "a group of furnished [rooms] . . . near a highway that offer accommodation to tourists"). Defendant, however, determined that plaintiffs' property, within the context of defendant's water ordinance, is in fact a condominium complex, and we agree. When the rooms in the building and an undivided interest in the common areas were sold to individuals, the rooms became condominium units and the building lost its status as a motel. This view is supported by the declaration of unit ownership recorded by the original owners designating the property as "Bogue Shores Condominiums," and establishing a homeowner's association. The fact that many of the individual condominium owners choose to operate like a motel is not determinative. The trial court properly granted summary judgment in favor of defendant on this issue.

II

[2] Plaintiffs argue that, even if this Court determines that defendant properly billed "Bogue Shores Motel-Condominiums" as a condominium complex, defendant's water ordinance is both arbitrary and discriminatory and in violation of the Equal Protection Clause, Article I, Section 19 of the North Carolina Constitution. Specifically, plaintiffs contend that defendant's water policy is discriminatory because it does not uniformly charge for minimum monthly water service. According to plaintiffs, *all*, not just some, customers should be charged based solely on the size of the service line in use.

Defendant, pursuant to N.C.G.S. § 160A-314(a), has the authority to charge, and to vary, minimum monthly amounts for water service based on reasonable classifications. In setting rates for its water service, however, defendant may not discriminate among customers of essentially the same character and services. *Ricks v. Town of Selma*, 99 N.C. App. 82, 87, 392 S.E.2d 437, 440 (1990). "[T]here must be some reasonable proportion between the variance in the conditions and the variances in the charges." *Id.* The party claiming that a rate-setting ordinance is unreasonable or discriminatory has the burden of proof on the issue. *Id.*

The evidence before the trial court established that under defendant's ordinance, single customers are charged a minimum monthly amount based on the size of their service line. For example, a residential customer living in a house with a three-quarter-inch service line is charged a minimum of $8.00 per month. A commercial customer in a building with a three-inch service line is charged a minimum of $125.00 per month. However, multiple unit residential customers with one service line, such as an apartment, condominium, or mobile home complex, are not charged based on the size of the service line. Rather, these establishments are charged a minimum of $8.00 times the number of units in the establishment.

According to defendant, multiple unit residential customers are analogous to residential customers living in houses with regard to the cooking, bathing, and laundry uses associated with long-term residence. Therefore, their charge *per unit* is the same as that for a single residential customer with a three-quarter-inch line—$8.00 per month. If, instead of using a single three-inch service line for the entire complex, plaintiffs decided to equip each condominium unit with its own separate three-quarter-inch line, then each unit owner would be individually billed a minimum of $8.00 per month. However, when only one service line is used, *the complex* is billed $8.00 for every unit therein. According to defendant, charging a condominium complex based only on the size of the service line rather than on the number of residential units in the complex would unfairly discriminate against single residential customers because it would place an unfair portion of the cost of water service on them. We agree. Accordingly, we conclude that the minimum monthly charge assessed condominium complexes is neither discriminatory nor arbitrary, but is reasonable, and hold that the trial court properly granted summary judgment in favor of defendant on this issue.

DEFENDANT'S APPEAL

III

[3] Defendant argues that the trial court erred in determining that defendant's assessment of a $15,000.00 "impact fee" for connecting plaintiffs' three-inch service line is arbitrary and capricious and in granting summary judgment in favor of plaintiffs on this issue. We agree.

The undisputed evidence at the summary judgment hearing established that Section 22 of defendant's water policy states that "impact fees will be required for all new and modified services" and "shall be put into a capital reserve fund for system improvements and modifications." However, defendant, pursuant to its unwritten policy of waiving the fee for customers in newly annexed areas, informed plaintiffs by letter that this fee would be waived if plaintiffs applied for service "prior to Tuesday, July 19, 1988 at 12 noon," but that "an impact fee . . . will be charged if your application is received after Tuesday, July 19, 1988 at 12 noon." Plaintiffs immediately applied for water service, and defendant determined that "by [plaintiffs] promptly coming in and beginning negotiations, that [defendant] would not require an impact fee if [plaintiffs] decided to hook up the water service at this time."

Other than the aforementioned evidence, nothing in the record sheds any light on whether or not plaintiffs have been or will be assessed a $15,000.00 impact fee. The record does not specifically indicate whether defendant determined at any point after informing plaintiffs that the fee would be waived that plaintiffs were no longer eligible for the impact fee waiver. Nonetheless, the trial court determined that defendant's water policy "which would require that plaintiffs pay an impact fee of $15,000.00 for a three-inch service connection . . . is arbitrary and capricious," and granted summary judgment in favor of plaintiffs on this issue. Because plaintiffs do not challenge the right of defendant to charge—or to waive—an impact fee, because there is no evidence that defendant has demanded payment of the fee by plaintiffs, and because plaintiffs have not sought declaratory relief, that portion of the trial court's order granting summary judgment in favor of plaintiffs is premature.

Based on the foregoing, we affirm that portion of the trial court's order granting summary judgment in favor of defendant,

and reverse that portion of the order granting summary judgment in favor of plaintiffs.

Affirmed in part and vacated in part.

Judges JOHNSON and MARTIN concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. CHRISTOPHER BAKER, DEFENDANT

No. 9215SC39

(Filed 6 April 1993)

1. **Rape and Allied Offenses § 5 (NCI4th)— rape—serious personal injury—mental injury—evidence insufficient**

The trial court erred by denying defendant's motions to dismiss the charge of first degree rape, but sufficient evidence of second degree rape was presented, where no evidence was presented to show that defendant possessed or used any type of weapon in the commission of the assault or that anyone aided or abetted him; the State sought to prove first degree rape based on serious personal injury; the victim testified that defendant grabbed her arms and pushed her into her bedroom where he threw her face down onto the bed, restraining her arms while he forced her to have intercourse; the victim was treated at a hospital following the assault; her treating physician testified that she did not observe any bruises, abrasions or any evidence of trauma to the victim's arms, wrists or vagi..al area; the victim did not complain of any bodily injuries as a result of the assault; the State offered evidence tending to show that the victim was depressed, ashamed, embarrassed and experienced nightmares, headaches and weight loss immediately following the assault; no evidence was presented to show whether or for how long these problems persisted; the victim testified that she did not seek medical treatment for these problems and the problems had been resolved for the most part by the time of trial; however, the victim also testified that she quit her job two days after the assault and left her infant son in the care of her mother for approximately nine months following the rape. The mental

injuries which the victim suffered in this case represent the *res gestae* results present in every forcible rape. N.C.G.S. § 14-27.2(a)(2)b.

2. **Evidence and Witnesses § 2750.1 (NCI4th)— rape—cross-examination about drug addiction—door opened by defendant**

The trial court did not err in a rape prosecution by allowing the State to cross-examine defendant about his drug addiction where defendant opened the door by testifying on direct examination about whether he had smoked marijuana or taken any drugs on the night of the rape.

Am Jur 2d, Witnesses § 417.

3. **Criminal Law § 1078 (NCI4th)— second degree sexual offense—sentence greater than presumptive term—no aggravating factors—error**

The trial court erred by sentencing defendant to a term of twenty years for second degree sexual offense without finding any aggravating factors where defense counsel incorrectly advised the court during the sentencing hearing that the presumptive sentence was twenty years rather than twelve years. N.C.G.S. § 15A-1340.4(b); N.C.G.S. § 14-27.5.

Appeal by defendant from judgments entered 16 August 1991 by Judge Hollis M. Owens, Jr., in Orange County Superior Court. Heard in the Court of Appeals 11 February 1993.

Defendant was charged in proper bills of indictment with rape in violation of G.S. §§ 14-27.2(a)(2) and 14-27.3(a)(1), and sexual offense in violation of G.S. §§ 14-27.4(a)(2) and 14-27.5(a)(1). The evidence presented at trial tends to show the following:

On 20 August 1990, the victim, Tammy Medlin, and her eleven month old son were living with a friend, Penny Brown, in her mobile home at the Windhams Trailer Park in Efland, North Carolina. At that time, Ms. Brown was dating the defendant. Shortly after midnight on 21 August 1990, defendant came to the trailer and pounded on the door. Everyone inside the trailer was asleep, but Ms. Medlin was awakened by the noise and answered the door. When she released the chain lock, defendant grabbed her and pinned her against the wall, holding her hands behind her back. Defendant began kissing her and, despite her protests, inserted his finger into her vagina. Defendant then pushed Ms. Medlin into her bedroom

where he threw her onto the bed face down, restrained her arms and forced her to have vaginal intercourse.

Shortly thereafter, defendant's friend, Page Kimery, who had been waiting outside in defendant's car, came to the door. At this point, defendant stopped having intercourse with Ms. Medlin and answered the door. Ms. Medlin told Kimery that defendant had raped her. Defendant then went into Ms. Brown's bedroom, and they began to fight. Defendant was physically beating Ms. Brown, and Ms. Medlin left the trailer to call the police. The police met Ms. Medlin, and she told them defendant had raped her.

Ms. Medlin was taken to the hospital where she told her treating physician that she had been raped. The physician testified that she did not observe any bruises, abrasions or other signs of trauma on Ms. Medlin's arms, wrists or vaginal area.

Ms. Medlin testified that immediately following the assault, she felt depressed, ashamed and embarrassed and experienced nightmares, headaches and weight loss. She quit her job as a cook and waitress at a pizza restaurant in Mebane, North Carolina two days after the assault because she "couldn't handle working with the public anymore" and felt that everyone knew what had happened to her. Ms. Medlin moved from the trailer three weeks after the incident. She stayed with her mother and stepfather for approximately two weeks and left her eleven month old son in their care for the next nine months because she could not care for him. Ms. Medlin contacted the rape crisis center, but did not seek any other counseling or treatment.

At the time of trial, Ms. Medlin was employed and had resumed caring for her son. She was still experiencing difficulty sleeping at times, but had regained some of the weight she had lost.

The jury found defendant guilty of first degree rape and second degree sexual offense. From judgments sentencing defendant to life imprisonment for first degree rape and for a concurrent term of twenty years for second degree sexual offense, defendant appealed.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Philip A. Telfer, for the State.

Glover & Petersen, P.A., by James R. Glover, for defendant-appellant.

MARTIN, Judge.

[1] Defendant first assigns error to the trial court's denial of his motions to dismiss the charge of first degree rape. He argues that "[t]he evidence was not sufficient to prove beyond a reasonable doubt that the defendant inflicted 'serious personal injury' of the kind which distinguishes first degree rape from second degree rape." For the reasons set forth below, we agree and order that the judgment sentencing defendant to life imprisonment for first degree rape be vacated and the cause remanded for entry of judgment on the charge of second degree rape.

The indictment in the present case was sufficient to charge defendant with both first and second degree rape. G.S. § 14-27.2 states in part:

> (a) A person is guilty of rape in the first degree if the person engages in vaginal intercourse:
>
> (2) With another person by force and against the will of the other person, and:
>
> a. Employs or displays a dangerous weapon or an article which the other person reasonably believes to be a dangerous weapon; or
>
> b. Inflicts serious personal injury upon the victim or another person; or
>
> c. The person commits the offense aided and abetted by one or more other persons. (Emphasis added.)

N.C. Gen. Stat. § 14-27.2 (1986). By contrast, G.S. § 14-27.3 defines second degree rape as follows:

> (a) A person is guilty of rape in the second degree if the person engages in vaginal intercourse with another person:
>
> (1) By force and against the will of the other person . . . .

N.C. Gen. Stat. § 14-27.3 (1986). As defendant correctly notes, first and second degree rape are distinguished by the existence, in addition to forcible, nonconsensual intercourse, of one or more of those elements enumerated in G.S. § 14-27.2(a)(2)(a-c).

In the present case, no evidence was presented to show that defendant possessed or used any type of weapon in the commission

of the assault, or that anyone aided or abetted him. Instead, the State sought to prove defendant's guilt of first degree rape by proof that he engaged in forcible vaginal intercourse with Ms. Medlin against her will and "inflicted serious personal injury upon [her]." Taking the evidence in the light most favorable to the State, we find the evidence insufficient to show that in the commission of the rape, defendant inflicted serious personal injury upon Ms. Medlin; and therefore, the submission of the charge of first degree rape to the jury was error.

In the case at bar, the victim testified that defendant grabbed her arms and pushed her into her bedroom where he threw her face down onto the bed, restraining her arms while he forced her to have intercourse. The victim was examined at a hospital following the assault. Her treating physician testified that she did not observe any bruises, abrasions or any evidence of trauma to the victim's arms, wrists or vaginal area. Furthermore, the victim did not complain of any bodily injuries as a result of the assault.

Our Supreme Court has held, however, that "proof of the element of infliction of 'serious personal injury' as required by G.S. § 14-27.2[(a)](2)b . . . may be met by the showing of mental injury as well as bodily injury." *State v. Boone*, 307 N.C. 198, 204, 297 S.E.2d 585, 589 (1982). Chief Justice Branch, writing for the Court, explained:

> It is impossible to enunciate a 'bright line' rule as to when the acts of an accused cause mental upset which could support a finding of 'serious personal injury.' It would defy reason and common sense to say that there could be a forcible rape or forcible sexual offense which did not humiliate, terrorize and inflict some degree of mental injury upon the victim. Yet, the legislature has seen fit to create two degrees of rape and provide that one of the elements which may raise the degree of the crime from second degree to first-degree rape is the infliction of 'serious personal injury.' . . . We therefore believe that the legislature intended that ordinarily the mental injury inflicted must be more than the *res gestae* results present in every forcible rape and sexual offense. In order to support a jury finding of serious personal injury because of injury to the mind or nervous system, the State must ordinarily offer proof that such injury was not only caused by the de-

> fendant but that the injury extended for some appreciable time beyond the incidents surrounding the crime itself. (Emphasis added.)

Boone, at 205, 297 S.E.2d at 589.

The Court further noted that the question of whether evidence of mental injury is sufficient to constitute "serious personal injury" must be decided by the facts of each case. *Id.* In *Boone*, the Court held that where the victim was shaking, crying and "hysterical" immediately after the assault, but no evidence was offered to show any residual injury to the mind or nervous system, the evidence was insufficient to support a finding that the victim had suffered "serious personal injury." *Id.*

In the instant case, the State offered evidence tending to show that Ms. Medlin was depressed, ashamed and embarrassed and experienced nightmares, headaches and weight loss immediately following the assault. No evidence, however, was presented to show whether or for how long these problems persisted. Ms. Medlin stated that she did not seek treatment for any of these problems; and by the time of trial, the problems had, for the most part, resolved. The State, however, relies on the testimony of the victim indicating she quit her job two days after the assault and left her infant son in the care of her mother for approximately nine months following the rape to establish the proof necessary for a finding of a "serious personal injury." The State contends the facts of the present case are similar to those in *State v. Mayse*, 97 N.C. App. 559, 389 S.E.2d 585, *disc. review denied*, 326 N.C. 803, 393 S.E.2d 903 (1990), in which this Court held the State had met its burden of proof in establishing the existence of a "serious personal injury" where the victim testified she had dropped out of technical college and moved from the city where she lived following the rape. The case *sub judice*, however, is distinguishable from *Mayse*. The victim in *Mayse* testified that she had received professional help from a mental health center for her injuries and that her injuries continued at the time of trial. *Id.* at 563, 389 S.E.2d at 587. In the case at bar, no evidence was presented that the victim's injuries continued at the time of trial; in fact, the victim testified to the contrary stating that she was employed and had resumed caring for her son. Additionally, we note in *Mayse*, defendant displayed a hunting knife to the victim during the assault—conduct which alone would require the submission of the charge

of first degree rape to the jury. *Id.* at 562-63, 389 S.E.2d at 586-87.

We hold the mental injuries which the victim suffered in the present case represent the "*res gestae* results present in every forcible rape," and since the State "failed to offer proof that such injur[ies] extended for some appreciable time beyond the incidents surrounding the crime itself," the evidence was insufficient to support a jury finding that the victim suffered serious personal injuries necessary for a conviction of first degree rape. Therefore, the trial court erred in denying defendant's motions to dismiss the charge of first degree rape. However, sufficient evidence of second degree rape was presented, and the cause must be remanded for entry of judgment on the charge of second degree rape.

[2] Defendant next contends "[t]he trial court erred by allowing the State to cross-examine the defendant about his addiction to drugs." We disagree.

Our review of the record in this case indicates that the victim and Ms. Brown both testified, without objection, that defendant appeared to be under the influence of drugs on the night of the rape. On direct examination, defense counsel asked defendant whether he had smoked marijuana or taken any drugs on that date. During cross-examination, the following exchange took place:

> Q. And you on direct examination indicated that you had 4 beers and that you didn't smoke marijuana. Is that correct?
>
> A. Yes, ma'm.
>
> Q. You didn't have any other controlled substances?
>
> A. No, ma'm.
>
> Q. And didn't Mr. Dickerson [defense counsel] ask you that because you do have a drug problem, don't you, Mr. Baker?
>
> MR. DICKERSON: Objection.
>
> COURT: Overruled.
>
> A. I'm clean now.
>
> Q. On August 20 of 1990, did you have a drug problem?
>
> A. Yes.

It is clear from the record that defendant "opened the door" to the inquiry concerning his drug use on direct examination. The trial court then properly allowed the State to follow up on his testimony during cross-examination. *See State v. McKinney*, 294 N.C. 432, 241 S.E.2d 503 (1978). Defendant's argument is meritless.

[3] Finally, defendant contends it was error for the trial court to sentence him to prison for a term of twenty years for the offense of second degree sexual offense without finding any aggravating factors. We agree.

Second degree sexual offense is a Class D felony carrying a presumptive sentence of twelve years. N.C. Gen. Stat. §§ 14-27.5 & 15A-1340.4(f). During the sentencing hearing, defense counsel incorrectly advised the trial court that the presumptive sentence for this offense was twenty years. Based upon counsel's advice, the trial judge entered a judgment sentencing defendant to twenty years without finding any aggravating factors. As the State concedes, a trial court can only impose a sentence in excess of the presumptive term after first finding aggravating and mitigating factors and finding that the factors in aggravation outweigh those in mitigation. N.C. Gen. Stat. § 15A-1340.4(b). Therefore, the case must be remanded for resentencing on the charge of second degree sexual offense.

No error in defendant's trial on 91 CrS 1753, but remanded for resentencing.

Judgment vacated as to first degree rape in 90 CrS 7948, but remanded for entry of judgment on the charge of second degree rape.

Judges WELLS and ORR concur.

STATE OF NORTH CAROLINA v. JAMES CHRISTOPHER TUCKER

No. 9129SC885

(Filed 6 April 1993)

1. Evidence and Witnesses § 1229 (NCI4th)— murder—confession to relative—deputy in another county—no Fifth Amendment violation

The trial court properly denied a murder defendant's motion to suppress inculpatory statements as violating his Fifth Amendment rights where defendant was imprisoned pursuant to a contempt citation for violation of a child custody order; he denied having any knowledge of the child's whereabouts; officers initiated a missing persons investigation; an S.B.I. agent and Polk County deputies attempted to question defendant, who indicated that he did not wish to answer any questions until he had been allowed an attorney; a Polk County deputy sent a PIN message to the Cumberland County Sheriff's Department, where defendant's uncle by marriage, McNeely, was employed as a deputy sheriff; the message requested information concerning McNeely's relationship with defendant; McNeely contacted the Polk County Sheriff's Department, was advised that the child was missing, and traveled to Polk County; McNeely was given permission to talk with defendant but defendant denied any knowledge of the whereabouts of the child; McNeely left a telephone number with defendant and was called the next day; McNeely went to the jail and defendant related the details of the child's death and the whereabouts of the body; McNeely then suggested that defendant talk to the S.B.I. agent; the agent advised defendant of his rights; defendant signed a written waiver; and defendant gave the agent a detailed statement. Defendant initiated the conversation in which he gave his incriminating statement to McNeely, defendant was not being held on any criminal charges at that time, the authorities did not know that a crime had been committed, McNeely was not acting in the capacity of a law enforcement official or an agent for the State, and defendant further incriminated himself by freely and voluntarily repeating essentially the same incriminating information to an S.B.I. agent after the agent read defendant his rights and obtained a waiver.

Am Jur 2d, Evidence § 554.

2. Constitutional Law § 264 (NCI4th)— murder—confession—Sixth Amendment right to counsel—no violation

The trial court properly ruled that a murder defendant's Sixth Amendment right to counsel was not violated by inculpatory statements where defendant was incarcerated pursuant to a contempt order for violating a child custody order; officers instituted a missing persons investigation for the child; defendant indicated that he did not wish to answer questions until he had been allowed an attorney; an uncle by marriage who was a deputy in another county heard of the investigation and was allowed to talk to defendant; defendant initially denied any knowledge of the child's whereabouts, then had the uncle called back to the jail; defendant gave the uncle a detailed statement; the uncle suggested that defendant talk to the S.B.I. agent; the S.B.I. agent read defendant his rights and obtained a written waiver; and defendant gave the agent a statement. The Sixth Amendment is not applicable because the uncle was not acting in the capacity of a law enforcement official or agent and the investigation had not reached the point of the accusatory stage or the point when adversary judicial proceedings had been initiated against defendant. Moreover, defendant initiated the second meeting with the uncle and freely and voluntarily gave him an incriminating statement, and defendant waived his rights before the conversation with the S.B.I. agent.

Am Jur 2d, Criminal Law §§ 743 et seq., 972 et seq.

3. Searches and Seizures § 23 (NCI3d)— murder—search warrant based on confession—motion to suppress denied

The trial court properly denied a murder defendant's motion to suppress evidence obtained pursuant to a search warrant that was based upon defendant's incriminating statements where the incriminating statements were not obtained in violation of the defendant's constitutional rights.

Am Jur 2d, Searches and Seizures § 48.

Validity of consent to search given by one in custody of officers. 9 ALR3d 858.

4. Evidence and Witnesses § 1242 (NCI4th)— murder—incriminating letter to jailer—admissible

A statement written by a murder defendant and given to a jailer trying to explain what he had done was not barred as a violation of defendant's Fifth and Sixth Amendment rights because it was freely and voluntarily given.

Am Jur 2d, Evidence §§ 555-557, 614; for general discussion of an accused's rights and privileges during the period of police custody, see 21A Am Jur 2d, Criminal Law §§ 788 et seq.

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.

Appeal by defendant from judgment entered 4 February 1991 by Judge Zoro J. Guice, Jr., in Polk County Superior Court. Heard in the Court of Appeals 22 October 1992.

Defendant, James Christopher Tucker, was arrested on a charge of second degree murder. On 28 January 1991, the matter was tried before a jury in the Polk County Superior Court with Judge Zoro Guice, Jr. presiding. The jury returned a verdict of guilty of second degree murder. From entry of this judgment, defendant gave a timely notice of appeal.

Prince, Youngblood, Massagee & Jackson, by J. Michael Edney and Sharon B. Ellis, for defendant-appellant.

Attorney General, Lacy H. Thornburg, by Assistant Attorney General, D. Sigsbee Miller, for State-Appellee.

JOHNSON, Judge.

James Christopher Tucker, defendant, and Sandra Hill were the parents of a two year old boy, Nathan Adam Hill. At the time Ms. Hill became pregnant, she and defendant were living together; however, prior to Nathan's birth, the couple stopped dating. By the time Nathan was born, Ms. Hill had moved out and was residing with another male. Nathan resided with Ms. Hill until December 1988.

In December 1988, the Polk County Department of Social Services began to suspect child abuse in the home of Ms. Hill. Subsequently, Nathan resided with defendant until March 1989. He returned to Ms. Hill's residence in March 1989 and stayed there until September 1989 when he was returned to defendant's residence. Ms. Hill last saw her son in November 1989.

In December 1989, Ms. Hill instituted a child custody action because she had not been allowed to see Nathan. In the child custody action, Ms. Hill obtained an order of custody and subsequently attempted to enforce this order by a contempt citation. Pursuant to the contempt citation, defendant was imprisoned in the Polk County Jail on 12 January 1990 until such time as he produced Nathan Adam Hill.

While defendant was in jail for contempt, he was questioned by the Polk County deputies as to the whereabouts of the child. Defendant denied having any knowledge of Nathan's whereabouts. The law enforcement officers then initiated a missing persons investigation and the State Bureau of Investigation became involved. S.B.I. Agent Pruitt and the Polk County deputies attempted to question defendant, but he indicated that he did not wish to answer any questions until he had been allowed an attorney.

On 12 January 1990, a deputy with the Polk County Sheriff's Department sent a PIN message to the Cumberland County Sheriff's Department where defendant's uncle by marriage, David McNeely, was employed as a deputy sheriff. The PIN message requested information concerning Mr. McNeely's relationship with defendant. Upon receipt of the message, Mr. McNeely contacted the Polk County Sheriff's office. He was advised that Nathan Hill was missing. On 16 January 1990, Mr. McNeely traveled to Polk County. Mr. McNeely was given permission to talk to defendant but in the brief conversation between defendant and Mr. McNeely, defendant denied any knowledge concerning the whereabouts of the child. Mr. McNeely then gave defendant a phone number in the event that defendant needed to contact him.

The next morning Mr. McNeely received a call from a person who identified herself as Melinda Waters, advising him that defendant wanted to talk to him. Mr. McNeely went to the jail and defendant related to Mr. McNeely the details of the child's death and the whereabouts of the child's body. Mr. McNeely then suggested that defendant talk to S.B.I. Agent Pruitt.

On 17 January 1990, S.B.I. Agent Pruitt saw defendant after he had talked to Mr. McNeely. Agent Pruitt advised defendant of his rights and defendant signed a written waiver of those rights. Defendant then gave a detailed statement to Agent Pruitt.

Based on the information provided, law enforcement officers obtained a search warrant and went to defendant's property. They found the body of two year old Nathan in a shallow grave at the bottom of an embankment. A search for evidence inside defendant's mobile home revealed blood wipings on the counter top and at the end of the dining room table.

Between 17 January 1990 and 1 March 1990, defendant handed a two-page handwritten letter to Nick Ross who was a jailer with the Polk County Sheriff's Department. In the letter, defendant stated "I was on cocaine, for one thing, and another was not working, being cooped up in the house all day. I caught myself being mean to him for no reason. I just lost control of everything."

An autopsy performed by Dr. Robert L. Thompson of the North Carolina Medical Examiner's office revealed that Nathan had died as a result of acute peritonitis. Dr. Thompson expressed an opinion that the injuries were likely caused by blunt trauma intentionally inflicted. As a result of the trauma, an infection developed which resulted in the child's death three or four days later.

[1] By defendant's first assignment of error, he contends that the trial court committed reversible error by denying his motion to suppress evidence of certain statements made by defendant because such statements were obtained in violation of his Fifth and Fourteenth Amendment rights. We find this contention without merit.

The Fifth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, provides a criminal suspect with the right not to be forced to incriminate himself. *Miranda v. Arizona*, 384 U.S. 436, 16 L.Ed.2d 694 (1966). Since the landmark case of *Miranda*, police have been required to inform a suspect of their rights and to obtain a waiver thereof as a precondition for conducting custodial interrogation. Miranda warnings are only required when an accused is about to be subjected to custodial interrogation. *State v. Fletcher and State v. St. Arnold*, 279 N.C. 85, 181 S.E.2d 405 (1971).

Custodial interrogation is a questioning initiated by law enforcement officers after a person has been taken into custody or otherwise deprived of his freedom. *State v. Thomas*, 284 N.C. 212, 200 S.E.2d 3 (1973). The Fifth Amendment provides a defendant with an absolute right to have counsel present during all custodial interrogation by police officers. *Miranda*, 384 U.S. at 436, 16 L.Ed.2d at 694. Once an accused has invoked this right to have counsel present during custodial interrogation, no further interrogation may constitutionally occur until counsel has been consulted or made available. *Edwards v. Arizona*, 451 U.S. 477, 68 L.Ed.2d 378, *reh'g denied*, 452 U.S. 973, 69 L.Ed.2d 984 (1981). Any statement obtained as a result of such further police-initiated interrogation is not admissible. *Id.* However, the *Miranda* Court recognized, "any statement given freely and voluntarily without any compelling influences is, of course, admissible in evidence. . . ." *Miranda*, 384 U.S. at 478, 16 L.Ed.2d at 694.

Defendant made motions to suppress the statements made to David McNeely and to S.B.I. Agent Pruitt. The trial judge conducted a lengthy voir dire hearing on defendant's motions and later made detailed findings of fact and conclusions of law in support of its decision. The court found that the statements of the defendant to David McNeely and S.B.I. Agent Pruitt were freely, voluntarily, and understandingly made; that none of the defendant's constitutional rights were violated; and that the said statements were admissible into evidence at trial.

At trial, the evidence tended to show that defendant initiated the conversation in which he gave his incriminating statement to Mr. McNeely, and that at the time, defendant was not being held on any criminal charges, nor did the authorities know that a crime had been committed. Although Mr. McNeely was a sheriff for the Cumberland County Sheriff's Department, he was not acting in the capacity of a law enforcement official or an agent for the State. Mr. McNeely's desire to assist in the case grew out of natural concern for his nephew, the defendant, and also out of concern for the missing child whom he had at one time discussed adopting. Statements will be admissible where they are voluntarily given to persons not acting in their official capacity as law enforcement officials or not acting as agents of the State. *State v. Johnson*, 29 N.C. App. 141, 223 S.E.2d 400, *disc. review denied*, 290 N.C. 310, 225 S.E.2d 831 (1976).

After defendant had voluntarily given incriminating statements to Mr. McNeely, defendant further incriminated himself by talking to S.B.I. Agent Pruitt who first read defendant his rights, and then obtained a knowing, voluntary and intelligent waiver thereof. Defendant then freely and voluntarily repeated essentially the same incriminating information to Agent Pruitt that he had given to Mr. McNeely. A statement is admissible into evidence where the defendant's statement was freely, knowingly, and understandingly given by defendant, after having been fully forewarned of his constitutional rights, and after having freely, knowingly, understandingly and voluntarily waived the same. *State v. McRae*, 276 N.C. 308, 172 S.E.2d 37 (1970).

The trial court's findings of fact following a voir dire hearing on the voluntariness of a confession are conclusive on appeal if supported by competent evidence in the record. *State v. Jackson*, 308 N.C. 549, 304 S.E.2d 134 (1983). "No reviewing court may properly set aside or modify those findings if so supported. This is true even though the evidence is conflicting." *State v. Massey*, 316 N.C. 558, 573, 342 S.E.2d 811, 820 (1986). We hold that there was competent evidence to support the trial court's findings of fact and that the findings of fact support the court's conclusions of law. The trial court properly denied defendant's motion to suppress the statements as violating his Fifth Amendment rights.

[2] By defendant's second assignment of error, he contends that the trial court erred in denying his motion to suppress the evidence of certain statements because such statements were obtained in violation of his Sixth and Fourteenth Amendment rights. We disagree.

The Sixth Amendment of the Constitution of the United States, made applicable to the States by the Fourteenth Amendment, guarantees that in all criminal prosecutions an accused shall enjoy the right to have assistance of counsel for his defense. *Gideon v. Wainright*, 372 U.S. 335, 9 L.Ed.2d 799 (1963). The Sixth Amendment right attaches at the initiation of adversary judicial criminal proceedings. *Kirby v. Illinois*, 406 U.S. 682, 32 L.Ed.2d 411 (1972). Police may not initiate interrogation of a defendant whose Sixth Amendment right has attached. *Michigan v. Jackson*, 475 U.S. 625, 89 L.Ed.2d 631 (1986).

Interrogation, as that term is used in Sixth Amendment cases, refers to conduct of law enforcement which is deliberately and

designedly set out to elicit incriminating information. *Brewer v. Williams*, 430 U.S. 387, 51 L.Ed.2d 424 (1977). In order to trigger the application of the Sixth Amendment, the act in question must involve the conduct of a law enforcement official or someone acting as their agent. As discussed in the first assignment of error, Mr. McNeely was not acting in the capacity of a law enforcement official or agent in his contact with the defendant. Therefore, this is not a case in which the Sixth Amendment is applicable.

However, even if we were to find that Mr. McNeely was acting in his official capacity as a law enforcement official when he talked with defendant, the Sixth Amendment would still be inapplicable because at the time Mr. McNeely talked with defendant, the investigation had not reached the point of the accusatory stage and had certainly not reached the point when adversary judicial proceedings had been initiated against defendant. *Kirby*, 406 U.S. 682, 32 L.Ed.2d 411.

Defendant initiated the second meeting with Mr. McNeely at which time he freely and voluntarily gave him an incriminating statement. The statement voluntarily given to Mr. McNeely as a result of the session initiated by defendant did not violate defendant's Sixth Amendment right to counsel.

We also find that the statement given to S.B.I. Agent Pruitt by defendant was not in violation of his Sixth Amendment right to counsel. After defendant gave incriminating statements to Mr. McNeely, Mr. McNeely suggested that defendant talk to Agent Pruitt. Before their conversation commenced, Agent Pruitt read defendant his rights, and defendant knowingly, voluntarily and intelligently signed a written waiver of his rights. Defendant then proceeded to give a detailed statement to Agent Pruitt. Under these circumstances, we find the trial court properly ruled that defendant's constitutional right was not violated.

[3] By defendant's third assignment of error, he contends that the trial court erred in denying his motion to suppress evidence obtained pursuant to a search warrant that was based upon evidence obtained in violation of his constitutional rights. We find this argument meritless.

Law enforcement officers obtained a search warrant based on an affidavit containing information given to David McNeely by defendant. Once law enforcement officers searched the property

of defendant, they found a shallow grave, 35 feet away from the house, with the body of the child buried therein. Defendant contends that the evidence obtained pursuant to the search of his premises is inadmissible because the information contained in the affidavit which was used to obtain the search warrant was elicited in violation of defendant's Fifth and Sixth Amendment rights.

As discussed above, this Court has already determined that the incriminating statements made were not obtained in violation of the defendant's constitutional rights, and therefore, can be used as the basis for probable cause in a validly issued search warrant. Accordingly, this Court finds that defendant's motion to suppress was properly denied by the trial court.

[4] By defendant's fourth assignment of error, he contends that the trial court erred by denying his motion to suppress a statement that was written by defendant and given to a jailer because such statement was obtained in violation of his constitutional rights. We find no merit in this argument.

After defendant had been charged with this crime and while still in custody, he wrote a letter to the jailer, Nick Ross, trying to explain what had been done. This unsolicited letter was not barred by a violation of defendant's Fifth and Sixth Amendment rights because it was freely and voluntarily given. The statement is therefore admissible.

By his final assignment of error, defendant contends that the evidence at trial was insufficient to support the findings of fact made by the trial judge. We have carefully reviewed the evidence and each of the court's findings and we find this assignment and all of defendant's assignments of error to be without merit. Defendant received a trial free of any prejudicial error.

We find no error.

Judges COZORT and LEWIS concur.

STATE OF NORTH CAROLINA v. EDWARD LONNIE McCARROLL AND CYNTHIA MARIE WATKINS

No. 925SC44

(Filed 6 April 1993)

Evidence and Witnesses § 125 (NCI4th)— rape and sexual offenses— thirteen-year-old victim—previous false accusations—not excluded by Rape Shield Statute

The trial court erred in a prosecution for rape and other sexual offenses against a thirteen-year-old victim by excluding evidence of previous false accusations where defendants were the mother of the victim and her boyfriend; the victim testified that she engaged in various sexual activities with defendant McCarroll on repeated occasions, both with and without her mother present, during weekend visits with her mother; her younger brother testified that he had seen a book containing nude drawings of children and movies about people having sex while at the trailer; that the victim had been followed into the bathroom on one occasion by defendant McCarroll; that he had heard only whispers from the bathroom and thirty minutes later his sister emerged; defendants attempted to introduce testimony that the victim had oral sex with her brother and that she had been previously abused; and her brother denied sexual activity with the victim. The purpose of the Rape Shield Statute is to prevent harassing, humiliating and irrelevant inquiries into the past sexual behavior of victims, as well as to prevent the introduction of collateral issues that may confuse the jury; however, the Legislature intended to exclude only the actual sexual history of the complainant and not prior false accusations. By not allowing defendants to inquire as to whether the victim had fantasized as to the previous sexual activity with her brother, defendants were denied the right of effective cross-examination. In light of other errors in the trial, the Court of Appeals could not agree that a different result would have been reached if the testimony had been admitted.

Am Jur 2d, Rape §§ 55 et seq.

Appeal by defendants from judgments and commitments entered 24 May 1991 by Judge Ernest B. Fullwood in New Hanover County Superior Court. Heard in the Court of Appeals 11 February 1993.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Jane Rankin Thompson, for the State.

Nora Henry Hargrove for defendant appellant Edward Lonnie McCarroll.

Appellate Defender Malcolm Ray Hunter, Jr., by Assistant Appellate Defender Mark D. Montgomery, for defendant appellant Cynthia Marie Watkins.

LEWIS, Judge.

The issue presented by this appeal is whether defendants were denied their constitutional right to confront the witness against them when the trial court excluded testimony of a sexual nature under North Carolina's Rape Shield Statute. We are forced to agree that defendants were denied their constitutional right of confrontation and hereby remand this matter for a new trial.

The facts of this case are so repulsive as to constitute a virtual encyclopedia of orgiastic implementation. Cynthia Marie Watkins ("Watkins") was the mother of three children: two daughters and a son. At all times pertinent to this appeal, Watkins lived with her boyfriend, Edward Lonnie McCarroll ("McCarroll") in a two bedroom trailer in Wilmington, North Carolina. Watkins and the children's natural father were separated and the father had custody but Watkins had visitation rights every other weekend. On these weekends, the children would come and stay with her in McCarroll's trailer. Watkins and McCarroll had a very open sexual relationship involving all sorts of pornographic material. The problem presented by this appeal, however, is that between August and October of 1990, Watkins and McCarroll began to involve Watkins' thirteen year old daughter (hereafter "the victim") in their sexual relations.

The victim testified at trial that during one of her weekend visits she was approached by Watkins and McCarroll and asked if she would like to have sex with them. Watkins and McCarroll stated that it would be "teaching you for when you [get] older." Though the record is not clear as to exactly when she began, the victim testified that she did engage in various sexual activities

including fellatio, cunnilingus and vaginal intercourse with McCarroll on repeated occasions, both with and without her mother present.

The victim's younger brother, Eddie, also testified at trial on behalf of the State. Eddie testified that during the weekend visits he had been shown a book entitled *Show Me*, containing nude drawings of children. Eddie also testified that he had seen real "bad movies" about people having sex while at McCarroll's trailer. However, the most damaging statements given by Eddie were those placing McCarroll and the victim in the bathroom at the same time. According to Eddie, on one occasion when the victim had gone into the bathroom she was followed by McCarroll. Eddie heard only whispers from the bathroom and then thirty minutes later his sister emerged.

When Eddie returned to his father's house, he told him what he had seen. This prompted Mr. Watkins to question the victim further about the episode and the victim confirmed that McCarroll had been in the bathroom with her. On the basis of this information, Mr. Watkins contacted Detective Boaz of the New Hanover County Sheriff's Department. Detective Boaz interviewed the victim and thereafter obtained a search warrant for McCarroll's trailer. Upon searching the trailer, Detective Boaz found adult magazines, X-rated movies, condoms, Vaseline, and a note of a sexual nature written by Watkins which read:

> Hi Babe & [victim]. I love you both very much. So don't please—So don't think I am jealous when I say this—Please use the rubbers each and every time whether you like them or not. Have good time and I'll be home sometime after 2:00 a.m. Okay. Remember what I said. Babe if you ain't finished when I get home finish on me. And remember tonight you don't have anyone else to watch the other two kids so be quiet and listen for yourself. Be careful hugs and ever more kisses. Love ya Always Cindy.

McCarroll and Watkins were subsequently arrested and charged with rape, crime against nature, taking indecent liberties with a minor, felonious child abuse, and felonious sexual intercourse by a substitute parent.

At the suggestion of Detective Boaz, the victim was examined by Dr. William Stewart, an expert in pediatric medicine with an emphasis in child sexual abuse diagnosis and treatment. Dr. Stewart

observed that the victim's hymen had been torn and that his speculum passed easily during his examination. It was Dr. Stewart's opinion that his physical findings were the result of repeated sexual intercourse, though he did admit that they could have been caused by masturbation.

Both McCarroll and Watkins took the stand and denied that any sexual activity had taken place with the victim. Watkins further testified that the note was merely a warning to her daughter intended to discourage her from becoming too active sexually and that it was not meant to be a sexual invitation.

McCarroll was convicted of taking indecent liberties with a minor, crime against nature, felony child abuse and the felony of engaging in vaginal intercourse with a minor over whom he had assumed the position of a parent but acquitted of rape. Watkins was similarly convicted of all charges except rape. Defendants appealed.

The major issue presented by defendants' appeal is whether the trial court erred in excluding under North Carolina's Rape Shield Statute testimony of previous false accusations by the victim. *See* N.C.G.S. § 8C-1, Rule 412 (1992). The first witness to testify at the trial was the victim's younger brother, Eddie. On cross-examination, defendants made a Rule 412 motion for an in camera hearing.

Defendants argued before the trial court that the purpose of the in camera hearing was to show that the victim had oral sex with her brother during the same time period as the other sexual activities with McCarroll and Watkins. Defendants wanted to introduce this testimony to show that the victim had prior knowledge of sexual activity and was possibly making false accusations. Upon hearing the arguments of counsel, the trial court determined that the defendants had not brought themselves within any of the exceptions set forth in Rule 412. Defendants asked to make an offer of proof and the trial court denied their request. However, the trial court said that it would reconsider the request at a later point in the trial.

While the victim was testifying, defendants again asked for a Rule 412 in camera hearing. During the in camera hearing, defendants sought to establish that the victim had been previously abused. In addition, defendants wanted to ask the victim about previous

sexual activities with her brother. The trial court allowed both. Responding to the defendants' questions, the victim stated that her brother had asked her to engage in fellatio with him and that her brother would sometimes come into her bedroom and get on top of her. Eddie denied any such activity.

After Eddie's testimony, defendants argued to the trial court that the jury should be allowed to hear the testimony because Rule 412 was designed to allow evidence of unfounded accusations of sexual activities. The trial court disagreed and refused to let the jury hear the evidence to which defendants assign error.

The purpose of the Rape Shield Statute is to prevent harassing, humiliating and irrelevant inquiries into the past sexual behavior of victims, as well as to prevent the introduction of collateral issues that may confuse the jury. *See State v. Fortney*, 301 N.C. 31, 269 S.E.2d 110 (1980). However, the legislature intended to exclude only the actual sexual history of the complainant and not prior false accusations. *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982). The reason for this distinction lies in the sixth amendment to the United States Constitution, made applicable to the states through the fourteenth amendment. "It has long been established that a defendant in a criminal case has a right to cross-examine adverse witnesses under the sixth amendment." *State v. Anthony*, 89 N.C. App. 93, 95, 365 S.E.2d 195, 196 (1988). The right of effective cross-examination, recognized as fundamental by the United States Supreme Court, is denied when a defendant is prevented from cross-examining a witness on a subject matter relevant to the witness' credibility. *State v. Durham*, 74 N.C. App. 159, 327 S.E.2d 920 (1985). Eddie's testimony, expressly denying any sexual activity with his sister, was highly relevant to the issue of the victim's credibility. By not allowing McCarroll and Watkins to inquire as to whether the victim had fantasized as to the previous sexual activity with her brother, defendants were denied the right of effective cross-examination. This is reversible error.

The State argued at oral argument that the situation in this case is similar to *Anthony*. We disagree. However, we are guided by the way in which the *Anthony* Court distinguished both *Baron* and *Durham*. In *Anthony*, this Court held that the factor that distinguished *Baron* and *Durham* was the existence of prior evidence tending to show that the previous sexual misconduct was false.

Anthony, 89 N.C. App. at 96-97, 365 S.E.2d at 197. This Court upheld the conviction because "no evidence . . . was introduced from which the trial court could conclude that the allegations were false." *Id.* at 97, 365 S.E.2d at 197. In contrast, Watkins and McCarroll attempted to introduce evidence showing the previous accusations to be false, but the trial court completely foreclosed this avenue of inquiry.

The facts of this case are virtually indistinguishable from those in *State v. Baron*, 58 N.C. App. 150, 292 S.E.2d 741 (1982). In *Baron*, defendant was accused of raping his thirteen year old daughter. Defendant testified and denied the allegations. Evidence heard in camera disclosed that the victim had previously accused a foster parent, a neighbor and her brother of improper sexual advances. During the in camera hearing, the defendant attempted to cross examine the victim as to those prior accusations and also to introduce the testimony of those accused to deny the allegations. The trial court ruled the evidence inadmissible. The Court of Appeals reversed. We see no substantive difference between the facts of this case and those in *Baron*. In this case more than ample evidence of a prior false accusation existed so that the jury should have been allowed to hear the evidence and to decide for themselves whether it affected the victim's credibility.

The State urges that a different result would not have been reached if the testimony about previous false accusations of sexual misconduct had been admitted. This Court stated in *Durham*, "the denial of that right [effective cross-examination] is a 'constitutional error of the first magnitude and no amount of showing of want of prejudice would cure it.' " *Durham*, 74 N.C. App. at 163, 327 S.E.2d at 923 (citations omitted). In light of the other errors that occurred during the trial, we cannot agree that a different result would not have been reached. During the trial, the State asked Watkins about a previous episode of sexual activity that she had while the family lived in Kansas. The State admitted in its brief that this inquiry was irrelevant, but contended that the inquiry was brief and not prejudicial. We agree that the inquiry was totally irrelevant, but we are unable to agree that the inquiry was not prejudicial. We are bound by *Baron* to reverse and therefore, we need not address defendants' remaining assignments of error.

Reversed and remanded for a new trial.

Judges JOHNSON and JOHN concur.

BUTLER DRIVE PROPERTY OWNERS ASSOCIATION, INC., ET AL, PETITIONERS v. GROVER L. EDWARDS AND LUCY EDWARDS, HIS WIFE, ET AL, RESPONDENTS

No. 916SC1263

(Filed 6 April 1993)

Easements § 43 (NCI4th)— easement appurtenant—right of ingress and egress—non-exclusive

The trial court did not err in a declaratory judgment action by finding that respondents, their heirs, assigns and legal representatives are entitled to the non-exclusive right of ingress and egress over and across Butler Drive where petitioners owned certain lots in Section I, Crescent Beach Subdivision and Crescent Beach Subdivision Extended; those lots are bounded on the north by Butler Drive; respondents own certain tracts or parcels that abut Butler Drive on the north side, opposite petitioners; all of the lots and parcels of land in question were owned by Norene K. Butler at one time; Norene Butler recorded certain restrictions on the lots in Section I, Crescent Beach; she conveyed lots subject to these restrictions but did not convey fee simple ownership of Butler Drive; Norene Butler devised all of her property to Frederick Butler, who conveyed lots subject to the restrictions; the deed to the Edwards parcel states, "[t]ogether with the non-exclusive right of ingress and egress . . . over Butler Drive . . . limited to those persons who purchase all or a part of the property [described in the deed]; Frederick Butler and his wife conveyed to petitioner Butler Drive Property Owners Association a sixty-foot wide strip of land; the Edwards parcel was again conveyed with the same language pertaining to the right of ingress and egress over Butler Drive; three parcels of the Edwards Parcel were conveyed in three separate deeds, including one to a respondent and one to a petitioner; and all of the owners of the Edwards Parcel use Butler Drive for ingress and egress. Although petitioners argue that they

are entitled to use Butler Drive to the exclusion of the general public based on a theory of dedication, the grant of the Edwards Parcel by Frederick Butler and his wife to Lawrence and Mary Wright on 10 May 1978 contains language which clearly shows an intention of the parties to grant the right of ingress and egress over Butler Drive to the owners of the Edwards Parcel. The language in this grant of easement, coupled with the grant of the Edwards Parcel, creates an easement appurtenant over Butler Drive. Although subsequent deeds did not contain that language, it was not necessary because the easement is appurtenant and attaches to, passes with, and is an incident of ownership of the Edwards Parcel.

Appeal by petitioners from judgment entered 4 October 1991 by Judge Russell Duke, Jr. in Northampton County Superior Court. Heard in the Court of Appeals 2 December 1992.

Petitioners Butler Drive Property Owners Association, Inc., *et al*, brought this action seeking a declaratory judgment upon an exclusive easement over Butler Drive and injunctive relief to prevent respondents from using this easement. On 24 January 1991, respondents filed an answer in this action asking the court to determine that petitioners are not the exclusive owners of Butler Drive and that the respondents have the right to use Butler Drive. On 4 October 1991, Judge Russell Duke, Jr. entered judgment for respondents, finding that respondents, their heirs, assigns and legal representatives are entitled to the non-exclusive right of ingress and egress over and across Butler Drive. From this judgment, petitioners appeal. For the reasons stated below, we affirm the decision of the trial court.

Cranford, Whitaker, and Dickens, by Cary Whitaker, for petitioner-appellants.

Ronnie C. Reaves, P.A., by Lynn Pierce and Ronnie C. Reaves, for respondent-appellees.

ORR, Judge.

This declaratory action was brought to determine the rights of the parties as to a strip of land known as Butler Drive. Petitioners are owners of certain lots in Section "I", Crescent Beach Subdivision and Crescent Beach Subdivision Extended, Gaston Township, Northampton County. These lots are bounded on the

North by Butler Drive. Respondents are owners of certain tracts or parcels of land that abut Butler Drive on the North side, opposite that of petitioners. The parties stipulated to all of the facts set out below.

All of the lots and parcels of land in question were owned by Norene K. Butler at one time. Norene Butler recorded an affidavit dated 20 June 1969 which contained certain restrictions. The affidavit referred to by this stipulation placed these restrictions on the lots in "Section 'I', Cresent [sic] Beach, . . . in order to insure the most beneficial development of [the] area as a residential subdivision . . . ." Prior to her death, Norene conveyed certain lots which are subject to these restrictions, but, at no time before her death did she convey fee simple ownership of Butler Drive.

Norene Butler died testate, devising all of her property to her son Frederick Paige Butler. Frederick conveyed certain lots which are subject to the restrictions. By deed dated 10 October 1977, Frederick and his wife conveyed certain lots to petitioner Carl S. Thompson, Jr. By deed dated 10 May 1978, Frederick and his wife conveyed a parcel of land to Lawrence E. Wright, Jr. and wife, Mary D. Wright (the "Edwards Parcel"). The deed to which this stipulation refers to states, "[t]ogether with the non-exclusive right of ingress and egress . . . over Butler Drive . . . limited to those persons who purchase all or a part of the property [described in the deed], ..." The Edwards Parcel abuts Butler Drive on one side, opposite the lots in the subdivision which are bounded on the North by Butler Drive.

By deed dated 16 October 1979, Frederick and his wife conveyed a sixty-foot wide strip of land to petitioner Butler Drive Property Owners Association. Prior to this conveyance, Frederick had not conveyed fee simple ownership in Butler Drive. By deed dated 25 April 1986, Lawrence Wright, Jr. and Mary D. Wright conveyed the Edwards Parcel to respondent Grover Edwards. The deed to which this stipulation refers to contains the same language pertaining to the right of ingress and egress over Butler Drive. Grover Edwards and his wife conveyed three separate parcels of the Edwards Parcel to Agnes M. Hall, respondent Doris Olivia Edwards, and petitioner Branch H. Benton, by three separate deeds. All of these owners of the Edwards Parcel, including Grover Edwards and his wife, use Butler Drive for ingress and egress to and from their respective parcels.

Petitioners contend that the trial court committed reversible error in entering judgment allowing a non-exclusive right of ingress and egress over and across Butler Drive to all of the respondents, their heirs, assigns and legal representatives. We disagree.

It appears from petitioner's brief that the only ground brought forward in support of their contention that respondents are not entitled to a non-exclusive right of ingress and egress over Butler Drive is that no public dedication of Butler Drive was made. This case does not, however, deal with the issue of a public dedication. Instead, the issue before us is whether an appurtenant easement over Butler Drive has been created.

Petitioners argue that they are entitled to the right to use Butler Drive to the exclusion of the general public and thus to the exclusion of the respondents based on a theory of dedication. Petitioners cite several cases that address the issue of when a street in a subdivision is dedicated for use by purchasers of lots in that subdivision. Specifically, petitioners rely on the following language stated by our Supreme Court in *Cleveland Realty Co. v. Hobbs*, 261 N.C. 414, 421, 135 S.E.2d 30, 35-6 (1964):

> Where lots are sold and conveyed by reference to a map or plat which represents a division of a tract of land into streets, lots, parks and playgrounds, a purchaser of a lot or lots acquires the right to have the streets, parks and playgrounds kept open for his reasonable use, and this right is not subject to revocation except by agreement. (citations omitted). It is said that such streets, parks and playgrounds are *dedicated* to the use of lot owners in the development. In a strict sense it is not a dedication, for a dedication must be made to the public and not to a part of the public. (citation omitted). It is a right in the nature of an easement appurtenant. Whether it be called an easement or a dedication, the right of the lot owners to the use of the streets, parks and playgrounds may not be extinguished, altered or diminished except by agreement or estoppel. (citations omitted). This is true because the existence of the right was an inducement to and a part of the consideration for the purchase of the lots. (citations omitted).

Petitioners go on to quote language found in *Owens v. Elliott*, 258 N.C. 314, 317, 128 S.E.2d 583, 586 (1962) which states:

> An acceptance by the public of an offer to dedicate a street or road must be by the proper public authorities—that is, by persons competent to act for the public, e.g., the governing board of a municipality or State Highway Commission. (citation omitted). To be binding, the acceptance by the public authority must be in some recognized legal manner. (citation omitted).

Further,

> [a] person who purchases a lot or parcel of land situate outside the boundaries of a subdivision has no rights with respect to the dedicated streets of the subdivision other than those enjoyed by the public generally, even though his lot or parcel abuts upon one of the streets.

Id. at 318, 128 S.E.2d at 586 (citations omitted). Based on this and similar language, petitioners conclude that they have the right to use Butler Drive to the exclusion of respondents as purchasers of lots within a subdivision.

However, petitioners have failed to address the fact that respondents are not merely members of the "general public" or purchasers of a lot outside of the subdivision possessing no interest in Butler Drive. On the contrary, respondents are owners of a parcel of land with an appurtenant easement that gives them the right of ingress and egress over Butler Drive.

"An easement is a right to make some use of land owned by another without taking a part thereof." *Builders Supplies Co. of Goldsboro, N.C., Inc. v. Gainey*, 282 N.C. 261, 266, 192 S.E.2d 449, 453 (1972) (citations omitted). " 'No particular words are necessary to constitute a grant [of an easement], and any words which clearly show the intention to give an easement, which is by law grantable, are sufficient to effect that purpose, provided the language is certain and definite in its terms.' " *Dees v. Colonial Pipeline Co.*, 266 N.C. 323, 327, 146 S.E.2d 50, 53 (1966) (citations omitted). "An easement deed is a contract. When such contracts are plain and unambiguous, their construction is a matter of law for the courts." *Lovin v. Crisp*, 36 N.C. App. 185, 188, 243 S.E.2d 406, 409 (1978) (citations omitted).

"An appurtenant easement is an easement created for the purpose of benefitting particular land. This easement attaches to, passes with and is an incident of ownership of the particular land."

Shear v. Stevens Bldg. Co., 107 N.C. App. 154, 161, 418 S.E.2d 841, 846 (1992).

> A deed which conveys a portion of the grantor's property and in addition grants the right of ingress and egress over other lands of the grantor to a highway creates an easement in favor of and appurtenant to the land conveyed and subjects the remaining land of the grantor to the burden of such easement.

Hensley v. Ramsey, 283 N.C. 714, 729, 199 S.E.2d 1, 10 (1973) (citation omitted).

In the case *sub judice*, Frederick Butler and his wife granted the Edwards Parcel to Lawrence and Mary Wright in a deed dated 10 May 1978. Along with this grant of land, the deed contains the language:

> Together with the non-exclusive right of ingress and egress for the parties of the second part, their heirs, assigns and legal representatives, over Butler Drive as shown on the map hereinabove referred to, upon the condition that such right of ingress and egress over Butler Drive shall be limited to those persons who purchase all or a part of the property herein described, the parties of the second part and the heirs and legal representatives of the parties of the second part.

This language clearly shows an intention of the parties to grant the right of ingress and egress over Butler Drive to the owners of the Edwards Parcel, or in other words, a right to make some use of land owned by another without taking a part thereof. Additionally, based on the language in *Hensley*, the language in this grant of easement, coupled with the grant of the Edwards Parcel, creates an easement appurtenant over Butler Drive.

Subsequently, on 25 April 1986, the Wrights effectively conveyed the Edwards Parcel to respondents Grover and Lucy Edwards in a deed containing the same language set out above. Grover and Lucy conveyed three separate parcels of the Edwards Parcel to Agnes M. Hall, respondent Doris Olivia Edwards, and petitioner Branch H. Benton by three separate deeds. These deeds do not contain the language cited above, but this language is not necessary to convey the easement with these deeds because the easement is one appurtenant. Because the Butler Drive easement granted in the deed to the Wrights is an appurtenant easement, it "attaches

to, passes with and is an incident of ownership of" the Edwards Parcel. *See, Shear, supra.* Thus, the Butler Drive easement passes with the conveyance of the Edwards Parcel to give Agnes M. Hall, Doris Olivia Edwards, and Branch H. Benton the right of ingress and egress over Butler Drive.

Affirmed.

Judges ARNOLD and JOHNSON concur.

STATE OF NORTH CAROLINA, PLAINTIFF v. JACK CORPENING, DEFENDANT

No. 9115SC1165

(Filed 6 April 1993)

Searches and Seizures § 11 (NCI3d)— search of disabled vehicle— odor of white liquor—probable cause

The trial court did not err by denying defendant's motion to suppress evidence of white liquor and marijuana found in the back of defendant's van where defendant pulled into the lot of an old store when the right rear tire of his van caught on fire; he found a water hose and extinguished the fire; a volunteer fire department arrived soon after and defendant requested that a wrecker be called; a deputy arrived at about the same time as the wrecker; the deputy observed that the rear area of the van had been burned, that the window glass was missing, and that a fresh piece of cardboard had been placed in the window so that the interior was not visible; defendant appeared to be nervous; the deputy, who had been a law enforcement officer for thirteen years and who had smelled white liquor on a number of occasions, recognized the odor of white liquor coming from the van; the deputy asked if he could look into the van and defendant replied, "Well, I'd rather you didn't"; the deputy told defendant he would need to investigate the fire further before the van could be towed and defendant said, "Okay, go ahead and look," or words to that effect; and the deputy discovered in the van 451 jugs of non-tax paid whiskey and a plastic bag containing marijuana. A search warrant is not a prerequisite to carrying out a search of a

motor vehicle as long as the officer has probable cause to search. The court in this case found that the deputy was sufficiently experienced to make a reliable determination that what he smelled was illegal contraband (white liquor), that defendant appeared to be very nervous, and that defendant had placed cardboard over a burned-out window on the van after the fire. Although defendant argues that there were no exigent circumstances and that the deputy could have obtained a warrant because the vehicle was not driveable and was going to be towed, no exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle in a public place based on probable cause to believe that it contains the instrumentality of or pertains to a crime.

Am Jur 2d, Searches and Seizures § 45.

Validity, under Federal Constitution, of warrantless search of motor vehicle—Supreme Court Cases. 89 L. Ed. 2d 939.

Appeal by defendant from judgments entered 26 June 1991 by Judge J. B. Allen, Jr., in Alamance County Superior Court. Heard in the Court of Appeals 3 February 1993.

Defendant was convicted of maintaining a vehicle for the purpose of keeping or selling controlled substances, felony possession of marijuana, possession with intent to sell or deliver marijuana, and possession and transportation of a non-tax paid alcoholic beverage. The trial court entered judgments sentencing defendant to imprisonment for a total of seven years. Defendant appealed.

Attorney General Lacy H. Thornburg, by Associate Attorney General J. Peter Rascoe, III, for the State.

Robert H. Hood, III, for defendant-appellant.

MARTIN, Judge.

Defendant's sole contention on appeal is that the trial court erred by denying his motion to suppress evidence discovered during a warrantless search of his motor vehicle. We find no error in the trial court's ruling.

The scope of review on appeal of the denial of a defendant's motion to suppress is strictly limited to determining whether the

trial court's findings of fact are supported by competent evidence, in which case they are binding on appeal, and in turn, whether those findings support the trial court's conclusions of law. *State v. Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982); *State v. Fleming*, 106 N.C. App. 165, 415 S.E.2d 782 (1992). In the present case, the evidence offered at the hearing on defendant's motion to suppress tended to show that defendant, who was from Burke County, was driving his 1979 Chevrolet van on N.C. Highway 62 in Alamance County when the right rear tire of the vehicle caught fire. Defendant pulled off the highway into the lot of an old store, found a water hose, and extinguished the fire. Shortly thereafter, a volunteer fire department crew arrived, and defendant requested that a wrecker be called.

Deputy K. B. Wolford of the Alamance County Sheriff's Department was dispatched and arrived at approximately the same time as the wrecker. He observed that the rear area of the van had been burned and that the window glass was missing. A fresh piece of cardboard had been placed in the window so that the interior of the van was not visible. Defendant appeared to Deputy Wolford to be nervous. While standing at the van, Deputy Wolford detected an odor coming from the van which he recognized as the odor of "white liquor." Deputy Wolford had been a law enforcement officer for thirteen years and had smelled "white liquor" on a number of occasions.

Deputy Wolford asked defendant if he could look into the van and defendant replied, "Well, I'd rather you didn't." Deputy Wolford then told defendant that he would need to investigate the fire further before the van could be towed and defendant said, "OK, go ahead and look," or words to that effect. When Deputy Wolford looked inside the van, he discovered 451 gallon jugs of non-tax paid whiskey. Some of the jugs at the rear of the van had been damaged by the fire, and the contents had spilled onto the floor of the vehicle. Defendant was placed under arrest. A further search of the van revealed a plastic bag containing marijuana.

In general, the Fourth Amendment to the Constitution of the United States requires that a governmental search and seizure of private property be accompanied by judicial approval in the form of a warrant, unless an established exception to the warrant requirement exists involving exigent circumstances. *State v. Cherry*, 298 N.C. 86, 257 S.E.2d 551 (1979), *cert. denied*, 446 U.S. 941, 64

L.Ed.2d 796 (1980); *Cooke*, 306 N.C. 132, 291 S.E.2d 618 (1982). The protection from unreasonable search and seizure provided by the Fourth Amendment and by Article I, Section 20 of the North Carolina Constitution extends to occupants of automobiles. *State v. Gwyn*, 103 N.C. App. 369, 406 S.E.2d 145, *disc. review denied*, 330 N.C. 199, 410 S.E.2d 498 (1991); *State v. Tillett*, 50 N.C. App. 520, 274 S.E.2d 361 (1981).

Both the United States Supreme Court and the North Carolina Supreme Court consistently hold that one exception to the warrant requirement involves the search of a motor vehicle on public property. *Carroll v. United States*, 267 U.S. 132, 69 L.Ed. 543 (1924); *State v. Isleib*, 319 N.C. 634, 356 S.E.2d 573 (1987). The inherent mobility of the motor vehicle is the exigent circumstance. *Isleib*, *supra*. Pursuant to the so-called "automobile exception" to the warrant requirement, a search warrant is not a prerequisite to the carrying out of a search of a motor vehicle as long as the officer has probable cause to search. *Id.*

Thus, because the search in the present case involved a motor vehicle in a public area, the only determination left for review is whether Deputy Wolford had probable cause to search the van. Probable cause requires that the existing facts and circumstances be sufficient to support a fair probability or reasonable belief that contraband will be found in the automobile. *State v. Simmons*, 278 N.C. 468, 180 S.E.2d 97 (1971); *State v. Ford*, 70 N.C. App. 244, 318 S.E.2d 914 (1984). It is not required that there be proof beyond a reasonable doubt or even *prima facie* evidence of guilt, rather it is enough if based upon the factual and practical considerations of everyday life, the evidence would actuate a reasonable person acting in good faith. *State v. Harris*, 279 N.C. 307, 182 S.E.2d 364 (1971); *State v. Andrews*, 52 N.C. App. 26, 277 S.E.2d 857 (1981), *aff'd in part, rev'd in part*, 306 N.C. 144, 291 S.E.2d 581, *cert. denied*, 459 U.S. 946, 74 L.Ed.2d 205 (1982).

In this case, the trial court found as facts that Deputy Wolford was sufficiently experienced to make a reliable determination that what he smelled was illegal contraband (white liquor). Other courts have similarly determined that the odor of illegal liquor or marijuana may form the basis of probable cause for a warrantless search of a vehicle. *State v. Greenwood*, 301 N.C. 705, 273 S.E.2d 438 (1981); *State v. Banks*, 265 N.C. 590, 144 S.E.2d 661 (1965). Additionally, the trial court found in this case that defendant appeared

to Deputy Wolford to be very nervous and that defendant had placed cardboard over a burned-out window on the van after the fire. These findings are fully supported by competent evidence and support the trial court's determination that Deputy Wolford had reasonable grounds to conclude that the van contained contraband, and that he did not need a warrant to search.

Although the trial court also determined that the white liquor presented a dangerous situation in conjunction with the previous fire, there was no requirement that Deputy Wolford believe that a dangerous condition existed before he could search. The automobile alone presented the exigent circumstances, and probable cause was established through the reasonable belief that the van contained contraband. Moreover, Deputy Wolford's authority to search, based on probable cause, extended to the entire van. In any event, once the defendant had been arrested, the entire passenger area of the van was subject to search as an incident of the arrest. *State v. Wrenn*, 316 N.C. 141, 340 S.E.2d 443 (1986).

Defendant cites *State v. Braxton*, 90 N.C. App. 204, 368 S.E.2d 56 (1988), in support of his contention that Deputy Wolford had insufficient information to provide probable cause to search. In *Braxton*, the officer stopped a speeding car intending to issue a warning to the operator. The officer observed, however, the operator stuff something under the seat. The driver then got out of the vehicle and closed the door. The officer opened the door, reached under the seat, and found marijuana. This Court held that the actions of the operator were insufficient to establish probable cause in the mind of the detective. *Id.*

The present case is easily distinguishable from *Braxton*. In that case, there was no evidence that the officer possessed any knowledge or information that the motorist was engaged in criminal conduct or in possession of contraband; indeed, the officer testified that he had no such information and intended only to issue a warning until he saw the motorist's suspicious movements. In the present case, Deputy Wolford not only observed suspicious circumstances, but also, through his recognition of the distinctive odor of the illicit liquor, gained specific information that defendant had contraband in his vehicle.

Defendant also argues that because his vehicle was not driveable, and was going to be towed, there were no exigent circumstances, and Deputy Wolford could have obtained a search warrant. Our

Supreme Court has specifically held that the fact that an officer has probable cause to secure a search warrant and adequate time to obtain one, but fails to do so, does not vitiate the rule of *Carroll. Isleib, supra.* No exigent circumstances other than the motor vehicle itself are required in order to justify a warrantless search of a motor vehicle in a public place based on probable cause to believe that it contains the instrumentality of or pertains to a crime. *Id.*

The trial court's denial of defendant's motion to suppress the evidence obtained as the result of a warrantless search of his vehicle was proper.

No error.

Judges JOHNSON and GREENE concur.

SUSAN G. PEAKE, PLAINTIFF/APPELLEE v. BEVERLY D. SHIRLEY, DEFENDANT/APPELLANT

No. 9224SC336

(Filed 6 April 1993)

Husband and Wife § 52 (NCI4th)— alienation of affections— sufficiency of evidence

The trial court did not err by denying defendant's motions for directed verdict and judgment n.o.v. in an alienation of affections case where plaintiff indicated that, prior to 1988, her husband had genuine love and affection for her and that she thought they had a perfect marriage; although defendant presented evidence that plaintiff's marriage was troubled by alcohol, this evidence merely created an issue of material fact as to whether genuine love and affection existed between plaintiff and her husband; it was uncontroverted that the love and affection, if it existed, was alienated; plaintiff presented evidence that defendant came to plaintiff's house to see her husband when she knew plaintiff would not be home; defendant made hotel reservations and spent over four hours in a hotel room with plaintiff's husband; and when confronted, defendant admitted her wrong and said "I am so sorry I have done this

to you." Viewing this evidence in the light most favorable to the plaintiff, a jury could reasonably conclude that defendant actively participated in alienating plaintiff's husband's affections and that her conduct led plaintiff's spouse to terminate the marriage.

Am Jur 2d, Husband and Wife § 501.

Appeal by defendant from judgment entered 19 December 1991 in Mitchell County Superior Court by Judge Claude S. Sitton. Heard in the Court of Appeals 9 March 1993.

Plaintiff instituted this action against defendant for alienation of her husband's affections. The record reveals the following facts and circumstances leading up to this action. Plaintiff and Dr. Dean Peake were married in 1967 and lived together until 18 February 1989, at which time Dr. Peake left the marital home. Plaintiff and Dr. Peake obtained a divorce on 30 April 1990.

During their marriage, Dr. Peake was regularly employed as a dentist, and plaintiff worked in his office as a receptionist and office manager. Plaintiff presented evidence that prior to their separation, plaintiff and Dr. Peake had a happy marriage. They went on vacations, weekend football outings, and beach trips together and regularly engaged in marital relations. Plaintiff felt that they had a good relationship and a fulfilling marriage.

Plaintiff began noticing changes in her relationship with her husband beginning the summer of 1988. Although it was his habit to eat lunch at his office, Dr. Peake began leaving the office during lunch time, saying he had to get out and ride around. Plaintiff noticed other changes in his behavior as well. Dr. Peake began drinking at defendant's father's home after work and was often not home nights and Saturdays.

On one occasion, plaintiff, Dr. Peake, defendant, and her husband were at the hospital visiting defendant's father. Dr. Peake and defendant left the hospital room together and were away about 10 minutes. When they returned, Dr. Peake said he was going to take everyone out to dinner. Defendant's husband, however, did not want to go. Dr. Peake then refused to take plaintiff to dinner alone. Plaintiff then inquired why Dr. Peake would go out to eat only if defendant was going. Dr. Peake replied that defendant had class but the plaintiff did not.

That same month, on a Thursday night, plaintiff was scheduled to go to a dance class. Instead, she stayed home because she was ill. During the time plaintiff would have been in class, defendant came to plaintiff's home. Defendant and Dr. Peake went downstairs to the den. Dr. Peake asked plaintiff to leave them alone. Around ten o'clock p.m., almost two hours later, Dr. Peake left home and stated that he was going to check on defendant's father. Defendant left shortly thereafter. Dr. Peake did not return home until 1:00 a.m.

Although plaintiff had never invited defendant to her home and had no knowledge that the defendant had ever been in her home on any prior occasions, defendant knew where the bathroom was in plaintiff's home. Further, a witness testified that she had seen the defendant leaving the plaintiff's residence around noon on 22 August 1988, while plaintiff was out of town.

On 11 February 1989, plaintiff and Dr. Peake attended a dance where the defendant was present. Dr. Peake and the defendant danced together numerous times and plaintiff was left sitting alone at a table.

Subsequent to their separation, plaintiff hired a private investigator to follow and observe Dr. Peake. On 4 May 1989, the investigator, his associate, and plaintiff observed Dr. Peake leave his office at approximately 3:30 p.m. He drove through a subdivision and took numerous detours but eventually left on the highway toward Asheville, North Carolina. He proceeded to a Red Roof Inn, circled the motel, parked the car, and entered through a breezeway leading to the motel rooms. Plaintiff and the investigators also observed defendant's car in the parking lot. Dr. Peake arrived at the motel at approximately 6:00 p.m.

At 10:00 p.m., plaintiff and the investigators observed Dr. Peake and the defendant leave the breezeway and proceed to defendant's automobile where they embraced and kissed and defendant got into her automobile. Plaintiff then approached defendant's automobile by the passenger door. Dr. Peake ran and plaintiff got into the car with defendant. Defendant then said to plaintiff, "Please forgive me. I am so sorry I have done this to you."

Defendant presented evidence to the effect that plaintiff and Dr. Peake had a difficult marriage which ended by a dispute over the discipline of their daughter. Plaintiff and Dr. Peake also had a continuing dispute during their marriage over plaintiff's relation-

ship with a Bud Phillips. Defendant further asserted that Dr. Peake abused alcohol throughout the marriage, as plaintiff indicated in her complaint for alimony.

A jury trial was held on 8 December 1991, and upon submission of the issues to the jury, a verdict was returned in favor of the plaintiff, awarding the plaintiff $5,000.00 for alienation of affections. Defendant appeals.

Lloyd Hise, Jr., P.A., by Lloyd Hise, Jr., for plaintiff-appellee.

Robert E. Riddle, P.A., by Robert E. Riddle, for defendant-appellant.

WELLS, Judge.

Although defendant presents four assignments of error for our review, the dispositive issue before us is whether the trial court erred in denying defendant's motions for directed verdict and judgment notwithstanding the verdict on plaintiff's alienation of affections claim. We find no error.

To withstand a motion for directed verdict on an alienation of affections claim, plaintiff must present evidence to show that: (1) there was genuine love and affection between plaintiff and her husband, and (2) because of the wrongful conduct of defendant, the love and affection was in fact destroyed. *Shaw v. Stringer*, 101 N.C. App. 513, 400 S.E.2d 101 (1991). Plaintiff must also show active and affirmative conduct on the part of defendant. One is not liable for merely becoming the object of the affections that are alienated from a spouse. There must be active participation, initiative or encouragement on the part of the defendant in causing one spouse's loss of the other spouse's affections for liability to arise. *Darnell v. Rupplin*, 91 N.C. App. 349, 371 S.E.2d 743 (1988). We find plaintiff presented sufficient evidence to overcome defendant's directed verdict motion and take the case to the jury.

Plaintiff indicated that prior to 1988, Dr. Peake had genuine love and affection for her. Plaintiff testified that she thought they had a perfect marriage. Although defendant presented evidence that plaintiff's marriage was troubled by alcohol, this evidence merely created an issue of material fact as to whether genuine love and affection existed between plaintiff and her husband. Whether Dr. Peake and plaintiff had an affectionate marriage was not a question for the court but for the jury.

It is uncontroverted that the love and affection, if it existed, was alienated. The question then becomes whether plaintiff presented sufficient evidence that the wrongful acts of defendant produced the alienation of affections. *Gray v. Hoover*, 94 N.C. App. 724, 381 S.E.2d 472 (1989). We find that she did.

Plaintiff presented evidence that defendant came to plaintiff's house to see Dr. Peake when she knew plaintiff would not be home. Defendant also made the hotel reservations at the Red Roof Inn, where she spent over four hours in a hotel room with him. When defendant was confronted, she admitted her wrong, and said, "I am so sorry I have done this to you." Viewing this evidence in the light most favorable to the plaintiff, a jury could reasonably conclude that defendant actively participated in alienating Dr. Peake's affections and that her conduct led plaintiff's spouse to terminate the marriage.

For the reasons stated above and in keeping with prior case law, we hold that the trial court did not err in denying defendant's motions for directed verdict and judgment notwithstanding the verdict.

No error.

Judges ORR and MARTIN concur.

STATE OF NORTH CAROLINA v. KYLE WINSLOW DUFFY, DEFENDANT

No. 9226SC144

(Filed 6 April 1993)

Criminal Law § 1183 (NCI4th)— burglary—sentencing—aggravating factor—prior offense—motion in limine hearing—defendant's admission

The trial court did not err when sentencing defendant for burglary by finding the aggravating factor of a prior conviction where defendant had filed a motion *in limine* before trial to prohibit the State from offering evidence of other crimes, the motion included a statement that defendant had previously been convicted of a felony in California, the prosecutor advised

the court that he did not intend to offer evidence of that conviction during the State's evidence, the prosecutor offered the motion during the sentencing hearing, and the court considered the statement contained in the motion. The motion in limine sought only to prevent the State from presenting evidence of defendant's prior California conviction to the jury and the statement was at the very least an evidential admission. Although N.C.G.S. § 15A-1340.4(e) permits proof of a prior conviction by stipulation of the parties or by the original or a certified copy of the court record of the prior conviction, the statute does not preclude other methods of proof and it has been held that a defendant's prior record may be proved by the statements of his counsel.

Appeal by defendant from judgment entered 26 September 1991 by Judge Hollis M. Owens, Jr., in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 March 1993.

Defendant was charged in a bill of indictment with first degree burglary in violation of G.S. § 14-51. The indictment alleged that defendant broke and entered the victim's occupied dwelling with the intent to commit the felonies of sex offense, rape and larceny. The State proceeded to trial on the charge of attempted first degree burglary, a class H felony, and the jury found defendant guilty. He appeals from a judgment imposing an active ten year term of imprisonment.

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

Murphy & Chapman, P.A., by Calvin E. Murphy, for defendant-appellant.

MARTIN, Judge.

Defendant assigns error only with respect to the sentence imposed by the trial court. The dispositive issue on appeal is whether the trial court erred in its finding, as a factor in aggravation of punishment, that defendant had a prior conviction of a criminal offense punishable by more than sixty days confinement. Although defendant asserts that there was no competent evidence to support the finding, we discern no error in the judgment of the trial court.

Before defendant's trial began, his counsel filed a motion in limine to prohibit the State from offering, during the presentation of its case, evidence of other crimes committed by defendant. The motion included the following statement:

> 6. That on October 22, 1985, the defendant was convicted of Sexual Penetration with a Foreign Object With Force, a felony, in the State of California. The offense occurred after the defendant entered the victim's residence through an unlocked door. The defendant cooperated with police and made a full confession of his crime.

When the motion was considered by the trial court, the prosecutor advised the court that he did not intend to offer evidence of the California conviction during the presentation of the State's evidence, and the following exchange took place between the court and defendant's counsel:

> The Court: I suppose the motion is moot then?
>
> Mr. Murphy: If they don't intend to do it, that's correct.
>
> The Court: All right.
>
> Mr. Murphy: Well, of course, the motion is allowed to the extent that they have made that announcement.
>
> The Court: All right.

At defendant's sentencing hearing, the prosecutor offered defendant's motion in limine into evidence as proof of defendant's previous conviction. Over defendant's objection, the court considered the statement contained in the motion in limine and found as a factor in aggravation of punishment that defendant had been convicted of an offense punishable by more than 60 days confinement. Defendant argues that the finding was erroneous because (1) the trial court relied on an unverified statement of defendant's counsel, (2) the evidence upon which the trial court based its finding was the very evidence which it had excluded by allowing the motion in limine, and (3) the State did not prove the prior conviction in accordance with the provisions of G.S. § 15A-1340.4(e). We find no merit in any of these contentions.

The motion in limine sought only to prevent the State from presenting evidence of defendant's prior California conviction to the jury, on the grounds that its probative value would be substan-

tially outweighed by its potential for unfair prejudice or for misleading the jury. The court's ruling with respect to the motion did not preclude it from considering the conviction in determining an appropriate sentence after the jury had found the defendant guilty. Moreover, even though the trial court may have incorrectly referred to counsel's written statement as a stipulation, it was at the very least admissible against the defendant as an evidential admission. *See* 2 *H. Brandis, North Carolina Evidence* §§ 171 & 177 (1988). Finally, though G.S. § 15A-1340.4(e) permits proof of a prior conviction by "stipulation of the parties or by the original or a certified copy of the court record of the prior conviction," the statute does not preclude other methods of proof, *State v. Thompson*, 309 N.C. 421, 307 S.E.2d 156 (1983), and we have held that a defendant's prior record may be proved by the statements of his counsel. *State v. Brewer*, 89 N.C. App. 431, 366 S.E.2d 580 (1988); *State v. Cook*, 65 N.C. App. 703, 309 S.E.2d 737 (1983). In this case, we hold that the admission, contained in defendant's motion in limine, of his previous conviction in California, was sufficient evidence to support the trial court's finding of the aggravating factor.

No error.

Judges WELLS and ORR concur.

IN RE: NATHAN GUARANTE, BRIAN ERB, CHRISTOPHER ERB, JESSICA ERB, NICHOLAS ERB

No. 927DC276

(Filed 6 April 1993)

Infants or Minors § 86 (NCI4th)— non-secure custody order—hearing to continue custody—petition dismissed—no authority

The trial court did not have authority to dismiss petitions alleging abuse, neglect, and/or dependency of five children where DSS had obtained non-secure custody orders, a hearing was held to determine the need for continued non-secure custody pending an adjudicatory hearing, and the judge ordered the children to be returned to the home and dismissed all of the

petitions. Although N.C.G.S. § 7A-577(a) states that the five-day hearing may be a hearing on the merits or a hearing to determine the need for continued custody, in this case notice was given on the form that the adjudicatory hearing had been set for a later date and neither party was on notice that the judge would decide the merits of the case. Preparation for a custody hearing is much different than for a more formal adjudicatory hearing at which the evidence rules are applicable. The interests of the parents or custodians are adequately protected by a five-day custody hearing and the children's interests are better protected by allowing such cases to proceed to an adjudicatory hearing rather than by permitting a judge to evaluate the merits of the case at an informal custody hearing.

Am Jur 2d, Juvenile Courts and Delinquent and Dependent Children §§ 35, 36.

Appeal by Nash County Department of Social Services from Order entered 29 August 1991, for 6 August 1991, by Judge Allen W. Harrell in Nash County District Court. Heard in the Court of Appeals 2 March 1993.

Nash County Department of Social Services, by Sonja S. Beckham and Myra Jane Bradshaw, for petitioner-appellant.

Terry W. Alford for respondent-appellee.

LEWIS, Judge.

On 2 August 1991 the Nash County Department of Social Services ("DSS") obtained non-secure custody orders for five children living with Sally and Ed Brake pursuant to an investigation conducted earlier that day. On 6 August 1991 DSS served the Brakes with five petitions alleging abuse, neglect, and/or dependency. Later that day a five-day hearing was held to determine the need for continued non-secure custody pending an adjudicatory hearing set for 19 August 1991. At this five-day hearing the judge ordered the children to be returned to the home of the Brakes and dismissed all of the petitions. DSS appeals, alleging the judge did not have the authority to dismiss the petitions at the five-day hearing.

N.C.G.S. § 7A-576 (1989) authorizes DSS to take immediate physical custody of a juvenile upon obtaining a nonsecure custody

order under N.C.G.S. § 7A-574(a) (1989). Nonsecure custody orders may be issued for reasons such as abandonment of a child, physical injury or sexual abuse, exposure to a substantial risk of injury or abuse, and the need for medical treatment. § 7A-574(a). In this case, DSS obtained a custody order on the basis of alleged physical injury and exposure to a substantial risk of further injury, as well as neglect and dependency. According to N.C.G.S. § 7A-577(a) (1989), "[n]o juvenile shall be held under a custody order for more than five calendar days without a hearing on the merits or a hearing to determine the need for continued custody."

DSS contends the 6 August 1991 hearing was clearly denominated a hearing to determine the need for continued custody. The judge therefore had the discretion to either continue nonsecure custody or to return the children to their home. He did not have the authority to dismiss the petitions, according to DSS, because in so doing he made an unauthorized determination of the merits of the case. There is no express statutory authority allowing the judge to dismiss the petitions at a five-day hearing.

Respondent, however, relies on the fact that section 577(a) does not specifically prevent a judge from dismissing the petitions at such a hearing. Respondent argues the trial judge should have the discretion to dismiss the petitions and that this determination should not be reviewed absent an abuse of discretion.

We agree with the position of DSS. The Juvenile Summons issued on 6 August 1991 lists that day as the "Date of Hearing On Continued Custody," and sets 19 August 1991 as the "Date of Hearing On Petition." The trial court acknowledged in its Order that "[t]he question before the Court was whether the five named children should be continued in the custody of the Nash County Department of Social Services." Although the statute states that the five-day hearing may be a "hearing on the merits or a hearing to determine the need for continued custody," § 7A-577(a), in this case the 6 August 1991 hearing was clearly a custody hearing. Notice was given on the form that the adjudicatory hearing had already been set for a later date, 19 August 1991. Neither party was on notice that the judge would decide the merits of the case or dismiss the petitions. DSS points out that a custody hearing is informal and the Rules of Evidence are not applicable. Obviously, preparation for a custody hearing is much different than for a

more formal adjudicatory hearing at which the evidence rules are applicable.

The interests of the parents or custodians are adequately protected by a five-day custody hearing. If the court finds continued custody unnecessary, the children are immediately returned to the home pending the adjudicatory hearing. The children's interests are better protected by allowing such cases to proceed to an adjudicatory hearing, rather than permitting a judge to attempt to evaluate the merits of the case at an informal custody hearing. We note that it would have been patently unfair to the Brakes had the judge made a final adjudication adverse to them at the five-day hearing.

Reversed; order of dismissal is vacated and the case is remanded for further proceedings.

Judges JOHNSON and JOHN concur.

STATE OF NORTH CAROLINA v. LARRY EMMET RUPE

No. 9118SC1140

(Filed 20 April 1993)

1. Embezzlement § 6 (NCI4th)— refundable reservation deposit for condominium—use of funds for start-up costs—deposits not returned—sufficient evidence of embezzlement

The evidence of a fiduciary relationship and fraudulent intent was sufficient to support defendant's conviction of embezzlement where it tended to show that defendant was an officer in corporations developing, marketing and managing condominium retirement communities; potential purchasers of a planned condominium project in Greensboro reserved a unit by paying five percent of the purchase price as a deposit; this deposit was fully refundable within 30 days upon written notice by the purchaser; the purchaser was required to pay another five percent when the contract of sale was signed, and the contract provided that the initial reservation deposit was to be held in a savings account until a construction loan

commitment was obtained for the project, at which time the deposit would be returned to the purchaser; defendant controlled the deposit of reservation funds and used these funds to pay various start-up expenses for the project; defendant intended to replace this money through the sale of limited partnership interests in the project; however, the partnerships were not in fact secured, the money was not replaced, and several persons who had reserved units did not receive a refund of their deposits. It is not necessary to show that defendant converted the property to his own use provided the State shows that defendant fraudulently or knowingly and willfully misapplied the property for purposes other than those for which he received it as agent or fiduciary, and an intent to restore or repay the property is not a defense to prosecution.

Am Jur 2d, Embezzlement §§ 1 et seq.

Embezzlement by independent collector or collection agency working on commission or percentage. 56 ALR2d 1165.

2. **Evidence and Witnesses § 967 (NCI4th)— receipts and copies of checks—business records exception—authentication**

Reservation deposit receipts, photographic copies of reservation deposit checks, and receipts for public offering statements seized by an officer from the model showroom office of a condominium project were admissible pursuant to the business records exception to the hearsay rule, and the officer was properly permitted to testify as to the names, dates and dollar amounts shown on each document, where the authenticity of the records was established by a condominium salesman's testimony that his own signature appeared on six of the reservation deposit receipts; he had received the deposit checks; all of the documents represented those kept by the condominium sales office in the course of a regularly conducted sale of a condominium unit and were created at the time of a sales transaction; and the office records were kept in the file compartment in the showroom. N.C.G.S. § 8C-1, Rule 803(6).

Am Jur 2d, Evidence §§ 914 et seq.

Admissibility in state court proceedings of police reports as business records. 77 ALR3d 115.

3. Evidence and Witnesses § 299 (NCI4th)— exclusion of evidence—probative value outweighed by danger of misleading jury

The trial court in an embezzlement prosecution did not abuse its discretion by refusing to permit an officer to testify that the failure to put condominium deposits in escrow in violation of N.C.G.S. § 47C-4-110 is not subject to criminal sanctions on the ground that, even if such testimony was relevant, its probative value was outweighed by the danger that it would mislead the jury. N.C.G.S. § 8C-1, Rule 403.

Am Jur 2d, Evidence § 260.

4. Housing § 79 (NCI4th)— condominiums—refundable reservation deposit—30-day wait—penalty—escrow requirement

Where potential purchasers of condominium units were entitled to a full refund of their reservation deposits within thirty days of the seller's receipt of written notice of cancellation, the thirty-day wait period acts as a penalty because the potential purchasers lose interest on their money during that time. Therefore, the reservation deposits are not exempted from the public offering requirement of N.C.G.S. § 47C-4-101(b)(6) and are required by N.C.G.S. § 47C-4-110(a) to be placed in an escrow account.

Appeal by defendant from judgment entered 25 February 1991 by Judge W. Douglas Albright in Guilford County Superior Court. Heard in the Court of Appeals 2 February 1993.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Francis W. Crawley for the State.

Charles L. White for defendant-appellant.

WYNN, Judge.

Defendant was indicted on forty counts of embezzlement on 5 July 1989. The jury returned verdicts of guilty on all counts. Twenty-one counts were consolidated for judgment and defendant was sentenced to seven years imprisonment. The remaining nineteen counts were consolidated for judgment and defendant was sentenced to five years imprisonment to begin at the expiration of the previously imposed sentence. From judgment and sentencing, defendant appeals.

The State's evidence tended to show the following. The embezzlement charges in this case arose out of activities involving defendant Larry Rupe and codefendant Reverend William L. Williams. The parties are in dispute and the evidence is unclear as to exactly when the defendants began working together. According to the State's brief, defendant and Mr. Williams began working together in 1985 organizing, developing, selling and managing the operation of condominium retirement communities in Georgia, Alabama, South Carolina and North Carolina. Apparently however, Mr. Williams had started the corporations prior to 1981 and defendant joined on in 1982 as an employee. Three separate corporations were later chartered in Georgia: Covenant Marketing Co., Covenant Development Co. and Covenant Management Co. Defendant became the president and owner of 30% of the stock of Covenant Marketing. He became the vice-president and owner of 10% of the stock of each of the latter two corporations. Codefendant Williams was the vice-president of Covenant Marketing and the president of the other two corporations. Williams and his family owned all remaining shares in the three corporations.

Covenant Development was organized to secure investors, consultants and contractors for the development of the retirement communities. Covenant Marketing was formed to market and sell the condominium units in the communities developed, and, Covenant Management was organized to manage the projects when complete. The three companies were interrelated through common owners, officers, staff and office space. In addition, monies from the companies were intermingled in a number of accounts.

Defendant's responsibilities, as president of Covenant Marketing, included managing sales of condominium units and training new salespersons. In addition, defendant was primarily responsible for keeping up with money that was accepted from potential purchasers as deposits. Williams was responsible for securing investors, contractors, consultants and financing. Williams received $5,000 per month salary and defendant received $3,500 per month salary and commissions as overrides.

By the mid 1980s, the Covenant Companies had developed several successful retirement condominium projects in several states. The standard procedure in developing a community involved hiring a marketing consultant to conduct a study of a potential area to determine whether a retirement community was needed and whether

it would be successful. If the consultant recommended building a retirement community, Williams would begin securing financing by establishing a limited partnership of investors which would own the project. Once the initial plans were complete, the company would build a model unit and sales office on the proposed site. Potential purchasers viewed the model, looked at plans, and if interested, reserved a unit by paying 5% of the purchase price as a deposit. In return, the buyer received a form acknowledging receipt of payment.

This procedure was followed when the Greensboro area was considered for potential development. Based upon a recommendation that Greensboro would be a successful area for development, an office opened in Greensboro in July 1987 and the "Carolina Glen" project was begun. Covenant Development was the general partner in Carolina Glen, controlling 90% of the limited partnership. In addition, there were initially 5 limited partners, each owning two percent.

Mr. and Mrs. Horace Bailes joined the sales staff to work in the Greensboro office. Mr. Bailes testified that defendant instructed the Bailes on the basics of sales procedure. The Bailes thereafter sold condo units to prospective purchasers and received a commission on each sale. Potential purchasers, after viewing a model unit, delivered a check payable to "Covenant Development Co. dba Carolina Glen" for 5% of the purchase price to reserve or hold a particular unit at Carolina Glen until the building was complete. In return, they received a reservation receipt signed by the salesperson involved and stating that the deposit was fully refundable by the seller within thirty days of receiving written notice. The purchaser was then required to pay another 5% when the contract for sale was signed. Defendant talked with the Bailes about opening a bank account in North Carolina for Carolina Glen and asked Mrs. Bailes to look into it. However, no account was opened while the Bailes were employed.

Reservation deposit checks were mailed to the corporate headquarters in Atlanta, Ga. In Atlanta, the checks were received by defendant or his secretary/assistant and given to the controller with instructions as to which account to make the deposit. Checks from Carolina Glen were recorded on the accounting books under marketing fees and classified as earned income. From July 1987 through October 1987, deposits from Carolina Glen were deposited

into the Covenant Development account at Bank South in Atlanta. The controller testified that he often transferred funds between 10 or 12 accounts as directed by the defendant and Williams.

"Retirement Community Living, Inc." (RCL) was incorporated by defendant in or around 1986 to take over the management of projects that Covenant Management had been managing but which were encountering financial difficulties. A corporate checking account in the name of RCL was opened with Wachovia Bank in Greensboro, North Carolina. Several reservation deposit checks payable to Covenant Development Company from the Carolina Glen project were deposited into the RCL account. In addition, RCL shared office space with the other Covenant Companies.

Williams, who previously pled guilty to charges of embezzlement testified for the State. According to his testimony, he was having trouble arranging financing and signing on limited partners to finance the Carolina Glen project. As a result, money from the RCL account representing deposits from Carolina Glen purchasers was borrowed to cover start-up expenses for the project. According to Williams, he and defendant knew that the money in the Wachovia account belonged to purchasers making deposits in Greensboro. They felt, however, that through the sale of the limited partnership interests the money would be replaced. But the partnerships were not in fact secured and the money was never replaced. As a consequence, several of the persons who had reserved units did not receive a refund of their prepaid deposit.

Greensboro police detective Glenn Knight interviewed defendant in Atlanta. Detective Knight testified regarding defendant's statement obtained during the interview. According to defendant's statement, the procedure being followed in Greensboro was to deposit the 5% reservation deposit in Atlanta. Individuals thereafter entering into a contract to purchase a unit would deliver a second check for another 5% to Covenant Development which was deposited in the RCL account at Wachovia in Greensboro. The purchaser in turn signed a receipt and received a public offering statement. The public offering statement contained a section stating that the deposit would be held in escrow pursuant to N.C. Gen. Stat. § 47C-4-110. A contract was also signed which stated that the initial deposit would be held in a savings account until a construction loan commitment was obtained for the Carolina Glen project, at which time the deposit would be returned to the purchaser.

Defendant's evidence tended to show that his primary work with the Covenant companies included marketing and management of resident services. He was not involved in the development aspects such as securing financing, partnerships and investors, and finding a location for a community to be developed. Williams controlled Covenant Marketing and defendant followed his instructions. Defendant was an officer in name only and signed documents for the corporation. Defendant formed RCL Inc. to enter into management agreements with completed facilities. RCL shared office space with the three Covenant companies. Defendant only did marketing for Carolina Glen after the Greensboro office opened.

Beginning in October 1987, the IRS seized the Covenant Development account and Williams instructed defendant to deposit money from Greensboro and elsewhere into the Trust Bank account in Atlanta for Covenant Marketing. In July 1988, deposits were switched from the Marketing account to the Wachovia account in Greensboro.

Defendant's motions to dismiss at the close of the State's evidence and at the close of all of the evidence were denied. The jury returned verdicts of guilty on all counts and judgments were entered thereon. Defendant appeals.

I.

[1] By defendant's first assignment of error he contends that the trial court erred in refusing to grant his motion to dismiss at the close of the State's evidence and at the close of all evidence. Defendant put on his own evidence, thereby waiving his motion to dismiss at the conclusion of the State's evidence. *State v. Britt*, 87 N.C. App. 152, 154, 360 S.E.2d 291, 292 (1987), *disc. rev. denied*, 321 N.C. 475, 364 S.E.2d 924 (1988). Thus we only address whether, based on all of the evidence presented at trial, it was error for the court to deny his motion to dismiss at the close of all of the evidence. *Id.*

On a motion to dismiss, the trial court's task is to determine whether there is substantial evidence of each essential element of the charged offense. *State v. Vines*, 317 N.C. 242, 253, 345 S.E.2d 169, 175 (1986). Substantial evidence is such evidence as a reasonable mind would accept as sufficient to support a conclusion. *State v. Smith*, 300 N.C. 71, 78-79, 265 S.E.2d 164, 169 (1980). All of the evidence actually admitted, both competent and incompetent may be considered. Such evidence should be viewed in the light

most favorable to the State, giving the State the benefit of every reasonable inference to be drawn therefrom. *State v. McKinney*, 288 N.C. 113, 117, 215 S.E.2d 578, 581-82 (1975). In addition, the court must consider any evidence presented by defendant which rebuts the inference of guilt so long as it is not contradicted by any of the State's evidence. *Britt*, 87 N.C. App. at 155, 360 S.E.2d at 292. If the State has offered substantial evidence of each essential element of the crime charged, the defendant's motion must be denied. *State v. Porter*, 303 N.C. 680, 685, 281 S.E.2d 377, 381 (1981).

N.C. Gen. Stat. § 14-90 defines the offense of embezzlement and requires the State to present proof of the following essential elements: (1) that the defendant, being more than 16 years of age, acted as an agent or fiduciary for his principal, (2) that he received money or valuable property of his principal in the course of his employment and by virtue of his fiduciary relationship, and (3) that he fraudulently or knowingly misapplied or converted to his own use such money or valuable property of his principal which he had received in his fiduciary capacity. *State v. Earnest*, 64 N.C. App. 162, 163-64, 306 S.E.2d 560, 562 (1983), *disc. rev. denied*, 310 N.C. 746, 315 S.E.2d 705 (1984); *State v. Kornegay*, 313 N.C. 1, 21, 326 S.E.2d 881, 896 (1985).

Defendant first argues that he did not hold an agency or fiduciary relationship with the principal as required by the statute. Specifically, he contends that his position was that of a vendor to the principal's vendee and as such, he was neither an agent nor fiduciary as to those purchasers named in the indictments. Defendant further argues that he was not directly involved in the sales transactions with purchasers. As a result, a fiduciary relationship did not exist between him and the prosecuting witnesses at the time they paid their deposits.

Our Courts have said that a person acts as an agent or fiduciary when another person places a special confidence in him and there is a duty created by his undertaking to act primarily for another's benefit. *State v. Seay*, 44 N.C. App. 301, 307, 260 S.E.2d 786, 789 (1979), *disc. rev. denied*, 299 N.C. 333, 265 S.E.2d 401, *cert. denied*, 449 U.S. 826, 66 L.Ed.2d 29 (1980). "It extends to any possible case in which a fiduciary relation exists in fact, and in which there is confidence reposed on one side, and resulting domination and influence on the other." *Id.* at 307-08, 260 S.E.2d at 790.

In the subject case, defendant held office as a vice-president in Covenant Development and Covenant Management and was president of Covenant Marketing. The evidence tends to show that defendant controlled the deposit of reservation funds and paid various corporate expenses which were unrelated to the development of Carolina Glen out of those funds. Therefore, defendant's promises, promotions, receipt and disbursement of money, and his positions in the Covenant corporations placed him in a fiduciary relationship with all of the investors and potential purchasers of Covenant properties.

Defendant next argues that the State failed to prove that he had the requisite criminal intent to fraudulently convert the funds at issue. The fraudulent intent required is the intent to willfully or corruptly use or misapply the property of another for purposes other than those for which the agent or fiduciary received it in the course of his employment. *Earnest*, 64 N.C. App. at 164, 306 S.E.2d at 562. It is not necessary that the State offer direct proof of fraudulent intent if facts and circumstances are shown from which it may be reasonably inferred. Further, it is not necessary to show defendant converted the property to his *own* use, provided the State shows defendant fraudulently or knowingly and willfully misapplied the property for purposes other than those for which he received it as agent or fiduciary. *State v. Melvin*, 86 N.C. App. 291, 298, 357 S.E.2d 379, 384 (1987). Finally, an intent to restore or repay the property embezzled is not a defense to prosecution. *State v. Agnew*, 294 N.C. 382, 390, 241 S.E.2d 684, 689, *cert. denied*, 439 U.S. 830, 58 L.Ed.2d 124 (1978).

Defendant in this case received, deposited and thereby controlled money paid by potential purchasers. When viewed in the light most favorable to the State, the evidence shows that the money was not held as promised; that defendant knowingly and willfully misapplied the money and as a result, it was not returned as promised upon demand to those who paid it. The funds were misapplied before the condos were underway and before proper financing was obtained. This evidence was sufficient to allow a reasonable inference to be drawn that the defendant either fraudulently or knowingly and willfully misapplied or converted funds of the investors and purchasers of the Carolina Glen project for improper purposes. Based on all of the evidence presented at trial, the trial judge did not err in denying the defendant's motion to dismiss.

II.

[2] By defendant's second assignment of error he contends that the trial court erred by admitting the hearsay-testimony of several witnesses not in court. The State presented evidence through Detective Glenn R. Knight regarding documents seized by him at the Carolina Glenn model showroom office on 15 May 1989. The documents generally included reservation deposit receipts, photographic copies of checks written to Covenant Development by potential purchasers as deposits, and receipts for public offering statements signed by the purchaser and salesperson.

Defendant argues that the court should not have permitted Detective Knight to identify the signatures on the checks or otherwise testify as to deposits from purchase transactions for which he was not a participant and had no first-hand knowledge. The State argues that the documents were admissible pursuant to the business records exception to the hearsay rule. We agree.

Rule 803(6) of the North Carolina Rules of Evidence is the business records exception to the hearsay rule and provides:

> Records of Regularly Conducted Activity.—A memorandum, report, record, or data compilation, in any form, of acts, events, conditions, . . . made at or near the time by, or from information transmitted by, a person with knowledge, if kept in the course of a regularly conducted business activity, and if it was the regular practice of that business activity to make the memorandum, report, record, or data compilation, all as shown by the testimony of the custodian or other qualified witness, unless the source of information or the method or circumstances of preparation indicate lack of trustworthiness.

The State's evidence tended to show that the documents were seized by Detective Knight in a brown wood-grained file box and remained unaltered throughout the period he held them prior to trial. The documents were arranged in the box in general alphabetical order according to the names of purchasers of units at Carolina Glen. Defendant objected to the introduction of some of these documents, labeled exhibits 45A through G, on the grounds that the purchasers had not testified to the authenticity of the documents relating to their purchase at Carolina Glen. Defendant agreed to allow Detective Knight to go through the exhibits describing the

names, dates and dollar amounts reflected on each individual document, on the premise that the documents later be authenticated.

The authenticity of business records may be established by a witness who is familiar with them and the system under which they were made, or by circumstantial evidence. *State v. Wilson*, 313 N.C. 516, 533, 330 S.E.2d 450, 462 (1985). It is not necessary that the records be authenticated by the person who made them. In fact, if the records themselves show that they were made at or near the time of the transaction in question, the authenticating witness need not testify from personal knowledge that they were made at that time. *Id.*

After Knight's testimony, the State recalled Mr. Bailes, the salesperson for six of the seven transactions in question, to testify as to the circumstances under which the documents were created. Bailes identified his own signature on six of the reservation deposit receipts and verified that he had received the checks which Detective Knight had discussed during his testimony. Bailes stated that all of the documents represented those kept by the Carolina Glen sales office in the course of a regularly conducted sale of a condominium unit and were created at the time of a sales transaction. He further testified that the office records were kept in the file compartment in the showroom. As one "familiar with the business entries and the system under which they were made," Bailes was a "qualified witness" to show that "it was the regular practice" of salespersons at Carolina Glen to create the documents in question during a sales transaction. Bailes testimony, coupled with the dates and signatures on the documents themselves are sufficient to establish that all of the documents were made and kept in the regular course of business at or near the time of each reservation or sale of a condominium unit.

III.

[3] Defendant's third assignment of error argues that the trial court committed reversible error by refusing to allow Detective Knight to testify that a violation of N.C. Gen. Stat. § 47C-4-110, for failure to put money in escrow, is not subject to criminal sanctions. He contends that this evidence was relevant to counter testimony for the State which tended to show that the reservation deposits should have gone into escrow.

Evidence is admissible at trial if it is relevant and its probative value is not substantially outweighed by, among other things, the danger that it will confuse or mislead the jury. N.C. Gen. Stat. § 8C-1, Rules 402 and 403; *State v. Knox*, 78 N.C. App. 493, 337 S.E.2d 154 (1985). Relevant evidence is defined as "any evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more or less probable than it would be without the evidence." N.C. Gen. Stat. § 8C-1, Rule 401. Whether or not to exclude evidence under Rule 403 is a matter within the sound discretion of the trial court, and the trial judge's ruling may be reversed for an abuse of discretion only upon a showing that it was so arbitrary that it could not have been the result of a reasoned decision. *State v. Jones*, 89 N.C. App. 584, 367 S.E.2d 139 (1988).

After substantial argument by counsel for both parties at trial, the trial judge found that permitting such testimony would be "absolutely . . . misleading to the jury." The judge stated, "Even if that's relevant, the probative value is substantially outweighed by the danger of confusion of the issues and absolutely misleading of [sic] the jury on what you're inquiring about, and I'm going to sustain it and keep it out . . . ." We agree with the conclusion of the trial judge and therefore hold that he did not abuse his discretion by refusing to admit the testimony of Detective Knight as to whether the Condominium statute is criminal in nature. This assignment of error is without merit.

IV.

[4] Defendant's fourth assignment of error argues that the trial court erred in refusing to grant his motion in limine to exclude evidence indicating that N.C. Gen. Stat. § 47C-4-110, the condominium statute, required the defendant to place the reservation deposits paid by potential purchasers in escrow. Defendant argues that the initial 5% deposit paid by potential purchasers to reserve a unit was not subject to the escrow deposit requirements of Chapter 47C, the Condominium Act. We disagree.

N.C. Gen. Stat. § 47C-4-110(a) states:

> *Any deposit* made in connection with the purchase or *reservation* of a unit from a person required to deliver a public offering statement pursuant to G.S. 47C-4-102(c) shall be immediately deposited in a trust or escrow account in an insured bank

> or savings and loan association in North Carolina and shall remain in such account for such period of time as a purchaser is entitled to cancel pursuant to G.S. 47C-4-108 or cancellation by the purchaser thereunder whichever occurs first. Payments held in such trust or escrow accounts shall be deemed to belong to the purchaser and not the seller.

Defendant argues that this provision only requires escrow deposits for transactions which in turn require a Public Offering Statement. N.C. Gen. Stat. § 47C-4-101(b)(6) provides that "[n]either a public offering statement nor a resale certificate need be prepared or delivered in the case of a disposition which is subject to cancellation at any time for any reason by the purchasers without penalty." Defendant contends that whereas the 5% reservation deposits at issue were subject to cancellation at any time for any reason by the purchaser without penalty, they are exempted from the public offering requirement by N.C. Gen. Stat. § 47C-4-101(b)(6) and accordingly exempted from the escrow requirements of N.C. Gen. Stat. § 47C-4-110(a).

Upon payment of the 5% deposit to reserve a unit at Carolina Glen, the potential purchaser received a reservation receipt, signed by the salesperson, which stated that the purchaser was entitled to a full refund from the seller within 30 days of the seller's receipt of written notice of cancellation. The State argues, and we agree, that the thirty day wait period following written notice of cancellation acts as a penalty during which time the potential purchasers lose interest on their money. As a result, the reservation deposit does not fall within the public offering exemption.

The North Carolina General Assembly enacted the North Carolina Condominium Act in 1986, based on the Uniform Condominium Act. The significant innovation of the Act is its protection of the consumer, provided in Article 4 which is entitled "Protection of Purchasers." N.C. Gen. Stat. § 47C-4. The Act provides protection for the consumer both as a potential purchaser and as an owner. James H. Jeffries IV, Note, *North Carolina Adopts the Uniform Condominium Act*, 66 N.C. L. Rev. 199, 221 (1987).

The commentary to section 47C-4-110 lends credence to the view that the language of that section requires that the reservation deposits in question be placed in an escrow account. Although the commentary is not binding when not enacted into law, where proper, it may be given substantial weight in discerning legislative

intent. *State v. Bogel*, 324 N.C. 190, 202 n.5, 376 S.E.2d 745, 752 n.5 (1989). In adopting the Uniform Condominium Act, the legislature directed that all relevant portions of the Official Commentary be included where appropriate to "explain or illustrate" portions of the Act. 1986 N.C. Sess. Laws ch. 877, § 2. Thus, in our efforts to determine the intent of the legislature, we accord considerable significance to the commentary to the Uniform Condominium Act.

Comment 1 of the Official Comment states that section 47C-4-110 "applies to the sale by persons required to furnish public offering statements of residential units and of non-residential units unless waived pursuant to the provisions of Section 4-101." Comment 3 then states that the "escrow requirements of this section apply in connection with *any* deposit made by a purchaser, whether such deposit is made pursuant to a binding contract *or pursuant to a non-binding reservation agreement (with respect to which no public offering statement is required under Section 4-101(b)(6)).*" The North Carolina Comment to § 47C-4-110 provides:

> [t]his section was rewritten to make it clear that the escrow period referred to is the period during which the *purchaser has the right to cancel.* The last sentence of subsection (a) is to negate any reference or argument in favor of ownership or right of possession to the deposit on the part of anyone other than the purchaser.

The purpose of the Uniform Condominium Act is to protect the purchaser from precisely the outcome that occurred in this case. The potential purchasers clearly had a right to cancel and obtain a refund of their reservation deposit. In accord, the deposit money given to reserve a unit was still rightfully owned by the purchaser. To ensure that those funds are available to consumers who decide to exercise their right to cancel, the statute requires that the funds be placed in escrow. It follows that it was not error for the trial judge to deny defendant's motion in limine to exclude evidence indicating such a requirement.

V.

Defendant's final assignment of error contends that the trial court erred by failing to charge the jury as requested, that there is no legal duty to escrow money paid as a reservation deposit when the reservation agreement is a non-binding agreement paid in advance. Based on the foregoing conclusion that N.C. Gen. Stat.

§ 47C-4-110, requires that both reservation and contract deposits should be placed in escrow upon receipt, defendant's assignment of error regarding the charge to the jury is without merit.

No Error.

Judges EAGLES and ORR concur.

STATE OF NORTH CAROLINA v. ROBERT LEE HOLMES

No. 9126SC1182

(Filed 20 April 1993)

1. Searches and Seizures § 12 (NCI3d)— investigatory stop of car—reasonable suspicion of criminal activity

An officer had an articulable and reasonable suspicion that occupants of a car were engaged in criminal activity to justify his investigatory stop of the vehicle where he received a radio communication from a vice and narcotics officer that the other officer had made the following observations: defendant drove slowly into a neighborhood known for its violence and drugs; defendant engaged two different groups of people in conversation from the car and then went into a house at which the officer had previously made drug-related arrests; defendant then returned to the car after only a few minutes and lit a cigarette which he shared with the two passengers in the car until the cigarette was gone and the car filled with smoke, leading the officer to believe that the cigarette was a marijuana cigarette; defendant then placed a plastic bag in the trunk of the car and returned to the house for thirty seconds; and when defendant returned to the car, he carefully concealed an object underneath the driver's seat.

Am Jur 2d, Searches and Seizures § 70.

2. Searches and Seizures § 11 (NCI3d)— lawful investigatory stop—observation of drug paraphernalia—probable cause to search car

Where an officer who made a lawful investigatory stop of defendant's car observed two needles and syringes in a

passenger door compartment when he opened the door to question the passenger, and the officer arrested the passenger for possession of drug paraphernalia, officers had probable cause to search defendant's vehicle, including the area underneath the driver's seat where an officer had observed defendant place a bag he had obtained from a house known for drug-related activities.

Am Jur 2d, Searches and Seizures § 70.

3. Evidence and Witnesses § 2479 (NCI4th)— denial of motion to sequester witnesses—no abuse of discretion

The trial court did not abuse its discretion by denying defendant's motion to sequester the State's witnesses in a prosecution for narcotics offenses where the record does not support defendant's contention that officers who testified for the State tailored their testimony to that given by other officers.

Am Jur 2d, Trial § 61.

4. Evidence and Witnesses § 117 (NCI4th)— possession of narcotics under driver's seat—passenger as dope dealer—exclusion of testimony

In a prosecution for the possession of cocaine and heroin found under the front seat of defendant's car, testimony that a passenger in the car was a dope dealer was not admissible to show that the passenger committed the crime with which defendant was charged where defendant was observed placing a package under the front seat and this package was later found to contain cocaine and heroin, since testimony that a passenger was a dope dealer did not imply that the passenger possessed the narcotics found under the seat and was not inconsistent with defendant's guilt, especially when the passenger was never observed with the package and was sitting in the back seat of the vehicle. N.C.G.S. § 8C-1, Rules 401 and 404(b).

Am Jur 2d, Evidence § 441.

5. Narcotics, Controlled Substances, and Paraphernalia § 114 (NCI3d)— possession of cocaine with intent to sell—possession of heroin—sufficiency of evidence

The State's evidence was sufficient to support defendant's convictions for possession of cocaine with intent to sell and

deliver and possession of a Schedule I controlled substance (heroin) where it tended to show that defendant was observed carrying a package from a house known for drug activities and placing it under the front seat of the car he was driving; a pouch containing twenty-eight baggies and two tin foil packages was later discovered under the driver's seat where defendant had placed this package; the baggies contained small amounts of cocaine and were tied with twist ties, and the tin foil packages contained heroin; and an officer stated his opinion, based on his extensive training in drug enforcement, that the baggies containing cocaine were packaged for street level sales.

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

What constitutes illegal, constructive possession under 21 USCS § 841(a)(1), prohibiting possession of a controlled substance with intent to manufacture, distribute or dispense the same. 87 ALR Fed 309.

6. Appeal and Error § 410 (NCI4th)— instructions—failure to record—presumption of propriety

The arguments to the jury are presumed proper where they were not recorded.

Appeal by defendant from judgment entered 18 July 1991 by Judge Marvin K. Gray in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 1993.

On 18 July 1991, a jury found defendant guilty of one count of possession with intent to sell and deliver a controlled substance in violation of N.C. Gen. Stat. § 90-95(a)(1) and one count of possession of Schedule I controlled substances in violation of N.C. Gen. Stat. § 90-95(a)(3). From the judgment entered on this verdict, defendant appeals. For the reasons stated below, we find no error.

Attorney General Lacy H. Thornburg, by Associate Attorney General John J. Aldridge, III, for the State.

Public Defender Isabel Scott Day, by Assistant Public Defender Anne Nicholson Hogewood, for defendant-appellant.

ORR, Judge.

On 12 December 1990, Sergeant Terry Sult of the Charlotte Police Department arrested defendant after discovering a black

zippered pouch containing baggies and tin foil packages of a powdered substance under the front seat of defendant's car. The baggies contained cocaine, and the tin foil contained heroin. Sult was the supervisor in charge of a drug surveillance unit on Wyatt and Person Streets in Charlotte, North Carolina. He stopped defendant's vehicle after hearing Officer William Holbrooke's broadcast of defendant's suspicious behavior.

The suspicious behavior of defendant observed by Holbrooke while he was on drug surveillance duty is as follows: On 12 December 1990, Holbrooke observed a white Pontiac Grand AM driving at a slow rate of speed down Wyatt Street. The car stopped beside a group of people standing on the side of the road, and the occupants of the car engaged the people in conversation. The car then backed up approximately seventy to seventy-five feet, and the occupants engaged another group of people in conversation. The car then proceeded back up Wyatt Street and onto Person Street where it stopped in front of a house familiar to Holbrooke as he has made other drug related arrests of people coming out of this house. After the car stopped in front of this house, three males exited the car and entered the house. At trial, Holbrooke identified the defendant as the driver of the car and as one of the three males who entered the house.

After approximately three to five minutes, defendant and the other two males exited the house and got back into the car. Holbrooke then observed defendant ignite and apparently inhale what appeared to be a cigarette and then pass it to the passenger. The passenger also appeared to inhale and then hand it to the occupant in the back seat. The three continued to pass it around until it went out and smoke filled the car. Holbrooke testified at trial that, based on his training, he felt like this was a marijuana cigarette.

After the cigarette went out, Holbrooke observed defendant walk back to the trunk, open the trunk, and place what appeared to be a plastic bag into the trunk and go back into the house. Defendant immediately returned from the house and carefully placed an object underneath the driver's seat. Defendant then drove off. Holbrooke testified he then radioed what he had observed to the other members of the surveillance unit, and Sergeant Sult and Officer Walker testified they heard this broadcast.

After hearing Holbrooke's broadcast, Sult stopped the car on Oaklawn Avenue and asked the defendant driver for his driver's

license, which he could not produce. Sult then asked defendant to step out of the car, and Sult searched the floorboard for weapons. Other officers arrived, including Officer Walker. Sult opened the passenger door to question the passenger, and he saw two needles and syringes in a compartment on the door. The passenger was then arrested for possession of these items. Officer Walker then conducted a thorough search of the car. Sult testified that the defendant consented to this search.

During the search, Walker discovered a pouch containing twenty-eight baggies of cocaine and two tin foil packages of heroin underneath the driver's seat. Defendant was then arrested, and on 8 April 1991 the Mecklenburg County Grand Jury indicted him for possession of cocaine with intent to sell and deliver and possession of heroin. On 15 July 1991, defendant moved to suppress the evidence seized by a warrantless search, which the trial court denied. On 17 July 1991, defendant filed a motion to exclude witnesses for the State from the trial pursuant to N.C. Gen. Stat. § 15A-1225, which the trial court denied. On 18 July 1991, the jury found defendant guilty of these charges. From this verdict, defendant appeals.

I.

[1] Defendant first assigns error to the denial of his motion to suppress the evidence seized from the warrantless search of his vehicle, based on the contention that the officer did not have a reasonable suspicion that the occupants were engaged in criminal activity to justify his stop of the vehicle. We find no error.

"It is well-settled law that a police officer may make a brief investigative stop of a vehicle if justified by specific, articulable facts giving rise to a reasonable suspicion of illegal activity." *State v. Reid*, 104 N.C. App. 334, 342, 410 S.E.2d 67, 71 (1991), *dismissal denied, disc. review allowed*, 331 N.C. 121, 414 S.E.2d 765 (1992) (citing *Alabama v. White*, 496 U.S. 325 (1990)). "We believe the standard set forth [for stopping an individual] requires only that the officer have a 'reasonable' or 'founded' suspicion as justification for a limited investigative seizure." *State v. Thompson*, 296 N.C. 703, 706, 252 S.E.2d 776, 779, *cert. denied*, 444 U.S. 907 (1979).

> 'Reasonable suspicion is a less demanding standard than probable cause not only in the sense that reasonable suspicion can be established with information that is different in quantity or content than that required to establish probable cause, but

> also in the sense that reasonable suspicion can arise from information that is less reliable than that required to show probable cause. . . .'

Reid, 104 N.C. App. at 342, 410 S.E.2d at 71-2 (quoting *Alabama*, at 330). Further, the evidence "collected must be seen and weighed not in terms of library analysis by scholars, but as understood by those versed in the field of law enforcement." *United States v. Cortez*, 449 U.S. 411, 418 (1981).

In the case *sub judice*, defendant argues Sergeant Sult unlawfully stopped the defendant's car because he did not have a reasonable suspicion that the occupants of the vehicle might be engaged in or connected with criminal activity. We disagree.

When viewed in their totality, the objective observations made by Holbrooke constitute sufficient articulable and reasonable suspicion to make Sult's stop of defendant's car legal. Holbrooke, a trained officer of the vice and narcotics unit of the Charlotte Police Department, observed defendant driving slowly into a neighborhood known for its violence and drugs. The defendant then engaged two different groups of people in conversation from the car and went inside of a house personally known to Holbrooke because he had made other drug related arrests there. The defendant then returned to the car after only a few minutes and lit a single cigarette which he shared with the other two passengers until the cigarette was gone and the car filled with smoke. Based on his training, Holbrooke felt these actions suggested the cigarette was a marijuana cigarette. Defendant then placed a plastic bag in the trunk of the car and returned back into the house alone for about thirty seconds. When defendant returned to the car, he carefully concealed an object underneath the driver's seat. Based on these observations, which Holbrooke subsequently relayed over the radio, Sult stopped defendant in his car.

We hold these circumstances create sufficient articulable and reasonable suspicion to make Sult's stop of defendant's car legal. *See, Thompson*, 296 N.C. at 707, 252 S.E.2d at 779 (holding officers had a justifiable reasonable suspicion that the occupants of a van might be engaged in criminal activity and these officers were within the limits of the Fourth Amendment in approaching this van to seek identification where the van was in an isolated location in a public place at a late hour with considerable activity around it); *See also, State v. Tillett*, 50 N.C. App. 520, 524, 274 S.E.2d

361, 364, *appeal dismissed by*, 302 N.C. 633, 280 S.E.2d 448 (1981) (holding officers had a justifiable reasonable suspicion that the occupants of a vehicle might be engaged in criminal activity and that these officers were within the limits of the Fourth Amendment in making an investigatory stop of the vehicle when the officers saw the vehicle drive down a one lane dirt road in a heavily wooded, seasonably unoccupied area in the late evening, in rainy weather where reports of "firelighting" deer had occurred, and where the officers knew a number of seasonal residences were on the dirt road, only one of which was occupied at the time).

II.

[2] Next, defendant contends that the trial court erred by denying his motion to suppress evidence because the officer did not have probable cause to conduct a warrantless search of defendant's vehicle. We disagree.

Our Supreme Court stated in *State v. Simmons*, 278 N.C. 468, 471, 180 S.E.2d 97, 99 (1971), "[A] police officer in the exercise of his duties may search an automobile . . . without a search warrant when the existing facts and circumstances are sufficient to support a reasonable belief that the automobile . . . carries contraband materials." If an officer conducts a warrantless search and seizure based on probable cause, " 'that is, upon a belief, reasonably arising out of the circumstances known to the seizing officer, that an automobile or other vehicle contains that which by law is subject to seizure and destruction, the search and seizure are valid.' " *State v. Martin*, 97 N.C. App. 19, 28, 387 S.E.2d 211, 216 (1990) (quoting *United States v. Ross*, 456 U.S. 798, 805 (1982)).

In *State v. Martin, supra*, an officer stopped a vehicle for a routine traffic violation in which the defendant was a passenger. The officer noticed empty vials between the driver and passenger seats. The officer had seen similar vials used in the sale of cocaine. After seeing the vials, the officer told the defendant that he had probable cause to search the car, and no protest ensued. This Court held that after the lawful stop of the vehicle, the presence of these vials which were recognized by the officer as vials used in trafficking drugs, developed the probable cause required to search defendant's vehicle.

In the case *sub judice*, following the lawful stop of defendant's car, Sergeant Sult opened the passenger door to question the

passenger, and he observed two needles and syringes in a small compartment on the car door. Under N.C. Gen. Stat. § 90-113.21(a)(11) (1990), these needles and syringes come within the definition of drug paraphernalia. Sult arrested the passenger for possession of these items, and Officer Walker conducted a thorough search of the vehicle. There is no evidence in the record that shows any protest ensued; in fact, Sult testified that defendant consented to the search. As in *Martin*, the presence of drug paraphernalia in defendant's vehicle, following a lawful stop of the vehicle, developed the probable cause needed to make Officer Walker's search of defendant's vehicle lawful.

Defendant goes on to argue, however, that Officer Walker did not have probable cause to search the area underneath the driver's seat. We disagree.

"If probable cause justifies the search of a lawfully stopped vehicle, it justifies the search of every part of the vehicle and its contents that may conceal the object of the search." *Ross*, 456 U.S. at 825; *Martin*, 97 N.C. App. at 28, 387 S.E.2d at 216. In the case *sub judice*, we have already held that probable cause existed to search the vehicle. The officers were searching for more contraband based on the drug paraphernalia found in the front seat and on observations made by officers prior to the search. Holbrooke had observed the defendant place a bag, which he had obtained from inside a house known for drug related activities, under the driver's seat. The area under the driver's seat would be an area that could conceal the object of this search. We hold, therefore, the search of the vehicle was lawful.

III.

[3] Next, defendant argues the trial court abused its discretion by denying his motion to sequester the State's witnesses. We disagree.

"Upon motion of a party the judge may order all or some of the witnesses other than the defendant to remain outside of the courtroom until called to testify, ..." N.C. Gen. Stat. § 15A-1225 (1988). "A motion to sequester witnesses is addressed to the sound discretion of the trial court, and the court's ruling on the motion will not be disturbed in the absence of a showing of abuse of that discretion." *State v. Batts*, 93 N.C. App. 404, 410, 378 S.E.2d 211, 214 (1989). "The aim of sequestration is two-

fold: First, it acts as a restraint on witnesses tailoring their testimony to that of earlier witnesses, and second, it aids in detecting testimony that is less than candid." *State v. Harrell*, 67 N.C. App. 57, 64, 312 S.E.2d 230, 236 (1984). "Due process does not automatically require separation of witnesses who are to testify to the same set of facts." *Id.*

In the case *sub judice*, the defendant argues that the trial court should have sequestered the State's witnesses because the State's entire case rests on the testimonies of three officers, Sult, Walker, and Holbrooke, who all three could tailor their testimony by hearing each other testify. In his brief, the defendant states:

> It is obvious from the record, that had Officer Walker and [sic] not been able to hear and tailor his testimony to that of Officers Holbrooke and Sult, the defendant would have been better able to cross-examine him. Further, both Sult and Walker were able to bolster the testimony of Holbrooke by conforming their descriptions of the [sic] Holbrooke's radio broadcast to the testimony given in court by Holbrooke.

Defendant fails to point out support for these contentions in the record. Additionally, we do not find support for these contentions in our review of the record. The record shows no abuse of discretion in the trial court's decision to deny defendant's motion to sequester the State's witnesses. We accordingly overrule this assignment of error.

IV.

[4] The defendant also assigns error to the trial court's refusal to allow defendant's witness to testify that another passenger in the vehicle was a dope dealer. We find no error.

Defendant argues that the testimony of a passenger in the vehicle that another passenger in the vehicle was a dope dealer was relevant to the question of whether defendant possessed the contraband found in the vehicle and that the trial court's failure to allow this statement greatly prejudiced the defendant. At trial, the defendant questioned a passenger in the vehicle as to why he asked the other passenger if he had any drugs on him once he realized that the police were following them. The State objected to the witness answering this question, and the trial court allowed the witness to write down his answer. The witness wrote down, "Becaed [sic] hem [sic] was a doup [sic] dealer." The trial court

then sustained the State's objection and did not allow the answer written down by the witness into evidence. Defendant argues this testimony was relevant to implicate the other passenger in the crime for which defendant was charged and was inconsistent with defendant's guilt such that it was admissible under Rules 401 and 404(b) of the North Carolina Rules of Evidence. Additionally, defendant contends that where the State relied on a theory of constructive possession to show that defendant possessed the contraband, the exclusion of this testimony was prejudicial error such that defendant is entitled to a new trial. We disagree.

Defendant relies on *State v. Cotton*, 318 N.C. 663, 351 S.E.2d 277 (1987), to support his contention. In *Cotton*, the defendant was charged with burglary, first degree rape and first degree sexual offense. The trial court excluded evidence that three other break-ins and sexual assaults occurred on the same night, committed in the same manner, near the site of the crime for which the defendant was charged. "The *modus operandi* in each case was very similar." *Id.* at 667, 351 S.E.2d at 280.

On appeal, our Supreme Court applied N.C.R. Evid. 401 and 404(b) to allow the evidence. Rule 404(b) states:

> Evidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show that he acted in conformity therewith. It may, however, be admissible for other purposes, such as proof of motive, opportunity, intent, preparation, plan, knowledge, identity, or absence of mistake, entrapment or accident.

The Court applied this Rule to allow the evidence, stating, "Certainly Rule 404(b) must be applied . . . to allow a defendant to introduce evidence of very similar crimes of another, when such evidence tends to show that the other person committed the crime for which the defendant is on trial." *Cotton*, 318 N.C. at 666, 351 S.E.2d at 279.

Additionally, the Court applied N.C.R. Evid. 401 to allow the evidence. The Court held, "The admissibility of evidence of the guilt of one other than the defendant is governed now by the general principle of relevancy [found in Rule 401]." *Id.* at 667, 351 S.E.2d at 280. Rule 401 states, " 'Relevant evidence' means evidence having any tendency to make the existence of any fact that is of consequence to the determination of the action more probable or less probable than it would be without the evidence." The Court

in *Cotton* stated, however, that "[u]nder Rule 401 such evidence must tend *both* to implicate another *and* be inconsistent with the guilt of the defendant." *Cotton*, 318 N.C. at 667, 351 S.E.2d at 279-80. Further, "[e]vidence that another committed the crime for which the defendant is charged generally is relevant and admissible as long as it does more than create an inference or conjecture in this regard." *Id.* at 667, 351 S.E.2d at 279.

In the case *sub judice*, the defendant argues the excluded testimony is admissible under N.C.R. Evid. 401 and 404(b) based on the holding in *Cotton*. The excluded evidence in the present case fails, however, to meet the requirements set out in *Cotton* for admissibility. Unlike the evidence in *Cotton* which pertained to other crimes committed that tended to show a common *modus operandi* of an individual other than the defendant such that the other individual could have committed the crime for which defendant was charged, the evidence excluded in the present case fails to show a common *modus operandi* of another or to go towards proving any of the other exceptions in Rule 404(b), and it fails to create more than an inference or conjecture that someone other than the defendant possessed the contraband. In light of the evidence that the defendant in the present case brought a package out of the house and placed it under the front seat of the car and that subsequently this package was found under the front seat of the car containing the contraband, the testimony that another passenger is a dope dealer does not imply that this passenger possessed the contraband found under the front seat, nor is it inconsistent with the guilt of the defendant, especially when this passenger was never observed with the package and when he was sitting in the back seat of the vehicle. Accordingly, we overrule this assignment of error.

V.

[5] Next, the defendant assigns error to the trial court's denial of his motion to dismiss both of the charges against him based on the contention that insufficient evidence exists to support these charges. We find no error.

> In ruling on a motion to dismiss, the trial court must view the evidence in the light most favorable to the State, giving it the benefit of all reasonable inferences which can be drawn therefrom. If there is "substantial evidence" of each element of the charged offense, the motion should be denied.

> Substantial evidence is that amount of evidence which a reasonable mind might accept as adequate to support a conclusion.

State v. Rich, 87 N.C. App. 380, 382, 361 S.E.2d 321, 323 (1987) (citations omitted).

In the present case, defendant was charged and convicted of one count of possession with intent to sell and deliver a controlled substance and one count of possession of Schedule I controlled substances. Defendant argues insufficient evidence exists to prove these charges.

N.C. Gen. Stat. § 90-87(5) defines a "Controlled substance" as "a drug, substance, or immediate precursor included in Schedules I through VI of this Article." N.C. Gen. Stat. § 90-89(b)(10) defines heroin as a Schedule I controlled substance, and N.C. Gen. Stat. § 90-90(a)(4) defines cocaine as a Schedule II controlled substance.

In the present case, Officer Holbrooke observed defendant carry a package from a house known for housing drug related activities and place it under the front seat of the car he was driving. Subsequently, Officer Walker discovered a pouch containing twenty-eight baggies and two tin foil packages underneath the driver's seat of the car where defendant had placed this package. The baggies contained small amounts of cocaine in the baggie corners and were tied with twist ties, and the tin foil packages contained heroin. Sergeant Sult testified that, based on his extensive training in drug enforcement, the baggies containing cocaine were packaged for street level sales.

In *State v. Williams*, 71 N.C. App. 136, 140, 321 S.E.2d 561, 564 (1984), this Court held, "The method of packaging a controlled substance, as well as the amount of the substance, may constitute evidence from which a jury can infer an intent to distribute." Additionally, in *State v. Dow*, 70 N.C. App. 82, 85, 318 S.E.2d 883, 885-86 (1984), this Court held:

> A defendant has possession of a controlled substance when he has both the power and intent to control its disposition or use. Possession may be either actual or constructive. Constructive possession exists when there is no actual personal dominion over the controlled substance, but there is an intent and capability to maintain control and dominion over it. . . .

> . . . An inference of constructive possession can . . . arise from evidence which tends to show that a defendant was the custodian of the vehicle where the controlled substance was found. . . . Moreover, power to control the automobile where a controlled substance was found is sufficient, in and of itself, to give rise to the inference of knowledge and possession sufficient to go to the jury.

(Citations omitted.) Thus, based on the holdings in *Dow* and *Williams*, and viewing the evidence in the light most favorable to the State, sufficient evidence exists to go to the jury on the charges of possession with intent to sell and deliver a controlled substance and possession of Schedule I controlled substances.

Defendant argues, however, that *State v. McLaurin*, 320 N.C. 143, 357 S.E.2d 636 (1987), applies to require more evidence than the State presented to get to the jury on the issue of possession. We disagree. The Court in *McLaurin* stated, "It is not necessary to show that an accused has exclusive control of the premises where [drug] paraphernalia are found, but 'where possession . . . is nonexclusive, constructive possession . . . may not be inferred without other incriminating circumstances.' " *Id.* at 146, 357 S.E.2d at 638. In *McLaurin* the only evidence linking the defendant to possession of drugs was that she resided in the house with others where drugs were found. Unlike the evidence in *McLaurin*, the evidence in the present case shows that defendant was observed carrying a package from a house known for housing drug related activities and placing it under the front seat of the car where the package containing the drugs was found. Additionally, the present case deals with a car driven by the defendant, not a house where defendant resides with others. The evidence in the present case is, therefore, greater than the evidence in *McLaurin* on the issue of drug possession, and we hold it was sufficient to go to the jury. Accordingly, defendant's assignment of error is overruled.

VI.

[6] Finally, the defendant argues that the trial court erred by overruling his objection to an inflammatory statement made by the prosecutor in his closing argument. "Assignments of error concerning jury arguments by counsel at trial are properly presented for review by this Court when such arguments by counsel are preserved and brought forward on appeal." *State v. Arnold*, 314 N.C. 301, 308, 333 S.E.2d 34, 39 (1985). In the present case, the

arguments to the jury were not recorded; we must, therefore, presume they were proper. Accordingly, we overrule this assignment of error.

No error.

Judges EAGLES and WYNN concur.

LORETTA MORRELL, AS GUARDIAN AD LITEM FOR JONATHAN LONG AND JOSHUA LONG, INDIVIDUALLY AND ON BEHALF OF ALL OTHERS SIMILARLY SITUATED v. DAVID T. FLAHERTY, IN HIS OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES AND MARY DEYAMPERT, IN HER OFFICIAL CAPACITY AS SECRETARY OF THE NORTH CAROLINA DIVISION OF SOCIAL SERVICES

No. 9226SC200

(Filed 20 April 1993)

Social Security and Public Welfare § 1 (NCI3d)— parents with children—grandchildren living in home—two AFDC assistance units—state policy against double payments in violation of federal policy

Section 2100 of the North Carolina AFDC manual, which provides that, "A specified relative cannot be payee for more than one AFDC check," violates federal AFDC regulations, since federal regulations essentially prohibit the income from an adult who is not legally responsible for a dependent child from being assumed available to that child. Therefore, plaintiff appellee and her husband who were legally responsible for their nine children should be classified as one assistance unit, and plaintiff's two grandchildren who lived with her but for whom she was not legally responsible should be classified as a second assistance unit so that plaintiff would receive two AFDC checks; however, this holding applies only to the named plaintiff and other members of the class whose DSS mandated assistance unit contains not only dependent children who are not their siblings, but also an adult who is legally responsible for the non-sibling children, but not legally responsible for the class members.

Am Jur 2d, Welfare Laws § 15.

Appeal by defendants from Order entered 25 November 1991 by Judge Forrest A. Ferrell in Mecklenburg County Superior Court. Heard in the Court of Appeals 4 February 1993.

Legal Services of Southern Piedmont, Inc., by Douglas Stuart Sea, for plaintiff-appellee.

Attorney General Lacy Thornburg, by Assistant Attorney General Marilyn A. Bair, for defendants-appellants.

WYNN, Judge.

Jonathan and Joshua Long are the minor children of Latrice Long Alexander and the grandchildren of the plaintiff, Loretta Morrell. Ms. Alexander married and has since moved out of state, leaving the children in Ms. Morrell's care for an unspecified period of time. While Ms. Alexander resided with her children, the three member family received Aid For Families with Dependent Children ("AFDC") benefits in the amount of $224 per month from the Mecklenburg County Department of Social Services ("DSS"). (The maximum grant for three people is $272; presumably the payment here was reduced to $224 due to part time earnings of Ms. Alexander). Ms. Alexander notified DSS that the children would no longer be in her care, but would instead be left in the care of Ms. Morrell. She, therefore, requested that Ms. Morrell be designated the payee for the children's AFDC benefits.

At about the time Joshua and Jonathan were left in her care, Ms. Morrell applied for AFDC benefits for herself, her husband and their nine minor children ("the Morrells"). DSS determined that Jonathan, Joshua, and the Morrells were all in need of AFDC benefits. For purposes of calculating the benefits to which they were entitled, DSS placed all thirteen people in one assistance unit. Thereafter, Ms. Morrell requested that Jonathan and Joshua be placed in one unit and her husband, children and she be placed in another unit. Ms. Morrell contended, and indeed the record tends to establish, that the effect of having all thirteen individuals in one assistance unit is to reduce by 40% the benefits they would receive if they were considered two assistance units. Jonathan and Joshua, as one two person unit, would receive $236, and the Morrells, as an eleven person unit, would receive $435. As one thirteen person unit, however, the household would receive only $483. Furthermore, any income earned by the Morrells would act to reduce the entire grant amount for the thirteen person unit,

including Jonathan and Joshua, whereas with two units those earnings would reduce only the Morrells' grant.

DSS, in denying Ms. Morrell's request that the families be classified as two household units, relied upon Section 2100(II) of its AFDC Manual, which provides: "A specified relative cannot be payee for more than one AFDC check. Include all children who are under his day-to-day care and supervision in the same assistance unit." The plaintiffs brought a class action suit seeking a preliminary and permanent injunction of this policy, alleging that it violates the federal regulations regarding the disbursement of AFDC benefits. The certified class was defined as follows:

> All dependent children not living with a parent or other legally financially responsible relative for whom AFDC benefits are, have been, or will be denied, terminated, or reduced by a North Carolina County Department of Social Services based on the requirement that the children be included in a single AFDC assistance unit with other dependent children who are not their siblings.

Both parties filed motions for summary judgment and on 25 November 1991 the trial court entered summary judgment in favor of the plaintiffs, concluding that there was no genuine issue of material fact and that the defendants' AFDC Manual, § 2100(II), on its face and as applied to the plaintiffs, violates federal AFDC regulations found at 45 C.F.R. § 233.90(a)(1) (1992), 45 C.F.R. § 233.20(a)(3)(ii)(D) (1992), and 45 C.F.R. § 233.20(a)(2)(viii) (1992).

From the entry of summary judgment the defendants appealed.

The sole issue on appeal is whether Section 2100(II) of the AFDC Manual violates the federal AFDC regulations. The appellees argue that the policy violates 45 C.F.R. § 233.90(a)(1) (1992), 45 C.F.R. § 233.20(a)(3)(ii)(D) (1992), and 45 C.F.R. § 233.20(a)(2)(viii) (1992), which essentially prohibit the income from an adult, who is not legally responsible for a dependent child, from being assumed available to that child. We agree with the appellees that a policy requiring such an assistance unit violates the federal regulations. Therefore, we affirm the trial court's Order for summary judgment in their favor. We note, however, that our holding applies to the named plaintiffs and other members of the class whose DSS mandated assistance unit contains not only dependent children who

are not their siblings, but also an adult who is legally responsible for the non-sibling children, but not legally responsible for the class members. The following discussion, which sets forth our reasons for so holding, begins with a discussion of the history of AFDC and then examines the facts of this case in light of the relevant statutory and case law that has developed in recent years.

AFDC is a welfare program funded in North Carolina by federal, state, and county resources. The program was established to "encourage[ ] the care of dependent children in their own homes or in the homes of relatives . . . ." 42 U.S.C.A. § 601 (1991). By offering assistance to needy children and their caretakers, AFDC seeks "to help maintain and strengthen family life and to help . . . parents or relatives to attain or retain capability for the maximum self-support and personal independence consistent with the maintenance of continuing parental care and protection . . . ." *Id.* The program is designed specifically to provide assistance to the families of *dependent* children, those children of a designated age who are "deprived of parental support or care . . . [due to] the death, continued absence from the home . . . , or physical or mental incapacity of a parent and who [are] living with . . . [a parent or other designated relative] in a place of residence maintained . . . [as that parent's or relative's] home." *Id.* § 606(a); *see also King v. Smith*, 392 U.S. 309, 313, 20 L.Ed.2d 1118, 1123 (1968). The relative with whom the child lives is the "specified relative caretaker," and the "payee" for the AFDC benefits.

AFDC benefits are disbursed to "assistance units," composed of "all individuals whose needs, income, and resources are considered in determining eligibility for, and the amount of, an assistance payment . . . ." 45 C.F.R. § 205.40(a)(1) (1992). The amount of an AFDC grant is calculated based on the size of the assistance unit, with incremental increases as new members are added to the unit. Any income earned or received by one member of an assistance unit is properly deemed available to all other members and results in the grant to that unit being reduced accordingly. *See Bowen v. Gilliard*, 483 U.S. 587, 97 L.Ed.2d 485 (1987) (child support payments to one child in the assistance unit results in the reduction of the unit's AFDC grant).

The Deficit Reduction Act of 1984 amended the AFDC Act to require that a dependant child's assistance unit include his parents, siblings, and half-siblings, if such relatives reside in the same

household as the dependant child. 42 U.S.C.A. § 602(a)(38); *Gilliard*, 483 U.S. at 590, 97 L.Ed.2d at 493-94 (the provision does not violate any Constitutional rights). Also in the Deficit Reduction Act, Congress determined that a portion of the income of a child's grandparent, if the child's parent is a minor who lives in that grandparent's home, and of a child's stepparent must be considered available to the dependant child. 42 U.S.C.A. §§ 602(a)(31), (39). However, Congress enacted no rules mandating that any other relative be a part of the minor child's assistance unit or that the income of any other relative, or other adult who was not legally responsible for the child, be deemed available to the minor child.

The appellants contend that the State can mandate an assistance unit composition not required by federal law because the development of an AFDC program is largely within the discretion of the State. *See King v. Smith*, 392 U.S. at 318-19, 20 L.Ed.2d at 1126. This broad discretion granted the state in shaping its individual AFDC policy is not, however, unfettered. The pertinent limitation here is that the State may not expand the provisions of the Deficit Reduction Act unless it can do so without violating any federal rule or regulation. *See Beaton v. Thomas*, 913 F.2d 701, 703-04 (9th Cir. 1982) (court found invalid a Washington regulation where the Washington State Department of Social and Health Services argued that its regulation did not impute income but merely redefined assistance unit as allowed by the federal regulations).

The federal regulations clearly prohibit the income of a non-legally responsible adult, living in the same household as the dependant child, to be assumed available to that child. *But see* 42 U.S.C.A. §§ 602(a)(31), (39). The regulations provide that

> the inclusion in the family, or the presence in the home, of a "substitute parent" or "man-in-the-house" or *any individual other than [an adult who is legally responsible for the dependent child] is not an acceptable basis for a finding of ineligibility or for assuming the availability of income by the State.*

45 C.F.R. § 233.90(a)(1) (1992) (emphasis added). The regulations also prohibit reducing the amount of funding granted to a needy child "solely because of the presence in the household of *a non-legally responsible individual*; and the agency will not assume any contribution from such individual for the support of the assistance unit . . . ." 45 C.F.R. § 233.20(a)(2)(viii) (1992) (emphasis added). These provisions have been recognized and applied to AFDC policies

in various jurisdictions. *See, e.g., Van Lare v. Hurley*, 421 U.S. 338, 44 L.Ed.2d 208 (1975) (New York regulation reducing the shelter component of AFDC grant because of the presence in the household of a non-legally responsible adult held to be invalid absent some showing of actual contribution by that adult); *Lewis v. Martin*, 397 U.S. 552, 25 L.Ed.2d 561 (1970) (California rule reducing the amount of AFDC benefits based on the income of a stepfather or an adult male assuming the role of a spouse who was not legally responsible for the child held to be invalid) (it appears that this decision has been partially superseded by the Deficit Reduction Act of 1984, 42 U.S.C.A. § 602(a)(31), discussed *supra*); *King v. Smith*, 392 U.S. 309, 20 L.Ed.2d 1118 (1968) (Alabama regulation reducing AFDC benefits based on the presence of a "substitute father" who was not legally responsible for the dependent child held invalid absent a hearing that actual contributions were made to the assistance unit); *but see also Allen v. Hettleman*, 494 F. Supp. 854 (D. Md. 1980) (Maryland regulation requiring minor mother and her child to be included in assistance unit with grandmother and grandmother's other minor children found valid) (reliance on this decision is likely misplaced because its reasoning, like the *Lewis* case, is probably superseded by the Deficit Reduction Act of 1984, 42 U.S.C.A. § 602(a)(39)).

The appellants find it notable that the aforementioned cases, unlike the case at bar, involve the income of an adult who is not the specified relative caretaker. They argue that this distinction is significant because "[e]ven though these relatives have no legal duty to support, once they become the specified relative caretaker, the statutory linkage created by Congress between this caretaker and child is as strong as between parent and child." In *MacInnes v. Commissioner of Public Welfare*, 593 N.E.2d 222 (Mass. 1992), the Massachusetts Supreme Court found that such a legal obligation did exist, stemming "from the Federal law requirement that the caretaker use all of the grant for the benefit of everyone in the assistance unit." *Id.* at 226; *see also* 42 U.S.C.A. § 605 (1991). This Court, however, finds that the legal obligation imposed on the relative caretaker is a legal obligation to use the AFDC grant for the benefit of the dependant child, not a legal obligation to make his or her own income available to the dependent child.

Beaton v. Thompson, 913 F.2d 701 (9th Cir. 1990) is directly on point with the case at bar. The Washington regulation at issue in that case provided that DSS "shall authorize only one assistance

unit grant for all needy eligible siblings and non-siblings living with a single caretaker relative or relative married couple." *Id.* at 702. The Ninth Circuit found the Washington policy to be invalid, based on its prior decision in *McCoog v. Hegstrom*, 690 F.2d 1280 (9th Cir. 1982), because it imputed income from a non-legally responsible adult to a dependent child. *McCoog* involved an Oregon regulation which required the shelter component of an AFDC grant to be reduced for a child who lived with a non-legally responsible adult, which adult did not himself receive benefits. The *McCoog* Court found that "it is improper for the state to assume that income and resources will be pooled to take advantage of the economies of scale." *Id.* at 1287. Without proof that the non-legally responsible, non-needy adult relative was making any actual contribution to the dependent child, that adult's income could not be presumed available for the needs of the child. *Id.* at 1286. The *Beaton* Court simply expanded the *McCoog* decision to include not only the non-needy relative, but also the needy relative who received AFDC benefits.

The appellants contend that *Beaton* is not a well-reasoned decision, is disavowed by the *McInnes* Court, and should not be followed by this Court. Interestingly, the DSS's policy is in line with the *McCoog* decision, upon which *Beaton* is based. Thus, as in *McCoog*, if the Morrells were not in need of AFDC benefits, Ms. Morrell could be the specified relative caretaker and designated payee for Jonathan and Joshua, who would receive $236 per month. The DSS policy has no requirement that a non-needy relative caretaker and her children be included in a dependant child's assistance unit. The Morrells income, therefore, could not be assumed available to Jonathan and Joshua. Moreover, if Ms. Alexander resided with Jonathan and Joshua in the same household as the Morrells, she and the boys could receive benefits as a three person unit and the Morrells could receive benefits as a separate eleven person unit. It is only in the situation where there is one caretaker or married couple who receives benefits on behalf of a group of non-sibling children that the policy at issue applies.

The practical effect of this policy is that a person receiving benefits for himself and his children, for whom he is legally responsible, cannot receive benefits for other children whom he has taken in and for whom he is not legally responsible, unless he makes them a part of his already existing AFDC unit. By making those children a part of an already existing unit, the household receives

only an incremental increase in benefits based on the concept of economies of scale. Thus, the policy discourages needy people from taking in dependent relatives, frustrating the very purpose of the AFDC program, a program designed to keep dependent children with their families.

This Court agrees with the Ninth Circuit decisions, despite the appellants' objection to *Beaton*, and finds them well-reasoned and persuasive in our resolution of the present case. We hold, therefore, that the DSS policy at issue violates the federal regulations against imputing income from a non-legally responsible adult to a dependant child. In so holding, we do not find that the income from a non-legally responsible relative caretaker can *never* be considered in determining a child's eligibility to receive AFDC, only that such income cannot be *assumed* available to the child. To conclude otherwise would allow the State to circumvent the federal regulations governing AFDC grants, which this Court finds impermissible.

The federal regulations provide that "income and resources are considered available both when actually available and when the applicant or recipient has a legal interest in a liquidated sum and has the legal ability to make such sum available for support and maintenance." 45 C.F.R. § 233.20(a)(3)(ii)(D). "Regular and actual contributions" to a dependent child, regardless of their source, therefore, must be considered in determining the child's eligibility, but such contributions must actually be available. *King*, 392 U.S. at 319, 20 L.Ed.2d at 1127. "This regulation properly excludes from consideration resources which are merely assumed to be available to the needy individual." *Id.* at 319, n.16, 20 L.Ed.2d at 1127, n.16 (citations omitted).

We note in conclusion that there is no issue before this Court as to whether the Morrells made actual contributions to Jonathan and Joshua, and we therefore make no decision regarding that issue. *See Beaver v. Hampton*, 333 N.C. 455, 427 S.E.2d 317 (1993).

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

Affirmed.

Judges EAGLES and ORR concur.

DAVID JOSEPH SMITHEMAN, AN INFANT, BY HIS GUARDIAN AD LITEM, PHILIP P. GODWIN, SR., AND MARK A. SMITHEMAN, PLAINTIFFS v. NATIONAL PRESTO INDUSTRIES, INC., HOMES BY OAKWOOD, INC., AND OAKWOOD MOBILE HOMES, INC., DEFENDANTS

No. 921SC225

(Filed 20 April 1993)

1. **Appeal and Error § 130 (NCI4th)— discovery order not appealable—sanctions order appealable**

An order compelling discovery is normally not appealable because it is not a final judgment and does not affect a substantial right; however, an order imposing sanctions under N.C.G.S. § 1A-1, Rule 37(b) is appealable as a final judgment.

Am Jur 2d, Appeal and Error §§ 47 et seq.

2. **Discovery and Depositions § 62 (NCI4th)— imposition of sanctions—sufficiency of notice and opportunity to be heard**

There was no merit to defendant's contention that the trial court erred in imposing sanctions against it without providing sufficient notice and opportunity to show justification for its failure to strictly comply with discovery, since plaintiffs' motion clearly indicated that they were seeking sanctions; defendant was given the opportunity to present an oral argument; and defendant was invited to submit further information for consideration after the hearing.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

3. **Discovery and Depositions § 62 (NCI4th)— severity of sanctions appropriate**

The trial court's order establishing defendant's negligence, prohibiting defendant from offering any evidence to refute negligence, awarding attorney fees to plaintiff's counsel, and denying defendant's motion to rehear did not amount to such severe sanctions as to violate the Law of the Land Clause of the North Carolina Constitution and the Due Process Clause of the United States Constitution, since defendant was given ample opportunity to explain its position and rebut the evidence and was even given the opportunity to submit further information after the hearing on sanctions.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

4. Discovery and Depositions § 62 (NCI4th)— failure to comply with discovery—action willful and without justification—sufficiency of evidence

There was ample evidence to support the trial judge's determination that defendant acted willfully and without justification in failing to comply with discovery requests where defendant had argued confidentiality of certain materials before a judge and had been ordered by the court to produce the information; defendant did not comply with the terms of that order; and this evidence thus supported the conclusion that defendant had not been cooperative in the discovery process.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

5. Discovery and Depositions § 62 (NCI4th)— defendant's negligence established—refuting evidence not allowed—sanction authorized by statute

The trial court did not abuse its discretion in imposing a sanction establishing defendant's negligence and prohibiting the introduction of any evidence on the issue of negligence, since N.C.G.S. § 1A-1, Rule 37(b) specifically authorizes the imposition of such sanctions.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

6. Discovery and Depositions § 62 (NCI4th)— sanctions for failure to comply with discovery—award of attorney fees—sufficiency of evidence

Evidence was sufficient to support the trial court's award to plaintiffs of attorney fees of $7,000 where the court found that plaintiffs' attorneys had spent 49 hours and paralegals had spent 10 hours in preparation for the 28 October hearing; additional preparation was necessary for the 31 October hearing; and the attorneys had made at least four round trips from Norfolk, Virginia in order to attend various discovery hearings.

Am Jur 2d, Depositions and Discovery §§ 373 et seq.

Appeal by defendants from order entered 26 November 1991 by Judge Richard B. Allsbrook in Gates County Superior Court. Heard in the Court of Appeals 2 March 1993.

Tavss, Fletcher, Earley & King, P.C., by John R. Fletcher and Ray W. King, and Overton & Carter, by Larry S. Overton, for plaintiffs-appellees.

Hornthal, Riley, Ellis & Maland, by M.H. Hood Ellis and Michael P. Sanders, and Willcox & Savage, P.C., by John Y. Pearson, Jr. and William M. Furr, for defendants-appellants.

LEWIS, Judge.

Plaintiffs filed this products liability action on 13 November 1989 against National Presto Industries, Inc. (hereinafter "Presto"), Oakwood Mobile Homes, Inc. and Homes by Oakwood, Inc. (hereinafter collectively referred to as "Oakwood"). Presto is the manufacturer of a cooker which tipped over and spilled hot oil on the minor plaintiff after he had pulled the cord. Oakwood manufactured the mobile home in which the accident occurred. On 27 November 1991 the court approved a settlement with Oakwood, thus leaving Presto as the only defendant in this action. In their complaint, plaintiffs alleged, among other things, negligent manufacture and design of the cooker and negligent failure to warn or adequately warn.

This appeal arises from a long discovery process culminating in sanctions imposed against Presto for failing to comply with previous court orders to respond to interrogatories and requests for production. Pursuant to Rule 37 of the North Carolina Rules of Civil Procedure, on 26 November 1991 Judge Allsbrook entered an order establishing Presto's negligence in the design and manufacture of the appliance and prohibited Presto from offering any evidence to refute negligence. N.C.G.S. § 1A-1, Rule 37(b)(2)a., -b. (1990). He also awarded plaintiffs' counsel $7,000 in attorney fees. That same day Judge Allsbrook entered a supplemental order denying Presto's motion to rehear. On 9 December 1991 Presto filed its appeal from these orders.

The facts show that discovery was extensive from the outset. On 16 February 1990 plaintiff David Smitheman served 26 interrogatories and a request for production of documents upon Presto, and plaintiff Mark Smitheman served 27 interrogatories. Presto filed a general objection to interrogatories on 14 March 1990. Plaintiffs first moved the court to overrule various objections to their interrogatories and to compel answers on 6 August 1990. Due to Presto's concern over certain confidential information, the court

entered a protective order on 8 October 1990. At hearings held on 8 and 11 October 1990, the court overruled some of Presto's objections and directed Presto to respond to certain interrogatories and requests for production. The court did not enter a written order to this effect until 13 June 1991, however.

On 17 December 1990 plaintiffs filed a set of supplemental interrogatories. They filed a second set of supplemental interrogatories on 11 April 1991. Presto delivered some documents to plaintiffs in April 1991, but they were neither indexed nor identified for any specific interrogatory or request for production. On 15 May 1991 plaintiffs filed their second discovery motion, requesting an entry of order regarding the ruling made in October 1990, an order compelling responses to discovery, and sanctions. On 13 June 1991 the court entered two orders. The first order memorialized the October 1990 hearings on the first motion to compel and required Presto to fully respond to certain interrogatories and requests for production within 30 days. The second order required Presto to answer the first and second set of supplemental interrogatories within 45 days.

Plaintiffs notified Presto on 16 July 1991 that the responses were past due. Plaintiffs filed their third discovery motion, to compel responses and for sanctions, on 5 September 1991. Presto filed some responses on 30 September 1991, but on 6 October plaintiffs informed Presto that the responses were inadequate and that they would be seeking sanctions on their motion. Presto filed additional but also inadequate responses on 24 October 1991. In a letter dated 24 October 1991 Presto expressly refused to supply the names of certain component part manufacturers although it had been ordered to do so almost one year earlier. Presto's attorney at the time, George J. Dancigers of the Virginia Bar, stated that he "fully realize[d] that the court has ordered National Presto to produce this information but since this is the only issue outstanding, perhaps you and I can discuss it further so that we do not need to make a trip to court on this issue alone."

On 28 and 31 October 1991 the court held hearings on the September 1991 discovery motion. At the hearings plaintiffs presented the court with a chronology of the discovery process up to that point, whereas Mr. Dancigers argued the issue of the identity of the component part manufacturers. Mr. Dancigers admitted that Presto had "no excuse" for not filing its answers on time

and for not completely responding to the court's orders. The court encouraged each party to submit further information after the 28 October hearing and before the 31 October hearing. Presto did not do so.

On 31 October the court dictated its order imposing sanctions. The court entered the order on 26 November 1991, at which time the court filed a supplemental order denying Presto's motion to amend findings and order, denying its motion for a new hearing, and also denying its alternative motion for relief from the order.

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[1] An order compelling discovery is normally not appealable, because it is not a final judgment and does not affect a substantial right. *Walker v. Liberty Mut. Ins. Co.*, 84 N.C. App. 552, 554, 353 S.E.2d 425, 426 (1987). However, an order imposing sanctions under Rule 37(b) is appealable as a final judgment. *Id.* at 554-5, 353 S.E.2d at 426. The imposition of discovery sanctions is within the sound discretion of the trial judge and will not be reversed absent a showing of abuse of that discretion. *Roane-Barker v. Southeastern Hosp. Supply Corp.*, 99 N.C. App. 30, 36, 392 S.E.2d 663, 667 (1990), *disc. rev. denied*, 328 N.C. 93, 402 S.E.2d 418 (1991). Presto changed counsel and now presents five arguments for our consideration. After reviewing these arguments, we conclude the trial judge did not abuse his discretion in ordering sanctions against Presto.

[2] (1) Presto first argues the trial court committed reversible error in imposing sanctions against it without providing sufficient notice and opportunity to show justification for its failure to strictly comply with discovery. We find that Presto did have sufficient notice that sanctions could be imposed, because plaintiffs' motion clearly indicated they were seeking sanctions. In their motion plaintiffs stated that

> Presto's failure to comply with this Court's Orders entitles the Plaintiffs to sanctions in accordance with Rule 37 of the Rules of Civil Procedure, including, but not limited to, an award of reasonable expenses and attorney fees, and an Order designating certain facts as established in accordance with the claims of the Plaintiffs, prohibiting Presto from introducing certain materials in evidence, and from opposing designated claims of the Plaintiffs.

At the hearing Presto's attorney was given the opportunity to explain to the court any justification Presto may have had for its delinquency in responding to discovery. Mr. Dancigers readily admitted that Presto had "no excuse," but then put forth several arguments as justification for its actions. The court patiently invited each party to submit further information for consideration after the 28 October hearing. Presto failed to submit any additional information. Thus, Presto had notice that sanctions were requested, Presto was given the opportunity to present an oral argument, and Presto was free to submit additional information. Presto cannot now argue that it was not given the opportunity to be heard.

[3] (2) Second, Presto argues the imposition of such severe sanctions violated the Law of the Land clause of the North Carolina Constitution and the Due Process clause of the United States Constitution. Presto claims constitutional violations arose because it was not afforded a fair hearing to "test, explain, or rebut" the evidence offered against it. *See Shepherd v. Shepherd*, 273 N.C. 71, 76, 159 S.E.2d 357, 361 (1968) (quoting *In re Custody of Gupton*, 238 N.C. 303, 304, 77 S.E.2d 716, 718 (1953)). This contention is also unconvincing. As stated above, Presto was given ample opportunity at the 28 October hearing to explain its position and rebut the evidence, and was even given the opportunity to submit further information after the hearing.

[4] (3) Presto challenges the court's finding that its failure to comply was willful and without justification, and the finding that Presto was uncooperative. Presto claims that the court gave "great weight" to these findings in determining the severity of the sanctions imposed. Presto concedes, however, that a finding of willfulness is not necessary in order to impose discovery sanctions. *Hayes v. Browne*, 76 N.C. App. 98, 101, 331 S.E.2d 763, 764 (1985), *disc. rev. denied*, 315 N.C. 587, 341 S.E.2d 25 (1986). Even if the court gave "great weight" to this finding in determining which sanctions to impose, we find this argument to be meritless since the evidence supports the judge's determination.

Presto admitted at the 28 October hearing that it had "no excuse" for its failure to comply, and tried to argue the confidentiality issue. However, Presto had been ordered by the court to provide certain confidential information on the component parts manufacturers in June 1991, when the court entered its order on the October 1990 hearing. In *Roane-Barker*, defendant argued its

noncompliance was justified because the requested information was confidential. 99 N.C. App. at 36, 392 S.E.2d at 667. This Court stated that after consenting to a court order providing that defendant would comply with plaintiff's requests, "[d]efendant may not unilaterally 'interpret' the relevant scope of its response and only provide that information it considers discoverable." *Id.* In that case defendant had not previously objected on the grounds of confidentiality, and had not sought a protective order.

In the case at hand, Presto did object to some discovery requests due to the confidentiality of the information. In October 1990 the court entered an order protecting the confidentiality of documents submitted to the court. In June 1991 the court entered an order based on the 8 October 1990 hearing granting some of Presto's objections to discovery requests, but ordering Presto to produce certain information within 30 days of the order. Presto did not comply with the terms of that order.

We find there was ample evidence to support the judge's determination that Presto acted willfully and without justification. This case is more convincing than *Roane-Barker*. Unlike the defendant in *Roane-Barker*, Presto had already argued the confidentiality issue before a judge and had been ordered by the court to produce the information. The same evidence supports the conclusion that Presto had not been cooperative in the discovery process.

[5] (4) Presto argues the trial court abused its discretion in imposing a sanction establishing Presto's negligence and prohibiting the introduction of any evidence on the issue of negligence. Presto's main argument is that the general purpose of the North Carolina Rules is to encourage trial on the merits. While this may be true, the Rules specifically authorize the imposition of such sanctions. § 1A-1, Rule 37(b)(2)a., -b. We find nothing in this argument indicating the trial court abused its discretion.

[6] (5) Finally, Presto argues the trial court committed reversible error in finding as a fact that $7,000 was a reasonable amount for plaintiffs' attorney fees and expenses. Presto contends the court failed to include findings of fact to support this award, and that there was insufficient evidence on the issue of attorney fees.

According to *Benfield v. Benfield*, 89 N.C. App. 415, 422, 366 S.E.2d 500, 504 (1988), the court must make findings of fact to support the award of attorney fees. The 26 November 1991 order

establishing Presto's negligence and awarding attorney fees did not contain any findings to support the determination of the fees. However, in the supplemental order entered the same day the judge addressed the basis for the amount of the award. He noted that the attorneys had spent 49 hours and paralegals had spent 10 hours in preparation for the hearing, that additional preparation was necessary for the 31 October hearing, and that the attorneys had made at least four round trips from Norfolk, Virginia in order to attend various discovery hearings. The judge stated the "Court was, and still is, of the opinion that $7,000.00 is a reasonable amount for the services and expenses and, in fact, is conservative under all of the existing circumstances." We find there was sufficient evidence to support the trial judge's award of attorney fees.

We have considered Presto's arguments and determine that they are without merit. Although the sanctions imposed were severe, they were clearly authorized by the North Carolina Rules of Civil Procedure. We find nothing to indicate the trial judge abused his discretion in imposing the sanctions. The order of the trial court is hereby

Affirmed.

Judges JOHNSON and JOHN concur.

STATE OF NORTH CAROLINA v. ALLISON BAKER, DEFENDANT/APPELLANT

No. 9114SC702

(Filed 20 April 1993)

Constitutional Law § 310 (NCI4th)— defendant's prior convictions —defense counsel's misstatements—failure to object to improper jury instructions—ineffective assistance of counsel

Where defense counsel's statements that defendant had no criminal record led directly to the introduction of evidence of his criminal record which would not have been otherwise admissible during the trial, and where defense counsel, without objection, allowed the jury to be instructed that they could only consider defendant's prior convictions as they may or may not impugn on defendant's credibility, though the convic-

tions had been admitted for the sole purpose of dispelling any false impression created by defense counsel, defense counsel's conduct was in error and deprived defendant of a fair trial.

Appeal by defendant from judgment entered 21 February 1991 by Judge A. M. Brannon in Durham County Superior Court. Heard in the Court of Appeals 8 April 1992. Reconsidered in the Court of Appeals pursuant to the mandate of the opinion filed 12 February 1993 by our Supreme Court.

The facts of this case have been set out at 106 N.C. App. 687, 418 S.E.2d 288 (1992) and 333 N.C. 325, 426 S.E.2d 73 (1993). Accordingly, we do not restate them here.

Attorney General Lacy H. Thornburg, by Assistant Attorney General Valerie L. Bateman, for the State.

Currin & Boyce, by George B. Currin and Mary C. Boyce, for the defendant-appellant.

EAGLES, Judge.

Pursuant to the direction of the Supreme Court, we have reconsidered defendant's assignments of error that our previous opinion did not address.

By his first assignment of error, defendant argues that he was denied effective assistance of counsel guaranteed under both the United States and North Carolina Constitutions. After careful examination of the record we agree.

> A defendant's constitutional right to counsel includes the right to the effective assistance of counsel. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241 (1985). The test for determining whether a defendant in a criminal case has received effective assistance of counsel is that set forth in *Strickland v. Washington*, 466 U.S. 668, 104 S.Ct. 2052, 80 L.Ed. 2d 674 (1984), and the test is the same under both the federal and state constitutions. *State v. Braswell*, 312 N.C. 553, 324 S.E.2d 241. To establish that there was ineffective assistance of counsel a defendant must meet the two-prong test of *Strickland:*
>
> > First the defendant must show that counsel's performance was deficient. This requires showing that counsel made

> errors so serious that counsel was not functioning as the 'counsel' guaranteed the defendant by the Sixth Amendment. Second, the defendant must show that the deficient performance prejudiced the defense. This requires showing that counsel's errors were so serious as to deprive the defendant of a fair trial, a trial whose result is reliable.

State v. Lewis, 321 N.C. 42, 48-49, 361 S.E.2d 728, 732 (1987) (quoting *Strickland v. Washington*, 466 U.S. 668, 687, 80 L. Ed. 2d 674, 693 (1984)).

Defendant argues that his trial counsel committed errors which prejudiced his defense and deprived him of a fair trial. Specifically, defendant argues that his counsel erred in three respects: (1) by "incorrectly and unnecessarily stat[ing] on several occasions during the trial and before the jury, that the defendant did not have a criminal record[;]" (2) by failing to object to irrelevant penetration evidence; and (3) by failing to object to the "court's instruction to the jury regarding consideration of the defendant's prior convictions . . . ."

The Supreme Court decided in *State v. Baker*, 333 N.C. 325, 426 S.E.2d 73 (1993) that penetration evidence was relevant to the charges brought against the defendant. Accordingly, we hold that defendant's counsel did not err by failing to object to the introduction of the evidence.

However, defendant's trial counsel's errors in handling of the defendant's prior convictions and the resulting jury instruction are not so easily overcome. Defendant contends in his brief that during opening statements his counsel told the jury that he did not have a criminal record. We are unable to find the opening statement in the trial transcript or record before us. Even so, the State concedes in its brief that defense counsel stated during his opening statement that the defendant did not have a criminal record. Later, during cross-examination of Dr. Gregory, defense counsel began to ask Dr. Gregory a question when an objection was interposed by the prosecution. Defense counsel began, "Okay. Well, you've got a man sitting there *with no record in the world*, good family man—[.]" (Emphasis added). The Court then allowed defense counsel to pose the following question to which the prosecution again objected and asked to be heard.

> Q. Well, let me ask the question this way, this is a forty-seven year old white male, married twenty years, twelve and a half years in his last employment, *no criminal record*, no children at home, is he the kind of person who would commit a sexual assault upon a child in an open spaced area, add to it, with the mother being less than five feet away, would he do that?

(Emphasis added).

After the State had rested its case, the prosecution responded to defense counsel's remarks by filing a motion to introduce the defendant's criminal record. The following is a portion of the colloquy that ensued between the court, defense counsel and the prosecutor.

> THE COURT: Mr. Vann, let me ask you this, let's do it step by step. It says here, defense counsel stated to the jury in his opening remarks, which is his opening statement that the defendant had no criminal record. Is that what you said?
>
> MR. VANN: I'm certain it is.
>
> THE COURT: I'm just asking you. Two, defense counsel asked Dr. Bonnie Gregory, that's the witness who was on the stand just before the break, to speculate, which is probably a fair word, on the defendant's ability to commit the offense charged given that he has been married twenty years, has a good work record and an absolutely clean criminal record.
>
> MR. VANN: Okay. I said that.
>
> THE COURT: Okay. Just checking. Three, defense counsel was provided a copy of the defendant's record prior to trial.
>
> MR. VANN: That's true. When I walked in the door I was given one. I didn't see one before.
>
> THE COURT: When did you see it?
>
> MR. VANN: When was it?
>
> MS. WEIS: Your Honor, I did provide Mr. Vann with a copy of the record Monday morning prior to—
>
> MR. VANN: (Interposing) I didn't get a copy.
>
> MS. WEIS: I showed it to him. Mr. Vann indicated to me that he was aware of those.

The court then examined a computer print out of the defendant's criminal record which appeared to the court to include the following information: (1) defendant was arrested and convicted in 1962 of felonious breaking and entering and larceny; (2) defendant was paroled on 6 February 1963; (3) the defendant's parole was revoked after he was arrested for possession of amphetamine drugs in June 1963; and (4) that the defendant went to prison for a misdemeanor conviction on 11 November 1966 of operating a motor vehicle with a suspended license. After reviewing the defendant's criminal record the following transpired:

MR. VANN: I assume that if you're going to rule in their favor, then what I'm going to do when he gets in the box and identifies himself, I'm going to clear this up. So, you know, I don't—

THE COURT: (Interposing) I understand. Mr. Vann, under the case law, I believe the State is right. Neither side is entitled to create a false impression.

MR. VANN: Well, that was certainly nobody's intent.

THE COURT: I'm not sure if it's a matter of intent, it was a matter of cold occurrence. If I was sitting in that jury box, I would take from your two remarks that your client came down here in the last snow storm, just like any other snow piece, clean as driven snow and had never seen the inside of a courthouse except to list and pay taxes and perhaps serve on the jury.

MR. VANN: Well, one of them is twenty-five years old and one is twenty-eight years old and one is twenty-nine years old.

THE COURT: I understand. You will note that under Rule 608, there are no time limits whatsoever as there are under 609. I'm perfectly prepared—I believe it would not have been admissible save and except for what you told this jury.

MR. VANN: Okay. Well, I'm going to untell them.

THE COURT: That's fine. Now, technically speaking, when you take a look at 608, it says 608 can only be inquired into on cross examination but out of a super abundance of precautions and because one of the commentators that I have been looking at in the last week says that that should be ignored,

I'm going to allow you, as though it was 609, to deal with it up front so as to rob any sting that might be in it.

MR. VANN: Okay. We're going to do that.

THE COURT: Okay.

MR. VANN: I've got the dates down here now.

THE COURT: I'll give you the printed record.

MR. VANN: February 26, '62, June of '63 and sometime in November of '66, driving with license revoked.

THE COURT: I'm going to give to y'all the computer record because I do not take my dates as being correct. You take whatever date you find correct. *But it's received for the limited purpose of dispelling what could be a false impression that counsel said was inadvertently created.* Whatever it was, it sure created it for me and, therefore, for the fourteen jurors.

(Emphasis added).

Thereupon, defense counsel elicited the defendant's criminal record from the defendant on direct examination. Defense counsel did not request a limiting instruction at that time, and the trial court did not offer one on its own. However, later, during the jury charge, the trial court instructed the jury as follows:

> You may consider any prior criminal convictions and/or prior acts tending to show a lack of truthfulness as well as showing truthfulness, but I specifically instruct you that any prior convictions may only be considered on the issue of credibility or believability. Other than that, they may not be considered by you for any other purpose in the case itself.

Defense counsel did not object to this instruction.

Clearly, defense counsel's statements led directly to introduction of evidence which, as the trial court recognized, would not have been otherwise admissible during the trial. Moreover, defense counsel, without objection, allowed the trial court to instruct the jury that the defendant's prior convictions could be considered to impeach the defendant's credibility or believability even though the defendant's convictions had been admitted *"for the limited purpose of dispelling what could be a false impression that counsel said was inadvertently created."* (Emphasis added). In short, defense

counsel, without objection, allowed the jury to be instructed that they could *only* consider the defendant's prior convictions as they may or may not impugn on the defendant's credibility. The instruction simply did not mention that the convictions had been admitted for the sole purpose of dispelling any false impression created by defense counsel. Defense counsel's failure to object to the instruction given is even more egregious when one considers that defense counsel should have been particularly sensitive to any instruction concerning the convictions. The trial court had expressly told defense counsel earlier that the convictions would not have been admissible save defense counsel's error.

We conclude that defense counsel's conduct was in error and deprived the defendant of a fair trial. Accordingly, we hold that the defendant was denied effective assistance of counsel as guaranteed under both the federal and state constitutions.

The State argues, however, that this case is controlled by *State v. Lewis*, 321 N.C. 42, 361 S.E.2d 728 (1987). In *Lewis*, defense counsel, during his opening statement, told the jury that his client did not have any other charges pending against him. The prosecution immediately objected and pointed out that contrary to defense counsel's assertion the defendant did, in fact, have other charges pending against him. The trial court immediately re-instructed the jury that counsel's statements were not evidence, that counsel was not sworn nor subject to cross-examination and that they were to disregard the statement of counsel in their deliberations.

Here the trial court did not instruct the jury to ignore defense counsel's misstatements. While defense counsel's statement clearly opened the door to admission of the convictions to dispel any false impression created by defense counsel, it did not open the door to attack the defendant's credibility. However, the trial court did not instruct the jury that the defendant's convictions could only be considered to dispel the false impression created by defense counsel. Rather, the court instructed the jury that they were to consider the defendant's convictions only as they related to his credibility.

We also note that in *Lewis* the Supreme Court indicated that in order to prevail on appeal, a defendant must be able to show that the jurors' knowledge of the defendant's criminal record compromised "their ability to listen anew to and fairly judge the evidence in defendant's case." *Lewis*, 321 at 49, 361 S.E.2d at 733 (quoting

State v. Ysaguire, 309 N.C. 780, 784, 309 S.E.2d 436, 439 (1985)). Here, we are persuaded that the trial court's instruction alone is sufficient to indicate that the jurors' ability to listen anew to and fairly judge the evidence was compromised. Accordingly, we hold that *Lewis* is factually distinguishable from the instant case.

Because of our disposition of defendant's first assignment of error, we do not address his remaining assignments.

New trial.

Chief Judge ARNOLD and Judge WELLS concur.

WILBURN REID MECIMORE AND WIFE, MILLIE M. MECIMORE; DOROTHY MECIMORE BEBBER AND HUSBAND, JOHN LITTLE BEBBER v. TOMMY J. COTHREN AND WIFE, BARBARA COTHREN

No. 9222DC287

(Filed 20 April 1993)

1. **Easements § 62 (NCI4th)— easement by prescription—sufficiency of evidence**

Plaintiffs provided sufficient evidence tending to show that they had acquired an easement by prescription over defendants' property, thus supporting the trial court's denial of defendants' motions for a directed verdict and for judgment n.o.v. where plaintiffs' evidence tended to show that they and their predecessors never requested and never received from defendants permission to use the driveway going from plaintiffs' land, across defendants' land, to a public highway; plaintiffs and their predecessors used the driveway exclusively from 1942 until 1988, and often from 1988 until 1990; and plaintiffs and their predecessors maintained the driveway by scraping, clearing sand, and removing brush from the road.

2. **Easements § 62 (NCI4th)— easement by prescription—other means of access—effect on permissive use presumption**

In an action to establish an easement over defendants' land, evidence of the existence of another means of access did not destroy plaintiffs' rebuttal of the permissive use presumption.

3. Easements § 66 (NCI4th)— easement by prescription—jury verdict not inconsistent

In an action to establish an easement across defendants' land, there was no merit to defendants' contention that the jury's verdict was inconsistent, since it was not contradictory for the jury to find that plaintiffs acquired an easement by prescription, but did not acquire an easement by implication.

4. Slander of Title § 1 (NCI3d)— filing of action to establish easement—lis pendens—no slander of title

In plaintiffs' action to establish an easement across defendants' land, the trial court properly dismissed defendants' counterclaim of slander of title, which was based on plaintiffs' filing a complaint and notice of lis pendens at the time defendants were negotiating a sale of their property, allegedly causing defendants to lose the sale, since the court properly found that plaintiffs did indeed acquire a prescriptive easement in defendants' property, and defendants thus failed to prove the elements of slander of title, which are (1) the uttering of slanderous words in regard to the title of someone's property, (2) the falsity of the words, (3) malice, and (4) special damages.

Am Jur 2d, Libel and Slander § 541.

Sufficiency of plaintiff's interest in real property to maintain action for slander of title. 86 ALR4th 738.

Appeal by defendants from judgment entered 30 October 1991, in Alexander County District Court by Judge Samuel A. Cathey. Heard in the Court of Appeals 26 February 1993.

L. Dale Graham for plaintiff-appellee.

Edward Jennings for defendant-appellant.

McCRODDEN, Judge.

Plaintiffs initiated this action to establish a dirt and gravel easement across defendants' property as a means to get to and from their land. Defendants answered and counterclaimed, alleging slander of title. On appeal, defendants pose questions of whether plaintiffs' evidence of adverse possession was sufficient to take their case to the jury and whether the trial court properly dismissed defendants' counterclaim.

Plaintiffs' evidence tended to show that on 2 January 1942, G.E. Mecimore, father of the plaintiffs Wilburn Reed Mecimore (plaintiff Mecimore) and Dorothy Mecimore Bebber (plaintiff Bebber), acquired by deed from Carl W. Watts and wife a tract of approximately 97 acres of land located east of Glade Creek in Alexander County. In 1978, G.E. Mecimore devised the southern half of his property to plaintiff Mecimore and the northern portion to plaintiff Bebber. The Watts family owned property west of Glade Creek adjacent to the Mecimore property until 1989, when the defendants purchased the property from Carl Watts, Jr.

This controversy arose out of plaintiffs' use of the portion of a dirt and gravel driveway which is located on the defendants' land. The driveway, which has existed in approximately the same location since at least 1942, runs from rural paved road 1608 through the defendants' property to plaintiff Mecimore's property. From at least 1920 until 1988, the dirt and gravel driveway was the only road which led onto the property of the plaintiffs, and the plaintiffs and their predecessors used the road as the sole means of ingress to and egress from their property. Plaintiffs' friends and business associates, such as Carnation Milk Company, also used the driveway as the sole access to plaintiffs' property until 1988.

In 1988, plaintiff Mecimore was granted permission by his son, Ronald Mecimore, to construct a roadway from rural paved road 1608 through his son's property to plaintiff Mecimore's property as a secondary access. This roadway does not extend to plaintiff Bebber's property. Ronald Mecimore has given the plaintiffs permission to use this roadway, but has never granted the plaintiffs an easement through his property. After the secondary roadway was built, the plaintiffs continued to use the dirt and gravel driveway until the defendants closed the driveway on 20 September 1990.

Plaintiffs' evidence further showed that the plaintiffs and their predecessors provided notice to the Watts family and the defendants of their continual use and maintenance of the driveway. The plaintiffs never requested and never received permission to use the dirt and gravel driveway, and, until it was closed, they maintained it by scraping, clearing sand, and removing brush from the road. Plaintiff Bebber's property is completely landlocked, with the driveway being the only means of access to her property. Although plaintiff Bebber does not live on her property, at the

time of trial she visited it at least once a month and, until the driveway was closed, she used it exclusively to access her property.

The court granted plaintiffs' motion to dismiss defendants' counterclaim alleging slander of title. It denied the defendants' motions for directed verdict, made at the close of plaintiffs' evidence, and for judgment notwithstanding the verdict, made after the jury found that plaintiffs had established an easement by prescription. From judgment entered on the verdict, defendants appeal.

We turn now to defendants' two assignments of error which are (1) whether the trial judge, pursuant to N.C. Gen. Stat. § 1A-1, Rules 50(a) & (b) (1990), properly denied the defendants' motions for directed verdict and for judgment notwithstanding the verdict and (2) whether he properly allowed the plaintiffs' motion to dismiss defendants' counterclaim. We hold that plaintiffs' evidence tending to establish a prescriptive easement was sufficient to survive defendants' motions and that the trial court properly dismissed defendants' counterclaim.

Defendants are entitled to a directed verdict and, thus, a judgment notwithstanding the verdict only if the evidence, when considered in the light most favorable to the plaintiffs, fails to show the existence of each element required to establish an easement by prescription. *Potts v. Burnette*, 301 N.C. 663, 665, 273 S.E.2d 285, 287 (1981). When determining whether the evidence is sufficient to go to the jury, plaintiffs are entitled to the benefit of every reasonable inference which may be legitimately drawn from the evidence, and all evidentiary conflicts must be resolved in favor of the plaintiffs. *Id.*

In order to prevail in an action to establish an easement by prescription or adverse use, plaintiffs must prove the following elements:

> (1) [T]hat the use is adverse, hostile or under claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period.

Id. at 666, 273 S.E.2d at 287-88. Defendants contend that, of the four elements, plaintiffs failed to establish that their use of the

driveway was "adverse, hostile, or under claim of right." To the contrary, defendants claim that plaintiffs' use of the driveway was permissive and inconsistent with their claim for a prescriptive easement. We disagree and find that plaintiffs' evidence on this element was sufficient to take the case to the jury.

Under North Carolina law, a presumption exists that the use of a roadway over another's property is permissive. *Dickinson v. Pake*, 284 N.C. 576, 580, 201 S.E.2d 897, 900 (1974). To rebut the presumption, plaintiffs must show that the use was not permissive, but the plaintiffs need not show that there was a heated controversy, or a manifestation of ill will, or that the claimant was an enemy of the owner of the servient estate. *Id.* at 580-81, 201 S.E.2d at 900. A "hostile" use is simply a use of such nature and exercised under such circumstances as to manifest and give notice that the use is being made under a claim of right. *Id.* at 581, 201 S.E.2d at 900.

[1] In *Potts v. Burnette, supra*, the Supreme Court determined that the presumption of permissive use may be overcome where the evidence tends to show that the plaintiffs never sought nor were given permission to use the road, that they used the road exclusively for the twenty-year period, and that they performed maintenance on the roadway. 301 N.C. 663, 273 S.E.2d 285. In the instant case, the evidence, considered in the light most favorable to the plaintiffs, similarly shows that they and their predecessors never requested and never received permission to use the driveway; they and their predecessors used the driveway exclusively from 1942 until 1988, and often from 1988 until 1990; and they and their predecessors maintained the driveway by scraping, clearing sand, and removing brush from the road.

[2] Defendants contend that because plaintiff Mecimore built a road over his son's property in 1988, which provided plaintiff Mecimore with another means of access to his property, plaintiffs failed to show adverse or hostile use of the driveway. Although both *Potts* and *Dickinson* dealt with disputed roadways which were the sole routes of ingress to and egress from plaintiffs' land, the existence of another means of access does not destroy plaintiffs' rebuttal of the permissive use presumption. *Presley v. Griggs*, 88 N.C. App. 226, 362 S.E.2d 830 (1987). In *Oshita v. Hill*, 65 N.C. App. 326, 330, 308 S.E.2d 923, 926 (1983), this Court found that it did not matter that plaintiffs had other ways to get to and from their property during the years that the prescriptive right

was being established, because an easement by prescription, unlike a statutory cartway, is not based upon need but upon use. That plaintiffs' predecessors had another way available to them tends to support plaintiffs' claim that the use was not permissive, since, nothing else appearing, there is no reason to give a way to one who already has one. *Id.*

[3] In defendants' first argument, they also complain that the jury's verdict was inconsistent. At trial, two issues were submitted to and answered by the jury:

> 1. Have the plaintiffs . . . acquired an easement over the land of the defendant . . . by adverse use of the road described in the Complaint for a period of twenty (20) years before this action was filed on October 30, 1990?
>
> Answer: Yes.
>
> 2. Are the plaintiffs . . . owners of an easement of ingress and egress on the land of the defendants . . . ?
>
> Answer: No.

Our Courts have held that where a jury's answers to the issues submitted are so contradictory as to invalidate the judgment, the practice of the court is to grant a new trial, because of the evident confusion. *Palmer v. Jennette*, 227 N.C. 377, 379, 42 S.E.2d 345, 347 (1947). Because the two issues in the instant case raise different questions, however, we find that the jury's answers support the judgment and reflect no confusion on the part of the jury. In the first issue, the trial judge instructed the jury to determine whether the plaintiffs acquired an easement by prescription. In the second issue, the jury decided whether the plaintiffs acquired an easement by implication, *i.e.*, whether an easement was implied on separation of title or by necessity. *See, e.g., Jones v. Carroll*, 91 N.C. App. 438, 371 S.E.2d 725 (1988). It was not contradictory for the jury to find that the plaintiffs acquired an easement by prescription, but did not acquire an easement by implication.

[4] In defendants' second assignment of error, they contend that the trial court improperly dismissed their counterclaim for slander of title. The elements of slander of title are (1) the uttering of slanderous words in regard to the title of someone's property, (2) the falsity of the words, (3) malice, and (4) special damages. *Allen v. Duvall*, 63 N.C. App. 342, 345, 304 S.E.2d 789, 791 (1983), *rev'd*

on other grounds, 311 N.C. 245, 316 S.E.2d 267 (1984). Defendants alleged slander of title because plaintiffs filed a complaint and notice of *lis pendens* at the time defendants were negotiating a sale of their property, allegedly causing the defendants to lose the sale. Since we are upholding the verdict that the plaintiffs acquired a prescriptive easement in defendants' property, their action against defendants did not constitute slander of title, and we consequently find that the defendants' second assignment of error is without merit.

In summary, we find that the plaintiffs provided sufficient evidence tending to show that they had acquired an easement by prescription over defendants' property, thus supporting the trial court's denial of defendants' motions for a directed verdict and for judgment notwithstanding the verdict. In addition, we find that the trial court properly dismissed defendants' counterclaim of slander of title.

The judgment from which the defendants appeal is affirmed.

Affirmed.

Chief Judge ARNOLD and Judge GREENE concur.

RALPH GASKILL v. STATE OF NORTH CAROLINA, EX REL. WILLIAM W. COBEY, JR., SECRETARY OF ENVIRONMENT, HEALTH AND NATURAL RESOURCES

No. 923SC323

(Filed 20 April 1993)

Administrative Law and Procedure § 30 (NCI4th)— excavating and filling salt marsh—violation of CAMA—imposition of penalty—petition for contested case hearing not verified or timely—no jurisdiction of OAH

Petitioner was not entitled to a contested case hearing on his alleged violation of the Coastal Area Management Act and the State Dredge and Fill Act by excavating and filling salt marsh on his property in Carteret County, since the Office of Administrative Hearings lacked subject matter jurisdiction

in this case because the petition was not verified as required by the Administrative Procedures Act and was not filed within twenty days after petitioner received notice of the penalty imposed by the Division of Coastal Management. N.C.G.S. §§ 113A-126(a)(3) and 150B-23(a).

Am Jur 2d, Administrative Law §§ 340-375.

Appeal by respondent from judgment entered 15 November 1991, in Carteret County Superior Court by Judge Franklin R. Brown. Heard by the Court of Appeals sitting in Special Session at Campbell University School of Law on 9 March 1993.

On 26 June 1987, respondent, through its Division of Coastal Management (DCM) served petitioner with notice of violation of the Coastal Area Management Act (CAMA), N.C. Gen. Stat. § 113A-100 (1989) *et seq.*, and the State Dredge and Fill Act, N.C. Gen. Stat. § 113-229 (1990) *et seq.*, by allegedly excavating and filling salt marsh on his property in Carteret County. On 29 August 1986, DCM instituted a civil action to require petitioner to restore the marsh. This resulted in a 14 August 1989 consent judgment signed by the presiding judge of a civil session of Superior Court in Carteret County. The consent judgment provided that petitioner would restore the affected marsh within thirty days after entry of the consent judgment, and it limited the penalties for violations prior to the date of its entry to $3,500.00.

By letter dated 19 July 1990, the DCM assessed civil penalties in the amount of $17,700.00 against petitioner for violations of CAMA, assessing $3,500.00 for violations committed before entry of the consent judgment on 14 August 1989, and $14,200.00 for violations committed after entry of the consent judgment. DCM served petitioner with assessment of these penalties on 4 September 1990.

On 21 September 1990, petitioner filed in the Office of Administrative Hearings (OAH) a petition for a contested case hearing. Both petitioner and his attorney signed the petition. In a notice filed on 27 September 1990, OAH notified petitioner's attorney that the petition was incomplete because it was not verified, and that it might be subject to dismissal. Petitioner executed a verification which he filed on 3 October 1990. DCM filed a motion to dismiss the contested case under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure, for lack of subject matter jurisdiction.

The Administrative Law Judge (ALJ) entered a final decision on 31 October 1990. He found that OAH lacked subject matter jurisdiction in the case because the petition was not verified as required by the Administrative Procedures Act (APA), and filed within the twenty day period for contesting a civil penalty as required by CAMA.

Petitioner filed a petition for judicial review in Superior Court, Carteret County, pursuant to N.C. Gen. Stat. § 150B-43 (1991). The trial court reversed the final decision of the ALJ finding that OAH lacked subject matter jurisdiction. The respondent appeals from that decision.

Attorney General Lacy H. Thornburg, by Associate Attorney General David G. Heeter, for respondent-appellant.

Wheatly, Wheatly, Nobles & Weeks, P.A., by C. R. Wheatly, III, for petitioner-appellee.

McCRODDEN, Judge.

Respondent contends that the trial court erred by reversing the final decision of OAH finding that it lacked subject matter jurisdiction over the petition for a contested case. In ruling on this contention, we must decide whether petitioner met the requirements for commencing a contested case hearing which are found at N.C.G.S. § 113A-126(d)(3) of CAMA and N.C.G.S. § 150B-23(a) of the APA. We hold that he did not, and we reverse the Superior Court's decision.

In order to commence a contested case, petitioner must follow the requirements in CAMA. That Act requires that a petition for a contested case be filed under N.C.G.S. § 150B-23 of the APA within the statutory period, which is twenty days after receiving notice of assessment. N.C.G.S. § 113A-126(d)(3). North Carolina cases interpreting administrative laws have consistently held that a contested case petition to challenge an agency's decision must be filed within the statutory deadline. *Gummels v. N.C. Dept. of Human Resources*, 98 N.C. App. 675, 392 S.E.2d 113 (1990), upheld the dismissal of a petition which was mailed but not received by OAH until after the thirty day statutory deadline. *Lewis v. N.C. Dept. of Human Resources*, 92 N.C. App. 737, 375 S.E.2d 682 (1989), upheld the dismissal of a petition filed one day after the statutory deadline. *Smith v. Daniels Int'l*, 64 N.C. App. 381, 307 S.E.2d 434 (1983),

upheld the dismissal of a petition filed two days after the statutory deadline.

N.C.G.S. § 150B-23 of the APA, which is incorporated in CAMA, requires that a petition for a contested case be properly verified in order to commence a contested case hearing. N.C.G.S. § 150B-23(a) states in pertinent part that "[a] contested case shall be commenced by filing a petition with the Office of Administrative Hearings . . . ." The then-applicable portion of that statute added that "[a]ny petition filed by a party other than an agency shall be verified or supported by affidavit . . . ." (This provision was deleted by an amendment of the APA which applies to contested cases commenced on or after 1 October 1991. N.C.G.S. § 150B-23(a) (editor's note). Since petitioner filed the petition for a contested case prior to 1 October 1991, the above provision is applicable.)

In order for petitioner to have a contested case hearing, therefore, he was required to file a verified petition with OAH within 20 days after he received notice of the penalty from DCM. The ALJ based his dismissal of petitioner's petition on the absence of such verification. Petitioner contends, however, that contrary to the ALJ's ruling, his petition for a contested case hearing was properly verified pursuant to Rule 11 of the North Carolina Rules of Civil Procedure because it was signed by him and his attorney. Rule 11(b) sets forth the language to be used when a party verifies a pleading:

> In any case in which verification of a pleading shall be required by these rules or by statute, it shall state in substance that the contents of the pleading verified are true to the knowledge of the person making the verification . . . . Such verification shall be by affidavit of the party . . . . Such affidavit may be made by the agent or attorney of a party in the cases and in the manner provided in section (c) of this rule.

N.C.R. Civ. P. 11(b). Rule 11(c) limits the situations in which an attorney may verify a pleading. The pertinent situation in this case is one in which "the material allegations of the pleadings are within the personal knowledge" of the attorney. Subsection (c)(2) clearly provides, however, that a verifying attorney in this situation must state in an affidavit that the material allegations of the pleadings are true to his personal knowledge, and the reasons the affidavit is not made by the party. Thus, according to Rule 11(b) and (c), a party or attorney may verify a pleading only by

affidavit of the party or attorney, and signatures alone are not sufficient.

On 21 September 1990, petitioner filed a petition for a contested case hearing containing his and his attorney's signatures. This petition failed to include either an affidavit executed by him or an affidavit executed by his attorney. Therefore, the petition that was timely filed was not verified under Rule 11(b) and (c) when it was filed.

Although petitioner filed a verification on 3 October 1990, this was inadequate because the twenty day statutory period to file a petition for a contested case hearing had run. In *Boyd v. Boyd*, 61 N.C. App. 334, 336, 300 S.E.2d 569, 570 (1983), the Court upheld the dismissal of plaintiff's complaint for lack of jurisdiction, and held that under N.C. Gen. Stat. § 50-8 (1987), a verified complaint for divorce must be filed before a civil action may be commenced and a court may obtain jurisdiction. The Court ruled that the complaint was properly dismissed under Rule 12(b)(1) of the North Carolina Rules of Civil Procedure because the complaint was not verified at the time it was filed. *Id.* The Court stated that although Rule 11 does not state a time period in which verification must occur, when read in conjunction with N.C.G.S. § 50-8, the complaint must be verified at the time it is filed in order to commence a civil action. *Id.* We follow the logic of the *Boyd* ruling in determining that petitioner's petition must be both verified and filed within the statutory time period in order to commence a contested case hearing.

In summary, N.C.G.S. § 113A-126(a)(3) and N.C.G.S. § 150B-23(a) require the filing of a verified petition for a contested case hearing with OAH within 20 days after petitioner receives notice of assessment. In this case, petitioner did not meet this requirement and, consequently, OAH never obtained subject matter jurisdiction. The trial court erred in reversing OAH's dismissal of petitioner's petition. Since we have decided that OAH never obtained subject matter jurisdiction, we need not address respondent's remaining three assignments of error.

This case is remanded to Superior Court with directions to enter an order upholding OAH's dismissal of petitioner's petition.

Reversed and remanded.

Chief Judge ARNOLD and Judge GREENE concur.

THE ESTATE OF WILLIAM FRANKLIN BELL, SR., BY EXECUTRIX OF HIS ESTATE, NELL ROSE QUINN BELL v. BLUE CROSS AND BLUE SHIELD OF NORTH CAROLINA

No. 9227SC263

(Filed 20 April 1993)

1. **Insurance § 134 (NCI4th)— health benefit plan—no coverage for services paid for by VA**

A health benefit plan underwritten and administered by defendant BCBS which provides that no benefits are provided for "services or supplies which are furnished without cost to a participant under the laws of the United States" is not ambiguous and should be interpreted to exclude coverage for services which are paid for by the Veterans Administration.

Am Jur 2d, Insurance §§ 271, 276.

2. **Insurance § 118 (NCI4th)— health benefit plan—explanatory booklet and contract contradictory—contract controlling—no ambiguity**

Even if defendant's explanatory booklet for its health benefit plan was in conflict with the contract, the contract was not thereby rendered ambiguous, since the booklet stated unequivocally that it was not a contract and that the terms of coverage were contained in the contract.

Am Jur 2d, Insurance §§ 269 et seq.

Group insurance: binding effect of limitation on or exclusions of coverage contained in master group policy but not in literature given individual insureds. 6 ALR4th 835.

3. **Insurance § 338 (NCI4th)— hospital paid by defendant and VA—refund to defendant—insured not entitled to refund—absence of coordinating clause—statutes rendering clause unnecessary**

Where decedent veteran was treated in a non-VA hospital, and the hospital received payment from the Veterans Administration and from defendant BCBS, which provided a health benefit plan covering decedent, plaintiff executrix was not entitled to a refund paid by the non-VA hospital to defendant BCBS reflecting VA's payment to the hospital for services rendered decedent veteran, even though there was no clause

coordinating benefits with the VA in defendant BCBS's contract, since 38 U.S.C. 1729(a)(2)(D) (1991) and 38 U.S.C. 1728(b)(2), together with the exclusion in the contract for services furnished without cost to a participant under laws of the United States, serve the same purpose of preventing double payment of claims that necessitates the clause coordinating benefits between insurers.

Am Jur 2d, Insurance §§ 547 et seq.

Applicability of other insurance benefits exclusion, from coverage of hospital or health and accident policy, to governmental insurance benefits to which insured would have been entitled by prior subscription. 29 ALR4th 361.

Appeal by plaintiff from judgment entered 17 February 1992, in Gaston County Superior Court by Judge Robert P. Johnston. Heard in the Court of Appeals 26 February 1993.

This action was brought by Nell Rose Quinn Bell, as the duly appointed executrix of the estate of William Franklin Bell, Sr., to recover money allegedly wrongfully retained by defendant Blue Cross and Blue Shield of North Carolina (BCBS). On 17 February 1992, the trial court granted defendant's motion for summary judgment, from which plaintiff appeals.

Don H. Bumgardner for plaintiff-appellant.

Cansler, Lockhart & Evans, P.A., by George K. Evans, Jr., for defendant-appellee.

McCRODDEN, Judge.

The facts of this case are not in dispute. William Bell was a disabled veteran and was entitled to Veterans Administration (VA) benefits. Among those benefits was an obligation to pay for medical care rendered to a veteran in a non-VA facility, for so long as necessary to stabilize the veteran's condition. Under the then-active VA directives, when a veteran was stable enough to be transported by ambulance to a VA facility, a bed would be offered to the veteran at the VA facility. If the veteran refused the bed, then the VA's obligation to pay for medical care rendered by a non-VA facility ended.

Bell was also a covered participant in the Gaston County Employee Health Benefit Plan, underwritten and administered by

BCBS. Benefits under the plan were provided pursuant to a Master Group Contract which allowed for payment of certain covered medical expenses incurred by participants.

In early April 1988, Bell was admitted to Charlotte Memorial Hospital for treatment of a heart condition, a service-connected disability. The VA determined that it was obligated to pay for Bell's hospitalization from 6 April through 11 April 1988. Bell was then offered admission to a VA facility but chose to stay in Charlotte Memorial. Upon his refusal to accept admittance to the VA facility, the VA's obligation to pay for his medical care ended.

BCBS paid Charlotte Memorial $2,442.44 on 6 June 1988 and $49,499.82 on 24 June 1988, for services rendered to Bell. In early December 1988, Charlotte Memorial refunded to BCBS $10,069.79, reflecting VA's payment to the hospital for April and May 1988 services. Appellant's action was to recover the amount of the refund, contending that this amount should have been paid to the estate.

The relevant provisions of the Master Group Contract (Contract or insurance contract) are as follows:

> I. BENEFITS
>
> This certificate provides coverage for the specified term for medically necessary reasonable and customary charges as determined by the Corporation for charges for covered medical expenses for treatment of disease or injury to participant as follows . . .
>
> VI. EXPENSES NOT COVERED—EXCLUSIONS AND LIMITATIONS
>
> No benefits shall be provided in this certificate on account of: . . . services or supplies for any occupational condition, ailment or injury arising out of and in the course of employment, or services or supplies which are furnished without cost to a participant under the laws of the United States or of any state or political subdivision thereof, except for inpatient treatment in Veterans Administration or armed forces facilities for non-service related medical conditions . . . .

The insurer also issued to its group health plan participants a handbook explaining the extent of coverage. The relevant portions of the handbook provide that:

> Your Comprehensive Major Medical coverage does not provide benefits for:

. . .

[a]dmissions to a company-owned hospital which provides services at no cost to the participant or a governmental hospital under the laws of the U.S. or any state or subdivision thereof or for services provided by the Veterans Administration [or]

. . .

[e]xpenses covered by any legislative acts.

Appellant presents only one question on appeal, and that is whether the trial court erred in granting appellee's motion for summary judgment. She contends in a series of arguments that the trial court incorrectly interpreted the insurance contract, specifically that portion which excludes from BCBS liability "services and supplies which are furnished without cost to a participant under the laws of the United States . . . ."

When a motion for summary judgment is granted, the question on appeal is whether there is a genuine issue as to any material fact and whether the movant is entitled to judgment as a matter of law. *Hagler v. Hagler*, 319 N.C. 287, 289, 354 S.E.2d 228, 231 (1987). Since the material facts are not in dispute, the only issue before this Court is the interpretation of the insurance contract.

[1] Appellant first argues that the contract is ambiguous and that such ambiguity must be construed against the appellee. The contract does not include a definition of "services and supplies which are furnished without cost to a participant under the laws of the United States." Appellant contends that this phrase refers only to services and supplies for which a patient is never billed, such as services and supplies provided to a veteran for a service-connected disability in a VA facility, and that "services or supplies which are furnished without cost to the participant" does not mean the same thing as services or supplies which are paid for by a third party such as the VA.

Insurance contracts are to be strictly read against the insurer and any ambiguity is to be read in favor of the insured. An ambiguity exists where, "in the opinion of the court, the language of the policy is fairly and reasonably susceptible to either of the constructions for which the parties contend." *Wachovia Bank & Trust Co. v. Westchester Fire Ins. Co.*, 276 N.C. 348, 354, 172 S.E.2d 518,

522 (1970). Nonetheless, "ambiguity in the terms of an insurance policy is not established by the mere fact that the plaintiff makes a claim based upon a construction of its language which the company asserts is not its meaning." *Id.*

In the view of this Court, reading the BCBS policy to exclude coverage for services which are paid for by the VA is the only sensible interpretation. Under 38 U.S.C. 1728(b)(2) (1991), the VA is authorized to reimburse an organization which makes expenditures on behalf of a veteran for a service-related disability. Such services are, therefore, "without cost to a participant under the laws of the United States." (Emphasis added.)

Moreover, since the insurance policy at issue provides coverage only for "covered medical expenses," appellant's interpretation that it should provide coverage in situations in which there are no expenses to the participant defies logic. "Each word [in an insurance contract] is deemed to have been put into the policy for a purpose and will be given effect, if that can be done by any reasonable construction . . . ." *Wachovia* at 355, 172 S.E.2d at 522. Appellant's interpretation renders the exclusion meaningless.

[2] Appellant also argues that BCBS's explanatory booklet is in conflict with the Contract, thereby compounding the alleged ambiguity. She notes that the Contract provides coverage for non-service-connected disabilities in VA facilities, while the booklet disclaims coverage for any services provided by the VA. Although the booklet and the master Contract do appear to be contradictory, the booklet states unequivocally that it is not a contract and that the terms of coverage are contained in the Contract. This discrepancy does not make the Contract ambiguous. We find that the exclusion is not fairly and reasonably susceptible to the construction appellant offers.

[3] Finally, appellant calls our attention to the fact that the Contract does not contain a provision for coordinating benefits with the VA and argues that this is proof that the estate of the deceased is entitled to the overpayment. To prevent double payment of claims, the Contract provides for coordination of benefits between BCBS and a number of other insurers. Appellant's contention is that the VA may be analogized to another insurer with whom BCBS does not coordinate benefits and that, in that situation, BCBS would be obligated to pay regardless of whether the other insurer (and, hence, VA) paid.

Appellant's analogy, however, fails. The Contract does not provide for coordination of benefits with the VA because it is unnecessary. Under 38 U.S.C. 1728(b)(2), the VA is authorized to reimburse an organization which makes expenditures on behalf of the veteran for a service-connected disability. Conversely, under 38 U.S.C. 1729(a)(2)(D) (1991), the United States has the right to recover from a third party the reasonable value of services provided by the VA to a veteran for a non service-connected disability, to the extent that the veteran would have been entitled to receive payment for such services, had they not been provided by the VA. These two statutes, together with the exclusion in the Contract, serve the same purpose of preventing double payment of claims that necessitates the clause coordinating benefits between insurers. Accordingly, we find no merit in appellant's argument.

The judgment from which appellant appeals is, therefore,

Affirmed.

Chief Judge ARNOLD and Judge GREENE concur.

LINDA C. RONE, PLAINTIFF v. BYRD FOOD STORES, INC., D/B/A BYRD'S, DEFENDANT

No. 915SC1260

(Filed 20 April 1993)

Negligence §§ 106, 109 (NCI4th)— slip and fall in grocery store—employee mopping floor immediately after closing—customer still in store—summary judgment inappropriate

In a negligence action in which plaintiff alleged that she suffered injuries when she fell on a wet floor in defendant's grocery store, the trial court erred in granting defendant's summary judgment motion where there was a genuine issue of material fact as to defendant's negligence and where the record supported an inference of no contributory negligence based on evidence tending to show that plaintiff entered defendant's grocery store to purchase some items; plaintiff was still in the store when the store closed and the front door was locked; plaintiff was at the check-out counter when she

remembered an item that she needed; she left the checkout counter at a swift walk; she did not see any warning signs, hear any verbal warnings, or note any water on the floor; plaintiff walked into the wet area and fell; and defendant's witnesses could not agree on where the floor was wet, how many warning signs had been placed on the floor, and where plaintiff fell in the store.

Am Jur 2d, Premises Liability §§ 29, 786, 790.

Store or business premises slip-and-fall: Modern status or rules requiring showing notice of proprietor of transitory interior condition allegedly causing plaintiff's fall. 85 ALR3d 1000.

Liability for injury to customer from object projecting into aisle or passageway in store. 26 ALR2d 675.

Appeal by plaintiff from order entered on 22 August 1991 by Judge J. B. Allen, Jr. in Alamance County Superior Court. Heard in the Court of Appeals on 2 December 1992.

This is a negligence action instituted by the filing of plaintiff's complaint on 15 March 1990 in which she alleges that she suffered injuries when she fell on a wet floor in defendant's grocery store on 10 September 1989. Defendant timely served an answer on 17 March 1990.

On 5 July 1991, defendant filed a motion for summary judgment. This matter came on for hearing before Judge J. B. Allen, Jr. in Alamance County Superior Court on 19 August 1991. In an order filed 22 August 1991, Judge Allen allowed defendant's motion for summary judgment. Plaintiff gave timely notice of appeal.

Gabriel Berry & Weston, by M. Douglas Berry, for plaintiff-appellant.

Elrod & Lawing, P.A., by Pamela A. Robertson, for defendant-appellee.

JOHNSON, Judge.

Plaintiff's evidence tended to show the following: On 10 September 1989, immediately following church on a Sunday evening, Mrs. Rone came into Byrd's grocery store right before closing time to purchase a small number of grocery items, and was still

in the store when the store was closed and the front doors were locked. At the time Mrs. Rone was in the store, there were just three employees there: Mr. McManus, the manager; Mr. Michael Riddle, the bagger; and Ms. Kathy Gilliam, the check-out lady.

The store closed at 8:00 p.m. sharp so that the floors could immediately be mopped. The tile floors were sealed with two coats of wax. The mopping was not done prior to the store closing, but was begun as soon as it closed. Byrd's policy was not to start mopping until the store closed because, in Mr. McManus' own words, "someone might slip and fall." Mr. Riddle was mopping the area in front of the aisle behind the registers when the store closed that evening.

At the check-out counter, Mrs. Rone realized that she had forgotten to get slaw and started to go to the produce area at a "swift walk." When Mrs. Rone fell, Mr. Riddle was in the middle of the aisle mopping right behind the check-out counter and the "wet floor" sign was further down the aisle by the time-clock. He heard Ms. Gilliam holler, "ma'am, the floor..." and at about the same time she fell.

Plaintiff contends that the trial court erred in granting defendant's summary judgment motion because there is a genuine issue of material fact and that defendant is not entitled to judgment as a matter of law. We agree.

The purpose of the summary judgment rule is to eliminate a trial when, based on the pleadings and supporting materials, the trial court determines that only questions of law, not fact, are at issue. *Loy v. Lorm Corp.*, 52 N.C. App. 428, 278 S.E.2d 897 (1981). Summary judgment is a drastic measure, and it should be used with caution, especially in a negligence case in which a jury ordinarily applies the reasonable person standard to the facts of each case. *Holcomb v. Insurance Co.*, 52 N.C. App. 474, 279 S.E.2d 50 (1981); *Laughter v. Southern Pump & Tank Co.*, 75 N.C. App. 185, 330 S.E.2d 51, *cert. denied*, 314 N.C. 666, 335 S.E.2d 495 (1985).

"All evidence before the court must be construed in the light most favorable to the non-moving party. The slightest doubt as to the facts entitles the non-moving party to a trial." *Ballenger v. Crowell*, 38 N.C. App. 50, 53, 247 S.E.2d 287, 290 (1978). A prima facie case of negligence is alleged when a plaintiff establishes

that: defendant owed plaintiff a duty of care; defendant's conduct breached that duty; the breach was the actual and proximate cause of plaintiff's injury; and damages resulted from the injury. *Southerland v. Kapp*, 59 N.C. App. 94, 295 S.E.2d 602 (1982).

The law is well-settled in North Carolina that a store owner is not an insurer of its premises. *Hull v. Winn-Dixie Greenville, Inc.*, 9 N.C. App. 234, 175 S.E.2d 607 (1970). The doctrine of *res ipsa loquitur* does not apply in such cases. *Skipper v. Cheatham*, 249 N.C. 706, 107 S.E.2d 625 (1959). Defendant proprietor owes to its invitees the duty to exercise "ordinary care to keep [its store] in a reasonably safe condition those portions of its premises which it may expect will be used by its customers during business hours, and to give warning of hidden perils or unsafe conditions insofar as they can be ascertained by reasonable inspection and supervision." *Raper v. McCrory-McLellan Corp.*, 259 N.C. 199, 203, 130 S.E.2d 281, 283 (1963).

Based on the aforementioned principles, we address plaintiff's contention that there is a genuine issue of fact as to defendant's negligence. The evidence construed in the light most favorable to plaintiff tended to show that on 10 September 1989, Mrs. Rone entered Byrd's grocery store to purchase some items; that Mrs. Rone was still in the store when the store closed and the front door locked; that Mrs. Rone was at the checkout counter when she remembered an item that she needed; that she left the checkout counter at a swift walk; that she did not see any warnings signs, hear any verbal warnings nor note any water on the floor; and that Mrs. Rone walked into the wet area and fell.

Defendant's evidence was conflicting. Defendant had three witnesses testify at a deposition proceeding and their version of the events that transpired varied. They could not agree on where the floor was wet, how many warning signs had been placed on the floor, where the warning signs had been placed, nor where plaintiff fell in the store.

Mr. McManus testified that the floor was wet almost up to the check-out line. Ms. Gilliam testified that it was dry up to the office area. While Mr. Riddle testified the floor was half wet and half dry in the area of the office.

Mr. McManus further testified that he only saw one warning sign. However, Mr. Riddle testified that he had placed two warn-

ings signs on each end of the wet area. Ms. Gilliam testified that she saw only one warning sign, but she also stated that "I didn't look around the room to find the other floor signs."

In addition, Mr. McManus indicated that a warning sign had been placed near the back of the office area. Ms. Gilliam indicated that a warning sign had been placed directly in front of the office area. While, Mr. Riddle indicated that one warning sign had been placed in the middle of the office area and one warning sign had been placed at the end of the aisle.

Lastly, Mr. McManus indicated, by marking on the deposition exhibit, that Mrs. Rone fell right before she entered the office area. Ms. Gilliam testified that Mrs. Rone fell at a point halfway between the cash register and the office wall, and Mr. Riddle testified that Mrs. Rone fell in the middle of the office area.

Where there is a need to find facts, then summary judgment is not an appropriate device to employ, provided those facts are material. *Robertson v. Hartman*, 90 N.C. App. 250, 368 S.E.2d 199 (1988). Based on the above facts in the record and the above law, there is at least a reasonable inference that defendant was negligent in creating a wet slippery condition and in failing to adequately warn plaintiff of the presence of the slippery floor.

Plaintiff further contends that the trial court erred in granting summary judgment on the issue of contributory negligence when the record supports an inference of no contributory negligence. We agree.

"Like negligence, contributory negligence is rarely appropriate for summary judgment." *Ballenger*, 38 N.C. App. at 55, 247 S.E.2d at 291. The North Carolina Supreme Court has set out in detail the standard of review for adjudication of retail store slip and fall claims on the grounds of the alleged contributory negligence of the plaintiff. The Supreme Court stated the basic rule as follows:

> The basic issue with respect to contributory negligence is whether the evidence shows that, as a matter of law, plaintiff failed to keep a proper lookout for her own safety. . . . When a defendant moves for a directed verdict on the grounds that the evidence establishes plaintiff's contributory negligence as a matter of law the question before the trial court is whether the evidence taken in the light most favorable to plaintiff establishes her negligence so clearly that no other reasonable

inference or conclusion may be drawn therefrom. Contradictions or discrepancies in the evidence even when arising from plaintiff's evidence must be resolved by the jury rather than the trial judge.

Norwood v. Sherwin-Williams Co., 303 N.C. 462, 468-69, 279 S.E.2d 559, 563 (1981).

Based on the above principle of law, we find the record does support an inference that plaintiff was not contributorily negligent as a matter of law. As stated earlier, plaintiff's evidence shows that she was not aware of any warning signs indicating the floor was wet nor did she notice any water on the floor when she walked swiftly to retrieve her last grocery item. The conflicting testimony of defendant's own witnesses supports plaintiff's argument that there is at least a reasonable inference that plaintiff was not contributorily negligent as a matter of law. "Where diverse inferences can be drawn the question of contributory negligence is for the trier of fact." *Ballenger*, 38 N.C. App. at 54, 247 S.E.2d at 291.

Accordingly, the decision of the trial court is reversed.

Chief Judge ARNOLD and Judge ORR concur.

THOMAS KEITH GIBSON AND WIFE, ELIZABETH BROOKSHIRE GIBSON, PLAINTIFFS v. RUSSELL B. HUNSBERGER AND WIFE, JEANNETTE B. HUNSBERGER, DEFENDANTS

No. 9129SC1294

(Filed 20 April 1993)

Negligence § 46 (NCI4th)— leaning tree—duty of landowner—no actual or constructive notice shown

A landowner has a duty to exercise reasonable care regarding natural conditions on his land which lies adjacent to a public highway in order to prevent harm to travelers using the highway, but a landowner is subject to liability only if he had actual or constructive notice of a dangerous natural condition; therefore, the trial court properly granted defendants' motion for summary judgment in a negligence action arising out of an automobile accident which occurred when

plaintiff hit a tree which had fallen from defendants' property across the road, since defendants were absentee landowners and thus had no actual notice, and since there was no evidence in the record from which constructive notice could be found in that the tree was leaning but appeared to be healthy and sound, and no one who observed the leaning tree prior to its fall thought it necessary to report the tree to the sheriff's department or DOT.

Am Jur 2d, Premises Liability §§ 480 et seq.

Appeal by plaintiffs from order entered 4 October 1991 by Judge John M. Gardner in McDowell County Superior Court. Heard in the Court of Appeals 7 December 1992.

Plaintiffs filed this action alleging negligence and defendants moved for summary judgment. The trial court granted defendants' motion. From this order plaintiffs appeal.

Byrd, Byrd, Ervin, Whisnant, McMahon & Ervin, P.A., by Robert C. Ervin, for plaintiff appellants.

Mitchell, Blackwell & Mitchell, P.A., by Marcus W. H. Mitchell, Jr. and Keith W. Rigsbee, for defendant appellees.

ARNOLD, Judge.

The issue here is whether summary judgment for defendants was proper. Summary judgment is proper when there is no genuine issue of material fact and a party is entitled to judgment as a matter of law. N.C.R. Civ. P. 56; *Lowe v. Bradford*, 305 N.C. 366, 368-69, 289 S.E.2d 363, 365-66 (1982). "The evidence presented must be viewed in the light most favorable to the non-movant." *Surrette v. Duke Power Co.*, 78 N.C. App. 647, 650, 338 S.E.2d 129, 131 (1986).

Here the forecast of evidence showed as follows: In the early morning hours of 15 February 1989, plaintiff Thomas Keith Gibson was driving along Old Fort-Sugar Hill Road, a rural paved road in McDowell County, when he hit a tree, causing him severe injuries. The tree had fallen from defendants' property and was suspended approximately four feet above the road on a telephone line located on the opposite side of the road. The limbs of the tree extended downward from the trunk, blocking both lanes of the road. Prior to the accident no one had reported to the McDowell County Sheriff's Department that a tree had fallen into the road.

Therefore, it most likely fell sometime the night before or the morning of the accident. The area where the accident occurred was rural and densely wooded, and leaning trees were common.

The tree that fell was a living Virginia Pine, an evergreen which grows tall and slender, with green needles. It was healthy and sound; it did not show any signs of rot, disease or decay even after its fall. The base of the tree was located forty-six feet from the center of the road. Before it fell, the top of the tree was leaning between a fork at the top of another tree which was an estimated twenty feet away from the leaning tree and approximately twenty to twenty-five feet back from the tree line along the road.

A forestry expert testified at his deposition as follows: Virginia Pines have a shallow root system, *i.e.* horizontal roots that are not very deep into the soil. Consequently, they have a tendency to "tilt over." The healthier the tree, the more apt it is to fall over because the "crown" is heavier. A healthy tree may have four times more needles than a sick tree and the root system of a healthy tree may not be able to hold the tree, especially if the ground is moist or there is a wind. A Virginia Pine could be loose in the ground for a year, but one would never know that by looking at it. The forestry expert further testified that, in his opinion, the tree in this case fell because (1) it was healthy and had a heavy crown, and (2) the ground was moist and contained gravel.

The defendants were residents of Collegeville, Pennsylvania. They purchased the 469-acre wooded tract from which the tree fell in 1942. Prior to the accident, they had visited the property only approximately three times, the last visit being in 1974. The property was heavily wooded and was in its natural, undeveloped state. No tree had fallen from their land into the road during the entire forty-seven years defendants owned the property. Moreover, defendants never received any report, prior to the accident, that any trees on their property were leaning.

A district engineer for the North Carolina Department of Transportation testified at his deposition that "many, many, many" trees were leaning along the highways in McDowell County and a number of them could potentially fall into the road. Also, after the accident, he reviewed Old Fort-Sugar Hill Road and found (1) "many, many, many trees that potentially could fall on the road," and (2) some leaning trees nevertheless appeared to be "solid." The

engineer also testified that preventing trees from falling into the road is not simply a matter of removing trees leaning toward the road that appear to be dead—a healthy tree could also fall into the road. In addition, he testified that prior to the accident the Department of Transportation never received any report of a dangerous situation or a problem with a leaning tree in the area where the accident occurred.

A school bus driver who came upon the scene of the accident testified at her deposition that she traveled this road four times each school day and she noticed that the tree that fell was leaning towards the road several months prior to the accident. The driver also testified that she did not remember filing a written report with anyone concerning the tree.

A Duke Power Company line technician who was dispatched to the scene following the accident testified at his deposition that, on several occasions approximately six to eight weeks prior to the accident, he noticed that the tree that fell was leaning towards the road. On each occasion, the tree was in the same position. He testified that he noticed the tree because while he is driving he typically looks toward the trees and power lines to spot leaning trees that could possibly fall onto the power lines. He concluded that it was not necessary to report this leaning tree to the Sheriff's Department because he believed it would remain where it was "for quite a while." He also testified that "we see so many trees and stuff leaning over a period of time that if we called in every tree we saw leaning, that would probably be about a full-time job."

Although the school bus driver and the Duke Power line technician testified that the tree was leaning prior to the accident, they also testified that the tree was not leaning out over the road. Indeed, all of the testimony in the record which addresses this point uniformly indicates that the tree was not leaning out over the road.

Section 363(1) of the Restatement of the Law of Torts 2d sets forth the general rule that a possessor of land is not liable "for physical harm caused to others outside of the land by a natural condition of the land." As an exception to this general rule, Section 363(2) of the Restatement specifically provides that "a possessor of land in an urban area is subject to liability to persons using a public highway for physical harm . . . arising from the condition of trees on the land near the highway." In addition, Section 840(2)

of the Restatement provides that "[a] possessor of land who knows or has reason to know that a public nuisance caused by natural conditions exists on his land near a public highway, is subject to liability for failure to exercise reasonable care to prevent an unreasonable risk of harm to persons using the highway." In other words, a landowner's liability for harm caused by natural conditions on his property near a public highway is determined by ordinary negligence principles.

> There is no duty to inspect for the purpose of discovering a dangerous natural condition. But if the possessor knows of the condition or has reason to know of it . . ., he does have a duty to act reasonably in regard to its removal. It is in connection with the reason to know of the condition that the distinction between urban and rural areas becomes significant. The size and condition of the possessor's tract of land, the nature of the highway and whether the possessor lives on the land or frequently travels the highway are all pertinent to the decision.

Id., Comment C.

We adopt the foregoing analysis and hold that a landowner has a duty to exercise reasonable care regarding natural conditions on his land which lies adjacent to a public highway in order to prevent harm to travelers using the highway. A landowner is subject to liability only if he had actual or constructive notice of a dangerous natural condition.

To impose a liability upon defendant landowners, plaintiffs had to prove not only that the tree constituted a dangerous condition to the travelers of the adjacent public road, but that the landowners had actual or constructive notice of the dangerous condition. Plaintiffs do not contend that defendants had actual notice. Defendants were absentee landowners.

Moreover, there is no evidence in the record from which constructive notice could be found. The tree was leaning but this was common in the area and the tree appeared to be healthy and sound. The tree was not leaning out over the road. It was not readily observable that the tree would fall into the road. Not one of the witnesses who observed the tree prior to its fall thought it was necessary to report the leaning tree to the Sheriff's Department or the Department of Transportation. None of this evidence

would have put a reasonable landowner on notice that a dangerous condition existed.

Viewing the foregoing evidence in the light most favorable to plaintiffs, we hold as a matter of law that defendants did not have actual or constructive notice of the dangerous condition of the tree. Accordingly, we affirm summary judgment for defendants.

Affirmed.

Judges JOHNSON and ORR concur.

IN THE MATTER OF THE ESTATE OF CLEOPATRA WALKER MORRELL, DECEASED:

MONA LEA MORRELL BRYANT AND L. H. MOUNT, CO-EXECUTORS, PETITIONERS

DAVID BUTT, RICK N. MILLER, MARSHA MORRELL, N.C. DEPARTMENT OF REVENUE, ANDREW P. COLLINS, GWYN R. PARSONS, WILLIAM B. CREWS, JR., RONALD L. O'CONNELL, LOIS C. O'CONNELL, W. NEIL FARFOUR, MONA LEA MORRELL BRYANT, MARY MILLICENT MORRELL MOATS, GERALD DON NELSON BRYANT, III, WILLIAM WOODLAND MORRELL BRYANT, MONA ELIZABETH LEA BRYANT, WILLIAM LESTER MORRELL, RESPONDENTS

No. 929SC188

(Filed 20 April 1993)

Executors and Administrators § 192 (NCI4th)— decedent's loans to grandson—bequest to grandson—set-off prior to creditors' claims against grandson

The trial court did not err in determining that the executors of decedent's estate were entitled to a set-off against decedent's grandson's beneficial interest by the amount he was indebted to the estate, prior to allowing his creditors to assert claims against the grandson's interest, since the set-off would not injure the rights of third parties or remaindermen in this case, as the bequest was an outright gift and respondent creditors had no direct interest in the legacy sought to be offset; there was no requirement that the grandson's debt to the estate be admitted or judicially determined; and there was competent evidence in the record to support a finding that the money deceased advanced her grandson was intended to be a loan and not a gift.

Am Jur 2d, Executors and Administrators §§ 1012 et seq.

Presentation of claim to executor or administrator as prerequisite of its availability as counterclaim or setoff. 36 ALR3d 693.

Personal representative's right of retainer or setoff against debtor's distributive share of estate of debt barred by statute of limitations. 39 ALR2d 675.

Appeal by respondents David Butt, Rick N. Miller and Gwyn R. Parsons from order entered 10 October 1991 by Judge F. Gordon Battle in Person County Superior Court. Heard in the Court of Appeals 3 February 1993.

Maxwell & Hutson, P.A., by James H. Hughes and Lauren M. Mikulka, for petitioner appellees.

Charles E. Clement for respondent appellant Gwyn R. Parsons; and Miller and Moseley, by Paul E. Miller, Jr., for respondent appellants David Butt and Rick N. Miller.

COZORT, Judge.

Petitioners, co-executors of the estate of Cleopatra Walker Morrell, filed this interpleader action on 27 June 1991 to determine the proper distribution of the beneficial interest of beneficiary William L. Morrell. On 10 October 1991, the trial court filed an order allowing the petitioners to reduce the beneficial interest of William L. Morrell by the indebtedness he owed to the estate. Respondents appeal. We affirm. The facts follow.

Cleopatra Walker Morrell died on 4 December 1989. In her will, Mrs. Morrell bequeathed one-tenth (1/10) of the residuary of her estate to William L. Morrell, her grandson. On 22 June 1990, William received a partial advancement in the amount of $10,000.00 to be charged against his beneficial interest. It was later discovered that William was indebted to the decedent in the amount of $52,733.76, plus interest, at the time of her death. The debt, comprised of five various disbursements by Cleopatra to William, was listed as an asset of the estate on the 90-day inventory dated 12 March 1990.

On 3 July 1990, respondents David Butt and Rick N. Miller filed a claim against the beneficial interest of William Morrell with the estate of Cleopatra Walker Morrell in the amount of $16,401.37,

plus interest and costs. The claim was based on a judgment filed and docketed against William Morrell in Watauga County and Person County. On 6 September 1990, respondent Gwyn R. Parsons filed a claim against the interest of William Morrell with the decedent's estate in the amount of $31,571.79, plus interest and costs. This claim was also based on a judgment against William Morrell filed and docketed in Watauga County and Person County. As of 20 September 1991, William Morrell's beneficial interest in Mrs. Morrell's estate was $89,496.57.

The trial court found that the total indebtedness of William Morrell to the estate is $86,133.20. In all, ten creditors filed claims against the beneficial interest of William L. Morrell. The trial court concluded that the indebtedness of William L. Morrell to his grandmother was properly set off against his beneficial interest. The court ordered that the co-executors pay to the Clerk of Superior Court the amount, if any, of William Morrell's beneficial interest which exceeded the amount set off for distribution to William Morrell's creditors, in order of their preference.

The issue presented by this appeal is whether the trial court erred in determining that the executors of Mrs. Morrell's estate were entitled to a set-off against William Morrell's beneficial interest by the amount he was indebted to the estate, prior to allowing his creditors to assert claims against William Morrell's interest. We find the trial court did not err in ordering the set-off.

Respondents advance several arguments. First, respondents claim that third parties would be injured as a result of the trial court's order allowing petitioners to charge any amount owed to Mrs. Morrell by William Morrell against the amount he would receive under her will. In support of their contention, respondents cite *Nicholson v. Serrill*, 191 N.C. 96, 131 S.E. 377 (1926). *Nicholson* recognizes that "[t]he right and duty of an executor to deduct from a legacy the amount of any indebtedness of the legatee to the estate of his testator, is well settled, and is in full accord with elementary principles of justice." *Id.* at 100, 131 S.E. at 379. *Nicholson* furthermore explains the theory of retainer, which is " 'the executor's duty to collect all debts due the estate, and that such debts are assets which it is the executor's right to retain and offset against a legacy.' " *Id.* (quoting *In re Bogert's Estate*, 41 Misc. Rep. 598, 85 N.Y.S. 291 (1903)). However, *Nicholson* also sets forth the conditional nature of the executor's set-off rights:

> The right of an executor to set off against a devisee debts owing by the devisee to the estate cannot be made effectual to the injury of the rights of others whose interests are in no way involved in the controversy and a set-off against a devisee for life cannot affect the rights of the remaindermen in fee.

Id. The *Nicholson* Court refused to allow the executors to set off the indebtedness against the legacy because the legacy was not bequeathed to the legatee absolutely. Because contingencies existed as to whom the bequest would actually go, the *Nicholson* Court determined a set-off would affect the rights of the parties.

The present case differs from *Nicholson* in that the bequest was an outright gift to William Morrell of one-tenth of her residuary estate, with no contingencies. Here, the respondents have no direct interest in the legacy sought to be offset. As a result, we cannot say the set-off would injure the rights of third parties or remaindermen in this case.

Respondents next argue the set-off is improper because Mr. Morrell's debt to the estate was not admitted or judicially determined. Respondents contend "[t]he law requires that claims be admitted or judically [*sic*] determined before an estate may set-off [*sic*] against a legacy to prevent unfairness and inequities." Respondents cite no binding substantive authority for this proposition. According to *Nicholson*, the executor may set off the amount of "any indebtedness" of the legatee to the estate of his testator. Because the law of our state does not impose a requirement that the debt be judicially determined, this argument is overruled.

Next, respondents argue there is no competent evidence presented in the record to indicate that Mrs. Morrell intended the money she gave to her grandson to be a debt as opposed to a gift. This contention has no merit. We have reviewed the record, including exhibits introduced into evidence by the petitioners, and find the evidence is competent to support a finding that the money Mrs. Morrell advanced to her grandson was intended to be a loan and not a gift.

Respondents further allege the trial court erred in ordering the set-off because the court entered findings of fact based on evidence not before the court. This argument essentially restates respondents' previous contention which questioned the competency

of the evidence in the record to show the funds in question were loans from Mrs. Morrell to William Morrell. There is evidence in the record consisting of copies of the promissory notes and checks, plus credible testimony concerning the execution of the loans, to support the findings of Mr. Morrell's indebtedness. Accordingly, the trial court did not enter erroneous findings of fact in its order.

We have reviewed the remaining assignments of error and find they have no merit.

Affirmed.

Judges WELLS and LEWIS concur.

EDITH O. ANDERSON v. THE NORTH CAROLINA DEPARTMENT OF HUMAN RESOURCES

No. 9218SC232

(Filed 20 April 1993)

Social Security and Public Welfare § 1 (NCI3d)— intentional violation of Food Stamp Program—ineligibility period—time of running—regulation in conflict with statute

7 U.S.C.A. § 2015(b)(1) (1991) requires that food stamp disqualification periods begin immediately upon a finding that a violation of the Food Stamp Program has been committed, and a federal regulation enacted by the Secretary of Agriculture pursuant to 7 U.S.C.A. § 2013(c) (1991) postponing the penalty period until the individual applies for and is determined eligible for benefits conflicts with the statute and is therefore an invalid construction of Congress's intent. Therefore, plaintiff's disqualification period began to run on 24 August 1989, the day she was informed of her 12-month disqualification for intentional violations of the Food Stamp Program, and concluded on 24 August 1990, and there was no basis for DSS to deny her food stamps when she applied, and was found income eligible, on 17 January 1991.

Am Jur 2d, Welfare Laws § 26.

ANDERSON v. N.C. DEPT. OF HUMAN RESOURCES

[109 N.C. App. 680 (1993)]

Appeal by plaintiff from Judgment entered 10 January 1992 by Judge Peter M. McHugh in Guilford County Superior Court. Heard in the Court of Appeals 3 March 1993.

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

Lacy H. Thornburg, Attorney General, by Marilyn A. Bair, Associate Attorney General, for the defendant-appellee.

WYNN, Judge.

On 26 June 1989, the Guilford County Department of Social Services held a hearing to determine whether the plaintiff, Edith O. Anderson, was guilty of intentional Food Stamp Program violations. Ms. Anderson, who had failed to attend that hearing, was informed on 24 August 1989 that she had been disqualified from receiving food stamps for twelve months because she had committed intentional violations of the Food Stamp Program. The DSS-8588 form, "Action Taken on your Administrative Hearing," which was sent to Ms. Anderson, stated that if she was satisfied with the decision and did not want a new hearing, she would not get food stamps for twelve months. The form also advised her that if she was not receiving food stamps at the present time, she would be subject to the penalty whenever she again applied and was found income eligible to receive food stamps.

Ms. Anderson understood the notice to mean that she could not receive food stamps for one year from the time that she received the notice, and, therefore, she did not reapply until 17 January 1991. At that time, she was informed that her ineligibility period had not run, and in fact would not begin to run until that day. On 2 May 1991, Ms. Anderson requested a state appeal on the denial of food stamps, which appeal was refused on 29 May 1991.

On 26 July 1991, Ms. Anderson filed a complaint in Guilford County Superior Court seeking declaratory and injunctive relief against the North Carolina Department of Human Resources ("the Department"). Prior to trial, both parties filed motions for summary judgment, which motions were heard on 4 November 1991. On 10 January 1992, judgment was entered granting the Department's motion for summary judgment, denying Ms. Anderson's motion for summary judgment, and declaring that the Department's disqualification policy did not violate any federal rules or regulations. From that judgment, Ms. Anderson appeals.

By her first assignment of error, the appellant contends that summary judgment should not have been granted to the State and denied to her. In support of this contention, she argues that 7 U.S.C.A. § 2015(b)(1) (1991) requires that food stamp disqualification periods begin immediately upon a finding that a violation has been committed. We agree.

The Food Stamp Act of 1977 provides that:

> Any person who has been found by any State or federal court or administrative agency to have intentionally (A) made a false or misleading statement . . . for the purpose of . . . receiving . . . coupons . . . *shall, immediately upon the rendering of such determination, become ineligible* for further participation in the program . . . (ii) for a period of one year upon the second occasion of any such determination.

7 U.S.C.A. § 2015(b)(1) (1991) (emphasis added). The federal regulations interpreting this statute, enacted by the Secretary of Agriculture pursuant to 7 U.S.C.A. § 2013(c) (1991), however, postpone the penalty period mandated by the statute. 7 C.F.R. § 273.16(e)(8)(iii) (1992) provides that "[i]f the individual is not eligible for the Program at the time the disqualification period is to begin, the period shall be postponed until the individual applies for and is determined eligible for benefits."

The appellant argues that the regulation conflicts with the statute and as such is an invalid construction of Congress' intent. In reviewing the validity of an agency's regulation, a court "must first determine if the regulation is consistent with the language of the statute." *K Mart Corp. v. Cartier, Inc.*, 486 U.S. 281, 291, 100 L.Ed.2d 313, 324 (1988). Both the courts and the agencies "must give effect to the unambiguously expressed intent of Congress." *Id.* (quoting *Chevron, U.S.A., Inc. v. Natural Resources Defense Council, Inc.*, 467 U.S. 837, 843, 81 L.Ed.2d 694, 703, *reh'g denied*, 468 U.S. 1227, 82 L.Ed.2d 921 (1984)). Therefore, if the language of the statute is clear and unambiguous, and the regulation is contrary to that language, "that is the end of the matter" and the regulation must be declared invalid. *See K Mart*, 486 U.S. at 291-92, 100 L.Ed.2d at 324; *Chevron*, 467 U.S. at 843, 81 L.Ed.2d at 703. While traditionally the courts pay deference to an agency regulation, such deference is inappropriate where the regulation alters the clearly expressed intent of Congress. *K Mart*, 486 U.S. at 291, 100 L.Ed.2d at 324. Only where the language of the statute

is unclear, ambiguous, or fails to answer the specific question at issue should deference be paid to a contested agency interpretation. *See Chevron*, 467 U.S. at 842-43, 81 L.Ed.2d at 703.

The specific issue in the case at bar is clearly resolved by the statute. The language of the statute requires a penalty of a specified period of time, to commence immediately upon a determination that a food stamp recipient has violated the provisions of the Food Stamp Act. Furthermore, the statute provides that the period of ineligibility "shall remain in effect, without possibility of administrative stay, unless and until the finding upon which the ineligibility is based is subsequently reversed by a court . . . ." 7 U.S.C.A. § 2015(b)(3)(1991). Thus, it is clear that the subject regulation does not "give effect to the unambiguously expressed intent of Congress" because it mandates what the statute clearly prohibits: postponement of the disqualification period.

The State contends that if effect is not given the regulation, then Congress' intent to punish violators may not be realized where a violator would not be income eligible at the time his penalty is imposed. The language of the statute, however, specifically does not allow for the postponement of the ineligibility period under any circumstances. If Congress had intended such a postponement, it could have enacted a provision which would require a determination of income eligibility upon the finding of a violation. As such, if the violator was not income eligible at that time, Congress likewise could have provided for a postponement of the penalty until the violator was again income eligible. To date, Congress has not chosen to enact such a provision, and, in view of the current statutory language, neither the courts nor any federal agencies have the power to so legislate.

Ms. Anderson was found to be in violation of the Food Stamp Program on 24 August 1989. Her disqualification period, therefore, began on that date and concluded on 24 August 1990. Hence, there was no basis for DSS to deny her food stamps when she applied, and was found income eligible, on 17 January 1991.

For the foregoing reasons, the trial court's entry of summary judgment in favor of the defendant is reversed and the cause is remanded for entry of summary judgment in favor of the plaintiff.

Judges EAGLES and COZORT concur.

STATE OF NORTH CAROLINA v. KARLOS SEBASTIAN NEAL, GARNETT TAYLOR

No. 9226SC26

(Filed 20 April 1993)

Narcotics, Controlled Substances, and Paraphernalia § 143 (NCI4th)—possession of cocaine with intent to sell and deliver—defendant fleeing scene—large sums of money on one defendant—sufficiency of evidence of constructive possession

In a prosecution of defendants for possession of cocaine with intent to sell and deliver, evidence of defendants' constructive possession of cocaine was sufficient to be submitted to the jury, though it was insufficient to show defendants' exclusive possession of the premises where the cocaine was found, where it tended to show that before officers entered the apartment they observed a shorter man, later identified as defendant Neal, standing in the bathroom where the cocaine was later discovered; defendant Neal fled from the bathroom as the officers entered the apartment, thus supporting an inference that he was fleeing so that he would not be caught actually possessing cocaine; from outside the apartment officers observed a taller man, later identified as defendant Taylor, standing in the bathroom from which cocaine was later retrieved; moments later officers found defendant Taylor in the bathroom, crouched over the toilet, in the process of flushing it; and a large sum of money was found in defendant Taylor's pockets.

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

Appeal by defendants from judgments entered 19 September 1991 in Mecklenburg County Superior Court by Judge James U. Downs. Heard in the Court of Appeals 26 February 1993.

Defendants Neal and Taylor were each charged with possession of cocaine with intent to sell and deliver cocaine, a violation of N.C. Gen. Stat. § 90-95(a)(1) (1990), and with possession of drug paraphernalia, a violation of N.C. Gen. Stat. § 90-113.22 (1990).

The defendants entered pleas of not guilty to both charges, and their cases were joined for trial.

The State's evidence tended to show that on 8 November 1990, at approximately 9:00 p.m., the Charlotte Vice Squad executed a search warrant on an apartment at 3823 Texas Court in Charlotte. As the officers approached the apartment, they saw a light shining in the bathroom which illuminated the heads of two males, one short and one taller. The officers knocked and forced open the apartment door, with approximately eight to ten seconds elapsing from the time the officers knocked until they entered the apartment. As the officers entered the apartment, a shorter man, later identified as defendant Neal, ran from the bathroom toward the bedroom, and a taller man, later identified as defendant Taylor, was found in the bathroom. Defendant Taylor, who was standing over the toilet in a crouched position, flushed the toilet as Officer Brown entered the bathroom. A woman, another male, and a small child were seated at a table in the living area when the officers entered the apartment.

The officers searched the apartment and found in the bathroom 6.2 grams of cocaine, packaged in nineteen separate baggies and placed inside one larger baggie which was found inside a cardboard roll of toilet paper on top of the toilet. In addition to the cocaine, the officers discovered approximately $860.00 in defendant Taylor's pockets, $1,999.00 in a sock inside a tennis shoe located in the closet of the bedroom, men's clothing that would fit defendant Taylor, drug paraphernalia, an envelope addressed to defendant Neal, and $200.00 in a dresser drawer in the bedroom.

As the officers prepared to take the defendants to the station, defendant Taylor retrieved tennis shoes from the bedroom.

The trial judge allowed the defendants' motions to dismiss the charges of possession of drug paraphernalia, but denied their motions to dismiss the charges of possession with intent to sell and deliver cocaine. The defendants were each found guilty of the lesser included offense of possession of cocaine, and from judgments imposing active sentences, they appeal.

Attorney General Lacy H. Thornburg, by Special Deputy Attorney General Robert G. Webb, for the State.

Keith M. Stroud for defendant-appellant Karlos Sebastian Neal.

James H. Carson, Jr. for defendant-appellant Garnett Taylor.

McCRODDEN, Judge.

Defendants have each filed a brief in which the sole assignment of error is that the trial court erred in its denial of their motions to dismiss the charges of possession of cocaine with intent to sell and deliver cocaine. The question presented on appeal to this Court is whether there was sufficient evidence of constructive possession of cocaine for the court to send the case to the jury. We conclude that there was.

A trial court properly denies a motion to dismiss if there is substantial evidence that the offense was committed and that the defendant committed it. *State v. Riddle*, 300 N.C. 744, 746, 268 S.E.2d 80, 81 (1980). In determining whether there is evidence sufficient for a case to go to the jury, the court must consider the evidence in the light most favorable to the State, and the State is entitled to every reasonable inference to be drawn from the evidence. *State v. Roseman*, 279 N.C. 573, 580, 184 S.E.2d 289, 294 (1971).

Since the defendants did not have actual possession of the cocaine, the State relied upon the doctrine of constructive possession. Under that doctrine, the State is not required to prove actual physical possession of the controlled substance; proof of constructive possession is sufficient and such possession need not be exclusive. *State v. Perry*, 316 N.C. 87, 96, 340 S.E.2d 450, 456 (1986). Constructive possession exists when a person, while not having actual possession of the controlled substance, has the intent and capability to maintain control and dominion over a controlled substance. *State v. Williams*, 307 N.C. 452, 455, 298 S.E.2d 372, 374 (1983). Where a controlled substance is found on premises under the defendant's control, this fact alone may be sufficient to overcome a motion to dismiss and to take the case to the jury. *State v. Harvey*, 281 N.C. 1, 12, 187 S.E.2d 706, 714 (1972). If a defendant does not maintain control of the premises, however, other incriminating circumstances must be established for constructive possession to be inferred. *State v. Alston*, 91 N.C. App. 707, 710, 373 S.E.2d 306, 309 (1988).

The defendants contend that the evidence does not show that the searched premises were under the control of the defendants, and therefore this Court should find no connection between the defendants and the cocaine. We agree that the State's evidence (men's clothing that might fit defendant Taylor, an envelope found

in a dresser drawer and addressed to defendant Neal, and defendant Taylor's tennis shoes retrieved from the bedroom), when viewed in the light most favorable to the State, is insufficient to establish control of the premises by the defendants. We disagree, however, with the defendants' argument that the evidence in this case causes us to be bound by the ruling in *State v. James*, 81 N.C. App. 91, 344 S.E.2d 77 (1986).

In *James*, the only evidence linking defendant Roddey, a casual visitor to the searched premises, to the cocaine located in the refrigerator was that he was "sneaking around" in the kitchen with a gun in his hand. *Id.* at 96, 344 S.E.2d at 81. The Court stated that "[t]he fact that a person is present in a room where drugs are located, nothing else appearing, does not mean that person has constructive possession of the drugs. If possession of the premises is non-exclusive, there must be evidence of other incriminating circumstances to support constructive possession." *Id.* at 93, 344 S.E.2d at 79 (citation omitted). In the instant case, we find the evidence insufficient to show exclusive possession of the premises by either defendant. As we have noted and as *James* holds, however, there is an additional inquiry into whether there were incriminating circumstances from which a jury might infer possession.

North Carolina Courts interpreting incriminating circumstances have found many examples of circumstances sufficient to allow a case to go to the jury. *Alston*, 91 N.C. App. 707, 373 S.E.2d 306 (1988). Three factual situations which have been held sufficient to allow an inference of constructive possession are similar to the evidence in the case at hand. First, the *Alston* case established that evidence of a defendant's presence in a closed room which contained the controlled substance is sufficient to support an inference of constructive possession. Second, *Alston* also held a large amount of cash found on the defendant's person at the time of the arrest to be another incriminating circumstance. Third, the case of *State v. Harrison*, 93 N.C. App. 496, 378 S.E.2d 190 (1989), held that evidence from which a jury might infer that defendant was fleeing from the area where illegal drugs were found is another circumstance supporting an inference of constructive possession. We find the evidence against defendants Neal and Taylor reveals incriminating circumstances that would allow a jury to infer their possession of cocaine. Before the officers entered the apartment they observed a shorter man, later identified as defendant Neal,

standing in the bathroom where the cocaine was later discovered. Evidence that defendant Neal ran from the bathroom as the officers entered the apartment supported an inference that defendant Neal was fleeing from the bathroom so that he would not be caught actually possessing the cocaine. This evidence is sufficient to support the trial court's denial of defendant Neal's motion to dismiss and to submit his case to the jury.

Likewise, there was sufficient evidence from which a jury could infer defendant Taylor's constructive possession of cocaine. From outside the apartment the officers observed a taller man, later identified as defendant Taylor, standing in the bathroom from which the officers were to retrieve the cocaine. Moments later, the officers found defendant Taylor in the bathroom, crouched over the toilet, in the process of flushing the toilet. A search of defendant Taylor revealed a large amount of cash, approximately $860.00, in his pockets. The trial court properly allowed the jury to review this evidence and to determine defendant Taylor's guilt.

The trial court correctly denied defendants' motions to dismiss, and we consequently overrule their assignments of error.

No error.

Chief Judge ARNOLD and Judge GREENE concur.

HAZEL G. McGOWEN, EXECUTRIX OF THE ESTATE OF FREDERICK McGOWEN, PLAINTIFF v. RENTAL TOOL COMPANY AND D. G. HUDSON AGENCY, INC., A DISSOLVED AND LIQUIDATED CORPORATION, D/B/A TRYON GAS COMPANY, DEFENDANTS

No. 924SC337

(Filed 20 April 1993)

Contracts § 10 (NCI4th); Abatement, Survival, and Revival of Actions § 16 (NCI4th) — personal injury action — settlement offer — death of plaintiff before acceptance — offer not revoked by death or withdrawn by defendant — acceptance by substitute plaintiff proper — defendant's compliance properly compelled

The 26 August 1991 settlement offer made by defendant was not revoked by operation of law upon the death of the

original plaintiff on 28 August 1991 of natural causes unrelated to the personal injuries for which the suit was brought, nor was the offer withdrawn by defendant upon learning of the original plaintiff's death or of the substitution of his wife as plaintiff; therefore, the substitute plaintiff could properly accept the outstanding offer on 14 October 1991 by and through her attorney, and the trial court therefore properly compelled defendant to comply with the agreed upon settlement.

Am Jur 2d, Contracts §§ 31 et seq.

Appeal by defendant from order entered 3 February 1992 by Judge James R. Strickland in Onslow County Superior Court. Heard in the Court of Appeals 9 March 1993.

Ellis, Hooper, Warlick, Morgan & Henry, by William J. Morgan, for plaintiff-appellee.

Stith and Stith, P. A., by F. Blackwell Stith and Susan H. McIntyre, for defendant-appellant.

JOHNSON, Judge.

The original plaintiff, Frederick McGowen, now deceased, filed a civil action against the defendants Rental Tool Company and D. G. Hudson Agency, Inc., a dissolved and liquidated corporation, d/b/a Tryon Gas Company, on 3 October 1989, seeking damages for personal injuries arising out of a fall from a scaffolding, which occurred on 16 October 1986.

Defendants, through their attorney, made a verbal offer of settlement totaling $63,000 to plaintiff's attorney on 26 August 1991. Defendant Rental Tool Company was to pay $60,000, and defendant D. G. Hudson Agency, Inc. was to pay $3,000. Plaintiff's attorney had written a letter to plaintiff on 27 August 1991, but before the offer was communicated to plaintiff, he died on 28 August 1991, of natural causes unrelated to the personal injuries he sustained in the fall.

Hazel G. McGowen, the widow of Mr. McGowen, was appointed executrix of her husband's estate. With the consent of defendants, Mrs. McGowen, in her representative capacity, was substituted as plaintiff in the civil action and was allowed to adopt the complaint of the original plaintiff.

On 14 October 1991, attorney Morgan, on behalf of plaintiff Hazel McGowen, verbally accepted the offer of settlement that had been made on 26 August 1991 by attorney Stith. In response, attorney Stith indicated that he was sure or that he felt that his client no longer considered the offer outstanding. On 28 October 1991, attorney Morgan received a letter dated 25 October 1991 in which attorney Stith indicated "that USF&G (the insurance carrier for Rental Tool Company) takes a position that there was no acceptance of its offer by your client who died before the offer was communicated to him." On 31 October 1991, attorney Morgan corresponded with attorney Stith, stating that the offer remained valid, had not been withdrawn and had been accepted.

On 18 December 1991, plaintiff filed a motion to compel compliance with the agreed upon settlement. On 26 February 1992, the trial court entered an order and judgment granting plaintiff's motion. On 23 March 1992, defendant Rental Tool Company gave notice of appeal. Defendant D. G. Hudson Agency, Inc. deposited with the clerk of Onslow County Superior Court its agreed upon portion of the settlement and is not a party to this action.

On appeal defendant-appellant brings forth one assignment of error. Defendant's sole assignment of error is that the trial court committed reversible error in granting plaintiff's motion to compel compliance with the agreed upon settlement because there was no contract of settlement. More specifically, defendant contends that the death of the offeree in the instant case terminated or revoked the offer as a matter of law.

To support its contention, defendant cites many general rules of contract law. For example, it states that an offer can be accepted only by the person or persons to whom it is made. 1 S. Williston, *The Law of Contracts* § 80 (3d ed. 1968). Defendant also states that the death or insanity of the offeror or the offeree will terminate the offer, as will the destruction of specific subject matter. 1 S. Williston, *The Law of Contracts* §§ 62, 62A (3d ed. 1968).

Defendant fails to state, however, that personal service contracts are terminated by the death of the offeror or the offeree. *See Peaseley v. Coke Co.*, 282 N.C. 585, 194 S.E.2d 133 (1973) (Contract did not provide for sole personal services of broker and, thus was not a personal service contract as would be terminated by broker's death; contract survived broker's death and could have been carried out by his associates.). The case *sub judice* does not

involve a personal service contract; thus, the contract survived the death of the offeree and could be carried out by the personal representative of his estate.

Defendant also overlooks North Carolina General Statutes § 28A-18-1 (1984) which provides that a civil action based upon personal injury survives the death of the plaintiff. *See Fuquay v. R. R.*, 199 N.C. 499, 155 S.E. 167 (1930). It does not matter, therefore, whether the original plaintiff accepted the offer himself or whether plaintiff's substituted representative, Mrs. McGowen, accepted the offer. The offer which was precipitated by the civil suit, survived the death of the plaintiff as did the suit itself. Mrs. McGowen, as the substituted representative in the civil suit, having adopted the complaint of the original plaintiff, had the power to accept the unrevoked settlement offer in her husband's stead.

We also note that plaintiff's attorney notified defendant's attorney by letter dated 29 August 1991, that Mr. McGowen had died and that a response to the settlement proposal would not be "as timely as I had hoped. It will be a few weeks before I can get medical information concerning cause of death. It will also take some time for a representative of the estate to be appointed and for me to bring that person up to date on where we are." At that time, defendant Rental Tool Company voiced no desire to revoke the 26 April 1991 offer. We further note that defendant made no objection to the substitution of Mrs. McGowen for her husband in the civil suit for personal injuries. The cover letter which was served with the motion to substitute Hazel McGowen, stated that "as soon as this [substitution of the parties] is done, I will be in a position to talk with you concerning the settlement of the claim." Defendant posed no objection to the substitution and did not indicate that the offer had been withdrawn or that withdrawing it was a consideration.

This Court therefore holds that the 26 August 1991 settlement offer was not withdrawn by defendant or revoked by operation of law, and that while the offer was outstanding, plaintiff Mrs. McGowen, who was substituted for her husband in the civil suit, accepted the offer by and through her attorney. Accordingly, we affirm the decision of the trial court which compelled compliance with the settlement offer.

The decision of the trial court is affirmed.

Judges Lewis and John concur.

STATE OF NORTH CAROLINA v. MICHAEL TAYLOR

No. 9220SC304

(Filed 20 April 1993)

Burglary and Unlawful Breakings § 8 (NCI4th)— occupied travel trailer—occupied dwelling requirement of burglary statute

Under N.C.G.S. § 14-51, an occupied travel trailer can satisfy the occupied dwelling element of first degree burglary. The characteristic of mobility is not the determining factor in considering whether the travel trailer is a structure under the statute; rather, the determining factor is whether the victim has made the trailer an area of repose, one from which he can reasonably expect to be safe from criminal intrusion.

Am Jur 2d, Burglary §§ 3 et seq.

Burglary: outbuildings or the like as part of "dwelling house." 43 ALR2d 831.

On certiorari from judgment entered 8 December 1988 in Moore County Superior Court by Judge John B. Lewis, Jr. Heard in the Court of Appeals 1 April 1993.

On 8 December 1988, a jury found defendant guilty of assault with a deadly weapon with intent to kill inflicting serious injury, first degree burglary, and common law robbery. Defendant was sentenced to 22 years. Defendant's court appointed counsel failed to advise him of his right to a direct appeal and no timely notice of appeal was entered on behalf of defendant.

On 19 April 1991, defendant contacted North Carolina Prisoner Legal Services, Inc. Prisoner Legal Services filed a petition for writ of certiorari in the North Carolina Court of Appeals on 12 July 1991. On 30 July 1991, the petition was allowed.

On 22 August 1982, Matthew Ray (hereinafter Ray) came to Moore County, where he became employed at Little River Farm. While living and working at Little River Farm, Ray lived in an eight by twelve foot travel trailer which was parked on the farm's property. Early in the morning of 25 August 1982, Ray was sleeping in the travel trailer, when he was awakened by a knock at the door. When Ray answered the door to his trailer, Michael Taylor

and Hilton Sweeney were standing outside. When Ray opened the door, Sweeney sprayed Ray in the face with some kind of air freshener and proceeded to force open the door to the trailer.

After being sprayed in the eyes, Ray attempted to run out of the trailer and fell down. Ray testified that he was kicked, punched, and stabbed numerous times before he could get up and run again. At that point, Ray ran approximately 20 yards until he was no longer pursued and then walked to a nearby house for assistance. Ray was later admitted to the hospital and treated for stab wounds to the chest and abdomen. Later, Ray reported that a gym bag was missing from under his bed.

Attorney General Lacy H. Thornburg, by Associate Attorney General Jill B. Hickey, for the State.

Pollock, Fullenwider, Cunningham & Patterson, P.A., by Bruce T. Cunningham, Jr., for defendant-appellant.

WELLS, Judge.

Pursuant to his sole assignment of error, defendant contends that the trial court committed reversible error by submitting the charge of first degree burglary to the jury. Defendant was convicted of first degree burglary under N.C. Gen. Stat. § 14-51 which reads, in pertinent part:

> **§ 14-51. First and second degree burglary.**
>
> There shall be two degrees in the crime of burglary as defined at the common law. If the crime be committed in a dwelling house, or in a room used as a sleeping apartment in any building, and any person is in the actual occupation of any part of said dwelling house or sleeping apartment at the time of the commission of such crime, it shall be burglary in the first degree.

Defendant contends that because the travel trailer which defendant broke into is not a permanent structure, the State failed to provide any evidence to show that defendant broke into and entered a "dwelling house" or "a sleeping apartment in any building." Defendant goes on to assert that N.C. Gen. Stat. § 14-56 was the proper statute to apply to his case. N.C. Gen. Stat. § 14-56 reads, in pertinent part:

§ 14-56. Breaking or entering into or breaking out of railroad cars, motor vehicles, trailers, aircraft, boats or other watercraft.

If any person, with intent to commit any felony or larceny therein, breaks or enters any railroad car, motor vehicle, trailer, aircraft, boat, or other watercraft of any kind, containing any goods wares, freight, or other thing of value, . . . that person is guilty of a Class I felony.

Defendant asserts that the travel trailer's characteristic of mobility and lack of permanence prevents it from constituting a dwelling under N.C. Gen. Stat. § 14-51, North Carolina's burglary statute. We disagree and find no error.

In support of his contention that the characteristic of mobility should be the determining factor in considering whether the travel trailer in question is a structure under N.C. Gen. Stat. § 14-51, defendant relies on *State v. Bost*, 55 N.C. App. 612, 286 S.E.2d 632, *cert. denied*, 305 N.C. 588, 292 S.E.2d 572 (1982). In *Bost*, defendant was convicted, under N.C. Gen. Stat. § 14-54, of breaking in and entering a construction site trailer. Similarly to the case at bar, defendant Bost contended on appeal that the trailer was not a "building" within the meaning of N.C. Gen. Stat. § 14-54, and that N.C. Gen. Stat. § 14-56 should apply. Focusing on the characteristic of mobility, the *Bost* court noted that the trailer was placed on blocks and was not being used to haul goods, thus, losing its characteristic of mobility and qualifying as a building under N.C. Gen. Stat. § 14-54.

We do not find the reasoning in *Bost* to be determinative in this case, but find the reasoning in *State v. Fields*, 315 N.C. 191, 337 S.E.2d 518 (1985), to be more appropriate. In *Fields*, our Supreme Court considered whether a particular occupied outbuilding fell within the curtilage of a dwelling. The Court wrote: "It is well to remember that the law of burglary is to protect people, not property." Applying that reasoning to the case at bar, we distinguish this case from *Bost* and find that, under N.C. Gen. Stat. § 14-51, an occupied travel trailer can satisfy the occupied dwelling element of first degree burglary.

In the case at bar, the fact that Mr. Ray was asleep in the travel trailer, having made it his living quarters for the time he was working at the farm is the determinative factor in considering whether the trailer qualifies as a dwelling under N.C. Gen. Stat.

§ 14-51. In the case of burglary, it would be absurd to base a determination on whether a burglary has taken place upon whether the trailer's weight rested on blocks or on tires. In the burglary context, it seems far more rational to consider whether or not the victim has made that trailer an area of repose, one which he can reasonably expect to be safe from criminal intrusion.

No error.

Judges GREENE and WYNN concur.

CASES REPORTED WITHOUT PUBLISHED OPINION

FILED 6 APRIL 1993

BERRY v. SMALL No. 9226SC972	Mecklenburg (90CVS11581)	Affirmed
BROWN v. REED No. 9126SC1288	Mecklenburg (90CVS10399)	Affirmed
CITIZENS FOR CLEAN INDUSTRY v. COBEY No. 9210SC90	Wake (91CVS5409)	Reversed & Remanded
HAYES v. TOWN OF WAYNESVILLE No. 9130SC1233	Haywood (90CVS425)	Affirmed
HINTON v. DUKE UNIVERSITY No. 9210IC219	Ind. Comm. (841473)	Affirmed
IN RE GARRETT No. 928SC1038	Lenoir (92J62)	Affirmed
IN RE PAIT No. 9216DC362	Robeson (89J62)	Affirmed
IN RE STAFFORD No. 9229DC978	Rutherford (91J81)	Affirmed
IN RE TILLMAN No. 9114DC1154	Durham (81J127B)	Affirmed
IVEY v. GUIN No. 9112SC1027	Cumberland (90CVS4575)	Affirmed
KEERY v. HITCHCOCK No. 9218SC803	Guilford (90CVS4952) (90CVS4972) (90CVS5588) (90CVS9299)	Affirmed
MADISON COUNTY CSEA EX REL. DAVIS v. LAWSON No. 9224DC101	Madison (91CVD0127)	Affirmed
OGBURN v. FARES No. 9221DC357	Forsyth (91CVD5588)	Affirmed
PEDDLE v. PEDDLE No. 9221DC771	Forsyth (92CVD1059)	Appeal Dismissed
RASNAKE ASSOCIATES, INC. v. COFFEY No. 9118SC823	Guilford (89CVS7403)	Affirmed

RUTLEDGE & RUTLEDGE, INC. v. WRIGHT No. 9221SC243	Forsyth (91CVS5194)	Reversed & Remanded
SEALEY v. GRINE No. 9211SC506	Johnston (90CVS0635)	Affirmed
STATE v. BAKER No. 9127SC1150	Gaston (89CRS26097) (89CRS26098)	No Error
STATE v. BAKER No. 9210SC689	Wake (91CRS73679)	No Error
STATE v. BUTLER No. 924SC797	Onslow (91CRS8567) (91CRS8811) (91CRS8812) (91CRS8813)	No Error
STATE v. CARDWELL No. 9223SC695	Wilkes (91CRS5301)	No Error
STATE v. CARPENTER No. 9226SC799	Mecklenburg (91CRS73459) (91CRS73460) (91CRS73461)	No Error
STATE v. CURRENCE No. 9227SC975	Cleveland (90CRS5880) (92CRS2170)	No Error
STATE v. DAVIS No. 9124SC1273	Watauga (90CRS4656)	In defendant's trial, we find no error; in defendant's sentencing, we reverse and remand for a new sentencing hearing.
STATE v. EVANS No. 9212SC685	Cumberland (91CRS003692)	No Error
STATE v. FRAZIER No. 929SC135	Person (90CRS5280)	No Error
STATE v. GAINEY No. 9216SC873	Scotland (90CRS6782)	No Error
STATE v. GAMBRELL No. 9210SC1030	Wake (91CRS45955)	No Error

STATE v. GRAY No. 9222SC1055	Davidson (91CRS20309)	No Error
STATE v. HEADEN No. 9111SC1283	Lee (91CRS3907) (91CRS3908)	No Error
STATE v. JOHNSON No. 9223SC842	Wilkes (90CRS773) (90CRS6975) (90CRS6976) (90CRS6977) (90CRS770) (90CRS771) (90CRS772) (90CRS1203) (90CRS3495) (90CRS3496) (90CRS3497) (90CRS3498) (90CRS4966) (90CRS4967) (90CRS4968) (90CRS4969) (89CRS6846) (90CRS7758) (90CRS7759)	No Error
STATE v. KEY No. 9223SC969	Wilkes (91CRS7270)	No Error
STATE v. KING No. 923SC753	Craven (90CRS11924) (90CRS11925) (91CRS5570)	No Error
STATE v. LINARDY No. 9211SC655	Johnston (91CRS3411) (91CRS3412)	No Error
STATE v. MOSLEY No. 9221SC764	Forsyth (91CRS22037)	No Error
STATE v. MOSS No. 9229SC661	Henderson (90CRS255)	No Error
STATE v. NEWSOME No. 926SC1032	Hertford (91CRS2747)	No Error
STATE v. OWENS No. 9215SC849	Orange (91CRS5749) (91CRS4611)	No Error

STATE v. PERRY No. 926SC786	Hertford (91CRS4269) (91CRS4270) (91CRS4271) (91CRS4272)	No Error
STATE v. REID No. 9226SC702	Mecklenburg (91CRS65492)	No Error
STATE v. ROSS No. 9226SC973	Mecklenburg (91CRS66060) (91CRS66062) (91CRS66063) (91CRS66069) (91CRS66070) (91CRS66071) (91CRS66072)	No Error
STATE v. SMITH No. 925SC840	Pender (91CRS0733) (91CRS0734)	91CRS0733—judgment vacated in part & remanded. 91CRS0734—no error
STATE v. SMITH No. 9210SC787	Wake (90CRS41771)	No Error
STATE v. STEWART and STATE v. BROWN No. 9110SC1235	Wake (91CRS37861) (91CRS37877) (91CRS37879)	As to defendant Stewart's appeal, No. 91CRS37861—No error. As to defendant Brown's appeal, No. 91CRS37879, we find no error in the trial, but vacate the sentence & remand for resentencing.
STATE v. WHITAKER No. 9223SC736	Alleghany (89CRS1008)	No Error
STATE v. WILSON No. 9225SC125	Catawba (90CRS10522)	New Trial
STATE v. WILSON No. 9227SC748	Cleveland (91CRS1557)	No Error
TAYLOR v. LAUGHLIN No. 9219DC708	Randolph (89CVD644)	Affirmed

TRAVELERS INDEMNITY CO. v. HARLEYSVILLE INS. CO. No. 915SC1152	New Hanover (89CVS3405)	Affirmed
WHITE v. WINN DIXIE RALEIGH No. 9114SC1238	Durham (90CVS04294)	Affirmed
WHITENER v. DEAL No. 9222DC409	Iredell (91CVD2031)	Affirmed
YARBOROUGH v. MOORE No. 9113SC1253	Brunswick (91CVS287)	Affirmed

FILED 20 APRIL 1993

CAROLINA GRADING AND EXCAVATING v. F & S DEVELOPERS No. 9214SC136	Durham (90CVS01316)	Affirmed
DAVIS v. SENCO PRODUCTS, INC. No. 921SC370	Dare (87CVS136)	Dismissed
GOODRUM v. GREEN No. 912SC1097	Martin (90CVS166)	Affirmed
HAGGARD v. MITCHELL No. 9217SC330	Stokes (90CVS0097)	Vacated & Remanded
HAMBY v. REINHARDT No. 9123SC449	Wilkes (90CVS327)	Affirmed
MARSH v. W. R. GRACE & CO. No. 9220SC774	Moore (89CVS634)	Affirmed
McKENZIE v. COMPREHENSIVE HOME HEALTH CARE I No. 925DC289	New Hanover (90CVD2182)	Affirmed
McLEAN v. GENERAL SPRAY & MAINTENANCE No. 9210IC719	Ind. Comm. (814062)	Dismissed
PERKINS v. PERKINS No. 929DC280	Person (83CVD253)	Affirmed
ROBERTS v. N.C. DEPT. OF AGRICULTURE No. 9223SC129	Wilkes (91CVS37)	Affirmed

STATE v. BAILEY No. 921SC742	Dare (91CRS12111)	No Error
STATE v. BROWN No. 9223SC741	Yadkin (91CRS1062)	Remanded
STATE v. DONALD No. 9226SC220	Mecklenburg (90CRS39687) (90CRS39688) (90CRS39690) (90CRS39691) (90CRS39692) (90CRS39693)	No Error
STATE v. DUREN No. 9126SC1196	Mecklenburg (90CRS94049) (90CRS94051) (90CRS94052) (90CRS94053) (90CRS94055) (91CRS3664)	No. 90CRS094052—second degree kidnapping—new trial. No. 90CRS094053—assault with a deadly weapon—arrested. Nos. 91CRS3664 & 90CRS094049—robbery with a dangerous weapon—no error. No. 90CRS094051—robbery with a dangerous weapon—remand for entry of judgment on common law robbery.
STATE v. JOHNSON No. 9226SC706	Mecklenburg (90CRS20477)	Affirmed
STATE v. LEACH No. 9110SC997	Wake (90CRS16273) (90CRS16274)	No Error
STATE v. SMITH No. 9217SC819	Surry (92CRS2949)	Affirmed
STATE v. TADLOCK No. 921SC705	Pasquotank (88CRS3496) (88CRS3497)	Affirmed
STATE v. TWIGGS No. 9221SC766	Forsyth (89CRS28605) (91CRS30485) (91CRS54765)	No Error

STATE v. WILLIAMS No. 9215SC680	Alamance (91CRS26251)	Remanded for resentencing
TOWN OF NORTH WILKESBORO v. WINEBARGER No. 9223SC666	Wilkes (91CVS43)	Affirmed

ANALYTICAL INDEX

WORD AND PHRASE INDEX

ANALYTICAL INDEX

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TOPICS COVERED IN THIS INDEX

ABATEMENT, SURVIVAL, AND REVIVAL OF ACTIONS

§ 16 (NCI4th). Survival of actions to and against personal representative

A settlement offer made by defendant was not revoked by operation of law upon the death of the original plaintiff, and the substitute plaintiff could properly accept the outstanding offer by and through her attorney. **McGowen v. Rental Tool Co.**, 688.

ADMINISTRATIVE LAW AND PROCEDURE

§ 30 (NCI4th). Adjudication of "contested case" generally

The Office of Administrative Hearings did not have subject matter jurisdiction of a petition by third parties for a contested case hearing concerning the issuance of an NPDES permit by the Department of E.H.N.R. since third parties do not have the right to commence a contested case hearing. **Citizens For Clean Industry v. Lofton**, 229.

Petitioner was not entitled to a contested case hearing on his alleged violation of the Coastal Area Management Act and the State Dredge and Fill Act where the petition was not verified as required by the Administrative Procedures Act and was not filed within twenty days after petitioner received notice of the penalty imposed by the Division of Coastal Management. **Gaskill v. State ex rel. Cobey**, 656.

§ 53 (NCI4th). Judicial review; necessity of raising issue in administrative proceeding

A dismissed teacher's objection to the constitutionality of a search was timely where the objection was raised for the first time in superior court. **In re Freeman**, 100.

§ 67 (NCI4th). Applicability of "whole record test"

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. A review of whether an agency decision is supported by sufficient evidence requires the court to apply the whole record test, which is also applied when the court considers whether an agency decision is arbitrary or capricious. **Brooks v. BCF Piping**, 26.

ANIMALS

§ 8 (NCI4th). Injuries caused by dogs

An ordinance requiring that dogs left unattended outdoors be restrained and restricted to the owner's property was a safety ordinance which could serve as the basis for a conviction of involuntary manslaughter, and there was ample evidence that defendant intentionally, willfully, and wantonly violated the ordinance. **State v. Powell**, 1.

APPEAL AND ERROR

§ 88 (NCI4th). Appealability of other interlocutory orders in criminal actions

An interlocutory order denying defendants' motion to remand to district court for entry of an appropriate judgment is not immediately appealable. **State v. Barnes**, 485.

§ 103 (NCI4th). Appealability of judgment on the pleadings

An immediate appeal will lie from the trial court's refusal to grant a judgment on the pleadings for the State on the ground of governmental immunity. **Whitaker v. Clark**, 379.

APPEAL AND ERROR — Continued

§ 111 (NCI4th). Appealability of orders denying motion to dismiss generally

It is improper to appeal the denial of a motion to dismiss or the denial of a motion for summary judgment if there has been a trial on the merits. **Munie v. Tangle Oaks Corp.**, 336.

§ 130 (NCI4th). Appealability of sanction orders

An order imposing discovery sanctions under Rule 37(b) is appealable as a final judgment. **Smitheman v. National Presto Industries**, 636.

§ 138 (NCI4th). Appealability of directed verdict order

Plaintiff had no right to immediately appeal an interlocutory order directing verdict against him in his action against the individual defendant where plaintiff withdrew his consent to a settlement of defendants' counterclaim after the court dismissed the jury but before the judgment was signed. **T. H. Blake Contracting Co. v. Sorrells**, 119.

§ 147 (NCI4th). Preserving question for appeal generally; necessity of request, objection, or motion

Plaintiff's argument that defendant did not properly introduce exhibits was not preserved for appeal where plaintiff made no objection at trial. **Albritton v. Albritton**, 36.

Defendant waived the right to challenge instructions on appeal by not objecting at trial. **Guyther v. Nationwide Mut. Fire Ins. Co.**, 506.

An assignment of error to instructions was preserved for appeal even though defendant failed to formally object where defendant requested that an instruction be altered and the court refused to instruct as requested. **Ibid.**

§ 317 (NCI4th). Record on appeal; criminal actions

There was no prejudicial error in a second degree murder prosecution arising from an automobile collision where defendant contends that the court permitted the State to make an erroneous argument to the jury but failed to record or transcribe the argument for review. **State v. McBride**, 64.

§ 329 (NCI4th). Models, diagrams, and exhibits of material

There was no prejudice in the inclusion of an insurance policy in a record on appeal even though the policy was not offered at the contempt hearing below. **Blazer v. Blazer**, 390.

§ 410 (NCI4th). Presumptions regarding charge to jury

The arguments to the jury are presumed proper where they were not recorded. **State v. Holmes**, 615.

§ 505 (NCI4th). Error cured by verdict

Any error in the admission and exclusion of evidence and instructions relating to the liability issue in an unfair debt collection action was harmless where plaintiff prevailed on the liability issue. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

ARBITRATION AND AWARD

§ 40 (NCI4th). Applications to court for vacation of award

The trial court did not err in failing to order the deposition of an arbitrator where defendants neither noticed the deposition of the arbitrator nor filed a motion

ARBITRATION AND AWARD — Continued

requesting the court to order his deposition. **Creative Homes and Millwork v. Hinkle**, 259.

An ex parte communication between an arbitrator and a witness for the plaintiff did not constitute misconduct requiring vacation of the arbitration award where the arbitrator, a contractor, merely asked the witness whether he did any business in the area and gave the witness his business card. **Ibid.**

ARSON AND OTHER BURNINGS

§ 8 (NCI4th). Burning of uninhabited houses, churches, farm buildings, or buildings used in trade or manufacture

The trial court did not err by denying defendant's motion to dismiss an indictment for burning an uninhabited storage building where the verdict sheet shows that the jury found defendant guilty of burning an "outhouse." **State v. Woods**, 360.

§ 29 (NCI4th). Identity of defendant as culprit; motive and opportunity; sufficiency of evidence in particular cases

The trial court properly denied defendant's motion to dismiss a charge of burning an uninhabited storage building for insufficient evidence where, viewed as a whole, there was substantial circumstantial evidence in that defendant was the only person seen in close proximity to the fire after it started, the fire was not accidental, defendant failed to warn nearby residents, lied about his identity, and attempted to flee the scene in a stolen car. **State v. Woods**, 360.

ASSAULT AND BATTERY

§ 2 (NCI4th). Sufficiency of evidence of civil assault and battery

The evidence was insufficient to support the infant plaintiff's claim for assault because he was either asleep or too young to understand what was going on, but the evidence was sufficient to support the infant's claim for battery where there was evidence that defendant had her elbow in the infant's back as she reached into a car and tried to pull the mother's hands off the key. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

The ten-year-old plaintiff's evidence was sufficient to support her claim for assault under the concept of transferred intent where she was sitting in the back seat of a car when defendant pointed a gun at the driver. **Ibid.**

ATTORNEYS AT LAW

§ 38 (NCI4th). Withdrawal from case

The failure of defendant's lead counsel to appear for the trial did not constitute a withdrawal from the case so as to require the trial court to allow a continuance. **Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac**, 352.

AUTOMOBILES AND OTHER VEHICLES

§ 253 (NCI4th). Express warranties generally

The evidence was sufficient to support the trial court's conclusion that defendant dealer made an express warranty to plaintiffs in the sale of an automobile to plaintiffs. **Riley v. Ken Wilson Ford, Inc.**, 163.

AUTOMOBILES AND OTHER VEHICLES — Continued

§ 254 (NCI4th). Express warranties; effect of failure to conform

The trial court properly denied defendant dealer's Rule 41(b) motion to dismiss plaintiffs' action for breach of express and implied warranties in the sale of an automobile. **Riley v. Ken Wilson Ford, Inc.**, 163.

The evidence supported the trial judge's conclusion that defects existed in an automobile at the time of purchase and that defendant breached its express warranty to plaintiffs when it refused to further repair plaintiffs' car only ten months after purchase and within the twelve-month warranty period. **Ibid.**

§ 255 (NCI4th). Defenses; generally

Though plaintiffs were entitled to revoke acceptance of a vehicle purchased from defendant, they failed to do so and were not entitled to damages under G.S. 25-2-711 but were instead entitled to damages for breach of warranty under G.S. 25-2-714 and to incidental and consequential damages under G.S. 25-2-715. **Riley v. Ken Wilson Ford, Inc.**, 163.

§ 259 (NCI4th). Relief available for breach of express warranty; liability

A delay of just over two years between the date of purchase of an automobile and the date of bringing an action for breach of express and implied warranties was not unreasonable for the purposes of satisfying the notice requirement of G.S. 25-2-607(3). **Riley v. Ken Wilson Ford, Inc.**, 163.

Plaintiffs were entitled to recover the difference between the value of a vehicle accepted "at the time and place of acceptance" and the value of the vehicle as warranted, and the case must be remanded to determine this value and the appropriate amount of damages. **Ibid.**

The trial court erred in an action for breach of express and implied warranties by allowing defendant seller to "retain" title and possession of the car in question where there was no rescission or revocation of acceptance. **Ibid.**

§ 767 (NCI4th). Instructions to the jury; sudden emergency and unavoidable accident; stopping on highway

The trial court erred in a negligence action arising from a rear end collision by instructing the jury on sudden emergency where the evidence indicates that defendant had reason to anticipate that plaintiff could start moving her vehicle and then suddenly stop again. **Keith v. Polier**, 94.

§ 790 (NCI4th). Vehicular murder and assault with deadly weapon

There was sufficient evidence of malice in a second degree murder prosecution arising from an automobile accident where defendant drove his car while substantially impaired after prior convictions for driving while impaired, drove while his license was permanently revoked, and used false license tags and lied to inspection personnel to obtain an inspection sticker. **State v. McBride**, 64.

BANKS AND OTHER FINANCIAL INSTITUTIONS

§ 81 (NCI4th). Right of depository bank to supply missing indorsement

The collecting bank did not cure its breach of warranty of presentment of good title by supplying the missing indorsement of its "customer" on a check where the payee had no account at the collecting bank and was thus not a "customer" of the bank. **United Carolina Bank v. First Union National Bank**, 201.

defendant's prior convictions as they may or may not impugn on defendant's credibility. **State v. Baker**, 643.

§ 349 (NCI4th). Cross-examination of witnesses

The first prong of the Confrontation Clause test of the Sixth Amendment to the United States Constitution and Article I, Section 23 of the North Carolina Constitution was satisfied and the inquiry became whether the evidence was admitted under one or more firmly rooted exceptions to the hearsay rule where a child sex abuse victim was unavailable to testify due to incompetency as a witness and her statements to others were admitted. **State v. Rogers**, 491.

CONSUMER AND BORROWER PROTECTION

§ 42 (NCI4th). Debt collectors generally

The statutes prohibiting unfair debt collection acts protect only the consumer and not bystanders or those who accompany the consumer at the time of the alleged statutory violation. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

§ 44 (NCI4th). Penalties for unfair debt collection

The trial court properly limited plaintiff debtor's claim for unfair debt collection acts to $1,000 and properly struck the complaint's prayer for treble damages. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

The trial court did not err in refusing to allow evidence of the financial records of defendant bank on the issue of damages in an unfair debt collection action. **Ibid.**

CONTRACTS

§ 10 (NCI4th). Offer and acceptance generally

A settlement offer made by defendant was not revoked by operation of law upon the death of the original plaintiff, and the substitute plaintiff could properly accept the outstanding offer by and through her attorney. **McGowen v. Rental Tool Co.**, 688.

§ 50 (NCI4th). Ambiguous agreements, generally

The merger agreement executed between Scottish Bank and First Union was ambiguous and did not establish as a matter of law that former employees of Scottish Bank were entitled to receive retirement benefits under the First Union Plan based on total years of service to both Scottish Bank and First Union as well as their accrued benefits under the previously existing Scottish Bank Plan, and the trial court erred in entering summary judgment for plaintiff. **Glover v. First Union National Bank**, 451.

§ 140 (NCI4th). Construction contracts not involving buildings

The trial court did not err by concluding that there was no contract between defendant prime contractor and plaintiff subcontractor where plaintiff submitted a bid which was used in the successful general bid, but plaintiff was not used on the project. **Clark Trucking of Hope Mills v. Lee Paving Co.**, 71.

§ 144 (NCI4th). Breach of building construction contracts

The trial court erred in granting summary judgment for defendant city on plaintiff prime contractor's claim for damages for breach of a coliseum construction

CONTRACTS — Continued

CORPORATIONS

COSTS

COURTS

CRIMINAL LAW

CRIMINAL LAW — Continued

§ 1098 (NCI4th). Aggravating factors under Fair Sentencing Act; prohibition on use of evidence of element of offense

The trial court erred in a second degree murder prosecution by finding prior convictions as an aggravating factor when those convictions had been offered by the State as proof of malice. **State v. McBride**, 64.

§ 1183 (NCI4th). Aggravating factors under Fair Sentencing Act; proof of prior convictions; alternate methods of proof

The trial court did not err when sentencing defendant for burglary by finding the aggravating factor of a prior conviction where defendant had filed a motion in limine before trial which included a statement that defendant had been convicted of a felony in California. The motion in limine sought only to prevent the State from presenting the evidence to the jury and the statement was at the very least an evidential admission. **State v. Duffy**, 595.

DAMAGES

§ 42 (NCI4th). Damages for loss of use and profits; vehicles

Plaintiff was not required to prove that he held an actual ownership interest in the damaged vehicle in order to recover for lost profits due to loss of use, it being sufficient that he had the vehicle in his possession at the time of the accident and that he normally used it in the course of his business with the permission of its owner, his wife. **Amerson v. Willis**, 297.

§ 104 (NCI4th). Sufficiency of allegations of punitive damages generally

The minor plaintiffs' failure to specifically request punitive damages in their prayer for relief in an assault and battery complaint arising from defendant bank employee's attempt to repossess a car did not preclude the jury's consideration of punitive damages. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

§ 132 (NCI4th). Punitive damages; gross negligence

The trial court erred in granting the motion of defendant nursing care facility and defendant attending physicians for partial summary judgment on the issue of punitive damages based on gross negligence in an action to recover for the wrongful death of a patient in defendant facility. **Cowan v. Brian Center Management Corp.**, 443.

§ 138 (NCI4th). Instructions on punitive damages

The minor plaintiffs were entitled to an instruction on punitive damages where the complaint alleged defendants' assault with a dangerous weapon and battery upon the minors while defendant bank employee was attempting to repossess a car from the mother of one of the minors. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

DEATH

§ 31 (NCI4th). Matters compensable

"Gross negligence" as that term is used in the wrongful death statute is something less than willful and wanton conduct. **Cowan v. Brian Center Management Corp.**, 443.

DISCOVERY AND DEPOSITIONS

§ 62 (NCI4th). Sanctions for failure to respond to discovery request

There was no merit to defendant's contention that the trial court imposed sanctions against it without providing sufficient notice and opportunity to show justification for its failure to strictly comply with discovery. **Smitheman v. National Presto Industries**, 636.

The trial court's order establishing defendant's negligence, prohibiting defendant from offering any evidence to refute negligence, awarding attorney fees to plaintiff's counsel, and denying defendant's motion to rehear did not amount to such severe sanctions as to violate due process. **Ibid.**

There was ample evidence to support the trial judge's determination that defendant acted willfully and without justification in failing to comply with discovery requests where defendant had argued confidentiality of certain materials and had been ordered by the court to produce the information. **Ibid.**

The trial court did not abuse its discretion in imposing a sanction establishing defendant's negligence and prohibiting the introduction of any evidence on the issue of negligence. **Ibid.**

The evidence was sufficient to support the trial court's award to plaintiffs of attorney fees of $7,000. **Ibid.**

DIVORCE AND SEPARATION

§ 142 (NCI4th). Pension and retirement benefits

The trial court did not err in an equitable distribution action by not putting a specific value on defendant's pension plan where it was plaintiff-appellant who failed to provide the trial court with the necessary information. **Albritton v. Albritton**, 36.

§ 143 (NCI4th). Equitable division of property; "equitable" and "equal" distinguished

The trial court did not abuse its discretion in an equitable distribution action by awarding plaintiff a disparate share of liquid assets where defendant does not allege that the total dollar value of the two halves are unfairly disparate. Any improper reliance on G.S. 50-20(c) was harmless error because the property was divided equally. **Eubanks v. Eubanks**, 127.

§ 144 (NCI4th). Distribution factors

The trial court did not abuse its discretion in an equitable distribution action by making an unequal division of marital property. **Albritton v. Albritton**, 36.

§ 158 (NCI4th). Other distribution factors

The trial court did not err in an equitable distribution action by holding that defendant was ill and unable to work and that plaintiff had hidden and secreted marital assets where there was competent evidence supporting those findings. **Albritton v. Albritton**, 36.

§ 164 (NCI4th). Agreements dividing property; oral agreements

A stipulation was properly admitted in an equitable distribution proceeding where the parties' attorneys negotiated a stipulation of certain facts, conferring with the parties between meetings. The parties played an active role in the negotiations before their attorneys signed the stipulation and the stipulation was offered into evidence by the parties' counsel, accepted by the trial court, and read into the record in the presence of the parties without objection. **Eubanks v. Eubanks**, 127.

DIVORCE AND SEPARATION — Continued

§ 165 (NCI4th). Distributive awards generally

The trial court did not err in an equitable distribution action by assigning a ten per cent interest rate to a note securing cash payments where the order which the parties signed and designated as a binding contract for the division of property included language which plainly constituted an agreement granting the trial court the power to set whatever interest rate it found supported by the evidence. **Coston v. Coston**, 306.

§ 166 (NCI4th). Distributive awards; lien to secure payment

The trial court did not err in an equitable distribution action in which plaintiff was given a distributive cash award by ordering defendant to obtain a release from his parents of their deed of trust and first lien of record on the residence. **Coston v. Coston**, 306.

§ 203 (NCI4th). Alimony; conduct of dependent spouse

The trial court properly gave defendant the choice of shielding herself from criminal charges by refusing to answer questions regarding her alleged adultery and in so doing abandon her alimony claim, or waiving her privilege and pursuing her claim. **Cantwell v. Cantwell**, 395.

§ 334 (NCI4th). Contempt; sufficiency of evidence to support findings

The trial court did not err by finding defendant in civil contempt where defendant was required by a consent order to maintain plaintiff and their minor children as beneficiaries of his hospitalization and medical insurance; he accepted a new job overseas; plaintiff and defendant went to an insurance company to take out an additional policy; plaintiff believed she was going to receive a policy which was the same as the original policy except for a change in the deductible; defendant paid the first premium and accepted employment in Saudi Arabia; the insurance company declined to cover plaintiff because she had pre-existing medical problems; plaintiff obtained temporary coverage and underwent surgery; and the bills were not covered by the temporary policy. **Blazer v. Blazer**, 390.

§ 354 (NCI4th). Sufficiency of findings and evidence to support custody granted to mother

The trial court erred in awarding sole custody of the parties' child to defendant mother where the court failed to give weight to the father's testimony concerning the child's state of mind and the age difference between the father and mother was a fundamental basis for the award. **Phelps v. Phelps**, 242.

§ 377 (NCI4th). Visitation generally

The constitutional rights of the minor plaintiff were not violated by an order specifying visitation with defendant, her father, where the child expressed a desire not to visit her father but the court determined that such visitation would be in the child's best interests based on findings supported by evidence in the record, the hearing was conducted in compliance with the parties' due process rights, and the provision that violation of the order would be punishable by contempt is a valid declaration that one who violates the order will be subject to contempt proceedings in accordance with due process. **Reynolds v. Reynolds**, 110.

§ 460 (NCI4th). Notice and service of process generally

The issue of primary custody of a child was not properly before the trial court where plaintiff's request for sole custody in his April 1990 motion did not

contemplate or give notice of a possible change in custody; plaintiff, in his response to defendant's February 1991 motion, prayed for the relief requested in his 1990 motion only as to child support; and defendant did not ask for a change of custody in her motion. **Jones v. Jones**, 293.

EASEMENTS

§ 43 (NCI4th). Who may use easement

The trial court did not err in a declaratory judgment action by finding that respondents, their heirs, assigns and legal representatives are entitled to the non-exclusive right of ingress and egress over and across Butler Drive where a grant of land contained language which clearly showed an intention to grant the right of ingress and egress. **Butler Drive Property Owners Assn. v. Edwards**, 580.

§ 62 (NCI4th). Prescriptive easements

Plaintiffs' evidence was sufficient to support their claim for a prescriptive easement in a driveway crossing defendants' property. **Mecimore v. Cothren**, 650.

Evidence of the existence of another means of access to plaintiffs' land did not destroy plaintiffs' rebuttal of the permissive use presumption. **Ibid.**

§ 66 (NCI4th). Verdict and findings in actions to establish easements

It was not contradictory for the jury to find that plaintiffs acquired an easement by prescription but did not acquire an easement by implication. **Mecimore v. Cothren**, 650.

EMBEZZLEMENT

§ 6 (NCI4th). Fraudulent or felonious intent

The evidence of a fiduciary relationship and fraudulent intent was sufficient to support defendant's conviction of embezzlement of refundable deposits for retirement condominiums which were used to pay start-up expenses for the condominium project. **State v. Rupe**, 601.

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION

§ 71 (NCI4th). Water pollution; permits

Petitioners did not have a right to a G.S. Ch. 150B, Art. 3 contested case hearing to challenge the decision of the Department of Administration that an environmental impact statement was not required in determining an application for an NPDES permit. **Citizens For Clean Industry v. Lofton**, 229.

The Office of Administrative Hearings did not have subject matter jurisdiction of a petition by third parties for a contested case hearing concerning the issuance of an NPDES permit. **Ibid.**

A decision by the Department of E.H.N.R. issuing an NPDES permit was a "final decision" in a "contested case" so that no additional administrative hearing was required in order for aggrieved third parties to seek judicial review under G.S. Ch. 150B, Art. 4. **Ibid.**

§ 75 (NCI4th). Hazardous or toxic substances, generally

The legislature did not intend for wastewater treated in elementary neutralization systems and discharged pursuant to NPDES permits to be assessed the tonnage

ENVIRONMENTAL PROTECTION, REGULATION, AND CONSERVATION — Continued

EVIDENCE AND WITNESSES

EVIDENCE AND WITNESSES — Continued

§ 929 (NCI4th). Exceptions to hearsay rule; excited utterances generally; statement made while declarant still under stress of excitement

Statements of a child sex abuse victim to a playmate's mother were properly admitted where the child was incompetent as a witness and the testimony indicated that the child's statements were spontaneous and not in response to any questioning by an adult, related to a startling event, and were made only three days after the assault. **State v. Rogers**, 491.

§ 961 (NCI4th). Exceptions to hearsay rule; statements for purposes of medical diagnosis or treatment

Out of court statements to her mother, a psychologist and a pediatrician by a child sexual abuse victim who was not competent to testify were admissible where statements to her mother resulted in the victim being taken to the hospital, although the mother first found a police officer; the purpose of the visits to the psychologist was to obtain therapy, although the visits undoubtedly prepared the psychologist for her testimony at trial, and the pediatrician used the victim's statements to make his diagnosis. **State v. Rogers**, 491.

§ 967 (NCI4th). Records of regularly conducted activity generally

Reservation deposit receipts, photographic copies of reservation deposit checks, and receipts for public offering statements seized by an officer from the model showroom office of a condominium project were admissible pursuant to the business records exception to the hearsay rule, and the officer was properly permitted to testify as to the names, dates and dollar amounts shown on each document. **State v. Rupe**, 601.

§ 1041 (NCI4th). Conduct as admissions

The trial court in an unfair debt collection case did not err by failing to instruct the jury on spoliation of evidence because defendant failed to produce a pistol at trial in response to a subpoena where the pistol had been thrown away by defendant's husband without her knowledge. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

§ 1218 (NCI4th). Confessions; matters affecting admissibility or voluntariness

The trial court did not err in a murder prosecution by failing to sustain defendant's objections to his written and oral statements, along with corresponding testimony by the officers to whom the statements were given, on the grounds that the State failed to prove that the statements were voluntarily and understandingly made. **State v. Willis**, 184.

§ 1229 (NCI4th). Matters affecting admissibility or voluntariness of confession; statement made to person other than police officer

The trial court properly denied a murder defendant's motion to suppress inculpatory statements as violating his Fifth Amendment rights where he was imprisoned pursuant to a contempt citation for violation of a child custody order, an uncle by marriage who was also a deputy sheriff in another county came to talk to him, defendant related the details of the child's death and location of the body, and defendant repeated the statement to an SBI agent. **State v. Tucker**, 565.

EVIDENCE AND WITNESSES — Continued

§ 1242 (NCI4th). Particular statements as volunteered or resulting from custodial interrogation; statements made in police custody following arrest

A statement written by a murder defendant and given to a jailer was freely and voluntarily given and was not barred. **State v. Tucker**, 565.

§ 1732 (NCI4th). Pornographic movies

Videotapes and other sexual materials were relevant and admissible in a termination of parental rights proceeding and there was no error in bringing all 1100 videotapes into the courtroom. **In re Beck**, 539.

§ 1756 (NCI4th). Models generally

The trial court did not err in a murder prosecution by allowing the expert witness who had performed the autopsy to place a dowel through a mannequin's head to illustrate the path of the bullet where the expert did not testify that the mannequin head was identical to the head of the victim and admitted that the mannequin was not a cast of the victim's head. **State v. Willis**, 184.

§ 1785 (NCI4th). Impeaching witness with evidence related to polygraph test

The trial court erred in a murder prosecution by admitting a polygraph examiner's testimony concerning his interview with defendant where the agent described the interview, including three of his questions and defendant's answers, but did not mention the polygraph test itself. The examiner's sole basis for testifying that defendant lied in answering his questions was his interpretation of the polygraph test results, evidence which the Supreme Court has held to be inherently unreliable. **State v. Willis**, 184.

§ 1974 (NCI4th). Documentary evidence; accident reports

An accident report was admissible in a negligence action arising from an automobile accident where the officer testified that he completed the report on the date of the accident based on information received from the drivers and his own investigation of the accident; he prepared the report during the course and scope of his employment as a police officer and as a regularly conducted activity; he reviewed the report with the parties and neither objected; and the officer subsequently filed the report with his immediate supervisor who in turn filed it with the records division of the Raleigh Police Department. **Keith v. Polier**, 94.

§ 2162 (NCI4th). Qualification of witness as expert; need for formal tender of witness for, or finding as to, qualification

The trial court ruled that two contractors were experts by implication even though they were never formally tendered as experts where the court permitted them to testify as experts after hearing their qualifications. **Guyther v. Nationwide Mut. Fire Ins. Co.**, 506.

§ 2209 (NCI4th). Blood; grouping and typing

The trial court did not err by allowing an expert in forensic serology to testify that tests on semen taken from the victim were inconclusive and that defendant could not be excluded. **State v. Summey**, 518.

§ 2210 (NCI4th). Existence of bloodstains; opinion as to source

The trial court did not abuse its discretion in a murder prosecution by permitting an S.B.I. agent to be qualified as an expert in blood spatter interpretation and then by allowing him to testify in that capacity. The witness is not required

HANDICAPPED PERSONS

§ 1 (NCI4th). Who are handicapped and disabled persons

A plaintiff who experienced some pain in her lower back and was under a physician's order not to lift more than 40 pounds, to avoid repetitive bending at the waist, and to avoid prolonged sitting or standing was not a "handicapped person" within the meaning of the Handicapped Persons Protection Act since her physical impairment did not limit a "major life activity." **Gravitte v. Mitsubishi Semiconductor America**, 466.

HIGHWAYS, STREETS, AND ROADS

§ 7 (NCI4th). Board of Transportation

There was no violation of G.S. 136-28.4 where plaintiff subcontractor, a Minority Business Enterprise, submitted a bid to defendant contractor for a highway project; defendant included plaintiff's bid in the general bid; defendant discovered after winning the bid that stone aggregate could be obtained at a better price from a different quarry; plaintiff quoted a higher price even though the distance from the two quarries to the job site was essentially the same; and plaintiff was not included in the project. **Clark Trucking of Hope Mills v. Lee Paving Co.**, 71.

HOMICIDE

§ 67 (NCI4th). Involuntary manslaughter; death resulting from intentional violation of statute

The trial court properly submitted the charge of involuntary manslaughter to the jury where the State presented evidence which a reasonable juror could accept as supporting a conclusion that defendant's dogs caused the victim's death and that defendant should have foreseen that his dogs would cause serious injury if left to run at large in violation of the city ordinance. **State v. Powell**, 1.

HOUSING

§ 79 (NCI4th). Condominium deposits

Where potential purchasers of condominium units were entitled to a full refund of their reservation deposits within thirty days of the seller's receipt of written notice of cancellation, the thirty-day wait period acts as a penalty and the deposits are required by statute to be placed in an escrow account. **State v. Rupe**, 601.

HUSBAND AND WIFE

§ 52 (NCI4th). Sufficiency of evidence of alienation of affections; summary judgment

The trial court did not err by denying defendant's motions for directed verdict and judgment n.o.v. in an alienation of affections case where a jury could reasonably conclude that defendant actively participated in alienating plaintiff husband's affections and that her conduct led plaintiff's spouse to terminate the marriage. **Peake v. Shirley**, 591.

INDEMNITY

§ 2 (NCI4th). Indemnification for negligence

The trial court's failure to instruct and submit an issue on defendant restaurant's claim against defendant tuna supplier for indemnity with respect to the issue

INSURANCE — Continued

§ 134 (NCI4th). Ordinary and plain meaning of words and phrases; effect of lack of ambiguity

A health benefit plan administered by defendant BCBS which provides that no benefits are provided for "services or supplies which are furnished without cost to a participant under the laws of the United States" is not ambiguous and excludes coverage for services which are paid for by the Veterans Administration. **Estate of Bell v. Blue Cross and Blue Shield**, 661.

§ 338 (NCI4th). Hospital expenses policy; what expenses are covered

Where decedent veteran was treated in a non-VA hospital, and the hospital received payment from the Veterans Administration and from defendant BCBS, plaintiff executrix was not entitled to a refund paid by the non-VA hospital to defendant BCBS reflecting the VA's payment to the hospital for services rendered decedent veteran, even though there was no clause coordinating benefits with the VA in defendant BCBS's contract. **Estate of Bell v. Blue Cross and Blue Shield**, 661.

§ 464 (NCI4th). Subrogation and actions against tortfeasors; effect of settlement between tortfeasor and insured

The trial court did not err by granting summary judgment for defendant where defendant tendered its automobile liability policy limits, plaintiff advanced that amount on behalf of defendant toward the settlement of the claim in order to preserve its right to subrogation, and defendant failed to reimburse plaintiff the advanced amount, claiming that plaintiff had acquired only the rights of its insured and was thus barred by the statute of limitations. **Nationwide Mut. Ins. Co. v. State Farm Mut. Auto. Ins. Co.**, 281.

§ 527 (NCI4th). Underinsured coverage generally

The trial court did not err by entering summary judgment for defendants where a school bus struck and seriously injured defendant Sydra Knudsen; the bus was subject to the North Carolina Tort Claims Act; defendants were covered by a personal automobile insurance policy issued by plaintiff which provides UIM coverage; and plaintiff filed a declaratory judgment action seeking a judgment that its policy does not provide UIM coverage for accidents involving a school bus. The Tort Claims Act serves the same function as liability insurance for school buses and therefore the Tort Claims Act falls within the categories of "liability bonds" and "insurance policies" for the purpose of determining eligibility for UIM coverage. **N.C. Farm Bureau Mut. Ins. Co. v. Knudsen**, 114.

§ 724 (NCI4th). Homeowner's policies; coverage of property damage

The trial court did not err by granting summary judgment for defendant insurance company where asbestos dust was spread throughout plaintiff's house during removal of vinyl flooring and a common sense reading of plaintiff's homeowner's policy excludes any loss to property caused by faulty workmanship, renovation, or remodeling and does not limit exclusion of damage to work product. **Smith v. State Farm Fire and Casualty Co.**, 77.

The trial court did not err by denying defendant's motion for a directed verdict and judgment n.o.v. where defendant claimed that the evidence failed to show that a collapse occurred but there was evidence that part of the house had dropped, one of the doors would not open, the floor was uneven and had pulled away from the baseboards, the ceiling was bowed and the roof had started to push down and out, the kitchen cabinets had pulled away from the wall, the upstairs floor

JUDGMENTS — Continued

did not render a decision on the motion until 4 November, the date on which the order was signed and filed; the 28 October session was adjourned on 1 November; the same judge was assigned to hold the 4 November session in Wake County; and the record reveals nothing to indicate that the trial judge extended the 28 October session or that the parties or their attorneys consented to entry of the order out of session. Although there was a stipulation in the record on appeal, a valid consent must affirmatively appear in the record of the trial court. **Capital Outdoor Advertising v. City of Raleigh**, 399.

§ 166 (NCI4th). Time for granting default judgment in action against more than one defendant

The trial court erred by not setting aside a default judgment against one defendant where the complaint alleged that all three defendants were jointly and severally liable. **John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes**, 174.

§ 391 (NCI4th). Setting aside default judgment; failure of attorney to file answer

An entry of default and default judgment against a defendant were vacated where defendant argued that an application and order for an extension of time were ambiguous as to whether they applied only to the corporate defendant or to the corporate and individual defendants and there was no compelling reason for the neglect of the attorney to be imputed to defendant. **John Henry Spainhour & Sons Grading Co. v. Carolina E.E. Homes**, 174.

§ 399 (NCI4th). Authority of attorney to consent to judgment

The trial court erred in setting aside a consent judgment against defendant on the ground that the court entering the judgment did not have jurisdiction over defendant since the dispositive question was whether the attorneys who signed the consent judgment for defendant had the authority to appear and approve a judgment on behalf of defendant. **Nye, Mitchell, Jarvis & Bugg v. Oates**, 289.

JURY

§ 12 (NCI4th). Waiver of right to jury trial generally

Defendant failed to rebut the presumption that his co-counsel had authority to waive a jury trial on the issue of damages. **Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac**, 352.

KIDNAPPING AND FELONIOUS RESTRAINT

§ 21 (NCI4th). Sufficiency of evidence; confinement, restraint, or removal for purpose of doing serious bodily harm to or terrorizing person

The trial court did not err in a kidnapping prosecution by denying defendant's motion to dismiss based on insufficient evidence where the indictment charged kidnapping for larceny and terrorizing the victim, the trial judge only instructed on terrorizing the victim, and, considered in the light most favorable to the State, the evidence would support a finding that the defendant intended by his actions and commands to put the victim in a state of intense fright or apprehension and that he grabbed her and threw her into his car for that purpose. The fact that he did not have the opportunity to fully carry out his intentions is of no avail. **State v. Surrett**, 344.

MASTER AND SERVANT — Continued

§ 93 (NCI4th). Proceedings before the Commission generally; parties

A deputy commissioner acted within the scope of his inquiry in a workers' compensation proceeding where another deputy commissioner had previously determined that plaintiff was entitled to total disability between 27 August and 16 February due to a head injury, but reserved judgment for the period following 16 February, and this deputy commissioner heard the case to determine what compensation, if any, was due after 16 February. **Ivey v. Fasco Industries**, 123.

The plaintiff in a workers' compensation action failed to demonstrate that the Industrial Commission abused its discretion in denying plaintiff's Rule 701 motion. **Ibid.**

§ 96.5 (NCI4th). Appeal and review of award; scope of review; specific instances where findings are conclusive or sufficient

The findings of the full Industrial Commission in a workers' compensation action were supported by the evidence and the Court of Appeals is bound by the Industrial Commission's findings when they are supported by direct evidence or by reasonable inferences drawn from the record. **Ivey v. Fasco Industries**, 123.

MORTGAGES AND DEEDS OF TRUST

§ 109 (NCI4th). Resale of property upon failure of bidder to comply with bid

A judgment creditor lacks standing to bring an action against a defaulting bidder since the trustee is the real party in interest. **Union Grove Milling and Manufacturing Co. v. Faw**, 248.

MUNICIPAL CORPORATIONS

§ 30.11 (NCI3d). Zoning ordinances; specific businesses, structures, or activities

The doctrine of laches applied to prevent defendant town from enforcing its own sign ordinance. **Abernethy v. Town of Boone Bd. of Adjustment**, 459.

§ 185 (NCI4th). Public utilities and services; establishment of charges or rates

The trial court did not err by granting summary judgment for defendant on the issue of whether a minimum monthly charge assessed a motel-condominium was arbitrary or discriminatory where Bogue Shores Motel-Condominiums fits the common definition of both condominium and motel but was a condominium complex within the context of defendant's water ordinance. **Bogue Shores Homeowners Assn. v. Town of Atlantic Beach**, 549.

The trial court properly granted summary judgment for defendant on the issue of whether a multi-rate water schedule based on the size of the service line was discriminatory or arbitrary because charging a condominium complex based only on the size of the service line rather than on the number of residential units in the complex would unfairly discriminate against single residential customers. **Ibid.**

Summary judgment for plaintiffs was premature on the issue of whether an impact fee for connecting a three-inch water service line was arbitrary and capricious where defendant waived the fee pursuant to an unwritten policy for newly annexed areas, there is no evidence that defendant has demanded payment of the fee, and plaintiffs have not sought declaratory relief. **Ibid.**

MUNICIPAL CORPORATIONS — Continued

§ 346 (NCI4th). Power of municipality to appropriate, expend, and allocate revenue

The trial court erred by granting declaratory judgment in favor of the City where plaintiff had brought an action challenging a section of the city code providing user fees; a municipality has only such powers as the legislature confers upon it; and there is no enabling legislation that expressly authorizes municipalities to charge these user fees. **Homebuilders Assn. of Charlotte v. City of Charlotte**, 327.

§ 405 (NCI4th). Sufficiency of notice of claim against municipality

Plaintiff prime contractor's forecast of evidence that it provided timely written notice to defendant city's architect that it needed a change work order for extra time or it would incur acceleration costs for which it expected to be compensated was sufficient to raise a genuine issue of material fact regarding sufficiency of notice given by plaintiff of a claim for an increase in the contract price. **Watson Electrical Construction Co. v. City of Winston-Salem**, 194.

The trial court properly granted summary judgment for defendant city on defendant general contractor's claim for damages for delays caused by the city where defendant contractor did not give timely notice that it was damaged by the city's delay. **Ibid.**

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA

§ 103 (NCI4th). Sufficiency of evidence of possession of other controlled substances

The State presented insufficient evidence to support defendant's conviction of unlawful possession of diazepam found in a bottle in defendant's residence. **State v. Tuggle**, 235.

§ 114 (NCI4th). Possession of cocaine with intent to sell or deliver

The State's evidence was sufficient to support defendant's convictions for possession of cocaine with intent to sell and deliver and possession of heroin where a package containing twenty-eight baggies with small amounts of cocaine and two tin foil packets of heroin were found under the front seat of the car defendant was driving. **State v. Holmes**, 615.

§ 136 (NCI4th). Maintaining dwelling for purpose of keeping and selling controlled substance

The State's evidence was sufficient to support defendant's convictions of knowingly maintaining a vehicle for selling marijuana and knowingly maintaining a dwelling for selling cocaine. **State v. Tuggle**, 235.

§ 143 (NCI4th). Possession of substances found in defendant's residence

Evidence of defendants' constructive possession of cocaine was sufficient to be submitted to the jury even though it was insufficient to show defendants' exclusive possession of the premises where the cocaine was found. **State v. Neal**, 684.

§ 181 (NCI4th). Instructions on control of premises as raising inference of knowledge and possession

The trial court did not err in instructing the jury that it could infer that defendant had constructive possession of a substance if it found that defendant exercised control over the premises in which the substance was found without also instructing the jury that it was not required to make such an inference. **State v. Tuggle**, 235.

NARCOTICS, CONTROLLED SUBSTANCES, AND PARAPHERNALIA — Continued

§ 208 (NCI4th). Double jeopardy; propriety of convictions on related offenses

The trial court did not violate defendant's constitutional right against double jeopardy by (1) imposing sentences upon defendant for possession of marijuana with intent to sell and manufacturing marijuana by packaging; (2) imposing consecutive sentences upon defendant for possession of marijuana with intent to sell, manufacturing marijuana by packaging, and maintaining a vehicle for selling marijuana; or (3) imposing consecutive sentences upon defendant for trafficking in cocaine and maintaining a dwelling for the purpose of selling cocaine. **State v. Tuggle**, 235.

NEGLIGENCE

§ 6 (NCI4th). Negligent infliction of emotional distress

The trial court erred by granting summary judgment for defendants on a claim for intentional infliction of emotional distress arising from an automobile accident where plaintiff was brought to the scene before his pregnant wife was freed from the wreckage, but did not witness the accident. **Andersen v. Baccus**, 16.

Plaintiffs' emotional distress could have been foreseeable to defendants when it arose from seeing their injured mother in the hospital shortly after an automobile accident and continued to be caused by the mother's severe injuries and ongoing difficulties. **Hickman v. McKoin**, 478.

§ 46 (NCI4th). Premises liability; other conditions or uses of lands and buildings

The trial court properly granted defendant absentee landowners' motion for summary judgment in an action arising from an automobile accident which occurred when plaintiff hit a tree which had fallen from defendants' property across the road. **Gibson v. Hunsberger**, 671.

§ 106 (NCI4th). Premises liability; duty to notify of unsafe conditions; proximate cause

A genuine issue of material fact as to defendant's negligence was presented in plaintiff's action to recover for injuries received when she fell on a wet floor in defendant's grocery store at the time the store closed. **Rone v. Byrd Food Stores**, 666.

PARENT AND CHILD

§ 1.5 (NCI3d). Procedure for termination of parental rights

Petitions to terminate respondent's parental rights which were unverified were defective on their face and should have been dismissed. **In re Triscari Children**, 285.

§ 1.6 (NCI3d). Termination of parental rights; competency and sufficiency of evidence

There was no error in a termination of parental rights proceeding based on neglect in the denial of respondents' motion to dismiss where the court correctly admitted a prior order adjudicating the child to be an abused juvenile, considered evidence of the circumstances before and after the prior adjudication, and there was evidence that respondents had refused to submit to psychological evaluation and treatment and there was no improvement in their living and employment conditions. **In re Beck**, 539.

The trial court did not err in a termination of parental rights proceeding by finding that the child had observed sexually explicit photographs being videotaped

RAPE AND ALLIED OFFENSES — Continued

§ 5 (NCI3d). Sufficiency of evidence and nonsuit

The evidence was sufficient to support defendant's conviction of first degree rape of his stepson by aiding and abetting. **State v. Ainsworth**, 136.

The trial court erred by denying defendant's motions to dismiss the charge of first degree rape, but sufficient evidence of second degree rape was presented, where no evidence was presented to show that defendant possessed or used any type of weapon in the commission of the assault or that anyone aided or abetted him, the victim did not complain of any bodily injuries as a result of the assault, and the mental injuries which the victim suffered represent results present in every forcible rape. **State v. Baker**, 557.

§ 7 (NCI3d). Verdict; sentence and punishment

The imposition of a mandatory life sentence for defendant's first degree rape conviction did not constitute cruel and unusual punishment. **State v. Ainsworth**, 136.

§ 19 (NCI3d). Taking indecent liberties with child

The jury could reasonably infer that defendant willfully engaged in an indecent liberty with her child to arouse or gratify her own sexual desire where she engaged in sexual activities with others in the presence of her child and watched her child engage in intercourse with an adult woman. **State v. Ainsworth**, 136.

The jury could reasonably infer that defendant willfully engaged in taking an indecent liberty with his stepson to arouse or gratify his own sexual desire where defendant called the child into his bedroom to watch sexual activity between the child's mother and another woman, engaged in intercourse with the child's mother in front of the child, and watched as the child engaged in intercourse with the other woman. **Ibid.**

The trial court properly submitted the charge of indecent liberties to the jury where the State presented evidence that the victim told her mother, a playmate's mother, and a doctor that defendant had touched her and hurt her and pointed to her chest and between her legs. **State v. Rogers**, 491.

ROBBERY

§ 4.3 (NCI3d). Armed robbery cases where evidence held sufficient

The trial court did not err by denying defendant's motion to dismiss charges of armed robbery where there was evidence that it appeared to the victims that the robbery was committed with dangerous weapons as well as evidence tending to show that the weapons in question were not dangerous weapons within the contemplation of G.S. 14-87. **State v. Summey**, 518.

RULES OF CIVIL PROCEDURE

§ 4 (NCI3d). Process

Each nonresident defendant fell within the reach of the long-arm statute in an action to enforce covenants not to compete. **Century Data Systems v. McDonald**, 425.

§ 11 (NCI3d). Signing and verification of pleadings; sanctions

The trial court is directed to determine the appropriate Rule 11 sanction against plaintiff for bringing an action against the individual defendant where plaintiff alleged that such defendant guaranteed payment under the corporate defendant's contract with plaintiff but presented no evidence at trial to show any

RULES OF CIVIL PROCEDURE — Continued

liability by the individual defendant. **T. H. Blake Contracting Co. v. Sorrells**, 119.

§ 15.2 (NCI3d). Amendments to conform to the evidence or proof

A breach of contract issue was properly tried with the consent of defendants where plaintiffs' complaint only raised issues of rescission and fraud, plaintiffs shifted to a theory of breach of contract in preparation for trial, and defendants did not specifically object to the breach of contract evidence on the grounds that it wasn't pertinent to an issue raised in the pleadings but did object to other evidence for that reason. **Munie v. Tangle Oaks Corp.**, 336.

§ 41.2 (NCI3d). Dismissal in particular cases

Rule 41(b) did not apply where the trial court struck defendants' affirmative defense based on the statute of limitations because no judgment on the merits was rendered. Plaintiff sought the dismissal pursuant to the court's inherent ability to impose fines and sanctions for disobeying a court order, and the record clearly shows that defendant repeatedly failed to file a motion for summary judgment, thereby delaying the proceeding without adequate justification. **Lowry v. Duke University Medical Center**, 83.

§ 50.4 (NCI3d). Judgment notwithstanding verdict

The trial court properly denied defendants' motion for a JNOV where defendants argued both the statute of limitations and insufficiency of evidence even though only the statute of limitations was previously raised on the directed verdict motion. **Munie v. Tangle Oaks Corp.**, 336.

§ 56.4 (NCI3d). Summary judgment; necessity for and sufficiency of supporting material; opposing party

The failure of defendant's lead counsel to appear at the summary judgment hearing did not affect the propriety of the summary judgment entered for plaintiff where defendant failed to respond to plaintiff's summary judgment motion or to present any materials opposing the motion, and plaintiff was entitled to judgment as a matter of law. **Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac**, 352.

§ 59 (NCI3d). New trials; amendment of judgments

The trial court abused its discretion by remitting a jury award only to $60,000 in an action arising from the sale of a townhouse and boat slip. **Munie v. Tangle Oaks Corp.**, 336.

§ 60.1 (NCI3d). Timeliness of motion for relief from judgment; notice

Defendant's motion to set aside a consent judgment on the ground that the trial court did not have personal jurisdiction over her was not untimely although it was made more than six years after entry of the judgment. **Nye, Mitchell, Jarvis & Bugg v. Oates**, 289.

SCHOOLS

§ 4 (NCI3d). Boards of education

Defendant insurer had a duty under its errors and omissions policy to defend plaintiff school board in an action by a mother whose child was allegedly raped by a middle school coach where the mother alleged that the superintendent, assist-

SEARCHES AND SEIZURES

SEARCHES AND SEIZURES — Continued

§ 32 (NCI3d). Scope and conduct of search and seizure in general; items which may be searched for and seized

Videotapes and other sexually explicit materials were admissible in a termination of parental rights hearing where deputies went to respondents' house to measure the temperature of the water heater and seized the material, criminal charges were eventually dismissed, DSS petitioned to terminate parental rights, and the Sheriff's Department transferred the seized materials to DSS. **In re Beck**, 539.

SLANDER OF TITLE

§ 1 (NCI3d). Generally

Where the trial court found that plaintiffs acquired a prescriptive easement over defendants' property, the court properly dismissed defendants' counterclaim of slander of title based on plaintiffs' filing a complaint and notice of lis pendens at the time defendants were negotiating a sale of their property. **Mecimore v. Cothren**, 650.

SOCIAL SECURITY AND PUBLIC WELFARE

§ 1 (NCI3d). Generally

A section of the North Carolina AFDC manual which provides that "A specified relative cannot be payee for more than one AFDC check" violates federal AFDC regulations, and plaintiff and her husband who were legally responsible for their nine children should be classified as one assistance unit, and plaintiff's two grandchildren who lived with her but for whom she was not legally responsible should be classified as a second assistance unit so that plaintiff would receive two AFDC checks. **Morrell v. Flaherty**, 628.

A federal statute requires that food stamp disqualification periods begin immediately upon a finding that a violation of the Food Stamp Program has been committed, and a federal regulation enacted by the Secretary of Agriculture postponing the penalty period until the individual applies for and is determined eligible for benefits conflicts with the statute and is an invalid construction of congressional intent. **Anderson v. N.C. Dept. of Human Resources**, 680.

STATE

§ 4.2 (NCI3d). Particular actions against the State; sovereign immunity

Defendants, employees of the Davie County DSS, were entitled to judgment on the pleadings on the ground of governmental immunity in plaintiff's action for the wrongful death of her son where the complaint failed to state a claim against defendants individually, and plaintiff failed to allege a waiver of governmental immunity by the purchase of insurance. **Whitaker v. Clark**, 379.

TRESPASS

§ 2 (NCI3d). Forcible trespass and trespass to the person

The trial court properly dismissed plaintiffs' claim for intentional infliction of emotional distress arising from an alleged assault and battery where there was no allegation of any threat of future harm. **Holloway v. Wachovia Bank and Tr. Co.**, 403.

TRIAL

§ 3.2 (NCI3d). Motions for continuance; particular grounds

The trial court did not abuse its discretion in denying defendant's motions for a continuance when defendant's lead counsel failed to appear for trial where the lead counsel and co-counsel appeared at the calendar call on the first day of the session, the lead counsel was advised that the case was likely to be reached during the week, and co-counsel was unable to go forward with evidence when the case was called for trial. **Wachovia Bank & Tr. Co. v. Templeton Olds.-Cadillac-Pontiac**, 352.

UNFAIR COMPETITION

§ 1 (NCI3d). Unfair trade practices, in general

The trial court did not err by granting summary judgment for defendant prime contractor in an action arising from a road construction project where plaintiff alleged unfair trade practices in that plaintiff submitted a bid to defendant as a Minority Business Enterprises subcontractor; defendant was required to employ MBEs; defendant discovered after winning the prime contract that it could obtain a better price for stone aggregates at a different quarry; plaintiff quoted a higher price even though the distance from the two quarries to the job site was essentially the same; defendant notified plaintiff that it would not be a subcontractor for the project; and defendant continued to meet DOT goals even without plaintiff's participation. **Clark Trucking of Hope Mills v. Lee Paving Co.**, 71.

WILLS

§ 19 (NCI3d). Evidence in caveat proceeding in general

The trial court in a caveat proceeding did not abuse its discretion in excluding a document handwritten by the testatrix fifteen years prior to the execution of her will when it was offered by caveators to prove testatrix's state of mind because it was remote in time, failed to specify to whom it referred, and failed to show a susceptibility of testatrix to propounder's influence. **In re Will of Prince**, 58.

§ 21.4 (NCI3d). Sufficiency of evidence of undue influence

Caveators' evidence was insufficient to warrant submission to the jury of an issue of undue influence by propounder. **In re Will of Prince**, 58.

WORD AND PHRASE INDEX

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